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- From a Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.
January 2014

Dear Clients:

The last few years have seen an explosion in class action and collective action litigation involving workplace issues. This came to a head in 2012 and 2013 with several major class action rulings from the U.S. Supreme Court. Likewise, the present economic climate is likely to fuel even more lawsuits. The stakes in these types of employment lawsuits can be extremely significant, as the financial risks of such cases are enormous. More often than not, class actions adversely affect the market share of a corporation and impact its reputation in the marketplace. It is a legal exposure which keeps corporate counsel and business executives awake at night.

Defense of corporations in complex, high-stakes workplace litigation is one of the hallmarks of Seyfarth Shaw’s practice. Through that work, our attorneys are on the forefront of the myriad of issues confronting employers in class action litigation.

In order to assist our clients in understanding and avoiding such litigation, we are pleased to present the 2014 Edition of the Seyfarth Shaw Annual Workplace Class Action Litigation Report. This edition, authored by the class action attorneys in our Labor & Employment Department, contains a circuit-by-circuit and state-by-state review of significant class action rulings rendered in 2013, and analyzes the most significant settlements over the past twelve months in class actions and collective actions. We hope this Annual Report will assist our clients in understanding class action and collective action exposures and the developing case law under both federal and state law.

Very truly yours,

J. Stephen Poor
Firm Managing Partner
Our Annual Report analyzes the leading class action and collective action decisions of 2013 involving claims against employers brought in federal courts under Title VII of the Civil Rights Act of 1964 (“Title VII”), the Age Discrimination in Employment Act (“ADEA”), the Fair Labor Standards Act (“FLSA”), the Employee Retirement Income Security Act (“ERISA”), and a host of other federal statutes applicable to workplace issues. The Report also analyzes class action and collective action rulings involving claims brought against employers in all 50 state court systems, including decisions pertaining to employment laws, wage & hour laws, and breach of employment contract actions. The key class action and collective action settlements over the past year are also analyzed, both in terms of gross settlement dollars in private plaintiff and government-initiated lawsuits as well as injunctive relief provisions in consent decrees. Finally, the Report also discusses important federal and state court rulings in non-workplace cases which are significant in their impact on the defense of workplace class action litigation. In total, there are 1,123 decisions analyzed in the Report.

The cases decided in 2013 foreshadow the direction of class action litigation in the coming year. One certain conclusion is that employment law class action and collective action litigation is becoming ever more sophisticated and will continue to be a source of significant financial exposure to employers well into the future. Employers also can expect that class action and collective action lawsuits increasingly will combine claims under multiple statutes, thereby requiring the defense bar to have a cross-disciplinary understanding of substantive employment law as well as the procedural peculiarities of opt-out classes under Rule 23 of the Federal Rules of Civil Procedure and the opt-in procedures in FLSA and ADEA collective actions.


Our goal is for this Report to guide clients through the thicket of class action and collective action decisional law, and to enable corporate counsel to make sound and informed litigation decisions while minimizing risk. We hope that you find the Seyfarth Shaw Annual Workplace Class Action Litigation Report to be useful.

Gerald L. Maatman, Jr./General Editor
Co-Chair, Class Action Litigation Practice Group of Seyfarth Shaw LLP

January 2014
Guide To Citation Formats

As corporate counsel utilize the Report for research, we have attempted to cite the West bound volumes wherever possible (e.g., Scott, et al. v. Family Dollar Stores, Inc., 733 F.3d 105 (4th Cir. 2013)). If a decision is unavailable in bound format, we have utilized a LEXIS cite from its electronic database (e.g., EEOC v. Kaplan Higher Education Corp., 2013 U.S. Dist. LEXIS 11722 (N.D. Ohio Jan. 28, 2013)), and if a LEXIS cite is not available, then to a Westlaw cite from its electronic database (e.g., Odle, et al. v. Wal-Mart Stores, Inc., 2013 WL 66035 (N.D. Tex. Jan. 7, 2013)). If a ruling is not contained in an electronic database, the full docketing information is provided (e.g., Stargel, et al. v. Suntrust Banks, Inc., Case No. 12-CV-3822 (N.D. Ga. Aug. 7, 2013)).

Search Functionality

This Report is fully searchable. Case names, Rule 23 terms, and class action topics can be searched by selecting Edit and then Find (or Ctrl+F), and then by typing in the word or phrase to be searched, and then either selecting Next or hitting Enter.

eBook Features

The 2014 Workplace Class Action Litigation Report is also available as an eBook. The downloaded eBook is accessible via freely available eBook reader apps like iBook, Kobo, Aldiko, etc. The eBook provides a rich and immersive reading experience to the users.

Some of the notable features include:

1. The eBook is completely searchable.
2. Users can increase or decrease the font sizes.
3. Active links are set for the table of contents to their respective sections.
4. Bookmarking is offered for notable pages.
5. Readers can drag to navigate through various pages.
References are made to Rule 23 of the Federal Rules of Civil Procedure and 29 U.S.C. § 216(b) throughout this Report. These are the two main statutory sources for class action and collective action decisional law. Both are procedural devices used in federal courts for determining the rights and remedies of litigants whose cases involve common questions of law and fact. The following summary provides a brief overview of Rule 23 and § 216(b).

**Class Action Terms**

The Report uses the term *class action* to mean any civil case in which parties indicated their intent to sue on behalf of themselves as well as others not specifically named in the suit at some point prior to the final resolution of the matter. This definition includes a case in which a class was formally approved by a judge (a *certified* class action), as well as a *putative* class action, in which a judge denied a motion for certification, in which a motion for certification had been made but a decision was still pending at the time of final resolution, or in which no formal motion had been made but other indications were present suggesting that class treatment was a distinct possibility (such as a statement in a complaint that the plaintiffs intended to bring the action on behalf of others similarly-situated).

Although certified class actions may receive considerable attention if they are reported publicly, defendants also must confront putative class actions that contain the potential for class treatment as a result of filing a motion for certification or because of allegations in the original complaint that assert that the named plaintiffs seek to represent others similarly-situated. Even if such cases are never actually certified, the possibility of the litigation expanding into a formal class action raises the stakes significantly, perhaps requiring a more aggressive (and costlier) defense or resulting in a settlement on an individual basis at a premium.

**Rule 23**

Rule 23 governs class actions in federal courts, and typically involves lawsuits that affect potential class members in different states or that have a nexus with federal law. Rule 23 requires a party seeking class certification to satisfy the four requirements of section (a) of the rule and at least one of three conditions of section (b) of the rule. Under U.S. Supreme Court precedent, a district court must undertake a “rigorous analysis of Rule 23 prerequisites” before certifying a class. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). More often than not, plaintiffs will support their motion for class certification with deposition testimony, declarations of putative class members, and expert opinions in the form of affidavits of expert witnesses. Courts often observe that the appropriate analysis in reviewing this evidence is not equivalent to an examination of the merits or a battle between the parties’ experts. Rather, the salient issue is whether plaintiffs’ legal theories and factual materials satisfy the Rule 23 requirements.

The Rule 23(a) requirements include:

- **Numerosity** – The individuals who would comprise the class must be so numerous that joinder of them all into the lawsuit would be impracticable.
- **Commonality** – There must be questions of law and fact common to the proposed class.
- **Typicality** – The claims or defenses of the representative parties must be typical of the claims and defenses of putative class members.
• Adequacy of Representation – The representative plaintiffs and their counsel must be capable of fairly and adequately protecting the interests of the class.

The standards for analyzing the commonality requirement of Rule 23(a)(2) were tightened in 2011 with the U.S. Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes, et al.*, 131 S. Ct. 2541 (2011). As a result, a “common” issue is one that is “capable of class-wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke.” *Id.* at 2551.

Once a plaintiff establishes the four requirements of Rule 23(a), he or she must satisfy one of the three requirements of Rule 23(b). In practice, a plaintiff typically establishes the propriety of class certification under either Rule 23(b)(2) or Rule 23(b)(3) in an employment-related case.

Because application of each rule depends on the nature of the injuries alleged and the relief sought, and imposes different certification standards on the class, the differences between Rule 23(b)(2) and (b)(3) are critical in employment-related class action litigation. In the words of the rule, a class may be certified under Rule 23(b)(2) if the party opposing the class “has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” In other words, plaintiffs seeking to certify class actions under Rule 23(b)(2) are restricted to those cases where the primary relief sought is injunctive or declaratory in nature. Rule 23(b)(2) does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Rule 23(b)(2) provides for a binding litigation order as to all class members without guarantees of personal notice and the opportunity to opt-out of the suit.

Rule 23(b)(3) is designed for circumstances in which class action treatment is not as clearly called for as in Rule 23(b)(1) and Rule 23(b)(2) situations, when a class action may nevertheless be convenient and desirable. A class may be certified under Rule 23(b)(3) if the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Pertinent considerations include the interest of the members of the class in individually controlling the prosecution of separate actions; the extent and nature of any litigation concerning the controversy already commenced by members of the class; the desirability of concentrating the litigation of the claims in one particular forum; and the difficulties likely to be encountered in the management of a class action.

To qualify for certification under Rule 23(b)(3), therefore, a class must meet not only the requirements of Rule 23(a), but also two additional requirements: “(1) common questions must predominate over any questions affecting only individual members; and (2) class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997). While the common question requirement of Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3) overlap, the predominance requirement is more stringent than the common question requirement. Thus, even though a case may present common questions of law or fact, those questions may not always predominate and class certification would be inappropriate.

Rule 23(b)(3) applies to cases where the primary relief sought is money damages. The Supreme Court has determined – in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) – that unlike in Rule 23(b)(2) class actions, each class member in a Rule 23(b)(3) class action for money damages is entitled as a matter of due process to personal notice and an opportunity to opt-out of the class action. Accordingly, Rule 23(c)(2) guarantees those rights for each member of a
class certified under Rule 23(b)(3). There are no comparable procedural guarantees for class members under Rule 23(b)(2).

29 U.S.C. § 216(b)

This statute governs multi-plaintiff lawsuits under the ADEA and the FLSA. Generally, such lawsuits are known as collective actions (as opposed to class actions).

Under 29 U.S.C. § 216(b), courts generally recognize that plaintiffs and other “non-party” individuals may not proceed collectively until they establish that they should be permitted to do so as a class. Under § 216(b), courts have held that “similarly-situated” individuals may proceed collectively as a class. The federal circuits have not agreed on the standard according to which such a class should be certified. Two competing standards for certification are recognized.

The first approach adopts the view that the “similarly-situated” inquiry is coextensive with the procedure used in class actions brought pursuant to Rule 23. Using this methodology, the court analyzes the putative class for factors including numerosity, commonality, typicality, and adequacy of representation. This typically occurs after some discovery has taken place. This approach is unusual and is not favored.

The second approach is a two-tiered approach involving a first stage conditioned certification process and a second stage potential decertification process. It is more commonly used and is the prevailing test in federal courts. In practice, it tends to be a “plaintiff-friendly” standard.

In the context of the first stage of conditional certification, plaintiffs typically move for conditional certification and permission to send notices to prospective class members. This generally occurs at an early stage of the case, and often before discovery even commences. Courts have held that a plaintiff's burden at this stage is minimal. A ruling at this stage of the litigation often is based upon allegations in the complaint and any affidavits submitted in favor of or in objection to conditional certification.

Courts have not clearly defined the qualitative or quantitative standards of evidence that should be applied at this stage. Courts are often reluctant to grant or deny certification on the merits of a plaintiff’s case. This frustrates defendants with clearly meritorious arguments in defense of the litigation, such as those based on compelling proof that would establish the exempt status of the plaintiffs and other employees alleged to be similarly-situated.

Instead, courts appear to find the most convincing proof that certification is improper based on evidence that putative class members perform different jobs in different locations or facilities, under different supervisors, and potentially pursuant to differing policies and practices. Courts also have held that certification is inappropriate when individualized inquiries into applicable defenses are required, such as when the employer asserts that the relevant employees are exempt.

Where conditional certification is granted, a defendant has the opportunity to request that the class be decertified after discovery is wholly or partially completed in the subsequent, second stage of decertification. Courts engage in a more rigorous scrutiny of the similarities and differences that exist amongst members of the class at the decertification stage. The scrutiny is based upon a more developed, if not entirely complete, record of evidence. Upon an employer’s motion for decertification, a court assesses the issue of similarity more critically and may revisit questions concerning the locations where employees work, the employees’
supervisors, their employment histories, the policies and practices according to which they perform work and are paid, and the distinct defenses that may require individualized analyses.

**Opt-In/Opt-Out Procedures**

Certification procedures are different under Rule 23 and 29 U.S.C. § 216(b). Under Rule 23(b)(2), a court’s order binds the class; under Rule 23(b)(3), however, a class member must opt-out of the class action (after receiving a class action notice). If he or she does not do so, they are bound by the judgment. Conversely, under § 216(b), a class member must opt-in to the lawsuit before he or she will be bound. While at or near 100% of class members are effectively bound by a Rule 23 order, opt-in rates in most § 216(b) collective actions typically range from 10% to 30%.
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APPENDIX I – TABLE OF 2013 WORKPLACE CLASS ACTION AND COLLECTIVE
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I. Overview Of The Year In Workplace Class Action Litigation

Workplace class action litigation is in a state of flux. The events of the past year in the workplace class action world demonstrate that the array of bet-the-company litigation issues that businesses face are evolving on a landscape that is continuing to undergo significant change. At the same time, governmental enforcement litigation remains “white hot” and regulatory oversight of workplace issues continues to be a priority, thereby challenging businesses to integrate their litigation and risk mitigation strategies to navigate these exposures.


More than any other development in 2013, the decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), continued to have a wide-ranging impact on virtually all types of class actions pending in both federal and state courts throughout the country. In many respects, *Wal-Mart* was the “800 pound gorilla” in courtrooms in 2013 as litigators argued and judges analyzed class certification issues. Rule 23 decisions in 2013 in large part pivoted off of *Wal-Mart*, and leverage points in class action litigation increased or decreased depending on the manner in which judges interpreted and applied *Wal-Mart*. Furthermore, *Comcast Corp.* fueled defense arguments by undermining attacks on class certification in a wide range of contexts, which were met with mixed success for employers.

As is well-known by now, the Supreme Court’s decision in *Wal-Mart* elucidated whether Rule 23(b)(2) could be used to recover individualized monetary relief for a class (and held it may not), established a heightened standard for the Rule 23(a)(2) commonality requirement (and determined that common questions for a class must have common answers), and rejected previous lower court interpretations of Supreme Court precedent on Rule 23 burdens of proof (and found that to the extent factual determinations that go to the merits also overlap with the Rule 23 requirements, those factual issues must be analyzed to determine the propriety of class certification). As a result, *Wal-Mart* continued to foster a tidal wave of decisions in 2013, as litigants and courts grappled with the ruling’s implications in a wide variety of class action litigation contexts. As of the close of the year, *Wal-Mart* had been cited a total of 561 times in lower federal and state court rulings.

This year’s ruling in *Comcast Corp.* also added a new weapon to employers’ arsenals in challenging class certification. The Supreme Court interpreted Rule 23(b)(3) – which requires “questions of law or fact common to class members predominate over any questions affecting only individual members” – to mandate that a class’ proposed damages model show damages on a class-wide basis. In so determining, the Supreme Court reaffirmed that district courts must undertake a “rigorous analysis” of whether a putative class satisfies the predominance criterion set forth in Rule 23(b)(3), even if that analysis overlaps with the merits of the underlying claims, and held that individual issues of damages may preclude class certification. This decision provides companies with a significant and rational defense to class certification in class actions. Much like *Wal-Mart*, the decision in *Comcast Corp.* reverberated throughout the lower federal and state courts, and was cited a total of 178 times by the close of the year, a rather remarkable figure for a decision rendered in March of 2013.

Against this backdrop, the plaintiffs’ class action employment bar filed and prosecuted significant class action and collective action lawsuits against employers in 2013. In turn, employers litigated an increasing number of novel defenses to these class action theories, fueled, in part, by the new standards enunciated in *Wal-Mart* and *Comcast Corp.* As this Report reflects, federal and state courts addressed a myriad of new theories and defenses in ruling on class action and collective action litigation issues. The impact and
meaning of “Wal-Mart issues” and “Comcast Corp. issues” were at the forefront of these case law developments.

An overview of workplace class action developments in 2013 reveals seven key trends.

First, the Supreme Court’s opinions in Wal-Mart and Comcast Corp. had a profound influence in shaping the course of class action litigation rulings throughout 2013. Wal-Mart and Comcast Corp. prompted defendants to mount challenges to class certification based on all sorts of theories (and not just those modeled after the nationwide class claims rejected in Wal-Mart and the antitrust damages issues discussed in Comcast Corp.). This resulted in new types of case law rulings on a myriad of Rule 23-related issues. The result was a year of decisions on class action issues the likes of which have never been seen before. This wave of new case law is still in its infancy. As many class action issues are in a state of flux post-Wal-Mart and post-Comcast Corp., these evolving precedents are expected to continue to develop in the coming year.

Second, government enforcement litigation in 2013 increased over levels in 2012. This was especially evident in terms of the systemic investigation program of the U.S. Equal Employment Opportunity Commission (“EEOC”). As an inevitable by-product of the economy’s unemployment rates, more discrimination charges were filed with the EEOC in 2013 than in all but three previous years since the founding of the Commission in 1964 – a total of 93,727 discrimination charges against private sector employers (by comparison, the EEOC last year reported receiving a then record high of 99,412 discrimination charges). The Obama Administration’s emphasis on administrative enforcement also spawned more government-initiated investigations over workplace issues. The EEOC’s systemic investigation program – in which the Commission emphasizes the identification, investigation, and litigation of discrimination claims affecting large groups of “alleged victims” – expanded yet again over prior years. EEOC systemic suits comprised 16% of all merits filings in 2013, and by the end of the year, represented 23.4% of the Commission’s active litigation docket. This development is of critical importance to employers, for it evidences an agency with a laser-focus on high-impact, big stakes litigation.

Third, Wal-Mart and Comcast Corp. influenced settlement strategies in workplace class actions in a profound way. Employers settled fewer employment discrimination class actions than at any time over the past decade and at a fraction of the levels of 2006 to 2012. The same was true with wage & hour and ERISA class actions, as well as governmental enforcement litigation; settlement numbers and aggregate totals were down in each category. This reflected the impact of Wal-Mart and Comcast Corp., and the notion that difficulties in certifying nationwide, massive class actions impaired the ability of the plaintiffs’ bar to convert their case filings into blockbuster settlements. It also manifested the ability of defendants to dismantle large class cases, or to devalue them for settlement purposes. Simply stated, Wal-Mart and Comcast Corp. aided employers to defeat, fracture, and/or devalue employment discrimination class actions, and resulted in fewer settlements at lower amounts.

1 The total of $234.1 million for the top ten largest employment discrimination class action settlements in 2013 is the second lowest total since 2010; the figures for each year were as follows: 2012 – $48.6 million; 2011 – $123.2 million; 2010 – $346.4 million; 2009 – $86.2 million; 2008 – $118.36 million; 2007 – $282.1 million; and 2006 – $91 million. The figure for 2013 is a result of one large settlement of $160 million; when that settlement is factored out, the 2013 total is the second lowest since 2006.

2 The total for the top ten wage & hour class actions settlements in 2013 was $248.45 million compared to $292 million in 2012. The total for the top ten ERISA class action settlements in 2013 was $155.6 million compared to $237 million in 2012. The total for the top ten government enforcement litigation settlements was $171.6 million compared to $262.78 million in 2012. The aggregate totals make 2013 the lowest year overall since 2006. An analysis of 2013 settlement activity is set forth in Chapter II.
Fourth, the continued dislocations in the economy during 2013 fueled more class action and collective action litigation over wage & hour laws. In particular, the plaintiffs’ class action bar eclipsed the pace of filings of FLSA collective actions and wage & hour class actions as compared to previous years. Furthermore, these conditions spawned more employment-related case filings, both by laid-off workers and government enforcement attorneys. As of the close of the year, filings held steady or were slightly down in the distinct categories of employment discrimination and ERISA class actions, and increased on an aggregate basis in wage & hour cases as well as government enforcement litigation. In turn, this resulted in more judicial rulings on wage & hour issues and EEOC lawsuits than any other area of workplace class action litigation. Even more wage & hour and EEOC litigation is expected in 2014. Indeed, the crest of the wave of wage & hour litigation is still not in sight, and this trend is likely to continue in 2014.

Fifth, case law developments under the Class Action Fairness Act of 2005 (“CAFA”) continued to mature and the U.S. Supreme Court decided its first case under the CAFA in 2013 in Standard Fire Insurance Co. v. Knowles. It rejected the increasingly frequent tactic of the plaintiffs’ bar to stipulate to damages of less than $5 million, the CAFA’s amount-in-controversy requirement, in an effort to prevent removal of class actions from state court to federal court. Case law under the CAFA turned the corner in this regard for employers in 2013, solidifying another defense strategy to secure removal of class actions to federal court.

Sixth, the Supreme Court’s ruling in 2013 on class arbitration issues in American Express Co. v. Italian Restaurant (“AMEX”) informed the ever-growing body of case law that allows employers to utilize carefully crafted workplace arbitration agreements to manage their class action litigation risks. While ill-conceived arbitration programs can create significant litigation problems, the AMEX decision rejected attempts by the plaintiffs’ bar to challenge arbitration as a violation of the public policies of federal statutory rights. This ought to help defendants avoid wage & hour class action litigation more easily for those employers that choose to institute workplace arbitration agreements.

Seventh, and finally, the plaintiffs’ class action bar is a tight-knit community, and developments in Rule 23 and § 216(b) case law in 2013 saw rapid strategic changes based on evolving decisions and developments. This fostered quick evolution in case theories, which in turn impacted defense litigation strategies. In reaction to the Supreme Court’s rulings in Wal-Mart and Comcast Corp., the plaintiffs’ class action bar continued the process of “re-booting” class-wide theories of certification, as well as new methods for establishing liability and damages on a class-wide basis. As a result, new certification approaches and cutting-edge strategies are rapidly evolving throughout the substantive areas encompassed by workplace class action law. More than any other trend, the on-going changes to strategy considerations in crafting class claims and litigating Rule 23 certification motions in the wake of Wal-Mart and Comcast Corp. drove case law developments in 2013. As a result, workplace class action case law is in flux, and more change is inevitable in 2014.

A. Significant Trends In Workplace Class Action Litigation In 2013

While shareholder and securities class action filings and settlements witnessed a sharp downtick to record lows in 2013, employment-related class action filings remained relatively flat, but with a pronounced increase in certain categories, especially wage & hour cases. Anecdotally, surveys of corporate counsel confirm that workplace litigation – and especially class action and multi-plaintiff lawsuits – remains one of the chief exposures driving corporate legal budget expenditures, as well as the type of legal dispute that causes the most concern for their companies. The prime concern in that array of risks is now wage & hour litigation exposure.

By the numbers, workplace litigation filings stayed constant over the past year, while wage & hour cases increased. By the close of the year, ERISA lawsuits totaled 7,279 (down slightly as compared to 7,908 in 2012), FLSA lawsuits totaled 7,882 (up significantly as compared to 7,672 in 2012), and employment discrimination filings totaled 12,311 lawsuits (a decrease from 14,260 in 2012). In terms of employment discrimination cases, employers can expect a significant jump in the coming year, as the charge number totals at the EEOC in 2011 and 2012 were the highest in the 48-year history of the Commission; due to the
time-lag in the period from the filing of a charge to the filing of a subsequent lawsuit, the charges in the EEOC’s inventory will become ripe for initiation of lawsuits in 2014.

FLSA collective action litigation increased yet again in 2013 and far outpaced employment discrimination class action filings. Wage & hour class actions filed in state court also represented an increasingly important part of this trend. Most pronounced in this respect were filings in California, Florida, Massachusetts, New Jersey, New York, and Pennsylvania state courts. California, in particular, continued to be a breeding ground for wage & hour class action litigation, as a result of laxer class certification standards under state law and more plaintiff-friendly approaches to wage & hour issues under the California Labor Code. For the second year in a row, the American Tort Reform Association selected California as the number one “judicial hellhole” as measured by the systematic application of laws and court procedures in an unfair and unbalanced manner.³

While plaintiffs continued to achieve initial conditional certification of wage & hour collective actions in 2013, employers also secured significant victories in defeating conditional certification motions and obtaining decertification of § 216(b) collective actions.⁴ It is expected that the vigorous pursuit of nationwide FLSA collective actions by the plaintiffs’ bar will continue in 2014 and that the pace of wage & hour filings will increase yet again over the next year.

A key FLSA litigation issue that percolated in the courts in 2013 is how Wal-Mart – to the extent it held that “trial by formula” via representative or statistical proof as to damages is inappropriate on a class-wide basis – and Comcast Corp. – to the extent it held that a viable class certification theory must present a damages model to adjudicate damages on a class-wide basis – impact conditional certification under 29 U.S.C. § 216(b) and/or Rule 23 class certification in wage & hour litigation. An emerging trend suggests that employers can more readily block certification – or secure decertification – in misclassification cases by targeting and challenging plaintiffs’ representative evidence, although use of Wal-Mart and Comcast Corp. has not yet gained significant traction in blocking certification § 216(b) contexts. Employers can expect this issue to continue to heat up with rulings throughout 2014.

At the same time, the Wal-Mart ruling also fueled more critical thinking and crafting of case theories in employment discrimination class action filings in 2013. The Supreme Court’s decision had the effect of forcing the plaintiffs’ bar to “re-boot” the architecture of their class action theories.⁵ While the playbook on Rule 23 strategies is undergoing an overhaul, the result on remand of the Wal-Mart case is a prime example of the morphing of plaintiffs’ certification and class structuring theories. Plaintiffs’ counsel narrowed their fourth amended complaint upon remand from the U.S. Supreme Court to assert gender discrimination claims on behalf of current and former female Wal-Mart employees in California only. While the fourth amended complaint continued to challenge Wal-Mart’s allegedly discriminatory pay and promotion practices against women, Plaintiffs sought to certify an injunctive relief class under Rule 23(b)(2) and a Rule 23(b)(3) monetary relief class for back pay, front pay, and punitive damages. The new complaint scaled back the proposed class size from a nationwide class to one that encompasses California-based workers only. The new proposed class had an estimated 45,000 members, about 3% of the total class size proposed and certified – and then decertified – previously. These new theories failed, as plaintiffs’ certification efforts were rejected in their entirety in Dukes, et al. v. Wal-Mart Stores, Inc., 2013


⁴ An analysis of rulings in ADEA collective actions in 2013 is set forth in Chapter IV. An analysis of FLSA collective actions in 2013 is set forth in Chapter V, and analysis of state law wage & hour class action rulings in 2013 is set forth in Chapter VII.

⁵ An analysis of rulings in employment discrimination class actions in 2013 is set forth in Chapter III.
In contrast, Plaintiffs have started to prune class definitions by size, geography, unit, and policy, and have also relied on a little-used provision of Rule 23 – Rule 23(c)(4) – which provides that “[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues.” Prior to Wal-Mart, views of Rule 23(c)(4) fell into two opposing camps – it was either (1) a “housekeeping” rule that could not be used to “manufacture predominance,” or (2) an acceptable way to certify a claim that would not ordinarily meet Rule 23(b)(3)’s stringent predominance requirement. This rule is now experiencing a renaissance after Wal-Mart. In particular, plaintiffs’ counsel have relied on McReynolds v. Merrill Lynch & Co., 672 F.3d 482 (7th Cir. 2012), perhaps the leading post-Wal-Mart ruling certifying an employment discrimination disparate impact class claim for injunctive relief under Rule 23(c)(4). In McReynolds, the Seventh Circuit reversed the decision to deny certification of a race discrimination class challenging the impact of two Merrill Lynch policies — one that allowed brokers to decide to work in “teams,” and one that suggested success-based criteria for distribution of departing brokers’ accounts — even though managers had discretion regarding implementation of both policies. In permitting such a class certification theory, the Seventh Circuit distinguished Wal-Mart from the facts before it in McReynolds, and concluded that the only “company-wide” policies at issue in Wal-Mart forbade discrimination and delegated employment decisions to local managers. In contrast, McReynolds involved “company-wide” policies that permitted individuals to exercise discretion in a manner that allegedly disparately impact African-American employees. Therefore, the Seventh Circuit reversed the denial of class certification and permitted the class to proceed under Rule 23(c)(4) notwithstanding its recognition that separate trials could be necessary if plaintiffs prevailed to determine which class members were actually impacted by one or both of the challenged policies, and the extent and nature of their individualized damages. The Seventh Circuit concluded, however, that the individualized nature of such damage calculations were insufficient to defeat class certification for claims brought under Rule 23(c)(4) and Rule 23(b)(2).

The McReynolds certification ruling necessarily impacted the trajectory of that case – it settled in 2013 for $160 million, making it the largest employment discrimination class action settlement of this past year (and indeed the largest settlement since the Supreme Court’s ruling in Wal-Mart). McReynolds demonstrates how certification of any aspect of the litigation — even a narrow issue unrelated to damages — drives litigation dynamics and settlement decision-making by litigants.

The ability of plaintiffs to obtain Rule 23(b)(3) certification on damages, however, is sharply curtailed by Comcast Corp., which holds that plaintiffs must adequately explain how a class-wide determination of damages is possible. If there is no certification of a class as to damages, it is likely that plaintiffs will bootstrap the initial liability finding to any later hearing on damages, arguing under Teamsters v. United States, 431 U.S. 324 (1977), that they are entitled to a presumption that they were discriminated against and their individual damages should be heard in mini-trials per Teamsters. Defendants will be forced to consider the transaction costs of hundreds or perhaps thousands of mini-hearings, but it is unclear how many class members would actually take the time to participate in such mini-trials, and it may be worth the gamble.

In sum, as the plaintiffs’ bar “re-boots” to take account of the Supreme Court’s ruling in Wal-Mart, and adapts through strategies based on McReynolds, future employment discrimination class action filings are

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6 Castano v. American Tobacco, 84 F.3d 734, 745 n.21 (5th Cir. 1996).
7 In Re Nassau County Strip Search Cases, 461 F.3d 219 (2d Cir. 2006).
likely to increase due to a strategy whereby state or regional-type classes are asserted rather than nationwide mega-cases.

Several trends dominated the ERISA litigation scene in 2013.\(^8\) In certain respects, the focus continued to rest on the Supreme Court as it shaped and reshaped the scope of potential liability and defenses in ERISA cases. In April of 2013, the Supreme Court handed down its decision in \textit{US Airways, Inc. v. McCutchen}, 133 S. Ct. 1537 (2013), in which it reiterated that ERISA plan documents are at the core of ERISA analysis and limited the ability of plan participants to use equitable defenses to fight the plan’s claims for reimbursement of overpaid benefits. \textit{McCutchen} is one in a growing line of Supreme Court cases to address the scope of equitable remedies (and defenses) in ERISA litigation. The year ended with another pro-employer ruling from the Supreme Court in \textit{Heimeshoff v. Hartford Life & Accident Insurance Co.}, 134 S. Ct. 604 (2013), in which the Supreme Court again enforced the terms of the plan document, this time a limitations provision in a disability plan. The Supreme Court left for another day complex questions about when ERISA claims accrue, but held that an ERISA plan may contain a reasonable provision limiting when a participant may sue. The holding bodes well for employers in the developing split over the enforceability of forum-selection clauses in ERISA plans.

The Supreme Court also teed up a major ERISA class action issue for decision in 2014. In \textit{Fifth Third Bancorp v. Duddenhoeffer}, No. 12-751 (U.S. Dec. 13, 2013), the Supreme Court agreed to decide whether the so-called \textit{Moench} presumption of prudence – from \textit{Moench v. Robertson}, 62 F.3d 553 (3d Cir. 1995) – applies to protect fiduciaries of plans that offer stock of the sponsoring employer as an investment and whether it can be used to dismiss a complaint on the pleadings. A ruling for the defense would effectively end ERISA stock drop litigation, while a ruling for plaintiffs would open the floodgates to new rounds of this type of litigation.

Finally, \textit{Wal-Mart} has changed the ERISA certification playing field by giving employers more grounds to oppose certification. The decisions in 2013 show that class certification motions will have the best chance of denial in the context of ERISA welfare plans, and ERISA defined contribution pension plans, where individualized notions of liability and damages are prevalent.

Meanwhile, on the governmental enforcement front, both the EEOC and the U.S. Department of Labor expanded and intensified their administrative enforcement activities and litigation filings in 2013.

The EEOC continued to follow through on the enforcement and litigation strategy plan it announced in April of 2006; that plan centers on the government bringing more systemic discrimination cases affecting large numbers of workers. As 2013 demonstrated, the EEOC’s prosecution of pattern or practice lawsuits is now an agency-wide priority. Many of the high-level investigations started in 2006 mushroomed into the institution of EEOC pattern or practice lawsuits in 2013. Under the Obama Administration, increases in funding expanded the number of investigators. The Commission’s 2013 Annual Report\(^9\) also announced that it expects to continue the dramatic shift in the composition of its litigation docket from small individual cases to pattern or practice lawsuits on behalf of larger groups of workers. The EEOC’s Annual Report detailed the EEOC’s activities from October 1, 2012 to September 30, 2013. The EEOC’s Report indicated that:

- The Commission completed work on 300 systemic investigations in FY 2013, which resulted in 106 reasonable cause determinations, and 36 settlements or conciliation agreements that yielded a total recovery of $40 million for systemic claims. The FY 2013 recoveries represent a four-fold increase over recoveries in FY 2011 and 2012.

\(^8\) An analysis of rulings in ERISA class actions in 2013 is set forth in Chapter VI.

• The EEOC’s administrative enforcement activities secured $372.1 million in recoveries, the highest level of monetary relief in the Commission’s history.

• The EEOC filed 131 lawsuits in 2013 (up again from 2012), of which 21 involved claims of systemic discrimination on behalf of more than 20 workers, and 21 cases involved multiple alleged discrimination victims of up to 20 individuals. The EEOC had 231 cases on its active lawsuit docket by year end, of which 20% involved multiple aggrieved parties and 23% involved challenges to alleged systemic discrimination. Overall, this represented increases in these categories in terms of the make-up of the Commission’s litigation being tilted toward systemic cases.

While the inevitable by-product of these governmental enforcement efforts is that employers are likely to face even more such claims in 2014, the EEOC’s systemic litigation program is not without its detractors. Several federal judges entered significant sanctions against the EEOC in 2013 – some in excess of seven figures – for its pursuit of pattern or practice cases that were deemed to be without a good faith basis in fact or law. The EEOC showed no signs of adjusting its litigation strategy in light of those sanction rulings, and employers can expect that the coming year will entail aggressive “push-the-envelope” litigation filings and prosecutions by the EEOC, as well as the filing of larger systemic cases.

The U.S. Department of Labor (“DOL”) also undertook aggressive enforcement activities in 2013. Over the past several years, the DOL’s Wage & Hour Division (“WHD”) fundamentally changed the way in which it pursues its investigations. This past year the WHD recovered $249,954,412 in back wages for more than 269,250 workers. According to the DOL, since early 2009, the WHD has closed 145,884 cases nationwide, resulting in more than $1 billion in back wages for 1,238,589 workers. Hence, in 2013, employers finally saw the impact of these changes on the WHD’s enforcement priorities, and 2014 is apt to bring much of the same. As 2014 approaches, former federal prosecutor and new Secretary of Labor Thomas Perez will have the opportunity to place his imprimatur on the DOL’s enforcement efforts. In addition, with the Senate’s elimination of the filibuster for nominees, the WHD might have a Senate-confirmed leader for the first time since 2004. With new leadership in place, employers can expect the WHD to find renewed vigor in its enforcement program.

• The nominee for the WHD Administrator is one of the architects of the WHD’s “fissured industry” initiatives, which relates to workers employed in franchised industries, as well as industries with sub-contracting, independent contracting, and other contingent workforce characteristics. The WHD has stated that its focus on independent contracting and the misclassification of employees as independent contractors will continue in 2014.

• Liquidated damages, penalties, sanctions, the FLSA “hot goods” provision, and similar strategies will be used by the WHD to deter violations among other employers. Press releases will likewise be used as part of the DOL’s “shaming” tactics, deterring the subject of the press release and other employers in the same geographic range or industry from future violations. The WHD also plans to pursue corporate-wide compliance strategies in an effort to ensure that compliance is achieved across an entire organization, rather than a single location.

• The WHD intends to rely upon partnership arrangements with other federal, state, and local agencies, and with worker and community-based organizations. These relationships will allow federal and state agencies to share information about violations and the worker and community-based organizations to provide the WHD with additional complaint-type information.

10 An analysis of rulings in EEOC cases in 2013 is set forth in Chapter III, Section B.
B. Impact Of Changing Rule 23 Standards On Workplace Arbitration Issues

The U.S. Supreme Court’s seminal ruling in Wal-Mart is as significant a ruling for employers as any decision in the history of workplace class action litigation. The lessons of Wal-Mart are wide and varied for a myriad of issues involving workplace class action litigation. The result is that Rule 23 law is undergoing a transformation.11

A corresponding development has been the continual removal of roadblocks to the use of workplace arbitration agreements to manage and control the risks of workplace class action litigation. Beginning with the decision in Stolt-Nielsen v. AnimalFeeds International Corp., 559 U.S. 662 (2010), the Supreme Court limited the ability of plaintiffs to pursue class-wide arbitration without an explicit agreement to class-wide adjudication. Then, in AT&T Mobility LLC v. Concepcion, et al., 131 S. Ct. 1740 (2011), the Supreme Court held that the Federal Arbitration Act (“FAA”) preempts state laws that stand as an impediment to enforcing class action waivers, and opened the door for the broad use of arbitration and class action waiver clauses in consumer and employment contracts.

Even after Concepcion, the plaintiffs’ bar pressed “public policy” arguments that class adjudication is essential to the vindication of employment rights under Title VII and the FLSA. In 2013, the Supreme Court rejected those arguments in American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013) (“AMEX”), holding that class-wide arbitration is not essential to the vindication of federal statutory rights.

Although AMEX did not involve wage & hour claims, it had an immediate impact on wage & hour cases across the country. Indeed, relying on the Supreme Court’s pronouncements, many federal district courts enforced class waivers in FLSA suits. In addition, in D.R. Horton, Inc. v. NLRB, 2013 U.S. App. LEXIS 24073 (5th Cir. Dec. 3, 2013), the Fifth Circuit overruled the National Labor Relations Board’s controversial decision of 2012 in which the Board held that arbitral class waivers violate employees’ rights under the National Labor Relations Act to engage in protected concerted activity. Basing its decision on Concepcion and AMEX, the Fifth Circuit ruled that nothing in federal labor law forbids employers and employees from agreeing to resolve disputes through individual rather than class or collective arbitration.

A critical question left unanswered by the Supreme Court was whether a court or an arbitrator should decide whether an employer that has agreed to arbitrate “all disputes” with its employees can be required to participate in class arbitration, even if its arbitration agreement does not mention class proceedings. In the wake of Concepcion and AMEX, the Sixth Circuit – in Reed Elsevier, Inc. v. Crockett, 2013 U.S. App. LEXIS 22408 (6th Cir. Nov. 5, 2013) – addressed that very question and ruled that the “who decides” issue is presumptively for a judge, not an arbitrator.

Concepcion and AMEX received almost as much attention as Wal-Mart by federal and state courts in 2013, in passing upon workplace arbitration issues in the class action context. Though the Supreme Court’s rulings pertained to consumer and antitrust contracts, 2013 saw widespread case law rulings on the application of these principles to workplace arbitration agreements. As of the close of the year, Concepcion had been cited in 309 rulings and AMEX had been cited in 68 rulings.

As a result, 2013 witnessed a seismic shift in the approaches of courts to motions to compel arbitration in general, and in particular to the use of workplace arbitration by employers to control workplace class action risks. The key battleground issues for the future are whether class action bans in arbitration agreements should not be enforced due to waiver, defects in formation, or under unconscionability defenses, but arbitration seems designed to leave its marks on workplace class action litigation for the foreseeable future.

11 An analysis of rulings in non-workplace class actions in 2013 is set forth in Chapter IX.
C. Implications Of These Developments For 2014

The one constant in workplace class action litigation is change. More than any other year in recent memory, 2013 was a year of great change in the landscape of Rule 23. As these issues play out in 2014, additional chapters in the class action playbook will be written.

So what will 2014 bring?

A certitude of the modern American workplace is that class action and collective action litigation is a magnet that attracts skilled members of the plaintiffs’ bar. The passage of the Class Action Fairness Act (“CAFA”) has had little impact on the pace and volume of overall workplace class action filings since 2005. Instead, the impact of the CAFA has been limited primarily to determine the proper venue, which often has a dramatic impact on the outcome of workplace class actions.\(^\text{12}\) The Supreme Court’s first ruling this year under the CAFA – in *Knowles* – ought to assist employers in removing more class actions from state courts to federal courts, thereby effectuating the purposes of the CAFA.

Overall, in 2014, the *Wal-Mart* and *Comcast Corp.* decisions are unlikely to dampen the focus of government enforcement litigators and the plaintiffs’ class action bar. Instead, case structuring theories will continue to undergo a wholesale “re-booting” process, and case law developments are expected to evolve and reflect these new creative litigation strategies.

On the ERISA front, corporate counsel can expect to see the following developments:

- ERISA class actions will continue to receive increased scrutiny at the class certification stage post-*Wal-Mart*, potentially making it increasingly more difficult for plaintiffs to secure certification of ERISA claims. Unlike in the employment discrimination arena, the focus is likely to be on whether it is possible to certify ERISA class actions under Rule 23(b). Plaintiffs’ counsel also are apt to begin to shift their case structuring from Rule 23(b)(1) and (b)(2), which have traditionally been used in ERISA cases, to Rule 23(b)(3).

- Plaintiffs’ attorneys continue to push the envelope of available remedies under the ERISA and have had some successes in the lower courts. The risk of increasing exposure on these theories will be a key driver of ERISA-related litigation in 2014. Employers also should pay special attention to the development of Rule 23 law in the Seventh Circuit, where Rule 23(c)(4) issue certification is favored (per *McReynolds*), as well as certification of multiple sub-classes, in order to avoid *Wal-Mart* commonality issues. Corporate counsel can expect plaintiffs to rely more often on Rule 23(b)(3) for class certification, notwithstanding that opt-out classes have been historically disfavored in ERISA class certification litigation. Employers also should expect to see more arguments that Rule 23(b)(3), plus ERISA fiduciary requirements, protect a class broader than the precise contours of the class definition.

On the wage & hour front, the deluge of FLSA filings – making wage & hour claims the most predominant type of workplace class action pursued against corporate America – is expected to continue with no end in sight. The wave of wage & hour filings has yet to crest. Corporate counsel, therefore, can expect to see a consistent level of significant litigation activity. Key areas to watch include:

- In terms of novel litigation theories, employers can expect an increase in off-the-clock litigation brought by non-exempt employees, fueled by new theories attacking employer

\(^\text{12}\) An analysis of key CAFA rulings in 2013 is set forth in Chapter VIII.
rounding practices, and increased off-duty use of PDAs and other mobile electronic devices vis-à-vis the application of the continuous workday rule.

- Increased litigation also is expected over issues in independent contractor misclassification and joint employer liability cases, as well as off-the-clock work (including donning and doffing cases), unpaid overtime, missed or late meal and rest breaks, time-shaving, and improper tip pooling.

- Continued developments in the case law are virtually certain relative to § 216(b) certification defenses, as Wal-Mart continues to impact FLSA certification questions and rulings, and as some courts narrow their conception of the "similarly-situated" requirement in collective actions based on the commonality requirement as reformulated by Wal-Mart.

Last but not least, employment discrimination class action litigation – both in terms of private plaintiff cases and government enforcement litigation brought by the EEOC – is expected to remain “white hot” in 2014. On the employment discrimination front, corporate counsel can expect to see the following developments:

- The plaintiffs' bar will continue to "re-boot" the architecture of employment discrimination class actions to increase their chances to secure class certification post-Wal-Mart. Their focus is likely to be on smaller class cases (e.g., confined to a single corporate facility or operations in one state) as opposed to nationwide, mega-class cases. In terms of certification theories, the plaintiffs’ bar is apt to pursue hybrid or parallel class certification theories where injunctive relief is sought under Rule 23(b)(2) and monetary relief is sought under Rule 23(b)(3), as well as a range of partial “issues certification” theories under Rule 23(c)(4) per McReynolds.

- Employers and their defense counsel will use new post-Wal-Mart case law authorities to challenge class allegations at the earliest opportunity. An emerging trend of rulings in 2013 will continue to develop, as courts confront these pro-active defense strategies.

- The EEOC’s systemic litigation program is expected to expand in 2014, with more filings, larger cases, and bigger monetary demands as the agency continues its aggressive enforcement activities. Corporate counsel also can expect to see more systemic administrative investigations relative to hiring issues (use of criminal histories in background checks) and those based on pay and promotions disparate impact theories due to alleged gender or race discrimination.

- Despite a series of setbacks for the EEOC in 2013, with federal judges entering significant sanctions and fee awards against the Commission (which the government has uniformly appealed), it is expected that these rulings will embolden rather than damper the EEOC’s aggressive enforcement of workplace bias laws.

In sum, the lesson to draw from 2013 is that the private plaintiffs’ bar and government enforcement attorneys are apt to be equally, if not more, aggressive in 2014 in bringing class action and collective action litigation against employers.

These novel challenges demand a shift of thinking in the way companies formulate their strategies. As class actions and collective actions are a pervasive aspect of litigation in Corporate America, defending and defeating this type of litigation is a top priority for corporate counsel. Identifying, addressing, and remediating class action vulnerabilities, therefore, deserves a place at the top of corporate counsel’s priorities list for 2014.
II. Significant Class Action Settlements In 2013

Similar to the trend over the last several years, the plaintiffs’ bar and government enforcement attorneys obtained many significant settlements in 2013. Particularly in the areas of employment discrimination class actions, wage & hour collective actions, ERISA class actions, and governmental enforcement lawsuits, the settlements were for very significant amounts. In the areas of private employment discrimination class actions, the settlement values represented increases over settlements obtained in 2012. In all other categories, aggregate settlement numbers decreased. This Chapter evaluates the top ten private plaintiff-initiated monetary settlements, government-initiated monetary settlements, and noteworthy injunctive relief provisions in class action settlements.

A. Top Ten Private Plaintiff-Initiated Monetary Settlements

Plaintiffs’ lawyers secured many large settlements in 2013 for employment discrimination, wage & hour, and ERISA class actions. The top ten settlements from these categories totaled $638.15 million in 2013. This is a decrease from 2012, when the top ten settlements in these categories totaled $840.43 million.

Settlements In Private Plaintiff Employment Discrimination Class Action Lawsuits

For employment discrimination class actions, the monetary value of the top ten private plaintiff settlements entered into or paid in 2013 totaled $234.1 million. This represented a significant increase from the prior year. By comparison, the top ten settlements in 2012 totaled $48.65 million.

1. $160 million – Merrill Lynch
2. $39 million – Bank Of America
3. $8 million – Costco Wholesale Corp.
4. $7.5 million – The Wet Seal Inc.
5. $6 million – City Of Los Angeles
6. $4.5 million – U.S. Postal Service
7. $3.7 million – City Of Chicago
8. $3.1 million – State Of Connecticut, Department of Correction
9. $1.3 million – City Of New York
10. $1 million – City Of Richmond

The biggest settlements involved nationwide classes and included six gender, two race, and one disability-related discrimination class action.


7. **$3.7 million – Vasich, et al. v. City Of Chicago, Case No. 11-CV-4843 (N.D. Ill. Sept. 5, 2013)** (final approval granted in settlement of a class action regarding women who were unable to secure jobs with the City of Chicago’s Fire Department due to a physical fitness test that discriminated against female applicants).

8. **$3.1 million – Easterling, et al. v. State Of Connecticut, Department Of Correction, Case No. 08-CV-826 (D. Conn. Sept. 12, 2013)** (final approval granted in settlement of a class action alleging disparate impact discrimination by the Department of Correction resulting from the use of a 1.5 mile run physical fitness test for female correction officer applicants).


### Settlements In Private Plaintiff Wage & Hour Class Actions

For wage & hour class actions, the monetary value of the top ten private settlements entered into or paid in 2013 totaled $248.45 million. This is a significant decrease from the top ten settlements in 2012, which totaled $292 million.

1. **$73 million – Bank Of America**
2. **$29.75 million – Tata Consultancy Services, Ltd.**
3. **$29 million – Ecolab Inc.**
4. **$21 million – Merrill Lynch**
5. **$20.9 million – Rite Aid Corp.**
6. **$19 million – AT&T Corp.**
7. **$17.5 million – 24 Hour Fitness USA, Inc.**

9. $12 million – Merrill Lynch

10. $12 million – Old Republic Title Co.

The top ten settlements were split evenly between nationwide and state-specific claims, and all but one of
the top ten settlements involved wage & hour lawsuits pending in either federal or state courts in New York
and California.

1. $73 million – In Re Bank Of America Wage & Hour Employment Litigation, Case No. 10-MD-
2138 (D. Kan. Dec. 18, 2013) (final approval granted in settlement of a nationwide class action
alleging that employer maintained a uniform, company-wide policy requiring non-exempt employees
to perform off-the-clock work).

2. $29.75 million – Vedachalam, et al. v. Tata Consultancy Services, Ltd., et al., Case No. 06-CV-
963 (N.D. Cal. July 18, 2013) (final approval granted in settlement of a class action alleging that the
employer required its foreign recruits to surrender their tax refunds off their payroll wages).

approval granted in settlement of a class action alleging pest control employees were wrongly
classified as exempt employees who worked overtime without receiving overtime pay).

April 26, 2013) (final approval granted in settlement of a class action brought by former advisers
who alleged they were denied deferred compensation).

(final approval granted in settlement of a class action involving failure to pay assistant store
managers and co-managers overtime pay).

approval granted in settlement of a class action involving 1,400 California field managers who
alleged they were denied overtime pay).

7. $17.5 million – Beauperthuy, et al. v. 24 Hour Fitness USA, Inc., Case No. 06-CV-715 (N.D.
Cal. Sept. 11, 2013) (final approval granted in settlement of a class action involving hundreds of
workers who were misclassified and denied overtime pay).

Sept. 18, 2013) (preliminary approval granted for settlement of a class action alleging Roto-Rooter
failed to pay its commissioned service technicians minimum wages and proper overtime).

2013) (final approval granted in settlement of a class and collective action alleging Merrill Lynch
failed to pay proper overtime to its client associates).

10. $12 million – Erickson, et al. v. Old Republic Title Co., Case No. 13-CV-1210 (S.D. Cal. June 5,
2013) (preliminary approval granted in settlement of a class action alleging the title company
worked around company policies and practices to avoid paying overtime to hourly workers).
Settlements In Private Plaintiff ERISA Class Actions

For ERISA class actions, the monetary value of the top ten private settlements entered into or paid in 2013 totaled $155.6 million. This amount is significantly lower than in 2012, when the total monetary value of the top ten private settlements reached $237 million.

1. $45.9 million – Colgate-Palmolive Co.
2. $35 million – CIGNA Corp.
3. $30 million – International Paper Co.
4. $22.5 million – Regions Financial Corp.
5. $5.1 million – Reser
6. $4.5 million – Advanta Corp.
7. $3.6 million – Coventry Health Care, Inc.
8. $3.5 million – United Community Banks, Inc.
9. $3 million – Flagstar Bancorp, Inc.
10. $2.5 million – AK Steel Corp.

The largest ERISA class action settlements involved disputes over the breach of fiduciary duty, reducing retiree benefits, and/or investing pension or 401(k) assets into company stock.

1. $45.9 million – In Re Colgate-Palmolive Co. ERISA Litigation, Case No. 07-CV-9515 (S.D.N.Y. Dec. 16, 2013) (preliminary approval granted for settlement of an ERISA class action involving claims that the company and its cash balance retirement plan failed to pay former employees their full accrued benefits and committed other violations under the ERISA).

2. $35 million – Nolte, et al. v. CIGNA Corp., Case No. 07-CV-2046 (C.D. Ill. Oct. 15, 2013) (final approval granted for settlement of an ERISA class action involving allegations that Defendant and related entities breached their fiduciary duties by paying excessive fees to themselves and receiving improper benefits from the Plan as a result of CIGNA’s sale of its retirement business).


4. $22.5 million – In Re Regions Morgan Keegan ERISA Litigation, Case No. 09-MD-2009 (W.D. Tenn. Dec. 19, 2013) (preliminary approval granted in settlement of an ERISA class action alleging that Defendant breached its fiduciary duties by continuing to invest in the company's common stock for its employee pension plan even when the common stock was not a prudent investment option).

5. $5.1 million – Vincent, et al. v. Reser, Case No. 11-CV-3572 (N.D. Cal. Feb. 19, 2013) (final approval granted in settlement of an ERISA class action involving fiduciary breach by an ESOP trustee to purchase ESOP insurance policies for protection after major sale of stock to the ESOP).
6. $4.5 million – *In Re Advanta Corp. ERISA Litigation*, Case No. 09-CV-4974 (E.D. Pa. Oct. 9, 2013) (preliminary approval granted for settlement of an ERISA class action alleging that Advanta management breached its fiduciary duties by purchasing and holding the company’s common stock as an investment option in its retirement plan even when the common stock was not a prudent investment option).

7. $3.6 million – *In Re Coventry Health Care, Inc. ERISA Litigation*, Case No. 09-CV-02661 (D. Md. Oct. 3, 2013) (preliminary approval granted for settlement of an ERISA class action alleging that Defendants breached their fiduciary duties to prudently and loyally manage the assets of the company’s employee retirement savings plan).

8. $3.5 million – *Alford, et al. v. United Community Banks, Inc.*, Case No. 11-CV-00309 (N.D. Ga. Dec. 12, 2013) (final approval granted for settlement of an ERISA class action alleging that Defendant breached its fiduciary duties by continuing to invest in the company’s common stock for its employee pension plan even when the common stock was not a prudent investment option).

9. $3 million – *Griffin, et al. v. Flagstar Bancorp, Inc.*, Case No. 10-CV-10610 (E.D. Mich. Dec. 12, 2013) (final approval granted for settlement of an ERISA class action involving 401(k) plan participants' allegations that Flagstar Bancorp breached its fiduciary duties by purchasing and holding the company’s common stock when the common stock was not a prudent investment option).

10. $2.5 million – *Patrick, et al. v. AK Steel Corp.*, Case No. 05-CV-681 (S.D. Ohio Nov. 22, 2013) (final approval granted for settlement of an ERISA class action alleging that Defendant made improper deductions to pension benefits for surviving spouses from the company’s non-contributory employee pension plan).

**B. Top Ten Government-Initiated Monetary Settlements**

The EEOC and the U.S. Department of Labor (“DOL”) aggressively litigated government enforcement actions in 2013.

Based on preliminary figures for the U.S. Government’s 2013 fiscal year, the EEOC filed 131 new lawsuits, including 21 non-systemic class suits and 21 systemic pattern or practice lawsuits. In 2013, the EEOC resolved 209 pending lawsuits and secured a record-breaking $372.1 million in settlements for allegedly injured victims of job bias, an increase of $6.7 million over the previous year and the highest level ever in the Commission’s history. The EEOC also received a total of 93,727 private sector charges of discrimination, which is approximately 6,000 fewer than the previous year (but still one of the highest totals in any year since 1964). In addition, the EEOC’s docket of systemic pattern or practice cases grew to over 23.4% of the Commission’s case load. Furthermore, the U.S. Department of Labor’s Wage & Hour Division reported that it recovered $249,954,412 in back wages for 269,250 workers in fiscal year 2013, a new record for the government.

For all types of government-initiated enforcement actions, the monetary value of the top ten settlements entered into or paid in 2013 totaled $171.6 million. This entailed a significant decrease over 2012, as the top ten settlements totaled $262.78 million.

**Settlements Of Government-Initiated Enforcement Actions And Pattern Or Practice Lawsuits**

1. $80 million – Sherwin-Williams
2. $35 million – Commonwealth Of Puerto Rico
3. $34 million – Austin Capital Management  
4. $8.1 million – San Diego Unified Port District  
5. $4.8 million – National Grid USA  
6. $3 million – Daniyal Enterprises, LLC  
7. $2.5 million – Carrols Corp.  
8. $2 million – Hutco Inc.  
9. $1.2 million – Global Horizons, Inc.  
10. $1 million – Bowlin Group LLC  

Two of the settlements involved EEOC pattern or practice lawsuits, five settlements involved federal DOL enforcement actions, and two settlements involved state DOL enforcement actions.  

1. **$80 million – Department Of Labor v. Sherwin-Williams** (DOL Feb. 21, 2013) (preliminary settlement approval granted to current and former employees’ stock purchase and savings plans resulting from an investigation of Sherwin-Williams and GreatBanc Trust Co.’s failure to provide benefits to plan and its participants equal to the amount paid in stock purchases).  

2. **$35 million – Department Of Labor v. Commonwealth Of Puerto Rico**, Case. No. 05-CV-2229 (D.P.R. April 12, 2013) (preliminary approval of settlement to nearly 4,500 corrections workers who were not adequately paid for overtime hours).  

3. **$34 million – Department Of Labor v. Austin Capital Management** (DOL Feb. 27, 2013) (settlement approval to plan investors’ employee benefit claims resulting from an investigation of Austin Capital’s indirect investments into the Madoff ponzi scheme).  


8. **$2 million – Department Of Labor v. Hutco, Inc.** (DOL May 7, 2013) (preliminary settlement resulting from a Department of Labor’s investigation of back wages and owed overtime to over 2,000 laborers assigned to client multi-state worksites).

10. $1 million – Department Of Labor v. Bowlin Group LLC, Case No. 12-CV-76 (E.D. Ky. April 30, 2013) (consent judgment entered in an FLSA lawsuit resulting from a Department of Labor investigation of a cable installation company’s failure to compensate over 100 employees overtime wages for hours worked).

C. Noteworthy Injunctive Relief Provisions In Class Action Settlements

Generally, the types of relief obtained in settlements of employment discrimination class actions can be grouped into five categories, including modification of internal personnel practices and procedures; oversight and monitoring of corporate practices; mandatory training of supervisory personnel and employees; compensation for named plaintiffs and class members; and an award of attorneys’ fees and costs for class counsel. In addition to substantial payments for overtime liability, settlements of FLSA collective actions often involve changes to payroll practices and procedures. In ERISA class action settlements, the terms typically include monetary payments along with injunctive orders barring fiduciaries and third-parties from serving as plan fiduciaries or managers.

Class action settlements involving private plaintiffs generally contain one or more of these items of non-monetary injunctive relief, but rarely contain all of them. Attorneys representing the U.S. Government in enforcement litigation actions also secured several settlements in 2013 that had noteworthy injunctive relief provisions. This reflects in some measure the significant “public interest” component of government-initiated class action litigation.

Among the more novel and/or onerous non-monetary relief requirements imposed on employers in 2013 are the following:

• Requirement to abstain from inquiring into the genetic information of an applicant or an applicant’s family members except as permitted by federal regulation;

• Requirement that prior to entering into contracts with any third-party farm labor contractor for the provision of temporary agricultural workers pursuant to the federal H-2A program, the third-party farm labor contractor is obligated to provide a copy of its EEO, anti-discrimination, anti-harassment, anti-retaliation, and complaint reporting policies;

• Requirement that an employer make available American Sign Language interpreters for important workplace communications and meetings dealing with employees with hearing impairments where meetings involve hiring, promotion, employee discipline, and similar matters;

• Implementation of on-line posting and registration of interest systems, coupled with adoption of new selection and structured interview policies based on recommendations from outside experts in industrial psychology;

• Requirement granting employees the option of adding a non-binding mediation process with a third-party neutral to their teaming agreements;

• Development and required application of a new pension determination formula as to retirement systems for teachers, firefighters, and other municipal workers so that every employee who has been or will be called up for active duty will receive all the earnings they would have gotten had they not been serving in the military;
• Requirement of affirmative hiring requirements to offer jobs during the three-year duration of the consent decree to no fewer than 40 women to whom the EEOC has identified as claimants affected by Defendant's hiring policy;
• Adoption of new testing and evaluation procedures for hiring, promotion, and compensation;
• Recission of an English-only language policy requiring that no other language be spoken at the employer's warehouse;
• Requirement to implement biometric time clocks to record employees' hours worked accurately.

The top ten settlements in 2013 involving significant injunctive relief provisions include:

1. Vasich, et al. v. City Of Chicago, Case No. 11-CV-4843 (N.D. Ill. Sept. 5, 2013). The Court approved a settlement agreement stemming from allegations that the City engaged in a policy or practice of sex discrimination through its use of a pre-hire physical abilities test in hiring firefighters and emergency medical technicians in violation of Title VII. As part of the City's obligations under the consent decree, the Court ordered the City to abandon its physical abilities test in favor of the more common test licensed by the International Association of Fire Fighters, which is aimed at testing practical firefighting skill as opposed to sheer strength. The consent decree also requires the City to give priority application status to the approximately 187 female applicants covered in the lawsuit for the next hiring period and would make their hiring mandatory provided the candidates meet all the administrative thresholds.

2. EEOC v. Global Horizons, Inc., Case No. 11-CV-257 (D. Haw. Nov. 27, 2013). The Court approved a consent decree between the EEOC and Defendant Del Monte Fresh Produce ("Del Monte") stemming from allegations that Defendants engaged in a pattern or practice of unlawful employment actions by subjecting Thai farm labor workers to disparate treatment, harassment, retaliation, and constructive discharge in violation of Title VII. In addition to monetary relief under the consent decree, Del Monte agreed to implement protocols aimed at ensuring that its labor contractors do not conflict with anti-discrimination laws. In particular, Del Monte agreed to implement procedures to ensure that the farm labor contractors that it uses disseminate policies and procedures prohibiting discrimination to their local workforce and to H2-A guest-workers in a language they understand. Furthermore, the consent decree requires that prior to entering into contract with any third-party farm labor contractor ("FLC") for the provision of temporary agricultural workers pursuant to the federal H-2A program ("Labor Contract"), the FLC is obligated to provide Del Monte a copy of its EEO, anti-discrimination, anti-harassment, anti-retaliation, and complaint reporting policies. If a complaint is lodged with Del Monte by an individual whose work is governed by a Labor Contract between Del Monte and an FLC, the complaint shall be referred to the FLC for investigation and resolution. If a complaint is lodged about a Del Monte employee, Del Monte is obligated to investigate promptly and resolve the matter pursuant to the aforementioned policies. Moreover, any Labor Contract between Del Monte and an FLC is required to include a provision requiring the FLC to comply with all federal, state, and local laws. The consent decree further requires that Del Monte must conduct audits to ensure its contractors’ compliance with the consent decree throughout its two-year term and to designate a compliance officer for oversight of contractor compliance and Title VII compliance.

3. Hubbard, et al. v. U.S. Postal Service, Case No. 03-CV-1062 (D.D.C. July 31, 2013). The Court approved a settlement agreement stemming from allegations that Defendant failed to provide reasonable accommodations to current and former hearing-impaired employees in violation of the Rehabilitation Act. In addition to a monetary award, the agreement requires Defendant to provide injunctive relief, including state-of-the-art technology and improved management structures designed to enable all deaf and hearing-impaired employees to participate fully and safely in the workplace. The agreement also requires Defendant to make available American Sign Language
interpreters for important workplace communications and meetings involving hiring, promotion, employee discipline, and similar matters. In addition, Defendant must create various internal management structures to monitor the provision of reasonable accommodations, and that Defendant engage an independent ombudsman to monitor compliance and enforcement of the agreement.

4. **EEOC v. Fabricut Inc., Case No. 13-CV-248 (N.D. Okla. May 7, 2013).** In the EEOC's first-ever genetic bias action, the Court approved a consent decree in a lawsuit filed by the EEOC alleging that Defendant discriminated against job applicants based on their disability and genetic information by requesting family medical history records. As part of the consent decree, Defendant is required to abstain from inquiring into the genetic information of an applicant or an applicant's family members except as permitted by federal regulations. The consent decree also requires that Defendant abstain from withdrawing a conditional job offer from an otherwise qualified applicant on the sole basis that the applicant reported different results to different treating physicians in different post-offers of employment medical examinations. Furthermore, Defendant is obligated to take specified actions designed to prevent future discrimination, including the posting of an anti-discrimination notice to employees and dissemination of anti-discrimination policies to employees. The consent decree also requires Defendant to have its employees responsible for hiring decisions undergo non-discrimination training, as well as to distribute non-discrimination policies to its employees.

5. **EEOC v. Presrite Corp., Case No. 11-CV-260 (N.D. Ohio April 24, 2013).** The Court approved a consent decree stemming from an EEOC pattern or practice lawsuit alleging systemic discrimination against female job applicants who sought positions at Defendant's three plants in violation of Title VII. As part of Defendant's obligations under the consent decree, Defendant is required to offer job positions during the three-year duration of the consent decree to no fewer than 40 women to whom the EEOC has identified as claimants affected by Defendant's hiring policy. The consent decree further requires Defendant to provide the EEOC with semi-annual reports disclosing the number of females and males who applied for entry-level positions as compared to those who were hired. In addition, Defendant is also obligated to conduct mandatory training sessions for its human resources staff and hiring managers regarding hiring discrimination. Furthermore, the consent decree requires Defendant to keep certain record-keeping duties as part of the settlement, including creating and maintaining applicant flow logs and preserving supplemental employment-related documents. In addition, Defendant is required to post a workplace notice about the settlement and file written reports with the EEOC during the duration of the decree. The consent decree also requires Defendant to create and maintain set job descriptions that accurately describe the required qualifications for all laborer and operative positions at all of its facilities.

6. **Goodman, et al. v. City Of New York, Case No. 10-CV-5236 (S.D.N.Y. July 2, 2013).** The Court granted preliminary approval of a class action settlement stemming from allegations that Defendants violated the Uniformed Services Employment and Reemployment Rights Act of 1994 by failing to compute city police department employees' compensation for pension purposes during their periods of active military service. Under the settlement agreement, the Court ordered Defendants to recalculate the pension benefits of the roughly 300 retirees within the proposed class to include overtime and additional night shift pay. The Court further ordered that Defendants apply a newly revised pension determination formula to the retirement systems for teachers, firefighters, and other municipal workers so that every city employee who has been or will be called up for active duty will receive all the earnings they would have received had they not been serving in the military. In addition, the Court ordered Defendants to take all reasonable steps necessary to train and educate all employees responsible for performing the re-calculation of the pension benefits under the revised pension determination formula. The Court further ordered any cost of living adjustments or wage increases that become effective during a period of active military service that
the NYPD uniformed member of service would have earned but for his or her period of active military service.

7. *Calibuso, et al. v. Bank Of America*, Case No. 10-CV-1413 (E.D.N.Y. Dec. 30, 2013). The Court gave final approval to a class action settlement stemming from a complaint filed by female financial advisors alleging that Defendant's compensation and account distribution policies unlawfully discriminated against female financial advisors in violation of the Equal Pay Act and Title VII. As to the programmatic relief entered by the Court under the terms of the preliminary settlement agreement, Defendant is required to engage an independent consultant selected by plaintiffs’ counsel to conduct an internal study of financial advisor teaming and make non-binding recommendations as to ways to facilitate improved teaming arrangements for female financial advisors. Furthermore, Defendant is obligated to post existing non-discrimination and anti-retaliation policies on an internal website accessible to all financial advisors. Defendant is also required annually to provide financial advisors with information about the process for making internal complaints of gender discrimination, and shall request that financial advisors acknowledge either in writing or electronically that they have read the complaint procedure. The Court further required Defendant to make available to all U.S. wealth management financial advisors and financial advisor trainees the option of adding a non-binding mediation process with a third-party neutral to their teaming agreements.

8. *EEOC v. Mesa Systems, Inc.*, Case No. 11-CV-1201 (D. Utah Sept. 27, 2013). The Court approved a consent decree stemming from an EEOC pattern or practice lawsuit alleging a hostile work environment against Hispanic employees and enforcing an overly restrictive English-only policy upon Hispanic and Asian/Pacific Islander employees. Pursuant to the three-year consent decree, the Court ordered Defendant to rescind its language policy that requires that only English and no other language be spoken in its warehouse. Defendant is further obligated to communicate verbally to all of its employees that its English-only language policy has been rescinded and is no longer Defendant’s policy or rule. In addition, the Court ordered Defendant to review and revise its written policies prohibiting unlawful discrimination and retaliation, provide equal employment opportunity training for all its employees plus enhanced training for its director of human resources, and post both its revised EEO policies and a notice informing employees about the consent decree and their Title VII rights in a prominent place in Defendant’s warehouse facility. The consent decree further requires Defendant to expunge from the personnel files of the charging parties and other aggrieved individuals identified by the EEOC: (i) any references to the allegations of discrimination filed against Defendant that formed the basis of this action; and (ii) any and all references to the charging parties' and other aggrieved individuals' participation in this action. The Court further required Defendant to provide an apology letter to the charging parties and other aggrieved individuals within ten days after the entry of the consent decree.

9. *Nolte, et al. v. CIGNA Corp.*, Case No. 07-CV-2046 (C.D. Ill. Oct. 15, 2013). The Court approved a settlement agreement of an ERISA class action involving 401(k) Plan participants’ allegations that Defendant breached its fiduciary duties by paying excessive fees to itself and receiving improper benefits from the Plan as a result of Defendant's sale of its retirement business. In addition to the monetary portion of the settlement agreement, the Court required Defendant to engage an independent consultant who has specific expertise with stable value investments. The Court also required that Defendant receive approval from plaintiffs’ counsel with respect to the hiring of an independent consultant. Furthermore, the Court ordered Defendant to revise its processes for obtaining investment products and services for the Plan, including the implementation of a competitive bidding process for record-keeping and administrative services.

overtime wages in violation of the FLSA. Pursuant to the three-year consent decree, the Court ordered Defendants to implement and utilize biometric time clocks to record employees’ hours worked in each gas station accurately. The Court further ordered that an independent monitor supervise Defendants’ compliance with the terms of the consent decree and report his findings to the DOL every six months throughout the three-year consent decree. In addition, the Court ordered Defendants to provide FLSA training for all employees in English and any other languages primarily spoken by a substantial number of employees. The Court also required Defendants to provide a toll-free telephone number for employees to report violations to the independent monitor. Moreover, the consent decree required Defendants to give written notice to their employees regarding the terms of the consent decree.
III. Significant Federal Employment Discrimination Class Action And EEOC Pattern Or Practice Rulings

This Chapter examines rulings in 2013 in employment discrimination class action cases arising under Title VII of the Civil Rights Act of 1964, as well as “pattern or practice” enforcement actions brought by the U.S. Equal Employment Opportunity Commission. Rulings are divided into these two substantive sections, and sub-divided into the federal circuits in which the appellate or district court rendered the decision.

A. Employment Discrimination Class Actions Under Title VII Of The Civil Rights Act Of 1964

(i) First Circuit

No reported decisions.

(ii) Second Circuit

Gulino, et al. v. The Board Of Education Of The City School District Of The City Of New York, 2013 U.S. Dist. LEXIS 123948 (S.D.N.Y. Aug. 29, 2013). Plaintiffs, a group of African-American and Latino teachers, brought a putative class action alleging that Defendant violated Title VII by giving exams that allegedly discriminated against them and had a disparate impact on minorities. The Court re-certified the class, reversing its earlier decision to partly decertify the class in light of Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011). The Court had earlier certified a class under Rule 23(b)(2), which was later decertified pursuant to Wal-Mart’s holding that Plaintiffs could not use Rule 23(b)(2) to certify class actions where Plaintiffs had sought non-incidental monetary relief or individualized injunctive relief. Id. at *7. The Court had thus decertified Plaintiffs’ class to the extent it sought damages and individualized injunctive relief. The Court had found that Plaintiffs’ request for declaratory relief and class-wide injunctive relief could proceed as a liability phase class action under Rule 23(b)(2), but had agreed with Defendant that Plaintiffs’ claim for back pay and individualized injunctive relief must be decertified in light of Wal-Mart. Id. at *8. Plaintiffs subsequently moved to certify a remedial class consisting of all African-American and Latino individuals employed by Defendant as New York City public school teachers for a defined period who failed to achieve a qualifying score and as a result lost or were denied a permanent teaching appointment. Id. at *9. The Court granted Plaintiffs’ motion. Plaintiffs established numerosity by a preponderance of evidence and the Court found that the exact composition of the class could be established through the notification process and through hearings in which individual Plaintiffs bear the burden of showing their adverse employment as the result of failing the exam. Id. at *16. The Court, however, rejected Plaintiffs’ proposed class definition to the extent it sought damages relating to liability that was not proved at trial. Plaintiffs had included all teachers who suffered an adverse employment action as a result of the exam even if they took and failed the exam subsequent to trial. The Court’s earlier ruling that the exam had a disparate impact and that Defendant violated Title VII by using the exam was based on data from 1993 through the end of the 2001/2002 school year. The Court therefore limited Plaintiffs’ class to those teachers who failed the exam during the period established at trial. Id. at *17. The Court agreed with Plaintiffs that the class shared common questions and answers relating to the calculation of appropriate remedies. Plaintiffs had proposed a two-stage remedial phase, with the first stage addressing class-wide issues, including calculation of back pay, pension benefits, and seniority, and a second stage addressing individual issues, including mitigation and the amount of back pay to which each claimant was entitled. Id. at *20. The Court found that using cohorts to calculate back pay on a periodic basis, as opposed to an aggregate basis, was appropriate to balance procedural fairness with efficient administration. Id. at *21. The Court, however, found that Plaintiffs’ proposal to use an expert to adjust the back pay calculation to account for the probability that a teacher would have earned more or less throughout their career as a result of various opportunities and circumstances was not suitable for class-wide resolution because such issues were better addressed individually at the second stage of the proceedings. Id. at *21-22. Because “even a single common question” is enough to satisfy Rule 23(a) as per Wal-Mart, and the class-wide calculation of back pay for each cohort satisfied the commonality requirement, the Court determined that Plaintiffs established commonality. Id. at *23. Finally, although some individualized issues existed in the remedial phase, the Court concluded that the predominance and
superiority elements were satisfied. The Court found that class-wide calculation of baseline back pay and baseline pension benefits on a year-by-year basis, class-wide determination of how to calculate compensation for medical benefits, class-wide establishment of non-discriminatory bases Defendant might use to defend, and class-wide process to collect information regarding mitigation established predominance. *Id.* at *34-35. Accordingly, the Court granted Plaintiffs’ motion to certify a damages class pursuant to Rule 23(b)(3).

**Kassman, et al. v. KPMG LLP, 925 F. Supp. 2d 453 (S.D.N.Y. 2013).** Plaintiffs, a group of five former female employees, brought a class action alleging that Defendant subjected women employees to pay, promotion, pregnancy, and caregiving discrimination in violation of Title VII, the New York State Human Rights Law (“NYSHRL”), the New York City Human Rights Law (“NYCHRL”), the Equal Pay Act, and the Family & Medical Leave Act. As an initial matter, Defendant moved to dismiss Plaintiffs’ class claims in light of *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), where the Supreme Court reversed a decision of the Ninth Circuit to certify a nationwide class of female employees who alleged that the discretion exercised by their local supervisors over pay and promotion matters was discriminatory. The Supreme Court held that the class could not satisfy the commonality requirement because the disparity in pay was a local discretionary decision limited to each store, and Plaintiffs failed to show a uniform employment policy. *Id.* at 463-64. The Court denied Defendant’s motion, finding that unlike this case, *Wal-Mart* involved an appeal from the certification of class, and at this stage – where Plaintiffs had not yet sought class certification – the relevant question was whether, based on the allegations in the complaint, Plaintiffs could come forth with sufficient evidence at the class certification stage to demonstrate commonality. *Id.* at 464. The Court found that Plaintiffs had met this burden and denied the motion to dismiss. Defendant also moved to strike Plaintiffs’ requests for injunctive or declaratory relief, arguing that they lacked standing to assert those claims. The Court noted that to satisfy constitutional standing requirements, Plaintiffs must demonstrate: (i) a personal injury-in-fact; (ii) that the challenged conduct of Defendant caused it; and (iii) that a favorable decision will likely address it. *Id.* at 465. Defendant relied on *Chen-Oster v. Goldman, Sachs & Co.*, 2012 U.S. Dist. LEXIS 12961 (S.D.N.Y. Jan. 19, 2012), where the Court concluded that it was bound by the Supreme Court’s ruling in *Wal-Mart* to hold that Plaintiff may never seek injunctive relief against his or her former employer. The Court noted that this conclusion was based on *Wal-Mart*, where the Supreme Court held that Plaintiffs’ claims for back pay were also improperly certified under Rule 23(b)(2) because that provision applied only when a single injunction or declaratory judgment would provide relief to each member of the class. The Court disagreed with *Chen-Oster*, finding that the analysis in *Wal-Mart* did not depend on such a broad reading of the language concerning the standing of former employees. *Id.* at 468. Accordingly, the Court found that Plaintiffs had a standing to bring their claims. The Court, however, granted Defendant’s motion to strike Plaintiffs’ state law claims to the extent that those claims were brought on behalf of people who did not live or work in New York State or New York City. The Court, nevertheless, denied the motion with respect to the named Plaintiffs and putative class members who did live or work within the relevant geographic boundaries.

(iii) **Third Circuit**

No reported decisions.

(iv) **Fourth Circuit**

**Scott, et al. v. Family Dollar Stores, Inc., 733 F.3d 105 (4th Cir. 2013).** Plaintiffs, on behalf of themselves and similarly-situated female store managers employed by Defendant, filed a nationwide class action alleging that Defendant paid female store managers less than males in violation of Title VII and the Equal Pay Act. Plaintiffs premised their claims on the allegation that they were discriminated against in pay as a result of subjective decisions made at the local store level. After substantial discovery, but before Plaintiffs moved for class certification, the Supreme Court issued its decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Thereafter, Defendant filed a motion to dismiss and/or strike Plaintiffs’ class claims on the grounds that those claims were foreclosed by the Supreme Court’s decision in *Wal-Mart*. In addition to opposing Defendant’s motion, Plaintiffs filed a motion for leave to file a first amended
complaint in an attempt to avoid the potential consequences of *Wal-Mart*. The District Court granted Defendant’s motion to dismiss and denied Plaintiffs’ motion for leave to file an amended complaint. Referencing Plaintiffs’ prior admission that the allegations of class-wide discrimination in their original complaint were “virtually identical” to those asserted in *Wal-Mart*, the District Court concluded that Plaintiffs’ allegations failed to satisfy Rule 23(a)(2)’s commonality requirement because they were based on subjective decisions made at the store level by hundreds of decision-makers. Furthermore, the District Court denied leave to amend on grounds of both prejudice and futility, noting that while Plaintiffs “purport to deny [in the amendment] that class members’ pay is set through a discretionary, subjective process … the discretionary pay of managers, within uniformly established parameters, remains the only source of discrimination alleged.” *Id.* at 10. Plaintiffs subsequently appealed the District Court’s order. On appeal, a divided three-judge Fourth Circuit panel first addressed whether it had jurisdiction to review the District Court’s denial of Plaintiffs’ motion for leave. The Fourth Circuit observed that class certification is usually pursued under Rule 23, but the District Court’s dismissal was essentially “the functional equivalent of denying a motion to certify the case as a class action.” *Id.* at 111. Thus, the Fourth Circuit reasoned that because it had jurisdiction to review the denial of class certification, it held that it could exercise pendent appellate jurisdiction to review the denial of Plaintiffs’ motion for leave to file an amended complaint, even though Plaintiffs’ Rule 23(f) petition had not sought review of that issue. *Id.* at 111-12. The Fourth Circuit also affirmed the District Court’s dismissal of Plaintiffs’ original complaint because those claims made conclusory allegations that Defendant exercised centralized control of store manager compensation at the corporate level, without identifying decision-makers or alleging that the “subjectivity and stereotyping” were exercised in a common manner with common direction. *Id.* at 112. However, the Fourth Circuit found that the District Court’s denial of leave to amend the complaint on grounds that it was foreclosed by *Wal-Mart* was erroneous and based on a misapprehension of the applicable law. In its attempt to distinguish Plaintiffs’ case from *Wal-Mart*, the Fourth Circuit noted two principles derived from the Supreme Court’s holding in *Wal-Mart*. First, the Fourth Circuit stated that *Wal-Mart* did not set out a *per se* rule against class certification where subjective decision-making or discretion was alleged. *Id.* at 113. Rather, in the Fourth Circuit’s view, certification might still be appropriate “if there is also an allegation of a company-wide policy of discrimination.” *Id.* Thus, the Fourth Circuit held that “even in cases where the complaint alleges discretion, if there is also an allegation of a company-wide policy of discrimination, the putative class may still satisfy the commonality requirement for certification.” *Id.* at 114. Second, the Fourth Circuit found that *Wal-Mart* was not applicable to “upper-level” decision-makers. *Id.* The Fourth Circuit reasoned that “when high-level personnel exercise discretion, [the] resulting decisions affect a much larger group,” and thus are “more likely to satisfy the commonality requirement than the discretion exercised by low-level managers in *Wal-Mart*.” *Id.* Applying these two principles, the Fourth Circuit found that the District Court erred in denying leave to amend because it failed to consider whether: (i) in light of the discretion alleged, the discretion was exercised in a common way under some common direction, or despite the discretion alleged, another company-wide policy of discrimination is also alleged; and (ii) the discretionary authority at issue was exercised by high-level managers, as distinct from the low-level type managers in *Wal-Mart*. *Id.* at 116. In addition, the Fourth Circuit took issue with the District Court’s finding that Plaintiffs’ proposed amended complaint would be prejudicial to Defendant. The Fourth Circuit reasoned that Plaintiffs’ proposed amended complaint did not introduce a new theory but, instead, included “numerous additional facts” to support their previous assertion of centralized corporate control. *Id.* at 118. Thus, the Fourth Circuit held that the proposed amended complaint would not be prejudicial to Defendant. Accordingly, the Fourth Circuit reversed the District Court’s decision in part and remanded for reconsideration.

**Editor’s Note:** *Scott* is one of the most controversial workplace class action rulings of 2013. It is the first ruling to limit *Wal-Mart* to class actions challenging practices stemming from “upper-level” decision-makers. In the vigorous dissent, the majority opinion was described as having “subverted a Supreme Court decision…” *Id.* at 135.
Sixth Circuit

*Davis, et al. v. Cintas Corp.*, 717 F.3d 476 (6th Cir. 2013). Plaintiff, on behalf of herself and similarly-situated female job applicants denied employment as entry-level sales representatives by Defendant, brought a putative nationwide class action alleging that Defendant's hiring practices intentionally discriminated against and disparately impacted female applicants in violation of Title VII. Subsequently, Plaintiff moved for class certification under both Rule 23(b)(2) and Rule 23(b)(3) for a nationwide class. In denying Plaintiff’s motion, the District Court held that Plaintiff’s evidence did not support a finding of company-wide gender discrimination. Plaintiff then appealed but she only challenged the District Court’s determination that class certification under Rule 23(b)(2) was inappropriate. On appeal, the Sixth Circuit observed that the “gravamen” of Plaintiff’s class claims was similar to that in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), because “[i]n each, the allegedly discriminatory employment decisions are ascribed to a corporate culture allegedly unfavorable to women. In each, applicants had to meet a basic set of criteria, but managers retained significant discretion over the challenged employment decisions. And in each, the class representative sought to prove her discrimination claim with a combination of statistical and anecdotal evidence.” Id. at 486. With respect to Rule 23(a)(2)’s commonality requirement, the Sixth Circuit noted that under the *Wal-Mart* framework, Plaintiff had to show that Defendant “used a biased testing procedure” or “operated under a general policy of discrimination.” Id. at 487. The Sixth Circuit observed that similar to *Wal-Mart*, Plaintiff did not argue that Defendant’s subjective hiring criteria led to anti-female bias, but rather that “subjective decisions made by some of Cintas’ managers favored males because of Cintas’ male-dominated corporate culture.” Id. The Sixth Circuit noted that the District Court found that Plaintiff’s claim could not support a finding of “general policy of discrimination” because Defendant’s hiring process was not entirely subjective. Id. In addition, the Sixth Circuit found that Defendant’s hiring process involved thousands of managers at hundreds of its facilities, and that hiring decisions were made for a diverse range of reasons and depended on widely differing circumstances at each facility. Id. The Sixth Circuit also observed the District Court’s point that Defendant’s hiring process had many different steps and at some points, involved hiring managers who were women themselves, and that putative class members would have suffered the alleged discrimination in different ways at different stages of the hiring process. Id. While Plaintiff’s experts suggested that women and minorities were under-represented in sales representative positions company-wide, Defendant’s experts countered by asserting that “although some Cintas locations under-hired women and racial minorities, other locations over-hired women and racial minorities during the same period.” Id. at 488. The Sixth Circuit held that none of the District Court’s evidentiary determinations were an abuse of discretion. Id. at 489. Therefore, the Sixth Circuit concluded that Plaintiff failed to satisfy Rule 23(a)(2) because “she could not show that a number of women, who failed to obtain employment at many places, over a long time, under a largely subjective hiring system, shared a common question of law or fact.” Id. With respect to injunctive relief under Rule 23(b)(2), the Sixth Circuit noted that Plaintiff had proposed a “shortfall-based model” for calculating damages. Under Plaintiff’s proposal, the District Court would declare Defendant’s hiring practices discriminatory and issue an injunction ordering Defendant to hire class members “randomly selected in numbers equal to the proven shortfalls” of women at each facility. Id. at 490. Plaintiff would then calculate back pay liability by multiplying the proven shortfall times by lost wages, and that calculation would be the limit of Defendant’s liability for back pay, which then would be distributed pro rata among eligible class members. Id. Continuing to rely on the *Wal-Mart* decision, the Sixth Circuit deemed the “shortfall-based model” similar to a “trial by formula” system that was rejected by the Supreme Court because it was found to have “abridged or modified *Wal-Mart’s* statutory right” under Title VII to assert individual defenses to individual back pay awards. Id. Indeed, the Sixth Circuit found that Plaintiff’s proposal “suffers from a similar, but even more troubling, infirmity,” noting that *Wal-Mart* “made clear that Cintas has the right to present defenses before paying any person an award of back pay.” Id. The Sixth Circuit found that not only did Plaintiff’s proposed shortfall-based model deprive Defendant of its right to present individualized defenses, but also it “made no attempt to individualize damages at all.” Id. Therefore, the Sixth Circuit held that the proposed system was “worse” than the system “unanimously rejected” in *Wal-Mart*. Id. at 491. For that reason, the Sixth Circuit concluded that individualized monetary relief was not incidental to the injunctive and declaratory relief, and that the District Court was correct to
deny certification under Rule 23(b)(2). Accordingly, the Sixth Circuit affirmed the District Court’s order denying Plaintiff’s motion for class certification of a nationwide class.

**Editor’s Note:** In its extensive application of the Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*, the Sixth Circuit’s ruling in *Cintas* not only resoundingly endorsed the *Wal-Mart* decision itself, but also its applicability in cases involving allegations of discriminatory hiring practices, as compared to pay and promotion decisions like those challenged in *Wal-Mart*. Moreover, the *Cintas* ruling is instrumental for employers challenging plaintiffs’ strategy of formulaic models for determining the amount of individualized damages in the form of front and/or back pay. The Sixth Circuit clearly rejected the “shortfall-based model,” that it found similar to the “trial by formula” model asserted in the *Wal-Mart* case, which is useful to cite in cases where plaintiffs attempt to assert similar formulaic models to justify certification pursuant to Rule 23(b)(2).

(vii)    **Seventh Circuit**

*Jones, et al. v. National Council Of Young Men’s Christian Associations Of The United States Of America*, 2013 U.S. Dist. LEXIS 129236 (N.D. Ill. Sept. 5, 2013). Plaintiffs, a group of current and former African-American employees, brought a class action seeking declaratory and injunctive relief on their race discrimination claims against the YMCA under Title VII. Plaintiffs filed a motion for class certification, which the Court denied. As to commonality, the Court observed that the legal landscape governing class certification of employment discrimination claims changed after the Supreme Court’s decision in *Wal-Mart, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and the Seventh Circuit’s decision in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012). The Court reasoned that the focus of *Wal-Mart* was that Plaintiffs could represent only those who suffered an injury. In *McReynolds*, Plaintiffs claimed that Merrill Lynch’s practice of delegating discretion over broker compensation to branch office supervisors through their implementation of the company’s teaming policy and account distribution policy had a disparate impact on African-Americans. The Seventh Circuit held that the existence of company-authorized policies that allowed broker-initiated teaming and base account distributions on past success was a common question that could be determined on a class-wide basis. *Id.* at *58. The Seventh Circuit, however, noted that the resolution of that issue on a class-wide basis might result in an injunction, but could not resolve individual class members’ damages claims. *McReynolds* found that at the pecuniary relief stage there might be no common issues, and individual trials would be necessary, and that those trials would be less rather than more complex, if the common issue of the existence and legality of the challenged company policy had already been determined. *Id.* at *59. Here, Defendant invoked *Wal-Mart*, distinguished *McReynolds*, and argued that Plaintiffs did not isolate and identify a specific policy or practice that allegedly caused discrimination; therefore, Defendant contended that commonality was not satisfied. Plaintiffs asserted that YMCA’s company-wide practice of making promotions and job assignments harmed African-American employees. Plaintiffs conceded that there were at least six paths to promotion, including the YMCA’s employee handbook description of the job posting process for obtaining promotion, but also there were discretionary paths, including reorganizations or giving an employee a new job title, salary, or responsibilities. As to performance evaluations, Plaintiffs alleged that the YMCA permitted supervisors to use their discretion to recommend numerical performance ratings for their direct reports based, in part, on common, subjective elements like the company-wide core values of honesty, respect, responsibility, and caring. As to compensation, Plaintiffs alleged that the YMCA made all decisions pursuant to a single, company-wide policy. In light of *Wal-Mart* and *McReynolds*, the Court determined that Plaintiffs did not supply significant proof that the YMCA operated under a general policy of discrimination. *Id.* at *68. The Court found that Plaintiffs did not prove a general policy of discrimination that manifested itself across the putative class in the same general fashion as required by *Wal-Mart*. *Id.* Plaintiffs argued that typicality was satisfied because the named Plaintiffs Nicole Steels, James Jones, and Iona Toles – and the class members – were harmed by the same company-wide pay, promotion, and performance evaluation practices. Plaintiffs asserted that their performance was evaluated pursuant to the YMCA’s performance evaluation system, and their compensation adjusted through the merit process. Defendants argued that the proposed class members’ claims involved facts that distinguished their claims from the claims of their
fellow class members and undermined the typicality demanded by Rule 23(a)(3). Defendants also contended that there was a conflict between the class members, as Steels and Jones both had critical roles in the development, implementation, and administration of the very policies the lawsuit attacked as discriminatory. Defendants contended that Steels and Jones: (i) developed training materials and assisted with training for the performance evaluation process; (ii) worked primarily on revising the YMCA’s salary grade definitions; and (iii) recommended that the YMCA create the salary administration guidelines. *Id.* at *77-78. The Court remarked that it was undisputed that Steels and Jones had those roles as part of their employment with the YMCA, and that the policies they changed, disseminated, and implemented while at the YMCA were the same policies of which they complained. *Id.* at *80. Plaintiffs proposed four sub-classes with an accompanying named Plaintiff that could represent each sub-class. Plaintiffs proposed that: (i) Jones could represent the individuals who Defendants contended influenced decisions; (ii) Toles could represent individuals who were denied promotions; (iii) Jones, Steels, and/or Toles could represent a performance evaluation sub-class; and (4) Jones, Steels, and/or Toles could represent the compensation sub-class. The Court found that this proposal only reinforced its finding that the named Plaintiffs and proposed class members did not satisfy typicality. *Id.* at *81. For the same reason, the Court found that Plaintiffs did not satisfy the adequacy of representation requirement. Accordingly, the Court denied Plaintiffs’ motion for class certification.

**Ladik, et al. v. Wal-Mart Stores, Inc., 291 F.R.D. 263 (W.D. Wis. 2013).** Plaintiffs, a group of female employees, brought a class action against Defendant alleging widespread sex discrimination in both pay and advancement opportunities. The case was filed by former members of the class in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), after the Supreme Court decertified a nationwide class action. The pay and promotion gender discrimination claims at issue were substantially similar to those being litigated in *Wal-Mart*, but Plaintiffs narrowed their class claims to “Region 14”– a region that includes stores in Wisconsin, Illinois, Indiana, and Michigan. Shortly after the case was filed, Defendant brought a motion to dismiss the class allegations. Defendant based its motion on two independent arguments. First, Defendant contended that, during the pendency of the *Wal-Mart* action, the statute of limitations for Plaintiffs’ class claims was not tolled under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). As a result, the claims were untimely. In *American Pipe*, the Supreme Court held “the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.” The Supreme Court later clarified in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), that this tolling rule applied to any class member who later filed an individual action, not just those who intervened in the same action. The Supreme Court did not address whether the tolling rule would apply to class members who later filed class claims in a federal venue. Defendant argued that such subsequently filed class claims are not entitled to tolling. Rejecting Defendant’s argument, the Court here stated that “once a Plaintiff has filed a complaint that is timely under *American Pipe*, the tolling issue is resolved, regardless of whether the plaintiff wishes to proceed individually or as a class.” *Id.* at 268. Reasoning that the tolling rule was designed to avoid the needless filing of repetitive claims, the Court found that limiting tolling to subsequently filed individual actions would simply encourage the filing of multiple collective actions. The Court noted that the “merits” of repetitive class claims “can be addressed through application of principles of stare decisis and issue preclusion.” *Id.* at 269. As the second ground for its motion to dismiss, Defendant contended that the class claims should be dismissed because Plaintiffs failed to identify a common question of law or fact in their complaint. Attempting to distinguish their class claims from the ones in *Wal-Mart*, Plaintiffs pointed to the geographical limitations on their proposed class. The Court did not find this difference meaningful, stating that such limitations “simply have created a smaller version of the same problem.” *Id.* at 270. Finding that Plaintiffs “must show a policy or practice at the regional level that applies to the entire class,” the Court observed that “Plaintiffs point to nothing in their complaint that is different from the allegations in *Dukes*.” *Id.* More specifically, the Court stated that Plaintiffs “do not even attempt to distinguish the common questions they identify from those found lacking in *Dukes*” and that “most of their alleged common questions still related to ‘nationwide policies,’ not any policies of Region 14.” *Id.* at 271. Given such substantial similarities, the Court found that Plaintiffs could not distinguish their proposed class from the one the Supreme Court rejected, and dismissed the class claims. *Id.* at 273.
Editor’s Note: The Ladik litigation stemmed from the decertified class in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2001), and involved claims by Wisconsin-based employees. The Court’s ruling demonstrates the wide-ranging implications of Wal-Mart, and how employers can utilize defense arguments to eliminate class claims at the motion to dismiss stage.

(viii) Eighth Circuit
No reported decisions.

(ix) Ninth Circuit

Diaz, et al. v. Brewer, Case No. 09-CV-2402 (D. Ariz. Dec. 23, 2013). Plaintiffs, a group of lesbian and gay state employees who sought health insurance coverage for their dependents, filed a class action seeking declaratory and injunctive relief for the discriminatory elimination of domestic partner health insurance benefits for lesbian and gay employees who have a committed same-sex life partner. The State of Arizona has historically provided heterosexual employees with the ability to obtain certain family health benefits, including subsidized access to healthcare coverage for their spouses and qualifying children through health benefit plans offered by the state. In 2008, Arizona Administrative Code § R2-5-101 was amended to provide lesbian and gay state employees – for the very first time – the ability to obtain subsidized access to healthcare coverage for their committed same-sex partners and partners’ qualifying children if they satisfied certain criteria. In August 2009, the Arizona House of Representatives passed H.B. 2013, which amended Ariz. Rev. Stat. § 38-651, a statute authorizing health and accident coverage for state employees and their qualifying dependents. H.B. 2013 added § O to that statute, which provided that “for the purposes of this section,” the term ‘dependent’ means a spouse under the laws of this state.” The Governor of the State of Arizona, Jan Brewer, signed H.B. 2013 on September 4, 2009. Article 30, § 1 of the Arizona Constitution provides that “[o]nly a union of one man and one woman shall be valid or recognized as a marriage in this state,” and Ariz. Rev. Stat. § 25-101(C) further provides that “marriage between persons of the same sex is void and prohibited.” As a result, the restriction of family coverage to a “spouse under the laws of this state” in § O effectively eliminated family healthcare coverage for lesbian and gay state employees’ dependents. Plaintiffs alleged that the elimination of these employee benefits from the compensation provided to the lesbian and gay employees was discriminatory and violated the Fourteenth Amendment to the U.S. Constitution pursuant to 42 U.S.C. § 1983. Defendants filed a motion to dismiss, and while the motion to dismiss was pending, Plaintiffs filed a request for a preliminary injunction, seeking to keep partner benefits in place for lesbian and gay state employees during the pendency of the case. The Court subsequently issued a preliminary injunction to maintain family benefits for all state lesbian and gay employees during the case, and denied the motion to dismiss. Defendants filed a series of appeals to the Ninth Circuit and U.S. Supreme Court, all of which were denied. Subsequently, Plaintiffs filed an unopposed motion to certify the case as a class action pursuant to Rules 23(a) and 23(b)(2). Id. at 1. In support of the commonality requirement of Rule 23(a)(2), Plaintiffs relied on Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2556 (2011), as well as prior briefing and findings with respect to Plaintiffs' motion for a preliminary injunction, to argue that numerous common questions applicable to a class existed, including: (i) whether § O violates the class members’ rights to equal protection by drawing an impermissible distinction between heterosexual state employees and lesbian and gay state employees based on their sexual orientation and sex in relation to their committed life partner; (ii) whether Defendants deny equal compensation to lesbian and gay state employees with committed same-sex partners by eliminating their family coverage while continuing coverage for heterosexual state employees with legally recognized spouses; (iii) whether any conceivable governmental interests support § O; and (iv) whether all lesbian and gay state employees suffered irreparable harm based on Defendants’ denial of their right to equal protection. Under Rule 23(b)(2), Plaintiffs argued that, if § O is enforced, Plaintiffs will suffer a violation of their right to equal protection under the law in that they will be deprived of family health insurance solely because of their sexual orientation and sex in relation to their partner, and because the same constitutional violation has been committed against each member of the class, injunctive and declaratory relief for the class as a whole was appropriate. Plaintiffs further argued that inconsistent adjudications with respect to individual class members would work a hardship on Defendants.
and – relying again on prior briefing in support of their motion for a preliminary injunction – cited to prior briefing in which Defendants expressed concern about administrative efficiency in that they would find it difficult to adhere to separate, varying, and potentially contradictory rulings on whether a particular gay or lesbian state employee can obtain family health insurance. For these reasons, the Court granted the motion and determined that the prerequisites for class certification were satisfied under Rule 23.  *Id.* at 2.

**Editor’s Note:** The ruling in *Diaz* is believed to be the first class action ever certified in a gay rights employment case.


Following the Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), which held that Plaintiffs failed to demonstrate a nationwide policy of discrimination to satisfy Rule 23(a)(2)’s commonality requirement, Plaintiffs filed a fourth amended complaint in which they redefined and narrowed their proposed class to current and former female employees within three Wal-Mart regions located in California. In their amended fourth complaint, Plaintiffs alleged both disparate treatment and disparate impact sex discrimination claims with respect to pay and promotions. Subsequently, Plaintiffs moved for class certification. With respect to their disparate treatment claims, Plaintiffs put forth new statistical evidence relevant to pay and promotion decisions in the three California regions, as well as different anecdotal evidence that Defendant’s CEO made gender-biased statements in 2004, in an attempt to show bias and stereotyped, gender-biased thinking among Defendant’s top-level management. As to Plaintiffs’ statistics, the Court found the new statistical data “underwhelming,” and noted that while Plaintiffs’ statistical evidence constituted “some evidence in support of their claim,” they failed to identify “statistically significant disparities in even a majority of the relevant decision units in any region across the challenged pay and promotion decisions.”  *Id.* at *12-14. Thus, the Court held that Plaintiffs’ statistical evidence failed to reflect significant proof of a general policy of discrimination in each region across the challenged decisions.  *Id.* at *15. With respect to Plaintiffs’ anecdotal evidence that there was “regular communications” among Defendant’s executives and managers and “shared training” that allegedly contributed to a “strong common culture” that included shared gender-biased stereotypes about women, the Court found Plaintiffs’ evidence of the CEO’s alleged 2004 statements to a meeting of District Managers was plagued by ambiguities.  *Id.* at *18-19. In rejecting Plaintiffs’ contention that they addressed the Supreme Court’s criticisms by identifying a “core group of biased upper-level managers” who influenced all the challenged decisions by lower-level managers, the Court noted that Plaintiffs’ definition of top management was a “bit slippery” because their definition included “at least 56 different people even if Plaintiffs’ characterization of the decision-making process is accurate.”  *Id.* at *20. Thus, the Court noted that even if Plaintiffs produced evidence of a district manager’s discretionary decision that was allegedly discriminatory, the decision of one particular district manager with respect to a particular female employee had no logical or legal relationship to another district manager’s discretionary decision with respect to a different female employee, or even the same female employee absent some evidence that discrimination against women was actually directed by Defendant.  *Id.* at *17-18. The Court further noted that anecdotal evidence from 86 people in a putative class of 150,000 did not “meaningfully improve” Plaintiffs’ showing.  *Id.* at *24. Therefore, the Court held that Plaintiffs failed to amass sufficient anecdotal evidence of bias and gender-biased stereotyped thinking among management to establish that intentional discrimination was a general policy affecting the entire class. With respect to Plaintiffs’ disparate impact claim, the Court held that each of the “specific employment practices” identified by Plaintiffs as “guiding local managers’ discretion” and being “responsible for the promotion and pay disparities” either: (i) did not actually apply across the putative class for the proposed class period; or (ii) boiled down to delegating discretion, which the Supreme Court in *Wal-Mart* held could not provide the commonality necessary to certify a class.  *Id.* at *26-27. Consequently, the Court held that Plaintiffs failed to demonstrate class-wide practices of requiring candidates for promotion to relocate, failing to post job openings, or promoting from within.  *Id.* at *29. Furthermore, the Court observed that Plaintiffs posited that Defendant gave managers “broad discretion” to “apply vague criteria” when interpreting the company policies at issue, and that, as a result, managers “fell back on their own stereotyped views of women in making pay and promotion decisions.”  *Id.* at *32-33. Relying on the Supreme Court’s reasoning in *Wal-Mart*, the Court held that this theory left Plaintiffs “right
back where they started: challenging Wal-Mart’s practice of delegating discretion to local managers, which
the Supreme Court specifically held was not a specific employment practice supplying a common question
sufficient to certify a class.” Id. at *33. Therefore, the Court held that Plaintiffs still could not identify a
common question of law or fact that would link hundreds of thousands of employment decisions made by
hundreds of district and store-level managers and permit a conclusion that Defendant acted under a
general policy of sex discrimination. Accordingly, the Court denied Plaintiffs’ motion for class certification.

Editor’s Note: The denial of the amended class certification motion in Dukes brought closure to a long and
tortured history of the most significant employment discrimination action ever filed. Plaintiffs won their
motions in the District Court and the Ninth Circuit in the early years of the litigation, and then lost before the
U.S. Supreme Court in 2011, which effectively dismantled the earlier class certification orders that
encompassed over 1.5 million class members.

(x) Tenth Circuit

Representatives at Hilti, a tool manufacturer. Id. at 1211. Inside sales employees at Hilti are often
promoted to Account Manager, where they are responsible for outside sales or field sales, including site
visits to customers within an assigned territory. Id. at 1212. Hilti established a performance management
and reporting process called “Global Develop and Coach Process” (“GDCP”), which included multiple
components that tracked aspects of an employee’s readiness to promote. Id. The GDCP process included
a priority rating (“P” rating) that indicated management’s subjective assessment of an employee’s
promotion-readiness based on certain competencies. Id. A “P1” rating indicated the employee was ready
for promotion, while a “P5” indicated the employee was ineligible for promotion. Id. A second component
was a mobility rating (“M” rating), which indicated the employee’s willingness to relocate. Id. Another
component was the employee’s own career goals. Id. Although Hilti considered GDCP the “official”
method for identifying employees who would be promoted internally, Hilti did not maintain careful
records. Id. Hilti’s applicant flow log data showed that 282 individuals were promoted between 2005 and
2008, but fewer than 24% had been assigned a P rating at the time of promotion; fewer than 37% of
promoted employees were assigned “M” ratings; fewer than 8% of individuals who were promoted to
outside sales positions had identified outside sales as a future career goal; and more than 64% of
employees were missing both “P” and “M” ratings at the time of promotion. Id. Moreover, Hilti managers
did not always follow the GDCP ratings in making promotion decisions. Id. Of the promoted employees
who had been assigned a “P” rating at the time of promotion, only 28% had a “P1” rating, and 33 promoted
employees were assigned a “P5 rating” at the time of promotion (indicating they were ineligible for
promotion). Id. Plaintiffs each filed individual claims alleging gender discrimination under Title VII,
retaliation and disparate impact, and moved to certify a class comprised of “all women employed by Hilti in
the United States denied promotion to Account Manager.” Id. at 1215. Plaintiffs alleged that male Inside
Sales Representatives were promoted through “tap on the shoulder” promotions, without posting positions
and/or allowing women to apply, and that ineligible male candidates were allowed — or even invited — to
apply for Account Manager positions, while female employees were told they could not apply until they
earned a “P1” rating. Id. at 1212. The District Court granted summary judgment for Hilti on Plaintiffs’
individual claims, and refused to certify the class, finding that Plaintiffs failed to meet the numerosity
requirement under Rule 23(a)(1), or any condition of Rule 23(b). On appeal, the Tenth Circuit affirmed the
District Court’s grant of summary judgment on certain individual claims of Plaintiffs, while it reversed with
respect to others. The Tenth Circuit affirmed the District Court’s refusal to certify the class on the ground
that Plaintiffs failed to show questions of law or fact common to the class under Rule 23(a)(2). Relying on
Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), and despite the “official” GDCP process, the Tenth
Circuit determined that Plaintiffs challenged a “highly discretionary policy” for granting promotions, and
failed to demonstrate a “common mode of exercising discretion that pervaded the entire company.” Id. at
1229 (citing Wal-Mart, 131 S. Ct. at 2254-55). It found that Hilti failed to maintain a GDCP system in any
uniform manner, and — despite the fact that Plaintiffs’ statistical evidence demonstrated (at least facially)
that the haphazard policy caused an overall disparate impact on women – they failed to show that
discriminatory promotion choices were common across the class. *Id.* The Tenth Circuit also found that Plaintiffs could not meet Rule 23(b)(3), the only sub-section of Rule 23(b) raised in the appeal. Rule 23(b)(3) requires that questions of law or fact common to class members predominate over any questions affecting only individual members. The Tenth Circuit agreed with the District Court in finding that “Defendants allege that both named Plaintiffs were denied promotion for specific, objective and individualized reasons,” and that “Hilti’s promotion decisions involve ‘highly individualized’ facts and defenses that cannot be effectively resolved in a class suit.” *Id.* at 1229-30.

(xii) Eleventh Circuit

*Bryant, et al. v. Southland Tube*, 2013 U.S. Dist. LEXIS 141607 (N.D. Ala. Sept. 29, 2013). Eleven named Plaintiffs brought suit against Defendant, the manufacturer of an electric resistance welded tubular product, alleging Defendant’s system for selecting employees for promotions, training, and pay increases had a disparate impact on African-Americans. *Id.* at *1. Plaintiffs were current and former employees of Southland who worked on the production side of its operations, referred to as “the Mill.” *Id.* at *6. Within the Mill, there are three layers of management – the Operations Manager, who is responsible for the entire operations of the Mill, five Superintendents, who are each responsible for one of the five distinct areas of the Mill, and Frontline Supervisors, who each oversee a particular shift within one of the five areas of the Mill. *Id.* at *7. Under Defendant’s pay and promotion system, significant weight was placed on the Frontline Supervisors’ promotion, training, and compensation recommendations, though the Operations Manager ultimately approved the decisions. *Id.* at *12. Defendant, however, provided only vague and subjective standards for making the recommendations, gave supervisors no written instructions pertaining to the qualifications necessary for promotions, and did not notify hourly employees of open training and promotion opportunities. *Id.* at *13. After a period of discovery, Plaintiffs filed a motion for class certification, seeking to certify a class of African-American employees who worked at Southland Tube at any time between 2006 and the present. *Id.* at *32. In support of their motion, Plaintiffs submitted an expert report setting forth three main findings: (i) the distribution of hourly wage rates among African-American employees fell primarily in the lower part of the range, whereas the distribution of hourly wage rates among white hourly employees fell more evenly over the range; (ii) more African-American employees were earning below the median hourly wage than were earning above the median hourly wage, whereas the opposite was true for white employees; and (iii) when comparing African-American employees to white employees with the same job and years of experience, the African-American employees earned, on average, a lower hourly rate and smaller bonuses than white employees in all years except 2007. *Id.* at *30-31. In considering Plaintiffs’ motion for class certification, the Court found that Plaintiffs satisfied Rule 23(a)’s numerosity and adequate representation requirements. *Id.* at *32-34, 49. However, the Court determined that Plaintiffs failed to satisfy both Rule 23(a)’s commonality and typicality requirements. *Id.* at *46, 48. As to the commonality requirement, the Court first noted that the “prosecution of disparate treatment claims, ‘while not dispositive, weighs against finding the commonality and typicality required by Rule 23’” because disparate treatment claims are by their very nature individualized. *Id.* at *35. Even if a disparate treatment claim lends itself to class treatment, the Court observed that Plaintiffs must show that the intentional discrimination was the employer’s standard operating procedure through a combination of statistics and anecdotes. *Id.* at *39. Relying heavily on *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the court found that Plaintiffs failed to make this showing. *Id.* at *46. The Court reasoned that merely proving an employer’s decision-makers made selections based on unrestrained discretion does not show that decision-makers acted with discriminatory motive toward the class as a whole. *Id.* at *42. As to Plaintiffs’ statistical evidence, the Court found it to be insufficient to support their claims that discrimination was Southland’s standard operating procedure. *Id.* at *44. Although the evidence showed that more African-Americans were paid below the median wage rate and African-Americans with the same years of service and in the same position were paid less than their white counterparts, Plaintiffs’ expert testimony was “worlds away from significant proof” that Southland operated under a general policy of discrimination. *Id.* at *44. The Court also noted Plaintiffs failed to produce evidence of a disparity between African-American and white employees with regard to promotions and training. *Id.* The Court concluded that Plaintiffs’ common contention that Defendant’s delegation of unfettered discretion to its supervisors and lack of established procedures to discriminate intentionally against African-American employees, without
any showing of statistically significant disparities between African-American and white employees, did not resolve any issue central to the validity of the class members’ pattern or practice of disparate treatment claims. Id. at *45. Accordingly, the Court held Plaintiffs failed to establish commonality under Rule 23(a).

Id. at *46. Turning to the typicality requirement, the Court noted that although all Plaintiffs worked in a single location and the personnel decisions at issue were approved by the Operations Manager, the named Plaintiffs’ claims of disparate treatment were primarily individual claims. Id. at *47. The Court reasoned that some Plaintiffs were employed in different positions, desired different promotions, and had different disciplinary records. Id. at *48. Because their experiences were varied, the Court found that resolution of their claims will require numerous factual determinations, and thus did not meet Rule 23(a)’s typicality requirement. Id.

July, et al. v. Board Of School Commissioners, 291 F.R.D. 653 (S.D. Ala. 2013). Plaintiffs, a group of African-American assistant principals, brought a class action alleging race discrimination and segregation in employment in violation of 42 U.S.C. § 1981 and Title VII. Plaintiffs alleged that although some of them had served as principals, the Board of School Commissioners did not permit them to serve as principal of a school with a predominantly Caucasian student body, and limited them to schools that had predominantly African-American student bodies. Plaintiffs sought a declaration that the Board’s employment practices violated their legal rights; a permanent injunction against continued violations of Title VII and § 1981; and make-whole relief in the form of back pay, front pay, offers of promotion, and compensatory damages. Plaintiffs moved for class certification of a class comprised of all present and former African-American employees of the School Board who, at any time since September 16, 2007, held a certificate issued by the Alabama State Department of Education qualifying them to be a principal in Mobile County. The Court denied the motion. The Court stated that there were a number of individualized questions addressing both liability and damages that prevented the common question from predominating as to whether the Board engaged in a pattern or practice of assigning principals based on race. The Court noted that the existence of a pattern or practice of discrimination did not entitle any Plaintiff to back pay or other monetary relief; instead, the Board was entitled to individualized determinations of each employee’s eligibility for back pay. Thus, each Plaintiff had to establish separately that he or she applied for a particular position or would have done so but for the Board’s discriminatory practices. Further, because proof of the pattern or practice supported an inference that any individual decision was the product of discrimination but did not conclusively resolve the issue, the Board could attempt to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons. For these reasons, the Court found that a substantial number of individual determinations would have to be made to decide which of the minority employees were actual victims of the Board’s discriminatory practices. Plaintiffs contended that these individualized questions were not relevant to the issue of liability for purposes of predominance, but the Court observed that the pattern or practice claim was a theory of intentional discrimination, and an employer cannot be liable to an individual under that theory without a finding of discrimination. Id. at 660. The Court stated that such a finding could not be made until after the individual Plaintiff showed that he or she applied and until after Defendant had presented its evidence that Plaintiff was or would have been denied the position for non-discriminatory reasons. The Court stated that Plaintiffs’ effort to recover compensatory damages, including for emotional distress, must focus almost entirely on facts and issues specific to individuals rather than the class as a whole, including how the discrimination affected each Plaintiff emotionally and physically at work and at home. Id. at 661. The Court determined that the many individual issues in this case did not arise only upon Plaintiffs’ failure to prove a pattern or practice; they were present even if such a pattern or practice was proved and therefore must be weighed in measuring predominance. Further, the Court remarked that although certification of a Title VII pattern or practice class action under Rule 23(b)(2) was available, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), precluded the recovery of back pay or other individual monetary relief in such an action. Id. at 663. Plaintiffs thus proposed hybrid certification under Rule 23(b)(2) as to their claim for declaratory and injunctive relief and a class under Rule 23(b)(3) as to their claim for monetary relief. The Court opined that there could be no certification under either Rule 23(b)(2) or (b)(3). Finally, although Plaintiffs identified the common issue for purposes of their disparate impact theory as their evidence of statistical disparity between the ranks of African-American employees qualified for a principal position and the representation...
of African-Americans as principals of predominantly white schools, the Court observed that without a specific, facially neutral practice to which the disparity could be traced, the existence of the disparity cannot affect the class and thus could not satisfy the commonality requirement. For these reasons, the Court denied Plaintiffs' motion for class certification.

(xii) District Of Columbia Circuit

Hubbard, et al. v. U.S. Postal Service, 2013 U.S. Dist. LEXIS 107096 (D.D.C. July 31, 2013). Plaintiffs, a group of deaf and hearing-impaired employees, brought a class action under the Rehabilitation Act of 1973 alleging denial of reasonable accommodations. Subsequently, Plaintiffs sought leave to file a third amended complaint to add Plaintiffs from Tighe v. Potter, EEOC No. 1E-801-0070-04 (collectively, the “Tighe Plaintiffs”). Plaintiffs and the Tighe Plaintiffs reinitiated settlement discussions with Defendant. Plaintiffs then filed an unopposed motion for preliminary approval of the proposed settlement. The Court granted the motion for leave to file a third amended complaint, certified the proposed settlement classes, granted preliminary approval of the settlement agreement except for the proposed attorneys’ fees and costs, and approved the class notice. Thereafter, parties moved for final approval of the settlement, and the Court granted the motion. The Court certified a damages settlement class comprising of all current and former deaf or hard of hearing employees who were employees of the Postal Service between November 14, 2001 and the present, who allegedly were denied communication accommodations, were denied emergency evacuation notification systems, were subjected to a hostile work environment and/or harassment due to their deafness or hearing impairment, and/or were denied promotional opportunities and/or assistance to pursue promotional opportunities within the Postal Service due to their deafness or hearing impairment. The Court also certified an injunctive settlement class comprising of all current deaf or hard of hearing employees who alleged the same allegations. The Court noted that the numerosity requirement under Rule 23(a)(1) was satisfied for both classes because Defendant employed over 6,000 deaf or hearing-impaired individuals between November 14, 2001 and the present, and joinder of all members would be impracticable. The Court ruled that the commonality requirement under Rule 23(a)(2) was also satisfied for both classes because the claims were based on the common contention that Defendant failed to provide reasonable accommodations to deaf and hearing-impaired employees from November 14, 2001 to the present. The Court opined that the resolution of this issue would affect all of the class members. Further, the Court noted that typicality under Rule 23(a)(3) was satisfied because the claims of the class representatives were based on the same course of conduct giving rise to the claims of the proposed settlement classes. Further, because the class representatives and class counsel adequately represented the absent class members and there was no conflict, the adequacy requirement under Rule 23(a)(4) was satisfied. The Court stated that the predominance requirement under Rule 23(b)(3) was satisfied because the predominant issue in the case – the question of denial of accommodations in violation of the Rehabilitation Act – pertained to each member of the class. Finally, the Court opined that the superiority requirement under Rule 23(b)(3) was also met because the small individual stakes involved made the class action a superior mechanism to effect a nationwide change in Defendant’s policies and ensure that class members would receive equal treatment. As a result, the Court found that the settlement of $4.55 million was fair and reasonable, and awarded class counsel $910,000 in attorneys’ fees and $114,216.69 in expenses from the total value of the settlement.

Moore, et al. v. Napolitano, 926 F. Supp. 2d 8 (D.D.C. 2013). Plaintiffs, a group of African-American Special Agents (“SAs”) of the U.S. Secret Service, brought a class action against the U.S. Department of Homeland Security alleging racial discrimination over promotions. Plaintiffs, who were allegedly denied promotions, accused the Department of violating the Title VII Civil Rights Act of 1964. Plaintiffs claimed that the Secret Service Special Agent Merit Promotion Program (“MPP”), an evaluation system used to determine promotions, was discriminatory against African-Americans from 1995 to 2005. Plaintiffs moved to certify a class of current and former African-American SAs who have allegedly been denied promotions due to racial discrimination under Rule 23. Id. at 12. The Court granted Plaintiffs’ motion, finding that Plaintiffs met the requirements of Rules 23(a) and (b)(3). Plaintiffs satisfied the numerosity requirement as the class contained 120 members who were geographically dispersed. Id. at 28. Plaintiffs produced both statistical and anecdotal evidence to show that they met the commonality requirement. Plaintiffs offered
the report of statistician Dr. Charles Mann, which concluded that the MPP process had an adverse impact on African-American SAs applying for promotion positions during the class period and a four-year background period. Although Defendant argued that Plaintiffs’ expert opinions were unreliable and irrelevant, the Court found that Dr. Mann’s analyses of individual states of the MPP process – which showed disparities between African-American SAs and non-African-American SAs – was relevant to Plaintiffs’ disparate treatment and disparate impact claim. Id. at 22. Dr. Mann’s report also indicated the difference between African-American SAs expected to reach a best qualified list in the absence of discrimination and the actual number of African-American SAs who reached a best qualified list; it also considered the rank by MPP score on the best qualified list that disproportionately disadvantaged African-Americans in addition to showing the disparity in African-American SAs’ mean rank on best qualified lists and African-American SAs on best qualified lists with an MPP score above the effective pass rate. Id. at 29-30. The Court found that Dr. Mann’s report was based on a reliable methodology. While Defendant asserted that Dr. Mann’s “best qualified to selected” analysis showed disparities in two distinct timeframes, the Court found that Plaintiffs could still establish commonality because Dr. Mann’s other three analyses showed statistically significant disparities for the entire class period. Id. The Court specifically pointed out that Dr. Mann’s best qualified list analysis showed that a stage of the MPP process had an adverse impact on African-American SAs during the class period. Id. The Court therefore held that there was at least one aspect common to the class for the entire class period. Id. Further, Plaintiffs’ anecdotal evidence showed that they were discriminated against by the Secret Service. Plaintiffs had asserted that the promotion panels discriminatorily diminished and discounted their demonstrated skills and qualifications, causing them to receive lower MPP scores than non-African-American SAs, that they were denied promotions as a result of their low MPP scores, and that the MPP process empowered the Advisory Board and Director to discriminate against African-American Agents by selectively employing criteria to recommend white Agents for promotion over qualified African-American candidates. Id. at 30. The Court found that Plaintiffs therefore established the commonality and the typicality requirements. Defendant disputed adequacy of representation, arguing that the proposed class contained supervisors who actively participated in an allegedly discriminatory promotions process against other putative class members who were seeking promotions. The record also demonstrated that several potential class members were directly involved in the evaluation process. Id. at 32. The record, however, was silent with respect to any direct accusations of discrimination within the newly constituted class, and did not show any specific allegations of discrimination by class members against other class members. Id. The Court therefore held that the representation as proposed was adequate. The Court further held that the common issues of whether the MPP promotions process discriminated against African-American SAs and whether the Secret Service had a pattern or practice of race discrimination predominated over individual issues because all members of the class would rely on the same statistical evidence to make the same claim. Id. at 33. The Court found that the only apparent non-common factual issues (of whether there were legitimate, non-discriminatory reasons not to promote a specific SA) would not destroy predominance, as these issues were not germane to the liability stage of a pattern or practice claim, and were not relevant to Plaintiffs’ disparate impact claim. Id. at 33-34. Finally, the Court found that the class action would be more efficient than individual actions because all of the cases would require the Court to determine whether the MPP promotions process was discriminatory. Id. at 34. Therefore, the Court granted Plaintiffs’ motion for class certification.

(xiii) U.S. Equal Employment Opportunity Commission

Garcia, et al. v. Holder, EEOC Case No. 01-2012-2033 (EEOC June 7, 2013). Plaintiff, a GS-13 level Special Agent (“SA”) working with the Drug Enforcement Agency (“DEA”), filed a formal class complaint alleging that the DEA discriminated against her and similarly-situated females on the basis of sex when the DEA denied female SA’s foreign assignments and promotions to supervisory positions. Additionally, Plaintiff alleged that the DEA’s acts constituted a pattern or practice of unlawful discrimination against female SAs in selections for foreign assignments and promotions to Grades 14 and above. The class complaint involved 64 class members. In addition to Plaintiff, 12 class members testified at the hearing and gave similar anecdotal accounts. Previously, in 1998, the Commission had issued a decision directing certification of a class composed of those female SAs who were denied foreign assignments between 1990
The EEOC agreed with the ALJ that the DEA failed to present a case of disparate treatment, as a preponderance of the evidence in the record was not met. The EEOC noted that the

at 6. Furthermore, the ALJ at 8-9. On this basis, the ALJ held that Plaintiffs’

Id. at 19. The EEOC observed that the evidence reflected that the class members at the DEA had experiences similar to Plaintiff. Further, the EEOC found that the record supported the ALJ’s finding that the DEA was aware of the lack of representation of female SAs in foreign assignments. Accordingly, the EEOC found that the substantial evidence in the record supported the ALJ’s finding that the class established a prima facie case of disparate impact, as a preponderance of the evidence in the record established that the DEA regularly and purposefully treated female SAs less favorably than male SAs in the selection for foreign assignments at GS levels 11-15. Id. at 20. The EEOC also agreed with the ALJ on the award of damages, attorneys’ fees, and costs.

White, et al. v. Holder, EEOC Case No. 510-2012-00077 (EEOC April 9, 2013). Plaintiffs, a group of female staff employees, filed a class action against the U.S. Department of Justice, Bureau of Prisons (“the Agency”) alleging that the Agency created a hostile work environment when it failed to correct known egregious sexual harassment perpetrated by inmates at the Federal Correctional Complex (“FCC”) against Plaintiffs in violation of Title VII. Subsequently, Plaintiffs moved to certify a class of all female employees who had worked for the Agency at the FCC since February 6, 2011, who were allegedly subjected to discriminatory sexual harassment. Per procedures applicable to federal employees, the Agency submitted Plaintiffs’ complaint to the EEOC for a decision by an Administrative Law Judge (“ALJ”) as to whether class certification was appropriate under 29 C.F.R. § 1614.204(a)(2). With respect to numerosity, the ALJ observed that Plaintiffs stated that the putative class consisted of at least 363 members, more than 150 women had initiated EEO counseling regarding sexual harassment at the FCC, and over 200 women had sought legal counseling regarding these issues. Id. at 8-9. On this basis, the ALJ held that Plaintiffs’ proposed class satisfied the numerosity requirement. With respect to commonality and typicality, the ALJ noted that the sexual harassment of women was so frequent, severe, and ever-present at the FCC as a whole that any reasonable woman would regard the environment as hostile. Id. at 6. Furthermore, the ALJ observed that management at the FCC had been repeatedly made aware of the sexual harassment of female employees by inmates. The ALJ also noted that there were common questions of law and fact regarding management’s failure to implement any measures to prevent or mitigate the sexual harassment. Id. at 7. Moreover, the ALJ opined that Plaintiffs’ claims were typical of the class insofar as they alleged that inmates subjected them to severe and pervasive sexual harassment, and that management was aware

established a prima facie case. Similarly, the EEOC agreed with the

Id. at 13. The EEOC noted that the sexual harassment of women was so frequent, severe, and ever-present at the FCC as a whole that any reasonable woman would regard the environment as hostile.

White, et al. v. Holder, EEOC Case No. 510-2012-00077 (EEOC April 9, 2013). Plaintiffs, a group of female staff employees, filed a class action against the U.S. Department of Justice, Bureau of Prisons (“the Agency”) alleging that the Agency created a hostile work environment when it failed to correct known egregious sexual harassment perpetrated by inmates at the Federal Correctional Complex (“FCC”) against Plaintiffs in violation of Title VII. Subsequently, Plaintiffs moved to certify a class of all female employees who had worked for the Agency at the FCC since February 6, 2011, who were allegedly subjected to discriminatory sexual harassment. Per procedures applicable to federal employees, the Agency submitted Plaintiffs’ complaint to the EEOC for a decision by an Administrative Law Judge (“ALJ”) as to whether class certification was appropriate under 29 C.F.R. § 1614.204(a)(2). With respect to numerosity, the ALJ observed that Plaintiffs stated that the putative class consisted of at least 363 members, more than 150 women had initiated EEO counseling regarding sexual harassment at the FCC, and over 200 women had sought legal counseling regarding these issues. Id. at 8-9. On this basis, the ALJ held that Plaintiffs’ proposed class satisfied the numerosity requirement. With respect to commonality and typicality, the ALJ noted that the sexual harassment of women was so frequent, severe, and ever-present at the FCC as a whole that any reasonable woman would regard the environment as hostile. Id. at 6. Furthermore, the ALJ observed that management at the FCC had been repeatedly made aware of the sexual harassment of female employees by inmates. The ALJ also noted that there were common questions of law and fact regarding management’s failure to implement any measures to prevent or mitigate the sexual harassment. Id. at 7. Moreover, the ALJ opined that Plaintiffs’ claims were typical of the class insofar as they alleged that inmates subjected them to severe and pervasive sexual harassment, and that management was aware
of this harassment and failed to take steps to prevent it or discipline inmates who engaged in it. Id. Therefore, the ALJ held that Plaintiffs’ allegations presented clear common questions of fact regarding whether the Agency created a hostile work environment for women, management’s knowledge of and tolerance for sexual harassment by inmates, and whether they took reasonable care to prevent and promptly correct sexually aggressive and threatening behaviors by inmates. Thus, the ALJ also held that the claims of Plaintiffs were typical of those of the class members. With respect to the adequacy of representation requirement, the ALJ noted that Plaintiffs’ counsel had experience and training in class actions, employment discrimination, and federal sector employment issues, and had represented numerous women in class and individual sex discrimination matters. Id. at 8. In addition, the ALJ observed that Plaintiffs had no interests that would be considered antagonistic to the class. Thus, the ALJ held that adequacy of representation was satisfied. As a result, the ALJ held that class certification was appropriate, and certified a class of all female employees who had worked at the FCC since February 6, 2011, who were allegedly subjected to sexual harassment.

B. EEOC Pattern Or Practice Cases

“Pattern or practice” lawsuits brought by the U.S. Equal Employment Opportunity Commission are not governed by Rule 23. Instead, Title VII governs these types of lawsuits. Under the statute, the EEOC need not satisfy the Rule 23 requirements in order to sue on behalf of a group of allegedly injured individuals. Instead, the EEOC must follow the framework established by the U.S. Supreme Court in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). Nonetheless, EEOC pattern or practice cases tend to involve litigation issues similar to private party Rule 23 class actions.

The EEOC launched a new systemic litigation initiative in 2006. As a result, the volume of rulings in EEOC pattern or practice lawsuits increased significantly in 2013. Rulings over the past year covered a wide gamut of issues, including the proper scope of an EEOC lawsuit based on the Commission’s administrative investigation; motions for summary judgment in EEOC pattern or practice cases; defenses to EEOC administrative enforcement proceedings; the proper scope of discovery in an EEOC lawsuit, both with respect to an employer’s discovery as to the EEOC and the Commission’s discovery relative to private employers; monetary sanctions against the EEOC for frivolous litigation; summary judgment on a class-wide basis in EEOC pattern or practice lawsuits; the scope of injunctive relief available as a remedy in EEOC litigation; the viability of various affirmative defenses to EEOC pattern or practice claims; the burdens of proof and discovery limits between § 706 and § 707 claims in an EEOC pattern or practice lawsuit; the standards for enforcement of EEOC administrative subpoenas; the appropriate statute of limitations for § 707 claims asserted by the EEOC; the availability of discovery against the EEOC relative to its own personnel practices; the propriety of late amendments to EEOC complaints; the scope of an employer’s defense based on the EEOC’s breach of its duty to engage in good faith conciliation prior to filing a lawsuit; and the interpretation of employer obligations in EEOC consent decrees.

(i) First Circuit

EEOC v. Autozone, Inc., 934 F. Supp. 2d 342 (D. Mass. 2013). The EEOC brought an action under Title VII of the Civil Rights Act of 1964 alleging that Defendant harassed former employee Mahoney Burroughs, a Sikh convert, and refused to accommodate his request to wear a turban and kara, a religious bracelet. Pursuant to Title VII and Massachusetts General Laws, the Court granted Burroughs’ subsequent motion to intervene. The parties reached a settlement agreement in the form of a consent decree, which included a stipulation that Burroughs would receive reasonable attorneys’ fees and costs. Id. at 346. Burroughs was represented by lawyers Sandeep Kaur Randhawa, Harsimran Kaur, Laura Maslow-Armand, Jamie Spiller, and David S. Godkin, who sought $220,355.50 in attorneys’ fees, $1,290.25 in taxable costs, and $1,332.90 in non-taxable costs. The Court granted Burroughs’ motion in part. Defendant argued that the award of attorneys’ fees ought to be reduced due to overstaffing, duplicative billing, and other inefficiencies. Defendant further contended that two of Burroughs’ lawyers charged an unreasonably high hourly rate. Id. at 347. The Court noted that Burroughs was entitled to recover attorneys’ fees similar to any prevailing party because, due to the alleged Title VII violations, he was a rightful Plaintiff to the lawsuit.
At the same time, the Court determined that the EEOC’s involvement, in conjunction with Burroughs’ own counsel, increased the possibility of overstaffing and duplicative work, which did not merit compensation. Id. at 349-50. The Court stated that hours expended on research or drafts with the same content by two or more lawyers, or two or more lawyers attending a court hearing or conference when one attorney would have sufficed, ought to be deducted from hours billed. Id. Thus, after reviewing the submitted time logs, the Court deducted hours it considered duplicative. The Court also deducted hours for excessive conferencing and media-related matters. The Court then deducted hours for time spent on investigating threats made against Burroughs. Further, the Court noted that 38.3 hours, which largely consisted of administrative and clerical tasks, were billed at a lawyer’s rate, and consequently deducted 19.15 hours from counsel's requested hours. Finally, Defendant contested that the hourly rates proposed by Godkin and Kaur of $425 and $330 respectively per hour were unreasonably high relative to the prevailing market rates in the relevant community. Id. at 356-59. The Court remarked that Godkin did not sufficiently demonstrate that his particular professional background warranted his hourly charge, which was above the prevailing market rate to begin with, and that his body of experience pertained primarily to complex commercial litigation and intellectual property matters, which did not suggest that his success in this case was attributable to a set of skills honed by years of employment discrimination engagements. Id. at 356-58. Accordingly, the Court concluded that Godkin’s extensive record as an accomplished federal litigator justified only a rate of $350 per hour. Kaur served as the legal director of the Sikh Coalition, a civil rights organization for the Sikh-American community, and was associated with the organization for the past six years. Id. at 359. Kaur had litigated a number of employment discrimination cases, and developed an expertise in matters associated with religion-based discrimination in the workplace. Id. Further, an affidavit submitted by an attorney at a Boston-based legal services organization with significant experience working on civil rights matters testified to Kaur’s specialized discrimination and employment-oriented skill set. The Court noted that it had already reduced the hours expanded by Kaur, and consequently found that it need not make any further adjustments to his hourly rate. Accordingly, the Court directed Defendant to compensate Burroughs $120,199.60 for attorneys’ fees.

**EEOC v. Windmill International, Inc., 2013 U.S. Dist. LEXIS 126031 (D.N.H. Sept. 4, 2013).** The EEOC brought an action on behalf of Nancy Hajjar, a former accountant, alleging that Defendant discriminated against her on the basis of her actual or perceived disability in violation of the ADA. Defendant moved for summary judgment, contending that its decision to terminate Hajjar was entirely unrelated to any real or perceived disability. The EEOC moved for partial summary judgment on its contention that Hajjar was diagnosed with Thoracic Outlet Syndrome, and that it was entitled to judgment as a matter of law as to Defendant’s assertion that Hajjar failed to mitigate her damages. The Court granted Defendant's motion and denied the EEOC’s motion as moot. Although Hajjar received a generally satisfactory evaluation in her performance review in March of 2009, by the fall of 2009, her direct supervisor, Jill Kwitkiwski, became sufficiently displeased with her performance, and recommended to John Katz, Director of Human Resources and John Sullivan, Vice President for Business Support Services, that Hajjar be terminated. Sullivan proposed the solution of putting Hajjar on a performance improvement plan (“PIP”). Each executive testified that the proposed use of a PIP was simply part of an overall plan to document Hajjar's shortcomings more fully and terminate her. By March 5, 2010, the group determined that Hajjar would not be put on a PIP, and instead would be terminated. Thereafter, on March 22, 2010, Hajjar informed Kwitkiwski that she needed to consult with a specialist regarding a blocked carotid artery. All the executives agreed that this was the first time Hajjar mentioned this medical condition to anyone. Kwitkiwski then sent an e-mail to Katz in which she said she hoped that, notwithstanding Hajjar’s recent disclosure, corporate counsel would permit them to move forward to terminate Hajjar. Subsequently, Katz met with Hajjar and notified her of the decision to fire her. All three executives testified that they jointly reached the decision to terminate Hajjar and that the decision to terminate Hajjar was reached well before she disclosed her medical condition to anyone at Windmill; that decision was based solely on performance issues and was entirely unrelated to her later-disclosed medical condition; and the timing of her discharge and its temporal proximity to her disclosure were entirely coincidental. Based upon the temporal proximity between Hajjar’s disclosure and her termination, the Court noted that the EEOC carried its modest burden of making a *prima facie* case of unlawful discrimination, and that in response, Defendant offered a
legitimate, non-discriminatory reason for its action, and presented evidence supporting its claim to have discharged Hajjar for reasons entirely unrelated to her medical condition. *Id.* at *11. Thus, the Court stated that the burden reverted to the EEOC to point to sufficient evidence to support a jury’s finding that Defendant engaged in unlawful disability discrimination. The EEOC argued that the record supported a reasonable inference that Defendant decided to terminate Hajjar only after it learned of her medical issues. The Court, however, observed that the last reference in the record suggesting that Defendant was contemplating putting Hajjar on a PIP was dated February 12, 2010. Even assuming the discussion about putting Hajjar on a PIP was not part of the overall plan to terminate her, the uncontradicted sworn testimony of the three executives was that by early March of 2010, they decided to forego the use of a PIP and agreed to simply terminate Hajjar’s employment, a decision that they reached well before Hajjar ever disclosed her medical condition to Windmill. Thus, the Court found that the EEOC could not sustain its burden of proof and that Defendant was entitled to summary judgment.

(ii) Second Circuit

**EEOC v. Bloomberg LP, 2013 U.S. Dist. LEXIS 128385 (S.D.N.Y. Sept. 9, 2013).** The EEOC brought a pattern or practice action on behalf of several current and former employees of Defendant who filed charges alleging sex and pregnancy discrimination and retaliation against Defendant in violation of Title VII. Defendant had allegedly discriminated and/or retaliated against claimants after they had announced their pregnancies and had returned to work following maternity leave. Specifically, the EEOC alleged that Defendant reduced the pay of pregnant women or mothers, demoted them in title or in number of direct reports, reduced their responsibilities, excluded them from management meetings, and subjected them to stereotypes about female caregivers. *Id.* at *12-13. After the Court granted Defendant summary judgment on the EEOC’s pattern or practice claims arising under § 707, Defendant moved for summary judgment on the remaining individual claims arising under § 706 brought by the EEOC on behalf of 29 non-intervening claimants. The Court granted Defendant’s motion. The Court found that the EEOC failed to satisfy its pre-litigation obligations with respect to all of the non-intervener claims. The EEOC had begun its investigation of Defendant after the charging parties filed sex/pregnancy discrimination charges with the EEOC. The EEOC expanded its investigation into Defendant’s related employment practices and received a spreadsheet from Defendant containing the names of women who had taken maternity leave. The EEOC later sent Defendant a Letter of Determination (“LOD”) regarding the discrimination claims, a proposed conciliation agreement, and additional monetary demands from the charging parties. The LOD stated that the charging parties’ claims of discrimination were echoed by a number of other current and former employees who took maternity leave. The EEOC’s conciliation agreement set forth its proposal for monetary relief to the charging parties and for Defendant to pay $7.5 million to establish a “claim fund,” which would be divided among all the class members who were defined as female employees who took maternity leaves during a defined period and who lost their job responsibilities, suffered a decline in job level or status, received less compensation, lost a scheduled increase, or otherwise experienced any reduction in the terms and conditions of their employment following notice to Defendant of their pregnancy or following their return from maternity leave. *Id.* at *9-10. After a series of meetings, Defendant sent the EEOC a written counter-proposal, which made clear that it believed that the charges lacked merit. Defendant had stated that it could not agree to the establishment of a claim fund and absent any information about potential claimants, any discussion of monetary settlements should be limited to the charging parties. *Id.* at *12. The EEOC then sent Defendant a letter declaring that conciliation had been unsuccessful and that further conciliation efforts would be futile. The EEOC argued that because the Court had already held that it had met its statutory conciliation obligation with respect to its class-wide discrimination claims (while dismissing its § 707 claims), the holding should be applied to its obligations in the context of the individual claims that it pursued. The Court, however, noted that the EEOC had not mentioned in the LOD the names of any individual claimants other than the charging parties, and the record reflected that several of the non-interveners were not contacted by the EEOC until after the action was filed. *Id.* at *25-26. Further, the previous order did not state that Title VII allowed the EEOC to use class-wide claims brought under § 707 to conduct an end run around the pre-litigation requirement that must be satisfied before bringing suit on behalf of individual claimants under § 706. *Id.* at *25. Because
§§ 706 and 707 claims were based on distinct theories and were adjudicated under different standards, the Court reasoned that allowing the EEOC to subvert its pre-litigation obligations with respect to individual claims by negotiating over class claims would undermine the statutory policy goal of encouraging conciliation. *Id.* The Court therefore held that its prior finding that the EEOC satisfied its pre-litigation obligations with respect to a class-wide claim applied to that class-wide claim only and that it must look independently at whether the EEOC fulfilled its statutory pre-litigation requirements with respect to the individual claims upon which it purported to continue the litigation. *Id.* at *25-26. As to that issue, the Court found that the record showed that the EEOC spurned any efforts to conciliate individual claims beyond those of the charging parties. *Id.* at *27. Although Defendant had explicitly offered to discuss the cases of legitimate grievances of identified individuals, the EEOC – rather than identifying additional potential claimants – had declared conciliation unsuccessful. *Id.* The EEOC did not formally identify for Defendant any of the non-interveners until nearly five months after commencing litigation, and had never attempted to revisit conciliation with respect to any individual claims with Defendant. The Court found that there was no evidence of a pre-suit investigation of individual claims and that the only inference that could be drawn was that the EEOC resorted to discovery conducted in conjunction with its class-wide claims to find the individual claimants. *Id.* at *30. The Court therefore concluded that the EEOC failed to satisfy its pre-litigation obligations with respect to all of the non-intervener claims of making a reasonable cause determination or ensuring that additional claims were reasonably related to the charge contained within the LOD so as to afford Defendant a reasonable opportunity to conciliate. *Id.* at *32. Accordingly, the Court granted Defendant’s motion for summary judgment on the EEOC’s § 706 claims brought on behalf of the non-interveners.

**EEOC v. Bloomberg LP, 2013 U.S. Dist. LEXIS 128388 (S.D.N.Y. Sept. 9, 2013)**. The EEOC sued Defendants after several of its current and former employees filed charges of sex/pregnancy discrimination and retaliation in violation of Title VII. The EEOC contended that Defendant had discriminated against and/or retaliated against the claimants and other similarly-situated employees after they had announced their pregnancies and had returned to work following maternity leave. Six claimants intervened into the action (“Plaintiffs-Interveners”). Meanwhile, the Court granted Defendants’ summary judgment on the EEOC’s pattern or practice claim under § 707, and also dismissed the EEOC’s claims brought on behalf of non-interveners. Defendant also moved for summary judgment on the Plaintiffs-Interveners’ claims, which the Court granted in part. First, the Court noted that Plaintiff-Intervener Jill Patricot alleged discrimination and retaliation claims under Title VII and the New York State and New York City Human Rights Law (“NYSHRL” and “NYCHRL”). Patricot alleged many acts of discrimination after she returned from her maternity leave, including that she was demoted and given a decrease in pay. Defendant contended that it had a legitimate, non-discriminatory reason for demoting her. Patricot offered evidence showing that action was taken against her for not being available in the office, while her successors were not questioned on their absence. The Court found that this evidence, along with Patricot’s testimony that her manager told her that sometimes when one has a baby a career is paused, was enough to establish a genuine issue of fact. *Id.* at *51-52. Accordingly, the Court denied Defendant’s motion. As to Patricot’s failure to promote claims, the Court found that she never applied for the position. *Id.* at *54-55. Accordingly, the Court granted summary judgment to Defendant on her failure to promote claim. Concerning retaliation, Patricot asserted six claims, including: (i) failure to provide her a desk or telephone upon her return from maternity leave; (ii) mistreatment by senior management; (iii) public verbal reprimands; (iv) statements to the media about her; (v) hostile work environment; and (vi) constructive discharge. The Court, however, found that the conduct referred to in items (i)-(iv) were not adverse employment actions, and that the evidence did not support her hostile work environment and constructive discharge claims. *Id.* at *59-63. Accordingly, the Court denied summary judgment on Patricot’s Title VII and NYSHRL demotion and discrimination in pay claims, but granted the motion as to all other claims. The Court opined that the standards for showing a violation of the NYCHRL are more liberally applied in favor of Plaintiffs than are the requirements under Title VII and the NYSHRL. *Id.* at *21-25. Under the more liberal NYCHRL standards, the Court denied summary judgment with respect to Patricot’s post-return discrimination and retaliation claims. *Id.* at *63-70. Plaintiffs-Interveners Tanya Lancaster, Janet Loures, Monica Prestia, Maria Mandalakis, and Marina Kushnir brought discrimination and retaliation claims under Title VII, NYSHRL, and the NYCHRL.
Plaintiffs-Interveners individually asserted that after they returned to work from maternity leave, they were demoted, or received reductions in compensation, and when they complained, they were retaliated against with further adverse employment actions, or eventually constructively discharged. The Court noted that most of the claims were based on vague allegations that Defendant allegedly was involved in retaliatory acts. However, Plaintiffs-Interveners offered no evidence showing that any of the individuals they claimed retaliated against them were aware that they engaged in protected activity. Accordingly, the Court dismissed all of their claims in their entirety, and granted summary judgment to Defendant on the five Plaintiffs-Interveners’ claims. Id. at *70-216.

**EEOC v. Mavis Discount Tires, 2013 U.S. Dist. LEXIS 141038 (S.D.N.Y. Sept. 30, 2013).** The EEOC brought an action against Defendants under Title VII of the Civil Rights Act for failure to correct unlawful employment practices in hiring on the basis of sex. Plaintiffs-Interveners Nicole Haywood, May Menawi, and Hattie Haynes sought leave to intervene in the action and bring claims under Title VII and the New York Human Rights Law, (“NYHRL”). The Court granted the motion in part and denied in part. Although the EEOC had issued a determination that there was reasonable cause to believe Defendants had violated Title VII by failing to hire Haywood and a class of females because of their sex, it did not issue Haywood a right to sue notice. Although it was undisputed that Haywood had a right to intervene in this action to assert a Title VII claim, the parties disagreed as to whether Menawi and Haynes could also intervene under the single filing rule. The Court noted that where one Plaintiff has filed a timely EEOC complaint, other non-filing Plaintiffs may join in the action if their individual claims arise out of similar discriminatory treatment in the same timeframe. Id. at *9. Further, the Court noted that when the allegedly discriminatory activity affects a large group, “piggy-backing” is not allowed unless the filed charge provides some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggy-back on the claim. Id. at *9-10. The Court stated that Menawi and Haynes could intervene as a matter of right by piggy-backing on to Haywood’s charge of discrimination because their claims arose out of similar discriminatory treatment in the same timeframe. The claims of Menawi and Haynes shared many factual similarities to Haywood’s charge of discrimination, including the facts that all three women applied for positions at Defendants between 2007 and 2008; none of them were hired, despite their qualifications and years of experience in the automotive industry; and equally or less qualified male applicants, with whom all three women had worked at Sears, were hired by Defendants during the period in which the three women filed their employment applications. Defendants argued that the claims of Menawi and Hayes were not sufficiently similar because they did not apply to Defendants during the exact same timeframe in 2008 as Haywood, and because Menawi and Hayes had not alleged facts regarding which location they applied to, or for what position. The Court observed that exact duplication of a timeframe is unnecessary to satisfy the single-filing rule; instead, mere similarity of grievances within the same general timeframe suffices to permit operation of the single filing rule, and that EEOC actions may be maintained against multiple business locations, even though the charge of discrimination was limited to a single location. Id. at *12. The Court remarked that the claims of Menawi and Haynes were virtually identical to Haywood’s claim and, as such, would fall within the scope of the EEOC’s investigation and could reasonably be expected to grow out of Haywood’s original charge of discrimination. Additionally, the Court noted that under the single filing rule, the timeliness of the claims of Menawi and Haynes was judged by evaluating the claims to see whether they were sufficiently similar to, and arose out of the same general time period as, the facts giving rise to Haywood’s claims. Id. at *14. Accordingly, the Court granted Plaintiffs-Interveners’ motion as to their Title VII claims. Plaintiffs-Interveners also sought to bring claims under the NYHRL. The Court observed that it has original jurisdiction in a civil action under 28 U.S.C. § 1367, and it also has supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the U.S. Constitution. Id. at *15. The Court, however, stated that pendent jurisdiction need not be exercised in every case, inasmuch as it is a doctrine of discretion, not of Plaintiff’s right, and that jurisdiction should be refused where there are reasons independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal theories of relief, that would justify separating state and federal claims for trial. Id. at *16. The Court observed that under the NYHRL, the doctrine of respondeat superior, or vicarious liability based on the agency relationship, is not available in cases...
involving discrimination, and to prevail on this claim, Plaintiffs had the additional burden of demonstrating that the employer acquiesced in the discriminatory conduct or subsequently condoned it. *Id.* at *16-17. Although Title VII does not require this additional showing, the Court noted that absence of notice to an employer does not necessarily insulate that employer from liability. *Id.* at *17. Here, the EEOC and Defendants intended to proceed with a bifurcated trial, and the Court agreed with Defendants that the significant potential for jury confusion weighed against exercising supplemental jurisdiction over Plaintiffs-Interveners’ state law claims. Accordingly, the Court denied Plaintiffs-Interveners’ motion as to their NYHRL claims.

**EEOC v. Sterling Jewelers Inc., 2013 U.S. Dist. LEXIS 125522 (W.D.N.Y. Sept. 3, 2013).** The EEOC filed an action against Defendant, alleging gender discrimination pursuant to §§ 706 and 707 of Title VII. The EEOC alleged that Defendant engaged in unlawful employment practices nationwide by maintaining a system of making promotion and compensation decisions that were excessively subjective and had a disparate impact on female retail sales employees. The EEOC took the deposition of Barry Fernholz, one of Defendant’s Division Vice Presidents. Thereafter, Defendant moved for an emergency motion to strike certain portions of Fernholz’s deposition testimony and questioning, concerning the alleged consumption of alcohol and alleged inappropriate behavior at one of Defendant’s managers’ meetings. Defendant also sought to prevent the EEOC from questioning other deponents about such matters in the future. The Court denied Defendant’s motion without prejudice, finding that this issue did not appear to have arisen in other depositions and as the deadline for fact discovery had expired. *Id.* at *4.

**EEOC v. Sterling Jewelers Inc., 2013 U.S. Dist. LEXIS 125522 (W.D.N.Y. Sept. 23, 2013).** The EEOC applied for an order to show cause as to why its second administrative subpoena, that it issued in 2012 during an investigation into Plaintiff’s EEOC charge alleging age and sex discrimination, should not be enforced. Diana Thielker, a former employee of Defendant, alleged that Sterling discriminated against her when it hired a younger male as timepiece manager, a position to which Thielker had applied. Thielker subsequently complained of discrimination relating to the promotion, and Sterling terminated her employment. During its investigation, the EEOC discovered an employee counseling report issued to Thielker in 2007, stating that “[a]ny discussions regarding payroll need only to be made between said employee + manager;” and that such discussions were a violation of Sterling’s code of conduct. *Id.* at *2. In addition, Thielker’s written comments in the report indicated that she felt discriminated against because of her gender, and that men throughout the company always made more money than women. Although not expressly part of the gender and age discrimination allegations set forth in Thielker’s charge, pursuant to the discovery of Thielker’s 2007 employee counseling report, in 2010 the EEOC served Defendant with a subpoena requesting information regarding Sterling’s alleged code of conduct prohibiting the discussion of pay, and disciplinary actions stemming from such discussions (“2010 Subpoena”). In April of 2011, the EEOC sought an order compelling Sterling to show cause as to why the 2010 Subpoena should not be enforced. In response to the Court’s recommendation to enforce the 2010 Subpoena, Defendant produced the 2007 code of conduct at issue, but denied the existence of a policy prohibiting employees from discussing their pay. As a result of a multitude of declarations produced by the EEOC allegedly evidencing the contrary, in 2012 the EEOC served Defendant with a second subpoena (“2012 Subpoena”), broadening the scope of information sought in its 2010 Subpoena, to include details regarding Sterling’s codes of conduct, disciplinary policies, confidentiality policies, and training documents relating to those policies; communications discouraging or prohibiting the discussion of compensation; and detailed information and documentation (including some personnel files) regarding employees who signed an August 2007 employee counseling report, and who were disciplined for discussing compensation or violating the code of conduct. Lastly, the 2012 Subpoena sought documents addressing Defendant’s process of tracking and coding disciplinary actions. The Court denied Defendant’s petition to revoke or modify the EEOC’s 2012 Subpoena, and Sterling subsequently produced documents relevant to several codes of conduct and Thielker. Defendant refused to produce documents relevant to the EEOC’s remaining requests, arguing that the EEOC sought information that was: (i) duplicative of its 2010 Subpoena; (ii) irrelevant to the Thielker matter; (iii) that the purpose of the information requested was illegitimate; and (iv) that compliance with the 2012 Subpoena would be unduly burdensome. In response to the EEOC’s arguments regarding
Defendant’s responses, the Court stated that Defendant should confirm whether its search for responsive information included ESI, and that it should identify requests to which the produced documents corresponded. In regards to Defendant’s arguments, the Court remarked that the information sought in the 2012 Subpoena was intended to prove the truth or falsity of Defendant’s representation that it did not have a policy prohibiting pay discussions. Unlike the 2010 Subpoena, which only sought the existence of such a policy and any discipline arising from violations of that policy, the 2012 Subpoena sought disclosure of employee discipline for discussing compensation, regardless of whether this discipline occurred pursuant to a formalized policy. Further, the Court observed that the EEOC has the power to investigate a broader picture of discrimination that unfolds in the course of a reasonable investigation of a specific charge. Id. at *12. As any formal or informal company-wide policy prohibiting employees from discussing their pay was relevant insofar as it could be used to mask the alleged discrimination, the Court opined that the pay-discussion information sought in the 2012 Subpoena was relevant. However, because some of the requests in the 2012 Subpoena were not sufficiently tailored to the purpose of obtaining pay-discussion documents, the Court ruled that the scope of these requests should be narrowed to documents and ESI concerning employee disclosures of compensation. In addition, although the information sought also could be relevant to the issues in other pending EEOC litigation brought against Defendant, this did not render the purpose of the subpoena improper or irrelevant to the Thielker charge. Thus, the Court held that the 2012 Subpoena was issued for a legitimate purpose. Finally, the Court remarked that Defendant failed to identify how the estimated cost of producing personnel files and responsive documents identifying employees who had received discipline or warning about discussions regarding their compensation would present an undue burden for a retailer of Sterling’s size, or how compliance with the subpoena would threaten its normal business operations. Accordingly, the Court granted the EEOC’s application in part and denied it in part.

**EEOC v. Sterling Jewelers Inc., 2013 U.S. Dist. LEXIS 141489 (W.D.N.Y. Oct. 16, 2013).** The charging party – Diane Thielker, Sterling Jewelers’ former employee – filed a charge with the EEOC, alleging that Sterling engaged in nationwide unlawful employment practices in violation of Title VII, by maintaining a system of making promotion and compensation decisions that were excessively subjective and had a disparate impact on female retail sales employees. During its investigation, the EEOC issued two subpoenas to Sterling, and when Sterling did not fully comply, the EEOC moved for an order to show cause as to why the subpoenas should not be enforced. The Magistrate Judge recommended that the EEOC’s application be granted in part and denied in part. Id. at *1-2. On Rule 72 objections, the Court adopted the report and recommendations of the Magistrate Judge. Among the documents sought by the EEOC in its 2010 subpoena were the code of conduct referred to in the employee counseling report issued by Sterling to Thielker and other similar policies prohibiting employees from discussing their pay, as well as documents that evidenced or explained all individuals disciplined under this policy. Id. at *4-5. Sterling provided the EEOC with a copy of Thielker’s executed statement of standards of conduct and business ethics and indicated that it had no policy prohibiting employees from discussing their pay. The EEOC’s 2012 subpoena sought additional documents and information. Sterling produced several codes of conduct utilized from 2004 to 2010 and 2012, but did not produce one for 2011. Id. at *4-9. Regarding documents and ESI describing disciplinary policies, and a complete personnel file for Thielker, the Magistrate Judge ordered that Sterling should confirm whether its search for responsive information included a search of its ESI, and that Sterling should identify which documents were produced in response to each request. Id. at *11-13. The Magistrate Judge ruled that any formal or informal company-wide policy prohibiting employees from discussing their pay was relevant because it could be used to mask the alleged discrimination. Thus, pay discussion information sought in the 2012 subpoena was relevant and must be produced. The Magistrate Judge, however, held that the scope of these requests should be narrowed to documents and ESI concerning employee disclosures of compensation. Id. at *16-21. Because the information sought arose from and was relevant to the Thielker charge, the Magistrate Judge opined that the 2012 Subpoena was issued for a legitimate purpose. Id. at *21-23. Finally, the Magistrate Judge opined that Sterling failed to demonstrate how the cost of compliance with the subpoena would present an undue burden for a retailer of its size or how it would threaten its normal business operations. Accordingly, the Magistrate Judge granted the EEOC’s application in part. Id. at *23-30.
Third Circuit

**EEOC v. FAPS, Inc., 2013 U.S. Dist. LEXIS 128717 (D.N.J. Sept. 10, 2013).** The EEOC brought an action under Title VII of the Civil Rights Act of 1964, the ADA, and Title I of the Civil Rights Act of 1991 alleging that Defendant engaged in an on-going pattern or practice of race discrimination against African-Americans in recruitment and hiring, and made improper pre-employment disability-related inquiries of applicants. The EEOC sought to prohibit Defendant from engaging in *ex parte* communications with allegedly injured victims, and to require Defendants to disclose all information obtained from the interviews held by CTS Research, Defendants' private investigator. The EEOC also sought depositions of Defendant's representatives who received information from allegedly injured victims, including, but not limited to, employees and agents of the private investigative firm. The Court granted the EEOC's motion in part. Defendant claimed that attorney-client privilege did not exist between the EEOC and allegedly injured victims, and that the private investigator was instructed to terminate interviews and all contact with allegedly injured victims if they informed the investigator that they were represented by counsel. The EEOC claimed that four allegedly injured victims interviewed disclosed that they were unaware that the private investigator had been hired by Defendant's counsel. Further, the EEOC submitted declarations from allegedly injured victims who were interviewed by the private investigator, wherein two stated that the private investigator affirmatively misled them by saying that he was with the EEOC, and three assumed that the private investigator worked for the EEOC, even though the investigator said that he worked for Defendant or with CTS Research. All five allegedly injured victims certified that they were represented by the EEOC, and during interviews with four of the five, the private investigator apparently did not ask whether they were represented by the EEOC or other counsel. The Court noted that although several jurisdictions allow *ex parte* communications with EEOC claimants prior to the establishment of the attorney-client relationship, *ex parte* communications should be undertaken with caution. *Id.* at *7. Further, the EEOC observed that determination of whether an attorney-client relationship exists should occur prior to any *ex parte* communication. *Id.* at *8. The Court stated that it was more likely to find attorney-client relationships between the EEOC and claimants when those claimants are the Defendant's current employees. *Id.* at *8-9. Here, Defendant denied employment to the 28 listed claimants. Thus, because the allegedly injured victims were not employed by Defendant, the Court found that there was a stronger presumption against the existence of an attorney-client relationship than in support of it. The Court, however, also observed that Defendant's private investigator did not take sufficient precautions to determine whether an attorney-client relationship existed between the EEOC and the allegedly injured victims prior to engaging in *ex parte* communications. Because there was sufficient indicia of wrong-doing to demonstrate that a level of misconduct occurred, the Court directed Defendant to disclose all materials, documents, notes, and communications between defense counsel or defense counsel's agents and the EEOC claimants. Further, the Court prohibited Defendant from using any information assembled from the CTS investigation, and from engaging in additional *ex parte* communications with the EEOC claimants and potential claimants. The Court noted that both parties had violated the Court's Case Management Order (“CMO”), because although fact discovery had long closed, both continued to engage in discovery. While Defendant engaged CTS who began interviewing claimants nearly two weeks after fact discovery closed, counsel for the EEOC also admitted to conducting fact discovery outside the bounds of the CMO. Accordingly, the Court directed both parties to immediately cease all fact discovery and prohibited them from engaging in any future discovery.

**EEOC v. Grane Healthcare Co., 2013 U.S. Dist. LEXIS 35869 (W.D. Pa. Mar. 15, 2013).** The EEOC brought an action alleging that Defendants violated the Americans With Disabilities Act (“ADA”) by subjecting employment candidates to medical examinations and health inquiries. The EEOC moved for partial summary judgment and a protective order, while Defendants moved to amend their answer, and to compel a Rule 30(B)(6) deposition of the EEOC. The Court granted both of Defendant’s motions and denied both of the EEOC’s motions. First, the Court considered Defendants’ motion to amend in conjunction with the EEOC’s motion for partial judgment on the pleadings. The Court noted that the EEOC must satisfy four requirements before it may file a complaint, including the existence of a timely charge of discrimination, and that the EEOC conducted an investigation, issued a reasonable cause determination, and attempted conciliation prior to filing suit. *Id.* at *7. Defendants asserted that at the time the answer
was filed, they were not aware of the EEOC’s failure to investigate the charge, and that they only became aware of this fact during the discovery process. *Id.* Thus, Defendants sought to amend their answer in order to assert that the EEOC failed to meet the conditions precedent to the lawsuit. *Id.* at *8. The Court found that Defendants did not engage in undue delay because they only became aware of the need for an amendment during the discovery process, a month before filing their motion to amend. *Id.* Further, the Court held that permitting the amendment was not futile because the EEOC must prove the existence of a condition precedent before filing the complaint, and that the lawsuit was in its early stages, where leave to amend is allowed under a more liberal standard. *Id.* The EEOC argued that Defendants’ answer generally denied the conditions precedent to the lawsuit, rather than denying them with specificity, and thus requested partial summary judgment due to filing a timely charge of discrimination, the fact that it conducted an investigation, issued a reasonable cause determination, and attempted conciliation prior to filing suit. *Id.* at *9. The Court held that the EEOC’s motion for partial summary judgment was rendered moot when it granted Defendants’ motion to amend their answer, and accordingly, the Court denied the EEOC’s motion. *Id.* Defendants also sought to compel a Rule 30(B)(6) deposition of the EEOC investigator to examine whether the EEOC satisfied the conditions precedent by actually investigating whether Defendants used certain health information to make their hiring decisions. *Id.* at *9-10. In response, the EEOC sought a protective order to avoid providing a designee to testify. *Id.* at *10. The Court noted that in *EEOC v. Keco*, 748 F.2d 1097 (6th Cir. 1984), the Sixth Circuit reasoned that the sufficiency of an investigation is under the exclusive discretion of the EEOC, but the actual existence of an investigation is discoverable. *Id.* at *11. The Court opined that the EEOC, similar to other litigants, must testify to the underlying facts and could object to the disclosure of any privileged information, and Defendants were permitted to depose the EEOC investigator where the EEOC was a named party in order to find underlying facts. *Id.* Additionally, the Court stated that the existence of a condition precedent was a relevant fact to the lawsuit because it is required before the EEOC may even file a complaint. *Id.* at *11-12. Thus, the Court determined that the EEOC had not met its burden of demonstrating good cause for a protective order. Accordingly, the Court denied the EEOC’s motion for a protective order and granted Defendants’ motion to compel.

**EEOC v. Kronos, Inc., 2013 U.S. Dist. LEXIS 125241 (W.D. Pa. Sept. 3, 2013).** The EEOC petitioned to enforce an administrative subpoena that it issued during its investigation of an individual’s charge alleging denial of employment because of disability in violation of the ADA. The District Court issued an order narrowing the scope of the subpoena and directed the parties to negotiate a confidentiality order. Subsequently, the District Court denied the EEOC’s motion to adopt its confidentiality order and granted Respondent’s motion for adoption of its proposed order. On appeal, the Third Circuit vacated the confidentiality order and remanded that issue to the District Court. On remand, the District Court ordered Respondent to comply with the modified subpoena and directed the EEOC to reimburse Respondent for 50% of the estimated cost of complying with the subpoena. The EEOC appealed for the second time and the Third Circuit partly reversed the District Court’s ruling and remanded for additional proceedings. Thereafter, the District Court provided notice of its intention to appoint special master Louis Kushner to issue a report and recommendation on expected actual costs to Defendant of compliance with the revised order pursuant to Rule 53. The EEOC objected to the appointment of a special master on the basis that such an appointment was not authorized by the rules, would result in unnecessary expense, and there were no exceptional circumstances supporting such an appointment. The District Court overruled the objections of the EEOC. The District Court stated that in light of the criminal trial schedule as outlined in the prior notice, and in addition to its caseload, exceptional conditions existed that justified appointment of a special master. Further, regarding the EEOC’s argument of unnecessary expense, the District Court reasoned that this argument was not convincing because instead of working through, or attempting to work through, the issue of compliance with an administrative subpoena to a non-party, the EEOC had aggressively pursued its case including two appeals to the Third Circuit, while the record did not indicate that the allegedly aggrieved claimant’s cause of action had moved forward. *Id.* at *5-6. The District Court stated that it would propose that Kushner issue a recommendation as to the cost of complying with the subpoena. The District Court remarked that as Kushner is a very capable mediator, the parties would be able to negotiate in good faith prior to the preparation of a report and recommendation, thereby saving the
parties from further litigation costs. Accordingly, the District Court held that appointment of a special master was appropriate.

**EEOC v. Ruby Tuesday, Inc., 919 F. Supp. 2d 587 (W.D. Pa. 2013).** The EEOC brought a pattern or practice action against Defendant under the ADEA on behalf of older job applicants who were denied employment. Defendant moved to dismiss on the grounds that the EEOC failed to state a claim, and for summary judgment because the EEOC failed to fulfill its statutory conciliation obligations. The Court denied the motion to dismiss, but ordered the EEOC to back-up its claims with more information and participate in conciliation discussions. *Id.* at 589. By keying the decision on the motion off of events that took place during only a five-week period (between August 25, 2009, when the EEOC issued a determination finding reasonable cause, and September 30, 2009, when the EEOC filed its lawsuit after asserting that conciliation failed), the Court decided to require the EEOC to provide the Defendant with the factual basis for its pattern or practice claims, and engage in good faith conciliation. A single employee had filed a charge of sex discrimination and retaliation in her employment in one of Defendant’s restaurants in Altoona, Pennsylvania. *Id.* at 590. Later, the charge was amended to add allegations of age discrimination. After an investigation, the EEOC found reasonable cause, and also determined that Defendant had engaged in a pattern or practice of age discrimination in six of its restaurants in Western Pennsylvania. *Id.* The EEOC’s August 25, 2009 determination gave Defendant only 13 days to respond, and Defendant sought a 30-day extension of time, while denying any wrong-doing. The EEOC denied the extension and specified for the first time that it sought $6,458,375 to resolve the claims. It also demanded a response from Defendant, either accepting that demand or setting forth a “best and final offer” no later than 2:30 pm nine days later, on September 18, 2009, without explaining why such a short response time was necessary (*e.g.*, to avoid expiration of the statute of limitations). *Id.* at 590-91. When Defendant made a counter-offer on September 15 as to the Charging Party’s individual claim, expressed a willingness to engage in further conciliation, and asked for the factual basis of the EEOC’s pattern or practice allegations, the EEOC refused to negotiate and filed a lawsuit on September 30, 2009. *Id.* at 591. More than three years of litigation and discovery ensued before Defendant filed its motion under Rule 12(b)(6). The Court concluded that the complaint “falls so substantially short of the minimal level” of notice required by Supreme Court precedent that it did not pass muster. *Id.* at 593. The Court, however, declined to dismiss the complaint, taking note of the fact that Defendant’s motion was untimely. *Id.* at 593-94. Instead, the Court ordered the EEOC to file a more definite statement within 30 days, and noted that the “EEOC is specifically cautioned that what it must plead is not a matter within its unilateral determination, and it acts at its peril if it elects only a very narrow interpretation of the scope of the plausible factual predicate that must be pled [given the] . . . thinness of the allegations” of the complaint. *Id.* at 594. As for Defendant’s motion for summary judgment for failure to engage in good faith conciliation, the Court determined that the EEOC had acted unreasonably and stated, “[i]t is difficult for the Court to discern how the EEOC’s actions here would indicate a meaningful desire to actually engage in a process of ‘persuasion,’ ‘conference,’ or ‘conciliation.’ . . . By any measure, a demand for the payment of more than $6 million, coupled with nine (9) days to either say ‘yes’ or to make a ‘best and final’ response in these circumstances (which includes . . . a demand for more than a dozen significant affirmative remedial measures) is so devoid of reasonableness as to lead this Court to the conclusion that it was not a meaningful, good faith conciliation effort.” *Id.* at 595.

**EEOC v. Ruby Tuesday, Inc., 2013 U.S. Dist. LEXIS 29783 (W.D. Pa. Mar. 5, 2013).** The EEOC brought a pattern or practice lawsuit against Defendant under the ADEA on behalf of older job applicants who were denied employment due to their age. A single employee of Defendant had filed a charge of sex discrimination and retaliation under Title VII of the Civil Rights Act and later amended the charge to allege age discrimination. The EEOC subsequently sued based on that charge. Defendant moved for Court approval of the content and placement of a proposed newspaper advertisement (“ad”) targeted at potential claimants, and a directive that any responses to any advertisement go to an appointed certified public accounting firm (“CPA”) rather than to the EEOC; Defendant also sought appointment of a retired federal judge to facilitate the statutory conciliation process. In its response, the EEOC requested approval of its version of such an ad. The Court denied all motions of Defendant and the EEOC’s request. *Id.* at *1-2.
The advertisement concept stemmed from the Defendant’s concern that it could not defend itself without a definitive listing of all of the potential claimants on whose behalf the EEOC was acting. Defendant sought the placement of an ad in less than all of the relevant markets and with content that never mentioned the litigation. Id. at *4. The EEOC argued that Defendant’s approach would yield incomplete results by using a newspaper ad to seek out claimants without also giving a hint as to this litigation. The Court noted that neither party cited any authority to demonstrate that the EEOC was barred from running truthful ads for the purpose of finding potential claimants, and in the form and manner it proposed, or that applicable statutory or case law required the Court to sign off on those efforts before it did so. Id. at *7-8. The Court stated that both parties should have a strong vested interest in working out a solution to their disagreement, one that fulfilled the purpose for the ads along with developing an additional statistical data set that both parties would be working from on the merits. The Court opined that it would be in the EEOC’s own interest to do this, given that an impending target date had been set for the identification of all claimants and that the case would not proceed to conclusion without a firm definition by the EEOC of the overall claimant group. Regarding the appointment of the CPA, the Court noted that the EEOC had been promptly telling Defendant about every claimant it identified, and Defendant swiftly set about the process of locking down the testimony of each such claimant with a deposition. There was no reason to alter that process, absent some indication that it had not worked in the past, or would not work in the future for an as yet undefined reason. Finally, the Court opined that involvement of a retired federal judge in the conciliation process mandated by the ADEA was unwarranted at that point. The Court stated that there was no indication that the conciliation process needed a Court-appointed proctor to keep order, or that conciliation was headed in a direction where the “steering to a solution” that might be facilitated by a retired judge would be of special value. Id. at *6-7. Thus, the Court opined that it would be better to proceed through the first in-person conciliation meeting, before declaring that the renewed conciliation process was doomed to be unproductive in either content or approach unless facilitated by a mediator. Id. at *12. Accordingly, the Court denied Defendant’s motions without prejudice. Id.

**EEOC v. United Galaxy, Inc., 2013 U.S. Dist. LEXIS 89200 (D.N.J. June 25, 2013).** The EEOC brought an action against Defendant under Title VII on behalf of Gurpreet Kherha, a member of the Sikh religion, alleging a failure to employ Kherha due to unwillingness to accommodate his religion. Kherha wore a beard because of his Sikh religious beliefs. The EEOC alleged that Kherha was not hired because his beard did not comply with Defendant’s no-beard policy and Defendant was unwilling to accommodate his religious beliefs. Id. at *10-12. T.K. Worldwide, Inc., a company that recruited and provided general sales training to individuals, engaged independent contractor, Full Throttle Training Corp., and its owner Dominick Pupo, to provide three days of training to Kherha. Defendant moved for summary judgment, and the District Court denied the motion. Defendant claimed that it lacked knowledge about the conflict between Kherha’s religious beliefs and Defendant’s no-beard policy, thus arguing that a *prima facie* failure to accommodate claim could not be established based on the undisputed material facts. The Court, however, noted that Kherha’s garb clearly indicated that he was a person of faith, or at least should have put Defendant on sufficient notice to inquire further. Moreover, the Court also observed that Pupo knew of Kherha’s faith through the initial screening interview, and that he notified Defendant of Kherha’s religious precept to wear an untampered beard. Id. According to both Kherha and Pupo, Pupo notified Defendant of the religious conflict, to which Defendant responded that there was a clear no-beard corporate policy. Id. at 16-17. Accordingly, the Court rejected Defendant’s lack of knowledge argument. Id. at *16-20. Defendant also argued that any statements made or repeated by Pupo based on his firsthand knowledge were inadmissible hearsay because he was not an agent of Defendant. Id. at *20. The Court held that, even if he was an independent contractor, Pupo had significant involvement in the process leading to the employment decision, sufficient to establish Pupo’s agency for purposes of admitting statements Rule 801(d)(2)(D) of the Federal Rules of Evidence. Id. at *20-23. Accordingly, the Court denied summary judgment on the failure to accommodate claims because of the existence of genuine issues of material fact. Id. at *26. Second, to establish a *prima facie* case for failure to hire, the Court noted that the EEOC must show that Kherha belonged to a protected category; that he applied for and was qualified for the job; and that he was rejected, despite his qualifications; and that after his rejection, the employer continued to seek applicants from persons with Kherha’s qualifications. Id. at *26. The Court noted that a reasonable
fact-finder could find that explanation a pretext for discrimination because Kherha was not provided any information to suggest that a reasonable accommodation would be made and he was not invited to return for the interview, though seven other candidates were. Id. at *26-33. Accordingly, because genuine issues of material fact were present, the Court denied summary judgment with respect to the failure to hire claim. Finally, Defendant also moved for summary judgment on the EEOC’s request for punitive damages. Because a genuine issue of material fact existed as to whether Defendant acted with reckless disregard to Kherha’s protected rights, the Court denied summary judgment on this issue. Id. at *33-35.

**EEOC v. United States Steel Corp., 2013 U.S. Dist. LEXIS 22748 (W.D. Pa. Feb. 20, 2013).** The EEOC brought an action on behalf of Abigail DeSimone, the charging party, and all similarly-situated employees alleging that Defendant’s practice of conducting random drug and alcohol testing on its probationary employees violated the ADA, which requires that an employer have a reasonable basis to conduct a medical test. Defendant had a policy of conducting random drug and alcohol testing on its probationary employees in accordance with the labor agreement entered with the employees’ union. Defendant dismissed DeSimone after she failed a breath alcohol test shortly after she began employment at Defendant’s plant. While DeSimone privately settled with Defendant, the EEOC continued to pursue its claims against Defendant’s practices. Defendant moved for summary judgment arguing, inter alia, that the EEOC failed to complete the multi-step enforcement procedure prior to bringing the lawsuit, and the practice of randomly testing probationary employees was job-related and consistent with business necessity. Id. at *2. The Court granted the motion and dismissed the action. First, the Court held that Defendant failed to carry its summary judgment burden of showing that the EEOC did not satisfy its Title VII pre-suit investigatory obligations. Although the evidence showed that the EEOC undertook minimal investigation before filing the lawsuit, that the EEOC did little to investigate DeSimone’s charge, and that the EEOC failed to obtain information as to whether employees at any of Defendant’s other plants were subject to the alcohol testing policy, the Court held that the absence of documentary evidence as to the substance of the conciliation process precluded disposing of the case on the basis that the EEOC failed to satisfy its pre-suit obligations. Id. at *32-34. The Court noted that the parties had engaged in conciliation efforts prior to litigation and upon Defendant’s request, the related discussions and motions were all deemed confidential. Thus, the only evidence before the Court regarding conciliation was that the parties made an unsuccessful effort to resolve the allegations prior to litigation. Id. at *14. The Court stated that Defendant could not withhold crucial documents used by the EEOC to conduct investigation and conciliation and then attempt to benefit from the ensuing evidentiary void. Id. at *35. As to the merits, the Court further held that Defendant’s policy was a business necessity and therefore Defendant could lawfully administer alcohol breath tests to probationary employees. The Court noted that the probationary employees performed dangerous and safety-sensitive duties alongside regular employees, and that they must be alert at all times in order to work in a hazardous work environment that included molten hot coke, toxic waste products, and massive moving machinery. Id. at *52-53. The Court noted that no level of intoxication could be acceptable on the job as even the smallest miscalculation could lead to dire consequences. Id. at *55. The Court further found no issue with limiting the scope of the random testing program only to probationary employees. The Court noted that regular employees, who were on the job for a long period of time, have proven that they follow the appropriate safety standards and adequately perform their job on a daily basis. Id. at *58. The new hires, on the other hand, were comparatively less skilled and inherently more dangerous to themselves as well as others because of their lack of training and familiarity with their jobs. The Court also determined that the tests were practical and fair because all employees wear heavy protective gear that obscured their faces and muffled their speech, making it nearly impossible to determine otherwise if an employee was intoxicated while working. Id. at *60. The Court therefore concluded that Defendant’s policy of randomly testing its employees for drug and alcohol abuse was a business necessity as the testing policy genuinely served a safety rationale, and was therefore reasonable. For these reasons, the Court granted Defendant’s motion for summary judgment.

(iv) **Fourth Circuit**

**EEOC v. 5042 Holdings Limited, 2013 U.S. Dist. LEXIS 53943 (N.D. W. Va. April 16, 2013).** The EEOC brought an action alleging that Defendants, 5042 Holdings Limited, d/b/a The Country Inn at Berkeley...
Springs ("Country Inn"), and Nancy M. Sostaric and Stjepan Sostaric ("Sostaric"), individually and as officers and shareholders of 5042 Holdings Limited, violated Title VII of the Civil Rights Act of 1964 by engaging in discriminatory employment practices. *Id.* at *3*. The parties settled the case before going to trial, and the EEOC moved for approval and entry of a consent decree. In addition to resolving the claims by enjoining the Country Inn from engaging in any further discrimination or harassment based on sex or retaliation, the consent decree provided $85,000 in monetary relief to the charging party and the other class members. *Id.* at *4*. The consent decree also outlined a schedule for Defendants’ monetary payments wherein individual Defendants, Nancy Sostaric and Stjepan Sostaric, personally guaranteed payment of the amounts from their personal assets if the Country Inn could not make the payments. *Id.* Subsequently, Defendants paid only $10,000 of the $85,000 judgment, excluding post-judgment interest, and failed to comply with the payment schedule mandated by the consent decree. *Id.* at *17*. The EEOC filed an application for a writ of continuing garnishment, which sought the issuance of the writ directed to MetLife Investors USA Insurance Company, specifically naming a life insurance policy in which the EEOC claimed Stjepan Sostaric had an interest. *Id.* at *4*-5. Sostaric filed objections to the EEOC’s writ of garnishment and a claim for exemption of his insurance policy. The Court overruled the objections, but granted the request for the exemption. Sostaric’s first objection was that the EEOC failed to give notice of non-compliance as required by the consent decree before applying for the writ. The Court held that the consent decree did not require such notice, and that even if it did, Sostaric’s counsel likely had notice. *Id.* at *8*. Sostaric’s second objection was that he was a guarantor and not a judgment debtor. The Court held that the consent decree was a final judgment and that made Sostaric a judgment debtor. *Id.* at *11*. Sostaric’s third and fourth objections were that the consent decree did not provide for continuing jurisdiction over Sostaric. However, the Court held that it had ancillary jurisdiction to enforce the judgment, and that was sufficient. *Id.* at *13*. Sostaric’s fifth objection asserted that the Court could not lawfully garnish his personal property. The Court overruled the objection because it was unsupported by any specific facts. Because the Court had jurisdiction over Sostaric and the consent decree was valid, there was no obvious reason why the Court could not lawfully garnish Sostaric’s personal property. *Id.* at *13*. Sostaric’s sixth objection was that the Court could not garnish any property over which it did not have in rem jurisdiction. The Court overruled the objection, stating that it had continuing jurisdiction to enforce the consent decree and that Sostaric did not specifically contest or point to property over which the Court did not have in rem jurisdiction. *Id.* at *13*-16. Finally, the Court agreed with Sostaric in that under applicable provisions of the District of Columbia Code, his life insurance policy, including its cash surrender value, was exempt from garnishment. *Id.* *22.*

**EEOC v. Bo-Cherry, Inc., 2013 U.S. Dist. LEXIS 74627 (W.D.N.C. May 28, 2013).** The EEOC brought an action on behalf of Devin Charles alleging that Defendant failed to accommodate Charles’ religious beliefs and discharged him because of his religion, Islam, in violation of Title VII. The EEOC alleged that Defendant terminated Charles’ employment because he refused to shave his beard even though Charles informed Defendant that he could not cut or trim his beard because of his religious beliefs. In its answer to the EEOC’s complaint, Defendant attached a pair of photographs of Charles as exhibits allegedly showing him with a closely cropped beard. Subsequently, the EEOC moved to strike the exhibits and contended that the exhibits were not permissible written instruments as contemplated pursuant to Rule 10(c) of the Federal Rules of Civil Procedure. The Court observed that although there was little case law addressing the issue, prior cases had unequivocally held that photographs should not be attached as exhibits to either a complaint or an answer. *Id.* at *7*-8. Furthermore, the Court noted that complaints and answers are “vehicles for teeing up claims and defenses, not offering or introducing proof of those claims.” *Id.* at *10*. The Court opined that while Defendant could certainly state in an affirmative defense that such a defense is based on information and belief, and that such information and belief is founded on an identification photograph procured on a date relevant to the allegations of a complaint, the Federal Rules of Civil Procedure simply do not allow an answer or affirmative defense to be the vehicle for publication of all evidence that may support a claim or defense. *Id.* Therefore, the Court found that the photographs were not written instruments pursuant to Rule 10(c) and thus not properly included in Defendant’s answer. Accordingly, the Court granted the EEOC’s motion to strike.
**EEOC v. Freeman, 2013 U.S. Dist. LEXIS 112368 (D. Md. Aug. 9, 2013).** The EEOC brought a pattern or practice action against Defendant, a service provider for corporate events, alleging that Defendant discriminated against African-Americans, Hispanics, and male applicants by using criminal background reports and credit histories as hiring screens. Defendant moved for summary judgment. The Court granted the motion, finding that the EEOC failed to provide the requisite facts to support a theory of disparate impact resulting from any identified, specific practice of Defendant. Id. at *34. Although the EEOC attempted to make a statistically sufficient demonstration of disparate impact through its experts, Drs. Kevin R. Murphy and Beth M. Huebner, the Court found the EEOC’s expert testimony completely unreliable and insufficient. Id. at *24-36. Defendant had identified a number of inaccuracies in Murphy’s report and the EEOC had failed to “fix” the identified issues even in its supplemental reports. Id. at *33-35. The Court found that Murphy’s analysis was not based on a random sample of accurate data from the relevant applicant pool and time period. Id. at *24-29. While the EEOC blamed this on Defendant for failing to produce sufficient information during discovery, the Court determined that Defendant clearly demonstrated that it had properly supplied the EEOC with complete background check logs for the entire period covered by the complaint. Id. The Court noted that Murphy, in his original report, had admitted that he had access to information on 58,892 applicants through the discovery materials. Id. at *26-27. His ultimate testing database, however, included fewer than 2,014 unique applicants, with many of the 2,014 entries being duplicates. Id. Murphy had relied almost entirely on the two Excel spreadsheets in creating his database, with only a few individuals cherry-picked for inclusion from the discovery materials. Id. Further, Murphy’s database did not cover the time period identified in the EEOC’s claims, and he did not perform a mathematical extrapolation to the time periods that were not covered by his analysis. Id. at *27-29. Murphy’s database contained no data from half of Defendant’s branches and he offered no explanation as to why the branches that he included should be considered a representative sample. Id. at *29-31. Murphy also had incorrectly coded the race and pass/fail status for several individuals and introduced fresh errors in his supplemental analysis, including many additional duplicates, material coding errors, and more double-counting. Id. The Court thus concluded that Murphy’s database was so full of flaws that any evidence of disparate impact derived from its analysis must be disregarded. The Court further found that even if Murphy’s supplemental reports and declarations were reliable, they were untimely. Id. at *34-39. Under the scheduling order, the EEOC should have completed all of its expert disclosures by July 18, 2012. The EEOC, however, filed Murphy’s amended report on July 26, 2012, and Murphy’s supplemental report and declaration almost half a year later on January 22, 2013. Id. The Court noted that Murphy’s changing analyses were based on materials that were available to the EEOC prior to his initial submission deadline and not on newly discovered information, and his supplemental reports and declarations were clearly not proper supplementation, but essentially counter-arguments that are strictly prohibited by the federal rules. Id. The Court therefore concluded that Murphy’s supplemental reports and declarations were untimely, unjustified in their lateness, and therefore inadmissible. Id. at *23. The Court further held that the testimony of EEOC’s other expert, Beth Huebner, was also unreliable. Huebner’s report added nothing significant to Murphy’s analyses, but merely replicated Murphy’s analysis and confirmed his conclusions regarding disparate impact, thereby relying on the same flawed database used by Murphy. Id. at *39. For these reasons, the Court rejected the expert testimony offered by the EEOC. The EEOC argued that even if Murphy and Huebner’s reports were inadmissible, the national statistics cited in their reports were sufficient evidence of disparate impact. Id. at *39-42. The Court also rejected this argument. Because Defendant performed criminal background checks after the applicant was offered and accepted a position, but before he or she began work, the Court reasoned that the general population pool “cannot be used as a surrogate for the class of qualified job applicants, because it contains many persons who have not (and would not) be” applying for a job with Defendant. Id. at *41. The Court thus held that neither national statistics nor any expert analysis supported the EEOC’s allegations of disparate impact. Id. at *24-25. The Court opined that, even otherwise, the EEOC and its experts had failed to identify the specific policy or policies causing the alleged disparate impact. Defendant’s background investigation policies were not simple, one-step processes. Rather, they involved different types of checks depending on the specific job an individual was seeking, consideration of both subjective and objective criteria, and examination of a long list of factors, any of which might control the ultimate employment decision. Id. One of the few “bright-line” rules Defendant had for disqualifying an applicant was whether the applicant had lied on his or
her application about their criminal history; otherwise, it looked at the timing and disposition of any criminal proceedings, as well as the relationship of the crime to the job for which the applicant was applying. *Id.* at *42-46. Similarly, for credit checks, Defendant had very specific criteria for disqualifying applicants whose positions mandated use of such checks. *Id.* The Court noted that if a policy could be broken down into discrete parts, the EEOC must identify which part is responsible for creating racial or gender disparities. *Id.* 

The EEOC had made no such effort. Although it was theoretically possible that one or more of Defendant’s background check considerations caused a disparate impact on certain individuals, the Court noted that the EEOC failed to demonstrate which such factor was the alleged cause of such a process. The Court thus concluded that the EEOC’s lawsuit was “a theory in search of facts to support it.” *Id.* at *53.

Accordingly, the Court entered summary judgment for Defendant.

**Editor’s Note:** The ruling for the defense in *EEOC v. Freeman* was one of the Commission’s biggest defeats in 2013. The Court pulled no punches in taking the EEOC to task based on the flaws in the data it relied upon in support of its disparate impact claims, labeling Dr. Murphy’s expert reports as “laughable;” “based on unreliable data;” “rife with analytical error;” containing “a plethora of errors and analytical fallacies” and a “mind-boggling number of errors;” “completely unreliable;” “so full of material flaws that any evidence of disparate impact derived from an analysis of its contents must necessarily be disregarded;” “distorted;” “both over and under-inclusive;” “cherry-picked;” “worthless;” and “an egregious example of scientific dishonesty.” *Id.* at *30-41.

**EEOC v. Greystar Management Services L.P., 2013 U.S. Dist. LEXIS 177238 (D. Md. Dec. 18, 2013).** The EEOC brought a Title VII action on behalf of Amada Lucero, a housekeeper, alleging that Defendant engaged in sex discrimination by terminating Lucero after she became pregnant. Lucero worked as a housekeeper in one of the large apartment complexes Defendant managed. After becoming pregnant, Lucero requested a change in job responsibilities since she frequently worked around chemicals. Defendant then requested a doctor’s note stating that she should not work around chemicals. Lucero provided a doctor’s note, and Defendant changed her responsibilities so that she was not working with chemicals. Sometime later, Lucero sought to modify her request for accommodation, and asked for a waiver of her medical restriction. *Id.* at *19. Defendant denied that request, and ultimately placed Lucero on unpaid leave. The EEOC sued to compel Defendant to correct unlawful employment practices on the basis of sex, and to provide appropriate relief to Lucero. The parties cross-moved for summary judgment and the Court denied both motions. The EEOC contended that the record contained direct evidence that Defendant intentionally discriminated against Lucero when it refused to allow her to waive her pregnancy-related medical restriction and resume her prior responsibilities, and instead put her on unpaid leave. *Id.* at *41-42. Defendant, however, stated that Lucero’s work status was altered because she requested an accommodation and submitted a doctor’s note containing restrictions that were incompatible with her duties. The Court agreed, finding that as the housekeepers worked around chemicals for a majority of their time, and for as much as 75% of their day, there was little basis to find that Lucero could have continued to work in her housekeeper position while adhering to the limitations outlined by her physician. *Id.* at *46.

The Court, however, noted that the central issue in the case was whether Defendant discriminated against Lucero by adhering to her doctor’s notes and refusing to allow her to waive her restrictions. The EEOC pointed to several statements made by Defendant’s employees and e-mail communications among them that showed that Defendant’s refusal to waive the medical restriction did not have anything to do with either Lucero’s well-being or her child’s health. Therefore, the Court determined that the EEOC had succeeded in showing direct evidence of discrimination, and thus, creating a genuine issue of material fact. Defendant further argued that Lucero’s medical restriction was the non-discriminatory basis for its employment decision. The Court agreed with Defendant based on considerable case law authorities in the Fourth Circuit indicating that an employer may defer to a medical restriction that a physician imposes on an employee. *Id.* at *58. The EEOC argued that although Lucero was medically restricted, she was nevertheless entitled to withdraw those notes and to choose to continue to work. The EEOC cited to *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), standing for the proposition that the choice to work while pregnant belonged to the mother and not the employer. *Id.* at *62. The Court, however, remarked that other case law authorities have endorsed the notion that an employer may rely on
the restrictions imposed by an employee’s physician. Id. at *71. The Court found that the undisputed facts indicated that Defendant had no policy barring pregnant women from working, it did not initiate any issue of concern as to Lucero’s pregnancy, and it requested a doctor’s note only after Lucero sought an accommodation. Id. at *84. Accordingly, the Court found that genuine issues of fact existed, and thus denied both motions.

_EEOC v. Propak Logistics, Inc., 2013 U.S. Dist. LEXIS 43511 (W.D.N.C. Mar. 27, 2013)._ The EEOC brought an action based on a charge filed by a former employee, Michael Quintois, alleging that Defendant violated Title VII by refusing to hire non-Hispanic persons for non-management positions at its Shelby, North Carolina facility. Defendant moved to dismiss on the grounds of laches, claiming unreasonable delay. Because both parties referred to matters outside the complaint, the Court converted the motion to dismiss to a motion for summary judgment, and allowed limited discovery. Id. at *2-4. The original charge of discrimination was filed on January 2, 2003. Id. at *7. On March 19, 2008, the EEOC issued a determination that Defendant failed to hire a class of Hispanic applicants because of their race. Id. at *14. Conciliation failed, and the EEOC filed its complaint on August 12, 2009, alleging discriminatory employment practices from October 2002 through June 2004. Id. at *15-16. The Court found that the near seven-year delay between the EEOC’s filing of the charge and the initiation of the litigation was unreasonable, noting substantial periods of inactivity by the EEOC during that period. Id. at *20-25. It also found that the Defendant had been prejudiced by the delay due to the loss of records and the unavailability of key witnesses. Id. at *25-31. The Court ruled that, as a matter of law, an employer does not have an obligation to maintain its employment records indefinitely after the filing of a charge with the EEOC. Id. at *30. The Court also noted potential prejudice to the Defendant due to the potential increased back pay remedy to a class of individuals resulting from the delay. Id. at *31-33. Accordingly, the Court granted the Defendant’s motion for summary judgment on the grounds of laches. Id. at *34.

Editor’s Note: Successful assertion of a laches defense in an EEOC pattern or practice case is exceedingly rare. The defense eliminated this lawsuit in its entirety based on successful invocation of the defense.

_EEOC v. Propak Logistics, Inc., 2013 U.S. Dist. LEXIS 159588 (W.D.N.C. Nov. 7, 2013)._ The EEOC brought an action alleging that Defendant violated Title VII by refusing to hire non-Hispanic persons for non-management positions. Earlier, the Court had denied Defendant’s motion to dismiss and ordered the EEOC to file the administrative record with the Court. The EEOC, however, stated that filing the entire administrative record would be burdensome and accordingly, submitted selected portions of the administrative record to the Court for an in camera review, but failed to file those selected portions in the electronic record. Id. at *2. When Defendant moved for summary judgment, the Court realized that those selected portions were not filed. Thus, the Court directed the Clerk to file those portions of the administrative record that had been submitted to the Court for in camera review to which the parties had cited in their briefs. Id. at *2-3. The EEOC did not request that any other documents be filed in the record at that time. The Court granted summary judgment to Defendant on the basis of laches. Subsequently, upon Defendant’s motion, the Court imposed attorneys’ fees on the EEOC. The EEOC appealed the Court’s award of attorneys’ fees, and during the pendency of the appeal, the EEOC moved to modify the record by adding four documents from the administrative file to the record so that such documents could be considered on appellate review. Id. at *3-4. The Court denied the motion. The EEOC asserted that the documents it sought to add to the record were included in the documents submitted to the Court in camera. The Court, however, noted that beyond the certification of the EEOC’s counsel of that fact, there was nothing in the record to indicate what documents were submitted. In spite of the fact that the EEOC’s failure to file these documents was contrary to the Court’s prior order, the Court had no way of verifying whether these documents were part of what was submitted. Further, the Court stated that although the EEOC contended that such documents were necessary to its appeal on the order awarding attorneys’ fees, the EEOC had not filed the documents during the proceedings or even requested that such documents should be included in the record. Id. at *5-6. Moreover, these documents were never cited by the EEOC or Defendant, nor were they referenced by the Court in either the order granting summary judgment or the
order granting the award of attorneys’ fees. *Id.* Accordingly, the Court held that these documents were
never part of the record in this case and therefore, they were not material and should not be included in the
record on appeal.

action under Title VII alleging that owner of SPOA, LLC, Michael Sakellis, sexually harassed former
waitress Jane Doe, former manager Dimitra Kokkinakos, and similarly-situated female employees. The
EEOC also alleged that after Kokkinakos complained to restaurant management about Sakellis’ behavior,
Sakellis discharged her. Doe filed a charge with the EEOC and the EEOC issued a Letter of Determination
(“LOD”), finding that Doe and other female employees faced a sexually hostile work environment, were
subjected to unwelcome sexual harassment, and were constructively discharged. Doe moved to intervene
in the EEOC’s lawsuit and to proceed under a pseudonym. Defendant moved to dismiss and for a more
definite statement. The Court denied the motion to dismiss, and granted the motion for a more definite
statement in part. First, regarding the motion to intervene, the Court observed that as long as an aggrieved
employee files a timely motion to intervene in the EEOC’s civil action, the charging party has an unqualified
right to intervene in the EEOC’s action. *Id.* at *8. Because Doe, an aggrieved former employee in this
action, timely moved to intervene a month after the EEOC filed the action, the Court granted the motion.
Second, the Court noted that Doe sought to preserve her privacy in a highly sensitive and personal matter
involving sexual assault, and ordering her to proceed under her legal name posed needless risk of mental
and psychological harm. Moreover, because Doe would appear under her legal name in open Court, there
was no risk that the Court’s limited grant of anonymity would implicitly influence the jury if this case
advanced to trial. Accordingly, the Court found that Doe must appear under her legal name in open Court
but remain anonymous in the pleadings, motions, docket entries, and all written materials filed in this case.
In support of its motion to dismiss, Defendant argued that the EEOC failed to satisfy the Rule 12(b)(6)
hurdle because it did not provide the legal names for the two anonymous claimants, Doe and Smith. The
Court rejected this contention, as the EEOC set forth detailed facts showing unwelcome, severe, and
pervasive conduct, for which Defendant could be held accountable. The Court found that the EEOC
provided sufficient facts to state a claim for relief. Defendant also argued that the EEOC’s suit must be
dismissed under Rule 12(b)(1) because the EEOC failed to conciliate the claims of Doe, Kokkinakos, or
Smith. The EEOC Investigator Glace’s invitation to conciliation discussed potential relief for both Doe and
Kokkinakos, and Defendant wrote two formal letters and engaged in telephone and e-mail communications
with Investigator Glace discussing the monetary and injunctive relief requested for both Doe and
Kokkinakos. Responding to Defendant’s first letter, Investigator Glace again indicated that it should
provide a counter-offer for compensatory damages, if it disputed the amount requested. The Court stated
that this back-and-forth communication showed that the EEOC responded to Defendant’s concerns
regarding the relief requested and acted reasonably under the circumstances. To the extent that the
EEOC sought relief for Smith as a member of the alleged class, the Court denied the motion to dismiss.
Further, the Court observed that Investigator Glace began her investigation promptly after the case was
assigned to her, and given the extent of her activities, as well as the progress she made toward the LOD, it
remarked that the length of her investigation was not unreasonable. The Court found that the approximate
two-month period of conciliation was reasonable in light of the requirement that the EEOC must attempt
conciliation for at least 30 days, and that the three-month period between conciliation and filing of the
action was reasonable for the EEOC to make a litigation decision. Thus, the Court dismissed Defendant’s
laches defense. Finally, Defendant argued that the complaint was too vague and ambiguous to respond to,
and regarding employee Mary Smith there was no way whatsoever to know who among its some 120
female ex-restaurant workers she was, thus making it impossible to investigate or make any response to
her allegations. The Court noted that Rule 12(e) permits a party to move for a more definite statement of a
pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party
cannot reasonably prepare a response. *Id.* at *30. The Court denied the motion regarding Doe because
Defendant admitted knowing her identity, but granted the motion regarding Smith because it agreed with
Defendant that it could not investigate and respond to the EEOC’s claim on behalf of Smith without
knowing her identity.
The EEOC brought an action under Title VII of the Civil Rights Act of 1964, alleging that Defendant subjected its employees to a racially hostile work environment. At trial, a jury awarded Robert Floyd Jr. and Contonius Gill $20,000 and $30,000 in compensatory damages and $75,000 each in punitive damages respectively. Defendant moved for a remittitur and/or a new trial. On behalf of Gill, the EEOC moved for back pay, pre-judgment interest, pre-judgment attachment, and injunctive relief. The Court granted Defendant’s motion for a remittitur, and the EEOC’s request for back pay, pre-judgment interest, and injunctive relief, but denied the motion for pre-judgment attachment. Defendant sought to remit the damages to $50,000 in accordance with the monetary cap contained in Title VII, 42 U.S.C. § 1981a(b)(3)(A), which limits total recovery to $50,000 for each complaining party when a Defendant has more than 14 and fewer than 101 employees for 20 or more calendar weeks in the current or preceding calendar year. Id. at *3. The EEOC agreed to the motion and the Court limited the EEOC’s damages to $50,000, which consisted of $20,000 in compensatory damages and $30,000 in punitive damages. Regarding back pay, the evidence showed that Gill earned $2,107.73 per month before he was discharged, and that he suffered 34 months of unemployment. Further, the Court determined that Gill mitigated his damages because he attempted to find employment, kept detailed records of his efforts, and participated in training to further his skills. Id. at *4. Accordingly, the Court awarded the EEOC back pay for Gill of $71,662.82. Regarding the award for pre-judgment interest, the Court noted that the objective is to make Plaintiff whole, or in the same position, he or she would be in had the discrimination never occurred. Id. at *4-5. The EEOC sought pre-judgment interest at the rate of 8%, as provided by North Carolina law, and that pre-judgment interest was compounded annually to reflect the economic reality that he would have been able to accrue accumulated interest on his earnings. Id. at *5. Defendant was aware of Gill’s monthly earnings at the time he was fired and the interest on the earnings was easily calculable. Id. at *6. Although Gill was partially at fault for the lengthy delay in his case because he waited two months to file his charge with the EEOC, the Court determined that he was sufficiently diligent. Id. Accordingly, the Court awarded pre-judgment interest amounting to $16,847.15 for a total back pay award with principal of $88,509.79. Furthermore, the EEOC moved for an order of attachment and/or seizure of Defendant’s property and assets. Id. at *10. The Court denied the order, holding that there was no evidence that Defendant had moved assets outside of the state. Id. The Court noted that Defendant had decreased his cash assets, but the cash was used in substantial part to purchase newer trucks, and did not demonstrate improper assignment or disposition of property. Id. Accordingly, the Court denied the motion for pre-judgment attachment. Finally, the evidence showed that Defendant’s discriminatory practices continued after Gill filed his EEOC charge, and that Defendant had no written or formalized anti-discrimination policy or reporting procedures. Id. at *12. Therefore, the Court enjoined further illegal discriminatory conduct, and required Defendant to remove references of the events leading to the finding of unlawful conduct from relevant personnel files. The Court also required Defendant to adopt and post a formal anti-discrimination policy with reasonable reporting provisions, imposed reasonable training and reporting requirements on Defendant as to its corrective efforts, required Defendant to record all instances of complaints of unlawful racial behavior alleged to violate Title VII and/or Defendant’s anti-discrimination policy, and permitted the EEOC to monitor compliance through reasonable inspections of appropriate records of Defendant.

Fifth Circuit

EEOC v. Bass Pro Outdoor World, LLC, 2013 U.S. Dist. LEXIS 36711 (S.D. Tex. Mar. 18, 2013). The EEOC brought an action alleging that Defendants had a nationwide policy of denying employment to Black and Hispanic applicants for many hourly and salaried positions at their retail stores, because of their race in violation of Title VII. According to the EEOC, Defendants hired Black and Hispanic applicants at rates far below their availability in the relevant labor pools. The EEOC alleged that Defendants’ operating procedure of discriminating minorities emanated from Defendants’ top management, and specifically, from owner and founder, Johnny Morris. In addition, the EEOC claimed that Defendants had unlawfully retaliated against employees who opposed practices that they reasonably perceived to violate Title VII. Defendants filed a motion to dismiss, which the Court granted in part. The EEOC identified almost 200 potential Black and Hispanic claimants who were denied employment. In support of its Title VII claim, the EEOC alleged that in a meeting of Store General Managers in 2004 or 2005, in response to a question concerning racial quotas,
Morris said “this company will never have a quota system because that’s not the kind of people I want working in my stores.” *Id.* at *9. The Court observed that Defendants’ hiring preference for Whites was known as “the Profile” and the EEOC provided a few examples in which Human Resources Managers referred specifically to the Profile as a directive to hire White candidates. *Id.* at *9-10. The Court remarked that while it found that Morris’ statement displayed a discriminatory attitude, it was insufficient to permit a fact-finder to conclude that any particular employment decision made by Defendants was linked directly to Morris’ statement. In addition, the Court also found that the EEOC failed to sufficiently plead a *prima facie* claim under the burden-shifting framework of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). The Court explained that the EEOC was missing vital information regarding whether Defendants were aware of a particular claimant’s race, whether a position was available when the claimant applied, and whether a similarly-situated individual was hired in lieu of the named claimant. The Court, however, remarked that this was precisely the type of information that the EEOC was likely to obtain through discovery.

Accordingly, the Court found that the EEOC had adequately put Defendants on notice regarding the nature of the EEOC’s claim. The Court therefore concluded that although the EEOC did not meet the requirements of a *prima facie* case under the *McDonnell Douglas* framework, the EEOC had provided names and details regarding the potential claimants, a description of discriminatory comments by Morris, and information regarding discriminatory actions and comments by other top-level managers. *Id.* at *17. Accordingly, the Court concluded that the EEOC had sufficiently pled a § 706 claim to survive the motion to dismiss. The Court also noted that the EEOC asserted a retaliation claim on behalf of five employees. Based on the record before it, the Court concluded that it should bar two claimants, where the EEOC did not allege any adverse employment action against them; at the same time, however, the EEOC had asserted plausible claims on behalf of the remaining three claimants. Similarly, the Court found that the EEOC had sufficiently shown – by statistical and anecdotal evidence – that Defendants engaged in a pattern or practice of discrimination. Accordingly, the Court granted Defendants’ motion in part as to the EEOC’s retaliation claims only.

**EEOC v. Bass Pro Outdoor World, LLC, 2013 U.S. Dist. LEXIS 142796 (S.D. Tex. Oct. 2, 2013).** The EEOC sued Defendants for alleged violations of Title VII. Defendants filed a motion for summary judgment, urging dismissal of the case based on the EEOC’s failure to attempt conciliation in good faith. In response, the EEOC filed its own motion for partial summary judgment, arguing that “whether the EEOC attempted conciliation is judicially reviewable, but how the EEOC conducted conciliation is not.” *Id.* at *2. The Court rejected the EEOC’s argument, noting that “it is simply not open to the Court to hold unreviewable whether the Commission has satisfied its duty to attempt conciliation.” *Id.* at *7. The Court determined that it was bound by the Fifth Circuit’s unambiguous ruling that it could review whether the EEOC has adequately fulfilled its statutory conciliation requirement based on “the reasonableness and responsiveness of the EEOC’s conduct under all the circumstances.” *Id.* at *5. The Fifth Circuit established a three-part test for this inquiry, requiring the EEOC to: (i) outline to the employer the reasonable cause for its belief that Title VII has been violated; (ii) offer an opportunity for voluntary compliance; and (iii) respond in a reasonable and flexible manner to the reasonable attitudes of the employer. *Id.* at *6. As such, “as far as this Court [was] concerned, the Fifth Circuit has spoken on the matter; this Court is not free to adopt the EEOC’s understanding of Title VII. *Id.* at *8. The Court also rejected the EEOC’s arguments that Defendants lack standing under the Administrative Procedures Act (“APA”) and that sovereign immunity and separation of power principles prevent the Court from reviewing the EEOC’s conciliation efforts. First, the Court flatly rejected the EEOC’s argument regarding APA standing, noting that the APA, which allows a private individual to bring suit based on a legal wrong committed by an agency, did not govern the suit because the case was brought by the agency, not an individual. As such, “the APA is simply not relevant.” *Id.* at *10. Moreover, the Court noted that standing was not even a relevant concept, where Defendant simply sought to challenge a statutory precondition to the EEOC’s authority to file suit. *Id.* at *7. Second, the Court rejected the EEOC’s sovereign immunity arguments. Generally, sovereign immunity protects the government from being sued without its consent. However, the Court refused to apply the doctrine in this context, explaining that “[i]t would make little sense for Congress to impose certain conditions precedent on the EEOC’s authority to bring suit if the EEOC could just turn around and claim sovereign immunity from judicial enforcement of the condition.” *Id.* at *13.
Third, the Court rejected the EEOC’s separation of powers argument, noting that the EEOC failed to cite any case in which a statutorily required precondition to filing a lawsuit was found unreviewable by the Court. *Id.* at *14. Rather, the Court observed that while judges do not “wade” into the EEOC’s decision to accept or reject specific conciliation offers, Congress has tasked Courts with ensuring that the EEOC adheres to Congress’ pre-litigation conciliation directive. *Id.* Finally, the Court noted that it “cannot agree” with the EEOC’s position that itsconciliation efforts are not subject to judicial review. Rather, the Court held that such review is mandated by not only binding Fifth Circuit precedent, but also the text and purpose of the statute. Accordingly, the Court denied the EEOC’s motion. *Id.* at *17.

**EEOC v. Boh Brothers Construction Co., LLC, 731 F.3d 444 (5th Cir. 2013).** The EEOC sued Defendant for its alleged mistreatment of a male employee due to same-sex harassment by a male manager and co-workers. After trial, the jury returned a verdict in the EEOC’s favor. Defendant appealed, contending that Title VII did not cover the conduct at issue. The Fifth Circuit held, by an *en banc* majority of ten judges, that harassment based on gender-stereotypes can be actionable harassment “because of sex” under Title VII. An ironworker on a bridge-maintenance crew was subjected to “almost-daily verbal and physical harassment because [he] did not conform to [the supervisor’s] view of how a man should act.” *Id.* at 449. Among other things, his supervisor: (i) ridiculed him because he used baby wipes instead of traditional toilet paper; (ii) called him “pu–y,” “princess,” and “fa–ot”; (iii) stood behind him and simulated intercourse; (iv) exposed his penis while waving and smiling; and (v) joked about forcing oral sex upon him. *Id.* at 449-50. As the Fifth Circuit observed, the EEOC’s evidence demonstrated the supervisor thought the victim was not a “manly-enough man” and fell outside the supervisor’s “manly-man stereotype.” *Id.* at 453, 459. The EEOC’s evidence did not follow any of the three evidentiary paths set forth by the Supreme Court for addressing same-sex harassment as articulated in *Oncale v. Sundowner Offshore Services,* 523 U.S. 75, 80-81 (1998). Thus, the same-sex harassment claim was cognizable even though: (i) there was no evidence the harasser was homosexual or motivated by sexual desire; (ii) there was no evidence the harasser was motivated by the general hostility toward a particular gender in the workplace; and (iii) there was no evidence the harasser treated men and women differently. *Id.* at *460. The Fifth Circuit, however, agreed with the Third, Seventh, Eighth, and Tenth Circuits in holding that the three evidentiary paths for proving same-sex harassment in the Supreme Court’s *Oncale* decision were merely “illustrative, not exhaustive.” *Id.* at 455. Thus, the EEOC could prove that the same-sex harassment was “because of sex” by presenting evidence that the harassment was based on a perceived lack of conformity with gender stereotypes. *Id.* at 456. Notably, the EEOC was not required to show that the victim was not, in fact, “manly.” *Id.* at 457. Rather, the Fifth Circuit reasoned that it was enough to show that the harasser admitted his epithets were directed at the victim’s masculinity. *Id.* at 465-70.

**EEOC v. Dynmcdermott Petroleum Operations Co., 2013 U.S. App. LEXIS 15264 (5th Cir. July 26, 2013).** In an action brought by the EEOC on behalf of Michael Swafford (“Swafford”) against Defendant under Title I of the Americans With Disabilities Act (“ADA”) and the Age Discrimination in Employment Act (“ADEA”), the Fifth Circuit reversed the District Court’s grant of summary judgment in Defendant’s favor. The Fifth Circuit found that genuine issues of material fact precluded summary judgment for Defendant. Swafford, a former planner/scheduler for Defendant, was recommended for an open position at Defendant’s facility by both his former supervisor and the manager in charge of hiring for the position. *Id.* at *2. Despite the recommendations, Defendant’s facility’s director, who had direct supervisory authority over the hiring manager, repeatedly stated that Swafford should not be hired because of his age, then 56 years, and his wife’s cancer, which the facility’s director assumed would interfere with Swafford’s ability to perform his job duties. *Id.* at *3. The director had also sent e-mails to the other officials, including the New Orleans-based Director of Operations and Management, citing Swafford’s age and his wife’s cancer as reasons for his opposition to hiring Swafford. *Id.* at *3-4. The director had further specified that he wanted to hire someone out of high school or in their mid-twenties, even though Swafford was qualified and need not be trained, having already worked in that position previously. *Id.* at *5. The director additionally threatened the hiring manager with disciplinary action for the hiring manager’s “insubordination” related to the prospective hiring of Swafford. *Id.* at *5-7. Subsequently, the hiring manager hired a 35-year-old applicant with no prior experience with Defendant. The District Court had ruled in Defendant’s favor,
finding that the director was not involved in the hiring, as the hiring manager was the one who hired the young candidate and there was no reason to believe the director influenced the hiring manager. Id. at *14. According to the District Court, the director’s statements and actions amounted to “mere stray remarks” because the EEOC could not establish that the director had authority over the hiring decision. Id. The Fifth Circuit, however, disagreed with the District Court and held that a reasonable jury could return a verdict for the EEOC that, but for Swafford’s age and disabled wife, Defendant would have hired him. Id. at *30. The Fifth Circuit pointed out that the director was the hiring manager’s direct supervisor, had issued a corrective action memo against the hiring manager, and had the authority to affect the hiring manager’s employment. Id. at *16. The Fifth Circuit therefore rejected the District Court’s finding that the director had no influence over the hiring manager and his hiring decision. The Fifth Circuit also rejected the District Court’s finding that there was a non-discriminatory reason to hire the younger candidate, i.e., the younger candidate was more qualified. The Fifth Circuit concluded that the District Court’s finding had no evidentiary support. While Swafford had experience with the SAP program used by Defendant, the younger candidate had been a logistical coordinator in the military and had no experience working with the specific system used by Defendant. Id. at *24. Moreover, Swafford’s performance as a planner/scheduler was above expectations and described as excellent and meticulous, and the director had himself sent an e-mail saying that he might need to hire Swafford temporarily to help out until someone was hired. Id. at *25. The Fifth Circuit therefore concluded that the District Court erred in granting summary judgment to Defendant.

**EEOC v. Houston Funding II, Ltd., 717 F.3d 425 (5th Cir. 2013).** The EEOC, on behalf of a female charging party formerly employed by Defendant, brought an action against Defendant alleging that it unlawfully discriminated against the charging party on the basis of her sex, including her pregnancy, childbirth, and related medical conditions. The EEOC alleged that Defendant terminated the charging party in violation of Title VII and the Pregnancy Discrimination Act (“PDA”) after she requested lactation space to breast-feed while at work. Subsequently, Defendant argued that Title VII does not cover breast-pump discrimination and moved for summary judgment. The District Court granted Defendant’s motion and held that, even if the EEOC’s allegations were true, “[f]iring someone because of lactation or breast-pumping is not sex discrimination,” and that lactation is not a related medical condition of pregnancy for purposes of the PDA. Id. at 427. The EEOC thereafter appealed. On appeal, the Fifth Circuit held that discrimination on the basis of lactation is a form of unlawful sex discrimination under Title VII and the PDA because of the biological fact that lactation is a physiological condition distinct to women who have undergone pregnancy and that men, as a matter of physiology, could not be fired for the same reason. Id. at 429. Furthermore, as to whether lactation is a related medical condition of pregnancy for the purposes of the PDA, the Fifth Circuit engaged in a plain-meaning analysis of the statutorily undefined term “medical condition,” and reasoned that lactation is a physiological process caused by hormonal changes associated with pregnancy and childbirth. The Fifth Circuit observed that since Title VII was amended to include the PDA, case law authorities have interpreted Title VII to cover a far wider range of employment decisions entailing female physiology. Id. at 427. The Fifth Circuit opined that if an employer unlawfully discriminated based on sex by instituting a policy revolving around a woman’s post-pregnancy menstrual cycle – as in *Harper v. Thiokol Chemical Corp.*, 619 F.2d 489 (5th Cir. 1980) – it was difficult to see how an employer who makes an employment decision based upon whether a woman was lactating could avoid a finding of unlawful sex discrimination. Id. at 429. Because both menstruation and lactation are aspects of female physiology affected by pregnancy, the Fifth Circuit held that each fit into a reasonable definition of “pregnancy, childbirth, or related medical conditions.” Id. at 429-30. Therefore, the Fifth Circuit reversed the District Court’s judgment and remanded for further proceedings.

**Editor’s Note:** The result in **EEOC v. Houston Funding II, Ltd.** is one of the Commission’s significant victories of 2013. It represents the EEOC’s efforts to create new law and stretch coverage under Title VII.

**EEOC v. LHC Group, Inc., 2013 U.S. Dist. LEXIS 72604 (S.D. Miss. May 22, 2013).** The EEOC brought an action under the Americans With Disabilities Act (“ADA”) on behalf of Kristy Sones, a Registered Nurse, alleging that Defendant terminated her because of her disability of epilepsy. The EEOC moved to exclude the opinion of Defendant’s experts, Dr. Ruth K. Fredericks, an expert in the field of neurology, and Dr. Carl...
G. Brooking, an economist. Id. at *1-2. The Court denied the EEOC’s motion. The EEOC contended that Dr. Fredericks did not have sufficient knowledge of Sones’ employment conditions or critical provisions of the Americans With Disabilities Act Amendments Act of 2008 (“ADAAA”). Dr. Fredericks had reviewed Sones’ medical records and other documents such as Sones’ EEOC and ADA complaints, job descriptions, and certain depositions in reaching the conclusions in her report. Sones had experienced two seizures in her lifetime. Although Dr. Fredericks did not dispute the diagnosis of epilepsy, she expressed skepticism that Sones’ reported symptoms after the second seizure were caused by the prescribed medication. Dr. Fredericks noted the appearance of Sones’ self-medication in the medical record, and instances where Sones tested positive for several different drugs, including drugs she said were not hers. Dr. Fredericks found Sones’ complaints more consistent with Sones’ self-medication than her prescribed anti-seizure medication, and her report expressed doubt that Sones was disabled from epilepsy, noting that Sones testified that on a normal day, she had no limitations on major life activities. Further, Dr. Fredericks noted that Sones, on her own, had stopped taking her anti-seizure medication one year before her second seizure. Id. at *5-6. Moreover, Dr. Fredericks opined that as a registered nurse, Sones had a duty to report any memory or alertness problems she was experiencing, whether caused by medication or a physical impairment, and Sones’ failure to do so posed a direct threat to the health of the patient and herself. The Court determined that Dr. Fredericks was qualified by education and experience to assess Sones’ medical records and reach conclusions therefrom, and stated that her knowledge of ADA legal standards was irrelevant. Although the EEOC asserted that Sones’ epilepsy diagnosis automatically qualified her as disabled under the ADA, the Court observed that individuals claiming disability status under the ADA may not rely merely on evidence of a medical diagnosis of an impairment, but must present evidence that the extent of the limitation is substantial and caused by their impairment in terms of their own experience. Id. at *6-7. The Court also concluded that Dr. Fredericks was well-qualified to opine about the danger Sones posed to patients because of her medical condition, and her opinions were relevant to the issues in the case. Id. at *7-8. Dr. Brooking also was engaged to provide lost wage damage calculations. The EEOC argued that no expert opinion was required in this area because the calculation of money damages could involve pure arithmetic, and required no methodology other than common sense. The Court, however, noted that expert economic testimony was routinely admitted to assist a jury in calculating damages in employment cases. The Court remarked that the value of the economic expert’s opinion was in advising the fact-finder of the appropriate inputs, and that Dr. Brooking’s expert economic opinion testimony could assist the fact-finder in calculating lost wage damages. Thus, the Court opined that both experts’ opinion testimony was admissible, and denied the EEOC’s motion. Id. at *8-9.

**EEOC v. Signal International, LLC, 2013 U.S. Dist. LEXIS 128990 (E.D. La. Sept. 10, 2013).** The EEOC and private Plaintiffs brought an action on behalf of a putative class, consisting of over 500 workers of Indian nationality that Defendant allegedly trafficked into the United States through the H-2B guest-worker visa program in violation of their rights, including their right to be free from forced labor and involuntary servitude under the 13th Amendment, the Trafficking Victims Protection Act of 2003, and the Racketeer Influenced and Corrupt Organizations Act. Both the EEOC and Defendant moved for protective orders, and the Court granted the motions in part and denied in part. The EEOC sought to prohibit Defendants from inquiring into any individual’s immigration history or status. Defendant sought to avoid the abuse of the discovered material and to protect the privacy of non-parties in a proposed protective order. First, the Court noted that even if the private Plaintiffs’ current immigration status was relevant to the claims asserted by the EEOC, discovery of such information would have an intimidating effect on an employee’s willingness to assert his workplace rights and subject such an employee to potential deportation. Further, the Court stated that the protective order would be necessary as it was entirely likely that any undocumented litigant forced to produce documents related to his or her immigration status would withdraw from the suit rather than produce such documents and face potential deportation. Although Defendant argued that the information as to current immigration status would allow them to test the private Plaintiffs’ credibility, the Court remarked that the opportunity to test the credibility of Plaintiffs did not outweigh the public interest in allowing employees to enforce their rights. Accordingly, the Court granted the EEOC’s motion on this issue which included the non-disclosure of Plaintiffs’ tax returns. The EEOC included the following language in the procedure to be followed with regard to confidential documents, namely that “as a federal government
agency, the EEOC had substantial obligations to disclose documents not prohibited by disclosure by law, or valid reason.” *Id.* at *21. Defendant argued that this language should be stricken from the proposed protective order because the Freedom of Information Act (“FOIA”) does not apply to Courts of the United States. The Court stated that the proposed protective orders would not protect records generated by a Court of the United States, and that the records involved in the discovery process would be generated by the parties, one of which was an agency of the United States and subject to the FOIA. The Court found that a protective order prohibiting parties from publicly disseminating information obtained through the pre-trial discovery process was warranted here, and noted that no party to a lawsuit has a First Amendment right to disseminate information obtained through the pre-trial discovery process. *Id.* at *24. The Court stated that the material collected through the pre-trial discovery process should be limited to the preparation for and use at trial and for no other purpose until this dispute was resolved. Finally, the Court stated that parties could disseminate the addresses and telephone numbers of former employees to persons who, in good faith, they deemed necessary to the prosecution of the lawsuit.

**EEOC v. Signal International, LLC, 2013 U.S. Dist. LEXIS 138476 (E.D. La. Sept. 26, 2013).** In this Title VII action brought by the EEOC against Signal International, a group of Signal’s former employees (“Plaintiffs-Interveners”) filed a complaint in intervention, seeking prospective relief under 42 U.S.C. § 2000e-5(g) and compensatory damages for pecuniary and non-pecuniary losses. Plaintiffs-Interveners also included a claim against Signal for recruitment fees (the “recruitment claim”) they paid prior to their arrival in the United States. *Id.* at *6-7. Signal moved to dismiss Plaintiffs-Interveners’ recruitment claim, and the Court granted the motion. While Signal asserted that Title VII did not apply extraterritorially, Plaintiffs-Interveners argued that the extraterritorial application of Title VII was not required because Plaintiffs-Interveners worked at Signal’s facilities in the United States. The Court stated that Plaintiffs-Interveners’ other Title VII claims were based on conditions within the United States, and as such, presented no extraterritoriality issues. However, the alleged discriminatory conduct in connection with the recruitment claim related to events outside of the United States before Plaintiffs-Interveners began work at Signal’s facilities. The Court noted that under § 2000e(f) of Title VII, with respect to employment in a foreign country, an employee includes an individual who is a citizen of the United States. *Id.* at *13. Further, the Court observed that § 2000e-1(a) states that Title VII shall not apply to an employer with respect to the employment of aliens outside any State. *Id.* Thus, the Court opined that it was Congress’ intention to exclude non-citizens located outside of the United States from the protection of Title VII. At the same time, non-citizens are covered by the statute if they are working in the United States. *Id.* at *14. Here, Plaintiffs-Interveners paid all recruitment fees prior to their arrival in the United States, and Signal’s alleged discriminatory acts – requiring Plaintiffs-Interveners to pay higher recruitment fees than other non-Indian workers – occurred before Plaintiffs-Interveners came to the United States. The Court thus held that under §§ 2000e(f) and 2000e-1(a), Plaintiffs-Interveners were not covered by Title VII when they paid the recruitment fees because they were non-citizens and they were not working within the United States at the time. Further, the Court remarked that Plaintiffs-Interveners could not recover under Title VII for their recruitment claim because of “when” the claims arose, not “where” the Interveners eventually worked. *Id.* at *16. Accordingly, the Court dismissed Plaintiffs-Interveners’ claim for recruitment fees.

**EEOC v. Signal International, LLC, 2013 U.S. Dist. LEXIS 169705 (E.D. La. Dec. 2, 2013).** The EEOC brought an action under Title VII alleging that Defendants discriminated against approximately 500 Indian national employees. The EEOC sought an order protecting private information of the employees and their families from discovery, including immigration status, income history, and current addresses. *Id.* at *15. Defendants argued that the information was necessary to protect their constitutional right under the Fifth Amendment to impeach those testifying against Defendants because the information was proof of bias, motive, and lack of credibility. *Id.* at *16. Defendants also sought a protective order of their own to prevent the dissemination of information gained through pre-trial discovery and to make former employees’ addresses and telephone numbers privy to only counsel in the case. The Magistrate Judge had granted the EEOC’s motion for a protective order with respect to the private information of the employees and their families. The Magistrate Judge also had granted Defendants’ motion for a protective order limiting the use of materials gathered through pre-trial discovery to preparation for and for use at trial, and also limited
disclosure of former employees’ addresses and telephone numbers to only those persons deemed in good faith necessary to the prosecution of the lawsuit. Defendants filed Rule 72 objections to the Magistrate Judge’s order to the extent it prevented discovery regarding immigration history and status, post-Signal employment, and tax returns. The Court affirmed the Magistrate Judge’s order. Defendant argued that the Magistrate Judge committed legal error in preventing the discovery of the employees’ private immigration and post-employment information because the Magistrate Judge did not fully consider Defendants’ Fifth Amendment right to cross-examine witnesses. *Id.* at *19. The Court noted that the Magistrate Judge’s order fully examined and balanced the relevance of the immigration information, the *in terrorem* effect on the employees, and Defendants’ right to cross-examine witnesses. *Id.* Further, the Magistrate Judge had found the information to be irrelevant, and concluded the *in terrorem* effect caused by seeking the employees’ immigration information outweighed Defendants’ interests in using the information to cross-examine witnesses. *Id.* at *20. Moreover, the Court stated that Defendants had not shown that the Magistrate Judge had failed to apply or misapplied relevant statutes, case law, or rules of procedure. Thus, the Court opined that the Magistrate Judge had fully considered Defendants’ right to cross-examine witnesses, and did not abuse his discretion.

**EEOC v. Simbaki, Ltd., 2013 U.S. Dist. LEXIS 74866 (S.D. Tex. May 29, 2013).** The EEOC brought an action on behalf of two female bartenders formerly employed by Defendant alleging that Defendant subjected the charging parties to unlawful sexual harassment and retaliated against them in violation of Title VII for reporting incidents of sexual harassment, which resulted in their constructive discharge and wrongful termination. Subsequently, the EEOC moved for partial summary judgment on the issues that: (i) Defendant created a hostile work environment that was severe or pervasive; and (ii) Defendant failed to establish its *Faragher/Ellerth* affirmative defense. With respect to the hostile work environment, issue Defendant asserted that questions of fact were not resolved by the EEOC’s citations to the Defendant franchise owner’s “vague and sometimes eccentric descriptions of the restaurant as ‘grab-assy,’” and noted that the charging parties chose to continue working at the location before eventually resigning. *Id.* at *18-19. However, Defendant conceded that its franchise owner “may have lapsed in his efforts” to respond to the complaints of the charging parties. The Court rejected Defendant’s argument and held that “the uncontroverted evidence, primarily the deposition testimony of [Defendant’s franchise owner], establish[ed] that [the location] was rife with sexual harassment.” *Id.* at *19. Furthermore, the Court noted that “[a]lthough the standard is severe or pervasive, the conduct admitted to by [the franchise owner] was both severe and pervasive.” *Id.* at *20 (emphasis in original). Therefore, the Court held that the EEOC was entitled to summary judgment as to whether Defendant created a hostile work environment that was severe or pervasive. With respect to the *Faragher/Ellerth* affirmative defense, the Court observed that Defendant’s franchise owner admitted during his deposition that he had never reviewed Defendant’s operations manual, never posted Defendant’s sexual harassment policy, and never provided training to employees in preventing sexual harassment or workplace discrimination. *Id.* at *21-22. Thus, the Court noted that “[t]he only avenues available to [the charging parties] were either to report the sexual harassment directly to the harasser, or to report it to individuals who had no authority other than to report the complaint to the harasser.” *Id.* at *22-23. Furthermore, the Court determined that both charging parties had verbally complained regarding the harassment and one had complained in writing. Therefore, the Court held that Defendant failed to raise a genuine issue of material fact regarding whether it had exercised reasonable care to prevent and correct harassment, or whether the charging parties had unreasonably failed to take advantage of any preventive or corrective opportunities to avoid harm. *Id.* at *23-24. Consequently, the Court held that Defendant was precluded from asserting the *Faragher/Ellerth* affirmative defense.

**EEOC v. Stone Pony Pizza, Inc., 2013 U.S. Dist. LEXIS 112605 (N.D. Miss. Aug. 9, 2013).** The EEOC brought an action under Title VII alleging racial discrimination by Defendant against Chendra Johnson-Hampton, Wylinda Gregory, and Youmeka Simpson (“Movants”). The Movants sought to intervene in the EEOC’s action on the ground that they had a statutory right to intervene pursuant to 42 U.S.C. § 2000e-5(f)(1) and that their claims shared common questions of law or fact pursuant to Rule 24(b)(1)(B). The Court granted the motion. The EEOC supported the Movants’ request and argued that Johnson-Hampton was expressly accorded the right to intervene, and Simpson and Gregory, as similarly-situated parties,
the criteria for opting-in under the law of the Fifth Circuit. The Court agreed with the EEOC that Johnson-Hampton was accorded the right to intervene in this action, and found that Simpson and Gregory were also aggrieved persons, considering that the scope of the EEOC’s investigation included their claims, and the EEOC filed this lawsuit to obtain relief for them and had named them in its complaint. Defendant argued that the Movants’ claims did not meet the requirement for permissive intervention under Rule 24(b)(1)(B), and diverted the Court’s attention to the issue of whether Simpson and Gregory were similarly-situated for purposes of piggy-backing on Johnson-Hampton’s charge. The Court stated that as the allegations in the Movants’ complaint were almost identical to those contained in the EEOC’s complaint, intervention was proper for all of the Movants. Further, the Court observed that as Defendant did not contest the timeliness of the motion or alleged prejudice or undue delay, intervention should be allowed. Defendant also contended that the Movants’ claims were barred due to their failure to exhaust administrative remedies. The Court remarked that individuals who have not timely filed a charge with the EEOC might piggy-back on the timely filed charge of another. Id. at *7. Defendant did not dispute that Johnson-Hampton’s charge was timely filed, but contended that Gregory’s charge and Simpson’s charge were procedurally time-barred. The Court observed that the EEOC’s complaint alleged that Simpson and Gregory applied for employment when Johnson-Hampton sought employment. Because Defendant had failed to present facts in support of its contention that Gregory’s charge and Simpson’s charge were actually time-barred at the time Johnson-Hampton filed her charge, the Court found this contention was without merit. Further, Defendant argued that Gregory and Simpson could not piggy-back on Johnson-Hampton’s charge because that charge did not allege class-wide discrimination, and Defendant pointed out that the charge was brought in Johnson’s name only and made no reference to other similarly-situated individuals. The Court opined that the single filing rule was a limited exception to the Title VII charge-filing requirement and under certain conditions would allow a non-filing Plaintiff to join the lawsuit of a similarly-situated litigant who had filed the statutorily mandated charge. Id. at *10. The Court found that as long as the EEOC and Defendant were aware of the nature and scope of the allegations, the purposes behind the administrative filing requirement was satisfied and no injustice or contravention of congressional intent occurred by allowing piggy-backing. Id. Because Defendant admitted that it was aware of all three of the Movants’ charges during the conciliation stage, it failed to convince the Court that allowing them to intervene in this action would be futile. Accordingly, the Court granted the Movants’ motion.

**EEOC v. Valero Refining-Texas L.P., 2013 U.S. Dist. LEXIS 42776 (S.D. Tex. Mar. 13, 2013).** The EEOC brought an action under the ADA alleging that Plaintiff-Intervener Bobby Bass was subjected to disability discrimination when Defendant failed to accommodate his reading disorder by administering the safety test orally, and when, as a result of this failure to accommodate, Bass was denied the opportunity to work at Defendant’s facility. Defendant hired Modern EPC, Inc. (“Modern”) to work on an improvement project as an independent contractor. Modern was in charge of hiring employees to work on the improvement project, and paid these workers, disciplined them, supervised their work, set their work schedules, provided the tools and equipment used on the project, and had the authority to fire them. Modern hired Bass as a general foreman. As a condition to employment within its refinery, Defendant required that all contractors pass a written safety examination. Although Modern requested that Bass be allowed to take this exam orally, due to his reading disorder, Defendant denied the request. Because Bass could not pass the written safety exam, Defendant exercised the contractual provision allowing it to exclude Modern’s employees from its premises, and denied Bass’ access to the refinery. Id. at *1-4. Defendant moved for summary judgment arguing, inter alia, that it was not Bass’ employer under the ADA since he was an independent contractor. The Court granted the motion. First, the Court noted that the economic realities of the relationship between Defendant and Bass, combined with the control Modern retained over Bass, demonstrated that Bass was an independent contractor with respect to Defendant. Regarding the economic reality factors, the Court found that Defendant did not pay Bass’ salary, withhold taxes, or provide benefits, and it set few terms and conditions of Bass’ employment. In terms of controlling the means and manner of Bass’ work, the Court remarked that it was Modern, not Defendant, that had the authority to hire, fire, supervise, and set the work schedule of Bass. Id. at *7. The Court also analyzed whether Defendant was a joint employer. The Court rejected Defendant’s argument that it should apply the integrated enterprise test rather than the joint employer test, noting that the integrated enterprise test was
not a good fit for a case involving one company having a service contract with another, as opposed to affiliated or related companies. *Id.* at *9.* In applying the joint employer test, the Court considered five factors, including: (i) whether the alleged joint employer did the hiring and firing; (ii) directly administered any disciplinary procedures; (iii) maintained records of hours, handled payroll, or provided insurance; (iv) directly or indirectly supervised employees; or (v) participated in the collective bargaining process. *Id.* at *11.* The Court found that Defendant’s exclusion of Bass from its premises, which caused Modern to terminate him, without more, did not amount to the control required to satisfy the joint employer test. The Court also determined that Defendant did not impose discipline, and it did not maintain Bass’ record of hours, handle payroll, or provide insurance. It held that did not directly supervise Bass and no collective bargaining process existed. Thus, the Court held that the joint employer test could not be satisfied, and granted Defendant’s motion for summary judgment. *Id.* at *14-15.*

(vi) Sixth Circuit

**EEOC v. Care Centers Management Consulting, Inc.**, 942 F. Supp. 2d 771 (E.D. Tenn. 2013). The EEOC brought an action on behalf of John/Jane Doe (“Doe”), the aggrieved party, alleging that Defendants engaged in unlawful employment practices that included discharging Doe because Doe suffered from HIV. The EEOC alleged that both Defendants – Care Centers Management Consulting, Inc. (“CCMC”) and Christian Care Center of Johnson City, Inc. (“Christian Care”) – operated as a single employer and/or integrated enterprise; that both shared common ownership and common management, with J.R. Lewis serving as the president of both entities; and both had centralized control of labor relations and personnel issues. *Id.* at 774. CCMC moved to dismiss, and the Court denied the motion. First, CCMC contended the EEOC’s complaint against it should be dismissed pursuant to Rule 12(b)(1) for lack of subject-matter jurisdiction because Doe failed to exhaust his administrative remedies against CCMC. Further, CCMC asserted that it was not Doe’s employer and Doe failed to name CCMC as its employer during the charge proceedings. The Court observed that a failure to comply with the naming requirement is excusable only if an “identity of interest” exists between the named and unnamed parties. *Id.* at 777. The Court noted that both Defendants had the same president, J.R. Lewis, who admitted to having a shared ownership interest in Christian Care. Although the charge only named Christian Care as the respondent, neither party disputed that CCMC had notice of the charge, and various communications supported this conclusion. CCMC, however, claimed that such notice was insufficient to afford it an opportunity to participate in the conciliation process, and that throughout the entire process only Christian Care was named as a Defendant and all further communication during the conciliation process was directed at Christian Care. The Court, however, opined that because of the interrelatedness of the management and directors, and some of the other facts set forth supporting the EEOC’s “single employer” or “integrated enterprise” theory, it would not have been unreasonable for CCMC to have concluded from the notice it received that it could or should have participated in the conciliation process. *Id.* at 779. Further, although Lewis contended he was not involved in making any employment-related decisions of Christian Care, the Court observed that the language in Christian Care’s Personnel Employee Handbook left open the possibility that Lewis may be involved in major decisions affecting all aspects of Christian Care’s operations. Thus, the Court determined that Defendants’ interests were similar enough that it would have been unnecessary to include CCMC directly in the EEOC proceedings. Thus, because the EEOC sufficiently showed that the shared ownership and management between Defendants supported a determination that an identity of interest existed, the Court denied CCMC’s motion to dismiss pursuant to Rule 12(b)(1). Second, CCMC contended the EEOC’s complaint should be dismissed for failure to state a claim under Rule 12(b)(6). The Court observed that the “single employer” or “integrated enterprise” doctrine allows two companies to be deemed interrelated such that they constitute a single employer subject to liability under the ADEA and/or the ADA. *Id.* at 780. The EEOC alleged that the two entities listed the same principal address and mailing address with the Tennessee Secretary of State, which the Court found to be indicative that there could be common or interrelated aspects to their operations. The Court concluded that Lewis’ dual role with both entities demonstrated that there was common management. Thus, because the EEOC’s complaint plead plausible facts sufficient to support the single employer or integrated enterprise theory, the Court denied CCMC’s motion to dismiss under Rule 12(b)(6).
The EEOC brought an action on behalf of Kayla Roberts, Ashley Hopmayer, and Miranda Watson alleging that they were sexually harassed by Gallian Fulton, Defendant’s general manager. Defendant filed a motion for summary judgment, and the EEOC cross-filed for partial summary judgment. The Court, however, granted only the EEOC’s motion in part. At the very outset, Defendant argued that because Roberts engaged in consensual sex with Fulton and because Roberts maintained a six-month long romantic relationship with him, her conduct proved that the alleged sexual advances were welcome. Defendant contended that relevant Tennessee law established a 16-year-old can consent to sex in the civil context because there was no definitive statutory age of consent in Tennessee. The Court, however, observed that in cases such as these, the primary concern was that the older male would use deceptive or manipulative methods to overcome the immature female’s reluctance to engage in sex. Id. at 918. Here, the sexual conduct occurred in an employment setting, as Fulton was Roberts’ supervisor, and was 22 years older than Roberts. Accordingly, the Court concluded that the presumption in favor of Roberts’ ability to consent was clearly rebutted, and there was sufficient evidence to raise a genuine issue of material fact as to whether the harassment was welcome. Defendants also invoked the affirmative defense under Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), where the Supreme Court held that an employer is not vicariously liable if: (i) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (ii) that Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. Id. at 919. Defendant asserted that it satisfied Ellerth’s requirements because it exercised reasonable care to prevent and correct sexually harassing behavior, and Roberts did not report any alleged harassment to Defendant. The Court rejected the defense position. It noted that with regard to supervisors, it is no longer enough for an employer to take corrective action; employers have an affirmative duty to prevent sexual harassment by supervisors. Id. at 920. As to Hopmayer’s sexual harassment claim, the Court noted that she undisputedly found Fulton’s conduct offensive, and under an objective standard, the Court concluded that the 38-year-old Fulton’s sexual harassment of the teenage Hopmayer created an intolerable work environment. In addition, the Court remarked that considering Hopmayer’s status as a juvenile for a period of her employment, a jury could find Fulton’s conduct sufficiently severe. Accordingly, the Court concluded that there was sufficient evidence to raise a genuine issue of material fact as to whether the EEOC proved a prima facie case; as to whether Hopmayer took sufficient steps to avoid harm; and as to whether she was constructively discharged. Id. at 921-22. Similarly, the Court found that there was sufficient record support to raise a genuine issue of material fact as to whether Fulton’s alleged conduct toward Watson was severe and pervasive. In its cross-motion, the EEOC argued that: (i) Defendant’s position that the EEOC’s claims were barred because all administrative remedies had not been properly exhausted was factually unsupported; (ii) Defendant’s defense that the EEOC’s claims were barred because they exceeded the scope of or were inconsistent with the charge of discrimination filed with the EEOC was factually unsupported; and (iii) Defendant could not avail itself of the Ellerth defense. The Court, however, found that the EEOC’s motion for partial summary judgment should be granted in part as to Defendant’s administrative-exhaustion affirmative defenses, but the EEOC’s motion should be denied as to its claims concerning Defendant’s Ellerth affirmative defense.

EEOC v. Finish Line, Inc., 2013 U.S. Dist. LEXIS 56793 (M.D. Tenn. April 19, 2013). The EEOC brought an action on behalf of Kayla Roberts, Ashley Hopmayer, and Miranda Watson alleging that they were sexually harassed by Gallian Fulton, Defendant’s general manager. Earlier, the jury returned a verdict in favor of the EEOC’s claims on behalf of the claimants and found that Fulton subjected the claimants to a hostile work environment, and that Defendant retaliated against and constructively discharged Watson. Although the jury awarded $10,000 in compensatory damages to each claimant, it did not find that Defendant, based upon the conduct of Fulton, acted with malice or reckless indifference to the federally protected rights of claimants, and did not award any punitive damages. The EEOC filed a renewed motion for judgment as a matter of law for Roberts’ constructive discharge claim or in the alternative, a new trial for Roberts on that claim and a new trial for damages. The Court granted both the motions. The Court remarked that Defendant was vicariously liable for Fulton’s conduct as the store manager whose authority extended to all conditions of claimants’ employment at the store. Further, the Court stated that despite evidence of Defendant’s written policies on sexual harassment and that the
store's assistant general managers knew of Fulton's conduct and had a duty to report such conduct, the assistant general managers did not report Fulton's conduct. The Court stated that given the jury's damages awards to each claimant, Defendant was vicariously liable for Fulton's conduct with Roberts. The Court also observed that to determine if there was a constructive discharge, both the employer's intent and the employee's objective feelings must be examined. *Id.* at *9. The Court noted that the undisputed evidence at trial established Fulton's repeated sexually exploitive conduct with Roberts, and given Fulton's age, position, and conduct and Roberts’ status as a minor employee with emotional maturity issues and a sexually transmitted disease, a reasonable employer would have foreseen from Fulton's conduct that Roberts would terminate her employment due to Fulton’s sexually predatory conduct. The Court opined that these undisputed facts clearly established that Roberts' quitting was a foreseeable result of Fulton’s conduct and that the jury’s finding that Roberts was not constructively discharged by Defendant was contrary to the evidence. Second, in its motion for new trial on damages, the EEOC contended that the jury's identical $10,000 damages award to each claimant and the jury’s finding that Defendant did not act with malice or reckless disregard to the federally protected rights of all claimants was against the weight of the evidence at trial and contrary to the Court’s jury instructions. The Court reviewed a comparative summary of Fulton’s conduct with each claimant, and noted that when comparing Fulton’s over-the-clothes touching of the shoulders, back, stomach, and legs of Hopmayer and Watson, the jury’s identical damage awards to Hopmayer and Watson were within the range of reasonableness, and should remain undisturbed. The Court, however, remarked that the evidence of Fulton's conduct toward Roberts was so grossly disproportional that identical compensatory awards to each claimant evinced bias against Roberts. The Court found that the evidence presented at trial did not support the jury’s award of identical $10,000 damage awards for Roberts and warranted a new trial on damages for Roberts. Finally, regarding a new trial on punitive damages, the Court observed that given Fulton’s relatively benign conduct toward Watson and Hopmayer, the jury could determine that Fulton’s conduct toward them was neither willful nor reckless disregard. The Court, however, found that regarding Roberts, Fulton’s acts exhibited a reckless disregard for Roberts’ right in the workplace, and that the jury's decision on punitive damages for Roberts was contrary to the evidence at trial. Accordingly, the Court granted the EEOC’s motions.

**EEOC v. Gregg Appliances, Inc., 2013 U.S. Dist. LEXIS 88694 (M.D. Tenn. June 25, 2013).** The EEOC, on behalf Courtney Keen, brought an action alleging that Defendant unlawfully retaliated against and wrongfully terminated Keen’s employment in violation of Title VII for reporting sexual harassment. Subsequently, Defendant moved for summary judgment. The Court noted that in order to establish a prima facie case of retaliation, the EEOC must show that: (i) Keen engaged in protected activity; (ii) the activity was known to Defendant; (iii) Keen was subjected to materially adverse action; and (iv) there was a causal connection between the protected activity and the adverse action. Defendant did not contest the first and third elements. With regard to the second element, Defendant argued that the EEOC failed to establish that Keen’s protected activity was known to Defendant because Defendant’s General Manager – who the EEOC alleged retaliated and wrongfully terminated Keen – was not aware of Keen’s protected activity. *Id.* at *14. The Court rejected Defendant’s argument and noted that knowledge of Keen’s prior protected activity could be inferred from evidence of the General Manager’s prior interaction with individuals with such knowledge of Keen’s protected activity and those taking the adverse action. *Id.* Thus, the Court held that the EEOC fulfilled its burden of proof to establish that Defendant was aware of Keen’s protected activity. With respect to the fourth element of whether there was a causal connection between the protected activity and the adverse action, Defendant argued that the EEOC could not establish that Keen’s sexual harassment complaint was the likely reason for any adverse employment action. In rejecting Defendant’s argument, the Court observed that the temporal proximity between Keen’s complaint and her termination was separated by less than four months. *Id.* at *15. Moreover, the Court noted it was only days in between Keen’s complaint and when Defendant’s General Manager issued the first of twelve disciplinary actions against Keen. *Id.* The Court held these facts were significant enough to constitute evidence of a causal connection. The Court also discussed the EEOC's “cat’s paw theory” of liability for causation. The Court observed that *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011), left open the question of whether an employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate adverse employment action. *Id.* at *18. Here, the Court held...
that the employer could be liable if a co-worker committed a discriminatory act that influenced the adverse employment action and noted that the whole point of the cat’s paw theory is to hold an employer accountable for supervisors who, for improper reasons, influence the decision-maker. Id. Finally, the Court further held that the EEOC had cast sufficient doubt on Defendant’s explanation for Keen’s termination because of her poor work performance. Accordingly, the Court denied Defendant’s motion for summary judgment.

**EEOC v. Gregg Appliances, Inc., 2013 U.S. Dist. LEXIS 88902 (M.D. Tenn. June 25, 2013).** The EEOC, on behalf of Courtney Keen, brought an action alleging that Defendant unlawfully retaliated against and wrongfully terminated Keen’s employment in violation of Title VII for reporting sexual harassment. Subsequently, the EEOC moved for partial summary judgment with respect to several defenses raised in Defendant’s answer to the EEOC’s complaint. Defendant argued that, as a procedural matter, the Court should not consider the EEOC’s motion because the EEOC filed its pleading after the deadline set forth in the case management order. Id. at *2. The Court agreed with Defendant that the EEOC should have filed its motion prior to the deadline, but noted that since the motion was filed a little more than a week late, Defendant had not shown any prejudice. Id. at *3. The Court opined that “considering the motion is in keeping with the principle that cases should be decided on their merits and a jury should not be burdened with hearing about issues that are subject to summary dismissal.” Id. at *3-4. With respect to the merits of the EEOC’s motion, Defendant argued that the EEOC’s wrongful termination claim was outside the scope of Keen’s EEOC charge because she only checked the box for retaliation without mentioning her employment termination and, as such, the EEOC was barred by the failure to exhaust administrative remedies. Id. at *4. The Court rejected Defendant’s argument and noted that under the Sixth Circuit’s expected scope of investigation test, “where facts related to the charged claim would prompt the EEOC to investigate a different, uncharged claim, the Claimant is not precluded from bringing suit on that claim.” Id. at *5. Pursuant to this test, the Court held that the EEOC’s termination claim was within the scope of the charge. Therefore, the Court granted summary judgment on Defendant’s failure to exhaust remedies defense. The Court also granted summary judgment in favor of the EEOC on Defendant’s statute of limitations defense because all the employment practices complained about were within 300 days of Keen’s filing of her EEOC charge. Id. at *6. Third, Defendant contended that any award of punitive damages would be unconstitutional and violate due process, as well as that the EEOC would not be able to establish a basis for punitive damages. As to the constitutionality of punitive damages, the Court held that Defendant was “decidedly incorrect” as Kolstad v. American Dental Association, 527 U.S. 526 (1999), made clear that punitive damages may be awarded in cases brought by the EEOC. Id. at *6-7. With respect to whether the EEOC would be able to establish a basis for punitive damages, the Court recognized that this was a valid basis for the defense and that Defendant was entitled to argue and present evidence on the issue. Id. at *7. Thus, the Court denied summary judgment on the issue. Finally, the EEOC argued that Keen’s status as an at-will employee was irrelevant to the issue of whether or not Defendant retaliated against her for engaging in protected activities. The Court observed that an employee’s at-will status was not a proper affirmative defense. Id. at *8. However, the Court noted that at-will employment status does come into play in Title VII cases and that Defendant was “entitled to argue and prove that [Keen] was an at-will employee as part of its evidence of legitimate, non-discriminatory/retaliatory reasons for any adverse employment action.” Id. at *8-9. Therefore, the Court denied summary judgment as to Defendant’s at-will employment allegation defense. Accordingly, the Court granted in part and denied in part the EEOC’s motion for partial summary judgment.

**EEOC v. Heartland Automotive Services, Inc. d/b/a Jiffy Lube, 2013 U.S. Dist. LEXIS 164114 (W.D. Tenn. Nov. 18, 2013).** The EEOC brought an action alleging that Defendant violated the Americans With Disabilities Act Amendment Act (“ADAAA”) by failing to hire Louis Davidson because he suffered from a permanent hearing impairment. Davidson applied for a technician post. After reviewing his application, the store manager telephoned Davidson about the position but refused to hire him after learning that Davidson was deaf. Defendant moved for summary judgment, which the Court denied. The Court remarked that the store manager telephoned Davidson about the position but refused to hire him after learning that Davidson was deaf. Defendant moved for summary judgment, which the Court denied. The Court remarked that the store manager’s refusal to hire Davidson based only on his hearing impairment, without making an effort to conduct an individualized assessment of Davidson’s capabilities, constituted direct evidence of
discrimination. The Court stated that because there was no dispute that Davidson was deaf, the EEOC was liable to prove that Davidson was otherwise qualified for the technician position by showing that he could perform the essential functions of the job, with or without accommodation. To the extent an accommodation was required to allow the employee to perform the essential functions of the job, the EEOC should have the opportunity to demonstrate that such an accommodation existed. *Id.* at *9-10.* The Court stated that there were several genuine issues of material fact that precluded summary judgment. First, the parties disputed the exact position to which Davidson applied. Second, the parties had provided conflicting evidence about the essential functions of the Lube Technician position. Therefore, with a dispute over what the essential functions were, it was impossible for the Court to determine whether Davidson was able to perform them. Third, even if there was no genuine issue as to the essential functions of the job, Defendant’s Human Resources Director testified that it was possible for a completely deaf person to perform the essential job functions with reasonable accommodations. Accordingly, the Court denied Defendant’s motion for summary judgment.

**EEOC v. JP Morgan Chase Bank, N.A., 2013 U.S. Dist. LEXIS 27499 (S.D. Ohio Feb. 28, 2013).** The EEOC brought an action alleging that Defendant discriminated against female employees as to terms and conditions of employment. Defendant allegedly removed female employees from the call queue at Defendant’s facility and had lucrative calls directed to male employees. In its discovery request, the EEOC sought Defendant’s skill login data records. When Defendant failed to provide selected data records and other information, the EEOC filed a motion to compel. The Magistrate Judge had partly granted the EEOC’s motion ordering Defendant to supplement its discovery response for a defined period. Because the production did not occur, the EEOC filed another motion to compel the same information along with other discovery. After a status conference with the parties, the Magistrate Judge then entered another order stating that the parties had agreed to resolve issues surrounding various motions, with the EEOC withdrawing its motion to compel without prejudice to re-filing following the denial of a motion for summary judgment and with Defendant withdrawing a related motion to strike. *Id.* at *4.* Asserting that Defendant had failed to comply with the Magistrate Judge’s order and that Defendant had purged the data, the EEOC subsequently sought discovery sanctions under Rule 37(b) and (c). Defendant filed an opposition asserting, in part, that the EEOC failed to comply with meet and confer obligations contained in the Magistrate Judge’s prior order. The Magistrate Judge rejected these arguments. The Magistrate Judge concluded that the meet and confer obligation of his prior order only applied to a refiling of the motion to compel or the motion to strike. On Rule 72 review, the Court also held that the meet and confer obligations of Rule 37(d)(1)(B) applied only to motions for sanctions filed pursuant to Rule 37(d). The EEOC’s motion for sanctions was filed pursuant to Rule 37(b) and (c) and the inherent authority of the Court. *Id.* at *11-13.* The Court next found that Defendant had engaged in sanctionable conduct regarding the data. Defendant had conceded that it had destroyed the skill login data at issue as a result of routine purging of electronic records, and asserted that until September 2010, the EEOC did not articulate its allegations in a manner that made the skill login data relevant to its claims. *Id.* at *19-20.* The Court, however, disagreed with Defendant. The Court noted that the EEOC’s pleading had put Defendant on notice of the scope of individuals involved and of the reach backward in time to data preceding the period before the filing of the EEOC’s claims, and the December 2008, April 2009, and June 2009 notices to Defendant, immediately prior to the destruction of relevant data, specifically revealed that a class claim was at issue. *Id.* at *20.* The Court further noted that the data would have informed the EEOC’s claim and Defendant’s defense as both sides relied on expert statistical analysis and opinions related to it. *Id.* at *21.* The Court thus found Defendant’s conduct was sanctionable as it had hampered the ease of, if not the ability, to uncover exactly what if anything impermissible had transpired. *Id.* at *23.* The Court further determined that Defendant’s conduct warranted one or more sanctions because Defendant had also moved for a summary judgment and providing the jury with a permissive adverse inference instruction related to the destroyed evidence was the only sanction that could prevent the EEOC’s claims from ever reaching a jury. *Id.* at *24.* The Court therefore, in its discretion, concluded that denying Defendant’s motion for summary judgment that could turn in part on skill login data was not only appropriate, but also necessary. *Id.* at *25.* Accordingly, the Court imposed the sanctions of denying Defendant’s merit-based motion for summary judgment and providing the jury with a permissive adverse inference instruction regarding the destroyed data.
**EEOC v. JP Morgan Chase Bank, N.A., 928 F. Supp. 2d 950 (S.D. Ohio 2013).** The EEOC brought an action alleging that Defendant discriminated against female employees as to terms and conditions of employment. Defendant allegedly removed female employees from the call queue at Defendant’s facility and had lucrative calls directed to male employees. Elizabeth Burke, an employee who allegedly suffered discrimination, filed a Chapter 7 bankruptcy petition which resulted in the discharge of her debts in June 2009. Defendant asserted that Burke failed to disclose her potential claims against Defendant in her bankruptcy proceedings, judicial estoppel barred the EEOC from recovering any monetary damages or other relief on Burke’s behalf. On this premise, Defendant filed a motion for summary judgment. *Id.* at 952. The Court denied the motion. Defendant pointed to Burke’s deposition testimony in which she acknowledged that she first suspected that she was being treated unlawfully sometime in January to March 2009. This suspicion possibly pre-dated the February 16, 2009, filing of her bankruptcy petition and unquestionably pre-dated her June 10, 2009 Amended Statement of Intent. Burke never amended her bankruptcy petition to include her claims as a potential asset. The parties disputed whether this non-disclosure precluded the EEOC from obtaining relief on Burke’s claims. *Id.* at 953. The Court opined that although it was clear that a debtor’s disclosure statement could be sufficient for applying judicial estoppel, it was uncertain whether a debtor’s actions could invoke judicial estoppel in a separate action brought by the EEOC. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, (2002), held that the EEOC cannot be judicially estopped from bringing suit in its own name to remedy employment discrimination simply because the Defendant happened to discriminate against an employee who, herself, was properly judicially estopped. Further, the Court observed that the EEOC’s role is to vindicate the public interest by pursuing victim-specific relief without standing for all purposes in the shoes of the victim. *Id.* at 954. The Court noted that although *EEOC v. Waffle House* recognized that the actions of an employee who failed to mitigate damages or who accepted a settlement could affect the relief that could be obtained in an EEOC case, an employee’s conduct affecting the form of available relief was quite different from an employee’s conduct affecting the ability of the EEOC to pursue the claim in the first place. *Id.* at 955. The Court reasoned that just as the expiration of an employee’s statute of limitations does not foreclose the EEOC’s ability to assert a claim on behalf of that employee, similarly a failure by an employee to state his or her claim as a bankruptcy asset does not extinguish that claim for the EEOC and all potential relief flowing from that claim. Application of judicial estoppel, the Court opined, would frustrate pursuit of vindicating a public interest for the conduct Burke allegedly endured, even if the end result was that Burke obtained a monetary benefit ancillary to the vindication of that public interest that she might not have otherwise been able to pursue, much less obtain, as a result of her conduct in her bankruptcy proceedings. Accordingly, the Court denied Defendant’s motion for summary judgment. *Id.* at 955-56.

**EEOC v. JP Morgan Chase Bank, N.A., 2013 U.S. Dist. LEXIS 35369 (S.D. Ohio Mar. 14, 2013).** The EEOC brought an action alleging that Defendant discriminated against female employees as to terms and conditions of employment. Defendant allegedly removed female employees from the call queue at Defendant’s facility and had lucrative calls directed to male employees. The Court denied the EEOC’s motion for partial summary judgment, and denied both parties’ motions to strike expert reports. The Court noted that the experts’ analysis was incomplete because of Defendant’s improper conduct. While imposing sanctions on Defendant, the Court had noted that Defendant had belatedly disclosed skill login data for 2009. This data would inform the analyses performed by the parties’ experts. Because the expert reports involved in the EEOC’s pending motion for summary judgment were completed before Defendant “discovered” the 2009 data, the parties presented the Court with expert opinions based on incomplete data. *Id.* at *2. The Court also observed that parties failed to place before it the majority of the summary judgment evidence on which they sought to rely. Out of 75 exhibits offered by the EEOC, 48 were excerpts of deposition transcripts, and for these 48 deposition transcript exhibits, the EEOC attached no court reporter certifications. The Court remarked that the failure to include such certifications meant that any partial or full deposition transcripts failed to qualify as proper summary judgment evidence under Rule 56. *Id.* at *3. The Court stated that the EEOC could not evade the unsigned certification errors by seeking refuge in the fact that the Local Civil Rules permit the filing of deposition excerpts as attachments to summary judgment memoranda. *Id.* at *6. The Local Civil Rules also require that evidence submitted shall be limited to that necessary for decision and shall include only essential portions of transcripts or exhibits.
The Court noted that the court reporter certification is an essential portion of a transcript necessary for decision because it qualifies any submitted transcript pages as summary judgment evidence, and the Local Civil Rules also mandate the filing of the certification. Id. at *6-7. While the EEOC filed uncertified excerpts, Defendant filed many certifications days after the EEOC had relied on excerpts of presumably the same depositions. Defendant provided its certifications to support different pages than the pages upon which the EEOC relied, and neither party filed the entire transcript on the docket in accordance with Local Civil Rule 7.2(e). Further, in separate letters to the Court, counsel for the parties informed it that they had sent various complete deposition transcripts that had been provided in lieu of publicly filing them. The Court remarked that it was charged with resolving what was before it, not in parsing the record for helpful exhibits that it could solicit from a party when that party has failed to provide such exhibits. Id. at *9. The Court noted that it was left with expert reports that did not include consideration of 2009 data that was likely relevant, numerous deposition transcripts that it could not take into account, and the improperly party-assigned burden of letting a party know whether the Court would like to look at any missing evidence. The Court stated that parties were attempting to exclude expert reports, debating whether they had been properly and timely disclosed, whether they were supplemental clarifications or present new analyses, and whether their methodology made sense. The Court remarked that all of this amounted to briefs that depended on incomplete or impermissible evidence and likely useful deposition transcripts which were not on the actual docket of this litigation. The Court, however, stated that it could not deny the EEOC the right to a new expert report that incorporated the belatedly produced 2009 data, and that Defendant might also wish to produce a new report utilizing this data. Accordingly, the Court denied the EEOC’s motion for partial summary judgment, and directed parties to make all final expert report disclosures, and complete all expert discovery.

**EEOC v. Kaplan Higher Education Corp., 2013 U.S. Dist. LEXIS 11722 (N.D. Ohio Jan. 28, 2013).** The EEOC brought a pattern or practice action alleging that Defendants, a group of educational institutions, engaged in unlawful discrimination by using applicants’ credit history to make hiring decisions. The EEOC alleged Defendants’ practice had a disparate impact on African-Americans. Id. at *3. Defendants moved for summary judgment, and to exclude the EEOC’s expert testimony and reports. Id. at *2. The Court granted the motions. The EEOC offered expert testimony and reports to support its allegation that Defendants’ use of credit reports had a disparate impact on African-American applicants. Id. at *13. To determine the race of a particular applicant, the EEOC subpoenaed driver’s license photos of the applicants from the Department of Motor Vehicles. The EEOC’s expert then assembled a team of five “race raters” and requested that they review each picture to determine whether the individual was African-American, Asian, Hispanic, White or “Other.” Id. at *14. Defendant moved to exclude the expert’s testimony and report on the grounds that the expert’s method to determine race was scientifically unsound, the sample used was not representative of the applicant pool, and the analysis failed to account for non-discriminatory variables that could account for any disparate impact. Id. at *15-16. The EEOC argued that disputes concerning the test’s accuracy were issues of fact, and therefore, not dispositive. Id. at *17. The Court opined that the expert’s reports and testimony were inadmissible because the EEOC failed to present sufficient evidence indicating that the expert’s method was reliable, or that its accuracy was tested. Id. at *20. The Court noted other deficiencies in the race rating test, including a lack of peer to peer review, an unknown rate of error, and a failure to account for multi-racial applicants. Id. at *22-26. Further, the Court noted that the EEOC failed to establish that the race rating analysis was subjected to proper controls because the expert was involved in both determining the data and the statistical analysis. Id. at *24. The EEOC argued that the expert’s race rating guidelines were implemented to facilitate and respect individual dignity. Id. at *25. The Court, however, found that the EEOC offered no evidence indicating that a visual test was a scientifically accepted method to determine race. Id. at *25-26. Defendants argued, in the alternative, that the expert’s testimony and reports should be excluded even if the methodology was scientifically sound, because the sample group selected was not representative of the applicant pool as a whole. Id. at *29-30. Defendants argued that the expert possessed information regarding 800 additional applicants whom were not included in his analysis. Id. Further, Defendant argued that expert’s sample selection was not random, which skewed the results in the EEOC’s favor. Id. The Court noted that the sample did not need to be perfectly random or precisely representative of the whole to be admissible, but it
ultimately agreed with Defendant, finding that the sample selection was neither fair nor representative. *Id.* at *31-33. As a result, the Court concluded that the EEOC failed to present admissible evidence establishing a *prima facie* case of unlawful discrimination. *Id.* at *34. For this reason, the Court excluded the EEOC’s expert report and testimony, and granted summary judgment to Defendants.

**EEOC v. Kaplan Higher Education Corp., 2013 U.S. Dist. LEXIS 34373 (N.D. Ohio Mar. 8, 2013).** The EEOC brought a Title VII pattern or practice action alleging that Defendants’ use of credit checks for job applicants and employees had an unlawful disparate impact on African-Americans. Earlier, the Court had partially dismissed the complaint on the grounds that the 300-day statute of limitations applied to limit the EEOC’s claim; excluded the reports and testimony of Dr. Kevin R. Murphy, the EEOC’s expert; and granted Defendants summary judgment because the EEOC failed to present sufficient evidence of disparate impact discrimination to establish a *prima facie* case. The EEOC moved for reconsideration of the summary judgment order. Defendant moved to strike the EEOC’s motion for reconsideration, arguing that it was a “non-dispositive” motion and, accordingly, must comply with the requirements for such motions. *Id.* at *2.*

The Court agreed and held that the EEOC’s motion far exceeded the page limitation applicable to non-dispositive motions. Accordingly, the Court struck the motion, but allowed the EEOC to re-file a motion that abided by the applicable page limitations and requirements.

**EEOC v. Kaplan Higher Education Corp., 2013 U.S. Dist. LEXIS 64353 (N.D. Ohio May 6, 2013).** The EEOC brought a Title VII action alleging that Defendants’ use of credit checks for job applicants and employees had an unlawful disparate impact on African-Americans. Earlier, the Court had partially dismissed the complaint on the grounds that the 300-day statute of limitations applied to limit the EEOC’s claim; excluded the reports and testimony of Dr. Kevin R. Murphy, the EEOC’s expert; and granted Defendants summary judgment because the EEOC failed to present sufficient evidence of disparate impact discrimination to establish a *prima facie* case. The EEOC moved for reconsideration. The Court denied the EEOC’s motion. First, the EEOC asserted that the Court erred by refusing to consider Dr. Murphy’s opinion as untimely submitted. The Court, however, stated that it had considered the aspects of Dr. Murphy’s affidavit that did not amount to new opinions and/or new analysis, and observed that Dr. Murphy’s affidavit was created in response to a motion filed by Defendants and constituted a different analysis, which was not timely disclosed to Defendants. Thus, the Court stated that the EEOC failed to present any ground for reconsideration on this point. Second, the EEOC argued that the Court erred in failing to apply the EEOC’s Uniform Guidelines on Employee Selection Procedures, which require that Defendants maintain data on applicants. The Court declined to consider these arguments because the EEOC never sought relief or made any of these arguments in its multiple motions filed earlier. Further, the EEOC argued that the Court applied *Daubert* too rigidly, and that its use of “race raters” was not scientific at all; rather, a layperson could adequately determine whether a person fell into one of five categories created by the EEOC’s expert, and thus the “rate of error” factor should not apply here. *Id.* at *10-11.*

The EEOC argued that it proved that the photo assessments to determine race had a rate of error of less than 5%, and that it need not have established that “race rating” was a peer reviewed technique, and attempted to establish, through a supplemental declaration, that the technique had been subjected to peer review. The Court remarked that the EEOC’s arguments were merely re-arguments of issues previously addressed and resolved. Thus, the Court refused to consider the newly filed affidavit submitted by Dr. Murphy. Further, the Court observed that the EEOC did not offer any explanation or reason as to why the information was not submitted in connection with the original briefing, nor did the EEOC establish that the information constituted new evidence that could not have been discovered in sufficient time to move under Rule 59. The EEOC contended that even if the Court did not consider the racial statistics offered by Dr. Murphy, sufficient evidence of national statistics existed in the record such that summary judgment should not have been granted. The Court rejected this argument, and stated that the EEOC did not make this argument in its initial briefing, and in its motion to reconsider, the EEOC failed to specifically cite or discuss any record evidence supporting its argument. The EEOC also asserted that race identification did not require expert testimony, and that the Court erred when it concluded that race must be distilled into scientific markers, marked by clear-cut categories. The Court observed that the EEOC’s expert asked the “race-raters” to identify a person’s race from among five race categories, including one labeled “other.” *Id.*
The EEOC gave no evidence that a lay person could determine whether, for example, a medium-skinned individual identified with the Caucasian race or whether the individual was bi-racial and, thus would belong in the “other” category. *Id.* The Court remarked that any trier of fact would not be able to place each photograph into one of five “race categories” without committing some errors, and without knowing the percentage of errors, the evidence would not be admissible. Finally, regarding the statute of limitations, the Court stated that if it were to reconsider its decision regarding the statute of limitations, there was no basis on which to reconsider its summary judgment ruling, and thus any reconsideration of its ruling on the motion to dismiss would be moot because no relief could be afforded. Accordingly, the Court denied the EEOC’s motion.

**EEOC v. Memphis Health Center, Inc., 2013 U.S. App. LEXIS 10259 (6th Cir. May 17, 2013).** The EEOC brought an action on behalf of Rita Smith against Defendant, a non-profit hospital, alleging unlawful discrimination and retaliation in violation of the ADEA. Smith was laid-off in 2007 in a downsizing. She filed a grievance claiming that Defendant favored an older, more recently hired worker. The grievance was denied and Smith filed a charge of discrimination with the EEOC. During her severance period, Smith accepted a lower-paying position as a call center operator with Defendant. In January 2008, a new dental assistant position arose at the hospital. Smith and two outside candidates applied. Defendant called Smith in for interview on a “casual Friday,” and she unintentionally dressed in jeans and tennis shoes, and failed to bring a copy of her resume. *Id.* at *4. Defendant hired another candidate, who was seven years younger than Smith. Finding reasonable cause, the EEOC filed suit claiming that the failure to re-hire Smith was discriminatory in violation of the ADEA and that Defendant retaliated against Smith for filing the grievance over her lay-off. *Id.* at *2-5. Defendant filed a motion for summary judgment and the District Court granted the motion, finding that the EEOC did not establish a *prima facie* case of age discrimination or retaliation. Following summary judgment, Defendant filed a motion seeking attorneys’ fees and costs totaling $70,389.83 against the EEOC pursuant to the Equal Access to Justice Act (“EAJA”). *Id.* Upon reference of the District Court, the Magistrate Judge conducted a claim-by-claim analysis, and found that only the age discrimination claim was substantially justified. *Id.* at *7. The Magistrate Judge then awarded 50% of the attorneys’ fees incurred by Defendant for defending the retaliation claim. *Id.* at *8. The District Court adopted the Magistrate Judge’s recommendation, and the EEOC appealed. The Sixth Circuit found the EEOC’s argument that the ADEA specifically precludes an award of attorneys’ fees to prevailing Defendants was unpersuasive. *Id.* at *12. The EAJA waives sovereign immunity and expressly authorizes fee-shifting against the government to deter unreasonable exercises of governmental authority. *Id.* at *10. The EAJA requires the EEOC to pay attorneys’ fees to a prevailing party, except as specifically prohibited by statute, “unless the Court finds that the position of the United States was substantially justified” or special circumstances make an award unjust. *Id.* at *11. The EEOC argued that the EAJA did not apply because the ADEA contains its own fee-shifting rule. The Sixth Circuit disagreed. The Sixth Circuit found that, because the ADEA is silent on the issue of fee awards to prevailing Defendants, the EAJA “fills the void.” *Id.* at *14. The Sixth Circuit thus held that the District Court properly applied the EAJA to the EEOC in an ADEA case. *Id.* at *15. The Sixth Circuit, however, held that the District Court erred by conducting a claim-by-claim analysis that segmented the substantial justification determination. *Id.* at *19-20. The Sixth Circuit found that the EAJA required a “holistic determination” of substantial justification of the government’s case as a whole. *Id.* at *20. According to the Sixth Circuit, the District Court, upon determining that the position of the government was justified as to the age discrimination claim but not the retaliation claim, should have determined what impact that dichotomy had on the government’s case as a whole. *Id.* at *21-22. The District Court should have assessed, if the two were distinct, which claim was more prominent in driving the case in order to make the substantial justification determination or if the claims were sufficiently intertwined legally and factually so that an insubstantial justification as to one rendered the entire overall position unjustified. *Id.* at *22. Because the District Court failed to do so, the Sixth Circuit remanded the action so that the District Court could assess whether the EEOC’s position, as a whole, was substantially justified. *Id.*

**EEOC v. Multilink, Inc., 2013 U.S. Dist. LEXIS 40097 (N.D. Ohio Mar. 12, 2013).** The EEOC brought an action alleging that Defendant sexually harassed Plaintiffs, a group of female employees, and that
Defendant had constructive or actual knowledge of the harassment and failed to take prompt or appropriate corrective action. \textit{Id.} at *1-2. Defendant moved for summary judgment, arguing that the EEOC failed to identify any class members during its administrative investigation. Further, Defendant sought sanctions from the EEOC for non-compliance with its statutorily-prescribed duties of investigation and conciliation. \textit{Id.} The Court denied the motion. First, the Court observed that \textit{EEOC v. Keco Industries Inc.}, 748 F.2d 1097, 1100-02 (6th Cir. 1984), held that while it is inappropriate to inquire into the sufficiency of the EEOC’s investigation, a Court may determine whether the EEOC has made a good faith effort to conciliate the claims it has asserted. Here, the Court noted that the EEOC had sent a letter to Defendant stating that it was investigating the possibility of other similarly-situated female employees who were subject to a hostile work environment, and also made a conciliation proposal with monetary and non-monetary components. \textit{Id.} at *3-4. Further, Defendant then countered the settlement proposal with an offer, which the EEOC found inadequate, and thereafter filed this lawsuit. \textit{Id.} The Court found that Defendant had notice of the claims that the EEOC was seeking to assert and to conciliate, both individual and class-wide claims, even though specific class members went unnamed. \textit{Id.} at *3-5. Thus, the Court determined that the EEOC acted in good faith, and appropriately filed suit when negotiations broke down. \textit{Id.} at *5. For these reasons, the Court denied Defendant’s motion.

\textbf{EEOC v. New Breed Logistics, 2013 U.S. Dist. LEXIS 40086 (W.D. Tenn. Mar. 22, 2013).} The EEOC filed suit against New Breed Logistics alleging sexual harassment and retaliation in violation of Title VII of the Civil Rights Act. Specifically, it alleged that an employee of Defendant, Calhoun, sexually harassed three co-workers – Hines, Pearson and Pete – who were working as temporary employees at the Defendant’s Avaya facility, and that Defendant terminated those employees for opposing the sexual harassment. It also alleged that it terminated a witness to that sexual harassment, Partee, also for opposing that conduct (the “Avaya Claims”). It further alleged that Defendant retaliated against Hines by discharging her from a permanent position at Defendant’s Olive Branch facility (the “Olive Branch Claim”). \textit{Id.} at *26-27. Defendant filed a motion for summary judgment as to all claims, and the Court denied the motion. Defendant first argued that it could not be vicariously liable for the hostile work environment Calhoun created because Calhoun was not the claimants’ supervisor and the EEOC could not show that it knew of the harassment and failed to take prompt corrective action. \textit{Id.} at *35. The Court stated that for purposes of the motion a supervisor is an individual who serves in a supervisor position and exercises significant control over hiring, firing, or conditions of employment. \textit{Id.} at *36. The Court noted that Calhoun’s job title was Supervisor of the Receiving Department. The EEOC also argued that Calhoun would lead department meetings twice a day, would give staff instructions throughout the day, oversaw clerks and forklift drivers, and otherwise exercised control over the Receiving Department. The Court held that these facts created a material issue of fact sufficient to defeat summary judgment. \textit{Id.} at *37. Defendant next argued that if Calhoun was a supervisor, the \textit{Faragher/Ellerth} affirmative defense shielded it from vicarious liability for Calhoun’s actions. The Court stated that the \textit{Faragher/Ellerth} defense was available only if the employer took no tangible employment action. The Court found that a material issue of fact existed as to whether Defendant took tangible employment actions against the claimants. \textit{Id.} at *38-39. The Court noted that a tangible employment action is a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. \textit{Id.} at *39. Defendant argued that as a matter of law the termination of a temporary employment assignment does not amount to a tangible employment action. While noting a disagreement in the case law authorities that have considered the question, the Court held that the termination was a tangible employment action. In this case the only employment available through the employees’ temporary employment agency would have required them to take a cut in pay from $11 per hour to $7.50 per hour. The Court found that to be materially adverse and denied the motion for summary judgment. Defendant further contended that the EEOC did not make out a \textit{prima facie} case for retaliation, and that even if it did, Defendant had shown legitimate, non-discriminatory reasons for their terminations. The Court explained that, at the least, the record provided a sufficient basis for a reasonable jury to find a causal link between the claimants’ protected activity – opposing Calhoun – and their termination. Accordingly, the Court denied summary judgment as to their retaliation claims. Finally, the Court found that a material issue of fact prevents summary judgment as to Partee’s retaliation claim. The Court noted that
Partee engaged in a protected activity by telling Calhoun to leave the women alone, and he was terminated shortly thereafter. *Id.* at *57-61. For these reasons, the Court denied Defendant’s motion in its entirety. *Id.* at *61-62.

**EEOC v. New Breed Logistics, 2013 U.S. Dist. LEXIS 49527 (W.D. Tenn. April 5, 2013).** The EEOC filed suit against New Breed Logistics, alleging sexual harassment and retaliation in violation of Title VII of the Civil Rights Act. Specifically, it alleged that an employee of Defendant, Calhoun, sexually harassed three co-workers – Hines, Pearson, and Pete – who were working as temporary employees at Defendant’s Avaya facility and that Defendant terminated those employees for opposing the sexual harassment. *Id.* at *5. It also alleged that Defendant terminated a witness to that sexual harassment, Partee, for opposing that conduct (the “Avaya Claims”). It further alleged that Defendant retaliated against Hines by discharging her from a permanent position at Defendant’s Olive Branch facility (the “Olive Branch Claim”). *Id.* at *6. The EEOC moved for partial summary judgment with respect to certain of Defendant’s affirmative defenses, and the Court granted the motion. The Court first addressed the affirmative defenses that focused on administrative exhaustion. The Court acknowledged that before bringing suit the EEOC must receive, investigate, and attempt to conciliate a charge of discrimination. *Id.* at *10. Under the “single filing” rule the EEOC is not required to receive a separate charge of discrimination for each claim that it asserts so long as the charge is “substantially related” to and “arises out of the same timeframe” as a timely filed claim. *Id.* at *10-11. The Court found the Avaya Claims to be substantially related because they all involved sexual harassment of three co-workers and the Defendant’s alleged retaliatory discharge of those co-workers and a witness for opposing the harassment. The Court also found that those claims arose out of the same timeframe because they occurred within a 60 day period. *Id.* at *11-13. The Court held that it may not inquire into the sufficiency of the EEOC’s investigation; all that is necessary for an investigation to be sufficient is that the EEOC determine that there is reasonable cause for a charge and that it provided notice of the charge to the employer. The Court found that the EEOC did so here. *Id.* at *13-14. The Court also held that it may not inquire into the sufficiency of the EEOC’s conciliation attempts. There was undisputed evidence that the EEOC in this case took some steps to conciliate, and the Court held that was sufficient. Accordingly, the Court granted the EEOC’s motion for partial summary judgment with respect to Defendant’s affirmative defenses relating to administrative exhaustion of the Avaya Claims. *Id.* at *15, 17. Concerning the Olive Branch claim of retaliation, the Court held that the EEOC is not required to exhaust administrative remedies in situations where the facts related to the charged claim would prompt the EEOC to investigate a different, uncharged claim. *Id.* at *15-16. In this case the Court held that retaliation naturally grew out of the harassment charge, and therefore, the EEOC did not need to exhaust administrative remedies with respect to this claim. The Court also granted summary judgment as to Defendant’s affirmative defense that attempted to reserve the right to challenge any award of punitive damages on constitutional grounds. The Court stated that there was no need to reserve such rights, and such defenses would be considered at the appropriate time. *Id.* at *17-18. The Court also granted summary judgment with respect to Defendant’s affirmative defense that reserved rights to assert additional affirmative defenses if a basis for such defenses was learned during the course of discovery. The Court held that the proper way to address that issue was to move to amend the answer. *Id.* at *19.

**EEOC v. New Breed Logistics, 2013 U.S. Dist. LEXIS 56956 (W.D. Tenn. April 22, 2013).** The EEOC brought an action alleging that New Breed Logistics’ (“New Breed”) employee James Calhoun sexually harassed employees Jackie Hines, Capricious Pearson, and Tiffany Pete, and that New Breed discharged them as well as Christopher Partee for opposing the sexual harassment. New Breed filed five motions *in limine*. New Breed sought to prohibit introduction or reference to any evidence regarding a sexual relationship between James Calhoun and Jovan Jay Hobson, and specifically what Claimants heard from other employees regarding Calhoun and Hobson’s relationship (“rumor evidence”). The Court held that the rumor evidence was inadmissible hearsay, and thus granted Defendant’s motion to exclude the rumor evidence. New Breed also opposed the introduction of evidence from Partee that Calhoun told Partee he was going to get Hobson while on the way to Hobson’s home, and when there, Calhoun and Hobson went into another room for an hour while Partee waited in the living room. The Court held that the hearsay rule did not apply because the testimony with respect to Calhoun’s statement fell under the then-existing
mental, emotional, or physical condition exception to the hearsay rule. *Id.* at *1-3. A tape of Partee had allegedly been destroyed even though Defendant denied such a tape existed in the first instance. New Breed wanted to put on evidence that certain people viewed the tape and relied on it, in part, in terminating Partee. The Court held that it could do so, but that the EEOC would then be allowed to call to the jury’s attention the fact that the tape no longer existed. New Breed also sought to prohibit the introduction of evidence regarding Calhoun’s post-employment conduct, particularly relating to his employment at IPS Industries and the matter of *EEOC v. IPS Industries, Inc.* The Court granted New Breed’s motion, noting that Rule 404(b) of the Federal Rules of Evidence provides that evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character. Further, the Court ruled that under Rule 613(b), the EEOC could introduce evidence of any prior statements made by Calhoun in the *IPS Industries* case that were inconsistent with his statements in this case. The Court also held that the EEOC could inquire as to specific examples of Calhoun’s acts to attack his character for truthfulness, but could not introduce extrinsic evidence of such examples. New Breed further sought to prohibit the EEOC from introducing evidence regarding or referring to an agency decision granting Calhoun unemployment benefits. The Court held that the decision fell within the public records exception to the hearsay rule, but it granted New Breed’s motion under Rule 403 because its probative value (a speculative inference that Calhoun was terminated for using foul language) was outweighed by a danger of unfair prejudice. Finally, New Breed sought to bar the EEOC from presenting or referring to evidence that Claimants suffered any physical or mental ailment as a result of New Breed’s actions, arguing that the EEOC did not offer expert medical testimony regarding such ailments, and that New Breed was unable to obtain a Rule 35 medical examination due to the EEOC’s assertion of only garden variety emotional distress. The Court, however, noted that the EEOC could prove emotional injury by testimony without medical support, and stated that if the EEOC attempted to introduce evidence of a psychiatric disorder or other diagnosis requiring expert testimony, it could deal with such issues as they arose through proper objection and, if necessary, curative instructions. Accordingly, the Court denied New Breed’s motion *in limine*.

**EEOC v. New Breed Logistics, 2013 U.S. Dist. LEXIS 120106 (W.D. Tenn. Aug. 23, 2013).** The EEOC filed suit against New Breed Logistics alleging sexual harassment and retaliation in violation of Title VII of the Civil Rights Act. Specifically, it alleged that an employee of Defendant, Calhoun, sexually harassed three co-workers – Hines, Pearson, and Pete – who were working as temporary employees at Defendant’s Avaya facility and that Defendant terminated those employees for opposing the sexual harassment. The parties proceeded to trial. Defendant moved for judgment pursuant to Rule 50, which the Court took under advisement until the jury returned a verdict. The jury returned a verdict against Defendant on the EEOC’s claims of sexual harassment and retaliation. Defendant then renewed its Rule 50 motion, and also sought to amend the judgment and for a new trial, which the Court granted in part. Defendant requested a new trial claiming that several jury instructions were flawed. Defendant argued that the Court’s instructions held Defendant strictly liable for Calhoun’s harassing behavior, and failed to instruct the jury on the necessary causation to remove *Faragher/Ellerth* defenses from the jury’s consideration. The Court observed that the standard upon which it would review Defendant’s claims of prejudicial jury instructions depended on whether Defendant waived its objections to those instructions. *Id.* at *7. Defendant contended that the Court erred in various ways, including: (i) on the EEOC’s sexual harassment claim, as to the employer knowledge instruction, Defendant assigned error in that the instruction allowed the jury to impute knowledge by Defendant for any complaint by an employee made to any supervisor including harassing supervisor; and (ii) as to causation standard, Defendant assigned error on an instruction given by the Court to ascertain if tangible employment action was taken by the supervisor. The Court found that because Defendant either acquiesced to the jury instructions as given, the jury instructions as given were not plainly erroneous, or because the jury instructions as given were correct statements of law, it denied Defendant’s motion for new trial on the ground of erroneous jury instructions. The Court found that the jury had sufficient evidence to support its verdict on the issues that Defendant raised, and thereby denied Defendant’s motion for a new trial. Defendant also argued that there was insufficient evidence that claimants engaged in protected activity, and that even if they did engage in protected activity, Defendant had a non-discriminatory or retaliatory reason for terminating them. The EEOC, however, attempted to
present evidence to rebut Defendant’s asserted non-discriminatory reasons. Because the Court felt the EEOC introduced sufficient evidence of a causal connection between protected action and adverse action for all four claimants to create a fact question, the Court denied Defendant’s motion on those issues. Id. at *39. Finally, because the jury’s award to one claimant exceeded Title VII’s statutory cap, the Court granted in part Defendant’s motion for judgment as a matter of law and reduced the award to $186,000 in compensatory damages and $114,000 in punitive damages.

**EEOC v. Peoplemark, Inc., 2013 U.S. App. LEXIS 20408 (6th Cir. Oct. 7, 2013).** The EEOC alleged in this case that Peoplemark’s policy of not hiring individuals with a criminal record had a disparate impact on African-Americans. Id. at *2. The problem with the EEOC’s theory was that Peoplemark had a blanket no-hire policy, which was not true. Of the 286 individuals the EEOC purported to represent in this case, only 22% actually had been hired and placed by Peoplemark. Id. at *82. The District Court found that even after the EEOC knew that was the case, it proceeded with the litigation. It was only after the EEOC failed to designate a statistical expert per a scheduling deadline that it finally folded and agreed to dismiss the case pursuant to a stipulation that allowed Peoplemark to seek fees as a prevailing party. Id. at *84. In its motion for fees, costs, and sanctions, Peoplemark argued that the EEOC had deliberately caused the company to incur attorneys’ fees and expert fees when it should have known that the company did not have the blanket no-hire policy. Both a Magistrate Judge and the District Court agreed, finding that if the EEOC had done a reasonable investigation, it should have known that Peoplemark had, in fact, hired a number of the allegedly injured individuals, thereby undercutting the EEOC’s central “blanket policy” position. Id. at *83. As such, the District Court entered an award against the EEOC totaling $751,942.28, which included $219,350.70 in attorneys’ fees, $526,172 in expert witness fees, and $6,419.78 in other expenses. Id. at *81. On appeal, the Sixth Circuit rejected the EEOC’s argument that the District Court abused its discretion when it imposed attorneys’ and expert fees. Id. at 9. Although holding that the EEOC’s case was not groundless when it was first filed, the Sixth Circuit held that, “when discovery clearly indicated Osten’s [Peoplemark’s Vice President] statements belied the facts, the Commission should have reassessed its claim.” Id. at *88. As such, the Sixth Circuit held that “from that point forward, it was unreasonable to continue to litigate the Commissioner’s pleaded claim because the claim was based on a company-wide policy that did not exist.” Id. Citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), the Sixth Circuit held that a fee award against the EEOC was appropriate since the EEOC “could not prove a prima facie case because its claim was groundless…” Id. Agreeing with the District Court, the Sixth Circuit held that the EEOC should be held liable for Peoplemark’s fees from October 1, 2009 through the end of the litigation because by this point, the EEOC “should have known it could not prove its claim as pleaded.” Id. at *90. Finally, the Sixth Circuit also upheld the grant of expert fees to Peoplemark since the retention of an expert was necessary to mount a defense against the EEOC’s claims. Id. at *93. The Sixth Circuit fully upheld the $751,942.48 award against the EEOC. In a strongly worded 50-page dissent, the Sixth Circuit reasoned that the District Court abused its discretion in awarding Peoplemark attorneys’ fees and expert fees since, in the dissent’s belief, the EEOC’s claims were not “frivolous, unreasonable, or groundless, or that the [EEOC] continued to litigate after it clearly became so.” Id. at *27. As the dissent stated in a footnote, “Most simply put, my disagreement with the majority’s analysis and result arises from my different reading, as explained in this dissent of the record. Where the majority sees mis-focus and dilatoriness on the part of the EEOC, I see an effort to gain information to refocus and reassess the Defendant’s conduct and practices, and, as importantly, obstructive tactics on the Defendant’s part that needless, but successful, ate up much of the time the Court allocated for discovery.” Id.

**Editor’s Note:** The Sixth Circuit’s ruling upholds one of the largest fee sanction awards against the EEOC in 2013.

**EEOC v. Skanska USA Building, Inc., Case Nos. 12-5967 & 12-6236 (6th Cir. Dec. 10, 2013).** Defendant utilized a subcontractor, C-1, to provide operators for temporary elevators on a construction site of a new hospital. Id. at 2. In turn, C-1 hired several employees, including three African-American employees who at various times during their “employment” at Defendant’s construction site were subjected to discriminatory treatment in the form of racial slurs, verbal and physical threats, as well as alleged
retaliatory termination after complaining about such treatment. \textit{Id.} at 3-4. The EEOC sued Defendant for subjecting these African-American employees of C-1 to a hostile work environment as well as retaliation. \textit{Id.} at 5. Both the EEOC and Defendant filed motions for partial summary judgment solely on the issue of whether Skanska was the joint employer of C-1’s employees, and thus liable under Title VII. \textit{Id.} The District Court denied the EEOC’s motion and granted summary judgment to Defendant, which the EEOC appealed to the Sixth Circuit. \textit{Id.} The Sixth Circuit reversed the District Court’s decision granting summary judgment to Defendant and, instead, reversed with instructions to grant summary judgment to the EEOC. Noting that both parties operated on the assumption that “Defendants can be liable under Title VII pursuant to a joint-employer theory,” the Sixth Circuit held that entities are joint employers if they “share or co-determine those matters governing essential terms and conditions of employment.” \textit{Id.} at 6.

Furthermore, the Sixth Circuit noted that in making this determination, it looks at “an entity’s ability to hire, fire or discipline employees, affect their compensation and benefits, and direct and supervise their performance.” \textit{Id.} at 7. The Sixth Circuit held that a joint-employer relationship existed between Defendant and the C-1 employees since Defendant “supervised and controlled” the employees’ day-to-day activities with little oversight; set the employees’ hours and daily assignments; determined who would supervise the C-1 employees; handled (and investigated) the C-1 employees’ workplace complaints; and did not consult with C-1. \textit{Id.} at 7. Given this control over the C-1 employees, the Sixth Circuit held that C-1 “was a non-entity on the construction site” and thus, “in the light most favorable to the Plaintiffs, the record here is enough to support a determination Skanska jointly employed the operators.” \textit{Id.} at 7-8. The Sixth Circuit found it to be “besides the point” that the contract between Defendant and C-1 “envisioned a more active role for C-1” given the realities of the situation. \textit{Id.} at 7.

\textbf{EEOC v. Spitzer Management, Inc., 2013 U.S. Dist. LEXIS 73150 (N.D. Ohio May 22, 2013).} The EEOC, on behalf of two charging parties and other similarly-situated employees currently and formerly employed by Defendants, brought a pattern or practice action alleging that Defendants violated Title VII by subjecting them to racial and national origin discrimination, and retaliated against them for discrimination charges filed with the EEOC. Thereafter, two interveners (“Plaintiffs”) sought and received permission to file their own complaints that were consolidated with the EEOC’s complaint. During the course of trial, the EEOC objected to certain exhibits being offered by Defendants and asserted that Defendants failed to produce important documents and exhibits that were material to the litigation. The Court agreed and declared a mistrial due to Defendants’ failure to produce a large amount of responsive materials despite proper discovery requests from the EEOC and Plaintiffs’ counsel. Thereafter, the EEOC and Plaintiffs’ counsel moved for a default judgment and sought attorneys’ fees and costs. As to the default judgment request, the Court noted that it had strongly considered default judgment. However, the Court opined that as it was able to witness the testimony of numerous Plaintiffs at trial in the matter, default judgment may in fact be a windfall for some if it were granted in total. \textit{Id.} at *28. Therefore, the Court denied the request for default judgment. Instead, the Court held that attorneys’ fees and costs were an appropriate sanction. In analyzing the fees and costs requested by the EEOC, the Court noted that the EEOC’s request for fees for the 90 days leading up to and including trial was more than reasonable. \textit{Id.} at *29. The Court additionally found that the rate of $350 per hour requested by the EEOC was reasonable for the market, and that the hours requested – 140 hours – were substantially lower than the Court anticipated for preparation and trial of this matter over a three-month period. \textit{Id.} Therefore, the Court awarded the EEOC fees and costs in the amount of $49,000. As to the request for fees and costs submitted by Plaintiffs’ counsel, the Court found their fee rates of $350 and $250 per hour were reasonable. The Court noted that Plaintiffs’ counsel, unlike the EEOC, sought fees dating back to 2010. Nevertheless, the Court held that since Defendants’ failure to produce relevant documents in the matter dated back to at least 2008, the timeframe requested by Plaintiffs’ counsel was reasonable. \textit{Id.} at *30. Therefore, the Court awarded Plaintiffs’ counsel fees and costs in the amount of $264,315. Finally, the Court ordered that the fees be levied against all defense counsel, as well as Defendants jointly and severally.

\textbf{EEOC v. The WW Group, Inc., 2013 U.S. Dist. LEXIS 101599 (E.D. Mich. July 22, 2013).} The EEOC brought an action alleging that Defendant discriminated against Wendy Lamond-Broughton on the basis of her sex when it refused to hire her due to her pregnancy. Defendant had a goal weight policy that required
applicants for the position of group leader or receptionist to be at goal weight when hired. Defendant also had a goal weight policy for hired staff, which made temporary exceptions to strict adherence to the goal weight policy under certain circumstances, including an employee’s pregnancy. These exceptions were not made for applicants to be hired. The EEOC did not challenge the legality of the goal weight requirement and did not claim that the goal weight policy had a disparate impact on pregnant women; the EEOC’s only claim related to the application of that policy to Lamond-Broughton. Earlier, the Magistrate Judge granted in part the EEOC’s motion to compel and Rule 56(d) motion to defer a summary judgment ruling. The EEOC filed Rule 72 objections to the Magistrate Judge’s order, which precluded the EEOC from obtaining discovery regarding Defendant’s treatment of pregnant employees under its staff goal weight policy, including whether and under what circumstances Defendant made exceptions to its policy for pregnant employees. Defendant conceded, for purposes of summary judgment, that its employee, Carolyn Bough, told Lamond-Broughton that Defendant did not hire pregnant women, and that such a statement, if made, would constitute direct evidence of discrimination. Defendant’s basis for its motion for summary judgment was that the EEOC could not establish a prima facie case of discrimination because Lamond-Broughton was not objectively qualified to be hired, according to Defendant’s policy. The Magistrate Judge had limited discovery to the objective qualification component of the case and to areas that may lead to evidence regarding whether in fact Lamond-Broughton was over her goal weight, whether Defendant unequally applied its goal weight policy to applicants, whether exceptions had been made to the policy for prior applicants, and what Defendant knew to be true about Lamond-Broughton’s weight and her application for employment. The Magistrate Judge had also permitted discovery into any statements or communications that could establish direct evidence of discrimination. The Court affirmed the order of the Magistrate Judge. The Court observed that because Lamond-Broughton was never Defendant’s employee, she was never subjected to the staff goal weight policy, and because the EEOC was not challenging the goal weight policy itself, or its impact on pregnant women as a group, the Magistrate Judge appropriately denied the EEOC’s motion to conduct discovery into Defendant’s treatment of its employees under the staff goal weight policy. Defendant conceded, for purposes of its summary judgment motion, that its employee, Carolyn Bough, directly discriminated against Broughton in the hiring process, and its only argument on summary judgment was that Lamond-Broughton was objectively unqualified for the position. The Court noted that in order to effectively respond to Defendant’s motion, the EEOC had been granted discovery into all matters relevant to responding to that motion, including the opportunity to conduct requested depositions of Defendant’s employees. In addition, the Court stated that the Magistrate Judge did not preclude discovery into whether there were exceptions made to the goal weight policy as applied to applicants, whether the applicant goal weight policy in fact had an acceptable goal range that was not observed in this case, and whether other applicants were given opportunities to achieve goal weight and re-apply. Accordingly, the Court concluded that the Magistrate Judge’s order was neither erroneous nor contrary to law.

**EEOC v. The WW Group, Inc., 2013 U.S. Dist. LEXIS 169134 (E.D. Mich. Dec. 2, 2013).** Wendy Lamond-Broughton was a Weight Watchers lifetime member who wished to apply for a position with Defendant as a group leader. *Id.* at *3. At the time she expressed an interest in applying for a position she was pregnant. *Id.* Prior to interviewing for the position, Broughton spoke with a Weight Watchers manager who told her that it was not worth coming to an upcoming interview session because Defendant did not hire pregnant women, as her pregnancy would cause her to be over her goal weight. *Id.* at *7. The manager admitted that she told Broughton that she must be at goal weight to attend the interview session, even if the reason for her weight gain was her pregnancy. *Id.* at *8. The EEOC subsequently sued Defendant for pregnancy discrimination against Broughton. Defendant moved for summary judgment. Weight Watchers conceded that the manager’s statement to Broughton constituted “direct evidence of discrimination,” and thus it had the burden to prove by a preponderance of the evidence that it would have made the same decision toward Broughton absent the impermissible motive (i.e., the alleged pregnancy discrimination). *Id.* at *23. Defendant argued that it satisfied this burden since Broughton was not objectively qualified for the job, as she failed to meet the goal weight policy and because it would not have hired Broughton even in the absence of the alleged discriminatory motive because she was above goal weight at the time she sought employment. *Id.* at *23-24. The Court denied Defendant’s motion, finding that, “there is at a minimum a
question of fact regarding whether the goal weight required, as applied to Broughton, was related to her ability to perform the job.” Id. at *25-26. The Court focused on the fact that Weight Watchers had a separate policy for current staff members (as compared to applicants like Broughton) that allows them to remain active employees even if they go above their goal weight because of pregnancy. Id. As such, the Court held that because Defendant deemed current employees who become pregnant and go above their goal weight as “qualified,” a question of fact existed as to “whether the applicant goal weight policy has a legitimate connection to the applicant’s ability to perform the job.” Id. at *30. Given that “a reasonable juror could conclude that [Broughton’s] pregnancy weight gain was entirely unrelated to her ability to be an effective group leader or receptionist” as well as Defendant’s “own concession that pregnant group leaders can effectively communicate in their positions without destroying the credibility of the WW program,” the Court reasoned that a question of fact existed rendering summary judgment inappropriate. Id at *31.

Defendant analogized its argument with a situation involving an African-American pilot who was denied a position because of his race, but nonetheless failed to possess the required pilot license so could not have been hired for the job even without the discriminatory motive. Id. at *32. The Court rejected this analogy as “inapt,” since unlike the pilot hypothetical it found there to be a genuine issue of material fact regarding the relevance of Defendant’s “objective” qualification given that Weight Watchers dispenses with this requirement for current employees as compared to the necessity of a license for a pilot. Id.

**EEOC v. Trinity Home Health Services, 2013 U.S. Dist. LEXIS 47273 (E.D. Mich. April 2, 2013).** The EEOC brought an action against Defendant on behalf of Patricia Barriger, a registered nurse, alleging unlawful employment practices in violation of § 102(a) of the Americans With Disabilities Act. Barriger was diagnosed with multiple sclerosis over 20 years ago. Initially, Defendant honored certain of her medical restrictions, such as reducing the amount of shifts lasting over eight hours. Due to an unrelated medical issue, Barriger asked Defendant to reduce her work schedule to one day a week for four hours, for the next three weeks. Defendant rejected her request, and terminated her employment. The EEOC moved to compel discovery for all documents relating to the terms and conditions of other employees managed by Defendant and holding the same position as Barriger. Furthermore, the EEOC requested documents concerning Defendant’s treatment of other disabled employees because Defendant intended to introduce evidence about disabled employees that it treated well as evidence that it did not discriminate against Barriger. Defendant agreed to produce part of the personnel files, including social security and personal information; however, the remainder of the files were withheld subject to a protective order. Defendant also withheld all personnel files of other disabled employees, subject to a proposed protective order. The EEOC filed a motion to compel and argued that the proposed protective orders failed to satisfy Rule 26 (c) because Defendant did not state with particularity the type of harm the employees would suffer if their personal files were released. The Court found that the information sought was relevant to Barriger’s discrimination claims, and therefore, within the scope of discovery. Id. at *6. Regarding the protective order, the Court found that the movant must provide specific facts with clear and serious injury resulting from the discovery sought, and cannot rely on mere conclusory statements. Id. at *7. Furthermore, the Court stated that Defendant had a valid interest in the privacy of non-party personnel files, which includes the protection of highly personal information such as an individual’s unlisted address, telephone number, marital status, wage information, medical background, credit history, and other work-related problems unrelated to Barriger’s claims. Id. at *8. The Court also noted that similar protective orders were commonly granted as a means of protecting the privacy interests of non-parties while still serving the needs of litigation. Id. Accordingly, the Court found that the proposed protective order was sufficiently tailored because it applied only to specific portions of the personnel files, such as medical, training, testing, disciplinary and performance evaluations of current or former employees. Id. For these reasons, the Court granted the protective order and also granted the EEOC’s motion to compel collection of the remaining documents.

(vii) Seventh Circuit

**EEOC v. Abbott Laboratories, 2013 U.S. Dist. LEXIS 49601 (E.D. Wis. Mar. 29, 2013).** The EEOC filed this action on behalf of a 54-year-old, long-time sales representative, John Ziegler, alleging that Defendant
terminated his employment in violation of the ADEA. Defendant filed a motion for summary judgment, which the Court granted. The Court noted that to establish a prima facie case of age discrimination under the indirect method of proof, the EEOC must prove that (i) Ziegler was a member of a protected class; (ii) his performance met Defendant’s legitimate expectations; (iii) despite his performance, he was subject to an adverse employment action; and (iv) Defendant treated similarly-situated employees under 40 more favorably. Id. at *73. With respect to the second prong, Defendant contended that Ziegler had documented performance problems for three years; he ranked last in his sales district in three of the four critical categories; his customers were complaining; and he did not call on the majority of his customers. The EEOC responded by asserting that Ziegler was performing near the top in his district, i.e., second out of six sales representatives, at the time his employment terminated. The Court noted, however, that this argument focused solely on Ziegler’s sales figures and rankings. The Court observed that Defendant evaluated a sales representative’s performance under a performance evaluation system that considered three categories, including core job responsibilities, goals, and competencies. The record established that for three consecutive years – from 2003 to 2005 – Ziegler had an overall rating that placed Ziegler in the lowest performing 5% of the Defendant’s sales force. Id. at *75. The Court reasoned that it did not sit as a super-personal department that reexamined an entity’s business decisions. Id. at *78. Accordingly, the Court concluded that the EEOC did not present sufficient evidence under the indirect method of proof to overcome Defendant’s summary judgment motion. The Court also analyzed the EEOC’s attempt to show discrimination under the direct method of proof. The Court noted that unlawful discrimination under the direct method could be demonstrated with circumstantial evidence, but the evidence must point directly to a discriminatory reason for the employer’s action. Id. at *80. The EEOC argued that the record showed suspicious timing because Ziegler’s employment was terminated shortly before his 55th birthday, while he was still officially on a performance improvement plan and after his sales numbers had recently risen, and his younger replacement had already received one of Ziegler’s accounts and was poised to take over the remainder. The EEOC also asserted that Ziegler’s supervisors made ageist remarks to and about him. The Court found that while there were positive developments in Ziegler’s performance, from Defendant’s perspective, overall the negative aspects of his performance outweighed the positives. The Court acknowledged that it was not the role of the EEOC or the Court to re-craft the Defendant’s criteria for evaluating its employees or assign different weights to the criteria. As to the alleged remarks, the Court found that some were not ageist and some were not made close enough in time to the termination to constitute evidence of discrimination. Id. at *83. The Court thus concluded that the evidence in the record, when viewed in the light most favorable to the EEOC, was insufficient to defeat summary judgment. Accordingly, the Court granted Defendant’s motion for summary judgment.

EEOC v. Aerotek, Inc., 498 Fed. App’x 645 (7th Cir. 2013). The EEOC issued an administrative subpoena to Defendant, a nationwide staffing company, during the course of an investigation that Defendant discriminated against its employees on the basis of national origin. Subsequently, six business days after service of the subpoena, Defendant filed a petition asking the EEOC to modify or revoke the subpoena. The EEOC’s two-member panel issued a determination stating that Defendant waived its right to object to the subpoena because Defendant’s petition was submitted one day too late under EEOC regulation 29 C.F.R. § 1601.16(b)(1), which requires respondents to file a petition within five business days after service. When the EEOC attempted to enforce the subpoena in District Court, Defendant filed a motion to dismiss on the ground that Title VII requires three Commissioners for a quorum, but only two members considered its petition to revoke or modify the subpoena. The District Court, ignoring the timeliness issue, denied Defendant’s motion on the merits, and Defendant subsequently appealed. On appeal, in addition to the three-member quorum requirement argument, Defendant contended that its failure to file a timely petition to revoke or modify the EEOC’s subpoena did not bar it from challenging a subsequent application by the EEOC to enforce its administrative subpoena. The Seventh Circuit noted that it need not address whether the EEOC was unable to act lawfully on Defendant’s petition since the EEOC was down to two commissioners because Defendant failed to object to the EEOC subpoena within five business days and, pursuant to the plain terms of the EEOC’s regulations, therefore waived its right to challenge the enforcement of the subpoena. Id. at 647-48. With respect to Defendant’s contention that its failure to file a timely petition does not bar it from challenging a subsequent application by the EEOC to
enforce, the Seventh Circuit opined that no other Court of Appeal had examined § 1601.16(b)(1) under Title VII. Nonetheless, the Seventh Circuit found guidance in *EEOC v. Sunco, Inc.*, 2009 U.S. Dist. LEXIS 6070 (E.D. Pa. Jan. 26, 2009), and *EEOC v. City of Milwaukee*, 54 F. Supp. 2d 885, 891 (E.D. Wis. 1999), both of which found that employers waive the right to object to the enforcement of a subpoena by failing to file a timely petition with EEOC within the agency’s five-day window. *Id.* at 649. The Seventh Circuit opined that “[o]ne could conceivably argue that we should distinguish this case from those where the respondents failed to petition for modification entirely, since here the petition was just late. But § 1601.16(b)(1) makes no such distinction and we see no reason to make an exception based on the record before us.” *Id.* The Seventh Circuit further noted that the oversight role of federal courts in subpoena enforcement is “sharply limited” because at this stage in reviewing an enforcement action, it is not the job of federal courts to assess the underlying merits of a charge of discrimination. *Id.* Therefore, the Seventh Circuit held that a failure to file a timely petition to revoke or modify a subpoena bars an employer from challenging a subsequent application by the EEOC to enforce its administrative subpoena. Accordingly, the Seventh Circuit affirmed the judgment of the District Court.

**EEOC v. AT&T Corp., 2013 U.S. Dist. LEXIS 164987 (S.D. Ind. Nov. 20, 2013).** The EEOC brought an action under the ADA alleging that Defendant failed to reasonably accommodate the disability of Lupe Cardona, and terminated her because of that disability. Cardona, a customer service specialist, was diagnosed with hepatitis C, a virus that attacks the liver. Cardona commenced interferon treatment for Hepatitis C for which she utilized intermittent and then extended leave under the Family & Medical Leave Act (“FMLA”). When Cardona did not come into work, Defendant issued a final written warning to her for unsatisfactory attendance. In a disciplinary meeting, Cardona informed one of Defendant’s managers that her medications were affecting her ability to function at work and it might take six months to be cured. Defendant’s manager suggested Cardona to contact Defendant’s Integrated Disability Service Center (“IDSC”), which deals with short-term disability (“STD”) claims and the job accommodation request process for Defendant. Cardona was advised by IDSC that she was eligible to receive up to 52 weeks of STD benefits with full pay and then processed Cardona according to the STD plan. Cardona did not report to work and remained absent under the STD policy and her remaining FMLA leave. After Cardona exhausted her FMLA leave, Defendant charged her continued absence during the remainder of her STD period as unexcused or unprotected. When Cardona returned to work after her treatment, she was called into a disciplinary meeting at which she was terminated for excessive absences. Defendant moved for summary judgment, arguing that Cardona was terminated because of unsatisfactory attendance and that she was not qualified to perform the essential functions of her job, so it was not required to accommodate her. Even if the ADA protected Cardona, Defendant asserted it was not required to excuse Cardona’s failure to perform her job for such an extended period of time. The EEOC also moved for partial summary judgment on Defendant’s liability for a discriminatory discharge and failure to accommodate. The Court denied both the motions. First, the Court stated that the parties disputed whether regular attendance was an essential function of Cardona’s employment. The Court noted that the job description for the specialist position was silent as to whether attendance was an essential job function. The EEOC also argued that Defendant’s policy of providing formal leave of absence plans belied its contention that regular attendance was an essential function. Therefore, the Court could not determine whether regular attendance was an essential function. Second, the Court stated that the facts were disputed as to whether Cardona put Defendant on notice that she was seeking job accommodations. The Court stated that the ADA’s reasonable accommodation requirement applies only to known disabilities; thus, a Plaintiff must normally request an accommodation before liability under the ADA attaches. *Id.* at *13. Here, Cardona never requested an accommodation from Defendant, but on the advice of her superiors, she contacted IDSC for job accommodations, which therefore raised a genuine issue of material fact barring summary judgment. Finally, the Court noted that the parties disputed the length of leave Cardona requested. The EEOC contended that Defendant was on notice that Cardona’s leave would be no more than 36 weeks. Defendant, however, contended that Cardona never specified the amount of time she would be absent and simply stopped coming to work. Thus, the Court noted that there was ample evidence in the record creating a disputed issue of fact, the determination of which was material to whether such an accommodation – even if required – was reasonable. Similarly, it was disputed as to whether Cardona’s
absence created an undue hardship, thereby making it an unreasonable accommodation. Accordingly, the Court denied both the motions.

**EEOC v. Aurora Health Care, Inc., 933 F. Supp. 2d 1079 (E.D. Wis. 2013).** The EEOC, on behalf of an African-American employee, brought an action alleging that Defendant discriminated against the employee on the basis of her race in violation of the Title VII of the Civil Rights Act. The EEOC charged that Defendant failed to investigate the employee’s numerous internal complaints and retaliated against her for filing internal complaints and a charge with the EEOC. The Court granted Defendant’s motion for summary judgment and dismissed the action with prejudice. The Court found that Defendant had established that the charging employee did not meet its legitimate expectations and that the EEOC failed to present evidence that Defendant treated other employees who were outside the protected class more favorably. In evaluating the employee’s conduct, Defendant had found that the employee’s behavior toward her superior and her supervisor was not consistent with Defendant’s service standards and values, and that the employee failed to take initiative to support her co-workers and to follow reasonable instructions. *Id.* at 1104. Defendant also pointed to the employee’s performance issues, her supervisor’s evaluation as less than competent, and the subsequent meetings regarding her conduct and performance to show that the employee was not performing according to its legitimate expectations. *Id.* The undisputed facts showed a steady increase in performance issues raised by multiple people against the charging employee despite Defendant’s efforts to accommodate her. *Id.* The Court found that a reasonable jury could not conclude that the charging employee was performing her job according to Defendant’s reasonable expectations. The Court further determined that the EEOC had failed to establish that a similarly-situated employee was treated differently. The EEOC had identified two Caucasian employees who were treated differently from the charging employee, but after examining the evidence, the Court concluded that neither employee had engaged in similar conduct of comparable seriousness. *Id.* at 1105-06. The Court thus found that the EEOC could not establish that either Caucasian employee was similarly-situated to the charging employee, and dismissed the EEOC’s race discrimination claim. *Id.* at 1106 The Court also dismissed the EEOC’s retaliation claim. While the reasons for the termination of the charging employee were the incidents that occurred after she filed the EEOC complaint and the termination occurred after mediation, the Court found no sufficient evidence to show that the protected events were a motivating factor of Defendant’s decision to terminate the employee. *Id.* at 1110. Two incidents were cited in charging employee’s termination paperwork and the termination was coded as being for misconduct. *Id.* at 1109. The concerns over employee’s work performance were present even at the first evaluation, as her supervisor stated that her performance was good when she began but deteriorated significantly over time. *Id.* at 1111. The Court thus found that Defendant had articulated a legitimate, non-discriminatory reason for terminating the charging employee and a reasonable jury would find that Defendant would have terminated the employee even if she had not engaged in protected activity. *Id.* Accordingly, the Court granted Defendant’s motion for summary judgment.

**EEOC v. Aurora Health Care, Inc., 2013 U.S. Dist. LEXIS 164565 (E.D. Wis. Nov. 5, 2013).** The EEOC brought an action under the ADA seeking to correct Defendant’s alleged unlawful employment practices on the basis of disability and to provide appropriate relief to Kelly Beckwith, who was diagnosed with multiple sclerosis (“MS”). The EEOC had disclosed one of Beckwith’s treating physicians, Dr. Bhupendra Khatri, as a non-retained expert witness. Thereafter, the EEOC supplemented its disclosure. Defendant moved to bar Dr. Khatri’s expert testimony on the basis that the supplement was deficient. *Id.* at *2. The Court denied the motion. The Court noted that the EEOC’s supplemental disclosure stated that MS had impaired Beckwith’s neurological system and that Beckwith did not need accommodations to perform the registered nurse coordinator position. The disclosure further explained that Dr. Khatri’s opinions were based on his experience treating Beckwith, his personal knowledge of her neurological condition, his expertise in neurology, and his review of her medical records, as well as information provided to him about the nurse position. *Id.* at *3. Defendant argued that it was entitled to know the specific medical records supporting Dr. Khatri’s opinion. The Court stated that Rule 26(b)(1)(B) incorporates only Rule 26(a)(2)(B)(i), according to which a report must contain a complete statement of all opinions the witness would express and the basis and reasons for them, and not Rule 26(a)(2)(B)(ii), which required disclosure of the facts or data.
considered by the witness in forming his opinions. *Id.* at *3. Further, the Court noted that the cases cited by Defendant involved retained experts and therefore failed to convince the Court that exclusion was proper here. Accordingly, the Court denied Defendant’s motion to bar the testimony of the EEOC’s expert.

**EEOC v. AutoZone, Inc., 707 F.3d 824 (7th Cir. 2013).** The EEOC brought an employment discrimination case on behalf of a former employee of Defendant. The employee, a sales clerk, had a back injury that was aggravated by mopping floors, and he claimed that Defendant required him to mop floors despite his requests for relief. The EEOC alleged that Defendant violated the ADA by failing to accommodate the employee’s disability during his employment from March to September 2003. The EEOC also alleged that Defendant retaliated against the employee and failed to accommodate his disability when it refused to allow him to return to work in January 2004 and later terminated his employment. In the first trial, the parties agreed to submit to the jurisdiction of a Magistrate Judge. The Magistrate awarded summary judgment to the Defendant but only on the March to September 2003 accommodation claim. On the January 2004 termination claim, a jury found that the employee had not been qualified to perform his job in January 2004 and ruled in Defendant’s favor. The EEOC appealed only the summary judgment award and the Seventh Circuit reversed and remanded. At the second trial, the jury returned a verdict stating that the employee was qualified to perform his job in March through September 2003 and found in the EEOC’s favor on the accommodation claim. *Id.* at 831. The second jury awarded $100,000 in compensatory damages, $500,000 in punitive damages, $115,000 in back pay, and an injunction against Defendant’s discriminatory practices. *Id.* Defendant appealed the verdict and the remedies. The Seventh Circuit substantially affirmed the judgment. Defendant argued that issue preclusion prevented the second jury from reaching its verdict in favor of the EEOC. The Seventh Circuit held that the first jury’s verdict finding – that the employee was not a qualified individual in 2004 at the time of his involuntary medical leave and termination – did not preclude the second jury from finding liability on the March to September 2003 accommodation claim because the two juries were considering different periods of time. *Id.* at 832. While Defendant argued that the employee’s back condition was constant throughout both periods of time, the record showed that the employee experienced a flare-up in September of 2003 that forced him to take a lengthy leave of absence. *Id.* The Seventh Circuit held that the two juries considered different issues, and therefore, Defendant failed to meet the elements of issue preclusion. *Id.* The Seventh Circuit also held that the District Court did not abuse its discretion by admitting the testimony of the EEOC’s expert without the expert submitting a written report. The Seventh Circuit found that the expert, a treating physician whose opinions were formed for diagnosis of the employee and not in preparation for litigation, could provide an opinion without submitting a written report. *Id.* at 833. The Seventh Circuit also upheld the award of compensatory damages, citing the medical evidence of the employee’s pain. The employee experienced near-daily pain that left him incapable of performing common activities, such as putting on his clothes and taking a shower. *Id.* at 834. The Seventh Circuit further held that Defendant’s conduct was sufficiently reprehensible to justify imposing punitive damages. Defendant was aware that the employee had a back injury and regarded it as a disability, but it repeatedly failed to accommodate the employee’s disability and such repeated failure could form the basis for a finding of reckless indifference. *Id.* at 837. Further, the amount of the punitive damages exceeded the compensatory damages by only a multiple of two, which was well within due process constraints. *Id.* at 839-40. Finally, the Seventh Circuit found that the “obey the law” injunction was warranted due to the Defendant’s inaction over eight years, but had to be remanded for the District Court to impose a temporal limit. *Id.* at 843-44.

**EEOC v. Celadon Trucking Services, Inc., 2013 U.S. Dist. LEXIS 55506 (S.D. Ind. April 18, 2013).** The EEOC brought an action under the Americans With Disabilities Act (“ADA”) alleging that Defendant engaged in a pattern or practice of making disability-related inquires and conducting pre-offer medical examinations of driver applicants. The EEOC moved to bifurcate the trial and discovery into two stages – a liability and punitive damages stage, and a remedial and compensatory damages stage. The EEOC also sought clarification of a discovery order compelling the production of certain damages information. The Defendant opposed both motions, and the Court granted and denied both in part. The Court noted that it could only bifurcate if doing so serves the interests of judicial economy or prevents prejudice to a party; does not unfairly prejudice the non-moving party; and does not violate the Seventh Amendment. *Id.* at *2.
The Court found that bifurcating trial and discovery between liability and damages would be more efficient. As to the trial, the Court ruled that presenting evidence of damages for over 100 class members to a jury before there is a finding of liability would put the cart before the horse and may distract the jury from focusing on the antecedent determination of liability. Bifurcation of discovery was a closer call, but the Court concluded that conducting extensive damages discovery for over 160 class members before a finding of liability was more likely to result in greater inefficiencies. The Court, thus, ordered that trial and discovery would be bifurcated into these two stages. *Id. at *3-5. Defendant asserted that bifurcation was prejudicial because access to the entire class was necessary to assess liability and to determine whether each class member was a qualified individual under the ADA. Defendant also contended that it intended to move for summary judgment, which would eliminate liability for most class members. The Court, however, remarked that these objections were based on the faulty premise that liability must be established for each individual class member. The Court opined that because the proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made pursuant to that policy, the EEOC need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of discrimination. *Id. at *6. Thus, the Court noted that it was unnecessary to conduct liability discovery on the entire class because a pattern or practice suit was not based on individual hiring decisions but on a pattern or practice of discrimination. The Court also stated that summary judgment would not eliminate individual class members based on an individual’s ability to qualify under the ADA, but would focus on whether a discriminatory pattern or practice was in place in violation of the ADA. Accordingly, the Court observed that there was no sufficient prejudice to overcome bifurcation. *Id. at *6-7. The Court also noted that punitive damages were frequently considered after the liability stage, and stated that here too, punitive damages should be determined after proof of liability to individual claimants at the second stage of a pattern or practice case, not upon the mere finding of general liability to the class at the first stage. *Id. at *8. Further, the Court remarked that any inefficiencies in recycling evidence from the liability stage could be minimized by stipulations or even a more focused stage two presentation based on experience derived from the liability stage. Finally, regarding the motion for clarification, the Court stated that the EEOC need not produce discovery at stage one responsive to Defendant’s requests that the EEOC detail each and every item of damages for the alleged class of applicants for trucking positions, to the extent that such information related to the pattern or practice claim.

**EEOC v. Mach Mining, LLC, 2013 U.S. Dist. LEXIS 71172 (S.D. Ill. May 20, 2013).** The EEOC brought a pattern or practice action on behalf of a group of female job applicants alleging that Defendant failed to hire females for mining and related non-office job positions because of their sex in violation of Title VII. The EEOC further alleged that Defendant’s hiring practices of employing only applicants referred by current employees disparately impacted female applicants. In its answer to the EEOC’s complaint, Defendant asserted that the EEOC failed to conciliate in good faith. The EEOC then filed a motion to partial summary judgment, arguing that conciliation is beyond the scope of judicial review. The Court denied the EEOC’s motion and noted that the EEOC’s conciliation efforts were subject to “at least *some* review.” *Id. at *2-3 (emphasis in original). The EEOC thereafter moved for reconsideration of the Court’s order. Alternatively, the EEOC asked the Court to certify for interlocutory appeal “whether, under Title VII or the Administrative Procedure Act (“APA”), Courts may review EEOC’s informal efforts to secure a conciliation agreement acceptable to the Commission before filing suit.” *Id. at *3. With respect to the motion for reconsideration, the EEOC contended that reconsideration was appropriate because the Court erred when it failed to construe the APA to preclude judicial review of conciliation. The Court rejected the EEOC’s argument and observed that the EEOC did not support its argument with any case law that the APA expressly precludes judicial inquiry into whether the EEOC made good faith efforts to conciliate. Moreover, the Court noted that the only case cited by the EEOC that actually addressed the issue of conciliation – **EEOC v. Elgin Teachers Association, 27 F.3d 292, 293 (7th Cir. 1994)** – supported the view that the Court does have the authority to review agency conciliation efforts. *Id. at *6-7. Therefore, the Court held that there was no manifest error of law in finding the EEOC’s conciliation process was subject to at least some level of review. The EEOC also argued that the Court erred when it failed to strike the relevant portion of Defendant’s response to the EEOC’s motion for partial summary judgment that referred to conciliation.
discussions between the parties. The EEOC contended that disclosure of conciliation discussions as evidence in a subsequent proceeding is expressly prohibited by Title VII’s anti-disclosure provision, 42 U.S.C. § 2000e-5(b). In rejecting the EEOC’s argument, the Court noted that Title VII’s requirement that conciliation talks be kept confidential conflicts with 42 U.S.C. § 2000e-f(b), which requires the EEOC to attempt to conciliate in good faith prior to filing suit. The Court opined that “to review whether the EEOC engaged in conciliation, at least some level of evidence regarding conciliation efforts must be introduced into evidence ….” Id. at *10. The Court further observed that all of the federal circuits that had directly confronted the question – the Fourth, Sixth, Tenth, and Eleventh Circuits – uniformly ruled that some judicial review of EEOC conciliation efforts was authorized. Id. The Court noted that the conflict between the Title VII provisions could be resolved by interpreting 42 U.S.C. § 2000e-5(b)’s anti-disclosure rule as only barring the introduction of conciliation matters into evidence to prove or disprove a claim on the merits of the EEOC’s allegations, and that the statute does not prohibit the introduction of conciliation matters in collateral proceedings such as contesting the EEOC’s conciliation efforts. Id. at *11. The Court noted that Defendant did not introduce conciliation matters for the purpose of proving or disproving the merits of the EEOC’s allegations, but rather it attached conciliation discussions between the parties to prove that the EEOC failed to fulfill its statutory obligation to conciliate. Therefore, the Court held that it did not commit a manifest error of law in failing to strike Defendant’s response to the EEOC’s motion for partial summary judgment. With respect to the EEOC’s alternative request that the conciliation reviewability issue be certified for immediate appellate review, the Court found that the two questions at issue – namely, whether the EEOC’s conciliation process was subject to judicial review, and whether the level of review was a deferential or heightened scrutiny level of review – were issues of law that were contestable and may control the outcome of the EEOC’s case. Id. at *15-16. Furthermore, the Court observed that the questions raised were controlling, and if conciliation was justiciable, the inquiry into the EEOC’s conciliation could dramatically affect the size of the class. Thus, the Court held that obtaining immediate answers to these questions from the Seventh Circuit met the criteria for interlocutory appeal. Id. at *17-18. Accordingly, the Court granted the EEOC’s request for interlocutory appeal.

**EEOC v. Mach Mining, LLC, 2013 U.S. App. LEXIS 25454 (7th Cir. Dec. 20, 2013).** The EEOC sued Defendant alleging a pattern or practice of not hiring women for mining and related positions, or, in the alternative, maintaining a neutral hiring policy that has a disparate impact on women. The company asserted a number of affirmative defenses, including that the EEOC failed to conciliate in good faith before suing. The EEOC moved for summary judgment on that defense, arguing that the Seventh Circuit’s decision in **EEOC v. Caterpillar, Inc., 409 F.3d 831 (7th Cir. 2005),** compelled the conclusion that the EEOC’s conciliation process is not subject to judicial review. The District Court denied the EEOC’s motion for summary judgment, but granted the Commission’s motion to certify the order to the Seventh Circuit pursuant to 28 U.S.C. § 1292(b). Id. at *5. The District Court certified two questions for appellate review, including: (i) whether District Courts may review the EEOC’s informal efforts to secure a conciliation agreement acceptable to the Commission before filing suit; and (ii) if District Courts may review the EEOC’s conciliation efforts, should that review apply a deferential or heightened scrutiny standard of review. In deciding whether to allow the “failure to conciliate” defense to stand, the Seventh Circuit considered: (i) the language of Title VII; (ii) whether there is a workable standard for such a defense; (iii) whether the defense might fit into the broader statutory scheme set forth by Congress in Title VII; (iv) its prior decisions; and (v) the decisions from other circuits recognizing the “failure to conciliate defense” as appropriate. Id. at *6. In rejecting the “failure to conciliate” defense, the Seventh Circuit held that the “Title VII contains no express provisions” for this defense and, in support of the EEOC’s position, makes clear that “conciliation is an informal process entrusted solely to the EEOC’s expert judgment and that the process is to remain confidential.” Id. The Seventh Circuit also held that cutting against the “failure to conciliate” defense is the fact that no workable standard of review exists by which District Courts can meaningfully judge whether the EEOC has conciliated in good faith. Id. at *9-10. Specifically, the Seventh Circuit held that “[a District Court] reviewing whether the agency negotiated in good faith would almost inevitably find itself engaged in a prohibited inquiry into the substantive reasonableness of particular offers – not to mention using confidential and inadmissible materials as evidence – unless its review were so cursory as to be meaningless.” Id. at *12. In terms of the statutory scheme of Title VII, the Seventh Circuit
held that the “failure to conciliate” defense does not comport with Congress’ intent since, “offering the implied defense invites employers to use the conciliation process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a dispute.” Id. at *16. Similarly, the Seventh Circuit determined that “if an employer engaged in conciliation knows it can avoid liability down the road, even if it has engaged in unlawful discrimination, by arguing that the EEOC did not negotiate properly – whatever that might mean – the employer’s incentive to reach an agreement can be outweighed by the incentive to stockpile exhibits for the coming court battle.” Id. at 16. In rejecting the argument advanced by the employer and numerous amici supporting the “failure to conciliate” defense, and the fact that Congress intended for District Courts to watch over the EEOC to ensure that it complied with pre-suit obligation, the Seventh Circuit opined that “[w]e are not persuaded….that EEOC field offices are so eager to win publicity or to curry favor with Washington by filing more lawsuits that they will needlessly rush to court.” Id. at *19. Finally, after noting that District Courts within the Seventh Circuit have exhibited “consistent skepticism toward employer’s efforts to change the focus from their own conduct to the agency’s pre-suit actions,” it analyzed case law from other circuits and noted that “our decision makes us [the Seventh Circuit] the first circuit to reject explicitly the implied affirmative defense of failure to conciliate.” Id. at *24. The Seventh Circuit then noted that its decision “may complicate an existing circuit split more than it creates one….” Id. at *25. The Seventh Circuit declined to follow the “three part inquiry” that the Second, Fifth, and Eleventh Circuits use to evaluate conciliation as well as the “minimal level of good faith” inquiry engaged in by the Fourth, Sixth, and Tenth Circuits to evaluate the EEOC’s pre-suit conciliation obligation, and held that “while we respect the views of our colleagues in these circuits, we also recognize our duty to decide our cases independently and to disagree when we must.” Id. The Seventh Circuit concluded its decision by reiterating that going forward it will not scrutinize the EEOC’s pre-suit obligations because, “if the EEOC has pled on the face of its complaint that it has complied with all procedures required under Title VII and the relevant documents are facially sufficient, our review of those procedures is satisfied.” Id. at *39.

Editor’s Note: The Seventh Circuit’s decision in EEOC v. Mach Mining is one of the Commission’s significant appellate victories in 2013. The ruling sets up a circuit split on the issue of the affirmative defense of the EEOC's failure to conciliate prior to filing suit and the extent to which judges may review the Commission's conduct. This issue is likely destined for review by the U.S. Supreme Court.

EEOC v. Midwest Independent Transmission Systems Operations Inc., 2013 U.S. Dist. LEXIS 75763 (S.D. Ind. May 30, 2013). The EEOC brought an ADA action alleging that Defendant failed to provide Crystal Wirstiuk with a reasonable accommodation and terminated her employment because of her disability. Wirstiuk was on a 12-week maternity leave with short-term disability benefits, and returned to work as scheduled on October 27, 2009, with no restriction. On January 27, 2010, Wirstiuk requested a 30-day leave of absence, which Defendant approved. Subsequently, Wirstiuk informed Defendant that her physician was putting her off work for another 30 days, and Defendant received a note from Wirstiuk’s healthcare provider stating that her post-partum complications had not yet been resolved and that she could return to work on April 2, 2010. Thereafter, Wirstiuk submitted the medical certification form, which indicated that her probable return-to-work date was March 29, 2010. However, when Wirstiuk was asked to clarify whether she intended to return on March 29 or April 2, Wirstiuk replied the latter. By letter dated March 23, 2010, Defendant informed Wirstiuk that due to her extended period of time out of the office, her employment would be terminated effective March 23, 2010. Defendant moved for summary judgment, and the Court granted in part and denied in part Defendant’s motion. First, Defendant argued that Wirstiuk was not a qualified individual with a disability, arguing that an employee who is unable to report to work for two months is not a qualified individual with a disability and therefore not covered by the ADA. Id. at *10. The Court stated that because a leave of absence can sometimes be a reasonable accommodation, a highly fact-specific inquiry needed to be conducted to determine whether the leave of absence requested by Wirstiuk was a reasonable accommodation given the specifics of Defendant’s situation. Although a lengthy leave of absence is not the type of accommodation that is reasonable in most cases, the Court noted that the EEOC offered evidence from which a reasonable jury could conclude that there were special circumstances that demonstrated that the leave requested by Wirstiuk was reasonable given the specific
facts of this case. After Wirstiuk was terminated, Defendant temporarily hired Hannah Pojar to replace Wirstiuk. Although Pojar was offered the position on May 24, 2010, she did not start until August 23, 2010. The Court remarked that while Defendant asserted that attendance was an essential function of Wirstiuk’s job that she could not satisfy because she could not return to work until June 2, a jury reasonably could discredit that assertion based on the apparent lack of urgency which Defendant set about with her replacement. On the other hand, the Court also noted that a jury reasonably could conclude that Wirstiuk’s requested accommodation was unreasonable. Thus, because of this material issue of fact, the Court denied Defendant’s motion on the EEOC’s failure to accommodate claim. Regarding the EEOC’s disability discrimination claim, the Court observed that Defendant did not raise the issue of whether Wirstiuk satisfied the ADA’s definition of a disability, and there was a genuine issue of material fact whether she could perform the essential functions of her job with a reasonable accommodation. Further, the EEOC did not present evidence from which a reasonable jury could conclude that she was terminated because of her disability. The Court stated that a jury could find that firing her for extended leave of absence violated the ADA because it constituted a failure to provide her with a reasonable accommodation, but, without more, no reasonable jury could find that her termination was because of her disability, rather than because of her absence from work. Accordingly, the Court granted Defendant’s motion on the EEOC’s disability discrimination claim. Finally, Defendant also moved for summary judgment on the EEOC’s claim for punitive damages. The Court rejected Defendant’s position because the record was sufficient to allow the issue of punitive damages to survive summary judgment.

**EEOC v. New Indianapolis Hotels, LLC, 2013 U.S. Dist. LEXIS 102825 (S.D. Ind. July 22, 2013).** The EEOC brought an action alleging racial discrimination, retaliation, wrongful termination, disparate wages and hours, and hiring discrimination with respect to black applicants for housekeeping positions. Earlier, the Court had entered a consent decree according to which a monetary fund of $195,000 was to be distributed to eligible applicant class members. *Id.* at *1-2. The Court stated that an applicant was not eligible to participate in the settlement if the applicant did not apply for a housekeeping position in the specified time period and if the EEOC was unable to locate the applicant and/or the applicant did not respond to correspondence from the EEOC. *Id.* at *2-3. The EEOC received letters of objection from Cilithia Herron and Quinteda McCann, two persons deemed ineligible applicants. Herron appeared at the fairness hearing and testified. McCann did not. The EEOC moved to strike any objections to the proposed distribution. The Court overruled the objections. The EEOC attempted to contact Herron and McCann by letter. The letter stated that Herron and McCann had been identified as potential class members and indicated that Herron and McCann must contact the EEOC if they were interested in participating in the case as a class member. The EEOC again attempted to contact Herron and McCann by letter indicating that it was the EEOC’s final attempt to contact them regarding their interest in participating as class members. Herron contacted the EEOC by phone and spoke with an EEOC intern, who said that Herron was skeptical of the organization and the suit, and requested that the EEOC mail her a pamphlet about the EEOC in general and more information about the case. The EEOC mailed the requested information to Herron and provided her with a one week deadline to contact the EEOC in order to participate in the suit. Herron was deemed ineligible because she did not respond to the EEOC’s letters. Herron testified that the address to which the EEOC sent its letters was the home of her mother and during that time, she was fighting with her mother and therefore did not receive any letters from the EEOC. Herron explained that her call to the EEOC was prompted by her mother’s report to her that Herron had received some mail from the EEOC, although Herron did not see the letter itself. Further, Herron stated that she did not thereafter receive the additional information sent by the EEOC to her, but she did not follow up with the EEOC. The Court ruled that the EEOC attempted to contact Herron at what she admitted was the address she used as her mailing address, and following a phone call with the EEOC during which she expressed skepticism about participating, Herron did not again contact the EEOC until after it issued its proposed notice of distribution. *Id.* at *3-6. Regarding McCann, the Court stated that McCann wrote to the EEOC and indicated her willingness to participate in an interview so as to participate in the case but did not appear at the hearing. As a result there was no evidence regarding any extenuating factors bearing on her apparent failure to timely respond to the EEOC’s correspondence. *Id.* at *6-7. Thus, the Court determined that both
Herron and McCann did not meet the requirements for eligible applicants, and accordingly overruled their objections to the proposed distribution pursuant to the consent decree.

**EEOC v. Northern Star Hospitality, Inc., 2013 U.S. LEXIS 127771 (W.D. Wis. Feb. 8, 2013).** The EEOC brought an action under Title VII alleging racial harassment against Dion Miller, and termination in retaliation for opposing the harassment. Defendants filed a counterclaim contending that the EEOC abused the legal process by asserting a claim without a legal basis and without conducting an adequate investigation, and issuing a press release for the purpose of obtaining some ulterior advantage. The EEOC moved to dismiss the counterclaim for failure to state a claim upon which relief may be granted. The EEOC contended that Defendants’ counterclaim was barred by the doctrine of sovereign immunity, and that its actions did not constitute an abuse of process under the law. The Court granted the EEOC’s motion. The Court noted that to assert a counterclaim against the United States or one of its agencies, Defendants must show that they were suing under a law that waived the sovereign immunity of the United States. Id. at *2. Defendants failed to point to any statute that waived sovereign immunity for abuse of process claims and they did not demonstrate why the doctrine did not bar their counterclaim. Further, although Defendants cited Wisconsin state law cases concerning abuse of process, the Court remarked that the fact that Wisconsin recognizes such a claim did not imply that Defendants could sue the EEOC for abuse of process. Further, the Court stated that although the Federal Torts Claims Act waives the United State’s sovereign immunity for a wide range of torts, the Act does not waive immunity for all tort claims against the United States, and in particular, the Act provides exceptions for claims arising out of abuse of process. Id. Accordingly, because Defendants’ counterclaim was barred by the doctrine of sovereign immunity, the Court dismissed the counterclaim.

**EEOC v. Northern Star Hospitality, Inc., 2013 U.S. LEXIS 127772 (W.D. Wis. May 9, 2013).** The EEOC brought an action under Title VII alleging that managers working for Defendants subjected Dion Miller, an African-American former employee, to racial harassment, and that Defendants retaliated against Miller by terminating him after he complained about the harassment. Miller saw a picture of Gary Coleman, an African-American actor posted on a cooler, above which was a notice to kitchen employees about rotating food in the cooler. In addition, a defaced one-dollar bill had been placed over the notice, on which a noose was drawn around George Washington’s neck, a swastika on his forehead and a “dark area” on his cheek; next to Washington’s portrait was a man on horseback and a “hooded klansman” with “KKK” written on his hood. Id. at *4-5. Evan Openshaw, a kitchen manager, told Miller that he had put up the picture of Coleman to remind employees to rotate the food stock, and that Chris Jarmuzek, a kitchen supervisor, had attached the dollar bill as a joke. Openshaw also asked whether Miller would be offended by a picture of David Hasselhoff, a white actor, instead of the picture of Gary Coleman. Miller said he would not. Openshaw then took down the dollar bill and replaced the picture of Coleman with one of Hasselhoff. Jarmuzek testified later that he had put the bill up next to the poster as a joke, knowing that Miller and the other kitchen employees would see it. After Miller’s complaints, Openshaw criticized his work several times, although he had never been disciplined, warned, or reprimanded by any other manager in the past. Although prior to Miller’s complaints, Jarmuzek had considered him an ideal employee, after the complaint, Jarmuzek told Openshaw that Miller was not prepping the right way and that his attitude had deteriorated. Subsequently, Miller was terminated. Defendants moved for summary judgment on the claims of racial harassment and retaliation. The Court granted summary judgment only on the claims of racial harassment and retaliation. The Court noted that to prevail on this claim, the EEOC must prove that the display was both objectively and subjectively offensive and severe or pervasive, and that there must be a basis for employer liability. Id. at *14. The Court stated that the cooler display was the only incident of racism or harassment that Miller experienced while working for Defendants, and the display was taken down immediately after Miller complained about it. Although Miller testified that the display was offensive, hurtful and made him angry, he did not testify that he felt physically threatened, intimidated, or humiliated by the display. The Court observed that the evidence showed that the display was a very bad joke. Thus, the Court stated that no reasonable jury could conclude that the cooler display was severe enough on its own to constitute a hostile work environment, and accordingly, granted
Defendants’ motion for summary judgment on the harassment claim. The Court stated that to prevail on a retaliation claim, the EEOC must prove that Miller engaged in a statutorily protected activity; he suffered a materially adverse action by his employer; and a causal connection exists between the two. Id. at *18-19. The Court noted that Miller was terminated just three weeks after his complaints about the cooler display, and Thomas Nesheim, general manager, admitted that although he had considered terminating Miller earlier, he made the final decision to terminate him after the cooler incident and on the basis of input from Openshaw and Kim Deasy, the front-of-the-house manager. Further, although Nesheim provided Miller a written explanation for his termination, neither he nor Deasy provided more than one or two specific examples of Miller’s purported attitude problems during their depositions. The Court found that a reasonable jury could infer that the purported reasons were pre-textual. Thus, because a reasonable jury could find a causal link between Miller’s complaints about the cooler display and his termination, the Court denied Defendants’ motion for summary judgment on the retaliation claim.

**EEOC v. Northern Star Hospitality, Inc., 2013 U.S. Dist. LEXIS 117638 (D. Wis. Aug. 20, 2013).** The EEOC brought an action under Title VII alleging that Defendant Northern Star Hospitality d/b/a Sparx Restaurant (“Hospitality”) racially harassed Dion Miller and terminated him in retaliation for opposing the harassment. Chris Brekken was the sole owner of the three Defendants – Hospitality, Northern Star Properties (“Properties”), and North Broadway Holdings, Inc. (“Holdings”). Id. at *2. In a bench trial held before a jury to determine liability, the Court addressed two issues, including: (i) whether Defendants were engaged in interstate commerce at the time of the alleged retaliation; and (ii) whether the three Defendants were a single employer for liability purposes. Id. at *1. As to the first question, the Court opined that the applicable test was whether Defendant used goods that at some point in time moved through interstate commerce. Id. at *11. The Court ruled that the test was satisfied as to all three Defendants. Hospitality and Holdings operated restaurants that bought food and supplies from interstate distributors. Properties owned land and a building that it rented to the restaurant operators and had community of interest with the other two Defendants. Id. The Court also concluded that three Defendants were a single employer for liability purposes. The Court found that the owner rarely observed corporate formalities when transferring debts or assets from one corporation to another, and thus sufficient grounds existed for piercing the corporate veil. Id. at *18. Accordingly, the Court denied Defendants’ motion to be dismissed from the case. Id. at *20-21.

**EEOC v. Professional Freezing Services, LLC, 2013 U.S. Dist. LEXIS 172862 (N.D. Ill. Dec. 3, 2013).** The EEOC brought an action alleging that Defendant violated the ADA by refusing to hire William Harvel because of his disability. Defendant moved to dismiss the complaint on the ground that the complaint exceeded the scope of Harvel’s charge. The Court denied the motion. Defendant contended that the complaint had little factual familiarity with the underlying EEOC charge, in which Harvel alleged that he was hired by Defendant and then discriminated against on the basis of his disability. The EEOC argued that although Harvel filed a charge alleging that Defendant discriminated against him in various ways after it hired him, the EEOC’s investigation established reasonable cause to believe that Defendant instead discriminated against Harvel by refusing to hire him. Defendant maintained that the applicable case law was clear in its requirement that an employment discrimination complaint should involve the same conduct as the underlying EEOC charge. The Court noted that the cases cited by Defendant involved an individual Plaintiff bringing suit after receiving a right to sue determination by the EEOC and none involved an action initiated by the EEOC. The Court reasoned that if a private party was permitted to add claims that had not been presented in the administrative charge filed with the EEOC, the EEOC’s informal procedures for resolving discrimination charges would be bypassed, in derogation of the statutory scheme. Such a procedural check was not necessary in suits where the EEOC itself sued in its own name. Id. at *7-8. Because the EEOC was charged with the enforcement of the ADA and was authorized to bring suit against employers that violated the statute without the participation of the complaining employee, the Court found that Defendant’s argument that the complaint was outside the scope of the charge was meritless. Id. at *9-10. Accordingly, the Court denied Defendant’s motion to dismiss the complaint.
**EEOC v. Rexnord Industries, LLC, 2013 U.S. Dist. LEXIS 124525 (E.D. Wis. Aug. 30, 2013).** The EEOC filed an action on behalf Danielle Sullivan, alleging that Defendant fired her either because it regarded her as disabled (by a seizure disorder) or because of her disability (migraines). Defendant filed motion for summary judgment. The Court denied Defendant’s motion, finding that there were numerous disputes of material fact. Sullivan, an assembler, blacked out at work and was subsequently evaluated for a possible seizure disorder. In the next few months, she excused herself from work for short periods. Her physician conducted a fitness for duty examination and stated that Sullivan was being treated for an active seizure disorder and that he recommended that she did not return to work until her medical condition was fully stabilized. After four days, Sullivan was terminated from her employment. The EEOC argued that Defendant discriminated against Sullivan because it regarded her as disabled due to a perceived seizure disorder. Defendant argued that Sullivan was not a qualified individual under the ADA. In this regard, relying upon the physician’s report, Defendant argued that Sullivan’s alleged seizure disorder made her a direct threat to the safety of herself and those around her. The Court observed that while Defendant’s reliance on Sullivan’s departure from workplace by ambulance, presentation of work excuses, receipt of disability benefits, absences from work, and her representations of her medical condition were relevant to whether Defendant made an individualized assessment of Sullivan’s ability to safely perform the essential functions of the job, these were not medical judgments. *Id.* at *13. The Court noted that the EEOC contested whether the physician’s evaluation relied on the most current medical knowledge and/or on the best available objective evidence and in turn whether it was objectively reasonable for Defendant to rely on the physician’s evaluation in determining Sullivan was a direct threat. The Court stated that the applicable regulations and interpretive case law required the evaluation of professional opinions upon which the employer relied. *Id.* at *14. Accordingly, there was a genuine issue of material fact that precluded summary judgment on this issue. With respect to Defendant’s argument that Sullivan’s seizures could continue for an indefinite period of time, the EEOC argued that Sullivan’s episodes lasted only seconds and she responded to them promptly. The Court stated that there was a dispute of fact as to whether Sullivan was actually experiencing seizures because several of Sullivan’s treating physicians were unwilling to make that diagnosis and Sullivan also testified that she reported that she was experiencing blackouts, not seizures. *Id.* at *18. Accordingly, there was a genuine issue of triable fact as to the duration of the risk. The Court admitted that Sullivan worked in a potentially dangerous environment, but the risks her physician presented rested on the premise that Sullivan would unexpectedly lose consciousness. The Court noted that Sullivan testified that she did not lose consciousness during the blackout, as such there was a genuine issue of triable fact as to the nature and severity of the harm caused by Sullivan’s medical condition. The Court stated that whether Sullivan’s medical condition was controlled and whether Sullivan could predict her blackouts was a disputed fact. Accordingly, the Court concluded that there were several disputes of material fact which precluded summary judgment.

**EEOC v. Sony Electronics, Inc., 2013 U.S. Dist. LEXIS 100988 (N.D. Ill. July 19, 2013).** The EEOC brought an action alleging that Defendant violated Title I of the ADA when it discharged Dorothy Shanks because of her disability. Shanks, a leg amputee, worked for Staffmark Investment, LLC, and was assigned to work at Ozbum-Hessey Logistics (“OHL”), where she inspected screws on Sony televisions. Subsequently, a Staffmark employee told Shanks that she was being taken off the line where she performed her job duties because of concerns that she would be bumped into or knocked down by someone. Although Shanks told the Staffmark employee that she wanted to continue working and believed that the area was safe for her, she was not allowed to continue working and the Staffmark employee led her out of the OHL facility. Staffmark never again sent Shanks on an assignment. She filed a charge of discrimination against Staffmark alleging that it discharged her and did not offer her employment opportunities because of her disability. *Id.* at *1-3. The EEOC received Staffmark’s position statement, stating that it removed Shanks from her temporary assignment at OHL at the client’s request. When the EEOC informed Shanks that she was removed from her position at OHL’s request, she also filed a timely charge against OHL. *Id.* at *5. Thereafter, Staffmark informed the EEOC that two Staffmark employees, Cecelia Mota and Tina Scott, could have been involved in events involving Shanks’ assignment at OHL. The EEOC interviewed several Staffmark employees, including Mota, who stated that the employee who requested claimant’s removal was employed by Sony Electronics, Inc. The EEOC informed Shanks, and
she then filed a charge against Sony. *Id.* at *5-6*. Sony moved for summary judgment, arguing that the EEOC’s action was barred by the 300-day statute of limitations set forth in § 706 of Title VII. The Court denied the motion. The EEOC opposed summary judgment based on the federal discovery rule, which provides that a claim does not accrue, and the limitations period does not begin to run, until Plaintiff discovers both the injury that gives rise to the claim and the person causing the injury. *Id.* at *6*. The EEOC argued that Shanks did not know of Sony’s involvement in her termination until the interview with Mota. With the date of interview as the starting date, her charge against Sony was timely. Defendant argued that the EEOC and Shanks were aware of Sony’s involvement in the termination and that they were careless during the first 300 days in not probing further into Sony’s potential involvement. Sony asserted that reasonable diligence was required to invoke the discovery rule, and that the EEOC could not make this showing given Shanks’ failure to scrutinize an obvious suspect. *Id.* at *6-7*. The Court, however, stated that Shanks’ knowledge that she worked on Sony’s products and her general references in her phone interview to working at Sony, did not establish that she knew about Sony’s involvement in her termination. Moreover, the Court remarked that there was no evidence that Shanks ever directly interacted with Sony’s employees, or had reason to believe that Sony’s employees were actively directing the activities of the Staffmark employees at OHL. In addition, the Court stated that even the relationship between Staffmark, OHL, and Sony did not directly evidence Sony’s involvement, and therefore it was reasonable for Shanks to rely on Staffmark’s position statement, which indicated that only Staffmark and its immediate client, OHL, were involved with her termination. Further, the Court also remarked that the EEOC and Shanks had exercised reasonable diligence in the action, and the inactivity was not unreasonable considering that the EEOC was understaffed, overworked, and still managed to move when it received a response to its inquiry about Staffmark employees involved with the termination. Thus, the Court opined that the 300-day clock did not start ticking against Sony until August 31, 2011, when Mota highlighted Sony’s involvement. Accordingly, the Court denied Defendant’s motion for summary judgment. *Id.* at *7-10.*

**EEOC v. South Loop Club, Case No. 12-CV-7677 (N.D. Ill. Feb. 6, 2013).** Five women who worked at South Loop Club, a Chicago bar and restaurant, filed charges with the EEOC alleging discrimination in violation of Title VII. Pursuant to its statutory obligations, the EEOC investigated the charges and found reasonable cause to believe that the Defendant discriminated against the charging parties. Through the EEOC’s investigation, the Commission allegedly found reason to believe that the Defendant also discriminated against an unnamed “class” of female employees. In July 2012, the parties discussed conciliation, but their efforts were fruitless. Two months later, the EEOC filed a complaint alleging that the Defendant discriminated against a “class” of female employees by subjecting them to harassment because of their sex, retaliating against them, and constructively discharging them as a result of the sexual harassment. The EEOC asserted that the Defendant harassed the charging parties by subjecting them to repeated acts and comments of a sexual nature that were demeaning and unwelcome. Specifically, the EEOC alleged that the Defendant made comments about the female employees’ bodies and touched female employees’ bodies. In October, four additional employees moved to intervene and filed a complaint. After a series of status hearings before the Court and before the parties even initiated discovery, they settled the litigation and filed a joint motion for entry of a consent decree. The next day, the Court signed the parties’ motion. The Court granted the EEOC’s motion for approval of the consent decree, which provides significant monetary relief to the allegedly aggrieved victims of sex harassment and retaliation of $64,000. The consent decree also provides that the Defendant will pay $36,000 in attorneys’ fees and costs to counsel for the intervening Plaintiffs. In terms of equitable relief, the consent decree included injunctions prohibiting the Defendant from future sexual or gender-based harassment or retaliation, including forbidding the toleration of a work environment that is sexually hostile to employees. Additionally, the Court ordered Defendant to adopt a policy and training to prevent sexual harassment, gender-based harassment, and retaliation. **EEOC v. Supervalu, Inc., 2013 U.S. Dist. LEXIS 37548 (N.D. Ill. Mar. 19, 2013).** The EEOC brought an action against Defendants for violation of the Americans With Disabilities Act (“ADA”). Subsequently, the parties entered into a consent decree (“Decree”) resolving the litigation. Later, the EEOC moved for contempt, contending that Defendants violated certain terms of the Decree. The Magistrate Judge filed a
The EEOC brought an action alleging that Defendants unlawfully terminated their employees upon expiration of disability leave unless the employee could return to work without any physical limitations or restrictions in violation of the ADA. Subsequently, the parties entered into a three-year consent decree resolving the litigation. A year after entry of the consent decree, the EEOC moved for contempt sanctions based on Defendants’ failure to send written return-to-work offers to three employees seeking to return to work from disability leave. The EEOC sought discovery, including written discovery, up to three depositions, and scheduling of an evidentiary hearing and associated pre-hearing conferences and filings. The Court observed that the language of the Decree was unambiguous, and that the alleged violations complained of were within the scope of the Decree and the EEOC properly sought relief. Further, the Court opined that the EEOC’s request for relief could be construed as process-related because it was seeking to ensure Defendants’ procedures for addressing an employee’s return to work after a disability leave complied with federal law. Accordingly, the Court sustained the EEOC’s objection to this aspect of the report and recommendations. Id. at *20-22.

**EEOC v. Supervalu, Inc., 2013 U.S. Dist. LEXIS 78828 (N.D. Ill. June 5, 2013).** The EEOC brought an action alleging that Defendants unlawfully terminated their employees upon expiration of disability leave unless the employee could return to work without any physical limitations or restrictions in violation of the ADA. Subsequently, the parties entered into a three-year consent decree resolving the litigation. A year after entry of the consent decree, the EEOC moved for contempt sanctions based on Defendants’ failure to send written return-to-work offers to three employees seeking to return to work from disability leave. The EEOC sought discovery, including written discovery, up to three depositions, and scheduling of an evidentiary hearing and associated pre-hearing conferences and filings. The Magistrate Judge recommended denying the EEOC’s motion for contempt and concluded that to allow the EEOC to pursue the requested relief would result in the effective abolishment of the statute of limitations and administrative exhaustion requirements under the ADA for any of Defendants’ employees seeking to challenge any accommodation decision made by Defendants for the duration of the consent decree. Id. at *2-3. However, on Rule 72 objections, the Court disagreed with the Magistrate Judge and held that the plain language of the consent decree, as well as Seventh Circuit case law, authorized the relief sought by the EEOC. Defendants thereafter moved for reconsideration and argued that it was the EEOC’s burden to establish that the broad enforcement language permitted it to disregard the applicable statute of limitations and bypass the administrative process in every case, and that the EEOC had failed to cite any case law authority supporting its position. Id. at *3. As an initial procedural matter, the Court noted that Defendants did not seek proper relief pursuant to a motion to reconsider an interlocutory order because Defendants...
had brought forth identical arguments in their original objections as well as in a brief discussing supplemental authority. The Court opined that “motions to reconsider are not at the disposal of parties who want to ‘rehash’ old arguments,” and thus denied Defendants’ motion to reconsider on that basis alone. Id.
The Court also remarked that Defendants implicitly argued that they had been wronged, because during settlement negotiations, the EEOC insisted that the consent decree contained a generic injunctive provision. The Court reasoned that as Defendants had not been duped or forced into signing the consent decree, nor had they taken efforts to include language addressing any limitations issues or exhaustion procedures required for the situation at hand, Defendants were bound by their agreement to the language in the consent decree. Id. at *4-5. Furthermore, the Court noted that Defendants’ concerns with the exhaustion of administrative remedies were misguided. The Court held that because the EEOC was the Plaintiff, not the individuals on whose behalf they were suing, and in bringing the instant suit and concomitant motion for contempt on behalf of individual employees, the EEOC was acting as a law enforcement agency for a class of individuals and was not merely a proxy for the victims of discrimination. Id. at *6. Therefore, the Court denied Defendants’ motion for reconsideration.

**EEOC v. SVT, LLC d/b/a Ultra Foods, 2013 U.S. Dist. LEXIS 161989 (N.D. Ind. Nov. 14, 2013).** The EEOC brought an action under Title VII alleging that Defendant was engaged in sex-based discriminatory hiring and record-keeping violations. The EEOC moved to strike Defendant’s affirmative defenses, arguing that they were nothing but bare bones conclusory allegations without any factual support. Defendant argued that the EEOC had failed to state facts sufficient to constitute a cause of action upon which relief could be granted. The Court found that although failure to state a claim was a recognized defense under Rule 12(b), it was not an affirmative defense because it did not assume that the allegations of the complaint were true. The Court noted that Defendant had not provided any allegations as to how the EEOC had failed to state a claim, especially when the EEOC had asserted two causes of action, and thus these bare bones legal assertions did not meet the standard of Rule 8(b). Id. at *4. Second, another affirmative defense asserted that the EEOC and any female applicants on whose behalf the EEOC purported to act were estopped from pursuing the claims in the EEOC’s complaint by reason of their own actions and course of conduct. The Court noted that these affirmative defenses were nothing more than bare bones, conclusory legal allegations because Defendant made no short and plain statement of facts either elsewhere in the answer or in the context of its affirmative defenses. Id. at *6. Regarding Defendant’s affirmative defense asserting that the Court lacked jurisdiction, the Court noted that this affirmative defense appeared to rest entirely upon the EEOC’s complaint exceeding the scope of the individual charges. Id. Defendant also denied that its employees and agents violated any statute. The Court observed that in general, an affirmative defense typically asserts that, even if the allegations of the complaint are true, additional facts excuse Defendant from some or all liability. Id. at *7. The Court found that mere denial of liability or causation was not a valid affirmative defense. Defendant further contended that the EEOC’s claims for exemplary and/or punitive damages were barred because it could not prove that Defendant acted with actual malice toward any female applicants. The Court remarked that this affirmative defense did not assert an excuse from some or all liability, but rather that the EEOC would be unable to meet its evidentiary burden. Id. Regarding Defendant’s request for costs and fees, the Court ruled that a request for fees and costs was not an affirmative defense and should be raised by a motion after the merits of the case had been determined. Id. at *8. Finally, Defendant asserted that it exercised reasonable care to prevent and correct promptly any discriminatory, retaliatory, or other unlawful behavior. The Court noted that Defendant’s response was vague, contained no citation to law, and essentially conceded that the affirmative defenses were improper. Accordingly, the Court granted the EEOC’s motion to strike Defendant’s affirmative defenses.

**EEOC v. Trinity Medical Center, 2013 U.S. Dist. LEXIS 127085 (C.D. Ill. Sept. 6, 2013).** The EEOC brought an action under Title VII alleging that an employee of Defendant, Deborah Chisholm, was subjected to a sexually hostile work environment by Chace De La Vega and that Defendant failed to take prompt action in response to Chisholm’s complaints, instead terminating her employment. The EEOC received Defendant’s Rule 26(a) disclosures identifying several witnesses, two of whom were other employees who had reported similar types of sexual harassment. In addition, another witness, Steven
Brown, informed the EEOC that De La Vega’s harassment was quite pervasive and that harassment frequently occurred in the presence of a supervisor, who found it amusing and did nothing. The EEOC moved to amend the complaint, stating that this previously unknown information served as a basis for requesting additional relief on the behalf of these identified employees. Defendant opposed the motion, arguing that it was filed after the date for amending pleadings and adding parties as set forth in the Rule 16 scheduling order. The Court denied the motion. The Court noted that the Rule 16 scheduling order could be modified only for good cause and with the judge’s consent, and the good cause standard primarily considered the diligence of the party seeking the amendment. The Court noted that the denial of a motion for leave to amend was not an abuse of discretion because the EEOC’s failure to amend prior to the deadline demonstrated a lack of diligence. Id. at *5. The Court remarked that naming only Chisholm as a charging party, rather than pursuing relief for the other employees, was a strategic decision and the statements made by these other employees during discovery in this case largely reflected the information that was collected during the investigative process that was conducted and completed before the case was filed. Moreover, the Court noted that Defendant provided its Rule 26 disclosures more than two months before the deadline for amending the complaint and adding parties. Accordingly, the Court found that the EEOC had not acted with necessary diligence and denied the EEOC’s motion for leave to amend. Id. at *6-7.

**EEOC v. United Parcel Service, Inc., 2013 U.S. Dist. LEXIS 4462 (N.D. Ill. Jan. 11, 2013).** The EEOC brought an action alleging that United Parcel Service (“UPS”) violated the ADA by permitting former employee Trudi Momsen and the other unidentified class members only 12-month leaves of absence and failing to provide them with reasonable accommodations for their disabilities. UPS moved to dismiss the complaint, arguing that none of the individuals for whom the EEOC was seeking relief could come within the protection of the ADA because they had taken 12-month-long leaves of absence prior to their administrative separations from UPS, and the inability to work for a multi-month period removes a person from protection under by the ADA. Alternatively, UPS argued that the EEOC failed to plead facts in support of its attempt to seek relief on behalf of a class, and that the EEOC had not pled any facts to suggest there was someone who might be able to convince the Court to find him or her a qualified individual with a disability despite missing 12 months of work at the time of his or her administrative separation. The Court granted UPS’ motion, concluding that the complaint did not allege sufficient facts demonstrating that Momsen or the potential class members were qualified individuals. The EEOC attempted to cure the deficiencies in a first amended complaint (“FAC”), but the Court ruled that its efforts were insufficient as to the unidentified class members, and granted Defendant’s motion to dismiss. It then denied the EEOC leave to file a proposed second amended complaint (“SAC”) as futile. Id. at *7-11. The EEOC asked the Court to certify for appeal the question of whether Rule 8 requires the EEOC, when seeking relief on behalf of unidentified qualified individuals with a disability, to plead facts specific to each individual demonstrating that each such individual is a qualified individual with a disability. In response, the Court on its own motion reconsidered and withdrew its earlier rulings on the motions to dismiss and motion for leave to file the SAC, denied UPS’ motion to dismiss, and granted EEOC’s motion for leave to file the SAC. The Court then denied the EEOC’s motion for certification as moot. The FAC alleged that UPS maintained an inflexible 12-month leave policy, which did not provide for reasonable accommodation of qualified individuals with disabilities and instead provided for termination of their employment. It offered detailed factual allegations as to how the policy affected two employees, Momsen and Luvert, and alleged that Defendant applied the same policy across the board to other employees. The Court noted that these allegations were sufficient to satisfy the requirements of Rule 8(a) and provide UPS with fair notice of the claims against it. Id. at *14. The Court stated that the EEOC was pursuing the action on behalf of a nationwide class of aggrieved individuals, and although the EEOC was subject to the federal pleading rules when acting in this capacity, the unique role of the EEOC was such that case law authorities generally had allowed complaints with class allegations comparable to those asserted here to move forward. Id. at *16-17. The EEOC’s complaint identified the statutes that UPS allegedly violated; the timeframe in which the alleged violations occurred; the names of two presently identified victims; a general description of the class of aggrieved persons; the specific claims alleged and their elements as to the charging party and the class of aggrieved persons; the types of conduct to which the named claimants and the unidentified class were subjected; and
the remedies being sought. *Id.* at *18. The Court concluded that based on the facts pleaded in the FAC, it could reasonably infer that UPS discriminated against other qualified individuals when it enforced its leave policy. The Court also noted that in compliance with Rule 9(c), the EEOC had alleged that all conditions precedent to the institution of this lawsuit had been fulfilled, and at this early stage of the litigation the Court was obligated to defer to the EEOC’s investigatory judgment. *Id.* at 20. Accordingly, the Court granted the EEOC leave to file its SAC.

**EEOC v. United Parcel Service, Inc., 2013 U.S. Dist. LEXIS 81688 (N.D. Ill. June 11, 2013).** The EEOC brought a pattern or practice action on behalf of Trudi Momsen, a former employee of Defendant, and other similarly-situated unidentified class members alleging that Defendant violated the ADA by allowing only 12-month leaves of absence, failing to provide disabled employees with further reasonable accommodations for their disabilities, and firing them if they exceeded those parameters. Subsequently, the EEOC filed two amended complaints, both of which the Court dismissed at Defendant’s request, finding that the EEOC had not alleged adequate factual information with respect to the unidentified class members. After the EEOC filed a motion to reconsider the Court’s dismissal of the case, the Court, on its own, reconsidered its earlier decisions and held that the most recent EEOC complaint satisfied the federal pleading standards. Thereafter, Defendant moved to certify for interlocutory appeal the Court’s order under 28 U.S.C. § 1292(b) and argued that precedent in the Seventh Circuit provided that an employee who is unable to work for several months “is not a qualified individual with a disability subject to the protections of the ADA.” *Id.* at *1. Defendant posited the question to the Court of whether the EEOC satisfied the pleading standards set by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), by “simply alleging ADA claims on behalf of unknowing individuals without any detail or fact, when each proposed individual for whom EEOC seeks relief was absent from work for 12 months at the time of separation.” *Id.* at *1-2. The Court observed that interlocutory appeals are “frowned on in the federal judicial system.” *Id.* at *3. The Court then noted that before an issue or question under § 1292(b) could be certified, the proponent of certification must demonstrate that there is a question of law, it must be controlling and contestable, and its resolution must speed up the litigation. *Id.* at *3-4. Here, the Court held that the challenged order addressing the adequacy under Rule 8 of the EEOC’s ADA claims on behalf of unidentified individuals presented a question of law, and was controlling and contestable. However, the Court noted that whether certification of the order would materially advance the ultimate termination of the litigation posed a challenge. The Court observed that an immediate appeal would entail “some delay” in the case because the median time lapse in 2012 between the entry of a certification order and the issuance of an order by the Seventh Circuit was 10.3 months. *Id.* at *6. Furthermore, the Court noted that even if the Seventh Circuit found that the EEOC’s current pleadings were wanting, it seemed unlikely that either the Seventh Circuit or the Court would dismiss the case without providing EEOC another opportunity to cure whatever the deficiencies in light of the Seventh Circuit’s guidance. *Id.* at *6-7. Alternatively, the Court observed that immediate further litigation would entail discovery in an effort to present for early evaluation of some threshold issues that the parties already had touched on in their pleadings. *Id.* at *7. The Court noted that focused and limited discovery would serve to materially advance the ultimate termination of the litigation by enabling the parties and the Court to determine the number of claimants and identifying overarching common legal issues that could be resolved through early motions for summary judgment. *Id.* at *7-8. Therefore, the Court denied Defendant’s motion for interlocutory appeal.

**(viii) Eighth Circuit**

**EEOC v. CRST Van Expedited, Inc., 2013 U.S. Dist. LEXIS 107822 (N.D. Iowa Aug. 1, 2013).** The EEOC brought a pattern or practice action on behalf of Monika Starke and a class of female employees of Defendant alleging that Defendant’s lead drivers and team drivers subjected female employees to sexual harassment and created a sexually hostile working environment in violation of Title VII of the Civil Rights Act. After a year of discovery, the EEOC was pressed to identify the total number of harmed individuals making up the purported class. In October 2008, the EEOC identified 270 allegedly aggrieved female employees. *Id.* at *7. The EEOC, however, failed to make all of the individuals available for deposition by the ordered deadline. The District Court then barred the EEOC from pursuing claims on behalf of the 99
individuals who were not deposed. \textit{Id.} at *10. Eventually, Defendant filed multiple motions for summary judgment and succeeded in getting the EEOC’s pattern or practice claim dismissed, leaving the EEOC to pursue harassment claims only on behalf of individual employees. \textit{Id.} at *11. Defendant then succeeded in getting all individual claims dismissed for multiple reasons, ranging from lack of evidence that some individuals had suffered severe or pervasive harassment to some individuals not reporting any harassment to Defendant. \textit{Id.} at *12-15. Essentially, 67 of the individual claims got dismissed because the EEOC had failed to exhaust administrative prerequisites by failing to investigate or attempt conciliation of the claims. \textit{Id.} at *16. Having dismissed all the claims against Defendant, the District Court found that Defendant was the prevailing party and was entitled to recover its attorneys’ fees and costs. \textit{Id.} Meantime, the EEOC appealed the dismissal of 107 of the claims to the Eighth Circuit. The Eighth Circuit reversed the dismissal of the claims on behalf of two female employees, including the charging party Starke, and had consequently found that Defendant was no longer the prevailing party entitled to recover its attorneys’ fees and costs. \textit{Id.} at *19-20. The Eighth Circuit remanded the action back to the District Court for continuation of the two claims. Subsequently, the EEOC voluntarily dismissed one of the two remaining claims and settled the other for $50,000. \textit{Id.} at *20-21. The parties then asked the District Court to dismiss the case in entirety. \textit{Id.} at *21. Defendant then moved to recover its attorneys’ fees, costs, and expenses for the claims on which it prevailed. Defendant contended that it prevailed on the EEOC’s pattern or practice claims and prevailed on all of the EEOC’s individual claims other than its claim on behalf of Starke. The EEOC argued that Defendant was not entitled to any attorneys’ fees and was no longer the prevailing party because the Eighth Circuit had reversed the original fee award in ruling that the EEOC could proceed on behalf of Starke. \textit{Id.} at *25-26. The District Court, however, found that Defendant was in fact a prevailing party because Defendant did not need to prevail on every claim to be the prevailing party within the meaning of 42 U.S.C. § 2000e-5(k). \textit{Id.} at *33. The District Court stood by its earlier determination that “the EEOC’s actions in pursuing this lawsuit were unreasonable, contrary to the procedure outlined by Title VII, and imposed an unnecessary burden upon [Defendant] and the Court.” \textit{Id.} at *43-44. Although the complaint initially suggested that the EEOC was seeking relief on behalf of at least two individuals, by October 15, 2008, it became clear that the EEOC was asserting approximately 270 claims, although that number dropped to 255 by 2009. \textit{Id.} at *30. Following the dismissal of the EEOC’s pattern or practice claim, the EEOC was required to prove each individual claim of sexual harassment, and at that stage, there were 154 allegedly aggrieved individuals remaining, and Defendant was required to defend against 154 sexual harassment claims. \textit{Id.} at *34. According to the District Court, Defendant was the prevailing party on the EEOC’s pattern or practice claim and on 153 of the EEOC’s individual claims. The District Court found that the EEOC’s failure to exhaust Title VII administrative prerequisites of investigation and conciliation for 67 of the individual claims was unreasonable. \textit{Id.} at *43. The District Court further ruled that the EEOC’s pattern or practice claim was unreasonable as it was based only on anecdotal evidence as well as the 153 of its individual claims which were unreasonable or groundless. \textit{Id.} at *45-48. The District Court thus concluded that Defendant was entitled to attorneys’ fees and costs. Finding the requested fees as reasonable, the District Court ordered the EEOC to pay Defendant $4,694,442, which represented $4,189,296 in attorneys’ fees, $91,758 in costs, and $413,387 in out-of-pocket expenses for expert witness fees, travel expenses, delivery fees, and similar expenses.

\textbf{Editor’s Note:} The fee sanction in this litigation is the largest ever assessed against the EEOC in the history of its existence.

\textbf{EEOC v. Help At Home, Inc., 2013 U.S. Dist. LEXIS 63321 (E.D. Mo. May 3, 2013).} The EEOC brought an action alleging that Defendant allowed its regional director to sexually harass employees, and unlawfully fired the victims and their supervisor for complaining about the harassment. The EEOC moved to compel supplementation of Defendant’s initial disclosures and discovery, and also requested its reasonable expenses including attorneys’ fees incurred in bringing its motion. The Court granted the motion in part. Defendant asserted that it had conducted an additional investigation and provided all of the contact information for each individual named in its Rule 26(a)(1) disclosures and in the EEOC’s interrogatories. Further, Defendant argued that an award of fees would be unjust because it had produced all of the documents and information requested and was substantially justified in its delay in providing such
information. While the issue of compliance was now moot, the Court found that an award of expenses and attorneys’ fees was appropriate. Defendant stated that the contact information for the individuals for whom the EEOC requested information was not readily available, and that Defendant made it clear to the EEOC when it submitted its first supplemental responses to Plaintiff’s interrogatories and first supplemental disclosures that it was in the process of obtaining the requested contact information and would update its responses as soon as possible. The Court, however, observed that Defendant did not request an extension of time to respond, thereby necessitating the EEOC’s filing of the motion to compel, and it was only after this motion was filed that Defendant supplemented its responses. Thus, to determine the amount of a reasonable attorneys’ fee, the Court ordered the EEOC to submit documentation of the expenses and attorneys’ fees it incurred in connection with its motion to compel.

**EEOC v. Hill Country Farms, Inc., Case No. 11-CV-41 (S.D. Iowa June 11, 2013).** The EEOC, on behalf of 32 mentally-disabled workers formerly employed by Defendant, brought an action alleging that Defendant discriminated against the workers and subjected them to a hostile work environment in violation of the ADA. After a week-long trial, the jury returned a verdict in favor of the EEOC and awarded $240 million for compensatory and punitive damages. Subsequently, the Court requested both parties to submit briefs regarding the appropriate judgment award to be entered. As an initial matter, the Court noted that the ADA imposes a statutory cap of $50,000 for each claimant in cases where an employer has more than 14 but fewer than 101 employees and that the $50,000 limit is inclusive of compensatory and punitive damages. Therefore, the Court reduced the jury award for compensatory and punitive damages to $1.6 million. The Court also granted the EEOC’s request for $283,568 in pre-judgment interest as to the back pay award and $138,109 for the compensatory damages award, as well as the EEOC’s request of $10,488 in costs. However, the Court denied the EEOC’s request for expert witness fees. The Court noted that although the EEOC’s expert testimony was crucial to the issues at trial, the EEOC failed to meet its burden of proving that the 32 claimants would not have prevailed without the expert’s testimony. Furthermore, the EEOC sought injunctive relief even though Defendant ceased conducting business in February of 2009. The Court granted the EEOC’s request for injunctive relief and directed Defendant to notify the EEOC immediately if it resumed conducting business, re-established itself under a different name and began to conduct business, or re-established itself as any other entity engaged in business activities similar to those conducted while named Hill Country Farms, Inc. or Henry’s Turkey Services. Id. at 2-3. Lastly, the Court instructed Defendant to pay post-judgment interest that would be applicable to any and all unpaid judgment sums, and would accrue for as long as the judgment was not paid in full in accordance with the Court’s orders.

**Editor’s Note:** The verdict of $240 million is the largest ever in any EEOC case.

**EEOC v. JBS USA, LLC, 2013 U.S. Dist. LEXIS 53354 (D. Neb. April 12, 2013).** The EEOC filed two lawsuits alleging that JBS USA, LLC, which does business as meat packing company JBS Swift & Company, discriminated against a class of Somali Muslim employees at its facilities in Greeley, Colorado and Grand Island, Nebraska. In the Nebraska suit, the EEOC alleged that JBS Swift engaged in a pattern or practice of religious discrimination when it failed to reasonably accommodate at least 153 Muslim employees by allowing them prayer breaks. The EEOC also alleged that the company retaliated against the employees and terminated their employment when they requested that the company move their evening breaks so that they could pray at sundown during the month of Ramadan. JBS sought summary judgment on EEOC’s pattern or practice claims, and the EEOC sought a ruling as a matter of law that JBS had engaged in a pattern or practice of denying reasonable accommodations. Id. at *6. JBS argued that the Court should grant summary judgment because the EEOC failed to satisfy certain conditions precedent to filing suit, including a class-wide, systemic administrative investigation. Id. at *31. JBS asserted that § 707 of Title VII authorizes only the EEOC to investigate charges of discrimination, and therefore, the EEOC could not rely on the investigation performed by the Nebraska Equal Opportunity Commission (“NEOC”). The Court disagreed. The Court found that, because § 707 incorporates the “procedures” set forth in § 706, and Title VII supports worksharing between the EEOC and state and local agencies, it likewise permitted the EEOC to rely on investigation performed by NEOC. Id. at *38. JBS also asserted
that the EEOC failed to satisfy conditions precedent because the investigation was flawed and insufficient. \textit{Id.} at *42. In rejecting JBS’ argument, the Court distinguished \textit{EEOC v. CRST Van Expedited, Inc.}, 679 F.3d 657 (8th Cir. 2012). Unlike \textit{EEOC v. CRST}, JBS did not assert that the EEOC failed to identify or give it notice of the individual claims; rather, JBS asserted that the EEOC’s investigation was inadequate. The Court held that the EEOC enjoys “wide latitude” to investigate charges and, so long as an investigation occurred, the Court cannot review its sufficiency. \textit{Id.} JBS also moved for summary judgment on the EEOC’s pattern or practice claims. JBS contended that the EEOC’s religious accommodation claims were inappropriate for pattern or practice treatment because, to show that unlawful discrimination occurred, each alleged victim must demonstrate a sincerely held religious belief. \textit{Id.} at *47-48. The Court rejected JBS’ argument, but noted that to the extent individual workers’ beliefs varied, JBS could present this evidence during Phase I to show that accommodation would cause undue hardship. \textit{Id.} at *49-50. JBS also asserted that the EEOC could not make out a \textit{prima facie} case because it could not show that discrimination was the company’s “standard operating procedure.” \textit{Id.} The Court noted that the EEOC failed to produce statistical evidence showing disparities between protected and non-protected workers, but it nevertheless concluded that evidence of JBS’ purported company-wide policies regarding unscheduled prayer breaks created issues of fact for trial. \textit{Id.} at *50-51. Finally, JBS asserted that the EEOC could not establish a pattern or practice of unlawful termination or retaliation based on JBS’ isolated termination of 80 Somali Muslim employees. The Court agreed, noting that “multiple acts of discrimination are required to establish a pattern or practice.” \textit{Id.} at *62. The EEOC did not allege that JBS adopted a discriminatory termination policy and, although it referred to 80 employment-related decisions, the mass termination was a single action in response to the events of a single day. \textit{Id.} at *63.

\textit{EEOC v. JBS USA, LLC}, 2013 U.S. Dist. LEXIS 176963 (D. Neb. Oct. 11, 2013). The EEOC brought an action alleging that Defendant engaged in a pattern or practice of discrimination against Somali Muslim employees in violation of Title VII because it failed to provide reasonable religious accommodations to Somali Muslim employees. \textit{Id.} at *2, 30. Defendant owned and operated a beef slaughter and fabrication facility in Grand Island, Nebraska. After a phase I trial was conducted, the Court granted Defendant’s motion for judgment on partial findings because it concluded that Defendant had established its affirmative defense of undue hardship. \textit{Id.} at *40. The Court explained that an employer may demonstrate undue hardship in two ways: (i) if the accommodation created more than a \textit{de minimis} cost to employer; and (ii) by showing that the accommodation would have caused more than a \textit{de minimis} imposition on co-workers. \textit{Id.} at *33. One of the proposed religious accommodations was for Defendant to allow employees to take unscheduled prayer breaks. The Court observed that Defendant would have been required to accommodate those requests within relatively small windows of time. Defendant contended that it could not have relieved 200 employees within a 10-minute window because of safety and quality concerns created by such an accommodation, and as the Muslim employees would have required extra breaks on a daily basis. The Court found that the evidence demonstrated that this accommodation would have imposed more than a \textit{de minimis} burden on Defendant as well as on co-workers. The Court observed that Defendant also demonstrated that unscheduled breaks had a negative impact on operational efficiency, as employees must cover for absent co-workers. Defendant contended that this would require the other employees to work more quickly and that as a result, they may not be able to trim product to meet specifications or yield standards. In the event such standards were not met, the Court noted that Defendant could be required to incur overtime expenses and/or risk customer dissatisfaction. Finally, the Court found that Defendant demonstrated that costs associated with such extra breaks would have a direct financial impact on Defendant. Defendant calculated a 10-minute additional down time would cost it about $100 per minute on the slaughter side, and $225 per minute on the fabrication side. Defendant calculated the average cost of a 10-minute break at $18,180 per day plant. Accordingly, the Court concluded that accommodating Muslim workers could cause greater than \textit{de minimis} cost to Defendant. Similarly, the Court found that accommodating Muslim workers would cause greater than \textit{de minimis} cost to co-workers primarily because it could have a negative impact on employee morale as they would be likely to conclude that they were forced to work harder and faster to cover for Muslims taking extra breaks. \textit{Id.} at *34-39.
The EEOC, on behalf of a commercial truck driver formerly employed by Defendant, brought a pattern or practice action alleging that Defendant’s policy prohibiting truck drivers from returning to their position after self-disclosure of alcohol problems, even if the driver completed a substance abuse treatment program, violated the ADA. The EEOC alleged that after the charging party disclosed his alcohol abuse problem, Defendant unlawfully denied him reasonable accommodations and wrongfully terminated his employment. Subsequently, Defendant moved for summary judgment. Defendant argued that the charging party was not disabled by alcoholism because the condition did not substantially limit his ability to work. The Court rejected Defendant’s argument, opining that working is not the only major life activity under the ADA, and held that the charging party’s alcoholism could substantially affect his performance of another major activity, including speaking, walking, concentrating, or communicating. Id. at *8. Thus, the Court noted that reasonable jurors could conclude that being regarded as an alcoholic would substantially limit the charging party’s ability to work and that he qualified as disabled under the ADA. Defendant also argued that the charging party was not “a qualified individual” with a disability under the ADA because he failed to complete the recommended treatment program and that, even if he had completed the treatment program, 49 C.F.R. § 382.101 of the Federal Motor Carrier Safety Regulations did not require Defendant to return a driver to a safety-sensitive position upon successful completion of the referral/evaluation/treatment process. Id. at *9-10. In response, the EEOC contended that Defendant could not require the charging party to complete the referral/evaluation/treatment process. Id. at *10. The Court disagreed with the EEOC’s argument and held that Defendant did not violate the ADA by suspending the charging party after his disclosure of alcohol problems. The Court held that 49 C.F.R. § 382.101 meant that drivers who admitted to alcohol misuse where there was no written company policy were subject to the referral/evaluation/treatment requirements, and thus Defendant could require the charging party to go through the referral/evaluation/treatment process before returning him to his position. Id. at *11. However, the Court held that Defendant violated the ADA because it did not attempt to provide the charging party with a reasonable accommodation but rather enforced its policy in which the charging party’s return to a driver position was permanently barred, even if he successfully completed treatment. Id. at *14. Furthermore, the Court rejected Defendant’s contention that, as a matter of business necessity and concern for public safety, it made a policy decision that alcoholic drivers in its employ could never return to driving. Although the Court recognized that these safety concerns fell under the ADA’s direct threat provision, it remarked that under the ADA a determination of whether an employee presented a direct threat requires “an individualized assessment of the individual’s present ability to safely perform the essential functions of the job.” Id. at *14. The Court noted that Defendant’s no-return policy admitted no such individualized assessment and provided no such interactive process. Therefore, the Court held that Defendant’s “no-return” policy for a truck driver who discloses an alcohol problem could not be justified under either the ADA’s qualification standard or its direct threat language. Accordingly, the Court denied Defendant’s motion for summary judgment.

EEOC v. Product Fabricators, Inc., 2013 U.S. Dist. LEXIS 36824 (D. Minn. Feb. 18, 2013). The EEOC brought an action alleging that Defendants discriminated against its former employee Adam Breaux, failed to accommodate him, and terminated his employment in violation of the ADA. Breaux was employed with Defendant Product Fabricators, Inc. (“PFI”) as a Lead of Turrets and Tapping. In February 2008, a former PFI employee named Dennis Anderson filed a charge of disability discrimination against PFI. The EEOC had interviewed management and other employees, including Anderson’s supervisor Breaux, in connection with his charge. Breaux’s interview with the EEOC was favorable to PFI, with Breaux stating that there was no discrimination. Id. at *4. The EEOC subsequently filed an action against PFI on behalf of Anderson under the ADA. In September 2008, Breaux reported a workplace injury to his right shoulder from lifting a heavy object, and PFI granted his request for time off for medical appointments and accommodated his renewed work restriction after each medical visit. According to PFI, starting in May or June 2009, Breaux was not managing his department effectively. PFI also claimed that Breaux was unprofessional and moody during the summer of 2009. Breaux was ultimately terminated for inefficiency on September 1, 2009, and when Breaux asked if he was being fired because of his shoulder, the people present at the meeting asked him “What’s wrong with your shoulder?” or “What injury?” Id. at *13. Breaux filed a charge with the EEOC.
alleging that PFI discriminated against and terminated him in violation of the ADA. After the EEOC filed this action, Breaux intervened. Both the EEOC and Breaux filed for summary judgment on the sole issue of M&M’s successor liability, and Defendants moved for summary judgment as to liability on the discrimination claims. The Court granted Defendants’ motion, and dismissed the complaint with prejudice. At the very outset, the Court noted that a Plaintiff seeking relief under the ADA must show that: (i) he is a disabled person; (ii) is qualified to perform the essential functions of job without accommodation; and (iii) he suffered an adverse employment action. Id. at *19-20. The Court found that it need not resolve the dispute as to the first and second prongs because if Breaux was disabled or otherwise qualified, his claims failed because he could not show causation or pretext. Id. at *20-22. As to the third prong, the Court found that there was no temporal proximity because although Breaux was disabled in 2008, PFI promoted him to supervisor after that date, and accommodated all of his restrictions and leave requests. The Court ruled that there was no temporal proximity and granted Defendants summary judgment on the ADA discrimination claim. Regarding Breaux’s ADA failure to accommodate claim, the Court found that that PFI accommodated Breaux by moving him to a less physically demanding position. Breaux’s entire claim was based on his alleged request for a leave of absence for his rotator cuff injury. The Court noted that the record was clear that Breaux did not provide sufficient information to PFI regarding his alleged request for medical leave to trigger this liability. Accordingly, the Court held that Defendants were entitled to summary judgment on the ADA failure to accommodate claim. Similarly, the Court granted Defendants summary judgment on Breaux’s retaliation claim based on his alleged request for leave. As to Breaux’s retaliation claim based on his interview with the EEOC, the Court there was no causal connection with the alleged protected activity and his termination. The Court explained that in June 2008, PFI knew Breaux had engaged in that protected activity, but it terminated him more than one year after it knew he had engaged in protected activity. The Court remarked that this was too far in time to support a causal connection. Id. at *35. Accordingly, the Court granted Defendants’ motion for summary judgment.

(ix) Ninth Circuit

EEOC v. Abercrombie & Fitch Stores, Inc., 2013 U.S. Dist. LEXIS 51905 (N.D. Cal. April 9, 2013). The EEOC brought an employment discrimination action on behalf of a female applicant alleging religious discrimination in Defendant’s hiring practices in violation of Title VII of the Civil Rights Act. Defendant allegedly refused to hire the female applicant because she insisted on wearing a headscarf. The EEOC alleged claims of disparate treatment and failure to accommodate under Title VII as well as claims for injunctive relief and punitive damages. Defendant moved for summary judgment as to each of the claims, which the Court denied. The Court found that the EEOC had raised a triable issue of fact as to whether the applicant was similarly-situated to any candidates hired by Defendant during the relevant period. Id. at *18. Defendant argued that the EEOC could not establish that any similarly-situated individual was treated more favorably than the applicant because the EEOC had not identified any candidate with a “similarly limited schedule and similar interview score” to the applicant who was hired during the relevant time period. Id. at *17. Defendant relied on three candidates hired to its kids store during the relevant time period who had the same or better scores than the applicant and significantly better availability, and it contended that they were not similarly-situated to the applicant. Id. at *18. The EEOC, however, disputed Defendant’s reliance on the kids store candidates, and contended that the Court should look to the hiring of three candidates with lower scores than the applicant who were hired in the adult store. Id. The Court could not make a determination as to which candidates, if any, were similarly-situated to the applicant, and thus found that summary judgment as to the EEOC’s prima facie case would be inappropriate at that stage. Id. at *18-19. Defendant also argued that it had a reasonable, non-discriminatory justification for its failure to hire the applicant, due to her non-availability to work on particular days of the week. The EEOC argued that Defendant’s “Look Policy,” the circumstances surrounding the interview, the adult store’s hiring considerations, and the hiring of less-qualified comparators, when taken together, generated a question of material fact as to whether Defendant’s availability justification was pre-textual. Id. at *22. Defendant’s Look Policy expressly prohibited employees from wearing caps or other headwear, and during the interview, the interviewer had expressly asked the applicant whether she was a Muslim and if she was required to wear her headscarf. The Court noted that the evidence suggested that the applicant’s religion was at least considered during the interview. Id. at *23. Further, Defendant’s hiring policy was to hire the
candidates with the highest score, and it had hired three candidates with lower scores than the applicant during the relevant period. Moreover, several employees of Defendant testified that availability was not a consideration for hiring in the adult store. Additionally, the EEOC pointed to several inconsistencies in Defendant’s key witness’ statements regarding the reasons for not hiring the applicant. Although Defendant’s key witness’ reasons varied from the applicant being not the most qualified to not sufficiently outgoing, engaging, and confident, Defendant never mentioned the applicant’s availability in any of its communications with the EEOC until after four years of the litigation. Id. at *25-26. Taking the evidence together, the Court found that the EEOC had supplied sufficient proof to show a genuine question of material fact as to the validity of Defendant’s justification, and therefore denied Defendant’s motion for summary judgment as to the disparate treatment claim. Id. at *26. Based on the same evidence, the Court also denied Defendant’s motion for summary judgment as to the EEOC’s failure to accommodate claim. The Court found the statement of Defendant’s key witness – that she considered the applicant’s availability, but not her headscarf, in making the hiring decision – insufficient and raised the question of credibility. Id. at *27-28. The EEOC had also sought injunctive relief in addition to punitive damages, asserting that the injury would be repeated. Because Defendant’s liability remained an open question and no harm had yet been shown, the Court held that making a determination as to the availability and scope of any injunction at that stage would be inappropriate. Id. at *31-32. The Court further held that summary judgment as to the punitive damages claim would also be inappropriate as the question of whether Defendant engaged in intentional discrimination was yet to be resolved. Id. at *35. The Court granted summary judgment to the EEOC as to Defendant’s affirmative defense of availability of substantially equivalent jobs. The Court found that the fact that the applicant applied to and was rejected from two other jobs in the area prior to interviewing with Defendant did not sufficiently show that substantially equivalent jobs were available after Defendant declined to hire her. Id. at *39. The Court further granted the EEOC’s motion for summary judgment as to Defendant’s undue burden defense. Defendant did not offer any studies demonstrating a correlation between failure to comply with its Look Policy and customer confusion or decreased sales, or any evidence of any of the store reports that linked poor sales performance with lack of adherence to the Look Policy. Id. at *40-41. Defendant also failed to furnish any evidence outlining the degree to which Look Policy compliance affected store performance or brand image. Id. at *43. The Court concluded that Defendant failed to show that it would be unduly burdened in permitting the applicant to wear a headscarf at work. Finally, the Court granted the EEOC’s motion for summary judgment as to Defendant’s First Amendment right to commercial speech defense. Defendant premised its defense on its unique marketing strategy of deploying its in-store personnel as “living advertisements” for its brand. Id. at *44. The Court, however, determined that Defendant’s control of its personnel’s appearance did not constitute an advertisement sufficient to constitute commercial speech. Although appearance was a factor in the interview process and adherence to the Look Policy a condition of employment, the Court found that the job responsibilities did not actually include serving as living advertisements, and if not advertisements, the appearance did not take on the form of any other protected speech. Id. at *47-49. Accordingly, the Court dismissed Defendant’s affirmative defenses and granted the EEOC’s motion for partial summary judgment.

The EEOC filed suit against Abercrombie on behalf of a former employee who, after working for Abercrombie for four months without incident, was told that despite her religious beliefs she could not wear her head scarf as it violated Abercrombie’s Look Policy. Id. at *9-10. Among other restrictions, Abercrombie’s Look Policy prohibited employees from wearing headwear on the job. Id. at *11. As the employee refused to remove her head scarf, Abercrombie terminated her employment. Id. Several days later the employee filed a charge of discrimination with the EEOC. Id. Several days after the charge was filed, Abercrombie offered the employee full reinstatement and the accommodation of wearing her head scarf while at work. Id. The employee refused this offer and proceeded with her charge. Id. Subsequently, the EEOC found probable cause that Abercrombie discriminated against the employee based on her religious beliefs. Id. at *12. At the same time it issued this determination, the EEOC was already in the midst of litigating two other cases against Abercrombie that also were based on Abercrombie’s failure to allow employees to wear head scarves for religious reasons based on its Look Policy. Id. During conciliation, the EEOC proposed a revised Look Policy which Abercrombie rejected as it
would require it “to do more than is required under the law and in the EEOC’s own guidance…” Id. at *14. As negotiations broke down, the EEOC alerted the charging party’s attorney that it was prepared to issue a notice of “fail conciliation” and file suit against Abercrombie, which it eventually did. Id. at *14-15. Prior to assessing the merits of the EEOC’s case, the Court first determined that the EEOC met its conciliation obligations prior to filing suit. Id. at *19. The Court noted that there is a split among the federal circuits as to the proper standard for evaluating whether the EEOC conciliated in good faith, with the Sixth Circuit applying a “highly differential” standard and the Second, Fifth and Eleventh Circuits applying a stricter approach that requires the EEOC to: (i) outline to the employer the reasonable cause for its belief that the [statute] has been violated; (ii) offer an opportunity for voluntary compliance; and (iii) respond in a reasonable and flexible manner to the reasonable attitude of the employer. Id. at *20. The Court held that under either standard, the EEOC met its conciliation obligation as it engaged in “extensive discussions” with Abercrombie over the course of several months before filing suit. Id. at *22-23. Notably, the Court rejected Abercrombie’s argument that the EEOC’s “all or nothing approach” as to its revisions to the Look Policy constituted bad faith, instead finding that the EEOC’s tactics merely demonstrated “that the parties took different positions on the scope of appropriate relief” during pre-suit negotiations. Id. at *22. Finding that the EEOC satisfied its pre-suit obligations, the Court held that the EEOC was entitled to summary judgment as to liability since Abercrombie failed to demonstrate that it could not reasonably accommodate the employee’s request to wear a head scarf without suffering undue hardship. Id. at *40-41. The Court held that in the Ninth Circuit, “heightened proof” of the purported “undue hardship” is required for an employer to state a cognizable defense to a claim of discrimination. Id. at *30. Here, the Court found all of Abercrombie’s evidence to be based on the “personal experiences” of various corporate representatives who did not come forward with the “specific admissible evidence” necessary to show how exempting the employee from the Look Policy “affects store performance or brand image, or causes financial hardship.” Id. at *32. Given that all Abercrombie relied upon in support of its “undue hardship” defense was the “unsubstantiated testimony of its own employees,” the Court found that the EEOC was entitled to summary judgment as “a reasonable jury could not conclude that Abercrombie would be unduly burdened by allowing Khan to continuing wearing her hijab [head scarf]…” Id. at *41. As an affirmative defense, Abercrombie alleged that it was shielded from liability as the Look Policy constitutes commercial free speech. Id. Abercrombie argued that its in-store employees should be classified as “living advertisements” for its brand, and therefore, their appearance is protected as commercial speech under the Constitution. Id. at *42. The Court rejected this defense, finding that Abercrombie’s Look Policy does not constitute commercial speech under both the applicable case law and facts of the case given that the employee at issue completed her tasks primarily in the stock room outside of the public’s view. Id. at *43-44. Finally, the Court rejected Abercrombie’s argument that both injunctive relief and punitive damages were not warranted. The Court found that Abercrombie’s claim that injunctive relief is not appropriate in light of its revisions to the Look Policy, since “a triable issue exists as to whether the recent changes in Abercrombie’s policies have completely and irremovably eradicated the efforts of the alleged violation.” Id. at *46. Similarly, the Court rejected Abercrombie’s claim that punitive damages are not warranted, since “a jury could find that punitive and exemplary damages are appropriate” and that Abercrombie acted with malice or reckless indifference when it demanded that the employee remove her hijab despite her religious beliefs. Id. at *55.

EEOC v. ABM Industries, Inc., 2013 U.S. Dist. LEXIS 51113 (E.D. Cal. April 9, 2013). The EEOC brought an action alleging sexual harassment by and against employees of Defendants. The Court issued two protective orders whereby employee contact information related to employees, documents which detailed claims of sexual harassment, and Defendant’s confidential corporate documents were made confidential. Thereafter, the parties settled the action. Mara Murillo, who brought an action against Defendants in state court, filed a motion to intervene in the EEOC’s action seeking to modify the protective orders so that she and the other parties in the state court action were free to use all of the discovery adduced in the EEOC’s action. The Court denied the motion. The Court found that the motion to intervene was untimely. The EEOC lawsuit was settled and closed for 29 months, Murillo filed her lawsuit more than two years prior, and her administrative charge was filed three years prior. The Court stated that any substantial lapse of time weighed heavily against intervention. The Court observed that the protective
order did not preclude the production of these documents in the state action, even if responding to the document requests would require Defendants to produce documents similar or identical to those produced in this action. The Court noted that the discovery propounded in the state court action did not seek Defendants’ corporate documents generally, but instead sought the documents produced in the EEOC’s action that implicated the protective order. The Court stated that the documents produced in the EEOC’s action were protected and whether responses should be compelled despite the language of the production request was a question for the state court judge. Further, the Court observed that use of the deposition transcripts by Murillo would require modification of the protective order, and that Murillo would have to demonstrate the relevance of the protected discovery to the collateral proceedings and its general discoverability. Murillo asserted that she had common claims with the EEOC, that Defendants had common defenses, and that the discovery needed included testimony on whether Defendants were on notice of the conduct of Adalberto Rodriguez, whether Rodriguez was a supervisor within the meaning of state law, Defendants’ response to complaints of sexual harassment, and whether Defendants’ policies were effective. Murillo further contended that the parties would have to waste time and resources in discovery and retaking numerous depositions when such evidence had already been produced in the EEOC’s action, unless the protective orders were modified. The Court, however, stated that Murillo did not explain why she believed that the testimony sought by her was relevant to her state court action. The Court found that Murillo did not meet her burden to demonstrate the relevance of the protected discovery to the collateral proceedings. Additionally, the Court observed that although Murillo asserted that modification of the protective orders were necessary to avoid discovery costs, she had taken the depositions of several witnesses whose deposition transcripts she now sought. Accordingly, the Court denied Morillo’s motion to intervene.

EEOC v. Ayala AG Services, 2013 U.S. Dist. LEXIS 148431 (E.D. Cal. Oct. 15, 2013). While investigating a Title VII discrimination and retaliation charges, the EEOC issued several requests for information to Respondent. Because Respondent failed to provide the requested information, the EEOC issued subpoenas0020seeking documents and information pertaining to the individual charging parties and their employment with Respondent; Respondent’s policies, training, and procedures for sexual harassment and retaliation; and information regarding potential comparators, witnesses, and other victims of harassment or retaliation. Respondent did not respond to the EEOC, failed to provide any of the information sought by the subpoenas, and did not petition to modify or revoke the subpoenas. The EEOC then filed an application for an order to show cause as to why an administrative subpoena should not be enforced against Respondent. Id. at *2-4. The Court granted the EEOC’s application. Johnny Pena, a former employee of Respondent (not an attorney) was present at the hearing and informed the Court that Respondent was out of business. The Court stated that Respondent appeared to be a business entity, and was therefore required to obtain counsel because a corporation may appear in Court only through licensed counsel. Id. at *4-5. Further, the Court opined that even if Respondent was not a business entity and was, for example, a sole proprietorship and would be able to appear in Court without counsel, Pena would still be unable to represent Respondent’s interests because it was well established that the privilege to represent oneself pro se provided by 28 U.S.C. § 1654 was personal to the litigant and did not extend to other parties or entities. Id. at *5. Further, the Court held that the EEOC’s subpoenas should be enforced. The Court observed that the EEOC was required to investigate the charges filed, and had the authority to issue subpoenas in the course of its investigation. The Court also noted that the charges from the charging parties included their names and contact information as well as their employers’ information, the approximate number of employees, and a statement of facts with dates alleging the unlawful employment practices. Thus, the charges satisfied the requirements for a valid charge as required by 29 C.F.R. § 1601.12(a). Further, the EEOC’s subpoenas stated the name and address of the agency issuing the subpoena, identified Respondent as the party subpoenaed, and identified with specificity the documents and information to be produced and the time and place of production. Thus, the EEOC had established that its subpoenas met the procedural requirements of an enforceable subpoena as required by § 1601.16(a). Id. at *6-9. The Court observed that the charging parties claimed that they were subject to discrimination and retaliation. In its investigation of these claims the EEOC sought three general categories of documents and information which were relevant to the charges alleged by the charging
parties. Id. at *10. Finally, the Court noted that if Respondent did not intend to comply with the subpoena, it should petition the EEOC to revoke or modify the subpoena within five business days of service. Here, Respondent waived the right to challenge the subpoenas because Respondent did not seek to challenge the subpoenas within the five-day period as required, nor at any time after that point. Moreover, Respondent had not shown that complying with the subpoenas would be unduly burdensome. Accordingly, the Court granted the EEOC’s petition to enforce its subpoena. Id. at *11-13.

**EEOC v. Evans Fruit Co., Inc., 2013 U.S. Dist. LEXIS 24624 (E.D. Wash. Feb. 20, 2013).** The EEOC brought an action on behalf of a class of current and former employees of Defendant Evans Fruit Co. alleging sexual harassment at Sunnyside Ranch. Three Plaintiff-Interveners sued Juan Marin, the ranch foreman, individually for violations of the Washington Law Against Discrimination (“WLAD”). Marin filed a motion for severance, which the Court granted. The Court noted that if Marin was tried at the same time Evans Fruit was tried on the claims asserted against it, the jury was going to hear not only about his alleged wrong-doing with respect to the three Plaintiffs-Interveners, but also about his alleged wrong-doing with respect to other members of the EEOC’s class, and the alleged wrong-doing of others to certain members of the EEOC’s class. Further, some of the EEOC’s class members who had not sued Marin individually alleged harassment by him that was more severe than that alleged by the Plaintiffs-Interveners who sued him individually. The Court thus opined that if the same jury tried both the claims against him and those against Evans Fruit, Marin would be prejudiced. Id. at *3-4. Only a separate trial would eliminate the danger of unfair prejudice and jury confusion. Id. at *4. Accordingly, the Court granted Marin’s motion for severance and stated that there would be a separate trial before a separate jury on the WLAD claims asserted by the Plaintiffs-Interveners against Marin.

**EEOC v. Evans Fruit Co., Inc., Case No. 10-CV-3033 (E.D. Wash. Mar. 13, 2013).** The EEOC brought an action on behalf of current and former employees of Defendant alleging sexual harassment at Sunnyside Ranch. Defendant filed 33 motions in limine, which the Court granted in part and denied in part. First, the Court granted Defendant’s request to exclude evidence or argument regarding the deaths of claimants Jacqueline Abundez Mendoza and/or Jessica Barajas and related allegations that Defendants Evans Fruit, Juan Marin, or anyone employed by or associated with Evans Fruit was involved in one or both of their deaths, and rumors to that effect. The Court stated that such evidence was irrelevant to the issues in this case and it was greatly outweighed by its propensity to unfairly prejudice Defendant and Marin and confuse the jury. Because summary judgment had been granted to Defendant on the sexual harassment claims of Jacqueline Abundez and her mother, Angela Mendoza, evidence regarding those claims was now irrelevant. The Court noted that some of the claimants’ alleged incidents arguably could be viewed as attempted rapes, and stated that they could describe to the jurors what allegedly occurred to them. The Court did not preclude the EEOC from arguing to the jury that these alleged incidents amounted to attempted rape if supported by the testimony. The Court excluded evidence of alleged harassment that a claimant heard of after her employment with Defendant ended, and denied the motion to the extent it sought to exclude all evidence of alleged harassment that a claimant did not personally experience or witness. The Court stated that if a claimant became aware of similar acts of sexual harassment during her employment she could use such evidence in support of that sexual harassment claim. However, she would need to first testify about how she was sexually harassed, and it would be necessary to establish that claimant’s awareness occurred while she was employed with Defendant. The Court was unaware of any allegation or evidence that Naul Arellano sexually harassed any of the claimants. The Court, however, recalled that Arellano’s interaction with some of the claimants had been cited by Defendant as relevant to its Ellerth-Faragher defense. Thus, the Court stated that it would not preclude argument or evidence regarding Arellano’s alleged responses to claimants who came to him with complaints about harassment, and accordingly, denied Defendant’s motion in limine to the extent it sought to exclude evidence of Arellano’s non-sex-based conduct, which was relevant to Defendant’s Ellerth-Faragher defense. The Court also excluded argument or evidence that Defendant implemented its sexual harassment policy in response to litigation or charges of sexual harassment, and argument that adoption of the policy was evidence of culpability for allegations arising before adoption of the policy. The Court, however, stated that the EEOC could present argument or evidence that the sexual harassment policy and general workplace policies that
preceded it were deficient in particular respects and thus did not constitute reasonable care to prevent or correct sexually harassing behavior. The Court further denied Defendant’s motion in limine, stating that while the EEOC determination letters could have limited probative value because they contained only bare conclusions that the EEOC had reasonable cause to believe a charging party was subjected to sexual harassment, such letters were admissible into evidence. Because testimony about alleged sexual harassment from individuals against whom summary judgment had been granted, and testimony from individuals who were never claimants in this case would mislead and confuse the jury regarding which legal and factual claims were at issue, the Court excluded such testimony. The Court also noted that the same jury was going to determine the liability as to each claimant after hearing testimony from all 15 claimants about the alleged sexual harassment each of them experienced. The Court also placed limitations on the extent of evidence Plaintiffs would be allowed to offer regarding Defendant Marin’s alleged fraudulent behavior. The Court remarked that the purpose of the trial was not to prove Marin committed fraud.

Further, the Court also excluded evidence regarding a February 2010 meeting at the Sunnyside library and its alleged aftermath because this evidence formed part of a separate retaliation lawsuit; evidence regarding any alleged improper conduct by attorneys for Defendant; evidence regarding Defendant’s employees allegedly drinking and using drugs at work; evidence of alleged harassment before October 2005; and evidence or argument that litigation of this action demonstrated indifference by Defendant to sexual harassment.

**EEOC v. Evans Fruit Co., Inc., 2013 U.S. Dist. LEXIS 40842 (E.D. Wash. Mar. 22, 2013).** The EEOC brought an action on behalf of current and former employees of Defendant alleging sexual harassment at Sunnyside Ranch. The Court had earlier severed the trial against ranch foreman Juan Marin involving the Washington Law Against Discrimination (“WLAD”) claims from the trial against Defendant Evans Fruit. Plaintiffs-Interveners now moved to decline supplemental jurisdiction of the claims against individual Defendant Marin, and alternatively, to stay the trial against him. The Court granted in part and denied in part the motion. The Court observed that it could decline exercising supplemental jurisdiction if a claim raises a novel or complex issue of state law and if the claim substantially predominates over the claim or claims over which the Court has original jurisdiction. *Id.* at *3. Plaintiffs-Interveners contended that the WLAD claims against Marin raised novel and complex issues regarding the admissibility of evidence as to immigration status. The Court had earlier held that immigration status was discoverable by Defendants, but that Defendants would have to persuade the Court at the damages phase of the trial that its probative value regarding emotional distress damages outweighed its danger of unfairly prejudicing the Plaintiffs-Interveners. Because Plaintiffs-Interveners chose not to allow their immigration status to be discovered, the Court stated that it would not be making any admissibility determination regarding immigration status. The Court remarked that although the discoverability of immigration status could constitute a novel or complex issue, it was not exclusively because of state law. Further, the Court noted that prior to the severance, Plaintiffs-Interveners’ WLAD claims did not substantially predominate over the Title VII claims as to which it had original jurisdiction, and although the WLAD claims were now the exclusive claims in the severed trial, it did not persuade the Court to decline supplemental jurisdiction. The Court reasoned that it would be inconvenient and unfair to Marin to decline supplemental jurisdiction over the WLAD claims asserted against him, and considerations of judicial economy weighed against declining supplemental jurisdiction and, issues of comity did not warrant declining supplemental jurisdiction. *Id.* at *6. Regarding the stay of the trial against Martin, the Court noted that after final judgment on the claims against Evans Fruit, the EEOC would appeal to the Ninth Circuit to determine whether immigration status was discoverable, and whether the Plaintiffs-Interveners’ failure to provide this information in discovery warranted precluding them from recovering compensatory damages. The Court stated that Plaintiffs-Interveners were precluded from recovery of emotional distress damages, and thus trial of their WLAD claims against Marin would involve only liability issues; if liability was established, Plaintiffs-Interveners would be limited to recovery of nominal damages, which the Court would award as a matter of law. The Court also noted the possibility that a jury in the anticipated liability trial against Marin could conclude that he was not liable to any of Plaintiffs-Interveners, which would lead to the likelihood that there would never be a damages trial against Marin, regardless of what the Ninth Circuit did on an appeal regarding the claims against Evans Fruit. Nevertheless, the Court stated that it would not stay any appropriate motion.
practice by Marin and/or Plaintiffs-Interveners, which was prompted by the final judgment entered on the
case asserted against Evans Fruit.

sued Evans Fruit on behalf of 10 charging parties who claimed that they were retaliated against for
participating in the EEOC's investigation into allegations of sexual harassment. The retaliation claims
stemmed from a meeting between EEOC attorneys and the claimants, a group of former Evans Fruit
employees, at a public library in Sunnyside, Washington. One of the charging parties recognized two men
at the library who he believed were Evans Fruit employees. The EEOC argued that the employees'
presence at the library was meant to intimidate the claimants and further asserted that several of the
individuals were threatened after they attended the meeting. In moving for summary judgment, Evans Fruit
challenged the evidentiary basis for the EEOC's assertions and argued that there was no proof of
retaliation. The Court granted Evans Fruit's motion for summary judgment, dismissing all 10 of the EEOC's
retaliation claims. Significantly, the Court noted that unlike sexual harassment claims that take into
account whether the alleged victim subjectively believed the work environment was hostile or abusive,
retaliation claims are based on an objective, reasonable person standard. Thus, although "out of court
statements relayed to a sexual harassment claimant regarding similar acts of harassment in the workplace
may be admissible for the purpose of showing the effect on the listener (the claimant)," such statements
serve no legitimate purpose in evaluating the charging parties' retaliation claims because the "subjective
effect of a statement on a particular claimant is irrelevant." *Id.* at *13. In reviewing the EEOC's purported
evidence of retaliation, the Court found that none of the claimants could reasonably have believed that their
presence at the library was retaliatory based on what they knew at the time, particularly because all but
one of the claimants were either unaware of the two men's presence at the library or did not believe their
presence was significant at the time. Critically, the Court ruled that the claimants' testimony that they later
came to believe that they had been retaliated against – after they learned of the men's identities and heard
that threats had been made by third-parties against those who attended the meeting – was based on out of
court statements offered to prove the truth of the matter asserted. Finding that nearly all of the EEOC's
evidence was based on inadmissible hearsay, the Court granted Evans Fruit's motion for summary
judgment and dismissed all 10 of the EEOC's claims for retaliation.

brought an action on behalf of current and former employees of Defendant alleging sexual harassment at
Sunnyside Ranch. The EEOC moved for judicial provision of interpreters for trial testimony and also
moved to expedite the hearing. The Court denied the motions. The EEOC asserted that the Court
Interpreter's Act and Rule 43(d) authorizes and directs the Court to provide interpreters for judicial
proceedings, and that the costs for interpreters should be borne by the Court where a federal agency such
as the EEOC is a party. The Court observed that it had earlier advised all parties that they would be
responsible for providing certified interpreters at their own expense for all non-English speaking witnesses
they were intending to call as witnesses. That directive was never questioned or challenged prior to the
day before trial. The Court also noted that the EEOC had arranged for and contracted with certified
interpreters for trial of this action prior to filing its present motion, which was filed on the last business day
before trial. The Court stated that under the practices prevailing in U.S. District Courts, the Department of
Justice pays the fees for interpreters required for witnesses in criminal cases initiated by the Department of
Justice. Here, the paperwork filed by the EEOC at the Court's request showed that the interpreters used at
trial were paid at the rate of $100 per hour, a sum which substantially exceeded the Court's current
payment schedule. The Court further observed that there was no clear case law which required it to order
payment from the Court's resources necessitated by the EEOC's initiation of civil litigation for which that
agency was otherwise accountable, nor were there in-house precedents or related practices known by the
Administrative Office of the U.S. Courts that guide and direct the Court in this novel area of trial practice
where another branch of government is involved. Accordingly, the Court stated that there was no
requirement or practice that mandated it to expend its resources to underwrite the costs of interpretive
services necessitated in litigation advance and prosecuted by the EEOC, and denied the EEOC's motion
for court interpreters. The Court also denied as moot the EEOC's motion to expedite hearing.
EEOC v. Evans Fruit Co., Inc., Case No. 10-CV-3093 (E.D. Wash. Aug. 21, 2013). The EEOC brought an action on behalf of current and former employees alleging sexual harassment at Sunnyside Ranch. Earlier, the Court had severed Plaintiffs-Interveners’ Washington Law Against Discrimination (“WLAD”) claims against Defendant-Intervener Juan Marin from their WLAD claims against Defendant Evans Fruit Co., Inc. Thereafter, in the trial against Evans Fruit, the jury found that the EEOC and none of the Plaintiffs-Interveners established by a preponderance of the evidence that they were subjected to a sexually hostile work environment while employed at Evans Fruit. Subsequently, the Court granted Defendant Marin’s motion for dismissal of those claims. Defendant-Interveners then moved for sanctions, and the Court denied the motion. The Court stated that the fact that it was not until summary judgment that Plaintiffs-Interveners conceded there was no basis for asserting Title VII claims against Defendant Marin did not warrant imposition of sanctions against Plaintiffs-Interveners. The Court noted that the claims were largely identical to the WLAD claims appropriately pled by Plaintiffs-Interveners against Defendant Marin and therefore did not result in an unnecessary multiplication of the proceedings. Defendant-Interveners contended that fees and costs should be awarded pursuant to Washington’s Civil Rule 11 (“CR 11”). The Court observed that a party seeking CR 11 sanctions must give notice to the Court and the offending party promptly upon discovering a basis for doing so. Id. at *2. Defendants-Interveners did not provide notice to counsel for Plaintiffs-Interveners of a possible CR 11 violation, and the Court remarked that the first time Defendants-Interveners raised the evidentiary issues was when they filed their motion for summary judgment, more than a year after the Complaint in Intervention was filed. Further, the Court stated that the complaint filed by Plaintiffs-Interveners was not wholly baseless from the very outset. Accordingly, the Court denied the motion for sanctions.

EEOC v. Evans Fruit Co., Inc., 2013 U.S. Dist. LEXIS 119023 (E.D. Wash. Aug. 21, 2013). The EEOC brought an action under Title VII and the Washington Law Against Discrimination (“WLAD”) alleging that Defendants retaliated against its workers for co-operating in a sexual harassment investigation. The charging parties intervened in the EEOC’s lawsuit. The Court subsequently granted summary judgment for Defendants on various claims. The EEOC then moved for reconsideration of the order granting summary judgment to Defendants. The Court partly granted and denied the motion. The Court had earlier granted Defendants’ motion to dismiss, finding that the EEOC had failed to present evidence that any of the workers had been threatened by anyone associated with Defendants. The EEOC’s initial sexual harassment action had alleged that Defendants singled out female workers for sexual advances, giving them work assignments that isolated them from friends and family members. In the retaliation action, the workers alleged that they met with EEOC representatives at a library and one of the workers, Gregorio Aguila (“Aguila”), alleged that two men, Domingo Cuenca and Alvaro Rojas, took pictures of workers and allegedly threatened Aguila. Other workers heard about the alleged intimidation and threats through Aguila or his counsel. The Court ruled that the threats allegedly made over the workers’ participation in the meeting were inadmissible hearsay. The Court found that claimants could not recount what Aguila or counsel or someone else told them without there being a hearsay issue. Id. at *11. Many claimants at the library meeting were not even aware that the two men were there or whether they had any connection with Defendants. Thus, concluding that out-of-court statements made by Aguila to his counsel and to others constituted inadmissible hearsay and that other claimants could not repeat what they were told by Aguila, the Court reaffirmed the summary judgment for Defendants on the retaliation claims. The Court further declined to reconsider awarding summary judgment to Defendant Juan Marin on the retaliation claim of Aguila. Aguila had indicated that Juan Marin had made certain statements to him following the alleged threat from Alberto Sanchez. The EEOC contended that the alleged threat was hearsay because it was a “verbal act” or because it was the statement of a co-conspirator. Id. at *27-28. The EEOC asserted that Sanchez was Marin’s co-conspirator and therefore, Sanchez’ statement was admissible against Marin as it constituted independent evidence which established the existence of a conspiracy that Marin was part of. Id. at *34-35. The Court, however, found that Marin’s statement was insufficient to establish by a preponderance of evidence that he was engaged in a conspiracy to retaliate against those who attended the library meeting. Id. at *38. The Court thus found that Marin’s statement to Aguila fell short of proving that Marin was aware of any unlawful motive of Sanchez related to the library meeting, and Sanchez’s statement was not reflective of Marin’s state of mind. Id. at *42-43. The Court therefore concluded that
Sanchez’s alleged threats to Aguila were not verbal acts vis-a-vis Marin because they were offered for the truth of the matter asserted and not admissions by a party opponent. \textit{Id.} at *44. The EEOC also contended that the Court had erred in finding that claimant Francisco Ramos did not fall within the “zone of interests” protected by Title VII of the WLAD. The Court had found that Ramos’ presence at the library meeting did not constitute participation in “protected activity” because he did not attend as a “potential witness or claimant,” and he did nothing more than accompany his wife to the meeting. \textit{Id.} at *16-17. The EEOC asserted that Ramos actually provided assistance to his wife by facilitating communications between his wife and the EEOC investigator. The EEOC, however, did not cite any record in support. The Court therefore held that it did not err in finding that Ramos’ attendance did not constitute protected activity. Even if it did, the Court held that Ramos’ contention that he was subjected to a materially adverse action depended on inadmissible hearsay testimony because Ramos had also repeated the alleged threat he was informed of by Aguila and/or his counsel. \textit{Id.} at *18. The Court therefore declined to reconsider awarding judgment for Defendants on the retaliation claims as to those claimants for whom the presence of Cuence and Rojas could only be “adverse” if there was admissible evidence to establish the meeting participants’ awareness of the alleged threat. As to Aguila, the Court noted that the record did not indicate that his attendance at the meeting did not constitute participation in any “protected activity.” \textit{Id.} at *22-23. According to the Court, a reasonable inference could be drawn from the record that Aguila was present at the meeting, if not to talk about sexual harassment, but to talk about other things which he reasonably perceived to be sexual harassment. \textit{Id.} at *23. The Court noted that, arguably, Aguila could have reasonably perceived himself to be included in the threat because at the time of the meeting, he intended to cooperate with the EEOC, which was confirmed by the fact that he was regularly in touch with the EEOC and his own counsel. \textit{Id.} at *25-26. The Court therefore allowed reconsideration of summary judgment awarded to Defendant on Aguila’s claims to the extent they were based on what Sanchez allegedly said to Aguila following the library meeting. Accordingly, the Court granted reconsideration of its order as to Aguila’s retaliation claims and denied it for the EEOC’s claims as to the remaining claimants.

\textit{EEOC v. Evergreen Alliance Golf, Ltd., 2013 U.S. Dist. LEXIS 42576 (D. Ariz. Mar. 26, 2013).} The EEOC, on behalf Defendant’s former employee Kevin Rasnake, brought an action alleging that Defendant discriminated and retaliated against him in violation of the ADA. \textit{Id.} at *9. Defendant moved for summary judgment, and the Court granted the motion with respect to the discrimination claim, but denied it as to the retaliation claim. Rasnake worked as the Membership Sales Director at Arrowhead Country Club in Glendale, Arizona. \textit{Id.} at *2. He suffered from cerebral palsy, and his right hand and leg were visibly impaired. \textit{Id.} at *3. Defendant contended that in March 2009 Rasnake was placed on a performance improvement plan (“PIP”) along with two other Membership Directors because he was one of the worst performing Membership Directors in the company in 2008 and early 2009. In 2008, he only achieved 30.14% of his annual sales goal. Defendant argued that in May 2009 Rasnake was terminated because he failed to meet the expectations of his PIP. The Court found that those were legitimate, non-discriminatory reasons for Defendant’s decision to terminate Rasnake. \textit{Id.} at *14-18. To establish pretext, the EEOC argued that direct evidence of Defendant’s discriminatory animus was shown by statements allegedly made by the General Manager, Chase Swanson, that his dog was like a “retarded kid,” that he would be getting rid of Rasnake for complaining to Human Resources (“HR”) that he made that remark, that he told disability-related jokes, and stated that Rasnake could not be hired as a dishwasher impliedly because of his disability. \textit{Id.} at *20-21. The Court found that the statement about getting rid of Rasnake had nothing to do with his disability but rather was his reaction to finding out that Rasnake reported him to HR. \textit{Id.} at *20-21. The Court also found that the other statements were stray remarks, had nothing to do with Rasnake’s termination, and were not direct evidence of discrimination. \textit{Id.} at *23. The Court also determined that the company’s business decision to remove tournament sales from Rasnake and give them to another employee was a business decision that the company was entitled to make and was not circumstantial evidence of discrimination. \textit{Id.} at *23-25. The Court reasoned that Defendant’s failure to place another sales director on a PIP was not circumstantial evidence of discrimination because that sales director’s sales performance was not comparable to Rasnake. \textit{Id.} at *26-27. The Court concluded that the EEOC offered no direct evidence of discrimination and insufficient circumstantial evidence to create a triable issue. Accordingly, the Court granted Defendant’s motion for summary judgment on the discrimination.
claim. As to the EEOC’s retaliation claim, the Court ruled that Rasnake had an objectively reasonable belief that Swanson’s “retarded kid” comment constituted a violation of the ADA. The Court opined that it was objectively reasonable for Rasnake to believe, even if his belief was wrong, that under the ADA his supervisor could not derogatorily use the word “retarded” in this fashion in a professional environment. Id. at *37. Accordingly, because Rasnake’s belief was reasonable, the Court concluded that the EEOC had established that Rasnake’s complaint to HR was protected activity. Although Defendant offered legitimate reasons for the alleged adverse employment action, i.e., Rasnake’s termination, the Court, nevertheless, found that there was enough direct evidence of retaliation (that Swanson said that he would get rid of Rasnake for reporting him) to create a triable issue of material fact and preclude summary judgment. Accordingly, the Court granted summary judgment to Defendant on the ADA discrimination claim, but denied it on the retaliation claim. Id. at *42-44.

**EEOC v. Evergreen Alliance Golf, Ltd., 2013 U.S. Dist. LEXIS 118805 (D. Ariz. Aug. 21, 2013).** The EEOC brought an action under the ADA alleging that Defendant unlawfully discriminated and retaliated against Kevin Rasnake, who suffered from cerebral palsy. Following a bench trial, the Court issued its findings of facts and conclusions of law. Rasnake, as a Membership Director (“MD”), was responsible for increasing golf membership, conducting club tours, and the formation and function of a membership committee. Rasnake also had a monthly and annual sales goal. Subsequently, during a meeting, Defendant’s General Manager made a comment which compared caring for the dog to raising a child with a disability. Rasnake complained to the Director of HR, and the Regional Vice President. Thereafter, after poor sales performance in 2008 and in January and February of 2009, Defendant issued Rasnake a performance improvement plan (“PIP”). In April 2009, commission compensation was changed for MDs. Rasnake was then terminated for not meeting the expectations of his PIP, and he was not given severance pay, and was designated ineligible for re-hire because of his documented performance issues. Earlier, the Court had summarily dismissed the EEOC's disability discrimination claim, and thus, only the retaliation claim remained. Id. at *19. The Court observed that to make out a hostile work environment claim, the EEOC must show that the conduct was sufficiently severe or pervasive to alter the condition of Rasnake’s employment and create an abusive work environment, and that a totality of the circumstances test is used to determine whether the EEOC’s allegations make out a colorable hostile work environment claim. Id. at *24. The Court stated that Rasnake did not have a reasonable belief that Swanson’s single use of the word “retarded” at a staff meeting, that was not directed at Rasnake, and that did not even reference his particular disability, created a hostile work environment and violated the ADA. Id. at *25-26. Because Swanson’s off-hand comment was an isolated incident and was not severe or pervasive enough for a reasonable person to believe that a hostile work environment was created, the Court determined that Rasnake’s complaint to HR was not protected activity. Id. at *26. The Court stated that changing Rasnake’s compensation structure was an adverse employment action because his job duty of tournament sales was transferred to another department head, his commission structure changed, and his bonus amount changed prior to showing him he would be getting a bonus. Further, the Court remarked that placing Rasnake on a PIP under the circumstances in this case, if it were done with a retaliatory motive, would likely deter someone in similar circumstances from engaging in protected activity in the future. The Court also noted that Rasnake’s eventual termination, designating him ineligible for re-hire, and not giving him severance pay was an adverse employment action. However, the Court observed that retaliation claims required proof that the adverse employment action would not have occurred in the absence of the protected activity. Id. at *28. The Court noted that the change to Rasnake’s bonus structure was consistent with bonuses offered to other MDs. The Court also stated that Defendant decided to place Rasnake on a PIP because he had one of the lowest individual membership sales percentages for MDs in 2008. The Court noted that two other MDs were also put on a PIP, and Rasnake’s PIP was issued for similar reasons, and had identical expectations to the PIPs of other MDs. Further, the Court observed that Rasnake did not meet the expectations of his PIP, which explained the consequences of not making progress toward meeting the performance expectations. In spite of being expected to form a membership committee, Rasnake did not communicate his progress with his supervisor while on the PIP. Thus, the Court found that Rasnake’s complaint to HR was not the but-for cause of Defendant’s decision to terminate him.
On behalf of several current and former female employees, the EEOC brought an action alleging that Charles Janac, one of Defendant's regular customers, sexually harassed them on multiple occasions, and that despite its knowledge, Defendant failed to adequately address the problem in violation of Title VII. Defendant filed a motion for summary judgment with respect to four of the seven employees. \textit{Id.} at *1-2. The Court denied Defendant’s motion. Defendant argued that the harassment at issue was not sufficiently severe and pervasive to support a Title VII sexual harassment claim of claimants O’Neal, McMurray, Atlee, and Humiston, and that Humiston had signed a release. O’Neal was a department manager of the Oak Grove store where all of the acts of harassment were alleged to have occurred. She testified that she was in the breast by Janac on one occasion and that she had been informed of at least five other instances in which Janac physically assaulted female employees. \textit{Id.} at *29. The Court found that this raised an issue of fact as to whether the conduct was sufficiently severe and pervasive to alter her conditions of condition employment. It rejected Defendant’s argument that O’Neal's evidence relied too heavily on “workplace gossip.” \textit{Id.} at *30. As all of the acts occurred at one location by the same individual, the Court concluded that repeatedly hearing accounts of harassment dealt by one man may make a reasonable woman feel unsafe in her work environment. \textit{Id.} at *30-31. The Court explained that here, the class members were potentially a victim of Janac’s conduct on any given day. Accordingly, it would be more reasonable for them to feel unsafe in their work environment, and that significant weight should be attributed to each class members’ knowledge of Janac's harassment of other employees. \textit{Id.} at *32. As to McMurray, Defendant pointed out that Janac put his hand down her shirt in 2007, and during her third stint of employment at the Oak Grove store, there were a few instances where Janac grabbed her hand, and on one instance blocked her only exit for a moment before he left the store in 2008 and 2009, respectively. Defendant argued that the incident that occurred in 2007 was barred by statute of limitation, and the other allegations were not severe and pervasive enough for a jury to find in McMurray’s favor. The Court rejected this argument, finding that enough time had not passed for the effects of the harassment in the Oak Grove store to dissipate. In fact, harassment in the store continued during McMurray’s six-month hiatus in 2007, and Janac continued to sexually intimidate other women after she got back to work. The Court remarked that in consideration of the totality of the circumstances, the EEOC raised facts indicating that Janac’s harassment of McMurray was both objectively and subjectively hostile. \textit{Id.} at *34-40. Accordingly, the Court denied summary judgment on McMurray’s claims. As to Atlee’s claims, Defendant argued that Janac’s interactions with her were not subjectively pervasive, because Atlee reported only one incident with Janac and never complained to her union. The Court noted that Atlee witnessed and was told about Janac’s harassment of other employees. She also testified Janac tried to grab her hands many times over, and that she reported the one incident because Janac creeped her out, and she proceeded to call her manager whenever she noticed that Janac was present in the store. The Court concluded that this was sufficient to make a showing that the terms and conditions of her work environment were subjectively altered. \textit{Id.} at *40-43. For similar reasons, the Court denied summary judgment on the claims of Humiston. It also denied summary judgment against Humiston based upon a release that she signed. Humiston had only a high school education, the release was not written in terms that she could reasonably understand, and she was not advised that she could consult with an attorney. \textit{Id.} at *43-50.

The EEOC brought an action under Title VII alleging that Defendant subjected a group of employees to a sexually hostile work environment. Defendant answered the complaint, asserting that any such victims had a duty to mitigate damages, including emotional damages. The EEOC moved for summary judgment as to this defense. The Court denied the motion. The EEOC then requested the Court to reconsider its decision on the basis that it was manifestly unjust. The Court granted the motion for reconsideration. The Court stated that pursuant to Rule 59(e), reconsideration was appropriate in the face of the existence of new evidence, an intervening change in the law, or as necessary to prevent manifest injustice. \textit{Id.} at *2-3. The Court also noted that it was an abuse of discretion to deny a motion for reconsideration if the underlying decision involved a clear error of law. \textit{Id.} at *3. The EEOC argued that Title VII contained no requirement that claimants mitigate their compensatory damages. The Court remarked that when a common law principle was well established, Congress had legislated with an expectation that the principle would apply except...
when a statutory purpose to the contrary was evident. The Court stated that because it had found common law persuasive in denying the EEOC’s request for summary judgment, it was clear that it erred by failing to consider Congress’ statutory purpose in drafting Title VII. Further, the Court observed that in the 1972 Amendments to the Title VII, Congress explicitly chose to include a duty of claimants to mitigate back pay losses; thus, Congress’ deliberate decision to carve out this duty to mitigate damages clearly signified that Congress did not intend to create a duty to mitigate all compensatory damages. The Court reasoned that if Congress intended there to be a duty to mitigate all compensatory damages, it was illogical that it chose to single out the duty to mitigate back pay alone. Because the Court relied on common law when faced with an evident statutory purpose, it found that it had committed a clear error. Accordingly, the Court found that reconsideration was appropriate and determined that Title VII claimants did not have a duty to mitigate emotional damages.

EEOC v. Geo Group, Inc., 2013 U.S. Dist. LEXIS 49277 (D. Ariz. Mar. 25, 2013). In this consolidated action of Plaintifs – the EEOC and the State of Arizona, Civil Rights Division (“ACRD”) – alleging sex discrimination and retaliation on behalf of Defendant Geo Group Inc.’s current and former correctional officers, the Court granted Defendants’ motion for summary judgment in part. Alice Hancock, Alisa Roach, Francis Wilcox, Roxanne Valenzuela Jennifer Younger, Sofia Hines, all of whom were current and former correctional officers at Geo Group, filed charges of sexual harassment and retaliation describing incidents of sexual harassment involving Sergeants Robert Kroen, Robert Tremont, and Jarrett Yoyokie. Similarly, others also alleged that they were sexually harassed and they were retaliated against for complaining. In its motion, Defendants argued that many of Plaintiffs’ claims were untimely because under Title VII, a charge must be filed within 180 days of the alleged employment practice or within 300 days of the alleged unlawful employment practice where the aggrieved person had initially instituted proceedings with a state or local agency. Defendants contended that because Hancock instituted proceedings with the ACRD as well as the EEOC, the 300-day deadline was applicable here. As Hancock filed her charges on June 5, 2009, acts occurring before August 9, 2008, would not be actionable. The Court, however, noted that there were certain caveats to that conclusion. For the purposes of hostile work environment claims, non-discrete acts that fall outside the statutory time period may be part of a single claim. Id. at *56. Second, the deadline applicable to Hancock, who filed her own charge of discrimination, was not necessarily applicable to the other aggrieved women in the case. Id. at *58. Defendant contended that Plaintiffs notified it that they were bringing claims on behalf of women other than Hancock in the ACRD’s May 2010 reasonable cause determination and that consequently, any claims by aggrieved women after July 2009 were untimely. The Court agreed with Defendants as far as Hancock was concerned, and for the other aggrieved women, it concluded that the claims arising as on the date of the ACRD reasonable cause determination, i.e., May 19, 2010 were timely. The Court found that Alisa Roach, and Francis Wilcox alleged no timely acts and that Defendant was therefore entitled to summary judgment on their claims in their entirety. Defendant still argued that it was entitled to summary judgment on the hostile work environment claims of Hancock, Valenzuela, Younger, and Hines. Defendant contended that Hancock could not establish a hostile work environment claim because: (i) her untimely sexual harassment allegations against Tremont in 2008 were not part of the same untimely employment practice set forth in her charge, alleging sexual harassment by Kroen in 2009; (ii) Defendant’s intervening acts severed any continuing violation; (iii) Hancock’s timely allegations were not sufficiently severe and pervasive to establish a hostile work environment claim; and (iv) the doctrine of laches barred claimed involving Tremont. Turning to Defendant’s intervening acts argument, the Court noted that the remedies for sexual harassment should be reasonably calculated to end the harassment, such as to stop harassment by the person, and to persuade potential harassers to refrain from unlawful conduct. Id. at *81-82. Defendant contended that when Hancock complained about Tremont, it issued him a written reprimand and which should prohibit Hancock from recovering from Tremont’s previous acts. The Court observed that if an employer’s attempted remedy is ineffectual, liability would attach. Id. at *84. Hancock testified that the supervisors were aware, and were even around Tremont and no supervisor said anything to him. Accordingly, the Court concluded that it was a disputed fact whether Defendant’s response was adequate to persuade other potential harassers to refrain from unlawful conduct. Likewise, the Court found that conduct against Valenzuela was severe and pervasive and was of an unwelcome sexual nature. Defendant nevertheless contended that it was entitled to

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summary judgment on Valenzuela’s hostile work environment based on the Faragher/Ellerth affirmative defense, where the Supreme Court held that an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor over that employee. Id. at *103. The Court remarked that whether Defendant’s responses to Valenzuela’s complaints against Tremont and Yoyokie were adequate was a disputed issue of fact. Because it was disputed issue of fact as to whether Defendant exercised reasonable care to prevent and correct promptly any sexually harassing behavior, the Court concluded that Defendant could not prevail in establishing the Faragher/Ellerth defense at the summary judgment stage. Similarly, the Court denied summary judgment on Younger as well Hines’ hostile work environment claims, and Younger’s retaliation claims. The Court denied Hines’ retaliation claim finding that the EEOC failed to present sufficient evidence upon which a reasonable juror could conclude that Hines suffered materially adverse retaliatory acts as a result of engaging in protected activities under Title VII. Accordingly, the Court granted Defendants’ motion for summary judgment in part.

**EEOC v. Global Horizons, Inc., 2013 U.S. Dist. LEXIS 2812 (C.D. Cal. Jan. 4, 2013).** The EEOC brought an action alleging that Defendants violated Title VII of the Civil Rights Act by engaging in unlawful employment practices including discrimination and harassment of Thai and Asian individuals hired to perform agricultural work. The Farm Defendants issued a subpoena seeking certain communications and documents exchanged between the EEOC and Thai Community Development Center (“Thai CDC”). The EEOC filed a motion to quash or modify the subpoena to non-party Thai CDC and for a protective order. Thai CDC also filed a motion for a protective order. The Court denied in part and granted in part both motions. First, the Farm Defendants sought documents and communications regarding stressors experienced by Thai workers during the time they claimed to have worked at the Farm Defendants’ orchards. Second, the Farm Defendants sought documents and communications regarding any alleged mistreatment suffered by Thai workers at the orchards. Thai CDC argued that the earlier order of the U.S. District Court of the Eastern District of Washington – limiting the EEOC’s claims to orchard-related matters in a related lawsuit – precluded the Farm Defendants’ requested non-orchard related alternate stressor information that may bear on complainants’ emotional distress damages. The Court found that the order’s limitation on the EEOC’s claims to orchard-related conduct was not intended to or precluded discovery of potential non-orchard related alternate stressor information that might bear on emotional distress damages and complainants’ credibility. Id. at *11. The Court saw no basis for restricting the Farm Defendants’ request for other relevant health, financial, and familial alternate stressor information based on privilege grounds. The Court reasoned that any privileges other than the attorney-client privilege, however, arguably were waived by putting emotional harm in issue. Id. at *12. The Thai CDC also asserted that all non-orchard related alternate stressor information was irrelevant because the EEOC had agreed to limit damages to “garden variety” emotional distress damages. Id. The Court rejected this position because discovery of alternate stressor documents responsive to the subpoena would lead to the discovery of admissible evidence. Id. at *14. The Thai CDC’s documents consisted of medical, health, financial, and familial information conveyed to Thai CDC by the complainants themselves. The Court observed that such documents could implicate privacy concerns but would not be privileged. Id. Further, the Court remarked that any alternate stressor documents claimed to be attorney-client privileged must be set forth on a privilege log to permit proper scrutiny and challenge. Id. at *14-15. Regarding whether non-privileged alternate stressor information was relevant or discoverable and Thai complainants’ privacy concerns should be overcome, the Court stated that several factors weighed in favor of discovery. Because the EEOC sought $300,000 in emotional distress damages for each Thai complainant (totaling $67,500,000 for all the claims), the Court was reluctant to deny discovery of alternate stressor information that went to the extent of harm and to complainant credibility when the Farm Defendants faced such a massive damages claim. Id. at *16. The Court also rejected the EEOC’s argument that the Thai CDC was not a party to the litigation and, thus, what it considered to be mistreatment was not relevant. Accordingly, the Court denied the Thai CDC’s motion for a protective order to the extent the Thai CDC was in possession of relevant, non-privileged documents responsive to the subpoena request.

practices, including discrimination and harassment of Thai and Asian individuals hired to perform agricultural work. Earlier, the Court had held that Title VII 300-day limitations period under § 706 applied to § 707 pattern or practice discrimination claims brought by the EEOC. Nevertheless, the Court declined to dismiss any of the EEOC's claims for lack of timeliness, finding that based upon the evidence before, the charges were not untimely as a matter of law. *Id.* at *6. The EEOC filed a motion for reconsideration of this order, stating that there had been an intervening change in law as a result of *EEOC o/b/o Serrano v. Cintas Corp.*, 699 F.3d 884 (6th Cir. 2012). The Court denied the motion. First, *Cintas Corp.*, being a Sixth Circuit decision, was not binding on the Court in Hawaii. Second, *Cintas Corp.* did not address the applicability of the statute of limitations in § 706 to § 707 pattern or practice claims; rather, it addressed the issue of whether the EEOC can pursue a pattern or practice claim under § 706, rather than § 707. *Id.* at *8. Thus, the Court opined that *Cintas Corp.* could not be said to constitute an intervening change of controlling law such that reconsideration was warranted. Accordingly, the Court denied the EEOC's motion for reconsideration.

**EEOC v. Global Horizons, Inc., 2013 U.S. Dist. LEXIS 26012 (D. Haw. Feb. 26, 2013).** The EEOC brought an action alleging that Defendants violated Title VII of the Civil Rights Act by engaging in unlawful practices, including discrimination and harassment of Thai and Asian individuals hired to perform agricultural work. Earlier, the Magistrate Judge had granted the EEOC's motion for a protective order and prohibited discovery regarding the claimants' immigration status after they ceased working for Defendants, and claimants' passport numbers, visa numbers, immigration document numbers, and social security numbers. The Magistrate Judge, however, had denied the EEOC's motion to the extent it sought to bar discovery of matters that could suggest one's immigration status, including discovery regarding the claimants' employment experience since leaving Defendants' employment, financial account numbers, marriage, educational background, date of birth, prior criminal convictions in another country, and social relationships and/or living arrangements, prior legal experience, other names used, and duration of residence in the United States. Defendants filed Rule 72 objections to the Magistrate Judge's order. The Court denied the objections. *Id.* at *11. The Court noted that the Magistrate Judge had acknowledged the broad scope of discovery available under the federal rules, and had noted that Rule 26(c) permitted a Court to enter a protective order when the party seeking the order established good cause for protecting a party from annoyance, embarrassment, oppression, or undue burden or expense. *Id.* at *8. Further, the Magistrate Judge had thoroughly analyzed the EEOC's request for a protective order and weighed the equities and interests of the parties in accordance with *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004). Defendants argued that the Magistrate Judge's order was erroneous and contrary to law because information related to claimants' immigration status after they ceased working for Defendants was highly probative regarding the claimants' claims for constructive discharge, emotional distress damages, and to assess their credibility. The Court, however, found that the Magistrate Judge appropriately exercised his discretion in balancing the interests of Defendants in conducting meaningful discovery regarding the claimants' allegations against the potential for harm to the claimants as a result of public disclosure of the details of certain personal information. *Id.* at *9-10. Accordingly, the Court opined that the Magistrate Judge's order was not erroneous and dismissed Defendants' Rule 72 objections.

**EEOC v. Global Horizons, Inc., 2013 U.S. Dist. LEXIS 32531 (E.D. Wash. Mar. 6, 2013).** The EEOC brought an action alleging that Defendants violated Title VII of the Civil Rights Act by engaging in unlawful practices, including discrimination and harassment of Thai and Asian individuals hired to perform agricultural work. The EEOC filed a motion for reconsideration of the Court's ruling of January 24, 2013, on the Grower Defendants' motion regarding discovery disputes. The Court denied the EEOC's motion for reconsideration. Earlier, the Court had found that documents in the EEOC's possession were discoverable documents relating to notices, questionnaires, letters, and other documents sent by the Thai Cultural Development Center (“CDC”) to Global workers and any documents received by the Thai CDC in response, and all documents that reflected or related to any communications between the Thai CDC and the EEOC concerning the mistreatment alleged in the Complaint. The EEOC sought reconsideration of this ruling, asserting that it conflicted with the Court's July 27, 2012 order and December 12, 2012 restrictions regarding disclosure of medical documentation and privileged information. The Court rejected the EEOC's...
argument. It stated that its January 24, 2013 ruling did not conflict with its July 27, 2012 order, which granted in part and denied in part the Grower Defendants 12(b)(6) motion; determined the first amended complaint only alleged “orchard-related matters” claims against the Grower Defendants; and found that the Grower Defendants could discover any non-privileged matter that was calculated to lead to the discovery of admissible information. Id. at *5. Thus, the Court opined that the Grower Defendants’ request encompassed in the January 24, 2013 order sought such relevant, non-privileged documentation. The Court noted that its order requiring the EEOC to comply with this request did not conflict with the December 12, 2012 ruling that directed the Grower Defendants to engage in a phased-discovery process regarding the Charging Parties’ medical information, the purpose of which was to reduce the potential disclosure of irrelevant personal medical and emotional information. The Court also declined to extend the physician-patient privilege or psychotherapist-patient privilege to the workers’ communications to the Thai CDC, which were then forwarded to the EEOC. The Grower Defendants sought documentation that the Thai CDC shared with the EEOC, and there was no evidence presented that the EEOC’s purpose was to assist individuals with obtaining medical or emotional treatment. Finally, the Court had earlier sanctioned the EEOC $1,000 because it failed to comply with its Rule 26(a) initial disclosure and Rule 26(b) discovery obligations. The Court stated that this sanction was necessary to emphasize to the EEOC that it must fully satisfy its discovery obligations, and thus refused to vacate the sanction. Id. at *8.

EEOC v. Global Horizons, Inc., Case No. 11-CV-3045 (E.D. Wash. April 12, 2013). The EEOC brought an action alleging that Defendants violated Title VII of the Civil Rights Act by engaging in unlawful practices, including discrimination and harassment of Thai and Asian laborers hired to perform agricultural work. The Court held that Plaintiffs had to reimburse Defendants Green Acre Farms, Inc. and Valley Fruit Orchards, LLC (collectively, “Grower Defendants”) for the attorneys’ fees and costs they incurred in responding to the EEOC’s motion for clarification and/or reconsideration of the Court’s earlier ruling regarding discovery disputes and a motion for partial stay. Accordingly, the Grower Defendants moved for attorneys’ fees amounting to $11,989.50. The Court granted the motion in part and denied it in part. The Court noted that it had warned the parties during the hearing on the Grower Defendants’ motion regarding discovery disputes that attorneys’ fees would be awarded to the party that substantially prevailed on any future discovery dispute. After the Court granted in part the Grower Defendants’ motion to compel and required the EEOC to pay a $1,000 sanction, the EEOC filed its reconsideration motion, which the Court granted, and related motion to stay, which the Court denied. Id. at 4. The Court noted that Rule 35(a)(5)(A) disallows an attorneys’ fee award if the movant fails to confer in good faith to obtain the discovery prior to filing a motion to compel or if the discovery non-disclosure was substantially justified. Id. at 5. The Court stated that the award of attorneys’ fees was based on its authority to sanction the EEOC’s continuous strategic delay in providing the requested information, even after a Court order to do so, to the financial detriment of the Grower Defendants. The Court observed that even if this attorneys’ fee award was based on Rule 37(a)(5), the Grower Defendants sufficiently conferred with the EEOC, and reasonably believed that Court intervention was required in order to obtain a complete response from the EEOC as to the outstanding discovery requests. The Court stated that it had granted the motion to stay in order to hear the reconsideration motion before requiring the EEOC to provide the previously ordered discovery and pay the $1,000 sanction. If the reconsideration motion had not been filed, the Grower Defendants would not have expended time responding to the motion to stay. Regarding the hourly rates of the attorneys, the Court observed that they were consistent with the rates charged by attorneys possessing similar skills and experience in the Eastern District of Washington. Further, with regard to the reasonableness of the incurred hours, the Court opined that the substantial majority of the hours were reasonably incurred in order to respond to the EEOC’s two motions and to prepare the attorneys’ fee motion. After multiplying the reasonable hourly rates for each attorney by their reasonable hours, the lodestar amounted to $9,760. The Court found that this lodestar was excessive and awarded $9,000 in attorneys’ fees.

EEOC v. Global Horizons, Inc., 2013 U.S. Dist. LEXIS 53282 (E.D. Wash. April 12, 2013). The EEOC brought an action alleging that Defendants violated Title VII of the Civil Rights Act by engaging in unlawful practices, including discrimination and harassment of Thai and Asian individuals hired to perform agricultural work. Prior to the action, the EEOC had made a conciliation proposal to Defendants, Green
Acre Farms, Inc. and Valley Fruit Orchards, LLC’s (collectively, “Grower Defendants”). It listed 29 charging parties for Valley Fruit Orchards, and 73 charging parties for Green Acre Farms. Subsequently, the EEOC sent notices of failure to conciliate to Green Acre for 71 charging parties, and to Valley Fruit for 28 charging parties. Thereafter, the EEOC brought this action, and in its initial disclosures the EEOC attached a list of 87 claimants as to Green Acre Farms, and 37 claimants as to Valley Fruit. On October 24, 2012, the EEOC advised that it sought $300,000 in emotional distress and punitive damages per class member – 140 claimants as to Green Acre, for a total requested monetary damages award of $42 million, and 85 claimants as to Valley Fruit, for a total monetary damages award of $25.5 million. Thereafter, in supplemental discovery responses, the EEOC increased the claimants relative to Green Acres to 245 and the claimants relative to Valley Fruit to 199. The Grower Defendants moved to dismiss for lack of jurisdiction pursuant to Rule 12(h)(3), asking the Court to dismiss the post-October 2012-disclosed claimants, and preclude the EEOC from adding any additional claimants because the EEOC failed to satisfy its Title VII statutory investigation and conciliation requirements regarding these additional claimants. The Court denied the motion, holding that its subject-matter jurisdiction was not dependent upon the satisfaction of 42 U.S.C. § 2000e-5’s pre-lawsuit administrative requirements. Id. at *4. The Court stated that § 2000e-5(f)(3), the sub-section granting subject-matter jurisdiction, does not limit jurisdiction to only those claims for which all pre-lawsuit requirements are met. Id. Further, the Court remarked that although § 2000e-5(f)(3) requires the EEOC to notify Defendants, investigate the alleged unlawful employment practice, make a reasonable cause determination, and meaningfully conciliate the matter prior to bringing a lawsuit, it does not vitiate a subject-matter jurisdiction to hear lawsuits brought by the EEOC under § 2000e-5. The Court opined that these pre-lawsuit requirements are elements that must be proven by the EEOC in order to show that it and the individuals on whose behalf it seeks relief are entitled to relief. In reaching this conclusion, the Court held that the Supreme Court in Arbaugh v. Y&H Corp., 546 U.S. 500, 510-11 (2006), and Sebelius v. Auburn Regional Medical Center, 133 S. Ct. 817, 824 (2013), overruled the earlier Ninth Circuit ruling in EEOC v. Pierce Packing Co., 669 F.2d 605, 607 (9th Cir. 1982), which had held that the EEOC’s pre-filing requirements were jurisdictional. Id. at *22-27. Additionally, the Court noted that although these statutory pre-lawsuit requirements are not subject-matter jurisdiction requirements, a failure to satisfy these requirements would result in the EEOC’s lawsuit being dismissed for failure to state a claim upon which relief can be granted under Rule 12(b)(6) or entry of summary judgment against the EEOC under Rule 56. Id. at *27-28. The Court stated that it was immaterial for the purposes of the Grower Defendants’ motion to dismiss under Rule 12(h)(3) whether the EEOC satisfied its investigation and conciliation requirements as to either the pre-October 2012-disclosed claimants or post-October 2012-disclosed claimants, and thus, inappropriate for the Court to assess the EEOC’s pre-lawsuit conduct at that time. Accordingly, the Court denied the Grower Defendants’ motion to dismiss for lack of jurisdiction under Rule 12(h)(3).

EEOC v. Global Horizons, Inc., 2013 U.S. Dist. LEXIS 82927 (E.D. Wash. June 12, 2013). The EEOC brought an action alleging that Defendants engaged in a pattern or practice of unlawful employment actions by subjecting Thai workers to disparate treatment, harassment, retaliation, and constructive discharge in violation of Title VII of the Civil Rights Act. Subsequently, Defendants Green Acre Farms, Inc. and Valley Fruit Orchards, LLC (collectively, the “Grower Defendants”) moved for summary judgment, asking the Court to prohibit the EEOC from: (i) seeking monetary or injunctive relief on behalf of any individual who could not demonstrate he worked within the relevant 300-day period at the Grower Defendants’ orchards; and (ii) limiting the class of claimants. Id. at *3. In its response, the EEOC requested that the Court not set a deadline by which it must identify the Claimants because the EEOC might revise the class of claimants after reviewing still-to-be-received discovery from co-Defendant Global Horizons. With respect to the 300-day statute of limitations, the Court noted that the EEOC must abide by the time limitations set forth in 42 U.S.C. § 2000e-5(e)(1). Thus, the Court held that the EEOC may not seek monetary or injunctive relief on behalf of any Thai worker who did not have an incident or injury at the Grower Defendants’ orchards within the 300-day statute of limitations period relevant to the particular orchard at which that individual worked. Id. at *3-4. As to setting a deadline in which the EEOC must identify the claimants, the Court noted that the Grower Defendants had the right to know the claimants’ names so that they could engage in discovery and prepare a defense against the claims brought by the EEOC. Id. at *5. Therefore, the Court...
ordered the EEOC to notify all Defendants as to the identity of the claimants by August 2, 2013. The Court opined that considering the length of time the EEOC had to ascertain the individuals who worked at each orchard, the Court’s timeframe was reasonable. Accordingly, the Court granted the Grower Defendants’ motion for summary judgment.

**EEOC v. Global Horizons, Inc., 2013 U.S. Dist. LEXIS 107676 (E.D. Wash. July 31, 2013).** The EEOC brought an action alleging that Defendants violated Title VII of the Civil Rights Act by engaging in unlawful practices, including discrimination and harassment of Thai and Asian individuals hired to perform agricultural work. Defendants moved to modify the protective order, and the Court granted the motion. Defendants sought amendment of the protective order permitting them to discover claimants’ T-Visa status and applications, arguing that such information was essential to assess the claimants’ credibility by comparing the information contained on the T-Visa applications with the claimants’ charges of discrimination and deposition testimony, and to support Defendants’ defense that the claimants were encouraged to make human-trafficking statements against Defendant to secure T-Visa status. Earlier, the Court had observed that a civil litigant was typically unable to discover another litigant’s immigration status simply for the purpose of challenging the litigant’s credibility. *Id.* at *7. The Court directed the Grower Defendants to depose the claimants to discern the alleged bases for the EEOC’s hostile work environment and constructive discharge claims and related pattern or practice claims, and the alleged bases for their retaliation claim and related pattern or practice claim. Further, the Court invited Defendants to seek leave of Court to obtain information about the claimants’ immigration information if, after deposing the claimants, they believed there was a need to compare or contrast the information received from the claimants with that contained in the claimants’ T-Visa application. Defendants had deposed five claimants and a representative from the Thai CDC. *Id.* at *9. The Court observed that T-Visa applications, and evidence submitted in support, contained information relevant to the EEOC’s claims and Defendants’ defenses. The sole basis for a claimant’s T-Visa application was that claimant asserted he was the victim of human trafficking at the hands of Global Horizons, the Grower Defendants, or another entity involved in the process of coordinating the claimant’s ability to work in the United States as guest-workers. Consistent with the statutory requirements for obtaining a T-Visa, a claimant applying for a T-Visa would have described and documented all factors relevant to his or her case. Further, because the claimants’ work in the United States was limited to that performed at the Grower Defendants’ orchards and other locales coordinated by Global Horizons, the Court stated that a claimant’s description of human trafficking would necessarily include discussion of Global Horizons’ and/or the Grower Defendants’ treatment of that particular claimant. Thus, the Court stated that T-Visa applications were a non-privileged matter relevant to a party’s claims or defenses. The Court concluded that a claimant’s T-Visa status was relevant to assess the credibility and motivation of a claimant to file a charge of discrimination, and that it could potentially lead to information regarding what the EEOC knew about Global Horizons’ and/or the Grower Defendants’ conduct when the EEOC engaged in the conciliation process and/or when this lawsuit was filed. The Court observed that all claimants were in the United States unlawfully after they chose to leave their guest-worker relationship, and no claimant would suffer undue prejudice if Defendants discovered that the claimant had a T-Visa. Accordingly, the Court granted Defendants’ motion permitting them to discover the claimants’ T-Visa applications, supporting material, and resulting T-Visa status.

**EEOC v. Global Horizons, Inc., 2013 U.S. Dist. LEXIS 130807 (D. Haw. Sept. 9, 2013).** The EEOC brought a pattern or practice action under Title VII alleging that Defendants subjected a class of Thai workers to disparate treatment, a hostile work environment, retaliation, and constructive discharge. In the EEOC’s first amended complaint, the EEOC added allegations regarding one of the other Defendants’ parent company and successor company after the Court had dismissed the complaint without prejudice. The Court also had dismissed portions of the second amended complaint, and gave the EEOC one last time to amend. The Court granted in part Defendants’ motions to dismiss the third amended complaint, stating that because it Plaintiff’s last opportunity to cure its pleading deficiencies, the claims at issue were dismissed with prejudice. The EEOC sought leave to file a fourth amended complaint to add two new Defendants to this case, Maui Land & Pineapple Company, Inc. ("MLP") and Haliimaile Pineapple Company, Ltd. ("HPC"). The EEOC asserted that MLP should be added as a Defendant as the alter ego of
Maui Pineapple, a current Defendant in the action, and that HPC should be added as the successor in interest to Maui Pineapple. The Court denied the motion. First, the Court found that MLP and HPC would be prejudiced if they were added as Defendants at this late stage of the litigation because MLP and HPC would have inadequate time to prepare their defense. Additionally, the Court stated that Maui Pineapple, MLP, and HPC would be prejudiced if the proposed amendments were allowed because additional discovery would be required as the allegations in the proposed amendments advanced new theories of liability and required proof of different facts. The Court identified the second factor in determining whether to grant a motion for leave to amend was whether the EEOC unduly delayed in filing its motion. Maui Pineapple asserted that the EEOC knew or should have known that Maui Pineapple’s operations were being discontinued and that MLP had entered into agreements with HPC regarding various assets because the information was publicly available through MLP’s Forms 10-K and numerous news articles. The EEOC contended that these arguments were unwarranted because the parties agreed to delay this motion in an effort to settle the case. The Court noted that although the briefing schedule for the opposition and reply to the present motion was delayed approximately 45 days so that the parties could focus on settlement, there was no indication in the record that the EEOC and Maui Pineapple had any agreement to delay the initial filing of the present motion or that there was any agreement between counsel to forego arguments regarding delay. Moreover, the Court stated that the EEOC did not offer any explanation as to why the proposed amendments related to alter ego and successor liability could not have been included in the EEOC’s three prior amendments to the complaint. The EEOC argued that MLP and HPC should have anticipated being brought into this litigation since 2010. The Court remarked that this argument underscored the fact that the EEOC itself knew or should have known of the facts underlying its proposed amendments since the filing of its original complaint in 2011. The Court held that where the theory of liability had been known to the party seeking amendment since the inception of the lawsuit, requests for leave to amend were not appropriate. *Id.* at *9-10. Accordingly, the Court denied the motion.

**EEOC v. Global Horizons, Inc., 2013 U.S. Dist. LEXIS 149713 (E. D. Wash. Oct. 3, 2013).** The EEOC brought an action alleging that Defendants violated Title VII of the Civil Rights Act by engaging in unlawful practices, including discrimination and harassment of Thai and Asian individuals hired to perform agricultural work. The EEOC moved to certify an interlocutory appeal relating to the Court’s July 31, 2013 Order (“Order”), which granted Defendants the ability to discover the Claimant’s T-Visa application, supporting material, and status (“T-Visa information”). The EEOC sought certification of two questions for interlocutory appellate review, including whether the T-Visa information was discoverable to challenge the claimants’ credibility and the EEOC’s pre-suit conduct, and whether the T-Visa information was discoverable in light of 8 U.S.C. § 1367(a)(2) and (b)’s statutory prohibition. The EEOC also moved to stay the proceedings during the pendency of its efforts to seek an interlocutory appeal. *Id.* at *3-4. The Court denied the motion for certification for interlocutory appeal, and granted in part the motion for a stay. First, although the challenged Order involved a question of law, the Court opined that it was not a controlling question of law. The Court stated that the Order did not impact or limit its jurisdiction, or eliminate or burden a party’s claim or defense. *Id.* at *5-6. Although the EEOC argued that § 1367 prohibited Defendants from discovering the claimants’ T-Visa information, the Court noted that sub-section (d) made clear that § 1367 applies only to individuals who are officers or employees of the listed government agencies, which was consistent with the disciplinary action language in § 1367(c). Thus, the Court held that § 1367 did not prevent Defendants from discovering T-Visa information from the claimants or the EEOC as entities and individuals who were not subject to § 1367’s restrictions. *Id.* at *11. Thus, the Court determined that the Order did not involve a controlling question of law. Second, recognizing the important public policy served by restricting the disclosure of immigration-related information in Title VII cases, the Court permitted Defendants to discover the claimants’ T-Visa information, after balancing the relevance of the information understood to be contained in the claimants’ T-Visa applications and supporting material with the minimal burden on the claimants with this required disclosure. The Court stated that the burden on the claimants was less given that no claimant provided a declaration expressing any burden or concern associated with the disclosure of this information to Defendants in this lawsuit, pursuant to the agreed-upon protective order to keep the information confidential. Further, each claimant was in the United States unlawfully after their H-2A guest-worker visa expired and before they received a T-Visa or other permission.
to remain in the United States. Thus, the concern that other individuals’ motivation to bring a Title VII lawsuit would be chilled as a result of the Court’s allowance of discovery by Defendants of the claimants’ T-Visa information was minimal. The Court held, however, that there could be a substantial ground for difference of opinion as to this question of law. Id. at *13-15. At the same time, the Court noted that an immediate appeal from Order would not materially advance the ultimate termination of the litigation. Thus, the Court denied the motion for an interlocutory appeal under § 1292(b). The Court, however, held that a limited stay of the Order was appropriate to permit the EEOC an opportunity to seek interlocutory relief from the Ninth Circuit. The Court recognized that the effects of disclosure could not be completely undone if the Order was reversed following entry of final judgment, and noted that the public interest in reducing in terrorem effects of discovery rulings favored a limited stay. Id. at *16-17.

**EEOC v. Hospital Housekeeping Systems Of Houston, Inc., 2013 U.S. Dist. LEXIS 155154 (E.D. Cal. Oct. 29, 2013).** The EEOC brought an action on behalf of a charging party who alleged that Defendants failed to make a reasonable accommodation for her learning disability in violation of the ADA. Defendants had employed charging party as a housekeeper at a children’s hospital, and had discharged her after learning that she could not read, a byproduct of her learning disability, while continuing to employ other non-disabled individuals who were similarly-situated. Id. at *2-3. The parties eventually initiated settlement discussions, and the informal settlement discussions culminated in a formal settlement conference on March 28, 2013, wherein Defendants agreed in principle that they would pay $40,000 to settle the case and sign the proposed three-year consent decree imposing specific obligations on Defendants to review and revise their ADA policies. The parties continued to propose and discuss the terms of the consent decree, and on April 10, 2013, the EEOC sent Defendants a second proposed consent decree, which reflected the agreements it believed were made prior to and at the settlement conference. Defendants, in response, provided the EEOC with their redlined version of the draft consent decree, which differed significantly on several provisions. Unable to resolve the discrepancies in the drafts of the consent decrees, Defendants moved to enforce the settlement agreement. Defendants argued that the EEOC’s proposed consent decree impermissibly sought to add different and additional terms to the settlement agreement on record. Id. at *5. The EEOC asserted that the fundamental differences between the parties’ proposed consent decrees signified that no agreement existed, as there was no meeting of the minds on material terms of the settlement agreement. Id. at *6. The Court granted Defendants’ motion. The Court found that the objective manifestations of the EEOC demonstrated that it intended to settle the case fully and to place the material terms of settlement on record. Id. at *14. The Court noted that both Parties had spent several hours facilitating settlement negotiations before agreeing to the settlement, and had taken substantial time to understand and negotiate the terms during the settlement conference. The transcript of the settlement conference of March 28, 2013 also demonstrated that the parties placed on the record the payment and consent decree terms, and understood and agreed to all of the material terms of the settlement. Although the agreement was recorded as having some remaining issues “to be ironed out,” the Court found that it did not render the entire settlement agreement unenforceable. Id. at *16. The parties were clear as to the settlement goals, and the key terms of the consent decree were negotiated and agreed upon the record. The Court thus found that the facts indicated that parties intended to settle and to reach a complete agreement as to the terms of the consent decree. Id. The EEOC argued that the material terms, including provisions for successor liability and the designation and duties of the ADA coordinator, were material terms that were not placed on the record. Id. at *18. The Court found the argument unpersuasive. The Court explained that if the provision were crucial and material to its end bargain, the EEOC would have placed those terms on the record. Moreover, the parties had engaged in extensive negotiations during the settlement conference regarding the terms of consent decree, and many were negotiated, rejected, and ultimately accepted in the final settlement instrument. Id. at *18-19. The Court noted that the evidence failed to indicate that there were any unresolved material terms to the settlement agreement. Id. at *19. The Court thus concluded that the parties had entered into an enforceable settlement agreement. Accordingly, the Court granted Defendants’ motion to enforce the settlement agreement.

**EEOC v. Hospital Housekeeping Systems Of Houston, Inc., 2013 U.S. Dist. LEXIS 166718 (E.D. Cal. Nov. 21, 2013).** The EEOC brought an action on behalf of a charging party who alleged that Defendants
failed to make a reasonable accommodation for her disability in violation of the ADA. The parties eventually initiated settlement discussions, and Defendants agreed in principle that they would pay $40,000 to settle the case and sign a proposed three-year consent decree imposing specific obligations on Defendants to review and revise their ADA policies. Thereafter, the EEOC sent Defendants a second proposed consent decree, which reflected the agreements it believed were made prior to and at a settlement conference. Defendants, in response, provided the EEOC with their version of the draft decree, which differed significantly on several provisions. Unable to resolve the discrepancies in the draft consent decrees, Defendants moved to enforce the settlement agreement. The Magistrate Judge found that the objective manifestations of the EEOC demonstrated that it intended to settle the case fully and to place the material terms of settlement on record. Moreover, the transcript of the settlement conference demonstrated that the parties placed on the record the payment and consent decree terms and understood and agreed to all of the material terms of the settlement. Thus, the Magistrate Judge found that the parties reached a meeting of the minds on all material terms of the settlement agreement and the agreement as placed on the record was sufficiently definite in all material terms and the disputes that subsequently arose over the final consent decree centered upon non-material terms. Id. at *2. Therefore, the Magistrate Judge recommended that Defendant’s motion should be granted. On Rule 72 objections, the Court found the findings and recommendation of the Magistrate Judge were supported by the record and by proper analysis. Id. at *3. Accordingly, the Court adopted the Magistrate Judge’s order and granted Defendant’s motion to enforce the settlement agreement.

**EEOC v. Northwest Motorsport, Inc., 2013 U.S. Dist. LEXIS 88512 (W.D. Wash. June 24, 2013).** The EEOC, on behalf of the charging party Bayani Salcedo, brought an action against Defendant alleging unlawful employment practices based on sex and national origin in violation of Title VII. Subsequently, the EEOC moved to compel Defendant’s certified financial statements from January 1, 2006 to date, and federal tax returns for 2006 through 2011. The EEOC argued that Defendant’s financial information was relevant to punitive damages and contended that since Defendant had not objected to the discovery, it waived any objections Defendant might have. Id. at *3. Defendant responded that the parties conferred and agreed to a narrower scope and alternative timing of the requested information, and that Defendant did make available its 2009 and 2010 tax returns. The Court rejected Defendant’s argument and found that the EEOC had shown that the requested discovery was relevant to its claims for punitive damages. Id. at *5. Furthermore, the Court noted that although Defendant produced its tax returns that both parties agreed on and then reached an agreement about how to handle other financial information, that alone did not provide a basis to deny the EEOC’s motion to compel. Id. Therefore, the Court granted the EEOC’s motion to compel production of Defendant’s financial statements.

**EEOC v. OSI Restaurant Partners, LLC, 2013 U.S. Dist. LEXIS 5668 (D. Ariz. Jan. 14, 2013).** In this ADA action, the EEOC alleged that Defendant terminated an employee, John Woods, who suffered from a traumatic brain injury, because of his disability and/or because he needed a reasonable accommodation. The EEOC sought back pay, compensatory and punitive damages, and appropriate injunctive relief to prevent any further discriminatory practices. Defendant moved for summary judgment. Because the EEOC raised genuine issues of material fact about whether Woods was qualified to perform his job as a server, and whether his disability was a motivating factor in Defendants’ decision to terminate him, the Court opined that Defendant was not entitled to judgment as a matter of law. Further, there were genuine issues about what the essential functions of Wood’s job were and whether he was able to perform them at the same level as other non-disabled workers. The EEOC presented evidence from Woods’ previous supervisors that he was able to perform the duties of a server as well as an average employee, and that he received many customer compliments, among other evidence. Thus, because a reasonable jury could conclude that Woods was able to perform all of the essential functions of his position as a server, the Court opined that summary judgment was inappropriate on those grounds. Id. at *6. The Court also found that there were genuine issues of fact about whether Defendants terminated Woods at least in part because of his disability. The evidence showed that Woods worked successfully for six weeks under the managers who supervised him when he was hired, and he was fired after working only two shifts under a new manager. Defendants argued that customers had complained about Woods’ service and that he had
difficulty working at the pace the job required. Nevertheless, the Court noted that there were issues of fact about which member of management made the decision to terminate Woods, when that decision was made, and what prompted the decision. The Court opined that from the evidence the EEOC presented, a reasonable jury could conclude that Defendants’ account of its decision to terminate Woods was not credible, and thus was a pretext for discrimination. Id. at *7. Further, the EEOC raised a triable issue of fact about whether Defendants’ reliance on Woods’ pace as a server was merely a proxy for his disability, such that a discriminatory motive more likely motivated their decision to terminate him. The EEOC also presented evidence that Woods had slower speech and thinking capabilities, and that he was able to perform his job satisfactorily with those symptoms before the new manager took over supervision. Based on that evidence, the Court noted that a jury could reasonably find the requisite causal link between Woods’ disability and his new manager’s unhappiness with the pace of his service and conclude that Woods was terminated because of his disability. Id. at *8. Accordingly, the Court denied Defendant’s motion for summary judgment.

**EEOC v. Pace Solano, 2013 U.S. Dist. LEXIS 85336 (E.D. Cal. June 13, 2013).** The EEOC brought an action alleging that Defendant violated the ADA when it withdrew a job offer because of the charging party’s disability. The parties subsequently submitted a proposed protective order to the Court, which stipulated that all documents filed with the Court would be under seal. The Court noted that all documents filed with it are presumptively public and that a protective order would not be entered absent a showing of good cause. Id. at *2-3. Moreover, the Court noted that “[a] party’s desire for a protective order does not constitute good cause to bar the public from access to litigation documents. Rather, the party seeking protection bears the burden of showing specific prejudice or harm, including, with respect to individual documents, particular and specific need for protection.” Id. at *3. The Court observed that the parties’ stipulated protective order lacked the required specification for the need for protection and unduly gave the parties “blanket authority” to file any and all designated documents under seal. Id. *4. Therefore, the Court held that the parties failed to make the required good cause showing. In addition, the Court noted that within the parties’ protective order, they stipulated that the Court would retain jurisdiction over the enforcement of the protective order even after the lawsuit was terminated. Id. at *4-5. The Court opined that, pursuant to Local Rule 141.1(f), once a lawsuit is terminated, unless otherwise ordered, the Court does not retain jurisdiction over enforcement of the terms of any protective order filed in the lawsuit. Id. at *5. Therefore, the Court denied the parties’ requested entry of their stipulated protective order without prejudice.

**EEOC v. Pioneer Hotel, Inc., 2013 U.S. Dist. LEXIS 98350 (D. Nev. July 15, 2013).** The EEOC brought an action under Title VII alleging that the claimant, a Mexican, and a class of similarly-situated individuals suffered harassment on the basis of their national origin. Earlier, the Court had granted in part and denied in part Defendant’s motion to dismiss for lack of subject-matter jurisdiction (for failure of the EEOC to conciliate) or failure to state a claim. Although the Court found that the EEOC had entered into conciliation in good faith, it found that the EEOC’s class action allegations were insufficient to identify the class. Id. at *2-3. Thereafter, the EEOC filed its first amended complaint (“FAC”) identifying a purported class of employees that were discriminated against based on their national origin, Latino, and their color, dark-skinned, working in all divisions. Defendant again moved to dismiss for lack of subject-matter jurisdiction or for failure to state a claim. The Court noted that the amended class allegations were reasonably related to the initial charge of discrimination. The Court, however, granted Defendant’s motion for a more definitive statement, and allowed the EEOC leave to file a second amended complaint stating whether it was vindicating the individual rights of claimant and the class under § 706, whether it was pursuing a pattern or practice claim under §§ 706 and/or 707, or if it was doing both. Id. at *4. The EEOC subsequently filed its second amended complaint (“SAC”) identifying § 706 as the relevant section under which it was bringing suit. Defendant again moved dismiss for failure to state a claim and lack of subject-matter jurisdiction, arguing that the SAC failed to identify a class of aggrieved individuals. Id. The Court denied the motion. The Court opined that a complaint containing allegations and factual statements that clearly put Defendant on notice that the instant action was based on Defendant’s alleged discrimination on a particular protected basis against the charging party and other similarly-situated employees beginning at a specific point in time.
was sufficient to survive a motion to dismiss. *Id.* at *7. Here, the EEOC’s SAC alleged that Defendant subjected a class of Latino and/or dark-skinned employees at its Laughlin, Nevada facility to unwelcome harassment based on their national origin and/or skin color that was severe and pervasive, creating a hostile work environment. The SAC identified four departments within which named and unnamed employees’ allegedly subjected claimant and the aggrieved class to conditions amounting to a hostile work environment. Further, the Court observed that the SAC asserted specific behaviors and language used to create the alleged hostile environment. Thus, the Court ruled that the factual allegations were sufficient to allege an aggrieved class, and accordingly, denied Defendant’s motion to dismiss. *Id.* at *7-8.

**EEOC v. Recession Proof USA LLC, 2013 U.S. Dist. LEXIS 171521 (D. Ariz. Dec. 4, 2013).** The EEOC brought an action against Defendants alleging that they terminated Richard Miller, for complaining of alleged discrimination, and that they terminated Ron Frasso, for participating in a proceeding under Title VII. The EEOC also alleged that Miller was terminated based on his race. Defendants failed to appear or otherwise respond to the complaint, and subsequently, the Magistrate Judge had recommended that a default judgment be entered in the EEOC’s favor. Specifically, the Magistrate Judge had granted a default judgment against Defendants Recession Proof USA LLC and Prime Time Marketing Solutions LLC d/b/a USA Supreme Technology, finding that they were joint employers of Miller and Frasso, but had denied the EEOC’s request for a default against Defendant Philip Smith. The Court adopted the Magistrate Judge’s report and recommendations. The Court agreed with the Magistrate Judge that the merits of the EEOC’s claims and the sufficiency of the complaint weighed in favor of default judgment against Defendants. There was no dispute that Recession Proof met the statutory definition of an employer and that Recession Proof was Miller’s and Frasso’s employer. There was also no dispute that Miller engaged in protected activity by opposing Recession Proof’s co-owner Daniel Brunson’s use of words “my nigga-high five,” and that he was terminated for opposing the alleged discrimination. *Id.* at *4. When Miller complained to his supervisor, Doug Rice about Brunson’s use of the “N” word, Brunson sent Miller a text message challenging him, and on the same day, as part of the same string of text messages, terminated Miller. The Magistrate Judge found sufficient evidence to raise an inference that Miller’s conduct was the reason for his termination. *Id.* at *14. The Magistrate Judge also found sufficient evidence to raise an inference that Frasso was also terminated in retaliation for participating as a witness during the EEOC’s investigation of Miller’s charge of discrimination as Frasso was reprimanded and terminated almost immediately after participation in the EEOC investigation. *Id.* at *15. The Magistrate Judge further found that Miller was terminated on the basis of his race, and the use of “N” word was sufficient evidence of racial animus. *Id.* at *17. The Court therefore adopted the Magistrate Judge’s finding that the EEOC had sufficiently alleged retaliation and discrimination. The Court further adopted the Magistrate Judge’s recommendation that Recession Proof and Prime Time be held liable as joint employers for the alleged discriminatory conduct. The Magistrate Judge found that the testimony and evidence supported a finding that Recession Proof and Prime Time were joint employers of Miller and Frasso. *Id.* at *37. Brunson and Smith, who was also the managing member of Prime Time, were both members of Recession Proof. USA Supreme was a trade name owned by Prime Time, and the employees of Recession Proof were required to enter a confidentiality agreement with Brunson, Recession Proof, Smith, and USA Supreme. Recession Proof’s employees obtained computer equipment and office supplies from USA Supreme and that Rice believed that USA Supreme was Recession Proof’s parent company. *Id.* at *38. The evidence showed that Smith participated in Recession Proof’s decision-making and daily activities, including approving sales scripts and approving Miller’s hiring and termination. The Magistrate Judge concluded that the EEOC had sufficiently established a joint employer relationship between Recession Proof and Prime Time. *Id.* at *39-40. The EEOC also asserted that the Court should pierce the corporate veil as to Recession Proof and hold Smith personally liable. The EEOC claimed that Smith was a joint employer with Recession Proof, a limited liability company, through Prime Time, and was individually liable as a sole proprietor of USA Supreme. The Magistrate Judge, however, recommended against entering a default judgment on the EEOC’s alter ego/veil piercing theory of liability. The Magistrate Judge noted that the EEOC’s complaint did not contain any allegations regarding the alter ego relationship between Smith and Recession Proof, other than merely naming Smith as a party doing business as Recession Proof. *Id.* at *24. There were no allegations that Smith treated Recession Proof’s assets as his own, that he commingled funds with Recession Proof, or
that Recession Proof was undercapitalized. Id. at *24-25. The Magistrate Judge thus found that the issue of alter ego/veil piercing was not sufficiently pleaded. The Magistrate Judge also determined that the EEOC’s allegation that Smith was a “joint employer” with Recession Proof, and that he was individually liable as a sole proprietor of USA Supreme, were simply other attempts to pierce the veil of Recession Proof and Prime Time. Id. at *32. The Court agreed with the Magistrate Judge that the EEOC failed to establish Smith’s liability in his personal capacity for the action of Defendants. Finding that all of the EEOC’s arguments had been adequately addressed, the Court adopted the Magistrate Judge’s report and recommendation that Miller and Frasso be granted back pay, compensatory damages, and punitive damages against Recession Proof and Prime Time, and that injunctive relief be granted against Recession Proof and Prime Time.

**EEOC v. Swissport Fueling, Inc., 916 F. Supp. 2d 1005 (D. Ariz. Jan. 7, 2013).** The EEOC brought claims for harassment, disparate treatment, and retaliation on behalf of a group of workers of Defendant from various countries in Africa, including Sudan, Nigeria, Ghana, and Sierra Leone. From April 2007 to June 2010, the EEOC investigated allegations made by 18 employees and subsequently issued letters of determination for each. Between June and September of 2010, Defendant and the EEOC unsuccessfully attempted to conciliate the charges. The EEOC’s initial conciliation offer demanded back pay for only four charging parties in the amount of $61,328.84, non-pecuniary compensatory damages in the amount of $3,725,000.00, and punitive damages in the amount of $1,200,000. When Defendant requested more information regarding the basis for these alleged damages, the EEOC stonewalled. The EEOC refused to indicate what factors it considered or how it arrived at any of its figures. Though Defendant indicated throughout the conciliation process that it might increase its offer if given more information, the EEOC steadfastly refused. Indeed, the EEOC repeatedly changed its position regarding how many charging parties and class members it sought to represent. Accordingly, the conciliation efforts by the EEOC failed to resolve the investigation. After filing suit, the EEOC identified 17 charging parties, who had been the subject of the pre-litigation conciliation efforts. The EEOC also named 21 additional charging parties, who were not identified prior to bringing suit. The EEOC’s claim was based on allegation that Defendant’s manager verbally abused African employees, ridiculed their national origins, yelled and cursed at them, and generally treated them more harshly than their non-African counterparts. The Court dismissed the EEOC’s claims brought on behalf of the 21 charging parties not identified before filing suit, concluding that the EEOC had failed to comply with its statutory mandate to engage in good faith conciliation. Id. at 1043-44. Specifically, the Court concluded that the EEOC did not give Defendant a meaningful opportunity to make an informed choice to settle when it failed to disclose the claimants’ identities, particularly in light of Defendant’s repeated requests to do so. Id. at 1039. The Court also noted that granting the EEOC a stay to attempt conciliation for claimants it had never previously identified would not only fail to resolve the deficiency, but also would “improperly reward the EEOC for using the discovery phase of this litigation to engage in prohibited ‘fishing’ to solicit more claimants.” Id. at 1040. Moreover, the Court ordered the EEOC’s claims brought on behalf of the 17 identified charging parties stayed, pending meaningful conciliation. Id. at 1044. The Court concluded that the EEOC’s failure to respond to Defendant’s reasonable requests for necessary information regarding the asserted claims and their value constituted a failure to conciliate in good faith. The Court noted that “[w]hile the EEOC’s burden to attempt conciliation is not a heavy one, it is not a mere formality.” Id. at 1043. Based upon its pre-litigation conduct, the EEOC failed to meet even that minimal burden. In turning to the merits, the Court concluded that the EEOC could not litigate the claims of the charging parties “in the aggregate.” Id. at 1020. Rather, it held that the EEOC must prove its hostile work environment claims on a claimant-by-claimant basis. Id. at 1021. Furthermore, the Court noted that the EEOC cannot substantiate hostile work environment claims based only on offensive comments made to persons other than the claimant. Id. at 1023. Additionally, the Court clarified that the EEOC cannot attempt to apply the continuing violation doctrine in the aggregate. Id. at 1033. The Court further refused to adopt the EEOC’s argument that it may bring claims on behalf of any claimant that experienced a hostile work environment, so long as one act against one claimant fell within the proper time period. Rather, the Court determined that this type of theory must be litigated on a claimant-by-claimant basis.
**EEOC v. Wal-Mart Stores, Inc., 2013 U.S. Dist. LEXIS 85343 (E.D. Cal. June 14, 2013).** The EEOC, on behalf of David Gallo, brought an action alleging that Defendant unlawfully retaliated against and wrongfully terminated Gallo’s employment for requesting a handicapped parking accommodation due to his heart condition, as well as for filing an EEOC administrative charge asserting a violation of the ADA. Subsequently, the EEOC moved for partial summary judgment as to two of Defendant’s affirmative defenses. Defendant also moved for summary judgment on the merits. With respect to the EEOC’s motion for partial summary judgment concerning Defendant’s defense for failure to exhaust conditions precedent to suit, the Court observed that the EEOC satisfied all conditions precedent to bringing the claims, which precluded Defendant from raising this defense. *Id.* at *6*. As to Defendant’s affirmative defense that Gallo failed to mitigate his damages, the Court noted that Defendant failed to present sufficient evidence to create a material issue of fact to meet its burden of proof that there were substantially equivalent jobs available that Gallo could have obtained. *Id.* at *7*. Therefore, the Court granted the EEOC’s motion for partial summary judgment. With respect to Defendant’s motion for summary judgment on the merits, Defendant argued that the EEOC failed to establish that Gallo’s request for handicapped parking was reasonable and effective. *Id.* The EEOC responded that witness statements contained in the EEOC intake interview were sufficient to create a genuine issue of material fact on this issue. The Court rejected the EEOC’s argument and found that the statements within the intake notes were inadmissible hearsay, and therefore could not be used to create a genuine issue of material fact. *Id.* at *8*. Therefore, the Court held that the EEOC did not present sufficient evidence to establish that Gallo’s request for parking was reasonable and effective. With respect to the ADA disparate treatment discrimination claim, the Court denied Defendant’s summary judgment concerning Gallo’s termination because genuine issues of material fact existed concerning whether Defendant’s asserted legitimate, non-discriminatory reasons for terminating Gallo’s employment were a pretext for discrimination. The Court observed that there was conflicting testimony as to whether Gallo was responsible for an incident on which Defendant formed in part the claimed basis for the termination. *Id.* at *10*. Therefore, the Court denied summary judgment on this issue. Defendant further argued that it was entitled to summary judgment as to the retaliation claim because the EEOC failed to establish a causal link between Gallo’s alleged request for a parking accommodation and his termination. The Court agreed with Defendant’s argument and noted that the evidence offered by the EEOC to support that there was a causal link was inadmissible hearsay. *Id.* at *11-12*. Although the Court held that the EEOC failed to establish a causal link between Gallo’s alleged request for a parking accommodation and his termination, the Court held that the EEOC sufficiently showed that there was a causal link between Gallo’s filing of his administrative charge and his termination. *Id.* at *12*. The Court opined that the EEOC presented sufficient evidence to create a factual issue whether Defendant’s manager was aware of Gallo’s EEOC administrative charge before deciding to terminate his employment. The Court further held that the six-month period in between Gallo’s filing of his administrative charge and his termination was insufficient to negate the possibility of a causal link. *Id.* at *12-13*. Accordingly, the Court granted in part and denied in part Defendant’s motion for summary judgment.

**EEOC v. Wedco, Inc., 2013 U.S. Dist. LEXIS 33880 (D. Nev. Mar. 11, 2013).** The EEOC brought an action on behalf of Larry Mitchell, an African-American delivery driver, alleging a racially hostile environment, harassment, constructive discharge, and disparate treatment in violation of Title VII. Upon investigation, the Nevada Equal Rights Commission (“NERC”) determined probable cause of a racially hostile work environment and constructive discharge. *Id.* at *2*. After the NERC’s conciliation with Defendant failed, it forwarded the charge to the EEOC. The EEOC issued a letter of determination to Defendant, and filed the complaint after attempts at conciliation failed. *Id.* Defendant moved to dismiss the claim for lack of subject-matter jurisdiction and for failure to state a claim. *Id.* In the alternative, Defendant sought to stay the case for further conciliation. The Court denied both motions. First, Defendant argued that failure to satisfy the statutory requirement resulted in a lack of subject-matter jurisdiction. The Court noted that the EEOC is statutorily required to make a good faith attempt to conciliate before filing an administrative charge and his termination. The Court agreed with Defendant’s argument and found that the statements within the intake notes were inadmissible hearsay, and therefore could not be used to create a genuine issue of material fact. *Id.* at *8*. Therefore, the Court held that the EEOC did not present sufficient evidence to establish that Gallo’s request for parking was reasonable and effective. With respect to the ADA disparate treatment discrimination claim, the Court denied Defendant’s summary judgment concerning Gallo’s termination because genuine issues of material fact existed concerning whether Defendant’s asserted legitimate, non-discriminatory reasons for terminating Gallo’s employment were a pretext for discrimination. The Court observed that there was conflicting testimony as to whether Gallo was responsible for an incident on which Defendant formed in part the claimed basis for the termination. *Id.* at *10*. Therefore, the Court denied summary judgment on this issue. Defendant further argued that it was entitled to summary judgment as to the retaliation claim because the EEOC failed to establish a causal link between Gallo’s alleged request for a parking accommodation and his termination. The Court agreed with Defendant’s argument and noted that the evidence offered by the EEOC to support that there was a causal link was inadmissible hearsay. *Id.* at *11-12*. Although the Court held that the EEOC failed to establish a causal link between Gallo’s alleged request for a parking accommodation and his termination, the Court held that the EEOC sufficiently showed that there was a causal link between Gallo’s filing of his administrative charge and his termination. *Id.* at *12*. The Court opined that the EEOC presented sufficient evidence to create a factual issue whether Defendant’s manager was aware of Gallo’s EEOC administrative charge before deciding to terminate his employment. The Court further held that the six-month period in between Gallo’s filing of his administrative charge and his termination was insufficient to negate the possibility of a causal link. *Id.* at *12-13*. Accordingly, the Court granted in part and denied in part Defendant’s motion for summary judgment.
conclusory because it failed to support its conclusion with sufficient factual detail; however, the NERC’s letter of determination outlined the charges against Defendant with what the Court determined to be sufficient factual detail to put Defendant on notice of the allegations. Further, the Court held that the EEOC was not required to restate the allegations because Defendant received the NERC’s letter of determination before EEOC’s letter of determination, which contained sufficient factual detail. Defendant also argued that on the merits, the EEOC failed to make any colorable attempt at conciliation apart from simply making a take-it-or-leave-it demand. Id. at *10. The Court noted a letter Defendant sent to the NERC after receiving the NERC’s determination, requesting factual findings and supporting evidence so that Defendant could assess the risks of a lawsuit. Further, Defendant received a settlement demand from the NERC, wherein Mitchell requested $36,000 in back pay, $3,000 in compensatory damages, $45,000 in front pay, and $75,000 in emotional damages, for a total of almost $161,000. Id. at *11. Defendant conceded that it participated in settlement negotiations, but argued that the negotiations did not establish a good faith attempt to conciliate because Defendant never made a counter-offer, the EEOC’s original offer was unreasonably high, and the EEOC never provided evidence supporting its allegations, which prevented Defendant from accurately assessing the lawsuit’s risk. Id. The Court reasoned that Defendant’s refusal to make any counter-offer actually favored the EEOC because it indicated that the EEOC had engaged in a good faith attempt to conciliate and that Defendant was unwilling to negotiate. Id. at *12. The Court also opined that the EEOC’s role is similar to that of a civil litigant, and was therefore justified in beginning negotiations with a high demand. Id. at *13-14. The Court also noted that if Defendant lacked necessary evidence to assess the lawsuit’s risk, it could have made a counter-offer for a token sum until the EEOC produced such evidence. Id. The Court concluded that Defendant’s continued refusal to make any counter-offer despite the EEOC’s repeated solicitations made it impossible to conclude that the EEOC breached its duty to conciliate in good faith. Accordingly, the Court denied Defendant’s motion.

(x) Tenth Circuit

_EEOC v. 704 HTL Operating, LLC_, 2013 U.S. Dist. LEXIS 144927 (D.N.M. Aug. 16, 2013). The EEOC brought a Title VII suit for religious discrimination and retaliation on behalf of Safia Abdullah, who contended that she was wrongfully terminated by Defendants after she declined to remove her hijab, the traditional headscarf worn by Muslim women. Defendant Investment Corporation of America (“ICA”) had 26 employees, and was based in Odessa, Texas; it was an investment company, with interests in a wide variety of business entities, all of which were separate legal entities. ICA’s investment interests included all eight of Defendant MCM Elegante’s hotels. Defendant 704 HTL Operating, LLC (“704-ABQ”) did business under the trade name MCM Elegante Hotel of Albuquerque, and ICA maintained a 90% ownership in 704-ABQ. The EEOC moved for a partial summary judgment that Defendants, together with the seven other MCM Elegante Hotels, were a single employer or integrated enterprise. Alternatively, the EEOC sought a summary judgment that Defendants were a joint employer, so that ICA was vicariously liable for the discriminatory acts of 704-ABQ. Defendants sought a summary judgment on the basis that they were not a single or joint employer. The Court denied both the motions. The Court noted that a “single-employer test” is used to determine whether two nominally separate entities should be treated as an integrated enterprise. Id. at *12. This test generally weighs four factors, including: (i) interrelations of operation; (ii) common management; (iii) centralized control of labor relations; and (iv) common ownership and financial control. Id. at *12-13. The EEOC asserted that ICA HR Manager Tanya Cooper and Senior Vice President Monty Pulliam provided human resources and management services, respectively, to all the hotels; Ed Lasater was President of both entities; 704-ABQ provided new employees with a booklet of all ICA entities so they understood that the hotel was part of a larger corporate structure; Defendants had one set of forms and policies applicable to all employees; the same insurance benefits were available to employees of ICA and employees of the MCM Elegante Hotels, provided by one provider, and administered by Cooper; eligible employees of all entities could participate in ICA’s 401(k) plan; ICA held quarterly meetings which all employees of the hotels and its other investment entities were invited to attend, at which the performance and profitability of the entities was discussed; and Lasater and Pulliam reviewed monthly financial statements for, and generally oversaw, all the hotels. On the other hand, Defendant stated that while ICA administered payroll and benefit programs for its subsidiaries, it did not control these operations, but merely processed checks and other paperwork; 704-ABQ paid its own bills; Defendants did not have the...
The EEOC filed a lawsuit based on Abercrombie’s decision not to offer employment to Samantha Elauf, a 17-year old female who applied for a Model position at an Abercrombie store in Tulsa, Oklahoma. \textit{id.} at 1110. The EEOC moved for summary judgment, which the District Court granted. Defendant then appealed. The evidence showed that Elauf has worn a hijab on her head since she was thirteen and testified that she does so for religious reasons. \textit{id.} at 1112 Although facts in the record indicated that they suspected as such, the two managerial employees who played a part in the decision to deny Elauf employment based on her wearing of a hijab had no particularized knowledge that she was a Muslim; that she wore the hijab for religious reasons and felt obligated to do so; and would therefore need an accommodation to address the conflict between her religious practice and the “Look Policy.” \textit{id.} at 1113. In over-turning the summary judgment order, it was this lack of knowledge concerning the reasons that Elauf wore the hijab that the Tenth Circuit held was fatal to the EEOC’s case. According to the Tenth Circuit, “A Plaintiff must establish that he or she initially informed the employer that he or she adheres to a particular practice for religious reasons and that he or she needs an accommodation for that practice, due to a conflict between the practice and the employer’s neutral work rule.” \textit{id.} at 1123. This is so because “[a]n applicant or employee may engage in practices that are associated with a particular religion, but do so for cultural or other reasons that are not grounded in that religion. If so, an employer’s discrimination against that individual for engaging in that practice – though possibly reprehensible and worthy of condemnation – would not contravene Title VII’s religion-discrimination provisions.” \textit{id.} at 1119. The Tenth Circuit expressly rejected the less restrictive approach advanced by the EEOC, namely, that in religious accommodation cases, “[t]he employer’s obligation is to attempt reasonable accommodation (where no undue hardship would result) when it has notice – be it from an affirmative statement by the individual, or some other source – of an individual’s religious belief that conflicts with a work requirement.” \textit{id.} at 1123. The Tenth Circuit rejected this less restrictive approach because “[a]n applicant or employee – should not be able to impose liability on an employer for failing to accommodate his or her religious practice on the ground that the employer should have guessed, surmised, or figured out from the surrounding circumstances, that the practice was based
upon his or her religion and that the plaintiff needed an accommodation for it.” *Id.* at 1127-1128. Here, since Abercrombie had no particularized, actual knowledge that Elauf’s wearing of a hijab stemmed from her religious beliefs and that she needed an accommodation based on this religious belief, the Tenth Circuit held that Abercrombie was entitled to summary judgment. Therefore, in announcing its standard it will apply to religious accommodation cases, the Tenth Circuit determined that “[i]n sum, we hold that, in order to establish the second element of their *prima facie* case under Title VII’s religion accommodation theory, ordinarily Plaintiffs must establish that they initially informed the employer that they engage in a particular practice for religious reasons and that they need an accommodation for the practice, due to a conflict between the practice and the employer’s work rules. As noted, we recognize that some courts have taken a different path on this question. However, we are confident that our approach is the sounder one.” *Id.* at 1131. In reaching this decision, the Tenth Circuit explained that its ruling was consistent with the very guidance issued by the EEOC as to how employers should address religious accommodation issues at the workplace. The Tenth Circuit noted that “if under Title VII an employer is affirmatively discouraged from asking applicants or employees whether their seemingly conflicting practice is based on religious beliefs, and, if so, whether they actually will need an accommodation for the practice, because it is inflexible (i.e., truly conflicting), and the employer also is discouraged by the EEOC from speculating about such matters, then the interactive accommodation process ordinarily only can be triggered when applicants or employees first provide the requisite information to the employer.” *Id.* at 1135.

**EEOC v. Beverage Distributors Co., LLC, 2013 U.S. Dist. LEXIS 172650 (D. Colo. Dec. 9, 2013).** The EEOC brought an action under the ADA, alleging that Defendant withdrew its conditional offer of employment to Mike Sungaila as a night warehouse loader upon being informed that Sungaila was legally blind. The EEOC proceeded to trial on its claim. The jury determined that Defendant withdrew its conditional offer of employment to Sungaila because of his disability, and thus awarded the EEOC back pay in the amount of $132,347. The jury eventually reduced the award to $102,803.75, finding that Defendant proved that Sungaila failed to mitigate his damages. The EEOC moved for judgment as a matter of law on the ground that as there was insufficient evidence for the jury to consider Defendant’s failure to mitigate defense, the damage award should be reinstated to award the total back pay amount. The Court granted the EEOC’s motion in part. Sungaila began working as a landscaper approximately one week after having his offer rescinded by Defendant. At trial, Defendant argued that Sungaila failed to mitigate his damages by not pursuing another position with similar pay to the night warehouse loader position. Further, Defendant pointed to evidence elicited from its expert, Dr. Robin Cook, regarding the Bureau of Labor Statistics (“BLS”) data that there were 10,000 open warehouse positions. The Court, however, rejected Defendant’s assertion that Cook’s testimony provided sufficient evidence that Sungaila did not mitigate his damages because that required evidence that there were open positions in existence. The Court observed that to give vitality to the principle of making an employee whole through back pay, yet requiring that employee to take responsibility for ameliorating his damages, an employer should present some evidence that positions were available and could have been obtained by the employee. *Id.* at *10-11. Further, because Cook specifically testified that she had not identified a single open position for which Sungaila was qualified, the Court remarked that there was no evidence showing that these positions were available, and no evidence that Sungaila could have obtained such a position so he could mitigate his damages. Thus, considering the lack of testimony regarding the availability of these positions coupled with the lack of evidence that Sungaila would qualify for such positions or that they were comparable to the night warehouse loader position, the Court concluded that there was insufficient evidence to allow the jury to consider Defendant’s failure to mitigate defense. *Id.* at *15. Although Cook testified that 10,000 positions existed in the Denver metropolitan area, the only testimony regarding that area was concerning the mean salary for warehouse positions. Defendant did not establish that the location of these positions were in commuting distance from Sungaila’s home, or submit evidence of what the salary was for a replacement position other than the mean salary, or provide evidence that any of these positions offered benefits or were for full-time rather than part-time work. Thus, the Court found that Defendant did not offer any viable evidence that a suitable position was available. Accordingly, the Court opined that Defendant failed to present evidence to support the jury’s reduction of the back pay damages award. The Court
opined that $132,347 – the amount the jury determined as back pay available to Sungaila in the absence of mitigation – was proper.

**EEOC v. Bok Financial Corp., 2013 U.S. Dist. LEXIS 93745 (D.N.M. Jan. 25, 2013).** The EEOC brought an action alleging unlawful employment discrimination on behalf of three female employees named Betty Brewer, Yolanda Fernandez, and Elizabeth Morantes. The EEOC filed a motion to amend, seeking to broaden the lawsuit to encompass an undefined class of women. Defendant served interrogatories, document requests, and requests for admission. The EEOC objected and responded in part to the requests. Defendant contended that the EEOC failed to properly provide all of the responsive information and filed a motion to compel, which the Court granted in part. The EEOC objected to producing materials based on the attorney-client privilege, the work product doctrine, and the governmental deliberative privilege. Sylvertooth was the EEOC investigator relating to Morantes’ and Fernandez’s charges of discrimination. Defendant sought information concerning statements made by the charging parties to Sylvertooth during the course of his investigations. The EEOC refused relying on attorney-client privilege. Because Sylvertooth was not the EEOC’s lawyer during the investigation of the two charging parties’ complaints, and he did not participate in any capacity as a lawyer and/or part of EEOC’s legal staff, the Court rejected the EEOC’s reliance on the attorney-client privilege as it related to communications with Sylvertooth. Id. at *11-12. The Court also addressed and rejected the EEOC assertion that the work product doctrine applied to all of the EEOC’s activity beginning at the time it opens an investigation of a claim of discrimination. The Court remarked that if it accepted the EEOC’s contention, the EEOC could protect everything it did at any stage of the investigation under the claim that it was preparing for litigation. Id. at *17. The Court stated that at the time the EEOC opens an investigation it is merely seeking to ascertain facts to evaluate the pros and cons of bringing potential charges. Id. at *15. Accordingly, the Court overruled the objection. Similarly, the Court overruled the EEOC’s assertion of governmental deliberative privilege, finding that the EEOC failed to properly invoke the privilege by filing a declaration from the Chair of the Commission. In sum, the Court overruled the EEOC’s objections based on the attorney-client privilege and work product protection as they related to the EEOC investigators’ information. The Court also overruled the governmental deliberative privilege, but allowed the EEOC to retain documents containing the mental impressions and/or legal analysis of the EEOC’s attorneys, relative to trial strategy or legal advice. The Court required the EEOC to review all withheld documents and to supplement disclosure in accordance with this decision and guidance provided about items listed in the privilege logs. The Court also awarded Defendant its attorneys’ fees in the amount of $4,500, which the Court deemed was reasonable reimbursement for the discovery motion. Id. at *67.

**EEOC v. Bok Financial Corp., Case No. 11-CV-1132 (D.N.M. April 19, 2013).** The EEOC brought an action alleging violations of the ADEA and Title VII of the Civil Rights Act. Earlier, the Court had granted in part Defendant’s motion to compel and had directed the EEOC to produce documents to Defendant. Defendant filed a motion for sanctions and to compel production of documents pursuant to this order, asserting that although the EEOC produced some of the required documents, the productions did not fully satisfy the Court’s order. The Court granted and denied the motion in part. First, Defendant sought spreadsheets of claimant, Elizabeth Morantes, setting forth her alleged damages. The spreadsheets were created by March Roco, a former employee of Defendant, who worked with Morantes at a subsequent employer. The EEOC’s counsel stated that Morantes’ privately retained counsel had asserted the attorney-client privilege with respect to the damage spreadsheets. Although Morantes’ attorney purportedly confirmed that neither Morantes nor her attorney ever provided those spreadsheets to the EEOC, Morantes testified in her deposition that she had. In its earlier order discussing responses to interrogatories that sought damage information and the way damages were calculated, the Court had observed that the EEOC’s objections to producing such information were specious, that Defendant was entitled to know the evidence supporting or refuting the EEOC’s damages claim and that the information should have been disclosed automatically. The Court remarked that Morantes’ deposition testimony did not support a claim of privilege or work product protection, and directed Morantes to provide all spreadsheet evidence of damages calculations, discussed at her deposition, for an in camera inspection. The District Court stated that if there were no grounds for the attorney-client privilege, it would consider whether sanctions against
Morantes were warranted, and declined to grant the request for sanctions at that time. Id. at 2-3. Defendant also sought original notes regarding conversations with one of Defendant’s customers who provided an affidavit supporting Morantes. Defendant argued that these notes dealt with Morantes’ only defense to her termination, that the copy produced appeared to be redacted, and that it had repeatedly asked the EEOC to produce the original notes. The EEOC did not have the original notes, and Defendant argued the original notes had not been preserved. Defendant asserted that it was entitled to either preclusion of the use of the customer affidavit that was the subject of the notes, the original of which was not preserved, or alternatively, a jury instruction that Morantes suggested to the customer that Morantes was fired because of the customer or because of her efforts to procure the customer’s affidavit. The Court declined the requested relief, and stated that a Court may not order a party to produce what it does not have. Id. at *5. Here, both the EEOC and Morantes’ private counsel represented that they did not have the original notes. The Court refrained from presuming that these representations were untrue, and denied the request for sanctions in relation to the production or redaction of the notes.


The EEOC brought an ADA action on behalf of a charging party, Kent Duty, alleging that Defendant discriminated against Duty when it failed to hire him on the basis of his disability. Duty intervened in the lawsuit, bringing similar claims and alleging that BNSF failed to hire him based on an actual disability and/or in retaliation for engaging in protected activities and failed to reasonably accommodate his disability. Duty had applied for a Locomotive Electrician position, and Defendant had extended a conditional offer of employment, subject to a drug screen, background check, and medical examination. After Duty submitted a functional capacity evaluation, he was informed him that he was not medically qualified for the position due to significant risks associated with lack of grip strength in his right hand, including safety concerns. Defendant then revoked the conditional offer of employment. Defendant moved to dismiss, arguing that allegations in the complaint were insufficient to satisfy the requirements of Rule 8. First, the EEOC alleged that Defendant unlawfully regarded Duty as disabled due to his physical impairment, and that Defendant regarded Duty’s physical impairment as substantially limiting in the major life activity of working. Defendant moved to dismiss these claims because the EEOC did not allege that Defendant regarded Duty as substantially limited in his ability to perform a broad range of jobs or a class of jobs; rather, the complaint alleged only that Defendant perceived Duty as unable to work in the Locomotive Electrician position. The Court noted that the EEOC had alleged that Defendant believed that Duty could not safely perform any jobs involving the use of tools and ladders such that Defendant regarded him as substantially limited in the major life activity of working, and that these allegations were sufficient to permit a plausible inference that Defendant regarded Duty as substantially limited in the major life activity of working. Defendant also argued that the EEOC did not sufficiently pled that Duty could have performed the essential functions of the job with or without reasonable accommodation. The EEOC expressly pled that Duty could climb ladders safely and use tools safely; that he was qualified to perform the essential functions of the locomotive electrician position; that Duty successfully completed BNSF’s Realistic Job Preview and Testing Session; and that he received a conditional offer of employment as a result. Thus, the Court stated that it was plausible that Duty was qualified to perform the essential functions of the locomotive electrician position with or without reasonable accommodation. Additionally, the Court noted that discovery could reveal that the job requirements of maintaining three-point contact on ladders and maintaining a firm grip on tools were not essential or that an accommodation existed that would permit Duty to perform them in any event. Second, Defendant also moved to dismiss the EEOC’s actual disability claim on the grounds that it did not sufficiently plead that Duty’s impairment substantially limited his ability to perform manual tasks. The Court found that the EEOC sufficiently pled a disability discrimination claim based on an actual disability. The EEOC identified a physical impairment to Duty’s right hand and wrist; alleged that the impairment substantially limited his ability to perform manual tasks; and included a detailed clinical description of his impairment that plausibly suggested that he was substantially limited in his ability to perform manual task. Finally, regarding Duty’s retaliation claim, the Court stated that the EEOC offered no facts showing a nexus between the person to whom Duty complained, an unidentified person responding to an e-mail he sent to Central Staffing HR, and the medical personnel who determined that he was not qualified for the position.
Accordingly, the Court granted in part and denied in part Defendant’s motion to dismiss the EEOC’s complaint.

**EEOC v. Burlington Northern Santa Fe Railroad, 2013 U.S. Dist. LEXIS 116204 (D. Kan. Aug. 16, 2013).** The EEOC brought an ADA action on behalf of Kent Duty, alleging that Defendant (“BNSF”) regarded Duty as disabled and failed to hire him. Duty intervened in the lawsuit and brought the same claims asserted by the EEOC and additionally alleged that BNSF failed to hire him based on an actual disability and/or in retaliation for engaging in protected activities and failed to reasonably accommodate his disability. *Id.* at *1-2. Because of physical impairments, Duty had limited grip strength and limitation in the range of motion in his right hand and wrist. Duty had applied for position of Locomotive Electrician, and BNSF extended him a conditional offer of employment, subject to a drug screen, background check, medical examination. Thereafter, Duty was notified that BNSF was not able to determine his medical qualification, and that he could be reconsidered if he supplied a current functional capacity evaluation (“FCE”) of his right hand and arm. After Duty submitted the FCE, Defendant informed him that he was not medically qualified for the position due to significant risks associated with lack of grip strength in his right hand, including safety concerns, and that the conditional offer of employment was revoked. The Court denied BNSF’s motion to dismiss with respect to “regarded as” claims and the actual disability claim, and granted BNSF’s motion to dismiss the retaliation claim, but allowed Duty an opportunity to file an amended complaint. *Id.* at *2. Duty then filed an amended complaint, and BNSF again moved to dismiss. The Court denied the motion. The Court noted that to prevail on a claim that BNSF regarded Duty as substantially limited in the major life activity of performing manual tasks; Duty must demonstrate that BNSF regarded him as significantly restricted from doing activities that were of central importance to most people’s daily lives. The Court stated that the focus at this stage was not on whether Duty would ultimately be able to prove his claim but on whether he had stated a plausible claim for relief. Duty identified a physical impairment to his right hand and wrist, he alleged that BNSF knew about that impairment, that BNSF denied his employment application based on that impairment, and that BNSF regarded that impairment as substantially limiting his ability to perform manual tasks. The Court remarked that although Duty had not specifically alleged that BNSF regarded him as substantially limited in his ability to perform tasks that were central to most people’s daily lives, he alleged that BNSF knew that he had virtually no grip strength in his right hand and that he was denied employment on this basis. Thus, the Court concluded that it was at least plausible that a complete inability to grip objects with one hand would qualify as a substantial limitation on the major life activity of performing manual tasks, and that BNSF accordingly perceived Duty as disabled within the meaning of the ADA. Because Duty sufficiently alleged that BNSF perceived him as having a substantial limitation on the ability to perform manual tasks, the Court denied BNSF’s motion to dismiss this claim. While determining the initial motion to dismiss, the Court had held that in the absence of facts suggesting that anyone in the medical review department had knowledge of Duty’s comments to HR, his retaliation claim did not rise above the speculative level. The Court noted that in Duty’s amended complaint, he alleged that besides the HR department, he directly contacted the medical review department and shared the same concerns, *i.e.*, the nature of his disability and his concerns about the requirement that he undergo a second examination. The Court determined that Duty specifically alleged a plausible connection between his protected activity and various adverse actions that BNSF allegedly took against him because he contacted the medical review department directly, essentially sought to have a discussion about reasonable accommodations for his disability, and thereafter had his offer of employment withdrawn because the medical review department deemed him unqualified. Accordingly, the Court denied BNSF’s motion to dismiss the retaliation claim.

**EEOC v. Goodwill Industries Of Southwest Oklahoma And North Texas, Inc., 2013 U.S. Dist. LEXIS 140137 (W.D. Okla. Sept. 30, 2013).** The EEOC brought an action on behalf of Plaintiff-Intervener Mary A. Goulet alleging that Defendant, Goulet’s former employer, terminated her in retaliation for her exercise of rights protected by both Title VII and the ADEA. The EEOC contended that Goulet was terminated because she offered deposition testimony in support of a former employee who had sued Defendant. Defendant denied the claims, arguing that her termination was based on non-discriminatory business reasons unrelated to her deposition testimony or to her race, gender, or religion. Both parties moved for
summary judgment. While the EEOC asserted that it was entitled to partial judgment on the issue of liability on its claims of unlawful retaliation under Title VII and ADEA, Defendant sought judgment on all claims asserted by Goulet and by the EEOC. In addition to joining in the EEOC’s retaliation claims, Goulet had also asserted claims of race, gender, and religious discrimination, sexual harassment based on hostile work environment, age discrimination, conspiracy to retaliate, negligence, and wrongful termination in violation of public policy. The Court denied the motions of both the EEOC and Defendant as to the Title VII and the retaliation claims, and granted Defendant’s motion as to all claims asserted by Goulet. Goulet, an African-American female, was the Vice President of Defendant’s Adult Day Care and Youth Services, and had given deposition testimony in a lawsuit brought by the then interim CEO of Defendant alleging that by hiring a new CEO (“Crews”), Defendant had discriminated against the interim CEO on the basis of her gender and age. Crews had attended the deposition wherein Goulet testified that she had heard some senior staff members stating that Crews was racist and sexist. Id. at *6. Goulet had also testified that one of the senior staff had said that Crews selected white males to replace employees who left Defendant. Id. Goulet’s employment was later terminated due to “insubordination, unsubstantiated racial and sexist accusations against supervisors and peers, inappropriate conduct to and in front of subordinates, and undermining the authority of her supervisor.” Id. at *7. The Court found that Goulet offered no evidence to support her claim that her discharge was motivated by discrimination based on her race or her gender. Id. at *23. While Goulet contended that she was subjected to gender discrimination by Crews because he invited only males to lunch or dinner, the record contained numerous references to lunch meetings attended by Goulet and the male vice presidents, and several occasion when Goulet had lunch with Crews. Further, Goulet offered no evidence to show any causal connection between Crew’s open statement that women should be homemakers, and Defendant’s decision to terminate Goulet. Id. at *18. There was also no evidence to show that Crews made the statement to Goulet or that he made any similar statement when disciplining her or terminating her. Further, the evidence showed that, of the five Defendant’s vice presidents serving with Goulet while Crews was the CEO, two were female, and a female had eventually replaced Goulet. Id. at *18-19. Thus, the Court concluded that there was no evidence that Goulet’s termination was based on her gender. Similarly, there was no evidence that Goulet’s termination was based on her race. Goulet testified that Crews often spoke to African-Americans in “black slang,” which she found offensive. Goulet, however, offered no evidence that Crews had used the slang while speaking to her, or that Crews directed any comments to her that had a negative attitude toward females and African-Americans. Id. at *20-21. The Court thus held that Defendant was entitled to summary judgment on Goulet’s claims of race and gender discrimination. The Court further held that Defendant was also entitled for summary judgment on Goulet’s claims of sexual harassment/hostile environment and age discrimination. Goulet had not alleged that she was subjected to any unwelcome physical or verbal conduct by Crews or other male employees, and the cited comments made by Crews that she found created a sexually hostile work environment were not related to her. Id. at *25-26. Goulet also failed to present any evidence to show that she was subjected to any religious discrimination, and that Crew’s religious beliefs had any causal connection to her termination. Id. at *31. Goulet, similarly, failed to offer any evidence that could arguably support her claim that, but for her age, she would not have been terminated. The Court noted that Crew’s alleged reference to an employee as a “young blonde” did not support a contention that he terminated Goulet or otherwise discriminated against her on the basis of her age. Id. at *35. The Court further held that Goulet’s state law discrimination claims also failed, as there was insufficient evidence to create material factual disputes on which a jury could find in her favor on those claims. Id. at *39. The Court, however, denied summary judgment on the Title VII and ADEA retaliation claims asserted by the EEOC and Goulet that, but for Goulet’s testimony, Defendant would not have terminated her employment. Id. at *42. Although Defendant contended it had a justifiable business reason for terminating her and that reason was unrelated to her deposition testimony, the Court found that disputed material facts precluded summary judgment for either the EEOC or Defendant. The Court could not conclude that Defendant’s decision would have been made even if Goulet had not offered the deposition testimony, given the fact that it did not know about her allegations of racism and sexism until she offered that testimony. Id. The Court therefore concluded that claims of retaliation for the exercise of Title VII and/or ADEA rights must be reserved for the trial, and accordingly, allowed the action to proceed only on the Title VII and ADEA retaliation claims.
EEOC v. JBS USA, LLC, 2013 U.S. Dist. LEXIS 150156 (D. Colo. Oct. 18, 2013). The EEOC brought pattern or practice action alleging that Defendant discriminated its workers based on their national origin, religion, and ethnicity. The EEOC also brought several individual claims on behalf of the charging parties for failure to accommodate religion, retaliation, hostile work environment, discriminatory discipline, and discharge. More than 200 interveners, current and former workers at Defendant’s Greeley plant, intervened in the lawsuit asserting multiple claims against Defendant, including discriminatory treatment because of race, national origin, religion, and retaliation pursuant to Title VII. After the Court bifurcated the trial and ordered that the trial should be conducted in two phases, two Interveners moved for leave to amend their complaint to incorporate facts surrounding their terminations, including new claims brought under the FMLA. The Court granted the motion. The Court stated that Defendant had ample time to prepare its defenses to the additional factual allegations and claims, as Interveners’ claims would be adjudicated in Phase II, and therefore Defendant would not be prejudiced by allowing the filing of the proposed amended complaint. Moreover, the Court noted that Interveners had demonstrated good cause for amending their complaint. The Court remarked that it was reasonable to allow the named Interveners to timely amend their complaint so as to clarify their factual allegations and include all related claims.

EEOC v. Kanbar Property Management, LLC, 2013 U.S. Dist. LEXIS 120051 (N.D. Okla. Aug. 23, 2013). The EEOC brought action on behalf of Toni Strength under the ADEA, alleging that Defendant terminated Strength because of her age. Strength, a property manager, was terminated by Sukhi Ghuman, Defendant’s Chief Executive officer, who provided Strength a letter stating that her position had been eliminated. The EEOC moved for partial summary judgment and Defendant moved for summary judgment. The Court granted in part the EEOC’s motion and denied Defendant’s motion. First, in opposition to Defendant’s motion, the EEOC identified statements attributed to Ghuman by Joe Russell, Braxton Fears, and Clay Clark as direct evidence of discrimination. In his declaration, Russell attested that he had a private conversation with Ghuman after Strength’s termination where Ghuman told him that he had fired Strength because she was older and that he did not believe she had the ability to meet potential tenants and entertain existing tenants after work. Russell also stated that Ghuman told him he wanted someone younger and prettier for the position. Fears and Clark both attested that Ghuman told them that he had terminated Strength because she was old and ugly. Id. at *9-10. The Court found that a reasonable jury could find Ghuman’s statement that Strength was old and ugly as attributable to her age, and that the statements directly demonstrated discriminatory motivation on the part of Ghuman and a direct nexus between that motivation and Ghuman’s decision to terminate Strength’s employment. The Court therefore concluded that the EEOC had met its burden of providing direct evidence of discrimination sufficient to preclude summary judgment as to its ADEA claim. Regarding the amount of damages recoverable by the EEOC, Defendant argued that the EEOC should be bound by a statement made by Strength in her deposition which Defendant characterized as an admission that $100,000 would make her whole. The Court noted that the exchange between Defendant’s counsel and Strength resembled a request for a settlement amount that Strength would be happy with on the day of her deposition, rather than an admission by Strength that her damages were limited to $100,000. The Court noted that Rule 408 of the Federal Rules of Evidence bars admission of evidence relating to settlement discussions if that evidence is offered to prove or disprove the validity or amount of a disputed claim. Id. at *13. Thus, the Court found that the exchange between Defendant’s counsel and Strength was inadmissible to establish the amount of damages, and accordingly denied Defendant’s request for summary judgment on this issue. The parties also sought summary judgment regarding whether Strength failed to mitigate her damages. The Court observed that Defendant produced no evidence showing that there were suitable positions available that she could have sought and for which she was qualified. Thus, because Defendant failed to carry its burden to produce evidence in support of its affirmative defense of failure to mitigate, the Court granted the EEOC’s motion for partial summary judgment on this issue.

EEOC v. LEHI Roller Mills Co., Inc., 2013 U.S. Dist. LEXIS 155017 (D. Utah Oct. 28, 2013). The EEOC brought an action alleging that Defendant discriminated against its former employee in violation of the ADEA. During the litigation process, Defendant filed for bankruptcy, and therefore the trial date was vacated. The Court allowed Defendant’s counsel to withdraw, and ordered Defendant or the new counsel
to file notice of appearance within 21 days after the bankruptcy stay was lifted. The EEOC moved for reconsideration of the Court’s order permitting Defendant’s counsel to withdraw. The EEOC requested the Court amend its order, requiring Defendant to retain new counsel within 21 days of the Court’s order rather than 21 days after the bankruptcy stay was lifted. The Court granted the motion. First, the Court noted that in EEOC v. McLean Trucking Co., 834 F.2d 398, 399 (4th Cir. 1987), the EEOC sought both injunctive and monetary relief including back pay and liquidated damages. The Bankruptcy Court held that the stay was effective against the EEOC. The Fourth Circuit reversed and held that the EEOC was not subject to an automatic stay because the EEOC was proceeding in the exercise of its police or regulatory power and thus was exempt from the automatic stay until its prayer for monetary relief was reduced to judgment. Id. at *4. Similarly, here the Court stated that the EEOC’s claim against Defendant was not subject to the automatic stay even though the EEOC’s requested relief included both injunctive and monetary relief. Further, in EEOC v. Noble Metal Processing, 2009 U.S. Dist. LEXIS 54851 (E.D. Mich. June 29, 2009), after the court administratively closed the civil suit due to the bankruptcy stay, the EEOC moved to set aside the order due to its exemption as a governmental unit. Defendant argued that the EEOC was attempting to enforce a monetary judgment. The Court found this argument without merit because the EEOC had not yet obtained a money judgment against the employer, and would be subject to the automatic stay only after it had secured a money judgment. Id. at *5. Likewise, here, the Court stated that the automatic stay would not be operative against the EEOC because the EEOC had not yet obtained a monetary judgment. Accordingly, the Court granted the EEOC’s motion.

EEOC v. Midwest Health, Inc., 2013 U.S. Dist. LEXIS 52155 (D. Kan. April 11, 2013). The EEOC initiated an action in order to enforce an administrative subpoena against Defendant. Earlier, the Magistrate Judge had directed Defendant to show cause why it should not be directed to comply with the administrative subpoena requiring it to produce documents in the EEOC’s investigation. Because Defendant failed to respond to the show cause order, the EEOC moved to compel compliance with its administrative subpoena. The Magistrate ordered Defendant to file its answers and documents in response to the subpoena. The EEOC also moved before the Magistrate for an order of production. The Court stated that to hold someone in contempt, there must be clear and convincing evidence that the actor disobeyed a known and valid order. Id. at *7. The Court issued a valid order setting a deadline of December 20, 2012, for Defendant to file its answers and documents in response to an administrative subpoena of the EEOC, and the docket entry for that order showed that it was mailed via certified mail to the pro se Defendant Midwest Health, and a Certified Mail Receipt within the record showed that a Susan Brooks, on behalf of the chief legal counsel, signed for the order addressed to Midwest Health. Although the EEOC asserted that Defendant had not responded to the order, it provided no declaration, affidavit, or other evidence that Defendant failed to comply with the order. Thus, the Court ruled that without clear and convincing evidence of non-compliance, it could not find that Defendant failed to comply with the order, and that the statement in the EEOC’s motion did not suffice. The Court opined that the EEOC had not carried its burden to show that Defendant’s actions or lack thereof constituted a civil or criminal contempt, and accordingly denied the EEOC’s motion. Id. at *8-9.

EEOC v. Original Honeybaked Ham Co. Of Georgia, Inc., 918 F. Supp. 2d 1171 (D. Colo. 2013). The EEOC brought a pattern or practice action alleging sexual harassment, hostile work environment, and retaliation under Title VII of the Civil Rights Act of 1964, claiming that Defendants subjected a class of female employees to sexual harassment and retaliated against them when they complained. The EEOC sought injunctive and monetary relief on behalf of Wendy Cabrera and a class of female employees. Defendant filed a motion to dismiss and sought to limit the scope of the EEOC’s claims, arguing that during the pre-litigation process, the EEOC did not give adequate notice of alleged sex discrimination by supervisors and managers other than James Jackman. Defendant also contended that the EEOC’s remedies should be limited to the alleged injuries suffered by Cabrera and the eight aggrieved individuals identified during the EEOC’s pre-litigation process. The EEOC responded that its pre-litigation disclosures were sufficient to put Defendant on notice that its claims would extend to conduct by managers and supervisors other than Jackman, and that it would seek a monetary award on behalf of aggrieved
individuals who were not disclosed pre-litigation. *Id.* at 1173. Further, the EEOC asserted that it referred to retaliatory conduct by Donna Wagner-Rego, the District 8 manager, and Michael Costello, the Human Resources representative for District 8, and these references put Defendant on notice that the conduct of managers and supervisors other than Jackman was at issue. The EEOC also asserted that allegations of harassment by managers and supervisors other than Jackman grew out of the investigation of Cabrera’s charge. The Court observed that for the EEOC to pursue claims based on additional wrong-doing, it must still give notice to the employer of the newly discovered conduct and provide an opportunity to conciliate all charges before a lawsuit is filed. *Id.* at 1177. There was nothing in the EEOC’s investigation, determination letter, or the subsequent conciliation that identified unlawful conduct of any manager or supervisor other than Jackman. The EEOC’s determination letter described the unlawful conduct of only a single supervisor, and this singular focus continued during pre-litigation conciliation. Further, the claim for punitive damages was premised on Defendant’s failure to take appropriate action with regard to complaints about behavior by Jackman, but not any other supervisor or manager. The Court observed that because the only unlawful conduct disclosed to Defendant was sexual harassment by Jackman, and complaints about his conduct would have been addressed by Wagner-Rego and Costello, it was reasonable for Defendant to assume that any alleged retaliation by them would have arisen from Jackman’s conduct. *Id.* at 1178. Even if allegations of retaliation by Wagner-Rego and Costello were deemed sufficient to put Defendant on notice of unlawful conduct by supervisors or managers other than Jackman, the Court opined that the EEOC made no attempt to conciliate such charges prior to bringing this lawsuit. Accordingly, the Court found that the EEOC’s claim of sex discrimination was limited to conduct by Jackman, and its retaliation claim was limited to retaliation for complaints about Jackman’s conduct. In conjunction with that conduct, before filing the suit, the EEOC identified Cabrera and eight others as aggrieved persons, and subsequently, it identified others. However, it was unclear which of the now-identified 17 aggrieved individuals were impacted by conduct of Jackman or someone else. Defendant did not argue that it was unable to ascertain from its own records the potential aggrieved individuals impacted by Jackman’s conduct. Thus, due to the clear description of the conduct, the alleged perpetrator Jackman, and the location, *i.e.*, the Highlands Ranch store, the Court found that Defendant had sufficient notice of all potentially aggrieved individuals. Accordingly, the Court found that the EEOC could pursue a remedy for those aggrieved individuals impacted by the conduct of Jackman, but no other supervisor or manager. *Id.* at 1180.  

**EEOC v. Original Honeybaked Ham Co. Of Georgia, Inc., 2013 U.S. Dist. LEXIS 19273 (D. Colo. Feb. 13, 2013).** The EEOC brought a pattern or practice action under Title VII of the Civil Rights Act of 1964, claiming that Defendant subjected a class of female employees to sexual harassment and retaliated against them when they complained about the harassment. Defendant moved to strike Catherine Vigil, Shannon Kennedy, Kelly Teegarden, and Lisa Jager from the group of allegedly aggrieved individuals on the basis that the EEOC untimely identified them in discovery. Defendant also requested an award of attorneys’ fees pursuant to Rule 37(b)(2)(C). The EEOC argued that although it was aware of the existence of these individuals, it was unable to communicate with them until after the deadline by which it was to identify each aggrieved individual for whom it sought relief. The Magistrate Judge recommended that the motion to strike be granted because the four individuals were not timely identified, and that the request for attorneys’ fees be denied as unjust under the circumstances. *Id.* at *2-4. On the Rule 72 objections of the EEOC, the Court declined to adopt the recommendations and rejected the motion to strike. The Court observed that the motion was filed and the recommendation was issued before the Court ruled on Defendant’s motion to dismiss. In its order on the motion to dismiss, the Court ruled that the EEOC’s claims were limited to sex discrimination resulting from a hostile work environment created by the sexual harassment of James Jackman, while a manager of stores in District 8, and retaliation against employees who complained of Jackman’s harassment. *Id.* at *4. Further, the Court limited the scope of the litigation to Jackman’s conduct while managing stores in District 8. Thus, the Court opined that the motion to strike had become moot to the extent that it concerned individuals allegedly harassed by someone other than Jackman. The Court also noted that the motion to strike was an attempt to limit any award of damages to the EEOC for the benefit of aggrieved individuals, and as such was premature. In essence, Defendant sought to prevent the EEOC from presenting evidence about certain aggrieved
individuals. The Court determined that whether such evidence should be precluded cannot be ascertained until it was clear what evidence would be presented at trial. Accordingly, the Court denied Defendant’s motion to strike. \textit{Id.} at *5-6.

\textbf{EEOC v. Original Honeybaked Ham Co. Of Georgia, Inc., 2013 U.S. Dist. LEXIS 26887 (D. Colo. Feb. 27, 2013).} The EEOC brought a pattern or practice action alleging sexual harassment, hostile work environment, and retaliation under Title VII of the Civil Rights Act of 1964, claiming that Defendant subjected a class of female employees to sexual harassment and retaliated against them when they complained about the harassment. Defendant filed a motion seeking sanctions against the EEOC for failing to comply with discovery. The Court granted the motion. The Court observed that the EEOC had often caused unnecessary expense and delay in this case, and had been negligent in its discovery obligations, dilatory in cooperating with defense counsel, and somewhat cavalier in its responsibility to the Court. The EEOC prematurely made promises about an agreed-upon discovery methodology and procedure when its counsel had no authority to do so, or else had authority only to be overturned by someone in a higher pay grade at the Commission; this became more problematic after Defendant and the Court relied on those promises and engaged in efforts to implement the commitments previously made. \textit{Id.} at *3. Further, the EEOC’s change of mind in midstream required Defendant to pay its attorneys more than should have been required, and multiplied and delayed the proceedings unnecessarily. The Court stated that although the EEOC’s conduct was inappropriate and obstreperous, it did not rise to a level that was sanctionable under most rules governing the litigation process. Both Rule 11 sanctions and the Court’s inherent authority generally require a finding of bad faith. \textit{Id.} at *5. Further, the Court was disinclined to punish the EEOC’s trial counsel personally under 28 U.S.C. § 1927 because fault lay with those higher in the organization. Although the Court concluded that no rule or doctrine concerning sanctions clearly applied here, it determined that a sanction under Rule 16(f)(1) would be appropriate. The Court noted that it should impose only so much of a sanction as was necessary to ensure that the offending conduct stopped. \textit{Id.} at *12. The Court concluded that awarding Defendant its reasonable attorneys’ fees in prosecuting its motion would suffice for that purpose. The Court, however, declined to impose anything more punitive because the EEOC’s conduct was mitigated by the fact that several of the contentious discovery issues arose from electronically-stored information and the relatively untested waters in which litigants found themselves. Accordingly, the Court ordered that the EEOC should pay Defendant reasonable attorneys’ fees and costs expended in bringing its motion. \textit{Id.} at *13.

\textbf{EEOC v. RadioShack Corp., 2013 U.S. Dist. LEXIS 173846 (D. Colo. Mar. 1. 2013).} The EEOC brought an action under the Age Discrimination in Employment Act (the “ADEA”), on behalf of David Nelson, a former RadioShack employee, alleging that Defendant discriminated against him on the basis of his age, and that it retaliated against him by firing him for complaining of age discrimination. The jury determined that Defendant did not terminate Nelson because of his age, but that it had retaliated against Nelson because he complained of age discrimination and, in doing so, willfully violated the ADEA. The jury awarded the EEOC $187,706 for his lost wages and benefits, and a “Lifetime RadioShack Discount Card.” \textit{Id.} at *1-2. The EEOC moved for equitable relief and liquidated damages per 29 U.S.C. §§ 626(b) and 216(b), requesting liquidated damages, the Discount Card, front pay, a tax penalty off-set, and injunctive relief. \textit{Id.} at *2-3. The Court awarded liquidated damages amounting to $187,706.00. The Court noted that once there is a finding of willfulness by the employer, as there was here, an award of liquidated damages is necessary. \textit{Id.} at *3-4. Regarding the tax penalty off-set, the EEOC argued that if front pay was awarded, Nelson would be paid the entire award at once, in a lump sum, subjecting him to a higher tax rate, and a higher tax penalty. The EEOC argued that Nelson was entitled to receive an additional amount to off-set the increased tax penalty. The Court noted that income averaging was eliminated from the tax code as of the Tax Reform Act of 1986, and thus Nelson would be unable to spread his lump sum award over a multi-year period. Consequently, he would be forced into a higher income tax bracket. Thus, in exercise of its equitable powers to make Nelson whole, the Court granted a tax off-set award for back pay amounting to $47,946.00, and a tax off-set award for front pay amounting to $53,711.00. \textit{Id.} at *12-15. Regarding front pay, the Court disagreed with Defendant that Nelson was precluded from receiving front pay because the jury found that he failed to mitigate his damages. The Court stated that Nelson’s failure to
mitigate reduced his back pay recovery, but it did not bar his recovery altogether as a matter of law. Further, Nelson’s failure was not so great as to completely negate his back pay award as a factual matter. Accordingly, the Court granted front pay amounting to $199,281.00. Id. at *6-12. Regarding the Discount Card, the Court found that it was a benefit that only RadioShack employees could earn through long-term employment, and that it was not money, the classic form of legal relief. Thus, the Court concluded that the Discount Card constituted equitable relief, and the power to award it lay with the Court not the jury. Although the EEOC argued that awarding the card would effectuate the purposes of the ADEA, the Court observed that the EEOC failed to say what those purposes were or to even cite them. Further, the EEOC failed to offer any legal authority for its argument that the card was meaningful to Nelson because of the discount and because it enabled him to visit a RadioShack store and to demonstrate that he was a long-term employee of the company. Thus, the Court ruled that awarding the Discount Card was unwarranted. Id. at *4-6. Finally, the Court denied injunctive relief because there was no evidence that Defendant had any unlawful employment practice or policy that it followed, nor was there evidence establishing a pattern of retaliation. Accordingly, the Court granted in part and denied in part the EEOC’s motion for equitable relief. Id. at *15-18.

**EEOC v. Unit Drilling Corp., 2013 U.S. Dist. LEXIS 156903 (N.D. Okla. Nov. 1, 2013).** The EEOC brought an action on behalf of a job applicant, Patsy Craig, and a class of female applicants under Title VII of the Civil Rights Act. Id. at *5. After Craig filed a charge alleging that she was not hired by Defendant because she was a female, the EEOC began its investigation. The EEOC notified Defendant that it was expanding the scope of its investigation to a nationwide class investigation of all facilities owned or operated by Defendant. After the EEOC issued a letter of determination stating that the investigator had uncovered evidence that Craig and other aggrieved women were not hired because of their sex, the EEOC proposed remedies on behalf of Craig and four other female job applicants, whom the EEOC determined were subjected to unlawful employment discrimination in hiring. Defendant did not respond to the EEOC until after the litigation was filed, and it rejected the EEOC’s proposal. Id. at *1-5. Defendant moved to dismiss, and the Court denied the motion. Defendant argued that the EEOC failed to satisfy the administrative prerequisites before filing suit, and failed to properly plead satisfaction of the administrative prerequisites in the first amended complaint. The Court noted that exhaustion of administrative remedies is a prerequisite to suit under Title VII, and before the EEOC can file suit against an employer, the following must occur: (i) a charge must be filed with the EEOC against the employer; (ii) notice of the charge must be given to the employer; (iii) an investigation by the EEOC must transpire; (iv) the EEOC must make a determination of reasonable cause; and (v) the EEOC must make a good faith effort at conciliation. Id. at *9-10. Defendant contended that the EEOC only provided notice of claims by Craig and the other four individuals specifically identified in the letter of determination, and that the EEOC should not be permitted to bring claims on behalf of any unidentified aggrieved individuals. Id. at *11. Although the EEOC formally notified Defendant of, and attempted to resolve, only the charges arising from Craig and the other four identified women, the Court found that the information provided to Defendant was sufficient to allow it to conduct its own investigation and estimate how many female job applicants could have been subjected to discrimination. Because the notice was specific as to geography, as to conduct, and to time, the Court reasoned that Defendant had sufficient notice of the alleged unlawful conduct, and it was not necessary for the EEOC to identify every aggrieved individual prior to litigation in order to satisfy administrative prerequisites. Thus, the Court ruled that the EEOC had sufficiently satisfied the notice requirements to pursue a remedy for all individuals subjected to discrimination during the relevant time period. Id. at *12-13. Further, Defendant argued that the EEOC only attempted to conciliate on behalf of Craig and the four other identified aggrieved individuals. The Court, however, noted that the EEOC’s settlement proposal informed Defendant of the nature and extent of the violations and the relief sought. Defendant was on notice that the EEOC was conducting a nationwide investigation, and the EEOC’s settlement proposal mentioned all of Defendant’s facilities. Thus, the Court observed that Defendant had sufficient notice that the EEOC’s conciliation efforts were on behalf of a potential nationwide class. Accordingly, the Court held that the EEOC satisfied its obligation by making a sufficient effort to conciliate. Finally, Defendant sought to limit the claims of unidentified aggrieved individuals pursuant to the single filing rule. The Court, however, ruled that the single filing rule applies only to individuals intervening in an existing lawsuit without
The EEOC v. Western Trading Co., 2013 U.S. Dist. LEXIS 22077 (D. Colo. Feb. 19, 2013). The EEOC brought a pattern or practice action alleging claims against Defendant for disability discrimination, failure to accommodate, and unlawful co-mingling of personnel and medical records, all in violation of the American With Disabilities Act. Id. at *1. Tyler Riley intervened, and brought a motion in limine with the EEOC to exclude Riley’s receipt of Social Security and other government benefits, purported drug and alcohol use, and non-compliance with his physician’s epilepsy medication instructions. Id. at *2. Defendant filed a motion in limine to exclude the testimony of three of Riley’s witnesses. The Court granted in part and denied in part Plaintiffs’ motion, and denied Defendant’s motion. First, the Court granted Plaintiffs’ motion to preclude any evidence related to Riley’s receipt of Social Security and other governmental benefits. The Court noted the collateral source rule which, in pertinent part, provides that evidence indicating Plaintiff received benefits from a source collateral to the tortfeasor is inadmissible at trial. Id. at *3. The Court noted that Barnett v. American Family Mutual Insurance Co., 843 P.2d 1302, 1309 (Colo. 1993), held that the collateral source rule applies to Social Security benefits. Id. Thus, the Court found that evidence of Riley’s government benefits, including Social Security, were barred by the collateral source rule. Further, the Court noted that pursuant to Rule 403 of the Federal Rules of Evidence, even if the collateral source rule did not apply, the Court would not permit Defendant to introduce the benefits at trial because the prejudicial effect would substantially outweigh any probative value. Id. at *4. Second, the EEOC and Riley sought to exclude evidence of Riley’s drug and alcohol use, asserting that it was irrelevant. Id. at *5. The Court noted that Rule 401 sets a very low bar to determine whether evidence is admissible. Id. The Court weighed the probative value of the evidence against its possible prejudicial effect. Id. The Court noted Defendant’s position that Riley’s drug use could have affected his medical condition. Id. The Court reasoned, however, that Riley’s drug and alcohol use was tangential to the case, and that there was evidence that Defendant was unaware of it when the relevant employment-related events occurred. Id. at *5-6. Finally, the Court found that any evidence related to Riley’s alleged drug and alcohol use would be highly prejudicial. Id. at *6. Accordingly, the Court granted the motion in limine of the EEOC and Riley to exclude evidence related to Riley’s drug and alcohol use because the evidence’s prejudicial effects substantially outweighed its slight probative value. Id. Finally, the EEOC sought to exclude any reference to Riley’s compliance with his physician’s instructions for epilepsy medication, alleging that it was irrelevant because it was undisputed that he suffered from a severe and uncontrollable form of epilepsy, even when he was on his medication. Id. Defendant contended that Riley’s compliance was relevant because his medical provider insisted that Riley would not suffer from seizures if he took his medication as prescribed. Id. The Court denied the motion to exclude the evidence because it found that Riley’s compliance with his physician’s instructions for epilepsy medication may have impacted his ability to perform essential job functions, which was the main issue of contention. Id. at *6-7. Defendant also sought to preclude testimony from two of the EEOC’s witnesses, Merlinda Berisa and Danee Attebury, alleging that they were not timely disclosed. Id. at *8. The Court noted that the witnesses were not formally disclosed until after the discovery deadline, but Defendant was aware that both witnesses had information relevant to the case before discovery closed. Id. at *9-10. Further, the Court noted that Defendant made no attempt to mitigate any prejudice caused by the late disclosure. Id. at *10. Defendant did not assert that allowing both witnesses to testify would disrupt the trial, nor that there was any bad faith or willfulness on the part of the EEOC and Riley. Id. at *10-11. Accordingly, the Court denied Defendant’s motion in limine to preclude testimony from Berisa and Attebury.

EEOC v. Western Trading Co., 2013 U.S. Dist. LEXIS 22078 (D. Colo. Feb. 19, 2013). The EEOC brought a pattern or practice action alleging claims against Defendant for disability discrimination, failure to accommodate, and unlawful co-mingling of personnel and medical records in violation of the American With Disabilities Act. Id. at *1. Subsequently, Tyler Riley, Defendant’s ex-employee, intervened as a party Plaintiff. The EEOC and Riley moved to exclude Defendant’s opinions of Donna Ferris and Richard Hughes, their two experts. Id. at *1-2. The Court denied the motion. Donna Ferris, designated by
Defendant as an expert in rehabilitation counselling, as well as vocational counselling, education, and rehabilitation, was retained to testify regarding Riley’s general ability to work. Id. at *3. The EEOC contended that Ferris’ opinion was not reliable; concerned topics that did not require expert testimony; and/or were prejudicial and confusing. Id. The Court determined that Ferris’ testimony was admissible pursuant to Rule 702 because it could assist the fact-finder in determining the extent to which Riley could work, and whether his job search was reasonable. Id. at *4. Further, the EEOC argued that much of Ferris’ expert report contained information that was not material to any of her conclusions. Id. at *4-5. The Court noted that Ferris, pursuant to Rule 702(b), was required to base her opinions on sufficient facts or data, and if Riley’s medical history did not affect her opinion, to omit any reference to the same. Id. at *5. Next, Hughes, a neurologist, intended to testify at trial regarding the course and nature of Riley’s epilepsy and general precautions for epileptic patients. Id. at *6. The EEOC contended that Hughes was not an expert on the ADA and therefore, unqualified to testify regarding ADA requirements. Id. *6-7. Defendant asserted that it did not offer Hughes as an expert on the ADA, but rather, a medical expert and that, given the lack of medical information provided by Riley to Defendant, it was reasonable for Defendant to follow up regarding Riley’s condition and work restrictions. Id. at *7. The Court opined that Hughes was entitled to testify that, based on his medical training, it was appropriate for an employer to take certain actions with respect to requests for additional information. Id. Additionally, the Court stated that it would consider providing a limiting instruction, clarifying that Hughes was not an expert in the ADA, and that “reasonable” could have different meanings in different contexts. Id. at *7-8. Further, the Court held that Hughes was qualified to act as an expert, and that his testimony was likely to assist the jury. Id. at *7. Accordingly, the Court denied the EEOC’s motion.

EEOC v. Western Trading Co., 2013 U.S. Dist. LEXIS 86788 (D. Colo. June 20, 2013). The EEOC brought an action against Defendant alleging claims for disability discrimination against Tyler Riley, its ex-employee, as well as failure to accommodate, and unlawful co-mingling of personnel and medical records, all in violation of the ADA. The jury returned a verdict in favor of the EEOC on the claim for disparate treatment and in favor of Defendant on the claims of failure to accommodate and failure to maintain separate medical records. Defendant moved to reduce the jury verdict in accordance with the statutory damages cap; at the same time, the EEOC moved for judgment as a matter of law on Defendant’s failure to mitigate defense, and for equitable relief. The Court granted Defendant’s motion, and partly granted and partly denied the EEOC’s motion. First, the Court noted that 42 U.S.C. § 1981a(b)(3) sets a damages cap for the combination of compensatory and punitive damages, and for an employer with between 14 and 101 employees, like Defendant, the cap is set at $50,000. Id. at *2. Because the EEOC was awarded $20,000 for compensatory damages and $65,000 for punitive damages, which exceeded the statutory cap, the Court reduced the verdict for damages, and granted Defendant’s motion. Second, prior to trial, the parties stipulated that Riley’s back pay for the relevant time period was $47,060, and in this stipulation, Defendant reserved the right to present evidence on failure to mitigate these back pay damages. During the conference on jury instructions, after all of the evidence had been presented at trial, the EEOC objected to the Court’s proposed instruction on mitigation of damages, arguing that Defendant had not presented sufficient evidence to warrant this instruction. The Court, however, overruled the objection, finding that Defendant had presented sufficient evidence as to mitigation by eliciting the testimony about Riley voluntarily quitting his temporary job. Thereafter, finding in the EEOC’s favor on the disparate treatment claim, the jury awarded $24,000 in back pay. The EEOC moved for judgment as a matter of law pursuant to Rule 50(b). Defendant argued that after he was terminated, Riley got a job cleaning stadiums at the rate of $7.50 per hour through an employment agency and that he voluntarily left this employment, which was sufficient evidence to permit the jury to reduce the amount of back pay. Riley was a full-time sales associate for Defendant, with a pay rate of $7.02 per hour plus benefits. The Court also noted that back pay is not cut-off when an employee voluntarily terminates employment that is not comparable to the employee’s former position. Although the hourly rate of pay was higher in cleaning stadiums, because of the irregularity of the hours, lack of benefits, and instability of the work, the Court opined that the stadium cleaning job was not comparable. Id. at *9-10. Thus, the Court held that Defendant failed to present sufficient evidence to support the jury’s reduction of the back pay damages award. Accordingly, the Court granted the EEOC’s motion, vacated the jury’s damages award, and awarded $46,422 for back pay. Id. at
After the EEOC filed a motion for equitable relief, the parties reached an agreement on a consent decree, and the Court entered it. The parties agreed that the consent decree mooted the request for injunctive relief and thus the sole issue remaining was whether to award pre-judgment interest and, if so, at what rate. The Court noted that awarding pre-judgment interest would be compensatory rather than punitive, and would simply put Riley in the position he would have been but for the wrongful termination, and that damages for back pay were simply the money that Riley would have earned had he not been unlawfully terminated. The Court observed that pre-judgment interest should normally be awarded on successful federal claims. Thus, applying a 3.18% interest rate to the back pay award of $46,422, the Court awarded pre-judgment interest of $5,818. *Id.* at *11-16.*

**Eleventh Circuit**

**EEOC v. HomeNurse, Inc., 2013 U.S. Dist. LEXIS 147686 (N.D. Ga. Sept. 30, 2013).** This action related to the EEOC’s investigation of a charge alleging discrimination based on race, age, disability, and genetic information, as well as retaliation. According to claimant, she was fired when she complained about her employer’s allegedly discriminatory pre-hire screening practices. *Id.* at *2.* According to Defendant, claimant was fired because she posted confidential patient information on her Facebook page. *Id.* at *6.* Claimant’s charge alleged class-wide discrimination by the employer against individuals with disabilities, individuals 40 and over, individuals with pre-existing genetic conditions, and African-Americans. Claimant, however, did not fall within any of these protected categories. *Id.* at *3.* In particular, “[j]t [was] undisputed that [the claimant] is not disabled, is under age 40, has no pre-existing genetic conditions, and is Caucasian.” *Id.* Instead of seeking information by way of requests for information, the EEOC launched its charge investigation—in the Court’s words—by “conducting a raid on [the employer’s] office ‘as if it were the FBI executing a criminal search warrant.’” *Id.* at *3-4.* According to Defendant, the EEOC “showed up unannounced [at the employer’s workplace] with subpoenas in hand, intimidated the staff of [the employer’s] small office, and began rifling through [the employer’s] confidential personnel and patient files” and allegedly confiscated certain documents. *Id.* at *4.* Over the next year and a half, the EEOC continued to pursue tactics that the Court held “constitut[e]d a misuse of [the EEOC’s] authority” including “failure to follow its own regulations, its foot-dragging, its errors in communication which caused unnecessary expense for [the subpoenaed employer], its demand for access to documents already in its possession, and its dogged pursuit of an investigation where it had no aggrieved person…. .” *Id.* at *44.* Further, the EEOC sought irrelevant, burdensome, and duplicative information, ignored the employer’s repeated requests to discuss the scope and relevance of the EEOC’s requests, and issued multiple subpoenas notwithstanding the employer’s on-going cooperation. Further, though the employer produced substantial responsive information and documents, the agency accused it of being obstructionist and blamed it for the agency’s own miscommunication. The EEOC eventually filed an application for enforcement of its administrative subpoena. While the Court acknowledged that it “must enforce a subpoena if (1) the administrative investigation is within the agency’s authority, (2) the agency’s demand is not too indefinite or overly burdensome, and (3) the information sought is reasonably relevant,” it held the EEOC failed to meet its burden as to all three factors. *Id.* at *27.* First, because claimant did not belong to the protected categories implicated by the class allegations, the EEOC did not have any authority to “investigate a generalized charge of discrimination that is untethered to any aggrieved person.” *Id.* at *33.* Second, noting the significant cost and disruption to the Defendant’s business to respond to the EEOC’s expansive requests, the Court held that the burden of complying with the subpoena would be disproportionate, especially given the Defendant’s size. Third, the Court held that Defendant had already provided relevant information and additional documents and information that the EEOC sought to compel were irrelevant. The Court thereby denied the EEOC’s application for enforcement of its administrative subpoena.

**EEOC v. Jacksonville Association Of Firefighters, 2013 U.S. Dist. LEXIS 47656 (M.D. Fla. Mar. 30, 2013).** The Department of Justice (“DOJ”) brought an action asserting that the City used a promotion process in certain years that resulted in a disparate impact upon black firefighters who sought promotions, and that the City continued to pursue discriminatory policies and practices in its promotion process. The DOJ claimed that these practices violated § 707 of Title VII and sought back pay for the affected firefighters
and an order enjoining the City from engaging in discriminatory employment practices against blacks in the referenced fire department ranks. Thereafter, the EEOC brought an action naming the City’s union as Defendant and sought damages under Title VII for the union’s alleged role in advocating for and negotiating in favor of an allegedly unlawful promotion process. Id. at *7-8. The union moved to dismiss the EEOC’s suit, and the EEOC moved to consolidate its action with the DOJ suit. Id. at *11. The Court denied both motions. Regarding the EEOC’s motion for consolidation, the Court observed that the EEOC’s claims were entirely dependent on a finding of unlawful disparate impact caused by the City’s promotion process, and although the EEOC sought to assess the disparate impact of the promotion process through consolidation of its suit with the DOJ suit, the Court opined that the EEOC’s statutory authority, which specifically precluded it from pursuing claims or taking any action against a government, prevented it from doing so. Id. at *15-18. Accordingly, the Court stayed the EEOC suit until the disparate impact issue was decided, and opined that the EEOC’s suit may not be consolidated with the DOJ suit.

**EEOC v. Joe Ryan Enterprises, Inc., 2013 U.S. Dist. LEXIS 44358 (M.D. Ala. Mar. 28, 2013).** The EEOC brought a pattern or practice action on behalf of Rhonda Brown and a class of similarly-situated employees, asserting claims of discrimination, harassment, and constructive discharge on the basis of sex in violation of Title VII. Brown had submitted a handwritten letter to the EEOC on January 12, 2010, alleging a sexually hostile work environment, and filed a formal charge of discrimination on February 2, 2010, alleging that she had been subjected to a sexually hostile work environment and constructive discharge. The EEOC moved for partial summary judgment on Defendant’s answer and counterclaim. The Court granted in part and denied in part the motion. First, Defendant claimed that some or all of the allegations in the EEOC’s amended complaint were time-barred because they were not filed timely. Id. at *8. The Court noted that the intent to file was clear in Brown’s January 12, 2010 letter, and consequently used it as the date to determine whether the allegations were time-barred. Id. at *11. The EEOC also sought damages for acts that occurred outside the limitations period, including acts that purportedly dated back to 2005. The Court observed that the continuing violation doctrine allows a Plaintiff to file a claim alleging discrimination which took place over 180 days earlier where the discriminatory act was part of a continuing violation of Title VII that continues beyond 180 days prior to filing the complaint. Id. at *12. The Court, however, noted that there was a genuine dispute of material fact as to whether there was a substantial nexus between the alleged discriminatory acts that occurred prior to and within the 180-day limitations period. Id. at *14. Further, Defendant contended that EEOC’s recovery was limited by the fact that Brown suffered no adverse employment action as a result of any alleged discrimination. Id. Defendant contended that Brown never complained about sexual harassment while employed and simply left work one day without providing any notice. Id. at *16. The Court noted that some evidence indicated that working conditions were not so intolerable that a reasonable person would have felt compelled to resign. Id. Accordingly, the Court noted that whether Brown was constructively discharged was best left to the jury. Id. Second, Defendant asserted that it exercised reasonable care to prevent and/or correct any unlawful or harassing behavior. Id. at *17. The Court opined that the Faragher/Ellerth affirmative defense, which turned on whether Brown suffered a tangible employment action, also depended on whether there was a constructive discharge, and also must be left for consideration by the jury. Id. Third, Defendant asserted that Brown’s claims were barred by the doctrines of laches and ratification, to the extent that she failed to report any allegedly unwelcomed conduct. Id. The Court was unaware of any authority to support the proposition that the defenses of laches and ratification applied in a sexual harassment/constructive discharge context, and accordingly granted the EEOC’s motion for partial summary judgment. Id. at *18-19. Fourth, Defendant argued that the EEOC was estopped from recovery due to Brown’s failure to exhaust employer-provided remedies. Id. at *19. The Court, however, remarked that Defendant had no written sexual harassment policy in place at any time during Brown’s employment, and thus, there were no employer-provided remedies in place for her to exhaust. Id. at *21. Finally, Defendant claimed that the EEOC was estopped from recovery due to Brown’s failure to mitigate damages by seeking and obtaining comparable employment after the alleged constructive discharge. Id. Brown testified that she sought employment from at least five different employers, and that she looked at want-ads in the newspaper at least once a week since being discharged. As a result, the Court denied Defendant’s affirmative defense because there was no evidence indicating that Brown refused a job offer.
**EEOC v. Southern Haulers, LLC, 2013 U.S. Dist. LEXIS 51538 (S.D. Ala. April 10, 2013).** The EEOC brought an action alleging that Defendant discriminated against African-American applicants at its Brewton, Alabama terminal and failed to hire them in violation of Title VII of the Civil Rights Act. According to the EEOC, two African-American truck drivers, Alfonzo Williams and Alton Kelly, spoke to Defendant’s Terminal Manager John Triezenberg hoping to apply for a job, but were told that there were no vacancies, and as a result, they were denied an opportunity to apply for the job. Both Williams and Kelly believed that they were denied an opportunity to apply because of their race, and Williams then intervened in the EEOC’s action. The EEOC also sought to represent a class of African-Americans. Defendant filed a motion for summary judgment, which the Court granted. At the very outset, Defendant contended that the EEOC failed to establish a *prima facie* case because it failed to establish that it was accepting applications or had truck driving positions available at the Brewton terminal at the times Williams and Kelly attempted to apply. The EEOC however, argued that it had met its burden because within a month after Kelly was informed that there were no vacancies, Defendant hired 34 truck drivers for all of its three facilities, including three drivers for the Brewton facility in early 2010. The Court, however, remarked that Williams and Kelly applied only for the Brewton facility, and not for all three terminal locations. In addition, the Court noted that the evidence demonstrated that no person either applied for employment, or was hired as a truck driver at the Brewton terminal between 2008, of whom two were African-American drivers, and the hiring of three drivers in early 2010. All the three drivers hired at Brewton terminal had submitted their applications within days before they were hired. *Id.* at *43. Accordingly, the Court concluded that there was no evidence to suggest that any application was taken or that any truck driver was hired at the Brewton terminal within even six months of the alleged inquiry made by Kelly seeking for a job. The EEOC also asserted that it established a *prima facie* case when it showed that the claimants did everything within their power to apply for employment. *Id.* at *45. The Court noted that in early 2009, Defendant had lost business and was not accepting job applications because it did not have any open positions. When Defendant acquired new business in early 2010, it could not be held liable for not hiring when there were no vacancies. Similarly, the Court found that Defendant could not be held liable for not offering the jobs to Williams and Kelly in 2010, when they never contacted Defendant about available truck driving positions after their initial inquiries in April 2009, and June 2009, respectively. Accordingly, the Court concluded that the EEOC failed to establish a *prima facie* case of discrimination. Because Defendant was not accepting any applications at the time when Williams and Kelly inquired for any vacancies, the Court concluded that Defendant had offered a legitimate, non-discriminatory reason for its action even assuming that the EEOC had proved its *prima facie* case. Finally, the Court concluded that EEOC failed to show that the reason for refusal to accept the applications was a pretext for discrimination, and granted Defendant’s motion for summary judgment.

(xii) District Of Columbia Circuit

No reported decisions.
IV. Significant Collective Action Rulings Under The Age Discrimination In Employment Act

Multiple-plaintiff age discrimination claims under the Age Discrimination in Employment Act (“ADEA”) are not governed by Rule 23. Instead, these claims are known as “collective actions,” and are governed by the litigation procedures in the Portal-to-Portal Act at 29 U.S.C. § 216(b). Courts and litigants commonly refer to these lawsuits as “§ 216(b) actions.”

Collective actions brought under the ADEA raise “opt-in” issues quite similar to those arising under the Fair Labor Standards Act (“FLSA”). In other words, class members (technically, “collective action” members, as class actions do not exist under the § 216(b) framework) do not become part of the litigation unless and until they affirmatively opt-in to the lawsuit (whereas under Rule 23, a class member must opt-out of the class action or otherwise will be bound by any judgment in the litigation).

The plaintiffs’ bar typically utilizes the FLSA’s two-step procedure under § 216(b) to obtain conditional certification of ADEA collective action claims. This approach, based upon the Tenth Circuit’s seminal decision in Thiessen, et al. v. General Electric Capital Corp., 267 F.3d 1095 (10th Cir. 2001), involves substituting “pattern or practice” claims for evidence of commonality and typicality. The pattern or practice vehicle by definition requires a higher threshold of proof, but plaintiffs have taken advantage of the more lenient step one process in the ADEA’s two-step procedure for certifying collective actions. In the “notice” or “conditional” certification stage, there is a lower threshold of proof than in cases brought under Rule 23, where Supreme Court decisional law requires a “rigorous analysis” of a plaintiff’s claims and evidence. Conditional certification under the ADEA authorizes plaintiffs to send class notices based on minimal evidentiary showings and enables them to gain leverage over employers who must then endure extensive discovery as plaintiffs seek to gather further proof of their claims.

A. Cases Certifying Or Refusing To Certify ADEA Collective Action Claims

(i) First Circuit
No reported decisions.

(ii) Second Circuit
No reported decisions.

(iii) Third Circuit
No reported decisions.

(iv) Fourth Circuit
No reported decisions.

(v) Fifth Circuit
No reported decisions.

(vi) Sixth Circuit
No reported decisions.

(vii) Seventh Circuit
No reported decisions.

(viii) Eighth Circuit
No reported decisions.
Ninth Circuit
No reported decisions.

Tenth Circuit
Roberts, et al. v. Target Corp., 2013 U.S. Dist. LEXIS 132431 (W.D. Okla. Sept. 17, 2013). Plaintiff, a former employee, brought a collective action under the ADEA on behalf of all terminated and constructively discharged employees who worked for Defendant who were 40 years of age and older as of the last date of discriminatory actions taken against them. Plaintiff also brought a state law claim pursuant to Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989). Subsequently, the Court dismissed the class action, constructive discharge, and Burk claims, and also denied Plaintiff’s motions to join additional party Plaintiffs, holding that the claims of all but three putative Plaintiffs were time-barred. The Court also determined that December 16, 2009 to October 12, 2010 was the relevant timeframe for this action, and that only putative Plaintiffs who were terminated during that timeframe would be able to take advantage of the single-filing exception to the exhaustion doctrine. Regarding the remaining three putative Plaintiffs, the Court found that Plaintiff failed to demonstrate that joinder was permissible. Thereafter, Plaintiff filed an amended complaint. The Court struck the additional Plaintiffs from the amended complaint, and dismissed Plaintiff’s request for class certification of her Burk claim, the constructive discharge claim, and her request for injunctive relief. Thus, the only remaining representative action was Plaintiff’s ADEA claim. Plaintiff then moved for conditional certification of a nationwide collective action of all former employees who worked for at least five years; who were terminated or constructively discharged; were 40 years of age or older when their employment ended; and whose employment ended between January 1, 2002 and October 12, 2010. The Court denied the motion. The Court noted that collective actions under the ADEA are authorized by 29 U.S.C. § 626(b), which explicitly borrows the opt-in class mechanism contained in the FLSA. Id. at *5. Further, the Court noted that an ad hoc approach should be used when determining whether putative Plaintiffs are similarly-situated, pursuant to which a Court requires nothing more than substantial allegations that the putative collective action members were together the victims of a single decision, policy, or plan. Id. at *6. The Court also stated that Plaintiff must present some evidence establishing a colorable basis that the putative collective action members were all the victims of a single decision, policy, or plan. Id. at *7. Further, the Court remarked that in a pattern or practice case Plaintiff has to demonstrate not only that a policy to discriminate exists, but also that unlawful discrimination is the employer’s regular procedure or policy because the ADEA prohibits discriminatory employment practices, not an abstract policy of discrimination. Id. at *8. The Court first addressed the timeframe at issue. Plaintiff asserted that because she alleged a continuing pattern or practice of discrimination, the statute of limitations was tolled as long as the practice continued. The Court observed that the continuing violation doctrine is not applicable to the discrete acts such as termination and hiring, the alleged discriminatory practices in this litigation. Id. at *11. Thus, the Court held that the continuing violation doctrine did not expand the statute of limitations in this case and that the relevant timeframe was December 16, 2009 to October 12, 2010. The Court also determined whether Plaintiff presented a colorable basis that the putative Plaintiffs were together victims of a single decision, policy, or plan during that timeframe. Much of Plaintiff’s evidence related to incidents that occurred from 2001 to 2004, more than a year before Plaintiff was hired and more than six years before she was terminated, and she did not present anything to link this testimony to the timeframe at issue here. The Court found that Plaintiff presented no evidence of a common denominator linking any of the alleged acts of discrimination in this case. Because there was nothing to connect the two instances of alleged discrimination, the Court found that certification of a collective action was not justified, and accordingly, denied Plaintiff’s motion.

Eleventh Circuit
No reported decisions.

District Of Columbia Circuit
No reported decisions.
B. Other Federal Rulings Affecting The Defense Of ADEA Collective Actions

Numerous federal courts issued rulings in ADEA collective actions in 2013 that affect § 216(b) certification issues. These rulings included procedural issues in ADEA collective actions; government regulation issues in ADEA litigation; adverse impact litigation issues; employee benefit plan litigation under the ADEA; arbitration of ADEA pattern or practice claims; public employee age discrimination litigation; and tolling in ADEA collective actions

(i) Procedural Issues In ADEA Collective Actions

Rodriguez, et al. v. Target Corp., 2013 U.S. Dist. LEXIS 178083 (D. Ariz. Dec. 19, 2013). Plaintiff filed a collective action alleging claims against Defendant for age discrimination and retaliation in violation of the Age Discrimination in Employment Act (“ADEA”). Plaintiff worked for Defendant for over 25 years until she was constructively discharged in 2011. Plaintiff alleged that she was constructively discharged through unwarranted discipline and negative performance evaluations, as well as suggestions that she should retire and threats that termination would cause her to lose her retirement benefits. Plaintiff further alleged that her treatment was part of a pattern or practice of age discrimination by Defendant as it attempted to rebrand itself with a more youthful image and force out older employees. Defendant sought leave to file a motion for summary judgment, and argued that its motion should be ruled upon prior to addressing Plaintiff’s motion for conditional certification. The Court agreed with Defendant, noting that Plaintiff “had not identified – and the Court had not discovered – a single case in which a Plaintiff who may not have suffered an adverse action may avoid early dismissal of a meritless claim by invoking a collection action claim.” Id. at *3. Defendant then filed its motion for summary judgment, arguing Plaintiff’s ADEA claim failed because she did not suffer an adverse employment action and her retaliation claims failed because she did not engage in protected activity. The Court noted that to establish a violation of the ADEA under the disparate treatment theory of liability, Plaintiff must establish that she was a member of a protected class (at least age 40), performed her job satisfactorily, and was discharged and was replaced by a substantially younger employee with equal or inferior qualifications. An employer may be liable for constructive discharge when it imposes intolerable working conditions that foreseeably would compel a reasonable employee to quit. In evaluating whether working conditions are intolerable, the Court applied an objective standard. In this case, Plaintiff alleged that she was constructively discharged because “she was questioned about when she was going to retire; her review score dropped; she was identified as needing attention; she was ‘bombarded’ with coachings; and she was threatened with a counseling.” Id. at *44. The Court found that the record did not support Plaintiff’s versions of events. Even construing the evidence in the light most favorable to Plaintiff, the only material facts presented by Plaintiff in support of her constructive discharge claim were that she received a series of coachings in two months, she received an evaluation score in April 2011 that was slightly lower than previous scores, and Plaintiff was called into a meeting at which she was told she was going to receive a step-two corrective action, i.e., counseling. The Court held that this chain of events, coupled with facts that support the conclusion that Plaintiff was not constructively discharged, did not rise to the level of intolerable discriminatory acts that would compel any reasonable person to quit. The Court therefore granted Defendant’s motion for summary judgment. Additionally, because the Court concluded that Plaintiff did not suffer an adverse employment action, it did not reach Defendants claim that Plaintiff did not engage in protected activity.

(ii) Government Regulation Issues In ADEA Litigation

Emory, et al. v. United Airlines, Inc., 720 F.3d 915 (D.C. Cir. 2013). Plaintiffs, a group of pilots over 60 years of age, brought an action against Defendants – the Federal Aviation Administration and an airline – challenging the constitutionality of 48 U.S.C. § 44729(e)(1)’s non-retroactivity provision as to an increased retirement age (the “Age 65 Rule”), the protection-for-compliance provision of § 44729(e)(2), and alleging discriminatory interpretations. First implemented in 1959, the FAA’s so-called Age 60 Rule barred any person 60 years of age or older from serving as pilot in flights conducted under Part 121 of the Federal Aviation Regulations. In 2006, the International Civil Aviation Organization (“ICAO”) revised the maximum age from 60 to 65 for certain pilots in international operations. The FAA subsequently announced that it would amend the Age 60 Rule; however, Congress preempted this rulemaking with the passage of the Fair
Treatment for Experienced Pilots Act ("FTEPA"), which abrogated the Age 60 Rule, and replaced it with the Age 65 Rule. Congress gave the Age 65 Rule prospective effect with just exceptions. A group of pilots filed an action in Adams v. United States, 786 F. Supp. 2d 67 (D.D.C. 2011), challenging the non-retroactivity and protection for compliance provisions as well as FAA’s implementation of them. Plaintiffs in this case, in contrast to Adams, supplemented their constitutional objections with a number of state and federal claims against Defendants, for advancing allegedly discriminatory interpretations of the non-retroactivity provision they knew or should have known to be incorrect. The Courts in both cases found in favor of Defendants, and Plaintiffs appealed the order, which was affirmed by the D.C. Circuit. In the Adams action, the Government defended the Act’s non-retroactivity by asserting a rational relationship to Congress’ concern for workplace harmony, which was a legitimate legislative concern under federal law. The D.C. Circuit noted that the air carriers hired new pilots in anticipation of Age 60 Rule remaining in effect, had Congress given FTEPA full retroactive effect, carriers might have reintroduced a significant number of over 60 pilots back into the workforce with full seniority. The D.C. Circuit noted that given the hierarchical nature in airline employment, the influx of senior pilots would have bumped less senior pilots and potentially caused some of the most junior to be fired. Id. at 922. Accordingly, the D.C. Circuit found that Congress did not act unreasonably or irrationally in tailoring the retroactive effect of its legislation to minimize the potential disruption to labor relations in the airline industry. Id. Therefore, the D.C. Circuit found that the District Court properly dismissed the equal protection, due process challenge. Plaintiffs in Adams contended that the law was an impermissible bill of attainder. The D.C. Circuit noted that a law is impermissible if it is applied with specificity, and imposes punishment. The D.C. Circuit found that there was nothing on record to show that Congress operated with animus because it conferred only a partial benefit to over-60 pilots. Id. at 925. To the contrary, the D.C. Circuit noted that the sponsors of the FTEPA supported senior pilots and even moved to expedite the legislation so fewer pilots approaching age 60 would find themselves on the opposite side of the retroactivity line. Id. Accordingly, the D.C. Circuit found no impropriety, and rejected the bill of attainder claim. Plaintiffs in Emory also suggested that the District Court erred when it interpreted the Age 60 Rule to mean Plaintiffs were removed from pilot status and were no longer permitted to serve as pilots upon turning 60. The D.C. Circuit rejected this argument because the District Court had found that Plaintiffs did not lose the pilot status, but the FTEPA’s non-retroactivity provision only affected an over-60 pilot that served as a required flight deck crew member. Id. at 927-28. Accordingly, the D.C. Circuit found that the non-retroactivity provision had been properly applied.

(iii) Adverse Impact Litigation Issues

Howe, et al. v. City Of Akron, 723 F.3d 651 (6th Cir. 2013). Plaintiffs, a group of firefighters, brought a class action alleging racial discrimination in the promotional examination process for the ranks of Lieutenant and Captain. A jury trial found that Defendant’s promotional process was discriminatory, and the District Court entered judgment in accordance with the jury verdict and granted a preliminary injunction requiring the automatic promotion of Plaintiffs. Defendant moved to suspend the District Court’s preliminary injunction, and the District Court denied the motion. On appeal, the Sixth Circuit affirmed. First, Defendant argued that Plaintiffs failed to show a substantial likelihood of the adverse impact finding being upheld; and even if there was substantial likelihood of success on the liability finding regarding disparate impact, Plaintiffs failed to show that each individual Plaintiff was entitled to promotion. Id. at 658. Defendants also argued that the District Court erred by permitting Plaintiffs to identify the promotional process in its entirety as a specific employment practice without requiring Plaintiffs to first show that the elements of the process were incapable of separation. Defendants asserted that the only employment practices identified by Plaintiffs were the promotional exams, which cannot be said to have had an adverse impact because comparing pass rates did not demonstrate disparate impact based on race or age. The Sixth Circuit stated that isolating the effects of the individual elements would have been harder if the “Rule of Three,” which required those with the top three scores to be considered for each promotion, had in fact influenced the promotion process such that lower-ranked candidates were promoted ahead of higher-ranked ones. Id. at 659. Candidates were promoted in perfect consistency with their rank-order, and the Sixth Circuit stated that Plaintiffs sufficiently identified a specific employment practice. Defendant further asserted that the District Court erred by permitting Plaintiffs to demonstrate adverse effect by applying the “four-fifths rule” to promotion rates instead of exam pass rates. Id. The Sixth Circuit observed that the
“four-fifths rule” could be used to demonstrate the adverse-effect element of a disparate impact claim, and that the rule instructs that a selection rate for any race, sex, or ethnic group which is less than four-fifths of the rate for the group with the highest rate be generally regarded as evidence of adverse impact. Id. Defendant claimed that its promotions were not rank-ordered due to the Rule of Three introducing a discretionary component and, even if they were, Plaintiffs produced no evidence of their scores being clustered at the lower end of the distribution. The Sixth Circuit, however, noted that all of the dozens of promotions made coincided exactly with the candidates’ places on the rank-ordered list, and stated that there was no need for Plaintiffs to demonstrate further evidence at the District Court level because the District Court permitted them to use promotion rates as a metric. Thus, the Sixth Circuit opined that all of the promoted Plaintiffs had demonstrated a substantial likelihood of success on the merits with regard to the adverse effect element of their disparate impact claims. The Sixth Circuit remarked that because Plaintiffs demonstrated a reasonable likelihood of promotion, there was a sufficient likelihood of success as to individual promotions to warrant a preliminary injunction. The Sixth Circuit observed that Plaintiffs showed that substantially delayed promotions would cause irreparable harm to their careers as firefighters. Defendant claimed that granting the preliminary injunction harmed other firefighters by reducing certain non-Plaintiff firefighters’ chances of promotion. Defendant asserted that granting the injunction harmed the public interest because it had not budgeted for all the resulting officer positions, but it did not quantify the amount of unnecessary funds spent. The District Court had pointed out that Defendant had saved a significant amount of money by filling vacancies with acting officers during this litigation; vacancies at the District Chief and Deputy Chief levels existed, so current Captains could be promoted to make room for Captain candidate Plaintiffs; and the current number of vacancies were a result of voluntary AFD choices. Based on the record, the Sixth Circuit concluded that Defendant also failed to show that ordering the promotions would negatively impact the public interest.

(iv) Employee Benefit Plan Litigation Under The ADEA

**Volpe, et al. v. Nassau County, 915 F. Supp. 2d 284 (E.D.N.Y. 2013).** Plaintiffs, a group of Police Communication Operators (“PCOs”) and Police Communication Operator Supervisors ("PCOSs"), brought a class action alleging that Defendants paid them wages lower than their female counterparts in violation of the Equal Pay Act and the New York Equal Pay Act ("NY EPA"). Defendants were Nassau County, the Police Department, and the Civil Service Commission also employed Fire Communication Technicians (“FCTs”) and Supervisors (“FCTSs”) who performed similar tasks as the PCOs and PCOSs. All FCTs and FCTSs were male employees. FCTs and FCTSs were ranked higher in pay grade than the PCOs and PCOSs, therefore, the Civil Service Commission equalized the pay grades by elevating the PCOs and PCOSs in 2005. Despite this, PCOs and PCOSs continued to be paid less than FCTs and FCTSs of comparable seniority. Id. at 289. In November 2005, a group of female PCOs and PCOSs initiated a class action in *Ebbert v. Nassau County* alleging discrimination on the basis of gender because of the disparity in pay in comparison with the FCTs and FCTSs. *Id.* Male PCOs and PCOSs did not intervene in the action. The *Ebbert* action settled for $7 million, and each female PCOs and PCOSs was awarded back pay and lump sum payments as a result of the settlement. *Id.* Plaintiffs alleged that the payment Defendants made to the *Ebbert* class made female PCOs and PCOSs higher paid than Plaintiffs. Defendants moved to dismiss the complaint, which the Court granted in part. Defendants first contended that Plaintiffs’ EPA claims were barred either by the two-year or three-year statute of limitations applicable to such cases because Plaintiffs would have known that their pay was not equal to that of FCTs and FCTSs in 2005. The Court disagreed with Defendants, finding that Plaintiffs’ EPA claims were premised on the disparity among the female and the male PCOs and PCOSs and not the FCTs and FCTSs. Accordingly, the Court ruled that the EPA claims were timely. *Id.* at 293. Defendants also moved to dismiss Plaintiffs’ EPA claims on the grounds that Plaintiffs failed to establish a prima facie case of wage discrimination because male and female PCOs and PCOSs of equal seniority were currently paid the same regular wages. The Court disagreed because the mere fact that an alleged discriminatory pay structure was the product of a voluntary settlement by an employer with other parties in a separate lawsuit, even with the Court’s approval, did not automatically immunize the employer from liability under the discrimination laws. *Id.* at 295. Defendants also moved to dismiss Plaintiffs’ § 1983 claim with respect to the County Defendants on the grounds that Plaintiffs’ claim was barred by the applicable statute of limitations, and Plaintiffs failed to
demonstrate that the alleged constitutional violation was caused by a policy or custom of the County. *Id.* at 296. Because Plaintiffs’ claim was brought within three years of the *Ebbert* settlement, the event that Plaintiffs alleged gave rise to their claim, the Court concluded that Plaintiffs’ § 1983 claim against the County was timely. *Id.* at 298. The Court noted that in support of their § 1983 claim, Plaintiffs alleged that the practices and policies of the County led to alleged intentional discrimination based upon gender in violation of § 1983. *Id.* Thus, the Court determined that these contentions were sufficient to allege a discriminatory policy that survived a motion to dismiss.

(v) **Arbitration Of ADEA Pattern Or Practice Claims**

*MacDonald, et al. v. Unisys Corp.*, 2013 U.S. Dist. LEXIS 82361 (E.D. Pa. June 12, 2013). Plaintiffs, a group of former employees, brought a collective action alleging violation of the Age Discrimination in Employment Act (“ADEA”). Defendant entered into an agreement with Hexaware Technologies, Inc. to outsource a portion of its internal IT functions. Defendant decided to terminate Plaintiffs and many other internal IT department employees who were immediately offered employment with Hexaware. Plaintiffs accepted Hexaware’s employment offers and entered into employment agreements with Hexaware that contained an arbitration clause. Defendant subsequently directed Hexaware to terminate Plaintiffs. Plaintiffs alleged that Defendant followed a two-step process of termination to terminate older workers from its workforce. Defendant moved to dismiss and compel arbitration. The Court denied Defendant’s motion. Defendant, a non-signatory to the employment agreements entered into between Hexaware and Plaintiffs, sought to enforce the arbitration clauses contained in agreements. Plaintiffs contended that arbitration could not be compelled because valid agreements to arbitrate did not exist between Plaintiffs and Hexaware and the terminations did not fall within the scope of the arbitration agreements. The Court noted that the language of the employment agreements mandated only arbitration of claims arising out of Plaintiffs’ employment with Hexaware and the terminations did not arise from Plaintiffs’ employment with Hexaware. Therefore, the Court denied Defendant’s motion with prejudice. *Id.* at *13. Plaintiffs alleged that Defendant further violated the ADEA when it directed Hexaware to terminate its employees. Plaintiffs disputed whether Defendant could enforce the arbitration provisions against Plaintiffs. Defendant argued that the arbitration provisions could be enforced because Defendant was the third-party beneficiary of the employment agreements and the doctrine of equitable estoppels would apply. Plaintiffs contended that state law governed a third-party beneficiary and equitable estoppel analysis whereas Defendant stated that third-party beneficiary was a matter of state law and equitable estoppel was a matter of federal common law. The Court found that state law governed the equitable estoppel and third-party beneficiary determinations. *Id.* at *17. Accordingly, the Court denied Defendant’s motion to dismiss and compel arbitration without prejudice to renew the motion under a summary judgment standard after relevant discovery had occurred.

(vi) **Public Employee Age Discrimination Litigation**

*Lerner, et al. v. Corbett*, 2013 U.S. Dist. LEXIS 136425 (M.D. Pa. Sept. 24, 2013). Plaintiffs, a group of Pennsylvania state court judges, brought an action alleging that Article V, § 16 of the Pennsylvania Constitution violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the U.S. Constitution. Under Article V, § 16 justices, judges and justices of the peace shall be retired on the last day of the calendar year in which they attain the age of 70 years. *Id.* at *2. Thus, Plaintiffs would be required to retire before the completion of their respective elected terms due to the passage of their 70th birthdays. Defendants moved to dismiss Plaintiffs’ complaint, and the Court granted the motion. First, Defendants asserted that rational basis review applied to the equal protection inquiry, explaining that age was not a suspect classification. Defendants also argued that there was no fundamental right to governmental employment nor to judicial appointments. The Court agreed with Defendants that classifications based on age are examined under the rational basis standard and also that legislation restricting available employment opportunities does not burden a fundamental right. *Id.* at *9. Thus, the Court opined that review of Article V, § 16(b) for its rational relation to a legitimate governmental purpose was appropriate. The Court noted that the Third Circuit previously had upheld the Pennsylvania constitutional provision challenged as consistent with the Equal Protection Clause. *Id.* at *10. The Court
observed that the Third Circuit had cited reference materials prepared for the delegates to the Pennsylvania Constitutional Convention of 1967-68, which indicated that the compulsory retirement provision was purposed to reduce court congestion by increasing the number of jurists; eliminate the unpleasant task of individually removing aged and disabled judges; prevent the harm caused by those few judges who become senile; and accord with the trend of imposing retirement in other public and private employment contexts. Id. The Third Circuit had ruled that the stated aims were legitimate and rationally related to the mandatory retirement age. Id. Similarly, the Supreme Court in *Gregory v. Ashcroft*, 501 U.S. 473 (1991), upheld a Missouri constitutional provision requiring judges to retire at age 70 against an equal protection challenge. Plaintiffs, however, argued that the Supreme Court’s recent application of the rational basis test in *United States v. Windsor*, U.S., 133 S. Ct. 2675 (2013), required that a law’s legitimate purpose be weighed against its improper purpose and effects. Id. at *12-13. Further, Plaintiffs contended that the passage of time since § 16(b) first was enacted had eroded any possible justification for compulsory retirement. The Court observed that *Windsor* did not utilize a balancing test in its equal protection inquiry. Id. at *14. Rather, in considering the constitutionality of § 3 of the Defense of Marriage Act (“DOMA”), the Supreme Court determined that no legitimate purpose supported the statute’s classification based on sexual orientation, which would vitiate the need for any further review. Id. at *14-15. The Court also remarked that it was unclear whether consideration of changed circumstances was appropriate to an equal protection inquiry. Here, Plaintiffs were challenging a provision which was not merely the result of legislative action, but a state constitutional provision approved by the voters of the Commonwealth. The Court reasoned that such provision reflected both the considered judgment of the state legislature that proposed it and that of the citizens of Pennsylvania who voted for it. Thus, the Court opined that requiring retirement at age 70 did not represent an irrational means of seeking to ensure a well-functioning state judiciary. Id. at *16. Second, regarding the due process issue, Defendants argued that the right to hold judicial office, as defined by Pennsylvania constitutional law, specifically excludes a right to continue in office past the mandatory retirement age. The Court agreed with Defendants that a Pennsylvania judge’s property interest in his or her employment is expressly limited by the condition, embedded in the state Constitution, he or she be retired upon reaching age 70, precluding any claim based on procedural due process. Id. at *18. Accordingly, the Court granted Defendants’ motion to dismiss.

Sadie, et al. v. City Of Cleveland, 718 F.3d 596 (6th Cir. 2013). Plaintiffs, a group of former police officers, brought a class action alleging violations of state and federal age discrimination statutes as well as the equal protection clause of the Fourteenth Amendment. Members of the Police Department had been allowed to request extensions of service under prior versions of § 135.07(a) of the Cleveland Codified Ordinance. Before 2010, the Department had never refused a request provided that the person making the request passed an independent medical exam. Because the City faced a financial crisis, the Chief of Police, Michael McGrath, decided that all requests for extensions of service in 2010 would be denied. Plaintiffs’ requests for extension were thus denied, and they were forced into mandatory retirement. The City moved for summary judgment, and the District Court granted the motion. Id. at 198-99. On appeal, the Sixth Circuit affirmed. The Sixth Circuit noted that § 623(j) of the ADEA allows state and local governments to set mandatory retirement ages for firefighters and law enforcement officers. Id. at 599. Plaintiffs argued that the District Court misallocated the burden of proof in determining whether the City’s mandatory retirement ordinance was a subterfuge to evade the purposes of the ADEA. Id. at 600. The City established that Chief McGrath decided to force the mandatory retirement of all police officers over the age of 65 because the lay-off and demotion of officers created a need for promoted and non-promoted officers that the Department could fill if it denied requests for extension of service. Both McGrath and Deputy Chief Timothy Hennessy testified that McGrath decided to deny all requests for an extension of service because there were police officers eligible for re-hire and promotion. The Sixth Circuit noted that the decision to deny all requests was in furtherance of the stated purpose of the retirement plan – the efficiency of the Department – and Plaintiffs did not put forth any evidence suggesting that the plan existed for some reason other than its stated purpose. Thus, the Sixth Court reasoned that even if the District Court incorrectly placed the burden of proof on Plaintiffs, the City had met its burden in establishing that the retirement plan was not a subterfuge for evading the purposes of the ADEA. Id. Although Plaintiffs argued that the City forced the retirees into retirement due to a discriminatory animus toward older police officers,
the Sixth Circuit observed that the ADEA allows state and local governments to terminate police and fire officers on the basis of their age pursuant to mandatory retirement provisions. Id. at 600-01. Finally, although Plaintiff argued that their forced retirements violated the equal protection clause of the Fourteenth Amendment, the Sixth Circuit opined that the decision not to extend the service of its officers over 65 years old was rationally related to the legitimate purpose of addressing budget concerns. Accordingly, the Sixth Circuit affirmed the order granting Defendants summary judgment. Id. at 602.

(vii) Tolling In ADEA Collective Actions

Apsley, et al. v. Boeing Co., 2013 U.S. Dist. LEXIS 172613 (D. Kan. Dec. 9, 2013). Plaintiffs brought a collective action alleging that Defendants Boeing Co. and Spirit Aerosystems, Inc. unlawfully terminated older workers in violation of the ADEA. The Court granted Plaintiffs’ motion for conditional certification, but later granted summary judgment in favor of Defendants with respect to Plaintiffs’ collective ADEA disparate impact and pattern or practice claims. Plaintiffs still had individual ADEA disparate treatment claims pending. Subsequently, Plaintiffs moved to seek determinations regarding: (i) whether the single-file rule excuses opt-in Plaintiffs from individually exhausting administrative remedies; and (ii) whether an ADEA collective action tolled the deadlines for Plaintiffs to file an administrative charge or lawsuit. Id. at *6. With respect to the tolling period, the Court observed the Supreme Court’s holding in American Pipe & Construction v. Utah, 414 U.S. 538, 560 (1974), that the tolling period ceases when a Court issues an order decertifying a class because the underlying policy of tolling – to preserve judicial economy in class actions – is no longer relevant. Id. at *9. In this case, Plaintiffs argued that the tolling period remained in effect because the Court never formally entered an order decertifying the collective action, but instead shattered the collective action by granting summary judgment on all collective action claims. In response, Defendants contended that the tolling period expired when the Court granted summary judgment on all collective action claims. Id. The Court observed that while American Pipe held that the tolling period expired upon decertification, its progeny focused less on decertification and instead emphasized the point in time when tolling no longer served the purposes of class treatment under Rule 23. Id. at *9-10. The Court agreed that the “true heart” of the tolling doctrine is to promote judicial efficiency achieved through class treatment under Rule 23. Id. at *12. Thus, the Court noted that Plaintiffs could no longer reasonably rely upon the collective action to obtain relief when the Court entered summary judgment on their claims. Id. Therefore, the Court held that tolling expired when the Court granted summary judgment on Plaintiffs’ ADEA claims. Id. With respect to the single-filing rule, the Court noted that the Tenth Circuit had not directly addressed whether opt-in Plaintiffs may utilize the single-filing rule after the Court has dismissed all collective action claims, but noted that the Third Circuit had addressed the issue in Ruehl v. Viacom, Inc., 500 F.3d 375 (3d Cir. 2007). The Court observed that in Ruehl, a Plaintiff asserted individual claims after decertification of an original class. Plaintiff in Ruehl failed to file a timely EEOC charge, but sought to invoke the single-filing rule to “piggy-back” on the timely-filed charge of the former class representative. Id. at *13-14. The Court noted that the Third Circuit refused to extend the single-filing rule to an individual Plaintiff following class decertification because “the single filing rule is not available to former members of a collective action that is decertified because the Plaintiffs are not ‘similarly-situated.’” Id. at *14. The Court agreed with the Third Circuit’s reasoning and found that the underlying policy and benefits of a single-filing rule were exhausted when the Court destroyed the collective action by granting summary judgment on Plaintiffs’ claims. Id. at *14-15. Therefore, the Court held that because a collective action no longer existed, Plaintiffs could not invoke the single-filing rule. Id. at *15. Accordingly, the Court denied Plaintiffs’ motion.

Barghout, et al. v. Bayer Healthcare Pharmaceuticals, Case No. 11-CV-01576 (D.N.J. May 31, 2013). Plaintiffs, a group of employees, brought a collective action asserting an unequal pay claim. Plaintiff moved to toll the statute of limitations on the Equal Pay Act (“EPA”) claims of absent collective action members. The Court granted the motion. Plaintiffs argued that tolling the statute of limitations was appropriate because delays arising out of motion practice and the discovery process pushed back the timeframe in which absent collective action members might reasonably be expected to opt-in and preserve their claims. Plaintiffs had filed their class complaint on March 21, 2011 and Defendants had filed a motion to strike the collective action allegations on August 3, 2011, which the Court denied on March 30, 2012.
Further, the initial status conference occurred 15 months after Plaintiffs first filed their complaint. Thereafter, the parties had engaged in motion practice over the scope of discovery. Subsequently, due to delays in the discovery process, the Court reset the pre-certification fact discovery end date on numerous occasions to October 28, 2013. *Id.* at 1-2. The Court stated that equitable tolling was a doctrine of fairness, and the mere passage of time associated with the taking of discovery would not give rise to the application of equitable tolling. Here, although the delay was not attributable to improper conduct on part of Defendant to actively mislead or hamper Plaintiffs’ ability to proceed at a quicker pace, the Court noted that such a finding was not necessary to find that equitable tolling was proper. The Court observed that although this was not a case where routine motion practice and the ordinary course of discovery slowed the matter’s progression, discovery disputes and procedural delays prolonged discovery in spite of Plaintiffs’ diligence in pursuing their claims and moving the matter forward. Because the unanticipated and significant procedural and discovery delays that hindered the prosecution of this action constituted extraordinary circumstances justifying equitable tolling, the Court granted Plaintiffs’ motion. *Id.* at 4-5.
V. Significant Collective Action Rulings Under The Fair Labor Standards Act

Fair Labor Standards Act (“FLSA”) collective action litigation continued at a rapid pace in 2013. FLSA collective actions were filed more frequently than all other types of workplace class actions.

Whereas in Title VII class actions the courts undertake a “rigorous analysis” required by U.S. Supreme Court decisional law for determining class-worthiness under Rule 23, courts have continued the trend of utilizing a two-step process for determining certification in FLSA collective action cases under 29 U.S.C. § 216(b). Under the first step of this approach, known as “notice” or “conditional” certification, courts generally impose a much lighter burden on plaintiffs to obtain conditional certification and to authorize a notice being sent to all putative collective action members. It is only at a second-stage proceeding, usually when considering a motion to decertify after discovery has been taken, that courts apply a more rigorous analysis of the evidence offered by plaintiffs.

Many courts in 2013 confronted the issue of whether the standards in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), applied to collective action certification issues under 29 U.S.C. § 216(b). The majority of courts thus far have concluded that Wal-Mart does not apply to § 216(b) issues.

Another prominent issue that saw significant litigation in 2013 is whether a case alleging violations of state wage & hour laws may simultaneously proceed in federal court as a Rule 23 class action alongside an FLSA collective action. Courts often are concerned about confusion that may result from class members receiving successive opt-in (collective action) and opt-out (class action) notices in such “hybrid” cases; whether or not a class action is a superior method for adjudicating state law wage & hour claims when such cases also include an FLSA claim covering the same conduct; and what effect a class member’s failure to opt-in to an FLSA collective action should have on his or her state law claim and the class as a whole.

A. Cases Certifying Or Refusing To Certify FLSA Collective Action Claims

(i) First Circuit

Martins, et al. v. 3PD, Inc., 2013 U.S. Dist. LEXIS 45753 (D. Mass. Mar. 28, 2013). Plaintiffs, a group of delivery drivers, brought a class action alleging that Defendant unlawfully shifted various business costs to its employees by classifying them as independent contractors in violation of Massachusetts state law. Count I of the complaint alleged unlawful employment classification, Count II alleged violations of the Massachusetts Wage Act, and Count III alleged unjust enrichment. Plaintiffs filed a motion for class certification, which the Court partially granted. Plaintiffs sought to certify a class of all individuals who performed delivery services as drivers for Defendant. At the very outset, the Court noted Defendant did not contest Rule 23(a)’s numerosity requirement. As to commonality, the Court noted that the putative class was composed of individuals who performed delivery services for Defendant, and the inquiry would be regarding whether the delivery services were in the usual course of Defendant’s business. The Court further observed that the Delivery Service Agreements governing the class members were nearly identical and the undisputed facts showed that Defendant systematically applied the same kinds of policies to each driver. Id. at *17. The Court remarked that this was precisely the kind of general policy contemplated by the Supreme Court in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011). Accordingly, the Court concluded that the commonality requirement was satisfied. Similarly, the Court found that the typicality and adequacy requirements were satisfied. As to the predominance requirement, the Court found that common questions predominated with respect to Count I. As to Counts II and III, the Court found that individual issues predominated regarding deductions and cost shifting. The Court explained that those individual issues were not limited to individual assessments of the measure of damages, but went directly to questions of liability. Id. at *24. The Court explained that to prove unjust enrichment, Plaintiffs must ultimately show a benefit conferred on another whose retention of the benefit at Plaintiff’s expense would be unconscionable. Id. Likewise, the Court explained that, to prevail on a Massachusetts Wage Act claim, Plaintiffs must show that Defendant made improper deductions from their pay. The Court found that no
common form of proof existed to prove those elements for the entire class. Accordingly, the Court granted Plaintiffs’ motion for class certification as to Count I, and denied it as to Counts II and III.

Perez, et al. v. Prime Steak House Restaurant Corp., 2013 U.S. Dist. LEXIS 115119 (D.P.R. Aug. 12, 2013). Plaintiffs, a group of restaurant workers, brought an action alleging that Defendant violated the FLSA by paying workers less than the minimum wage, withholding tips from service employees, failing to inform workers about the tip-credit provisions of the FLSA, and failing to pay overtime wages. Plaintiffs moved for conditional certification of a collective action consisting of all present and former restaurant workers from Prime Steak House Restaurant Corp. d/b/a Ruth’s Chris Steak House P.R., who worked overtime hours and/or who had participated in the tip-pool Defendant established. The Court granted the motion. In an attempt to establish that all restaurant workers were similarly-situated, Plaintiffs asserted that the restaurant worker positions were related to the serving of food or drinks to clients at Defendant’s restaurant. Further, Plaintiffs pled that it was Defendant’s policy that all these employees would work together as a team to better serve the clientele, and income earned by each position would rely partly on tips. The Court concluded that Defendant had a policy of participating in the tip-pool for operations, which would violate § 203(m) of the FLSA. Accordingly, the Court found that employees at Defendant’s restaurant were similarly-situated in relevant respects. Id. at *7. Further, the Court noted that Plaintiffs sought certification of a collective action that included all individuals employed in any tipped position by Defendant at any Puerto Rico location, rather than only those current or former employees at Plaintiffs’ individual workplace at the El San Juan Hotel. For a collective action to extend beyond the named Plaintiffs’ own work location, the Court noted that Plaintiffs must demonstrate that employees outside of the work location for which the employee had provided evidence were similarly affected by the employer’s policies. Id. at *7-8. The Court found that Plaintiffs’ amended complaint and supporting affidavits were entirely devoid of sufficient evidence to meet this standard. Accordingly, the evidence submitted did not support any conditional certification at Defendant’s locations outside of the Ruth’s Chris restaurant at the El San Juan Hotel. Regarding whether the similarly-situated employees were interested in joining the suit, the Court noted that in their amended complaint, Plaintiffs identified 18 servers and five runners who they claim either were or are currently included in Defendant’s tip-pool, but did not offer any evidence regarding their interest in joining the suit. Plaintiffs submitted two motions which included affidavits signed by eleven employees indicating that similarly-situated employees were interested in joining the suit. Id. at *11-12. Accordingly, the Court found that conditional certification was warranted for a collective action of all present and former restaurant workers from Prime Steak House Restaurant Corp. d/b/a Ruth’s Chris Steak House P.R., El at the San Juan Hotel, Puerto Rico location from April 13, 2009, to the present who worked overtime hours and/or who participated in Defendant’s tip-pool.

Raposo, et al. v. Garelick Farms, LLC, 2013 U.S. Dist. LEXIS 97475 (D. Mass. July 11, 2013). Plaintiffs, a group of former truck drivers, brought a class action alleging that Defendant failed to pay wages and had been unjustly enriched by its failure to pay proper wages in violation of state common law. Defendant operated facilities in Franklin and Lynn, Massachusetts. Plaintiffs were employed at the Franklin facility. Plaintiffs alleged that they were owed compensation for unpaid meal breaks, which they did not take in order to meet work requirements. Plaintiffs also claimed that even if drivers take their 30-minute break, the restrictions Defendant imposed on where and how such breaks must be taken rendered that time compensable. Plaintiffs moved for class certification of a class of all individuals who have worked as delivery drivers for Defendant in Massachusetts since September 27, 2005. The Court denied the motion. Plaintiffs argued that the Rule 23(a) commonality requirement was satisfied because Defendant had system-wide automatic deduction and break policies that applied to all class members. The Court stated that those policies were not system-wide because some of them applied only to one facility and hence to only some class members. The Court remarked that even if the policies were system-wide, the cases Plaintiffs cited for the proposition that commonality was satisfied where a lawsuit challenged a system-wide policy or implementation of a common scheme were decided prior to Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011). Id. at *9. Plaintiffs also claimed that Defendant's policy of automatically deducting 30 minutes of time from drivers’ timecards to account for mandatory unpaid meal breaks violated Massachusetts state law because Defendant knew or should have known that drivers were working during
those meal breaks based on XATANET, a program used by Defendant for tracking truck movements. The Court noted that deposition testimony indicated that not all drivers worked through their meal breaks and for drivers who did actually work through their breaks, the reasons for doing so vary from driver to driver and from day to day. Therefore, the Court concluded that the reason why drivers worked through breaks could not be answered on a class-wide basis. Further, the Court observed that Plaintiffs acknowledged that some drivers who worked through breaks were subsequently compensated for that time after notifying their supervisor. Thus, the question whether drivers were compensated for working through breaks could not be answered on a class-wide basis, and the proposed class could not satisfy the commonality requirement. Plaintiffs then asserted that, even when they did take meal breaks, the breaks were subject to restrictions that in effect convert those breaks into working time for which drivers must be compensated. The Court opined that meal breaks during which an employee was relieved of all work-related duties were not considered working time, and as such an employer was not required to compensate for that time. *Id. at *13. Plaintiffs pointed to Defendant’s practices to support their claim that their meals breaks were actually working time: (i) the request that drivers try to keep their vehicles within sight when parked for meals, and (ii) the expectation that drivers not go off route more than five to ten miles to take their breaks. The Court stated that the first policy did not apply to Plaintiffs’ proposed class because it was only in effect at the Franklin facility and was therefore not capable of class-wide resolution and the only policy shared by both facilities was the expectation that drivers would not go off route more than five or ten miles to take their breaks. The Court also observed that Plaintiffs had presented no evidence of an official policy requiring drivers to stay on their route except employee depositions and the answer to this inquiry required an individualized analysis, making the claim incapable of class-wide resolution. Accordingly, the Court denied Plaintiffs’ motion for class certification.

Schwann, et al. v. FedEx Ground Package Systems, Inc., 2013 U.S. Dist. LEXIS 46908 (D. Mass. April 1, 2013). Plaintiffs, a group of former FedEx drivers, brought an action alleging they were improperly classified as independent contractors in violation of Massachusetts law. The proposed class members were objectors from a settlement in Sheehan v. FedEx Ground Package Sys., Inc., Case No. 05-CV-10936 (D. Mass. May 6, 2005). Sheehan, which involved the same improper classification claim and sought the same remedies, was transferred by the Multidistrict Litigation (MDL) Panel to the U.S. District Court for the Northern District of Indiana, where it was consolidated for pre-trial purposes with a number of identical cases brought against FedEx. Plaintiffs’ motion for class certification was denied in Sheehan and the case was returned to the District Court of Massachusetts. Thereafter, the parties in Sheehan entered into a settlement agreement. After being advised of the settlement terms, 40 of the drivers chose not to participate and opted-out. The present action was then brought on behalf of the drivers who did not settle. Plaintiffs moved for class certification, and the Court denied the motion. Each putative class member, upon joining FedEx, signed an Operating Agreement, which specified that the signatory driver was to work as an independent contractor, and not as an employee of FedEx. Nevertheless, Plaintiffs claimed that FedEx retained and exercised nearly complete control over their daily activities, and pointed to provisions in the Operating Agreement, which specified the vehicle the driver was to use and its appearance; required the driver to wear a uniform with a prominent FedEx logo; established the driver’s rate of pay; and allowed FedEx to determine the minimum number of packages the driver had to handle on a daily basis. The Court noted that under Massachusetts General Laws Ch. 149, § 148B, a worker is deemed an employee unless the putative employer can show: (i) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; (ii) and the service is performed outside the usual course of the business of the employer; and (iii) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed. *Id. at *6. Plaintiffs argued that the second prong of the test could not be proved and relied on the restrictive provisions of the Operating Agreements and the purported evidence about FedEx’s business model. Because each driver signed an Operating Agreement as a prelude to beginning work for FedEx, Plaintiffs contended that common issues predominated. The Court noted that the first and third prong required individualized factual inquiries, and that regarding prong one, FedEx could only show that a driver was an independent contractor by proving that he or she was not only free from the company’s control under the Operating Agreement, but also was free in fact. Further,
the Court stated that prong three required FedEx to provide individualized evidence about each driver’s history of customary work apart from his or her duties with FedEx. The Court remarked that Plaintiffs' position that one could bypass the statutory test by making the classification decision based solely on common evidence directed to the second prong of § 48B, effectively presumed that the drivers were employees of FedEx. The Court reasoned that it was premature to reach such a conclusion without considering the test as a whole. The Court noted that there was no disagreement that the appropriateness of classification of Plaintiffs was the foundation of any eventual award of class action status and that the correctness of that determination would be made under the terms of § 148B. The Court, however, observed that Plaintiffs in effect were asking it to make a preemptive strike by concluding from the outset that FedEx’s independent contractor defense must inevitably fail. This, the Court opined, would not be a probe of the merits, but an adjudication that was not permitted at the class certification stage of Rule 23 litigation. Id. at *11. Accordingly, the Court denied the motion.

(ii) Second Circuit

_Ahmed, et al. v. T.J. Maxx Corp.,_ 2013 U.S. Dist. LEXIS 81942 (E.D.N.Y. June 8, 2013). Plaintiff, a former Assistant Store Manager (“ASM”), brought an action under the FLSA and the New York Labor Law, alleging that although ASMs spent the majority of their time performing non-exempt duties, they were labeled as exempt and denied overtime pay. The Magistrate Judge conditionally certified a class consisting of all ASMs employed from August of 2007 through the present. Defendants moved to set aside this decision per Rule 72 objections, and the Court granted the motion. The Magistrate Judge had found that Plaintiff presented evidence from ASMs working in New York and also from Joseph Paparrato, who worked in Connecticut. The Court, however, declined to conclude that this fact alone supported significantly expanding the geographical region at issue. Further, the Court stated that Paparrato’s deposition testimony did not corroborate Plaintiff’s claims; rather, he indicated that his responsibilities as an ASM included conducting interviews for new hires, contributing to decisions to terminate employees, and disciplining employees and scheduling; he also testified that he rarely performed non-managerial tasks. The Court stated that the argument that a Plaintiff need only show that he performed tasks in contravention of a common legal policy boils down to the proposition that any employee classified as exempt by a company that does business nationwide is entitled to bring a collective action for all employees of that business simply based on the employee’s testimony that he was required to perform non-exempt tasks. Id. at *36-37. The Court rejected this contention. Plaintiff’s primary evidence was his testimony, Andrea Casale’s testimony, and Marion Settle’s affidavit. However, only Plaintiff and Casale opted-in as Plaintiffs, and both worked exclusively in the New York metro tri-state area, while Settle worked in just two stores in Arkansas. Because the knowledge of all three of these ASMs was limited to their own personal experiences, most of which they attributed to their individual Store Managers, the Court stated that the existence of a _de facto_ illegal policy common as to all ASMs in more than 4,000 stores nationwide could not be presumed based only on allegations from three ASMs working in a handful of stores in the tri-state area and in Arkansas. Thus, the Court found that because there could be vast differences in the practices of individual stores across the country, conditional certification was not appropriate. Additionally, the Court observed that although evidence that a company had attempted to raise profits by decreasing the hours worked by hourly employees and transferring their job duties to management may establish a factual nexus among the potential Plaintiffs, Plaintiff’s theory was not supported by the evidence. Id. at *42. While the evidence revealed that Defendants reduced planned labor hours, the evidence also showed that each time they reduced planned labor hours, they also reduced planned sales. Thus, the Court stated that this indicated that Defendants’ goal was not to increase profits by reducing the labor hours of hourly employees and then transfer their non-managerial responsibilities to ASMs; instead, the evidence suggested that Defendants’ labor demands simply corresponded with Defendants’ planned sales. Accordingly, the Court concluded that the decision of the Magistrate Judge was erroneous.

CSAs work overtime, preventing CSAs from recording their overtime hours, and from receiving compensation for overtime actually worked. Plaintiffs moved for conditional certification of the FLSA action and the Court granted Plaintiffs’ motion. Three Plaintiffs, five opt-in Plaintiffs, and three declarants each alleged that he or she was employed as a CSA, a position that is not exempt from the FLSA’s overtime pay provisions, and was not always compensated for overtime work. These 11 individuals worked in nine states and 13 branches; nine of them asserted that they witnessed or had knowledge that other CSAs at either their Morgan Stanley branches or at others worked more than 40 hours per week without being paid overtime. Plaintiffs also submitted evidence that CSAs generally had uniform duties and responsibilities. Further, Plaintiffs presented evidence that Morgan Stanley branch managers and supervisors knew that CSAs were working overtime hours but nonetheless told them to not record those hours, except in particular circumstances and with pre-approval; altered time records that reflected overtime; demanded that CSAs who submitted timesheets reflecting overtime change those timesheets; and/or pressured CSAs to discourage them from asking for overtime. The Court observed that such allegations were sufficient at the conditional certification stage, particularly because Plaintiffs need not show that all managers nationwide acted in lockstep in order to make a modest factual showing that they were subject to a common policy or practice. Id. at *20-21. The Court also remarked that the mere fact that Defendant had paid a significant sum in overtime to CSAs was not dispositive or even relevant at the conditional certification stage. Id. at *25. The Court determined that Plaintiffs demonstrated a common de facto policy or practice. Because Plaintiffs satisfied their minimal burden, the Court stated that they could disseminate notice to other potentially similarly-situated members of the putative class. The Court ordered Defendants to produce a list, in electronic format, of the names, e-mail addresses, work locations, and dates of employment of all persons employed by Defendants as CSAs in the last three years, exclusive of CSAs who work or worked in California. The Court, however, stated that Defendants need not post notice and consent forms at the work locations of potential collective action members. Accordingly, the Court granted Plaintiffs’ motion for conditional certification under 29 U.S.C. § 216(b).

Boutros, et al. v. JTC Painting And Decorating Corp., 2013 U.S. Dist. LEXIS 86878 (S.D.N.Y. June 19, 2013). Plaintiffs, a group of painters, brought a class and collective action under the FLSA and the New York Labor Law (“NYLL”) seeking overtime pay. Plaintiffs alleged that they were paid straight time wages instead of overtime and that Defendants would regularly pay Plaintiffs a payroll check for the first 35 hours worked in a week and in cash or with a non-payroll check for hours in excess of 35 hours per week. Plaintiffs repeated these allegations in their declarations, stating that they were paid the overtime rate only when they worked on public works projects, or when a shop steward from the union was present. Plaintiffs also stated that their lawyers showed them payroll records Defendant provided, and that those records consistently and extensively understated how many hours each Plaintiff worked every week. Further, Plaintiffs testified that they worked with dozens of other painters who did substantially the same work and who had the same terms and conditions of employment, and faced similar overtime payment issues. Plaintiffs moved for conditional certification of FLSA collective action with regard to their overtime claims. The Court denied the motion. The Court noted that Plaintiffs must sufficiently allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours. Id. at *9. The Court reasoned that Plaintiffs’ claims were akin to vague, conclusory pleadings, and Plaintiffs only stated that they regularly worked in excess of 40 hours per week but were paid only straight time wages for that work. Because there was no reference to any particular week in which either Plaintiff worked more than 40 hours, the Court opined that Plaintiffs’ pleadings lacked sufficient particularity to state a plausible FLSA claim. Further, Plaintiffs’ declarations reasserted that they regularly worked more than 40 hours a week but were rarely paid the time-and-a-half overtime rate. The Court remarked that this lack of specificity persisted even though Plaintiffs asserted that they had reviewed Defendant’s payroll records. Rather than setting forth examples of inaccuracies in these records, Plaintiffs simply stated that the records consistently and extensively understated how many hours they worked each week. Thus, because of the deficient pleading, the Court denied Plaintiffs’ motion for conditional certification without prejudice, and because Plaintiffs’ complaint lacked specificity, the Court dismissed Plaintiffs’ overtime claims without prejudice.
Plaintiffs, a group of tipped servers and bartenders (“tipped employees”), brought an action alleging that Defendants violated the FLSA and NYLL by failing to pay them the full minimum wage rate, pay for all hours worked, and pay them overtime wages. Plaintiffs moved for conditional certification of a collective action. The Court granted Plaintiffs’ motion. The Court found that Plaintiffs met their burden establishing common practices and FLSA violations. Defendants required tipped employees to spend at least 20% of their shift engaged in non-tipped side work. Plaintiffs claimed that although they spent a substantial amount of time performing opening and closing side work duties, Defendants failed to pay them for that time at the full minimum wage rate. Id. at *14. Plaintiffs also asserted that Defendants failed to monitor the amount of time tipped employees spent performing side work at the opening and close of each service, thereby perpetrating a common policy of permitting side work to exceed 20% of their shifts. Id. at *15. In an attempt to defeat Plaintiffs’ claim, Defendants submitted a number of declarations from tipped employees which claimed that they never performed non-tipped side work in excess of 20% of their shift. Defendants also contended that individualized differences among tipped employees’ side work performance would make it impossible for Plaintiffs to show common proof. The Court noted that Plaintiffs had adduced substantial evidence showing that Defendants adhered to certain side work practices and Defendant centrally controlled the side work performed. Id. at *33-34. Defendant personally selected certified trainers to oversee the training of tipped employees in its side work practices and it made occasional brand-wide changes to its side work specifications. Id. at *34. Although Plaintiffs’ evidence also indicated that there was substantial overlap in the type of side work performed by tipped employees, the Court found that Plaintiffs had submitted ample deposition testimony in support of their argument that Defendants’ side work practices resulted in a pattern of similar FLSA violations. Id. at *34-35. The Court rejected Defendants’ competing declarations as they required it to evaluate credibility and determine the facts, which it found inappropriate at the certification stage. Id. at *36-37. Plaintiffs had also alleged that because employees who did not customarily and regularly receive tips shared in the tip pool, Defendants improperly took advantage of the tip credit and paid them less than minimum wage. Id. at *17. Defendants argued that Plaintiffs were not similarly-situated to putative collective action members with respect to the tip pool claim as Defendants did not have a common policy or practice regarding sharing tips. Id. at *39. The Court, however, was persuaded by evidence presented by Plaintiffs indicating that tip pools included silverware polishers and dishwashers in at least nine of Defendant’s locations. The evidence established that silverware polishers and/or dishwashers were tip-ineligible employees because they did not interact with customers as their primary responsibility was to clean flatware and glasses in the kitchen area, away from table service. Id. at *40. Defendants next claimed that Plaintiffs failed to establish that they and other tipped employees were victims of a common policy that required tipped employees to work off-the-clock. Plaintiffs asserted that Defendants failed to pay tipped employees for all the hours that they worked as Defendants’ time-keeping system (“DASH”) and safe and secure policy often resulted in tipped employees working off-the-clock. Defendants maintained that its time-recording and safe and secure policies were facially lawful and that Plaintiffs failed to establish common deviations that resulted in FLSA violations. Id. at *43. The Court found that Plaintiffs’ declarations had sufficiently established Defendants’ control over the time-keeping policies and procedures, and it was undisputed that all tipped employees were required to log-in to clock-in or out, request time-off, or access payroll information. Id. Plaintiffs presented significant evidence that established that managing partners had refused to adjust tipped employees’ scheduled shift or record overtime hours in the DASH systems. Id. at *44. The Court thus concluded that Plaintiffs met their minimal burden of establishing their claims and accordingly, authorized the distribution of proposed notice to all tipped employees of Defendants that would allow opt-in Plaintiffs to consent to join the collective action.

Colon, et al. v. Major Perry Street Corp., 2013 U.S. Dist. LEXIS 93021 (S.D.N.Y. July 2, 2013). Plaintiff, a former superintendent, brought an action under the FLSA and New York state laws alleging that Defendants willfully failed and refused to pay minimum wage and overtime compensation. Prior to being promoted to superintendent, Plaintiff worked as a handyman. Plaintiff alleged that as a superintendent, he worked between 78 and 93 hours per week, and did not receive any additional pay for overtime hours. Plaintiff further alleged that he was paid monthly instead of weekly, which resulted in his salary being...
reduced by an additional $2,000 below his $26,000 yearly salary. Plaintiff alleged that there were over 100 current and former superintendents, maintenance workers, and workers performing similar tasks and duties that were similarly-situated to him and who had been denied minimum wage and overtime compensation. Plaintiff moved for conditional certification of an FLSA collective action. The Court granted in part and denied in part Plaintiff’s motion. Plaintiff presented declarations from two employees, Gabriel Ortiz and Alen Balic, which advanced similar allegations that most of Defendants’ handymen and superintendents were immigrants with limited English-language skills. Ortiz, a superintendent, stated that he worked more than 50 hours each week performing his general maintenance responsibilities and no less than an additional 10 hours each week responding to calls from tenants. Ortiz asserted that he was paid $400 per week and given lodging in one of the buildings he helped maintain. Ortiz never received additional pay for work outside his official schedule and, even after complaining to a supervisor about the excessive workload, was never paid for the extra overtime hours. Balic, a superintendent, alleged that she regularly worked at least 70 hours a week, although her weekly hours varied depending on the tasks she needed to perform and the number of repairs she needed to make. Balic claimed that she was paid $600 per week, plus lodging, but that she rarely received all of $600 because Defendants regularly deducted from her wages for various reasons. Plaintiff alleged that superintendents must work substantially more than 40 hours per week to satisfy the obligations imposed on them by Defendants, that they were paid a flat salary no matter how many hours they worked, that they received accommodation from Defendants during their tenure, that this policy was coordinated and implemented by Defendants’ centralized management system, and that superintendents handled various apartment-related tasks that were not adequately covered by assistance from handymen. The Court found that these claims sufficiently satisfied the requirement of a modest factual showing that Plaintiffs and potential opt-ins together were victims of a common policy or plan that violated the law. Defendants asserted that superintendents in different buildings were not similarly-situated because they performed different tasks, as superintendents are required only to work 40 hour weeks and that the provision of lodging to the superintendents was meant to cover any emergency overtime. The Court, however, stated that the question before it was not whether Plaintiff and other superintendents were identical in all respects, but rather whether they were subjected to a common policy to deprive them of overtime pay when they worked more than 40 hours per week. Accordingly, the Court certified a collective action for superintendents. The Court, however, found that it was not proper to include the handymen in that collective action because the superintendents and handymen were not similarly-situated. The jobs involved different pay scales, different hours and tasks, different overtime policies, and different compensation schemes. The Court reasoned that there was no basis for concluding that these two groups were subject to the same policy or that they shared any sort of factual nexus.

**Cuevas, et al. v. Citizens Financial Group, Inc., 526 Fed. App’x 19 (2d Cir. 2013).** Plaintiff, on behalf of himself and similarly-situated Assistant Bank Managers (“ABM’s”), brought a putative class action alleging that Defendants had misclassified all ABMs as exempt in violation of the New York Labor Law’s overtime requirements. Subsequently, the District Court granted class certification of Plaintiffs’ proposed class comprised of all ABMs employed at Citizens Bank retail branches in New York during any workweek since December 1, 2004, who were paid a salary and classified by Defendants as exempt. Defendants then appealed, and argued that the District Court erred in deciding that Plaintiff satisfied Rule 23(a)(2)’s commonality requirement because the District Court failed to resolve factual disputes regarding the ABMs’ job duties. The Second Circuit observed that although the Plaintiff had submitted policy documents and job descriptions that suggested the ABMs performed primarily the same duties company-wide, many of the declarations submitted to the District Court from the ABMs, bank managers, regional managers, and others suggested that the ABMs’ primary duties varied in material ways. *Id.* at 21. The Second Circuit noted that these factual disputes were relevant to the determination whether Plaintiff had presented a claim capable of class-wide resolution and must be resolved before a determination may be made that Plaintiff satisfied Rule 23(a)(2)’s commonality requirement. Thus, the Second Circuit held that the District Court failed to conduct a rigorous analysis, as required by the Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), whether Plaintiff presented a common question capable of class-wide resolution. *Id.* at 21-22. For the same reasons, the Second Circuit agreed with Defendants that the District Court erred in concluding Rule 23(b)(3)’s predominance requirement was satisfied. Reiterating its prior...
holding in *Myers v. Hertz Corporation*, 624 F.3d 537, 548 (2010), the Second Circuit stated that determining whether employees are exempt from overtime “should be resolved by examining the employees’ actual job characteristics and duties.” *Id.* at 22. Thus, the Second Circuit found that it was essential for the District Court to examine all of the evidence before it and resolve the disputed facts to determine whether the ABMs “actually share primary duties such that common issues predominate over individual ones.” *Id.* Accordingly, the Second Circuit vacated the District Court’s class certification decision and remanded for further consideration.


Plaintiffs, a group of tow-truck drivers, brought an action against Defendants under the FLSA and NYLL to recover hourly, overtime, and spread of hours wages allegedly due to them. Plaintiffs filed a motion for collective action certification under the FLSA and a motion for class certification as to their state law claims, and both parties filed motions for partial summary judgment. The Court certified the collective and class actions, and granted the motions for partial summary judgment in part. Defendants moved for summary judgment on Plaintiffs’ FLSA overtime claims on the grounds that they were exempt under the motor carrier exemption. The Court noted that the motor carrier exemption provides that the FLSA’s overtime provision shall not apply to any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours pursuant to 49 U.S.C. § 31502. *Id.* at *21. The exemption serves to prevent conflict between the FLSA and the Motor Carrier Act ("MCA"). Plaintiffs argued that Runway was not a motor carrier within the meaning of the MCA because a motor carrier refers to a person providing commercial motor vehicle transportation for compensation. Plaintiffs also challenged the applicability of the motor carrier exemption on the ground that their activities did not involve interstate transportation. The Court noted that the interstate transportation requirement was met where interstate travel constitutes a natural, integral, and inseparable part of an employee’s activities. The Court found that the record indicated that there was genuine dispute as to whether the activities of Runway’s employees involved interstate transportation. The Court reasoned that Defendants’ only evidence in support of the interstate transportation requirement was its own representation to Department of Transportation during the period it employed Plaintiffs that its operations involved intrastate transportation only. Accordingly, the Court found that the motor carrier exemption was inapplicable to Defendants and denied summary judgment to Defendants on Plaintiffs’ FLSA overtime claim. Plaintiffs moved for summary judgment on their overtime and minimum wage claims pursuant to the FLSA. The Court found that the record conclusively established that Defendants did not pay overtime compensation as required by the FLSA. It was undisputed that Plaintiffs were paid an hourly or daily rate, and that they worked over 40 hours in a week on more than one occasion. *Id.* at *52. Accordingly, the Court granted summary judgment on liability to each of the remaining Plaintiffs on the FLSA overtime claims, but denied their motion on their claims of retaliation, finding that there were genuine disputes of facts. Finally, Plaintiffs sought collective action certification. The Court noted that the record supported the certification of Plaintiffs’ putative class action as to the FLSA overtime claim. The Court explained that Plaintiffs shared similar factual and employment circumstances. The records indicated that Runway was a relatively small operation, and that a husband and wife almost exclusively managed payroll and employment practices. Defendants explicitly admitted to implementing an overtime policy based on 12-hour workday that paid standard $10, rather than a 40 hour workweek and one and one half times the regular rate in contravention of the FLSA. *Id.* at *63. Accordingly, the Court granted Plaintiffs’ motion for collective action certification.


Plaintiffs, working as financial specialists/personal bankers, brought a class and collective action against their employers, a group of retail banking corporations, under the FLSA, the New York Labor Law ("NYLL"), and the ERISA. Plaintiffs asserted that they were subjected to common policies that unlawfully denied them compensation, specifically including denial of pay for work in opening and closing bank branches, requirements to work through meal breaks without compensation, and requirements to perform off-the-clock marketing tasks. Plaintiffs moved for class certification. The Court found that Plaintiffs had failed to demonstrate a common policy concerning the unlawful compensation practices, and thus failed to make a factual showing that common issues predominated over individual ones. Accordingly, the Court had
denied Plaintiffs’ motion for conditional certification as a collective action under the FLSA and class certification of their New York Labor Law (“NYLL”) claims. Plaintiffs moved for reconsideration of the order and sought to certify an FLSA collective action and two NYLL classes consisting of certain employees who recorded breaks of 20 minutes or less in duration for which they were not paid regular wages and/or overtime compensation. Id. at *2-4. The Court also denied the new motion. The Court stated that the proposed classes were based on a theory of liability not raised in Plaintiffs’ previous motions and was not set forth in the complaint. Plaintiffs asserted that certification of the newly proposed class would be an appropriate exercise of the Court’s inherent power to oversee and manage a class action. The Court noted that Plaintiffs sought certification for an entirely new claim on a national basis whereas, in their prior motion, they sought a collective action only on behalf of employees in the northeast region of Defendants’ branches. Id. at *5. Plaintiffs argued that the motion reflected a narrowing of their previously proposed class definitions and raised a new theory of liability on behalf of a national collective action. The Court held that a motion for reconsideration is not an appropriate vehicle for asserting this expansive new claim, and therefore, denied the motion. Id. at *6-7.


Plaintiffs, a group of financial specialists/personal bankers, brought an action against their employers, a group of retail banking corporations, for claims under the FLSA, the New York Labor Law (“NYLL”), and ERISA. Plaintiffs stated that in addition to customer service and marketing services, they were also required to open and close bank branches and work through meal breaks without compensation. Plaintiffs alleged that these responsibilities required them to work off-the-clock hours without receiving overtime pay. Further, that they were discouraged from reporting overtime and managers had authority to override time entries. Plaintiffs filed motion for class certification and preliminary certification of a collective action under the FLSA. The Court denied both the motions. Regarding, Plaintiffs’ Rule 23 motion for class certification of their NYLL claims, the Court found that Plaintiffs failed to establish commonality. The Court noted that nowhere in Plaintiffs’ papers did they cite a specific, concrete, management directive concerning Plaintiffs’ off-the-clock work or any purported requirement not to record hours worked. Id. at *16. Furthermore, the Court determined that Defendants had come forward with evidence that they repeatedly told personal bankers that they should record all time worked. Id. at *18. Under the rules of Defendants’ 2011 handbook, Plaintiffs were required to submit timely and accurate records of the hours worked and also take their meal breaks. The handbook forbade managers from denying overtime pay to employees and also forbade managers to permit employees to work off-the-clock. The Court reasoned that while these written policies did not foreclose the possibility of a de facto company policy to deny overtime or limit employees’ time entries, the record offered no significant proof of a general policy to deny such pay or limit such entries. Id. at *19. The Court noted that the evidence submitted by Plaintiffs had no direct application to their proposed class definitions. Further, the declarations submitted by Plaintiffs also contained significant factual gaps. Their value as proof of a common policy was limited because of the lack of detail concerning the underlying communications. Id. at *24. Specifically, the declarations included no dates of when these communications took place. Id. They identified none of the speakers or participants in these communications. Plaintiffs submitted no e-mails that purportedly limited overtime availability. Id. at *25. The declarations consisted largely of hearsay by declarants whose identities and status within Defendants’ hierarchy was not revealed beyond vague generalities. Specifically, with reference to the opening and closing procedures at bank branches, the Court found that common policy consisted mainly of security procedures and did not address compensation. With respect to meal breaks, the Court found that although the time records submitted by Plaintiffs reflected that employee schedules allotted times for meal breaks, they did not provide evidence that they worked through lunch without compensation. Finally, the evidence in respect of Plaintiffs’ marketing responsibilities was regarding employee expectations concerning business generation and did not speak about compensation issues. The Court therefore determined that Plaintiffs had failed to establish that the proposed NYLL class was denied overtime under a common policy. The Court also found that Plaintiffs also failed to establish predominance under Rule 23(b)(3). The Court observed that without meaningful evidence of a New York-wide policy, a determination of liability turned on highly individualized, employee-by-employee analysis of what they were told by management and how any time-recording practices were applied. Id. at *42. Regarding the conditional certification as
the FLSA collective action, the Court found that Plaintiffs failed to submit meaningful evidence of a policy directed specifically at the region for which Plaintiffs were seeking certification. Further, much of the evidence submitted fell outside of the relevant time period. The Court reiterated that Plaintiffs submitted no evidence that supported a formal or de facto compensation policy to deny overtime pay. The Court thus concluded that Plaintiffs had not made the modest factual showing that they and potential opt-in Plaintiffs together were victims of a common policy or plan that violated the law, and therefore denied Plaintiffs' motion for conditional certification under 29 U.S.C. § 216(b).


Plaintiffs, a group of permanent mortgage underwriters, brought a class and collective action alleging unlawful denial of overtime pay under the FLSA and the Connecticut Minimum Wage Act (“CMWA”). All mortgage underwriters had the same or similar duties, and while temporary mortgage underwriters received overtime compensation, Defendant classified permanent mortgage underwriters as exempt employees. The Court conditionally certified the FLSA collective action but denied Rule 23 class certification of the state law claims. First, regarding certification of the collective action under the FLSA, the Court noted that all putative collective action members shared a single job title and description and Defendant also asserted that all collective action members worked at a single facility. Moreover, nothing in the record implied that potential opt-in Plaintiffs were differently situated relative to the claim that Defendant’s policy unlawfully denied them overtime compensation. Further, the Court stated that Plaintiffs’ affidavits satisfied the modest factual showing based on their own observations that employees worked similar overtime. In the absence of any counter evidence, the Court opined that Plaintiffs’ affidavits, when added to the undisputed facts that all putative collective action members worked out of a single office and under a single job title and description, was enough to warrant conditional certification. Accordingly, the Court certified a collective action of all underwriters who worked out of Defendant’s Bridgeport office since May 3, 2009. As to certification of a class action, the Court noted that numerosity was not established. The Court observed that although numerosity could be presumed for a class of 40 or more, proposed classes between 21 and 40 fell within a grey area. Here, Plaintiffs’ proposed class included 31 to 35 members. The Court stated that number alone was not decisive because the ultimate question was the impracticability of joinder, for which a variety of additional factors should be considered, including judicial economy arising from the avoidance of a multiplicity of actions, geographic dispersion of class members, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief that would involve future class members. Id. at *12. The Court observed that the putative class members were not dispersed geographically, nor did they lack the resources or ability to pursue individual actions. By re-classifying all mortgage underwriters as non-exempt employees, Defendant had also foreclosed the need for injunctive relief. Further, although the class mechanism would allow other potential Plaintiffs a larger recovery of unpaid overtime, the Court remarked that the size of the recovery, did not, by itself, satisfy numerosity. The Court concluded that Plaintiffs were unable to point to a single factor that would make joinder inappropriate or unworkable for resolving other Plaintiffs’ related state law claims. The Court therefore denied class certification under Rule 23.


Plaintiffs, a group of stockbrokers, brought a class and collective action under the FLSA and the New York Labor Law (“NYLL”) alleging failure to pay minimum wage, overtime wages, payment in a timely manner in accordance with the terms of their employment, and improper wage deductions. Although Defendant required its stockbrokers to be licensed, there was no requirement that such employees have any specialized training or education. The stockbrokers’ workday entailed a minimum of 10 hours in the office on Monday through Thursday and seven and a half hours on Friday, although Defendant suggested longer hours. The stockbrokers regularly worked at least 50 hours per week. Defendant paid trainees approximately $300 per week, although it reserved the right to recover a portion of that money if a stockbroker left before generating sufficient revenue for the firm. Eventually, trainees became stockbrokers and were paid based on commissions, with no guarantee that they would earn at or above the minimum wage. Plaintiffs moved for conditional certification of their FLSA collective action, and the Court granted the motion. The Court noted that all stockbrokers had the same job requirements and duties. Although
stockbrokers did not need a college degree, they had to have Series 7 and Series 63 licenses and undergo significant on-the-job training as a cold-caller, during which time they worked for an established stockbroker. As stockbrokers, their daily activities included researching and pitching potential investments, executing trades, maintaining contact with existing clients, and cold-calling potential clients. Further, stockbrokers’ pay was based on commissions received from stock transactions for their clients, which were split with Defendant. Although stockbrokers were required to work set hours, there was no relationship between their hours and their compensation. Defendant also deducted a number of expenses from the commissions earned by stockbrokers, including various types of fees, postage, healthcare costs, and costs for purchasing leads on potential clients and the use of assistants. The Court opined that Plaintiffs satisfied their minimal burden of making a modest factual showing that they and other employees were victims of a common policy or plan, and accordingly granted the motion for conditional certification of the FLSA collective action.

Plaintiffs brought an action under the FLSA seeking unpaid wages alleging that although Defendants had a nationwide policy whereby its bartenders, servers, and food runners (collectively “Tipped Employees”) were required to work off-the-clock, some of the time they worked was not entered into the time-keeping system. Plaintiffs alleged that because Defendant’s strict company-wide labor scheduling system and staffing guidelines prohibited overtime work and monitored employees’ hours, Tipped Employees were forced to work off-the-clock to complete all the required tasks. Plaintiffs moved for conditional class certification of a nationwide class consisting of all current and former Tipped Employees who had worked for Defendant within the statutory period covered by the complaint. The Court granted the motion. Plaintiffs’ evidence showed that Defendant maintained uniform job descriptions as well as uniform task checklist for Tipped Employees throughout its restaurants, and that Defendant had a company-wide policy of prohibiting overtime work, a centralized time-keeping system and a uniform bonus policy that applied to all restaurant managers, which considered, among others, the restaurant’s labor costs. Defendant also utilized a centralized system of staffing all of its restaurants using the same software program and updating the staff plans on a quarterly basis at the level of its regional directors, rather than at the level of individual restaurants. Additionally, individual declarations and depositions of Plaintiffs and opt-in Plaintiffs covered the practice of off-the-clock work in eight different restaurants located in four different states. Thus, the Court found that the minimal factual burden to support conditional certification had been met. Defendant, however, argued that Plaintiffs’ proposed nationwide class was too large and diverse to be certified based on evidence from few restaurants. The Court noted that Plaintiffs’ declarations and depositions that covered at least eight store locations in four states was complemented by both documentary evidence and depositions that supported Plaintiffs’ contention of Defendant’s nationwide policy, and its centralized staffing and labor budget management system. Accordingly, the Court granted Plaintiffs’ motion for conditional certification under 29 U.S.C. § 216(b).

Hamadou, et al. v. Hess Corp., 915 F. Supp. 2d 651 (S.D.N.Y. 2013). Plaintiffs, a group of hourly employees, brought an action for unpaid wages, including for failure to pay overtime compensation under the FLSA and the New York Labor Law. The gas stations owned by Hess Corp. were split into two regions that were headed by a regional marketing representative (“RSM”). The gas stations were staffed by four to six hourly employees, and the station manager (“SM”) oversaw the daily operations, including scheduling, payroll, management, and merchandising. Plaintiffs alleged that the SMs regularly modified employees’ timesheets, reducing the number of hours worked to below 40 hours per week, depriving employees of any pay for overtime, and routinely required cashiers to work off-the-clock, without recording the time they worked and therefore denying them compensation. Plaintiffs moved for conditional certification of a putative class consisting of all hourly employees of Hess gas stations in New York, employed at any time in the last three years. The Court granted the motion in part. The Court noted that Plaintiffs made a sufficient showing that at the Queens Station, employees’ hours were consistently altered in the time-keeping system and that they were forced to work off-the-clock. Each Plaintiff submitted a declaration alleging that their manager, Defendant Mamadou Gueye, regularly engaged in such practices, and thus they did not receive pay for all of the hours they worked, including overtime pay. Defendant Hess admitted that Gueye did what
Plaintiffs alleged with respect to overtime hours, and Gueye’s declaration and the timesheets corroborated that in weeks where they worked over 40 hours, Gueye cut their recorded hours and they were not paid for any overtime. Further, Plaintiffs also made substantial allegations that this practice may have existed throughout the territory, not just at the Queens Station. All three Plaintiffs attested to the fact that Gueye told them his actions were company policy, and that the RSMs for his territory insisted he alter the time records. The Court observed that the declarations indicated that RSMs were responsible for ensuring that all stations in his or her territory adhered to lawful time-keeping policies. Plaintiffs made substantial allegations of unlawful time-keeping practices at the Bronx Station, which was in a different territory. Named Plaintiff Diallo Hamadou identified two employees of the Bronx Station who complained that their SM regularly altered their time records and forced them to work off-the-clock. Timesheets submitted by Plaintiffs reinforced these claims. The Court found that Plaintiffs’ submissions were also sufficient to infer that a common practice could have existed among the other stations in the same territory as the Bronx Station, and that employees at all stations in the territories encompassing the Bronx and Queens stations should be part of the collective action. The Court, however, remarked that Plaintiffs’ allegations were insufficient to merit state-wide certification. The Court observed that conditional certification of a state-wide class or a nationwide class must be denied where Plaintiffs alleged that a de facto unlawful policy exists, but have only presented facts pertinent to several locations in a particular region. Id. at 666. Nothing in the record suggested that similar failures in enforcing the company’s official policy to accurately record employees’ time existed in other territories, which were managed and supervised by different people. Defendants also submitted declarations from each of the RSMs in the state which averred that no such problems existed in other territories. The Court stated that although it would be inappropriate to rely on Defendants’ affidavits prior to the affiants’ availability for deposition, Plaintiffs had the opportunity to depose those RSMs, and Plaintiffs did not present any other evidence regarding time-keeping practices in areas outside of the Queens and Bronx territories. Accordingly, the Court conditionally certified the class of all hourly employees working at Hess gas stations limited to the two Hess-designated territories including the Queens and Bronx stations.

Hernandez, et al. v. NGM Management Group LLC d/b/a Bareburger Chelsea, 2013 U.S. Dist. LEXIS 150270 (S.D.N.Y. Oct. 18, 2013). Plaintiff brought an action on behalf of himself and all non-exempt tipped employees alleging that Defendant NGM Management Group d/b/a Bareburger Chelsea and certain individual Defendants failed to pay them the proper minimum wages under the FLSA and the New York Labor Law. Plaintiff was employed full-time as a delivery person at the Bareburger LaGuardia and was advised of similar work available at the franchise in Chelsea (“Bareburger Chelsea”). Thereafter, he obtained part-time employment at Bareburger Chelsea on his days off from Bareburger LaGuardia and was advised of similar work available at the franchise in Chelsea (“Bareburger Chelsea”). Plaintiff moved for conditional collective certification for a class of tipped employees of NGM Management Group LLC d/b/a Bareburger Chelsea. Id. at *1-2. The Court denied the motion. Plaintiff alleged that the other similarly-situated tipped employees at Bareburger Chelsea were required to engage in non-tipped duties exceeding 20% of their workday and did not receive proper wage statements reflecting the proper amount of tip credit or the required minimum wage. The Court stated that although such collective actions are favored under the law because they benefit the judicial system, an adequate factual basis for Plaintiff’s allegation should be established. The Court noted that Plaintiff had not submitted the name of even one employee to substantiate his contentions. Moreover, the Court observed that Plaintiff admitted in his deposition that he did not speak with any employees at Defendants’ facility either during or after his employment. Further, the Court opined that Plaintiff had not elaborated on how the 20% calculation of hours in his workdays that were spent on non-tipped duties was determined or how many employees he saw suffered from the same scheme or plan. Accordingly, the Court denied the motion because Plaintiff had failed to make the sufficient factual showing to justify conditional collective action certification. Id. at *5.

Ikikhueme, et al. v. CulinArt, Inc., 2013 U.S. Dist. LEXIS 77720 (S.D.N.Y. June 3, 2013). Plaintiff brought a wage & hour action under the FLSA and the New York Labor Law (“NYLL”). Plaintiff was employed in various food service capacities and at various locations, and asserted that as a Sous Chef at Teachers College, Columbia University, he was not paid overtime. Plaintiff also contended that he was
misclassified as exempt under the FLSA, and claimed that after he complained about the illegal pay practices, he was given false disciplinary write-ups and ultimately terminated. Plaintiff sought to represent a class comprised of Sous Chefs employed by CulinArt across all locations, and moved for preliminary certification of a collective action and approval of a collective action notice. The Court denied the motion. The Court observed that to warrant preliminary certification, Plaintiff need only make a modest factual showing that he and potential opt-in Plaintiffs together were victims of a common policy or plan that violated the law. *Id.* at *4-5. Here, Plaintiff’s claims arose out of his employment at a single location operated by CulinArt, i.e., the Teachers College, where he was the only Sous Chef, and the only affidavits filed in support of the motion for certification were from Plaintiff himself. Further, Plaintiff made no allegations either in his pleadings or affidavits regarding the responsibilities or pay practices of the Sous Chefs who preceded him or succeeded him at Teachers College. Plaintiff made only one statement regarding other Sous Chefs wherein he stated that it was his understanding that the other Sous Chefs had similar duties and responsibilities and also were not managers. The Court stated that such unsupported assertions could not satisfy Plaintiff’s burden at the preliminary certification stage. Thus, because there was no evidence regarding similarly-situated Sous Chefs, the Court denied Plaintiff’s motion for conditional certification of a collective action and approval of the proposed notice.

**Indergit, et al. v. Rite Aid Corp., 2013 U.S. Dist. LEXIS 138614 (S.D.N.Y. Sept. 26, 2013).** Plaintiff, on behalf of himself and others similarly-situated, brought an action alleging that Defendant failed to compensate its store managers (“SMs”) for overtime hours in violation of both the FLSA and the New York Labor Law (“NYLL”). The Court had earlier conditionally certified the FLSA collective action of SMs and approved Court-authorized notice. Defendant now moved to decertify the FLSA class, asserting that the discovery had revealed that Plaintiffs were not “similarly-situated” for purposes of the misclassification inquiry as well as opposed Plaintiff’s motion to certify a class of New York-based Plaintiffs pursuant to Rule 23. *Id.* at *8. The Court denied Defendant’s motion and granted Plaintiff’s motion as to liability. Although Defendant had classified all of its SMs as exempt employees under the FLSA, Plaintiffs alleged that they were repeatedly mandated to perform menial, non-exempt tasks without payment of overtime wages. *Id.* at *6. Plaintiffs claimed that their choices were carefully circumscribed by corporate policies and micro-managing of District Managers (“DMs”), regardless of store location, size, volume, staffing, or any other variables. *Id.* at *6-7. Defendants contended that the issue of whether its SMs were entitled to overtime, or by contrast, were properly classified as exempt workers under the executive, administrative, or combination exemption, was highly fact-specific and individualized, rendering class treatment inappropriate. *Id.* at *21. The Court disagreed. The Court noted the time the SMs claimed they spent of non-managerial, non-exempt task was generally consistent and included a similar mix of running the register, stocking shelves, unloading trucks, engaging in plan-o-grams, and general maintenance. *Id.* at *23-24. The vast majority of SMs had agreed that their role was to be “in charge” of their store, even when the demands of the store required multi-tasking, while concurrently performing non-exempt duties. *Id.* at *26. Defendant pointed to disparate accounts of the way in which the SM’s role was affected by store turnover, management styles, and the store’s type or location, contending that the differences revealed the individualized nature of the exemption inquiry. *Id.* at *31-32. The Court, however, found that a closer look at the divergent statements revealed that the difference among SMs were marginal and expected, rather than individualized and unpredictable. *Id.* at *32. The differences among stores as related to their turnover were only relevant insofar as they affected the relevant classification of SMs as exempt workers. The Court specifically noted that the fact that some associates required more training than others did not alter the fundamental mix of similar duties in which SMs engaged and thus did not render the class dissimilar. *Id.* at *33-34. Further, the testimony involving SMs’ various management and work styles did not reflect a difference in primary duties, the authority, or discretion SMs were able to exercise on a given workday, or the supervisory duties of SMs. *Id.* at *34. Defendants’ reference to testimony suggesting that the duties of SMs varied based on season, location, store volume and store type did not go to the heart of the SMs’ duties. The Court explained that the fact that off-loading a truck might take a different amount of time depending on the size of the load or the season did not render a SM’s primary duty non-managerial at times and managerial at others. *Id.* at *36-37. The testimony regarding the SMs’ role in terminating employees also reflected consistency. The SMs, as a general rule, required DM approval before terminating employees, and the
asserted “differences” between terminations in union versus non-union stores, existed only at the margins. Id. *45-46. The Court concluded that variations in the testimony revealed after discovery did not require decertification of the SMs’ FLSA claim. As to certification of the class of New York-based SMs, the Court granted Plaintiff’s motion for purposes of liability only. Plaintiffs had submitted evidence that all the SMs in the putative class performed similar duties and had meaningful discretion in hiring, firing, disciplining, allocation of labor budgets, scheduling, and merchandise ordering. Id. at *68-70. The Court thus found that the answers to the common questions relevant to the misclassification inquiry appeared to be largely similar. Defendant argued that there could be no company policy of misclassification as SMs received starkly disparate training, and the business decision to re-classify some SMs as exempt and others as non-exempt revealed the ill-suited nature of Plaintiff’s claims for class certification and treatment. Id. at *90. The Court, however, noted that the record evidence revealed that in areas relevant to the misclassification inquiry, their approaches to the job were remarkably consistent. Id. According to the Court, Defendant’s business decision to re-classify some SMs as exempt did not automatically convert the putative class’ claims into those only resolvable at the individual level. Id. at *91. The Court therefore concluded that common questions predominated and the class action was the superior method for resolving the dispute at issue. Plaintiff, however, failed to offer a sufficient explanation or an approach for calculating damages which would be capable of class-wide proof. Because such a failure was not fatal to the class as bifurcation was possible, the Court certified a class as to liability only, and held that Plaintiff could move to certify the class as to damages later in the litigation. Id. at *95. Accordingly, the Court denied Defendant’s motion to decertify the FLSA collective action and granted Plaintiff’s motion to certify the class of New York-based SMs pursuant to Rule 23(b)(3) as to liability only.

**Jacob, et al. v. Duane Reade, Inc., 289 F.R.D. 408 (S.D.N.Y. 2013).** Plaintiffs, individually and on behalf of all other similarly-situated assistant store managers (“ASMs”), brought a class action alleging that Defendants misclassified ASMs as exempt employees and failed to pay them overtime compensation in violation of the FLSA and the New York Labor Law. Plaintiffs moved for class certification of their NYLL claims, and the Court certified a class consisting of all ASMs who were not paid overtime compensation for hours worked in excess of 40 hours per workweek at any time between January 8, 2009 and the date of final judgment in this action. The Court found that Plaintiffs satisfied the numerosity requirement because the class consisted of nearly 750 current and former ASMs. Regarding commonality, the Court noted that Defendants uniformly classified all ASMs as exempt without an individualized determination of each ASM’s individual job. ASMs carried out their duties pursuant to a uniform policy, uniform training, uniform job description, and uniform procedures set in place for each store, procedures that required adherence on the part of all ASMs who wished to maintain their job. As a class, Plaintiffs sought a determination as to whether their work deviated from the description upon which their exempt classification was based, and as such, constituted a legitimate claim under NYLL. The Court opined that the question presented common factual issues that applied to all Plaintiffs. ASMs had similar baseline responsibilities from store to store and that the duties had not changed significantly since 2007. Accordingly, the Court concluded that commonality was satisfied. The Court further observed that the typicality requirement was usually met irrespective of minor variations in the fact patterns underlying individual claims, when it was alleged that the same unlawful conduct was directed at or affected both the named Plaintiffs and the class they sought to be represented. Id. at 417. Although Defendants tried to emphasize the minor variations between the named Plaintiffs’ testimony, the Court noted that their accounts of the ASMs’ duties were largely consistent with one another and consistent with the majority of the other ASMs’ testimony who had given depositions. Finally, the Court noted that there was no evidence suggesting that any proposed class members had antagonistic interests, which in turn established adequacy. As to predominance, the Court found that although there were minor deviations, ASMs had similar primary responsibilities. Accordingly, the Court found that common issues predominated over individual issues. The Court also opined that class action was a superior method of adjudication because the alleged misclassification applied to an entire class of employees’ duties, rather than an individual, case-by-case determination. Additionally, the burden and expense of individual litigation would likely be prohibitive for most ASMs. Accordingly, the Court granted Plaintiffs’ motion for class certification.
Jacob, et al. v. Duane Reade, Inc., 2013 U.S. Dist. LEXIS 111989 (S.D.N.Y. Aug. 8, 2013). Plaintiffs, a group of Assistant Store Managers (“ASMs”), brought an action against Defendant under the FLSA and the New York Labor Law (“NYLL”) seeking overtime wages. The Court had earlier certified a class with regard to Plaintiffs’ NYLL claims pursuant to Rule 23. Defendant now sought decertification of the class in light of the Supreme Court’s decision in Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013). Specifically, in light of Comcast, Defendant contended that it now was axiomatic that “individual monetary damages claims of the class members may not predominate over the claims for injunctive relief.” Id. at *8. The Court partly granted Defendant’s motion by decertifying the class for damages purposes in light of the need for individualized proof necessary to determine monies potentially owed to each ASM. Id. at *33. Comcast, where the Supreme Court considered the class certification of a class of subscribers who sought damages for purported violations of the federal antitrust laws, required that a putative class seeking Rule 23(b)(3) certification demonstrate a linkage between its theory of liability and its theory of damages. Id. at *39. Defendant pointed out that there were at least three different sub-sets of ASMs, including: (i) ASMs who believed that their salary was designed to cover 40 hours of work per week, or “standard employees;” (ii) ASMs who believed that their salary was to cover however many hours they worked a week, or so-called “fluctuating workweek” (“FWW”) employees; and (iii) employees who understood their salary to cover work up to a certain number of hours per week, such as 60, but no more, the “hybrid employees.” Id. at *43-44. Thus, the category into which a particular ASM was placed depended upon the salary, hours, and in some instances the understanding of how many hours a week the salary was intended to cover. Id. at *44. Defendants pointed to evidence suggesting that discerning an ASM’s salary, together with the hours the salary was meant to cover, would, in many cases, require an inquiry into each class member’s circumstances, and such a process would be time-consuming and incapable of “class-wide proof.” Id. Moreover, the nature of the FWW’s applicability in misclassification cases remains unsettled. While the First, Fifth, and Tenth Circuits have determined that the appropriate measure of damages for a misclassified FWW employee would constitute half-time of that employee’s regular rate of pay, other circuits have utilized the FWW, half-time method to calculate misclassification damages, and the Second and Ninth Circuits have held the FWW method to be inappropriate in misclassification cases. Id. at *47-48. Nevertheless, Defendant contended that the FWW employees, even if misclassified, would be entitled to half time their regular rate of pay for all hours worked above 40. Id. at *48-49. The Court noted that regardless of the category of a given ASM, all overtime calculations first required a determination of that employee’s regular rate of pay, which is defined as the regular hourly rate of pay during a workweek. Id. While the regular rate of pay for FWW ASMs should be calculated per week, the calculation of the regular rate of pay for a standard ASM, or a hybrid ASM, would simply involve the division of a salary by the hours per week that the salary was intended to compensate, and there would be no need to do a week-by-week analysis. Id. at *50-51. In light of these discrepancies, coupled with the individualized proof that they required, the Court concluded that certification of the class for all purposes would be inappropriate. Id. at *52-53. The Court, however, also noted that nothing in Comcast vitiated the longstanding principle that it might certify a class as to liability, but not damages, utilizing Rule 23(c)(4), so long as the proposed liability class meet the requirements of Rule 23(a) and (b). Id. at *39. Regardless of whether an ASM was a standard, FWW, or hybrid employee, Plaintiffs claim were the same, i.e., they were wrongfully classified as a statutorily exempt employee, and, as such, were never paid the overtime compensation to which they were entitled. Id. at *53. The Court thus noted that, unlike in Comcast, the injury here – lack of overtime – clearly stemmed from one common harm – the uniform misclassification of all ASMs. Id. The Court had already determined that the putative class satisfied its predominance requirement as to liability, and Defendant’s misclassification, if proved, would necessarily cause a uniform type of injury to class members, i.e., the lack of overtime to which all class members would be entitled. Id. at *57. The only remaining question then would be how much each individual was owed, an inquiry that might require varying levels of individualized proof. Id. The Court found that Plaintiffs’ action was one in which the certification of the liability class was particularly appropriate. Id. Accordingly, the Court certified Plaintiffs’ class for liability purpose only, and decertified the damages claims.


Seyfarth Shaw LLP
Defendant failed to pay them between 10 and 30 minutes per day in straight time or overtime compensation in violation of the FLSA and the New York Labor Law ("NYLL"). The CSRs worked at the Syracuse Life Operations Contact Center (the "SLOCC") responding to customer inquiries over the telephone, and serviced Defendant AXA’s Mutual of New York and Mutual Life of America lines of business. Earlier, the CSRs began recording time worked by logging-in to the telephone system, a process that required the CSRs to enter a four digit pass-code and then hit another button. Id. at *4. Subsequently, another system was used wherein the CSRs logged-in to the computer and opened a particular application to begin recording their time. Plaintiffs alleged that CSRs were not permitted to log-in to the telephone system until they were logged-in to all of the computer programs, which allegedly took 10 minutes. Plaintiffs also alleged that they were required to follow a six-step process to log-off, after which they were required to shut down their computer systems, which took about five to 20 minutes. Id. at *7. Plaintiffs alleged that they were routinely not paid for periods worked before logging-in and after their assigned shift ended. Plaintiffs moved for certification of a class comprising of all CSRs who worked in the SLOCC at any time from the past six years, and conditional certification of a collective action consisting of all CSRs who worked in the SLOCC at any time from the past three years. The Court granted the FLSA conditional certification motion, but denied Rule 23 class certification on the NYLL claims for failure to establish commonality and predominance. Although Defendant’s overtime policy was facially compliant with the FLSA and the NYLL, Plaintiffs argued that Defendant also imposed informal policies at the SLOCC that barred CSRs from reporting overtime for certain types of activities performed, such as initiating certain applications prior to beginning their shifts and to complete tasks after their shift. Id. at *13. Plaintiffs also alleged that they were informed by a supervisor that time spent in such activities was not compensable. The Court found that Plaintiffs were similarly-situated for conditional certification purposes to CSRs who were allegedly uncompensated for time spent logging-in to their computers prior to logging-in to the telephone system due to the alleged informal policy baring overtime filing. Id. at *14. Accordingly, the Court granted conditional certification to that extent. Although Plaintiffs asserted that their experience was that logging-in to and logging-out of numerous programs required work outside of the allocated shift hours, they acknowledged that practices varied and that some procedures were completed very quickly or may not have been necessary every shift. Id. at *18. Plaintiffs also acknowledged that other employees had different start up routines. Id. The Court remarked that Plaintiffs’ testimony was also contradictory with respect to whether and how many programs were required to be initiated prior to logging-in to the phone system, and it was unclear that all CSRs even required additional time to initiate the computer programs. Id. The Court found that because of the issues of whether and to what extent the alleged policy resulted in violations of the NYLL, the claims presented individualized questions that predominated. For this reason, the Court denied class certification.


Plaintiffs, a group of financial advisors ("FAs"), brought an action under the FLSA, the New York Labor Law, and the New Jersey Wage and Hour Law alleging that they were misclassified as exempt employees and thereby denied overtime compensation. Plaintiffs alleged that FAs had the same primary job duty of selling financial products to individuals. Defendants’ job description for FAs was uniform across the country, and all FAs were subject to the same system of compensation. Plaintiffs moved for conditional certification of a collective action, and the Court granted the motion. Plaintiffs submitted declarations from 13 individuals who worked as FAs in 10 different states, which stated that they all performed the same primary job duty and day-to-day tasks, were subject to the same compensation policies, and regularly worked overtime. Defendants contended that Plaintiffs and other FAs were not similarly-situated and submitted numerous declarations in which other FAs testified that their duties varied widely. The Court stated that even if Defendants’ evidence was considered, the declarations that Plaintiffs submitted along with Defendants’ own description of the FA position sufficiently demonstrated that there were other employees who were similarly-situated with respect to their job requirements and with regard to their pay provisions who were classified as exempt pursuant to a common policy or scheme. The Court noted that Plaintiffs’ declarations asserted that FAs were compensated in the same manner, and regularly worked overtime, and there was no dispute that all FAs were classified as exempt from the FLSA’s overtime
provisions. Accordingly, the Court granted conditional certification under 29 U.S.C. § 216(b), and limited the notice to individuals who were FAs within three years from the date the Court issued its order.

*Melgadejo, et al. v. S&D Fruits & Vegetables, Inc., 2013 U.S. Dist. LEXIS 172405 (S.D.N.Y. Nov. 7, 2013).* Plaintiff brought an action on behalf of himself and other similarly-situated employees under the FLSA and the New York Labor Law (“NYLL”) to recover unpaid wages, unpaid overtime compensation, and statutory damages from Defendants. After Defendants failed to answer the complaint, Plaintiff moved to certify a NYLL class consisting of all individuals employed by Defendants who worked over 40 hours per week and/or over 10 hours per day; were not compensated with overtime pay; and/or were not compensated at a rate in accordance with minimum wage laws. *Id.* at *3. The Court denied the motion. Plaintiff had submitted the sworn affidavits of himself and six other affiants who were employed by Defendants, and a copy of his complaint in support of his motion. The Court observed that generally, upon entry of a default, the factual allegations in the complaint, except as to damages, must be taken as true; however, notwithstanding this general rule, when class certification was sought, a Court must still independently determine that Rule 23’s requirements are met before a putative class can be certified. *Id.* at *4. Based on this requirement, the Court concluded that class certification could not be granted on default and that certification was not appropriate unless Plaintiff’s submissions affirmatively established that the requirements of Rule 23 had been met. The Court found that Plaintiff’s submissions did not establish the requirements for class certification because his memorandum of law neither addressed the requirements of Rule 23 nor explained how those requirements were satisfied. Moreover, Plaintiff’s affidavits were no substitute because they did not mention any law nor did they discuss the requirements of Rule 23. Accordingly, the Court denied Plaintiff’s motion of class certification.

*Meyer, et al. v. United States Tennis Association, 2013 U.S. Dist. LEXIS 60091 (S.D.N.Y. April 25, 2013).* Plaintiffs brought a class and collective action under the FLSA and New York Labor Law (“NYLL”) alleging that Defendant failed to compensate their umpires for overtime work. Defendant classified all umpires as independent contractors and paid them a fixed, non-negotiable daily rate with no pay for any hours worked in excess of 40. Plaintiffs contended that umpires were misclassified as independent contractors. After being granted conditional certification of the FLSA claims, Plaintiffs moved for class certification of their NYLL claims pursuant to Rule 23. Plaintiffs proposed a class of all umpires who worked for Defendant at the U.S. Open beginning in 2005 and through the date of final judgment. *Id.* at *11. The Court granted Plaintiffs’ motion, finding that Plaintiffs satisfied all of the Rule 23 requirements. Plaintiffs satisfied the numerosity requirement as Defendant had hired between 285 and 316 umpires at each Open, who were putative class members of the instant action. *Id.* Plaintiffs satisfied the commonality requirement by asserting several common questions, including whether Defendant had a policy of misclassifying umpires as independent contractors, whether Defendant failed and/or refused to pay Plaintiffs overtime pay, and whether Defendant denied overtime to all umpires for work performed before and after the U.S. Open. *Id.* at *13-14. Further, “the uniform classification of umpires, the uniform description of umpires’ duties, the finite three-week period during which the U.S. Open event took place once a year, and the discrete, geographical location of the Open,” led the Court to conclude that Plaintiffs sufficiently established commonality. *Id.* at *15. Plaintiffs’ claims were also sufficiently typical of those asserted by other class members, for the duties they performed resembled those of each other. *Id.* at *25. Although Defendant asked the Court to focus on the inconsistencies between Plaintiffs’ testimony regarding their primary duties, the Court noted that the records showed that the umpires’ duties were largely consistent with one another, and consistent with the majority of the other umpires’ testimony in their depositions. *Id.* Plaintiffs further demonstrated that they would adequately represent the class and no evidence suggested that any proposed class members had antagonistic interests. *Id.* at *27. The Court found that Plaintiffs also established that common questions predominated. Defendant contended that Plaintiffs’ theory that Defendant controlled the means and manner by which Plaintiffs umpire matches was based on a series of facts that were not common to the putative class. *Id.* at *29-30. Defendant pointed out that not all class members were subject to detailed evaluations, the number of evaluations conducted as to those varied, and even among the evaluated umpires, their testimony differed as to whether the evaluations affected the manner in which they called matches. *Id.* at *30. Defendant asserted that “an
individualized inquiry into each umpire’s actual duties constituted the only way to ultimately determine whether a given employee was properly classified as an independent contractor.” *Id.* The Court, however, noted that the deposition testimony, together with the declarations offered by Defendant, showed that most umpires performed a similar swath of duties. *Id.* at *33. The Court found that any minor deviations did not eliminate the overriding consistencies present throughout the testimony and Defendant’s uniform polices of control governing all umpires. *Id.* at *33-34. Thus, finding that common issues predominated in the case, and that class action was the superior method of determining the issue, the Court granted Plaintiffs’ motion for class certification.

**Ming Lin, et al. v. Benihana N.Y. Corp., 2013 U.S. Dist. LEXIS 27792 (S.D.N.Y. Feb. 27, 2013).** Plaintiffs, a group of non-exempt employees, brought a class and collective action under the FLSA and the New York Labor Law (“NYLL”) alleging that Defendants did not pay required spread of hours wages, and did not provide proper wage statements and wage & hour notices. The Magistrate Judge recommended certification of a spread of hours class and a wage statement class. On Rule 72 objections, the Court rejected the Defendants objections and adopted the report and recommendation of the Magistrate Judge. *Id.* at *3-5. Defendants contended that Plaintiffs had not submitted sufficient evidence in support of their claim. Plaintiffs submitted payroll records that reflected pay periods predating June 25, 2009, but that did not reflect the payment of any spread of hours wages during that time. These records showed that after June 25, 2009, employees did receive spread of hours pay when their workday exceeded 10 hours. Thus, the remaining issue was whether employees were entitled to spread of hours pay prior to June 25, 2009, because they worked for periods in excess of 10 hours. Plaintiffs requested that Defendants produce the timesheets that would demonstrate the hours their employees worked prior to June 25, 2009, but Defendants did not do so. Although the Court remarked that Plaintiff could have produced stronger evidence, it reasoned that was appropriate at this stage to infer that Plaintiffs’ hours before June 25, 2009, were similar to their hours thereafter. *Id.* at *8. Thus, Plaintiffs adduced evidence sufficient to find the existence of a common contention that Defendants had a policy of not paying spread of hours wages before June 25, 2009, of such a nature that it was capable of class-wide resolution. *Id.* at *10. Defendants also argued that the wage statement class should begin on April 9, 2011, the effective date of the Wage Theft Prevention Act (“WTPA”), which amended the NYLL to augment the requirements for employee wage statements. Plaintiffs, however, alleged non-compliance not only with the requirements of the WTPA, but also with wage statement requirements in effect prior to April 9, 2011. Accordingly, the Court found no reason to limit the wage statement class period. *Id.* at *11.

**Morangelli, et al. v. Chemed Corp., 922 F. Supp. 2d 278 (E.D.N.Y. 2013).** Plaintiffs, a group of current and former plumbing repair and maintenance technicians, brought an action alleging that a number of Defendants’ policies violated the FLSA and the wage & hour laws of the states in which they worked. Plaintiffs asserted three categories of claims. First, Plaintiffs claimed that Defendants required them to bear business expenses that had the effect of bringing wages below the applicable minimum wage (“business expense claims”). Second, Plaintiffs contended that Defendants failed to compensate them for all hours they worked including time shaved from their actual working hours and time spent at “turn-in” – a weekly process where technicians reviewed their time records for accuracy and submitted records of their expenses, and money orders for that week (“uncompensated hours claims”). *Id.* at 282. Third, Plaintiffs alleged that Defendants violated state law by taking deductions from Plaintiffs’ wages for call-back work for warranty service (“illegal deductions claims”). Previously, the Court had certified an FLSA collective action on the business and uncompensated hours claims, and certified 14 state law class actions for liability purposes only based on the three categories of claims. Plaintiffs then filed a motion for summary judgment, and a motion to amend the class certification order; at the same time, Defendants sought decertification and cross-filed for summary judgment. The Court partly granted summary judgment and partly granted Defendants’ motion for decertification. In their motion to decertify the business expense claims classes and the FLSA collective action, Defendants argued that the technicians were not similarly-situated for FLSA purposes. Defendants asserted that determining whether certain expenses would be considered business expenses and when those expenses must be reimbursed required individualized inquiries. The Court found that Defendants’ substantiated expenses policy made the question of what
constituted a business expense one that could be readily answered through generalized proof. \textit{Id.} at 303. Accordingly, the Court denied Defendants’ motion to decertify the business expense claims classes and FLSA collective action. The Court noted that after the classes were certified, Plaintiffs had limited uncompensated hours claims. Plaintiffs’ uncompensated hours claims were based on two sets of factual allegations, including: (i) that Defendants shaved hours from Plaintiffs’ actual working time; and (ii) Defendants did not compensate Plaintiffs for time spent at turn-in. Plaintiffs claimed that they were not compensated for time spent maintaining their vans and tools. Defendants sought reconsideration of the certification order, arguing that there was documentation that would be able to establish liability for van and tool maintenance time. The Court amended the definition of the uncompensated hours claims classes to exclude claims for uncompensated time spent maintaining vans and equipment. In their motion to amend the class definition, Plaintiffs attempted to distinguish between the minor and major forms of van maintenance, and tried to clarify the testimony that were relying upon. Therefore, the Court noted that their motion actually sought reconsideration of the reconsideration order. The Court found that Plaintiffs failed to show that it had overlooked anything in the reconsideration order. \textit{Id.} at 306. Accordingly, the Court denied Plaintiffs’ motion to amend the class definition, and granted Defendants’ motion and decertified the van and equipment maintenance time claim in the FLSA collective action. Opposing Defendants’ motion to decertify the time shaving claims, Plaintiffs argued that they were routinely denied overtime because Defendants altered the time records. At the class certification stage, the Court had expressed concern because a technician’s hours may be altered for an entirely proper reason, such as technician forgetting to log-out at the end of his shift; therefore, Defendants would be able to defend themselves only through an individual inquiry. \textit{Id.} Nevertheless, the Court certified classes on the time-shaving claims, relying on Plaintiffs’ representation that their claims focused on alterations where Defendants’ highly detailed records themselves demonstrated that it was more likely than not that no legitimate reason for the alteration existed. Alternatively, Defendants asserted that the claims should be dismissed for Plaintiffs in some state classes due to a lack of evidence to support their claims. The Court, however, found that although Defendants called into question much of Plaintiffs’ proposed trial plan to provide common evidence, the plan remained viable.

\textit{Morris, et al. v. Alle Processing Corp., 2013 U.S. Dist. LEXIS 64534 (E.D.N.Y. May 6, 2013).} Plaintiffs, a group of food processing workers, brought an action against Defendant and several of its executives. Plaintiffs claimed that they were not paid for the time they spent donning and doffing uniforms, and that Defendants illegally shaved time from the employees’ time records. Plaintiffs asserted violations of the FLSA for failing to pay minimum and overtime wages and the New York Labor Law (“NYLL”) for failing to pay earned wages, overtime wages, and spread of hours compensation. \textit{Id.} at *2-3. Following the grant of conditional certification of a collective action for FLSA claim, Plaintiffs moved for Rule 23 class certification of their New York state law claims. \textit{Id.} at *12-13. The Court granted Plaintiffs’ motion. The Court first rejected Defendants’ argument that the class was not ascertainable because whether an individual meets the class definition could be determined based upon objective criteria and an analysis of Defendants’ documents. \textit{Id.} at *19. It found numerosity was satisfied because the class had at least 40 members and likely many more. \textit{Id.} at *21. The Court addressed commonality and typicality together and concluded that these requirements had been satisfied too. \textit{Id.} at *26. It found that the named Plaintiffs and the class members’ claims arose out of the same course of conduct (Defendants’ practice and policy of failing to pay wages and overtime), raised common issue of law and fact (among other things, whether Defendants improperly shaved time records, refused to pay for time spent donning and doffing, failed to pay time and a half for all hours worked over 40, and failed to pay spread of hours), and were based on the same legal theory (violations of the NYLL). \textit{Id.} The Court concluded that Defendants’ arguments that individual analysis was necessary principally related to damages issues. To the extent individual questions were raised, they could be resolved based on mechanical computations from Defendants’ documents, and thus, they did not overwhelm the litigation. \textit{Id.} at *31. The Court also found that adequacy of representation was satisfied, rejecting Defendants’ argument that Plaintiffs failed to provide reliable and accurate information and that they had a union-based motivation to pursue the litigation. \textit{Id.} at *31-35. The Court then found that predominance was satisfied for the reasons stated with respect to commonality. \textit{Id.} at *35-40. Finally, the Court found that superiority was satisfied because there were numerous small dollar claims, class
members could fear reprisal by bringing individual claims and the NYLL claims, were nearly identical to the FLSA claims that were going to be tried collectively. *Id.* at *40-42.

**Roach, et al. v. T.L. Cannon Corp., 2013 U.S. Dist. LEXIS 45373 (N.D.N.Y. Mar. 29, 2013).** Plaintiffs, a group of former employees, brought a class and collective action under the New York State Labor Law (“NYLL”) and the FLSA alleging that they did not receive laundry and uniform fees in addition to their wages; that they did not receive an additional hour of work time wages where their spread of hours exceeded 10-hours per shift; and they were not given proper rest periods or paid for all hours to which they were entitled. Plaintiff moved for conditional certification of the FLSA claims and class certification of the NYLL claims, which consisted of four sub-classes. The Magistrate Judge opined that the requisites for FLSA certification was satisfied, and that the requisites for class action certification with respect to the NYLL claims was not satisfied, with the exception of the spread of hours claim. On Rule 72 objections, the Court adopted in part and modified in part the Magistrate Judge’s recommendations, and denied class certification of the NYLL claims. Plaintiffs’ spread of hours claim was based upon a former New York State regulation, which provided that, on each day in which the spread of hours exceeds 10 hours, an employee shall receive one hour’s pay at the basic minimum hourly wage before allowances, in addition to the minimum wages. *Id.* at *6. The Court opined that because Plaintiffs offered no model of damages susceptible of measurement across the entire putative 10-hour spread claim class, questions of individual damage calculations would inevitably overwhelm questions common to the class. Plaintiffs asserted that class members were denied pay for all hours worked because managers allegedly altered time records to reflect that employees were given a NYLL-mandated rest period that they had not actually taken. The Court observed that the proof of damages on this claim was highly individualized because it was dependent on the circumstances of each individual employee. The Court noted that damages were also individual to the various class members depending on the number of times each was in a situation falling within the scope of the claim. Accordingly, the Court opined that the rest break class could not be certified. Regarding Plaintiffs’ laundry claims, the Magistrate Judge had noted that typicality could not be established because the competing record evidence that suggested Defendants failed to make laundry facilities available to their employees was speculative. Further, named Plaintiff Longo testified that she witnessed the line cooks use the washer and dryer to wash their clothes. Thus, the Court adopted the Magistrate Judge’s recommendation to not certify that class claim. Finally, because no objections were raised to the Magistrate Judge’s recommendation not to certify the uniform claim class, the Court adopted that aspect of the recommendation. Accordingly, the Court denied class action certification of the NYLL claims.

**Saleem, et al. v. Corporate Transportation Group, Ltd., 2013 U.S. Dist. LEXIS 163934 (S.D.N.Y. Nov. 15, 2013).** Plaintiffs, a group of drivers, brought an action alleging that Corporate Transportation Group and its affiliated franchiser companies (“CTG”) improperly classified them as independent contractors, thereby depriving of overtime pay under the FLSA and New York Labor Law (“NYLL”). Plaintiffs moved to certify an NYLL class consisting of all drivers at any CTG franchise company in New York. The Court denied the motion. The Court noted that whether the commonality requirement was met depended upon whether the question of CTG correctly classifying the franchisors’ drivers as independent contractors could be answered through common evidence. Arguing that the inquiry into the employment relationship could be conducted on a class-wide basis, Plaintiffs asserted that all drivers signed substantially identical franchise agreements, governing the terms of their work, were subject to the same policies for receiving and accepting work, and were subject to discipline by committees that operated in uniform ways. The Court noted that Plaintiffs had failed to prove that all drivers signed substantially identical franchise agreements because there were six different franchisor Defendants in the suit, and Plaintiffs had provided only two franchise agreements. The Court stated that even if all of the franchise agreements were substantially identical, Plaintiffs’ argument overlooked that the critical determinant of employment status under New York law was not the right of a purported employer to control a purported employee, but the degree to which the purported employer exercises control over the results produced or the means used to obtain them. *Id.* at *22. Although forms of agreement and other standardized documents were pertinent to the analysis, the Court reasoned that such documents were not necessarily dispositive of what, ultimately, would be an individualized determination of the degree of control that CTG
actually exercised over each of the putative class members. In addition, there was contradictory evidence. While some drivers owned their own vehicles, maintained their own vehicles, had private customers, and drove for competitor car companies, other drivers did not have private customers, did not own their vehicles, did not perform their own maintenance, and did not drive for competitor companies. Plaintiffs, however, argued that class treatment was appropriate because CTG allowed all drivers to make free choices about their work. The Court rejected this argument because Plaintiffs focused on the wrong question of whether CTG had the right to control the drivers as opposed to whether in fact it exercised control over them. The Court determined that given the focus of the inquiry under New York law and the factual differences within the proposed class, answering the question of whether a particular driver was an independent contractor was likely to be fact-specific and could be employee-specific. Id. at *25. The Court stated that Plaintiffs had failed to demonstrate, by a preponderance of the evidence, a similar level of homogeneity among CTG drivers. Thus, the Court concluded that the common question would not yield a common answer, and instead, answering that question as to each driver would require a fact-specific and driver-specific examination of the degree of control that CTG exercised. Because the question whether Plaintiffs were properly classified as independent contractors would require individualized examination into the extent of control that CTG exercised over each driver, the Court found that common questions did not predominate over individual ones. For similar reasons, the Court ruled that a class action was not superior to other available methods for fairly and efficiently adjudicating the controversy, and denied Plaintiffs’ motion for class certification.

Shayler, et al. v. Midtown Investigations, Ltd., 2013 U.S. Dist. LEXIS 29540 (S.D.N.Y. Feb. 27, 2013). Plaintiffs, a group of security guards who obtained assignments through Midtown Investigations, Ltd. (“All-Tech”) at David Yurman Enterprises LLC (“Yurman”) and Chopard USA Ltd. (“Chopard”), brought a collective action for unpaid overtime wages under the FLSA and the New York Labor Law (“NYLL”). Until 2010, All-Tech security guards were given the option of being compensated as independent contractors or receiving compensation as an employee. All-Tech guards worked either full-time, part-time, as relief guards, floaters, and supervisors. All guards were compensated through All-Tech and some were obtained by All-Tech through arrangements that it had with outside consultants and/or contractors. Plaintiffs sought certification of two sub-classes, including all persons who work or have worked as a security guard through All-Tech at a: (i) Yurman location in New York; and (ii) a Chopard location in New York at any time from June 14, 2006 to the present. The Court denied the motion. The Court found that because the Yurman sub-class had, at most, 26 potential Plaintiffs, there was no presumption of numerosity. The evidence showed that there were only 13 security guards placed at Chopard during the period in question, and the Court observed that there were at least 26 individuals who held such a position during the approximately 6.6-year putative class period, which was insufficient to establish numerosity. The Court noted that named Plaintiff Shayler, the only one who asserted a NYLL claim, was only at Yurman. Further, Plaintiff Shayler was referred to as an independent contractor, whereas other individuals are or were employees; likewise, Plaintiff Shayler never asserted that he was a supervisor, floater, or relief guard, and thus could not represent their terms and conditions of employment. The Court observed that whether Plaintiff Shayler had a liability claim would require different proof from others and comparing his position as a full-time security guard could not provide an evidentiary basis as to whether others in different positions did or did not have a liability claim. Further, it was unclear whether the opt-in Plaintiffs had NYLL claims as employees or whether separately or together they represented the interests of individuals who filled other positions. Accordingly, the Court found that typicality was not met. The Court observed that because Plaintiff Shayler was fired for suspicion of drug use while at work, the claims of other parties could not proceed represented by an individual fired for a serious issue when nothing suggested he could or would well represent absent class members. The Court noted that although some of the guards agreed to work as independent contractors, Plaintiffs claimed that they were in fact employees; there were differences between where the various guards worked, when, and in what capacity. The Court remarked that it could not assume a key liability issue in Plaintiffs’ favor, and Plaintiffs had not met the predominance requirement. Finally, the Court observed that class treatment was not a superior means of proceeding because given how few additional people it would bring in, class treatment at this stage complicated rather than simplified this proceeding. Accordingly, the Court denied Plaintiffs’ motion for class certification.
Silva, et al. v. Calle 8, LLC, 2013 U.S. Dist. LEXIS 171696 (E.D.N.Y. Dec. 5, 2013). Plaintiff brought a putative collective action under the FLSA alleging that Defendants failed to pay him and other similarly-situated employees overtime wages for hours worked over 40 per week and that Defendants altered their timesheets and disabled their time clock. In his motion for conditional certification, Plaintiff sought to compel Defendants to provide contact information of their current and former employees and for permission to notify these employees of the pendency of his action. In support of the motion, Plaintiff submitted a two page affidavit that contained similarly general allegations. The Court granted Plaintiff’s motion to compel in part and denied the motion for leave to send a collective action notice without prejudice. The Court noted that Plaintiff failed to demonstrate that the putative class members had any reason to, or did, fear retaliation by Defendant. Moreover, there also did not appear to be any judicial economy to be gained from litigating this matter as a Rule 23 class. Thus, the Court concluded that Plaintiff had not shown that joinder was impractical. Regarding the FLSA claims, Plaintiff asserted that SDRs were paid by salary and assigned an eight-hour shift, five days a week and were expected to work 10 to 15 minutes in advance of their shifts to check e-mail for important information and after the end of their shifts to enter all notes and updates to our tickets and log-out of Bloomberg’s computer system. Plaintiff contended that SDRs also often worked during the unpaid lunch hour period and SDRs who worked into the evening or on weekends were given comp time, but were not paid for overtime work. The Court observed that Plaintiff had satisfied the minimal burden of showing that he was similarly-situated to the proposed class members to warrant distribution of notice of a collective action. The Court stated that Plaintiff’s declaration demonstrated that he was similarly-situated to other SDRs in respect to common wage and overtime practices. Accordingly, the Court granted the request to send notice of the FLSA collective action pursuant to 29 U.S.C. § 216(b).

Siegel, et al. v. Bloomberg, LP, 2013 U.S. Dist. LEXIS 116503 (S.D.N.Y. Aug. 16, 2013). Plaintiff, an employee, brought an action alleging violations of the FLSA and the New York Labor Law (“NYLL”). Plaintiff moved for conditional certification of an FLSA collective action and for class certification of NYLL claims consisting of a class of all service desk representatives (SDRs”) who are or were employed by Bloomberg and who were not paid overtime at the rate of time-and-one-half for all hours worked over 40 in one or more weeks. SDRs were PC support staff members who provide technical support for Defendant’s employees. The Court denied the motion for Rule 23 class certification, but granted the motion for collective action certification under 29 U.S.C. § 216(b). The Court noted that Plaintiff had presented no evidence as to how many SDRs actually worked overtime hours, but at most, 33 SDRs would be eligible to join the class action. The Court stated that this number was not sufficient to satisfy the numerosity requirement. Because a determination of practicability depends on all the circumstances surrounding a case, the Court also looked to considerations such as the judicial economy arising from the avoidance of a multiplicity of actions, geographic dispersion of class members, financial resources of class members, and the ability of claimants to institute individual suits. Id. at *5-6. Plaintiff argued that it was unlikely that SDRs independently would bring claims against Defendant given the small amount of individual recovery and risk of retaliation. The Court observed that Plaintiff had presented no evidence to support his claim that SDRs would be unable to join the lawsuit voluntarily or to file their own lawsuits. Further, the Court stated that Plaintiff failed to demonstrate that the putative class members had any reason to, or did, fear retaliation by Defendant. Moreover, there also did not appear to be any judicial economy to be gained from litigating this matter as a Rule 23 class. Thus, the Court concluded that Plaintiff had not shown that joinder was impractical. Regarding the FLSA claims, Plaintiff asserted that SDRs were paid by salary and assigned an eight-hour shift, five days a week and were expected to work 10 to 15 minutes in advance of their shifts to check e-mail for important information and after the end of their shifts to enter all notes and updates to our tickets and log-out of Bloomberg’s computer system. Plaintiff contended that SDRs also often worked during the unpaid lunch hour period and SDRs who worked into the evening or on weekends were given comp time, but were not paid for overtime work. The Court observed that Plaintiff had satisfied the minimal burden of showing that he was similarly-situated to the proposed class members to warrant distribution of notice of a collective action. The Court stated that Plaintiff’s declaration demonstrated that he was similarly-situated to other SDRs in respect to common wage and overtime practices. Accordingly, the Court granted the request to send notice of the FLSA collective action pursuant to 29 U.S.C. § 216(b).
Court stated that Plaintiff’s proposed notice did not include any description of the job duties of the relevant class to whom he contended he was similarly-situated; therefore it was not possible to conclude that a collective action certification was warranted. Accordingly, the Court denied without prejudice Plaintiff’s motion for conditional certification of a collective action.


Plaintiff, on behalf of himself and other similarly-situated parking assistants, brought a class action alleging that Defendant failed to pay overtime premium rates in violation of the FLSA and New York Labor Laws (“NYLL”). Defendants contracted with Consolidated Edison, Inc. (“ConEd”) to send its parking assistants to ConEd jobsites. The ConEd-NPT contract stated that Defendants would be paid a straight time rate and overtime would not be compensated. As such, Defendants had no overtime policy; all parking assistants signed a worker’s agreement stating that they were limited to working 40 hours per week and that Defendants would pay overtime premium rates. Defendants usually capped the parking assistants’ biweekly compensation at 80 hours. For the hours worked in excess of 80, Defendants utilized a roll over procedure; instead of paying the parking assistants for the excess hours in that pay period, Defendants rolled the excess hours over into the next pay period, where they were counted toward that pay period’s 80-hour limit and compensated at a straight time rate. Plaintiff alleged that through its practice and procedures, Defendants selectively enforced its no overtime policy in a way that allowed parking assistants to work overtime hours, but precluded them from being paid overtime premium rates. Plaintiff moved for conditional certification of a collective action for the FLSA unpaid overtime claim and Rule 23 class certification for the NYLL claims. The Court granted Plaintiff’s motion. Regarding the collective action certification, Plaintiff alleged that he and the potential opt-in Plaintiffs were similarly-situated in that they shared the same job responsibilities and were subject to the same policies and practices. The Court observed that Defendants’ unequivocal admission that its policy was to not pay overtime wages for hours worked in excess of 40 hours per week bolstered the case for conditional certification. Defendants, however, argued that Plaintiff failed to carry his burden because: (i) three of the five individuals named in his affidavit were supervisors exempt from FLSA overtime requirements; (ii) all parking assistants signed written agreements not to work more than 40 hours per week; and (iii) Plaintiff failed to submit any parking assistant’s affidavit stating that he worked more than 40 hours per week. Defendants contended that its admission that parking assistants were not paid overtime did not amount to an admission of a widespread practice of parking assistants working more than permissible maximum of 40 hours per week. The Court remarked that as far as the affidavits of supervisors were concerned, it was a premature argument, as Plaintiff only sought to represent similarly-situated parking assistants in this collective action, and if it turned out that anyone who opted-in was not sufficiently similarly-situated, Defendants could move to decertify. Id. at *32-33. Regarding the insufficiency of evidence, the Court noted that the worker’s agreement providing that the parking assistants should not work overtime, coupled with Defendants’ admission that its no-overtime policy was applied uniformly, was sufficient to support conditional collective action certification. Id. at *37. Accordingly, the Court granted Plaintiff’s motion under 29 U.S.C. § 216(b). Regarding Rule 23 class certification, Defendants first argued that numerosity was satisfied because there was insufficient proof of the exact number of parking assistants who were denied overtime wages. The Court, however, found that the evidence was sufficient to allow it to infer that the precise number of Defendants’ over 200 parking assistants was sufficiently numerous to warrant class certification. Similarly, the Court concluded Defendants express policy not to pay overtime, and its unequivocal admission that it had never paid overtime wages, and that it applied the policies and practices uniformly, was sufficient to establish commonality. Similarly, the Court found that the typicality and adequacy requirements were satisfied. For the same reasons of uniform policies and practices, the Court found that the predominance requirement was satisfied, and certified the Rule 23 class.


Plaintiff brought a collective action for overtime compensation on behalf of a group of Ryan homes sales and marketing representatives (“SMRs”). Earlier, the Court had conditionally certified the FLSA collective action. Defendant then moved to decertify the FLSA collective action, and Plaintiff moved for class certification of the New York Labor Law claims. The Court granted Defendant’s motion and denied Plaintiff’s motion. The
Court noted that several categories of employees were exempted from the FLSA’s overtime compensation requirements, including outside sales representatives. Id. at *6. The Court observed that although SMRs had the same job description and duties, and that those duties included actions undertaken both in the office and outside it, they had flexibility in the manner in which they chose to allocate their time and resources to perform those activities and thus, there were wide discrepancies between SMRs. Id. SMRs’ outside sales activities included visiting model homes and home sites, taking potential buyers on community tours, inspecting model homes and sites owned by competitors, and selling homes in other NVR communities. SMRs were generally permitted to perform these activities in the manner and to the extent they chose. Further, the sales managers supervising the SMRs had varying expectations, and in some cases, imposed particular duty requirements limiting the amount of discretion SMRs had over some of their sales activities outside the office, while others permitted their SMRs greater discretion, with visits to realtors once per quarter being sufficient. In some divisions, SMRs were required to attend preconstruction meetings with their customers which were often held off-site, or else chose to do so as a matter of course, while other divisions and SMRs did so infrequently. Additionally, the performance of sales activities outside of the office activities by the SMRs varied over a short period of time depending on a myriad factors. The parties admitted that there were no time-keeping requirements for SMRs, and hence all of the evidence concerning how SMRs’ days were spent, and the amount of time devoted to outside sales activities, would derive from testimony by individual SMRs themselves. That testimony would vary widely. The Court remarked that SMRs had broad discretion to determine their time allocation, and that the undisputed functional goals of the SMRs here did not suggest a reasonable estimation of outside office work time. Further, the Court noted that the defenses available to Defendant would also be individualized to each Plaintiff. Defendant had no policy or practice relative to hours worked and kept no time records, and Plaintiffs would have to demonstrate that each individual manager had actual or constructive knowledge that Plaintiffs were performing off-the-clock work without proper compensation, and such proof would require individualized testimony from every current or former manager who supervised any of the putative class members during the relevant time period, and would be highly fact-specific. The Court observed that because of all these differences, dozens of mini-trials would be required to determine whether each employee’s particular time away from the model home or trailer met the one to two hours, at least two days a week threshold indicated by the Department of Labor for outside salespersons. Id. at *14. The Court thereby decertified the collective action. Regarding the motion for class action certification, the Court observed that because Plaintiffs’ claims pertained to different SMRs in different locations, under different managers, who performed duties outside of their offices to varying degrees and in different ways, Plaintiffs’ claims as well as any determinations to be made concerning damages were too highly individualized to form the basis for a class action. Accordingly, the Court also denied Plaintiff’s motion for class certification.

Trinidad, et al. v. Pret A Manger Limited, 2013 U.S. Dist. LEXIS 97544 (S.D.N.Y. July 11, 2013). Plaintiffs, a group of non-exempt employees, brought an action alleging failure to pay proper overtime premium under the FLSA, to pay proper tip compensation due to an invalid tip-pooling policy, to pay for off-the-clock work, and to comply with various provisions of the New York Labor Law (“NYLL”). Plaintiffs moved for conditional certification of a class of all non-exempt team members employed in New York City stores during the last six years. The Court granted the motion in part. The Court observed that to state a plausible FLSA overtime claim, Plaintiffs must sufficiently allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours. Id. at *23. Plaintiff Manuel Trinidad alleged that he worked nine hours per day, five days a week, for 45 hours per week, and that he worked up to one hour before and two hours after his shift each day. Plaintiff Prospero Trinidad claimed he worked more than 40 hours in more than half of his six-month period of employment and that he worked past his scheduled shift every day at the 32nd Street and Park Avenue location, and three or four times per week at the 50th Street and 7th Avenue location. Finally, Janckell Fermin testified that he frequently worked through lunch and worked past his scheduled end time by 30 minutes to two hours during his scheduled 40-hour workweek, and that he told his manager that he stayed late every night. Accordingly, the Court granted conditional certification based on the overtime claims asserted by Plaintiffs Manuel Trinidad, Prospero Trinidad, and Janckell Fermin. The Court noted that three Plaintiffs who had alleged plausible overtime claims only testified to working at 10 stores. Plaintiff Manuel admitted that his manager was the
only manager who told him to come in early at any store at which he worked, and that not all employees came in before their shifts, and that he never knew of another manager who told employees they could not record all the hours they actually worked. Plaintiffs Janckell and Prospero asserted that they received overtime on some occasions, and Prospero also stated that he did not use the sign-in sheet at stores at which he was only visiting, instead, he signed in and out from the store at which he was based. The Court found that there were inconsistent practices across the stores at which Plaintiffs worked, and that Plaintiffs did not allege facts to support an inference of a uniform policy of illegal overtime practices across all stores in New York City. The Court therefore authorized notice to employees at six stores only. Plaintiffs also asserted that cashier employees were required to share their tips with other non-cashier employees who did not serve customers. The Court noted that an employer’s failure to abide by the FLSA’s requirements for tip-pooling is illegal only if, without the tip credit, the employee’s compensation would fall short of the minimum wage. Id. at *39. Although each Plaintiff attested to making well above the minimum wage without the tip credit, they argued that the employer’s reliance on a tip credit to achieve the minimum wage was not necessary for there to be a violation of the tip-pooling provisions of the FLSA. Plaintiff relied on a recent DOL regulation that states that an employer is prohibited from using an employee’s tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in § 3(m), i.e., a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool. Id. at *40. The Court, however, opined that § 203(m) imposes conditions on tip-pooling arrangements as a means of vindicating the FLSA’s minimum wage requirement, and that it was not plausibly read to impose a nationwide freestanding code of conduct regarding the handling of tip money where the statute’s minimum wage command was otherwise met. Id. at *44. Further, the Court reasoned that if Congress intended to federalize tipping practices, it would have expressed this intention without keying the tip-pooling requirements to the tip credit, and that reading § 203(m) to implicitly impose such a mandate would render the FLSA’s references to tip credits superfluous. Id. at *44-45. Thus, because the Court doubted that the DOL’s regulations permissibly construe the statute, and because it was undisputed that Defendant paid its employees the minimum wage without taking into account the tip credit, the Court declined to conditionally certify a class based on Plaintiffs’ tip-pooling claims.

Wang, et al. v. The Hearst Corp., 2013 U.S. Dist. LEXIS 65869 (S.D.N.Y. May 8, 2013). Plaintiffs, a group of unpaid interns, brought an action under the FLSA and the New York Labor Law (“NYLL”) alleging that they were paid no wages and that Defendant required them to purchase college credit as a condition of employment. Defendant is one of the world’s largest publishers of monthly magazines with 20 U.S. magazine titles and several corporate departments. Defendant did not to pay interns because they were in college and eligible to receive academic credit. All magazines followed this policy, which was in place at least since 2006. Plaintiffs sought certification of their NYLL claims for a proposed class consisting of all unpaid interns at Hearst Magazines in New York between February 1, 2006 and the date of final judgment. The Court denied the motion for failure to meet the Rule 23’s commonality, predominance, and superiority requirements. Because Plaintiffs could not show anything more than a uniform policy of unpaid internship, the Court opined that the evidence of a corporate-wide policy of classifying the proposed class members as unpaid interns was insufficient, as that policy alone could answer the liability question, which turned on what the interns did and what benefits they received during their internship. The lead Plaintiffs and opt-in Plaintiffs worked for different magazines and their work assignments were widely varied. This suggested that internships varied greatly from magazine to magazine. The Court remarked that it was unable to resort to any common proof to determine the very nature of the interns’ work. The Court stated that Plaintiffs failed to satisfy the predominance requirement because the record showed that there was no uniform policy among the magazines with respect to the contents of the internship, including the interns’ duties, their training, and supervision. Plaintiffs argued that such a deficiency in the record should be overlooked because the Court could make a determination at the general level as to the nature of the interns’ duties, as well as the benefits, training, and supervision that they received, and suggested that the Court do so based on the testimony of select interns and supervisors, various job postings and evaluation forms, and intern manuals and guidelines of individual magazines. The Court, however, noted that this was precisely the reason which, when examined closely, directly undermined the predominance prerequisites. For instance, there was a myriad of internship postings, manuals, and guidelines that set out...
different duties and training for each magazine; indeed, this was so even for the specific departments within a single magazine. The Court observed that to make liability determinations, it would have to evaluate all of such individualized evidence, in addition to individualized testimony about the level of supervision and respective benefits. Because the content of the internships, which was the core of the dispute, could not be evaluated based on common proof, the Court opined that individual issues clearly overwhelmed the common ones. Finally, the Court noted that while there was undeniable efficiency that stemmed from consolidating and concentrating the litigation of similar claims, the individualized nature of proofs in this case signaled that case management would be difficult, and separate actions would be more appropriate. Accordingly, the Court denied the motion for class certification.

(iii) Third Circuit

**Aboud, et al. v. The City Of Wildwood, 2013 U.S. Dist. LEXIS 70083 (D.N.J. May 17, 2013).** Plaintiffs, a group of current or former police officers, brought an action under the FLSA for failure to pay wages and overtime compensation. Plaintiffs alleged that they were not paid for work performed before and after their scheduled shifts. Plaintiffs moved for conditional certification and for Court approved notice. The Court granted in part and denied in part Plaintiffs’ motion. The Court found that Plaintiffs showed that they were similarly-situated to the putative class because Plaintiffs and all putative class members were subject to the same requirements. Although Plaintiffs had different jobs within the Wildwood Police Department, they were all uniformed officers and were bound by the same collective bargaining agreement (“CBA”). Further, although pursuant to the CBA all uniformed officers had to report to work 15 minutes before their scheduled shift started, they were not paid for this 15-minute time period. Thus, the Court observed that Plaintiffs and all uniformed Wildwood police officers were subject to the requirement that they report to work 15 minutes before their shift started. Defendant argued that because police officers worked five 8-hour shifts per week and each shift included a 30-minute lunch break and two 15-minute breaks, officers were only scheduled to work 35 hours per week. Defendant argued that even if the 15 minute early arrival time was included in an officer’s workweek, the total time worked would only be 36.25 hours per week. The Court noted that under the CBA a workweek consisted of 40 hours, and officers were allowed one 30-minute meal break and two 15-minute coffee breaks. Because Plaintiffs’ two 15-minute breaks were of short duration, the Court rejected Defendant’s arguments and concluded that for present purposes they were compensable. Further, the Court stated that at this stage of the proceeding, Plaintiffs only need to produce some evidence to support conditional certification. *Id.* at *10-11. Plaintiffs claimed that although they were required to work overtime, and Defendant knowingly permitted this to occur, Defendant only paid for pre-approved overtime, thus resulting in an FLSA violation because they were not paid overtime for extra hours worked. The Court focused on named Plaintiff Paul Zielinski’s declaration, which stated that he and other police officers regularly performed work after the end of his or her respective shift without being paid unless such time was preapproved. Zielinski also alleged that he routinely worked more than eight hours per shift. The Court concluded that Plaintiffs satisfied the modest factual showing necessary to conditionally certify their second claim. The Court held that two changes should be made to the notice form, namely that the form should make clear the submission date, and that the form should indicate that the Court had conditionally certified a class involving two claims: (i) employees who were not paid for the 15 minutes they were required to clock-in before their shift officially started; and (ii) employees who were not paid for overtime that was suffered or permitted but not pre-approved. Further, although the Court granted Plaintiffs’ request that Defendant produce the names and last known addresses of the putative class members, it denied Plaintiffs’ request for the production of the dates of birth and social security numbers for any class member whose mailed notice was returned. The Court also denied Plaintiffs’ request for leave to send a follow-up postcard to any class members who did not respond within 30 days of mailing, and Plaintiffs’ request that notice be posted at Police Department worksites.

policies designed to arbitrarily re-classify its captive insurance agent workforces as independent contractors. Plaintiffs sought to certify a state law class comprised of eleven state law sub-classes, seven of which were further divided into separate overtime and deduction sub-classes, for a total of eighteen sub-classes. Each of the state law sub-classes further consisted of three different groups of agents, including: (i) financial services associates; (ii) former Prudential representatives; and (iii) statutory agents. The Court denied the motion. Seeking certification under Rule 23(b)(3), Plaintiffs argued that the differences between the pertinent state laws were minor and readily manageable. Plaintiffs further argued that a nationwide assertion of state law claims may be certified for class resolution if Plaintiffs possessed sufficiently similar rights under the laws of all states that the Court could readily control for differences among various jurisdictions. Id. at *23. Defendant contended that factual differences existed between individual statutory agents and also between statutory agents and the other members of each sub-class, and that the statutory agents were independent contractors exempt from the protection of wage & hour law. Thus, the hallmark of any analysis of independent contractor status was the need to weigh evidence of numerous factors, none of which was solely determinative. Id. at *25. The Court found that actual “exercise of control” over each statutory agents is necessary to determine whether or not they are exempt from the protection of wage & hour law. Id. at *28. The “control” test under Lowe v. Zarghami 153 N.J. 606, 616 (1999), involves four factors focusing on the right to control, but that factor alone was not determinative, as other factors include: (i) the degree of control exercised by the employer over the means of completing the work; (ii) the source of the worker’s compensation; (iii) the source of the worker’s equipment and resources; and (iv) the employer’s termination rights. Id. at *27. Plaintiffs interpretation of Lowe was that an employer’s “right to control” alone was dispositive of statutory agents status. Id. at *26. The Court remarked that, quoting Sloan v. Luyando, 305 N.J. Super. 140, 148 (App. Div. 1997), Lowe stated that the control test was satisfied whenever the employer retained the right of control, even if the employer might not exercise actual control over the worker. Id. at *27. Reading Sloan, however, it appeared to the Court that the New Jersey Appellate Division only began its inquiry as to independent contractor status by looking at right to control. The Appellate Division’s analysis continued by looking at the “relative nature of the work” test, which considered multiple additional factors. Id. Thus, the Court concluded that more needed to be considered under New Jersey law’s “right to control” theory. Id. at *27-28. Thus, given that Prudential had raised an independent contractor defense, the Court found that New Jersey law required an individual analysis of those classified as statutory agents in order to determine whether or not they were exempt from the applicable state wage and overtime laws. Because Prudential’s independent contractor defense applied to a significant cross-section of each sub-class, it would require individualized factual inquiries in each case. Id. at *28. Prudential argued that numerous factors existed as to the varying degree of control exhibited over statutory agents, thereby warranting individualized inquiries. Plaintiffs acknowledged that agents designated as statutory agents existed within each sub-class, but instead argued that the difference in agent designations was readily manageable because common evidence showed Prudential’s actual right to control the means and manner of statutory agents’ work. Given the number of individual state sub-classes that existed, coupled with the potential for individualized inquiry, and the individual inquiry that would be necessary regarding the independent contractor status of at least some of the members of each sub-class, the Court foresaw significant difficulty managing this case. Id. at *30. Accordingly, the Court denied Plaintiffs’ motion for class certification.

Bouder, et al. v. Prudential Financial, Inc., Case No. 06-CV-4359 (D.N.J. July 22, 2013). Plaintiffs brought a class action against Defendant on behalf of insurance agents alleging violations of the FLSA, and the labor laws of the States of California, Hawaii, Illinois, Michigan, Montana, New Jersey, New York, Ohio, Oregon, Pennsylvania, and Washington. Plaintiffs alleged that Prudential misclassified its insurance agents as outside salespersons exempt from state and federal overtime requirements and by adopting policies designed to arbitrarily re-classify its captive insurance agent workforces as independent contractors. Plaintiffs sought to certify a state law class comprised of eleven state law sub-classes, seven of which were further divided into separate overtime and deduction sub-classes, for a total of eighteen sub-classes. Each of the state law sub-classes further consisted of three different groups of agents, including: (i) financial services associates; (ii) former Prudential representatives; and (iii) statutory agents. The Court denied the motion. Plaintiffs then moved for reconsideration of this order, and the Court granted the
motion. Motions for reconsideration are governed by Local Civil Rule 7.1(i) and are appropriate where the Court had previously overlooked dispositive factual matters or controlling decisions of law. *Id.* at 1.

Plaintiffs contended that no factual or legal issues existed that would prevent the certification of any classes or sub-classes sought by their motion for class certification, except as they related to statutory agents. The Court noted that Defendants would not be prejudiced if Plaintiffs’ motion was granted, and accordingly, granted Plaintiffs’ motion and instructed them to file a renewed Rule 23 class certification motion regarding the state sub-classes.

**Goldstein, et al. v. Children’s Hospital Of Philadelphia, 2013 U.S. Dist. LEXIS 24974 (E.D. Pa. Feb. 25, 2013).** Plaintiff, a security guard at Children’s Hospital of Philadelphia (“CHOP”), brought a collective action alleging that Defendant violated the FLSA by not paying overtime and not recording time spent maintaining the uniform she was required to wear while on duty. *Id.* at *2. Plaintiff sought conditional certification of a collective action consisting of all Pennsylvania residents that Defendant employed on an hourly basis at any time during the period from December 20, 2007 to the present who were required to launder their own uniforms. *Id.* at *2-3. The Court granted in part and denied in part Plaintiff’s motion. Defendant conceded that it did not permit employees to launder their uniform during their shift, nor compensated hourly employees for time spent cleaning, pressing, or otherwise maintaining their work uniforms at home. Defendant contended that such time was not compensable and that there were no other employees who were similarly-situated to Plaintiff. *Id.* at *8. First, the Court considered whether Plaintiff was similarly-situated to other security guards. Plaintiff was subject to the CHOP Security Department’s policy concerning dress code/uniform inspections, which required the uniform to be worn on duty, well maintained, and pass inspection. *Id.* at *11. The Court noted that all security officers were subject to the same policy regarding uniform maintenance. *Id.* at *17. The Court granted Plaintiff’s motion for conditional certification because it noted a nexus between the effect Defendant’s policy had on Plaintiff and other employees. *Id.* at *18. Plaintiff also sought conditional certification for a broader-range of employees, arguing that Defendant’s system-wide employee appearance policy, which required employees to maintain certain levels of hygiene and uniform care, resulted in non-compensated work. *Id.* at *19. The Court noted that claims regarding time spent on uniform maintenance would like vary between employees with different job titles. *Id.* at *21. Further, the Court stated that to determine whether time spent maintaining uniforms was compensable, an analysis under the Portal-to-Portal Act would inquire into the principal activity or activities for each job title encompassed in Plaintiff’s prospective collective action to assess whether uniform maintenance activities could be considered integral and indispensable to performing the principle activities. *Id.* The Court noted that due to various departmental requirements, the dress code between Plaintiff and other employees in different department would fluctuate. *Id.* Moreover, the principal activities of each job differed so much that one class’ uniform maintenance may be compensable while another class’ uniform maintenance may not. *Id.* The Court opined that the fact that there was an appearance policy that applied broadly to CHOP non-exempt employees did not render those employees similarly-situated to Plaintiff. *Id.* Thus, the Court concluded that Plaintiff failed to show that employees with other principal work activities were similarly-situated in regards to the FLSA violation arising from Defendant’s failure to compensate employees for time spent maintaining their work attire. *Id.* at *21-22. Accordingly, the Court denied Plaintiff’s motion for conditional certification of a collective action that encompassed other hourly, non-exempt employees of Defendant.

**Hernandez, et al. v. Ashley Furniture Industries, Inc., 2013 U.S. Dist. LEXIS 72387 (E.D. Pa. May 22, 2013).** Plaintiffs brought a class action alleging violations of the Pennsylvania Minimum Wage Act (“MWA”) and the Pennsylvania Wage Payment and Collection Law (“WPCL”), as well as for breach of contract and unjust enrichment. Plaintiffs alleged that Defendant failed to pay employees for all time worked before and after scheduled shifts, during paid rest breaks, and during unpaid meal breaks. Plaintiffs also argued that assembly employees were not properly compensated under the incentive pay system. Plaintiffs sought certification of a class comprised of all current and former non-supervisory hourly employees at the company’s Leesport, Pennsylvania facility who worked during the class period. The Court denied the motion. Defendant’s official policy required employees to clock-in no earlier than 15 minutes before the scheduled start time for their shift. If an employee clocked-in during the 15-minute window prior to the
scheduled start time, the system disregarded the employee’s clock-in time and calculated pay from the scheduled start time unless the supervisor entered additional time. If work began before the scheduled start time, a supervisor could adjust the time records to reflect the actual hours worked by each employee. Further, employees were given a 30-minute unpaid meal break every day, and if an employee was asked to work during the meal break, a supervisor could override the system’s default to ensure that the employee was paid for the additional time. Under the incentive pay system, each worker had two assigned wage rates – a low base rate providing minimum compensation regardless of productivity, and a high base rate for greater efficiency as measured against Defendant’s engineering standards. Plaintiffs argued that they could prove on a class-wide basis that the rounding of start and end times under Defendant’s electronic time-keeping system denied employees pay for all hours worked. The Court, however, noted that each supervisor was vested with the authority to override the default settings if an employee worked before or after scheduled shift times, and Plaintiffs did not demonstrate that the supervisors uniformly exercised this discretion in a manner that permitted employees to work without pay. The testimony of Plaintiffs and other former employees reflected a broad range of experiences, and the time records showed many instances in which employees were paid from the time they clocked-in until the time they clocked-out. Thus, the Court opined that there was no way to determine, without resorting to individualized inquiries, whether an employee whose start or end time was rounded on a particular day actually worked additional time without compensation. The Court also observed that supervisors could override the electronic time-keeping system’s automatic deduction for meal breaks, and Defendant’s records indicated numerous times that they did so. Moreover, numerous former employees, including Plaintiffs, testified that they did not work during meal breaks or rest breaks. Thus, the Court reasoned that ascertaining whether a statutory violation occurred would require individual inquiry for each employee. Additionally, the Court stated that Plaintiffs’ allegations that incentive-paid employees were not put into downtime when appropriate would also require individualized proof to determine factual issues such as when production stopped, how long it remained stopped, and whether downtime was appropriate in a particular instance. Accordingly, the Court denied Plaintiffs’ motion for class certification.

Martin, et al. v. Citizens Financial Group, Inc., 2013 U.S. Dist. LEXIS 43084 (E.D. Pa. Mar. 27, 2013). Plaintiffs brought a collective action under the FLSA alleging that Defendants engaged in an unwritten policy of denying overtime, whereby, at the start of each year, Defendants’ headquarters would determine the budgeted full-time equivalent (“FTE”) of employees that should work at each branch. Plaintiffs claimed that because the FTE did not include overtime, managers were pressured into not paying overtime. Defendants moved to decertify the conditionally certified collective action, and the Court granted the motion, concluding that Plaintiffs were not similarly-situated. First, Defendant pointed to differences in the factual and employment setting of the various Plaintiffs. Defendants asserted that Plaintiffs worked at hundreds of branches, spread over nine states, and had five different job classifications; that each branch was headed by a branch manager, and usually an assistant branch manager; and that anywhere from three to 20 branches made up a region headed by its own regional manager. Defendants also pointed to their written policy of paying employees overtime in accordance with the law, and to declarations from 30 Plaintiffs reflecting that overtime was accurately paid. The Court noted that to resolve the question of
liability, a fact-finder would need to determine whether the employee or the manager was being truthful, and resolving this question with regard to one manager and one employee would not accomplish the task for any of the others. Further, the Court remarked that even if a successful cross examination left the trier of fact questioning one Plaintiff’s veracity, the same juror would have little sense as to whether the hundreds of other Plaintiffs were truthful in claiming that they were denied overtime. Id. at *20. The Court also observed that cross examination of each Plaintiff would require consideration of different facts and individualized testimony unique to each Plaintiff and could not be generalized among the other Plaintiffs. Finally, Plaintiffs had provided Defendants with a proposed trial plan, which provided that testimony from Plaintiffs would be provided on a representative basis. The Court determined that drawing liability conclusions about a large group based upon a small portion of statements could be problematic, especially when testimony among the representatives themselves was different. Id. at *23. The Court thus held that given the multitude of differences in the factual and employment settings of Plaintiffs, Plaintiffs’ inability to provide evidence of an overarching illegal policy, concerns of individualized defenses, and fairness and procedural considerations required decertification of the collective action. For these reasons, the Court granted Defendants’ motion for decertification.

McKee, et al. v. Petsmart, Inc., 2013 U.S. Dist. LEXIS 174123 (D. Del. Dec. 9, 2013). Plaintiffs, a group of operations managers (“OMs”), brought an FLSA action alleging that Defendant misclassified them and others similarly-situated as exempt and failed to pay them overtime for all the hours worked over 40 hours in a workweek. Plaintiffs moved to conditionally certify a collective action consisting of all OMs who were classified as exempt employees. The Court granted the motion. Plaintiffs contended that Defendant’s uniform corporate policies and procedures, along with Plaintiffs’ testimony, demonstrated a factual nexus between the manner in which Defendant’s policies had affected Plaintiffs and the manner in which the policies had affected other employees. Defendant argued that the combination of corporate uniformity and Plaintiffs’ allegations of FSLA violations should not itself be a sufficient nexus. The Court stated that in order to show sufficient factual support, Plaintiffs should demonstrate a factual nexus between their alleged experiences at Defendant’s stores and the experiences of current and former OMs throughout the country. Plaintiff agreed that he did not know anything about the experiences of other OMs at different Defendant’s stores and that he simply assumed that other OMs had the same experiences he did. The Court, however, noted that the record indicated that OMs performed whatever tasks need to be performed to accomplish the non-exempt duties, such as stocking shelves, assisting customers, and unloading deliveries. Thus, the Court found that the very nature of the OM’s job and the manner in which OMs perform any work satisfied the modest factual showing required for the proposed collective action members to be similarly-situated. Accordingly, the Court granted Plaintiffs’ motion to conditionally certify the proposed collective action.

Moore, et al. v. PNC Bank, N.A., 2013 U.S. Dist. LEXIS 74845 (W.D. Pa. May 29, 2013). Plaintiff, an Assistant Bank Manager (“ABM”), brought a wage & hour action alleging that PNC Bank misclassified all ABMs as overtime-exempt and willfully violated the FLSA by failing to compensate ABMs for work exceeding 40 hours per week. Plaintiff sought conditional certification of a collective action of every individual who, during any workweek after August 8, 2009, was employed as a salaried ABM and classified as overtime-exempt. The Court denied the motion. Plaintiff claimed that during discovery she had obtained substantial evidence to establish that she and other ABMs were similarly-situated. Plaintiff claimed that Defendant maintained an across-the-board exemption policy for all ABMs. Defendant admitted that the job duties and functions of the ABM position were the same at every branch company-wide and expected its ABMs to work at least 40 hours per week. Defendant also required all ABMs to operate within PNC’s common retail bank hierarchy, which apparently indicated that the ABM position fell within the same level of authority as the non-exempt positions of Financial Sales Consultant and Teller. Defendant used detailed company-wide policies to ensure that all branches were uniformly operated. The Court observed that certification at the notice stage, although governed by a lenient standard, was not automatic, and Plaintiff must instead show a factual nexus between the manner in which the employer’s alleged policy affected her and the manner in which it affected other employees. Id. at *14. Further, the Court also noted that in spite of the modest factual nexus evidentiary standard, conditional certification ought to be denied when evidence was lacking, and when Plaintiff relies on a common exemption status as the factor that
bound the collective action together. *Id.* The Court remarked that Plaintiff assumed that any employee classified as exempt by a company that did business nationwide was entitled to participate in a collective action simply based on the employee’s testimony that she was required to perform non-exempt tasks. The Court reasoned that such a theory ignored the requirement that Plaintiff show she was similarly-situated to the employees she proposed to include in the collective action with respect to her claim that she performed non-exempt duties. Additionally, the Court stated that even when considering those decisions that weighed a company’s blanket exemption policy in favor of conditional certification, more of showing than an across-the-board classification is necessary. *Id.* at *16. Here, Plaintiff did not file any supporting declarations or submit deposition testimony of any other current or former ABMs to bolster her claim. The only evidence that other similarly-situated individuals existed was the addition of a single other opt-in. The Court found that besides mere allegations, Plaintiff did not show a factual nexus between her alleged experiences at two PNC branches in Ohio and the experiences of current and former ABMs throughout the country. Accordingly, the Court denied Plaintiff’s motion for conditional certification.


Plaintiffs, a group of employees, brought a collective action alleging that they were not compensated for their time performing shift relief and donning and doffing, as required by the FLSA and the Pennsylvania Wage Payment Collection Law. Plaintiffs alleged that Defendant maintained a facility-wide policy requiring 12-hour shift employees to be in their areas up to 15 minutes early to provide shift relief, and required 12-hour shift employees to be present at the facility before and after their scheduled shifts to put on and take off uniforms, boots, and safety goggles. Accordingly, Plaintiffs alleged failure to pay overtime compensation. Plaintiffs moved for conditional certification of a collective action of similarly-situated Plaintiffs comprising of all 12-hour shift employees who were not compensated for participating in shift relief and/or donning and doffing uniforms and protective gear. The Court granted the motion. First, regarding the shift relief claim, Plaintiffs provided declarations from 10 workers who stated that they were all subject to the same shift relief policy and were not compensated for this time. Defendants also conceded that DuPont’s policy applied to all 12-hour shift employees, and that the policy worked in conjunction with their meal break policy. DuPont’s meal break policy provided for three, 30-minute paid breaks to employees who work 12-hour shifts requiring shift relief. Because Defendants made this payment for time that was not compensable under the FLSA, they argued that using this time as a set-off to credit other time during the day Plaintiffs and other 12-hour shift employees were working, including shift relief, did not violate the FLSA. The Court, however, noted that Plaintiffs only had to make a modest factual showing that other employees were similarly-situated at this stage of litigation. Accordingly, the Court found that there was ample evidence to establish that Plaintiffs and proposed collective action members were similarly-situated. Second, regarding the donning and doffing claim, Plaintiffs provided declarations from 10 workers substantiating their allegation that the donning and doffing policy affected similar 12-hour shift employees. Further, Defendants agreed for the purposes of this motion only, that the time Plaintiffs and other 12-hour employees spent donning and doffing was compensable under the FLSA. Thus, the Court noted that Plaintiffs had established a modest factual showing pertaining to Defendant’s donning and doffing policy. Accordingly, the Court granted Plaintiffs’ motion for conditional certification.


Plaintiffs brought an FLSA action alleging that Defendant misclassified its delivery drivers as independent contractors and thus denied them overtime compensation. Earlier, the Court had conditionally certified an FLSA collective class of all former and current delivery drivers who may be owed unpaid overtime wages and whose claims for such wages are not barred by the three-year statute of limitations. Defendant subsequently moved for decertification, which the Court granted. Although Plaintiff asserted that all collective action members signed the Transportation Brokerage Agreement (“TBA”), which classified each driver as an independent contractor and that Defendant subjected them to certain policies controlling some aspects of how they performed their work, the Court noted that these standards were applied inconsistently to the proposed collective action members. While Plaintiffs argued that they were forbidden from deviating from the route manifests and specified delivery times, several drivers testified that for some customers, the delivery sequence and times were merely suggestions and they could decide how
best to sequence deliveries. Plaintiffs also argued that they were subjected to random field audits to enforce a number of performance requirements, but a significant portion of the collective action members had never been audited, and several drivers testified that they made stops without authorization for personal reasons without repercussions. Further, Plaintiffs pointed to a document purporting to reflect a policy that all delivery vehicles must be less than five years old and undergo inspection by Defendant, but many collective action members used vehicles more than five years old and some of their vehicles were never inspected. The Court observed that under the FLSA, an employer’s degree of control over its workers was determined by examining the employer’s actual control, not its right to control.  

Further, the Court noted that determination of the economic realities of AEX’s control over its drivers would require individualized examinations of every collective action member. The Court opined that the fact that all drivers signed the same TBA did not help Plaintiffs’ cause, because economic realities, not contractual labels, determined employment status for the remedial purposes of the FLSA.  

Further, the Court remarked that this kind of entrepreneurial conduct suggested an independent contractor relationship, while the absence of such activity was indicative of employee status. Further, although most collective action members had to invest in a vehicle, cell phone, cargo scanner, and accident insurance, some used cars they previously owned while others purchased cargo vans to be eligible to perform a broader range of deliveries, while the opt-in Plaintiff invested nothing to perform services for Defendant. The Court opined that the investment factor weighed in favor of or against employment status depending on the particular collective action member. Thus, the Court stated that resolving the claims of the collective action members would require an individual examination of each driver’s relationship with Defendant, and collective treatment would not satisfy the objectives of § 216(b) of reducing costs and increasing efficiency. Therefore, since Plaintiffs failed to show that the proposed collective action members were similarly-situated, the Court granted Defendant’s motion to decertify.  

Tyger, et al. v. Precision Drilling Corp., Case No. 11-CV-1913 (M.D. Pa. Jan. 7, 2013). Plaintiffs, a group of hourly rig employees, brought a putative collective action alleging that Defendant failed to compensate them for pre-shift and post-shift activities, including for time spent donning and doffing protective equipment and for attending mandatory post-shift safety meetings in violation of the FLSA. Subsequently, Plaintiffs moved to conditionally certify a nationwide class comprised of all hourly rig employees employed by Defendant. In support of their motion, Plaintiffs submitted four declarations from putative class members who worked for Defendant in Pennsylvania, Utah, Colorado, Louisiana, and Wyoming within the last three years.  

Defendant argued that the evidence of Defendant’s uniform policy was insufficient to support the certification of a nationwide class. Further, Defendant maintained that individualized inquiries would be required. The Court noted Defendant’s argument, but found that such arguments were inappropriate for its preliminary determination of conditional certification. Accordingly, the Court granted Plaintiffs’ motion for conditional certification. Accordingly, the Court granted Defendant’s motion to decertify.  

(iv) Fourth Circuit  

Amir, et al. v. Sunny’s Executive Sedan Service, Inc., Case No. 13-CV-161 (E.D. Va. July 30, 2013). Plaintiffs, a group of chauffeurs, brought an action seeking recovery of unpaid minimum wage and overtime compensation and damages under the FLSA and Virginia common law. Defendants provide chauffeured transportation in a variety of vehicles and employed approximately 50 drivers to serve Washington, D.C. metropolitan area customers. Drivers worked for Defendants pursuant to two different independent contractor agreements, employed as either an employee, an affiliate, or a combination of the two. The pay structure differed from driver-to-driver and could differ for the same driver depending upon the time period. A driver who was at one time an independent contractor could later be hired as an employee. The
independent contractors were paid on a piece-rate/commission basis while the affiliate drivers were paid according to another arrangement. Plaintiffs moved for conditional certification and to facilitate identification and notification of similarly-situated employees. The Court denied the motion. The Court stated that Plaintiffs were not appropriate collective action representatives because they were performing services pursuant to different contract agreements and terms and conditions of employment, had differing compensation arrangements, drove different vehicles, and worked differing schedules. Further, the Court remarked that these claims were individual, fact-intensive, and fact-specific and would require individualized ad hoc inquiries for each Plaintiff. Thus, the Court opined that Plaintiffs were not similarly-situated and pursuing this matter as a collective action would not promote judicial economy. The Court stated that a collective action could not be certified on the ground that Defendant would be precluded from litigating its statutory defenses to individual claims. Moreover, the Court noted that these claims were individual claims and necessitated individual factual inquiries and defenses, which were inappropriate to resolve as a class. Accordingly, the Court denied Plaintiffs’ motion.

**Curtis, et al. v. Time Warner Entertainment-Advance/Newhouse Partnership, 2013 U.S. Dist. LEXIS 63603 (D.S.C. May 3, 2013).** Plaintiffs, a group of former inbound sales representatives, brought an action alleging that Defendant had a policy requiring representatives to reconcile commission eligible sales recorded via Defendant’s sales-tracking software during unpaid time. Plaintiffs, who were paid an hourly rate and commissions on sales they made, checked the status of their sales and commissions using the GLOCENT sales-tracking software, which Plaintiffs alleged failed to properly record the sales and commissions earned. Plaintiffs contended that it was necessary to periodically reconcile their sales. Plaintiffs alleged that they were instructed to perform reconciliations off-the-clock, resulting in the employees performing uncompensated work in violation of the FLSA. Plaintiffs moved for conditional certification of a collective action, and the Court granted the motion. The affidavit of a former representative at Defendant’s West Columbia call center corroborated the allegations in Plaintiffs’ complaint, and the depositions of a current employee and manager supported the existence of a policy requiring representatives to reconcile sales during uncompensated time. The manager also testified that this policy was changed via an e-mail sent on May 10, 2010, which acknowledged problems with the GLOCENT software and encouraged employees to reconcile sales, but directed that they do so during compensated time only. The Court stated that this e-mail corroborated Plaintiffs’ allegations regarding reconciliation, problems with GLOCENT, and an informal policy requiring employees to reconcile sales during uncompensated time prior to the date of the e-mail. The Court also noted that this e-mail was sent to the Raleigh and South Carolina telesales teams, and that supervisors, managers, and representatives in those locations would have received this e-mail. Additionally, the named Plaintiff testified that Defendant routed calls to its West Columbia call center from its other locations in New York, Charlotte, and Winston-Salem. Accordingly, the Court found that Plaintiffs met their modest burden to show that similarly-situated Plaintiffs existed, and conditional certification was appropriate. Defendant argued that the collective action should be limited to representatives who performed reconciliation off-the-clock prior to the date of the e-mail. Defendant’s Vice President of Telesales testified that Defendant ceased using GLOCENT company-wide in June of 2011, and thus in the alternative Defendant argued that the proposed collective action should be limited accordingly. Because there were no IBS representatives at any of Defendant’s call centers who would have used GLOCENT after June of 2011, the Court concluded that the collective action should be limited accordingly. Finally, Defendant asserted that the proposed collective action should not extend beyond the West Columbia call center. The Court, however, noted that Plaintiffs had submitted evidence and testimony of an informal policy requiring off-the-clock reconciliation in other call centers, which was sufficient to justify a collective action of nationwide scope at this stage in the litigation. Accordingly, the Court conditionally certified a nationwide class of all current or former non-exempt representatives who were required to use the GLOCENT software pursuant to their employment and were instructed to reconcile their actual sales during uncompensated time, at any point between August 20, 2009 and June 30, 2011.

Further, neither party discussed the duties or services performed by determining their compensation and performance requirements. Accordingly, the Court granted conditional certification of a collective action. The Court denied Plaintiffs’ motion and Defendant’s motions. Defendant contested Plaintiffs’ allegations that they were employed by Defendant, and submitted the affidavit of Keith Crook, which asserted that none of Plaintiffs were employed by Defendant during the specific periods alleged in the complaint. Id. at *6. The Court noted that Defendant did not offer any details with respect to the identity of the affiant and the declaration also lacked evidence supporting its conclusion. Id. Plaintiffs submitted affidavits attesting to their periods of employment with Defendant to support their allegation that they were employed by Defendant. Id. at *7. The Court observed that the employment periods listed in the affidavits were inconsistent with those in the complaint. Id. Neither of the parties disputed the relevant facts that a Court would use to determine whether a party is an “employee” under the FLSA. Id. Further, neither party discussed the duties or services performed by any Plaintiff or the promises or expectations of compensation for services rendered. Id. at *8. The Court noted that the competing affidavits, however, did present a genuine dispute regarding the Plaintiffs’ employment with Defendant, a necessary and material fact to the adjudication of the claims asserted. Id. Accordingly the Court held that summary judgment was inappropriate. In their motion, Plaintiffs sought conditional certification for a collective action consisting of all Multifresh employees in West Virginia who were not paid for work performed during their meal break after April 16, 2009. Id. at *10. The Court noted that Plaintiffs failed to support the allegations in their pleadings that other similarly-situated aggrieved employees existed. Id. at *13. Plaintiffs neither asserted nor offered any factual evidence that Defendant maintained a state-wide policy to deny appropriate compensation for overtime hours, or requiring employees to forego a meal break. Id. at *14. Accordingly, the Court denied Plaintiffs’ motion for conditional certification.


Plaintiffs, a group of bakery product distributors, brought an action under the FLSA and the North Carolina Wage and Hour Act, alleging they were misclassified as independent contractors. Plaintiffs filed a motion for conditional certification of a collective action and Court-facilitated notice. The Court granted Plaintiffs’ motion. Plaintiffs’ job duties involved picking up bakery products from one of the 24 Defendant-owned warehouses and delivering them to customers in defined geographical territories. A Sales Manager managed each warehouse and was responsible for the oversight of the territories within their respective branch. Distributors purchased or were granted distribution rights to certain product brands within a defined geographic territory, and a distributor’s route was pre-determined by Defendant. Subject to Defendant’s contract with each distributor, each distributor was responsible for purchasing their vehicles and some of their own equipment. Defendants claimed that the distributor alone determined the type of product and quantity that was delivered to a particular customer; each customer was delivered a quantity based on a four week average, to which distributors could make adjustments based upon the customers’ needs. Plaintiffs asserted that Defendants reserved the right to change the quantity of a particular order and the distributor was required to deliver that amount, even if he disagreed. Distributors were paid on a piece-rate basis where Defendants paid them based upon the quantity of product sold by customers. Plaintiffs contended that although they could pursue additional cash accounts, Defendants retained exclusive control over all products. Distributors serviced both cash accounts and charge accounts; while distributors were granted a certain amount of autonomy for cash accounts, charge accounts were governed by a stricter set of contractual requirements negotiated between the customer and Defendants. While the number of cash and charge accounts each distributor serviced varied, the nature of the distributor position while servicing each type of account were substantially similar. The Court observed that Plaintiffs had shown that the proposed collective action members were together the probable victims of a single decision, policy, or plan. Further, the Court opined that Plaintiffs presented evidence that they were similarly-situated because they had the same job duties and were subject to the same policies and standards determining their compensation and performance requirements. Accordingly, the Court granted conditional
certification for a collective action comprised of all workers who are or were working as distributors for Defendants at any time from September 12, 2009 to the entry of the order. The Court also approved the notice to be sent to potential collective action members.

**Ealy, et al. v. Pinkerton Government Services, Inc., 514 Fed. App’x 299 (4th Cir. 2013).** Plaintiffs, a group of private security employees, brought an action against Defendant seeking unpaid wages. The District Court granted Plaintiffs’ motion for class certification. Upon Defendant’s appeal, the Fourth Circuit vacated the District Court’s order. The Fourth Circuit found that the District Court failed to conduct a “rigorous analysis” pursuant to the standard laid out in *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011), to determine if the class met Rule 23 requirements. Plaintiffs alleged that they were required to show up 30 minutes before their shifts started for briefings from supervisors and to “arm up,” i.e., to check out weapons from the base’s armory that they needed to perform their duties at the base’s entrances, and had to spend 15 minutes returning the weapons to the armory after the shifts without any compensation. *Id.* at 301. Defendant later changed its payroll and record-keeping processes to include arming up and disarming, but then began deducting a 45-minute lunch break from the guards’ timesheets even if they had spent the majority of the duration of their meal breaks at the guard shack, armed, and on-call in case of emergencies. *Id.* at 301-02. Plaintiffs alleged that Defendant’s compensation practices related to disarming and meal breaks violated the FLSA, the Maryland Wage and Hour Law, and the Maryland Wage Payment and Collection Law. *Id.* at 302. Determining that there were facts common to the entire class, including that all class members were uncompensated for their meal breaks and that any obligations that allegedly accompanied their meal breaks were applicable to all class members, that their claims were typical of the class and that Plaintiffs would fairly and adequately protect the interests of the class, the District Court had certified a 152-member class of all current and former Defendant’s employees who worked at Andrews Air Force Base and held non-exempt position as civilian security guards. *Id.* at 302. Although the District Court had recognized that some dissimilarities existed among the class because some individuals had, in fact, been compensated for their disarming time, it had held that it did not change the outcome about the propriety of a class action going forward because those class members who did not suffer the disarming injury could be excluded from any potential recovery for the disarming component. *Id.* at 302-03. The Fourth Circuit stated that the District Court must determine whether even a single question of fact or law is common to the class, and such questions depend on a “common contention,” the resolution of which would resolve an issue that is central to the validity of each one of the claims in one stroke. *Id.* at 307. The Fourth Circuit did not dispute that the District Court recognized a common question as to whether or not the class members were compensated for their meal breaks. The Fourth Circuit noted, however, that given the factual circumstances of the meal breaks, a common question of law could be whether or not the class members should have been compensated for that time under Maryland law, and whether the common questions were dependent upon a common contention. *Id.* at 306. The District Court had failed to make such a determination in the first instance. The District Court also had failed to clearly address the typicality requirement in any meaningful way as it did not compare the claims of Plaintiffs with the class as a whole to determine whether Plaintiffs’ claims were typical of the class. *Id.* Further, the District Court had failed to conduct the required separate inquiry as to whether common questions of law or fact predominated over those affecting only individual class members. *Id.* The Fourth Circuit found the District Court’s predominance analysis unclear and insufficiently rigorous. *Id.* The Fourth Circuit therefore vacated and remanded the District Court’s class certification order.

**Fifth Circuit**

**Clark, et al. v. Centene Corp, Case No. 12-CV-174 (W.D. Tex. May 8, 2013).** Plaintiffs, a group of nurses, brought an FLSA collective action seeking to recover unpaid overtime wages under the FLSA. Although their specific job titles varied, Plaintiffs generally performed utilization review, a process involving the review of requests for services from healthcare providers. Plaintiffs moved for conditional certification of a collective action, and the Court granted the motion. The Court observed that there was a reasonable basis for believing that other potential collective action members existed and wanted to opt-in to this suit. The parties agreed that there were putative collective action members who would want to join this suit, and discovery had revealed that Defendant believed there were employees who performed either Plaintiffs’
exact jobs or jobs with substantially similar job duties and who were classified as exempt in seven other Texas offices. The Court, however, noted that there were obvious differences among Plaintiffs. Further, putative collective action members would obviously work in different offices and in different cities across the state of Texas, and may have different salaries, employment histories, and levels of education. The Court also stated that the employees undoubtedly had different workloads, worked different numbers of hours, and may have even applied varying guidelines, or at least applied the same set of guidelines in different ways. Nevertheless, the Court opined that these potential differences did not preclude the conditional certification of a collective action. Defendant requested that notice be limited to individuals with Plaintiffs’ exact job titles, that a 45 day opt-in period was sufficient, and that notice should be given by approved mailing. The Court reasoned that the ultimate certification of a collective action would hinge on a determination, at the decertification stage, of whether the opt-in Plaintiffs were similarly-situated to the named Plaintiffs, and thus it was somewhat circular to tie the notice to those who were similarly-situated. Id. at *7. Thus, the Court altered the proposed language and limited the notice to individuals who shared the named Plaintiffs’ job titles and those individuals Defendant identified as nurses working in utilization management.

In In Re Wells Fargo Wage & Hour Employment Practices Litigation, Case No. 11-MD-2266 (S.D. Tex. Aug. 1, 2013). In this multi-district litigation brought by home mortgage consultants (“HMCs”) and mortgage consultants (“MCs”) alleging failure to pay overtime compensation, the Court had conditionally certified two collective actions. Defendants had argued that the individuals in the proposed collective action were not similarly-situated with regard to the type of work they did and thus not similarly-situated with regard to whether FLSA overtime exemptions applied. The Court had rejected that argument because whether exemptions apply was a merits-based inquiry and not relevant at the notice stage. The conditional certification order required Defendants to provide Plaintiffs with lists of all individuals who met the class definitions so that Plaintiffs could mail notice to these individuals. Defendants now moved to enforce the conditional certification order contending that Defendants had failed to provide an accurate and complete list of individuals in the defined class. Specifically, Defendants were withholding information on 8,000 California-based HMCs who the banks claimed had released their claims as part of a class action settlement in California state court (the “Lofton class”). Defendants argued that Plaintiffs wanted to destroy a carefully negotiated, California state court-approved class action settlement of wage claims and resurrection of rights and liabilities of thousands of previously litigated employee disputes. The Magistrate Judge denied the motion to enforce and recommended that the Court reconsider its earlier conditional certification order. The Magistrate Judge noted that Defendants, by refusing to supply the names of all the members of the putative collective action, essentially wished to redefine the collective action without the Court’s intervention. Further, the Magistrate Judge stated that in their conditional certification briefing, Defendants did not request that the Court limit the collective action definition to carve out these individuals. The Magistrate Judge observed that Defendants did not make it clear that it would not include the Lofton class in the list. Moreover, the Magistrate Judge stated that if Defendants believed that the Lofton class should be excluded from the putative collective action, they should not have waited to advise Plaintiffs and the Court. The Magistrate Judge recommended that the Court could ignore Defendants’ non-disclosure of the California state court action and just address the issue at the decertification stage. The Magistrate Judge determined, however, that it was not in the best interests of judicial economy to put off for another day whether the Lofton claims should have been included in the collective action. The Court agreed with the Magistrate Judge on Rule 72 objections. Plaintiffs asserted that whether the Lofton class settlement precluded recovery in this action was a merits-based defense and the Court had already ruled that it would not rule on merits-based defenses at the conditional certification stage. The Court stated that it was not inclined to rule at this point on whether Defendants had successfully proven their defense; rather it was concerned with the new information about the California court-approved settlement and release of claims might indicate that the Lofton class was not similarly-situated to the other Plaintiffs in the putative collective action. Thus, the Court decided to reconsider its conditional certification order and directed the parties to brief the issue.

Plaintiffs, a group of workers employed in various roles at the Houston Sprint Strategic Business Units (“SBUs”) call center, brought an FLSA action seeking unpaid regular wages, unpaid overtime wages, lost wages, liquidated damages, attorneys’ fees, and costs. Id. at *7. CSRs recorded their time through an Auxiliary Work mode (“Aux Work”) system. There were two modes in the Aux Work system. When in work mode, CSRs could receive calls from clients, and when in non-work mode, they could not receive calls. Plaintiffs stated that they were required to log-in to the Aux Work system in order to record time and that their time was not recorded unless they were logged-in to the system. Plaintiffs also alleged that they were not paid for time spent locating a work station, logging-in to the computer and telephone system, and that under both systems they were frequently logged-out by supervisors and others, resulting in unpaid time. Further, Plaintiffs contended that they were not paid when the time-keeping system experienced technical issues. Id. at *4-6. Plaintiffs moved for conditional certification, and the Court denied the motion. Plaintiffs alleged that they, as well as others, were subject to a common policy or practice whereby the time that they actually worked was not accurately recorded because Plaintiffs were frequently logged-out of Defendant’s time-keeping system. The Court, however, observed that Plaintiffs did not produce evidence to suggest that Defendant had instituted a Texas-wide policy, written or otherwise, to deny call-center employees pay for time recorded in certain Aux Work modes or for time spent during a system failure. Almost all of Plaintiffs’ evidence related to employees at the Houston Sprint SBU, and Plaintiffs’ only other evidence consisted of declarations from two employees at an XCS SBU in El Paso, Texas. The Court opined that Plaintiffs’ evidence was insufficient to support conditional certification of a Texas-wide (or any other) class. Id. at *19-20. Further, the Court remarked that the evidence was uncontroverted that there were and had been significant differences in the way that employees at various SBUs recorded time and were compensated. Plaintiffs did not show that the time-keeping systems operated consistently such that employees at the various SBUs would be similarly-situated. Further, the Court stated that Plaintiffs did not demonstrate a basis to find that they were logged-out of the automated time-recording program in any systematic fashion or that Defendant had a plan or policy to log them out systematically. While Plaintiffs argued that employees who acted in a supervisory role logged them out of the time-keeping program when a Plaintiff shifted to non-work Aux Work mode on many occasions, and that the supervisors were incentivized to do so in order to minimize employee overtime payments, some Plaintiffs conceded that their supervisors did not log them out every time they shifted into certain Aux Work modes. Id. at *20-22. Plaintiffs also complained about log-outs and inaccurate recording of time that were not the result of a systematic policy. The Court observed that Plaintiffs’ claims and each week’s time would need to be assessed through a range of individualized inquiries, such as who logged each Plaintiff out, why and when each Plaintiff was logged-out, the reasons that supervisors chose to log-out each employee each day, whether the employee manually recorded the unlogged time, whether the employee requested credit for the time from a supervisor, and whether or not each employee’s supervisor properly corrected the time-keeping records. Id. at *24. Because there was no evidence that Plaintiffs and other call-center employees were similarly-situated with regard to a Texas-wide, or even SBU-wide, policy in violation of the FLSA, the Court denied conditional certification. Id. at *25-26.


Plaintiffs, a group of former employees, brought two separate FLSA actions alleging failure to include commissions and bonuses in their regular rates of pay for purposes of calculating overtime compensation (the “Rate Claim”). Plaintiffs also asserted that they were not compensated for all overtime hours worked (the “Off-The-Clock Claim”). Plaintiffs sought conditional certification of a nationwide class of more than 800 Fitness Consultants and 120 Sales Managers. The Court granted Plaintiffs’ motions in part. Following Spectrum Clubs, Inc.’s (“Spectrum”) acquisition, Defendant Gold’s Texas Holdings Group, Inc. (“GTH”) hired many of Spectrum’s former employees to continue working at the gyms, including several to work as Fitness Consultants and Sales Managers. Defendants maintained official, written policies requiring non-exempt employees, including Sales Managers and Fitness Consultants, to record and be paid for all time worked, and the policies expressly prohibited off-the-clock work. Defendants also had a policy that prohibited falsification of accurate time-keeping or other business records. Further, Defendants had a policy that employees must be paid for all hours worked whether scheduled or unscheduled, even if
overtime was not pre-approved by management, and all managers and non-exempt employees were trained in the time-keeping and overtime policies. The vast majority of named and opt-in Plaintiffs were former employees of San Antonio, Texas gyms that once belonged to Spectrum. Many of them submitted declarations that they were encouraged to work off-the clock and that their General Managers had them sign forms to alter the recorded number of hours they worked. Several also stated that although they complained to their supervisors that they were working overtime without compensation, no corrective action was taken to ensure that they were compensated. The Court noted that there was no evidence to suggest that there was a de facto policy of requiring off-the-clock work. Although Plaintiffs relied solely upon job descriptions and compensation plans applicable to Sales Managers and Fitness Consultants across the country to infer a national policy existed to require off-the-clock work, the Court remarked that the various job descriptions did not state that job duties were to be performed without compensation or that employees would not be paid for work in excess of 40 hours a week. The Court opined that the fact that managers within one specific region allegedly required or condoned off-the-clock work was insufficient to warrant certification of a nationwide class. The Court, however, observed that Plaintiffs sufficiently showed that a regional policy or practice of not compensating Sales Managers and Fitness Consultants for all time worked existed in the South Texas division. Defendants argued that Plaintiffs had unique job duties during the ownership transition, and thus, other Fitness Consultants and Sales Managers located across the country were not sufficiently similarly-situated to Plaintiffs. The Court noted that Gold’s Gym International, Inc., the entity overseeing Human Resources for all regional subsidiaries, maintained uniform job descriptions for Sales Managers and Fitness Consultants nationwide. Further, Defendants conceded that Sales Managers and Fitness Consultants generally sold gym memberships and training packages and were paid through commissions and bonuses. Thus, the Court determined that on a national basis, Sales Managers and Fitness Consultants shared the same general job duties, and that slight differences in job duties or functions did not run afoul of the similarly-situated requirement. Although Defendants asserted that sales goals differed from gym to gym, Plaintiffs presented sufficient evidence that, at least in the South Texas division, sales goals promulgated in some fashion by the Regional Manager, and enforced by at least ten General Managers, caused Plaintiffs to work overtime hours without compensation. Additionally, the Court stated that although while at Spectrum, Plaintiffs were classified as exempt and reclassified as non-exempt after the acquisition, this uniqueness regarding former Spectrum employees was insufficient to defeat certification. Thus, the Court granted conditional certification as to Plaintiffs’ off-the-clock claims with respect to only a regional class consisting of those Fitness Consultants and Sales Managers working in GTH’s South Texas division, and granted conditional certification of a national class with respect to Plaintiffs’ Rate Claims.

(vi) Sixth Circuit

Creely, et al. v. HCR ManorCare, Inc., 920 F. Supp. 2d 846 (N.D. Ohio 2013). Plaintiffs, a group of non-exempt skilled nursing employees, brought a collective action alleging that Defendant’s use of a computerized time-keeping systems that automatically deducted a 30-minute meal period from hourly employees’ time-cards for shifts more than five hours violated the FLSA. Under the system, employees clocked-in at the beginning of their shift and clocked-out at the end of their shift, but did not clock-in or clock-out during their meal breaks. Payroll personnel would then adjust the employee’s time-card to reverse the automatically deducted 30 minutes so that the employee would be paid for all time actually worked. Initially, the Court granted conditional certification to Plaintiffs’ collective action claims, and at the end of discovery, Plaintiff moved for final certification of the collective action claims and Defendant moved to decertify the collective action. Id. at 850. First, the Court noted that the system required employees to cancel a deduction if they worked through a meal break, which shifted the burden of monitoring missed meal breaks from the employer to the employees. However, the Court noted that the auto-deduct policy, alone, did not form the basis of a FLSA violation under an improper burden-shifting theory. Id. at 851-52. Thus, the issue was whether Defendant inadequately and unlawfully implemented its auto-deduct policy across the board creating a class of similarly-situated Plaintiffs. The Court opined that the varying accounts among the witnesses and individual testimony weighed against final certification. Id. at 854-55. Although all Plaintiffs were subject to the auto-deduct policy, the policy’s application varied based on factors such as job duties and individual managers at the various HCR facilities. Furthermore, managers
involvement in implementing the policy, Plaintiffs' knowledge of and training on the policy, and the application of the auto-deduct policy itself varied depending on the individual managers. *Id.* 854. The Court observed that analogous case law authorities had decertified classes that exhibited these types of factual distinctions among a class of Plaintiffs. *Id.* Courts had also decertified classes where company-wide policies were implemented in a decentralized manner. *Id.* at 855. The Court observed that Defendant had demonstrated inconsistencies among and within opt-in Plaintiffs' testimony, and while the record was indicative of individual FLSA violations, the evidence, as a whole, did not show similarly-situated Plaintiffs experiencing a common FLSA injury. *Id.* at 856. The Court also assessed the defenses available to Defendant, and determined whether they were individualized as to each Plaintiff or could be asserted broadly against an entire class. *Id.* The Court observed that where Plaintiffs had disparate factual and employment settings, defenses would likely be individualized, rendering collective treatment inappropriate. *Id.* Defendant argued that it would need to inquire into each Plaintiff’s knowledge of the meal break cancellation policy, whether and how often each Plaintiff worked through or was interrupted during a meal break, whether each Plaintiff submitted missed punch forms and, if so, whether they were compensated. *Id.* The Court opined that the knowledge and testimony of each individual manager would be relevant and necessary to the defenses Defendant asserted because of the decentralized implementation of the auto-deduct policy. *Id.* Thus, because individualized defenses would overwhelm any trial of this case as a collective action, the Court concluded that this consideration also weighed against certification. Finally, the Court observed that it was unclear how proceeding collectively and using representative testimony would be fair or useful. *Id.* at 857. Further, the primary difficulty in producing representative testimony would not be resolved by certifying sub-classes based on job descriptions because Defendant’s implementation of its policy was done through individual managers on a decentralized basis, and was also dependent on the nature of the resident population at the individual facilities. Accordingly, the Court granted Defendant’s motion for decertification. Hathaway, et al. v. Shawn Jones Masonry, 2013 U.S. Dist. LEXIS 63374 (W.D. Ky. May 3, 2013). Plaintiff, a laborer, brought a collective action on behalf of himself and all individuals employed by Defendant from July 8, 2008 to the present time, alleging failure to compensate for non-commute travel and waiting time after the beginning of workday, in violation of the FLSA. Plaintiff alleged that laborers received wages only for the hours they actively worked at a worksite, and the time spent in waiting for work to commence and travelling between Defendant’s facility and worksite at the beginning and end of each workday was not compensated. If weather conditions were unsuitable after arrival at the worksite, the work was abandoned and the workers were not paid for the day. Earlier, the Court had conditionally certified Plaintiff’s claims as a collective action. Thereafter, three individuals joined the action and participated in the discovery process, primarily to determine whether the opt-in Plaintiffs were similarly-situated to named Plaintiff Michael Hathaway. Plaintiffs now moved for final certification as a collective action. The Court granted in part and denied in part the motion. Plaintiffs contended that because the opt-in Plaintiffs performed the same job duties, were paid in the same way, and were pursuing similar legal theories to remedy the denial of pay for the time they were required to be at the company’s disposal without compensation, they were similarly-situated for purposes of filing a collective action. The Court observed that both Hathaway and opt-in Plaintiff Michael Flener worked as laborers, both were hourly employees subject to the same compensation policies, both rode the company van from the Murray Facility to job sites of various distances, both asserted that each day they either loaded or watched other men load the company van, and both asserted that, after the foreman declared the workday over, they would clean-up the job site and load equipment before boarding the company van. Thus, the Court found that Flener and Hathaway were similarly-situated. Opt-in Plaintiffs David Henson and Alfredo Rocha drove their personal vehicles to job sites. Henson and Rocha’s compensation did not begin until the company van arrived and the foreman declared the workday started, and they were not paid for this time spent waiting at the job site. The Court stated that to the extent Henson and Rocha sought relief for failure to compensate them for their time waiting for the company van to arrive, they were not similarly-situated to Hathaway. Unlike Hathaway and Flener, who argued that they should be compensated for their travel time in the company van, Henson and Rocha acknowledged that they were not entitled to compensation for their commutes from home to the job site. Henson and Rocha’s claims rested on the separate theory of liability that they were entitled to
compensation from the moment they arrived at the job site and that Defendant unlawfully failed to compensate them for their time spent waiting for the company van to arrive. The Court remarked that the differences among Plaintiffs outweighed the similarities, and that Henson and Rocha were not similarly-situated in this regard, and thus dismissed their claims based on the time spent waiting for the company van to arrive. The Court, however, noted that all opt-in Plaintiffs shared the common theory that Defendant unlawfully failed to pay laborers who were at the job site and ready to work until the foreman determined if the day’s work would proceed. Thus, to the extent they sought compensation based on Defendant’s inclement weather policy, the Court observed that Henson and Rocha were similarly-situated, and therefore properly in the collective action. Accordingly, the Court granted in part and denied in part the motion for final certification under 29 U.S.C. § 216(b).

**Hendricks, et al. v. Total Quality Logistics, LLC, 2013 U.S. Dist. LEXIS 7986 (S.D. Ohio Jan. 18, 2013).** Plaintiffs, a group of logistics account executives (“LAEs”) and logistics account executive trainees (“LAETs”), brought an action alleging that they were misclassified as exempt employees and denied overtime pay in violation of the FLSA and the Ohio Minimum Fair Wage Standards Act (“Ohio Wage Act”). Defendant’s sales teams were comprised of 60 to 70 LAEs, LAETs, and other sales support personnel. The LAET job was a training position, and after 26 weeks of training, many LAETs were promoted to the LAE position. Plaintiffs moved for certification of a class comprised of all inside sales employees including LAEs or brokers and LAETs or assistant brokers. The Court granted in part Plaintiffs’ motion. Defendant’s declarations indicated that up to 1,033 LAETs and 462 LAEs were employed in 2011. Given that these numbers would increase once all former employees were included, the Court found that Plaintiffs easily satisfied the numerosity requirement. The Court noted that the common issue was whether LAEs and LAETs were entitled to overtime compensation. Further, the Court observed that the administrative exemption applied to an employee if he or she was compensated on a salary basis at a rate of not less than $455 per week; his or her primary duty was the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and his or her primary duty included the exercise of discretion and independent judgment with respect to matters of significance. Id. at *28-29. Regarding the LAETs, the Court noted that they worked in an environment that was highly controlled by Defendant, and most of their tasks were defined in detailed job descriptions. With few exceptions, LAETs were required to participate in an extensive training program. LAETs were also provided comprehensive manuals detailing their responsibilities, and a daily schedule that described in minute detail the daily duties and responsibilities of job. The testimony from putative class members also demonstrated that the daily duties and responsibilities performed by LAETs were substantially similar. Thus, the Court observed that with such uniformity in the duties and responsibilities of LAETs, the parties would be able to submit common proof on the issues of whether these duties satisfied the management/business operations prong and the discretion/independent judgment prong of the administrative exemption. Regarding the LAEs, the Court observed the existence of common questions such as whether they primarily performed work directly related to the management or general business operations, whether they exercised discretion and independent judgment with respect to matters of significance, and whether they customarily and regularly performed one or more of the exempt duties or responsibilities of an executive, administrative or professional employee. Defendant, however, submitted evidence demonstrating that the answers to these questions could vary from one LAE to the next, especially with regard to how LAEs spent their time in relation to the exemptions at issue, how and when they exercised discretion in carrying out their duties, their authority to hire or fire, and whether they directed the work of other employees. Regarding the highly-compensated employee exemption, the evidence showed that some LAEs earned at least $100,000 and regularly oversaw the work of two or more sales support personnel. Further, an estimated 16% of the current LAEs had two or more assistants working under them. The day-to-day duties and responsibilities of LAEs appeared to differ in ways relevant to the administrative and executive exemptions, especially when comparing new LAEs to more seasoned LAEs. Thus, the Court stated that the differences among LAEs could affect the outcome of the legal issue. Third, the Court observed that the typicality requirement was satisfied regarding the LAETs because the claims of Plaintiffs and the class members arose from the same practice of misclassification, affected the class members in the same manner, and arose from the same legal theory.
argued that named Plaintiff Hendricks changed his testimony concerning the circumstances surrounding his resignation and that he violated restrictive covenants, which resulted in prior litigation with Defendant. The Court, however, remarked that although it may consider the honesty and trustworthiness of the named Plaintiff, only when attacks on the credibility of the representative party are so sharp as to jeopardize the interests of absent class members should such attacks render a putative class representative inadequate. Id. at *40-41. The Court noted that there were numerous common questions of law and fact arising out of Defendant’s conduct to the LAETs, making this an appropriate case for resolution by means of a class action. The Court determined that these issues could be determined based on common proof, and common questions clearly predominated. Finally, the Court noted that there was no evidence that the LAETs had any interest in maintaining this litigation in separate actions, and there was no record of other similar litigation against Defendant. Further, the Court did not anticipate major difficulties in management of the class action, especially as the Court limited the class action to the LAETs. Accordingly, the Court certified a class comprising of all LAETs who worked for Defendant in Ohio, and denied certification as to the claims of all other putative class members.

**Lawrence, et al. v. Maxim Healthcare Services, Inc., 2013 U.S. Dist. LEXIS 146032 (N.D. Ohio Oct. 9, 2013).** Plaintiff, who was employed by Defendant as an in-home health aide (“HHA”), brought an FLSA action alleging that Defendant required her and those similarly-situated to work more than 40 hours a week without overtime pay. Plaintiff moved for conditional certification on behalf of Defendant’s hourly in-home healthcare workers employed at any time in the past three years. The Court granted the motion. Plaintiff alleged that her collective action claim depended on a factual question “whether they were employed by Defendant to work in the clients’ homes to provide companionship services, or instead, were employed by Defendant to perform general household work for their clients in the clients’ homes for more than 20% of the total weekly hours worked.” Id. at *2. In support of her motion, Plaintiff offered as evidence her own declaration, and additional declarations of two opt-in Plaintiffs, both HHAs who performed the same duties as Plaintiff. Defendant, however, contended that HHAs duties varied from patient-to-patient as did the time spent on those duties, and as such, required highly individualized inquiries not suitable for a collective action. Defendant further argued that while the definition of the FLSA claim was broadly worded, Plaintiff had only offered evidence to support FLSA violations on behalf of HHAs in Ohio. Defendant also contended that additional factors such as the number of patients assigned to an HHA, the program or policy governing that patient’s care, the work schedules of the HHAs, and the patient’s environment all impacted the nature of the duties and the time spent by an HHA on a patient and present highly individualized situations not suitable for a collective action. Defendant also asserted that HHAs were exempt employees under the companionship services exemption. The Court observed that at the conditional certification stage, Plaintiff only needed to show that the proposed FLSA collective action members suffered from a common FLSA violating policy. Id. at *6-7. The Court found that Plaintiffs’ claims were unified by common theories of Defendants’ statutory violations, even if the proofs of these theories were “inevitably individualized and distinct.” Id. at *7. Thus, the Court found that the similarity of Plaintiff and the collective action members’ job descriptions and duties were not dispositive of whether to conditionally certify the collective action, and it did not matter if the employees held different job titles. Id. The Court found that in support of the declarations, Plaintiff offered her pay stub and weekly notes evidencing that she worked more than 40 hours in a week without receiving time and a half pay. Therefore, the Court concluded that Plaintiff had met the modest factual showing sufficient to warrant conditional certification. The Court remarked that it was inappropriate at the notice stage to resolve factual disputes or determine the merits of the claims or defenses. Accordingly, the Court conditionally certified the collective action and approved the proposed notice pursuant to 29 U.S.C. § 216(b).

**Link, et al. v. W.L. Markers, Inc., 2013 U.S. Dist. LEXIS 78946 (S.D. Ohio June 5, 2013).** Plaintiffs, a group of pavement marker installers, brought an FLSA action alleging that Defendants denied them full overtime pay. The parties jointly moved to certify a class consisting of all pavement marker installers employed from October 17, 2009 to the present, who were not paid overtime at a rate of one and one-half times their regular hourly rate for all hours worked in excess of 40 hours per week. The Court granted the motion. Plaintiffs alleged that they and all of Defendant’s pavement marker installers were subject to a
pattern of improper wage and overtime compensation calculation, and therefore the employees so affected were entitled to notice of this action and an opportunity to choose whether to opt-in. The Court stated that there is a two-phase inquiry to address whether Plaintiffs’ suit could proceed as a collective action pursuant to the FLSA. At the first stage, Plaintiffs must show that their position is similar, though not identical to the positions held by the putative collective action members and at the second stage, Courts examine more closely the question of whether particular members of the collective action are, in fact, similarly-situated.

Id. at *2-3. The Court stated that at the first stage, Plaintiffs were only required to demonstrate a factual nexus that supports a finding that potential Plaintiffs were subject to a common illegal scheme. Here, the Court noted that Defendant did not challenge the first stage conditional class certification, and Plaintiffs had alleged FLSA violations that, if proved, would affect all employees classified as pavement marker installers and those bearing a different designation but having the same job description and wage schedule. Therefore, for the benefit of potential Plaintiffs who had not joined the lawsuit yet, the Court granted the motion to conditionally certify the collective action pursuant to 29 U.S.C. § 216(b).


Plaintiff, a former employee, brought a collective action under the FLSA seeking overtime pay. Plaintiff alleged that there were at least 100 nurses (RNs, LPNs, and STNAs) employed by Defendant in Toledo, Ohio and that all of these employees had their meal breaks automatically deducted regardless of whether or not they received a meal period or were required to perform work during their meal period. Plaintiff moved for conditional certification of a class of all hourly compensated RNs, LPNs, and STNAs who were employed at Liberty Nursing Center of Toledo between March 21, 2010 and February 7, 2013, and at some point during that period worked at least 37.5 hours in one week. The Court granted Plaintiff’s motion. Plaintiff alleged that the putative class’ claims were unified by a common theory of Defendant’s statutory violation, i.e., a willful and systematic denial of overtime compensation, in spite of knowledge that the nurses were working more than 40 hours a week. Although Defendant argued that conditional certification should be denied because of individual issues, the Court stated that once Plaintiff met the burden at the notice stage, Defendant could not overcome that showing by arguing that individual issues predominate. Id. at *6. Given that the notice stage is fairly lenient and places a low burden on Plaintiff, the Court observed that the existence of individual issues was not an appropriate reason to deny conditional certification. Defendant also argued that under the FLSA, an employer who establishes a reasonable process for an employee to report uncompensated work time is not liable for non-payment if the employee fails to follow the established process. The Court stated that the existence of reasonable time reporting procedures acts as a means of showing lack of knowledge, but does not shield Defendant from liability if Plaintiff can show actual knowledge or that Defendant should have known Plaintiff was uncompensated for some hours. The Court remarked that Plaintiff sufficiently alleged a claim upon which relief could be granted. Thus, because Plaintiff established that she was similarly-situated to the putative class, the Court granted Plaintiff’s motion for conditional certification of the collective action.


Plaintiffs, a group of construction workers, brought a collective action under the FLSA for unpaid wages and overtime pay. Plaintiffs sought to represent three classes. The first class consisted of all current and former Claypool Electric employees employed as a foreman or similar classifications who worked in excess of 40 hours per week and were not compensated for hours worked in excess of 40 hours per week at one and one-half times his or her regular rate of pay. The second class consisted of all current and former Claypool Electric employees that were paid in “comp time,” i.e., received paid time off, in lieu of being compensated for each and every hour worked in excess of 40 hours per workweek at one and one-half times his regular rate of pay. Id. at *3. The third group consisted of all current and former Claypool Electric employees whose overtime rate of pay was not calculated by using the weighted average of all hourly rates paid in one workweek. Plaintiffs sought conditional certification of a collective action, and filed affidavits in support of the motion. Defendants moved to strike certain paragraphs of Plaintiffs’ affidavits. The Magistrate Judge recommended that the motion for certification be denied and that the motion to strike be granted in part. On Plaintiffs’ Rule 72 objections, the Court affirmed and adopted the report and recommendation in its entirety. First, Defendants moved to strike certain portions of Plaintiffs’ affidavits on
the basis that each contained hearsay statements related to what other employees told each Plaintiff concerning their hours and pay. The Magistrate Judge granted the motion to strike, finding that hearsay statements were not proper for consideration at the conditional certification stage. Id. at *7. The Court agreed with the Magistrate Judge. Second, regarding the “comp time” class, the Magistrate Judge acknowledged Plaintiffs’ evidence of Defendant’s alleged failure to compensate named Plaintiffs Whitlatch and Cox, as well as four to five unidentified individuals, but held that the small number of employees and the actual hours of disputed overtime did not support a widespread discriminatory policy. Id. at *12. Further, Plaintiffs did not explain or provide any evidence to suggest a common policy. The Magistrate Judge also held that Plaintiffs failed to demonstrate that the proposed “comp time” class was a manageable class. Id. The Court stated that alleged violations impacting only a small number of employees was not evidence of a required common policy or plan, and as such, was insufficient to support conditional certification. Id. Further, the Court remarked that even if were to consider Plaintiffs’ arguments that the proposed class could be re-shaped, they failed to provide any guidance as to what would be a manageable comp time class. For example, there was no evidence that Plaintiffs would present a single claim that if resolved for one, would be resolved for all. Id. at *13. Accordingly, the Court opined that the Magistrate Judge had correctly declined certification of Plaintiffs’ comp time class. Regarding the weighted average class, Plaintiffs offered no evidence to show other similarly-situated employees who were not paid a weighted average of all hourly rates paid in one workweek. In its answer, Defendant stated that employees were paid overtime at the rate of one and one-half times the basic hourly rate applicable to the work performed by the employees during the overtime hours. Defendant, however, asserted that this did not provide any evidence regarding whether any employees ever worked at two different pay rates during any week, much less regarding whether the alleged practice was widespread or occurred regularly. The Court concluded that there was no evidence that anyone other than named Plaintiff Rutledge worked on both regular and prevailing wage jobs during any week in which they worked overtime. Id. at *16. Thus, the Court held that the Magistrate Judge had correctly declined certification of the weighted average class. Accordingly, the Court adopted in full the report and recommendation of the Magistrate Judge.

Snodgrass, et al. v. Bob Evans Farms, LLC, 2013 U.S. Dist. LEXIS 172279 (S.D. Ohio Dec. 5, 2013). Plaintiff, an assistant restaurant manager, brought an FLSA action alleging that Defendant failed to pay him overtime wages. Plaintiff moved for conditional certification, and the Court granted the motion. At issue was whether Defendant properly classified assistant managers as exempt from the overtime requirements of the FLSA. According to Defendant’s vice president of field human resources, John Carothers, the purported job duties and functions of the assistant managers were governed by centralized policies created by Defendant’s corporate management. Further, Carothers testified that only one written job description existed for the assistant manager position company-wide; that regardless of the state and the size of the restaurants all assistant managers nationwide were expected to manage Defendant’s restaurants; and that all assistant managers were classified as exempt from overtime and none were paid overtime compensation. The record indicated that Defendant’s restaurants were operated according to policies and procedures that applied to all company restaurants nationwide. Plaintiff asserted that his specific primary duties did not differ substantially from those performed by non-exempt employees, and included tasks such as operating the cash register, preparing and cooking food, cleaning, and stocking supplies. Each of the opt-in Plaintiffs also contended that they were employed as assistant managers, worked on average more than 40 hours per week, were not paid overtime, and, despite the job descriptions and policies for their positions, they spent significant amounts of time doing work that would likely be considered non-exempt. The Court observed that Plaintiff made the modest showing required to demonstrate that he was similarly-situated to the opt-in Plaintiffs and potentially other assistant managers working at Defendant’s restaurants throughout the country. The Court stated that Plaintiff’s individual claims and those of the opt-in Plaintiffs were unified by common theories of FLSA violations – i.e., that the primary duty of at least a portion of the assistant managers who were not paid overtime compensation despite regularly working more than 40 hours per week was the performance of non-exempt work. Additionally, the record contained the declarations of 64 assistant managers, each averring that they spent the majority of their time managing the activities of subordinate employees as opposed to performing non-exempt, category work. Defendant asserted that this evidence, coupled with the small number of opt-in Plaintiffs (64 opt-in Plaintiffs of the
over 2,500 assistant managers), showed that there was no widespread plan by which it allegedly violated the FLSA. The Court, however, remarked that the small number of assistant managers who had joined this lawsuit and the fact that there may be assistant managers properly classified as exempt was of limited relevance to the question of conditional certification. The Court found that to obtain conditional certification, Plaintiff is not required to show unified violative policies, and there is no requirement in the FLSA that collective actions be maintained by a certain threshold number of employees. *Id.* at *14. Further, the Court reasoned that the only requirement was that opt-in Plaintiffs be similarly-situated with the lead Plaintiff. *Id.* Accordingly, the Court certified a collective action under 29 U.S.C. § 216(b) consisting of all individuals either employed or previously employed as assistant managers by Defendant at any time from August 27, 2009 to the present.

**Struck, et al. v. PNC Bank N.A., 2013 U.S. Dist. LEXIS 19444 (S.D. Ohio Feb. 13, 2013).** Plaintiffs, a group of mortgage loan officers (“MLOs”), brought a collective action for unpaid overtime under the FLSA. Prior to 2011, Defendant classified its MLOs as exempt from the requirements of the FLSA and did not compensate them with overtime pay for work over 40 hours in a workweek. During this period, MLOs were compensated through a combination of commissions and a salary draw. Subsequently, Defendant reclassified MLOs as non-exempt, overtime-eligible employees. Defendant asserted that it did not reclassify its MLOs because they were previously misclassified, but in response to regulatory developments in the loan origination industry, including the adoption of the Dodd-Frank Loan Officer Compensation Rules. Plaintiffs moved for conditional certification of the FLSA collective action and supervised notice to a putative class of current and former MLOs employed at any of Defendant’s locations across the country during any workweek beginning on November 3, 2008. Plaintiffs submitted declarations from opt-in Plaintiffs who stated that they regularly worked over 40 hours per week and did not receive overtime compensation. Defendant characterized its MLOs as a highly heterogeneous group vested with substantial discretion as to when, where, and how to perform their job duties. Defendant contended that the lack of centralized policies in these matters resulted in a workforce whose employment experiences and compensation varied from person to person. Defendant presented declarations from MLOs who described their jobs as independent and entrepreneurial, and akin to running one’s own business. The Court granted Plaintiffs’ motion. The Court opined that Plaintiffs met their initial burden to show that a class of similarly-situated employees existed, and noted that the fact that Defendants chose to re-classify MLOs as a group implied that the MLOs as a whole, performed similar duties. Further, Plaintiffs asserted common theories of Defendants’ statutory violations, namely that Defendant’s prior classification of MLOs was improper, that MLOs regularly worked in excess of 40 hours a week without overtime compensation to meet PNC production goals, and that these employees are therefore owed back pay. The Court refrained from considering the merits of the claims, resolving factual disputes, or evaluating credibility at this stage of the proceedings. The Court also observed that where Plaintiffs’ claims were sufficiently unified by common theories of Defendants’ statutory violations, a putative class can satisfy the FLSA collective action standard even if the proofs of these theories were inevitably individualized and distinct. *Id.* at *16. Defendant argued that Plaintiffs’ private notice process rendered judicially supervised conditional certification and notice unnecessary. The Court, however, stated that pre-certification communications with putative members of a § 216(b) collective action should be allowed unless communication contradicts a court notice, is misleading, or improper. *Id.* at *17-18. That Plaintiffs were able to successfully contact some 45 opt-in Plaintiffs without the Court’s aid did not negate the need to facilitate notice to other class members on whom the statute of limitations was still running. Thus, the Court noted that counsels’ pre-certification communications with potential class members did not form an appropriate basis for denying class certification. Accordingly, the Court granted Plaintiffs’ motion for conditional class certification and granted Plaintiffs’ request to distribute notice to former employees via e-mail.

and Comcast at *12. The Court noted that the Sixth Circuit had also held in Comcast that did not constitute a merits determination Id. that Plaintiffs must show that questions of law or fact common to members of the class predominate over any questions that affect only individual members. Id. at *9. Moreover, the Ninth Circuit expressed a similar understanding in Leyva v. Medline Industries Inc., 716 F.3d 510 (9th Cir. 2013), where the Ninth Circuit acknowledged that under Comcast Plaintiffs must be able to show that their damages stemmed from Defendant’s actions that created the legal liability. Further, the Ninth Circuit construed Comcast as no bar if putative class members prove Defendant’s liability and damages would be calculated based on the wages each employee lost due to Defendant’s unlawful practices. Id. at *10. Based on this case law, the Court found that decertification of the class was not warranted because Comcast reaffirmed the settled rule that to satisfy Rule 23(b)(3), the named Plaintiffs must show that questions of law or fact common to members of the class predominated over any questions that affect only individual members. The Court stated that it previously concluded that this requirement was satisfied in this case, as Defendant followed a common policy or practice of requiring non-salaried employees to work off-the-clock and of requiring tipped employees to participate in tip pooling and sharing. Second, the Court stated that if Plaintiffs were able to prove Defendants’ liability, damages would be calculated based on the wages each employee lost due to Defendants’ unlawful practices; thus, Comcast did not require decertification. Third, the Court stated that the presence of individualized damages could not, by itself, defeat class certification under Rule 23(b)(3) because when damages vary, the Court can bifurcate the lawsuit so that Defendants’ liability could be determined initially. The Seventh Circuit in Butler v. Sears, Roebuck & Co., 727 F.3d 796 (7th Cir. 2013), explained that a class action limited to determining liability on a class-wide basis, with separate hearings to determine the damages of individual class members, or homogeneous groups of class members, was permitted by Rule 23(c)(4) and would often be the sensible way to proceed. Id. at *12. The Court noted that the Sixth Circuit had also held in Whirlpool that where determinations on liability and damages had been bifurcated, the decision in Comcast – to reject certification of a liability and damages class because Plaintiffs failed to establish that damages could be measured on a class-wide basis – had limited application. Id. at *13. Here, the Court previously determined that common issues regarding Defendants’ liability for wage & hour violations predominated over any potential individual damages issues. While recognizing that class members would have differing damages or individual damages issues, the Court determined that these individualized damages questions did not warrant decertification of the class for liability purposes in light of the Court’s previous opinion. Thus, in light of Comcast and Whirlpool, the Court found that bifurcating the issues of liability and damages at trial would remedy any problems surrounding individualized proof of damages. Accordingly, the Court denied Defendant’s motion to reconsider the class certification order.

(vii) Seventh Circuit

**Allen v. City Of Chicago, 2013 U.S. Dist. LEXIS 5394 (N.D. Ill. Jan. 14, 2013).** Plaintiff, a Chicago police sergeant, brought an FLSA action alleging that Defendant failed to pay overtime. Plaintiff moved for conditional certification of a collective action class, and the Court granted the motion. Id. at *3-4. Plaintiff alleged that he and similarly-situated workers were subject to a longstanding and unwritten policy that members of the Bureau of Organized Crime (“BOC”) would monitor and perform work on employer-issued BlackBerry devices while off-duty, but would not submit overtime slips or otherwise be paid for their labor. Further, Plaintiff alleged that he and similarly-situated employees were expected to be available 24 hours per day via BlackBerry. Although Plaintiff did not dispute that Defendant had an express policy that generally covered compensation for overtime work, he alleged that Defendant had a different, unwritten policy that officers in BOC not receive compensation for overtime work using BlackBerries. Plaintiff alleged that because of this unwritten policy, officers did not turn in time due slips for off-duty use of their BlackBerries. Id. at *10. During discovery, two of eight deponents testified that they were verbally instructed by their supervisors that they had an obligation to monitor their BlackBerries while off-duty. Five
deponents testified that their supervisors did not instruct them on what to do with their BlackBerries while off-duty, and that they in turn did not expressly instruct their subordinates on that issue either; four of them testified that they nevertheless understood or believed that they were expected to monitor their BlackBerries while they were off-duty, and they expected their subordinates to do the same. The remaining deponent stated that he had no understanding or knowledge of anything regarding off-duty Blackberry use; further, he did not feel obligated to monitor his Blackberry while he was off-duty. None of the deponents were instructed by their supervisors on whether to submit time slips for off-duty Blackberry use, and they likewise did not instruct their subordinates on this matter. Seven deponents never submitted overtime slips for off-duty use of their Blackberry, and they never received overtime slips from their subordinates for off-duty use of their Blackberry. Only one deponent received compensation for any off-duty Blackberry use. *Id.* at *17. The Court found that Plaintiff made a modest factual showing that Sergeants and Lieutenants in the BOC believed that they were expected to check and possibly respond to e-mails and calls made to their department-issued BlackBerries while they were off-duty without being compensated for these activities. Although one of the deponents testified that he was compensated for at least some overtime work done on his Blackberry, he did not submit overtime slips for other off-duty uses of his Blackberry. For these reasons, the Court held that Plaintiff and potential collective action members were similarly-situated. Plaintiff also contended that while the amount of overtime officers spent on their department-issued BlackBerries may have varied, the policy of not granting overtime compensation for off-duty work on BlackBerries did not. The Court found that Plaintiff met his minimal burden to offer evidence that BOC officers with department-issued BlackBerries were subject to a common policy that did not provide overtime compensation, in violation of the FLSA. Accordingly, the Court granted conditional certification pursuant to 29 U.S.C. § 216(b). *Id.* at *28.

Bell, *et al.* v. Bimbo Foods Bakeries Distribution, Inc., 2013 U.S. Dist. LEXIS 170063 (N.D. Ill. Dec. 3, 2013). Plaintiff, a distributor for Defendant, brought a class action alleging that Defendant violated the Illinois Wage Payment and Collection Act (“IWPCA”), and breached the terms of the distributor agreement. Although the distributor agreement classified Plaintiff as an independent contractor, he contended that he was actually an employee of Defendant. Regarding his IWPCA claim, Plaintiff moved for certification of a class comprised of all individuals who, through a contract or agreement, sold or distributed Defendant’s bakery products within Illinois, who were classified as independent operators/independent contractors, and who had unauthorized deductions taken from their weekly pay for various handheld computer-related expenses. For the breach of contract claim, Plaintiff sought certification of a class comprised of all individuals who, through a contract or agreement, sold or distributed Defendant’s bakery products within Illinois, and who are or were classified as independent operators/independent contractors. Plaintiff also proposed a sub-class of distributors who were subject to specific requirements for sales to Jewel stores and a separate sub-class for distributors that had to follow Bimbo’s amended stale return policy. The Court denied the motion, finding that the individualized details of each distributor agreement hampered commonality and predominance. When Plaintiff filed his lawsuit, Defendant had agreements with 139 distributors in Illinois that worked out of 22 different depots. Plaintiff provided no evidence demonstrating how many iterations of the distributor agreement there were out of the 139 proposed class members. Plaintiff also failed to show that a substantial number of distributors had the same agreement. Regarding the pricing and promotions claim, the Court observed that it would have to analyze the precise language of each distributor agreement to determine whether there was a breach. There were materially different terms governing Defendant’s negotiations with chain stores, and while Plaintiff could not negotiate with chains stores under his distributor agreement, other distributors’ agreements did not foreclose direct negotiations between distributors and chain stores. Further, the Court noted that it would have to similarly compare and analyze the terms of each distributor agreement to determine whether each distributor had established that Defendant breached a particular agreement. Relative to the claim challenging the amended stale return policy, the Court stated that while Plaintiff’s distributor agreement limited amendments to the stale return policy to those required by changing technology or competitive circumstances in the industry or a market, other agreements gave Defendant open-ended discretion to make reasonable amendments from time to time. The Court remarked that determining whether there was a breach would require comparing the amended policy to the varying language in each individual distributor agreement.
agreement, thereby defeating commonality and predominance. Finally, regarding the IWPCA claim, the Court observed that the different language in each distributor agreement would result in a highly individualized analysis of whether there was an employee-employer relationship. Further, the IWPCA’s independent-contractor exemption also would require an individualized analysis of three separate elements that went beyond the scope of the agreement itself. Thus, the Court reasoned that individualized contract analysis with a test that was already multi-factored necessarily foreclosed Plaintiff from satisfying the commonality and predominance requirements for the IWPCA claim. Because variation in contract language, dissimilarities in the proposed class’ distributor agreements, and individualized analysis of each contract would overwhelm any common questions of law or fact, the Court denied Plaintiff’s motion for class certification.


Plaintiffs brought an action under the FLSA and Illinois state law based on the application of an automatic 30-minute meal break deduction policy without ensuring that employees actually took the deducted break. Plaintiffs sought certification of an Illinois Minimum Wage Law (“IMWL”) class comprising of all individuals employed at Defendant’s Illinois facility from January 12, 2007 who: (i) worked in excess of 40 hours in a workweek; (ii) whose pay was subject to an automatic 30-minute meal period deduction even when they performed compensable work during the unpaid meal break; and (iii) who were not paid for all overtime worked. Plaintiffs also sought certification of an Illinois Wage Payment Collection Act (“IWPCA”) class comprising all individuals employed by Defendant’s Illinois facility at any time since January 12, 2000 who: (i) worked fewer than 40 hours in a workweek; (ii) whose pay was subject to an automatic 30-minute meal period deduction even when they performed compensable work during the unpaid meal break; and (iii) who were not paid for all time worked. Alternatively, Plaintiffs moved for certification of a common law unjust enrichment claim class. The Court granted in part and denied in part Plaintiffs’ motion. Entities owned by Defendant Kindred Healthcare Operating, Inc. were divided into the Hospital Division, the Nursing Center, and the Rehabilitation Division. From January 2007 until May 2010, entities within the Hospital Division, outside of California, automatically deducted 30 minutes for the meal breaks of hourly employees. No entities in the Nursing Center Division or the Rehabilitation Division or any entities in California had 30 minutes automatically deducted for their meal breaks during this period of time. Since May 2010, all hourly employees working at all Kindred facilities were required to clock-out and then back in for their meal breaks. Kindred Chicago Lakeshore employees were informed of its meal break policy at an orientation session and provided with a copy of an employee handbook, and required to acknowledge having read the handbook. A missed punch form was used to record interrupted or missed meal breaks. Defendants’ handbook stated that clocked meals were rounded, and that meals shorter than 30 minutes were rounded up to 30 minutes, thus still enforcing the 30-minute auto-deduct. The Court noted that although the rule was narrow, applying only to clocked meals, at this stage of the proceedings, it was possible to argue that if applied to short interruptions of a meal break, the rule could result in failure to provide a full meal break or proper compensation. The Court found that conditional certification was appropriate but should be limited to the meal break rule as experienced by nurses and hospital employees who were engaged in the direct care of patients because the nature of their interrupted meal breaks was affected by the demands of patient care. Accordingly, the Court ruled that notice should be sent to only those Hospital Division employees who were directly engaged in patient care.


Plaintiffs, a group of current and former field technicians in Wisconsin, brought an action alleging that Defendants violated the FLSA and Wisconsin law by failing to pay wages for meal breaks. Defendants are telecommunications companies. Within the Wisconsin network, there are three departments, including Installation and Repair, Construction and Engineering, and U-Verse. Defendants track technicians’ activities and location throughout the day using a GPS vehicle tracking system. The managers use near real-time inquiries and analysis from the GPS data to identify patterns of inefficient travel, inefficient work methods, and other productivity inhibitors. The technicians are subject to certain restrictions on how they are allowed to use meal break time. The meal break restrictions applicable to technicians are set forth
primarily in Defendants’ 2008 Non-Management Employee Expectations. Id. at *7. Under the
Expectations, technicians are expected not to drive off route between one job to the next; not to use
company vehicles for personal business; and not to read, nap, or operate electronic equipment in the
vehicles. According to Plaintiffs, Defendants imposed such severe restrictions on what Plaintiffs could do
during breaks that the breaks should be compensated. Additionally, Plaintiffs contended that Defendants’
performance and efficiency rating system compelled Plaintiffs to work through their meal breaks without
reporting the work. Id. at *15. Plaintiffs moved for conditional certification of an opt-in collection action
under 29 U.S.C. § 216(b), and class certification of Rule 23. The Court denied the motions. Defendants
contended that apart from the numerosity requirement, Plaintiffs could not satisfy the remaining Rule 23(a)
requirements. As to commonality, the Court found that Plaintiffs did not frame their common question in
terms of the actual elements of a claim under Wisconsin or federal law. The Court explained that because
as the Supreme Court made it clear in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011),
commonality was not simply a matter of common questions, but rather, whether the class proceeding can
generate common answers apt to drive the resolution of the litigation. Id. at *19-20. The Court observed
that Plaintiffs cited nothing in Wisconsin or federal law supporting the proposition that employers must pay
employees for meal breaks simply because the employee is restricted in what he can do during the break,
regardless whether the employees are performing work for employer. Id. at *22. The Court explained that
under Plaintiffs theory, they should be paid, even if they were just sitting in their trucks, because
Defendants’ restrictions prohibited them from doing the things that they would like to be doing with their
meal breaks. Id. The Court remarked that the law requires only that employees be compensated for
performing work. The Court thus ruled that the relevant question for Plaintiffs’ claim was whether the meal
break restrictions resulted in field technicians’ engaging in activities that predominantly benefited
Defendants during their meal breaks. The Court concluded that it was clear that the question could not be
resolved on a class-wide basis because Plaintiffs submitted insufficient evidence to support a finding that
field technicians who took meal breaks commonly ended up engaging in activities for the benefit of
Defendants during those breaks. As to Plaintiffs’ second claim, the Court noted that the combination of the
meal break restrictions and Defendants’ efficiency and performance system caused them to work during
their unpaid meal breaks without reporting their time. The Court noted that whether technicians decided to
work through meal breaks because of the meal break restrictions depended on the day, the volume of
work, the route, the supervisor, and the technician’s individual needs and desires. Id. at *31-32. The Court
concluded that the determination of the issues did not involve common proof, and therefore, the
commonality requirement was not satisfied. For the same reason that the commonality was not satisfied,
the Court ruled that the predominance requirement also was not met, and declined to certify a class under
Rule 23. As far as the FLSA conditional certification was concerned, the Court found that the facts in the
record failed to establish that Plaintiffs and potential class members were victims of a common policy or
plan that resulted in common injuries. Accordingly, the Court also denied conditional certification of a
collection action under § 216(b).

Plaintiffs, on behalf of themselves and other similarly-situated current and former technicians employed by
Defendant AT&T and its subsidiaries, brought a putative class and collective action alleging Defendants
failed to pay wages for meal breaks in violation of the FLSA and Wisconsin state wage laws. Plaintiffs
subsequently moved class certification under Rule 23 and conditional certification of their FLSA claim. The
Court denied Plaintiffs’ motions, and Plaintiffs then moved for reconsideration. In support of their motion
for reconsideration, Plaintiffs argued that the Court failed to recognize the importance of their contention
that Defendants’ management knew or should have known that technicians worked through their lunch
breaks without reporting or being paid for the work. Plaintiffs contended that Defendants’ knowledge of the
unpaid work was dispositive of Defendants’ liability for the entire class and made it immaterial that
“particular technicians skipped or shortened their lunch break on any given day.” Id. at *4-5. The Court
noted that in their initial brief in support of their motion for class certification, Plaintiffs argued that
certification was appropriate because they were challenging the effect of company-wide policies common
to the class. Id. at *7. Consequently, the Court held that Plaintiffs waived their new legal theory because
they failed to develop the argument until they moved for reconsideration. Id. at *8. Nonetheless, the Court
observed that even if it overlooked Plaintiffs’ shifting legal theory deficiency, it still would deny Plaintiffs’ motion for reconsideration. Citing to the Seventh Circuit’s decision in Espenscheid, et al. v. DirectSat USA, LLC, 705 F.3d 770 (7th Cir. 2013), where the Seventh Circuit concluded that the standard for certifying an opt-in collective action is the same as the standard for certifying an opt-out class action under Rule 23, the Court found that Plaintiffs were required to submit evidence sufficient to show that certification was appropriate under Rule 23 and the FLSA. Id. at *9. The Court also cited to the Supreme Court’s decision in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), and found that Plaintiffs had adduced no evidence that Defendants had a policy of requiring technicians to work through their lunch breaks, and there was significant evidence that whether technicians did so depended on their location, supervisor and daily assignments. Id. at *9-10. Thus, the Court opined that “unless there is some evidence of company-level actions related to the wage & hour violations, Plaintiffs’ claims [would] require significant individualized proof.” Id. at *10. In rejecting Plaintiffs’ contention that they put forth evidence that was sufficient to establish Rule 23(a)(2)’s commonality requirement, the Court noted that although Plaintiffs argued repeatedly that the reason technicians worked through their lunch breaks were irrelevant because of Defendants’ knowledge, Plaintiffs made no attempt to explain how the reasons could be separated from Defendants’ alleged knowledge of under-reporting. Id. at *15. Thus, the Court held that the evidence in the record showed that whether and why technicians under-reported their time depended on their individual circumstances and particular supervisor. Id. at *17. The Court further noted that although Defendants might have had reason to believe that some technicians were under-reporting their time as a result of the efficiency ranking system, Plaintiffs had not submitted proof sufficient to show that Defendants knew or should have known that there was widespread under-reporting caused by a variety of factors or that this issue could be resolved on a class-wide basis. Id. at *18. Therefore, the Court concluded that Plaintiffs had not satisfied their burden under Rule 23 or the FLSA. Accordingly, the Court denied Plaintiffs’ motion for reconsideration.

Clark, et al. v. Honey-Jam Café, LLC, 2013 U.S. Dist. LEXIS 62561 (N.D. Ill. Mar. 21, 2013). Plaintiff, an employee, brought an action under the FLSA and the Illinois Minimum Wage law for failure to pay minimum wage. Plaintiffs moved for conditional certification of an FLSA collective action, and Rule 23 class certification for state law claims. The Court granted the motions and certified a class of all individuals who worked as tipped employees earning a sub-minimum, tip-credit wage rate, and who performed duties unrelated to their tipped occupation, for which they were not paid minimum wage. Plaintiff claimed that Defendant required tipped employees to perform duties outside of their tipped occupation, but paid those employees the sub-minimum, tip-credit wage rate. Plaintiff produced declarations of tipped employees describing their regular duties to include, inter alia, food preparation and general cleaning. Accordingly, the Court opined that Plaintiff met the commonality requirement. Regarding predominance, the Court stated that Plaintiff must show that the claim brought by the proposed class was capable of proof at trial through evidence common to the class rather than individual to its members. Id. at *4. Defendant asserted that extensive individual proof of the time each worker spent on each particular task would be necessary to determine liability. The Court, however, observed that because Plaintiff submitted declarations of tipped employees describing their regular tasks, the issue of liability was whether duties performed by tipped employees outside the tipped occupation were separately recorded and appropriately paid. Plaintiff contended that Defendant’s time and payroll records would establish for all tipped employees whether they received the tip-credit wage rate. The Court concluded that this showing was sufficient to satisfy predominance and rejected Defendant’s argument that individual questions regarding damages predominated. Further, the Court noted that because common questions and a methodology predominated, a class action was a superior form of adjudication. Defendant also argued that the class definition was overbroad. Because Plaintiff asserted that there were 275 potential class members consisting of servers, bussers, and runners, the Court observed that the proposed class definition was not unidentifiable, and not overbroad enough to deny certification. In conclusion, the Court opined that for determining certification of a collective action and a class action in a single suit, the same standard was applicable for certification of both types of cases. Id. at *7. Thus, because Plaintiff showed commonality under Rule 23, the Court reasoned that she also satisfied her burden to demonstrate that other members of
the potential FLSA collective action were similarly-situated, and that certification of the collective action was appropriate.

_Cramer, et al. v. Bank Of America Corp., 2013 U.S. Dist. LEXIS 173797 (N.D. Ill. Dec. 10, 2013)._ Plaintiffs filed a collective action under the Fair Labor Standards Act (“FLSA”) alleging that Defendant failed to pay employees in accordance with overtime laws. Plaintiffs proposed two sub-classes, the first which consisted of employees holding at least one of seven job titles, all collectively referred to as “Loan Officers.” Plaintiffs asserted that Defendant improperly classified the employees in sub-class I as exempt from the FLSA overtime wage requirements. Plaintiffs’ proposed sub-class II consisted of a different set of employees who Defendant allegedly classified as non-exempt from FLSA overtime wage requirements. Plaintiffs asserted that the employees in each sub-class were similarly-situated with respect to the work they performed for Defendant, and that they were all injured by Defendant’s alleged policy of denying such employees overtime wages. In determining whether Plaintiffs’ FLSA suit should proceed as a collective action, the Court adopted a two-step analysis. First, the Court considered if the Plaintiffs made a modest factual showing that they and the members of the potential collective action were similarly-situated, and that they were injured by a common policy or plan that violated the law. The second step occurs after the parties have engaged in discovery and the collective action opt-in process is complete. Plaintiffs asserted, with sworn declarations from the named Plaintiffs and numerous opt-in Plaintiffs in support, that all of the employees in sub-class I had the same basic job of selling mortgage products to individual customers. Plaintiffs asserted that their job performances were evaluated on the same basis, that they accomplish their duties by performing largely the same set of tasks, that any one of these employees may fill in for another, and that they regularly share the same work place. Plaintiffs also asserted that Defendant instructed the employees in sub-class I that they were not eligible for overtime, that they could not receive additional compensation for hours worked beyond 40 in a workweek, and that they worked without full compensation due to Defendant’s policy of denying its loan officers overtime earnings. Defendant argued that differences existed among the job descriptions of the various putative collective action members such that the employees could not be found to be similarly-situated. Defendant also argued that these employees fell under at least one of the several exemptions to the overtime pay requirement provided by the FLSA. Defendant also contended that the individualized determinations as to whether an exemption applies to a given employee would render trial of the claims on a collective basis unmanageable. At this stage, the Court found that Plaintiffs’ showing that they and the putative collective action members were similarly-situated and had been injured by Defendant’s common policy was sufficient to grant conditional certification of Plaintiffs’ sub-class I. The Court explained that the standard of review at the first stage of certification is insufficiently searching to reach the applicability of FLSA exemptions. Greater scrutiny applies at the second stage, when both parties, and Plaintiffs in particular, will be better equipped to argue the merits of proceeding collectively under closer scrutiny with the benefit of a more complete factual record. The Court stated that the “potential problems Defendant raised in opposition to proceeding with this claim collectively appear to be material, and Plaintiffs appear to have their work cut out for them. But at this point they are only potential problems.” _Id._ at *9-10. For the foregoing reasons, the Court granted Plaintiffs’ motion for conditional certification as to sub-class I.

_Driver, et al. v. Appleillinois, LLC d/b/a Applebee's Neighborhood Grill & Bar, 2013 U.S. Dist. LEXIS 154773 (N.D. Ill. Oct. 29, 2013)._ Plaintiffs, a group of tipped employees at Defendants’ restaurants, brought an action alleging that Defendant Appleillinois, LLC, and certain individual Defendants violated the Illinois Minimum Wage Law (“IMWL”) and the FLSA. Specifically, Plaintiffs alleged that Defendants violated the IMWL by requiring tipped employees to perform duties of non-tipped occupations while paying them at a sub-minimum tip credit wage rate (“dual jobs” claim). _Id._ at *6. Several IMWL classes were certified, including the dual jobs claim, and summary judgment was granted to the class on the dual jobs claim and to the individual Plaintiffs on their similar FLSA dual jobs claim. _Id._ Eventually, Defendant Appleillinois filed for bankruptcy, and the Court deferred action on the pending motions of claims against it by Plaintiffs. While claims against Appleillinois were to be dealt with in the bankruptcy proceeding, all individual Defendants except Curtis Smith reached a settlement with Plaintiffs. Plaintiffs thus proceeded the action against Smith, and Smith moved for decertification of the dual jobs class. The certified class
consisted of “persons employed by Appleillinois who worked as tipped employees earning a sub-minimum, tip credit wage rate, and who performed duties unrelated to their tipped occupation for which they were not paid at the minimum wage rate, and/or performed non-tip-producing duties a substantial amount of time (in excess of 20%) of their shift and were not paid at the minimum wage for that time.” Id. at *9. Smith argued that the class was not sufficiently defined because membership in the class, especially where conditioned on the performance of non-tip-producing duties more than 20% of the time, could not be determined without a detailed examination of the merits of each individual’s claim. Id. at *26. The Court denied Smith’s motion. The Court found that the various amounts of time that tipped employees spent performing work for which they should have been paid the minimum wage was not an ascertainability question, but an issue to be addressed in the consideration of damages. Id. at *32. The Court noted that the class was held together by the common question of whether Appleillinois’ policy and practice prevented employees from earning their minimum wage and common proof responsive to that inquiry. Plaintiffs’ complaint had alleged that Appleillinois’ policy and practice of requiring tipped employees to perform dual jobs while paying them at the tip credit violated that IMWL. Further, the certification decision had discussed Plaintiffs’ claim that all tipped employees were subject to the complained of policy and practice, and the summary judgment decision had determined that Plaintiffs carried their burden of proof on that claim in alternate and overlapping fashion, both demonstrating the performance of unrelated duties and of related but non-tip-producing duties more than 20% of the time. Id. at *29. The liability determination also was based not only on the declarations of current and former employees, but also on the evidence applicable to all tipped employees. The Court thus found that it would be incorrect to argue in the face of previous rulings that the class was not identifiable and that liability to the class has not yet been established. Id. at *30. The Court further found that the evidence that some tipped employees performed one or more duties than other tipped employees did not change the conclusion that Appleillinois had a policy and practice of using tipped employees to perform work for which they should have been paid at the minimum wage, and the differences Smith highlighted related only to the extent of damages. Id. at *31-32. However, the issue of whether Plaintiffs’ evidence would establish damages for the class as a matter of just and reasonable inference remained to be determined. While Plaintiffs proposed to establish the amount of damages by Appleillinois’ time and payroll records, its policies and side work lists, and representative evidence, including the declarations of then-current employees placed in the record by Defendants, Smith contended that representative evidence could not be used and that each class member must present sufficient evidence to establish that he or she performed certain work as well as the amount and extent of hours for which he or she was not properly compensated. Id. at *16-17. Because the facts of the case and the evidence presented at the summary judgment showed that all tipped employees were subject to Appleillinois’ common policy and practice requiring them to perform dual jobs, the Court held that Plaintiffs should be given an opportunity to establish damages by representative evidence, such that a just and reasonable inference could be made. Id. at *23-24. Accordingly, the Court denied Smith’s motion for decertification.

Espenscheid, et al. v. DirectSat USA, LLC, 705 F.3d 770 (7th Cir. 2013). Plaintiffs, a group of satellite television technicians, brought a collective action on behalf of themselves and a putative class of 2,341 similarly-situated technicians, against Defendants for unpaid wages and overtime in violation of the FLSA, as well as a class action under Wisconsin, Minnesota, and Pennsylvania state wage & hour laws. Subsequently, the District Court certified several sub-classes, but later decertified the classes because Plaintiffs failed to provide a viable litigation plan addressing how damages would be determined for the putative class members at trial. Plaintiffs thereafter moved for reconsideration, which was denied, and Plaintiffs then appealed. On appeal, the Seventh Circuit first noted that despite the difference between a collective action and a class action, there was no “good reason” to have different standards when examining class certification under Rule 23 or decertification under § 216(b) of the FLSA, and that the evolving factors regarding decertification of FLSA collective classes had largely merged with Rule 23 standards. Id. at 772. Further noting that simplification is favored in the law and that one of the intentions of both FLSA collective actions and Rule 23 class actions is to promote efficiency, the Seventh Circuit held that “we can, with no distortion in our analysis, treat the entire set of suits before us as if it were a single class action.” Id. With respect to the trial plan offered by Plaintiffs, the Seventh Circuit noted that Plaintiffs’
Furthermore, the Seventh Circuit approved of the District Court's decision in proposed presenting testimony at trial from 42 representative members of the class, which they claimed would suffice to establish liability and damages. The Seventh Circuit rejected Plaintiffs' proposal and concluded that determining damages would require separate evidentiary hearings for each of the 2,341 putative class members, which would overwhelm the District Court's ability to manage the litigation. Specifically, the Seventh Circuit opined “[t]o extrapolate from the experience of the 42 to that of the 2,341 would require that all 2,341 have done roughly the same amount of work, including the same amount of overtime work, and had been paid the same wage.” Id. at 774. Furthermore, the Seventh Circuit approved of the District Court's decision requiring Plaintiffs to submit a “specific plan for litigating the case . . . given the difficulty of trying a class action.” Id. at 775. The Seventh Circuit characterized Plaintiffs' approach to trial as “a shapeless, freewheeling trial that would combine liability and damages and would be virtually evidence-free so far as damages were concerned.” Id. at 776. The Seventh Circuit concluded that “if class counsel is incapable of proposing a feasible litigation plan though asked to do so, the judge's duty is at an end.” Id. Accordingly, the Seventh Circuit affirmed the order of the District Court.

Editor’s Note: The Seventh Circuit’s ruling in Espenscheid is one of the most important FLSA collective actions rulings of the year. First, the Seventh Circuit concluded that the standard for certifying an opt-in collective action is the same as the standard for certifying an opt-out class action under Rule 23. In deciding the propriety of class treatment for both the Rule 23 and FLSA claims, and without specifically citing to the Supreme Court’s decision Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), the Seventh Circuit adopted the Supreme Court’s rejection of “trial by formula” in class actions. As in Wal-Mart, the Seventh Circuit rejected a “formulaic” approach and concluded that determining damages would require separate evidentiary hearings for each putative class member. Lastly, the Seventh Circuit’s analysis sends a strong message that District Courts should closely scrutinize the feasibility of plaintiffs’ trial plans before certifying and permitting FLSA collective actions to proceed to trial.

Farmer, et al. v. DirectSat USA, LLC, 2013 U.S. Dist. LEXIS 79825 (N.D. Ill. June 6, 2013). Plaintiffs, a group of former installation and service technicians, brought an action under the Illinois Minimum Wage Law (“IMWL”) and the FLSA alleging failure to compensate for all the work performed because they were prohibited from recording time worked before they arrived at their first job of the day and after they left their last job of the day. Earlier, the Court had certified an IMWL class of all individuals who were employed as service technicians or production technicians in the state of Illinois between December 3, 2006 and June 11, 2008. Pursuant to the Seventh Circuit’s recent decision in Espenscheid v. DirectSat USA, LLC, 705 F.3d 770 (7th Cir. 2013), Defendant subsequently moved for decertification. The Court granted the motion. In Espenscheid, 2,341 DirectSat installation and service technicians alleged the failure to pay them for all of the time they were required to work. The Seventh Circuit affirmed decertification of the class because determining damages would require 2,341 separate evidentiary hearings, thereby rendering class treatment suitable. Id. at *9. The Seventh Circuit concluded that determining damages required individualized inquiries because DirectSat technicians varied in how much they worked, how efficiently they worked, and how they recorded time. Id. at *9-10. To overcome this problem of variance, Plaintiffs in Espenscheid in proposed presenting testimony at trial from 42 representative members of the class. The Seventh Circuit deemed this inadequate because there was no evidence that sampling methods used in any statistical analysis were employed to create a random sample of class members. Thus, the Seventh Circuit held that the 42 individuals were not representative of the class and could not serve as a benchmark from which class-wide damages could be extrapolated. Id. at *11. Further, the Seventh Circuit stated that even if the 42 litigants were in fact representatives of the class, this would not enable the damages of any members of the class other than the 42 to be calculated. This was because an effort to extrapolate from
Plaintiffs, a group of present and former employees, brought an action under the FLSA for overtime. At decision. First, the parties and claims were nearly identical, and a sufficient number of class members here had consented to join the FLSA collective action as opt-in Plaintiffs in Espenscheid. Plaintiffs argued that Espenscheid was different because this class consisted of only 500 employees and all class members worked in Illinois, advanced the same legal theory, asserted violations of the same statute, and challenged the same corporate-wide practice. The Court observed that the decision in Espenscheid was based on the nature of the technicians’ work, the way they were paid, and Plaintiffs’ proposed representative proof, and that the Seventh Circuit did not rely on the number of offices out of which Plaintiffs worked or the fact that they worked in multiple states. Further, the legal analysis under the IMWL is the same as the legal analysis under the FLSA. Thus, the Court remarked that Plaintiffs’ distinctions were unpersuasive. Second, like Plaintiffs in Espenscheid, Plaintiffs here proposed relying on representative proof, but failed to demonstrate that the selected representatives provided an appropriate benchmark from which class-wide damages could be extrapolated. Although Plaintiffs contended that the speculative issues regarding damages were managed here through the use of a retired U.S. Department of Labor investigator (who served as Plaintiffs’ expert) along with empirical GPS data from the technicians’ work vehicles, the Court observed that it had earlier found the testimony of Plaintiffs’ proposed expert unreliable and granted Defendants’ motion to exclude his testimony. Thus, Plaintiffs failed to establish that their proposed representative proof would cure the variances found fatal in Espenscheid. Third, the Court opined that even if Plaintiffs had demonstrated that the 16 class members who proposed to testify at trial were representative of the class, this would not enable the damages of any members of the class other than the 16 to be calculated. The Court stated that because technicians varied in the amount they worked, the amount of overtime they worked, and the efficiency with which they worked, even if Plaintiffs could establish an average number of overtime hours through representative proof, some technicians would receive a windfall while others would be under-compensated. Id. at *20. Finally, the Court noted that Plaintiffs had insufficient records to establish their individualized unreported work time, and Plaintiffs were unable to identify which of their timesheets were inaccurate. Thus, separate hearings would have to be conducted to calculate damages. For these reasons, the Court granted Defendant’s motion for decertification.

Garcia, et al. v. Moorehead Communications, Inc., 2013 U.S. Dist. LEXIS 116810 (N.D. Ind. Aug. 19, 2013). Plaintiffs, a group of present and former employees, brought an action under the FLSA for overtime wages. As a technician, named Plaintiff Garcia installed satellite and related equipment for customers, and as a technician and Field Service Manager (“FSM”), named Plaintiff Wilkerson had additional duties, which included the need to train, direct, and oversee the technicians, as well as attend weekly meetings with management. Plaintiffs submitted declarations asserting that although they worked over 40 hours a week, they were paid on a piecework basis and were not paid for overtime, including time spent traveling to worksites. The Court conditionally certified a collective action consisting of present and former satellite installer technicians and FSMs employed for any period of time from August 19, 2010 to August 25, 2012, and who had not been paid overtime wages for all time spent working beyond 40 hours per week. The key issue for the Court was whether the collective action could include both technicians and FSMs. Defendant relied on cases wherein certification was denied because the class included both supervisors and their subordinates. The Court, however, noted that here, the success of the technicians’ claims did not depend on their ability to prove that FSMs acted illegally. Based on Plaintiffs’ declarations and submissions made in support of their motion for conditional certification, the Court determined that FSMs were not responsible for the number of hours worked by technicians, for approving or reporting the number of hours worked by the technicians, or for pressuring technicians to under-report the hours actually worked. Further, FSMs had no incentive to encourage technicians to under-report their hours, since Defendant was not paying overtime rates to either technicians or FSMs. Further, there was no apparent competing interest between technicians and FSMs, as both performed similar duties involving the installation of satellite and related equipment. Although the FSMs had additional supervisory roles, these duties did not relate to the
reporting, approval, or payment of technicians’ overtime hours. Thus, the Court found that the proposed collective action was not overly broad. The Court reasoned that because the conditional certification stage occurs early in the case, the evidence need not be admissible at trial in order for Plaintiffs to meet the low threshold requirement, and the Court need not reach the merits of the FLSA claims at this time. Id. at *15. The Court observed that Plaintiffs submitted more than just conclusory allegations and provided two additional declarations from other technicians/FSMS, in addition to their own declarations, which alleged similar facts based on the personal knowledge of the Declarants. The declaration of Defendant’s Satellite Installation Manager further corroborated the allegations of Plaintiffs. Thus, the Court determined that there was sufficient evidence to make the requisite factual showing for purposes of conditional certification that Plaintiffs and similarly-situated technicians and FSMS were subject to Defendant’s common policy or plan to violate the FLSA. Third, the Court remarked that Defendant’s argument that individual inquiries would be required to determine damages, even before discovery had been conducted, was untimely. Further, the Court stated that conditional certification should not be blocked because individual issues relative to calculating damages may arise. Id. at *20. Finally, because potential Plaintiffs were not afforded a tolling of the statute of limitations, the Court directed Defendant to produce within ten days a list of names and addresses of all former and current technicians and FSMS who worked any time from three years prior to the date of the order, and up to August 25, 2012, when the pay policy was revised. Accordingly, the Court granted Plaintiffs’ motion for conditional certification under 29 U.S.C. § 216(b).

Johnson, et al. v. Pinstripes, Inc., 2013 U.S. Dist. LEXIS 138253 (N.D. Ill. Sept. 26, 2013). Plaintiffs brought an action alleging violations of the Illinois Minimum Wage Law (“IMWL”) and the FLSA. Plaintiffs claimed that they were paid a tipped wage and overtime wage lower than was permissible by federal and state law, that Defendants improperly paid them a tipped wage when employees were engaged in duties not related to their tipped duties, and that Defendants failed to inform them of the provisions of § 3(m) of the FLSA. Plaintiffs also alleged that Defendants improperly appropriated a portion of the house tips paid by customers. Plaintiffs sought to certify three classes for their IMWL minimum wage claims. Class one comprised tipped employees earning a sub-minimum, tip credit wage rate, and who performed duties unrelated to their tipped occupation, for which they were not paid minimum wage. Class two comprised tipped employees earning a sub-minimum, tip credit wage rate, and who worked private events in which a service charge was paid by the customer. Class three consisted all individuals who were not paid the proper minimum wage rate or overtime at the properly calculated time and one-half rate, plus 2% damages under the IMWL. The Court granted Plaintiffs’ motion. For class one, Plaintiffs alleged that whether Defendants had a policy of paying employees tipped wages while requiring them to perform duties outside their tipped occupation was a common question. Further, for class two, Plaintiffs argued that whether Defendant inappropriately took a portion of their tips during private events was a common question, and for class three, Plaintiffs claimed that whether Defendants paid employees all minimum wages and overtime wages owed including liquidated damages was a common question of law and fact. Regarding class one, Plaintiffs alleged that Defendants required them to complete side work, or work unrelated to employees’ tipped occupation, and presented training manuals and depositions of employees detailing this required side work. Because Plaintiffs submitted evidence of a company-wide policy of side work, the Court found that the common question of whether employees still engaged in tipped labor through required side work was common for class one. The Court stated that there was a class-wide question of liability based on the side work policy, which predominated over individual damages questions. Further, because Defendants did not challenge the commonality requirement for class two or class three, the Court determined that those arguments were waived. Regarding class two, Plaintiffs alleged that Defendants either improperly appropriated a portion of the service charge assessed at private events, thus depriving employees of their lawful tip, or paid employees at a tip-credit wage during private events, even when gratuities were not given, in violation of IMWL. The Court observed that if Defendants assessed the service charge as a bona fide service charge, then that service charge was not a tip and could not be used as tip credit toward the minimum wage, but if the service charge was a tip, then it was improper for Defendants to appropriate a portion of that tip for their own revenues. Thus, the Court stated that there was a common question of the status of the service charge that dictated liability on Plaintiffs’ claim that predominated. Regarding class three, Plaintiffs claimed that Defendants failed to pay tipped employees the lawful tip-credit wage rate and
failed to calculate overtime pay properly when they failed to properly adjust the minimum wage and tip-credit wage paid to employees after the minimum wage was raised. The Court noted that the question of whether Defendants failed to pay their employees the adjusted rate was a claim that could be adjudicated on a class-wide basis, and that the wage rate paid was a question that predominated over the question of any remaining individual damages owed to the employees. The Court also observed that class one satisfied the typicality requirement. Plaintiffs claimed that Defendants had a policy in place that required all employees to complete side work unrelated to their tipped duties, which was an alleged practice or course of conduct that was common to all employees, and their claims were all based on the same theory of liability. Class two also met the typicality requirement. Plaintiffs claimed that Defendants had a policy of retaining part of the service charge assessed at private events, and that they were not legally allowed to do so while paying a tip-credit wage. Further, this common practice affected all tipped employees who worked at private events. The Court also noted that class three satisfied typicality because Plaintiffs alleged that Defendants failed to pay all employees the proper tip-credit and overtime wage after the minimum wage increase, and this alleged violation affected all tipped employees. Regarding the FLSA conditional certification, the Court observed that Plaintiffs presented sufficient evidence to suggest that Defendants paid employees below minimum wage and failed to correctly pay overtime wages. Further, the Court remarked that Plaintiffs’ contention that tipped employees were not informed of the requirements of the FLSA could also be determined on a class-wide basis. Accordingly, the Court granted Plaintiffs’ motion for class certification.

Salmans, et al. v. Byron Udell & Associates, Inc., 2013 U.S. Dist. LEXIS 28073 (N.D. Ill. Feb. 26, 2013). Plaintiffs brought a collective action alleging that Defendant improperly classified all of its Account Executives (“AEs”) as exempt from the requirements of the FLSA. Plaintiffs moved for conditional certification and the Court granted the motion. Plaintiffs claimed that AEs spend a majority of their time talking to potential clients on the phone and attempting to sell insurance products. Further, Plaintiffs submitted declarations regarding their job duties and Defendant’s policies and practices, wherein the declarants stated that other AEs performed similar tasks as the declarants and were treated similarly by Defendant. Further, one Plaintiff trained many other AEs on how to work with potential customers, and thus had information about those AEs’ job duties. The Court observed that although some AEs did not consider themselves salespeople, their activities nonetheless appeared to be facially similar to the activities that Plaintiffs described, and thus were similarly-situated to Plaintiffs for the purposes of conditional class certification. Although Defendant contended that some AEs worked with a different group of potential customers, the Court noted that even so, they performed similar duties and thus were similarly-situated to Plaintiffs. Accordingly, the Court opined that Plaintiffs made the modest factual showing necessary to establish that they were similarly-situated with other AEs in both of Defendant’s offices. Defendant maintained that its policy of classifying AEs as exempt was lawful because AEs were financial services employees, rather than salespeople, and thus exempt pursuant to regulations codified at 29 C.F.R. § 541.203(b). The Court stated that deciding whether AEs were financial services employees, as opposed to salespeople, required discovery and went to the merits of the case, which was inappropriate at this stage. Finally, the parties disagreed whether a two-year or three-year statute of limitations applied to this claim. Although Plaintiffs alleged a willful violation, they did not allege any specific facts showing that Defendant willfully violated the law. Nevertheless, the Court observed that a conclusory willfulness allegation was sufficient to justify providing notice to the putative class on the basis of the potentially applicable three year statute. Id. at *17. The Court noted that there was no basis to exclude from the potential class AEs who worked for Defendants within the past three years given the possibility that Plaintiffs would be able to show that Defendants acted willfully. The Court reasoned that because Plaintiffs had adequately pleaded willfulness, and it was possible that they would be able to prove willfulness after an opportunity for discovery, notice should be sent to all potential class members who may have valid claims if Defendant acted willfully. Additionally, the Court directed that the notice should reflect that only those individuals who worked for Defendant within three years of the date on which the notice was sent were potentially eligible to join the class. Accordingly, the Court granted Plaintiff’s motion for conditional class certification.
Plaintiff, on behalf of himself and others similarly-situated, brought suit against Defendants for violating the tip credit provisions of the FLSA and the Illinois Minimum Wage Act. Specifically, Plaintiff claimed that Defendants required him and other servers at their restaurants to perform non-tipped duties while paying them at the sub-minimum tip-credit wage rate. Plaintiff moved for certification of the state law minimum wage claim under Rule 23. The Court granted Plaintiff’s motion, certifying a class of “all persons employed by Defendants as servers from October 5, 2007, to the conclusion of this action, who were paid a sub-minimum, tip credit wage rate, and who performed duties unrelated to their tipped occupation, for which they were not paid minimum wage.” Id. at *3. The Court noted that under Rule 23, a class representative must be “part of the class and possess the same interest and suffer the same injury as the class members.” Id. at *4. Plaintiff must satisfy the four prerequisites of Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation – and one of the conditions of Rule 23(b). Plaintiff sought certification under Rule 23(b)(3), asserting that “questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Id. Defendant argued that Plaintiff neither satisfied Rule 23(a)’s commonality and typicality threshold requirements, nor Rule 23(b)’s predominance or superiority requirements. To satisfy the commonality requirement, the Court opined that Plaintiff must show “the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.” Id. at *4 (citations omitted). Plaintiff maintained that a common claim that Defendants’ unlawful policy or practice of denying lawful wages is a “common answer that potentially drives the resolution of the litigation.” Id. at *5. Plaintiff alleged that Defendants engaged in standardized conduct of unlawfully paying the sub-minimum tip-credit wage rate to servers who performed non-tipped duties. Plaintiff submitted declarations from numerous servers describing their regular duties to include non-tipped duties. The Court found that Plaintiff showed a common claim sufficient to meet the commonality requirement. As to typicality, the Court opined that “a Plaintiff’s claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.” Id. at *6. Defendants argued that Plaintiff could not demonstrate typicality because his experience at two of the six restaurants was not typical of that of other members of the proposed class based on variations in the types of tasks he performed, the amount of customer interactions, or the amount of time he spent on each task. The Court rejected this argument. It reasoned that small factual distinctions do not defeat typicality, and that Plaintiff’s claims were sufficiently typical of the claims of the class as a whole. Id. at *7. Finally, under Rule 23(b)(3), Plaintiff must show that questions of law or fact common to the class predominate over questions affecting only individual class members, and that a class action is superior to other methods of resolving the litigation. The Court held that both requirements were satisfied. The Court concluded that individual issues did not overwhelm the common issues and a class action was the most efficient way to resolve the controversy. Accordingly, the Court certified Plaintiff’s state law claims under Rule 23.

Plaintiffs, a group of former customer service representatives, brought an class action under Illinois Minimum Wage Law ("IMWL"), alleging that Defendant failed to pay its hourly employees for all of the time worked. Plaintiffs alleged that they were required to make bank deposits after clocking-out, perform off-the-clock work in the store, run errands without pay, and work special assignments without paying for travel time. Plaintiffs filed a motion for class certification. Plaintiffs relied on alleged official and unofficial company-wide policies that they contended led to company-wide IMWL violations and declarations from seven proposed class members. In the outset, the Court noted that the sample size of Plaintiffs’ anecdotal evidence was extremely small as it represented only 0.19% of the proposed class. Regarding the allegation that Plaintiffs were required to make bank deposits, the Court remarked that because Plaintiffs could not rely on the documented policy to show that their individual claims were shared by all Illinois hourly employees after May 2011, the policy was insufficient to establish commonality across the entire class. Further, the Court noted that because Plaintiffs’ declarations demonstrated that whether an employee was required to make an off-the-clock bank deposit depended on the individual store and the people working at the store, Plaintiffs failed to show that their claims regarding off-the-clock bank deposits
was capable of proof at trial through evidence that was common to the class. Second, the Court remarked that named Plaintiff Erin Box failed to establish that her claim regarding off-the-clock errands was common to the class and capable of class-wide resolution because whether an employee was required to run an errand depended on the manager on duty in the store, and Plaintiffs provided no evidence that all or most store managers instructed employees to run off-the-clock errands. Regarding the allegation of unpaid travel time, Box relied upon her declaration and the declarations of two proposed class members, who alleged that they were also required to travel to set up new stores and remodel other stores and were not paid for all of the travel time. The Court stated that these declarations failed to establish commonality because the declarations did not point to any company-wide policy regarding the alleged unpaid travel time, and that they contained no details as to who required the declarants to incur unpaid travel time or why Plaintiffs believed they were required to do so. Thus, the Court remarked that an individual inquiry at the store level, if not the individual employee level, would be required to ascertain whether and under what circumstances an employee was required to incur unpaid travel time. Id. at *25. Regarding off-the-clock work in the stores, Plaintiffs pointed to Defendant’s overtime policy instructing that overtime should be avoided whenever possible and that it should be pre-approved. The Court stated that Plaintiffs' declarations did not demonstrate that Defendant had an state-wide policy requiring in-store, off-the-clock work that applied to employees in all of its Illinois stores; instead, the declarations showed an inconsistent and individualized picture of off-the-clock work that varied from store to store and from store manager to store manager. Finally, Plaintiff alleged that Defendant short-changed its hourly employees by under-calcating their overtime rates of pay. Under Defendant’s policy, retail employees earned commissions for selling promotional items, and each employee’s individual payroll ID number recorded and tracked his or her commissions, which were subsequently processed for payment monthly. Based on the payroll information, Defendant paid its employees overtime, but did not include commissions in the base amount. The Court observed that because Defendant’s policy excluding commissions from the calculation of overtime pay rates was company-wide, Box sufficiently demonstrated that her individual claims regarding the policy’s legality were common to the class and capable of class-wide resolution. The Court opined that even though Plaintiffs identified one claim that satisfied Rule 23(a)(2)’s commonality requirement, the improper calculation of overtime rates of pay based on commissions this issue in itself did not predominate over the otherwise individual claims. The Court remarked that the location and manager-dependent nature of the remainder of Plaintiffs’ claims destroyed Rule 23(b)(3) predominance. Id. at *36. Accordingly, the Court denied Plaintiffs’ motion for class certification.

Tamas, et al. v. Family Video Movie Club, Inc., 2013 U.S. Dist. LEXIS 114130 (N.D. Ill. Aug. 13, 2013). Plaintiffs, a group of salaried store managers (“SMs”) and managers-in-training (“MITs”), brought an FLSA collective action and Rule 23 class action for violation of the Illinois Minimum Wage Law (“IMWL”). Plaintiffs alleged that Defendant improperly classified them as exempt employees and thus failed to pay them overtime pay for work done in excess of 40 hours in a week. The Court granted Plaintiffs’ motion for FLSA conditional certification, and denied the motion for certification of the IMWL class, finding that the Rule 23(b)(2) predominance requirement was not met. Plaintiffs asserted that they spent approximately 90% of their time each week performing non-managerial tasks such as stocking movies, taking inventory, and checking out customers. The declarations submitted by six Plaintiffs uniformly asserted that there was virtually no difference in their job responsibilities vis-à-vis those of hourly customer service representatives and that their duties were overwhelmingly manual tasks. The declarations of all current or former salaried MITs and SMs submitted by Defendant asserted that their time was spent on the performance of managerial duties. Regarding FLSA conditional certification, Plaintiffs contended that Defendant’s salaried MITs and SMs were, as a matter of corporate policy, treated as exempt employees, thereby rendering conditional certification appropriate. The Court found that Plaintiffs’ argument that Defendant classified all salaried MITs and SMs as exempt was sufficient to warrant conditional certification under the FLSA. The Court held that Plaintiffs had made a modest factual showing that they were similarly-situated because they provided evidence that they were subject to the same policy that misclassified them as exempt employees. The Court found that Defendant’s argument that individualized inquiries were necessary to determine whether each Plaintiff was properly classified as exempt was inappropriate at this stage. Accordingly, the Court granted conditional certification to the proposed collective action. Regarding class certification of the
IMWL class, Plaintiffs contended that the common injury requirement was satisfied because the putative class members were improperly classified as exempt employees and denied overtime pay as a result of a uniform and company-wide practice. Defendant referred to the job descriptions that appeared in the employee handbook, and the STAR Binder, which described the salaried SM and MIT positions as having primarily managerial duties. Plaintiffs asserted that the Star Binder mandated routine daily operating procedures of stores and required all employees, salaried or not, to perform janitorial tasks to maintain their stores as necessary. The Court determined that Defendant’s comprehensive employee handbook, the daily tickler checklist, and its consistent policy of classifying all salaried SMs and MITs as exempt, taken together, constituted sufficient evidence of an overarching corporate policy sufficient to establish commonality. With respect to the Rule 23(b)(3) requirement of predominance, Defendant contended that individualized inquiries would be necessary to determine whether each putative class member at each store was performing duties sufficient to qualify as an exempt employee. *Id.* at *26. Plaintiffs argued that common issues predominated, because in this misclassification case, the test turned on the balance of common issues to individual issues. *Id.* at *26-27. The Court found that the opposite was true here, because there were individualized questions as to liability. The Court opined that the crux of the dispute was whether the primary duties required of the salaried SMs and MITs were managerial, not whether Defendant had a common policy of denying overtime to SMs and MITs. *Id.* at *28. The parties had presented an array of disparate facts as to this issue, the resolution of which required individualized inquiries into the duties that each member of the proposed class actually performed. *Id.* Such differences potentially existed at the state, regional, and local levels. The Court therefore concluded that the need for individualized liability assessments precluded a finding of predominance. Accordingly, the Court denied Plaintiffs’ motion to certify an IMWL class under Rule 23.

(viii) Eighth Circuit

*Collins, et al. v. Barney’s Barn, Inc.*, 2013 U.S. Dist. LEXIS 54955 (E.D. Ark. April 17, 2013). Plaintiffs, a group of former employees, brought a wage & hour action under the FLSA and the Arkansas Minimum Wage Act (“AMWA”). Named Plaintiffs Collins, Hillman, and Jackson (collectively, the “Dancer Plaintiffs”) earned money solely from tips, and alleged that they were classified as zero-wage independent contractors and never paid an hourly wage, even though Defendants controlled almost every detail of their work. The Dancer Plaintiffs contended that they were entitled to FLSA-mandated compensation for tipped employees, including a minimum hourly wage and overtime compensation, and that Defendants required them to pay a portion of their tips to “the house” and other employees who did not receive tips. *Id.* at *3. Named Plaintiffs Cruthis, Stevens, and Townsend (collectively, the “Non-Dancer Plaintiffs”) alleged that they were paid a flat fee for each shift they worked, regardless of the number of hours worked, and that Defendants failed to pay them minimum wage and overtime compensation. Named Plaintiff Hudson, who worked in multiple capacities, alleged that Defendant failed to pay her in conformity with the FLSA requirements for tipped employees. Plaintiffs moved for conditional certification of the FLSA collective action. Hudson testified that she worked 12-hour shifts, and that she received $2.00 per hour for taking drink orders, preparing and serving drinks, and performing clean-up duties after the club closed. Hudson also testified that she requested Defendants provide her information necessary for her personal income tax filings, but she never received the requested tax forms. As a dancer, Hudson stated that Defendants required her to pay “shift fees” each night that she worked, from tips that she received from customers, and that she was encouraged to pay “tip-outs” to the disc jockeys and bouncers, and if a disc jockey thought she had short-changed him on tips, he would extort higher tip-outs from her. *Id.* at *12-13. Although Hudson provided a detailed account of oppressive working conditions, and stated that approximately 50 other dancers were subject to the same rules, requirements, and financial controls, she provided no information regarding other current or former dancers interested in joining this action. Townsend, a lead bartender, testified that Defendants paid her $44 per work shift, and that they refused to pay her for “opening duties.” *Id.* at *14. Stevens testified that as a waiter, he was paid $65 per shift, regardless of hours worked, and when he became an assistant manager, he earned $75 per shift, regardless of hours worked. Cruthis, a waiter, testified that he was paid $65 per shift, regardless of hours worked, and that all bouncers earned the same $65 per shift fee, with no overtime. Neither Stevens nor Cruthis identified other employees interested in joining a collective action. The Court remarked that the Named Plaintiffs performed different...
jobs and some performed multiple jobs, and were subject to different policies and practices depending on their job classification. Plaintiffs proposed three separate opt-in classes, including a class consisting of dancers who worked for tips; a class consisting of bouncers, DJ’s, managers, and lead bartenders, who received a flat fee of $75.00 or less for their services; and a class consisting of all non-lead bartenders, waitresses, and others who received less than $2.12 per hour for their services. The Court opined that even if the case proceeded as three collective actions joined in one lawsuit, individual inquiries would be required to determine the class to which a Plaintiff belonged. The Court also noted that this task would be especially demanding in the case of a Plaintiff who worked in multiple capacities and received pay under different pay systems. Id. at *17. Additionally, the Dancer Plaintiffs’ claim that Defendants required them to share tips was entirely separate from the minimum wage and overtime claims pursued by all Plaintiffs, and the Dancer Plaintiffs’ allegation that non-dancer personnel used coercive means to extort tips indicated that conflicts could arise between the proposed classes. The Court held that Plaintiffs failed to show that they were similarly-situated to each other or to putative class members, and that dividing Plaintiffs into three different sub-classes would not lead to efficient adjudication, and that dissimilarities among class members would remain. Id. at *18. Nevertheless, the Court observed that the Dancer Plaintiffs, in isolation, demonstrated that they and other similarly-situated dancers were victims of a common policy that violated the FLSA. The Court, however, denied conditional certification because the Dancer Plaintiffs failed to demonstrate the existence of similarly-situated employees who desired to join the lawsuit. The Court stated that the mere anticipation that others may want to join the lawsuit or the mere presence of a uniformly adverse compensation policy was insufficient by itself to warrant a collective action. Id. at *18-19. Accordingly, the Court denied the motion for conditional certification of a collective action.

**Cruthis, et al. v. Vision’s, 2013 U.S. Dist. LEXIS 111156 (E.D. Ark. Aug. 7, 2013).** Plaintiffs, a group of current and former exotic dancers, brought an FLSA action alleging that they were subjected to certain shift fees and unlawful tip-outs, and were not paid minimum and overtime wages. Plaintiffs sought collective action certification of all women who danced for Defendants any time from February 11, 2008 to the present, and continuing thereafter through the date of final judgment. The Court granted the motion in part. Plaintiffs submitted affidavits describing the alleged nature of their job duties and how they purportedly were required to pay certain shift fees and tip-outs each night they worked. Further, Plaintiffs stated that they observed numerous other dancers being subjected to these same rules, requirements, and financial controls, and that all dancers were categorized as independent contractors and never paid an hourly wage. Defendants argued that Plaintiffs were neither engaged in interstate commerce or the production of goods for interstate commerce, nor employed by an enterprise engaged in interstate commerce as required by 29 U.S.C. § 206(a), and that the Court’s jurisdiction was dependent upon satisfying these requirements. The Court, however, observed that the FLSA’s requirement that an individual be employed by an enterprise engaged in interstate commerce was not jurisdictional. Id. at *7. Defendants also contended that conditional certification was inappropriate because Plaintiffs failed to establish that there were other individuals who wished to opt-in to the proposed collective action. This lawsuit was the third action in less than two years that Defendant had been sued by former dancers for alleged violations of the FLSA. Assuming without deciding that the FLSA requires Plaintiffs to demonstrate that other employees are interested in joining the action, the Court was satisfied that some potential collective action members would wish to opt-in to this litigation if given the opportunity. Accordingly, the Court opined that Plaintiffs satisfied their lenient burden of establishing that they were similarly-situated to other dancers who worked at Defendants, and thus, conditionally certified a collective action.

**Garrison, et al. v. Conagra Foods Packaged Food, LLC, 2013 U.S. Dist. LEXIS 43405 (E.D. Ark. Mar. 27, 2013).** Plaintiff, a former front line supervisor/team leader, brought a collective and class action under the FLSA and Arkansas Minimum Wage Act alleging that Defendant misclassified her and other similarly-situated employees as exempt in order to avoid paying them overtime wages. Plaintiff also alleged that Defendant failed to maintain records of the hours worked by its employees. Plaintiff sought conditional certification of a collective action consisting of all former and current salaried front line supervisors/team leaders anytime within the last three years. The Court granted the motion. The Court noted that to determine whether employees are similarly-situated, several factors need to be considered,
including whether Plaintiffs hold the same job title; whether they worked in the same geographic location; whether the alleged violations occurred during the same time period; whether Plaintiffs were subjected to the same policies and practices; and the extent to which the acts constituting the alleged violations are similar. Id. at *11. Additionally, the Court stated that although Plaintiff need not show that her position was identical to those of the putative class members, she must still establish that it was similar. Id. Accordingly, the Court opined that there were no significant dissimilarities among the front line supervisors/team leaders positions or anything indicating that Defendant would otherwise be defending against evidence that was not common to all class members. Further, Plaintiff submitted consent forms of other opt-in candidates, making a sufficient factual showing that a similarly-situated group of potential Plaintiffs existed; the collective action was manageable; and there are no apparent procedural considerations weighing against the conditional certification of a collective action. Plaintiff further requested that the statute of limitations for all potential opt-in Plaintiffs be tolled as of the date of filing of her motion for class certification. The Court observed that the doctrine of equitable tolling should be invoked only in exceptional circumstances truly beyond Plaintiff’s control. Id. The Court determined that there was no evidence of the requisite extraordinary circumstances. Further, the Court observed that there was nothing extraordinary about a motion for conditional certification and the delay in notice while that motion was pending and to hold otherwise would be to opine that equitable tolling should be granted in every § 216(b) case as a matter of course during the pendency of a conditional class certification request, thereby transforming this extraordinary remedy into a routine, automatic one. Id. at *15. Accordingly, the Court rejected Plaintiff’s request to toll the statute of limitations for all potential opt-in Plaintiffs.

Gomez, et al. v. Tyson Foods, Inc., 2013 U.S. Dist. LEXIS 141750 (D. Neb. Oct. 1, 2013). Plaintiffs, a group of current or former employees of Defendant’s meat processing unit, brought a class action alleging that Defendant failed to pay them minimum wage and overtime compensation for pre-production and post-production line activities including donning and doffing protective and sanitary gear in violation of the FLSA and state law. After the Court certified the class, Defendant moved to decertify the class contending that Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, (2011), and Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013), disallowed trial by formula. The Court denied the motion. Defendant argued that the damages of Plaintiffs and the class should be proved individually with respect to each Plaintiff. Further, Defendant argued that Plaintiffs offered no class-wide proof and there was significant variation among the class. Defendant also asserted that Plaintiffs’ evidence was not representative of the class and did not offer a class-wide number of minutes. The Court noted that unlike Wal-Mart, which involved the subjective intent of thousands of managers, this case involved a uniform policy or practice of compensating employees on gang-time and the primary issue with respect to all members of the class was whether their donning and doffing activities were compensable. Id. at *13. The Court found that Plaintiffs provided sufficient proof of an uniform policy of underpayment for donning and doffing activities, presenting a common question subject to class-wide proof. The Court stated that the evidence included an expert time study and representative testimony that established the approximate, average time that Plaintiffs were entitled to recover and the individual calculations of the exact amount due each class member had been derived from Defendant’s wage records. Similarly, the Court observed that the Supreme Court’s holding in Comcast was inapposite. Comcast held that a damages suit could not be certified to proceed as a class action unless the damages sought are the result of the class-wide injury that the suit alleged. Id. at *15. The Court opined that Comcast holding was not applicable to this case because Plaintiffs proceeded on only one theory of recovery and damages were attributable to that theory. Further, the Court reasoned that Defendant’s argument that Plaintiffs had to prove the amount and extent of each individual Plaintiff’s work was misplaced and the cases cited by Defendant did not stand for that proposition. Accordingly, the Court denied the motion to decertify. Finally, the Court amended the class definition to include all current and former employees of Defendant Tyson’s Dakota City, Nebraska, meat processing facility who have been employed by Tyson at any time from January 17, 2004, to April 3, 2013, and are or were paid under a “gang time” compensation system in the Slaughter or Processing Departments.

Arkansas Minimum Wage Act ("AMWA") challenging Defendant’s lunch deduction and reclamation policy. Plaintiffs moved for conditional certification of a collective action and for class certification of all state law claims. The Court granted in part Plaintiffs’ motion for conditional certification and denied without prejudice their motion for class certification. The Court noted that patient care employees at Arkansas Convalescent Center were similarly-situated as to the lunch deduction and reclamation process. The Court, however, found that clerical and custodial workers, and any other employees not involved in patient care, were not similarly-situated. The Court noted that there was some evidence that the reclamation policy was unpublicized, and that when known, use of it was discouraged. The Court remarked that to the extent there was silence from nursing supervisors about taking lunch or reclaiming worked lunch time, a lack of common supervision or implementation across patient-care workers and other hourly employees also existed. The Court thus concluded that only the patient-care workers were similarly-situated enough to proceed collectively on a conditional basis. Accordingly, the Court extended the collective action across all non-exempt hourly patient-care workers, including licensed practical nurses and certified nursing assistants employed from April 24, 2009, until the date on which the Court would enter final judgment. Regarding the motion for class certification, the Court stated that the proposed class of all hourly employees was over-inclusive, and Plaintiffs had made no showing that any clerical, maintenance, or dietary staff at the nursing home either routinely worked some or all of an unpaid lunch break or were discouraged from reclaiming any such time. Moreover, the Court observed that the proposed class representatives did not meet the commonality or typicality prerequisites for a class of all hourly employees. The Court stated that Plaintiffs pleaded an overtime claim under AMWA, but not a straight time claim, and the broad class definition they proposed did not bring any clarity on this point. The Court doubted whether a Rule 23 class on the state statutory version of the overtime claim was a superior method for fairly and efficiently adjudicating the controversy when the FLSA collective action already had been conditionally certified. Thus, the Court held that the balance of practical factors weighed against a Rule 23(b)(3) class on the AMWA over-time claims. Accordingly, the Court denied with prejudice Plaintiffs’ motion for class certification.

Koenig, et al. v. Bourdeau Construction, LLC, 2013 U.S. Dist. LEXIS 156217 (E.D. Mo. Oct. 31, 2013). Plaintiffs, a group of laborers, brought an action under the FLSA and the Missouri Minimum Wage Law alleging that Defendant had a policy of misclassifying overtime hours as vacation or sick time and requiring employees to work more than 40 hours per week without overtime pay. Plaintiffs moved to conditionally certify a collective action of similarly-situated employees over the past three years. The Court granted the motion. Plaintiffs submitted three affidavits from former employees who testified that they were required to work more than 40 hours per week but were not paid overtime, and also witnessed other similarly-situated laborers not receiving overtime pay. The Court determined that Plaintiffs had adequately alleged that the work they performed was similar to those they sought to represent and Plaintiffs worked directly with other similarly-situated employees and were able to share their direct observations to prove the existence of a class. Defendant opposed conditional certification, contending that it had properly compensated its employees for all overtime hours actually worked and that it was not required to compensate its employees for time periods during which they were traveling in a company vehicle to and from various job sites. The Court, however, remarked that Defendant’s arguments did not preclude conditional certification. Defendant argued that the collective action period should be a two-year time period because the FLSA required that a civil enforcement action be commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation might be commenced within three years. The Court noted that Plaintiffs’ affidavits and the allegations of willful conduct in the complaint were sufficient for purposes of conditional certification, and accordingly the Court conditionally certified the collective action with a three-year statute of limitations. Finally, regarding the proposed notice and consent, the Court found that the proposed notice did not properly designate the class and time period and it should be revised. Further, the Court agreed with Defendant that the references to claims concerning minimum wage should be removed from the notice as well as the reference to state law in the consent form should also be removed. Defendant also proposed to add the following statement in the notice — “if the putative Plaintiffs join the lawsuit, they would be bound by the judgment and if the Court ruled in favor of Defendant, they would not be entitled to any relief, and they might have to pay some portion of the costs and expenses incurred by Defendant.” Id. at *10-11. The Court found that because an award of costs to a Defendant as a prevailing
party in an FLSA case was possible, in the interest of full and fair disclosure, the language should be included in the notice. Finally, the Court directed Defendant to provide Plaintiffs' counsel with putative class members' details along with their e-mail addresses, in addition to their physical addresses.

**Lindsay, et al. v. Wells Fargo Advisors, LLC, 2013 U.S. Dist. LEXIS 33982 (E.D. Mo. Mar. 11, 2013).** Plaintiff brought an FLSA collective action alleging that Defendant required its client associates ("CAs") to report an no more than eight hours on their timesheets even when they worked more than eight hours per day. Plaintiff asserted that it was Defendant's practice and policy to wilfully fail and refuse to properly pay CAs for all straight time and overtime compensation in violation of the FLSA. Plaintiff moved for conditional certification of a nationwide class, for disclosure of putative class members' names and contact information, and to facilitate class notice. The Court granted Plaintiff's motion and certified a collective action of all current and former unlicensed CAs who worked at any time during the past three years. Plaintiff's affidavit stated that she was instructed not to include overtime on her timesheet and that if she did include any overtime she would be fired. Plaintiff also stated that there were approximately five other CAs in her office and she was aware that they too were required to work past their scheduled work shifts, and that she understood that they too were unpaid for such work. Susan Meyers, a CA in the Knoxville, Tennessee branch, stated that her office's compliance officer instructed her not to record overtime hours that were not pre-approved, and on occasions where she recorded unscheduled overtime on her timesheets, her timesheets were returned and she was told that she had to remove the extra time. Meyer's affidavit further stated that she was told that Defendant did not allow this, and it was a company rule; and that the company policy of not paying for unscheduled overtime continued after her compliance officer was replaced. Both Plaintiff and Meyers testified that as a result of the policy, they did not report all of the hours that they worked. Two former employees stated that they were told by supervisors not to record any overtime and, they were not paid for all the hours worked; they also observed other CAs work overtime who were not paid for doing so. The Court remarked that Defendant's objections related to the affiants' credibility was improper at this juncture. The Court opined that the affidavits provide a colorable basis for Plaintiff's claim that the class members were the victims of a single decision, policy, or plan. The Court noted that although the affiants were from offices throughout the country, they all described a common company policy to refuse to pay overtime compensation, and all of the affidavits indicated that the workers were instructed not to report overtime, as it was against company policy. Likewise, all affiants stated that they were not properly compensated as a result of this company policy. Accordingly, the Court granted conditional certification.

**Luiken, et al. v. Domino’s Pizza, LLC, 705 F.3d 370 (8th Cir. 2013).** Plaintiffs, a group of pizza delivery drivers, brought an action alleging that Defendant charged customers a delivery charge and retained that charge without distributing it to the drivers, in violation of the FLSA and Minnesota Statutes § 177.21, et seq. The District Court certified a class of about 1,600 Minnesota delivery drivers employed by Defendant between March 6, 2006, and February 28, 2010. The Eighth Circuit granted an interlocutory appeal and reversed the certification order. Plaintiffs asserted that under Minnesota law, the delivery charge was a service charge or surcharge included in the statement of charges, and thus by definition an obligatory charge which might reasonably be construed as payment for personal services. Alternatively, Plaintiffs asserted that the nature of the charge itself shows that it might reasonably be construed as such a payment, and that it therefore was a gratuity under § 177.23. Although according to Plaintiffs, the context of specific transactions was irrelevant, the Eighth Circuit noted that the plain language of the statute and rule indicated that context mattered. Minnesota Rule 5200.0080 lists service charges and surcharges as examples of obligatory charges, which might reasonably be construed by the guest, customer, or patron as payment for personal services. Id. at 373. The Eighth Circuit stated that the statute and rule's use of “the” – “which might reasonably be construed by the guest, customer, or patron” – indicated that they referred to someone specific, and that the customer’s circumstances determined whether the delivery charge might reasonably be construed as a payment for personal services. Id. The parties agreed that liability under the statute and rule was based on an objective, reasonable person standard. Here, some customers asked about the charge and some did not; some employees volunteered that it was not a gratuity and some did not. The Eighth Circuit stated that those circumstances determined the objective reasonableness of
construing the charge as a payment for personal services. *Id.* at 374. The Eighth Circuit remarked that the District Court was tasked with applying the reasonable customer standard in context. Plaintiffs also argued that verbal communication by Defendant's employees would not satisfy the regulatory definition of clear and conspicuous notice. The Eighth Circuit, however, stated that notice was relevant only if the charge was the type that might reasonably be construed as a payment for personal services. *Id.* at 375. The Eighth Circuit observed that because varying circumstances guided the statutory standard, the class did not meet the requirement of commonality. Whether the delivery charge might reasonably be construed as a payment for personal services in one transaction did not determine whether it might reasonably be construed that way in another transaction. The differences in delivery transactions affected the reasonableness of construing the delivery charge as a gratuity. Plaintiffs argued that the focus at certification should be on Defendant's conduct and whether that conduct was the same as to all class members. The Eighth Circuit reasoned that Plaintiffs ignored the statute's emphasis on whether the charge might be construed as a payment for personal services and asserted that Defendant was obligated to provide the statutorily-defined notice. *Id.* at 377. The Eighth Circuit held that the varied context of the transactions made it unreasonable for some customers to construe the delivery charge as a payment for personal services, thereby preventing a single determination of a class-wide question. *Id.* at 378. The Eighth Circuit opined that the District Court abused its discretion by certifying the class, and accordingly, reversed the certification order.

*Perrin, et al. v. Papa John's International, Inc.*, 2013 U.S. Dist. LEXIS 181749 (E.D. Mo. Dec. 31, 2013). Plaintiffs, on behalf of themselves and other similarly-situated non-exempt delivery drivers employed by Defendants, filed a putative class and collective action alleging that Defendants failed to pay proper minimum wages due to Defendants' failure to reasonably approximate the delivery drivers' automotive expenses for reimbursement purposes in violation of the FLSA and five states' wage & hour laws. Subsequently, the Court granted Plaintiffs' motion for conditional certification of their FLSA claim. As to their state law claims, Plaintiffs then moved for class certification under Rule 23. In response, Defendants did not contest Rule 23's numerosity or adequacy requirements. However, Defendants contended that Plaintiffs could not meet Rule 23(a)(2)'s commonality requirement because whether the application of Defendants' reimbursement policy resulted in sub-minimum wage for a particular driver was dependent on individualized evidence regarding that driver's income and expenses. *Id.* at *16-17. The Court rejected Defendants' argument and found that despite the fact that there would be a need for individualized calculations of damages, the issues facing the putative class arose from common questions involving Defendants' policies regarding the calculation and payment of reimbursement for delivery expenses. *Id.* at *17-18. Thus, the Court held that Plaintiffs satisfied the commonality requirement. With respect to Rule 23(a)(3)'s typicality requirement, the Court rejected Defendants' argument that no putative class member was typical of any other proposed class member because each putative class member's claim required a case-by-case determination based on proof unique to each driver for the same reasons it rejected Defendants' commonality argument. *Id.* at *18. With respect to Rule 23(b)(3)'s predominance requirement, Defendants asserted that the predominance requirement could not be met because to prove their *prima facie* case, Plaintiffs would need to show that their individual vehicle expenses exceeded the delivery-related vehicle reimbursements. *Id.* at *20. Plaintiffs asserted that individual proof of actual expenses was not required to establish liability and contended that common evidence predominated over individualized proof in establishing the central question with respect to liability – whether Defendants' vehicle reimbursement policy reasonably approximated the vehicle expenses of delivery drivers in each state class – did not require individualized proof. *Id.* at *20-21. The Court agreed with Plaintiffs' argument. The Court noted that Defendants' own reimbursement methodology did not depend upon the drivers' actual expenses. *Id.* at *24. Moreover, the Court noted that the U.S. Department of Labor's regulatory framework did not require that reimbursements be based on actual expenses. *Id.* Lastly, the Court opined that Defendants failed to argue in their opposition briefs that if Plaintiffs prevailed on their theory of liability, Defendants would not be able to determine each putative class member's damages by using computer data readily available to Defendants. *Id.* at *24. Therefore, the Court held that Plaintiffs satisfied Rule 23(b)(3)'s predominance requirement. Accordingly, the Court granted Plaintiffs' motion for class certification.
Editor’s Note: The ruling in Perrin is the final wage & hour class certification ruling in 2013. As compared to rulings in employment discrimination and ERISA class actions, wage & hour decisions far out-paced other types of workplace class actions. Perrin represents a significant line of cases where the defense rulings in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), and Comcast v. Behrend, 133 S. Ct. 1426 (2013), were not applied in the same manner in the wage & hour context as in other types of workplace class actions.


Plaintiffs, a group of students enrolled in the student driver program, brought a class and collective action under Nebraska’s Hour & Wage Act ("NWHA"), the Nebraska’s Wage Payment and Collection Act ("WPCA"), and the FLSA alleging that Defendants’ policies regarding its training program systematically under-compensated newly hired drivers who participated in that program. The program was part of the training and orientation for new drivers. Plaintiffs contended that Defendants inappropriately designated significant amounts of legally compensable time as off-duty, leading to under-compensation in violation of the FLSA. Plaintiffs moved for Rule 23 certification of their state law claims on behalf of all drivers who had been employed in the program during the last five years. The Court granted the motion. First, based on an affidavit from one of Defendants’ employees, Plaintiffs asserted that the putative class consisted of at least 41,000 truck drivers, thus establishing the impracticability of joining all class members. Second, Plaintiffs alleged claims arising from the same conduct as other class members, namely Defendants’ systematic denial of compensation for breaks and certain periods of sleeper berth time. The Court observed that subject to general commonality concerns, Plaintiffs’ claims were identical to the claims of other potential class members. Thus, the Court found that the typicality requirement was established. Third, the Court noted that the representatives’ legal claims or factual circumstances did not suggest that their interests in pursuing the litigation would diverge from the class as a whole. The Court noted that liability under the WPCA depended upon whether Nebraska law otherwise provides for compensation based on Plaintiffs’ alleged facts, and stated that if there was an underlying basis for payment, the WPCA would be triggered for all Plaintiffs, although the exact amount owed could differ. The Court observed that the DOL’s regulations require compensation, under certain circumstances, for periods in which the employee was not actively working, and if such breaks were not per se compensable under the NWHA statute, Plaintiffs’ common contention regarding the injury they suffered dissolved into individualized inquiries regarding how each Plaintiff spent off-duty time and whether it was for the benefit of Defendant. Thus, the Court noted that the predominance and the commonality analysis depended on interpretation of the NWHA. The Court stated the language, purpose, and legislative history of the Nebraska statute evidenced that the NWHA was intended to have substantially the same coverage as the FLSA. The Court opined that the NWHA should provide coverage co-extensive with the FLSA for these periods because such break time was for the primary benefit of the employer. Id. at *13. Accordingly, the Court concluded that the common issues predominated over the individualized concerns, and granted Plaintiffs’ motion for class certification.


Plaintiffs, a group of sales representatives, brought an action under the FLSA and Missouri Minimum Wage Law alleging that Defendants refused to pay them overtime wages. Subsequently, the Court conditionally certified the class and tailored a possible class of opt-in Plaintiffs to include only individuals that worked for Defendants as sales representatives from September 13, 2008 to September 13, 2011. Defendants subsequently moved to decertify Plaintiff’s FLSA claim as a collective action, contending that Plaintiffs were unable to show that they were similarly-situated with respect to their overtime wage claims, as required to sustain a collective action under the FLSA. The Court denied the motion. The Court noted that Plaintiffs worked at a single call center and that the named Plaintiff’s claims were of the same essential character as the other collective action members’ claims that managers encouraged Plaintiffs to work after their shifts in order to meet established sales goals. Further, the Court stated that the evidence Plaintiffs presented demonstrated that Defendants’ managers regularly instructed Plaintiffs to work through their lunches, on Saturdays, and beyond their scheduled shifts in order to meet their quotas, which led to the inference that Defendants maintained a top-down, centralized policy regarding overtime. Regarding defenses individual to each Plaintiff, the Court found that the likely defenses could be raised in a collective action, where
Defendants would be free to present evidence of their lawful employment policies and practices, to cross-examine individual representative Plaintiffs, and to call to the stand others with material testimony that would help Defendants’ case. In addition, the Court stated that it would consider bifurcation of the case into a liability stage, where the parties could address the alleged existence of an impermissible policy or practice, and a damages stage, where they could, if necessary, debate the impact of that policy or practice on individual Plaintiffs. Thus, the Court found that this factor weighed in favor of denying decertification as well. Finally, the Court remarked that Plaintiffs had established that they were sufficiently similarly-situated, and the fairness and procedural considerations raised by Defendants did not warrant disturbance of the Court’s conclusion that at least the liability phase of this case should proceed to trial collectively. Accordingly, the Court denied Defendants’ motion for decertification.

**Settles, et al. v. General Electric Corp., Case No. 12-CV-602 (W.D. Mo. Feb. 19, 2013).** Plaintiff brought an FLSA action alleging that Defendant discouraged its service technicians from recording overtime, did not provide a time-keeping system to accurately record overtime, and did not compensate service technicians for maintaining their company vehicles or for repairing their company computers and software programs. Plaintiff moved for conditional certification of a class of service technicians who were obligated to perform tasks included but not limited to attending to customer service and/or repair calls; travel to and from such calls; preparatory duties, such as loading and collecting inventory at the beginning of a workday; moving, unpacking and organizing inventory which was delivered to technicians’ personal residences; and end of the day duties such as unloading and accounting for inventory, and disposing of unneeded and used packaging. The Court denied the motion. Defendant asserted that it delegated discretion to its customer service managers (“CSMs”) in implementing productivity plans that set work and revenue goals for service technicians, as well as in reviewing and approving overtime. The Court found that CSMs had the discretion to evaluate service technician productivity and to review and approve overtime, which was evidence that no single company decision, policy, or plan to discourage reporting governed the putative class members. Thus, the Court opined that there was no evidence that the putative class members were the victims of a single decision, policy, or plan by Defendant to discourage recordation and compensation of overtime. Plaintiff also alleged that by virtue of the DTT program and GE’s time-keeping system, service technicians inevitably worked off-the-clock without compensation. The Court, however, noted that the three affidavits upon which Plaintiff relied were insufficient. The Court concluded that unsupported assertions or those not based on personal knowledge would not show that Plaintiffs were similarly-situated for purposes of conditional certification. Id. at *8. The Court observed that Plaintiff failed to establish that the DTT program encouraged service technicians to perform necessary tasks without recording and receiving overtime compensation for purposes of conditional certification. Finally, Plaintiff argued that service technicians were responsible for maintenance of the GE-provided equipment, which often occurs off-the-clock and was therefore uncompensated. Because Plaintiff did not directly implicate any particular managers or supervisors who allegedly knew about or facilitated the illegal overtime practices, the Court concluded that Plaintiff did not demonstrate that Defendant failed to compensate technicians for overtime hours spent on maintaining their company vehicles, their company computers, and software programs. Accordingly, the Court denied Plaintiff’s motion for conditional certification under 29 U.S.C. § 216(b).

**Simmons, et al. v. Valspar Corp., 2013 U.S. Dist. LEXIS 69528 (D. Minn. May 16, 2013).** Plaintiffs, a group of territory managers (“TMs”), brought an action under the FLSA alleging that Defendant, a manufacturer of paints, stains, and similar products, misclassified them as exempt and failed to pay them overtime. Earlier, the Court had conditionally certified a collective action. Defendant moved for decertification of the class, and the Court denied the motion. TMs promoted and oversaw Defendant’s products in Lowe’s home-improvement stores, and each TM was responsible for an assigned territory, which encompassed an average of six Lowe’s stores. Each TM was supervised by a Regional Manager who evaluated their performance. The average number of weekly hours each Plaintiff reported working varied, but all Plaintiffs reported working more than 40 hours per week. Although the amount of time each Plaintiff devoted to a given task varied not only from Plaintiff to Plaintiff, but also from day to day, week to week, and store to store, all Plaintiffs reported spending a majority of their time on store sales and store appearance. TMs were expected to log-in and out of the Lowe’s time-keeping system upon arriving and
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Teramura, et al. v. Walgreen Co., Case No. 12-CV-5244 (W.D. Ark. Mar. 7, 2013). Plaintiffs, a group of current and former employees, brought an FLSA action alleging that Defendant improperly classified them as exempt from overtime compensation. Plaintiffs sought unpaid overtime compensation, liquidated damages, interest, costs, and attorneys’ fees. Plaintiff moved for conditional certification of a collective action, which the Court granted in part and denied in part. First, declarations from 19 named Plaintiffs and potential opt-in Plaintiffs who worked as executive assistant managers (“EAMs”) in multiple Walgreens stores under multiple store managers stated that they worked in excess of 40 hours per week doing primarily non-managerial tasks. The Court opined that these declarations were sufficient to justify a conditional certification of the proposed collective action. Further, all members of the proposed collective action held the same job title while working for Defendant at some time in the last three years, were paid a salary, and were expected to work in excess of 40 hours per week without receiving overtime compensation. The duties performed by the proposed collective action members were largely the same. Although the Court opined that these similarities were sufficient for collective action certification, it noted that Plaintiffs’ class description was too broad regarding the collective action period. Accordingly, the Court granted certification to all current and former salaried EAMs employed by Defendant at any of its Walgreens stores nationwide at any time within the three years immediately preceding November 15, 2012, and continuing thereafter through the expiration of the opt-in period for potential Plaintiffs. The Court stated that the class period described in the proposed notice to putative collective action members should include the three years preceding the filing of the complaint and go forward to encompass the time that runs to the end of the opt-in period. Accordingly, the Court approved the description of the collective action period, as well as the form and content of the notice as proposed by Plaintiffs. Defendant opposed Plaintiffs’ request for contact information for the collective action members and contended a third-party administrator should be appointed to distribute the notice. The Court, however, observed that appointment of a third-party administrator was unnecessary and that the privacy of potential opt-in Plaintiffs could be protected by permitting only the names and last known home and work addresses to be provided to Plaintiffs, and directing that such information be used only for the purpose of notifying potential opt-in Plaintiffs of this lawsuit. Further, the Court denied Plaintiffs’ request to communicate with potential
Plaintiffs by telephone, e-mail, or a website, stating that notice by first-class mail would be adequate, and declined to permit the sending of “reminder” postcards to potential Plaintiffs who did not initially respond to the notice. Finally, the Court allowed Plaintiffs 90 days from the date they received collective action members’ contact information to distribute the notice and file consent forms, but denied Plaintiffs’ request to post the notice on employee bulletin boards or in other common areas.

(ix) Ninth Circuit

Abdullah, et al. v. U.S. Security Associates, Inc., 731 F.3d 952 (9th Cir. 2013). Plaintiffs, a group of current and former employees, brought a class action alleging that Defendant had a policy of requiring employees to work through their meal periods and was therefore liable for paying overtime compensation for missed meal periods pursuant to § 226.7 of the California Labor Code and the applicable Industrial Welfare Commission Wage Order. The District Court granted class certification to Plaintiffs and also certified a meal break sub-class. Defendant appealed, arguing that Plaintiffs failed to establish commonality under Rule 23(a)(2) or predominance under Rule 23(b)(3). The Ninth Circuit affirmed. Most Plaintiffs worked at single post locations, meaning that no other guards were on duty at the same time. As a condition of employment, Plaintiffs signed on-duty meal period agreements under which they agreed to have their daily meal period on duty because of the nature of their work. The District Court had concluded that the common legal question was whether California’s “nature of the work” exception to the Industrial Welfare Commission (“IWC”) Wage Order applied to Defendant’s single guard post staffing model. Id. at 957. Defendant argued that this question would not generate a common answer because Defendant’s “nature of the work” defense required an individualized, fact-specific analysis of each employee’s work history, including a day-by-day examination of an employee’s job duties. Id. The Ninth Circuit referred to the Rule 23(a)(2)’s commonality requirement discussed in Brinker Restaurant Corp. v. Superior Court, 273 P.3d 513 (Cal. 2012). In Brinker, the California Supreme Court held that an employer was required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it did not – if, for example, it adopted a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two were required – it violated the wage order and was liable. Id. at 961. The Ninth Circuit also referred to Faulkinbury v. Boyd & Assocs., 216 Cal. App. 4th 220 (2013), a case with similar facts, in which the California Court of Appeal explicitly rejected Defendant’s argument that the “nature of the work” exception applied, concluding that by requiring blanket off-duty meal break waivers in advance from all security guard employees, regardless of the working conditions at a particular station, Defendant itself treated the off-duty meal break issues on a class-wide basis. Id. at 961-62. The Ninth Circuit noted that Defendant’s sole explanation for why it required on-duty meal periods was that its guards were staffed at single-guard locations. The duties that employees performed were undoubtedly distinct from one another, but the only reason any of them prevented the employee from taking a meal period was because Defendant had chosen to adopt a single-guard staffing model. The Ninth Circuit therefore determined that the merits inquiry would turn on whether Defendant was permitted to adopt a single-guard staffing model that did not allow for off-duty meal periods, i.e., whether it could invoke a “nature of the work” defense on a class-wide basis, where the need for on-duty meal periods resulted from its own staffing decisions. Id. at 963. The Ninth Circuit stated that such an inquiry was permissible under Brinker and Faulkinbury. The Ninth Circuit concluded that the legality of Defendant’s policy was a significant question of law that was apt to drive the resolution of the litigation. Accordingly, it found that the District Court did not abuse its discretion in concluding that Rule 23(a)(2) was satisfied. Defendant also argued that individual issues would predominate due to its need to present an individual nature of the work defense for each Plaintiff and each worksite. The Ninth Circuit agreed with the District Court that where, as here, there were no relevant distinctions between the worksites, the “nature of the work” inquiry would be a common one, focused on the legality of a single-guard staffing model, rather than a site-by-site inquiry. Id. at 964. The Ninth Circuit also noted that the District Court did not rely on the existence of Defendant’s uniform on-duty meal period policy to the exclusion of other factors. Id. at 965. To the contrary, the District Court found that nearly all of the evidence in the record – including the testimony by Defendant’s officer, Leo Flury, about Defendant’s actual business practices, as well as the declarations of Defendant’s employees – supported a finding that common questions would predominate. Flury’s testimony described more than a policy, since he also explained how Defendant’s policies and practices were implemented on
None of the employee declarations established that the declarant was categorically given off-duty meal breaks. The Ninth Circuit noted that given the uniform policy of requiring the on-duty meal break agreement, the District Court correctly found that in the vast majority of cases, this policy was implemented to require that on-duty meal breaks be taken. The Ninth Circuit remarked that Defendant’s challenge of the District Court’s factual findings with respect to employee declarations was contradicted by Flury’s testimony that 99.9% of employees worked at single guard posts, that no single guard post allowed for a lunch break, and that such on-duty meal periods were required as a matter of policy. Noting that Flury’s admissions were material, the Ninth Circuit concluded that the District Court did not abuse its discretion by finding, on the record before it, that common issues of law or fact predominated. Finally, the Ninth Circuit rejected Defendant’s argument that individual issues predominated because Defendant’s time records would not dispositively show which meal periods were off-duty meal periods, because many employee declarations described keeping records of their time worked. Defendant’s records of each employee’s clock-in and clock-out times, how much each Plaintiff was paid, and whether each Plaintiff was staffed at a single guard post could be used to extrapolate whether the meal break was on-duty or off-duty. Accordingly, the Ninth Circuit affirmed the District Court’s class certification order.

**Brewer, et al. v. General Nutrition Corp., 2013 U.S. Dist. LEXIS 2948 (N.D. Cal. Jan. 7, 2013).** Plaintiff, a former non-exempt sales employee, brought a putative collective action alleging that Defendant failed to compensate him for certain tasks completed after clocking-out for the day and often failed to receive overtime pay in violation of the FLSA. Subsequently, Plaintiff moved for conditional certification of a collective action consisting of all current and former retail store employees who worked the closing shift and/or worked shifts where that employee worked alone without help or support. In support of his motion, Plaintiff set forth evidence that Defendant had a uniform written policy requiring its non-exempt sales associates and assistant managers to perform work after clocking-out. Plaintiff further provided four declarations from putative collective action members in which each stated that the employee would be scheduled to work 40 hours per week, would spend uncompensated time performing closing duties that was in excess of 40 hours paid, and the employee was not trained on how to get compensated for this time. *Id.* at *10-11. In response, Defendant submitted time and pay records to disprove the statements made by the four putative collective action members in their declarations. *Id.* at *13. However, the Court noted that at this stage it was inappropriate to inquire into the merits of the claims or to make factual findings. *Id.* Therefore, the Court held that Plaintiff had made substantial allegations and a modest factual showing that he and other sales associates and assistant managers were subjected to a common policy or plan that violated the FLSA. With respect to the scope of the collective action definition, the Court observed that Plaintiff sought to certify a collective action broader than the FLSA claim alleged in Plaintiff’s second amended complaint. In his amended complaint, Plaintiff brought claims on behalf of sales associates and assistant managers; subsequently, Plaintiff sought an expanded nationwide collective action including the store managers and senior store managers. *Id.* at *11-12. As such, the Court held that because Plaintiff did not make any allegations in his FLSA claim with respect to store managers or senior store managers, Plaintiff was unable to make the required showing to certify an FLSA collective action with respect to these job categories and these overtime claims. Accordingly, the Court granted Plaintiff’s motion in part for conditional certification.

**Busk, et al. v. Integrity Staffing Solutions, Inc., 713 F.3d 525 (9th Cir. 2013).** Plaintiffs, a group of warehouse workers, brought a wage & hour class action seeking unpaid wages under the FLSA and state labor laws. Plaintiffs alleged that Defendant violated federal and state labor laws by requiring them to pass through a security clearance at the end of each shift, for which they were not compensated. *Id.* at 527. Plaintiffs also sought compensation for their entire 30-minute unpaid lunch periods because they spent up to 10 minutes of the meal period walking to and from the cafeteria and/or undergoing security clearances. *Id.* The District Court dismissed Plaintiffs’ claims, finding that the time spent clearing security was not compensable under FLSA, relying on other case law authorities finding the time employees spent passing through security screenings was non-compensable. *Id.* The District Court also held that Plaintiffs’ allegations about shortened meal periods did not state a claim under FLSA because Plaintiffs did not allege that they performed “any duty related to their job as warehouse workers” during their lunch breaks. *Id.*
528. The District Court had further determined that the state law claims must be dismissed due to “conflicting” class certification mechanisms, namely that while Plaintiffs must opt-in to a collective action under the FLSA, Plaintiffs must opt-out of a class action under Rule 23. Id. Upon appeal, the Ninth Circuit reversed the dismissal of state law claims and held that they could be certified using different class certification procedures. Id. at 526. The Ninth Circuit held that an FLSA collective action and a state law class action were not inherently incompatible as a matter of law even though Rule 23 class actions use an opt-out mechanism and the FLSA collective actions use an opt-in mechanism. Id. The Ninth Circuit reasoned that FLSA’s plain text did not suggest that a District Court must dismiss a state law claim that would be certified using an opt-out procedure, and its opt-in requirement extended only to “any such action,” such as an FLSA claim. Id. at 528. The Ninth Circuit further noted that the legislative history of § 216(b) also did not support the view of some District Courts that allowing both actions to proceed simultaneously would essentially nullify Congress’ intent in crafting § 216(b) and eviscerate the purpose of the opt-in requirement. Id. at 529. According to the Ninth Circuit, the purpose of limiting private FLSA Plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions did not evince an intent to eliminate opt-out class actions for state wage & hour claims brought in federal court. Id. The Ninth Circuit therefore held that Rule 23 class actions and FLSA collective actions did not create a conflict warranting dismissal of the state law claims. The Ninth Circuit also opined that the District Court erred in holding that Plaintiffs failed to state a claim under FLSA for passing through security clearances at the end of the day. The Ninth Circuit found that preliminary and post-liminary activities were still compensable under the FLSA if they were integral and indispensable to an employee’s principal activities. Id. at 530. Defendant required security screenings, which were conducted at work, and the screenings were allegedly intended to prevent employee theft and for Defendant’s benefit, thus making it part of the employees’ work related duties. Id. at 530-31. The Ninth Circuit distinguished the procedure for undergoing security clearances at Defendant’s facilities from other cases that held that time spent at security check points on the way into a facility was for the benefit of the general public, and stated that the District Court erred in assuming that those cases created a blanket rule that security clearances were non-compensable. Id. at 531. The Ninth Circuit thus found that Plaintiffs stated a plausible claim for relief under the FLSA for the time spent passing through security clearances. For the same reason, the Ninth Circuit also reversed the District Court’s dismissal of the parallel state law claim. Id. The Ninth Circuit, however, upheld the District Court’s conclusion that Plaintiffs failed to state a claim under the FLSA for their shortened lunch periods. The Ninth Circuit agreed with the District Court that walking to the lunchroom was not necessary to Plaintiffs’ principal work as warehouse employees, and that the relatively minimal time expended for the security clearance on the way to lunch did not make it compensable work. Id. at 532. Accordingly, the Ninth Circuit partly affirmed and partly reversed the District Court’s ruling.

Campbell, et al. v. Best Buy Stores, L.P., 2013 U.S. Dist. LEXIS 137792 (C.D. Cal. Sept. 20, 2013). Plaintiffs, a group of field repair technicians (“Techs”), brought a class action alleging wage & hour violations under California law. Defendant, a retail store, also offered in-home repair services, and had employed several Techs throughout California to perform the repair work. Plaintiffs alleged that Defendant’s efforts to achieve profits pressured Techs to work overtime and to forgo meal and rest breaks. Id. at *8. Plaintiffs also alleged that because in-home managers received bonuses and other compensation based on the Techs’ productivity, they had an incentive to press the Techs to increase their productivity levels by working and not claiming overtime. Id. Plaintiffs further asserted that Techs could not both take meal and rest breaks and satisfy Defendant’s requirements. Id. at *10. Techs were also required to drive Defendant’s vehicles while on the job and were expected to drive them to their residences after the completion of their final appointment each day. Plaintiff asserted that Defendant should have paid Techs for their drive time home after the last service call of the day. Id. at *13. Plaintiffs moved for class certification. The Court granted Plaintiffs’ motion as to their claim regarding compensation for Techs’ drive time. The evidence showed that Defendant had a policy that it would not compensate Techs for the first 30 minutes of their drive home in Defendant’s vehicles, and those whose commute home from their final service call took more than 30 minutes were compensated only for the commute time in excess of 30 minutes. Id. at *38. The Court found that the policy gave rise to a common question amenable to a class-
The Court, however, found that Plaintiffs’ evidence was insufficient to demonstrate that common questions predominated over individual inquiries with regard to either the overtime or meal and rest break claims. Specifically, Plaintiffs’ evidence did not show any official policy or practice that required or coerced Techs to forgo their breaks or to not report their overtime. *Id.* at *31. Many Techs had confirmed that their supervisors repeatedly reminded them at training sessions and by e-mail that they were not to work off-the-clock and to report all time that they worked. *Id.* at *32. Defendant’s policy required Techs to take a 30-minute meal break if they worked longer than five hours. *Id.* at *33. Furthermore, some Techs testified that they always took their meal and rest breaks and others testified that they chose to take them on certain occasions. The evidence demonstrated that even if some Techs experienced pressure from their supervisors to miss breaks or not to report or request overtime, some Techs did not, and why they did so would involve individualized inquiries. *Id.* at *35. The Court therefore found that Plaintiffs failed to show that common questions predominated as to the overtime and missed meal and rest breaks. *Id.* Accordingly, the Court granted Plaintiffs’ motion for class certification as to their claim regarding compensation for drive time, and denied the motion as to their claim for overtime and missed meal and rest breaks.

**Coleman, et al. v. Jenny Craig, Inc., 2013 U.S. Dist. LEXIS 176294 (S.D. Cal. Nov. 27, 2013).** Plaintiff, a former hourly and non-exempt employee, brought a putative collective and class action against Defendant, a nationwide weight loss company, alleging violation of the FLSA and California’s wage & hour laws. Plaintiff alleged that Defendant’s employees routinely worked before and after their shifts without compensation and often worked without taking meal or rest breaks. Plaintiff moved for certification of a California class of 1,055 former and current employees of Defendant, and for certification of several subclasses based on claims for off-the-clock work, unpaid overtime, meal and rest breaks, and other alleged wage & hour violations. The Court denied class certification, finding that common questions did not predominate over individualized inquiries. The Court determined that the payroll evidence showing overtime payments undermined Plaintiff’s claim that Defendant had a common policy or practice of failing to pay for overtime work. Defendant’s official policy prohibited off-the-clock work, and the policy statement provided that all hourly employees were entitled to pay for all time worked. *Id.* at *17. Plaintiff contended that despite the official policy statement, Defendant had uniform policies and practices that resulted in employees not being paid for all time worked, and missing meal and rest periods. *Id.* at *20. Plaintiff submitted declarations from herself and several other putative class members claiming that they had to work off-the-clock to fulfill their duties. The Court, however, found that the evidence was insufficient to show that any alleged off-the-clock work was due to a uniform policy or practice promulgated by Defendant company-wide, rather than as a result of an individual employee’s own choices regarding how to manage time. *Id.* at *25-26. Plaintiff’s own payroll records did not support her claim as she worked and received overtime pay 18 out of 27 pay periods, and Plaintiff presented no evidence of a company-wide policy of expecting employees to work uncompensated overtime. Moreover, Defendant submitted declarations of putative class members who maintained that they were never required to work off-the-clock or perform off-duty task. Similarly, the disparate experiences did not support Plaintiff’s claim that Defendant’s customer service or safety policies uniformly interfered with employees’ meal or rest breaks. *Id.* at *29. Plaintiff could not point to any official policy of Defendant that required or coerced employees to forgo their meal or rest periods. *Id.* at *27. Plaintiff’s own testimony demonstrated the lack of a uniformly applied customer service policy prohibiting employees from taking their meal and rest breaks. Plaintiff testified that she took complete lunch break on some days, and some days she did not, and some days her center was too busy for lunch and some days it was not. Further, the testimony of other employees’ experiences differed from Plaintiff’s experience, depending on factors such as location and the business load on a given day. *Id.* at *29. Because Plaintiff failed to show that Defendant used a company-wide policy for denying overtime compensation, for failing to pay employees for off-the-clock work, or to prevent employees from taking meal and rest breaks, the Court held that Plaintiffs’ proposed sub-class for such claims were not appropriate for certification. Plaintiff had also proposed a sub-class of current and former employees who were not paid the required split shift premium for working split shifts of less than three hours. California law requires that when an employee works a split shift, one hour’s pay at the minimum wage shall be paid in addition to wages for that workday. *Id.* at *30. Plaintiff alleged that Defendant only paid the one hour split
shift premium when there was a three-hour gap in the workday, as opposed to a gap of one or two hours, and as such, Defendant’s split shift policy was illegal on its face. The Court, however, found that Defendant’s split shift policy did not violate California’s Labor Code as the law permitted Defendant to define a split shift as having a break of three hours. Id. at *34. Defendant’s policy defined how it scheduled split shifts and not how Defendant compensated its employees for working split shifts. Defendant also presented declarations from putative class members stating that they always received split shift premium pay, split shifts were always scheduled with a three hour break per the company’s scheduling policy, and that any time they had a break of less than three hours between shifts it was due to longer lunch breaks or absence to conduct personal business, and any such breaks were not part of working a split shift. Id. at *34-35. The Court opined that Plaintiff failed to show that Defendant had a common policy of not paying its employees split shift premiums in accordance with California law. Id. at *35. Plaintiff’s remaining claims regarding inaccurate wage statements and waiting time penalties were derivative of her overtime, off-the-clock, and meal/rest period claims, for which she failed to demonstrate commonality. The Court therefore concluded that Plaintiff failed to demonstrate commonality with respect to any of the proposed classes, and in the absence of any common policy, an individualized inquiry would be required as to whether Defendant failed to pay any putative class member for all hours worked, or failed to provide the requisite meal and rest periods. Id. at *37-38. Accordingly, the Court denied Plaintiff’s motion for class certification.

Comparetto, et al. v. Allstate Insurance Co., 2013 U.S. Dist. LEXIS 179617 (C.D. Cal. Nov. 20, 2013). Plaintiffs, a group of independent contractor insurance agents, brought a class action alleging breach of the implied covenant of good faith and fair dealing; breach of written contract; and violation of California Business & Professions Code. The terms of the independent contractor relationship between Defendant and the agents were set forth in one of three versions of the agency agreements. Plaintiffs contend their agencies declined in value and they became entitled to reimbursement for business expenses. Plaintiffs moved for certification of a class comprised of all persons operating an insurance agency within California pursuant to an agency agreement at any time from September 1, 2007, until the time when class notice would be given. The Court denied the motion for failure to establish predominance. Plaintiffs cited to their own individual experiences, declaring that they allocated staff and resources in a particular way in order to meet targets, but provided no evidence to demonstrate that their respective experiences were consistent with those of all, or even a substantial number, of the putative class members. Defendant also submitted evidence that individual agencies’ sales targets varied depending on their size and how long they had been operating. Plaintiffs contended that whether Defendant forced agents to perform services for its corporate customers without compensation was a common question. While two agency agreements expressly stated that agents would service the company’s customers in a manner consistent with the company’s goodwill, reputation, and overall business strategy, another agreement contained no such requirement. The Court stated that whether the policy breached each of the three types of agency agreements would require different analysis, and thus, there was no common issue with respect to whether this policy breached the agreements. Third, Plaintiffs contended that from 2008 Defendant assigned individual tasks to the R3001 Agents and monitored the agency staff through its mandated impact computer system. Defendant submitted evidence that other putative class members did not believe that these tasks were mandatory. Plaintiffs contended that Defendant instituted a mystery shopper program, which recorded an agent’s interaction. The Court found that Plaintiffs failed to show that this program was evidence of Defendant’s assertion of a right to control the manner and means by which they operated their respective businesses. Plaintiffs only stated that Defendant’s corporate managers would contact them or their employees when their agency had not properly handled the mystery shopper calls as dictated by Defendant. The Court determined that Defendant’s assertion of the right to provide feedback did not establish that it asserted the right to exercise control over the manner and means by which class members operated their business. The Court remarked that although the assertion of the right to conduct the mystery shopper calls was a common question, Plaintiffs failed to show that this common question would be significant to the determination of the action. Finally, Plaintiffs contended that from Defendant conducted mandatory training sessions at which agents’ employees were taught mandatory sales techniques. Defendant conceded that it held mandatory training sessions. Thus, the Court found that whether Defendant conducted mandatory
training sessions and imparted mandatory sales techniques was a common issue. The Court, however, observed that the presence of one or a few common issues was not sufficient to show that common issues predominate under Rule 23(b)(3). Id. at *15. The Court concluded that there were several substantial issues with respect to the alleged control of agencies that required individualized evidence and analysis. Thus, because Plaintiffs failed to show that common issues predominated, the Court denied the motion for class certification.


Plaintiffs, a group of former home-delivery newspaper carriers, brought a class action alleging that they were misclassified as independent contractors resulting in unpaid regular and overtime wages, unpaid rest breaks and meal periods, improper deductions from their paychecks, and expenses incurred in discharging their duties. Subsequently, the Court granted certification to a class comprised of all persons engaged as newspaper home delivery carriers by Lee Publications, Inc., and for the North County Times newspaper in California, and who, as a condition of such engagement, signed a written agreement for the home delivery of newspapers, which categorized them as independent contractors and not employees. Thereafter, the Court denied Defendant’s motion to decertify the class, holding that there was a significant common issue central to the case. Defendant then filed a renewed motion to decertify the class. The Court granted in part and denied in part Defendant’s motion. First, the Court noted that the newspaper carrier’s contracts required the carriers to pay for all the supplies used in performance of their duties, including car expenses, plastic bags, and rubber bands. Additional evidence indicated that Defendant controlled the delivery process by managing and monitoring complaints, levying penalties, and conducting spot checks to ensure that the papers were delivered on time. Moreover, Defendant provided the newspapers to the carriers each morning, thereby dictating the time when Plaintiffs could begin folding and delivering papers. The Court stated that the carriers allegedly suffered the same injury of misclassification as independent contractors, and that Plaintiffs had sufficiently proved they could demonstrate this issue on a class-wide basis. Second, regarding Plaintiffs’ overtime claim, the Court noted that the contract provisions indicated that while the carrier was obligated to deliver papers in a certain condition seven days a week or each day the newspaper was published, the carrier could also assign that duty to another individual. Class members used substitutes and/or helpers to perform their obligations under the contract. Thus, the Court remarked that the contract alone failed to show the carrier worked more than six days a week to be entitled to overtime pay, and that absent common proof to determine which carriers worked seven consecutive days, there was the likelihood of individually litigating factually unique questions to determine a right to recover for seventh day overtime. Because Plaintiffs failed to provide common, reliable proof needed to establish liability for the overtime claims, the Court vacated the class certification order as to all of Plaintiffs’ overtime claims. Third, regarding the minimum wage claim, the Court noted that like the overtime claims, Plaintiffs could not provide common, reliable proof that the carrier performed the work, which was essential to determine liability. Thus, because individualized inquiries as to whether Plaintiffs actually performed the work would predominate during the liability phase of the trial, the Court also decertified the class on the minimum wage claim. Fourth, regarding the meal and rest break claims, the Court observed that the review of the spreadsheets provided by Plaintiffs disclosed a wide variation in the number of hours worked by the carriers. Thus, given these differences, the Court stated that individual inquiries for a large number of carriers would be required as part of the defense to this claim. Further, the hourly estimates did not identify the specific day of the week when a carrier worked more than 3-1/2 hours. Accordingly, the Court stated that individualized determinations as to work hours would predominate at trial and there was insufficient common proof to establish liability for rest break claims, and vacated the class certification order as to Plaintiffs’ rest break claims. Finally, Plaintiffs alleged that the carriers were entitled to recover unreimbursed expenditures and losses in relation to their job performance. The Court found that based on common evidence, Plaintiffs could show the essential elements of the claim that the carriers were employees, incurred necessary expenses to perform their duties, and Defendant deducted those expenses from the carriers’ earnings. Thus, the Court stated that certification of the claim for unreasonable business expenses was warranted. Accordingly, the Court granted in part and denied in part Defendant’s motion for decertification of the classes.
Daniels, et al. v. Aéropostale West, Inc., 2013 U.S. Dist. LEXIS 59514 (N.D. Cal. April 24, 2013). Plaintiff, a store manager, brought a collective action alleging that she consistently worked more than 40 hours per week without being paid overtime compensation, and she received several non-discretionary bonuses that were not included in her regular rate of pay when she worked overtime. Plaintiff alleged that in violation of the FLSA, Defendants had a uniform, nationwide practice of failing to include earned bonus amounts into non-exempt store employees’ regular rate of pay for overtime purposes. Plaintiff moved for conditional certification of an FLSA collective action of a nationwide class comprised of all current and former employees classified as non-exempt, who worked overtime and received a non-discretionary bonus. The Court granted the motion. In support of her motion, Plaintiff pointed to her declaration in which she stated that she did not receive an overtime pay adjustment to reflect her bonuses. Plaintiff also included her earnings statements showing the bonuses and the overtime she worked. Plaintiff relied on statements from Defendants’ director of payroll, Rawle Boatswain, derived from a deposition conducted for Sankey v. Aéropostale, Inc., a related wage & hour action against Defendants in California state court. Plaintiff argued that Defendants used a software program, data, and methodology to calculate the overtime pay of all employees nationwide, and thus, any errors in the calculations or formulas would affect all employees. Additionally, Plaintiff provided a letter from Defendants that was sent to employees stating that as a result of the Sankey litigation, Defendants found that overtime pay was potentially under-calculated. Along with the letter, Defendants enclosed a check and a detailed spreadsheet for the overtime pay adjustment. Although Defendants provided Plaintiff’s earnings statements showing that she was paid an overtime adjustment, Boatswain conceded that Plaintiff did not receive an overtime adjustment for the overtime she worked, which he asserted was an inadvertent mistake. Defendants’ counsel confirmed that Plaintiff had not yet received the overtime adjustment due her, and Boatswain stated in his declaration that since November 2009, the nationwide practice had been to pay overtime on bonuses as an overtime adjustment and in 2011, the error was corrected (i.e., of failing to pay overtime on earned bonuses in states in which double time was earned). The Court opined that Plaintiff had provided sufficient evidence to show that there was a uniform, nationwide policy of failing to pay non-exempt employees the appropriate overtime compensation in a timely manner. For these reasons, the Court granted the motion for conditional certification under 29 U.S.C. § 216(b).

Deane, et al. v. Fastenal Co., 2013 U.S. Dist. LEXIS 25631 (N.D. Cal. Feb. 25, 2013). Plaintiffs, a group of former General Mangers (“GMs”), brought an action against Defendant alleging that they were improperly classified as exempt from overtime payment requirements under the FLSA. Earlier, the Court had granted conditional certification of the FLSA claims to GMs who were employed as overtime-exempt managers by Defendant in one or more of its retail locations on or after February 16, 2008. After class certification discovery, the Court denied Rule 23 class certification for the state law claims, finding that Plaintiffs failed to establish that a common issue of fact or law predominated over the claims. Id. at *3. As each claim required an inquiry for the percentage or proportion of the employee’s time spent on tasks that qualified for the exemption, the Court opined that it would have to examine how each individual employee spent their time. Id. The Court noted that Plaintiffs did not provide evidence indicating that the alleged exemptions could be analyzed by common proof for the putative class. Id. at *4. Further, the record demonstrated that the amount of time spent on exempt activities varied widely between putative class members. Further, there were no common policies, procedures, training, or other evidence to show that the amount of time spent on exempt activities was amenable to common proof. Id. Thus, the Court denied class certification because determining the amount of time spent on exempt activities varied from person-to-person and overwhelmed any common questions. Id. Subsequently, Defendant moved to decertify the FLSA collective action, and the Court also granted that motion. The Court noted that a collective action under the FLSA claim would be unwieldy and unwarranted because the facts concerning exemptions for each individual varied widely. Id. at *6. The Court stated that Plaintiffs could not rely on the fact that Defendant categorized all employees as exempt, but must also show a substantial level of commonality among the duties performed, and time spent on them. Id. at *6-7. However, the discrepancies between the tasks performed and the time spent performing those tasks made collective treatment impracticable. Id. at *7. The Court observed that decertification would likely result in the litigation of hundreds of individual claims, but these potential consequences did not change the Court’s ultimate analysis that the opt-in
Plaintiffs had hundreds of related, but factually distinct claims. *Id.* at *7-8* Accordingly, the Court granted Defendant’s motion for decertification of the collective action under 29 U.S.C. § 216(b).

**Delbridge, et al. v. Kmart Corp., 2013 U.S. Dist. LEXIS 82868 (N.D. Cal. June 11, 2013).** Plaintiff Lisa Garvey brought a class action alleging that Defendant violated California Wage Order 7-2001(14) by not providing seats to its check-out stand cashiers. Garvey pursued a claim under the Private Attorney General Act (“PAGA”) as a class action, seeking to represent other Kmart cashiers in California. Earlier, the Court had rejected a state-wide class in favor of a class limited to cashiers at a Kmart store in Tulare, California. Garvey’s class claims proceeded to a bench trial, and at the trial Plaintiff’s counsel failed to prove that the nature of the work at the Tulare store reasonably permitted the seating modification. The Court subsequently provided Plaintiff an opportunity to add further representatives for other stores. Thereafter, Plaintiffs Sabrina Cline and Collette Delbridge intervened as Plaintiffs. They then moved for certification of a state-wide class of Kmart cashiers on the same claim for relief as Garvey. The Court dismissed Cline from the action because she failed to list and to disclose her claim against Kmart in a bankruptcy proceeding, and thus lacked standing. Plaintiffs’ evidence showed commonality of working conditions among cashiers sufficient to certify a class at Kmart’s Store in Redlands, and that Delbridge’s own experience at the store was typical of the class. Defendant did not demonstrate that differences in the cashiers’ physical stature at the Redlands store, or other variances in the experiences of Redlands cashiers, overshadowed the evidence of a common policy of not providing seats and the evidence that cashiers spent the majority of their time at their registers performing a limited set of check-out duties. Further, the Court remarked that Defendant’s contention that civil penalties under the PAGA cannot be calculated on a class-wide basis was rejected previously in the first round of class certification. The Court also opined that Plaintiffs’ trial management plan – based on testimony from Kmart’s Rule 30(b)(6) witness and testimony from Kmart cashiers as well as several experts – would be adequate for a class limited to a single Kmart store. The Court, however, also noted that the check-out stand configurations differed from store to store, and that the Tulare trial demonstrated that the configuration of the check-out stand was a key determinant of the nature of a cashier’s work. The record showed that although in nearly all instances the cashier check-out stands in a single store would be the same, they varied across stores. The Court concluded that this variation in check-out stand configurations created both a problem of manageability and a problem of proof, and showed that cashier experiences could vary significantly across stores. Accordingly, the Court ruled that certification of a class limited to the Redlands store where the sole Plaintiff worked was appropriate. Thus, the Court certified a class of all individuals who, during the applicable statute of limitations, were employed as cashiers at the Redlands Kmart store and were not provided with a seat while working the front-end cash registers.

**Escano, et al. v. Kindred Healthcare Operating Co. Inc., 2013 U.S. Dist. LEXIS 29899 (C.D. Cal. Mar. 5, 2013).** Plaintiffs, a group of hourly employees at hospitals owned by Defendant brought two separate wage & hour class actions, alleging failure to pay appropriate overtime compensation, provide meal periods, and furnish accurate itemized wage statements. Both Plaintiffs filed a joint motion for class certification. *Id.* at *3-4* The Court granted in part and denied in part the motion. First, the Court noted that the employer must pay a “short-shift penalty” if alternative work schedule (“AWS”) employees are required to work fewer hours than scheduled. *Id.* at *6-7* Defendants had a policy to not pay overtime to an AWS employees who worked more than eight hours but less than a full AWS shift. Further, the Kronos time-keeping system did not have a code to indicate whether an employee was required to leave early, or volunteered to end their shift early. *Id.* at *11* Defendant argued that neither a question of common law or fact existed, because the Court would need to determine whether each individual employee was required to leave early, or left voluntarily. *Id.* at *13* The Court noted that neither Plaintiffs nor Defendant were aware that employees who were asked to leave early were entitled to a short shift penalty, and consequently held that the decision to leave early was never voluntary because Plaintiffs were not aware that they forfeited the short-shift penalty in the process. *Id.* at *15-16* Further, the Court noted that Plaintiffs were likely to offer class-wide proof in the form of time and patient records *Id.* Accordingly, the Court opined that the predominance and commonality requirements were met, because Plaintiffs alleged a single policy which injured class members in a similar way. *Id.* at *17* At the same time, the Court denied certification for the
failure to provide all meal periods class. The Court observed that although Plaintiffs’ proposed proof of correlating missed meals with patient census records could be common proof that would allow the issue of missed meal periods to be determined on a class-wide basis, Plaintiffs did not provide such proof or attempt to obtain patient census records or perform a sample of the necessary analysis. Id. at *26. The only common evidence available was that the meal policy did not specifically mention a review process to ensure that employees took a meal break within the first five hours. Id. Thus, the Court determined that Plaintiffs’ evidence was insufficient to establish predominance. Next, the Court certified a meal waiver class of all current and former hourly hospital employees regularly scheduled to work 12-hour shifts and signed a meal waiver. Under California law, AWS employees could waive their right to one of two meal periods. Id. at *28. Plaintiffs presented evidence that all or nearly all AWS employees signed the second meal waiver. The Court inferred that the near unanimous waiver acceptance indicated that it was a condition of employment and gave rise to a class question. Id. at *32. The Court also denied certification for a third meal sub-class due to lack of a common legal question for the sub-class because there was no requirement to provide a third meal period before 16 hours. Id. at *33-34. Regarding the wage statement class, Defendants argued that a paycheck deficiency under § 226(a) was not an injury. The Court stated that the injury requirement should be minimal and easily satisfied to effectuate the wage statement statute’s purpose. Id. at *36. The Court observed that the injury requirement had been met because Plaintiffs' pay stubs did not include the total number of hours worked or pay rates for each employee, and certified a class for all current and former hourly hospital employees who worked for Defendants at the base rate only, who were not provided pay stubs that complied with § 226 of the California Labor Code.


Plaintiff, a handler and customer service agent, brought a class action alleging that FedEx failed to pay hourly employees for work during unpaid meal and rest breaks, and failed to pay for all hours worked, including off-the-clock work. Plaintiff sought certification of a class of all California-based hourly, non-exempt employees who used the FAMIS time-keeping system and who were paid from their scheduled start time to their scheduled end time instead of from clock-in to clock-out time (unpaid on-the-clock class); and all California-based hourly, non-exempt FedEx employees who used FAMIS who worked during their unpaid meal break (working meal break class). The Court denied Plaintiff’s motion for class certification. Regarding the unpaid on-the-clock class, the Court observed that it had to determine whether the level of FedEx’s control over employees within the proposed general class when they were on-the-clock but off-shift was sufficient to render the on-the-clock but off-shift time compensable under California law by determining whether Rule 23 certification was proper and, subsequently, by deciding the merits. Id. at *6. The Court remarked that Plaintiff must bring forth a measurement method that could be applied class-wide and that tied Plaintiff’s legal theory to the impact of Defendant’s allegedly illegal conduct. Id. at *7. The Court stated that while clocking-in and clocking-out were relevant to and probative of whether an employee was under an employer’s control, they were far from dispositive and, standing alone, did not prove that an employee must be paid for the time spent off-the-clock but outside of the employee’s scheduled start time. Id. at *8. The Court opined that Plaintiff’s proposed class claim raised factual questions of whether each individual employee was in fact working and/or whether the employee was under the employer’s control during the grace period. Plaintiff pointed to her deposition testimony that when she was working as a handler she would begin work on certain tasks after she clocked-in but before her shift was scheduled to begin, and that not everybody clocked-in and began work prior to their scheduled start times. Plaintiff also estimated that she worked 75% of the time before her scheduled start time and approximately 40 times after clocking-out. The Court found that Plaintiff’s testimony was illustrative of the type of particularized and individualized testimony that would be required to establish FedEx’s liability as to unpaid on-the-clock time. FedEx provided a declaration of an Operations Manager at the Los Angeles hub facility, which stated that during the proposed class period, employees who arrived early were free to use the time for their own personal purposes except that they could not leave the premises or perform any work. FedEx provided another declaration regarding a San Diego FedEx facility that, by contrast, indicated that if employees clocked-in early, they were free to use the time for their own purposes, including leaving the facility and the property. The Court noted that the differences between these two facilities highlighted the individualized issues that rendered the class inappropriate for certification under Rule 23(b)(2), and remarked that Plaintiff
failed to demonstrate that class treatment under Rule 23(b)(3) was appropriate for her proposed unpaid on-the-clock class. Regarding the working meal break class, Plaintiff argued that certification was appropriate by referring to her own testimony that she could not recall ever receiving an uninterrupted 30 minute lunch break, and pointing to the testimony of an employee who claimed that he was required to work through unpaid meal breaks. The Court stated that although Plaintiff’s evidence and method of proof was applicable to the class as a whole, it did not adequately tie Plaintiff’s allegation that FedEx failed to pay employees for time spent working on meal breaks to a proper and reliable measure of damages for work done on those breaks, particularly as Plaintiff had to prove that FedEx knew or reasonably should have known that the worker was working through the authorized meal period. The Court remarked that the evidence was probative of policies of certain job classifications at individual FedEx stations, which was not the class Plaintiff sought to certify. Thus, the Court found that the proposed class was too broad to pass the rigorous analysis required for class certification, and thereby denied the motion.

Giles, et al. v. St. Charles Health System, Inc., 2013 U.S. Dist. LEXIS 152695 (D. Ore. Oct. 22, 2013). Plaintiffs, a group of registered nurses, brought an action alleging that Defendant violated the FLSA and Oregon’s labor laws by failing to compensate for study and test-taking time. Defendant had required its hourly nurses and caregivers to fulfill training and certification requirements as a condition of employment, which were not necessary to maintain an Oregon nursing license. Plaintiffs alleged that it was unlawful not to compensate the employees for study and test-taking time. Plaintiffs moved for class certification, proposing a class of all present and former hourly nurses and respiratory therapists, who were employed by Defendant in Oregon, and studied for, trained for, obtained, or renewed one of the listed certifications for a defined period. Id. at *3. The Court granted Plaintiffs’ motion. Plaintiffs satisfied the numerosity requirement as there were at least 849 nurses who were potentially affected by the challenged payment practice. Id. at *7. Plaintiffs also satisfied commonality requirement as Defendant subjected each putative class member to the same policies regarding test-taking and study time. There was no evidence indicating that any of the named Plaintiffs executed a release or retro-pay forms reflecting their receipt of wages. The Court, however, noted that executing of forms were immaterial at the present stage of litigation because Defendant had previously represented and notified the caregivers who signed any releases that executing a release would not affect a potential class member’s ability to collect all amounts due for unpaid study and test-taking time. Id. at *12. The fact that different class members might be entitled to recover different amounts due, in part, to the releases, was a damage calculation issue, and the Court found that it was not a basis to deny class certification. Id. at *13. The Court further found that Defendant was correct that former caregivers might have a cognizable claim under the Oregon statute that governs final paycheck claims and Plaintiffs, as current employees would not. The Court, nevertheless, found that it was undisputed that all of the claims were based on the same employer misconduct, which was the failure to provide compensation for certain certification requirements, and to the extent Plaintiffs were seeking to recover unpaid regular and overtime wages due to Defendant’s allegedly illegal payment practices, Plaintiffs’ claims were reasonably co-extensive with those of former caregivers. Id. at *14-15. The Court thus found that Plaintiffs satisfied the typicality requirement. Defendant disputed that Plaintiffs were not adequate class representatives because they did not execute releases. The Court rejected Defendant’s argument because it had already found that the releases did not impact a caregiver’s ability to participate in the action as they shared the same interests as the putative class members, even those who signed releases, in that they all sought to recover damages stemming from Defendant’s failure to compensate them for required study and test-taking time. Id. at *16-17. Defendant also contended that the named class representative was not adequate because she was subject to a unique defense under statute of limitations. Defendant did not provide any argument or evidence regarding the proper accrual date or limitation period for the named Plaintiff’s action, but merely asserted that it was time-barred. The named class representative had made a complaint to Defendant’s management about the unlawfulness of the compensation, and in response, Defendant had agreed in writing to begin drafting a policy regarding the issue. Id. at *1-2. The named class representative, in exchange, had dismissed her complaint without prejudice. The Court found that the class representative relied on the representation made by management in delaying the filing of the suit, and therefore Defendant’s argument that her claim was subject to unique defense was without merit. Id. at *19-20. Thus, the Court found that Plaintiffs satisfied
the adequacy of representation requirement. The Court also determined that Plaintiffs established that common questions of law and fact predominated over any individual issues. There were no significant individual issues presented, and it was undisputed that Plaintiffs and the putative class members were subjected to the same illegal payment practice, and thus were “similarly-situated.” *Id.* at *26. The Court noted that, if Plaintiffs prevailed on the issue of liability, damages could be calculated based on Defendant’s computerized records reflecting the wages that each caregiver lost as a result of Defendant’s unlawful payment practice. *Id.* at *27. The Court thus concluded that it would be in the class members’ best interest to litigate their claims in a single action. Accordingly, the Court granted Plaintiffs’ motion for class certification.

**Ginsburg, et al. v. Comcast Cable Communications Management LLC, 2013 U.S. Dist. LEXIS 55149 (W.D. Wash. April 17, 2013).** Plaintiffs, a group of customer account executives (“CAEs”) at Defendant’s call centers, brought a class action alleging that they regularly arrived at work before the scheduled start of their shifts in order to perform tasks preliminary to answering customer phone calls, for which they received no pay, in violation of the Washington Minimum Wage Act and other Washington wage & hour laws. Plaintiffs sought certification of a class consisting of CAEs who worked at Comcast’s Washington call centers since October of 2007. The Court denied the motion for failure to establish predominance. The Court noted that there were approximately 900 CAEs working under 77 supervisors, and most CAEs spent their time on the phone. Plaintiffs asserted that there was systemic pressure for CAEs to maximize their time on the telephone and minimize their time devoted to other tasks. Plaintiffs’ anecdotal evidence explained that before taking calls on each shift, Plaintiffs needed to log-in to their computers, launch several programs, and review e-mails and communications, and that as the result of pressure to minimize the time they spent performing these tasks, they regularly worked off-the-clock before their shifts began. Supplementing this evidence, Defendant stated that it imposed a “pre-shift” period for CAEs, which was a paid period at the beginning of a shift in which CAEs were expected to accomplish all tasks preliminary to taking phone calls. *Id.* at *10. The second primary form of evidence was a data analysis from Dr. Robert Abbott, a statistician at the University of Washington, which revealed that CAEs regularly logged-in to their computers before the start of their paid shifts, and that on average, CAEs logged-in between 9 and 13 minutes early. The Court noted that Plaintiffs’ evidence also revealed a variety of ways by which supervisors imposed pressure on CAEs, and a variety of ways in which CAEs responded to that pressure. Defendant’s evidence consisted of 50 declarations from its current CAEs in which everyone insisted that they were trained to record their work accurately and were forbidden to work off-the-clock, and almost all of them reported a consistent 10-minute “pre-shift” period and asserted that the “pre-shift” period was adequate to complete all preliminary work. *Id.* at *18. The Court noted that the parties offered no evidence about how they selected the employees who provided declarations, and although both parties hired statisticians to assist them, neither statistician suggested that the selected employees were representative of any group, or the class as a whole. Based on the anecdotal evidence, the Court opined that many of the questions critical to the resolution of class members’ claims were not susceptible of class-wide proof. The Court remarked that the anecdotal evidence revealed that some individuals started work by logging-in to their phones or with some other act, and that some individuals logged-in to their computers but did not start work. The Court also observed that Plaintiffs suggested no class-wide proof that would establish what act marked the beginning of compensable work, and that the evidence suggested that the answer varied for every class member. Further, the Court noted that Dr. Abbott’s mathematical conclusions depended on the assumption that each CAE’s work invariably began when he or she logged-on the computer network, and thus without a class-wide means of proving the truth of that assumption, his analysis did not demonstrate how much uncompensated work the class collectively performed. The Court also observed that although it was likely that logging-in to the computer network was necessary to a CAE’s principal work, an employee who logged-in 15 minutes early to accomplish personal business or as a matter of convenience was not doing so for the benefit of the employer, and under Washington law, that same employee was not authorized or required by Defendant to be on duty. *Id.* at *22. The Court also remarked that Plaintiffs suggested no class-wide means of determining when each class member’s daily work began. The Court further observed that Plaintiffs’ declarations—which highlighted that the way in which the pressure to maximize phone time manifested in the conduct of a particular CAE—showed how these issues raised
individualized inquiries. Further, some CAEs reported receiving no paid time to complete preliminary tasks; others reported inadequate paid “pre-shift” periods of varying durations; some CAEs worked off-the-clock without discussing it with their supervisors; and others informed their supervisors that they could not complete their preliminary work within the paid “pre-shift” period. The Court reasoned that Plaintiffs suggested no class-wide means of demonstrating that each of the 77 supervisors required, encouraged, or knowingly permitted off-the-clock work. Finally, the Court noted that class members’ damages would also require individualized proof, and Plaintiffs proposed no manageable way to calculate damages. Accordingly, the Court held that the legal and factual questions common to class members did not predominate over questions affecting only individual class members, and denied class certification.

Gonzales, et al. v. Simplexgrinnell LP, 289 F.R.D. 463 (N.D. Cal. 2013). Plaintiffs, a group of field technicians (“FTs”), brought a class action alleging that Defendant did not compensate them for time spent driving company-supplied vehicles at the beginning and end of the workday in violation of California labor laws. The FTs performed work at Defendant’s customer locations, and reported to the district office only on as-needed basis to pick up materials, plans, to drop off paperwork, or to attend periodic training sessions and meetings. The FTs were provided a company-owned vehicle, which they used to travel to the first job site of the day, to travel to any additional job sites in the interim, and then from the last job site of the day. Plaintiffs sought class certification consisting of all current or former FTs who were assigned a decaled or labeled vehicle between January 24, 2007 and the present. The Court granted Plaintiffs’ motion for class certification. Defendant argued that Plaintiffs would be unable to prove the existence of uniform policies and circumstances giving rise to a right for class members to be compensated for travel time, and that under Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) an inquiry into the merits of Plaintiffs’ allegations was appropriate at that stage of the proceedings. Although Defendant pointed to substantial hurdles that Plaintiffs would face in showing uniform policies and practices regarding the FTs’ use of company cars and compensation for travel time, the Court observed that the issue was significantly different than that presented in Wal-Mart. Id. at 465. The Court stated that there were no questions here as to whether individual managers acted with improper motive, as intent was not an element of Plaintiffs’ claims; instead the action involved a legal dispute as to whether California law requires compensation for travel time. Id. The Court remarked that if Defendant was correct that Plaintiffs would be unable to show the policies and practices they alleged even exist, the claims would fail on a class-wide basis. Further, the Court reasoned that even if Plaintiffs’ characterization as to the uniformity of Defendant’s policies and practices was supported, the question would still remain as to whether California law requires compensation for travel time in such circumstances. The Court determined that Plaintiffs had otherwise shown all of the prerequisites for class certification to be satisfied, and accordingly granted the motion for class certification.

Helde, et al. v. Knight Transportation, Inc., 2013 U.S. Dist. LEXIS 147006 (W.D. Wash. Oct. 9, 2013). Plaintiffs, a group of drivers, brought a class action alleging that Defendant failed to pay them for the hours spent in mandatory orientation, made unauthorized deductions from their wages, delayed payment of earned rate increases, and failed to pay them for all hours worked, in violation of the Washington Minimum Wage Act (“MWA”). Additionally, Plaintiffs alleged that Defendant deceptively advertised the wages paid to its drivers in violation of the Washington Consumer Protection Act (“CPA”). Plaintiffs moved to certify a class consisting of all current and former drivers of Defendant who, at any time from June 18, 2008 through the date of final disposition, worked while residing in the state of Washington and using Defendant’s service center in Washington as their hometown location. The Court granted the motion in part. First, Defendant argued that the use of the phrase “hometown location” made the class definition unworkable, as it did not currently have any Washington-based drivers subject to the MWA, and at the end of June 2012, Defendant had closed its Washington terminal, transferring all management and dispatch operations to its Oregon facility. Id. at *2-3. Therefore, Defendant contended that the class period should be confined to the period between June 2008 and June 2012 because any wage claims arising after that date would be governed by Oregon’s wage & hour laws. The Court noted that the MWA regulated only employers who were doing business in Washington and who had hired Washington-based employees. Id. at *3-4. Thus, the Court rejected Defendant’s argument that the application of Washington’s wage law to a Washington
resident based in Washington but driving in other states would burden interstate commerce to such an extent that it outweighed Washington’s local interest in assuring proper compensation for its citizens. Having considered the undisputed facts regarding Defendant’s operations and the restrictions contained in Plaintiffs’ proposed class definition, the Court found that Washington had the most significant relationship to the facts giving rise to this litigation and that its wage law should apply throughout the class period. Regarding commonality, the Court observed that Defendant’s motion for summary judgment showed that there were common questions as to the orientation claim, the per diem plan claim, the $1.00 charge for payroll advances claim, the non-driving work claim, and the CPA claim that could be productively litigated on a class-wide basis and which, once resolved, would either lead to dismissal of the claim or establish one of its central elements. However, the Court observed that Plaintiffs had not shown that their penalty or delayed payment claims depended on common wrongful acts or policies. Moreover, the evidence in the record suggested that Defendant’s objectionable conduct was ad hoc or non-uniform as to the entire class and thus, the Court concluded that Plaintiffs had not established commonality as to the penalty and delayed payment claims. Regarding the predominance and superiority requirements, the Court reasoned that in order to calculate damages, individualized review of each class member’s payroll and hour records likely would be necessary even if all common questions were resolved in Plaintiffs’ favor. The documents suggested that these calculations, while labor intensive and individualized, could be made based on existing records and would not necessarily require individual depositions or additional fact-finding. Thus, the Court opined that the common questions related to the orientation, per diem plan, $1.00 charge for payroll advances, and non-driving work claims predominated over the individualized damages issues. The Court also stated that class-wide resolution of the common issues was superior to the filing of multiple and duplicative lawsuits and would result in the efficient and consistent resolution of overarching questions. In addition, the Court found that the nature of these claims and the lack of any other pending lawsuits suggested that the class’ interests would be best protected through representative litigation, concentrating Washington state law claims in Washington was desirable, and the calculation of damages could be managed effectively despite its individualized nature. Further, regarding Plaintiffs’ CPA claim, the Court remarked that individualized inquiries would involve not only a damage calculation, but also a determination of whether there was a causal link between the unfair and deceptive advertisements complained of and the injury suffered by each class member. This inquiry would require testimony from each class member to determine what, if any, advertising he or she saw, whether the advertisement contained a representation regarding a per mile pay rate, whether the representation was false as to that class member, and whether, but for the misrepresentation, each class member would not have suffered an injury. Accordingly, the Court denied class certification on Plaintiffs’ penalty, delayed payment, and CPA claims, and granted the motion for class certification on the remaining claims.

**Henderson, et al. v. JP Morgan Chase Bank, Case No. 11-CV-3428 (C.D. Cal. March 4, 2013).**

Plaintiffs, a group of bank tellers, brought a class action alleging that Defendant failed to provide suitable access to seating throughout the course of their employment in violation of § 4(A) of California Wage Order 4-2001. Plaintiffs alleged that the nature of tellers’ work reasonably permitted the use of seats. Plaintiffs sought class certification of all individuals employed as a teller or lead teller by JPMorgan Chase in California for any period after February 17, 2010 who were not provided access to seating during their employment. *Id.* at 2. The Court denied Plaintiffs’ motion for certification because they failed to show commonality. First, the Court noted that there was sufficient evidence indicating that Defendant had a common policy of not providing tellers with access to seats. *Id.* at 8. Michael Andrews, the head of Branch Operations and Defendant’s 30(b)(6) witness on seat issues, testified that Defendant had an unwritten policy to not provide seats for tellers, and that Defendant would not provide seats for tellers unless it was medically necessary. *Id.* The Court noted anecdotal evidence that employees without medical conditions were given access to seating, but the majority of the testimony indicated that as a general rule, those without a medical condition were denied access to seating. *Id.* at 9. Accordingly, the Court found that Plaintiffs established a company-wide policy to not provide tellers with seats. Second, the Court observed that the question of whether the duties of a teller could be performed while seated did not produce a common answer. *Id.* at 10. Evidence showed that teller and lead teller’s job duties varied depending on the day, shift, and branch location. Consequently, the question of whether the nature of Plaintiffs’ work...
reasonably permitted the use of seats would not produce a common answer. *Id.* The Court stated that the certification issues could not be solved by dividing the class into sub-classes of tellers and lead letters because evidence demonstrated that the tasks of each group of tellers and lead tellers were not uniform throughout California. *Id.* at 11. Further, tellers had different duties depending on the location they worked, timing of their shift, and whether they took on additional responsibilities. *Id.* Other variables that impacted the reasonableness of seating included: branch configuration, amenities, and customer traffic. *Id.* at 12. Finally, Plaintiffs provided different estimates as to how much time they spent at their stations compared to the time they spent performing tasks away from their stations. *Id.* at 13. Thus, the Court opined that it needed to conduct an individualized inquiry in each case to determine whether a teller’s work reasonably permitted seating. *Id.* Third, the question of what type of seat was suitable for tellers did not produce a common answer. *Id.* at 14. The Court noted that there were three different configurations for newly-installed teller stations, in addition to previously existing teller stations which effected the type of seating that would be appropriate. *Id.* Accordingly, the Court denied Plaintiffs’ motion for class certification.

**Kress, et al. v. PricewaterhouseCoopers LLP, 2013 U.S. Dist. LEXIS 4172 (E.D. Cal. Jan. 10, 2013).** Plaintiffs, a group of unlicensed accountants, brought a class action alleging that Defendant misclassified them as exempt employees and were not paid overtime compensation in violation of California state wage & hour laws. Subsequently, Plaintiffs moved for class certification under Rule 23 of a state-wide class. Defendant contended that Plaintiffs were exempt from California’s labor laws under the learned profession and administrative exemptions. Thus, Defendant argued that in order to show that it properly withheld overtime pay for all putative class members, it must be able to show how that employee was exempt on an individual employee basis. Specifically, Defendant contended that neither exemption could be determined without examining the actual work performed by each putative class member on a week-by-week basis. Defendant argued that this type of individual examination for each putative class member defeated any showing of commonality and that individual issues predominated. As to the learned profession exemption, the Court rejected Defendant’s argument and remarked that it was apparent that this exemption presented a common question, *i.e.*, did acceptance or promotion into a senior associate position require advanced knowledge customarily acquired by a prolonged course of specialized academic instruction? *Id.* at *16-17. The Court noted Plaintiffs met their initial burden by showing that Defendant did not require advanced courses of study for the position and that senior associates were most commonly promoted into that position after having been associates. *Id.* at *17. Therefore, the Court concluded that Plaintiffs had met their burden to show that there was common proof establishing that Defendant would not be able to invoke the learned profession exemption. Plaintiffs also argued that the administrative exemption was inapplicable because California law prohibited the senior associates from advising clients because they were not licensed accountants. The Court accepted Plaintiffs’ argument and found that Plaintiffs had sufficiently shown that the class of unlicensed senior associates could not have legally performed the work Defendant contended would exempt them from California’s labor laws. The Court opined that “until Defendant shows that unlicensed accountants are permitted to do the things California law and [American Institute of Certified Public Accountants] rules say they cannot do, there is no need to conduct the requested point-by-point examination of their actual work.” *Id.* at *35. Therefore, the Court held that Plaintiffs had satisfied Rule 23(a)(2)’s commonality requirement as well as Rule 23(b)(3)’s predominance requirement. Accordingly, the Court granted Plaintiffs’ motion for class certification of a state-wide class.

**Lee, et al. v. ITT Corp., 2013 U.S. App. LEXIS 15036 (9th Cir. July 24, 2013).** Plaintiffs, a group of employees in Kuwait, brought a class action alleging that Defendants breached their contracts by failing to pay overtime and benefits as required by Kuwaiti law and the contracts. Defendants had entered into a contract with the United States for General Maintenance and Supply Services (“GMASS”), which required Defendants to provide maintenance and supply services to the army in Kuwait. The District Court granted Plaintiffs’ motion to certify a class of all employees of Defendant or its subsidiaries who performed work under the GMASS contract in Kuwait. The Ninth Circuit reversed and remanded the case to the District Court. The Ninth Circuit held that the District Court correctly held that Kuwait’s substantive law governed these claims, but erred in applying Washington’s six-year statute of limitations. Further, the Ninth Circuit
observed that nothing in the record showed that any of the unnamed Plaintiffs could not pursue their claims within one year of the contract’s end because of the hardships associated with living and working in Kuwait. Moreover, the Ninth Circuit stated that the record showed that some unnamed class members knew about their claims while they were in Kuwait, before their contracts ended, and the named Plaintiffs appeared to have sued within one year as required under Kuwait’s law. For these reasons, the Ninth Circuit concluded that it could not discern from the record how many class members would be affected by applying the Kuwaiti statute, and therefore vacated the order certifying the class.

*Leyva, et al. v. Medline Industries Inc.*, 716 F.3d 510 (9th Cir. 2013). Plaintiff brought a wage & hour action alleging violations of the California Labor Code, California Industrial Commission Wage Order, and California’s Unfair Business Practices Law. Defendant rounded its hourly employees’ start times in 29 minute increments. Plaintiffs alleged that this rounding practice resulted in employees performing unpaid work before their scheduled start times. Plaintiff also alleged that Defendant excluded non-discretionary bonuses from employees’ overtime rates, thus lowering overtime pay. Plaintiff further claimed that because of the time rounding and bonus violations, Defendant owned its employees waiting time penalties, and Defendant’s payroll records did not accurately record the hours employees worked and the wages they earned. Plaintiff sought class certification of four sub-classes regarding the rounding violation, the bonus violation, the waiting time penalties, and the wage statement penalties. The District Court denied class certification, holding that common questions did not predominate over individual questions because the damages inquiry would be highly individualized. On appeal, the Ninth Circuit reversed and remanded. The Ninth Circuit observed that the only individualized factor identified by the District Court was the amount of pay owed. The Ninth Circuit remarked that damage calculations alone cannot defeat certification. *Id.* at 513. Further, because damages determinations were individualized in nearly all wage & hour class actions, the Ninth Circuit opined that the amount of damages was invariably an individual question and did not defeat class action treatment. *Id.* at 513-14. The Ninth Circuit also stated that if putative class members proved Defendant’s liability, damages would be calculated based on the wages each employee lost due to Defendant’s unlawful practices. Plaintiff provided deposition testimony that showed that Defendant’s computerized payroll and time-keeping database would enable the District Court to accurately calculate damages and related penalties for each claim. Defendant listed the amount-in-controversy for each individual claim and totaled the exposure on all the claims, calculating a total amount-in-controversy of $5,934,761. Thus, the Ninth Circuit found that Defendant’s removal notice demonstrated that damages could be calculated feasibly and efficiently once the common liability questions were adjudicated. The Ninth Circuit also held that the District Court incorrectly ruled that class certification was not the superior method of adjudication because of the difficulty of managing the approximately 500 member class and determining the extent to which each putative class member lost wages, and, consequently, suffered damages. The Ninth Circuit remarked that the District Court abused its discretion when it based its manageability concerns on the need to calculate damages individually. Further, the District Court did not suggest any other means for putative class members to adjudicate their claims. In light of the small size of the putative class members’ potential individual monetary recovery, the Ninth Circuit found that class certification may be the only feasible means for them to adjudicate their claims, and that class certification was also the superior method of adjudication. The Ninth Circuit also stated that the District Court abused its discretion by ignoring Defendant’s computerized time-keeping database’s potential to alleviate the burden of determining damages. Accordingly, the Ninth Circuit reversed the order and remanded the action with directions to the District Court to grant class certification.

*McKeen-Chaplin, et al. v. Provident Savings Bank, FSB, 2013 U.S. Dist. LEXIS 113654 (E.D. Cal. Aug. 12, 2013).* Plaintiff, a mortgage underwriter, brought a class action alleging failure to pay overtime compensation, to provide itemized wage statements, and to provide and authorize second meal periods in violation of California labor laws. Plaintiff also alleged failure to pay overtime in violation of the FLSA. Underwriters were classified as administrative employees exempt from federal and state overtime pay requirements, and thus their hours were not tracked. Plaintiff moved for certification of the state law claims on behalf of a class of all persons who have been employed as mortgage underwriters in California from December 17, 2008 until the trial of this case, and also sought conditional certification of the FLSA claim on
behalf of all mortgage underwriters who are or were employed at any time from three years prior to the date of the Court’s order granting conditional certification and continuing to the present. The Court granted the motion. First, the Court noted that Plaintiff submitted evidence showing that underwriters performed substantially the same job, followed detailed and standardized procedures, and were uniformly classified as exempt. This evidence included the deposition testimony of Defendant’s corporate designee, who stated that underwriters’ duties were so well-known and so substantially similar that they need not be observed or investigated to make an exemption decision. The Court stated that this evidence demonstrated that underwriters were subject to centralized control in the form of standardized corporate policies and procedures and other factors susceptible to common proof. The Court also observed that if Defendant misclassified underwriters, then Defendant was obligated to track underwriters’ hours, and thus should have known whether each underwriter worked overtime. Accordingly, the Court stated that Plaintiff’s evidence affirmatively demonstrated that questions of law or fact common to class members predominated under Rule 23(b)(3). Second, the Court found that Plaintiff’s state law claims on behalf of the 58 current and former underwriters satisfied numerosity, and that requiring each of the 26 to 28 former underwriters to serve as named Plaintiffs or separately litigate their waiting time claims would be difficult and inconvenient. Third, the Court noted that because the underwriter classification was a common question and Defendant lacked a compliant second meal period policy, Plaintiff had established commonality as to all of her state law claims. Fourth, Defendant argued that Plaintiff’s overtime claim was not typical of the class she sought to represent because Defendant did not know or have constructive knowledge that she was working overtime, and her second meal period claim was not typical because it was not viable. The Court, however, observed that Plaintiff provided evidence showing that whether Defendant knew or should have known Underwriters worked overtime could be subject to common proof. Plaintiff also submitted evidence showing that her second meal period claim was viable. Thus, the Court found that typicality was established. Finally, because both Plaintiff and class counsel would prosecute the action vigorously on behalf of the class, without any conflicts of interest with other class members, the Court stated that adequacy of representation had also been established. Accordingly, the Court certified Plaintiff’s state law claims. Next, regarding the FLSA conditional certification, Plaintiff argued the Underwriters were similarly-situated because Defendant admitted that all class members had the same job duties. The Court agreed with Plaintiff that under the lenient first tier of the analysis, Defendant’s admission that Underwriters were similarly-situated was sufficient for conditional certification. Accordingly, the Court granted conditional certification of the collective action. **McKeen-Chaplin, et al. v. Provident Savings Bank, FSB, 2013 U.S. Dist. LEXIS 155869 (E.D. Cal. Oct. 30, 2013).** Plaintiff, a mortgage underwriter, brought an action alleging failure to pay overtime compensation, to provide itemized wage statements, and to afford second meal periods in violation of California labor laws. After the Court had granted class certification to Plaintiff, Defendant moved to stay the further proceedings of this case pending its Rule 23(f) appeal in the Ninth Circuit. After considering Defendant’s stay argument that class certification was inappropriate in the light of the factual record, the Court decertified Plaintiff’s state law claims. The class certification order had found that common issues would predominate in the litigation because the underwriters’ overtime hours could be proven with common proof and representative testimony. **Id. at *5.** Defendant argued that this ruling raised serious legal questions justifying a stay of the proceedings because Plaintiff did not describe the testimony on which she would rely or the means of estimating the amounts of overtime worked by 58 class members dispersed among 13 different locations by anecdotal evidence from three individuals working in only three locations. Plaintiff contended that the Court would not have to engage in individualized inquiries to determine whether underwriters worked overtime, as she could establish liability through representative testimony, such as the declaration and deposition testimony she submitted in her class certification motion. **Id.** Defendant countered Plaintiff’s argument with evidence from which inferences could be drawn that individual issues predominated and the resolution of which depended upon how employees spent their time at work. Specifically, Plaintiff testified that she did not keep records of the hours she worked, and occasionally worked more than 10 hours a day, regularly worked evenings and weekends, and never received second meal periods. **Id. at *7.** One of the underwriter testified that she regularly worked 10 or more hours a day and worked without a single meal period. Another underwriter also declared that she worked between 10
and 12 hours a day without receiving two meal periods. *Id.* Considering this testimony, the Court opined that Plaintiff had not demonstrated that the referenced hours worked were similar to the hours underwriters worked at Defendant’s other offices. Further, according to Defendant’s vice president of operations, the underwriters’ workloads and production standards varied by office, depending on the amount of business per location and the size of the staff. The record also indicated that the underwriters had considerable autonomy in scheduling their work. *Id.* at *8. The Court stated that reconsideration of the class certification decision revealed that determining whether all underwriters actually worked overtime would require an individualized inquiry into the work schedules of each class member. Therefore, the Court reasoned that Plaintiff’s class claims failed the predominance requirement not only on the alleged unpaid overtime claim and the IWC Wage Orders, but also on the claims for failure to provide and/or authorize second meal periods, waiting time penalties, and unfair business practices. Moreover, Plaintiff had not shown that employees in all of Defendant’s offices worked a sufficient number of hours to entitle them to second meal periods or that common questions predominated for the waiting time penalties claim, because this claim was derivative of Plaintiff’s overtime claim. Plaintiff also had not established predominance on the unfair competition claim for the same reasons. *Id.* at *10. The Court found that although common questions predominated for Plaintiff’s wage statement claim, Plaintiff had not shown that the claims, as a whole, satisfied predominance, and premised her class certification motion on certifying all state claims. Accordingly, the Court decertified all the class claims and denied Defendant’s motion for a stay as moot.

**Molina, et al. v. Dollar Tree Stores, Inc., 2013 U.S. Dist. LEXIS 138642 (C.D. Cal. Aug. 9, 2013).** Plaintiffs, a group of store managers, brought a class action alleging unfair competition in violation of California Business & Professions Code, failure to pay overtime compensation, failure to provide accurate itemized statements, and failure to provide wages when due in violation of California Labor Code. Subsequently, Plaintiffs amended the complaint to add a claim under the Private Attorney General Act (“PAGA”). Defendant moved to dismiss the representative action under the PAGA, and the Court denied the motion. Defendant argued that named Plaintiff Oscar Molina was an exempt employee, whereas, Molina contended that he spent considerable time on non-exempt activities such as merchandising. The Court observed that under the California executive exemption guidelines, the replenishing of stocks of merchandise on the sales floor is customarily assigned to a non-exempt employee, and the performance of such work by the manager or buyer of the department is non-exempt work. *Id.* at *10. The Court found that although common questions predominated for Plaintiff’s wage statement claim, Plaintiff had not shown that the claims, as a whole, satisfied predominance, and premised her class certification motion on certifying all state claims. Accordingly, the Court decertified all the class claims and denied Defendant’s motion for a stay as moot.
the claim, the Court noted that Plaintiffs had provided a reasonable level of specificity, defining aggrieved employees as Defendant’s Store Managers who were exempt from overtime wages in California during the applicable statutory period. Thus, because Defendant failed to demonstrate that the PAGA claim would have no possible bearing on the subject matter of the litigation regarding the Labor Code violations, the Court denied Defendant’s motion.

**Ordenez, et al. v. Radio Shack, Inc., 2013 U.S. Dist. LEXIS 7868 (C.D. Cal. Jan. 17, 2013).** Plaintiff, on behalf of a group of current and former employees, brought a putative class action alleging that Defendant failed to provide required meal periods and rest periods, pay overtime compensation, pay minimum wages, and maintain required records, in violation of California Labor Code and the California Business and Professions Code. Plaintiff moved for class certification of all hourly employees, including all current and former non-exempt employees of Defendant, who held the positions of sales associates and stock position for a defined period of time, or alternatively, a meal break sub-class, a rest break sub-class, and an off-the-clock sub-class. The Court denied Plaintiff’s motion. The Court found that there were no common issues capable of resolution on a class-wide basis. The Court observed that Plaintiff failed to identify any common policy that uniformly deprived employees of the opportunity to take meal breaks. Defendant’s meal and rest breaks policy required all employees to take one paid 15-minute rest break for every four hours worked in a given shift and to take an unpaid meal break of at least 30 minutes for every five hours worked in a shift. Id. at *12. Further, all employees were required to timely clock-in and out of each shift and when leaving for and returning from a meal break. Id. While Plaintiff contended that employees were often not provided with their statutorily mandated meal and rest breaks and were not properly compensated for the missed or interrupted breaks, there was no argument that Defendant’s written policy did not comply with California law. Id. at *22. Plaintiff’s theory depended on two pieces of circumstantial evidence – the existence of de facto “uniform” policies that deprived putative class members of the ability to take the statutorily prescribed meal breaks, and statistical evidence that demonstrated that over half of all putative class members experienced significant meal break violations throughout the class period. Id. Because the evidence presented numerous possibilities as to why certain employees had a late, short, or missed meal break during a given shift, the Court held that the proposed meal break sub-class’ claims were not capable of class-wide resolution. Id. at *24. The Court further found that the proposed off-the-clock sub-class was also not capable of class-wide resolution because Plaintiff’s claims were inherently premised upon the disparate employment settings among its putative members. Id. at *27-28. While Plaintiff focused on statistical and circumstantial evidence demonstrating that Defendant had a common policy of failing to compensate employees for all of the hours that they worked, Defendant had established that it maintained a lawful policy prohibiting off-the-clock work and that it had paid more than 57,000 hours of overtime during the proposed class period. Id. at *29. Plaintiff offered insufficient evidence that any alleged off-the-clock work was due to a standardized employment practice, rather than a product of the vagaries of the store an employee worked in, the time of year, or the manager who was in charge. Id. at *27-28. The Court therefore held that the individualized assessment necessary to ascertain whether there were in fact any employees who were told to work off-the-clock would not be susceptible to common proof. Id. at *29. Although a common question existed as to whether Defendant’s uniform rest break policy deprived employees of an opportunity to take all of the statutorily required breaks under California law, the Court found that individual issues predominated in considering Plaintiff’s rest break claims. Defendant’s written rest break policy did not authorize a second break to those associates who worked shifts over six hours, but less than eight hours, or at least 20 minutes of total rest break time; instead, it only provided for one break every four hours, albeit a break of 15 minutes. Id. at *34. Although Defendant’s policy appeared to be facially inconsistent with California law, Defendant offered testimony that despite its written policy, putative class members were granted rest breaks in accordance with California law – or at a minimum, in accordance with no uniform policy at all. Id. at *37. Putative class members, on the other hand, offered testimony on Plaintiff’s behalf describing not being able to take a rest break at all, being interrupted during their rest break or having to ask permission to take one, or not receiving a second rest break for shifts greater than six hours in length. Id. Plaintiff also pointed to the testimony of Defendant’s witness, who testified that Defendant’s policy was actually executed as written. Id. at *38. Because of the competing testimony, the Court found it difficult to determine that common issues predominated. Although Plaintiff
argued that no issue of waiver ever arise for a rest break that was required by law but never authorized, Plaintiff failed to demonstrate how, on a class-wide basis, he could show that Defendant failed to authorize the minimum amount of rest periods required by California law. Id. at *39. As Defendant was not required to record rest break under California law, the Court found that Plaintiff would be unable to offer any class-wide method for proving when class members were or were not authorized and permitted to take a rest break. Id. at *40. Thus, because individual issues predominated in considering Plaintiff’s rest break claims and no common issues existed for Plaintiff’s meal break claims and off-the-clock claims, the Court concluded that certification was inappropriate.

**Ortiz, et al. v. CVS Caremark Corp., 2013 U.S. Dist. LEXIS 169854 (N.D. Cal. Dec. 2, 2013).** Plaintiffs brought a class action alleging that Defendants directed employees to perform Inter-Store Transfers (“ISTs”) of merchandise before or after their shifts or on their meal break without compensation. Plaintiffs also alleged that Defendants did not have a policy to reimburse employees for mileage-related expenses incurred for ISTs, and that Defendants underpaid mileage reimbursements. Plaintiffs moved for certification of three sub-classes. The inter-store unpaid wages class consisted of all non-exempt hourly employees who transported medications and/or merchandise from one store to another and were not paid for that time. The inter-store unpaid expense reimbursement class was comprised of similar employees who were not reimbursed for mileage or other expenses, and the inter-store underpaid expense reimbursement class was comprised of similar employees who submitted mileage reimbursement requests and did not receive the full reimbursement required by law. The Court denied the motion for lack of commonality. Regarding the first sub-class, the Court noted that Defendant’s policy was that employees must be clocked-in when they were working and could be subject to discipline if they were not. The Court stated that mini-trials of all putative class members would have to be conducted to determine whether that employee performed the IST off-the-clock, and if so, whether the employee was paid or not by adjusting the time records retroactively, as well as whether management had reason to know that the employee had worked without pay. Id. at *30. Although Plaintiffs argued that Defendants’ policy required non-exempt employees to perform ISTs before and after a scheduled shift or while clocked-out for lunch, the Court noted that there was no evidence of such a uniform policy or practice. Even if an IST was performed off-the-clock, Defendants’ policy required that employees must be paid for all time worked, and managers could change time records to account for the IST. Further, the Court remarked that Plaintiffs failed to show how the Court could determine whether Defendants’ store managers across 850 stores in California over a five year period knew of each instance of an alleged off-the-clock IST. Regarding the second sub-class, the Court found that the question whether putative class members incurred an expense varied. Because some class members did not conduct ISTs and did not otherwise use their vehicles for business purposes, there was no reliable way to determine which employees conducted most of the ISTs. Further, the Court remarked that even if an employee performed an IST, he or she may not have incurred an expense. Id. at *38. There was no common answer to whether putative class members actually sought reimbursement. Thus, the Court opined that even if the commute exclusion was improper, there were individual instances of how ISTs were performed that would require individual determinations. Accordingly, the Court concluded that the first and second sub-classes failed to satisfy the commonality requirement. Finally, the Court noted that Plaintiffs narrowed the third proposed sub-class from a general failure to indemnify business expenses to inadequate mileage reimbursement. Because this narrow proposed sub-class was not pled in the operative first amended complaint, the Court denied certification of the third sub-class. Id. at *42-43. Accordingly, the Court denied Plaintiffs’ motion for class certification.

**Pedroza, et al. v. PetSmart, Inc. et al., 2013 U.S. Dist. LEXIS 53794 (C.D. Cal. Jan. 28, 2013).** Plaintiff, a former Store Manager (“SM”), brought a class action alleging that Defendant misclassified SMs as exempt employees and thus failed to provide required meal and rest periods, to pay minimum and overtime wages, and to pay wages upon termination. Plaintiff asserted claims under the California Labor Code, and also sought penalties under the Private Attorney General Act (“PAGA”). Plaintiff moved to certify a class of all persons who were employed in California as a Store Manager at any time on or after November 29, 2006. The Court denied the motion. First, the Court opined that the declarations, training program, and other purported common proof did not demonstrate that Defendant had a policy or practice of requiring its
SMs to spend more than 50% of their time on non-exempt tasks. The Court noted that absent such data that accounted for the SMs’ total work hours and tasks performed, Plaintiff could not demonstrate whether the SMs spent more than 50% of their time on non-exempt tasks. Id. at *11. Defendant’s representative expressly stated that SMs fill in an associate gap only as an exception. The Court stated that although some records showed a SM was performing non-exempt tasks, they provided only piecemeal information about how long a SM spent on non-exempt tasks. Other records revealed only the length of time worked by SMs, not the tasks they performed during those periods. Thus, the records did not demonstrate how a SM allocated his or her time between exempt and non-exempt tasks on a weekly basis, much less on a class-wide basis. Id. at *24-25. Accordingly, the Court stated that Plaintiff failed to show that these records had the ability to prove the existence of a common practice. Furthermore, because Plaintiff did not show state the amount of class members, it was difficult to the Court to gauge how representative the 12 declarations of the SMs worked in single location were relative to the whole class. Second, relevant manuals and policies showed that Defendant did not strip SMs of all or nearly all discretion as alleged; instead, the manuals implicitly or expressly required SMs to exercise their discretion on matters that could be considered consequential. That SMs must exercise their discretion within certain parameters did not mean that they were stripped of all or nearly all discretion. Id. at *40. Further, SMs were evaluated based on their overall ability to exercise good discretion and judgment in managing their stores. These evaluation criteria showed that the SMs were called upon to exercise their discretion on matters of consequence, and there was no means of determining whether they did so customarily or regularly on a class-wide basis. Further, the SMs’ testimony showed that even if the manuals and policies imposed certain restrictions on the SMs, their application, in practice, left room for the SMs to exercise their discretion on matters of consequence. Thus, the Court found that Plaintiff failed to show that Defendant had a common policy or practice of leaving SMs with little discretion in how to manage their stores. Finally, the Court observed that PAGA claims need not comply with Rule 23 requirements to proceed on a representational basis. Id. at *49. The Court reasoned that PAGA actions, as a law enforcement action seeking to protect the public against Labor Code violations by assessing penalties against violating employers, serve a fundamentally different purpose from class actions, which allows a named Plaintiff to represent class members to recover individual relief on their behalf for the sake of efficiency and practicality. Id. at *51-52. Thus, because Plaintiff failed to demonstrate commonality as to her non-PAGA claims, the Court denied Plaintiff’s motion for class certification as to her non-PAGA claims. However, as to Plaintiff’s PAGA claim, the Court stated that the case could proceed on a representational basis without certification under Rule 23.

Rai, et al. v. CVS Caremark Corp., 2013 U.S. Dist. LEXIS 177730 (C.D. Cal. Oct. 11, 2013). Plaintiffs, a group of assistant managers and supervisors, brought a class action alleging claims for denial of meal periods and rest periods under the California Labor Code. Specifically, Plaintiffs alleged that during the relevant period, it was Defendant’s policy and practice to staff its stores such that non-exempt supervisors and assistant managers were routinely required to attend to business when they would otherwise be on a rest or meal break, and were regularly not permitted to take a rest and/or meal period. Plaintiffs moved to certify a class composed of “all persons currently or formerly employed by Defendant in California as a Supervisor or Assistant Manager, or equivalent positions, for a defined period, who worked a shift of at least 3.5 continuous hours as the sole employee with keys and authority to perform each of the following functions: open a store, its cash registers, safes, drop boxes, change drawers, and offices.” Id. at *3-4. The proposed class contained three sub-classes, including one for those who missed meal periods, another for those who were not given rest periods, and a third for those who were not compensated properly but did not fall directly in either of the first two classes. The Court denied Plaintiffs’ motion. The Court agreed with Defendant that the proposed class was not sufficiently ascertainable. The operation of each store required keys, and Defendant authorized only management employees to use the key codes. Plaintiffs contended that Defendant uniformly required at least one “key carrier” employee to open and remain in stores until closing, and the “key carrier” duties were required to be performed throughout each shift. Plaintiffs thus claimed compensation for non-compliant rest and meal periods “based on a uniform company policy of not relieving Managers of ‘key carrier’ duties, and requiring Managers to remain on premises during breaks, when they are the sole ‘key carrier’ on duty.” Id. at *7-8. Defendant argued that Plaintiffs’ proposed class was not ascertainable as the time records retained by Defendant could not show
who the “sole key carrier” was at any given time because the time records did not show all employees present at a particular time, and some employees, other than putative class members, such as pharmacists, had override authority or had keys, which was not recorded on time records. *Id.* at *14.

Defendant also presented evidence that store managers did not always put themselves on the schedule or did not work the hours they put on the schedule, and thus store schedules could not establish when supervisors and assistant managers served as sole key carriers. *Id.* Additionally, the individuals with the ability to carry out “key carrier” duties varied from store to store, and Plaintiffs did not identify a Defendant’s policy which provided keys for broad categories of employees. *Id.* Because of the variety of responsibilities and keys even within job descriptions, the Court concluded that the proposed class was not ascertainable. *Id.* at *15. The Court further found that although Plaintiffs had raised common issues of law and fact, which included whether Defendant had a policy requiring assistant managers and supervisors to stay in the store when there were no other “key carriers” working, and whether such a policy violated Defendant’s obligation to provide off-duty meal and rest breaks, the evidence demonstrated that adjudication of the putative class members’ meal and rest break claims would involve predominately individual issues regarding the reason putative class members missed meal or rest breaks. While Plaintiff offered no evidence that they were not allowed to leave Defendant’s premises during any rest or meal break when they were the sole manager or supervisor on duty, Defendant submitted declarations of some employees that reflected that it was rare for some supervisors and assistant managers to miss their meal or rest periods at all. *Id.* at *22-23. The Court found that in the absence of common evidence that putative class members were regularly forced to work through meal and rest periods when no other manager or supervisor was on duty, it would be required to make individual inquiries as to why an individual missed meal or rest periods. *Id.* at *24-25. The Court thus held that Plaintiffs failed to meet the predominance requirement, and a class action was not superior to individual litigation. Accordingly, the Court denied Plaintiffs’ motion for class certification.

**Ramirez, et al. v. Ghilotti Brothers, Inc., 941 F. Supp. 2d 1197 (N.D. Cal. 2013).** Plaintiffs brought an FLSA action alleging failure to provide proper meal and rest periods, failure to provide accurate wage statements, and failure to provide overtime and minimum wages owed on account of uncompensated work that employees were required to perform. Plaintiffs asserted that Defendant did not pay its driving laborers for time spent at the beginning and the end of their shifts in loading and unloading trucks and driving between loading areas and job sites. A laborer assigned to drive a company truck had to determine what time to show up at the loading area, which involved working backwards from the shift start time specified by dispatch and estimating loading and driving time from the loading area. Once at the loading area, the laborer had to inspect the truck, fill it with oil and gas, collect and load the dispatch-specified materials into it, and then drive to the job site. This process took between 1 and 1.5 hours. At the end of the shift at the worksite, the driving laborer had to collect the materials he transported to the job site and load them back on to the company truck, and then drive the truck back to the loading area and unload the materials. This post-shift loading and transportation process also took between 1 and 1.5 hours. Plaintiffs moved for conditional certification of a collective action, and the Court granted the motion. Defendant maintained that it had procedures in place to ensure that employees were paid for all time worked, and that employees received a weekly report summarizing their hours worked that included a section where employees could note errors and specify additional time actually worked. Defendant contended that the named Plaintiffs knew about those forms, that they understood they could submit claims for additional time, and that no one ever told them that they could not submit such a form for driving and loading duties. Further, Defendant asserted that the company’s relevant decision-making was decentralized and placed largely in the hands of the 20 to 30 foreman who supervised each job site, and thus the issue of uncompensated work was highly individualized and unsuitable for collective adjudication. The Court, however, reasoned that merely because individual supervisors deviated from that practice on rare occasions did not mean that the practice did not exist or that conditional collective action certification was inappropriate. The Court stated that employees might not use the payroll discrepancy forms to insist on being paid for driving and transport duties for fear of retaliation, or a universal understanding that such a request would be futile. The Court also noted that Plaintiffs made an adequate threshold showing that Defendant’s management knew that its employees were required to perform uncompensated work, and that the company itself had briefly
experimented with a policy to provide some kind of compensation for driving duties, which was consistent with the company itself recognizing the problem. Accordingly, the Court granted Plaintiffs’ motion for conditional certification of a collective action.

**Ribot, et al. v. Farmers Insurance Group, 2013 U.S. Dist. LEXIS 100810 (C.D. Cal. July 17, 2013).** Plaintiffs, a group of current and former customer service representatives (“CSRs”), brought a class and collective action alleging that Defendants denied them compensation for post-shift duties they performed. Plaintiffs worked as CSRs in call centers located in California, Oregon, Kansas, Texas, and Michigan. Plaintiffs’ principal job duties were to handle in-bound telephone calls from insurance agents and policyholders, to answer questions concerning home and automobile insurance policies, and provide agents with technical support. Plaintiffs contended that in addition to their principal job duties they were required to arrive 15 minutes early to boot up their computers, load programs, log on to the telephone system, and review e-mails. They also claimed that they were required to perform post-shift duties including, among other things, making customer service calls and the tasks associated with shutting down computer systems. Plaintiffs sought certification of the state law classes pursuant to Rule 23, and conditional certification of the FLSA collective action pursuant to 29 U.S.C. § 216(b). Id. at *2-4. The Court granted Plaintiffs’ motion in part and denied it in part. Plaintiffs sought certification of five state law sub-classes. Defendants argued that the classes were overbroad because they included claims that would have expired under the applicable statutes of limitations. The Court agreed, stating that the tolling agreement entered into by the Defendants applied only to FLSA claims. The Court also ruled that the class period ended at the time Defendants changed their policy regarding phone log-on procedures. Id. at *11. The Court ruled that numerosity was satisfied even without evidence of a precise class number because general knowledge and common sense indicated that the classes were large. Id. at *12. Based on testimony of employees from multiple facilities that supervisors instructed employees to arrive early to perform functions necessary to be ready to work at the start of their designated shift time, the Court ruled that commonality was satisfied with respect to Plaintiffs’ pre-shift claims. However, there was conflicting testimony as to whether Plaintiffs were compensated when they worked past their shifts. Id. at *27. Plaintiffs were unable to show that application of Defendants’ rounding policy presented common issues. Id. at *28-29 Thus, the Court ruled that commonality was established as to Plaintiffs pre-shift claims but not their post-shift claims. Id. at *29. The Court also ruled that typicality was satisfied. It rejected Defendants’ argument that Plaintiffs’ claims were not typical because they did not work at all the facilities, noting there was sufficient evidence that the policies at issue were in place at all call centers. Id. at *29-33. The Court also ruled that predominance was satisfied. It rejected Defendants’ argument that the different laws of the five states defeated predominance, noting that there was a separate sub-class for each state. Id. at *35. Regarding conditional certification of the FLSA claim, the Court found that class members were similarly-situated, but only with respect to their pre-shift claims, for the reasons addressed as to commonality. Id. at *41-42. It also held that equitable tolling of the statute of limitations should apply based upon the refusal of the Defendants to supply a class list when requested by Plaintiffs in discovery. Id. at *47-48. Finally, the Court ruled that based upon the tolling agreement, the statute of limitations was tolled as to all class members at the facilities investigated earlier by the U.S. Department of Labor. Id. at *48-50. Accordingly, with respect to the pre-shift claims, the Court granted the Plaintiffs’ motion for class certification and conditional collective action certification. Id. at *50-51.

**Rodriguez-Juvera, et al. v. Salcido, 2013 U.S. Dist. LEXIS 48867 (D. Ariz. April 4, 2013).** Plaintiffs, a group of cashiers, brought a class and collective action alleging that because of Defendants’ policies charging cashiers for cash shortages, extra uniforms, security tags, and other miscellaneous items, cashiers were not paid the minimum wage in violation of the FLSA and the Arizona Minimum Wage Act. Plaintiffs moved for conditional certification of an FLSA collective action, and Rule 23 class certification for their state law claims. Plaintiffs’ class consisted of Defendants’ all current and former cashiers employed in Arizona any time after January 1, 2007. The Court granted the motion. The Court noted that Plaintiffs’ pleadings and declarations supported their assertion that Plaintiffs and members of the potential collective action were all employed as cashiers in Arizona and were subject to the same policies of requiring reimbursement or being charged for cash shortages, uniforms, and security tags. Thus, the Court opined
that Plaintiffs established the proof required for a finding under the similarly-situated analysis, and accordingly granted conditional certification of the FLSA claims. At the same time, Plaintiffs sought class certification pursuant to Rule 23 on their state law claims which were predicated on Plaintiffs’ allegation that Defendants failed to pay minimum wage to its cashiers as a result of Defendants charging cashiers for cash shortages and work-related items. First, the Court noted that there were approximately 200 current and former cashiers in the proposed class. Second, the Court observed that Plaintiffs and members of the potential class were all employed as cashiers and performed the same basic duties and were subject to the same policies because of which each putative class member had their pay reduced below the minimum wage. The Court opined that resolving the question of whether Defendants’ policies reduced the wages of class members below the minimum wage would resolve an issue central to the validity of each claim. Further, Plaintiffs’ allegations were based on the same legal theories and sought the same legal remedies for the putative class members. Accordingly, the Court found that Plaintiffs established commonality and typicality. Finally, the Court found that the adequacy requirement was met because Plaintiffs and their counsel had been prosecuting this action vigorously on behalf of the class, and that record did not suggest that Plaintiffs and their counsel had conflicts of interest with other class members. The Court noted that although the putative class members were entitled to different damages based on the amount below the minimum wage that were actually paid, these individual issues did not overcome the fact that common questions presented a significant aspect of the case and could be resolved on a representative rather than individual basis. Further, the Court determined that a class action would allow federal and state claims to be brought in this case, which would resolve predominate issues of fact and law in both federal and state law claims and avoid piecemeal litigation. This would promote fair and efficient adjudication, which would make it a superior form of adjudication. Accordingly, the Court granted Plaintiffs’ motion for class certification.

Roth, et al. v. CHA Hollywood Medical Center, L.P., 2013 U.S. Dist. LEXIS 153856 (C.D. Cal. Oct. 25, 2013). Plaintiff, a nurse, brought a class action alleging failure to provide mandated meal and rest breaks, failure to pay wages when due, failure to provide accurate wage statements, and violation of California’s Unfair Competition Law. Plaintiff moved to certify one class and three sub-classes. The general class comprised of all non-exempt employees who held the title of nurse, licensed vocational nurses (“LVN”), or registered nurses (“RN”), and who, at any time during the proposed class period, worked a 12-hour shift. The rest break sub-class consisted of all class members who did not receive at least three duty-free ten minute rest breaks during the course of a 12-hour shift. The meal period sub-class included all class members who did not receive mandated meal periods, because they were either late, or not provided at all, or were not duty-free for at least 30 minutes, or because no second meal period was provided. Finally, the terminated employee sub-class was comprised of all class members whose employment with Defendants terminated during the class period. The Court denied the motion for failure to establish ascertainability, commonality, and predominance. Regarding ascertainability, Plaintiff argued that one could determine who was a class member by evaluating Defendants’ payroll records, and that the number of missed breaks could be determined by reviewing the nurse assignment sheets and patient logs from each department. The Court noted that class treatment is inappropriate if the Court must determine the merits of an individual claim to determine who is a member of the class. Id. at *12. The Court observed that Brinker Restaurant Corp. v. Superior Court, 53 Cal. 4th 1004, 1040 (2012), held that an employer provides a meal break when it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. Id. at *13. To ascertain who is in the class, the Court would have to make individual determinations of whether each putative class member was relieved of all duties during his or her breaks. Regarding commonality, the Court noted that many nurses asserted they had no issue taking proper breaks. This demonstrated that there would be no way to determine the existence of a uniform, class-wide policy of rendering employees unable to take rest and meal periods in each instance. Rather, adjudication of these claims would require an individual determination of whether a particular nurse was too busy, had no coverage, or both for each rest and meal break to which she was entitled. Id. at *18-19. Although
 Plaintiff’s expert, Constance Doyle, testified that the policy and practice was to staff nurses at the minimum needed to meet the statutory nurse-to-patient requirements, she admitted that she did not have any patient-census information. The Court remarked that without having this patient information, it was difficult to understand how Doyle could come to any reliable inference about whether only the minimum number of nurses was staffed to meet the statutory ratios, and without determining this alleged bare-staffing practice, there was no way to tell on a class-wide basis whether all putative class members were invariably prevented from taking rest and meal breaks. *Id.* at *19-21. Accordingly, the Court noted that Plaintiff failed to demonstrate commonality. *Id.* at *22. Finally, the Court noted that neither HR policies provide the requisite common question sufficient for class certification, nor did each department’s assignment sheets reflect why nurses missed breaks, how late the breaks were provided, whether a break was interrupted, or whether an employee waived a break. Without any such documentary evidence, each class member would have to be interviewed to determine whether she missed breaks and the circumstances surrounding each discrete occasion. Accordingly, the Court concluded that common issues did not predominate, and denied Plaintiff’s motion for class certification. *Id.* at *25-26.

*Santiago, et al. v. Amdocs, Inc.*, 2013 U.S. Dist. LEXIS 142511 (N.D. Cal. Sept. 30, 2013). Plaintiffs, a group of current and former information technology employees, brought an action under the FLSA and the California Labor Code alleging that they routinely worked without overtime pay and that they were not provided with required meal and rest breaks because they were misclassified as exempt employees. While some employees were directly hired by Defendant, others joined the company as a result of corporate acquisitions, and others transitioned to Amdocs as a result of managed services agreements between Amdocs and its customers. Further, while Amdocs employed workers in California at Amdocs-owned or leased facilities, or at client-owned facilities, some employees in California worked from home. Amdocs mapped an employee into its global job classification system, whereby the employee was designated into Job Role, Job Title, Job Stream, Job Family, and Band. Amdocs asserted that an employee’s mapping was independent of an employee’s status as exempt from overtime, and that the decision about whether the position was exempt was made at the time of recruitment. Amdocs also stated that that the process for mapping and examining overtime exemption varied from project to project and from employee to employee. Amdocs moved to decertify Plaintiff’s conditionally certified FLSA collective action. At the same time, Plaintiffs sought to certify a state law claim class comprised of all individuals employed by Amdocs in California at any time from April 16, 2006 to the present, who were Band 2 or Band 3 employees in the Development Technologies, System Integration, or Technical Business Operations Job Families, and who were designated as Individual Contributors. The Court denied Plaintiff’s motion, and granted Defendant’s motion. First, Defendant argued that Plaintiffs failed to show that collective action members were similarly-situated, and that members of the conditionally certified class performed vastly different jobs with different supervisors and in different settings. Defendant also contended that the opt-in Plaintiffs had 51 different job titles with highly divergent job duties, and that the Court would be required to analyze each collective action member’s job duties to determine whether that employee was properly classified as exempt. Plaintiffs asserted that the testimony of Thomas Drury, Vice President of Human Resources, showed that Amdocs had admitted that while there were differences between Job Families, employees in the same Job Family and who had the same Band rank were similarly-situated regardless of where they worked, for whom they worked, or what particular job they did. The Court, however, observed that testimony that Job Families consisted of a broad grouping of jobs that required similar education, experience, and competencies did not, on its own, establish that all employees within the same Job Family and Band rank were similarly-situated. *Id.* at *18. The Court stated that Drury’s deposition that the mapping decisions were made at the individual manager level, and not based on any corporate-level policies, did not support Plaintiffs’ assertion that employees were mapped pursuant to a common, uniform corporate policy and practice. Further, Drury testified that employees were divided into Bands to distinguish between levels of expertise, knowledge, capability, and that to determine what Band an employee should be placed in, Amdocs evaluated job duties, responsibilities, and the scope of work that’s expected from that employee. The Court stated that while this testimony supported the proposition that employees at higher band levels had greater levels of responsibility, Drury’s testimony did not demonstrate that all Band 2 and 3 employees did not exercise discretion and independent judgment with respect to matters of significance. Further, the
Court noted that the fact that an employer classified all or most of a particular class of employees as exempt did not eliminate the need to make a factual determination as to whether class members were actually performing similar duties. *Id.* at *23. The Court stated that the evidence showed significant disparities in the job duties of class members, and employment settings, and that class members also worked in a variety of locations and settings, with some working at home for some portion of time, and many class members having little to no direct interaction with their supervisors. Thus, the Court found that Plaintiffs did not offer substantial evidence showing that Plaintiffs and the class members were similarly-situated and that the misclassification claims could be litigated on a class-wide basis. Further, the Court remarked that Plaintiffs also had not identified any policy that had allegedly caused their injuries. Because Plaintiffs failed to demonstrate that the collective action members were similarly-situated for purposes of the FLSA overtime claims, the Court stated that it foreclosed certification of a similarly defined Rule 23 class for Plaintiffs’ state law overtime claims. The Court opined that because California law requires an employer to provide uninterrupted meals periods and authorize and permit rest breaks only for non-exempt employees, Plaintiffs’ meal and rest break claims were derivative of their claims that Defendant misclassified them as exempt employees. Accordingly, the Court granted Defendant’s motion for decertification under 29 U.S.C. § 216(b) and denied Plaintiffs’ motion for certification of the state law claims.

**Saucedo, et al. v. NW Management & Realty Services, Inc., 290 F.R.D. 671 (E.D. Wash. 2013).**

Plaintiffs, a group of farm workers, brought a putative class action alleging that Defendant violated the Washington Farm Labor Contractors Act (“FLCA”) by failing to obtain a farm labor contractor license, by failing to provide written disclosures concerning the terms and conditions of employment, and by allowing class members to be intimidated by a supervisor who carried and discharged a firearm in their presence. Plaintiffs moved to certify a class consisting of all farm workers who worked for Defendant from 2009 to 2011. *Id.* at 675. The Court granted class certification as to the claims for failure to obtain a farm labor contractor’s license and for failure to provide written disclosures concerning terms and conditions of employment, but denied the motion as to the claims for making false or misleading representations and unlawful intimidation. The Court found that although the class claims for failure to obtain a farm labor contractor license and failure to provide written disclosures concerning terms and conditions of employment were sufficiently parallel to warrant class-wide adjudication, the class claims for providing false or misleading information and unlawful intimidation lacked a common contention capable of generating common answers on a class-wide basis. *Id.* at 677. Regarding the claim for failure to obtain a farm labor contractor license, Defendants had conceded that NW Management was not licensed as a farm labor contractor during the relevant years, and that Defendants – Farmland Management Services (“Farmland”), the lessee of the orchards, and John Hancock Life & Health Insurance and Texas Municipal Plans Consortium (“John Hancock”) – had contracted with NW Management for the unlicensed services. Thus, the only disputed issues for purposes of establishing liability were whether NW Management qualified as a farm labor contractor under the FLCA such that it was required to obtain a farm labor contractor’ license, and whether Farmland and John Hancock knowingly used NW Management’s unlicensed services such that they could be held jointly and severally liable for the alleged violations. *Id.* The Court therefore found that the claim for failure to obtain a farm labor contractor’s license satisfied Rule 23(a)(2)’s commonality requirement. The Court, however, found that Plaintiffs’ misrepresentation claim was not sufficiently cohesive to warrant class-wide adjudication. *Id.* at 679. Plaintiffs alleged NW Management had a general policy and practice of issuing pay stubs that did not accurately reflect the wages promised or the amount of work actually performed. In support, Plaintiff produced declarations from several class members stating that Defendant’s supervisor routinely and unilaterally paid workers at a lower rate of pay than was initially promised, reduced the amount of time claimed by workers on hourly tasks, and lowered the quantity of work claimed by workers on per piece tasks. *Id.* The Court found that the allegations arose from multiple incidents that were utilized across a variety of different labor tasks like picking, pruning, and tying. *Id.* at 680. The Court thus found very little uniformity among members of the putative class concerning the type and nature of the misrepresentations made to adjudicate the claim on class-wide basis. *Id.* The Court similarly determined that the allegation that the supervisor intimidated workers by openly carrying and discharging a firearm arose from a series of unique incidents that it did not warrant class-wide adjudication.
While the putative class members asserted that the supervisor carried and occasionally fired a gun while supervising workers in the orchards, there was substantial disagreement about whether the conduct was calculated to intimidate. *Id.* at 681. The Court stated that it was not sufficient for Plaintiffs to establish that the supervisor carried or fired a gun in the presence of putative class members, but rather Plaintiffs must establish that the supervisor displayed a firearm in a manner that manifested an intent to intimidate another or willfully discharged a firearm in any place where any person might be endangered. *Id.* at 682. Because Plaintiffs failed to establish this, the Court held that Plaintiffs’ claim of unlawful intimidation of workers did not satisfy the commonality requirement. For the same reasons, the Court held that Plaintiffs’ claims for making false or misleading misrepresentations and for unlawful intimidation did not satisfy typicality requirement. *Id.* The Court, however, noted that Plaintiffs’ claims for failure to obtain a farm labor contractor’s license and failure to provide written disclosures satisfied the typicality requirement and the class representatives would adequately represent the class. The Court found no conflict of interest between the named representatives and the other members of the proposed class. *Id.* at 683. Finally, the Court held that questions common to the class claims for failure to obtain a farm labor contractor’s license and failure to provide written disclosures predominated over individualized questions, and a balancing of the Rule 23(b)(3) factors weighed strongly in favor of adjudication on a class-wide basis. *Id.* at 684. Accordingly, the Court granted Plaintiffs’ motion for certification only on their claims for failure to obtain a farm labor contractor’s license and failure to provide written disclosures concerning terms and conditions of employment.

**Seckler, et al. v. Kindred Healthcare Operating Group, Inc., 2013 U.S. Dist. LEXIS 29940 (C.D. Cal. Mar. 5, 2013).** Plaintiffs, a group of hourly hospital employees, brought a putative class action alleging that Defendants violated the California Labor Code by failing to pay overtime, failing to provide meal periods, and failing to furnish accurate itemized wage statements. The Court partly granted and partly denied Plaintiffs’ motion for class certification. Plaintiffs based their overtime claims on instances when Defendants required employees to work overtime on shifts that had fewer hours than the employees’ regular alternative workweek schedule (“AWS”). Plaintiffs’ AWS class was comprised of all AWS employee who worked more than eight but fewer than 12 hours and did not receive overtime compensation. *Id.* at *5-6. Defendants argued that the AWS class did not meet the predominance requirement because there was a question in each instance as to whether an employee chose to leave early or was required to do so. *Id.* at *10. The Court, however, found that common questions of law or fact predominated over individual questions. Plaintiffs presented evidence that showed that Defendants had a policy of not paying overtime to AWS employees working more than eight hours but less than a full AWS shift. *Id.* Defendant’s payroll system had no code that indicated that an employee was entitled to a short-shift penalty, and payroll coordinators and officers indicated that they were not aware of the law regarding short-shift penalties. *Id.* at *11. The employees also were not informed that they were entitled to a short-shift premium. The Court stated that because the employment policies dealt with details other than AWS overtime, the failure to address short shift penalties indicated a policy of not paying such premiums. *Id.* Further, because neither the employees nor the human resources staff knew that employees who were required to leave were entitled to a penalty, the Court held that an employee’s decision to “volunteer” to take a short shift could not be considered voluntary. *Id.* at *15. The Court therefore found the AWS class suitable for certification. The Court also found Plaintiffs’ regular rate class appropriate for certification. Defendants did not dispute that the regular rate class failed to meet any of the Rule 23 requirements. The regular rate class consisted of employees who were paid a double time premium and/or paid for at least one missed meal period payment. *Id.* at *17-18. Plaintiffs alleged that the double time premium and missed meal period payments were paid at the base rate and not the regular rate. The Court also granted certification for a meal waiver class consisting of all employees who were regularly scheduled to work 12-hour shifts and who signed a meal waiver as a condition of employment. *Id.* at *27. The Court found that the universal meal waiver signing inferred that the waiver was a condition of employment, which gave rise to a class question. *Id.* at *30. The Court also certified Plaintiffs’ § 226 claim under the Labor Code alleging that the Defendants failed to provide wage statements that accurately showed gross wages, total hours, and deductions. *Id.* at *34, 39-40. Defendants asserted that a paycheck deficiency under § 226(a) was not an injury making the employee eligible for compensation, and that the issue was whether the pay stub provided sufficient
information to enable an employee to confirm whether she was properly paid. Id. at *34-35. The Court disagreed and held that the injury requirement should be interpreted as minimal in order to effectuate the purpose of the wage statement statute, and if the injury requirement were more than minimal, it would nullify the impact of the requirements of the statute. Id. at *36. The Court found that Plaintiffs met the minimal injury requirement by showing the inability to determine whether they have been paid appropriately. Id. at *37-38. The Court thus found the wage statement class also appropriate for certification. The Court, however, denied certification for the meal period class consisting of employees who were not provided legally compliant meal periods within the first five hours of their shift. Id. at *21, 38. Although the records showed missed meals after five hour long shifts, Plaintiffs failed to provide common evidence of inadequate meal periods. Plaintiffs merely asserted that correlating missed meals with patient census record would show whether Plaintiffs’ late lunches coincided with times when the hospital had insufficient staff coverage to relieve employees of all duties for a meal period while maintaining the mandated patient-to-staff ratio. Id. at *22. Plaintiffs, however, did not perform such analysis or obtain the records to do so. Because Plaintiffs did not offer any proof sufficient to establish predominance, the Court found the meal period class inappropriate for certification. Id. at *27. Plaintiffs had also proposed a third meal sub-class consisting of all employees who worked over 12 hours in a shift without being provided an additional meal period or requisite payment for said meal for certification. Id. at *31-32. Because there was no requirement to provide a third meal period until the end of 15 consecutive work hours, the Court concluded that Plaintiffs had failed to establish a common legal question, and therefore denied certification as to that class claim. Id. at *33.

Shepard, et al. v. Lowe’s HIW, Inc., 2013 U.S. Dist. LEXIS 118419 (N.D. Cal. Aug. 19, 2013). Plaintiff, an installer, brought a class action alleging violations of the California Labor Code and unfair competition in violation of California Business and Professions Code. Plaintiff was hired to perform installations of garage doors for Defendant’s store in California. Plaintiff alleged that Defendant treated him and all other installers as independent contractors when they should have been classified as employees and entitled to benefits. Plaintiff alleged that Defendant controlled all aspects of installation jobs by Plaintiff and all other class members. Plaintiff moved for class certification of all persons who installed products for Defendant or performed services for Defendant in California and who were treated as independent contractors. The Court granted the motion. First, regarding ascertainability, Plaintiff asserted that the members of the purported class were easily identified and known by Defendant’s discovery responses. The Court agreed and found that Plaintiff had set forth an identifiable and ascertainable class. Relative to the numerosity requirement, the Court determined that the class exceeded 860 installers. Plaintiff contended that he was typical of all installers who were allegedly misclassified by Defendant as independent contractors instead of employees. Plaintiff alleged that, like all other installers, he was subject to an interview process, required to submit to and pass a background check, and entered into an installation services agreement with Defendant. Plaintiff also alleged that Defendant included guides and standards as appendices to the installer contracts setting forth the expectations for performance on the contracts. Moreover, Plaintiff asserted that Defendant controlled the payment on any installation project and maintained uniform policies for performance compliance and procedures for warning and terminating installers under certain circumstances. The Court stated that although there were minor differences among the contracts for the types of installers and those contracts changed over time, the variations did not affect the issue of Defendant’s right to control to the manner of performance of the contract. Further, Plaintiff argued that the variations in the actual relationships between various Defendant’s stores and the multiple installers did not alter the common legal issue of Defendant’s right to control, regardless of whether Defendant exercised that control in any particular relationship. The Court agreed that the question of whether the installers were free from control and direction as a matter of contract was a common issue. Defendant argued that Plaintiff’s motion should be denied because each of the potential class members had unique sets of circumstances upon which their claims turned, and each installer’s experience, relationship, and interaction with Defendant was unique in ways that would impact the independent contractor analysis. The Court stated that although Defendant might be correct that some of the factual inquiries would vary by individual store and individual installer, the Court found that Defendant’s right to control the installers – as well as many of the secondary indicia of classification of the employment relationship – would involve common
inquiries. Because the contract and standards at issue were substantially identical and provided the legal structure for the relationship and the scope of Defendant’s right to control the installers, the Court held that class certification was appropriate.

**Slack, et al. v. Swift Transportation Co. Of Arizona, LLC., 2013 U.S. Dist. LEXIS 165998 (W.D. Wash. Nov. 20, 2013).** Plaintiffs, a group of truck drivers, brought a class action under Washington law alleging that they were not fully compensated by Defendant for the hours they were employed. Plaintiffs moved to certify a class consisting of all current and former interstate drivers who were assigned by Defendant to a Washington position and who were paid by the mile and worked in excess of 40 hours in a week; who participated in and completed Defendant’s new driver orientation program or in-truck training program in a Washington location; or who participated in Defendant’s per diem program for mileage-based drivers. The Court granted the motion in part. The Court stated that Plaintiffs had satisfied the numerosity requirement because there were over 1,000 class members for the overtime, the orientation, and the in-training category of drivers, and that there were 185 drivers in the per diem category of drivers. Regarding commonality, Defendant contended that there was neither a common class of Washington-based drivers nor a common question of liability for each sub-class of claims, and the Court should engage in a choice-of-law analysis as to each proposed member of the class. The Court noted that its previous case law held that enforcement of the Washington Minimum Wage Act (“MWA”) on hours worked outside of Washington by a Washington-based employee did not create conflicting obligations and did not rise to the level of an impermissible burden, given the importance of the legitimate local public interest at stake. *Id.* at *7.

Accordingly, the Court declined to impose a choice-of-law analysis on each proposed class member and found that Plaintiffs had satisfied commonality with regard to the dedicated drivers. With regard to the over-the-road drivers, Defendant submitted the declaration of one of the drivers, Nathaniel Thomas, to support its contentions. The Court was unable to conclude that common questions of law or fact existed for the proposed class of over-the-road drivers. Regarding computing overtime, the Court stated that an individual inquiry as to each member’s hours did not eviscerate the common question of law as to the Washington-based direct drivers. Regarding in-truck training, the Court noted that Plaintiffs had failed to define a common class and there were no common questions of liability. The Court, however, recognized a possibility of certifying a sub-class similar to the Washington-based direct drivers if Plaintiffs proposed limitations to separate the trainees who were trained with the direct drivers as opposed to the trainees who were flown to California to train with a driver based in Arizona. Regarding the per diem claim, Defendant argued that Plaintiffs had failed to sufficiently identify Washington-based drivers, and that an individualized inquiry was required to establish liability. The Court found that Plaintiffs had sufficiently identified Washington-based dedicated drivers, and that individualized inquiries were not necessary to determine whether the policy violated Washington law. Regarding typicality, Court found that the named Plaintiffs’ injuries were not typical of the proposed class with respect to over-the-road drivers. Finally, the Court ruled that the class should be certified because common issues predominated over individual issues and because a class action was the superior method to adjudicate the issues. Accordingly, the Court granted Plaintiffs’ motion in part, and denied it with respect to over-the-road drivers and the in-truck training class.

**Soto, et al. v. Diakon Logistics (Delaware), Inc., 2013 U.S. Dist. LEXIS 119028 (S.D. Cal. Aug. 21, 2013).** Plaintiffs, a group of truck drivers, brought a class action alleging that they were misclassified as independent contractors, and sought recovery for alleged violations of the California Labor Code. After the Court denied Plaintiffs’ motion for class certification twice, Plaintiffs moved for class certification of a narrower class comprised of all individuals who worked as delivery-truck drivers in the State of California and were designated and paid as independent contractors rather than employees, and who did not employ or use other drivers to perform the work assigned to them by Defendant. *Id.* at *3, 8. The Court granted Plaintiffs’ motion in part. First, the Court found that numerosity was satisfied because there were at least 315 drivers that met the proposed class definition. *Id.* at *9-10. Second, the Court concluded that commonality was satisfied, citing several case law authorities that have so held in cases involving claims of independent contractor misclassification. *Id.* at *11. The Court then addressed the predominance issue under Rule 23(b)(3). Concerning the issue of whether the class members were non-exempt employees misclassified as independent contractors, the Court found that all class members signed the same service
Soto, et al. v. Castlerock Farming And Transport, Inc., 2013 U.S. Dist. LEXIS 179899 (E.D. Cal. Dec. 23, 2013). Plaintiff, on behalf of himself and other current and former non-exempt agricultural field workers, brought an action alleging violation of the Agricultural Workers Protection Act, failure to pay wages, reporting time wages, and failure to provide rest and meal breaks. According to Plaintiff, Defendant had long permitted an off-the-clock work practice of requiring fieldworkers to take the table-grape trays home and wash them without compensation (the “trays class”), and were forced to purchase necessary work equipment and were not reimbursed for the costs incurred by them (the “tools class”). Plaintiff filed a motion for class certification. The Court denied the motion. Defendant asserted that Plaintiff did not have Article III standing to seek class certification, because he had not established that he was jointly employed by Castlerock. Plaintiff contended that he had satisfied the standing requirements because there was evidence showing that Castlerock exercised control of fieldworkers’ wages, hours, and working conditions for the putative class members. The Court noted that the records showed that Castlerock employees supervised the foreman and were responsible for all the crews in the vineyard. The Court concluded that Plaintiff had sufficiently stated that he had an Article III standing. As to the Rule 23(a) requirements, Plaintiff asserted that several questions were common across the trays class, such as: (i) whether Defendant had practice of requiring fieldworkers to take trays home and clean them without compensation; and (ii) whether the time spent was compensable. The Court noted that the evidence submitted by Plaintiff demonstrated that Castlerock took steps to ensure trays and other equipment were not taken from the premises. In fact, the agreement between Castlerock and Golden Grain read that removal of equipment from the premises was a breach of the agreement. In addition, nearly 30 fieldworkers who were deposed admitted that they were never required to take the equipment home to wash. The Court noted that the evidence provided by the parties regarding a practice requiring fieldworkers to perform tray washing at home without compensation was directly in conflict. Defendant filed declarations from over 200 putative class members disputing Plaintiff’s claims. The Court reasoned that the conflicting evidence revealed that Defendant did not have a uniform practice. In light of the dissimilarities and conflicting testimony of the putative class members, the Court determined that it was unable to find a contention that was capable of a class-wide resolution. Accordingly, the Court concluded that Plaintiff failed to demonstrate commonality. As to the tools class, Plaintiff testified that one day he left his company issued scissors at home, and he purchased new scissors from his foreperson for $10. Because Plaintiff did not claim that the company failed to provide the necessary tools for his work, or that he was forced to purchase new scissors, the Court concluded that he did not have a standing to pursue the claim. Similarly, as Plaintiff was the only individual who asserted that he had to purchase a replacement tool, the Court held that Plaintiff did not establish commonality as to the tools class. Accordingly, the Court denied Plaintiff’s motion for class certification.
Till, et al. v. Saks Inc., 2013 U.S. Dist. LEXIS 145842 (N.D. Cal. Sept. 30, 2013). Plaintiffs, a group of former employees, brought a class action asserting violations of the FLSA and the California Labor Code, and alleging that they were misclassified as exempt and not paid overtime wages although they primarily performed duties of non-exempt employees. Plaintiffs moved for certification of a class consisting of managers or similarly titled personnel who were performing the same sort of functions as the named Plaintiffs at Saks Fifth Avenue Off Fifth stores in California. Plaintiffs also sought to represent a similar nationwide class with respect to their FLSA claims. Defendants moved to deny FLSA certification of a nationwide class. The Court denied Plaintiffs’ motion and granted Defendants’ motion. Regarding class certification, Plaintiffs asserted that there were 39 California employees who met their class definition. In the absence of any citation to the record, the Court was unable to confirm whether there was evidence to support Plaintiffs’ contention, and thus it found that numerosity was not established. Plaintiffs then pointed to a single common question of whether the job duties of Assistant Managers qualified for the executive exemption under California law. First, Plaintiffs alleged that budgetary constraints resulted in a shortage of hourly workers, which, in turn, caused them to perform primarily non-exempt tasks. The Court, however, observed that there was no specific evidence on a class basis that Defendants’ labor budgets had any effect on the actual tasks performed by Assistant Managers, and instead noted that Defendants’ labor budgets varied from store-to-store, depending on a variety of factors, including sales volume, square footage, store hours, the number of entrances, and the store’s location. Second, Plaintiffs cited to the declarations of two former employees who averred that they were required to perform merchandising tasks in accordance with detailed directives provided by Defendants’ corporate office. The Court determined that the existence of such directives did not show that class members necessarily were required to spend any particular amount of time performing such duties, or that class members were divested of discretion and independent judgment. Thus, the Court concluded that Plaintiff failed to make a showing that there was common proof that corporate directives relating to store merchandising resulted in class members performing mostly non-exempt tasks. Third, Plaintiffs contended that Defendants’ commitment to making customer service a number one priority caused putative class members to perform primarily non-exempt work. The declarations of former managers that Plaintiffs provided as evidence failed to mention any company commitment to customer service or that such a commitment caused them to perform mostly non-exempt tasks. The Court remarked that their statements merely showed that, on occasion, they provided support on the sales floor when needed. Finally, Plaintiffs asserted that class treatment was warranted based on Defendants’ alleged knowledge that Assistant Managers in fact performed non-exempt functions as their primary job duties. The Court, however, stated that it was unclear how such alleged knowledge was relevant to showing that there were common answers to the salient issue of whether Plaintiffs and class members were misclassified. Furthermore, the Court observed that there was contrary evidence from Plaintiffs’ managers, who stated that Plaintiffs spent between 50% and 70% of their time performing managerial duties. Accordingly, the Court observed that there were significant dissimilarities in the experiences of proposed class members that impeded the generation of common answers, and that the disparities in the alleged practices attributed to Defendants militated against finding that there was a question common to the class. Regarding typicality, the Court noted that the experiences of the two Plaintiffs compared to class members diverged significantly, and that their experiences were typical of only some of the proposed class members. Further, the Court opined that the adequacy requirement was not met because Plaintiffs failed to show that they shared the same interests and suffered the same injury as the class. The Court stated that the failure to establish the commonality requirement foreclosed certification under Rule 23(b)(3). Plaintiffs argued that a class action was superior because of employees’ fear of reprisal, and costs of individual litigation. The Court, however, noted that California law prohibits retaliation, by discharge or other discrimination, against any employee for exercising rights protected by the California Labor Code. Id. at *27-28. The Court also noted that the cost savings resulting from proceeding on a class-wide basis was undermined by the presence of individualized issues regarding individual class member. Accordingly, the Court denied Plaintiffs’ motion for class certification. At the same time, the Court granted Defendants’ motion to deny FLSA certification because the factual record confirmed the disparate experiences of putative class members, which varied by store and individuals within the same store, and that some of Plaintiffs could be subject to releases, which Plaintiffs acknowledged was an
individualized defense. Plaintiffs also did not identify any particular fairness and procedural considerations that justified permitting them to proceed on their FLSA claims on a collective basis.

_Twegbe, et al. v. Pharmaca Integrative Pharmacy, Inc., 2013 U.S. Dist. LEXIS 100067 (N.D. Cal. July 17, 2013)._ Plaintiffs, a group of former pharmacy managers, brought a class action under California law alleging failure to pay overtime wages, provide proper meal and rest breaks, and timely pay wages during separations. Plaintiffs sought to represent pharmacy managers who worked at Defendant’s pharmacies in California between 2008 and the present, and alternatively proposed dividing that group into an overtime sub-class, a meal break sub-class, and a rest break sub-class. Plaintiffs alleged that the class comprised between 30 and 50 members. Defendant demonstrated that 40 pharmacy managers worked in the class period proposed by Plaintiffs, and that three of those managers had already entered into settlement agreements with Defendant voluntarily releasing all claims against it. Thus, because the proposed class would have 37 members, Defendant moved to deny class certification, arguing that the proposed class was not so numerous that joinder of all members was impracticable. The Court denied Defendant’s motion. Defendant argued that the real number of class members was 26 because Plaintiffs’ claims logically broke down into one class of exempt managers who worked between 2008 and June 2010, and a second class of exempt managers who worked after June 2011 and who did not receive proper meal and rest breaks. According to Defendant, each of those classes contained only 26 members. The Court stated that both the proposed numbers of 26 and 37 fell within the gray area where the raw number itself was not dispositive. The Court observed that Plaintiffs’ claims logically broke down into one 37-member class of managers who were denied proper meal and rest breaks because of company policies independent of their classification, and a second class of 26 managers who were denied overtime pay due to misclassification between 2008 and 2011. Because Plaintiffs alleged that meal and rest break violations continued even after their re-classification, the Court found that Plaintiffs had proposed a class comprised of 37 members, a number very close to the threshold for presumptive impracticability. The Court thus stated that this factor weighed in favor of a finding that joinder was impracticable. The Court noted that the class was definite and its members were identifiable, but the spreadsheet containing their names and contact information was on Defendant’s computers, and Defendant refused to share it without a Court order. Although Plaintiffs uncovered details of 14 of the 37 class members, the Court was doubtful whether Plaintiffs would be able to contact all class members to pursue joinder. Thus, this factor weighed slightly in favor that joinder would be impracticable. The Court observed that even a relatively small group of people may be difficult to join if they were spread out far enough. Defendant’s spreadsheet containing contact information for the putative class indicated that all but one of its members lived in California, with about 70% of the people residing or currently working in the Northern District of California. The out-of-state class member lived in New York, and the other class members were spread out around California. Because Rule 23(a)(1) speaks in terms of the joinder of “all” class members, not most of them, the Court stated that this factor weighed slightly in favor of the position that joinder would be impracticable. _Id._ at *11. Finally, regarding ability and willingness to sue, the Court stated that the size of the individual claims mattered because small recoveries did not provide the incentive for any individual to bring an individual action prosecuting his or her rights. _Id._ at *13. Because the parties agreed that the potential recoveries here were substantial, the Court found that the potential recoveries at issue provided real incentives to institute individual actions. The Court, however, also noted the fear of reprisal in bringing an action against an employer, and stated that whether or not an employer had actually threatened to retaliate, a class member presented with the opportunity to sue the company signing her paychecks likely would worry that the adversarial postures adopted in the lawsuit would spill over to the workplace. Thus, the Court found that the potential for employer retaliation presented a daunting obstacle. Therefore, the Court denied Defendant’s motion to deny class certification.

_Wang, et al. v. Chinese Daily News, 709 F.3d 829 (9th Cir. 2013)._ Plaintiffs brought a class and collective action alleging violations of the FLSA, the California Unfair Business Practices Law, and the California Labor Code. Plaintiffs alleged that employees were made to work more than eight hours per day and more than 40 hours per week, they were wrongfully denied overtime compensation, and were denied meal and rest breaks. The District Court certified the FLSA claim as a collective action, and certified the
state law claims as a class action. Later, the jury awarded over $2.5 million in damages to the class, which the Ninth Circuit had affirmed. Thereafter, the U.S. Supreme Court vacated and remanded for reconsideration in light of its decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). On remand, the Ninth Circuit reversed and remanded to the District Court. Plaintiffs contended that Defendant waived the right to challenge the commonality requirement. The Ninth Circuit, however, stated that the *Wal-Mart* decision presented a sufficiently significant legal development to excuse any failure of Defendant to discuss the commonality requirement in its opening brief. *Id.* at 833. The District Court had held that the commonality requirement under Rule 23 (a)(2) was satisfied because of numerous common questions of law and fact arising from Defendant’s alleged pattern of violating state labor standards. The Ninth Circuit noted that *Wal-Mart* specified that what matters to class certification is not the raising of common questions, but rather the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. *Id.* It pointed out that if there is no evidence that the entire class was subject to the same allegedly discriminatory practice, there is no question common to the class. *Id.* Further, the Ninth Circuit observed that the merits of the class members’ substantive claims may be relevant when determining whether to certify a class, and the District Court must consider the merits if they overlap with Rule 23(a)’s requirements. *Id.* at 834. In this respect, the District Court was required to resolve any factual disputes necessary to determine whether there was a common pattern or practice that could affect the class as a whole. *Id.* Thus, the Ninth Circuit vacated the District Court’s Rule 23(a)(2) commonality finding and remanded for reconsideration in light of *Wal-Mart*, directing it to determine whether the claims of the proposed class depended upon a common contention of such a nature that it was capable of class-wide resolution. *Id.* The Ninth Circuit had earlier observed that class certification under Rule 23(b)(2) was proper because the class’ claims for monetary relief did not predominate over its claims for injunctive relief. *Wal-Mart*, however, stated that individualized monetary claims belong in a Rule 23(b)(3) class rather than a Rule 23(b)(2) class. Further, Plaintiffs conceded that class certification for their monetary claims under Rule 23(b)(2) could not stand in light of *Wal-Mart*. Furthermore, none of the named Plaintiffs had standing to pursue injunctive relief on behalf of the class because none of them was a current employee. Thus, the Ninth Circuit reversed the District Court’s class certification order under Rule 23(b)(2). The Ninth Circuit also stated that the District Court’s conclusion that common questions predominated rested on the fact, considered largely in isolation, that Plaintiffs were challenging Defendant’s uniform policy of classifying all reporters and account executives as exempt employees. The Ninth Circuit found that the District Court abused its discretion in relying on an internal uniform exemption policy to the near exclusion of other factors relevant to the predominance inquiry. *Id.* at 835. Further, *Brinker Restaurant Corp. v. Superior Court*, 273 P.3d 513, 535 (Cal. 2012), held that an employer is obligated to relieve its employee of all duties for an uninterrupted 30-minute period in order to satisfy its meal break obligations, but that the employer need not actually ensure that its employees take meal breaks. *Id.* at 835-36. Accordingly, the Ninth Circuit vacated and remanded to the District Court for reconsideration of the propriety of class certification under Rule 23(b)(3). Finally, because *Wal-Mart* stated that employers are entitled to individualized determinations of each employee’s eligibility for monetary relief, and that employers are also entitled to litigate any individual affirmative defenses they may have to a class member’s claims, the Ninth Circuit opined that if the District Court again certified a class under Rule 23(b)(3), it should calculate damages in light of the Supreme Court’s admonitions in *Wal-Mart*. *Id.* at 836.

**Editor’s Note:** The decision by the Ninth Circuit in *Wang* is one of the more employer-friendly rulings in that jurisdiction over the past few years. It demonstrates the impact of *Wal-Mart* on the certification process.

*Zaborowski, et al. v. MHN Government Services, Inc.*, 2013 U.S. Dist. LEXIS 59492 (N.D. Cal. April 25, 2013). Plaintiffs, a group of Military Family Life Consultants (“MFLC”), brought a collective action alleging they were misclassified as independent contractors. Defendants moved to compel arbitration. The Court denied the motion, and Defendant appealed. Subsequently, Plaintiffs moved for conditional FLSA collective action certification for a class comprising of Defendants’ MFLCs who were classified as independent contractors at any time from October 2, 2009 to the time of trial. The Court granted the motion. First, Defendants argued that Plaintiffs’ motion should not be considered because the pending
appeal of the Court’s Arbitration Order warranted a delay on the decision of Plaintiffs’ motion. Alternatively, Defendant argued that judicial resources could be wasted and the MFLCs would be needlessly contacted if the Arbitration Order was reversed. The Court, however, remarked that in a conditional certification process, members would be contacted to opt-in to a class, and then the class could later become disbanded. *Id.* at *6. The Court also stated that the possibility that the Arbitration Order could be reversed was not a persuasive reason to delay the decision on Plaintiffs’ motion for conditional certification, as a class could not materialize in many other different scenarios. *Id.* at *7. The Court noted that Plaintiffs and other MFLCs shared the same job title and similar duties. Defendants had standard policies which applied to all MFLCs, who were also all subject to the same employment agreement with Defendants, and Defendants classified all MFLCs as exempt employees, and did not pay them for overtime hours. Additionally, Plaintiffs made a showing that the MFLCs had similar duties regardless of the type or location of assignment they were given. MFLCs testified that their work on different assignments was fundamentally similar, and that Defendants treated them as interchangeable units. One MFLC explained that the MFLC position was, by design, standardized so that any fully trained MFLC could step in and perform the job duties of any other MFLC with little to no disruption in services. Thus, the Court found that Plaintiffs made the requisite showing that the MFLCs were similarly-situated, and that they need not show that the position was identical. Accordingly, the Court granted Plaintiffs’ motion for conditional certification under 29 U.S.C. § 216(b).

*Zulewski, et al. v. The Hershey Co., 2013 U.S. Dist. LEXIS 58299 (N.D. Cal. April 23, 2013).* Plaintiffs brought an action alleging that Defendant had wrongfully misclassified its retail sales representatives (“RSRs”) as exempt employees and denied them overtime compensation. Plaintiffs sought to certify both a nationwide FLSA collective action on behalf of all RSRs and a Rule 23 class action on behalf of all RSRs in California. Earlier, although Defendant filed a motion to deny class certification, the presiding judge never ruled on the motion, and when the case was reassigned, the motion was vacated. Thus, Defendant re-noticed the motion to deny class certification to Plaintiffs’ proposed class consisting of all RSRs who worked in California within the limitations period who did not fully and completely resolve these claims in a related action entitled *Campanelli v. The Hershey Co.*, Case No. 08-CV-1862 (N.D. Cal.). The Court granted the motion. Plaintiffs asserted that Defendant’s motion was premature because Plaintiffs had not re-noticed their Rule 23 certification motion. The Court observed that because the original motion was briefed more than a year ago, Plaintiffs and their counsel had since had ample opportunity to conduct discovery regarding class certification, and thus Defendant’s motion to deny class certification was not premature. Second, the Court stated that the dispositive issue was whether the California class could be certified under Rule 23(b)(3). The Court noted that Plaintiffs did not address Rule 23(b) in their opposition, thereby failing to meet their burden, which was fatal to class certification. Further, the Court remarked that although Plaintiffs all worked for Defendant in the same position classification and were all allegedly misclassified as exempt employees, this was not enough to meet the predominance requirement of Rule 23(b). The Court also stated that this litigation would not resolve all California claims, because the parties had agreed to stipulate to the dismissal with a tolling agreement of all California state law claims except for California state law overtime claims. Thus, because the class action would not resolve all California state law claims, the Court found that predominance was not satisfied. Additionally, only five of the approximately 53 California RSRs chose to opt-in. The Court noted that allowing an opt-out class action under 29 U.S.C. § 216(b), with the knowledge that many potential class members were non-responsive to the FLSA opt-in collective action, could amount to a deprivation of rights. *Id.* at *12. This, the Court found, was a genuine possibility because with the tolling of most state law claims, individual class members would be limited to litigating the denial of compensation for meal and rest breaks, and precluded from contesting the issue of overtime, the principal source of damages. Accordingly, the Court determined that Plaintiffs did not satisfy Rule 23(b)(3), as the adjudication of selected state law claims did not achieve judicial economy and only served to limit the ability of California RSRs to individually recover damages for those tolled state law claims. Thus, because Plaintiffs did not meet their burden in showing that the Rule 23 requirements had been met, the Court granted Defendant’s motion to deny class certification.
Seyfarth Shaw LLP

Tenth Circuit

Barbosa, et al. v. National Beef Packing Co., L.P., 2013 U.S. Dist. LEXIS 12815 (D. Kan. Jan. 31, 2013). Plaintiffs, a group of hourly production employees, brought a collective action seeking straight time pay, overtime premiums, and related penalties and damages under the FLSA. Defendant required Plaintiffs to swipe an electronic security badge to enter the plant’s security gate and to clock-in and out of their shifts. Plaintiff alleged that despite the use of badges, Defendant did not use that system to record compensable wages, and rather used a “gang time” system, which paid hourly production employees only for the time that they worked on a running production line. Id. at *6. Defendant did not compensate hourly production employees for time spent at the plant but away from their respective production lines, or for time spent at the production line when it was not moving and producing product. Defendant paid some hourly production employees for additional time, up to nine minutes, as donning and doffing pay. Id. Plaintiffs sought conditional certification of class consisting of all hourly production employees who have been subject to Defendant’s “gang time” compensation practices at Defendant’s Liberal, Kansas facility for the past three years. Additionally, Plaintiffs sought approval of their proposed notice, to require Defendant to post the notice at its facility, to require Defendant to provide certain information regarding individual class members, to designate Plaintiffs as class representatives, and to appoint Plaintiffs’ counsel to act as class counsel. The Court granted the motion. Plaintiffs asserted that they had adequately shown that Defendant similarly treated putative class members under a single decision, policy, or plan that did not fully compensate them for widespread off-the-clock work. Defendant argued that putative class members were not similarly-situated due to differences in compensation methods and production-related tasks. Defendant asserted that individual supervisors had discretion to change an employee’s job position and compensation method on an ad-hoc, day-to-day basis, and that Plaintiffs’ claims failed on the merits. Defendant also contended that each production job required different combinations of equipment and tools, which required differing amounts of time to put on and off and to clean. The Court noted that under the lenient standard of 29 U.S.C. § 216(b), Plaintiffs satisfied their minimal burden of substantially alleging that Defendant similarly treated putative class members under a single decision, policy, or plan, which resulted in hourly production employees not receiving pay for off-the-clock duties. Accordingly, the Court conditionally certified the collective action. Regarding Plaintiffs’ proposed notice, the Court observed that it did not provide a deadline for individuals to opt-in to the collective action. The Court directed Plaintiffs to modify the proposed notice and consent form to provide a reasonable time for individuals to return consent forms and opt-in to the collective action. Plaintiffs also asked that Defendant post the notice both in English and Spanish in the Liberal facility in addition to mailing it. The Court found that Plaintiffs did not show that posting the notice at the Liberal facility was necessary. The Court stated that if Defendant did not have current addresses for many of its current employees, Plaintiffs could renew their request.

Gordineer, et al. v. Rocky Mountain Offender Management Systems, 2013 U.S. Dist. LEXIS 7195 (D. Colo. Jan. 17, 2013). Plaintiffs, a group of former case managers, brought a collective action alleging that Defendants denied hourly wages and overtime pay in violation of the FLSA. Plaintiffs alleged that Defendants required employees to work to off-the-clock, including work during unpaid meal breaks, without overtime pay. Plaintiffs also alleged that Defendants set overtime policies on a uniform basis, through the use of company memoranda and policies applicable to all employees and enforced uniform policies for individuals employed as case managers, through the Rocky Mountain Offender Management Systems (“RMOMS”) University. Plaintiffs further alleged that Defendant knew that they worked overtime hours for which they were not being paid. Named Plaintiff Robert Losh asserted that he could not get his work done within 40 hour workweek, yet his supervisors did not allow him to claim and receive overtime for the hours worked, and they changed his time-card reports to eliminate overtime hours so that he did not receive overtime pay. Plaintiffs also alleged that they observed other case managers worked beyond normal shift hours. The Court granted Plaintiffs’ motion for conditional certification and court-supervised notice. The Court noted that the declarations alleged that a number of managers over a number of years participated in Defendants’ alleged policy of denying payment for wages and overtime compensation to Plaintiffs and others who were or are similarly-situated. Id. at *5. Plaintiffs made substantial allegations, which were supported by declarations and Defendants’ documents, showing that there were questions of law and fact common to Defendants’ employees and the named Plaintiffs. Id. at *7. Defendants argued that Plaintiffs
were subjected to a policy that was dissimilar to that applied to other employees, and therefore, conditional certification was inappropriate. The Court, however, opined that an individualized analysis of Plaintiffs’ claims and Defendants’ defense was more appropriate during decertification at the conclusion of discovery, and not at the first step of the notice stage of conditional certification under 29 U.S.C. § 216(b). Id. at *8. Further, the Court stated that the class should not be limited to Colorado RMOMS employees. However, it would be limited to individuals previously or presently employed as case managers within three years from the date the conditional certification order was issued. Further, the Court directed parties to meet and confer on the contents of the notice.


Plaintiffs, a group of drivers, brought a class and collective action alleging failure to pay minimum wage and overtime premiums in violation of the FLSA, failure to pay for all hours worked and for overtime, to keep accurate records of all hours worked by employees in violation of Missouri Revised Statutes (“MMW”), and deduction of certain expenses from their compensation in violation of the Kansas Wage Payment Act (“KWPA”). Plaintiffs moved for certification of a class comprising of all current and former drivers who were employed by Defendant from August 31, 2008 to the present, who were compensated on a piece-rate basis at a rate less than the minimum wage, who were not paid overtime compensation when they worked more than 40 hours in a workweek, and/or whose compensation had been deducted to pay for credit card charges, lost or damaged property, and disciplinary reasons. The Court granted the motion. Defendant’s drivers were subject to the same policies, which remained consistent over the last several years. Drivers were paid based on each job, with a minimum two paid hours, and hours accrued from when they picked a client up until they dropped a client off at a destination. Drivers were not paid for the time spent inspecting, cleaning, and preparing the vehicle. Further, although drivers were expected to arrive at the client location at least 10 to 15 minutes prior to the scheduled pick-up time, they were not paid for this time, nor were they paid while waiting at a location between jobs. Moreover, drivers did not clock-in and clock-out when they picked up and dropped off the vehicle, and Defendant did not track drivers’ actual work time beyond the time from pick-up to drop-off. Drivers were not paid an overtime premium and their paychecks were subject to deductions by Defendant. The parties agreed that the potential class consisted of approximately 140 current and former drivers, and thus the Court found that numerosity was satisfied. The Court observed that the questions of whether Defendant violated the FLSA, the MMW, and/or the KWPA adequately established commonality. Although Defendant argued that Plaintiff Pinkston was not a typical driver because he worked only six weeks and never more than 40 hours, the Court opined that he was a typical member of the class because his claims and those of the potential class members were based on the same legal or remedial theory. Defendant argued that Pinkston’s interests were adverse to current drivers who benefitted from Defendant’s pay policies because they could be paid for more time than their trips actually took. The Court, however, remarked that if the current payment system did not violate the law, then the system need not change and the current drivers would not be affected. Finally, the Court opined that class action was superior form of adjudication because in individual lawsuits each driver would assert the same claims, using the same evidence and seeking the same remedy. Accordingly, the Court granted the motion for class certification.


Plaintiff, a former project engineer, brought a FLSA collective action alleging that Defendants misclassified him as an exempt employee for overtime purposes. Id. at *4-5. Plaintiff moved for conditional certification and approval of his notice form. The Court granted the motion for conditional certification and ordered the parties to meet and confer regarding the notice. Plaintiff submitted declarations from himself and two other engineers who stated that the company had a policy of requiring all exempt employees to work 100 hours per each two-week period, requiring such employees to make up lost work time spent on absences of less than a day, and deducting pay from the wages of such employees when their hours worked during a two-week period were less than 100 hours by more than a minimal amount. Plaintiff alleged that his job duties did not meet the requirements for exempt status, and that Defendants made deductions from his wages within both workweeks and pay periods when he did not meet Defendants’ minimum hourly requirements. Id. at *6. During Plaintiff’s employment, Defendants employed more than 25 employees at its plant in
Kansas, and Plaintiff alleged that these similarly-situated employees were paid pursuant to the same policies and practices that Defendants paid him, and were denied overtime. Plaintiff requested conditional certification of: (i) all purportedly exempt administrative, executive, and professional employees regardless of the department and facility within which they worked; and (ii) all engineers in the engineering department in which Plaintiff worked. According to Plaintiff, the same alleged unlawful pay plan was applied to all purportedly white-collar exempt employees, thus, making him similarly-situated to all such employees, regardless of department or location within the company. The Court noted that the declarations supported this argument, and the declarants alleged that they had knowledge that the same practices applied to other exempt employees. Id. at *17. The Court held that Plaintiff had set forth substantial allegations, supported by the declarations, sufficient to warrant certification of a collective action of exempt professional employees under the lenient conditional certification requirements. Id. at *20-21. The Court also found that for the same reason, Plaintiff had also satisfied the requirements for conditional certification of the proposed collective action of engineers within his engineering department. Id. at *23. Because the parties had not yet met and conferred regarding the notice to be sent to putative collective action members, the Court denied Plaintiff’s motion regarding the form and substance of the notice and consent-to-join forms. Finally, the Court directed Defendants to provide Plaintiff’s counsel with a list of all present and former employees within the designated classes, with last known addresses and telephone numbers within the specified timeframe. Id. at **26.

**Eleventh Circuit**

*Billingsley, et al. v. Citi Trends, Inc.*, 2013 U.S. Dist. LEXIS 8910 (N.D. Ala. Jan. 23, 2013). Plaintiffs, a group of store managers (“SMs”), brought a collective action alleging that Defendant had a uniform policy and practice that required SMs to work over 40 hours per week without receiving an overtime premium in violation of the FLSA. All SMs operated under identical job descriptions, which Defendant classified as salary/exempt and not entitled to overtime. Id. at *2. Further, Defendant had a uniform job description for all SMs nationwide, but conceded that the day-to-day experiences of SMs varied from store to store. The Court granted Plaintiffs’ motion for conditional certification, and granted in part and denied in part Plaintiffs’ motion for corrective action in their motion to strike and entry of protective order. Before Plaintiffs filed a motion for conditional certification, Defendant initiated company-wide, in-person meetings between two corporate representatives and potential class action members. During these meetings, every SM, with few exceptions, executed a declaration about their job duties and signed an arbitration agreement binding them to arbitrate any claims against Defendant. Id. at *8. Every SM also was presented with a disclosure about the lawsuit and the arbitration agreement’s impact on his or her rights in the lawsuit. Id. In regards to Plaintiff’s motion to strike the arbitration agreement, the Court noted that individualized meetings between potentially adverse parties, particularly within the context of an employer-employee relationship, is susceptible to abuse. Id. The Court further noted that the Eleventh Circuit recognized the potential for coercion in such situations and held that under Rule 23, the Court may invalidate opt-outs when they were procured through fraud, duress, or other improper conduct. Id. at *8-9. The Court observed that Defendant had an obvious interest in diminishing the putative class’ size, and that unsupervised communications were likely to impair an employee’s decision-making abilities concerning their involvement in the lawsuit; however, at the same time, the Court also noted that some employees may have decided to opt-out without any coercion or duress. Id. at *9. Accordingly, the Court granted in part and denied in part Plaintiffs’ motion to strike, allowing employees who alleged that they were coerced into signing the arbitration agreement to nevertheless opt-in to the lawsuit. Defendant argued that Plaintiffs could not show a reasonable basis to determine that the potential Plaintiffs were similarly-situated. Id. at *10. Plaintiffs asserted that the potential opt-ins were similarly-situated because each SM was subject to the same company-wide, uniform job description, responsibilities, and pay practices. Id. Further, Defendant characterized all SMs as salary-exempt, regardless of the region, district, or store they worked in and regardless of the store’s size, level of shrinkage, volume of merchandise, or any other store-specific characteristic. Id. Plaintiffs argued that the universal classification resulted in a class-wide legal issue that could be uniformly resolved for all SMs. Id. Plaintiffs relied on the declarations of eight SMs from Alabama, Florida, Wisconsin, and Illinois, all of whom stated that they performed non-exempt duties for 80% of their working time, and consequently were not exempt under the FLSA. Id. The Court opined that
Plaintiffs’ allegations and opt-in declarations were sufficient to conclude that the potential class was similarly-situated, particularly because Defendant conceded that the challenged action was a company-wide policy. Accordingly, the Court also granted Plaintiff’s motion for conditional certification and Court-approved notice.

**Bradford, et al. v. CVS Pharmacy, Inc., 2013 U.S. Dist. LEXIS 14403 (N.D. Ga. Feb. 4, 2013).** Plaintiff, a former regional loss prevention manager (“RLPM”), brought a collective action alleging that Defendant improperly classified RLPMs as exempt from the FLSA’s overtime requirements and denied them overtime compensation. Plaintiff moved for conditional certification. The Court granted Plaintiff’s motion. Although Defendant did not dispute that its RLPMs were similarly-situated in terms of pay provisions, it argued that RLPMs had different job requirements, and that an individual assessment of each RLPM was required to determine overtime eligibility. Plaintiff divided the nationwide class into sub-classes. Class A encompassed those RLPMs under the same Area Director responsible for loss prevention in Virginia, Washington, D.C., Maryland, and Pennsylvania. Class B encompassed those RLPMs under the same Area Director responsible for loss prevention in Louisiana, Texas, Mississippi, and Oklahoma. Class C encompassed those RLPMs under Area Director Paul Lehman, who was responsible for loss prevention in Georgia, South Carolina, and North Carolina. Class D encompassed those RLPMs under Area Director Chris Knight, who was responsible for loss prevention in New York, Pennsylvania, New Jersey, Delaware, and Ohio. Class D also encompassed those RLPMs under Area Director Don Dugger, who was responsible for loss prevention in Pennsylvania, Ohio, Kentucky, Tennessee, West Virginia, and Minnesota. Plaintiff presented affidavits to support the claim that he was similarly-situated with those RLPMs in their respective areas and rebut Defendant’s claim that RLPMs were exempt from the FLSA’s overtime requirements according to the managerial and administrative exemption defenses. Plaintiff stated that he worked with and had personal contact with the RLPMs in their respective regions, and that all RLPMs were subject to the same corporate policies and had the same job requirements and pay provisions. Further, Plaintiff presented declarations from RLPMs in four of Defendant’s nine nationwide areas. Moreover, opt-in Plaintiffs in five of the nine areas filed consents. The Court observed that even if one viewed the opt-in Plaintiffs as representing only eight of 41 states in which RLPMs worked instead of five of nine areas, as Defendant urged the Court to do, the sample was still significant. Further, all RLPMs had the same job description, and all reported to Area Directors who in turn all reported to Mike Silveira. While the Court agreed that a company’s management structure alone cannot justify a nationwide collective action, there was other evidence that allowed a finding of reasonable basis that all RLPMs nationwide were similarly-situated. *Id.* at *11. The Court found that Plaintiff also showed a reasonable basis for his claim that other RLPMs wished to opt-in to this action. Six consents were filed before the Plaintiff’s motion, and three more were filed during briefing. The Court thus opined that these numbers were significantly higher than other cases in the Eleventh Circuit in which conditional certification was granted. *Id.* at *15. Accordingly, the Court granted Plaintiff’s motion for conditional certification and issuance of notice to putative collective action members.

**Chalker, et al. v. Burlington Coat Factory Of Florida, LLC, 2013 U.S. Dist. LEXIS 159628 (M.D. Fla. Nov. 7, 2013).** Plaintiff, a loss prevention associate (“LPA”), brought an FLSA action alleging that Defendants forced her and other LPAs to work overtime, off-the-clock, and without compensation. Plaintiff moved for conditional certification of a collective action consisting of all LPAs who were denied overtime pay. In an attempt to establish that all LPAs were similarly-situated, Plaintiff identified the statements of Defendant’s managers to prove that they were victims of a common, unlawful policy that violated the law. One manager admitted that although the hourly, non-exempt employees were restricted to no more than 40 hours per week, he noted that these employees, including the LPA in his region, were told by their store managers to work off-the-clock in order to complete their job duties. The Court noted that these statements did not establish a company-wide policy; rather it was individual store managers who instructed the employees to work without pay. The Court observed that these statements disproved Plaintiff’s contention that a common scheme applied uniformly to force employees to work off-the-clock. Further, the Court noted that these statements identified a common policy, that the company instructed the employees not to work overtime, which was lawful and different from a policy that forces employees to work off-the-...
Similarly, the Court identified another manager’s e-mail, which showed that overtime was allowed if the overtime was approved by him and that he never said that employees should work overtime without pay. Therefore, the Court opined that discouraging an employee’s working overtime was not unlawful and insufficient to warrant conditional certification. Id. at *6. Further, the Court stated that one manager showed that the company disfavored overtime work and required supervisory approval for overtime, but he never claimed that company policy required an employee to work without compensation. Accordingly, the Court conducted that the individualized inquiries made the certification of a collective action unwarranted. Although Plaintiff had presented evidence that Defendant discouraged overtime, she had presented no evidence of a common scheme applied uniformly and nationwide across more than 500 stores to force employees to work off-the-clock. Instead, Plaintiff’s evidence suggested, that one or more store managers, acting independently and not in accord with a common policy, forced some employees to work overtime without compensation. Accordingly, the Court denied Plaintiff’s motion for conditional certification under 29 U.S.C. § 216(b).

Greenhill, et al. v. Wise Alloys, LLC, 2013 U.S. Dist. LEXIS 135503 (N.D. Ala. Sept. 23, 2013). Plaintiff brought an FLSA collective action alleging that Defendant denied compensation, including overtime pay, to its hourly production workers by requiring them to work off-the-clock. Defendant’s aluminum rolling plant consisted of three separate facilities, which were located at different locations and where employees were represented by different unions. Employees in these three facilities performed different tasks under entirely different supervisors, and worked different shifts. Plaintiff moved for conditional certification on behalf of all current and former hourly production employees, who were not compensated for all hours worked and as a result were not paid compensation, including overtime. The Magistrate Judge recommended denying certification, and the Court adopted the recommendation of the Magistrate Judge. The only competent evidence submitted by Plaintiff was his time records for the period May 14, 2010, to May 15, 2012, which showed the work date and day, the scheduled exit time, the time Plaintiff actually clocked-out, and the time he exited the plant gate. The records also showed the difference between the clocking-out time and the scheduled shift end time. Plaintiff did not file any declarations or affidavits with his motion, and the Magistrate Judge noted that although lenient, a Plaintiff’s burden at the conditional certification stage is not invisible. It cannot be sustained by counsel’s unsupported assertions that FLSA violations were widespread and that additional Plaintiffs would join the action. While Plaintiff produced no evidence to show that he was similarly-situated, the evidence presented by Defendant demonstrated that Plaintiff and the broad class of all hourly production employees had not been affected by a common policy or plan that violated the FLSA, nor did they share common supervision, jobs or work locations. Further, Plaintiff’s time records showed that he clocked-out an average of 52 seconds after the end of his shift and that he exited the property an average of 90 seconds after clocking-out, and the time he exited the plant gate. The records also showed the difference between the clocking-out time and the scheduled shift end time. Plaintiff did not file any declarations or affidavits with his motion, and the Magistrate Judge noted that although lenient, a Plaintiff’s burden at the conditional certification stage is not invisible. It cannot be sustained by counsel’s unsupported assertions that FLSA violations were widespread and that additional Plaintiffs would join the action. While Plaintiff produced no evidence to show that he was similarly-situated, the evidence presented by Defendant demonstrated that Plaintiff and the broad class of all hourly production employees had not been affected by a common policy or plan that violated the FLSA, nor did they share common supervision, jobs or work locations. Further, Plaintiff’s time records showed that he clocked-out an average of 52 seconds after the end of his shift and that he exited the property an average of 90 seconds after clocking-out at the end of his shift. To the extent Plaintiff sought payment for the time spent walking from his work station to the time clock, and then to the plant exit, the Court found that such time was not compensable under the FLSA. Further, to the extent Plaintiff argued that his time records showed some instances where he swipe out more than 52 seconds after his shift ended and that such instances represented FLSA violations, the Court remarked that Plaintiff failed to show a common policy or practice affecting all production employees that resulted in these alleged FLSA violations. The Court observed that neither Plaintiff, nor any other employee or the unions representing them, had filed any grievance or request to arbitrate any claim for uncompensated work off-the-clock. The record demonstrated that only seven other employees or former employees out of 545 hourly production workers wished to join the action. Because there was no indication where these seven employees worked it was impossible to determine if they were similarly-situated to Plaintiff with respect to their job requirements and pay provisions. Thus, because Plaintiff failed to show that putative class members were victims of a single decision, policy, or plan that was violative of the FLSA, the Court denied Plaintiff’s motion for conditional certification under 29 U.S.C. § 216(b).

Palma, et al. v. Metropcs Wireless, Inc., 2013 U.S. Dist. LEXIS 175934 (M.D. Fla. Dec. 16, 2013). Plaintiffs, a group of account service representatives (“ASRs”), brought an FLSA action alleging that because they were misclassified as exempt employees, as they were paid salary plus commissions instead of overtime premiums. Plaintiffs moved for conditional certification of a nationwide collective action.
comprised of ASRs employed within the last three years who were paid salary plus commissions and who earned less than $100,000 per year for any period of their employment within the statute of limitations, and who were not paid overtime compensation for hours worked over 40 in a workweek. *Id.* at *3.* The Court granted the motion. The Court found that the nine opt-in notices showed that other ASRs desired to join in the action. The Court noted that all ASRs were classified as exempt from overtime, and completed standardized duties, which for the purposes of the notice stage showed that they were substantially similar. The declarations Plaintiffs submitted shared common allegations showing that neither the job duties nor the manner in which Defendant paid an ASR changed in any material way; that Defendant never paid for overtime; and that Defendant classified everyone in the ASR position as exempt from overtime. *Id.* at *8.* Further, the Court observed that each declaration was similar and asserted that ASRs performed standardized duties with the primary duty being to develop and maintain supportive relationships with Defendant’s existing accounts. Relative to Defendant’s motion to strike declarations submitted by Plaintiffs, the Court found that one of Plaintiffs’ declarants, a former manager, had entered into a separation agreement with Defendant, and in consideration of $47,960.93, had agreed to refrain from making any harmful or negative statements about Defendant. The manager, in her declaration, had stated that Defendant violated the FLSA, which the Court opined was a harmful and negative statement about Defendant. Accordingly, the Court declined to consider this declaration and struck it from the record. *Id.* at *17.* Defendant sought to limit Plaintiffs’ action to ASRs located in Florida, New York, and California. The Court determined that Plaintiffs, however, presented a reasonable basis for finding that all ASRs nationwide were similarly-situated. Plaintiffs offered declarations from ASRs from Florida, New York, and California and supplied uniform job descriptions for ASRs job openings in Pennsylvania, Florida, New York, Michigan, Georgia, and Rhode Island. *Id.* at *18.* Accordingly, the Court declined to limit the scope of the collective action and granted nationwide conditional certification.

**Pittman, et al. v. Comfort Systems USA, Inc., 2013 U.S. Dist. LEXIS 19434 (M.D. Fla. Feb. 13, 2013).** Plaintiff, a service technician, brought a collective action under the FLSA alleging that he was not compensated for the time he spent traveling from his last jobsite to his in-home office, or for the time he spent scanning, e-mailing, and faxing paperwork to Defendant at the end of each workday from his in-home office. Plaintiff moved for conditional certification of the FLSA collective action and the Court granted the motion. Plaintiff asserted that since the filing of his lawsuit, five remote service technicians employed by Defendant had come forward to participate in this case by opting-in and that the remote service technicians had similar claims to Plaintiff. Plaintiff requested the Court to permit, under its supervision, notice to all full-time remote service technicians employed by Defendant in Florida within the last three years. Defendant agreed that it did not have a reasonable basis to oppose Plaintiff’s satisfaction of this preliminary threshold because five similarly-situated individuals had already opted-in to the lawsuit and other individuals had expressed an interest in opting-in too. Defendant stated that it did not object to Plaintiff’s proposed notice to the extent that it would be sent only to remote service technicians who reported to Defendant’s Tampa office within the statute of limitations, but objected to certain details contained within the form of Plaintiff’s proposed notice. Defendant also argued that the Court should address other issues surrounding the notice, since the proposed 90-day notice period was overbroad (and Defendant requested a 60 day notice period). The Court held that a 90-day notice period was appropriate and overruled this objection. Defendant further argued that Plaintiff’s request for disclosure of the putative class member’s names, addresses, phone numbers, social security numbers, and e-mail addresses was unnecessary because Defendant was willing to transmit the notice to all putative class members. The Court remarked that the disclosure of social security numbers and phone numbers was not necessary and impacted the putative class members’ privacy. Further, the Court concluded that communication through e-mail, in addition to regular mail, was fair and proper notice. The Court agreed that Plaintiff’s proposal to send a reminder notice postcard to the putative class members at the half-way point in the notice period was inappropriate. Accordingly, the Court conditionally certified a class of current and former full-time remote service technicians who worked for Defendant based out of the Tampa, Florida office from the last three years.

Plaintiff, a driver/messenger, brought an FLSA action alleging that Defendant failed to pay him and other driver/messengers overtime wages. Plaintiff alleged that Defendant considered its drivers/messengers exempt from the FLSA’s requirement to pay overtime after 40 hours, and implemented a policy under which work was paid at overtime rates only after 50 hours of work per week. Plaintiff filed a motion seeking to conditionally certify a collective action consisting of current and former drivers/messengers who worked for Defendant’s Tampa, Orlando, West Palm Beach, and Miami branches in the last three years. The Court granted the motion in part. As a threshold matter, Defendant argued that the purported collective action was exempt from overtime requirements and relied on Baez v. Wells Fargo Armored Service Corp., 938 F.2d 180 (11th Cir. 1991), where the Eleventh Circuit had concluded that armored truck drivers and guards were exempt from overtime requirements. Baez found that Defendant was a motor carrier whose transportation of property was subject to the Secretary of Transportation’s jurisdiction under the motor-carrier exemption. Id. at *7. The Court remarked that although the collective action that Plaintiff sought to conditionally certify shared many similarities with the class in Baez, at the conditional certification stage, all that a Court needed to ascertain was whether other employees desired to opt-in, and if they were similarly-situated to Plaintiff. Id. at *8. The Court remarked that if the drivers/messengers were classified as exempt, it weighed in favor of the argument that the class was similarly-situated. Id. at *9. The Court found that a similarly-situated analysis has five factors at the conditional certification stage, including: (i) whether Plaintiffs held the same job title; (ii) they worked in the same geographic location; (iii) the alleged violations occurred during the same time period; (iv) whether all Plaintiffs were subjected to the same policies and practices; and (v) the extent to which the actions which constituted the violations claimed by Plaintiffs were similar. Id. at *16. As to the third factor, Plaintiff alleged that all the putative collective action members were classified by Defendant as exempt. Defendant argued that an employer’s practice of classifying a group of employees as exempt was not a basis for proceeding collectively. The Court remarked that uniform classification of a group as exempt under the FLSA, even if not sufficient to prove the group was similarly-situated for the purpose of collective action certification, certainly did not suggest that the group could be dissimilar. Id. at *21. As a result, the Court concluded that driver/messengers were subjected to the same policy and practices for the purposes of conditional certification. The parties also disputed about the form and content of the notice and consent forms to be sent to potential opt-in Plaintiffs. Plaintiff separately moved for equitable tolling of the limitations period for 31 days in response to the Court’s granting of Defendant’s motion for a 30 day extension to respond to the motion for conditional certification. Id. at *26. The Court found that Plaintiff failed to show extraordinary circumstances that prevented an employee from filing a written consent to join the action. Accordingly, the Court denied Plaintiff’s motion for equitable tolling. Id. at *27.


Plaintiff filed a collective action under the FLSA alleging that he and other similarly-situated employees were denied overtime compensation throughout their employment. Plaintiff sought to represent all current and former salaried recruiters who were employed by Defendant at any time during the past three years. In support of his motion for conditional certification, Plaintiff submitted four declarations from current or former employees alleging: (i) recruiters were hired as entry-level employees; (ii) recruiters would work approximately 50 hours a week; (iii) recruiters assisted in the placement of nurses by screening potential candidates; (iv) recruiters never received overtime pay despite working more than 40 hours per week; (v) and recruiters reported to an account manager and mostly did not have discretion, judgment, or ability to make decisions concerning hiring, firing, discipline, or assignment of duties. Defendant asserted that Plaintiff had not established that the putative collective action members were similarly-situated because their duties and pay varied by branch office and level of experience of each recruiter. Furthermore, Plaintiff and the opt-in Plaintiffs’ declarations all purported to be homecare recruiters, which carried different duties and levels of responsibility from other types of recruiters. The Court remarked that in their declarations, the opt-in Plaintiffs attested that they were hired as recruiters, and that their job duties as entry-level recruiters in the homecare sub-division did not include discretion. Defendant argued that Plaintiff did not make a showing that the members of the broad collective action that he sought would be similarly-situated to him. Specifically, neither Plaintiff nor the opt-in Plaintiffs provided any evidence regarding the job duties of the
recruiters in the other sub-divisions in the homecare division, nor any knowledge regarding recruiters in the other divisions. In light of the declarations submitted by Defendant, which were more detailed and particularized compared to Plaintiff’s generic declarations, the Court concluded that Plaintiff had not met his burden of demonstrating a “reasonable basis” for his contention that the nationwide collective action for all recruiter types was appropriate. Id. at *7. Because Plaintiff failed to satisfy his minimal burden, the Court limited the conditional certification to homecare division recruiters.

Stevenson, et al. v. The Great American Dream, Inc., 2013 U.S. Dist. LEXIS 114419 (N.D. Ga. Aug. 14, 2013). Plaintiffs, a group of nightclub entertainers, brought an FLSA action seeking damages for violation of the minimum wage and overtime wage requirements. Plaintiffs moved for conditional certification of a collective action and sought to send notice to all entertainers who worked at Pin Ups Nightclub (“Pin Ups”) in the past three years. The Court granted the motion. Defendants argued that the entertainers were independent contractors rather than employees and thus fell outside the protections of the FLSA. The Court, however, noted that at the conditional certification stage, the focus is not on whether there has been an actual violation of law but rather on whether the proposed Plaintiffs are similarly-situated. Id. at *5. Defendants classified all entertainers as independent contractors rather than as employees, and did not pay them a minimum wage for all hours worked at Pin Ups. The entertainers were not paid hourly wages and were required to pay house fees. Further, all entertainers performed the same job duties of performing for customers at Pin Ups and providing customers with personal dances when requested. Accordingly, the Court stated that all current and former entertainers at Pin Ups were similarly-situated. The Court observed that Plaintiffs showed a reasonable basis for their claim that other entertainers wished to opt-in to this action because one consent was filed during the briefing of the motion. Accordingly, the Court directed Defendants to provide Plaintiffs with a list of the names, last known addresses, phone numbers, dates of birth, last four digits of Social Security numbers, and employment dates of all entertainers within three years prior to the date of the order.

Stuven, et al. v. Texas De Brazil (Tampa) Corp., 2013 U.S. Dist. LEXIS 22240 (M.D. Fla. Feb. 19, 2013). Plaintiff, a server at Defendants’ restaurant, brought a collective action alleging that Defendants required him to pay for his own uniforms and that Defendants failed to pay the correct rate of overtime pay for tipped employees in violation of the FLSA and the Florida Constitution. Plaintiff sought conditional certification of a collective action comprised of a class of servers and bartenders who worked for Defendants in Florida in the last three years. The Court granted the motion. In his declaration, Plaintiff stated that based on his personal experience in the two stores in which he worked, he could confirm that all servers and bartenders were paid an hourly wage plus tips. Plaintiff asserted that other servers and bartenders he worked with had to pay for their own uniforms and that each of them were treated the same. The Court considered whether there was a showing that a sufficient number of other servers were interested in joining the lawsuit. Although Defendants argued that the fact that there were only three opt-in Plaintiffs demonstrated a lack of sufficient interest in the lawsuit, the Court noted that even a fewer number of opt-in Plaintiffs demonstrated a sufficient interest in the lawsuit at this stage of the litigation. Id. at *9. Accordingly, the Court opined that the complaint, in combination with the declarations and the presence of three additional opt-in Plaintiffs, presented adequate evidence that others desired to join this action. Id. at *10. Defendants also argued that Plaintiff was unable to represent a putative collective action consisting of both servers and bartenders, as he had never held the latter position. The Court, however, noted that Plaintiff presented sufficient evidence to find that both positions were similarly-situated for purposes of conditional certification. The Court stated that because all servers and bartenders were hourly employees paid by the tip credit and subject to the same uniform deductions, Plaintiff had made a sufficient showing that servers and bartenders were similarly-situated. Defendants further argued that the collective action should be limited to the locations where Plaintiff worked and that notice should only be sent to those locations. The Court remarked that Plaintiff need not show that he worked at all Defendants’ locations to have knowledge that Defendants imposed its policies at all locations. Plaintiff submitted the uniform policy and uniform acknowledgement form that purportedly applied to employees working at all Florida locations. Plaintiff also alleged that Defendants’ policies regarding paying for uniforms and the incorrect overtime rate were common to all servers and bartenders in Florida. Accordingly, the Court opined that servers and
bartenders throughout Florida were paid in a similar manner. Finally, Defendants argued that virtually all current and former employees, who separated after January 2012, signed a valid dispute resolution agreement containing a provision that required arbitration of all claims and a class action waiver. Thus, pursuant to the parties’ agreement, the Court stated that the class should exclude employees who signed arbitration agreements, and the proposed notice should reflect this exclusion. Accordingly, the Court conditionally certified a class of servers and bartenders who worked at any Florida location between June 7, 2009, to the present.

**Whitaker, et al. v. Kablelink Communications, LLC, 2013 U.S. Dist. LEXIS 157675 (M.D. Fla. Nov. 4, 2013).** Plaintiff brought an FLSA action alleging that Defendants unlawfully classified him and other lead or field supervisors as independent contractors and deprived them of overtime compensation. Plaintiff moved to conditionally certify a collective action consisting of all leads who performed work for Defendants in Florida or North Carolina within the last three years and who were classified as independent contractors and not paid overtime wages in any workweek where they worked over 40 hours. The Court granted the motion. First, regarding the similarly-situated requirement, Plaintiff filed a declaration, as well as declarations from five other leads who worked in Florida, showing that the work performed by leads was similar to the work performed by Plaintiff and that the leads were similarly-situated to Plaintiff with regard to their pay provisions. Defendants filed a declaration of their chief executive officer, Craig Cuffe, stating that the potential opt-in Plaintiffs had varying job duties, responsibilities, and pay structures which varied from location to location. The declaration, however, did not elaborate on what the differences were in the pay structures or provide what factors vary by location that created these differences. Defendants pointed out that none of Plaintiff’s declarations were from a lead working in North Carolina, and that the pay structure and job duties of North Carolina leads were different than those in Florida. Based on the leads’ declarations, the Court concluded that Plaintiff had made a sufficient showing that the leads working in Florida were similarly-situated to Plaintiff. However, because Plaintiff failed to demonstrate that North Carolina leads were similarly-situated to those in Florida, the Court found that conditional certification should be granted only as to all Florida leads. Defendants also argued that Plaintiff had improperly calculated the relevant timeframe for the FLSA claims, because a two year period, as opposed to a three year period, should be used because Plaintiff had not produced any evidence that Defendants willfully violated the FLSA. The Court, however, stated that Plaintiff had alleged sufficient facts to raise an inference of willfulness in this case and the affidavits submitted by Plaintiff were sufficient to support his request for a three-year period in the § 216(b) notice. Finally, Defendants argued that Plaintiffs’ proposed notice should be modified. Plaintiff agreed to modify the proposed notice to reflect a 45-day opt-in period. The Court instructed that the notice should include language regarding potential liability for costs and attorneys’ fees if the Court found that Plaintiffs were independent contractors and therefore not covered under the FLSA. Accordingly, the Court conditionally certified the collective action for Florida-based leads only.

(xii) **District Of Columbia Circuit**

**Blount, et al. v. U.S. Security Associates, Inc., 2013 U.S. Dist. LEXIS 72819 (D.D.C. May 23, 2013).** Plaintiffs, a group of security guards, brought an action under the FLSA, the D.C. Minimum Wage Act Revision Act, and the D.C. Wage Payment and Collection Law alleging reduction in pay for meal breaks during which Plaintiffs continued working. Plaintiffs alleged that the employment and payroll policies of Defendants were identical in all respects relevant to this action and that the guards had similar job duties. The guards’ duties included securing school facilities, providing protection to faculty and students, patrolling school buildings and grounds, controlling school access points, monitoring visitors, responding to calls for assistance, and maintaining daily patrol logs and incident report. Further, Plaintiffs’ declarations stated that Defendants automatically deducted 30 minutes of pay per shift worked to account for unpaid 30-minute meal breaks, but that during these meal breaks, guards were forbidden from leaving school grounds, were required to carry a radio, and had to be ready to respond to calls for assistance. Plaintiffs asserted that the meal break policy was applied at all 78 schools at which Defendants provided security services and was administered through a centralized payroll system. Plaintiffs moved for conditional certification of two classes, a U.S. Security class and a Watkins D.C. class, each consisting of all security
guards employed by U.S. Security or Watkins D.C. at public elementary and middle schools in the District of Columbia during the period beginning October 1, 2009, and ending January 12, 2012. Plaintiffs also sought approval of notice. The Court granted in part and denied in part Plaintiffs’ motion. The Court found that Plaintiffs had made a sufficient showing that they and potential Plaintiffs together were victims of a common policy or plan that violated the law. Although Defendants contended that the type, frequency, and impact of interruptions to the guards’ meal breaks varied widely from school-to-school and person-to-person, the Court concluded that this case was about a uniformly applied, allegedly unlawful policy, and not a policy alleged to be unlawful because of how it was applied. Thus, the Court remarked that it did not matter that the actual interruptions to meal breaks differed from one guard to the next because the focus of Plaintiffs’ claims was the underlying policy. Id. at *16-17. Accordingly, the Court found that despite some differences among the putative collective action members, Plaintiffs met their modest initial burden of showing that they and the potential Plaintiffs were similarly-situated. Pursuant to Plaintiffs’ requests, the Court instructed Defendants to produce the names and addresses of the proposed collective action members along with their dates of employment. The Court, however, observed that disclosure of phone numbers and dates of birth implicated privacy concerns and would not be required absent particularized need. The Court therefore directed the parties to submit a mutually agreed upon notice.

Driscoll, et al. v. George Washington University, 938 F. Supp. 2d 19 (D.D.C. 2013). Plaintiff, a former Department Operations/Administrative Manager, brought a FLSA and state law class action for unpaid overtime wages. Plaintiff was initially classified as an exempt employee and thereafter reclassified as non-exempt when Defendant undertook a project to review the classifications of many positions, thereby entitling him to prospective overtime payments consistent with the FLSA and the D.C. Minimum Wage Act (“DCMWA”). Defendant also decided to pay reclassified employees overtime pay during the two years prior to the reclassification, and to determine the amount of overtime owed each employee. Defendant relied on managers and supervisors to estimate the overtime hours worked by each reclassified employee. Plaintiff’s supervisor estimated that he had worked 24 hours overtime during the 20 month period he was employed prior to his reclassification. Plaintiff asserted that he had worked in excess of 24 hours of overtime, and provided a spreadsheet containing the hours he worked during one two-week period, which included more than 50 overtime hours. Plaintiff, however, did not identify the total number of overtime hours he believed he worked prior to the reclassification, and Defendant did not pay him any additional money beyond the initial overtime pay. After the Court conditionally certified an FLSA action, Plaintiff moved to certify a Rule 23 class action with respect to his DCWPCL claim and Defendant moved for partial summary judgment as to that claim. The Court granted Defendant’s motion and denied Plaintiff’s motion as moot. Because Plaintiff alleged that he was not paid overtime for all hours he worked, and that the overtime payments he received were only one-half his usual hourly rate, he stated a claim under the DCMWA. Plaintiff, however, also sought relief under the DCWPCL based on identical facts. Defendant argued that Plaintiff could not bring claims under both statutes because the DCMWA provides the exclusive remedy for a Plaintiff alleging a right to be paid overtime wages under D.C. law. The DCWPCL provides how and when employers must pay their employees’ wages; establishes a framework for recovery against an employer who violated its provisions; and provides that an employee may recover unpaid wages and liquidated damages and may bring a class action on behalf of himself and other employees similarly-situated. Thereafter, the DCMWA was enacted to guarantee a certain minimum wage and overtime payments to all non-exempt employees, and limiting class actions to opt-in lawsuits. The Court noted that a specific statute controls over a general one, and this was true even where the general statute was enacted later than the more specific statute. Id. at 23. The Court observed that because the D.C. Council enacted a comprehensive, detailed, and restrictive enforcement scheme for violations of the DCMWA, with full awareness of the more expansive enforcement provisions of the pre-existing DCWPCL, it would frustrate legislative intent to conclude that because the facts of Plaintiff’s complaint amounted to a violation of both the DCMWA and the DCWPCL, he could proceed under either or both statutes. Further, the Court stated that permitting Plaintiff to proceed under the DCWPCL would allow him to avoid the DCMWA’s opt-in class action provision, even though his DCWPCL claim was based on the same facts as his DCMWA claim. Furthermore, the Court noted that claims seeking overtime payments under a state’s wage payment and collection law were more properly brought under the state’s minimum wage law, notwithstanding the
broad statutory language, much like the language of the DCWPCL that allows recovery of unpaid overtime wages. *Id.* at 24. The Court remarked that if a violation of the DCMWA based on a failure to pay overtime wages was automatically subject to the DCWPCL’s penalties, the more stringent sanctions of the DCMWA would be rendered meaningless. *Id.* For these reasons, the Court opined that the proper avenue for Plaintiff to pursue his claim for unpaid overtime wages was under the DCMWA, and dismissed his DCWPCL claim. Accordingly, the Court granted Defendant’s motion.

(xiii) Federal Court Of Claims

*McClendon, et al. v. United States, 2013 U.S. Claims LEXIS 19 (Fed. Cl. Jan. 24, 2013).* Plaintiff, on behalf of himself and similarly-situated U.S. Veterans Affairs Department counselors, brought a collective action alleging that Defendant misclassified him as an exempt employee and was not paid overtime compensation in violation of the FLSA. Subsequently, Plaintiff moved for conditional certification. With respect to the two-step certification approach utilized in FLSA collective actions, the Court observed that this approach was not specified by the plain text of the statute or binding case law precedent. *Id.* at *2. The Court noted that its approach to FLSA collective actions was constrained by the express language of the FLSA. *Id.* at *6. The Court interpreted the statute’s “similarly-situated” language as allowing Plaintiff to define “similarly-situated” employees, and that based on the express language in § 16(b) of the FLSA, it was “precluded from determining, at this initial stage of proceedings, who may join the suit.” Thus, the Court denied Plaintiff’s motion for conditional certification as “unnecessary.” *Id.* Nonetheless, the Court determined that it was not precluded from considering Plaintiff’s motion for Court-facilitated notice. *Id.* at *7. In granting Plaintiff’s motion for Court-facilitated notice, the Court found that such notice was an effective and efficient method of implementing the FLSA’s collective action provision. Therefore, the Court granted in part and denied in part Plaintiff’s motion for conditional certification.

B. Other Federal Rulings Affecting The Defense Of FLSA Collective Actions

Throughout 2013, federal courts issued a wide variety of rulings on procedural and substantive matters in FLSA collective action litigation. Those rulings included notice issues in FLSA collective actions; mootness in FLSA collective actions; individual executive liability in FLSA collective actions; awards of attorneys’ fees in FLSA collective actions; application of *Twombly* pleading standards in FLSA collective actions; FLSA collective actions for donning and doffing; exemption issues in FLSA collective actions; discovery in FLSA collective actions; public employee FLSA collective action litigation; preemption issues in FLSA collective actions; independent contractor issues in wage & hour class actions; communications with class members in FLSA collective actions; actions; venue issues in FLSA collective actions; pay policies in FLSA collective actions; class arbitration of wage & hour claims; settlement of wage & hour class actions and collective actions; DOL wage & hour enforcement actions; application of statute of limitations in FLSA collective actions; concurrence state law claims in wage & hour class actions; joint employer and employer status issues in FLSA collective actions; litigation of tip pooling and tip credit claims under the FLSA; litigation of service charge claims in wage & hour litigation; sanctions in wage & hour class actions; issues with opt-in rights in wage & hour class actions; trial issues in FLSA collective actions; issues with intern under the FLSA; tolling issues in wage & hour class actions; interlocutory appeals in wage & hour class actions; amendments in FLSA collective actions; travel time issues in wage & hour class actions; foreign worker wage & hour class actions; retaliation issues in wage & hour class actions; counterclaims in FLSA collective actions; and All Writs Act issues in wage & hour class actions.

(i) Notice Issues In FLSA Collective Actions

*Alequin, et al. v. Darden Restaurants, Inc., 2013 U.S. Dist. LEXIS 108341 (S.D. Fla. July 31, 2013).* Plaintiffs brought a collective action under the FLSA alleging unpaid wages, failure to pay overtime, and minimum wage violations. After the Court granted conditional certification under 29 U.S.C. § 216(b), Plaintiffs sought to modify the notice and consent form. Plaintiffs attached to their motion a proposed revised notice to members of the conditionally certified collective action, and also requested the Court to direct Defendants to disclose the e-mail addresses of members of the conditionally certified collective action so that Plaintiffs could provide the notice and consent form through e-mail. Plaintiffs also sought to
require Defendants to provide notice to members of the conditionally certified collective action through Defendants’ internal dish network through which Defendants communicate with their employees. Defendants objected to the format of Plaintiffs’ proposed revised notice. The Court opined that it was not necessary for the notice and consent form to include the heading “United States District Court Southern District Of Florida,” and that this heading might unintentionally mislead collective action members that the form was issued by the Court. It therefore directed Plaintiffs to remove this heading from their proposed notice and consent form. Id. at *5. Defendants also claimed that Plaintiffs failed to follow the Court’s order correctly to reflect the format of the consent forms authorized in Bennett v. Hayes Robertson Group, Inc., 880 F. Supp. 2d 1270 (S.D. Fla. 2012), and Bell v. Mynt Entertainment, LLC, 223 F.R.D. 680 (S.D. Fla. 2004). The Court noted that the numbered paragraph format of Defendants’ consent form more closely reflected the forms authorized in Bennett and Bell, and was easier to read than Plaintiffs’ block-paragraph format, and as Defendants’ proposed form also included a section in which collective action members could check which claims applied to them, i.e., off-the-clock work, overtime, or incorrect application of the tipped-wage rate. Thus, the Court directed Plaintiffs to use the format of Defendants’ proposed consent form, but also to include spaces for collective action members to fill in the locations of their restaurants, personal addresses, telephone numbers, and e-mail addresses. The Court stated that e-mail was an efficient and non-intrusive method of communication and accordingly, directed that Defendants should disclose known e-mail addresses of potential opt-ins to Plaintiffs so that Plaintiffs could transmit the notice and consent form through e-mail. Defendants, however, objected to Plaintiffs’ request to post notice on Defendants’ internal dish network. Defendants noted that the dish network reached only Defendants’ current employees, whereas the conditionally certified collective action included any server or bartender employed between September 6, 2009, and September 6, 2012. Defendants also pointed out that the dish system did not allow Defendants to post a notice to only those current employees who were also potential opt-in members of the conditionally certified collective action, so if notice were posted on the dish system, many employees who were not members of the collective action also would receive notice. As a result, the Court remarked that posting notice on Defendants’ centralized computer network was overly and unnecessarily intrusive into the operations of Defendants’ restaurants, and accordingly denied Plaintiffs’ request to post the notice and consent form on Defendants’ dish network.

Colon, et al. v. Major Perry Street Corp., 2013 U.S. Dist. LEXIS 178346 (S.D.N.Y. Dec. 19, 2013). Plaintiff filed a collective action under the FLSA alleging that Defendants failed to pay employees in accordance with minimum wage and overtime laws. Earlier, the Court granted in part Plaintiffs’ motion for conditional certification under 29 U.S.C. § 216(b), and ordered the parties to submit a revised § 216(b) notice to send to potential opt-ins. Subsequently, the Second Circuit issued its decision in Palma v. NLRB, 723 F.3d 176 (2d Cir. July 10, 2013), limiting the discretion of the National Labor Relations Board (“NLRB”) to award certain damages to undocumented workers under the National Labor Relations Act (“NLRA”). Plaintiff believed that some of the potential members of the FLSA collective action may be undocumented workers and the parties disagreed about the impact of Palma on the terms of the notice. In FLSA actions, undocumented workers are traditionally allowed to recover unpaid minimum wage and overtime pay for work that has already been performed. In contrast, in NLRA actions, undocumented workers are not permitted to recover post-termination back pay for work that was not actually performed, but that would have been performed but for an employer’s action. The Court held that undocumented workers continue to be eligible to recover unpaid minimum wage and overtime wages under the FLSA. The Court reasoned that the plain language of the FLSA unambiguously encompasses unauthorized aliens. The legislative history of the FLSA and the Immigration Reform and Control Act of 1986 (“IRCA”) also supported the Court’s holding that the FLSA encompasses unauthorized aliens. The Court concluded that the historical divergence of the NLRA and the FLSA and the basis for that divergence strongly suggest that the NLRA did not alter the statutory interpretation of the FLSA. Thus, despite recent developments under the NLRA, the Court held that undocumented workers are still entitled to retrospective back pay under the FLSA. Accordingly, the Court approved the revised § 216(b) opt-in notice based on Plaintiffs’ latest proposed language, and denied Defendants’ motion for discovery regarding immigration status.
Cooper, et al. v. East Coast Assemblers, Inc., 2013 U.S. Dist. LEXIS 10435 (S.D. Fla. Jan. 25, 2013). Plaintiff, a former assembler, brought a collective action under the FLSA alleging entitlement to unpaid wages for overtime work. Plaintiff moved for conditional certification and to notify potential class members. The Court granted the motion. The Court stated that Plaintiff had provided the declarations of two of the opt-in Plaintiffs – Darryl Michael Lane and Ramonda McDonald, former assemblers, as well as Plaintiff’s own declaration and the declaration of Lee Bolaro, former regional sales scheduler – stating that Defendants employed assemblers all over the United States, these assemblers maintained nearly identical job duties, they are similarly compensated, they regularly worked in excess of 40 hours per week, and that Defendants failed to pay them overtime compensation as required by the FLSA. The Court observed that a previous Department of Labor investigation supported the conclusion that Defendants failed to pay their assemblers overtime as required by the FLSA. Defendants argued that Plaintiff had failed to prove that other employees would seek to opt-in to the lawsuit, and Plaintiff’s motion lacked the requisite detailed allegations that other employees were similarly-situated to Plaintiff with respect to their job requirements or pay provisions. The Court rejected both arguments. The Court stated that two former assemblers had already opted-in and Plaintiff submitted four sworn declarations as well as evidence of the Department of Labor’s investigation regarding the same allegations at issue here. The Court considered Plaintiff’s declarations because they were based upon the affiants’ personal knowledge. Id. at *7. Defendants also objected to the proposed notices on various grounds, including that notice should not be e-mailed, and Plaintiff’s counsel should not be permitted to send reminder notice postcards after the initial notices were delivered; 60 days was an appropriate notice period as opposed to Plaintiff’s request for 90 days; Plaintiff’s proposed class of assemblers should be narrowed to those assemblers who were paid solely on a piece-rate basis as opposed to those assemblers paid both piece-rate and hourly; the applicable time period for putative class members should run from three years before this order, not three years before Plaintiff filed the complaint; the proposed notice should revise the identity of the employer to reflect that Defendants denied Plaintiff’s allegation that Defendants were joint employers; the proposed notice should inform putative class members that they might be required to provide information under oath, they might be required to sit for depositions, and they might be liable for costs if Defendants were the prevailing party; the proposed notice should identify the putative class members’ right to independent counsel; the final paragraph of the notice constituted an impermissible advertisement for the law firm of Plaintiff’s counsel; and Plaintiff’s proposed consent to join form should be replaced by a form that indicated how the assembler was paid, how many hours he worked per week, how many times he was not paid overtime, when did he work, and did he agree to be represented by Plaintiff’s counsel. The Court determined that Plaintiff’s counsel might e-mail the notice in addition to its mailing, the notice period should be 60 days, and the applicable time period for putative class members should run from three years before Plaintiff’s filing of the complaint. Additionally, the Court ruled that the notice need not be clarified regarding Defendants’ denial of their joint employer status, the notice should reflect that assemblers might be required to provide information under oath and that they might be liable to Defendants for costs if Defendants prevailed, the notice should not inform assemblers where they might have to sit for depositions, and the final paragraph of the notice was an inappropriate advertisement. Id. at *15. The Court also rejected Defendants’ attempt to replace Plaintiff’s proposed consent to join form.

In Re Penthouse Executive Club Compensation Litigation, Case No. 10-CV-1145 (S.D.N.Y. May 10, 2013). Plaintiffs, a group of former entertainers at the Penthouse Executive Club, brought an action alleging failure to pay minimum and overtime wages in violation of the FLSA and New York Labor Law. Subsequently, the parties settled the action, and the Court granted preliminary approval to the settlement, which provided an $8 million fund. The Court certified a settlement class consisting of all individuals who perform or performed at the Penthouse Executive Club as entertainers between 2004 and June 12, 2012. The Court also appointed Outten & Golden LLP, Virginia & Ambinder LLP, Leeds Brown Law, PC, and the Urban Justice Center Sex Workers Project as class counsel. In its order granting preliminary approval to the settlement, the Court had noted that the parties agreed to provide additional notice to the class through a website and Xtreme Magazine, an adult entertainment publication. Subsequently, the parties submitted the proposed notices for approval. The Court granted approval to the proposed notice. Because the
parties’ settlement agreement provided for the cost of notice to the class to be paid out of class counsel’s fee award, the Court stated that the cost of this notice would also come from the attorneys’ fee award.

**In Re Wells Fargo Wage & Hour Employment Practices Litigation, 2013 U.S. Dist. LEXIS 70040 (S.D. Tex. May 17, 2013).** In this multi-district litigation brought by home mortgage consultants (“HMCs”) and mortgage consultants (“MCs”) alleging failure to pay overtime compensation, the Court had conditionally certified two collective actions. Plaintiffs moved for approval of their proposed notice, approval of various methods of notice, and extension of the length of the notice period. The Court granted in part and denied in part Plaintiffs’ motion. Plaintiffs requested the expansion of notice period from 90 days to 180 days because of the seven-month delay while Wells Fargo sought a writ of mandamus to challenge the certification order. Plaintiffs argued that there was a high turnover rate among the potential collective action members and that additional time was warranted to allow for returned mail, follow up on returned notice forms, and research on invalid addresses. Because Plaintiffs adequately justified a slightly longer than normal notice period, given the heavy turnover rate of the potential collective action members, the Court found that a 120-day notice period was sufficient. *Id.* at *5. Plaintiffs also requested to send notice by mail and e-mail, and to provide notice on the internet, Defendants’ intranet, and by posting in Defendants’ offices. *Id.* at *6. The Court opined that the provision of e-mail addresses, and postings on Defendants’ intranet and Defendants’ offices would not facilitate notice. Plaintiffs sought to establish a website with the Court-approved notice and related information, contending that the proposed website would allow potential Plaintiffs to view the notice, learn about the status of the litigation, and execute consent forms on-line. Because the Court opined that a website potentially could help find missing individuals, it granted Plaintiffs’ request to publish notice on the internet in addition to mailing notice. *Id.* at *9. Defendants objected to certain portions of the proposed notice. First, the Court sustained Defendants’ objection to references to the amount of the settlement in a related Northern District of California case, which they claimed fomented litigation and created expectancy. The Court observed that the amount of the settlement was not relevant and could create expectations of a recovery to recipients of the notice. *Id.* at *5. Second, Defendants objected to the bolded, all caps language about the Court’s authorization of the notice. The Court stated because the first section of the notice clearly stated that the Court had not yet rendered any determination on the merits of this case, the proposed notice did not suggest that the Court endorsed Plaintiffs’ claims. The Court, however, directed Plaintiffs to remove the term “Court authorized” from the title. *Id.* at *15. Defendant further objected to the bold, underlined, all caps language that potential Plaintiffs must join the case to preclude the statute of limitations running. The Court noted that because the proposed form improperly made it appear that all potential Plaintiffs must opt-in to this lawsuit if they desired to bring claims, the language in the proposed notice as currently worded needed to be revised. *Id.* at *19. Finally, Defendants argued that the proposed notice did not adequately inform potential Plaintiffs that they were bound by any potential unfavorable rulings. The Court found that the proposed notice, which stated that potential Plaintiffs, if they opted-in, would be bound by the judgment, covered any judgment. Further, because there was no reason to believe that any costs assessed should Defendants prevail would be more than minimal with respect to each Plaintiff, the Court ruled that a warning about potential liability for Defendants’ costs were not appropriate. *Id.* at *24. The Court, however, observed that the language stating that opt-in Plaintiffs would not be responsible for any attorneys’ fees and costs out of their pockets, while aimed at the responsibility for Plaintiffs’ fees and costs, could be misconstrued. Thus, the Court sustained in part and overruled in part Defendants’ objection to language in the notice regarding the fees and expenses.

**Snelling, et al. v. ATC Healthcare Services, Inc., 2013 U.S. Dist. LEXIS 49105 (S.D. Ohio April 4, 2013).** Plaintiff, a former nurse, brought an action alleging that Defendants wilfully failed to pay overtime pursuant to the terms of the FLSA and the Ohio Minimum Fair Wage Standards Act. The Court had conditionally certified the FLSA collective action consisting of a class of all current and former Ohio nurses, since November 3, 2008, who could potentially pursue claims for FLSA overtime and minimum wage violations. Regarding the FLSA notice process, the Court directed the parties to confer regarding the proper form of class notice and to submit a proposed notice form. The parties disputed the proper scope of notice, and each party submitted separate proposed notice forms. Plaintiff argued that the notice should
inform potential class members that the lawsuit applied to any nurse who worked a minimum of 40 hours in any week from November 3, 2008 to the present. The Court stated that the notice should follow Plaintiff’s broader definition of the class because it was consistent with its earlier opinion and order considering class certification. The Court reasoned that it did not limit class certification to nurses whose hourly and/or overtime rates were modified, and that it had directed Defendants to produce contact information for the nurses they employed for the purpose of notice. Thus, the Court remarked that although notice should follow Plaintiff’s class definition and be sent to all nurses, the parties should revise this class definition to more clearly reflect that the notice was intended for nurses who did not receive proper overtime payment. Further, the Court observed that Plaintiff did not limit her allegations to the failure to pay compensation for specific job duties, but contended that Defendants failed to pay her and other nurses proper overtime wages when they worked over 40 hours in a week. Plaintiff’s complaint did not reflect that her action was limited to one particular method of failing to pay overtime. Thus, the Court opined that notice should apply to any of Defendants’ nurses who could potentially pursue overtime claims. The parties also disputed whether the notice should mention prior overtime payments. The Court found that this provision should be excluded from the conditional certification notice because it could confuse prospective class members. Finally, the Court observed that the notice should not advise potential class members how to best preserve their rights and direct them that they must take any particular form of action in order to receive payment. Rather, the Court directed that the notice should inform potential class members that if they did not receive proper overtime payments, and if they wished to join the lawsuit, they could preserve their rights by sending in the attached consent form. Finally, the Court stated that the notice could also advise potential class member that their delay could result in a loss of rights to payment. Accordingly, the Court directed the parties to submit a joint proposed notice and consent forms within 10 days.


Plaintiffs, a group of computer technicians, brought an FLSA action alleging that Defendant denied them overtime compensation for hours worked in excess of 40 in a single workweek. The parties jointly moved for conditional certification of a class of eight computer field technicians who were not paid for all hours worked during the past three-year period, and an order for Defendant to provide the name and contact information of each potential eligible collective action member. The Court conditionally certified the collective action and ordered Defendant to provide Plaintiffs a list of the eight potential collective action members, their last known mailing addresses, e-mail addresses, and telephone numbers. Regarding approval of their proposed notice, the Court stated that although it has the power and duty to ensure fair and accurate notice, it should refrain from altering a proposed notice unless doing so is necessary. *Id.* at *2-3*. The Court found that apart from some grammatical errors and inconsistencies which are not material, the proposed notice and consent forms were adequate to ensure fair and accurate notice. Accordingly, the Court granted the motion.


Plaintiff, a former assistant store manager (“ASM”), brought a class action alleging that Defendant denied minimum and overtime wages to ASMs in violation of the FLSA and Colorado state law. The Court granted Defendant’s motion for summary judgment. Defendant sought to dismiss 568 opt-in Plaintiffs who could not satisfy the FLSA’s three-year statute of limitations for willful violations. Specifically, Defendant sought dismissal of 511 opt-in Plaintiffs who last received any payment from Defendant more than the three years prior to filing their consents to join, and dismissal of 57 opt-in Plaintiffs who last received a payment from Defendant for work as ASMs more than three years prior to the date that each filed his or her consent form. The Court stated that to be timely under the statute of limitations, an opt-in Plaintiff’s written consent should be filed within three years of the date when the cause of action accrued. *Id.* at *3*. The Court noted that none of the 568 opt-in Plaintiffs received a paycheck from Defendant for work as an ASM within the three years before the date when his or her consent form was filed. The Court found that 511 never received any paycheck from Defendant within three years before their consent forms were filed. The remaining 57 opt-in Plaintiffs did receive paychecks within the three years prior to filing their consent forms, but for work in other positions and not for work done as ASMs. Thus, the Court remarked that there was no material
fact in dispute and the claims of the 568 opt-in Plaintiffs were time-barred. Accordingly, the Court granted summary judgment to Defendant.

(ii)  Mootness In FLSA Collective Actions

*Genesis HealthCare Corp. v. Symczyk, et al.*, 133 S. Ct. 1523 (2013). Plaintiff, an employee of a nursing home owned by Defendant, brought a collective action for violations of the FLSA alleging that Defendant had failed to pay her for her 30 minute meal breaks when she worked through all or part of the break. Defendant made a Rule 68 offer of judgment to satisfy all of Plaintiff's claims for $7,500 in unpaid wages, plus attorneys' fees, costs and expenses. *Id.* at 1527. Although Plaintiff failed to accept the offer, Defendant moved to dismiss the action for lack of subject-matter jurisdiction. Defendant argued that because they offered Plaintiff complete relief on her individual damages claim, she no longer possessed a personal stake in the outcome of the suit, rendering the action moot. *Id.* The District Court granted Defendant's motion, holding that it lacked subject-matter jurisdiction because no other Plaintiffs had joined the action. *Id.* The Third Circuit, however, reversed. Although recognizing that Defendant had offered complete relief, thus mooting the individual FLSA claim, the Third Circuit held that using strategic Rule 68 offers to “pick off” aggrieved Plaintiffs would frustrate the FLSA's collective action process. *Id.* The Third Circuit, therefore, remanded the action to allow Plaintiff to seek conditional certification, which, if granted, would relate back to the date of the complaint. *Id.* Defendant sought review by the Supreme Court, which granted *certiorari*. The Supreme Court held that District Courts lack jurisdiction to hear collective actions if the named Plaintiff’s own claims are moot. The Supreme Court refused to consider whether an unaccepted offer of judgment was sufficient to render Plaintiff’s claim moot, an issue that had generated a split among the circuit courts. Because Plaintiff failed to raise the issue of mootness or to file a cross appeal on that issue, the Supreme Court considered itself bound by the Third Circuit’s conclusion that her individual claim was, in fact, moot. *Id.* at 1529. The sole question for the Supreme Court’s consideration was whether Plaintiff’s action remained justiciable based solely on the collective action allegations made in the complaint. *Id.* The Supreme Court concluded that it did not. While the FLSA authorizes an aggrieved employee to bring an action on behalf of himself and other employees similarly-situated, the Supreme Court held that the mere presence of collective action allegations in the complaint could not save the suit from mootness once the individual claim is satisfied. *Id.* The Supreme Court ruled that cases decided under Rule 23 were inapposite because of the fundamental difference between collective actions and class actions. Once it is certified under Rule 23, a class acquires independent legal status. By contrast, under the FLSA, conditional certification does not produce a class with an independent legal status, or join additional parties to the action. According to the Supreme Court, conditional certification under 29 U.S.C. § 216(b) has only one consequence, which is the sending of written notice to employees who do not become parties to the action unless they file written consents with the District Court. *Id.* at 1530. The Supreme Court also rejected Plaintiff’s argument that the action was inherently transitory and likely to evade review because un-joined Plaintiffs, although prevented from seeking relief in Plaintiff’s action, remained capable of bringing their own actions to enforce their rights. *Id.* at 1531. The Supreme Court also rejected Plaintiff’s argument that if Defendant were permitted to “pick off” party Plaintiffs, it would frustrate the objectives of the FLSA's collective action provision. *Id.* at 1532. In doing so, the Supreme Court distinguished the Rule 23 authority offered by Plaintiff because in that situation, a Plaintiff had a continuing stake in the outcome. *Id.* By contrast, here, Plaintiff conceded Defendant’s offer provided complete relief on her individual claims and she failed to assert any continuing economic interest in shifting attorneys’ fees and costs to others. *Id.* Accordingly, the Supreme Court concluded that Plaintiff’s action was appropriately dismissed for lack of subject-matter jurisdiction.

*Editor’s Note:* The Supreme Court’s ruling in *Genesis HealthCare* had an immediate impact on defense strategies in FLSA collective actions and wage & hour class actions. It “green lights” a strategy for employers that had been rejected by various lower federal courts.

*Mould, et al. v. NJG Food Service Inc.*, 2013 U.S. Dist. LEXIS 170855 (D. Md. Dec. 4, 2013). Plaintiff, on behalf of a group of servers, brought a collective and class action against Defendants alleging that they utilized a tip credit to satisfy minimum wage requirements under the FLSA and the Maryland Wage Hour
Law (“MWHL”). Defendants required servers to contribute either 2.5% or 5% of net sales for the relevant shifts to the tip-pool, which was later distributed to various employees, including bus boys, food runners, line cooks, and carryout cashiers. Id. at *6. Plaintiffs alleged that both the tip-pooling arrangement and the use of a tip credit violated the minimum wage requirement under the FLSA and the MWHL, and the overtime requirement under the FLSA. Plaintiffs also alleged that Defendants failed to give Plaintiffs notice about any tip credit they were utilizing to meet minimum wage requirements, and that they and others similarly-situated were coerced by Defendants into participating in a tip-pooling arrangement, whose terms violated the FLSA and the MWHL. Id. at *5-6. Defendants made an offer of judgment to the named Plaintiff in the amount of $40,000 representing full judgment to settle, release, and satisfy any and all causes of action. Id. at *9-10. Defendants also made a second offer to Plaintiff to have a judgment entered against them in the amount of $35,151.20 with regard to the minimum wage and overtime claims that he had advanced under the FLSA and the MWHL. Defendants also agreed to pay reasonable attorneys’ fees and costs in both the offers. Plaintiff refused to accept either offer, and filed a second amended complaint. Defendants, in response, filed a motion to stay discovery, and consolidate another action brought against it by other Plaintiffs alleging similar claims. Defendants offered the other Plaintiffs to have judgment entered against them in the amounts of $13,200 and $10,750 respectively. Id. at *13. Neither of them accepted Defendants’ offer either. The cases were consolidated, and Defendants moved to dismiss the actions. The Court denied Defendants’ motion. The Court found that Defendants’ offer did not provide Plaintiffs all they sought to obtain. The Court focused on the remedies sought by Plaintiffs regarding their minimum wage FLSA claims, their MWHL minimum wage claims, and their FLSA overtime claims, and found that Plaintiffs had not made any specific demand. The Court therefore turned to the damages provisions of the FLSA and the MWHL, and found that the scope of Plaintiffs’ recovery could possibly consist of unpaid wages, and liquidated damages in an amount equal to the unpaid wages, both being subject to a three-year statute of limitations at most, in addition to reasonable attorneys’ fees and costs of the action. Id. at *49-50. Plaintiffs had also sought to recover the amounts contributed to the tip-pool. Because neither the FLSA nor the MWHL provide for such a remedy, the Court determined that the measure of damages under the statutes was the difference between the minimum wage required and the wage paid by the employer. Id. at *50. Defendants argued that their offers of judgment offered more than full relief for Plaintiffs’ FLSA and MWHL claims. Defendants relied on the calculations of a CPA retained by them who based the calculations on the payroll records provided to her by Defendants. Defendants’ CPA determined the actual payment each employee received on an hourly basis every week and the number of hours for which the employee was not compensated, and determined the offered amount. Plaintiffs, however, questioned the accuracy of the payroll records that formed the basis of Defendants’ CPA’s analysis, and requested the opportunity to conduct discovery and to have their own expert review Defendants’ payroll and any related records. Id. at *53. The Court agreed with Plaintiffs. The Court therefore held that it could not simply hold that Plaintiffs could not possibly recover more than what Defendants offered. Accordingly, the Court denied Defendants’ motion to dismiss Plaintiffs’ FLSA minimum wage and overtime claims and MWHL minimum wage claims.

Silva, et al. v. Tegrity Personnel Services, Inc., 2013 U.S. Dist. LEXIS 171465 (S.D. Tex. Dec. 5, 2013). Plaintiff brought a putative collective action alleging that Defendant violated the FLSA by failing to pay her overtime wages. In connection with the claim, Plaintiff and another similarly-situated individual filed notices of consent, thereby opting-in to the lawsuit. Defendant, in response, presented both Plaintiffs with offers of judgment pursuant to Rule 68. Plaintiff refused to accept the offer, and filed a motion to conditionally certify a collective action. A few weeks later, four additional individuals opted-in and filed their notices of consent to join the action. Defendant thereafter made Rule 68 offers to each of the additional Plaintiffs. Plaintiffs refused them and Defendant moved to dismiss all Plaintiffs’ overtime claims as moot. Defendant argued that the action became moot on July 23, 2013, when all Plaintiffs had received Rule 68 offers and all of those offers had expired. Id. at *9. Plaintiff relied primarily on the Fifth Circuit’s decision in Sandoz v. Cingular Wireless LLC, 553 F.3d 913 (5th Cir. 2008), and insisted that she should have a chance to certify the collective action before the suit was dismissed on mootness grounds. Id. at *21. The Court denied Defendant’s motion. The Court found that Plaintiffs’ overtime claims might have been mooted by Defendant’s Rule 68 offer; however, the original named Plaintiff still had her individual claim that she had...
been retaliated against in violation of the FLSA. Defendant had excluded the individual claim from their Rule 68 offer. Because Defendant’s offer expressly did not include any damages for Plaintiff’s FLSA retaliation claim, and had not been severed from the case, the Court concluded that no portion of the case was moot and allowed the named Plaintiff to proceed to seek conditional certification of a FLSA collective action.  *Id.* at *38.

**iii Individual Executive Liability In FLSA Collective Actions**

*Irizarry, et al. v. Catsimatidis, 2013 U.S. App. LEXIS 13796 (2d Cir. July 9, 2013).*  Plaintiffs, a group of current and former employees of a supermarket chain, brought an action alleging that they were denied overtime wages in violation of the Fair Labor Standards Act (“FLSA”) and the New York Labor Law (“NYLL”). Plaintiffs asserted claims against several companies involved in operating the stores and three individual Defendants, including Catsimatidis, the owner and corporate head of all of the implicated companies.  *Id.* at *2-4. After the District Court certified the class, it granted summary judgment to Plaintiffs on their FLSA and NYLL claims. Following summary judgment, the parties reached a settlement agreement, which the District Court approved. The corporate Defendants defaulted on their payment obligations under the agreement. Plaintiffs then moved for partial summary judgment on their claim against Catsimatidis for personal liability for the alleged FLSA and NYLL claims, and the District Court granted the motion. On appeal, the Second Circuit affirmed the District Court’s order with respect to the FLSA claim, but reversed and remanded the ruling as to the NYLL. Catsimatidis’ personal liability under the FLSA turned on whether he was an employer of Plaintiffs under the economic reality test.  *Id.* at *32. In determining whether he was, the Second Circuit applied the four factor test set forth in *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984), including whether the alleged employer (i) had the power to hire and fire the employees; (ii) supervised and controlled employee work schedules or conditions of employment; (iii) determined the rate and method of payment; and (iv) maintained employment records.  *Id.* at *10-11, 40-49. The Second Circuit found that Catsimatidis had the power to hire and fire anyone he chose. In doing so, it stated that the hiring and firing of individuals who were in charge of employees is a strong indication of control.  *Id.* at *40-41. As to the second factor, the Second Circuit determined that although Catsimatidis’ involvement with the company and the stores demonstrated some exercise of operational control, that control did not relate closely to the issue of supervision over employee work schedules or conditions of employment.  *Id.* at *43. The Second Circuit found the third factor satisfied based upon the fact that Catsimatidis had the authority to sign paychecks during the relevant period and exercised over all financial control of the company.  *Id.* at *43-45. Finally, the Second Circuit noted that Plaintiffs did not meet the fourth factor concerning maintaining employment records.  *Id.* at *45. Thus, the Second Circuit concluded that two of the four *Carter* factors were satisfied.  *Id.* Considering these and other factors in the “totality of the circumstances,” the Second Circuit concluded that, while a close case, Catsimatidis was an employer within the meaning of the FLSA.  *Id.* at *45-49. The Second Circuit noted considerations underlying an expansive interpretation of the FLSA to remunerate aggrieved employees, and that purpose was particularly applicable here given the failure of the settlement between the corporate Defendants and Plaintiffs.  *Id.* at *47-48. The Second Circuit explained that although Catsimatidis was not personally responsible for the FLSA violations, he nonetheless profited from them.  *Id.* at *48. The Second Circuit reasoned that his actions and responsibilities – particularly as demonstrated by his active exercise of overall control over the company, his ultimate responsibility for the Plaintiffs’ wages, his supervision of managerial employees, and his actions in individual stores – demonstrated that he was an employer for purposes of the FLSA.  *Id.* at *49. Accordingly, the Second Circuit affirmed the District Court’s order with respect to the FLSA claim. However, it found that the District Court did not address the basis for its decision under the NYLL claim. Accordingly, Second Circuit vacated the NYLL order and remanded the case to the District Court.  *Id.* at *50-51.

*Leal, et al. v. Masonry Services Inc., 2013 U.S. Dist. LEXIS 19142 (E.D.N.Y. Feb. 12, 2013).*  Plaintiff brought an action under the FLSA to recover unpaid overtime and spread of hours compensation. Plaintiff claimed that he worked from 7:30 a.m. to 6 p.m. or 7 p.m., with a 30-minute lunch break, and did not receive overtime or spread of hours wages during his employment, and was paid the same rate regardless of the number of hours he worked. Plaintiff stated that the corporate Defendants had common ownership,
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liable under the FLSA because an employer’s business partner could not be subject to liability under the FLSA based upon partnership and agency law, but only if he qualified as an employer in his own right or as a “joint employer” under the economic reality test. Id. at *30-31. While Plaintiffs had failed to provide any evidence supporting such a factor, the evidence created a genuine issue of material fact as to the Producers’ status as employers. Newman had testified that the Producers had the power to hire and fire employees and change the production schedule, and one of the Producers had testified that they “operated under the umbrella” of Stage Presence. Id. at *31. The Court therefore held that the question of whether the Producers qualified as Plaintiffs’ employers must be left for trial. Id. Accordingly, the Court granted Plaintiffs’ cross-motion for summary judgment with respect to their claim that Defendant Newman qualified as an “employer” within the meaning of the FLSA and denied the remaining motions in all other respects.

(iv) Awards Of Attorneys’ Fees In FLSA Collective Actions

Brown, et al. v. Mustang Sally’s Spirits And Grill, Inc., 2013 U.S. Dist. LEXIS 133618 (W.D.N.Y. Sept. 18, 2013). Plaintiffs, a group of dancers who worked at Defendants’ night club, brought an action alleging that Defendants failed to pay dancers minimum wage and overtime pay; failed to reimburse dancers for the uniforms that they were required to wear; and failed to keep accurate employment records in violation of both FLSA and the New York Labor Law. Earlier, the Court had granted the parties’ joint motion for a settlement stipulation and consent decree thereby ending the litigation. Plaintiffs then moved for attorneys’ fees and costs associated with the resolution of this matter. The Court granted Plaintiffs’ motion. Plaintiffs conceded that the requested hourly rates of their lawyers, ranging from $550 for one of the named partners to $135 for each paralegal, exceeded the rates generally found reasonable in the U.S. District Court for the Western District of New York. The Court found that a reasonable, fee-paying client would not pay the hourly rates as set out by Plaintiffs, and instead a rate more consistent with Western District of New York’s average was appropriate. Accordingly, the Court set the hourly rates from $300 to $170. Further, the Court stated that the hourly rate of $75 was reasonable for the listed paralegals, and the listed technology specialist, and that $30 per hour was a reasonable rate for clerical time. The Court also observed that internal discussions were a necessary part of any representation and billing records were not necessarily repetitive just because two staff members worked on a particular event. Nonetheless, the Court stated that internal conferences were harder to verify and therefore more likely to be excessive. Thus, the Court concluded that a 20% across-the-board reduction in fees was appropriate. Id. at *18-19. Accordingly, the Court awarded $78,817.63 in attorneys’ fees and costs as opposed to $95,100 requested by Plaintiffs’ counsel. Id. at *20-21.

Cohen, et al. v. Gerson Lehrman Group, Inc., 2013 U.S. App. LEXIS 9663 (2d Cir. May 14, 2013). Plaintiff brought an action alleging failure to pay overtime for work performed by research associates in violation of the FLSA and the New York Labor Law. Subsequently, the parties entered into a settlement stipulation establishing a $900,000 qualified settlement fund to provide for class members’ unpaid back overtime wages, enhancement payments, attorneys’ fees, and administrative costs. Further, the settlement stipulation included a waiver of the parties’ right to appeal provided that the final approval order was consistent with the terms and conditions of the settlement stipulation in all material respects. The settlement stipulation also contained language specifying that an award of enhancement payments or attorneys’ fees in an amount less than that sought would not constitute a material modification of the settlement stipulation. The District Court granted final approval of the settlement, declined to award enhancement payments or the full sum of attorneys’ fees, and instead awarded Plaintiff’s counsel a total of $97,487 in fees. On appeal, the Second Circuit affirmed. The Second Circuit observed that settlement agreements are contracts and must therefore be construed according to general principles of contract law. Id. at *3. Further, the Second Circuit noted that there was no ambiguity in the settlement stipulation, which explicitly stated that an award of enhancement payments or attorneys’ fees in an amount less than requested did not materially alter the contract. Thus, the Second Circuit stated that a reduced award was consistent with the settlement stipulation in all material respects, and that Plaintiff had waived the right to appeal on this basis. Id. at *3-4.
De La Riva, et al. v. Houlihan Smith & Co., Inc., 2013 U.S. Dist. LEXIS 136339 (N.D. Ill. Sept. 24, 2013). Plaintiffs brought a wage & hour action alleging individual claims under the FLSA, and claims on behalf of a putative class under the Illinois Minimum Wage Law (“IMWL”). The parties agreed to a settlement, and memorialized the terms of settlement in a consent decree, by which the two named Plaintiffs received a total FLSA award of $23,222.42 (including wages and liquidated damages). Plaintiffs moved for attorney fees and costs, and the Court awarded $8,000 in costs and $129,141 in attorneys’ fees, for a total award of $137,141. At issue was whether Plaintiffs should be compensated for the time their attorneys spent pursuing the IMWL claims. The Court noted that although the IMWL and FLSA claims arose from the same core of facts, Plaintiffs’ efforts in the federal action on the IMWL claims were devoted largely to class certification issues, which were irrelevant to the FLSA claims given that Plaintiffs did not seek to certify a collective action under the FLSA. The Court also observed that the IMWL claims remained pending in a state action. Thus, the Court stated that although it might have the discretion to award fees for litigating the IMWL claims in the federal action, it would be far more appropriate to allow the judge in the state action to determine whether Plaintiffs were entitled to such fees and, if so, how much. Accordingly, the Court noted that for purposes of the fee award in the federal action, Plaintiffs would be deemed to have prevailed on the FLSA claims but not their IMWL claims. The Court observed that there were two phases to the federal litigation, namely the period before the remand of the IMWL claims, and the period after the remand. The Court gave credit to Plaintiffs for hours spent on the briefing the Court had requested on whether the IMWL claims should be remanded. Regarding the remaining pre-remand time, the Court noted that nearly all of the time entries related solely to the IMWL class certification issues or the underlying IMWL claims or were block-billed or non-specific, making it impossible to tell how much of that time was spent on the IMWL claims and how much on the FLSA claims. Although the Court stated that it would be within its discretion to strike these hours in their entirety, it noted that because some time undoubtedly was spent on the FLSA claims, the hours would be reduced on a percentage basis. Accordingly, the Court awarded Plaintiffs 20% of the pre-remand time. Regarding the post-remand hours, the Court opined that all of the hours were reasonably expended on the FLSA claims, except for the hours that Plaintiffs’ counsel continued to devote to the IMWL claims or hours that were block-billed with tasks devoted to the IMWL claims. Considering the relative simplicity of the individual FLSA claims in this case, and considering lead attorney’s experience in this field, the Court stated that an hourly rate of $450 was reasonable and supported by his past awards in similar cases. Further, the Court opined that a $300 hourly rate for the lead attorney’s associate was appropriate. Accordingly, the Court awarded attorneys' fee of $129,141.

In Re Wal-Mart Wage & Hour Employment Practices Litigation, 2013 U.S. App. LEXIS 24948 (9th Cir. Dec. 17, 2013). Wal-Mart settled multi-district wage & hour litigation for $85 million. The District Court awarded Plaintiffs approximately $28 million in attorneys’ fees. The settlement agreement provided that if class counsel could not agree upon the allocation of those fees among class counsel, the dispute concerning the allocation would be submitted “to binding, non-appealable arbitration.” Id. at *4. Class counsel were unable to agree on the allocation, and their dispute was submitted to an arbitrator. The arbitrator issued an opinion and order allocating the fees of over $6 million to the Burton Group; over $11 million to Bonsignore; and over $730,000 to LaPlant. Bonsignore moved to confirm the arbitrator’s award, and the Burton Group moved to vacate it. The District Court granted Bonsignore’s motion and denied the motion of the Burton Group. Id. at *3-4. On appeal, Bonsignore argued that the Ninth Circuit lacked jurisdiction because of the non-appealability language of the settlement agreement. However, the Ninth Circuit rejected Bonsignore’s argument and held that it did have jurisdiction. In a separate opinion, it upheld the District Court’s decision. Id. at *2. The jurisdictional issue presented a question of first impression in the Ninth Circuit. Id. The Ninth Circuit began its analysis by noting that the non-appealable language of the settlement agreement was ambiguous and susceptible of two different meanings. First, and as the District Court concluded, the phrase could be understood to preclude only review of the merits of the arbitrator’s decision and not eliminate the parties’ right to appeal the decision under § 10 of the Federal Arbitration Act (“FAA”). Second, the clause could be read to preclude both District Court and appellate review of the arbitrator’s decision on any ground, including those enumerated in § 10 of the FAA. The Ninth Circuit concluded that it need not resolve the ambiguity if it determined that the second possible
construction was unenforceable because it eliminated judicial review under § 10 of the FAA. The Ninth Circuit noted that under § 10(a) of the FAA, a District Court may vacate an arbitration award if: (i) the award was procured by corruption, fraud, or undue means; (ii) there was evident partiality or corruption of the arbitrator; (iii) the arbitrator was guilty of misconduct; or (iv) the arbitrator exceeded his or her powers. The Ninth Circuit also noted that the Supreme Court in *Hall St. Associates v. Mattel, Inc.*, 552 U.S. 576, 578 (2008), clarified that based on the text of the FAA, the statutory grounds for judicial review under the FAA are exclusive and may not be supplemented by contract. *Id.* at *9-10. The Ninth Circuit concluded that for similar reasons the grounds for vacating an arbitrator’s award as provided in the FAA are not waivable or subject to elimination by contract. *Id.* at *12-13. The Ninth Circuit reasoned that permitting parties to contractually eliminate all judicial review of arbitration awards would not only run counter to the text of the FAA, but also would frustrate Congress’ attempt to ensure a minimum level of due process for parties to an arbitration. *Id.* at *13. Accordingly, the Ninth Circuit concluded that it had jurisdiction to hear the appeal.

*Minor, et al. v. FedEx Office & Print Services, Inc.*, 2013 U.S. Dist. LEXIS 106655 (N.D. Cal. July 30, 2013). In this wage & hour class action filed under the California Labor Code, the Court had granted preliminary approval of a class action settlement and ordered distribution of notices to the class members. In response to the notice, 5,147 class members, or 44% of the class of 11,669, submitted timely and valid claim forms and only seven class members submitted requests for exclusion. Plaintiffs then moved for final approval of a class action settlement and for attorneys’ fees, costs, and class representatives’ enhancement payment. The Court granted the motion. The Court stated that pursuant to Rule 23(e), the terms of the settlement agreement were fair, reasonable, and adequate to the class and to each class member. The Court noted that the settlement agreement appeared to be the result of good faith, arm’s-length negotiations, after adequate factual and legal investigation and it did not appear to be the product of fraud or overreaching by, or collusion between, the negotiating parties. Class counsel requested $2,406,450 in fees, calculated as 25% of the gross settlement amount and supported by a lodestar crosscheck of $2,526,992.50. Class counsel estimated the class’ damages approximated $31.5 million; however, the Court observed that the claimed amount that would be paid out to class members was $4,187,937.77, approximately 13% of the estimated damages incurred. The Court found that the $2.4 million fee request was neither reasonable within the meaning and mandate of Rule 23(h), nor warranted in this case. Instead it found that a reduced fee award in the amount of $1.6 million was adequate, reasonable, and appropriate. Plaintiffs also requested $25,000 in payments to the named class representatives who executed the full release. The Court stated that such an enhancement payment was vastly out of proportion to the payments received by the rest of the class and approving such grossly disproportionate payments would risk corrupting the settlement and set a precedent that would encourage class representatives in future cases to prioritize their own financial interests over the interests of the class as a whole. Accordingly, the Court awarded enhancement payments to the class representatives in the adjusted amount of $15,000.01 per person and $5,000 to the named Plaintiff. The Court found that these payments were reasonable as payments to non-named class members averaged $821.

(v) Application Of Twombly Pleading Standards In FLSA Collective Actions

*Bejiani, et al. v. Manhattan Sheraton Corp.*, 2013 U.S. Dist. LEXIS 90467 (S.D.N.Y. June 27, 2013). Plaintiffs, a group of banquet servers, brought a class action both against their employer, a hotel, and their union. Plaintiffs’ terms and conditions of employment were governed by the multi-employer collective bargaining agreement negotiated between the union and a hotel trade association (“IWA”). Plaintiffs alleged that the hotel violated the terms of the IWA, and that their union violated its duty of fair representation (“DFR”). Defendants moved to dismiss Plaintiffs’ complaint, and the Court granted the motion. Earlier, Plaintiffs had filed a civil complaint alleging that the union and the hotel had failed to abide by an arbitration decision requiring the payment to Plaintiffs of gratuities on the revenue generated from room rental and other fees associated with banquet events. Plaintiffs also alleged the existence of an illegal tip pool that deprived them of millions of dollars of gratuity compensation. Subsequently, Plaintiffs executed an Omnibus Agreement releasing all claims relating to banquet issues against the hotel and the union in lieu of individual payments to them. Subsequently, Plaintiffs found out that prior to the execution of the Omnibus Agreement, the union and hotel had executed a separate agreement (“Adour Agreement”),
which provided that all banquet and private functions scheduled in the Adour restaurant in the hotel or at space occupied by Adour during the day shall be serviced by Adour staff. Plaintiffs then filed a class action alleging that the union breached its DFR by entering into the Adour Agreement, failing to grieve or adequately address the transfer of certain banquet-style events to hotel rooms, and, more generally, conspiring with the hotel throughout this course of events to deprive Plaintiffs of the benefits afforded to them in the Omnibus Agreement. Id. at *25. Plaintiffs asserted that the union breached the DFR by entering into the Adour Agreement and that the Adour Agreement was arbitrary and an exercise of bad faith. At the outset, the Court noted that the union was within its rights to negotiate the Adour Agreement, as no provision of the IWA prevented any such negotiations or spoke to the question of how the union should address entities like Adour. Id. at *25. Rather, the creation of such deals was an ordinary part of union business. Nor did the Adour Agreement’s redistributive effects among union employees based at the hotel, including its harmful effects on Plaintiffs, constitute an irrational act by the union. To the contrary, it was entirely rational for the union to favor an agreement allowing Adour servers to handle functions held at Adour. Id. at *26. As a result, the Court determined that Plaintiffs’ claims failed for two reasons. First, Plaintiffs could not plausibly allege that they enjoyed a clear contractual right under the IWA that the union violated by negotiating the Adour Agreement. The Court stated that because the Adour Agreement, which dealt with the separate issue of which staff would cover functions hosted in Adour, did not destroy or abrogate any unambiguous contractual entitlement, it was not the basis of a bad faith-based DFR claim by mere virtue of its non-public nature. Plaintiffs also contended that the union breached the DFR by failing to file grievances and seek arbitration with respect to the hotel’s transfer of banquet functions to hotel rooms. Id. at *32. The Court stated that Plaintiffs had not alleged any facts – beyond the overarching conspiracy – that even tended to suggest that the union’s delay, including the series of cancelled meetings and missed phone calls, satisfied these requirements. Id. at *33. The Court observed that the fact that the union elected to allow other employees it represented to receive work opportunities that Plaintiffs coveted for themselves did not necessarily mean it breached any duty it owed to them, since it owed exactly the same duty to the room service servers. Id. at *35. Finally, Plaintiffs alleged that Defendants acted in concert to undermine and destroy the benefits afforded by the Omnibus Agreement and that Defendants took fraudulent and deceitful steps to achieve that goal. The Court noted that Plaintiffs’ complaint alleged no facts that explained why Defendants would have been mutually aggrieved by the Omnibus Agreement, why they would have acted in unison to harm Plaintiffs, or how the agreement operated on the ground. Id. at *42-43. Furthermore, it did not explain how Defendants’ mutual course of dealing departed from the standard obligations of negotiation and agreement that labor law imposed upon unions and employers. The Court determined that the bare and conclusory allegation that the union manifested bad faith by conspiring with the hotel did not satisfy the plausibility threshold. Accordingly, the Court granted Defendants’ motions to dismiss the DFR claims.

DeJesus, et al. v. HF Management Services, LLC, 726 F.3d 85 (2d Cir. 2013). Plaintiff, a promoter of Defendant’s insurance programs, brought a class and collective action under the FLSA and the New York Labor Law for unpaid overtime wages. Plaintiff alleged that there were weeks in which she was paid for her overtime hours but in which Defendant failed to include the commission payments in the calculation of her overtime pay. Defendant moved to dismiss, and the District Court granted the motion, holding that Plaintiff failed to set forth the precise position she held, any approximation of the number of unpaid overtime hours worked, her rate of pay, or any approximation of the amount of wages due. On appeal, the Second Circuit affirmed. First, the Second Circuit observed that to state a plausible FLSA overtime claim, a Plaintiff must sufficiently allege 40 hours of work in a given workweek as well as some uncompensated time in excess of 40 hours. Id. at 88. Further, the Second Circuit noted that determining whether a plausible claim had been pled was a context-specific task requiring the District Court to draw on its judicial experience and common sense. Although the Second Circuit did not make it mandatory to make an approximation of overtime hours in all cases, it remarked that an approximation could help move a Plaintiff’s claim closer to plausibility. Id. Here, although Plaintiff alleged widespread improper behavior by Defendant, she did not estimate her hours in any weeks or provide any other factual context. Plaintiff’s complaint merely alleged that she worked more than 40 hours a week without being paid overtime. The Second Circuit reasoned that Plaintiff’s complaint tracked the statutory language of the FLSA, lifted its
numbers, and rehashed its formulation, but alleged no particular facts sufficient to raise a plausible inference of an FLSA overtime violation. Thus, the Second Circuit opined that Plaintiff’s FLSA and NYLL claims were inadequate and properly dismissed. As to whether Plaintiff had not sufficiently alleged that she was an employee of Defendant within the meaning of the FLSA, the Second Circuit noted that an “employee” is any individual employed by an employer, and an “employer” includes any person acting directly or indirectly in the interest of an employer in relation to an employee. Id. at 90. The Second Circuit observed that relevant case law had found that complaints sufficiently allege employment when they state where Plaintiffs worked, outline their positions, and provide their dates of employment. Id. at 91. Here, Plaintiff detailed where she worked, providing Defendant’s address and its corporate purposes. Plaintiff outlined her position as a promoter, and described her responsibilities and the pay structure. Plaintiff also provided her dates of employment, and alleged that she was an hourly employee within the meaning of the FLSA. Accordingly, the Second Circuit held that Plaintiff adequately pled that she was an employee and Defendant was her employer under the FLSA. However, because Plaintiff failed to sufficiently plead that she worked overtime without proper compensation, the Second Circuit affirmed the order of the District Court.

(vi) FLSA Collective Actions For Donning And Doffing

Adair, et al. v. ConAgra Foods, Inc., 728 F.3d 849 (8th Cir. 2013). Plaintiffs brought an action alleging that Defendants violated the FLSA by failing to compensate them for time spent changing into and out of uniforms, and time spent walking between changing stations and the time clock. Defendants moved for summary judgment, and the District Court denied the motion on the walking time issue. On appeal, the Eighth Circuit reversed the District Court’s order. Plaintiffs first argued that Defendants were required to compensate them for time spent changing clothes, because § 203(o) and its exclusion for such time did not apply and urged that neither of the two conditions required by that statutory exclusion was satisfied, i.e., the protective gear they were required to wear did not fall within the statutory term of “clothes,” and no express term of, or custom or practice under, a collective bargaining agreement established that donning and doffing were not compensable activities. Id. at 851. The District Court had stated that the protective gear worn by Plaintiffs constituted clothes, and clothes-changing time was uncompensated by custom or practice under a bona fide collective bargaining agreement and had granted Defendants’ motion for summary judgment on that issue. Alternatively, Plaintiffs argued that donning and doffing their uniforms were principal activities of their employment, even if changing time was excluded from their hours under § 203(o) and therefore uncompensated. Because their day commenced and concluded in the changing stations rather than at the time clock, Plaintiffs contended that time spent walking between the changing stations and the time clock must be included in their hours. The District Court had determined that donning and doffing uniforms begin and end the workday, because wearing those uniforms was integral and indispensable to Plaintiffs’ principal work activity, whether or not the employees were compensated for time spent changing clothes and thus, had denied Defendants’ motion for summary judgment on the walking-time issue. Plaintiffs maintained that even though their time spent changing clothes was not compensable because of a custom or practice under the collective bargaining agreement, it was still a principal activity that begins and ends the workday and contended that the time walking to and from the time clock was part of the workday and workweek that must be compensated. The Eighth Circuit stated that § 203(o) provided that any time spent in changing clothes or washing at the beginning or end of each workday was excluded from the hours for which an employee was employed, so long as those hours had been excluded from measured working time by custom or practice under a collective bargaining agreement. Id. at 852. Thus, the clothes-changing time of Plaintiffs was excluded by custom or practice under the collective bargaining agreement, so the hours spent changing clothes were not hours for which an employee was employed. Moreover, the Eighth Circuit concluded that the changing of clothes was not a principal activity that begins and ends the workday, because it was not an activity the employee was employed to perform. Id. Therefore, it followed that time spent walking between the clothes-changing stations and the time clock was not part of the workday and workweek for which the employer was liable to pay overtime compensation under the Act. Accordingly, the Eighth Circuit reversed the District Court’s order.
DeKeyser, et al. v. Waupaca, Inc., 2013 U.S. App. LEXIS 22230 (7th Cir. Oct. 30, 2013). Plaintiffs, a group of foundry workers, brought a FLSA action seeking overtime compensation for time they spent showering and changing clothes at the foundries. Employees were required to wear personal protective equipment (“PPE”) while working, and failure to comply with the safety standards could result in discipline. Typically, when foundry workers finished their shift, they clocked-out and proceeded to the locker rooms, where they removed their uniforms and PPE, showered, and changed into street clothes. Defendant moved for summary judgment, and the District Court granted the motion. On appeal, the Seventh Circuit reversed and remanded. Id. at *1-2. The District Court had noted that neither the law nor Defendant required employees to shower and change clothes on-site, and that whether the nature of the work required such on-site activities was not a question that either the District Court or a jury was well-equipped to answer. Further, recognizing the burdensome nature of discovery related to the health impacts of hazardous materials exposure and the difficulty of attributing any negative health impacts to an employee’s failure to shower and change clothes at work, the District Court concluded that the litigation was poorly suited in determining the practices and procedures that should be mandated to protect worker health and safety in the workplace on an industry-wide basis. The District Court had opined that Congress, in enacting the Occupational Safety and Health Act (“OSHA”), intended OSHA to make such determinations through the regulatory process. Accordingly, the District Court had observed that because OSHA promulgated a standard for hazardous material exposure that does not mandate changing clothes and showering after work, such activities were not required by the nature of the work. Id. at *7. The Seventh Circuit, however, concluded that it could not draw any negative inferences from the absence of an OSHA standard requiring foundry workers to shower and change clothes on-site, and that it could not ignore factual evidence and expert testimony offered by the parties to establish the compensability of an activity under the FLSA. It further stated that although cases such as this could implicate very difficult and complex scientific issues, the District Court could not avoid discovery or expert testimony simply because such discovery or testimony may be costly, time consuming, or difficult to understand. Thus, the Seventh Circuit opined that the District Court erred when it ignored the sharp disputes in the evidence as to the health effects of chemical exposure at the foundries and the impact that showering and changing clothes would have on the workers and granted summary judgment in the face of such factual disputes. Accordingly, the Seventh Circuit reversed and remanded. Id. at *7-10.

Gomez, et al. v. Tyson Foods, Inc., 2013 U.S. Dist. LEXIS 142587 (D. Neb. Oct. 2, 2013). Plaintiffs, a group of current or former employees who worked at Defendant’s meat processing facility, brought an action under the FLSA and state law regarding pay for pre-production and post-production line activities, including donning and doffing, and other activities in connection with job functions. Plaintiffs sought relief for alleged violations of state and federal wage & hour laws, including alleged failures to pay minimum wage and overtime compensation for uncompensated job-related activities. Earlier, the Court had granted Plaintiffs’ motion for summary judgment on liability, stating that Defendant was not entitled to a defense of good faith, and that Defendant’s conduct was both objectively unreasonable and its actions were taken in reckless disregard of the law. Thereafter, the jury determined that on average, per day, employees in the Kill Department spent 5.79 minutes performing the compensable activities at issue and employees in the Processing Department spent 4.56 minutes. Both parties submitted their respective damage calculations, and the Court awarded a total award of $3,307,191.20 to Plaintiffs. Plaintiffs also submitted the expert report and calculations of Dr. Liesl Fox, who based his calculations on Defendant’s pay data. Defendant submitted damages calculations prepared by its Rule 1006 witness, Dr. Peter Nickerson. The Court stated that the appropriate time period for recovery of damages began on January 17, 2004 and ended on April 3, 2013, and that the class included all individuals hired and working between those dates. Further, the Court noted that Plaintiffs’ complaint was not limited to unpaid overtime wages and explicitly sought unpaid wages as well as unpaid overtime wage. Plaintiffs were required to present evidence of a reasonable approximation of the time, which Plaintiffs’ expert provided. The Court found that Plaintiffs’ expert witness was credible and adopted her calculations. Accordingly, the Court also awarded Plaintiffs compensatory damages of $1,653,595.60 plus liquidated damages in the same amount.
**Exemption Issues In FLSA Collective Actions**

**Arenas, et al. v. Trusell Endeavor Corp., 2013 U.S. Dist. LEXIS 9376 (N.D. Ill. Jan. 23, 2013).** Plaintiffs, a group of janitors, brought a collective and class action alleging that Defendants denied them minimum pay and overtime wages in violation of the FLSA and the Illinois Minimum Wage Law (“IMWL”) Act. Additionally, named Plaintiff Linares brought a claim under the Equal Pay Act alleging that Defendants paid her less than her male counterparts for equal work. Plaintiffs alleged that they worked eight hours per week cleaning homes of private individuals, and residential and commercial customers. Defendants paid Plaintiffs an hourly rate without regard to the location or type of work they performed or whether they had worked more than 40 hours per week. Defendants moved for summary judgment. Defendants argued that they were not an enterprise engaged in commerce under the FLSA because their annual revenues were below $500,000. The Court observed that Plaintiffs would be entitled to a minimum wage and overtime compensation only if they were “engaged in commerce” or employed in “domestic service.” *Id.* at *7.

Plaintiffs argued that Defendants were engaged in interstate commerce because they purchased cleaning supplies and deodorizers that were manufactured outside the state of Illinois and then required Plaintiffs to deliver those items to customers. Plaintiffs stated that delivery of products manufactured in the other state constituted “commerce” within the scope of FLSA. Plaintiffs admitted that all the cleaning supplies that were used were purchased by Defendants within Illinois. The Court observed that some Illinois merchants obtained the cleaning supplies and deodorizers from out of state and Defendants then purchased them, from that merchant, in Illinois. Plaintiffs’ involvement with the goods was local and did not involve them in interstate commerce. Thus, the Court opined that Plaintiffs’ delivery of cleaning supplies did not bring them within the FLSA minimum wage and overtime provisions. Defendants also argued that Plaintiffs were not domestic services employees because they were not directly employed by the household in which they worked. Plaintiffs relied on statutory language with § 13(a)(15) of the FLSA and the Department of Labor’s (“DOL”) interpretation of the regulatory definition to argue that they were domestic service employees. The Court stated that although Plaintiffs were employees of a third-party employer, they were domestic services employees under the terms of the FLSA, and thus subject to the FLSA’s protections. The DOL memo interpreted the term “domestic services employees” to include domestic services workers employed by third-parties; it also stated that exclusion of workers employed by third-parties would be contrary to Congress’ express intent. *Id.* at *13. Further, the Court noted that the statute provides that any employee working at least eight hours per week in domestic services employment is covered by the FLSA. *Id.* at *14.

In addition, the statute expressly contemplates that a domestic services employee might perform domestic
services in more than one household, a possibility that is far more likely to apply to domestic services workers employed by a third-party than to those employed by private parties. Id. at *15. Thus, the Court opined that the definition “domestic services employees” should not be construed to only those employees who work in the homes of their employers. Id. at *16. Accordingly, the Court denied Defendants’ motion.


Plaintiffs, a group of former district fire chiefs, brought an action alleging that they were non-exempt employees entitled to overtime compensation under the FLSA. Both parties moved for summary judgment, and the District Court granted Defendant's motion for summary judgment. Upon appeal, the Fifth Circuit affirmed the District Court's order. The Fifth Circuit stated that to qualify under the administrative exemption to the FLSA, an employee should have supervisory duties and meet the salary basis test. Plaintiffs asserted that they did not meet the qualifications of the salary basis test because Defendant adopted a policy that could have reduced their pay based on the quantity of hours worked. Although Plaintiffs admitted that no district fire chief had ever been docked pay for missing portions of shifts, they argued that actual deductions were unnecessary to remove them from exempt status; it was enough that an existing policy counseled the possibility of such deductions. Plaintiffs asserted that policy (“AWOL”) allegedly infringed Department of Labor regulations construing the salary basis test, because it presented a substantial likelihood of disciplinary suspensions for the district fire chiefs of less than a week and it did not apply to all employees of the department or Defendant. The Fifth Circuit rejected Plaintiffs' contentions, finding that they were never subjected to the potentially offending policies. The Fifth Circuit stated that Plaintiffs offered nothing more than conjecture, unsupported in practice, and hence a level of justification that could not meet the standard set forth in Auer v. Robbins, 519 U.S. 452 (1997). In Auer, the Supreme Court accepted the Secretary’s definition that an otherwise-exempt employee was subject to the FLSA when there was a significant likelihood that an improper deduction might occur as a practical matter. Id. at *5. Here, the Fifth Circuit noted that Plaintiffs were not subject to salary deductions or suspensions because Plaintiffs were unable to demonstrate that they were subjected to policies that would violate the Department of Labor's mandates for exempt status.


Plaintiffs, a group of special investigator employees (“SI’s”), brought a collective action alleging that Defendant improperly classified Plaintiffs as administrative employees, exempt from the FLSA’s overtime requirements and analogous provisions of New York and California state law. Id. at *1. The District Court granted partial summary judgment to Defendant, finding that Plaintiffs were not entitled to overtime pay because they qualified under the administrative employee exemption of the FLSA. The Sixth Circuit affirmed the District Court’s decision. Defendant was an insurance provider and Plaintiffs’ primary duty concerned investigating suspicious claims. Id. at *4. To qualify as an administrative employee, the employee’s work must be directly related to the employer’s general business operations, as opposed to actual business operations. Id. at *9. Plaintiffs argued that they were production employees because Defendant’s business was selling the promise of asset protection, and by investigating suspicious claims, Plaintiffs produced that asset. Id. at *10-11. The District Court found that Defendant’s business was to create and market insurance policies and that Plaintiffs were not production employees because Plaintiffs did not write or sell insurance policies. Id. at *11-12. The Sixth Circuit agreed that Plaintiffs’ duties to investigate suspicious claims were directly related to assisting Defendant’s business, and not Defendant’s general business operation. Id. at *14-15. In the alternative, Plaintiffs argued that they did not qualify under the administrative employee exemption because SI’s duties did not require discretion or independent judgment. Plaintiffs further argued that Defendant had stripped the SIs of tasks that involved exercise of any discretion and independent judgment by separating the claims adjusting duties from investigative duties and subjecting the SIs’ work to guidelines, extensive quality control, and auditing standards that with respect to matters of significance. Id. at *17. To determine whether an employee, constrained by guidelines and procedures, exercises any discretion or independent judgment, the Sixth Circuit noted that the issue is whether the guidelines and procedures contemplate independent judgment calls or allow for deviations. Id. at *17-18. The Sixth Circuit affirmed the District Court’s factual determination that an SI’s primary duty was to investigate, detect, and deter fraud, which requires the exercise of discretion and
independent judgment. *Id.* The Sixth Circuit determined that the SIs’ duties required the exercise of discretion and independent judgment because, in order to produce factual findings, SIs has to use their experience and knowledge of fraud to distinguish the relevant from the irrelevant to resolve competing versions of events. *Id.* at *22-23. Finally, to qualify as an administrative employee, the employee’s discretion must have a significant impact on the employer. The Sixth Circuit also affirmed the District Court’s holding that the SIs’ discretion had a significant impact on the Defendant because their investigations would influence Defendant’s decision to pay or deny an insurance claim. Accordingly, the Sixth Circuit affirmed the District Court.

**Jones, et al. v. Judge Technical Services, Inc., 2013 U.S. Dist. LEXIS 153343 (E.D. Pa. Oct. 25, 2013).** Plaintiff, a Senior Project Manager placed with Citigroup, brought a collective action alleging that Defendant misclassified him and other employees as exempt in violation of the FLSA. Defendant, a staffing company that placed individuals into temporary employment positions, placed Plaintiff with Citigroup. Plaintiff was subject to Defendant’s Professional Day pay plan under which an employee would not be paid for more than eight hours in a day, unless that employee worked more than 10 hours in a day. Employees under this structure were designated as exempt by Defendant under 29 U.S.C. § 213(a)(17) (the FLSA’s computer employee exemption). Plaintiff entered his daily hours in Defendant’s EaZyTyme system, and also reported his work hours directly to Citigroup for purposes of effectuating payment from Citigroup to Defendant for Plaintiff’s work. During his placement with Citigroup, Plaintiff routinely worked over 40 hours per week and occasionally over 50 hours per week. Subsequently, Plaintiff was taken out of the Professional Day structure and paid on an hourly basis. Defendant moved for partial summary judgment on Plaintiff’s FLSA claim for misclassification of his exempt status. *Id.* at *2-6. The Court denied the motion. The Court observed that the computer employee exemption has two criteria, including: (i) that the employee perform certain primary duties, and (ii) that he be compensated at a rate of at least $27.63 an hour. *Id.* at *27. Defendant asserted that it was entitled to judgment, arguing that the second requirement was met so long as an employee was paid an average hourly wage of $27.63 or more in a given workweek. Defendant contended that because Plaintiff was always paid an average hourly wage well above $27.63, the exemption’s $27.63 requirement was met. Plaintiff, however, argued that the statute sets forth an hour-by-hour, rather than an averaging, approach, and thus computer employees must be paid at least $27.63 for each hour worked. Because Plaintiff was paid nothing for hours nine and ten while he was paid under the Professional Day structure, he argued that the exemption’s second requirement was not satisfied and he was misclassified as exempt. The Court noted that neither the FLSA nor the U.S. Department of Labor’s (“DOL”) implementing regulations set forth a formula for determining whether an employee has received not less than $27.63 an hour and both parties presented plausible interpretations of the provision. The Court remarked that Defendant’s argument failed to recognize that Plaintiff’s claims were for unpaid overtime under § 207, not for unpaid minimum wages under § 206, and that there was a significant distinction between those provisions. The Court noted that while § 206 is directed at providing a minimum standard of living, § 207 is concerned with deterring long hours by making those hours more expensive for the employer. *Id.* at *31-32. The Court opined that the fact that § 213(a) refers to both §§ 206 and 207 did not mean that the overtime provisions of § 207 can be conflated with minimum wage principles. *Id.* at *32. Because neither the legislative history nor the DOL regulations clarify whether the computer employee exemption’s $27.63 requirement is to be calculated on a weekly or hourly basis, the Court rested its determination on a construction that best accorded with the overall purposes of the statute. *Id.* at *32. The Court noted that the Third Circuit had held that the FLSA must be construed liberally in favor of employees, and that statutory exemptions should thus be construed narrowly. *Id.* at *33-34. Thus, the Court ruled that computer employee exemption was applicable only where, assuming the primary duties test is met, an employee paid on an hourly basis received compensation at a rate of $27.63 for each and every hour worked. Accordingly, because Plaintiff was misclassified as exempt under § 213(a)(17), the Court denied Defendant’s motion for partial summary judgment with respect to this claim. *Id.* at *34-35.

**Ladore, et al. v. Ecolab Inc., Case No. 11-CV-9386 (C.D. Cal. Jan. 22, 2013).** Plaintiff brought a putative wage & hour class action alleging that he and other employees were entitled to overtime pay under California’s labor laws. The parties filed cross-motions for summary judgment. Defendant contended that
Plaintiff was not entitled to overtime subject to an exemption that applies to drivers of hazardous materials and Plaintiff contended that class members’ principle job duties were pest extermination and related customer-service tasks and that the transportation of the materials was incidental. The Court denied Defendant’s motion and granted Plaintiff’s motion. The Court held that the hazardous material exemption, if construed properly, would apply only to those employees for whom driving is their principal job duty. \textit{Id.} at 2. Plaintiff drove to customer locations in a service vehicle carrying a variety of pest elimination products. Although the service vehicles required hazardous materials placards if the materials were present in sufficient quantities, Defendant’s service vehicles did not display any such placards, and no special driver’s license was required to operate the service vehicles. The Court noted that although the California Industrial Welfare Commission’s Wage Order sets out overtime pay requirements for California non-exempt employees, the California Labor Code creates an exemption to the general rule and provides that the provisions are not applicable to employees whose hours of service are regulated by U.S. Department of Transportation’s regulations, titled Hours of Service of Drivers, or Title 13 of the California Code of Regulations regulating hours of drivers. \textit{Id.} at 5-6. The federal regulations expressly exempted from coverage a number of people who “drive” during their work such as driver-salespersons, drivers involved in short-haul operations, operators of property carrying commercial motor vehicles not requiring a commercial driver’s license, and delivery drivers, and also imposed limits on the driver’s driving time in addition to requiring the employers of drivers to control the number of hours worked and to maintain detailed information regarding the driver’s workdays and hours of driving time. \textit{Id.} at 7. The Court specifically noted that the federal regulations indicated a principal purpose to promote safety by monitoring and regulating the operation of long-haul truck drivers who work irregular and often long hours. \textit{Id.} Moreover, the California regulation also imposed maximum driving time limits, monitoring and maintaining record of driving time, fatigue levels or illness status, preparing daily report regarding the condition of the service vehicle, ensuring that service vehicles used are in safe operating condition, and maintaining inspections. \textit{Id.} at 8. Reading the two regulatory schemes together, the Court held that they were essentially directed at the activities of individuals whose principal duties involved driving goods from one place to another on behalf of their employer. \textit{Id.} at 9. Thus, because Plaintiff did not perform any of the duties mentioned under the regulations and because Defendant did not comply with any safety-related elements of the regulatory scheme, the Court held that the hazardous exemption did not apply to Plaintiff. Accordingly, the Court granted Plaintiff’s motion for summary judgment.

\textit{Mann, et al. v. Falk}, 523 Fed. App’x 549 (11th Cir. 2013). Plaintiff, a group of former employees of Adelaide Shores RV Resort, brought a collective action under the FLSA alleging retaliation and denial of overtime compensation. Defendants asserted that Adelaide Shores was a recreational establishment that was statutorily exempt from the overtime provision of the FLSA. Adelaide Shores is a recreational vehicle park, which derives approximately 92% of its income from renting lots, and the remainder from selling recreational vehicles. The District Court granted Plaintiff partial summary judgment, holding that Adelaide Shores did not qualify as a recreational establishment. On appeal, the Eleventh Circuit affirmed the District Court’s order. Defendants argued that Adelaide Shores satisfied the two-part test to be eligible for the recreational exemption to the overtime compensation provision of the FLSA because it was a destination getaway that offered activities for its clientele and its income flow evidenced that it was a seasonal business. The Eleventh Circuit noted that the Department of Labor had issued a regulation interpreting that a recreational establishment is an establishment frequented by the public for its recreation. \textit{Id.} at 552. The Eleventh Circuit opined that the business of a recreational establishment is to provide amusement or entertainment for its customers, and a recreational establishment must also sell recreation or entertainment as its principal activity. \textit{Id.} Accordingly, the Eleventh Circuit concluded that Adelaide Shores RV Resort did not qualify as a recreational establishment. The Eleventh Circuit found that the principal activity of Adelaide Shores was selling recreational vehicle lots and recreational vehicles, and that providing recreation was not its principal activity. Moreover, the Eleventh Circuit observed that the majority of recreational activities at Adelaide Shores were organized and funded by the residents and it used the community activities to entice retirees to visit and purchase a site for their recreational vehicle. Further, the Eleventh Circuit held that the District Court did not err when it entered judgment in favor of Plaintiff because Adelaide Shores did not qualify as a recreational establishment as its principal activity, selling recreational
vehicles and leasing lots to house those vehicles, was not recreational in nature, and therefore did not qualify for the exception.

**Rodriguez, et al. v. Pure Beauty Farms, Inc., 503 Fed. App’x 772 (11th Cir. 2013).** Plaintiffs, a group of former merchandisers or merchants, brought an FLSA action alleging that Defendant failed to provide them overtime compensation. Plaintiffs’ jobs were to make sure that Defendant’s plants, while located in Home Depot stores, remained healthy, attractive, and in a sellable condition until they were purchased. The District Court granted Defendant summary judgment, holding that Plaintiffs were agricultural workers, and thus exempt from the FLSA’s overtime provisions. On appeal, the Eleventh Circuit affirmed. Section 213(a)(6) of the FLSA provides that an employee is exempt from the FLSA’s overtime provisions if he is employed “in agriculture.” *Id.* at 774. The FLSA defines agriculture as primary agriculture and secondary agriculture. To fall within the secondary agriculture definition, the practice must be performed either by a farmer or on a farm; it must be performed either in connection with the farmer’s own farming operations or in connection with farming operations conducted on the farm where the practice is performed; and it must be performed as an incident to or in conjunction with the farming operations. *Id.* at 774-75. The Eleventh Circuit observed that to be a farmer within the meaning of the agricultural exemption, the employer must be engaged in activities of a type and to the extent that the person ordinarily regarded as a farmer is engaged, and the regulation also gives the example of an employer engaged in raising nursery stock. *Id.* at 775. Thus, the Eleventh Circuit concluded that Defendant, a commercial nursery that grew and cultivated plants, was a farmer for purposes of the exemption. As employees of Defendant, Plaintiffs were also farmers, and the practices they performed at the Home Depot sites were performed by a farmer. Additionally, because Plaintiffs maintained only plants owned and grown by Defendant, their work was in connection with Defendant’s own farming operations. Thus, the Eleventh Circuit noted that the first two requirements of the secondary definition of agriculture were met. *Id.* Regarding the third requirement, the Eleventh Circuit observed that a practice performed in connection with farming operations is within the statutory language only if it constitutes an established part of agriculture, is subordinate to the farming operations involved, and does not amount to an independent business. *Id.* The Eleventh Circuit also noted that a farmer or his employees selling the farmer’s own agricultural commodities is also a practice incident to or in conjunction with the farming operations as long as it does not amount to a separate business. *Id.* at 776. Further, 29 C.F.R. § 780.205 indicates that if nursery employees are engaged in planting, cultivating, watering, spraying, fertilizing, pruning, bracing, and feeding the growing crop, they are employed in agriculture; further, 29 C.F.R. § 780.209 provides that employees of a grower of nursery stock who work in packing and storage sheds sorting the stock, grading and trimming it, racking it in bins, and packing it for shipment are employed in agriculture provided they handle only products grown by their employer and their activities constitute an established part of their employer’s agricultural activities and are subordinate to his farming operations. *Id.* at 775-76. Here, Defendant handled and sold only its own plants, and Plaintiffs watered, pruned, and cared for only Defendant’s plants situated at the Home Depot stores; Plaintiffs did not work in a wholesale distribution center for other growers’ horticultural products. Moreover, Plaintiffs did not change the plants from their natural state, such that they could be said to be engaged in the separate enterprise of processing or manufacturing. Accordingly, the Eleventh Circuit opined that Plaintiffs’ work was directly connected with and subordinate to Defendant’s own nursery-farming operation. *Id.* at 777. Additionally, the Eleventh Circuit remarked that the fact that Defendant used independent contractors to transport its plants did not end its status as a farmer and render non-exempt Plaintiffs’ work caring for the plants before a purchaser buys them at the Home Depot stores. Accordingly, the Eleventh Circuit concluded that Plaintiffs’ job duties fell within the FLSA’s definition of secondary agriculture and they were exempt from the FLSA’s overtime provisions. *Id.* at 778.

**Smith, et al. v. Pepper Source, Ltd., 2013 U.S. Dist. LEXIS 72515 (W.D. Ark. May 22, 2013).** Plaintiffs, a group of employees, brought an action under the FLSA alleging that although they performed exempt job duties, they were not exempt employees because they were paid on an hourly basis. Plaintiffs moved for partial summary judgment, and Defendant filed a cross-motion for summary judgment. Plaintiffs asserted that because they were actually paid as hourly employees they were underpaid for overtime work. Plaintiffs used their timesheets and the fact that their weekly pay was not uniform to demonstrate that they
were paid as hourly employees. The Court stated that the fact that an employer might calculate a salaried employee’s weekly salary using a 40 hour per week multiplier was not conclusive evidence that an employee was paid hourly. Further, Plaintiffs’ stated variance in their weekly pay showed that their pay actually depended on the number of hours they worked. The Court stated that the formatting of Defendant’s timesheets or the input requirements of the payroll system was not determinative of an FLSA claim or exemption. Further, because Plaintiffs were paid more when they worked additional production hours on the weekend, the Court opined that Defendant was not precluded from paying a salaried employee compensation over and above his pre-determined weekly salary. The Court found that an FLSA exemption for a salaried employee was not lost if the exempt employee, who was guaranteed a pre-determined weekly pay of at least $455, also received compensation based on hours worked beyond the normal workweek, including compensation on a straight time hourly basis. Id. at *8. Thus, Defendant did not lose its FLSA exemption by paying those employees extra, straight time compensation for production work on the weekends. Plaintiffs also pointed out that during certain weeks they were paid less than their pre-determined weekly salaries. The Court stated that an employer who makes improper deductions from salary loses the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis. Id. Plaintiffs argued that Defendant made numerous improper deductions sufficient to demonstrate an actual practice of improper deduction. However, only one of the nine improper deductions was alleged to have occurred during the relevant statute of limitation period, and the Court remarked that even considering the deductions made outside the statute of limitations period, Plaintiffs could not establish a practice. Further, Defendant stated that no such deductions were made during the three years preceding this lawsuit and contended that it was entitled to the benefit of a window of correction and was ready to reimburse Plaintiffs for any improper deductions that were mistakenly made. Further, it was undisputed that Plaintiffs were paid their pre-determined salary even when they worked less than 40 hours, and Plaintiffs also signed a classification of salaried employees statement recognizing that they were classified as exempt salaried employees upon starting their supervisory positions. The Court found that Defendant had established that Plaintiffs were exempt as supervisory, salaried employees, and that the timesheets did not conclusively show that Plaintiffs’ were paid hourly. Moreover, the Court stated that Plaintiffs had not shown that such a practice continued into a time period during which Plaintiffs’ claims would not be barred by the applicable statute of limitations. The Court also noted that Defendant intended to, and did, pay Plaintiffs on a salaried basis during the relevant time periods. Accordingly, the Court granted Defendant’s motion for summary judgment.

(viii) Discovery In FLSA Collective Actions

Jewell, et al. v. Aaron’s Inc., Case No. 12-CV-563 (N.D. Ga. Mar. 25, 2013). Plaintiff, a non-exempt hourly employee, filed an FLSA collective action alleging denial of meal breaks and failure to pay for meal periods. Plaintiff was employed in various positions (account manager, manager trainee, and sales manager) at a lease-to-own store operated by Defendant. After reviewing the parties’ submissions and holding a discovery status conference, the Court issued a discovery plan and scheduling order. The Court stated that a more in-depth review would be conducted after discovery to determine whether Plaintiff and the opt-in Plaintiffs were similarly-situated enough to proceed to trial on a collective action basis, for which discovery from a sufficient sampling of about 80 to 100 opt-in Plaintiffs would be required. The Court noted that the sample discovery Plaintiffs would be selected randomly by first separating the approximately 1,788 opt-in Plaintiffs into five sub-lists, one for each of the five job classes or positions. Because some opt-ins held more than one job position during the class period, the total number of opt-in Plaintiffs on the five sub-lists would be greater than 1,788. Defendant estimated that the total number of positions held by the opt-in Plaintiffs during the class period was 2,345. The Court observed that the relative proportion of each sub-list in the total sample would be calculated by comparing the number of opt-in Plaintiffs on a given sub-list with the total number of opt-in Plaintiffs on all five sub-lists collectively, which would then be applied to the desired sample size of 80 to determine the number of opt-in Plaintiffs who should be selected from each sub-list. The Court then instructed the parties to conduct random draws from each sub-list to come up with a sample of approximately 80 opt-in Plaintiffs, and assess the sample to determine whether substantial under-representation of regions had occurred. The Court also directed that the parties should randomly draw 15 additional individuals to serve as alternates if an opt-in Plaintiff chosen for the sample was unable
to participate in discovery. The Court instructed the parties to confer and involve the Court if necessary, to
determine whether an opt-in Plaintiff’s refusal or inability to participate in discovery was for exceptional or
unexceptional reasons. The Court reserved for determination at a later time what sanctions a Plaintiff
would be subject to for failing to participate in discovery. The Court also noted that Defendant could serve
written discovery, consisting of interrogatories, requests for production of documents, and requests for
admission, on the sample Plaintiffs if written in simple terms and properly limited in scope. The Court
observed that Defendant could take depositions and serve full written discovery to Plaintiff and four opt-in
Plaintiffs identified as principal witnesses. The Court also permitted Plaintiff to take 15 general manager
depositions and 20 depositions of Regional Managers, both which would be limited to the stores and
regions in which the sample Plaintiffs worked. The Court directed Plaintiff to send revised discovery
requests to Defendant for review, and schedule a conference to resolve disputes regarding the written
discovery requests.

Plaintiffs brought a class and collective action alleging failure to pay proper wages and overtime pay to
tipped employees, such as servers. During discovery, the Magistrate Judge ordered limits to the scope of
discovery Plaintiffs sought. Plaintiffs filed Rule 72 objections to various aspects of the Magistrate Judge’s
order, including: (i) limiting the scope of Plaintiffs’ Rule 30(b)(6) deposition; (ii) denying Plaintiff’s motion to
compel production of electronic documents from additional custodians and use of Plaintiffs’ search terms;
and (iii) granting Defendants’ motion to compel Plaintiffs to provide individual responses to Defendants’
document request. The Court overruled Plaintiffs’ objections. *Id* at *5. The Magistrate Judge had limited
the scope of Plaintiffs’ Rule 30(b)(6) depositions to a list of 11 topics. Plaintiffs argued that these
limitations prejudiced their ability to prove that the putative class members were similarly-situated. The
Court observed that the approved topics covered a wide range of company procedures and gave Plaintiffs
the ability to determine whether the different restaurant brands owned by Defendant utilized similar
policies. Further, the Court noted that although Plaintiffs maintained that some of the excluded topics were
relevant to the issue of enterprise liability under the FLSA, Defendants had agreed not to oppose class
certification on the grounds that some Defendants may not be covered entities under the FLSA. The Court
also agreed with the Magistrate Judge that various findings of the U.S. Department of Labor on
Defendants’ tipped employees appeared more relevant to damages than class certification. Accordingly,
the Court held that the limitations were not erroneous or contrary to law. *Id* at *7. Second, the Magistrate
Judge had denied in part Plaintiffs’ request for a broad range of electronically-stored information regarding
Defendants’ middle and upper management, and limited Plaintiffs from applying certain search terms to 34
data sets designated by Defendants. Plaintiffs maintained that this denied them access to potentially
responsive documents and e-mails; that Defendants failed to show that complying with Plaintiffs’ request
would have been unduly burdensome; and criticized the analysis Defendants performed to estimate the
number of files that would be produced in response to Plaintiffs’ request. The Court, however, stated that it
could not conclude that the estimates used by Defendants were contrary to law or that, under the
circumstances, it was not appropriate to engage in an estimating methodology. Accordingly, the Court
found that the Magistrate Judge’s decision to narrow Plaintiffs’ request was not erroneous. *Id.* Finally,
although Plaintiffs had filed a joint response to Defendants’ first document requests, Plaintiffs were ordered
to submit individual responses. Plaintiffs asserted that the responses were identical and it would be absurd
to require separate but identical pleadings. The Court, however, observed that Plaintiffs’ counsel agreed to
serve individual responses on behalf of each Plaintiff, if so desired by the Magistrate Judge. Thus, the
Court concluded that the Magistrate Judge’s decision to order a response format agreed to by Plaintiffs
was not erroneous. Accordingly, the Court overruled Plaintiffs’ Rule 72 objections. *Id* at *9.

Plaintiffs, a group of student drivers enrolled in Defendant’s Student Driver Program, brought a collective
action alleging that Defendant’s policies regarding its training program systematically under-compensated
newly hired drivers who participated in that program in violation of the FLSA. The Student Driver Program
was part of the training and orientation for new drivers. Defendant compensated trainees with either $50
per day or $7.25 per “on-duty” hour, whichever was greater. Plaintiffs contended that Defendant
inappropriately designated significant amounts of legally compensable time as off-duty, thereby leading to under-compensation in violation of the FLSA. Plaintiffs communicated their status using coded messages over a “Qualcomm” system, which connected the driver in the vehicle to Defendant’s home office. Defendant then used a computer program to calculate compensation based on the drivers’ coded entries. Plaintiffs filed a motion for discovery, seeking the source code and a forensic copy of the computer program. Additionally, Plaintiffs requested all e-mails, memorandums, notes, and other documents that discussed actual or proposed policies and practices that related to the compensability of rest breaks, sleeping time, and time designated as off-duty for purposes of DOT regulations. The Court granted the motion. The Court stated that in order to confirm whether Plaintiff’s compensation was calculated correctly, the workings of the computer program itself had to be reviewed and then the calculated compensation had to be compared with Defendant’s policies and the requirements of the relevant wage & hour laws. Id. at *4. Thus, the Court observed that a useable copy of the software and a copy of the un-compiled source code in the programming language in which the program was written were relevant and should be produced. The Court also held that a protective order was appropriate, which would be issued upon submission of a proposed order prepared by the parties. Defendant contended that it had already produced all documents responsive to Plaintiffs’ request of pay policies and it had no additional responsive documents. Plaintiffs failed to identify any specific documents that they contended were responsive, but which Defendants had refused to produce. Accordingly, the Court stated that any further order was inappropriate at this time. Defendant claimed that some of these documents were privileged, and Plaintiffs’ motion suggested that a privilege log-in conformance with Rule 26(b)(5) had not been provided. The Court assumed privilege for attorney-client communications that transpired after the initiation of litigation in situations where Plaintiff was requesting extensive discovery. Id. at *6. The Court, however, opined that to the extent that responsive documents had not been produced on the basis of privilege, a privilege log must be provided to Plaintiffs so that any dispute about the scope or appropriateness of the privilege asserted could be reviewed and, if necessary, contested. Accordingly, the Court granted the motion compelling discovery.

Romo, et al. v. GMRI, Inc., Case No. 12-CV-715 (C.D. Cal. Jan. 2, 2013). In this wage & hour class action, the Court denied Defendants’ amended motion to modify a protective order. Earlier, pursuant to the protective order, Defendants had agreed to produce the putative class members’ contact information. Defendants then sought an extension of time to produce the information and filed the motion to modify the protective order informing the Court that Initiative Legal Group, the law firm appointed interim class counsel in this case, was sanctioned in an unrelated wage & hour class action case – Clarke v. First Transit, Inc., et al., Case No. 07-CV-6476 (C.D. Cal.) – for violating a protective order by misusing confidential information to solicit clients for a new lawsuit. Miriam Schemmel, an attorney for Plaintiffs, was an attorney of record in the Clarke case, although there was no indication she was explicitly involved in the conduct resulting in sanctions. Defendants feared that Plaintiffs’ counsel might or could misuse the putative class information in this case and thus requested the Court add language to the protective order to: (i) require that Plaintiffs submit all written solicitation correspondence to the putative class to the Court for review and approval prior to dissemination; (ii) state the Court shall impose serious consequences for violation of this protective order; and (iii) state that confidential information will be used solely and exclusively for this case. The Court found that the agreed protective order already stated that confidential information should be used solely for purposes of the prosecution and defense of this action and could not be used for in any other proceeding for any reason whatsoever. Accordingly, the Court concluded that there was no basis for modifying the protective order as proposed by Defendants. Moreover, the Court remarked that Defendants filed this motion after hasty and minimal engagement in the meet and confer process for the sole purposes of informing the Court of a negative order against Plaintiffs’ counsel, and for delay in the production of class information. Id. at 2.

Romo, et al. v. GMRI, Inc., 2013 U.S. Dist. LEXIS 56898 (C.D. Cal. Feb. 16, 2013). Plaintiffs, three former cooks at Olive Garden restaurants in Los Angeles and Riverside County, California, brought a class action on behalf of themselves and all other hourly employees alleging that they were subject to various forms of state wage & hour violations, including unpaid overtime; unpaid minimum wages; failure to provide meal and rest periods; non-compliant wage statements; unlawful deductions for non-slip shoes; failure to
reimburse business expenses; and wages not timely paid upon termination. Specifically, one Plaintiff, Garcia, alleged that she usually worked off-the-clock after clocking-out for breaks and then after clocking-out at the end of the workday because the restaurant was busy and understaffed. *Id.* at *2. She alleged that Defendant did not pay her overtime for this off-the-clock work, and also that she incurred unreimbursed business expenses and costs, including cell phone and uniform expenses. *Id.* Defendants served subpoenas to two El Pollo Loco restaurants where Plaintiff Garcia worked a second job during the relevant time period that he worked for Defendants. Defendants’ subpoenas sought information regarding other jobs Plaintiff Garcia applied for during that period. *Id.* at *3-4. As to the first category of documents, Defendants sought information regarding Garcia’s work at El Pollo Loco, including performance and disciplinary documents, charts, data, and calendar entries related to her employment there. Plaintiffs sought to quash the subpoenas. The Court held that the information was not discoverable by defense counsel, but that El Pollo Loco must provide the information to Plaintiffs’ counsel for submission of the information to the Court for in camera review, so that the Court could determine if it is discoverable by Defendant. The Court reasoned that “[c]redibility is not a requirement of a class representative.” *Id.* at *6. Defendants sought the information to show Plaintiff was a poor performer – for example, she testified at her deposition that she was often late to work – but the Court opined that this was not relevant to her claims in this case, except to the extent it could be shown that she was working at El Pollo Loco during the time she claimed she worked overtime at Defendants’ restaurant. The Court observed that the standard to admit evidence that goes to a class member’s credibility is an onerous one; thus, “[for] an assault on the class representative’s credibility to succeed, the party mounting the assault must demonstrate that there exists admissible evidence so severely undermining Plaintiff’s credibility that a fact-finder might reasonably focus on Plaintiff’s credibility to the detriment of the absent class members’ claims.” *Id.* The Court also refused to quash Defendants’ subpoena seeking information about Garcia’s employment outside of Defendants’ restaurants. However, the Court modified the requests to allow discovery as to positions actually held during the relevant time period (and not those “applied for”). *Id.* at *7. Due to Garcia’s simultaneous employment, the Court reasoned that the information sought could lead to discoverable evidence pertaining to Garcia’s off-the-clock work, and possibly unreimbursed business expenses. The Court stated that because the information sought was likely to be of little utility to the case, all counsel must work together and coordinate discovery with El Pollo Loco’s human resources department in regards to the manner and the timing of the response to limit the burden on El Pollo Loco associated with production of these documents.

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(ix) **Public Employee FLSA Collective Action Litigation**

**Barry, et al. v. United States, 2013 U.S. Claims LEXIS 1873 (Ct. Cl. Dec. 4, 2013).** Plaintiffs, current and former public employees, brought an FLSA action alleging that they were wrongly classified as exempt prior to February 12, 2012. On February 12, 2012, Plaintiffs were reclassified as non-exempt for purposes of the FLSA. Defendant challenged the Court of Federal Claims’ subject-matter jurisdiction over Plaintiffs’ claims, and moved to transfer the case to the U.S. District Court for the District of Nebraska. *Id.* at *1. The Court of Federal Claims denied the motion. The Court of Federal Claims noted that the jurisdictional dispute rested on the relationship between the Tucker Act, the principal jurisdiction granting statute applicable to the Court of Federal Claims, and the FLSA, the statute providing the substantive right Plaintiffs sought to enforce. The Court noted that the Tucker Act provided for a waiver of sovereign immunity and provided the Court with jurisdiction over claims for monetary relief against the United States founded upon the Constitution, any Act of Congress, any regulation of an executive department, or upon any express or implied contract with the United States. *Id.* at *4. Further, the Court observed that although constituting a grant of jurisdiction, the Tucker Act does not create a substantive legal right. *Id.* The Court of Federal Claims noted that United States v. Bormes, 133 S. Ct. 16 (2012), held that the broad waiver of sovereign immunity in the Tucker Act does not apply when the statute providing the cause of action provides a remedial scheme with a divergent jurisdictional avenue, and that the Tucker Act may be called upon when no special remedy has been provided to enforce a payment to which a claimant was entitled. *Id.* at *11-12. Relying on the decision in Bormes, Defendant asserted that the Tucker Act’s grant of jurisdiction was necessarily displaced by a statute creating a substantive legal right and also providing a detailed remedial scheme. Defendant contended that in such a situation, the Court of Federal Claims is deprived of subject-matter jurisdiction unless jurisdiction is specifically granted to it by the statute providing
the substantive cause of action, and that the FLSA presented such a situation. The Court of Federal Claims disagreed, stating that where a statute provides a comprehensive remedial scheme that includes an attendant waiver of sovereign immunity, the Court of Federal Claims may still have jurisdiction through the Tucker Act if Congress so intended under the terms of the statute. Id. at *14. The Court of Federal Claims opined that the FLSA contains an express waiver of sovereign immunity distinct and separate from the Tucker Act, and that the forum provision of the FLSA does not grant jurisdiction to any specified forum, providing only that jurisdiction is appropriate in any “competent” state or federal court. Id. at *17. Thus, the Court of Federal Claims found that the FLSA was not similar to other statutes that have been interpreted to foreclose jurisdiction in the Court of Federal Claims, and instead, juridically, the FLSA was expressly open-ended. Further, the Court of Federal Claims remarked that Congress never excluded FLSA claims from the purview of the Court of Federal Claims, either expressly or impliedly, and that it was appropriately a “competent” court within the terms of the FLSA when jurisdiction was invoked under the Tucker Act. Id. at *17-18. Accordingly, because the Court of Federal Claims had jurisdiction over Plaintiffs’ claims, it denied the Government’s motion to transfer.

Cannon, et al. v. District Of Columbia, 717 F.3d 200 (D.C. Cir. 2013). Plaintiffs, a group of Metropolitan Police Department (“MPD”) retirees, brought an action alleging that their salary off-set violated the Fifth Amendment, the Equal Protection Clause, and that Defendant also violated the First Amendment by retaliating against them for filing their lawsuit. Additionally, three Plaintiffs asserted that they did not receive a minimum wage under the FLSA. Under the D.C. Code, the salary of a retired MPD employee drawing on a retirement plan pension is off-set by the amount of the pension payments. Id. at 202. Defendant re-hired Plaintiffs to work, and through the end of 2011, Plaintiffs were paid their full salaries while they continued to receive Retirement Plan annuities. Subsequently, Defendant enforced § 5-723(e) against Plaintiffs, and Plaintiffs brought this action. The District Court entered summary judgment for Defendant on the FLSA and First Amendment claims, and dismissed Plaintiffs’ Fifth Amendment claims under Rule 12(b)(6). The District Court, however, declined to exercise supplemental jurisdiction over Plaintiffs’ remaining D.C. law claims. On appeal, the D.C. Circuit affirmed the judgment on the constitutional claims, but reversed and remanded as to the claim under the FLSA and the D.C. law. First, regarding the FLSA claims, Defendant asserted that the employees were exempt under the FLSA because they were employed in a bona fide executive, administrative, or professional capacity. Both parties agreed that the amount each of these Plaintiffs received in their paychecks fell below $455 per week since January 2012. The D.C. Circuit opined that pension payments cannot be considered as compensation for Plaintiffs’ current work, and the money they received from their pensions was a retirement benefit. The D.C. Circuit observed that asking Plaintiffs to choose between losing their pension payments and taking a pay cut to satisfy the FLSA did not convert the annuities into compensation because pensions were not contingent upon their current work. Id. at 205. Thus, because Plaintiffs did not receive the $455 weekly compensation necessary to qualify for the exemption, the D.C. Circuit held that Defendant violated the FLSA. Second, all Plaintiffs claimed a cognizable property interest in the simultaneous receipt of their annuities and full salaries, arguing that Defendant use of the off-set amounted to a taking and interfered with that property interest. Id. at 206. The D.C. Circuit stated that because Plaintiffs were not entitled to both full salary and their annuities, their due process and takings claims failed. Third, Plaintiffs alleged that because the MPD gave large raises to senior officers who were retirees who had been re-hired, Defendant violated their right to equal protection of the laws. Plaintiffs, however, conceded that they were not similarly-situated to the officers who received pay raises because Plaintiffs now worked for Protective Services and not the MPD, and they did not perform the same functions, have the same duties and responsibilities, or the same background or experience as the MPD employees. Thus, the D.C. Circuit affirmed the dismissal of Plaintiffs’ equal protection claim. Finally, Plaintiffs claimed that Defendant took two retaliatory actions against the exercise of their First Amendment right to bring this suit. Plaintiff Louis Cannon was terminated and Plaintiffs did not receive their pay through direct deposit but were issued paper paychecks instead. Plaintiffs argued that summary judgment was improper because a jury should have determined the District’s intent in issuing the paper paychecks. Because the question of retaliatory intent was rendered irrelevant by the District Court’s holding that Defendant’s use of a paper paycheck in the place of direct deposit would not deter the exercise of First Amendment rights, the D.C. Circuit held that
Plaintiffs’ challenge failed. Further, regarding Cannon’s termination, Defendant produced documentary evidence and an affidavit demonstrating that the director of the Department of Human Resources approved the firing before Plaintiffs filed suit and for unrelated reasons. The D.C. Circuit therefore concluded that the District Court did not abuse its discretion in granting Defendant’s summary judgment motion.

Carmody, et al. v. Kansas City Board Of Police Commissioners, 2013 U.S. App. LEXIS 8128 (8th Cir. April 23, 2013). Plaintiffs, members of the Kansas City Police Department, brought an action under the FLSA and Missouri Minimum Wage Law, alleging that instead of paying overtime compensation, the City provided them flex-time or time-off. Id. at *1-2. The City moved for summary judgment, and the District Court granted the motion. During discovery, Plaintiffs’ interrogatory responses did not provide precise information of the number of uncompensated hours or the amount of overtime owed. Plaintiffs stated that they would need access to Defendant’s documents to provide more precise information. Id. at *3-4. Defendant claimed that it provided all but 165 documents to Plaintiffs by January 27, 2012. Plaintiffs contended that they did not receive the last of the documents until February 16, 2012. Defendant deposed Plaintiffs between February 21, 2012, and March 2, 2012. Discovery closed on March 2, 2012, and Defendant filed a motion for summary judgment on March 30, 2012. In support of their opposition to the motion, Plaintiffs submitted affidavits providing precise estimates of the overtime hours owed. The District Court struck the affidavits as a discovery sanction and granted the motion for summary judgment, finding that Plaintiffs had failed to meet their evidentiary burden. Id. at *4-5. On appeal, the Eighth Circuit affirmed. In striking the affidavits, the District Court applied a balancing test and evaluated the importance of the evidence to Plaintiffs, the justifications for Plaintiffs’ failure to comply with discovery, the prejudice to Defendant if the evidence were allowed to be used, and whether a continuance would effectively cure the prejudice. Id. at *7. Plaintiffs argued that the substantial volume of Defendant’s documents that were produced late in discovery mitigated their fault. The District Court had noted that Plaintiffs never requested additional time to review the documents. Although the District Court considered lesser sanctions, it ruled Defendant would be significantly prejudiced if the affidavits were allowed. The Eighth Circuit concluded there was no abuse of discretion in striking the affidavits. Id. at *7-9. Plaintiffs contended that they had produced sufficient evidence to allow a jury to find the amount of damages by just and reasonable inference, even without the affidavits. Because the City failed to keep accurate time records, the District Court applied the relaxed evidentiary standard. The Eighth Circuit noted that under the relaxed standard, once the employee has shown work performed for which the employee was not compensated, and sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference, the burden then shifts to the employer to produce evidence to dispute the reasonableness of the inference. Id. at *9-10. Although there was evidence that the flex-time practice existed, Plaintiffs could produce no evidence that they worked overtime hours for which they were not compensated. The Eighth Circuit noted that although Defendant’s failure to provide accurate time records reduced Plaintiffs’ burden, it did not eliminate it. Accordingly, the Eighth Circuit affirmed the District Court’s grant of summary judgment. Id. at *10-13.

Cromwell, et al. v. New York City Health & Hospitals Corp., 2013 U.S. Dist. LEXIS 69414 (S.D.N.Y. May 15, 2013). Plaintiff, a former hospital police officer with the New York City Health & Hospitals Corporation (“HHC”), brought a class and collective action seeking to recover unpaid wages allegedly owed to hourly employees for unspecified meal periods and breaks during which they worked, and for work performed before and after scheduled shifts. Plaintiff asserted that he and similarly-situated employees were deprived of premium pay and overtime pay in violation of the FLSA and the New York Labor Law (“NYLL”). Defendants moved to dismiss, and the Court granted the motion. The Court observed that to state a claim under the FLSA, a complaint must state more than vague legal conclusions, and that a Plaintiff must sufficiently allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours. The Court noted that Plaintiff’s factual allegations suffered from a lack of specificity, and that his complaint did not allege precisely when, or at what point during his 21 years of employment, Plaintiff worked more than 40 hours. Further, the Court remarked that even assuming arguendo that a three-year statute of limitations governed Plaintiff’s claims, the complaint did not point to any particular workweek within the limitations period during which he worked uncompensated time more
than 40 hours. Thus, because Plaintiff’s complaint failed to plead facts sufficient to support a plausible claim that the FLSA was violated, the Court dismissed Plaintiff’s claim for uncompensated overtime pay under the FLSA. *Id.* at *8-11.

The Court also determined whether it should exercise supplemental jurisdiction over Plaintiff’s NYLL claims. *Id.* The Court stated that both the Second Circuit and the Supreme Court have held that, as a general rule, when the federal claims are dismissed the state claims should be dismissed as well. *Id.* Thus, because the Court had not yet invested the resources necessary to resolve the NYLL claim, nor did convenience, fairness, and comity counsel in favor of retaining jurisdiction, the Court declined to exercise supplemental jurisdiction over the NYLL claims and dismissed them without prejudice. *Id.* at *11-14.

*Cromwell, et al. v. New York City Health & Hospitals Corp.*, 2013 U.S. Dist. LEXIS 149203 (S.D.N.Y. Oct. 16, 2013). Plaintiff, a hospital police officer, brought an action under the FLSA and the New York Labor Law (“NYLL”) for unpaid wages allegedly owed to hourly employees for work performed before and after scheduled shifts, and during meal periods and breaks. Defendants moved to dismiss Plaintiff’s NYLL claims against Defendant New York City Health and Hospitals Corp. (“HHC”) in their entirety, arguing that the HHC was a political sub-division of New York State and therefore exempt from the NYLL’s wage provisions. The Court granted the motion. The Court noted that NYLL excludes from its definition of “employee” those individuals employed by a federal, state, or municipal government or political subdivision, and thus if the HHC was a political sub-division, then NYLL’s wage provisions did not apply to HHC’s employees. *Id.* at *9-10. The Court observed that *Drayton v. MetroPlus Health Plan, Inc.*, 791 F. Supp. 2d 343 (S.D.N.Y. 2011), had held that the HHC was a political sub-division for purposes of the NYLL. *Id.* at *13. *Drayton* analyzed the HHC’s enabling statute, which stated that the HHC was constituted to perform the essential public and governmental function of providing and delivering comprehensive care and treatment for the ill and infirm, which was in all respects for the benefit of the people of New York. *Id.* at *14. *Drayton* also noted that the HHC received a substantial amount of financial support from public sources of funding. *Id.* The Court also reasoned that exposing the HHC to suit under the NYLL would potentially subject the HHC to paying, in addition to back wages, 100% liquidated damages, and that the remedies provided by the NYLL extended beyond those available under the FLSA. Because under New York law, the State and its political sub-divisions are not subject to punitive damages, the Court stated that imposing 100% liquidated damages on the HHC would disserve the public interest, particularly because such a penalty, in all likelihood, would either diminish the HHC’s resources or fall on the blameless taxpayer. *Id.* at *16-17. The Court noted that the HHC’s employees were subject to Article 14 of the civil service law and for all such purposes were deemed public employees, covered by the Public Employees’ Fair Employment Act, and also subject to New York City’s Collective Bargaining Law, which applies only to public sector municipal employees. *Id.* at *17. The Court also noted that the HHC had been deemed a political sub-division of the State of New York for purposes of exempting the HHC from antitrust liability pursuant to the state action doctrine. *Id.* at *17-18. Accordingly, the Court found that the HHC was a political sub-division of New York State for NYLL purposes, and granted Defendants’ motion to dismiss Plaintiff’s NYLL claims with prejudice.

*Gilliland, et al. v. Board Of Education Of Charles County*, 526 Fed. App’x 243 (4th Cir. 2013). Plaintiffs, a group of bus drivers and attendants, brought an action seeking to recover unpaid wages, including overtime wages, primarily on the basis of the FLSA. The District Court denied Defendants’ motion to dismiss the FLSA claim to the extent it sought damages of up to $100,000, concluding that Maryland had legislatively waived Eleventh Amendment immunity for an FLSA claim for damages up to that amount. On appeal, the Fourth Circuit reversed and remanded. The Fourth Circuit noted that Eleventh Amendment immunity protects unwilling states from suit in federal court, and this immunity also protects state agents and state instrumentalities. *Id.* at 245. The Fourth Circuit, however, also observed that state legislatures are authorized to enact statutory waivers of Eleventh Amendment immunity that apply to state agencies. *Id.* at 246. Two Maryland statutes appeared relevant to the waiver issue, including § 12-201(a) of the State Government Article and § 5-518 of the Courts and Judicial Proceedings Article. The Fourth Circuit found that § 12-201(a) could not waive Eleventh Amendment immunity because it applied only in state court to cases that were based on written contracts, and Plaintiffs’ case was being...
litigated in federal court and was not based on a written contract. Thus, any legislative waiver would derive from § 5-518, the applicability of which turned on the type of claim asserted. *Id.* Section 5-518 provides, in relevant part that a county board of education may raise the defense of sovereign immunity to any amount claimed above the limit of its insurance policy or, if self-insured or a member of a pool described under § 4-105(c)(1)(ii) of the Education Article, above $100,000, and a county board of education may not raise the defense of sovereign immunity to any claim of $100,000 or less. *Id.* at 247. The Fourth Circuit concluded that the statute applied only to tort claims, such as personal injury actions, and tort-related claims, such as discrimination actions. *Id.* at 249. The Fourth Circuit reasoned that the FLSA claim did not fit that description because FLSA claims are contractual in their nature. In light of the contractual nature of the FLSA claim, the Fourth Circuit observed that Maryland courts would not consider it to be an employment law claim in this context. Thus, because § 5-518 did not apply to Plaintiffs’ FLSA claim, the Fourth Circuit noted that Maryland had not even partially waived the Defendant’s Eleventh Amendment immunity against the claim. Accordingly, the Fourth Circuit reversed the District Court’s denial of Defendants’ motion to dismiss and remanded for entry of judgment in their favor. *Id.* at 249-50.

**Lockhart, et al. v. County Of Los Angeles, Case No. 07-CV-1680 (C.D. Cal. Sept. 9, 2013).** Plaintiffs, a group of deputy sheriffs, brought a collective action against Defendant alleging that it failed to pay them overtime wages in violation of the FLSA. Defendant moved for summary judgment. The Court partly denied and partly granted Defendant’s motion. The Court found that triable issues of fact existed as to whether Defendant “suffered” or “permitted” Plaintiffs to work off-the-clock without compensation. *Id.* at 5. Although Defendant had a written policy that required all deputies to accurately report the overtime worked on their timesheets, Plaintiffs claimed that Defendant had an unwritten policy that discouraged deputies from reporting overtime. Defendant contended that it did not know that Plaintiffs were engaging in off-the-clock work for which they were not paid because Plaintiffs did not comply with its written policy. The Court, however, found that Plaintiffs had presented enough evidence of whether Defendant had actual or constructive knowledge of Plaintiffs’ allegedly uncompensated overtime work to create a triable issue of fact. *Id.* at 6. Plaintiffs’ claim was that notwithstanding the written policy, Defendant had an unwritten policy or practices to discourage deputies from reporting or seeking overtime compensation. Plaintiffs had stated in their declarations that the unwritten policy or practice was taught to them during training and it persisted throughout their careers. Plaintiffs asserted that they were taught at the training academy that asking for overtime would make them a “sniveler.” *Id.* at 7. The record also included several specific anecdotes supporting Plaintiffs’ claim that seeking pay for overtime was discouraged. As Plaintiffs alleged, the overtime claims were at times not approved, and at other times not filed out of fear of repercussions from their supervisors. The Court ruled that Defendant’s written policy did not foreclose Plaintiffs’ claim based on an unwritten policy. *Id.* at 6-7. The Court thus held that the evidence gave rise to disputed facts about whether Defendant had actual or constructive knowledge that Plaintiffs performed overtime work without being compensated, and therefore denied summary judgment to Defendant on the issue. *Id.* at 8. Defendant also argued that Plaintiffs did not have sufficient evidence to show the amount of compensated overtime they allegedly worked. Plaintiffs had, however, testified as to various pre-shift and post-shift tasks performed off-the-clock, without compensation, at their various assignments, and had also estimated how often they performed such tasks, and how much time they spent on the tasks. *Id.* The Court therefore rejected Defendant’s argument and held that the amount of time Plaintiffs worked without compensation could be estimated reasonably and was not merely a matter of speculation. *Id.* at 9. Defendant further argued that some of Plaintiffs’ alleged overtime work was non-compensable because the tasks performed were for their own benefit, and some tasks could have performed during their shifts. The Court reviewed the evidence and found that triable issues of fact precluded a determination of whether the alleged unpaid overtime was non-compensable for reasons stated by Defendant. *Id.* The Court, however, granted Defendant’s motion for summary judgment on the claims for “gap time” pay, *i.e.*, for hours worked between 40 and 43 hours. The Court noted that the only way Plaintiffs could assert a claim for gap time pay under the FLSA was if they could also establish a minimum wage violation. *Id.* at 15. Plaintiffs did not assert a minimum wage violation, but only that they were not paid overtime. The Court thus held that Plaintiffs had no “gap time” claim and thus were not entitled to compensation under the FLSA for the time worked between 40 and 43 hours. *Id.*
**Nigg, et al. v. U.S. Postal Service, 2013 U.S. App. LEXIS 22925 (9th Cir. Nov. 13, 2013).** Plaintiffs, a group of retired postal inspectors, brought a collective action alleging that they were entitled to overtime pay under the FLSA. Defendant asserted that it was not liable to Plaintiffs under the FLSA’s administrative exemption and the highly compensated employee exemption, and that, even if Plaintiffs were entitled to overtime wages, it was entitled to a good faith defense to liability under the Portal-to-Portal Act. The District Court granted summary judgment to Defendant, finding that Plaintiffs were covered by the administrative exemption because they appeared to have a primary duty directly related to the general business operation of their employer. On appeal, the Ninth Circuit affirmed the District Court’s order. The mission of Defendant’s inspection service was to support and protect the Postal Service and its employees, infrastructure, and customers, enforce the laws that defend the nation’s mail system from illegal or dangerous use, and ensure public trust in the mail. The inspectors safeguarded hundreds of thousands of postal employees, millions of customers who used the Postal Service, thousands of facilities, and millions of dollars in Postal Service assets. Defendant therefore argued that Plaintiffs’ primary duty directly related to its general business operations. The District Court had agreed that Plaintiffs’ duties supported the general business operations of Defendant and customers. The District Court had noted that, by performing law enforcement functions, including the investigation, apprehension, and detention of individuals suspected or convicted of crimes relating to the Postal Service, the inspectors protected Postal Service employees and customers, bolstered public trust in the mail, and helped Defendant to avoid revenue loss. Plaintiffs had asserted that these law enforcement activities did not directly relate to the management or general business operations of Defendant. The District Court, however, found that the employees’ law enforcement duties were intended to provide support for their employer’s business operations, instead of being the commodity or service that the employer existed to provide. The District Court had further explained that inspectors’ criminal investigation duties were not among the primary functions of Defendant’s business, and instead, were necessary to support the primary function of delivering mail safely and reliably. The District Court found the distinction between the law enforcement duties that were the service provided by law enforcement agencies and the law enforcement duties that were necessary for safeguarding the business operations of the employer to be dispositive distinction on the issue. Accordingly, the District Court had granted summary judgment to Defendant on the issue that the primary duty of the inspectors related to the general business operations of the Postal Service and its customers. The District Court, however, denied summary judgment to Defendant on the issue that Plaintiffs were exempt under the “highly compensated employee exemption,” although a significant number of inspectors received total annual compensation of at least $100,000, because a genuine issue of fact remained as to whether the inspectors’ primary duty involved office or non-manual work. *Id.* 3. While Defendant had identified a number of duties performed by Plaintiffs – including providing training, conducting installations, educating customers, making recommendations to management, determining which areas to investigate, investigating areas of misconduct, participating in negotiations for administrative resolutions of disputes with mailers, preparing written reports, and serving as witnesses in criminal, civil, and administrative proceedings – to support their argument that Plaintiffs’ primary duty was performance of office or non-manual work, Plaintiffs had countered with extensive list of non-manual duties they performed (including rigorous manual work associated with the investigation, apprehension, and detention of individuals suspected or convicted of crimes, carrying firearms, and making arrests). Because neither party had demonstrated as to which of the inspectors’ multitude of duties constituted their “primary duty,” the District Court had found that a triable issue of fact remained as to whether the Inspectors’ primary duty was office or non-manual work. The Ninth Circuit adopted this reasoning, and affirmed the District Court’s order.

**Perry, et al. v. City Of New York, 2013 U.S. Dist. LEXIS 177396 (S.D.N.Y. Dec. 17, 2013).** Plaintiffs, a group of paramedics, emergency medical technicians, and fire inspectors, brought an action under the FLSA alleging failure to pay overtime compensation. Plaintiffs were assigned to one of four platoons, A, B, C, or D, which determined Plaintiffs’ work schedule. *Id.* at *38. Plaintiffs also performed various tasks before and after their shifts for which they were not compensated, but which Defendants tracked using their time-keeping system. Defendants moved to dismiss the amended complaint, and the Court denied the motion. Defendants argued that the amended complaint did not allege Plaintiffs’ claims with sufficient specificity, emphasizing that it failed to allege a single claim on behalf of a specific individual or group of.
individuals, and that none of the 2,511 named Plaintiffs was specifically referenced. *Id.* at *37. Defendants also contended that the amended complaint failed to approximate the amount of uncompensated overtime Plaintiffs worked. The Court noted that Plaintiffs were not required to provide an approximation of uncompensated overtime hours in order to survive a motion to dismiss the FLSA overtime claims, and that they must simply allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours. *Id.* at *42-43. Plaintiffs assigned to Platoons A, B, and C were scheduled to work 40 hours in approximately 35 weeks of the year, and Plaintiffs assigned to Platoons D were scheduled to work 40 hours every week of the year. Adding to this, the uncompensated time that Plaintiffs alleged they worked on a daily basis clearly went beyond the 40 hour requirement in 35 weeks of the year for individuals in Platoons A, B, and C, and in every week of the year for those in Platoon D. *Id.* The Court stated that the fact that the amended complaint did not set forth specific allegations for each Plaintiff did not warrant dismissal because each Plaintiff need not make individualized factual allegations. *Id.* at *46. Plaintiffs alleged with a sufficient degree of clarity that Defendants failed to compensate each of them for work he or she completed before and after their shifts. The Court remarked that requiring separate statements for each individual would unnecessarily complicate the pleadings. Accordingly, the Court opined that the claims were sufficiently specific to survive Defendants’ motion to dismiss.

**Thompson, et al. v. McGovern And Massachusetts Port Authority, 2013 U.S. Dist. LEXIS 151472 (D. Mass. Oct. 22, 2013).** Plaintiffs, a group of retired Massachusetts State Police (“MSP”) officers, brought an action alleging that Defendants, Marian J. McGovern, the Superintendent of the MSP, and David S. Mackey, the Interim Chief Executive Officer of the Massachusetts Port Authority (“MassPort”) violated the FLSA by failing to pay them for compensatory time. Thereafter, Mackey was dismissed and MassPort was substituted as the appropriate Defendant. McGovern then moved to dismiss the claims against her and subsequently, MassPort sought to join in McGovern’s request for dismissal based on the doctrine of sovereign immunity. The Court granted the motion. First, the Court dismissed the claims for money damages against McGovern because she had been sued in her official capacity as the superintendent of the MSP, which is an arm of the Commonwealth of Massachusetts; the Court also stayed any potential claims against her for injunctive relief. The Court stated that the bar of sovereign immunity could be avoided by naming a state officer in his or her official capacity only in cases where prospective declaratory and injunctive relief was sought under federal law. *Id.* at *7. Plaintiffs sought only monetary damages, which, in fact, constituted the only sort of relief available to Plaintiffs as employees bringing suit pursuant to the FLSA. Therefore, the Court dismissed the action in its entirety due to the unavailability of such prospective relief. With respect to the claim against MassPort, Plaintiffs acknowledged that MassPort was contractually obligated to pay them in accordance with the terms of the collective bargaining agreement (“CBA”), but Plaintiffs argued that MassPort had a separate obligation to ensure that their compensation complied with the FLSA. The Court opined that although MassPort paid Plaintiffs, MassPort could not be considered their employer for FLSA purposes because it would be contrary to the terms of the agreement defining MassPort’s role with respect to Plaintiffs. Further, the Court stated that even if MassPort could be considered Plaintiffs’ employer for FLSA purposes, Plaintiffs had not alleged MassPort or any of its agents engaged in any independent wrongful conduct and thus MassPort was not responsible for drafting or agreeing to the disputed provision in the CBA. The Court found that even assuming MassPort could be considered Plaintiffs’ employer, and that Plaintiffs adequately had alleged FLSA violations by MassPort, Plaintiffs’ claims were precluded by the doctrine of derivative sovereign immunity. Because MassPort was performing delegated duties pursuant to governmental authority, a suit against MassPort would be equivalent to a suit against the Commonwealth itself. MassPort could not be held liable for actions taken pursuant to its contract with the MSP unless, its action was beyond the authority delegated to it, the authority was invalidly conferred, or the harm was caused by MassPort’s own tortious conduct. *Id.* at *11-12. The Court determined that none of these three exceptions applied, and therefore the claims against MassPort failed as a matter of law.

(x) **Preemption Issues In FLSA Collective Actions**

(“operators”), brought an action under the FLSA against the Southeastern Pennsylvania Transportation Authority (“SEPTA”) alleging that although they were compensated for performing a series of clerical tasks each morning (the “reporting tasks”), this time was not included in Defendant’s calculation of overtime. Plaintiffs also alleged that SEPTA failed to compensate them for daily pre-trip inspections (the “CDL inspections”), and that they had to perform them off-the-clock the operators and the SEPTA was bound by the terms of three separate collective bargaining agreements (“CBA”), and each CBA included a provision concerning compensation for time spent working prior to the morning scheduled start time. Each CBA also included broad grievance provisions, which required that parties submit to arbitration any dispute involving the application, implementation, or interpretation of any of the provisions of the agreements. The SEPTA moved to dismiss the complaint, and the District Court granted the motion for lack of subject-matter jurisdiction. The District Court concluded that the resolution of the FLSA claim depended upon the interpretation of provisions of the CBAs, which, in accordance with the grievance and arbitration provisions of the CBAs, and the strong federal policy in favor of arbitration, must be decided in the first instance by an arbitrator. Id. at *7. On appeal, the Third Circuit vacated the order and remanded. The Third Circuit noted that the minimum protections the FLSA provides to individual workers take precedence over conflicting provisions in a collectively bargained compensation arrangement. Id. at *8. Thus, the Third Circuit stated that employee’s right to relief under the FLSA was distinct from an employee’s contractual rights as provided in a CBA. Further, the Third Circuit observed that when vindicating rights under the FLSA, the statute’s enforcement scheme grants individual employees broad access to the judicial process, and no exhaustion requirement or other procedural barriers are set up, and no other forum for enforcement of statutory rights is referred to or created by the statute. Id. The SEPTA contended that operators must first exhaust arbitration pursuant to the CBAs’ grievance provisions before proceeding with their FLSA claim. The Third Circuit, however, remarked that there was no dispute over the interpretation or application of any of the provisions of the CBAs that had any impact on the operators’ FLSA claim. Id. at *11. The operators argued that their FLSA claim existed independently of any rights they had under their respective CBAs, as they were not fully compensated for approximately 15 minutes spent performing CDL inspections, and their CDL inspections and the reporting tasks were not included in the calculation of overtime. Id. at *12. The Third Circuit opined that neither of these alleged failures necessitated the resolution of the applicability of the contractual provisions regarding pre-trip reporting in the CBAs to morning inspections, nor was the FLSA claim pursuant to the terms of the CBAs. The Third Circuit stated that resolution of the FLSA claim required a factual determination of the amount of time the operators were required to work prior to their scheduled start, and a legal determination regarding whether this time was compensable and subject to the overtime provisions of the FLSA. Id.

**Brown, et al. v. United Airlines, Inc.,** 720 F.3d 60 (1st Cir. 2013). Plaintiffs, a group of skycaps, brought a class action based on common law claims for unjust enrichment and tortious interference due to Defendant’s imposition and retention of baggage-handling fees for their services. Plaintiffs alleged that this caused a dramatic decrease in their compensation because passengers either thought that the fee was a mandatory gratuity or they voluntarily declined to tip in addition to the fee. The District Court dismissed Plaintiffs’ claims, finding that they were preempted by the Airline Deregulation Act (“ADA”), which provides, in relevant part, that a state “may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of an air carrier . . .”. Id. at 62. On Plaintiffs’ appeal, the First Circuit affirmed, holding that claims that materially affected an air carrier’s imposition of baggage-handling fees were related to the air carrier’s prices and services and the common law was a state “law, regulation, or other provision having the force and effect of law” within the meaning of the ADA’s preemption clause. Id. at 64. The First Circuit determined that common law – no less than positive law – had the force and effect of law for purposes of the preemption analysis under the ADA. The First Circuit also noted that the ADA preemption had consistently been given a wide interpretive sweep, rejecting Plaintiff’s argument to the contrary. Id. at 65.

**Buck, et al. v. Cemex, Inc.,** 2013 U.S. Dist. LEXIS 124111 (E.D. Cal. Aug. 29, 2013). Plaintiff, a former truck driver, brought a class action in the state court under the California Labor Code alleging that Defendants failed to provide meal periods and rest breaks, that those failures resulted in wage under-
payments, inaccurate wage statements, and failure to pay full wages timely on termination. Plaintiff alleged that these failures also constituted unfair and unlawful business practices under California law. Defendants removed the action, contending that Plaintiff’s allegations brought the claims within § 301 of the Labor Management Relations Act ("LMRA"), and thereby raised federal question jurisdiction. Defendants asserted that because the employees were members of Teamsters Local No. 386 and because their employment terms and conditions were governed by a collective bargaining agreement ("CBA") between Defendant and the Teamsters Local, resolution of Plaintiff’s claims would require analysis and interpretation of the CBA. Plaintiff moved for remand, arguing that the complaint sought to enforce non-negotiable statutory rights and protections that arose exclusively out of state law and exist independently of the CBA. Plaintiff also argued that the mere need to consult the CBA in the course of resolving Plaintiff’s claims did not trigger § 301 preemption. The Court denied Plaintiff’s motion. At issue was whether the meal period obligations imposed on California employers by § 512(a) of the California Labor Code applied to employees such as Plaintiff. Consistent with California law, the CBA provided for a 10 minute rest period and 30 minute lunch breaks every four hours, although for meal breaks the CBA gave the driver the option of taking an “on duty” meal and being paid for that time or taking the lunch break “off-duty.” Id. at *14. Defendant asserted that §§ 512(e) and (f) allow employers of commercial drivers subject to a valid CBA to exempt themselves from § 512’s terms if the CBA expressly provides for employee wages, hours, working conditions, and meal periods and for final and binding arbitration of disputes concerning application of its meal period provisions. The Court noted that if the CBA’s provision for arbitration of meal break issues was final and binding, then § 512 exempted it from the non-negotiable, non-waivable protections afforded by the statute. Id. at *16-17. In that case, the Court opined that because the CBA made specific and rather unique provision for meal breaks for drivers, the CBA must be consulted to determine if Defendants met its obligation to Plaintiff and to similarly-situated drivers with regard to meal breaks. Further, the Court remarked that the terms of the CBA were inextricably intertwined with the issue, such that the CBA terms would control that issue, and the issue would be subject to the Court’s jurisdiction under § 301 (and the other issues raised by the complaint would come within the supplemental jurisdiction of the Court even if only tangentially involved with the CBA). The Court observed that the language in the CBA to the effect that disputes were “subject solely to resolution under the following procedures” was consistent with the conclusion that the decisions were final and binding. Id. at *18. Thus, because there was no CBA language or legal authority to the contrary, the Court held that the CBA provision for arbitration was final and binding within the meaning of § 514, and that the CBA must be consulted and relied upon to determine the meal break issues. Accordingly, the Court concluded that the state law claims here were preempted by § 301 and denied Plaintiff’s motion for remand.

Gennell, Jr., et al. v. FedEx Ground Package System, Inc., 2013 U.S. Dist. LEXIS 118388 (D.N.H. Aug. 21, 2013). Plaintiffs, a group of FedEx drivers, brought an action alleging that Defendant improperly classified them as independent contractors. The action was centralized in a MDL proceeding with other similar actions against Defendant, but it was later determined that the New Hampshire drivers could be treated as independent contractors under the New Hampshire common law but that they qualified as employees under certain state statutes, and then remanded to the Court. Two class claims remained in dispute, including: (i) Plaintiffs’ deduction claim that Defendant made deductions from the drivers’ compensation that were prohibited by N.H. Rev. Stat. Ann. § 275:48; and (ii) Plaintiffs’ reimbursement claim that Defendant failed to reimburse the drivers for work-related expenses in violation of N.H. Rev. Stat. Ann. § 275:57. Defendant filed a motion for summary judgment, contending that both claims were preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), and Plaintiffs sought for partial summary judgment. The Court granted Plaintiffs’ motion as to their deduction claim. At the very outset, the Court noted that the FAAAA has an express preemption proviso that a state may not enforce a law, regulation, or other provision having the force and effect of law related to price, route, or service of any motor carrier with respect to the transportation of property. Id. at *10-11. Defendant argued that Plaintiffs’ claims were preempted because the statutes on which the claims were based affected its brand communication practices in a way that was related to its pricing and services. The Court noted that the FAAAA’s preemption provision was modeled on a similar provision in the Airline Deregulation Act of 1978 ("ADA"), and it has been analyzed in similar fashion. The Court noted that the Supreme Court had
never held that a state employee compensation statute was preempted by either the ADA or the FAAAA. DiFiore v. American Airlines, Inc., 646 F.3d 81 (1st Cir. 2011), involved an effort to use an employee compensation statute to directly attack an airline’s prices and services. The Court noted that because unlike the Massachusetts Tips Law (the issue involved in DiFiore), Plaintiffs’ claims had no direct connection to Defendant’s prices, routes, or services. Id. at *17. In order to overcome this challenge, Defendant relied on its branding strategy, which requires its drivers to use the FedEx brand on their trucks and uniforms, which obviously related to the services the company provided. In summary, the Court concluded that the record in this case demonstrated that the deduction and reimbursement statutes were employee compensation statutes that had no direct connection to FedEx’s prices, routes, or services. Id. at *21. The Court explained that neither statute related to FedEx’s prices, routes, or services merely because FedEx must comply with both statutes if it chose to bar its drivers from holding themselves out to be in business for themselves. Id. The Court noted that the reimbursement statute requires an employer to reimburse an employee for certain expenses, and Plaintiffs sought to recover a variety of business-related expenses that they agreed to assume in their Operating Agreements (“OA”). Plaintiffs’ theory was that Defendant asked them to assume the expenses were not of a type normally borne by an employee as a condition of employment. The Court declined to resolve that issue because the matter had not been adequately briefed. Accordingly, the Court denied both the motions. Plaintiffs sought summary judgment on their claim that FedEx violated the deduction statute by improperly withholding expenses from their wages. Plaintiffs sought to recover four types of deductions, including: (i) business support package deductions; (ii) work accident and deadhead insurance deductions; (iii) cargo insurance claim deductions; and (iv) postage deductions. The Court noted that instead of arguing that any of the deductions were expressly authorized by any version of the deduction statute, Defendant cited a clarifying amendment to the statute that was enacted after the class period ended, and argued that the amendment made it clear that the deductions were authorized by implication under earlier versions of the statute. The Court noted that the amended stated “[f]or any purpose on which the employer and employee mutually agree that does not grant financial advantage to the employer, when the employee has given his or her written authorization and deductions are duly recorded.” Id. at *27. The Court noted that although FedEx claimed that the 2011 amendment clarified earlier versions of the deduction statute, it failed to identify any ambiguous statutory text that the amendment was intended to clarify. Id. The Court remarked that the statute itself was quite clear in specifying that deductions are not permitted unless they are authorized by the statute itself or in regulations issued by the Department of Labor. Id. Because Defendant failed to offer any other persuasive argument, the Court granted Plaintiffs’ motion as to their deduction claim.

Hernandez, et al. v. Harvard University, 2013 U.S. Dist. LEXIS 46889 (D. Mass. Mar. 28, 2013). In this class action brought in state court, Plaintiff, a waiter at Defendant’s Faculty Club restaurant, argued that Defendant illegally retained gratuities in violation of the Massachusetts Tips Law and the common law unjust enrichment doctrine. Defendant removed the case on the grounds that Plaintiff’s claims were completely preempted under the Labor Management Relations Act (“LMRA”), which preempts state law claims founded directly on rights created by collective bargaining agreements (“CBAs”) or substantially dependent on analysis of the CBA. Id. at *5. Defendant reasoned that under the applicable CBA between Defendant and Plaintiff’s union, the wait staff was paid a flat hourly rate. The Court remanded the case. The Court reasoned that because the CBA was silent on the issue of gratuities, Plaintiff’s claims were not founded on the CBA, and thus not preempted. As to the unjust enrichment claim, Defendant asserted that interpretation of the CBA was required to determine whether any retention of tips was “inequitable” or “unjust.” Id. at *7. The Court noted that the gratuities at issue were a form of compensation wholly extraneous to the CBA. Id. at *8. The Court observed that the CBA at most needed to be consulted, rather than interpreted, to assess Plaintiff’s unjust enrichment claim. Defendant also argued that Plaintiff’s wage & hour claim required interpretation of the collective bargaining relationship, which would allegedly establish the understanding that wait staff would not receive gratuities. Id. at *11-12. The Court, however, rejected this argument. It doubted whether interpretation of the bargaining history would necessarily give rise to complete preemption, particularly because Plaintiff’s claim was based on an independent right under state law. Id. at *13. The Court also found irrelevant whether Defendant’s rationale for not paying gratuities to its wait staff was based on an implicit CBA-derived no-tipping policy, as the CBA could not be
enforced in a manner that violated the law. Thus, once gratuities were found to have been withheld from the wait staff, the only factual questions for purposes of liability under the Tips Law would be whether patrons were informed that tipping was prohibited. *Id.* at *14. The Court found such matters to be independent from the analysis of the governing CBA and thus independent of the LMRA. *Id.* at *15.

**Manning, et al. v. Boston Medical Center, 725 F.3d 34 (1st Cir. 2013).** Plaintiffs, a group of current and former nurses, brought an FLSA action alleging that Defendants deprived them of wages through the use of time-keeping policies and employment practices that required them to work through their meal and rest periods; put in extra work time before and after their regularly worked shifts, and attend mandatory training sessions. Plaintiffs sought to represent a group of 4,000 current and former hourly workers of Defendant Boston Medical Center (“BMC”). The crux of Plaintiffs’ claim was that Defendants denied the BMC’s workers full compensation for their work through a combination of unlawful pay practices and time-keeping policies. Plaintiffs filed two actions, one in the federal court (“Manning I”), and one in the Massachusetts state court (“Manning II”). Defendants removed Manning II, and the District Court consolidated it with Manning I. The District Court subsequently dismissed both the actions with prejudice. On Plaintiffs appeal, the First Circuit affirmed in part. The First Circuit observed that the work done by the workers, the First Circuit observed that the work done by them during their breaks was essentially indistinguishable from work performed during the employees’ regularly scheduled hours. *Id.* at 34. Therefore, the First Circuit concluded that the second element was satisfied. As to the third element, the First Circuit noted that the complaint properly alleged that each of the individually named Plaintiffs worked more than 40 hours in a given week. *Id.* Defendants also challenged the viability of Plaintiffs’ FLSA claims based on federal laws governing unions, including the National Labor Relations Act (“NLRA”) and the Labor Management Relations Act (“LMRA”). The First Circuit noted that § 301 of the LMRA embodies a strong federal policy in favor of protecting the use of arbitration and grievance procedures common to collective bargaining agreements (“CBAs”), and therefore, exerted a strong preemptive effect over state law causes of action so long as relief can be provided within the CBA process. *Id.* at 37. The First Circuit however, found that FLSA claims were not subject the CBA’s grievance and arbitration procedures simply because they addressed similar subject matters or because CBAs defined compensable work. *Id.* The First Circuit remarked that although the state law was unsettled as to whether a FLSA claim may ever be preempted by a CBA, the law was clear that in order for a CBA to subject a federal statutory claim to arbitration, any such waiver must be clear and unmistakable on its face. *Id.* Because Defendants failed to point out any of the CBAs that worked a clear and unmistakable waiver of Plaintiffs’ FLSA claims, the First Circuit concluded that Plaintiffs need not seek redress of their FLSA claims through the CBA’s grievance processes. The First Circuit however, affirmed the dismissal of Plaintiffs’ state law claims of fraud and negligent misrepresentation claims.

(xi) **Independent Contractor Issues In Wage & Hour Class Actions**

**Bobbitt, et al. v. Broadband Interactive, Inc., 2013 U.S. Dist. LEXIS 150854 (M.D. Fla. Oct. 21, 2013).** Plaintiffs, a group of technicians, brought an action seeking minimum wage and overtime under the FLSA alleging that they were misclassified by Defendant, a cable company, as independent contractors. The Court had earlier conditionally certified a collective action consisting of collections/ disconnect technicians (“CD Techs”) that performed work for Defendant during the relevant period. Defendant then moved to decertify the collective action and sought summary judgment. The Court denied Defendant’s motions. In denying summary judgment, the Court found that genuine issues of material fact existed as to the issue of whether Plaintiffs were employees or independent contractors. Defendant provided cable installation,
disconnection, and other services to telecommunications companies, and employed CD Techs for the collection of money, equipment, and the disconnection of services. CD Techs were required to have or purchase a vehicle, auto insurance, a ladder, tools, safety equipment, and a cell phone in order to perform their work. Id. at *5. No experience or special skills were required in order to be hired as a CD Tech, and once hired, they were trained in two to three days. CD Techs were issued a Tech Number, which was required for assigning work, and Defendant grouped work orders by zip code. Id. at *6, 9. If a CD Tech wanted to exchange a work order with another tech, one of the techs had to call Defendant so that the Tech Number could be changed on the work order. The CD Techs could call Defendant if they encountered a problem or needed help while performing the work assigned to them, and sometimes were required to notify Defendant when they completed a work order or at the end of the day to inform Defendant of the work that they did not complete. Id. at *15. Defendant also had certain requirements regarding the appearance of the CD Techs, and required the CD Techs to follow its driver policy. The CD Techs were paid at a piece-rate, and they had no say in the rates that Defendant paid them. Id. at *18. The CD Techs disputed Defendant’s contentions that they could hire assistants to help them with their work, that they were not prohibited from engaging in outside work, and that never disciplined CD Techs. Id. at *17-19. The Court found that genuine issues of material fact precluded summary judgment on the issue. The Court therefore denied summary judgment. In denying Defendant’s motion for decertification, the Court held that Plaintiffs were sufficiently similarly-situated such that their FLSA claims could be tried fairly as a collective action. Id. at *36. The Court found that the distinctions regarding the amount if input the CD Techs had regarding their route, the CD Tech’s ability to switch work orders, their dress codes, Defendant’s supervision of the CD Techs, the CD Techs’ schedules, the CD Techs’ investment in equipment, and the CD Tech’s special skills did not prevent a finding that the CD Techs were similarly-situated. Id. at *37-46. The Court agreed that the number of hours worked and extent of overtime damages owed to Plaintiffs, if any, must be addressed on an individualized basis. The Court also noted that it was not the only issue in the case because the main issues included liability (including whether the CD Techs were employees) and damages, and common evidence could be used for the liability phase. Id. at *48. The Court stated that the “fact that common evidence, by itself, will not be sufficient for the damages phase – if liability is proven – does not undermine the judicial economy that can be achieved from this case proceeding as a collective action.” Id. Accordingly, the Court denied Defendant’s motions for decertification and summary judgment.

Hart, et al. v. Rick’s Cabaret International, Inc., 2013 U.S. Dist. LEXIS 129130 (S.D.N.Y. Sept. 10, 2013). Plaintiffs, a group of exotic dancers, brought an action alleging that they were not paid a salary in violation of the FLSA and the New York Labor Law (“NYLL”). Plaintiffs claimed that they were employees as defined under the FLSA and the NYLL, and as such, were entitled to be paid a minimum wage by their employer. Defendants contended that Plaintiffs were independent contractors and not employees, and therefore, were not covered by the FLSA or the NYLL. After the Court had conditionally certified a collective action, the parties cross-moved for partial summary judgment. The Court granted only Plaintiffs’ motion in part. At the very outset, the Court noted that the Second Circuit had adopted an economic realities test to determine whether an individual is an employee or an independent contractor. The factors in an economic realities test are: (i) the degree of control of employer over employee; (ii) the workers’ opportunity for profit or loss and their investment in the business; (iii) the degree of skill and independent initiative required to perform the work; (iv) the permanence or duration of the working relationship; and (v) the extent to which the work is an integral part of the employer’s business. Id. at *15. Defendants first argued that they exercised minimal control as the dancers were more like independent contractors than they were like employees. The Court, however, noted that Defendants had a degree of control by, among other things, imposing written guidelines that regulated almost every aspect of the dancers’ behavior within the club. The Court concluded that Defendants managed certain small aspects of its dancers’ work lives, which favored a finding that the dancers were employees, and not independent contractors under the FLSA. Id. at *35. The Court found that Plaintiffs did not share the profit or loss, and hence the second factor weighed in favor of Plaintiffs that they were employees under the FLSA. Similarly, the Court determined that the other factors also favored a conclusion that Plaintiffs were employees under the FLSA. The Court explained that Defendants exerted significant control over its dancers’ behavior; had a dominant
opportunity for profit; the exotic dancers had no specialized skills and a limited real investment (essentially in their costumes and nightly fees); and the dancers were integral to the success of Defendants’ business. *Id.* at *45. Accordingly, the Court concluded that under the FLSA test, the five factors favored a finding that the dancers were employees, as a matter of economic reality. As to the employee status under the NYLL, the Court observed that the New York case law requires a worker to make a showing that he or she: (i) worked at his/her own convenience; (ii) was to engage in other employment; (iii) received fringe benefits; (iv) was on the employer’s payroll; and (v) was on a fixed schedule. *Id.* at *49. Here, the Court noted that the second, third and fourth factors weighed in favor of Defendants. The Court explained that the dancers were free to take on other jobs, and the dancers did not receive any benefits because Defendants treated them as independent contractors. *Id.* at *54-55. Therefore, the Court denied summary judgment to Plaintiffs on the NYLL claims. The Court granted summary judgment to Plaintiffs on their minimum wage claims under the FLSA, finding that because they were treated as independent contractors, they were not paid minimum wages. *Id.* at *81.

**Scantland, et al. v. Jeffry Knight, Inc.**, 731 F.3d 1308 (11th Cir. 2013). Plaintiffs, a group of current and former technicians, brought an FLSA collective action, claiming that they were employees and not independent contractors. The Court granted summary judgment to Defendants, holding that Plaintiffs were independent contractors and not employees. Upon Plaintiffs’ appeal, the Eleventh Circuit reversed and remanded. The Eleventh Circuit focused primarily on the economic reality of the relationship between Plaintiffs and Defendants. First, with respect to control exercised by the employer, the Eleventh Circuit found that technicians were required to report by 7:00 a.m. each morning, submit work orders, and receive a route detailing the day’s work orders. Plaintiffs did not sell services of other cable network providers to customers and could not work for other companies. Plaintiffs routinely communicated with dispatch during the day and were required to log-in and log-out of Work Force Management. Defendants conducted site checks of technicians’ work, exercised quality control, had power to levy uncontestable fines (called chargebacks) and fire employees. Plaintiffs worked five to seven days a week and regularly worked more than 40 hours a week. They had to inform their supervisors for taking time off or request time off in advance. The Eleventh Circuit inferred that Defendants controlled what jobs Plaintiffs did, how much they were paid, how many hours they worked, how many days they worked, their daily work schedule, whether they could work for others, whether they could earn additional income from customers, and closely monitored the quality of their work. *Id.* at 1315. Accordingly, the alleged control strongly suggested that Plaintiffs were economically dependent upon Defendants. Defendants argued that the specifications that technicians were required to follow and the periodic communication with Defendants were consistent with duties required of independent contractors. The Eleventh Circuit pointed out that Plaintiffs had testified that the manner of their work was tightly regulated by Defendants and left them with no discretion in how to approach a particular job. *Id.* Furthermore, the communication they were required to maintain with Defendants was constant, not periodic. Therefore, there was a strong indication of an employee-employer relationship. The Eleventh Circuit also rejected Defendants’ argument that its quality control measures and regulation of schedules stemmed from the nature of the business, and stated that if the nature of a business required a company to exert control over workers to the extent that Defendants had allegedly done, then that company must hire employees, not independent contractors. *Id.* at 1316. The Eleventh Circuit therefore determined that the degree of control by employer factor pointed strongly toward employee status. With respect to Plaintiffs’ opportunity for profit or loss, the Eleventh Circuit opined that this depended more upon Defendants’ provision of work orders. Technicians could not negotiate or otherwise determine the rates they were paid for jobs. They were also subjected to uncontestable chargebacks that could wipe out their earnings from a single job. Plaintiffs’ ability to earn additional income through their own initiative or technical skill was limited because Plaintiffs could not sell outside services to customers, nor work for other companies. In light of the minimal opportunity for profit, this factor suggested economic dependence, and pointed strongly toward employee status. *Id.* at 1317. The Eleventh Circuit then discussed the degree of permanency and duration of the working relationship. The Eleventh Circuit pointed out that named Plaintiffs worked for Defendants for an average of more than five years. Their contracts were for year terms, were automatically renewed, and were terminable with 30 days’ notice, which suggested substantial permanence of relationship. Relative to Defendants’ argument that a
technician’s ability to work for other installation contractors was significant, the Eleventh Circuit determined that evidence indicated that Plaintiffs could not work for other companies, were required to work long hours, and could not turn down work orders. Thus, their relationship with Defendants was not only of long duration, but it was also exclusive. Further, that long tenure, along with control and lack of opportunity for profit, pointed strongly toward economic dependence and therefore, employee status. Id. at *1319. Finally, the Eleventh Circuit concluded that the services rendered by Plaintiffs were an integral part of Defendants’ business and weighed clearly intervener employee status. Approximately two-thirds of Defendants’ business consisted of the telecommunications installation and repair services. Defendants relied on approximately five hundred technicians to perform installations and repairs in customers’ homes and businesses. Defendants’ website described its Installation Services department as the backbone of its business. Weighing all the factors, the Eleventh Circuit concluded that Plaintiffs were employees and not independent contractors.

Schwann, et al. v. FedEx Ground Package Systems, Inc., 2013 U.S. Dist. LEXIS 93509 (D. Mass. July 3, 2013). Plaintiffs, a group of former pick-up and delivery drivers, brought a class action alleging that Defendant violated Massachusetts law by improperly classifying them as independent contractors. The parties filed cross-motions for summary judgment. The Court granted Plaintiffs’ motion for summary judgment. The Court held that Plaintiffs’ duties fell within the scope of Defendant’s usual course of business and therefore, under the Massachusetts Independent Contractor Statute, they were company employees, and not outside contractors. Id. at *5. Defendant argued that although it operated a “sophisticated information and distribution network,” it did not itself provide any delivery services and thus the package pick-up and delivery services that Plaintiffs performed were outside its usual course of business. Id. at *13-14. The Court held that it was “beyond cavil that the pick-up and delivery drivers are essential to FedEx’s business.” Id. at *19. Defendant held itself out to the public as providing package pick-up and delivery services, and had advertised its services as “economical ground delivery to businesses” in promotional brochures. Id. at *18. Defendant had also described in its annual report its purpose as “small-package pick-up and delivery.” Id. The Court stated that without the drivers, there could have been no pick up or delivery of packages, and Defendant’s distribution network would be of such diminished value that the prospect of shareholder approval of the sale would have been next to zero. Id. at *19. The Court therefore held that Plaintiffs were employees of Defendant under Massachusetts law. Defendant had also moved for summary judgment on all the claims, stating that the Massachusetts Independent Contractor Statute, as applied to the motor carrier industry, did not apply because it was preempted by the 1994 Federal Aviation Administration Authorization Act (“FAAAA”), which barred states from enacting laws related to “a price, route, or service of any motor carrier . . . with respect to the transportation of property.” Id. at *5-6. The Court rejected Defendant’s argument. The Court held that the Massachusetts Independent Contractor Statute was not overridden by the FAAA, citing the U.S. Supreme Court’s finding that the Act’s scope of preemption was limited to laws that pertained to a carrier’s “transportation of property,” which Massachusetts statute did not touch on. Id. at *8-9. The Court stated “[t]he statute has nothing to do with the regulation of the “carriage of property,” and that “[i]t simply explains to businesses like FedEx who operate in the Commonwealth when a worker must be paid as an employee.” Id. at *9. Accordingly, the Court denied Defendant’s motion for summary judgment on the grounds of preemption, and granted Plaintiff’s motion for summary judgment, finding them to be employees rather than independent contractors.

(xii) Communications With Class Members In FLSA Collective Actions

Benedict, et al. v. Hewlett-Packard Co., 2013 U.S. Dist. LEXIS 89225 (N.D. Cal. June 25, 2013). Plaintiffs, a group of technical support employees, brought a collective action alleging misclassification and failure to pay overtime compensation in violation the FLSA. Plaintiffs moved for enforcement of an earlier Court order requiring production of a class list for technical solutions consultants, field technical support consultants, and technology consultants. Defendant requested an order adopting its proposed protocol for production of identified class contact information. The Court granted Plaintiffs’ motion and also granted in part and denied in part Defendant’s request. First, because Plaintiffs did not oppose Defendant’s request for the designation of the class list pursuant to the stipulated protective order, which would require
destruction of the class list upon final disposition of the action, the Court granted Defendant’s request to designate the class list as “highly confidential.” Id. at *4. Further, Defendant proposed that the contact information should be used only for the purposes of this lawsuit, and should not be distributed to any other person or entity. Because the protective order adequately addressed these concerns, the Court denied Defendant’s request as moot. Second, Defendant sought to impose a protocol by which employees could opt-out of having their names, addresses, job titles, and employment dates disclosed to Plaintiffs’ attorneys. The Court remarked that disclosing the requested information did not constitute such a serious invasion of privacy that an opt-out notice was required, and that such disclosure did not conflict with Defendant’s privacy policy, which put employees on notice that their personal information could be transferred to third-parties under certain conditions. The Court, however, ordered Plaintiffs’ counsel to inform each potential putative class member contacted by Plaintiffs that he or she had a right not to talk to counsel and that, if he or she elected to do so, Plaintiffs’ counsel would terminate the contact and not contact them again. Additionally, the Court ordered that the initial communication by Plaintiffs with prospective class members must make clear that Defendant was compelled to disclose its employees’ information by Court order and communicate the highly confidential nature of this disclosure. Third, Defendant estimated that the number of putative class members in the three job categories at issue exceeded 20,000, and proposed a sampling protocol, by which it would produce only 10% of the information ordered to be produced by the Court. The Court found that a protocol involving the production of only one-tenth of the information constituted a violation of its order, and although Defendant framed its proposal as a procedural limitation, the Court noted that Defendant actually sought to re-litigate its earlier order without filing a motion for reconsideration. Id. at *10. Further, Plaintiffs represented that contact information for the entire requested list was important for their class certification motion. Accordingly, the Court ordered Defendant to produce the full class list. Fourth, Defendant proposed that Plaintiffs’ counsel should maintain a list of every person from the contact list with whom they made contact, separately designating any person who refused to communicate with them, which would be produced in connection with any conditional certification motion or class certification motion. Id. at *13. Because Defendant failed to explain the need for such a log and considering the concerns of attorney-client privilege, attorney work product protections, and potential witness intimidation, the Court denied Defendant’s request. The Court stated that the class list should include the name, last known address, job title, and dates in that position of all individuals who had worked for Defendant in any of the three job titles.

Bobryk, et al. v. Durand Glass Manufacturing Co. Inc., 2013 U.S. Dist. LEXIS 145758 (D.N.J. Oct. 9, 2013). Plaintiffs, a group of employees, brought an action under the FLSA, the New Jersey Wage and Hour Law, and the New Jersey Wage Payment Law alleging that they had to work beyond their scheduled shift times without compensation for overtime wages earned during pre-shift and post-shift activities. Plaintiffs alleged that Defendant’s counsel obtained misleading declarations from putative class members by improperly eliciting statements of purported facts that were known to be untrue by counsel at the time the declarations were drafted. Plaintiffs contended that the declarations were improperly obtained in light of counsel’s alleged failure to advise putative class members of the identity of Plaintiffs’ counsel; Plaintiffs’ theory of the case; their right to counsel; their legal rights; and the existence of a lawsuit related to a failure to pay overtime. Plaintiffs moved to prohibit Defendant and its counsel from engaging in any future ex parte communications with putative class members prior to class certification, and to preclude Defendant from making any use of the declarations obtained during the course of their communications. Plaintiffs also sought to compel Defendant to produce all notes from ex parte communications; identify all putative class members contacted by Defendant or Defendant’s counsel for investigations or the solicitation of declarations; produce all drafts of declarations; and produce all writings shared with or reviewed by such putative class members in connection with such investigations. The Court denied the motion. Id. at *5, 32. The Court observed that the script of the interviews prepared by Defendant’s counsel provided putative class members with a fair, objective, and plain language explanation of Plaintiffs’ claims. Further, before the putative class members signed their declarations they were told that they were speaking to Defendant’s attorney and why; that the purpose of the interview was to discuss the lawsuit; the general nature of named Plaintiff’s claims; that Plaintiff was proceeding as a representative on behalf of Defendant’s employees; their participation was voluntary; Defendant would be using the information to demonstrate that Plaintiff’s
work experiences were not representative of their own; they would not be retaliated against; and their answers would not be shared with their managers. The Court found that this disclosure to the declarants evidenced that Defendant’s interviews were not coercive or abusive, and did not thwart the proper functioning of the litigation. The Court remarked that it was unaware of any statutory rule or case law that required Defendant’s counsel to give specific information and instructions to putative class members, or of any “magic words” that must be disclosed. *Id.* at *17. Thus, considering the content of the disclosures of Defendant’s counsel to the putative class members, and in the absence of evidence that Defendant’s actions were misleading or coercive, the Court held that Plaintiffs’ allegations regarding alleged abusive and unethical communications were unfounded. Additionally, the Court agreed with Defendant that the declarations reflected the putative class members’ understanding of their work habits, pre-shift and post-shift duties, and whether each employee received compensation for overtime. Likewise, the declarants were free to decline to sign if they disagreed with the statements or facts contained in their statements. The Court determined that as long as the communications of Defendant’s counsel with the putative class were not misleading or coercive, Defendant was entitled to gather information from witnesses, especially where the Court had not yet granted class certification and it was still unclear whether the employees were similarly-situated to Plaintiffs. Thus, because Defendant’s conduct was not misleading or coercive, the Court denied Plaintiffs’ motion.

**Gamble, et al. v. Boyd Gaming Corp., 2013 U.S. Dist. LEXIS 176378 (D. Nev. Nov. 20, 2013).** Plaintiffs, a group of employees, brought a putative collective action under the FLSA alleging that they were required to work off-the-clock without pay. Defendant alleged that Plaintiffs’ counsel was using false and misleading advertisements in an attempt to reach out to potential collective action members. Defendant specifically claimed that Plaintiffs’ counsel had created a website and had posted advertisements on Facebook asserting that Plaintiffs’ counsel was representing employees of Defendant who were owed overtime for work performed off-the-clock. Defendant further claimed that the Facebook advertisement contained a link to Defendant’s own Facebook page, which caused the advertisement to appear on Defendant’s public Facebook news feed. Defendant moved to enjoin Plaintiffs’ advertising campaign. The Court denied the motion. Defendant argued that these advertisements presented only one-sided and misleading information, which wrongly led the potential collective action members to believe that liability had already been determined in this case, and that the presence of this advertisement on Defendant’s Facebook page might mislead individuals that Defendant had approved the messages of the advertisement. Therefore, Defendant requested the Court to issue an injunction that would prevent Plaintiffs’ counsel from performing any further misleading advertising. The Court stated that although it had the power to sanction false advertisements regarding pending litigation, it was not the role of the Court to control the activities of parties or their counsel. Further, the Court stated that Defendant’s request to issue an injunction against Plaintiffs’ counsel would potentially force the Court to examine every attempt to reach out to collective action members and determine the honesty of each representation. Such an activity would frustrate the interests of judicial economy and could freeze Plaintiffs from making permissible advertisements for fear of adverse action by the Court. *Id.* at *4. Accordingly, the Court denied the motion.

**Lee, et al. v. GAB Telecom, Inc., 2013 U.S. Dist. LEXIS 111537 (E.D. Mich. Aug. 8, 2013).** Plaintiffs, a group of cable installers, brought an action claiming that Defendant violated the FLSA by classifying Plaintiffs as exempt and thereby not paying overtime wages. Earlier, the Court had conditionally certified the action and had allowed for an opt-in period where others who were similarly-situated may join the action. Before the opt-in period was to begin, Plaintiffs’ counsel advertised the case on their website to identify potential opt-ins. Thereafter, Defendant served opt-in Plaintiffs directly with written discovery. Plaintiffs moved for supplemental class notice and for sanctions, while Defendant moved to prohibit opt-ins from participating and for removal of the website postings. The Court granted Plaintiffs’ motion for supplemental class notice, and denied the other motions. Plaintiffs requested that the Court authorize a second judicial notice clarifying the right to opt-in and requested an additional 30 days during which potential Plaintiffs might opt-in to the suit. Plaintiffs contended that by sending the interrogatories directly to the potential opt-ins instead of to their counsel, Defendant discouraged potential opt-ins from entering the lawsuit. Defendant asserted that it was not aware that the lead counsel was representing the opt-in
parties, as lead counsel for Plaintiffs had not filed an appearance for those opt-ins. The Court observed
that the Michigan Rules of Professional Conduct provide that a party may not communicate about the
subject of the representation with a party whom the lawyer knows to be represented in the matter by
another lawyer, unless the lawyer has the consent of the other lawyer or was authorized by law to do so.
Id. at *5. Moreover, the Court remarked that in collective action suits, Plaintiffs' counsel generally
represented opt-in participants and so Defendant should have known that Plaintiffs' counsel was
representing the opt-in Plaintiffs; thus, the interrogatories were improperly served. Further, the Court
stated that as interrogatories were improperly served, it might have had a chilling effect on potential opt-ins.
Therefore, the Court opined that additional time for opt-ins to join the suit was appropriate. The Court also
ruled that it would also give Plaintiffs' counsel more time to contact potential participants and reassure
them that they would be represented. Accordingly, the Court granted Plaintiff's motion for supplemental
class notice. Further, Plaintiffs requested the Court to quash the interrogatories sent to the opt-in
participants and limit the scope of discovery to 20% of Plaintiffs via a representative sample. The Court
agreed that the interrogatories should be quashed because of the improper service, but there was no
compelling reason to restrict discovery because there were less than 50 Plaintiffs in the suit, and allowing
discovery for each opt-in would not unnecessarily increase the cost of litigation. Given the extension of
opt-in period, the Court deferred the hearing on this issue. Finally, regarding sanctions, the Court noted
that correspondence between the two parties showed that there might have been some confusion as to
whether lead Plaintiffs' counsel was representing the opt-in participants. Moreover, because the
interrogatories were quashed, the Court declined to sanction Defendant. In addition, Defendant argued
that the opt-in Plaintiffs should not be allowed to participate in the lawsuit because lead Plaintiffs' counsel
improperly solicited potential opt-ins on their website prior to the allotted time period, and the postings
should be removed to avoid prejudice against Defendant by allowing more opt-ins into the lawsuit. The
Court noted that while solicitation outside of the allotted time period was improper, the State Bar of
Michigan Standing Committee on Professional and Judicial Ethics had ruled that posting on one's own
website was not solicitation under the Rule. The Committee determined that as postings on one's own
website were not targeted to individuals and could not be accessed without voluntarily visiting the firm's
website, Plaintiffs' counsel had not acted improperly. Id. at *9. The Court opined that as the post in
question was on the website of Plaintiffs' counsel, there was no improper solicitation.

Plaintiff, a psychiatrist, brought an FLSA action alleging that Defendant failed to pay its home health
clinicians overtime. Defendants moved to stay this case pending resolution of class certification issues and
dispositive motions in the similar matter entitled Tompkins v. Amedisys, Inc., Case No. 12-CV-1082 (D.
Conn.). After the Court stayed the case, allowing only limited discovery that would enable Plaintiff to
provide notice to potential class members in Illinois only, Defendant mailed a dispute resolution agreement
("DRA") to its employees, including all potential Illinois class members, without letting Plaintiff's counsel
know or seeking to modify the stay. The e-mail contained links to three documents, one of which was a
cover letter informing employees that if they did not want to be bound by the new arbitration policy, they
had to notify Defendant within 30 days by printing out and signing an opt-out form. The employees who did
not opt-out of arbitration would be barred from taking part in class litigation. Plaintiff moved for a protective
order and also requested the Court to invalidate the DRA and to authorize the issuance of corrective notice
to Illinois class members. The Court granted the motion in part. Plaintiff argued that Defendants'
implementation of an arbitration program was improper, abusive, and misleading because it was done after
this collective action was filed and after Defendants obtained a stay of the litigation and because
Defendants implemented the policy in a way that made it unlikely that employees would opt-out. The Court
found that Defendants' distribution of the DRA was likely to confuse and mislead potential class members
and prevent them from participating in this litigation. The Court observed that in order to opt-out of binding
arbitration, the employees needed to affirmatively complete several steps and Defendants' proficiency at
creating electronic links to documents begged the question why Defendants insisted on its employees
printing out and mailing back a paper opt-out form, instead of creating a much more accessible electronic
form that could be signed and submitted electronically. The Court determined that the reason was obvious,
i.e., that Defendants intended its employees would not follow all these steps and would instead be bound to
arbitrate their grievances. The Court found that it was likely that the employees might not understand that they would be bound by this agreement, distributed electronically, unless they affirmatively opted-out. Accordingly, the Court held that in light of its orders staying the case, Defendants’ actions were highly improper and their abusive tactics had to be remedied. Thus, the Court concluded that the DRA was void as to Illinois class members in the present case, and directed Defendant to provide Plaintiff the names and contact information of Illinois class members who had been sent the agreement and to provide Plaintiff with any opt-out forms received from them. Additionally, the Court authorized Plaintiff to send out a corrective notice at Defendants’ expense.

Quezada, et al. v. Schneider Logistics Transloading And Distribution, Case No. 12-CV-2188 (C.D. Cal. Mar. 25, 2013). In this wage & hour action brought by Schneider Logistics Transloading and Distribution’s (“SLTD”) low-wage workers, SLTD obtained 106 sworn declarations from potential class members regarding the conduct alleged in Plaintiffs’ complaint, during a series of interviews conducted with employees shortly after Plaintiffs filed their action. The questions focused on the conduct alleged in Plaintiffs’ complaint, and at the end of the interviews, the employees were asked to sign a declaration. The SLTD lawyers did not, however, tell the employees that the document was a sworn declaration which could be used in Plaintiffs’ lawsuit to limit the employees’ potential recovery; instead they were told that the document was a consent form stating that the employee had voluntarily agreed to be interviewed. Plaintiffs argued that the manner in which SLTD obtained these declarations was coercive and unethical. They moved to limit communications between Defendant and potential class members. The Court granted the motion. The Court observed that although Defendants in a class action are not barred from pre-certification communications with prospective class members, a limitation on pre-certification communications was appropriate when misleading, coercive, or improper communications had taken place. Id. at *6. Defendant asserted that the information provided by SLTD prior to the interviews prevented the meetings from becoming coercive or deceptive because the participating employees were told that the attorneys represented SLTD, and were also told that they were free to leave, to refuse to sign a declaration, and to make changes to their declaration prior to signing. The Court, however, stated that SLTD communications with its employees were deceptive because the attorneys failed to notify the employees of the nature and purpose of the communications, and employees were never told that the purpose of the interviews was to gather evidence to be used against them in a lawsuit. The Court stated that failing to inform the employees of the evidence gathering purpose of the interviews rendered the communications fundamentally misleading and deceptive because the employees were unaware that the interview was taking place in an adversarial context, and that the employees’ statements could be used to limit their right to relief. Id. at 8. The Court noted that the deceptive nature of the interviews weighed in favor of finding that improper communications had taken place. The Court also observed that the interviews were conducted in a coercive manner because the employees did not attend the interviews on their own initiative, but instead were summoned into attendance over a loudspeaker or directly ordered to attend by their supervisors, without being given the option of simply not attending. Thus, the Court ruled that any declarations obtained through improper communications would be disregarded, and accordingly granted Plaintiffs’ request to disregard the 106 declarations obtained; issued a notice informing potential class members that the declarations they signed would not be considered by the Court in this lawsuit; and preventing SLTD from engaging in any additional communications with potential class members regarding this lawsuit without first obtaining permission from the Court.

(xiii) Venue Issues In FLSA Collective Actions

Douglas, et al. v. Chariots For Hire, 918 F. Supp. 2d 24 (D.D.C. 2013). Plaintiffs, a group of limousine drivers, brought a FLSA action alleging that Defendants, an employer and its management, misclassified Plaintiffs as casual workers or independent contractors for tax and employee benefits purposes. Id. at 27. Defendants moved to dismiss or to transfer venue to the U.S. District Court for the Eastern District of Virginia, arguing that nearly all of the alleged events giving rise to Plaintiff’s claims arose in Virginia and not the District of Columbia. Id. The Court denied the motion. The Court noted that a civil action may be brought in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred. Id. at 28. Defendants conceded that more than one-third of Plaintiffs’ trip hours were spent in
the District of Columbia. *Id.* at 29. Additionally, Plaintiff asserted that a substantial amount of Defendants’ business was focused on operating within the District of Columbia, and that Defendant was a corporate resident of the District of Columbia. *Id.* at 30. Accordingly, the Court opined that a substantial part of the events took place in the District of Columbia, thus making it a proper venue for the suit, and a transfer under 28 U.S.C. § 1406(a) improper. *Id.* at 30-31. Alternatively, Defendant argued that transfer was proper under 28 U.S.C. § 1404(a). The Court noted that the claim could have been filed in the Eastern District of Virginia because all Defendants were Virginia residents. Therefore, the Court analyzed the private and public interest factors underlying the case-specific, discretionary transfer inquiry under § 1404(a). *Id.* at 31. First, the Court observed that although Plaintiff’s choice of forum was paramount in any determination of a transfer request, that deference is lessened when the forum has no meaningful ties to the controversy, and when the transferee venue does have substantial ties to both Plaintiffs and the subject matter of the lawsuit. *Id.* at 31-32. Second, the Court remarked that Defendants must establish that the added convenience and justice of litigating in their chosen forum overcomes the deference ordinarily given to Plaintiffs’ decision. *Id.* at 32. Third, the Court noted that when the material events giving raise to Plaintiffs’ claim did not occur in the chosen forum, transfer is favored. *Id.* Further, the Court also gave weight to the location of where the corporate decisions underlying those claims took place. *Id.* The Court stated that this factor favored transfer because the corporate decisions and most of the significant events giving rise to the claims occurred in Virginia. *Id.* The Court determined that the private interest factors did not tilt in favor of either venue, and turned intervener the public interest factors. *Id.* at 32-33. The Court rejected Defendants’ argument that the case should be transferred to the Eastern District of Virginia because that Court would be more familiar with Virginia law, because it determined that it was not significant. *Id.* at 33. Second, the Court noted that both districts had an equally congested docket. *Id.* at 33-24. Third, the Court noted that Defendants correctly alleged that the Eastern District of Virginia had a strong interest in resolving Plaintiffs’ claims; however, Defendants’ substantial business engagements in the District of Columbia largely neutralized this factor. *Id.* at 34. Finally, the Court observed that when a Court gains knowledge and familiarity with the facts, the interests of justice and efficiency favor retaining the suit. *Id.* Here, the Court had ruled on a number of substantive motions, met with the lawyers on multiple occasions, and helped guide the discovery and class procedures. *Id.* at 34-35. The Court remarked that its familiarity would be squandered by a transfer, and that the interests of justice would be served by retaining the case. *Id.* at 35. Accordingly, the Court denied Defendant’s motion for transfer of venue.

(xiv) Pay Policies In FLSA Collective Actions

*Kulish, et al. v. Rite Aid Corp.*, 2013 U.S. App. LEXIS 17049 (4th Cir. Aug. 16, 2013). Plaintiffs, a group of pharmacists, brought a class action under the FLSA and the Maryland Wage & Hour Law. In addition to sick leave and paid leave, Defendant had offered unpaid personal leave time which could be used by a pharmacist who had exhausted accrued paid leave. The unpaid leave was offered only in full-day increments even if an employee only needed a few hours of leave and thus, a full day of unpaid leave was reflected by a deduction for a full-day shift, calculated at the pharmacist’s hourly rate. As a result, Plaintiffs experienced reductions in their bi-weekly paychecks to below their base salary level. Plaintiffs asserted that Defendant engaged in an illegal pay scheme, through the use of its unpaid leave policy, to avoid paying a full day’s salary to an employee who needed only a few hours of unpaid leave. The District Court granted Defendant summary judgment. On appeal, the Fourth Circuit affirmed the order. The Fourth Circuit agreed with the District Court that Defendant did not violate the law in offering unpaid leave that could only be taken in full-day increments. The FLSA provides that a full-day unpaid leave policy represents an improper deduction for an absence occasioned by the employer or by the operating requirements of the business when the employee is otherwise ready, willing, and able to work. The District Court had found that the absences for unpaid leave were not occasioned by the employer or operating requirements of the business, but rather were optional and used by the employees in order to be absent from work to engage in personal activities when they were out of paid leave. Plaintiffs were given a certain amount of paid leave, were not obligated to use any leave, paid or unpaid, had the option of switching shifts or hours with another pharmacist so as to avoid using any leave, whether paid or unpaid, and Defendant never directed an employee to use unpaid leave in the absence of available paid leave. The
District Court thus held that Plaintiffs’ decision to take time off from work for personal reasons, without pay, was voluntary and not occasioned by the employer under the plain meaning of the U.S. Department of Labor’s (“DOL”) regulations. The District Court also noted that the DOL regulations specify that a deduction made for partial-day absences would bar certain FLSA-exemptions for salaried employees. In contrast, deductions for full-day absences are expressly permitted if the time off was for personal reasons. The District Court thus held that, without jeopardizing exempt status, an employee might be docked for a full day absence when the employee had no remaining vacation or personal time left to allocate intervener the time missed from work. Accordingly, the District Court concluded that Defendant did not make improper salary deductions for absences based on unpaid leave, and granted summary judgment. The Fourth Circuit agreed with the District Court and ruled that there was no reversible error.

*Perez, et al. v. G&P Auto Wash Inc.*, 930 F. Supp. 2d 423 (E.D.N.Y. 2013). Plaintiffs, a group of employees, brought an action alleging that Defendants violated the minimum wage and overtime payment requirements set forth in the FLSA and the New York Labor Law (“NYLL”) and the spread of hours requirement of the NYLL. Out of the four Plaintiffs, three were employed as car wash attendants and the fourth Plaintiff worked as the manager. The car wash attendant Plaintiffs asserted that they were required to work off-the-clock and that this time was not included in overtime calculations. *Id.* at 429. They also claimed that Defendants failed to satisfy the requirements for taking tips into account in calculating Plaintiffs’ minimum wages. *Id.* at 432. Defendants sought summary judgment, and the Court granted in part and denied in part Defendants’ motion. Plaintiffs provided evidence that they were required to report to the car wash before it opened and take out and set up the equipment they needed to wash cars, and that they were to stay after the car wash closed to clean the facility. *Id.* at 430. The Court therefore held that a genuine issue of material fact existed as to whether the work Plaintiffs performed before the car wash opened and after the car wash closed was compensable and therefore should be counted intervener their weekly hours for purposes of computing overtime. *Id.* at 432. For the same reasons, the Court also found that a question of fact existed as to whether such off-the-clock work should have been counted for purposes of determining whether Plaintiffs were entitled to the spread of hours pay under the NYLL. *Id.* at 436. The Court therefore denied Defendants’ motion for summary judgment as to Plaintiffs’ overtime claims based on their alleged performance of off-the-clock work and the NYLL spread of hours claim. *Id.*

Plaintiffs based their minimum wage claim on the allegation that Defendants paid Plaintiffs an hourly rate of $5.50, and used a tip credit of $1.75 to meet the minimum wage requirement of $7.25. *Id.* at 433. Plaintiffs asserted that Defendants failed to make any record of the amount of tips that Plaintiffs actually received and simply took advantage of the tip credit system without complying with its requirements. *Id.* The Court, however, found that Plaintiffs failed to raise a genuine issue of fact as to whether the amount of the tip allowance used by Defendants was improper under the FLSA or the NYLL. *Id.* at 434. There was no dispute that Plaintiffs’ occupation was one in which tips have customarily and usually constituted a part of their remuneration, and Plaintiffs pointed to no evidence suggesting that they actually earned less than a weekly hourly average of $1.75 in tips. *Id.* Further, Defendants submitted weekly payroll signage sheets signed by Plaintiffs, which clearly indicated the hours each employee worked and the amount of tips they earned that week. *Id.* Plaintiffs did not dispute the accuracy of these records, but asserted that Defendants did not provide them with proper written notice that a tip credit was being used to calculate their hourly wage. *Id.* Although Defendants contended that they provided Plaintiffs with adequate notice of their intention to use a tip credit by posting signs throughout the workplace that provided an explanation of tip appropriation and contained all other relevant federal and state labor laws, Plaintiffs contended that they did not understand them because the signs were all in English. *Id.* at 435. Defendants asserted that the signs were in both English and Spanish and submitted color photographs of the posters. The Court ruled the text on the posters was too small to discern their content, and Defendants submitted no evidence from anyone with firsthand knowledge attesting that the posters did contain the relevant information. *Id.* The Court therefore denied Defendants’ motion for summary judgment as to Plaintiffs’ claim that Defendants failed to provide adequate notice that tips would be considered part of their hourly wage for minimum wage purposes. *Id.* at 436.
Class Arbitration Of Wage & Hour Claims


Earlier, in Sliger, et al. v. Prospect Mortgage, LLC, Case No. 11-CV-465 (C.D. Cal.), Plaintiffs had alleged violations of the FLSA, the California Labor Code, and the California Unfair Competition Law, and the Court certified a class comprising all current and former loan officers employed by Defendant. Defendant then produced personnel files for the named and opt-in Plaintiffs, some of which contained arbitration agreements requiring that employment-related disputes be submitted to arbitration. Thereafter, the parties filed a stipulation to decertify the collective action and the Court granted the decertification. Plaintiffs in Sliger who had signed arbitration agreements filed this action, and demanded arbitration. Defendant refused to commence arbitration proceedings arguing that Plaintiffs had waived their rights to arbitrate their claims. Plaintiffs moved to compel arbitration, and the Court granted the motion. First, Defendant argued that Plaintiffs knew of the existence of their arbitration agreements, at the latest, when it produced personnel files for all opt-in Plaintiffs in Sliger, and alternatively that their attorneys’ knowledge of the agreements produced in discovery was imputed to them. The Court, however, noted that case law did not make clear whether Defendant must prove that Plaintiffs had actual personal knowledge of their right to compel arbitration, and if so, Defendant had not met its burden of demonstrating the knowledge prong of the waiver test. The Court, however, opined that the knowledge factor was not dispositive to the waiver analysis. Second, Defendant contended that Plaintiffs acted inconsistently with the right to compel arbitration because they elected to adjudicate claims in Court; they litigated for an extended period; and they delayed for several years to compel arbitration. The Court remarked that Plaintiffs had joined Sliger upon notice issued to them by the Court, and that it was unclear whether Plaintiffs knew of their right to arbitrate before they opted-in to Sliger and received copies of their personnel files produced in discovery. The Court opined that Defendant’s attempts to analogize the collective action in this case with a class certified under Rule 23 was inapt because in a Rule 23 class action, the class representatives represented all absent class members from the moment of certification, whereas in an FLSA collective action, Plaintiffs must opt-in to the collective action. Id. at *10-11. Thus, the Court held that Plaintiffs could not be held responsible for the actions of the Sliger Plaintiffs before they were parties to the litigation. Accordingly, the Court concluded that Defendant had not met its burden to prove actions inconsistent with arbitration when viewing the actions attributable solely to Plaintiffs after they joined the Sliger litigation. Although Defendant argued that it incurred substantial legal expenses defending Sliger over the course of two years, and much of its effort was directed at its opposition to certification of the collective action, the Court stated that under California law there is no prejudice where the party opposing arbitration shows that it incurred costs and legal expenses, because merely participating in litigation, by itself, does not result in a waiver. Id. at *17. The Court remarked that Defendant would have had to engage in the same litigation activity even if Plaintiffs had not opted-in. Thus, because Defendant did not demonstrate that it suffered prejudice as a result of Plaintiffs’ conduct in the Sliger lawsuit, the Court granted Plaintiffs’ motion to compel arbitration.


Plaintiffs moved to compel individual arbitration of their wage & hour claims. The District Court denied the motion, finding that by filing a putative class action and seeking to compel arbitration after class certification was denied, Plaintiffs had waived their rights to compel individual arbitration. On appeal, the Ninth Circuit reversed the District Court’s order. The Ninth Circuit stated that to establish waiver under California law, Defendants must demonstrate Plaintiffs’ knowledge of an existing right to compel arbitration, acts inconsistent with that existing right, and prejudice to Defendants resulting from such inconsistent acts. Id. at *3. Defendants had offered only that they were prejudiced because Plaintiffs resorted to litigation. The District Court, however, had erroneously determined this to be sufficient, finding that Defendants met their burden to show that they were prejudiced by the time and expense of litigating this case for the past three years. The Ninth Circuit stated that under the California law, there is no prejudice where the party opposing arbitration showed only that it incurred costs and legal expenses, because merely participating in litigation did not result in a waiver; rather, sufficient prejudice was found only where the petitioning party’s conduct had substantially undermined the important public policy of favoring arbitration or substantially impaired the other side’s ability to take advantage of the benefits and efficiencies of arbitration. Id. at *4. The Ninth Circuit remarked that there was no evidence that Defendants suffered any detriment beyond
having to litigate issues related to class certification. Because Defendants had not established that they suffered any prejudice from Plaintiffs’ decision to file a class action and to compel individual arbitration after class certification was denied, the Ninth Circuit reversed the District Court’s order.


Plaintiff, a former customer service employee, brought a class and collective action under the Idaho Wage Claims Act ("IWCA") and the FLSA seeking to recover unpaid wages, and alleging that she and other customer service employees were required to work off-the-clock for at least 20 minutes a day during which employees logged-on to the computer system and prepared equipment at the beginning of a shift, and logged-out at the end of the shift. Defendant moved to compel arbitration and to dismiss the claims, contending that Plaintiff had signed an arbitration agreement requiring her to individually arbitrate any employment-related dispute. *Id.* at *1-2. The Court denied the motion. Plaintiff argued that because the FLSA gave her a statutory right to file a collective action, the mandate to arbitrate in the Federal Arbitration Act ("FAA") must be overridden by this contrary congressional command. The Court observed that several circuits have held that the waivers of the FLSA’s collective action rights affects only the employee’s procedural right to bring a collective action, not his substantive right to seek recovery under the FLSA for himself, and thus such a waiver is invalid. *Id.* at *6. The Court, however, noted that these cases did determine whether a waiver of FLSA collective action rights violates the National Labor Relations Act ("NLRA"). Section 7 of the NLRA vests in employees the right to engage in concerted activities for the purpose of mutual aid or protection. *Id.* at *7. The Court observed that in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), the NLRB held that an employee’s lawsuit asserting a collective action under the FLSA is concerted action protected by § 7 of the NLRA. The Court stated that although some § 7 rights could be waived by a union acting on behalf of employees, it is unlawful for an employer to condition employment on the waiver of employees’ § 7 rights. *Id.* at *7-8. The Court opined that a collective action seeking recovery of wages for off-the-clock work fell within the language of § 7 protecting concerted action brought for the mutual aid and protection of the employees. *Id.* at *8. Accordingly, the Court stated that Defendant’s arbitration agreement waived Plaintiff’s § 7 rights to bring an FLSA collective action, and noted that an arbitration agreement could, by the terms of the FAA, be declared unenforceable upon such grounds as exist at law or in equity for the revocation of any contract. *Id.* at *9. The Court opined that because § 7 rights are protected as an instrument of national labor policy, Defendant’s arbitration agreement did more than merely waive Plaintiff’s right to a procedural remedy; it barred her from asserting a substantive right that was critical to national labor policy. Thus, the Court observed that there were legal grounds to revoke the arbitration agreement’s waiver of the right to bring a collective action under the FLSA and a class action under the IWCA, and accordingly denied Defendant’s motion to compel arbitration and dismiss Plaintiff’s claims. *Id.* at *9-10.


Plaintiffs, a group of cruise attendants, brought an action alleging that Defendant unlawfully withheld or delayed paying their wages in violation of the Seamen Wage Act (“Wage Act”). When Defendant sought to enforce the mandatory arbitration provisions in the employment and collective bargaining agreements between them, Plaintiffs raised an affirmative defense that because the arbitration provisions required the application of Norwegian law to any dispute between Plaintiffs and Defendant, they were contrary to public policy. The District Court granted Defendant’s motion to compel arbitration, finding that the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (“the Convention”) and its implementing legislation required enforcement of the agreement to arbitrate. On appeal, the Eleventh Circuit affirmed the District Court’s order. The Eleventh Circuit noted that Plaintiffs’ request seeking a declaratory judgment that the arbitration provisions of the agreements were unenforceable presupposed that the arbitration agreements existed and Plaintiffs were bound by it. The Eleventh Circuit stated that while Plaintiffs could not raise their affirmative defense at the arbitration enforcement stage, they could raise certain standard breach of contract defenses that could be applied neutrally on an international scale, but not public policy defenses. To support their public policy argument, Plaintiffs cited *Thomas v. Carnival Corp.*, 573 F.3d 1113 (11th Cir. 2009), which held that an arbitration provision requiring application of foreign law constituted a waiver of seafarers’ rights under the Seamen Wage Act and was therefore
The Eleventh Circuit stated that holding in *Thomas* was unavailing because in *Lindo v. NCL (Bahamas) Ltd.*, 652 F.3d 1257, 1276 (11th Cir. 2011), it clear that *Thomas's* expansion of defenses available against enforcement of an international arbitration agreement violated the terms of the Convention. *Id.* at *5. Accordingly, the Eleventh Circuit affirmed the District Court’s order compelling arbitration.

*Chatman, et al. v. Pizza Hut, Inc.*, 2013 U.S. Dist. LEXIS 73426 (N.D. Ill. May 23, 2013). Plaintiff, a delivery driver, brought an action under the Illinois Wage Payment and Collection Act (“IWPCA”), and the Illinois Minimum Wage Law (“IMWL”) alleging insufficient reimbursement for automobile expenses and failure to compensate for the actual time worked each week. Plaintiff had electronically signed and submitted to Defendant an on-line job application containing an arbitration provision. Defendant moved to stay this action and compel individual arbitration of all claims. The Court granted the motion. Defendant asserted that the arbitration provision constituted a valid written contract. The Court first analyzed whether there was sufficient consideration to constitute a valid agreement to arbitrate. The Court observed that where an employer promises to consider an applicant for employment in exchange for the applicant's return promise to abide by company rules upon employment -- including the arbitration of all claims -- there is sufficient consideration to establish a valid, enforceable contract. *Id.* at *10-11. Here, Defendant's willingness to consider Plaintiff for employment provided the consideration needed to support the arbitration agreement. Further, the Court stated that by continuing to employ Plaintiff and having a mutual promise to arbitrate, Defendant offered sufficient consideration to support the arbitration agreement. Plaintiff, however, argued that there was no mutual promise to arbitrate because a clause in the on-line application allowed Defendant to change its rules and policies without notice. Defendant contended that this clause was an unrelated passage in a wholly distinct section that pertained only to its ability to change rules and policies of employment completely unrelated to arbitration. Thus, Defendant conceded that the arbitration clause applied to it no less than it applied to Plaintiff. The Court agreed with Defendant that this clause did not apply to the arbitration provision, and declined to hold that it rendered Defendant's agreement to arbitrate illusory. Further, the Court remarked that any doubt had been eliminated by Defendant's concession. Accordingly, because sufficient consideration supported the arbitration provision, the Court found that the arbitration provision constituted a valid written arbitration agreement. Regarding the class action waiver, Defendant asserted that because the arbitration provision did not mention class arbitration, the case must proceed to individual arbitration. Plaintiff, however, contended that if the Court compelled arbitration, it must compel arbitration on a class-wide basis because the arbitration provision stated that the parties agreed to arbitration of any claims that arose between Defendant and their current or former employees. Plaintiff argued that by drafting the provision broadly to encompass any claims, Defendant included language that encompassed class actions. The Court held that it was up to the arbitrator to resolve the question of whether the agreement at issue allowed class arbitration of the issues covered by the arbitration provision. Thus, the Court granted Defendant's motion to compel arbitration, but left it for the arbitrator to determine whether to arbitrate individually or on a class-wide basis.

*Dixon, et al. v. NBC Universal Media, LLC*, 2013 U.S. Dist. LEXIS 75313 (S.D.N.Y. May 28, 2013). Plaintiff brought a class and collective action on behalf of herself and a class of production coordinators employed by Defendants, Oxygen Media and NBC Universal Media, alleging that Defendants failed to compensate them for overtime wages in violation of the FLSA and the New York Labor Law (“NYLL”). Defendants moved to compel arbitration invoking the company-wide alternative dispute resolution program. The Court granted Defendants' motion. Plaintiff began working for Oxygen Media in 2006 and remained with the company after it was acquired by Defendant NBC Universal Media in 2007. Defendants moved to compel arbitration utilizing NBC Universal's alternative dispute resolution procedure called “Solutions.” *Id.* at *3. Plaintiff argued that Solutions did not bind her to arbitrate because it did not apply to Oxygen's employees, and she never entered into an agreement to arbitrate her claims. *Id.* at *18-19. The Court disagreed, holding that because Oxygen Media was a subsidiary of NBC Universal, its employees were contractually bound to arbitrate their employment disputes. *Id.* at *20-21. The Court further held that Plaintiff had agreed to the terms of the arbitration program because she had received an e-mail that informed her that Solutions would be rolled out to NBC Universal's employees. *Id.* at *22. The e-mail also
contained a link to a PowerPoint training course, which explicitly informed Plaintiff of the binding nature of the Solutions program and that it applied to her and her claims. Although Plaintiff asserted that she never followed that link and did not view the manual until the litigation began, the Court found that Plaintiff did complete the training course on Solutions. The presentation had expressly stated that no class or collective actions would be permitted, and had notified Plaintiff that “by choosing to continue to work for the company after July 1, 2009, you are agreeing to be covered by Solutions after July 1, 2009.” Id. at *23. The Court thus found that agreement to the program’s terms was implied by Plaintiff’s continued employment at NBCUniversal. The Court further determined that the explicit terms of the manuals that Plaintiff received, and the descriptions provided in the training course she completed, gave her ample notice that she was required to utilize Solutions. Id. at *27. The Court also rejected Plaintiff’s argument that even if the terms of Solutions purported to bind her to arbitrate her claims, the provision of Solutions that waived collective action rights was unenforceable per se. Id. at *28. The Court concluded that the right to proceed collectively under the FLSA could be waived in an arbitration agreement. Id. at *33. The Court found nothing contrary in the FLSA as the statute’s plain text requires that an employee affirmatively opt-in to any collective action. Id. at *36. Further, the legislative history did not demonstrate congressional intent to preclude waiver of FLSA collective action claims. Id. at *37. Accordingly, the Court denied Plaintiff’s motion for collective action certification and granted Defendants’ motion to compel arbitration of Plaintiff’s claims.

*Muriithi, et al. v. Shuttle Express, Inc., 2013 U.S. App. LEXIS 6464 (4th Cir. April 1, 2013).* Plaintiff, a driver for an airport shuttle, brought a collective action under the FLSA alleging that Defendant improperly misclassified him as “independent contractor” or “franchisee,” rather than as “employee,” and that it failed to pay minimum wage and overtime pay. Id. at *3-4. Plaintiff also raised various state law claims on behalf of all members of the purported class. Defendant moved to dismiss or to compel arbitration pursuant to an arbitration provision in a franchise agreement executed between Plaintiff and Defendant. The franchise agreement required arbitration of any controversy arising out of the agreement to be submitted to the American Arbitration Association. The District Court denied Defendant’s motion, finding that the arbitration clause was unconscionable. The District Court found that Plaintiffs could not effectively vindicate their statutory rights due to the class action waiver, fee-splitting, and a one year statute of limitation provision in the franchise agreement. Id. at *5-6. Upon Defendant’s appeal, the Fourth Circuit reversed the District Court’s order. First, the Fourth Circuit determined that although Plaintiff’s claims were asserted under the various provision of federal and state law, they plainly arose out of the franchise agreement and were within the scope of the arbitration provision because the dispute regarding the classification as franchisee rather than as employee derived from the language of the franchise agreement. Id. at *10. Relying on *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Fourth Circuit found that the District Court erred in holding that the class action waiver was unconscionable. According to the District Court, if class actions were prohibited by the franchise agreement, the realistic alternative would be that no individual suits would be brought given that the costs of each individual arbitration had the potential to exceed any recovery. Id. at *11. The Fourth Circuit found that the Supreme Court’s holding in *Concepcion* was not merely an assertion of federal preemption, but also plainly prohibited application of the general contract defense of unconscionability to invalidate an otherwise valid arbitration agreement. Id. at *13. Because the District Court reached an opposite conclusion, the Fourth Circuit held that the District Court erred in finding the class action waiver was an unconscionable contract provision. The Fourth Circuit also held that the District Court erred in holding that the fee-splitting provision imposed prohibitive arbitration costs on Plaintiff. Instead, the Fourth Circuit opined that Plaintiff failed to meet his substantial burden of showing prohibitive arbitration costs. Id. at *19. Plaintiff also failed to provide any evidence or argument about the value of his claim, which was a critical factor in a prohibitive costs analysis. Id. at *20. The Fourth Circuit therefore held that Plaintiff did not meet his burden of proving that the costs of arbitration would be prohibitive. Finally, the Fourth Circuit held that the District Court erred in holding that the one-year limitations period was unconscionable. The Fourth Circuit found that the statute of limitations contained outside of the arbitration clause should be reviewed by the arbitrator. The one-year limitations provision was not referenced in the arbitration clause, but was applicable generally to the franchise agreement and the language of limitation provision did not overlap in any substantive manner with the language of the
arbitration clause. *Id.* at *23-24. The Fourth Circuit therefore ruled that a challenge specific to an arbitration clause could be considered by the District Court in a motion to compel, while a challenge relating to the entire contract could be heard only after the merits of a case have been referred to an arbitrator or have been retained for decision by the District Court. *Id.* at *24. Accordingly, the Fourth Circuit vacated the District Court’s order and instructed it to enter an order compelling arbitration.

**Newbanks, et al. v. Cellular Sales Of South Carolina, LLC, 2013 U.S. App. LEXIS 24043 (4th Cir. Dec. 3, 2013).** Plaintiffs filed a putative collective and class action against the Defendant, alleging it violated the Fair Labor Standards Act (“FLSA”) and the South Carolina Payment of Wages Act by misclassifying their employment status as independent contractors. Plaintiffs argued that because of Defendant’s “actual control” over their work – specifically their hours, duties, and company procedures and protocols – they were employees under the FLSA and corresponding state law. *Id.* at *1. Relying on the arbitration provision contained in the Plaintiffs’ compensation agreements, Defendants moved to dismiss and compel arbitration of the dispute. The compensation agreements stated in relevant part: “[a]ll claims, disputes, or controversies arising out of, or in relation to this document or Employee’s employment with Company shall be decided by arbitration utilizing a single arbitrator in accordance with the Expedited Labor Arbitration Procedures of the American Arbitration Association (“AAA”)….. The right to arbitrate shall survive termination of Employee’s employment with Company.” *Id.* at *1. The District Court denied Defendant’s motion, and concluded that the arbitration provision’s language did not contemplate disputes arising when Plaintiffs were independent contractors of the Defendant. On appeal, the Fourth Circuit affirmed the District Court’s ruling, holding that it properly declined to compel individual arbitration. The Fourth Circuit reasoned that Plaintiffs did not become at-will employees of Defendant until December 2011, when they executed compensation agreements. By that same document, Plaintiffs also agreed to arbitrate disputes arising from or related to “Employee’s employment with Company.” *Id.* The Fourth Circuit concluded that this arbitration requirement only applied to causes of action accruing from the execution of the compensation agreements and onward. The Fourth Circuit reached this conclusion under the plain language of the contract. Thus, because the arbitration provision plainly stated that disputes related to “Employee’s employment with Company” were to be resolved in arbitration, and Plaintiffs were not employees of Defendant until the execution of the compensation agreement, the arbitration provision did not apply to the claims that accrued prior to the signing of the compensation agreements. *Id.* at *2. Accordingly, the Fourth Circuit affirmed the District Court’s order.

**Owen, et al. v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013).** Plaintiff brought an action asserting that Defendant misclassified its administrators as exempt employees, and that Defendant required them to work more than 40 hours per week without overtime compensation. The parties had signed a mandatory arbitration agreement (“MAA”), which stipulated resolution of disputes by arbitration, and which applied to claims for wages or other compensation, and claims for violation of any federal statute including the FLSA. Although the MAA contained a class waiver, it did not waive the right to file a complaint with the EEOC or any other federal, state, or local agency designated to investigate complaints of harassment, discrimination, other statutory violations, or similar claims. Defendant sought to compel arbitration, which the District Court denied, holding that, although the allegations fell within the scope of the agreement, the MAA was invalid because of the class waiver. On appeal, the Eighth Circuit reversed the District Court’s decision, stating that class waiver in the MAA was enforceable. First, because Plaintiff identified nothing in either the text or legislative history of the FLSA that indicated a congressional intent to bar employees from agreeing to arbitrate FLSA claims individually, and because there was no inherent conflict between the FLSA and the Federal Arbitration Act (“FAA”), the Eighth Circuit opined that the FLSA contained no contrary congressional command as required to override the FAA. *Id.* at 1052. Although Plaintiff contended that § 216(b) of the FLSA created a right to pursue a collective action, the Eighth Circuit noted that the FLSA also states that no employee shall be a party Plaintiff to any such action unless he gives his consent in writing. *Id.* Thus, even assuming that the Congress intended to create some right to collective actions, if an employee must affirmatively opt-in to any such collective action, the employee also had the power to waive participation in a collective action. *Id.* at 1052-53 The Eighth Circuit remarked that this provision fell short of the “contrary congressional command” required to override the FAA. *Id.* at 1053.
Second, Plaintiff contended that the National Labor Relations Act ("NLRA") was passed to secure for employees the full right to act collectively to ensure that employers and employees should possess equality of bargaining power. Plaintiff asserted that in passing the NLRA, Congress intended to build upon the Norris-LaGuardia Act, which was enacted to prevent employers from imposing contracts on employees that would require employees to forgo collective actions. The Eighth Circuit, however, noted that although the FAA originally was enacted in 1925, it was re-enacted in 1947; this re-enactment came 12 years after the NLRA and 15 years after the passage of the Norris-LaGuardia Act. Further, the FAA's re-enactment also occurred nine years after the passage of the FLSA in 1938. The Eighth Circuit opined that the decision to re-enact the FAA suggested that Congress intended its arbitration protections to remain intact even in light of the earlier passage of three major labor relations statutes. Id. Thus, there was no inconsistency between either the FLSA's text or its legislative history and the conclusion that arbitration agreements containing class waivers are enforceable in cases involving the FLSA. Plaintiff also relied on In Re D.R. Horton, Inc., 357 NLRB No. 184 (Jan. 3, 2012), which held a class waiver unenforceable in a similar FLSA challenge based on the conclusion of the National Labor Relations Board ("NLRB") that such a waiver conflicted with the rights protected by § 7 of the NLRA. The Eighth Circuit, however, noted that the NLRB limited its holding to arbitration agreements barring all protected concerted action, and that in contrast, the MAA did not preclude an employee from filing a complaint with an administrative agency such as the Department of Labor, the EEOC, the NLRB, or any similar administrative body. Id. Moreover, the MAA did not preclude any of these agencies from investigating and filing suit on behalf of a class of employees. The Eighth Circuit also stated that although no federal circuit had addressed D.R. Horton, nearly all of the District Courts had declined to follow it. Thus, in the absence of any contrary congressional command from the FLSA that a right to engage in collective actions overrides the mandate of the FAA in favor of arbitration, the Eighth Circuit declined to follow D.R. Horton and held that arbitration agreements containing class waivers are enforceable as to claims brought under the FLSA. Id. at 1054-55. Accordingly, the Eighth Circuit reversed the District Court's decision and directed it to enter an order granting Defendant’s motion to stay proceedings and compel arbitration.

Parvataneni, et al. v. E*Trade Financial Corp., 2013 U.S. Dist. LEXIS 136950 (N.D. Cal. Sept. 24, 2013). Plaintiff brought an action asserting violations of California’s Private Attorneys General Act ("PAGA") relating to unpaid overtime wages and for Defendant’s alleged failure to maintain adequate time-keeping records. Plaintiff alleged that he often worked in excess of 40 hours per week, but was unable to claim overtime payments. Id. at *2. Plaintiff had signed an arbitration agreement agreeing to arbitrate all disputes relating to his employment with Defendant. Defendant filed a motion to dismiss, or in the alternative, to compel Plaintiff to arbitration. The Court granted Defendant’s motion to compel. Plaintiff opposed Defendant’s motion on several bases. Plaintiff argued that the arbitration agreement granted him the right to pursue collective arbitration. Additionally, Plaintiff contended that if the arbitration agreement did not include a right to collective arbitration, it was void because it exempted Defendant from enforcement actions under the PAGA. Id. at *5. The Court noted that the arbitration agreement was silent as to class arbitration, and there was no evidence that parties considered the issue prior to signing the contract, and no contractual basis for concluding that they intended to include class arbitration in terms of the agreement. Id. at *9. Accordingly, the Court ruled that it could not construe the agreement to include class arbitration as to Plaintiff’s representative claims under the PAGA. Plaintiff further argued that mere failure to mention class arbitration itself did not necessarily equate with the silence discussed in Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010). The Court, however, noted that here there was no basis to conclude that the parties intended to include class arbitration in their agreement. Accordingly, the Court opined that it was unfair to coerce Defendant to participate in arbitration proceedings. Id. at *10. Plaintiff also contended that the Court should permit an arbitrator to decide whether the arbitration agreement provided for collective arbitration. The Court rejected this argument, finding that with no clear and unmistakable evidence that the parties intended to arbitrate the arbitrability issue, the arbitrability question was for the Court to decide. Id. at *12. Finally, Plaintiff contended that, if the arbitration agreement prevented him from bringing his representative claims under the PAGA, then it unlawfully exempted Defendant from such actions. The Court noted that in Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005), the California Supreme Court had found that arbitration agreements are per
unconscionable when it prevented Plaintiffs from asserting class actions. The Court remarked that AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), specifically found that the Federal Arbitration Act preempted Discover Bank and held that Courts must compel arbitration even in the absence of the opportunity for Plaintiffs to bring their claims as a class action. Id. at *14. Following Concepcion, the Court also held that arbitration agreement that denies a Plaintiff the right to pursue a representative claim was still a valid agreement. Id. at *14-15. Accordingly, the Court granted Defendant’s motion to compel arbitration.

Porreca, et al. v. The Rose Group d/b/a Applebee’s Neighborhood Grill & Bar, 2013 U.S. Dist. LEXIS 173587 (E.D. Pa. Dec. 11, 2013). Plaintiff, on behalf of a group of former employees, brought a collective and class action under the FLSA and alleged that Defendant failed to properly compensate them. Plaintiffs asserted that Defendant had a longstanding policy and practice of paying tipped employees less than the hourly minimum wage and yet requiring them to spend a substantial amount of time performing an array of duties outside the duties of their position for which they earned no tips. Id. at *2-3. Defendant moved to compel the named Plaintiff to arbitrate his claims on an individual basis pursuant to an arbitration agreement he executed when joining Defendant. The Court granted Defendant’s motion. Plaintiff established that the agreement was procedurally unconscionable as the arbitration agreement was presented to him as a take-it-or-leave proposal, the evidence suggested that the parties were not on equal footing, and Plaintiff was economically compelled to accept Defendant’s terms. However, the Court found that Plaintiff could not sustain his burden of demonstrating substantial unconscionability. The Court rejected Plaintiff’s contention that the arbitration agreement denied him the right to guaranteed attorneys’ fees and costs should he prevail. The Court noted that the provision at issue allowed for the possibility of an award of attorneys’ fees and had covered all fee-shifting statutory claims. Id. at *29. The Court therefore held that the arbitration agreement did not foreclose an award of attorneys’ fees as permitted by law, and thus the attorneys’ fees provision was not unconscionable. The Court also held that the agreement was not substantively unconscionable with respect to liquidated or statutory damages because the agreement did not limit or alter Plaintiff’s rights and remedies as mandated by controlling law. Id. at *31-32. The Court further rejected Plaintiff’s contention that Defendant’s five-step process set up to resolve disputes was substantively unconscionable. Plaintiff complained about the “egregiously one-sided mediation process” that allowed Defendant to select the mediator and allowed the arbitrator to dismiss a claim for arbitration if the party seeking arbitration fails to first attempt mediation. Id. at *32. Plaintiff, however, offered no reason as to why the fact that Defendant selects the mediator was substantively unconscionable. Plaintiff also failed to demonstrate that the tiered nature of the arbitration agreement unreasonably favored Defendant. The Court therefore refused to strike down the agreed upon procedure as substantively unconscionable. Finally, relying upon AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740 (2011), and American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013), the Court rejected Plaintiff’s contention that collective action waivers of FLSA claims contained in the arbitration agreement was substantively unconscionable. The Court opined that the Supreme Court precedents inexorably lead to the conclusion that the waiver of collective action claims was permissible in the FLSA context. Id. at *41. The Court therefore found that Plaintiff failed to demonstrate substantive unconscionability, a necessary condition to invalidating an arbitration agreement, and accordingly, granted Defendant’s motion to compel arbitration.

Raniere, et al. v. Citigroup Inc., 2013 U.S. App. LEXIS 16765 (2d Cir. Aug. 12, 2013). Plaintiffs, a group of home lending consultants and loan specialists, brought an action alleging that Defendants improperly classified them as exempt and denied overtime wages in violation of the FLSA and the New York Labor Law. Plaintiffs moved for conditional certification and Defendants moved to dismiss and to compel arbitration. The District Court denied Defendant’s motion, concluding that a waiver of the right to proceed collectively under the FLSA within Defendant’s arbitration agreement was unenforceable as a matter of law, and if any one potential class member met the burden of proving that his costs precluded him from effectively vindicating his statutory rights in arbitration, the clause was unenforceable as to that class or collective action. On appeal, the Second Circuit reversed the District Court’s order. Plaintiffs argued that the text and legislative history of the FLSA were clear that the right to litigate a collective action was an
integral and fundamentally substantive element of the FLSA that could not be subject to waiver. The Second Circuit stated that Plaintiffs’ argument was directly foreclosed by Sutherland v. Ernst & Young LLP, 2013 U.S. App. LEXIS 16513 (2d Cir. Aug. 9, 2013), where it held that no contrary congressional command required rejection of the waiver of class arbitration in the FLSA context. Id. at *6. Alternatively, Plaintiffs argued that the decisions in In Re American Express Merchants’ Litigation, 554 F.3d 300 (2d Cir. 2009) (“Amex I”), and In Re American Express Merchants’ Litigation, 667 F.3d 204 (2d Cir. 2012) (“Amex III”), instructed that collective action waivers were unenforceable where any putative member of the class or collective action would be unable to vindicate their statutory rights. Id. at *7. The Second Circuit remarked that American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013), reversed Amex III and held that although the effective vindication doctrine was designed to prevent the prospective waiver of a party’s right to pursue statutory remedies, that doctrine did not apply because it was not economically feasible for Plaintiffs to enforce their statutory rights individually. Id. Accordingly, the Second Circuit held that the District Court erred in denying Defendant’s motion.

Editor’s Note: The decision in Raniere – along with the Second Circuit’s ruling in Sutherland, et al. v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013) – is significant in terms of workplace arbitration agreements and their utility for controlling and mitigating class action exposures. The application of the Supreme Court’s decision in AMEX to the wage & hour context manifests the importance of utilizing sound workplace arbitration programs.

Richards, et al. v. Ernst & Young, LLP, 2013 U.S. App. LEXIS 17488 (9th Cir. Aug. 21, 2013). Plaintiff, a former employee, brought an action for herself and on behalf of a putative class for violation of the FLSA and the California Labor Code alleging that Defendant failed to pay overtime or provide meal and rest breaks. Defendant moved to compel arbitration of the state wage & hour claims, and the District Court denied the motion. On appeal, the Ninth Circuit reversed the District Court’s order. The Ninth Circuit stated that a party seeking to prove waiver of a right to arbitration must demonstrate knowledge of an existing right to compel arbitration; acts inconsistent with that existing right; and prejudice to the party opposing arbitration resulting from such inconsistent acts. Id. at *3. Plaintiff argued that she was prejudiced because Defendant engaged in litigation on the merits, and, as a result, some of her claims were dismissed. The Ninth Circuit did not accept this argument because one of Plaintiff’s claims that Defendant failed to provide meal and rest breaks was dismissed without prejudice, as it was not a decision on the merits. Further, the Ninth Circuit stated that Plaintiff’s claim for injunctive relief was resolved by the District Court due to lack of standing because Plaintiff, as a former employee, could not benefit from prospective relief and therefore did not have standing to assert that claim. Plaintiff also asserted that she was prejudiced because Defendant conducted discovery that caused her to incur expenses during the years of litigation prior to the motion to compel. The Ninth Circuit noted that Plaintiff did not contend that Defendant used discovery to gain information about the other side’s case that could not have been gained in arbitration. The Ninth Circuit had previously rejected the notion that self-inflicted expenses could be evidence of prejudice. Id. at *5. The Ninth Circuit observed that Plaintiff was a party to an agreement making arbitration of disputes mandatory, and therefore any extra expense incurred as a result of Plaintiff’s deliberate choice of an improper forum, in contravention of her contract, could not be charged to Defendant. Plaintiff alternatively urged the Ninth Circuit to rely on the decision of the National Labor Relations Board (“NLRB”) in D.R. Horton, 357 NLRB No. 184 (Jan. 3, 2012), to affirm the District Court’s judgment. The Ninth Circuit stated that the overwhelming majority of case law authorities had determined that they should not defer to the NLRB’s decision in D.R. Horton because it conflicted with the explicit pronouncements of the U.S. Supreme Court concerning the policies underlying the Federal Arbitration Act (“FAA”). Id. at *5-6. Finally, the Ninth Circuit remarked that the Supreme Court had recently reiterated that District Courts must rigorously enforce arbitration agreements according to their terms and that this held true for claims that alleged a violation of a federal statute, unless the FAA’s mandate had been overridden by a contrary congressional command. Id. at *7-8. Accordingly, the Ninth Circuit reversed the District Court’s order.
The Court observed that if there is a controversy, the parties asked that the Court direct them to the Open ADR Track, which stated that when parties do not have to disclose the terms of the compromise to the Court. Id. at 5. The parties asked that the Court direct them to the Open ADR Track, where parties can employ any form of ADR upon which they mutually agree including private arbitration. Id. The Court stated that while it should refer to arbitration disputes in which an employee’s claims against the employer arose out of a collective bargaining agreement containing an arbitration provision, different consideration applied where the employee’s claims were based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers. Id. at 6. Further, the statutory enforcement scheme granted employees access to the Courts and no other forum for enforcement of statutory rights was referred to or created by the statute. Id. The Court observed that if there is a bona fide dispute over FLSA coverage, parties may negotiate a compromise subject to the Court’s supervision and the Court must determine whether the proposed settlement was fair and reasonable. Id. at 7. The Court noted that when it directs a case to the Open ADR Track, the Court loses contact with the case if the parties settle because the parties do not have to disclose the terms of the compromise to the Court. Id. at 9. Thus, the ADR Plan frustrates implementation of the private-public rights granted by the FLSA and thwarts Congress’ intent to ensure widespread compliance with the statute. Id. The Court remarked that the FLSA’s incompatibility with the ADR Plan manifested here where the employer’s alleged violation of the FLSA had purportedly affected Defendant’s present and former event workers. The Court opined that Plaintiffs’ allegations were true, then the public had an interest in seeing that every putative opt-in collective action member received damages. The Court also stated that when parties believed that there was a bona fide controversy concerning FLSA claims, they could ask a mediator to help reach a compromise, but the Court ultimately must decide whether there was a legitimate controversy that provided the basis for compromise and whether the settlement proposed was fair and reasonable. Id. at *9-10. Accordingly, the Court denied the parties’ motion to refer the matter to arbitration and directed the parties to submit their proposed settlement for judicial review if they decided to compromise.

Ryan, et al. v. JPMorgan Chase & Co., 2013 U.S. Dist. LEXIS 24628 (S.D.N.Y. Feb. 21, 2013). Plaintiff, a former assistant branch manager, brought an FLSA action alleging that Defendant failed to compensate her and others similarly-situated for lawful overtime wages. Plaintiff entered into a binding arbitration agreement (“BAA”) with Defendant, which stated that all covered claims including employment-related claims would be resolved through binding arbitration. Further, the BAA provided that no claims could be arbitrated on a class or collective basis. Defendant moved to dismiss or to stay the proceedings and compel arbitration. The Court granted Defendant’s motion. First, the Court observed that collective action waivers were not per se unenforceable due to the FAA’s overarching purpose of ensuring the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Id. at *9. Thus, the Court stated that Plaintiff’s contention was without merit insofar as she claimed that her FLSA could not be waived. Second, the Court noted that Plaintiff failed to satisfy her burden to show that arbitrating her claim individually precluded her from vindicating her statutory rights. Plaintiff estimated she had $9,817.50 in damages for her overtime claim, including liquidated damages, and her opposition papers noted she individually would pursue higher damages in this action. Plaintiff’s cost in comparison to her damages was substantially low. Further, Plaintiff did not allege that she would incur expert fees; the BAA obligated Defendants to pay the costs of arbitration; and, under 29 U.S.C. § 216(b), Defendants would pay Plaintiff’s reasonable attorneys’ fees if she prevailed in arbitration. The Court also noted that the BAA’s class action waiver was fair, permitted Plaintiff to vindicate her statutory rights under the FLSA, did not hinder her ability to recover attorneys’ fees or costs, and comported with public policy favoring arbitration.
and honoring private contracts. Thus, the Court opined that Plaintiff failed to satisfy her burden to show that the claims at issue were unsuitable for arbitration, and that arbitration would be prohibitively expensive. Finally, Plaintiff argued that the BAA was contrary to federal policy expressed in the National Labor Relations Act (“NLRA”). The Court stated that this argument was without merit because NLRA did not determine whether a Plaintiff has a right to bring a collective action under the FLSA. Id. at *16.

Accordingly, the Court granted Defendant’s motion to dismiss and ordered that Plaintiff’s claims must be arbitrated.

Simpson, et al. v. Inter-Con Security Systems Inc., 2013 U.S. Dist. LEXIS 67102 (W.D. Wash. May 10, 2013). Plaintiffs, a group of security guards, brought a class and collective action alleging that they were wrongfully denied overtime pay for off-the-clock work. Id. at *2-3. Defendant moved to compel arbitration, contending that Plaintiffs signed an arbitration agreement covering all of their claims in this suit. Defendant asserted that the arbitration agreement precluded class actions, collective actions, and class arbitration, and that Plaintiffs had no right to pursue claims on behalf of other guards. The Court granted in part and denied in part Defendant’s motion. Because the arbitration agreement expressly covered claims for wages or other compensation due, claims for breaks and rest periods, and claims for breach of any contract, the Court noted that the arbitration agreement covered all of Plaintiffs’ claims. Plaintiffs, however, contended that the arbitration agreement was procedurally unconscionable under Washington law. Plaintiffs asserted that they had no power to negotiate the terms of the agreement, and that Defendant neither explained the agreement nor gave them adequate time to review it. Further, Plaintiffs claimed that Defendant required them to either sign the agreement or forego employment. Although the Court stated that the agreement was a contract of adhesion, it opined that adhesion contracts and unequal bargaining power were the norm in employee arbitration agreements, and they were not by themselves sufficient to declare an agreement unconscionable. Id. at *4-9. Further, the Court remarked that although Plaintiffs contended they had little time to consider the agreement, they did not contend that they attempted to consider it, attempted to ask questions about it, or even that they would have asked questions if they had more time. Accordingly, the Court observed that the agreement was not procedurally unconscionable. Id. at *9. Plaintiffs attempted to disagree that they signed the arbitration agreement. Defendant, however, produced a copy of the agreement bearing named Plaintiff Alisker’s signature, and also produced a policy acknowledgment form bearing his signature. For named Plaintiff Simpson, although Defendant was not able to produce a signed arbitration agreement, it produced the policy acknowledgment bearing his signature. Plaintiffs nevertheless asserted that they did not recall signing any documents containing an arbitration agreement. The Court noted that the Ninth Circuit had not yet explained what standards apply when a Court considers whether a party entered an agreement. The Seventh Circuit in Deputy v. Lehman Brothers, Inc., 510 (7th Cir. 2003), held that handwriting samples were sufficient to create an issue of fact as to whether Plaintiff in fact had signed the arbitration agreement in question. Id. at *13. Defendant had not moved for summary judgment, but the Court noted that it had the power to grant summary judgment if it first gives notice to the parties. Thus, the Court gave notice that it preliminarily concluded Plaintiff Alisker signed an arbitration agreement and that issues of fact existed as to whether Simpson did. The Court then ordered further briefing on the issue. Id. at *14-16.

Sutherland, et al. v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013). Plaintiff, a former employee, brought a class action alleging that Defendant wrongfully classified her and others similarly-situated as exempt from the overtime requirements of the FLSA and New York law. As a condition of her employment, Plaintiff consented to Defendant’s Dispute Resolution Program (the “Agreement”), which required binding individual arbitration. Defendant moved to compel arbitration of Plaintiff’s claims on an individual basis. The District Court found that the Agreement was unenforceable because it prevented Plaintiff from vindicating her statutory rights and thereby denied Defendant’s motion. Defendant then moved for reconsideration of the District Court’s order, which it denied. On appeal, the Second Circuit reversed the District Court’s order. The Second Circuit stated that the issue was whether an employee could invalidate a class action waiver provision in an arbitration agreement when that waiver removed the financial incentive for her to pursue her FLSA claim. First, the Second Circuit noted that the text of the FLSA did not show an intention to preclude a waiver of class action procedure. Plaintiff argued to the contrary, asserting
that § 16(b) of the FLSA created a “right” to bring a collective action because the statute provided that an action to recover might be maintained against any employer by any one or more employees for and in behalf of himself or themselves or other employees similarly-situated. Id. at 296. The Second Circuit, however, remarked that Plaintiff neglected the fact that § 216(b) also required an employee with a FLSA claim to affirmatively opt-in to any collective action. Id. Second, the Second Circuit remarked that Supreme Court precedent inevitably led to the conclusion that the waiver of collective action claims was permissible in the FLSA context. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), held that the FAA preempted a California judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts because requiring the availability of class-wide arbitration would interfere with fundamental attributes of arbitration and thus created a scheme inconsistent with the FAA. Id. at 297. Moreover, in Gilmer v. Inter-state/Johnson Lane Corp., 500 U.S. 20 (1991), the Supreme Court had upheld the waiver of a collective action provision in the Age Discrimination in Employment Act (“ADEA”). In doing so, the Supreme Court had noted that even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the ADEA provided for the possibility of bringing a collective action did not mean that individual attempts at conciliation were intended to be barred. Id. Based on this, the Second Circuit reasoned that the FLSA did not include a contrary congressional command that prevented the underlying arbitration agreement from being enforced by its terms. Plaintiff further argued that pursuing individual arbitration would be prohibitively expensive because the recovery she sought was dwarfed by the costs of individual arbitration. The Second Circuit stated that despite the obstacles facing the vindication of Plaintiff’s claims, the Supreme Court’s recent decision in American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013), compelled the conclusion that Plaintiff’s class action waiver was not rendered invalid by virtue of the fact that her claim was not worth pursuing individually. Id. at 298. The Second Circuit remarked that Plaintiff could not use the doctrine to invalidate class action waiver provisions by showing that she had no economic incentive to pursue the FLSA claims individually in arbitration. Accordingly, the Second Circuit held that Plaintiff’s arguments were insufficient to invalidate the class action waiver provision in this case and therefore, reversed the District Court’s order and remanded the case for further proceeding.

Valencia-Velazquez, et al. v. Sears, Roebuck & Co., 2013 U.S. Dist. LEXIS 121400 (S.D. Cal. Aug. 26, 2013). Plaintiff, an employee, brought a wage & hour class action alleging failure to pay minimum wages and unlawful business practices. Pursuant to an arbitration policy/agreement (“Agreement”), participating employees and Defendant each waived the right to pursue employment-related claims in Court, and agreed to submit such disputes to binding arbitration. Defendant moved to compel arbitration, and the Court granted the motion. Plaintiff contended that the Agreement was substantively unconscionable because it contained a discretionary attorneys’ fees provision that was in direct contravention to the California Labor Code’s mandatory award of attorneys’ fees and costs provisions. The Agreement provided that the Arbitrator could award any party any remedy to which that party was entitled under applicable law, including an award of attorneys’ fees, but such remedies would be limited to those that would be available to a party in his or her individual capacity in a Court of law for the claims presented to and decided by the Arbitrator. Further, no remedies that otherwise would be available to an individual in a Court of law would be forfeited by virtue of the Agreement. Id. at *11. The Court found that the language in the Agreement did not render it substantively unconscionable. Plaintiff also argued that the confidentiality provision in the Agreement was substantively unconscionable because it prevented other Plaintiffs from accessing precedent. The Court, however, observed that the enforceability of the confidentiality clause was distinct from the enforceability of the arbitration clause in general. Id. at *14-15. The Court stated that the confidentiality provision did not render the Agreement substantively unconscionable, and that Plaintiff was free to argue during arbitration that the confidentiality clause was not enforceable. The Agreement also waived the right or authority for any dispute to be brought, heard, or arbitrated as a class action, a collective action, or a Private Attorney General Act (“PAGA”) action. Plaintiff contended that this provision and a related severability provision yielded improper forum shopping and reflected a mistrust of arbitration. The Court noted that Plaintiff’s contention that the Agreement’s ban on class arbitration was unconscionable under California law was now expressly foreclosed by AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1753, (2011), and that the severability provision, which sought to avoid
class arbitrations, was consistent with Concepcion’s discussion of why arbitration is poorly suited to the higher stakes of class litigation. Id. at *16. Concepcion held that class arbitration, to the extent it was manufactured by a California rule that made class action waivers unconscionable rather than consensual, was inconsistent with the FAA. Id. Thus, the Court stated that the class action, collective action, and PAGA waivers did not render the Agreement substantively unconscionable. Id. at *16. The Court noted that the on-line method of presenting the Agreement, the arbitration rules, and the opt-out procedure did not render the Agreement procedurally unconscionable. Further, the Court determined that Plaintiff had an opportunity of 30 days to opt-out of the arbitration provision when signing the Agreement and still preserve her job. The option to opt-out was not buried in fine print but was instead clearly labelled in boldface. Thus, the Court concluded that pursuant to the FAA, the PAGA and class action waivers in the Agreement were enforceable, and accordingly granted the motion to compel arbitration.

Zaborowski, et al. v. MHN Government Services, Inc., 936 F. Supp. 2d 1145 (N.D. Cal. 2013). In this FLSA and state labor law class action, Plaintiffs alleged Defendant misclassified them as independent contractors, and failed to pay overtime. Defendant moved to compel arbitration pursuant to its Provider Services Task Order Agreement, which contained an express mandatory arbitration clause. The Court denied the motion. The Court noted that under AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011), a rule that prohibits the arbitration of a particular type of claim is preempted by the Federal Arbitration Act (“FAA”). The Court reasoned that Concepcion reaffirmed California’s general contract defense of unconscionability as applied to arbitration agreements. To find that an arbitration agreement is unconscionable, a Court must find that it is both procedurally and substantively unconscionable. In doing so, the Courts use a sliding scale – the more procedurally unconscionable an agreement is the less substantively unconscionable it must be and vice versa. Id. at 1151. The Court found that the arbitration agreement was procedurally unconscionable because it was a contract of adhesion and oppressive, and created an unfair surprise. The Court opined that the agreement was a contract of adhesion because it was a standardized contract and offered to Plaintiffs on a take-it-or-leave-it basis. Surprise was also present in the agreement because the arbitration clause appeared in paragraph 20 of 23 paragraphs and was not set apart from the rest of the agreement in any way. The Court noted that an arbitration provision is substantively unconscionable if it is overly harsh or generates one-sided results. Id. at 1152. The Court stated that the provision that arbitration must be initiated within six months after the alleged controversy or claim occurred was unconscionable. The Court noted that California case law authority generally disapproves of contractually limiting the statute of limitations in the employment context, especially if doing so would foreclose statutory remedies to which workers may be otherwise entitled. Id. at 1153. The provision that Defendant would provide Plaintiffs with a list of three neutral arbitrators from which Plaintiffs would select their choice of an arbitrator created a one-sided arbitration process because Defendant had the opportunity to choose the three most sympathetic arbitrators it could find. Id. Nonetheless, the Court rejected Plaintiffs’ argument that the limited discovery was so one-sided or inadequate that it was unconscionable. No showing was made that the allowable discovery was insufficient to allow Plaintiffs a fair opportunity to present their claims. Id. at 1154. The arbitration agreement also provided that the AAA commercial arbitration rules governed. Those rules required a filing fee that was almost 15 times greater than the AAA fee for employment disputes; hence, the Court found it unconscionable. The agreement also had a fee shifting provision allowing fees to the prevailing party that was unconscionable because both California law and the FLSA required an award of fees and costs only to the prevailing Plaintiff. The Court also found that the Agreement’s provision prohibiting a punitive damages award was unconscionable because such remedies were available under applicable law. Id. at 1155. Finally, the Court concluded that the agreement was so permeated with unconscionability that it was not severable, and accordingly, denied Defendant’s motion to compel arbitration. Id. at 1157.

containing the arbitration clause. The Court denied the motion. The Court found that Form U-4 was
governed by the rules of FINRA, which prohibited the enforcement of arbitration agreements against a
member of a putative class or collective action until class or collective certification had been denied or
decertified, and for class actions only, until a member had been excluded from the class by the Court or
opted-out of the class. Id. at *5-6. The Court noted that the SEC's own interpretation of this rule supported
the view that arbitration could not be compelled at that stage. Moreover, the Court observed that in the
letter issued prior to promulgation of FINRA Rule 13204(b), an agency representative stated that FLSA
collective actions should be treated like class actions for the purposes of Rule 13204, and were ineligible
for arbitration. Following an instance in which a judge did not treat a FLSA collective action as a class
action under Rule 13204, the SEC amended the FINRA rules to add § 13204(b) to extend the treatment set
out in Rule 13204(a) to FLSA collective actions. The Court noted that, in its notice prior to amending the
rule, the SEC again affirmed the view that FINRA believed that collective actions, like class actions, should
be handled by the judiciary system, which had extensive procedures to manage such claims. Id. at *6-7.
The Court stated that the language of the statute, its legislative history, notice provisions, and agency
interpretation each rejected Defendants' contention that arbitration should be compelled at this stage of the
litigation. Accordingly, the Court denied Defendants' motion to compel arbitration.

(xvi) Settlement Of Wage & Hour Class Actions And Collective Actions

group of assistant managers or technicians, brought a collective action under the FLSA seeking to recover
unpaid overtime compensation. Plaintiffs claimed that they were never accurately paid one-and-one-half
times their regular hourly rate for overtime hours. The parties subsequently entered into a settlement
agreement, which called for the payment of back wages and liquidated damages to 37 Plaintiffs, totaling
$93,000; a $4,000 payment to the original named Plaintiff; $97,000 to Plaintiffs' counsel for attorneys' fees
and costs; and an individual amount to each of the 37 Plaintiffs in satisfaction of their specific overtime and
off-the-clock claims. The award of attorneys' fees and costs was subject to Court approval, but the
agreement was not contingent upon the Court's approval. The Court approved the settlement agreement
with the exception of its confidentiality provision. The Court found that the agreement was fair and
reasonable. It compromised disputed issues by compensating Plaintiffs for their overtime and off-the-clock
claims, and by agreeing to a settlement the parties would avoid the costs of a lengthy and complex trial.
The Court also found that settlement was prudent because Plaintiffs would likely face considerable risks in
establishing damages at trial in light of the potential applicability of a two-year statute of limitations and the
retail sales exemption, as well as the technical nature of calculating damages. Counsel for the parties
thoroughly litigated the action, conducted extensive discovery, and fully briefed a dispositive motion. Id. at
*6-7. However, the Court noted that the agreement's confidentiality provision stipulated that if any Plaintiff
disclosed any information regarding the settlement to a third-party, Defendant was authorized to recover
damages from that Plaintiff, including the entirety of his or her settlement proceeds. Id. at *9. The Court
opined that such a provision contravened the FLSA because it permitted Defendant to retaliate against a
Plaintiff and promoted the silencing of an employee who had vindicated a disputed FLSA right. Id. Accordingly, the Court approved the settlement agreement with the exception of the confidentiality provision. Id. at *9-10.

brought a wage & hour class action under the California Labor Code, Business & Professional Code, and
the Private Attorneys General Act. Subsequent to discovery, Plaintiff's counsel developed a rough
estimate of the damages that would result if Plaintiff were to prevail at trial. The parties then mediated and
reached a class-wide settlement. Defendants agreed to pay a gross settlement amount of $3.5 million, and
in addition to providing settlement awards to class members, the gross settlement award would be used to
satisfy attorneys' fees and costs not to exceed $1,155,000; (ii) claimed administration fees estimated at
$16,342; (iii) an enhancement award to Plaintiff of up to $8,000; (iv) a $25,000 payment to the Labor
Workforce Development Agency; (v) and a $125,000 hold-back fund that would be used to resolve
disputed late claims and undisputed expenses, and, if any portion was not distributed within 120 days
following the mailing of settlement award distributions, it would then be used to reimburse Defendants for
employer-side payroll taxes incurred in the settlement process. The remaining amount would be distributed to the proposed class members based on the total number of weeks that the employee worked with Defendants, and the settlement award checks that remained uncashed after 180 days would be distributed in equal amounts to the Legal Aid Society’s Employment Law Center and the Juvenile Diabetes Research Fund as cy pres recipients. Id. at *4-5. Plaintiff moved for preliminary approval of class action settlement, and the Court denied the motion without prejudice. The Court stated that the proposed settlement might be deficient by providing for a cy pres award that lacked a nexus to the class. Id. at *8. The Court noted that Plaintiff did not explain why the proposed distribution to the Juvenile Diabetes Research Fund was relevant to the proposed class, much less that the award qualified as the next best distribution to giving the funds directly to class members. Therefore, the Court could not conclude that the proposed distribution of unclaimed funds was fair to the proposed class. The Court stated that distribution scheme was based primarily on the number of weeks that each of the class members worked, but Plaintiff had brought some claims for which the extent of damages did not appear to be proportional to the amount of time worked. The Court observed that according to the settlement agreement an employee would get the same credit for a week worked whether he or she worked a single shift that week or many shifts throughout the week; therefore, it was not clear whether this was fair to all proposed class members. Id. at *11. The Court observed that the rough estimate of the damages of Plaintiff’s counsel did not appear in the record, and Plaintiff provided no information about the maximum amount that the putative class members could have recovered if they ultimately prevailed on the merits of their claims. The Court recognized that it was well-settled law that a cash settlement amounting to only a fraction of the potential recovery did not per se render the settlement inadequate or unfair. Further, the Court noted that Plaintiff’s motion stated that no portion of the gross settlement amount would revert to Defendants, which was inconsistent with the provision in the proposed settlement that used any portion of the hold-back fund that remained undistributed after 120 days to reimburse Defendants for employer-side payroll taxes incurred during the settlement process. The Court found that Plaintiff did not demonstrate why it was fair to proposed class members to divert this amount back to Defendant, which could reach $125,000. Accordingly, the Court denied the motion without prejudice.

Donovan, et al. v. Rite Aid Of New York, Inc., 2013 U.S. Dist. LEXIS 168188 (S.D.N.Y. Nov. 14, 2013). Plaintiff, a former assistant store manager, bought an action seeking overtime pay under the FLSA and the New York Labor Law (“NYLL”), and alleging retaliation for participation in a class action lawsuit in violation of the New York City Human Rights Law and state common law. Earlier, Craig, et al. v. Rite Aid Corp., No. 08-CV-2317 (M.D. Pa. 2008) (“the Craig action”) had challenged Defendant’s designation of assistant store managers as exempt from overtime pay requirements under the FLSA. Eddie Ibea also filed a class action lawsuit asserting similar claims (the “Ibea action”). Plaintiff had consented to become a party Plaintiff in the Ibea action, and acknowledged that he would be bound by any settlement approved or judgment entered by the Court. Subsequently, the parties settled the action, and the Ibea action was transferred and consolidated with the Craig action. The settlement provided $20.9 million in exchange for a release of claims by all class members who failed to opt-out of the settlement class. While the settlement class included the individuals who worked as assistant store managers and/or co-managers, the settlement class included the members of the Ibea action. The released parties included Rite Aid Corp., all of its divisions and subsidiaries, and all of its employees, and the wage & hour lawsuits that were released included the Craig and Ibea actions. The Court had granted final approval to the settlement, after which Plaintiff filed the instant action. Defendant moved for summary judgment, arguing that Plaintiff was precluded from asserting his claims under the Craig settlement agreement. The Court granted the motion. The Court observed that class actions may release claims, even if not pled, when such claims arise out of the same factual predicate as settled class claims. Id. at *8. Here, the settlement agreement released all state and federal claims that were asserted or could have been asserted regarding events that occurred or were alleged to have occurred from the beginning of time until the 10th business day following the entry of the final approval order. Because Plaintiff’s claim for misclassification was asserted in the Ibea action, which Plaintiff joined, and which was consolidated with the Craig action, and which was settled, the Court held that Plaintiff’s overtime claims under both the FLSA and the NYLL were barred by the release. Plaintiff argued that he could not have brought his retaliation claims within the class action suit because those
actions only asserted causes of action under the FLSA and NYLL. The Court, however, noted that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the identical factual predicate as the settled conduct. *Id.* at *11.

Because Plaintiff’s claims arose out of the same factual predicate as the settled conduct and related to the settlement itself, the Court noted that they were validly released. Further, both the FLSA and NYLL contain anti-retaliation provisions. *Id.* The Court observed that the terms of the release contained in the settlement agreement stated that all class members agreed to discharge the released parties from any and all actions or demands against them or any of them based on alleged violations of relevant state and federal law. The wage & hour claims broadly and comprehensively included any and all actions or demands based on alleged violations of the FLSA, as well as any state or local law. Accordingly, because Plaintiff had released all claims alleged in the complaint, the Court granted Defendant’s motion for summary judgment.


Plaintiffs, a group of Mortgage Loan Officers (“MLOs”), brought an action alleging violations of the FLSA and Oregon and Washington state wage & hour laws. Plaintiffs alleged that they were at times paid on a commission-only and/or draw against commission basis, which denied them minimum and overtime wages. Plaintiffs also alleged that Defendant illegally deducted certain cost of doing business items from MLOs’ wages. Subsequently, the parties settled the action, and the Court granted preliminary approval to the settlement. Plaintiff moved for final approval, and the Court granted the motion. The Court found that the parties had negotiated a settlement agreement that was fair, reasonable, and adequate. Defendant agreed to pay $1,375,000 as the total settlement fund, without admitting liability. Notice was sent to class members, which described the settlement and classes, contained an estimate of their recovery, and provided the opportunity to opt-out or object. Over 95% of the class received the notice, and 290 class members returned a claim form and would receive a monetary recovery under the settlement. Plaintiffs’ counsel sought an award of 25% of the settlement fund. Considering the successful outcome, the Court remarked that there was no reason to adjust the benchmark percentage, and that the requested fee was fair, reasonable, and appropriate. Class counsel sought reimbursement for $11,533.49 in costs and expenses, and payment of $16,000 from the settlement fund to third-party BMC Group to administer the settlement. The Court stated that the requested costs were reasonable and relevant to the litigation. Because the service fee requested was reasonable, the Court has awarded $2,500 to the named Plaintiffs. Accordingly, the Court approved the settlement.

**Fosbinder-Bittorf, et al. v. SSM Healthcare Of Wisconsin, Inc., Case No. 11-CV-592 (W.D. Wis. July 26, 2013).** Plaintiff brought an action under the FLSA and Wisconsin state law alleging that Defendant maintained an automatic meal break deduction policy, which caused the putative class members and Plaintiff to spend time working without proper compensation, including overtime. Earlier, the Court had granted Plaintiff’s motion for conditional certification of an FLSA collective action. Plaintiff retained an expert to create a damages model under which the class members would receive an average of $1,625.50. The parties then participated in mediation with the Magistrate Judge and agreed to settle the dispute for a total of $3.5 million, inclusive of attorneys’ fees and costs. Plaintiff stated that her counsel would ask the Court for an award of attorneys’ fees not to exceed $1,116,666.66, or one third of the settlement fund and if the Court granted an award which was less than 25% of the settlement fund, Plaintiffs had the right to void the settlement. Plaintiff moved for preliminary approval of the settlement agreement and for class certification of a settlement class. The Court granted the motion. The Court stated that the proposed settlement was within the range of possible approval. Although the Court was satisfied that the settlement was facially reasonable, it intended to scrutinize Plaintiff’s application for attorneys’ fees at the time of final approval of the settlement. The Court stated that it might use counsel’s hourly billing records and billing rates as a factor in determining an appropriate fee award. Further, the Court certified the settlement class consisting of all persons who had been or are currently employed by SSM as a nurse at St. Mary’s Hospital at 700 South Park Street in Madison, Wisconsin during the period from August 23, 2009 and April 13, 2013. *Id.* at 4. The Court observed that the requirements Rule 23 were met for settlement class certification because there were more than 1,400 putative class members and thus joinder was impracticable, the class members shared common alleged issues of fact and law, Plaintiff’s
claims arose from the same factual and legal circumstances as the Rule 23 class members, class counsel were qualified, experienced, and able to conduct the litigation and as the named Plaintiff’s interests were not antagonistic to the class members’ interests. Moreover, the Court stated that the common factual allegations and a common legal theory predominated over any factual or legal variations among class members. The Court noted that class adjudication of this case was superior to individual adjudication because it would conserve judicial resources and was more efficient for class members, mainly those who lacked the resources to bring their claims individually. The Court appointed Hawks Quindel, S.C. and Habush, Habush & Rottier, S.C. as class counsel because they met all of the requirements of Rule 23(g). The Court found Quindel to be adequate class counsel in employment law class actions in the past and stated that the work that class counsel had performed in litigating and settling this case demonstrated their commitment to the class and to representing the class’ interests. The Court approved the proposed settlement notice and directed the distribution and filing of the notice. The Court observed that the notice satisfied each of these requirements and adequately put the Rule 23 class members on notice of the proposed settlement. Accordingly, the Court granted preliminary approval of the settlement.

**Foster, et al. v. Kraft Foods Group, Inc., 2013 U.S. Dist. LEXIS 25442 (W.D. Pa. Jan. 15, 2013).** Plaintiff brought a class action seeking overtime pay under the Pennsylvania Minimum Wage Act (“PWMA”). Subsequently, the parties entered into a settlement agreement for $1.75 million and sought settlement approval. The Court approved the settlement. The Court opined that the settlement was fair, adequate, and reasonable; that it had been reached as a result of intensive, serious and non-collusive arms-length negotiations; that the parties had conducted extensive and costly investigation and research; and counsel for the parties were able to reasonably evaluate their respective positions. Class members included all present and former employees of Kraft who were employed in the State of Pennsylvania as wall-to-wall sales representatives from July 1, 2007 to March 31, 2012. *Id.* at *3. The Court awarded Plaintiffs’ attorneys’ fees and costs in the amount of $583,333.33. The Court also approved $15,000 in incentive awards to the named Plaintiffs, and $6,500 for administration expenses. The Court directed Defendant to file a report setting forth the total of the gross settlement amounts for the settlement class members and certifying compliance with the terms of the settlement.

**Hickton, et al. v. Enterprise Rent-A-Car Co., Case No. 11-CV-333 (W.D. Pa. Aug. 28, 2013).** Plaintiffs, a group of current and former assistant managers, brought a collective and class action alleging failure to pay overtime compensation. Subsequently, the parties settled the action for $7.75 million, and the Court granted preliminary approval to the settlement. The parties moved for final approval and the Court granted the motion. The Court, for the purposes of settlement, certified state law settlement classes comprised of all current and former employees of Enterprise Rent-A-Car Company of Pittsburgh, LLC; Enterprise Leasing Company of Philadelphia; EAN Holdings LLC; Enterprise Leasing Company of Chicago, LLC; Enterprise Rent-A-Car Company-Midwest, LLC; EAN Holdings LLC; Enterprise RAC Company of Maryland, LLC; and Enterprise Leasing Company-West, LLC who had worked as an assistant branch manager for at least one workweek at any time within the applicable statute of limitations periods in Illinois, Maryland, Nevada, New York, Oregon, and Pennsylvania. Further, the Court stated that each state’s employees who worked for any Defendant should constitute a separate state settlement class. For the purposes of settlement, the Court also certified a collective action consisting of all assistant branch managers who worked for Defendants and/or one or more of the settlement groups that elected to participate in the settlement, anywhere in the United States, except California, for at least one workweek, within the time periods. The Court observed that the notices of class settlement provided sufficient information of the proposed settlement to all persons and entities affected by and/or entitled to participate in the settlement, and enabled class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement or opting-out of the class. Further, considering Plaintiffs’ likelihood of success at trial, the range of possible recovery, the complexity, expense and duration of the litigation, and the state of proceedings at which the settlement was achieved, the Court stated that the settlement was fair, reasonable and adequate. The Court opined that the settlement was within the range of settlement terms that would be considered fair, reasonable and adequate considering the possibility that Defendants could prevail before a jury on the merits or in summary judgment with respect to Plaintiffs who
had not yet had motions for summary judgment filed by Defendants based on one or more of the claimed defenses. Accordingly, the Court granted final settlement approval.

_In Re Bank Of America Wage & Hour Employment Litigation, Case No. 10-MD-2138 (D. Kan. Dec. 18, 2013)._ In this multi-district litigation, Plaintiffs filed a putative nationwide class and collective action alleging that Defendant maintained a uniform, company-wide policy and practice requiring non-exempt employees to perform off-the-clock work in violation of federal and state wage & hour laws. After the Court granted Plaintiffs’ motion for conditional certification, the parties agreed to settle the matter. The Court subsequently entered a preliminary approval order of the parties’ proposed settlement agreement. After notice issued to the class, Plaintiffs then moved for final approval of the class action settlement. Pursuant to the terms of the settlement agreement, Defendant agreed to establish a settlement fund capped at $73 million to allow for payments to approximately 185,000 non-exempt hourly employees. With respect to the settlement agreement’s $73 million monetary fund, while the Court noted that the recovery was “modest in light of the size of the class and the nature of the harm alleged,” it also observed that the settlement eliminated the risks faced by Plaintiffs, as the Court had denied Plaintiffs’ Rule 23 certification of the state wage & hour claims, as well as Defendant’s indication of its intent to seek interlocutory appeal of the conditional certification order. _Id._ at 5. Therefore, the Court found the monetary fund to be fair, reasonable, and adequate in light of Plaintiffs’ formidable litigation risks. With respect to attorneys’ fees, the Court approved Plaintiffs’ fee request for 25% of the settlement fund – a figure of approximately $18 million in attorneys’ fees. _Id._ at 6. In support of their fee request, Plaintiffs’ counsel submitted affidavits reflecting that the percentage fee represented a lodestar multiplier of 1.10, which the Court found reflected the reasonableness of the percentage fee award. _Id._ The Court also approved Plaintiffs’ request for costs and expenses of approximately $900,000. With respect to service awards, the Court approved service awards of $3,000 for each named Plaintiff, $1,000 for Plaintiffs who provided a deposition, $500 for Plaintiffs who responded to interrogatories, and $300 for Plaintiffs who provided a declaration or responded to document requests. _Id._ at 8. The Court noted that the service awards would be capped at $200,000. _Id._ Finally, the Court allowed payment to the California Labor Workforce Development Agency for settlement of claims under the California Private Attorney General Act. Therefore, in light of its findings, the Court granted Plaintiffs’ motion for final approval of the parties’ settlement agreement.

_Jones, et al. v. Agilysys, Inc., 2013 U.S. Dist. LEXIS 116247 (N.D. Cal. Aug. 15, 2013)._ Plaintiffs, a group of installation specialists ("IS"), brought a class action alleging that Defendant misclassified them as exempt employees and failed to pay them overtime wages as required by state and federal laws. Plaintiffs amended their complaint and alleged violations of the FLSA on behalf of a nationwide class as well as violations of the California Labor Code on behalf of a California sub-class. Subsequently, the parties settled the action, pursuant to which Defendants agreed to pay a gross settlement amount ("GSA") of $1,530,830. Plaintiffs moved for preliminary approval of the settlement, and conditional certification of a nationwide class under the FLSA and a class certification of a California sub-class. The Court denied the motion. Plaintiffs stated that there were a total of 131 current and former IS employees, of which approximately 117 were employed outside of California and 14 were employed in California. Regarding the non-California FLSA class, the Court noted that Plaintiffs had adequately demonstrated that the potential collective action members were subject to the same policy that resulted in Defendants’ failure to pay them wages to which they were lawfully entitled under the FLSA. Accordingly, the Court found that Plaintiffs sufficiently showed that potential collective action members in states outside of California were similarly-situated for purposes of conditional certification. Regarding class certification of former and current ISs employed in California, Plaintiffs contended that there were a total of 131 putative class members, which they contended satisfied the numerosity requirement. The Court, however, noted that Plaintiffs were not seeking to certify a nationwide class consisting of 131 present and former IS employees, and IS workers employed outside of California were part of the FLSA collective action, and not the California sub-class class. Therefore, the Court held that Plaintiffs’ request for class certification applied only to the California sub-class, which was comprised of 14 individuals. Given the small number of individuals, the Court denied certification of the California sub-class for failure to satisfy the numerosity requirement. _Id._ at *15. Further,
because preliminary approval of the settlement was dependent upon approval of both the non-California FLSA class and the California class, the Court denied preliminarily approval to the settlement.

**Lou, et al. v. Zynga, Inc., 2013 U.S. Dist. LEXIS 155144 (N.D. Cal. Oct. 29, 2013).** Plaintiff brought a class action alleging that Defendant failed to pay its software engineers overtime wages in violation of the FLSA and state wage & hour laws. Subsequently, the parties filed a joint motion seeking approval of a settlement agreement between them, and sought dismissal of the action. The motion stated that settlement agreement executed by the parties contained a confidentiality provision preventing its filing as a public record. The Court ordered the parties to file the settlement agreement under seal and directed them to address whether the settlement agreement should be filed as a public record. The parties argued that the settlement agreement should remain confidential; otherwise, it would become null and void. The Court stated that a presumption of public access should be applied while considering a motion to seal in connection with a motion to approve settlement of FLSA claims. The parties argued that the settlement agreement should remain under seal because it contained a confidentiality provision preventing its filing in the public record. In addition, the parties argued that making the agreement public might discourage settlement by exposing Defendant to potential additional litigation, and might discourage employees from filing FLSA claims if too much detail was made public about their lawsuit against a former employer. The Court stated that although confidential settlement agreements are the type of discovery which it had the discretion to protect, a party seeking to seal a confidentiality agreement should meet its burden and mere existence of a confidentiality provision did not constitute good cause to seal. Id. at *8-9. Moreover, the Court reasoned that a litigant was not entitled to protection from exposure to additional liability and litigation. The mere fact that the production of records might lead to a litigant’s embarrassment, incrimination, or exposure to further litigation would not compel the Court to seal its records. Further, the Court noted that the fact of Plaintiff’s lawsuit and his specific allegations against Defendant were already a matter of public record, and Plaintiff had not explained how making the settlement agreement public would discourage employees from filing similar claims. Because the parties here had failed to articulate any facts that would justify sealing their settlement agreement, the Court found that the settlement agreement should be unsealed. Id. at *10. The Court, however, gave option to the parties to withdraw their motion or to move forward with their motion and settlement agreement as part of the public record.

**Moore, et al. v. Fitness International, LLC, 2013 U.S. Dist. LEXIS 87782 (S.D. Cal. April 4, 2013).** Plaintiff originally brought a collective action under the FLSA on behalf of all Fitness International personal trainers challenging the use of a session rate compensation system, where personal trainers were compensated for only the time actually spent in personal training sessions and not for the time required to complete the necessary and associated tasks occurring before and after the sessions. Subsequently, Plaintiff Leah Ervin joined the action and alleged Rule 23 class claims under California law for herself and a California sub-class. Thereafter, the parties settled the litigation. The parties subsequently settled. Pursuant to the settlement, Plaintiffs sought certification of a settlement class, which comprised all non-exempt, club level Fitness International employees in California who began employment on or after December 1, 2011, and settlement of a collective action comprised of all those employed by Fitness International as Personal Trainers in the United States from June 22, 2009. Most of the claims of the settlement class were settled in another suit entitled Baker v. L.A. Fitness International, LLC, Case No. BC438654 (Los Angeles County Superior Court), and the settlement class here included gym-level employees who began working after the release date in Baker. The settlement of the collective action included personal trainers nationwide covered by the FLSA and who did not recover in the Baker settlement. The parties settled for $600,000, and the Magistrate Judge recommended granting preliminary settlement approval. The Magistrate Judge recommended certification of a settlement class. Considering the work done in this case and the three similar cases, its experience litigating class actions in this area of law, and resources available to the class, the Magistrate Judge recommended appointing Plaintiff’s counsel as class counsel for the purpose of the settlement. The parties agreed to a claims-made settlement of up to 30% of the net settlement value to the settlement class, which would be calculated by subtracting enhancement awards, as well as 33.33% for attorneys’ fees, expenses, and administration costs. The Magistrate Judge found that this proposed recovery was fair, adequate, and reasonable. The Magistrate
Judge noted that the settlement of the collective action consisted of 10,968 personal trainers who alleged an FLSA claim. The Magistrate Judge observed that the claims of the collective action members were weak, given that personal trainers made above minimum wage and did not work overtime, and were largely compensated for time spent outside of training sessions and reimbursed for business expenses. The Magistrate Judge, however, opined that because the length of time for the collective action was nearly four years and covered many more shifts, while the period for the California settlement class was approximately 16 months, the 70% allotment of the settlement for the collective action was fair in light of the longer time period covered. The Magistrate Judge also noted that the settlement resulted from a thorough investigation and consideration of strengths and weaknesses in the case, that the parties’ counsel were experienced in wage & hour employment law and class actions, and engaged in arms-length negotiations. Finally, considering the efforts expended and risks undertaken, the Magistrate Judge opined that the requested amount of $2,500 as incentive payments to the class representatives was reasonable. Accordingly, the Magistrate Judge recommended preliminary approval to the settlement.


Plaintiff brought a collective action under the FLSA and the New York Labor Law to recover unpaid overtime compensation from Defendants. Thereafter, the parties settled the action on a confidential basis, and requested the Court to approve their FLSA settlement agreement. The Court denied the request. First, the Court noted that the parties had not made the necessary showing of the need for the terms of their settlement to contain a confidentiality provision. The Court stated that because judicial approval was required for any settlement under the FLSA, settlement agreements in FLSA cases were judicial documents to which a presumption of public access applied. Despite the parties’ desire to keep the terms of the settlement agreement confidential, the mere fact that confidentiality was essential to the agreement was insufficient to overcome the presumption. Moreover, the Court observed that case law authority in the Second Circuit banned confidentiality provisions in stipulated settlement agreements for FLSA actions because such confidentiality clauses contravened the legislative intent of the FLSA. Thus, the Court ruled that the parties must make a substantial showing of a need for the terms of their settlement to contain a confidentiality provision to overcome the factors weighing in favor of public access. Second, the Court held that it was unable to scrutinize the fairness and reasonableness of the attorneys’ fee award contained in the settlement agreement because the parties merely provided that Plaintiff’s counsel would be paid $4,000 as compensation for attorneys’ fees and costs, which was not sufficient to find that the proposed attorneys’ fees award was fair and reasonable. Accordingly, the Court denied the parties’ request for settlement approval.


Plaintiff, a former desk clerk and night auditor, brought an action under the FLSA seeking overtime compensation. Plaintiff used a time clock to keep track of the hours she worked. Defendant told her to stop using the time clock and he would pay her a salary of $8.75 per hour. Plaintiff claimed that she worked more than 40 hours per week but was not paid overtime compensation. Plaintiff contended that Defendant owed her at least $3,780 in unpaid overtime, and $3,780 in liquidated damages, totaling $7,560. Defendant met with Plaintiff in absence of her counsel and presented her two documents to sign and offered her a check for $1,000 and another $1,000 to $2,000 in cash if she agreed to sign them and dismiss her lawsuit. Plaintiff signed those two documents, which were a voluntary dismissal with prejudices of her complaint and a letter to her attorney informing that the case had been settled. There was no written settlement agreement. Thereafter, Defendant filed a motion to enforce the settlement agreement. The Magistrate Judge held an evidentiary hearing on that motion and issued a report and recommendation approving the settlement and dismissing the case with prejudice because the agreement that Plaintiff and Defendant had reached was a fair and reasonable resolution of a bona fide dispute under the FLSA. The Court adopted the Magistrate Judge’s report and recommendation by overruling Plaintiff’s objections. On appeal, the Eleventh Circuit vacated the District Court’s order and remanded the case. Lynn’s Food Stores, Inc. v. United States, 679 F.2d 1350 (11th Cir. 1982), held that there were only two ways in which back wage claims arising under the FLSA can be settled or compromised by employees. The first was under the supervision of the U.S. Secretary of Labor. The second was provided in the context of a lawsuit brought directly by an employee against an employer to
recover back wages for FLSA violations. Id. at 1306. The Eleventh Circuit noted that Lynn’s Food decision relied on Brooklyn Savings Bank v. O’Neil, 324 U.S. 697 (1945), where the Supreme Court held that a Plaintiff could not waive her right to liquidated damages in a FLSA settlement when there was no genuine dispute about whether she was entitled to them. Id. at 1307. The Eleventh Circuit stated that the Supreme Court’s decision that the settlement of that former employee’s claim was invalid means that the limitations on settlement of FLSA claims apply to settlements by former employees as well as current employees. Further, the Eleventh Circuit observed that the agreement between Plaintiff and Defendant was not made under the supervision of the Secretary of Labor, and although the District Court entered a judgment approving the settlement, it was not a stipulated one. Moreover, the Eleventh Circuit found that when Plaintiff’s attorney objected to approval of the settlement agreement, contending that the terms were not fair and reasonable, and asked the District Court to reject a settlement agreement that was reached without the attorney’s knowledge or participation, whatever else the judgment approving the agreement may be, it was not a stipulated judgment within the meaning of Lynn’s Food. Accordingly, the Eleventh Circuit vacated the District Court’s order and remanded the case for further proceedings.

**Editor’s Note:** Though not a class action, Nall is important for employers in specifying the methods available to resolve FLSA collective actions.

**Nash, et al. v. CVS Caremark Corp., Case No. 9-CV-79 (D.R.I. Feb. 25, 2013).** Plaintiff brought a class action alleging that Defendants misclassified their assistant managers and failed to pay them overtime wages. Subsequently, the parties reached a settlement in which the Defendants agreed to pay up to $34 million. The Court granted preliminary approval. The parties agreed that the net distribution amount to the class members would be calculated as a weekly payment based on the net settlement amount divided by the total number of completed workweeks that the settlement class members worked as assistant store managers, excluding leaves of absence, during the applicable class period. Each participating class member would receive an award in the amount of the weekly payment multiplied by the number of completed workweeks that he or she worked for Defendants as an assistant manager, excluding leaves of absence, during the applicable class period or as determined by a date three years prior to their having filed a consent to join in any of the wage & hour lawsuits, whichever was longer. Plaintiffs filed a motion seeking an additional deposit of $1,991,228.02 to the qualified settlement fund to fully comply with the class action settlement agreement. All parties agreed that the settlement administrator made a clerical error in calculating the total amount of money needed to fully fund the settlement. Defendants, however, argued that they had complied with the settlement agreement because they had made the payment as instructed by the settlement administrator. The Court stated that a clerical error by the settlement administrator in calculating the agreed to amount owed did not relieve Defendants from their obligation to fully fund the settlement. The Court determined that it was simply enforcing the settlement agreement by ordering that Defendants make the correct full payment to which they agreed. Accordingly, the Court ordered Defendants to deposit an additional $1,991,228.02 into the qualified settlement fund. Id. at *5-6.

**Nielson, et al. v. The Sports Authority, 2013 U.S. Dist. LEXIS 94936 (N.D. Cal. July 8, 2013).** Plaintiff brought a wage & hour class action alleging that she and other non-exempt employees were not paid in accordance with the California Labor Code, and that they were subject to off-the-clock mandatory security checks of their personal bags whenever they left the store, even when they were leaving to take a rest or meal breaks. Subsequently, the parties settled the class action for $2.5 million, but the Court had denied preliminary approval to the settlement due to various deficiencies. The parties then revised their settlement agreement and filed an application for settlement approval. To rectify the deficiencies of her first motion, Plaintiff submitted a declaration to clarify her job titles and the nature of the mandatory security policy that underligned the claims alleged in the complaint. The Court again denied the motion, this time due to lack of timeliness and lack of standing. First, the Court observed that the parties filed their renewed motion for preliminary approval a month after the May 7 motion cut-off date, without requesting or obtaining leave of Court to file the motion. Id. at *9-10. The Court remarked that instead of seeking a modification to the Court’s scheduling order, the parties attempted to circumvent the motion deadline by styling their motion as a stipulated ex parte application, as opposed to a motion for preliminary approval. Further, the Court
stated that because the substance of and relief sought in the parties’ ex parte application were functionally indistinguishable from Plaintiff’s earlier motion for preliminary approval, the Court construed the parties’ ex parte application as a motion subject to the May 7 motion cut-off. Because the parties failed to comply with the standing order and seek an extension of the motion cut-off, and failed to show good cause to extend the motion cut-off date, the Court denied their renewed motion for preliminary approval as untimely. Second, the Court expressed concern about whether Plaintiff had standing to litigate and settle a class claim. Id. at *11. The Court stated that the standing requirement applies to a class representative who must be part of the class and possess the same interest and suffer the same injury as the class members, and if the litigant fails to establish standing, he or she may not seek relief on behalf of any other member of the class. Id. at *12. In her declaration, Plaintiff stated that she brought claims based on her understanding of Defendant’s policies relating to time-keeping, meal/rest breaks, and security inspections, and that it was her understanding that Defendant’s policy was to not record time spent in security inspections, not compensate employees for inspection time, and not add a corresponding amount of time to employees’ meal or rest break or pay a meal or rest break premium. Plaintiff also asserted that it was her understanding that employees were not paid overtime wages and were not paid for missed breaks. The Court observed that there was no evidence that Plaintiff was personally subjected to Defendant’s security inspection policy while she was on a rest or meal break, or that she otherwise was not fully and properly compensated by Defendant. Thus, in the absence of a showing that Plaintiff suffered any actual injury, the Court held that she had no standing to maintain this action either individually or as a class action. Finally, the Court remarked that an action could be dismissed for failure to comply with any order of the Court. Plaintiff failed to file her renewed motion for preliminary approval until well after the motion cut-off date had passed, and attempted to circumvent that deadline by styling her motion as a stipulated ex parte application. Plaintiff also failed to comply with the deadline for filing pre-trial documents. Accordingly, the Court instructed Plaintiff to show cause why the action should not be dismissed for lack of subject-matter jurisdiction and failure to comply with a Court order.

**Picerni, et al. v. Bilingual Sgt & Preschool, Inc., 925 F. Supp. 2d 368 (E.D.N.Y. 2013).** Plaintiff, a teacher, brought an action under the FLSA and corresponding state laws alleging that although she was paid on an hourly basis under an employment contract, she was not paid for approximately 15 hours every workweek, bringing her hourly rate below the minimum wage required by the FLSA. Subsequently, Plaintiff filed a notice of acceptance of a Rule 68 offer of judgment, which provided that the case would be settled on an individual basis for $5,000 payable to Plaintiff, plus attorneys’ fees of $4,590. The Court, however, declined to enter judgment, and stated that an FLSA case cannot be resolved merely by acceptance of a Rule 68 offer. Id. at 368. Plaintiff then filed a motion to explain that the settlement and her attorneys’ fees had a reasonable basis. The Court sua sponte determined that the FLSA was not exempt from Rule 41 and vacated its earlier order. The Court noted that Rule 41(a) gives Plaintiff or, after an answer or motion for summary judgment has been served, the parties the right to dismiss an action without the oversight or approval of the Court, subject to certain enumerated provisions of other Federal Rules, or any applicable federal statute. Id. Earlier, the Court had noted that Plaintiff, in a pre-answer, pre-summary judgment motion case, or the parties, after either of those events, was prohibited from discontinuing an FLSA case unless the Court found that a bona fide dispute exists and the proposed resolution is reasonable. Id. at 372. Subsequently, the Court stated that the procedure was just an assumed principle based on a presumed need to ensure that Plaintiff was receiving what was owed, which was the intent of the statute and the case law, or it may reflect what appeared to be an erroneous assumption that an employer would not want to settle anyway without the protection of a Court’s fairness determination. Id. The Court opined that the procedure of requiring approval before permitting parties to voluntarily dismiss an FLSA action was incorrect; it ran afoul of Rule 41, which gives Plaintiff, at the early stage of the case, or the parties jointly, at a later stage in the case, free reign to discontinue for any reason. Id. Parties can voluntarily dismiss an FLSA case without judicial approval, if Defendant is willing to undertake the risk of doing so. Id. at 373. The Court remarked that the scenario was conducive to a dynamic that allows both Plaintiff and his employer to leverage a comparatively cheap settlement on the backs of Plaintiff’s co-employees, which runs contrary to the intent of Congress in enacting the FLSA. Further, a related problem created by a unilateral right to withdraw a case was that to some extent, it circumvented the body of case law that
refuses to approve FLSA settlements that contain a confidentiality provision. Despite these concerns, the Court held that the FLSA was not one of the qualifying statutes that fell within the exemption from Rule 41. While the FLSA expressly authorizes an individual or collective action for wage violations, it did not condition their dismissal upon Court approval. Id. at 375. The Court reasoned that the absence of such a requirement indicated that Congress did not intend it, as it had expressly conditioned dismissals under other statutes upon Court approval. Id. Further, the body of case law did not preclude private settlement; they simply refused to recognize releases in subsequent litigation where the settlement was unreasonable or not the result of a bona fide dispute. Id. at 375-76. Accordingly, the Court vacated its earlier order; directed that judgment be entered as provided in the notice of acceptance with offer of judgment; and denied the pending motions for approval of the settlement as moot.

**Tijero, et al. v. Aaron Brothers, 2012 U.S. Dist. LEXIS 183238 (N.D. Cal. Jan. 2, 2013).** Plaintiffs, a group of non-exempt hourly employees, brought a wage & hour collective action alleging that Defendant failed to pay them overtime wages, and failed to provide meal and rest breaks in violation of the FLSA and various California labor laws. The parties participated in mediation, and reached a settlement agreement. The settlement called for payment of $800,000 into a gross settlement fund for: (i) the claims of all settlement class members; (ii) an award for attorneys’ fees; (iii) incentive awards for Plaintiffs; (iv) a PAGA penalty; and (v) all costs associated with claims administration. After deducting attorneys’ fees in the amount of $266,666.66 (representing 33% of the common fund), costs in the amount of $30,000, incentive award payments to Plaintiffs in the collective amount of $10,000, claims administration fees in the amount of $68,000, and a PAGA penalty in the amount of $10,000, the net settlement amount reflecting the amount available to pay claims made by class members was projected to be $415,333.34. Based on the data provided by Defendant in connection with the mediation, class members were employed approximately 269,941 weeks, and equating this with the settlement amount, the average net payout would equate to approximately $1.54 per week. The records showed that there were approximately 6,500 class members; thus, assuming that a class member was employed 41 weeks during the claim period, each class member would receive the equivalent of $63.96. Plaintiffs moved for preliminary approval of the class settlement, which the Court denied. First, the Court found that Plaintiffs failed to satisfy Rule 23. The Court explained that as to commonality, Plaintiffs contended that Defendant had a policy of failing to provide rest breaks and a policy of not paying overtime wages, and sought to represent non-exempt employees without identifying all the job positions they sought to represent. As to typicality, Plaintiffs stated that they sought to represent all hourly non-exempt employees including managers, sales associates, and framers. The Court noted that Plaintiffs did not state whether they sought to represent only managers, or just assistant store managers. Because commonality only existed as to class members who shared the job position actually held by Plaintiffs, the Court concluded that Plaintiffs failed to establish commonality. Id. at *15-17. Similarly, the Court found that as Plaintiffs failed to identify all positions they sought to represent and to describe the duties of those positions, the typicality requirement was not satisfied. Accordingly, the Court refused to certify the settlement class. As to the fairness of the settlement, the Court found that there were obvious deficiencies in the settlement. For example, the Court found that the proposed settlement was deficient because approval of settlement would violate the FLSA. The Court explained that Plaintiffs only sought to conditionally certify a Rule 23 opt-out class, but did not seek to conditionally certify a FLSA opt-in collective action; however, the settlement sought release of all claims, which would necessarily release the FLSA claims as well. The release was defective according to the Court because it was contrary to § 216(b) to bind class members to a release of FLSA claims, where the class members had not affirmatively elected to participate in the lawsuit by filing a written consent form. In addition, the Court found that the scope of the release was overly broad and improper, and it expressed concern with the language in the release provision providing that the settlement agreement shall be binding on all non-opt-out members of settlement class whether or not they actually received a payment pursuant to the agreement. Finally, the Court remarked that Plaintiffs did not provide any information on the potential range of recovery; therefore, it could not determine whether the expected recovery balanced against the value of the settlement offered. Accordingly, the Court denied Plaintiffs’ motion for preliminary approval of the class settlement.
Villa, et al. v. United Site Services Of California, Inc., Case No. 12-CV-318 (N.D. Cal. Nov. 27, 2013). Plaintiff, on behalf of himself and similarly-situated delivery drivers employed by Defendant, filed a putative class and collective action against Defendant for unpaid wages and overtime in violation of the FLSA and California state wage & hour laws. Subsequently, the parties agreed to settle the matter and moved for preliminary approval of the settlement agreement. In assessing the parties’ settlement agreement, the Court noted its concern that out of a total settlement fund of $349,676, Plaintiff’s attorney requested $220,000 in attorneys’ fees and $51,176.30 in costs, which amounted to 78% of the total settlement fund. This was well above the 25% benchmark that the Ninth Circuit used to evaluate the reasonableness of attorneys’ fees awards in class actions. Id. at 1. Furthermore, the Court observed that the wording of the settlement agreement indicated that the attorneys’ fees and costs award was calculated independently from the award to the class members, and that any reduction in attorneys’ fees and costs would not accrue to the class members and would instead revert to Defendant, as would any checks not cashed by class members. Id. at 2. Finally, the Court noted its concern that the settlement agreement allowed Defendant’s in-house counsel access to the identities of class members who participated in the settlement. The Court noted this provision was not appropriate in light of Defendant’s previous conduct in the litigation, which included holding mandatory, one-on-one meetings with putative class members during work hours in an effort to obtain declarations stating that the potential class members were not prevented from taking their required meal breaks. Id. In light of these concerns, the Court denied without prejudice the parties’ motion for preliminary approval of the settlement agreement.

(xvii) DOL Wage & Hour Enforcement Actions

Harris, et al. v. Super Buffet, LLC, 2013 U.S. Dist. LEXIS 130069 (W.D. Wash. Sept. 11, 2013). The U.S. Department of Labor ("DOL") brought an action under the FLSA alleging that Defendant failed to pay its employees the minimum wage and overtime pay, and also failed to keep accurate records for all hours worked by each employee. The DOL moved for summary judgment on the issue of liability and damages. The Court granted the motion. The DOL provided a copy of the requests for admission that it served on Defendant. Because Defendant had not respond to the request for admissions, the Court found that failure to answer or object to a proper request for admission was itself an admission. Id. at *6. Further, the Court observed that Defendant had not filed a motion asking the Court to withdraw its admission, so the matters in the DOL’s requests for admission were deemed conclusively established. In absence of accurate employment records kept by Defendant, the Court resorted to applicable wage & hour regulations for determining back wages. The Court observed that the DOL investigator determined that minimum wage violations resulted in back wages totaling $259,286.50 that were owed to 16 employees. The investigator also found that $156,975 in overtime back wages were owed to 14 employees. Defendant challenged this calculation, stating that the amount of money spent by Defendant on housing and food for the employees had not been figured into the calculations to determine whether or not the employees were paid minimum wage and overtime wage. The Court opined that Defendant provided no authority supporting its assertion that housing or food costs should be taken into account under the FLSA, and provided no detail regarding these supposed expenditures. The Court found that the DOL had satisfied its burden under Rule 56, and Defendant had failed to provide specific facts showing that there was a genuine issue for trial. Further, the Court stated that the DOL also demonstrated that no genuine issue of fact existed as to whether Defendant willfully violated the Act by showing that one of the members of Defendant’s management had lived and worked in the United States for 15 years, including many years working in Chinese restaurants where he himself received overtime pay, which strongly supported a finding that Defendant knew the requirements of the FLSA. The Court remarked that the undisputed material facts conclusively demonstrated Defendant’s violations of the minimum wage and overtime provisions of the FLSA. Thus, the DOL was entitled to liquidated damages in an amount equal to the back wages owed. Accordingly, the Court granted a permanent injunction enjoining Defendant from violating the provisions of the FLSA, and awarded $416,261.15 in back wages, as well as $416,251.15 in liquidated damages due under the FLSA.

employees in tip pools. At issue was whether these regulations were valid under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and its progeny. The new DOL regulations purported to make clear that tips were the property of the employee, and that § 3(m) of the FLSA set forth the only permitted uses of an employee’s tips – either through a tip credit or a valid tip pool – whether or not the employer has elected the tip credit. After the Court granted Plaintiffs summary judgment, Plaintiffs filed their bill of costs. The Court granted Plaintiffs’ bill of costs in the amount of $550. Plaintiffs sought recovery of fees to the clerk and marshal, which included Plaintiffs’ filing fee as well as the *pro hac vice* admission fees for four attorneys. The DOL opposed only the latter. The Court agreed that *pro hac vice* fees were taxable as costs if reasonably necessary to prosecute the case. The Court noted that although Plaintiffs asserted that each of the four attorneys for whom they sought fee reimbursement was reasonably necessary to prosecute this case, they had not explained why this was so. Thus, the Court denied fee reimbursement for two of Plaintiffs’ attorneys and granted Plaintiffs’ bill of costs in the amount of $550.

*Solis, et al. v. Cascom, Inc.*, 2013 U.S. Dist. LEXIS 121858 (S.D. Ohio Aug. 27, 2013). Plaintiff, the Secretary of the U.S. Department of Labor (“DOL”), brought an action under the FLSA asserting that Defendants failed to pay overtime wages to its television cable installers and failed to maintain records of hours worked. The Court bifurcated the action, and after holding a hearing on liability, it opined that the installers were employees rather than independent contractors and that Defendants owed them overtime compensation. Thereafter, the Court held a damages hearing and awarded back wages, liquidated damages, and injunctive relief. *Id.* at *1-2*. Defendants did not keep a record of hours worked for its installers. However, payroll records showing gross wages were provided to David Huster, the DOL Wage & Hour Investigator, in the course of his investigation, which Huster used to estimate the damages for the trainee installers. For the period after the training period expired, Huster created estimates based upon the number of hours worked by the installers who testified at trial. *Id.* at *3-4*. Defendants disputed the amount of hours worked as estimated by the DOL, and relied on the testimony of Heather Duwel-Mehl, the granddaughter of Defendant Julia Gress, who testified concerning an exhibit which showed hours worked by five of the employees who testified at the liability hearing. Although Duwel-Mehl compiled this exhibit by taking screenshots from the computer system of Time Warner, with whom Defendant contracted to provide cable installation services, the actual Time Warner screenshots were not included in the record. The Court credited the calculations of Huster over those of Duwel-Mehl. Huster opined that while the witnesses’ testimony was in accord with the information he gleaned from non-testifying employees, the damages were based solely on the witnesses’ sworn trial testimony. Duwel-Mehl’s testimony, in contrast, was based upon Defendants’ exhibit, which was not produced during the discovery phase of the proceeding and was not produced until after Huster had completed his investigation. Further, Defendants did not provide a foundation for the screen shots upon which Duwel-Mehl based her testimony. These were Time Warner business records for which a Time-Warner record-keeper would need to testify to inform the finder of fact of foundational information and respond to examination and cross-examination as to what the records showed and what they do not show. Defendants treated Duwel-Mehl as an undeclared expert witness who never filed a report, and the Court declined to credit Duwel-Mehl’s testimony. *Id.* at *6-7*. Accordingly, the Court held that the DOL was entitled to recover damages on behalf of the employees on the basis of the witness testimony and the calculations of Huster. The Court ordered Defendants to pay back wages in the amount of $737,133.13, and an equal amount of liquidated damages. The DOL also requested issuance of an injunction forbidding Defendants from violating the FLSA in the future. Because Defendants did not act in good faith, the Court issued an injunction. While Defendants protested that their retreat from the business rendered an injunction unnecessary, the Court concluded that the injunction would not burden them in any way. *Id.* at *10*.

*Solis, et al. v. KGB USA Inc.*, Case No. 13-CV-227 (E.D. Pa. Jan. 31, 2013). The U.S. Secretary of Labor brought an action against Defendant under the FLSA alleging that Defendant misclassified its Special Agents as independent contractors, failed to pay minimum and overtime wages, and failed to maintain accurate employee related records. Pursuant to a consent judgment, the Court ordered Defendant to pay $1.3 million in unpaid wages. The Court instructed Defendant to refrain from paying its employees below the minimum wage, to refrain from not paying overtime compensation, and to refrain from
classifying workers as independent contractors unless such worker was a *bona fide* independent contractor. The Court also directed Defendant to maintain and keep all employment records. The Court stated that Defendant should make electronic payments to current and former employees in the amount of back wages due, less deductions for social security, federal income tax, and state or other tax. The Court also provided that Defendant must provide information to the Secretary regarding Defendant’s federal ID number, name, address, and social security number of employees listed to whom back pay was payable. Further, Defendant had to forward a payment to the Wage and Hour Division of the Department of Labor for the total net amount of back wages that could not be distributed to the identified employees. The Wage and Hour Division would then distribute the back wages to the identified employees. Finally, the Court limited the action to the timeframe from January 19, 2009 through December 4, 2012.

**(xviii) Application Of Statute Of Limitations In FLSA Collective Actions**

*Brandon v. National Railroad Passenger Corp.*, 2013 U.S. Dist. LEXIS 29111 (C.D. Cal. Mar. 1, 2013). Plaintiff, a former station agent, brought a class action under the California Labor Code and Business & Professions Code for unpaid meal and rest breaks, unreimbursed business expenses, and unfair business practices. Defendant moved for summary judgment, arguing that Plaintiff’s underlying claims were barred by the statute of limitations and because Plaintiff’s Unfair Competition Law (“UCL”) claim was derivative of these time-barred claims, Plaintiff could not maintain her UCL claim. Defendant also argued that Plaintiff’s UCL claim had been rendered moot by the payment of restitution to Plaintiff. *Id.* at *2. The Court granted Defendant’s motion. The Court noted that a three-year statute of limitations applies to meal and rest break claims under the statute. *Id.* at *4. Because Plaintiff’s complaint was filed on December 8, 2011, more than three years from the date of her termination, her meal and rest break claims were barred. The statute of limitations under § 2802 of the California Labor Code for unreimbursed business expenses is three years because unreimbursed business expenses are not considered a penalty, but rather are considered restitution. *Id.* at *5-6. Because any claims regarding reimbursement of business expenses pre-dated Plaintiff’s termination of employment by more than three years, they were barred by the statute of limitations. *Id.* at *6. The Court also noted that unlike §§ 226.7 and 2802 of the California Labor Code, the UCL has a statute of limitations of four years, so the UCL claims were not immediately barred by the statute of limitations. *Id.* at *7. The Court concluded that Plaintiff’s claims for unpaid meal and rest periods and unreimbursed business expenses were restitutory and therefore actionable under the UCL. *Id.* at *9. However, there was no meaningful relief which could be provided to Plaintiff because Defendant had tendered $5,000 as restitution for these claims, and for attorneys’ fees and costs. The Court noted that a claim becomes moot where an opposing party has agreed to everything the other party has demanded. *Id.* at *10. Because Defendants tendered the amount sought by Plaintiff, she could no longer state a claim for restitution. *Id.* at *11. Further, the Court remarked that the fact that Plaintiff sought certification of a restitution class did not change the analysis because she did not move to certify the class before her personal stake in the action had evaporated. Additionally, the Court observed that the deadline for class certification had passed and the parties did not stipulate to an extension of the certification deadline. Accordingly, the Court granted Defendants’ motion for summary judgment. *Id.* at *14.

*Jones, et al. v. United States*, 113 Fed. Cl. 39 (Fed. Cl. Oct. 2, 2013). Plaintiffs, a group of government employees, brought an action alleging that they were entitled to premium pay, pursuant to 5 U.S.C. §§ 5544(a) and 5546(a), for work performed on Sundays. Plaintiffs sought damages dating back to May 26, 2003. Defendant moved to dismiss a portion of Plaintiffs’ claims as time-barred. The Court granted the motion. In *Fathauer v. United States*, 566 F.3d 1352 (Fed. Cir. 2009), the Federal Circuit had held that, for purposes of § 5546(a), employees included part-time employees. *Id.* at 40. Following the decision in *Fathauer*, the Office of Personnel Management (“OPM”) issued a compensation policy memorandum (“CPM”) indicating that agencies are required to pay part-time employees Sunday premium pay when such employees otherwise meet the requirements of §§ 5544(a) and 5546(a). Further, in March 2010, the Department of Commerce issued a memorandum stating that in addition to paying part-time employees for regularly scheduled work performed on a Sunday from May 26, 2009 to the present, employees may file a claim for back pay within six years after the claim accrued for the period prior to May 26, 2009, when they performed regularly scheduled Sunday work without receiving the premium pay. *Id.* The Court noted that
28 U.S.C. § 2501 provides that every claim of which the Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues. The Court noted that this limitation is jurisdictional, thereby barring equitable tolling. \textit{Id.} at 41. Because Plaintiffs filed their lawsuit on October 14, 2011, the Court determined that it lacked jurisdiction to entertain claims for back-pay for work performed before October 14, 2005. Moreover, a claim accrues as soon as all events have occurred that are necessary to enable Plaintiffs to bring suit. Under this standard, claims for back pay are considered to be continuing in nature, accruing anew each time a payment is due. \textit{Id.} Accordingly, the Court stated that Plaintiffs’ claims for Sunday premium pay accrued each time pay was due, regardless of whether Plaintiffs knew that they were entitled to seek these premiums. Thus, the Court opined that it could not entertain claims for premium pay that accrued before October 14, 2005. The Court rejected Plaintiffs’ argument that the Back Pay Act, coupled with the \textit{Fathauer} decision and the OPM, extended the statute of limitation to six years before the decision, \textit{i.e.}, May 26, 2003. Even assuming the Back Pay Act applied, the operable language is “in no case may pay … be granted … for a period beginning more than six years before … the date of the administrative determination.” According to the Court, this provision did not purport to extend a statute of limitations but rather imposed an outside limitation. \textit{Id.} at 42. Accordingly, the Court granted Defendant’s motion to dismiss Plaintiffs’ claims as time-barred.

(xix) Concurrent State Law Claims In Wage & Hour Class Actions

\textbf{Bennett, et al. v. Simplexgrinnell LP, 2013 U.S. Dist. LEXIS 149753 (N.D. Cal. Oct. 17, 2013).} Plaintiffs brought a class action alleging that Defendant failed to pay them prevailing wages and wages owed upon termination in violation of the California Labor Code. Defendant moved to dismiss or strike Plaintiffs’ claim for liquidated damages under § 1194.2(a) of the California Labor Code on the ground that § 1194.2(a) did not apply to claims for unpaid prevailing wages. The Court granted the motion. The Court concluded that liquidated damages were not available for violations of California’s prevailing wage law because the plain language of § 1194.2 limited the recovery of liquidated damages to the enforcement of minimum wages set by statute, and prevailing wages did not fall within this category. Rather, prevailing wages are set by the Director of the Department of Industrial Relations. \textit{Id.} at *7. Plaintiffs argued that prevailing wages were fixed by statute because numerous case law authorities have held that the duty to pay prevailing wages arose from statute. The Court was not persuaded by this argument because it improperly combined the duty to pay prevailing wages with the manner in which prevailing wages was set. Further, the cases cited by Plaintiffs in support of their argument did not shed light on the question of whether liquidated damages under § 1194.2 were available for prevailing wage violations. Accordingly, the Court granted Defendant’s motion to dismiss.

\textbf{Bryan, et al. v. Wal-Mart Stores, Inc., 2013 U.S. Dist. LEXIS 90007 (N.D. Cal. June 26, 2013).} Plaintiffs, a group of truck drivers, brought a class action asserting failure to provide meal and rest breaks, to timely pay wages, to provide an accurate wage statement, and to pay minimum wage in violation of California labor laws. Defendant moved to dismiss the complaint, and the Court granted in part and denied in part Defendant’s motion. First, Plaintiffs alleged that Defendant pressured drivers from taking breaks by limiting the driving time per day, yet granting bonuses for miles driven and efficiency. Plaintiffs further alleged that they were discouraged from taking breaks because they were not paid for time spent washing their trucks, waiting to get dispatched, or waiting at stores. The Court noted that these facts were sufficient to raise a right to relief and to infer more than the mere possibility of misconduct. Defendant, however, argued that the meals and rest break claims should be dismissed because of federal preemption. The Court had earlier found that California’s meal and rest break laws did not relate to motor carriers’ rates, routes, or services, and were not preempted by the Federal Aviation Administration Authorization Act (“FAAAA”). Thus, the Court stated that because it had already decided this issue, it would first have to grant a motion to reconsider in order to again address the federal preemption question. Because Defendant presented no new law or evidence to contradict the Court’s earlier holding, nor did it not obtain leave for reconsideration, the Court denied Defendant’s motion to dismiss Plaintiffs’ meal and rest break claims. Second, because Plaintiffs sufficiently provided facts to support their allegation that Defendant failed to pay earned wages, the Court stated that Plaintiffs’ derivative claim for unpaid wages was also sufficiently pled, and thus denied Defendant’s motion to dismiss this claim. Third, regarding its wage statement claims, Plaintiffs alleged that...
although Defendant had documents necessary to provide check stubs with a breakdown of the piece-rate pay earned, and although the documents stating the total number of hours worked and activities performed by the drivers enabled Defendant to determine the information required, Defendant provided only a gross statement for regular earning. The Court noted that this information provided factual support to the allegation that Defendant failed to provide accurate wage statement, and thus, denied Defendant’s motion to dismiss the wage statement claim. Fourth, because Plaintiffs’ allegations that drivers were not being paid for activities such as time required to drop their trailer for fueling, time spent moving trailers, and time spent clearing a dock to drop a trailer, were sufficient to state a valid claim for violation of California’s minimum wage laws, the Court denied the motion to dismiss the minimum wage claim. Finally, Plaintiffs alleged that Defendant violated the Unfair Competition Law (“UCL”) by failing to pay Plaintiffs’ minimum wage, preventing them from taking rest and meal breaks, and misrepresented their statutory duty to provide meal periods. Because the UCL claim was derivative of the other causes of action, and because Plaintiffs had sufficiently pled a claim for those causes of action, the Court found that Plaintiffs had also sufficiently stated a claim under UCL, and accordingly denied the motion to dismiss it.

Cordero, et al. v. New York Institute Of Technology, 2013 U.S. Dist. LEXIS 87655 (E.D.N.Y. June 20, 2013). Plaintiffs, a group of former and current employees, brought a class action under the FLSA and the New York Labor Law (“NYLL”) alleging failure to pay overtime, to reimburse for the costs of purchasing and maintaining their uniforms, and for retaining charges to customers purporting to be gratuities for Plaintiffs. Defendant moved to dismiss the claims regarding gratuities and uniforms arguing that the Department of Labor had exempted it, as a not-for-profit educational corporation, from both the Hospitality Wage Order and § 196-d of the NYLL. The Court denied the motion. First, § 196-d of the NYLL provides that no employer shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee. Id. at *2-3. The Court noted that the § 196-d was not restricted to any particular industry, and that the New York Department of Labor (“DOL”) promulgated additional regulations that are specifically applicable to the hospitality industry, namely the Hospitality Wage Order. Id. at *3. The Hospitality Wage Order requires employers in the hospitality industry to provide compensation for employees’ purchase and maintenance of required uniforms. Id. at *4-5. Defendant’s argument for dismissing both claims rested upon its assertion that, as a not-for-profit educational corporation, it was exempt from the Hospitality Wage Order. The Court observed that the Hospitality Wage Order specifically excludes from the hospitality industry establishments where the service of food or beverage or the provision of lodging is offered by any corporation, unincorporated association, community chest, fund, or foundation organized exclusively for religious, charitable, or educational purposes, no part of the net earnings benefitted any private shareholder or individual. Id. at *10. Defendant claimed that the language of the exclusion from the Hospitality Wage Order was almost identical to the definition of an organization exempt from taxation set forth in 26 U.S.C. § 501(c)(3). The Court noted that Defendant did not provide persuasive support for its argument that an organization that was tax exempt under § 501(c)(3) was excluded from the Hospitality Wage Order as a matter of law. Further, because Defendant’s § 501(c)(3) status was not dispositive of the issue, the Court opined that the motion to dismiss was premature. Although the complaint stated that Defendant was a private, not-for-profit educational institution and that it operated the de Seversky Mansion, the Court stated that this did not constitute an admission that no part of Defendant’s net earnings from the operation of the de Seversky Mansion inured to the benefit of any private shareholder or individual. Plaintiffs’ allegations showed that the de Seversky Mansion was an establishment that prepared and offered food or beverages. While Defendant asserted that the DOL had recognized that not-for-profit educational organizations’ service of food and beverages is a collateral function, and an incidental part of, its core operations and mission, the Court remarked that it was unclear from the pleadings that the de Seversky Mansion constituted such an incidental or collateral operation. Accordingly, the Court stated that Defendant was not exempt from the Hospitality Wage Order. Further, the Court noted that there was no indication that the New York Legislature intended to exclude not-for-profit organizations from the scope of § 196-d, and such an interpretation would conflict with the natural and obvious reading of the term employer, as defined in the NYLL. Id. at *14-15. Additionally, the Court remarked that the exclusion of not-for-profit organizations from the scope of § 196-d would be inconsistent with the purpose of the statute, i.e., to end the unfair and
deceptive practice of an employer retaining money paid by a patron under the impression that he is giving it to the employee. Id. at *17. Thus, the Court found that there was no reason to conclude that not-for-profit organizations whose employees work in circumstances substantially identical to those in the for-profit hospitality industry were less likely to engage in the practices that the statute seeks to prevent. Accordingly, the Court denied Defendant’s motion.

Green, et al. v. Bank Of America, N.A., 512 Fed. App’x 665 (9th Cir. 2013). Plaintiffs, a group of bank tellers, brought a class action alleging that Defendant failed to provide them with seating. The District Court granted Defendant’s motion to dismiss, finding that Plaintiffs did not produce any evidence that they had requested seats. Upon Plaintiffs’ appeal, the Ninth Circuit reversed, noting that California Wage Order 7-2001 § 14 states that all working employees shall be provided with suitable seats when the nature of their work reasonably permits the use of seats. Id. at 665-66. The Ninth Circuit opined that the District Court erred when it assumed that employees must request seating before it is offered. Id. Plaintiffs alleged that the nature of their work reasonably permitted the use of seats. The Ninth Circuit viewed the factual allegations in the light most favorable to the non-moving party, and refrained from determining whether seating was suitable, or whether the nature of Plaintiffs’ work reasonably permitted the use of seats. Id. at 666. The Defendant argued that any award under California’s Private Attorneys General Act and the California Labor Code would be unjust. Id. The Ninth Circuit opined that this argument was premature, and stated that the reasonableness of any award depends on the facts of the case, which had not yet been developed. Id. The Ninth Circuit also observed that named Plaintiff Green had alleged sufficient injury to satisfy Article III standing requirements. Id. Accordingly, the Ninth Circuit reversed the order of the District Court.

Adams, et al. v. US Airways, Inc., 2013 U.S. Dist. LEXIS 46790 (D. Ariz. Mar. 29, 2013). Plaintiffs, a group of skycaps at US Airways terminals, brought a class action alleging that after Defendant imposed a mandatory $2 per bag fee, tips decreased dramatically to the point that Plaintiffs no longer received a minimum wage in violation of the FLSA and state law. Plaintiffs also alleged that they were not paid overtime compensation, and that Defendant’s actions constituted unjust enrichment. US Airways contracted with Defendant Prospect Airport Services, Inc., (“Prospect”) for the provision of skycap services to US Airways’ passengers for curb side check in at Phoenix Sky Harbor International Airport. Prospect in turn contracted with Independent Skycap Services, LLC (“ISS”). Subsequently, US Airways terminated the contract with Prospect for skycap services, and in turn ISS terminated its skycaps who performed services for US Airways passengers. US Airways moved for summary judgment, contending that it was not a joint employer of the skycaps. The Court granted the motion. The Court stated that the economic reality test is applied in determining whether an entity is a joint employer under the FLSA. Under this test the Court considers a number of factors to determine whether an outsourcing relationship exists or whether the relationship is a subterfuge for the purpose of evading the requirements of the FLSA. Id. at *4. The Court first found that the evidence did not support Plaintiffs’ contention that US Airways had the right to hire or fire the skycaps. Id. at *10. Plaintiffs also contended that US Airways supervised and controlled the skycaps’ work schedules and conditions of employment because the contract between Prospect and US Airways required the skycap service provider to provide the appropriate number of uniformed personnel to perform such service as requested by US Airways. The Court noted that although US Airways did schedule its flights, which determined the number of employees that would be necessary to provide the contracted services, it had no responsibility for designating which employees would report to service the scheduled flight. Plaintiffs also asserted that US Airways controlled the conditions of employment by its direct involvement in the supervision and disciplining of skycap employees. After reviewing the testimony, the Court concluded that US Airways did not issue instructions directly to the skycaps but to the ISS and Prospect managers, and such direct interaction did not evidence control but rather the appropriate supervision of an outsourcing contractor. Further, it was undisputed that ISS was responsible for setting the skycaps’ work hours, granting medical or other leave, and maintaining all pay records. Id. at *12. The Court noted that although US Airways kept records of the number of bags checked-in, this record-keeping was necessary because US Airways paid its subcontractor based upon the number of bags that were
checked. There was no evidence in the record that US Airways maintained any other type of employment record that would typically be maintained by an employer. *Id.* at *13. Additionally, although Plaintiffs worked only at the US Airways curb, these skycaps worked for another carrier before worked the US Airways curb, and there was no evidence that the ISS skycaps could not have worked for another carrier at any time. *Id.* at *13-14. Further, the Court found that although skycaps’ work was a specialty job on the production line constituting part of the integrated unit of production, the skycaps’ function was not integral to the activity of the alleged joint employer; rather their services were ancillary and incidental to US Airways’ operations. Thus, the Court concluded that US Airways’ conduct was more consistent with a permissible outsourcing contract than a subterfuge around wage & hour laws, and accordingly, granted US Airways’ motion for summary judgment. *Id.* at *15-16.

Calderon, et al. v. J. Younes Construction, LLC, 2013 U.S. Dist. LEXIS 87817 (N.D. Ill. June 23, 2013). Plaintiffs, a group of former construction and maintenance workers, brought an action under the FLSA and the Illinois Minimum Wage Law (“IMWL”) for unpaid minimum wages, unpaid overtime compensation, and wrongful retaliation. John Younes, the sole owner of Defendant J. Younes Construction LLC (“JYC”) was not involved in the daily operations when Plaintiffs were employed; rather he had delegated his father, Joseph Younes with that responsibility. Earlier, the Court had conducted a bench trial of Plaintiffs’ claims. In rendering its findings of facts and conclusions of law, the Court observed that an enterprise engaged in commerce is one that has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person. *Id.* at *14. Here, because each Plaintiff worked with, handled, and installed materials that were manufactured outside the United States, the Court found that Plaintiffs had established FLSA coverage. Second, the Court stated that employees are those who as a matter of economic reality are dependent upon the business to which they render service. *Id.* at *15. The evidence showed that JYC controlled the manner in which the work was performed, and the workers had no opportunity for profit or loss, and were paid a fixed wage, and although they were able to sell and keep some of the proceeds of scrap metal recovered in doing demolition, this was of little consequence given the infrequency of those events. Further, the workers did not invest in equipment or materials because these were provided by JYC, and no Plaintiffs employed others. Workers performed basic construction work without any indication that they had specialized skills or training, and they worked only for JYC. Plaintiffs regularly worked over 40 hours weekly for significant periods of time. Moreover, JYC could not have performed its construction and maintenance contract without Plaintiffs. The Court remarked that the absence of withholding of payroll taxes did not outweigh the other factors, and that Plaintiffs proved by a preponderance of evidence that they were JYC employees. Third, because payroll records prepared by JYC showed that each Plaintiff regularly worked over 40 hours per week but was not paid for overtime, the Court found that JYC violated the FLSA for each of those weeks. Fourth, regarding John Younes’ liability, the Court stated that an individual may be considered an employer under the FLSA if he has supervisory authority over the employee and is at least partly responsible for the statutory violation, and ability to exercise control over the aspect of employment that gave rise to the statutory violation is the key factor. *Id.* at *19. Joseph Younes testified that the way in which he dealt with Plaintiffs was the way he had always worked. The Court opined that this testimony permitted a reasonable inference that JYC’s practice of non-compliance with the FLSA and IMWL existed during the earlier period in which John Younes was running the company’s daily operations. During the years when Plaintiffs worked for JYC, Joseph Younes carried on this established practice. Thus, the Court found that John Younes was aware of, helped establish, and condoned the practice of non-compliance with the FLSA. Further, John Younes also testified that he had the power to hire and fire workers, and that he maintained JYC’s financial records and signed the company’s tax documents. Accordingly, the Court found that John Younes was an employer individually liable for unpaid overtime compensation, even though he did not deal directly with any Plaintiff.

with IRR. Century Bank claimed it had no employment relationship with Plaintiffs. The Court granted summary judgment in favor of Century Bank, finding that it was not Plaintiffs’ employer under the FLSA. IRR operated a security service. Its clients included a condominium, a supermarket chain, and Century Bank. IRR invoiced Century Bank for every hour logged by the security officers, which the Bank paid. Century Bank never created or maintained any employment records for any security officers and the undisputed facts showed that Century Bank failed to exert much control beyond its regulation of Plaintiffs’ hours. Plaintiffs claimed that Century Bank set up their management structure by assigning specific tasks. Id. at *16. Plaintiffs also pointed to the provisions in the vendor agreement reserving Century Bank’s right to request or reject the presence of specific officers and granting it the authority to designate the officers’ hours. Id. at *17. The Court found that Century Bank did not direct Plaintiffs beyond providing general instructions. Id. at *18. In particular, bank representatives informed Plaintiffs of their general tasks on their respective first days and only provided Plaintiffs with any sort of specific instructions sporadically. Id. The Court thus found that Century Bank “did not actively and overtly involve itself in Plaintiffs’ specific tasks on a constant basis.” Id. The Court further found that Century Bank did not exercise any control over the specific assignment of Plaintiffs and it was only IRR that made the choice to assign Plaintiffs to work at Century Bank from amongst their various clients. Id. No records suggested that Century Bank engaged in any consistent auditing of Plaintiffs’ work to confirm compliance with the vendor agreement and Plaintiffs were largely unsupervised during most of their workdays. Id. at *21. Although Century Bank could affect Plaintiffs’ ability to work at its offices, it could not modify their employment if IRR assigned them to work for another client. Id. at *22. Further, the vendor agreements specifically granted IRR the power to determine the pay rates of its security officers and designated the process through which IRR billed Century Bank for the services. Id. at *23-24. Century Bank never created or maintained any of Plaintiffs’ employment records beyond the invoices and the timesheets that IRR sent when billing the bank. Id. at *29. Moreover, Plaintiffs did not perform a specialty job integral to Century Bank’s business in the sense of an employee “working at a particular position on a larger production line”. Id. at *27. The Court found that such minimal involvement with the employment process did not suggest joint employment. Id. at *23. Accordingly, the Court concluded that Century Bank was not Plaintiffs’ joint employer under the FLSA.

Godlewskia et al. v. HDA, Inc., 916 F. Supp. 2d 246 (E.D.N.Y. 2013). Plaintiffs brought a collective and class action seeking unpaid minimum and overtime wages, benefits, liquidated damages, and damages for retaliation under the FLSA, the Civil Rights Act, the New York Labor Law, and state common law. Plaintiffs were current and former home attendants employed by Defendant Human Development Association (“HDA”). HDA provided personal care services (“PCS”) under the Medicaid Program in the state of New York. The administration of PCS, and the procedures that HRA followed in providing Medicaid services were governed by 18 N.Y.C.R.R. § 505.14 (the “Regulations”). New York City, the HRA, and the HRA Commissioner (collectively “the City Defendants”) moved for summary judgment, contending that they were not Plaintiffs’ joint employers with HDA. The Court granted the motion. The Second Circuit test for joint employment examines whether the alleged employer: (i) had the power to hire and fire employees; (ii) supervised and controlled employee work schedules or conditions of employment; (iii) determined the rate and method of payment; and (iv) maintained employment records. Id. at 257. The Court noted that the Regulations required the HRA to use a state-approved model contract when it contracted with home healthcare agencies. HDA and the HRA did not negotiate the contract, but the contract stated several times that the City Defendants did not have an employment relationship with HDA or the home attendants. Pursuant to the contract, HDA was responsible for the recruitment and employment of home attendants. The Regulations required that home attendants receive administrative supervision and nursing supervision both of which were handled by HDA. HDA evaluated the home attendants’ performance annually, and handled home attendants’ complaints; however, both HDA and the City Defendants handled patients’ complaints. Subject to the state’s approval, the Regulations required the HRA to monitor and audit the delivery of personal care services provided pursuant to the contract, maintain a record of its monitoring activities, and report its monitoring activities in the annual plan it submits to the state. This monitoring included evaluating HDA’s ability to deliver PCS, measuring HDA’s performance against regulatory and contractual requirements, and reviewing HDA’s fiscal practices. The contract also obligated HDA to comply with the City’s Living Wage Law. Plaintiffs claimed that they were paid a flat rate rather than an
hourly rate, and that they spent several months-long stretches working full-time with HDA patients. The Court noted that contrary to Plaintiffs’ allegation, the Regulations, and not the City Defendants, set the minimum qualifications for home attendants. HDA, and not the City Defendants, recruited and screened home attendants, and chose which ones to hire. As to the power to fire, the Court noted that HAD personnel specialists handled any disciplinary issues involving the home attendants. In fact, the evidence before the Court suggested that the HRA never recommended to HDA that a specific home attendant be disciplined. Accordingly, the Court found that the first factor was not satisfied. As to the second factor, the Court observed that HDA determined which home attendant to assign to each patient. Moreover, the City Defendants did not control or supervise Plaintiffs’ working conditions. Accordingly, the Court found that the second factor also did not weigh in Plaintiffs’ favor. As to the third factor, the Court noted that the City Defendants merely imposed a cap on the hourly pay rate and that there was insufficient evidence as to whether the City Defendants maintained employment records. Accordingly, the Court found that the City Defendants did not exercise formal control. The Court next analyzed whether the City Defendants exercised functional control over Plaintiffs. The first factor was whether Plaintiffs used the City Defendants’ premises and equipment for their work. As Plaintiffs worked in the patients’ homes and did not use the City Defendants’ equipment, the Court concluded that the first factor was not satisfied. The second factor was whether HDA could or did shift as a unit from one putative joint employer to another. It was undisputed that HDA contracted only with the City Defendants; therefore, the Court found that HDA could not shift from City Defendants to another employer. The third factor was the extent to which Plaintiffs performed a discrete line-job that was integral to the City Defendants’ process of production. The Court found that Plaintiffs did not perform piecework or a discrete line-job. Accordingly, the Court determined that the third factor was not satisfied. Similarly, the Court found that the remaining three factors — i.e., whether the responsibility under the contract could pass from one home healthcare agency to another without material changes; the degree to which the City Defendants supervised Plaintiffs’ work; and whether Plaintiffs worked exclusively or predominantly for the City Defendants – did not favor a finding that the City Defendants were joint employers with HDA. Accordingly, the Court granted Defendants’ motion for summary judgment.

Litigation Of Tip Pooling And Tip Credit Claims Under The FLSA

Barenboim, et al. v. Starbucks Corp., 2013 U.S. App. LEXIS 23370 (2d Cir. Nov. 21, 2013). Plaintiffs, a group of employees, brought a class action alleging that Defendant’s policy of allowing shift supervisors to participate in tip pooling violated the New York Labor Law (“NYLL”). Plaintiffs asserted that a shift supervisors who held a position of authority should not be allowed to participate in an employer-mandated tip allocation arrangement. Plaintiffs appealed the District Court’s grant of summary judgment to Defendant. Plaintiffs argued that the NYLL barred any employee with even the slightest degree of supervisory responsibility from sharing tips. Id. at *3. The Second Circuit affirmed the District Court’s judgment. The Second Circuit noted that, according to the New York Court of Appeals’ interpretation of the NYLL, “employer-mandated tip splitting should be limited to employees who, like waiters and bus boys, are ordinarily engaged in personal customer service, a rule that comports with the expectations of the reasonable customer,” and thus, “an employee whose personal service to patrons is a principal or regular part of his or her duties may participate in an employer-mandated tip allocation arrangement under Labor Law even if that employee possesses limited supervisory responsibilities.” Id. It was undisputed that Defendant’s shift supervisors spent a majority of their time performing the same duties as baristas, and were primarily responsible for serving food and beverages to customers. The Second Circuit found that the limited nature of the shift supervisors’ supervisory duties, considered together with their “principal” responsibilities to provide “personal service to patrons,” could not support a finding of the meaningful or significant authority or control over subordinates. Id. at *4-5. Plaintiffs argued that shift supervisors had significant authority over subordinates because they disciplined baristas by verbally correcting their mistakes or coaching their job performance, advising managers regarding the baristas’ job performance, and coordinating baristas schedules and breaks. Id. at *5. The record, however, demonstrated that, while shift supervisors could provide feedback to baristas, they could not formally discipline the baristas, and had no input into the creation of the work schedule. The Second Circuit noted that although shift supervisors supervised baristas, their primary job functions were the same as baristas. Id. at *6. The Second Circuit
therefore concluded that the NYLL permitted shift supervisors to participate in Defendant’s tip pools. Accordingly, the Second Circuit affirmed the judgment of the District Court.

*Maldonado, et al. v. BTB Events & Celebrations, Inc., 2013 U.S. Dist. LEXIS 166598 (S.D.N.Y. Nov. 22, 2013).* Plaintiffs, a group of delivery workers, brought an action under the FLSA and the New York Labor Law ("NYLL") alleging that because an 11% surcharge charged for delivery orders was a tip or gratuity, Defendants were not entitled to withhold a portion of the charge from them. Before 2007, Defendants’ invoices described the 11% surcharge as a service charge, after the surcharge had been denoted as a processing surcharge. Defendants included proceeds from the 11% surcharge in their gross receipts, and distributed 45% of those proceeds to delivery personnel, and retained the remaining 55%. The parties cross-moved for partial summary judgment on whether the 11% surcharge constituted a gratuity under the FLSA and the NYLL. First, the Court observed that a tip under the FLSA is a sum presented by a customer as a gift or gratuity, and that a mandatory charge did not constitute a tip. *Id.* at *17. At all times, Defendants automatically added the surcharge to customer invoices for delivery orders and included the 11% surcharge in its gross receipts. Accordingly, the Court opined that the 11% surcharge was not a tip under the FLSA. Second, the Court noted that § 196-d of the NYLL provides in relevant part that no employer or his agent or an officer or agent shall demand or accept, directly or indirectly, any part of the gratuities received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee. *Id.* at *20. In March 2010, the New York State Department of Labor ("NYSDOL") issued a list of factors that bear on whether a reasonable customer would believe a particular service charge is a gratuity. The Court opined that after 2011, the NYSDOL regulations used more determinate terms in construing § 196-d. The Court divided its analysis into the periods before and after the 2011 Regulations. In all customer invoices for the period preceding the effective date of the 2011 Regulations, the 11% surcharge appeared above the line subject to sales tax, was included in the sub-total, and a separate line indicated it was a gratuity. The gratuity line was of equal size and prominence as the surcharge. Further, from late 2007 through the end of 2010, the surcharge was described as a processing surcharge. Viewed under the totality of the circumstances, the Court opined that a reasonable customer would believe that the 11% charge was an administrative charge that would be retained by Defendant, not a gratuity to be distributed to delivery personnel. Further, the customers’ gratuity-giving practices supported this conclusion because approximately 75% of customers left an additional gratuity that was memorialized on the completed invoice. The Court, however, remarked that Defendants could have clarified through a plain statement on the invoice that the 11% surcharge was not a gratuity, and that it would be retaining some of that surcharge. *Id.* at *21. Thus, because a reasonable customer viewing the 11% surcharge in context would not regard it as a purported gratuity, the Court granted Defendants’ motion for partial summary judgment as to the period prior to the 2011 Regulations, and denied Plaintiffs’ cross-motion. The Court also noted that N.Y. Comp. Codes Title 12, § 146-2.18(b) creates a rebuttable presumption that any charge made in addition to charges for food, beverage, and specified other materials or services is a charge purported to be a gratuity. *Id.* at *31-32. Further, the Court noted that § 146-2.19 states that an administrative charge shall be clearly identified as such and customers shall be notified that the charge is not a gratuity or tip; that the employer has the burden of demonstrating that the notification was sufficient to ensure that a reasonable customer would understand that the charge was not purported to be a gratuity; and that adequate notification shall include a statement in the contract or agreement with the customer, and on any menu or bill listing prices, that the administrative charge is for administration, is not purported to be a gratuity, and will not be distributed as gratuities to the employees who provided service. *Id.* at *32. The Court opined that under this heightened standard, Defendant’s circumstantial proof certainly did not show, clearly and convincingly, that a reasonable customer would have viewed the 11% surcharge as something other than a gratuity. The Court stated that if Defendant wanted to avoid future liability under the NYLL based on inadequately explained mandatory charges, Defendant should include an explicit statement on its invoices. Thus, for the period between January 1, 2011 and September 26, 2012, the Court granted Plaintiffs’ motion for partial summary judgment based on § 196-d, and denied Defendants’ motion for partial summary judgment.
Roberts, et al. v. Apple Sauce, Inc., 2013 U.S. Dist. LEXIS 68255 (N.D. Ind. May 13, 2013). Plaintiff, a server at an Applebee’s restaurant, brought a collective action alleging violation of the FLSA’s minimum wage provisions with respect to servers, bartenders, hosts, and other tipped employees. Defendants moved to dismiss, arguing that Plaintiff did not adequately allege facts in support of a minimum wage claim, and that Plaintiff failed to adequately plead that Defendants, Apple Sauce Inc., and W. Curtis Smith, were employers under the FLSA. The Court granted in part and denied in part Defendants’ motion. Plaintiff and other similarly-situated current and former employees were paid a sub-minimum hourly wage under the tip credit provisions of the FLSA. Plaintiff alleged that Defendants failed to comply with the tip credit provision when they required the tipped employees to perform duties outside their tipped occupations. The Court observed that Plaintiff and other employees working in tipped occupations at the restaurant were required to wash dishes, prepare food, clean the kitchen and bathroom, and remove trash. Further, the Court noted that the regulations of the Department of Labor (“DOL”) provide that employees who spend substantial time, which is defined as more than 20%, performing related but non-tipped duties should be paid at the full minimum wage for that time without the tip credit. Id. at *14. The Court observed that 29 C.F.R. § 531.56(e), specifically identifies a server’s time as spent cleaning and setting table, toasting bread, making coffee, and washing dishes as duties that are related to his or her occupation. Id. at *16. Thus, the Court stated that simply because a duty may overlap with another occupation did not mean that the employee was employed in a dual job. Additionally, the Court noted that the DOL recognizes that servers may spend some time performing general preparation work or maintenance such as cleaning and setting tables, and still continue to be engaged in a tipped occupation even though these duties were not tip producing, provided such duties were incidental to the regular duties of the server, were generally assigned to the servers, and did not exceed 20% of their time. Id. at *17. The Court found that Plaintiff’s allegations did not indicate the amount of time the employees spent performing these duties or under what circumstances, or create a reasonable inference that these duties comprised a substantial amount of their time. The Court remarked that the factual allegations did not establish a violation of the minimum wage provisions of the FLSA based on the performance of dual jobs. Plaintiff also alleged that Defendants failed to inform the employees of the provisions of the tip credit sub-section of the FLSA. The Court, however, found that Plaintiff had not shown that she was similarly-situated to other individuals. The Court noted that the only evidence in support of the statement regarding lack of notice was Plaintiff’s affidavit, and for this reason, Plaintiff did not demonstrate a common policy or plan. Finally, Defendants argued that Plaintiff failed to adequately plead that they were employers under the FLSA. Apple Sauce was the management company that operated the Indiana Applebee’s restaurants owned by CJ Apple I, and Smith was the president of both companies, the sole living shareholder, and involved in the daily operations of Apple Sauce, including the policies that give rise to the wage claims. The Court noted that a corporate officer with operational control of a corporation’s covered enterprise is an employer along with the corporation, and jointly and severally liable under the FLSA for unpaid wages. Id. at *25. The Court stated that this included a corporate officer with significant ownership interests, day-to-day control of operations, and involvement in the supervision and payment of employees. Id. Accordingly, the Court opined that Smith was an employer. Further, the Court observed that Apple Sauce, as a management company, acted directly or indirectly in the interest of CJ Apple I in relation to its restaurant employees and thus satisfied the definition of an employer under the FLSA. Accordingly, the Court opined that Plaintiff could only proceed against all three Defendants as joint employers on the claim that she was not properly informed of the tip credit provisions.

Rubio, et al. v. Fuji Sushi & Teppani, Inc., 2013 U.S. Dist. LEXIS 8469 (M.D. Fla. Jan. 22, 2013). Plaintiff brought an action alleging that Defendants retained tips to pay for various expenses and pooled tips among both tipped and non-tipped employees in violation of the FLSA. Plaintiff moved for partial summary judgment on the grounds that Fuji violated the FLSA by requiring the class to participate in an invalid tip pool, that the class was entitled to liquidated damages under the FLSA, and that Defendants Howlander and Kahn were individually liable for the alleged FLSA violations. The Court granted in part and denied in part Plaintiff’s motion. Plaintiff argued that Fuji illegally retained a portion of its servers’ tips to cover accidents that happened on the job. Although Fuji had a policy that money from the tip pool would go intervener replacing broken glass and cleaning napkins, a factual dispute existed as to whether any tip
money was actually used in this way. Thus, the Court denied summary judgment on this issue. Second, the Court found that where an employer took the tip credit in connection with a tip pooling arrangement, the application of the credit only would be valid so long as the pool includes only those employees who customarily and regularly received tips. \textit{Id.} at *6. Here, employees like kitchen chefs were not tipped employees under the FLSA, and they engaged with customers only when a customer had a complaint or asked to compliment the chef. Defendants had not produced any evidence to the contrary, and these duties did not compare to those of servers, bus persons, food runners, hosts, maître d’s, or sushi chefs, who all interact with customers on a much more frequent basis. Moreover, the Court stated that the kitchen chefs did not provide service to customers in a way that warranted a share of the gratuity left by customers; therefore, Fuji violated the FLSA by including the kitchen chefs in the tip pool. Accordingly, the Court granted summary judgment on this issue.

\textit{Stewart, et al. v. CUS Nashville, LLC, 2013 U.S. Dist. LEXIS 111802 (M.D. Tenn. Aug. 8, 2013).} Plaintiffs, a group of current and former female bartenders, brought an FLSA action alleging that Defendants engaged in illegal tip-pooling and failed to compensate them for work performed off-the-clock. Plaintiffs asserted two separate classes. The first class included those current and former employees who were required to contribute their tips to a tip pool in which security guards also shared (the “nationwide class”). The second class included those current and former employees in the company-owned saloon in Nashville, Tennessee who performed off-the-clock and overtime work (“the Nashville class”). Two individual class members alleged that Defendants retaliated against them for engaging in activities protected under the FLSA. The Court conducted a bench trial, and entered judgment to Plaintiffs as to Nashville class, and entered judgment for Defendants as for the nationwide class, and the two individual retaliation claims. The nationwide class members alleged that Defendants’ policy of requiring bartenders to participate in a tip pool with security guards violated the FLSA because security guards were statutorily ineligible to participate in the tip pooling arrangement. Defendants contended that the security guards sufficiently interacted with customers so as to constitute employees who “customarily and regularly receive tips” under \textit{Kilgore v. Outback Steakhouse of Florida, Inc.}, 160 F.3d 294 (6th Cir. 1998). \textit{Id.} at *43. In \textit{Kilgore}, Plaintiffs – a group of servers – contended that they were made to share their tips with the hosts who were not tipped employees. The Sixth Circuit found that the hosts performed important customer service functions, such as greeting customers, supplying them with menus, and seating them at tables; therefore, they were entitled to tips. \textit{Id.} at *45. Similarly, here, the Court noted that there was ample evidence that the security guards attracted customers’ attention, employed various methods to bring people inside, encouraged customers to order drinks, and flirted with and took pictures with female customers. \textit{Id.} at *46. Accordingly, the Court concluded that the security guards were tipped employees, and Defendants’ policy requiring bartenders to participate in a tip-pool did not violate the FLSA. The Nashville class members alleged that they performed uncompensated work both before and after their shifts, and Defendants altered their time records in violation of the FLSA. Based on the documentary and testimonial evidence presented at trial, the Court concluded that Defendants altered the Nashville Plaintiffs’ time records to their detriment and that Plaintiffs worked off-the-clock. \textit{Id.} at *52. Accordingly, the Court granted judgment to the Nashville class members. The two individual claimants contended that they were retaliated against for engaging in protected activity. The Court, however, concluded that the evidence at trial did not show that the two Plaintiffs suffered an adverse action for initiating the lawsuit, and in any event, did not suffer any measurable harm. \textit{Id.} at *57.
Defendant violated Hawaii Revised Statutes, § 481B-14, and carried on an unfair method of competition or practice pursuant to Hawaii Revised Statutes, § 480-2. Plaintiff also alleged intentional interference, breach of implied contract, unjust enrichment, and failure to pay service charges to Plaintiffs, which deprived them of income that constituted wages and was actionable under Hawaii Revised Statutes, §§ 388-6, 388-10, and 388-11. Plaintiffs stated that although Defendant imposed a service charge on food and beverages served at the resort, including in the banquet department, restaurants, and room service, Defendant failed to pay the entire charge to Plaintiffs as tip income. Plaintiffs also asserted that Defendant did not disclose to the customers that the service charges were not remitted in full to Plaintiffs. Plaintiffs moved for summary judgment as to Defendant’s liability for failure to pay entire service charge to them for the statutory period until October 2010. The Court granted the motion in part. Defendant asserted that Plaintiffs’ claim was extinguished as of January 2009 when disclosures were included in the banquet event orders (“BEOs”). The Court noted that Defendant failed to produce any evidence that would create a genuine issue of material fact as to the question of whether, prior to January 2009, Defendant provided notice to its banquet customers or to its room service customers that it was not remitting the full service charge to its food and beverage servers. Thus, the Court found that in light of this failure Plaintiffs were entitled to summary judgment as to Defendant’s liability for failure to pay service charge from July 2004 to January 2009. Further, Plaintiffs argued that they were also entitled to summary judgment as to Defendant’s liability for failure to pay service charges from January of 2009 to October of 2010 because the disclosures that Defendant provided during that period did not include disclosures in the banquet contracts, and thus was not sufficient to comply with § 481B-14. Defendant presented evidence that before January 2009, it began including a disclosure in its on-line menus, BEOs, and for room service. The Court stated that the disclosures were provided to customers for review prior to the rendition of service, thereby giving customers meaningful opportunities to decide to provide additional gratuities to the servers or to take their business elsewhere. *Id.* at *14. Therefore, the Court concluded that Plaintiff was not entitled to summary judgment as to Defendant’s liability for failure to pay service charge from January 2009 to October 2010.

Sanctions In Wage & Hour Class Actions

Orozco, et al. v. Borenstein, 2013 U.S. Dist. LEXIS 122668 (D. Ariz. Aug. 28, 2013). Plaintiff, an employee, brought an action under the FLSA and the Arizona’s wage statutes alleging that Defendant deducted work-related expenses from its hourly employees’ paychecks, which caused their net pay fell below the minimum wage. Subsequently, Defendants stopped making the challenged deductions and reimbursed Plaintiff and similarly-situated employees. Thereafter, the Court granted Defendants’ motion to dismiss because the tender of full payment for all wage deductions plus statutory damages mooted the action. The Court then found that Plaintiff was entitled to a reimbursement of attorneys’ fees because the broad remedial purpose of the FLSA allows Plaintiffs to enforce their rights without incurring prohibitive expenses, and reimbursement of attorneys’ fees under the FLSA was mandatory. *Id.* at *2. The Court had also noted that the United Food and Commercial Workers Union (“UFCW”) had spearheaded this action from its inception, allegedly as part of its on-going efforts to organize the employees. Further, the UFCW, not Plaintiff, hired the attorneys and also agreed to pay all of Plaintiff’s legal fees. The Court denied Defendants’ motion. Plaintiff moved for attorneys’ fees and costs amounting to $144,202.09. The Court noted that Plaintiff had continued to press meritless claims despite clear evidence that he and the putative class had been fully compensated. Further, the Court stated that the rate for paralegal work and billing rate of Plaintiffs’ lead attorney was unreasonable. Additionally, almost two-thirds of the total fees billed was attributed to Plaintiff’s motion for attorneys’ fees. The Court remarked that the expenditure of twice the hours in the pursuit of attorneys’ fees as that sought for work on the substantive claim was unreasonable, and therefore not fully compensable. The Court also reduced Plaintiff’s claimed non-taxable expenses. Accordingly, the Court awarded Plaintiff $35,000 in attorneys’ fees and $3,000 in non-taxable costs. Finally, Defendants moved to impose sanctions amounting to $33,238 for the attorneys’ fees they incurred since April 25, 2012, against Plaintiff’s counsel and his law firm for protracting this litigation. The Court had already determined that since April 25, 2012, Plaintiff’s lawyers continued to litigate Plaintiff’s claims despite clear evidence that Plaintiff and the putative class had been fully compensated. *Id.* at *10. The Court stated that Plaintiff’s counsel, working with the UFCW, used this case to unionize rather than to defend employee’s FLSA rights, and in the process unreasonably protracted the litigation. The Court
granted the motion and found that reimbursing Defendants for the unwarranted attorneys’ fees was a reasonable sanction.

**Pruell, et al. v. Caritas Christi**, Case No. 09-CV-11466 (D. Mass. May 31, 2013). Plaintiffs, on behalf of themselves and other similarly-situated nurses, filed a collective action against Defendants, a hospital network and two of its senior executives, alleging that Defendants failed to compensate them for time worked during meal breaks and overtime pay as a result of Defendants’ policies that automatically deducted time for meal breaks in violation of the FLSA. After filing a second amended complaint, Plaintiffs moved for conditional certification, asserting that employees at each of Defendants’ member hospitals were subjected to similar FLSA violations. In support of their motion, Plaintiffs’ counsel submitted 12 declarations from nurses employed by Defendants who claimed that they had worked throughout Defendants’ member hospitals and were aware of Defendants’ centralized pay deduction policy, as well as Defendants’ centralized time-keeping and payroll processing. Id. at 1. Defendants thereafter moved for sanctions against Plaintiffs’ counsel for submitting false affirmations of fact in support of their motion to certify a collective action and including false allegations in their second amended complaint. Defendants also moved to strike the affirmations and Plaintiffs’ second amended complaint. The Court observed that the declarations submitted by Plaintiffs’ counsel were “virtually identical but for a few minor details.” Id. However, the Court found that deposition testimony from two of the declarants unequivocally showed that statements in their declarations were false and inaccurate, because each had worked at only one of Defendants’ hospitals and each admitted that they had no knowledge of how any other of Defendants’ member hospitals handled payroll or time-keeping. Id. at 2. The Court noted that upon an objective reasonable inquiry, Plaintiffs’ counsel should have at least known that the two declarants did not work throughout Defendants’ member hospitals and that they lacked the knowledge to make detailed assertions about payroll and time-keeping policies. Id. The Court held that since the additional declarations submitted by Plaintiffs’ counsel were “boilerplate affirmations,” that “there is no reason to have confidence in the truth” of those accounts, and struck all of the declarations from the record. Id. Furthermore, as an additional sanction, the Court struck Plaintiffs’ collective action claim and noted that there was no plausible showing that there was a class of similarly-situated nurses employed throughout Defendants’ member hospitals. Finally, the Court ordered Plaintiffs’ counsel to pay Defendants’ costs and attorneys’ fees incurred in litigating the motion for sanctions. The Court opined that the sanction was appropriate given that Plaintiffs’ counsel was given the opportunity to withdraw the declarations, but instead chose to contest the motion for sanctions. Id. at 3. Accordingly, the Court granted Defendants’ motion to strike and for sanctions.

(XXIV) **Issues With Opt-In Rights In Wage & Hour Class Actions**

**David, et al. v. Signal International, LLC**, 2013 U.S. Dist. LEXIS 151559 (E.D. La. Oct. 22, 2013). Plaintiffs brought an action on behalf of a putative class consisting of approximately 578 workers from India alleging that Defendants violated the Trafficking Victims Protection Act of 2003 (“TVPRA”) and the Racketeer Influenced and Corrupt Organization Act (“RICO”). Plaintiffs also alleged violations of the FLSA. After the Court denied Plaintiffs’ motion for class certification, Plaintiffs moved to protect the opt-ins who filed consents to sue in this case, but filed their non-FLSA claims in other courts. The Court denied the motion. The Court stated that although Plaintiffs proposed three alternatives to protect the opt-ins’ FLSA claims in the new actions, it was not clear what relief Plaintiffs requested. First, Plaintiffs asked the Court to toll the statute of limitations for the opt-ins to file their FLSA claims in other courts, which would require the Court to compel another judge to toll the statutes of limitations for the opt-ins’ claims. The Court observed that Plaintiffs, however, had not cited any authority for doing so. Second, Plaintiffs asked the Court to sever the opt-ins’ FLSA claims and transfer them to the new actions. The Court stated that in order to sever claims, the following factors should be considered, including whether the claims arose out of the same transaction or occurrence; whether the claims present common questions of law or fact; whether settlement or judicial economy would be promoted; whether prejudice would be averted by severance; and whether different witnesses and documentary proof are required. Id. at *10. Here, the Court noted that severance and transfer of the opt-ins’ FLSA claims was not appropriate because Plaintiffs filed their FLSA consents to sue in the Eastern District of Louisiana and requested that their FLSA claims be treated as a
collective action under 29 U.S.C. § 216(b). The Court remarked that the resolution of all of the opt-ins’ FLSA claims in a collective manner was the most efficient way to adjudicate their claims. Moreover, severing the FLSA claims and transferring them to the new actions would undermine rather than promote judicial economy, and the opt-ins would not suffer prejudice by having their claims decided in the Eastern District of Louisiana. Finally, Plaintiffs requested the Court to prevent Defendants from raising res judicata as a defense in the new actions. The Court remarked that it had no authority to prevent Defendants from raising a res judicata defense in an action before another judge. Accordingly, the Court denied Plaintiffs’ motion.

**(xxv) Trial Issues In FLSA Collective Actions**

**Guyton, et al. v. Tyson Foods, Inc., Case No. 07-CV-88 (S.D. Iowa April 2, 2013).** Plaintiffs, a group of hourly production workers, brought a class and collective action under the FLSA and the Iowa Wage Payment Collection Law, alleging that they were not adequately compensated for the time they spent donning and doffing personal protective equipment (“PPE”). Defendant compensated hourly production workers, in part, on a “gang time” basis, which was the time that the processing lines were moving and during which production workers were physically at the assembly line. *Id.* at 2. Additionally, Defendant paid “extra” minutes per day to compensate workers for donning, doffing, and cleaning their PPE. *Id.* Both the class and the collective actions were certified and the case proceeded to trial on that basis. At the close of Plaintiffs’ case in chief, the Court granted Defendant’s motion for judgment as a matter of law with respect to Plaintiffs’ willfulness claim, concluding that Plaintiffs failed to call any witnesses or provide any evidence concerning Defendant’s willfulness. Subsequently, a jury found that Plaintiffs failed to prove that the donning and doffing was integral and indispensable to a principal activity, and that the donning and doffing activities were not de minimis. However, the jury also determined that Plaintiffs proved no damages for either the FLSA or Iowa classes, and that Defendant proved its “good faith” defense. *Id.* at 3. Plaintiffs moved for judgment as a matter of law or alternatively for a new trial. The Court denied the motion. Plaintiffs argued that the donning and doffing at issue was integral and indispensable to their principal activity; Plaintiffs were damaged by non-payment of wages for the work performed; Defendant did not act in “good faith;” the Court, not the jury, should decide compensability and good faith as a matter of law; and the jury was erroneously instructed that liability and damages must be based on the “reasonable” rather than “actual” time to perform the work at issue. *Id.* at 4. The Court found that there was evidence in the record from which a reasonable jury could find that the donning and doffing at issue was not integral and indispensable to Plaintiffs’ principle activity on a class-wide basis. The General Supervisor testified that certain PPE was optional depending on the work station, and two Plaintiffs testified that certain items were not required by Defendant for their particular positions. Further, the Court observed that the testimony and reports of the damages expert were insufficient to prove that the donning and doffing was integral and indispensable on a class-wide basis, because he did not study each job at the plant, nor did he specifically distinguish between employees utilizing different PPE. *Id.* at 4-5. Second, the Court also concluded that the jury’s finding of “$0.00” damages was reasonable because the jury could have concluded Plaintiffs did not meet their burden of proof. Plaintiffs’ damages expert was consistently challenged by Defendant’s counsel, and the jury could have concluded that his methods were inconsistent and incomplete. *Id.* at 5-6. Third, the Court noted that there was testimony that suggested that Defendant acted in a manner it thought was consistent with the determinations and decisions of the DOL and the agency’s enforcement actions under the FLSA. Thus, the Court found that the evidence presented at trial was sufficient for a reasonable jury to conclude that Defendant acted in good faith. *Id.* at 6-7. Finally, the Court noted that use of the “reasonable” time standard in calculating damages was proper. *Id.* at 7. The Court stated that Plaintiffs’ expert did not provide actual times on a class-wide basis. Further, Plaintiffs’ damages expert testified that, given those calculations, certain members of the Iowa class would not be entitled to damages. The Court remarked that the individual and varying testimony of Plaintiffs at trial suggested that the jury would be unable to calculate actual time on a class-wide basis. Accordingly, the Court concluded that Plaintiffs failed to meet their burden to overturn a jury’s verdict. *Id.* at 7-8.

Wage Law (“IMWL”) alleging that they performed off-the-clock work, including mandatory training, orientation, pre/post-shift work, and uniform maintenance. Initially, the Court had granted class certification for the IMWL training/orientation claim, but denied certification for the IMWL pre/post-shift work and uniform maintenance/cleaning claims. *Id.* at *1*. On the Court’s own motion, and pursuant to Rule 42(b), the Court bifurcated the trial on the training/orientation claim from trial on the pre/post-shift work and uniform maintenance/cleaning claims. *Id.* at *2*. The Court observed the Seventh Circuit’s ruling in *Hydrite Chemical Co. v. Calumet Lubricants Co.*, 47 F.3d 887, 891 (7th Cir. 1995), which stated that while it is more common to bifurcate claims between liability and damages, there was no rule requiring the split to be between liability and damages. Further, the Court noted that it could bifurcate a case at any point to minimize overlap in evidence between the segmented phases or otherwise promote economy and accuracy in adjudication. *Id.* The Court observed that bifurcation would serve judicial economy and avoid possible prejudice to both parties. Further, the Court observed that Seventh Circuit case law observed that bifurcation is appropriate if three criteria are met, including: (i) the judge must determine whether separate trials would avoid prejudice to a party or promote judicial economy; (ii) the judge must be satisfied that the decision to bifurcate does not unfairly prejudice the non-moving party; and (iii) separate trials must not be granted if doing so would violate the Seventh Amendment. The Court determined that the present case satisfied all three conditions. *Id.* at *3*. First, bifurcation served judicial economy and avoided a possible prejudice to both parties because the training and orientation class consisted of several thousand individuals, while the pre/post-shift work and uniform maintenance claims were comprised of only the named Plaintiffs. *Id.* Thus, the Court stated that it was better for a jury to focus exclusively on the training and orientation claim rather than consider the claim along with the other two claims. *Id.* Secondly, the Court noted that bifurcation would not prejudice either side because both parties had an interest in focusing the jury’s attention on the claim with the largest potential liability. *Id.* at *4*. Moreover, the Court observed that bifurcation would not violate the Seventh Amendment because the training and orientation claim entailed factual inquires distinct from those raised by the pre/post-shift work and uniform maintenance and cleaning claims. *Id.* Accordingly, the Court stated that it would first try the training/orientation claim and then try the pre/post-shift work and uniform cleaning/maintenance claims.

(xxvi) **Issues With Interns Under The FLSA**

*Glatt, et al. v. Fox Searchlight Pictures, Inc.*, 2013 U.S. Dist. LEXIS 82079 (S.D.N.Y. June 11, 2013). Plaintiffs brought a class action alleging that Defendant had classified them as unpaid interns rather than paid employees in violation of the FLSA and the New York Labor Law. Plaintiffs worked as production assistants, bookkeepers, secretaries, and janitors on films produced by Searchlight. The named Plaintiffs, Eric Glatt and Alexander Footman, were unpaid interns who worked on production of the film Black Swan in New York. After the end of production, Glatt took a second unpaid internship relating to Black Swan’s post-production. Plaintiff Eden Antalik claimed that she was part of a “centralized unpaid internship program” in which unpaid interns at FEG’s subsidiaries were subject to a single set of policies administered by a small team of intern recruiters. *Id.* at *3*. While Glatt and Footman moved for summary judgment asserting that they were “employees” covered by the FLSA and the NYLL and that Searchlight was their employer, Antalik moved for class certification of her NYLL claims and conditional certification of a collective action for her FLSA claims. *Id.* at *1*-3. The Court held that Plaintiffs Glatt and Alexander Footman were employees of Defendant and thus protected by the FLSA and state wage & hour laws. The Court upheld and applied the Department of Labor’s six-part test for determining whether an internship was employment covered by the FLSA and found that the interns were in fact regular employees who should have been paid. Glatt and Footman’s internships were based at Lake of Tears’ offices, which it leased before signing a production agreement with Searchlight. *Id.* at *22*. There was no evidence that either Glatt or Footman ever visited Searchlight offices or used its equipment. *Id.* Searchlight, however, had reserved the right in its sole reasonable discretion to require Lake of Tears to dispense with the services of any person rendering services with respect to Black Swan and it had closely supervised the work on Black Swan. *Id.* at *17*-18. Further, Searchlight had set the overall budget for Black Swan, and Glatt and Footman argued that through this control, Searchlight had *de facto* set wages for all production workers. *Id.* at *19*. Searchlight also required production staff to sign confidentiality agreements and required memos from the paid employees who oversaw the unpaid interns. *Id.* at *20*. Moreover, Footman and
Glatt worked exclusively on Black Swan. *Id.* at *25. The Court thus found that control factors weighed in favor of finding that Searchlight was a joint employer, which in turn was sufficient to find Searchlight was Plaintiffs’ employer. *Id.* at *26. The Court also determined that Glatt and Footman did not fall within the FLSA’s unpaid “trainee” exception. Glatt and Footman did not receive training similar to that in an educational environment, and they performed routine tasks that otherwise would have been performed by paid employees. *Id.* at *37. On the other hand, Searchlight received the benefits of the unpaid work as it obtained an immediate advantage from Glatt and Footman’s work. The Court thus held that Searchlight was the “primary” beneficiary of the internships. *Id.* Although Glatt and Footman understood that their internships would be unpaid, the Court pointed out that the FLSA “does not allow employees to waive their entitlement to wages.” *Id.* at *39. Thus, considering the totality of the circumstances, the Court concluded that Glatt and Footman were classified improperly as unpaid interns and were “employees” covered by the FLSA and the NYLL. *Id.* at *40. The Court also held that Plaintiff Antalik could prosecute her claims as a class action against Defendants on behalf of interns employed by certain FEG subsidiaries, since the requirements of Rule 23 were satisfied. Antalik offered Defendants’ intern personnel database as proof that there were at least 45 class members who interned between 2007 and 2010. *Id.* at *43. Antalik also identified several common questions relevant to determining the NYLL violations, including whether Defendants derived an immediate advantage from interns’ work, whether interns displaced regular employees, and whether FEG’s internship program was for the benefit of interns. *Id.* at *46. She also claimed that FEG’s internship request forms, which described various internship positions, constituted class-wide evidence that interns provided an immediate advantage to Defendants. *Id.* at *46-47. Further, the evidence showed that interns were recruited to help with busy periods, that they displaced paid employees, and that those who oversaw the internships did not believe that they complied with applicable law. *Id.* at *49. The Court thus found the evidence capable of generating common answers to questions of liability. *Id.* Because Antalik participated in the same internship program administered by the same set of recruiters as all class members, was classified as an unpaid intern like all class members, brought an NYLL wage claim like all class members, and had no known conflicts with the class, she also satisfied the typicality and adequacy requirements. *Id.* at *50-52. Further, the generalized proof on the issue of Defendants’ liability established that common questions of liability predominated over individual calculations of damages, and the relatively small recoveries available to individual Plaintiffs made a class action a more efficient mechanism. *Id.* at *52-53. The Court therefore certified Antalik’s proposed class under Rule 23(b)(3) with Antalik as the class representative. The Court further conditionally certified a related FLSA collective action because Antalik had put forth generalized proof that interns were victims of a common policy to replace paid workers with unpaid interns. *Id.* at *55. Accordingly, the Court granted Glatt and Footman’s motion for summary judgment that they were “employees” covered by the FLSA and the NYLL and that Searchlight was their joint employer, and Antalik’s motions for class certification of her NYLL claims and conditional certification of her FLSA collective action.

Wang, et al. v. The Hearst Corp., 2013 U.S. Dist. LEXIS 3768 (S.D.N.Y. Jan. 9, 2013). Plaintiffs, a group of unpaid interns, brought an action under the FLSA and the New York Labor Law (“NYLL”). Plaintiffs alleged that although their work was productive, they were paid no wages, and Defendant required them to purchase college credit as a condition of employment. Specifically, Plaintiffs alleged that Defendant took unlawful deductions by requiring interns to purchase academic credit from an accredited college or university as a condition of employment and that these “deductions” constituted “payments by separate transaction” that violated § 193 of the NYLL. *Id.* at *3. Defendant moved for judgment on pleadings with respect to this allegation, which the Court granted. Section 193(3) states that no employer shall make any charge against wages, or require an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages. *Id.* at *4. Defendant argued that this did not apply to Plaintiffs, because Plaintiffs neither purchased the academic credit from Defendant nor received any wages for the internship. Plaintiffs relied on the Court’s prior denial of Defendant’s motion to strike the class allegations and argued that the pertinent question was whether Defendant benefited from the credit requirement, not whether the credit was purchased from a third-party or whether Defendant paid no wages. The Court found that Plaintiffs did not receive wages. The Court pointed out that § 193(3)(a) does not prohibit “any payment by separate transaction” in itself but such a payment “as a deduction from wages,”
and this understanding has been affirmed by the New York Court of Appeals, when it stated that from the statutory context “any payment” is actually meant to refer only to payments from wages. Id. at *6-7. The Court remarked that Plaintiffs were unable to provide a single case law authority for the position that § 193(3)(a) should apply in cases where no wages, or anything arguably equivalent, were alleged. The Court explained that there can be no “deduction” within the meaning of § 193 when there is nothing from which to take away or subtract. Id. at *6. Specifically, § 193 applies if the non-payment results from unlawful deductions from wages. However, that scenario was not Plaintiffs’ situation, where there were no wages to begin with. Id. at *8. The Court also disagreed with the conclusion that Plaintiffs drew from the Court’s prior denial of Defendant’s motion to strike the class allegations. In that order, the Court had held that the deductions issue under NYLL was a factual question that was not appropriate for a motion to dismiss. The issue before the Court at that time was whether Plaintiffs’ proposed state law class could be certified under Rule 23, and the Court had held that because scant discovery had occurred, this argument was premature. Because the Court concluded that there were no wages from which the unlawful deductions could be taken, the Court granted Defendant’s motion for partial judgment on the pleadings.

In Re Chickie’s & Pete’s Wage & Hour Litigation, 2013 U.S. Dist. LEXIS 78573 (E.D. Pa. June 5, 2013). In these consolidated actions, Plaintiffs, a group of current or former employees of Chickie’s & Pete’s, asserted claims under the FLSA and Pennsylvania and New Jersey state laws. Defendants filed a motion to stay the proceedings until conclusion of the Department of Labor’s (“DOL”) wage & hour audit. The Court denied Defendants’ motion. The Court noted that in considering a motion to stay, it must examine the length of the requested stay; the hardship that the movant would face if the stay was not granted; the injury that a stay would inflict on the non-movant; and whether granting a stay would streamline the proceedings by simplifying issues and promoting judicial economy. Id. at *5-6. Defendant contended that staying the current action would benefit Plaintiffs by resolving the matters in a more expedient fashion while including all potential class members involved and avoiding years of costly litigation. The Court observed that for opt-in Plaintiffs, the statute of limitations is only tolled once an individual Plaintiff files a written consent, and until that point, the statute of limitations continues to run against class members. Id. at *9-10. Further, the Court stated that once the signed consents are filed with the Court, they do not relate back to the filing date of the consolidated complaint, and staying the present action would not automatically toll the statute of limitations. Id. at *10. Thus, the Court held that there was a strong potential harm against non-parties to the collective action, as the two-year or three-year statute of limitations would continue to run against potential Plaintiffs until the claimant’s individual written consent was filed with the Court. Accordingly, the Court denied Defendants’ motion to stay the proceedings.

Santiago, et al. v. Amdocs, Inc., 2013 U.S. Dist. LEXIS 165960 (N.D. Cal. Oct. 10, 2013). Plaintiffs, a group of current and former information technology employees, brought an action under the FLSA and the California Labor Code, alleging that they routinely worked without overtime pay, and that they were not provided with required meal and rest breaks because they were misclassified as exempt employees. The Court found that Plaintiffs failed to show that class members were similarly-situated and that members of the conditionally certified class performed vastly different jobs with different supervisors and in different settings. The opt-in Plaintiffs had 51 different job titles four with highly divergent job duties, and the Court would be required to inquire into each class member’s job duties to determine whether that employee was properly classified as exempt. Accordingly, the Court had decertified the previously certified collective action under the FLSA. Plaintiffs then moved for tolling the statutes of limitations for persons who filed opt-in notices prior to decertification of FLSA class. The Court granted the motion and tolled the statute of limitations for 60 days by exercising its equitable powers.

Plaintiff brought a putative collective action alleging that Defendant violated the FLSA by failing to pay its employees overtime compensation. Plaintiff contended that she and other collective action members were covered employees entitled to the FLSA protections. The Court granted Plaintiff summary judgment. Defendant moved to amend the Court’s order to certify it for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Court granted Defendant’s motion. The Court concluded that Defendant had established the three elements of § 1292(b) necessary to certify the order for interlocutory appeal. Id. at *1. First, the Court’s memorandum opinion and order involved a controlling question of law. Second, regarding dismissal of Plaintiffs’ state law Rule 23 class claims, Defendant argued that there was a fundamental and irreconcilable incompatibility between FLSA collective actions and Rule 23 class actions. The Court stated that considerable division existed among case law authorities regarding whether Rule 23 class actions could proceed simultaneous with FLSA collective actions. Moreover, the Court remarked that Plaintiff had not articulated any meritorious reason why it should adopt a conflicting view in this case. Accordingly, the Court granted with prejudice Defendant’s motion to dismiss Plaintiffs’ state law claims and hybrid class action allegations.

**McMaster, et al. v. Eastern Armored Services, Inc., 2013 U.S. Dist. LEXIS 160974 (D.N.J. Nov. 12, 2013).** Plaintiff brought a putative collective action alleging that Defendant violated the FLSA by failing to pay its employees overtime compensation. Plaintiff contended that she and other collective action members were covered employees entitled to the FLSA protections. The Court granted Plaintiff summary judgment. Defendant moved to amend the Court’s order to certify it for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Court granted Defendant’s motion. The Court concluded that Defendant had established the three elements of § 1292(b) necessary to certify the order for interlocutory appeal. Id. at *1. First, the Court’s memorandum opinion and order involved a controlling question of law. Second, substantial grounds for difference of opinion existed regarding the definition of covered employees entitled to the FLSA overtime compensation as described in the SAFETEA-LU Technical Corrections Act (“TCA”). Third, a definitive, appellate ruling on the application of the TCA’s definition regarding overtime compensation for employees who work on mixed fleets-part non-commercial vehicles and part-commercial vehicles would materially advance the ultimate termination of the litigation, especially with regard to the 25 opt-in Plaintiffs. Id. at *2-3. Accordingly, the Court granted Defendant’s motion to amend.

**Thompson, et al. v. Bruister And Associates, Inc., 2013 U.S. Dist. LEXIS 139374 (M.D. Tenn. Sept. 27, 2013).** Plaintiffs, a group of cable technicians, brought an FLSA action alleging violations of the minimum wage, overtime pay, and record-keeping provisions. Earlier, the District Court had denied Defendants DirecTV, Bruister and Associates, Inc. (“BAI”), and Herbert C. Bruister’s motions to decertify and to dismiss the collective action. Defendants moved for a stay and for certification of that order for interlocutory appeal to the Sixth Circuit. The District Court noted that although Rule 23(f) permits an appeal from an order granting or denying class action certification, litigants in collective actions are left with 28 U.S.C. § 1292(b) as the primary avenue for an interlocutory appeal. Id. at *15. Some 60 Plaintiffs and 40 representatives for Defendants were expected to testify in a trial that was intended to resolve the case as to all parties, including the almost 1,740 technicians who had opted-in to the case. The Court remarked that if the certification decision was wrong, the trial would be a colossal waste of time, money and expense for all concerned, except perhaps to the extent it provided leverage for settlement, a factor which weighed in favor of interlocutory review. The Court stated that although Plaintiffs had addressed trial manageability...
concerns, questions remained as to whether this case was suitable for collective action treatment considering that the determination of damages could be closely intertwined with the determination of liability, as well as questions as to Plaintiffs’ proposed method for calculating damages on a class-wide basis. Finally, the Court observed that § 1292(b) requires that the resolution of a controlling question of law may materially advance the ultimate termination of the litigation. \textit{Id.} at *21-22. The Court remarked that this was far from a typical FLSA case such that resolution of the certification question would materially advance the final resolution of this case. The Court determined that although this case had been pending for many years, a relatively short delay in the scheme of things would be nothing compared to trying this case as a collective action, only to find out much later that the certification decision was wrong, and that the initial trial was for naught. Accordingly, the Court granted Defendants’ motion to certify the decertification issue for interlocutory appeal under 28 U.S.C. § 1292(b).

\textit{Wang, et al. v. The Hearst Corp., 2013 U.S. Dist. LEXIS 92091 (S.D.N.Y. June 27, 2013).} Plaintiffs, a group of unpaid interns, brought an action under the FLSA and the New York Labor Law ("NYLL") alleging that they were paid no wages and that Defendant required them to purchase college credit as a condition of employment. Plaintiffs asserted that they were Hearst’s employees under the FLSA and the NYLL. The Court denied certification of Plaintiffs’ NYLL claims for failure to meet Rule 23’s commonality, predominance, and superiority requirements. The Court also had denied Plaintiffs’ summary judgment motion with respect to their “employee status” under the FLSA and the NYLL, finding that a genuine issue of material fact existed under the totality of circumstances test and the U.S. Department of Labor’s six-factor test. \textit{Id.} at *4. Plaintiffs then moved to certify the order for interlocutory appeal. The Court granted the motion. Section 1292(b) provides that a Court may allow an immediate appeal when it is of the opinion that there is a controlling question of law, there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. \textit{Id.} at *5. The Court observed that controlling questions of law included whether the facts supported a finding that neither predominance nor commonality were satisfied so that a class might be certified. \textit{Id.} The Court also determined that whether the totality of circumstances for employee status was or was not the appropriate legal standard was another controlling question of law. The Court observed that the questions raised by Plaintiffs here were difficult and of first impression, which could easily give rise to different opinions. The Court found that if the Second Circuit provided clarification or a different legal standard, it would guide a resolution of the outstanding issues pending in the Court. Further, the Court stated that an appeal should be considered if it would advance the ultimate termination of the litigation. Accordingly, the Court granted Plaintiffs’ motion.

\textit{Smith, et al. v. ERJ Dining, LLC, 2013 U.S. Dist. LEXIS 44303 (N.D. Ill. Mar. 28, 2013).} Plaintiff, a server at a restaurant, brought an action under the FLSA and Illinois Minimum Wage Law alleging that Defendants required tipped employees to spend substantial amounts of time performing non-tipped or indirectly related work, which led to the tipped employees earning less than the minimum wage. Although Plaintiff sought to certify her IMWL claims as a class action, she never sought conditional certification of the FLSA collective action. \textit{Id.} at *2-5. Thereafter, Plaintiff severed ties with her counsel. Counsel then filed a motion for leave to file a second amended complaint, stating that they had been retained by another putative class member, Bonzeus Carranza, and they desired to substitute him as the representative Plaintiff and proposed class representative. Counsel asserted that Carranza had identical claims against Defendants and that he would adequately represent the interests of the current putative class members. Counsel also moved to toll the statute of limitations on the FLSA claims originally asserted; however, counsel did not file a separate motion seeking conditional collective action certification. The Court expressed concern that it might not be possible to simply substitute a new Plaintiff for a former Plaintiff in the FLSA context, as one of counsel's motions had proposed, and suggested intervention. Thus, counsel filed a motion seeking leave for Carranza to intervene, and also attached to the motion a copy of the proposed second amended complaint. The Court dismissed the case for lack of subject-matter jurisdiction, and struck all motions. First, the Court noted that because it was a court of limited jurisdiction, both the parties and the Court of its own accord have an obligation at each stage of the proceedings to ensure that
there is subject-matter jurisdiction over the dispute. *Id.* at *14. Further, the Court observed that Article III of the Constitution limited the jurisdiction to actual cases and controversies, and if a case or controversy ceased to be live at any time during its pendency, Article III prohibited the Court from reaching the merits. *Id.* Here, from its inception until Plaintiff and counsel terminated their relationship, the case was alive. Unnamed claimants similarly-situated to Plaintiff were not parties to or bound by the result of her pending FLSA lawsuit unless and until they affirmatively opted-in. The Court noted that the FLSA’s statute of limitations continued to run for each potential Plaintiff until he or she consented to join an existing action or filed his or her own action. After Plaintiff abdicated her role in the case, any case or controversy that existed as to her personal FLSA and IMWL claims disappeared and the Court’s jurisdiction over the case disappeared along with it. The Court remarked that not only did the FLSA claim become moot without a Plaintiff, but also the entire federal case collapsed because the FLSA claim had provided the jurisdictional hook on which the Court’s authority to decide the case rested. *Id.* at *18. The Court thus stated that without a live controversy as to the sole federal claim between the parties to the action, it was left with a jurisdictional void that required dismissal of the case. The Court noted that counsel tried to keep the case alive by attempting to substitute in a new class representative. The Court observed that the unique type of Plaintiff substitution that was permitted in Rule 23 actions was consistent with the notions of “opting-out” and the due process and preclusion concerns that attended Rule 23 class actions, which also comported with the American Pipe rule – from *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) – that a pending motion for class certification tolls the statute of limitations for absent class members. *Id.* at *20.

The Court, however, noted that a different set of rules and procedures applied to FLSA claims, which involved an “opt-in” process and had different statute of limitations and preclusion concerns. *Id.* at *20-21. Thus, because the Court lost jurisdiction on the date when the attorney-client relationship was terminated, it dismissed the case.

*Snelling, et al. v. ATC Healthcare Services, Inc.*, 2013 U.S. Dist. LEXIS 177179 (S.D. Ohio Oct. 17, 2013). Plaintiff, a former nurse, brought an action seeking unpaid overtime compensation under the FLSA and the Ohio Minimum Fair Wage Standards Act (“OMFWSA”). After the Court granted Plaintiff leave to amend her complaint to assert that Defendants violated the FLSA and OMFWSA by failing to pay nurses worked in excess of 40 hours per week, Plaintiff moved for leave again to file a second amended complaint. It included allegations that Defendant subtracted of 1/2 hour from daily shifts for meal breaks; accounted for time spent for early arrival at worksites to allow for security check, obtaining keys, and receiving debriefing from nurses on the prior shifts; and accounting for time spent by nurses who remained at worksites finishing care for patients until incoming nurses arrived and were debriefed, and for time spent at the end of shifts counting narcotics and resolving discrepancies in the count, handling medical records, and exchanging keys. The Court denied Plaintiff’s motion to amend. Defendants contended that Plaintiff should have added the substance of the proposed new claims as part of her first amended complaint, because the information underlying the proposed new claims was known to Plaintiff at that time. The Court stated that delay alone was not a sufficient basis for denying leave to amend unless the delay caused significant prejudice to the opposing party. The Court stated that in determining what constitutes prejudice, it considered whether the proposed claim would require the opponent to expend significant additional resources to conduct discovery and prepare for trial; significantly delay the resolution of the dispute; or prevent Plaintiff from bringing a timely action in another jurisdiction. *Id.* at *7. Defendants asserted that Plaintiff knew or should have known of the basis for the proposed amendments by at least July 2012. Plaintiff conceded that, in hindsight, it was entirely possible that a thorough interrogation of Plaintiff by her counsel of all possible wage & hour issues would have revealed claims for uncompensated time for her personally, if not for a class. Nevertheless, Plaintiff argued that it was not until information was received from opt-in Plaintiffs and from Defendants’ payroll records that Plaintiff actually learned the information supporting the proposed new claims. Taking into consideration all these circumstances, the Court found that Plaintiff’s case had been pending for almost two years and the amended complaint was filed more than one year ago. Moreover, the proposed new claims were based on information regarding Plaintiff’s claimed working conditions, which had at all relevant times been within the knowledge of Plaintiff. The Court determined that the fact that Plaintiff did nothing with that information or knowledge until its significance became more clear would not excuse Plaintiff’s delay in pursuing the proposed new claims. Further, the
Court opined that permitting Plaintiff to pursue the proposed new claims would work to the substantial prejudice of Defendants because assertion of the proposed new claims would necessitate additional discovery, which could not be completed within the current discovery deadline. Accordingly, the Court denied Plaintiff’s motion to amend.


Plaintiffs, a group of warehouse employees, brought an action under the FLSA and California wage & hour laws, alleging that Defendant denied hourly warehouse employees their earned wages for all hours worked off-the-clock, including straight time and overtime wages. Earlier, the Court had certified a California class encompassing all hourly, non-exempt, union or non-union employees employed in Defendant’s warehouses in California. Thereafter, the Court granted summary judgment to Defendant, finding that the union exemption under § 514 of the California Labor Code prevented class members represented by unions from recovering overtime pay under state law. Subsequently, Plaintiffs moved to file a fourth amended complaint to clarify that the members of the proposed California class were non-union members. The Court granted Plaintiffs leave and accordingly certified the new California class defined as all persons who worked for Defendant in California as hourly, non-exempt, non-union employees who were subject to Defendant’s lockdown procedures. Id. at *3. After reviewing certain records, Plaintiffs realized that they had mistakenly excluded from the California class union employees eligible to receive straight time. Id. at *4. Plaintiffs thus moved for leave to file a fifth amended complaint to modify the class definition to include both union and non-union hourly employees for purposes of recovering unpaid straight time. The Court denied the motion. To determine whether Plaintiffs’ failure to abide by the deadline to amend their complaint was a result of excusable neglect, the Court applied the factors laid down in *Pioneer Investment Services v. Brunswick Associates, Ltd.*, 507 U.S. 380, 395 (1993)). First, regarding danger of prejudice to the non-moving party, the Court found that Defendant would suffer some prejudice by Plaintiffs’ untimely request for leave to amend because Defendant would be required to spend time and money producing additional documents, deposing at least one union employee, and sending notice to over 16,000 new class members. Id. at *9. The Court opined that it would require re-opening of discovery at this late stage in the proceedings, and thus concluded that this factor weighed against a finding of excusable neglect. Second, regarding the length of delay and potential impact on judicial proceedings, the Court noted that Plaintiffs filed their fifth amended complaint more than two years after the deadline to amend was passed, almost two years after they filed their fourth amended complaint, and three months after the close of discovery. The impact of this delay would require the Court to re-open discovery at a late stage in the proceedings. Because this was not a significant impact on the judicial proceedings, the Court found that the length of delay weighed against a finding of excusable neglect. Third, regarding the reason for delay, the Court stated that although Plaintiffs represented that they mistakenly omitted union employees from the class definition, they had the information necessary to correct their mistake but failed to do so in a timely manner. Accordingly, the Court denied Plaintiffs’ motion to amend.


Plaintiffs, a group of employees, brought a class action alleging that Defendant violated their rights under the FLSA and Wisconsin state law by failing to calculate overtime correctly and to pay for time spent in training, study, class, and travel. After the Court dismissed Plaintiffs’ state law class claims because these claims substantially predominated over Plaintiffs’ individual federal claims, Plaintiffs moved for leave to amend their complaint to add an FLSA collective action claim. The Court denied the motion. The Court stated that granting Plaintiffs’ motion to amend their complaint would necessarily require amendment to the scheduling order established for the case. As Plaintiffs acknowledged by simultaneously filing a motion for conditional certification of an FLSA collective action, additional time would need to be built into the schedule to accommodate the FLSA’s two-step collective action process. Accordingly, the Court stated that Plaintiffs’ motion for leave to amend the complaint required a showing of good cause under Rule 16. The Court noted that Plaintiffs failed to offer any reason for their failure to allege a FLSA collective action in a timely manner, beyond their being unaware of the need to raise such a claim before the Court found their state law class action claims predominated over any individual FLSA claim. Further, the Court stated that even if a showing of good cause under Rule 16 were not required, leave was still inappropriate under Rule 15(a).
where there was undue delay, bad faith, dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of the amendment. The Court observed that many of these factors were present here. Moreover, the Court noted that Plaintiffs amended their complaint twice without adding an FLSA collective action, in spite of the notice of Defendant’s intent to challenge supplemental jurisdiction over their alleged state law class claims. Accordingly, the Court denied Plaintiffs’ motion for leave to amend.

Travel Time Issues In Wage & Hour Class Actions

Griffin, et al. v. S&B Engineers & Constructors, Ltd., 2013 U.S. App. LEXIS 785 (5th Cir. Jan. 11, 2013). Plaintiff, a former journeyman electrician, brought a collective action alleging that Defendant’s mandatory busing scheme violated the FLSA because laborers were not compensated for their travel time while busing from and to the worksite. Defendant provided construction services at the Motiva Plant in Texas, and required laborers to participate in a mandatory park and ride scheme, which required all laborers to use buses from the National Parking Lot (located approximately six to seven miles away from the Motiva Plant) to the worksite. Defendant did not provide laborers with any job-related instructions prior to or during the bus rides or compensate them for the travel time to and from the Motiva Plant. The District Court granted Defendant’s motion for summary judgment, ruling that the travel time was not compensable under the FLSA. Id. at *5. The District Court also noted that the Transportation Rules of Conduct were reasonably related to the logistics of commuting, which was not a principal activity. Id. at *6. Further, the District Court observed that merely traveling or commuting did not confer a benefit on the employer because it did not relate to the duties the employee was hired to perform. Id. at *5. On appeal, the Fifth Circuit affirmed the order of the District Court. Id. at *17-18. Although whether a mandatory transportation scheme per se rendered such travel time compensable under the FLSA was a question of first impression for the Fifth Circuit, it noted that other circuits had disfavored fashioning a per se rule. Id. at *13. The Fifth Circuit reasoned that Defendant’s mandatory busing scheme was simply normal traveling time that laborers also would be required to undertake by the mere fact of working at the Motiva Plant. Id. at *14. Further, the Fifth Circuit found that the travel time was not compensable under the FLSA, as it constituted ordinary home-to-work-and-back travel. Id. at *14. Plaintiff conceded that he neither performed any work prior to beginning his shift at the Motiva Plant, nor received any work-related instructions prior to or during the bus rides. Id. at *15. Plaintiff also acknowledged that he retrieved his tools after daily safety meetings, which were held at the Motiva Plant and that returned his tools ten minutes prior to the end of his shift. Plaintiff admitted that he was not restricted from engaging in personal activities such as sleeping and reading during the rides. Based on these facts, the Fifth Circuit opined that Plaintiff’s travel time was not compensable. Id. at *17-18. Furthermore, the Fifth Circuit observed that the park-and-ride scheme was simply logistical, administrative, and marginally restrictive, as opposed to integral and indispensable to Plaintiff’s activities as a journeyman electrician. Id. at *16. Finally, the Fifth Circuit noted the interpretative statements of the Wage and Hour Division of the Department of Labor, which stated that busing to a place of employment was an exempt activity from the FLSA pursuant to the Portal to Portal Act. Id. at *17. Accordingly, the Fifth Circuit affirmed the grant of summary judgment to Defendant. Id. at 17-18.

Foreign Worker Issues In Wage & Hour Class Actions

Lamonica, et al. v. Safe Hurricane Shutters, Inc., 2013 U.S. App. LEXIS 4599 (11th Cir. Mar. 6, 2013). Plaintiffs, a group of former employees, brought action seeking unpaid overtime wages under the FLSA. At trial, a jury found in favor of Plaintiffs against Defendant, and awarded damages of $20,849.38 to Plaintiff Mario Feliciano and $1,312.50 to Plaintiff Augustin Milan. Subsequently, the District Court determined that both Plaintiffs were entitled to liquidated damages equal to their actual damages, and entered final judgment in favor of Feliciano for $41,698.76 and in favor of Milan for $2,625.00. Id. at *2-3. Defendant filed a motion to alter or amend the judgment under Rule 59(e), as well as a renewed motion for judgment as a matter of law and an alternative motion for new trial order under Rule 50(b). The District Court denied both the motions, and the Defendant appealed. Id. at *3. Defendant argued that the District Court should have granted the motion for judgment as a matter of law based on the doctrine of in pari delicto, which bars...
a Plaintiff from recovering if they personally contribute to the damages. *Id.* at *4. Defendant argued that both Feliciano and Milan contributed to the damages by failing to accurately report income to the IRS. Defendant also argued that Milan contributed to the damage because he was not authorized to work in the United States, and used a false Social Security number to secure employment. As a result, Defendant contended that Feliciano and Milan should be barred from recovering under the FLSA. The Eleventh Circuit remarked in *Patel v. Quality Inn S.*, 846 F.2d 700, 706 (11th Cir. 1988), that undocumented aliens may recover unpaid wages under the FLSA. Defendants nevertheless argued that the Supreme Court had effectively overruled *Quality Inn in Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002), finding that NLRB cannot award back pay to undocumented aliens who are terminated for union activity in violation of the National Labor Relations Act. The Eleventh Circuit, however, noted that in *Hoffman*, the Supreme Court did not disturb the prior holding in *Quality Inn*, but merely limited the remedies available to undocumented aliens. *Id.* at *7. Accordingly, the Eleventh Circuit found that undocumented aliens could recover under the FLSA. *Id.* In addition, the Eleventh Circuit observed that in *Hoffman*, the Supreme Court concluded that awarding back pay to undocumented aliens is inconsistent with the Immigration Reform Control Act, which was designed to combat the employment of illegal aliens. *Id.* at *8. In contrast, the Eleventh Circuit remarked that in *Quality Inn*, Defendant did not attempt to recover back pay for being deprived of a job, but rather to recover for work already performed. *Id.* at *9. The Eleventh Circuit determined that in this circumstance, the violation had already occurred and awarding damages does not condone the conduct, but rather ensures that the employer does not benefit from the undocumented workers’ labor. *Id.* For these reasons, the Eleventh Circuit concluded that *Hoffman* was not clearly on point and that it was bound by *Quality Inn*. Consequently, Milan’s ability to recover unpaid wages under the FLSA did not depend on his immigration status. *Id.* at *10. Defendants also argued that the *in pari delicto* doctrine still barred recovery because Plaintiffs applied to work for Defendant using a false Social Security number, and failed to accurately report their income to the IRS. The Eleventh Circuit noted that the *in pari delicto* defense may be applied to bar recovery under a federal statute only where: (i) Plaintiff bears at least substantially equal responsibility for the violations he seeks to redress; and (ii) preclusion of the suit would not substantially interfere with the statute’s policy goals. *Id.* The Eleventh Circuit found that Defendant could not satisfy this test because neither Plaintiff participated in Defendant’s decision to withhold overtime wages in violation of the FLSA. *Id.* at *12. Accordingly, the Eleventh Circuit ruled that the District Court was correct to deny the motion for judgment as a matter of law based on the *in pari delicto* doctrine. *Id.*

*Lucas, et al. v. Jerusalem Cafe, LLC, 2013 U.S. App. LEXIS 15320 (8th Cir. July 29, 2013).* Plaintiffs, a group of workers without employment authorization, brought a collective action alleging that their employers failed to pay them minimum and overtime wages in violation of the FLSA. Defendants argued that Plaintiffs volunteered to work at their restaurants. After a jury decided in favor of Plaintiffs, the District Court awarded minimum and overtime wages, statutory liquidated damages, and legal fees to Plaintiffs. Defendants filed motion for judgment as a matter of law or a new trial, arguing that Plaintiffs, as undocumented aliens, were prohibited by law from receiving any wages and lacked standing to sue for back pay under the FLSA. The District Court denied Defendants’ motion. Defendants appealed and the Eighth Circuit affirmed. Defendants argued that the FLSA did not apply to employers who illegally hired unauthorized aliens. The Eighth Circuit first looked at the plain text of the FLSA. Section 206(a) provides that every employer shall pay to each of his employee wages at the minimum wage rate. The Eighth Circuit then analyzed the various definitions in 29 U.S.C. § 203(d), (e)(1), and (g). The term “employee” includes any person acting directly or indirectly in the interest of an employer. *Id.* at *12. The term “employee” means any individual employed by an employer. “Employ” includes to suffer or permit to work. *Id.* The Eighth Circuit opined that the FLSA’s sweeping definitions of employer and employee unambiguously encompassed unauthorized aliens. *Id.* The Eighth Circuit pointed out that had Congress intended to limit this broad definition with respect to unauthorized aliens it would have done so expressly. The Eighth Circuit, therefore, determined that the FLSA by its plain terms protected aliens working without authorization. Defendants also argued that the Immigration Reform and Control Act of 1986 (“IRCA”) implicitly amended the FLSA to exclude unauthorized aliens. The Eighth Circuit gave deference to the Department of Labor’s consistent and long-standing position that the FLSA applied to aliens without
employment authorization. The Eighth Circuit noted the Secretary’s explanation that applying the FLSA to unauthorized aliens was essential to achieving the purposes of the FLSA to protect workers from substandard working conditions, to reduce unfair competition for law-abiding employers, and avoid unemployment by requiring employers to pay overtime compensation. Id. at *18. With respect to standing, the Eighth Circuit opined that Plaintiffs had Article III standing to sue because Defendants violated the FLSA by paying Plaintiffs sub-standard wages, which meant Plaintiffs’ suit to recover damages was a justiciable case or controversy. Regardless of any waiver, Plaintiffs had prudential standing because Plaintiffs were employees under § 203(e), who plainly fell within the zone of interests protected or regulated by § 216(b). Finally, the Eighth Circuit rejected Defendants’ challenge to the District Court’s decision to suppress evidence related to Plaintiffs’ immigration status. The Eighth Circuit gave due deference to the District Court’s evidentiary ruling. Because Plaintiffs were seeking redress only for work actually performed, the District Court reasonably concluded any reference to their immigration status would be substantially more prejudicial than probative under Rule 403 of the Federal Rules of Evidence. Id. at *28. Accordingly, the Eighth Circuit affirmed the order of the District Court.

Moore, et al. v. Appliance Direct Inc., 2013 U.S. App. LEXIS 3047 (11th Cir. Feb. 13, 2013). A group of delivery truck drivers sued Defendant alleging that it violated the anti-retaliation provision of the FLSA. Plaintiffs had earlier brought a collective action alleging that Defendant and its CEO violated the overtime provisions of the FLSA. During the pendency of the overtime action, Defendants began changing the employment status of its delivery drivers from employees to independent contractors. While other drivers formerly employed by Defendants received offers to become independent contractors, Plaintiffs did not receive the offers and their employment was terminated as their jobs were outsourced. Plaintiffs then brought their retaliation action. The overtime action eventually was settled. Defendants then filed for bankruptcy, and the retaliation case proceeded to a jury trial against only the CEO. At the end of trial, the jury awarded Plaintiffs economic damages in the amount of $30,000 each, after which Plaintiffs filed a post-trial motion for liquidated damages. Id. at *5. Plaintiffs contended that § 216(b) of the FLSA provided for a mandatory award of liquidated damages against an employer who violated the anti-retaliation provision of the FLSA unless the employer demonstrates that he was acting in good faith and had reasonable grounds for believing that his actions were not in violation of the FLSA. Id. at *11. The District Court rejected Plaintiffs’ argument, concluding that the plain language of the FLSA states that an award of liquidated damages in a retaliation case is discretionary, rather than mandatory. The District Court concluded that the economic damages awarded by the jury appropriately effectuated the purposes of the anti-retaliation provision, and thus no award of liquidated damages was necessary. Id. at *17. The District Court also denied the CEO’s motions filed for judgment as a matter of law and for remittitur or a new trial based on his claim that he was not an employer under the FLSA and that Plaintiffs did not sufficiently prove their damages. Id. at *4. The parties filed cross-appeals on the District Court’s verdict. The Eleventh Circuit affirmed the District Court’s rulings. The Eleventh Circuit explained that although the first sentence of § 216(b) presumes that liquidated damages would be awarded for minimum wage and overtime violations, the second sentence made liquidated damages for retaliation claims discretionary with the District Court. In particular, the second sentence states that an employer who engages in unlawful retaliation shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of the FLSA’s anti-retaliation provision, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. Id. at *18. Joining the Sixth and Eighth Circuits, the Eleventh Circuit concluded the second sentence created a separate, discretionary standard of damages for FLSA retaliation claims, and indicated that whatever is awarded must be appropriate to effectuate the purposes of the retaliation provision, which is within the discretion of the District Court. Id. at *23. The Eleventh Circuit also affirmed the District Court’s finding that the CEO was an employer under the FLSA as the evidence showed that as the 75% owner of Defendant, he had guided company policy and had given instructions to managers regarding job duties. Id. at *6-7. The evidence also showed that the CEO was the ultimate decision-maker, that he negotiated leases and vendor contracts, and directed that Plaintiffs not be given sub-contracts for delivery services. Id. The Eleventh Circuit therefore held that the District Court properly denied the CEO’s motions for judgment as a matter of law. The Eleventh Circuit
further held that the District Court did not abuse its discretion in denying the CEO’s multiple motions on the basis that Plaintiffs had failed to prove their damages at trial. The Eleventh Circuit concluded that the damages awarded to Plaintiffs were supported by the evidence and were similar to those awarded to employees who have gone through a reduction-in-force and were discriminated against during the rehiring process. *Id.* at *8. Accordingly, the Eleventh Circuit affirmed the District Court’s denial of requests for a reduction of the award, a new trial, and an award of liquidated damages.

(a) **Counterclaims In FLSA Collective Actions**

*Herron, et al. v. MortgageNow, Inc.*, 2013 U.S. Dist. LEXIS 32012 (E.D. Pa. Mar. 7, 2013). Plaintiffs filed a collective action against Defendants MortgageNow and its CEO and majority shareholder James Marchese alleging violations of the Fair Labor Standards Act, the Pennsylvania Minimum Wage Act of 1968, and the Pennsylvania Wage Payment and Collection Law. Defendant Marchese, acting *pro se*, brought a number of counterclaims against Plaintiffs and sought to join eight additional parties as Defendants to his claims. Plaintiffs and the putative additional Defendants moved to dismiss Marchese’s counterclaims, arguing that they were barred by *res judicata* based on a ruling in a previous case in New Jersey state court. The Court agreed with Plaintiffs and the putative additional Defendants and granted the motion to dismiss. In the prior New Jersey state court case, Marchese had brought claims based on MortgageNow’s rights. The New Jersey state court, however, held that those rights belonged to MortgageNow and had not been validly assigned to Marchese. Following the New Jersey state court decision, the Court held that all of Marchese’s counterclaims must be dismissed, either because he failed to state a claim, or because his claims were based on the rights of MortgageNow, and those rights were never validly assigned to him. Marchese alleged that Plaintiffs threatened him with instituting a legal action for an improper purpose, which resulted in either publicity placing him in a false light or malicious prosecution. An essential element of these claims is “publicity.” *Id.* at *8. When the only “publicity” is institution of a civil matter, a claim can only be made under both New Jersey and Pennsylvania law when the “allegedly unlawful” civil proceedings have “terminated in favor of the person against whom they are brought.” *Id.* Accordingly, the Court ruled that Marchese failed to state a claim. The Court also held that Marchese’s claims were invalid against the other putative Defendants who were not already Plaintiffs in the case. They were not “opposing parties” under Rule 13, so they were not viable Plaintiffs. The Court further determined that Marchese lacked standing for the remainder of his claims, because he failed to allege that he suffered any damages directly (but rather, alleged that MortgageNow had suffered damages), and also failed to show that the rights he attempted to vindicate belonged to him, as opposed to MortgageNow. *Id.* at *10. The Court held that he could not re-litigate whether MortgageNow had validly assigned rights to him, because that argument had already been made and determined in the New Jersey state court action, and collateral estoppel precluded re-litigation of those claims. *Id.* at *17. Accordingly, the Court granted the Plaintiffs’ motion to dismiss Marchese’s counterclaims and held that the claims could not be brought against the additional putative Defendants either.

(b) **All Writs Act Issues In Wage & Hour Class Actions**

*Norris-Wilson, et al. v. Delta-T Group San Diego, Inc.*, 2013 U.S. Dist. LEXIS 35016 (S.D. Cal. Mar. 8, 2013). Plaintiffs, a group of healthcare professionals, alleged that Defendants, a group of referral agencies, improperly classified them as independent contractors and wrongfully denied them overtime pay, meal and rest breaks, itemized wage statements, and reimbursement of business-related expenses under the California Labor Code and the California Business and Professions Code. The Court had previously entered an order granting final approval of the parties’ class action settlement. *Id.* at *2*. The settlement agreement negotiated by the parties expressly provided that it was contingent on securing an order barring all class members from filing wage & hour claims against Defendants on a nationwide basis. Subsequently, Defendants moved for an order barring class members from bringing subsequent lawsuits arising from the alleged facts that gave rise to the action that was settled per the All Writs Act, 28 U.S.C. § 2293. The Court granted Defendants’ motion and entered an order holding that all settlement class members who did not request exclusion from the class were enjoined and restrained from commencing any action or proceeding
against Defendants or any related parties or affiliates relating to any of the claims that were settled. *Id.* at *2-3.*
VI. Significant Class Action Rulings Under The Employee Retirement Income Security Act Of 1974

Class action settlements and decisions in 2013 under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq. (“ERISA”), significantly impacted the direction of ERISA litigation. Among the more closely watched ERISA class actions, courts confronted class certification issues in cases involving challenges to continued employer stock investments in 401(k) defined contribution pension plans and employee stock ownership plans (“ESOP’s”). Courts also have continued to split on whether Plaintiffs who have received lump sum distributions have standing to sue under ERISA, whether cash balance plans are inherently age-discriminatory, and whether employers may modify retiree health benefits. Plaintiffs also have filed repeated class actions challenging the reasonableness of investment management and other fees against some of the nation’s largest 401(k) retirement savings plans.

A. Cases Certifying Or Refusing To Certify ERISA Class Actions

(i) First Circuit

No reported decisions.

(ii) Second Circuit

*Bauer-Ramazani, et al. v. Teachers Insurance & Annuity Association Of America-College Retirement & Equities Fund, 290 F.R.D. 452 (D. Vt. 2013).* Plaintiffs in this ERISA class action alleged that Defendants breached their fiduciary duties and engaged in prohibited transactions by investing customer funds for purposes other than the customers’ benefit after a transfer or redemption request and subsequently compensating some, but not all, customers for delayed payment. Plaintiffs sought disgorgement of the investment gains generated by their funds after Plaintiffs had requested them back, or payment of other compensation for the use of their funds. Plaintiffs sought certification of a class comprised of all persons who requested a transfer or distribution of mutual fund or money market accounts covered by the ERISA and whose accounts Defendants invested, kept invested, benefitted from, or otherwise used for purposes other than the benefit of the account holder for a period of time other than that permitted by the fund prospectus, *i.e.*, seven days. The Court granted in part and denied in part Plaintiffs’ motion. As to the Rule 23(a) prerequisites, numerosity was not challenged. As to commonality, the Court found that Plaintiffs challenged the application of a system-wide policy of retaining gains in plan members’ accounts when the accounts were not transferred within the required seven-day period and sought the same relief under all claims. The Court determined that whether this policy was lawful was central to the validity of each member’s claim. With respect to typicality, despite the variation in fact patterns presented by the claims of the named Plaintiffs, they alleged that a greater than seven-day delay affected them. The Court concluded that Plaintiffs’ allegations was the practice that affected the proposed class. Finally, the Court concluded that Plaintiffs were adequate representatives because they sought one type of relief, and thus the general interests of the proposed class were in accord. The Court also opined that Plaintiffs’ counsel were adequate representatives for the class. Turning to Rule 23(b)(3)’s predominance requirement, the Court opined that the two issues raised by Plaintiffs – (i) whether Defendants must disgorge investment gains earned on customer funds held for a period other than the prospectus allowed; and (ii) whether, having paid such gains to non-ERISA customers, it must do so for ERISA customers as well – were predominant because they were subject to class-wide proof and resolution. That Defendants had individualized defenses to the claims of certain class members was of no moment for the Court because Plaintiffs had alleged that they were aggrieved by a single policy of Defendants. As to superiority, the Court found that there was no evidence that any putative class member would prefer to pursue a separate lawsuit. However, the Court rejected Plaintiffs’ proposed class definition, finding it too broad and imprecise, and instead defined the class as all persons, who at the any time during the class period requested a transfer or distribution of TIAA-CREF mutual fund or money market accounts covered by the ERISA whose accounts were not transferred or distributed within seven days of the date the account was valued and were denied the investment gains.
Haddock, et al. v. Nationwide Financial Services, Inc., 2013 U.S. Dist. LEXIS 127116 (D. Conn. Sept. 6, 2013). Plaintiffs, a putative class of pension plan trustees, brought a class action under § 502(a)(3) of the ERISA alleging that Nationwide, an investment and plan administrative services provider, breached its alleged fiduciary duties by collecting revenue sharing payments from the mutual funds that Nationwide selected and offered to Plaintiffs’ plans. Plaintiffs sought as relief a declaratory judgment that Nationwide’s revenue sharing violated the ERISA, an injunction barring Nationwide from receiving revenue sharing payments, and disgorgement of the revenue sharing payments received by Nationwide. The District Court originally granted Plaintiffs’ motion for class certification, finding Plaintiffs’ claims concerned a process that was relatively uniform across the proposed class, and therefore class treatment would be appropriate. In light of the Supreme Court’s decision in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), the Second Circuit vacated the grant of class certification and remanded with instructions to apply the more rigorous standard established in Wal-Mart. On remand, the District Court found that Wal-Mart did not disturb its earlier determination. The District Court found that the two issues regarding liability – (i) whether Nationwide was a fiduciary, and (ii) whether it breached its obligations to the plans as a fiduciary – could be resolved on a class-wide basis. The District Court concluded that because Plaintiffs’ theories were premised on the structural nature of Nationwide’s contractual relationship with the mutual funds, which was identical across the class, class-wide adjudication of the claims for equitable relief was appropriate under Rule 23(b)(3). The District Court concluded that, alternatively, a claim for injunctive relief previously certified under Rule 23(b)(2), remained viable, so long as any claims for plan-specific relief were determined in separate proceedings. Furthermore, with regard to Plaintiffs’ claim for disgorgement, the District Court established that a reasonable fact-finder could conclude that the entire value of the revenue sharing payment was “profit” eligible to be disgorged. The District Court went on to find that calculating the amount of disgorged profits attributable to individual plans would not be difficult, and concluded that Plaintiffs satisfied the predominance requirement of Rule 23(b)(3), and held that manageability posed no impediment to certification.

Third Circuit

Cottillion, et al. v. United Refining Co., 2013 U.S. Dist. LEXIS 158077 (W.D. Pa. Nov. 5, 2013). Plaintiffs, former employees of United Refining Co. (“Defendant”) and vested participants in the United Refining Pension Plan for Salaried Employees (the “Plan”), sought certification of a class with respect to their claim alleging that Defendant violated the ERISA’s anti-cut-back provision. Before 2005, the Plan Administrator had interpreted the relevant Plan documents as providing unreduced early retirement benefits for terminated vested participants, such as the named Plaintiffs. However, in 2005, the Plan Administrator began issuing letters to terminated vested participants informing them that previous benefit calculations had been incorrect and that their monthly pension amounts should have been actuarially reduced. The Plan Administrator petitioned the IRS to allow the Plan to recoup the overpayments resulting from the change in Plan interpretation. Plaintiffs filed suit, seeking to certify a class of vested former employees who alleged that they had accrued a right to unreduced early retirement benefits. The Court granted Plaintiffs’ motion for certification, finding Plaintiffs satisfied all requirements under Rule 23. Because the proposed class included nearly 200 members, the Court found that the numerosity requirement satisfied. The Court also found that Plaintiffs met the commonality and typicality elements. In reaching this conclusion, the Court rejected Defendant’s argument that commonality and typicality were not present as the putative class consisted of persons whose claims arose under various iterations of the Plan, and as not all putative Plaintiffs had exhausted their administrative remedies prior to bringing suit. The Court reasoned that the source of the alleged harm was the same across the class (the change in plan interpretation) and Defendant’s actions to recoup benefits applied to each putative class member in the same fashion. The Court further noted that each class member was uniformly told that they would receive unreduced early retirement benefits upon reaching their early retirement date if they elected to enter into pay status at that time. The Court rejected the exhaustion defense by noting that exhaustion of administrative remedies would be futile. The Court went on to find that the named Plaintiffs were adequate class representatives because they shared an identical interest with the proposed class members. As to Rule 23(b), the Court found class certification appropriate because inconsistent adjudications with respect to different class members could establish incompatible standards of conduct for the Plan, and if relief were
granted to some terminated vested participants, but not others, the Plan would be faced with the impossible task of distributing benefits to similarly-situated participants under two conflicting standards. Accordingly, the Court granted Plaintiffs’ motion for class certification.

**Feeko, et al. v. Pfizer, Inc., 2013 U.S. Dist. LEXIS 28492 (E.D. Pa. Feb. 28, 2013).** In this putative class action under the ERISA, the Court denied Plaintiffs’ motion for class certification, finding that Plaintiffs had not met Rule 23(a)’s numerosity requirement. Plaintiffs, a group of former employees, alleged that the administrative committee for Defendant’s severance plan had abused its discretion by denying their claims for severance benefits and by failing to construe the terms of the plan in good faith. The severance plan was established to provide employees with benefits in the event that employment was terminated within 24 months of a change in control of the company. After Plaintiffs’ employer was acquired by Defendant, Plaintiffs were transferred to Defendant’s payroll and participated in Defendant’s benefit programs, but they worked at another corporation that was a separate legal entity from Defendant. Thereafter, they were informed by Defendant that they were no longer employed by Defendant, but by the separate corporation where they were working. Defendant stated that they would not be eligible for severance plan benefits because they were transferred and not terminated. Plaintiffs proposed a class consisting of participants in the severance plan, who, as employees of Defendant, provided services to the separate corporation, experienced an involuntary termination of employment by the company on March 31, 2010, after which they were hired by the separate corporation and not provided with severance benefits. The Court denied Plaintiffs’ motion for class certification, because since the alleged termination, only the three named Plaintiffs had filed administrative claims for severance benefits and the complaint was filed more than one year after the deadline for a timely claim. Plaintiffs conceded that none of the unnamed Plaintiffs timely filed for benefits or filed late. The Court concluded that the unnamed class members who failed to initiate administrative claims did not have cognizable claims. As a result, there were insufficient, if any, class members with viable claims. *Id.* at *18. The Court therefore denied Plaintiffs’ motion for lack of numerosity. *Id.* at *19.

**Franco, et al. v. Connecticut General Life Insurance Co., 289 F.R.D. 121 (D.N.J. 2013).** Plaintiffs, a group of participants or beneficiaries of employer-sponsored health benefit plans administered by Defendant Cigna (“Cigna Plans”), brought a class action seeking to recover allegedly unpaid benefits under § 502(a)(1)(B) of the ERISA. The Cigna Plans set the allowed amount for out-of-network (“ONET”) claims at the usual, customary, and reasonable (“UCR”) amount for the service. The claims here revolved around the alleged denial of ONET benefits as a result of Cigna’s use of an allegedly flawed database, operated by Ingenix, to determine the UCR. Plaintiffs alleged that Cigna violated the ERISA when it made benefit determinations based on flawed ONET data. Plaintiffs sought to certify a class consisting of anyone in the Cigna Plan who had received medical services. The Court denied Plaintiffs’ motion for class certification. The Court found that for Rule 23(a), commonality was based upon the observation that the class claims were held together by alleged errors in the Ingenix database. As to typicality, Plaintiffs contended that each of the class members’ claims arose from Cigna’s alleged improper ONET benefits determinations based on the alleged flawed Ingenix data. The Court found that the legal issues governing the named Plaintiffs’ claims would also govern those of the absent class members and concluded that typicality was satisfied. However, in its predominance analysis under Rule 23(b)(3), the Court observed that Cigna Plans’ records did not show that Cigna either formally adopted a standard definition of the UCR or used the same or substantially similar language across its plans. The Court therefore concluded that Plaintiffs did not demonstrate that uniform criteria were used across-the-board and predominance was not satisfied. *Id.* at 137. The Court also criticized the Plaintiffs’ proposed trial plan, which asserted that the damages could be determined on an aggregate basis, based on the computerized records of Cigna, since Plaintiffs had not demonstrated how Cigna could simply reprocess benefits not using flawed Ingenix data. The Court found that Plaintiffs did not present a workable framework that would permit the Court to adjudicate a class-wide monetary award. *Id.* at 140. Finally, the Court found that the proposed class definition was overbroad because the ERISA class as defined went beyond the parameters of the action. It would capture all instances in which the allowed amount was less than the billed change, regardless of whether the processing of the ONET claim involved Ingenix or some other derived UCR standard.
Lipstein, et al. v. UnitedHealth Group, 2013 U.S. Dist. LEXIS 138045 (D.N.J. Sept. 26, 2013). In this putative ERISA class action, Plaintiffs, a group of plan participants, alleged that Defendants, as claim administrators for thousands of health insurance plans, including one in which Plaintiffs were participants, failed to follow the clear language of the plans when applying coordination of coverage rules relating to secondary insurance coverage. More specifically, Plaintiffs claimed that Defendants used an improper methodology to estimate the amount Medicare would have paid for services to insureds, thus resulting in an under-payment of secondary benefits. Plaintiffs moved for class certification, which Defendants opposed. Defendants also moved for summary judgment. In support of class certification, Plaintiffs argued that the common issue was whether the estimation method used in determining secondary benefits was ERISA compliant. In opposition, Defendants argued that the Court would have to analyze each plan and the varying estimation policies set forth therein to determine whether the methods were in fact ERISA compliant. Doing so, Defendants argued, would require individualized inquiries, which would defeat Rule 23(a)’s commonality requirement. The Court agreed with Defendants. It held that deciding whether Defendants’ decision would enjoy discretion under each plan was a threshold issue that would necessarily involve an individualized analysis of thousands of plans. In addition, the Court held that the fact that the plans differed in material ways concerning the estimation policy was itself sufficient to preclude a finding of commonality. The Court went on to find that even if Plaintiffs had succeeded in establishing commonality, class certification nonetheless would be inappropriate because Plaintiffs failed to satisfy the requirements of Rule 23(b)(2) or (b)(3). Citing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), the Court found that Plaintiff’s request for declaratory or injunctive relief was not appropriate on a class-wide basis because the varying provision of each individual plan, which could yield different results on the legality of the estimation policy. As such, the Court found that a single injunction or declaratory judgment would not provide relief to each putative class member, which thus precluded class treatment under Rule 23(b)(2). The Court used the same rationale to find a lack of predominance under Rule 23(b)(3). Finally, the Court found that the Defendants were entitled to summary judgment on the named Plaintiffs’ claims because Defendants’ interpretation of the language of the Plan in which the named Plaintiff participated was neither arbitrary nor capricious.

(iv) Fourth Circuit

Knight, et al. v. Lavine, 2013 U.S. Dist. LEXIS 14855 (E.D. Va. Feb. 4, 2013). In this putative ERISA class action, Plaintiff, a participant in a stock purchase plan, alleged that Defendants, directors of the employer, violated their fiduciary duties under the ERISA by allowing participants to sell shares of the employer’s stock back to it for less than the stock’s alleged true value. Plaintiff contended that the true value of the stock could be determined by looking to the price the company was sold for when it was acquired by another entity. Plaintiffs moved for class certification on behalf of a class consisting of all participants who sold shares from their accounts between the time that the company set the allegedly artificially low share price and the time it was acquired for a much higher share price. The Court granted this motion. First, the Court found that the numerosity requirement was satisfied because the proposed class comprised 56 individuals. Second, the Court found commonality as whether or not a breach indeed occurred was a question fit for class-wide resolution. Third, the named Plaintiff’s claims were typical of the class because they all claimed harm to the plan in the form of stock buy-backs at an allegedly low price. Fourth, the Court stated that it did not find that individual differences in whether and how the class members relied on representations by Defendants made this case inappropriate for class treatment. The Court further noted that certification was proper under Rule 23(b)(1), as absent class treatment there was a substantial risk of conflicting rulings.

(v) Fifth Circuit

Eddingston, et al. v. UBS Financial Services, Inc., 2013 U.S. Dist. LEXIS 128318 (E.D. Tex. June 12, 2013). In a class action alleging that Defendant UBS Financial Services, Inc. (“UBS”) enforced vesting requirements under its PartnerPlus Plan (the “Plan”) in violation of the ERISA, the Court granted Plaintiffs’ motion for the certification of two nationwide classes of former UBS financial advisors and branch managers. Defendant argued that Plaintiffs had waived their right to bring class claims due to an
arbitration provision in its Financial Advisor Compensation Plan (“Compensation Plan”). The Court found this waiver ineffective because the Compensation Plan also contained a clause stating that the terms of the Plan document would control in the event of ambiguity. Therefore, the Plan document’s arbitration provision controlled, which included no waiver of class claims and incorporated FINRA rules accommodating class actions. Reaching the merits of the class certification motions, the Court focused on the contested Rule 23(a) prerequisites of typicality and adequacy. As to typicality, the Court noted that all claims centered on the Plan, which purported to affect all class members. Further, each class member’s claim was based on the same legal and remedial theory, i.e., that the Plan was subject to and in violation of the vesting and anti-forfeiture provisions of § 1053 of the ERISA. With regard to adequacy, the Court concluded that the named Plaintiffs were ready and able to perform their duties as class representatives and that Plaintiffs’ attorneys possessed the necessary zeal and competence to represent the class. Finally, the Court rejected Defendants’ arguments that minor chronological differences between class members’ claims, the signing of general releases of questionable validity by some Plaintiffs, and the receipt of in-service payments by the class representatives undermined these prerequisites. Turning to the basis for class certification, the Court concluded that both Rule 23(b)(1)(A) and Rule 23(b)(2) were satisfied. First, the Court stated that the critical factor in determining the propriety of a Rule 23(b)(2) class was the indivisible nature of the injunctive or declaratory remedy desired. In this case, the ERISA either applied to the Plan as to all Plaintiffs or it did not; in essence, the determination was not an individual one. Further, Plaintiffs’ claim for monetary relief did not prevent Rule 23(b)(2) certification because it was incidental to the declaratory or injunctive relief and could be determined by simple accounting. Second, the Court observed that Rule 23(b)(1)(A) allows a party to maintain a class action if prosecuting separate actions by individual class members would create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for the opposing party. In this case, the ERISA either applied to the Plan or it did not; thus, it might result in inconsistent or varying adjudications if individual actions were filed. Therefore, the Court found class certification proper under either Rule 23(b)(1)(A) or Rule 23(b)(2).

Leal, et al. v. Paramount Restaurants Group, Inc., 2013 U.S. Dist. LEXIS 46521 (N.D. Tex. Mar. 29, 2013). In this putative ERISA class action, Plaintiffs alleged that through a series of fraudulent misrepresentations, Defendants induced Plaintiffs to roll over their retirement savings accounts (held in employee profit sharing, retirement, and pension plans) into a series of employee stock ownership plans which only held employer stock. Plaintiffs alleged that after the rollovers, Defendants engaged in a course of self-dealing, breaches of fiduciary duty, and prohibited transactions, as a result of which all of the stock in the ESOPs lost most, if not all, of its value. Plaintiffs moved for class certification. The proposed class consisted of “all persons other than individual Defendants who owned PRG stock on May 14, 2000” and “all persons who were participants or beneficiaries at any time from May 14, 2000, to the present, who authorized the rollover of their retirement fund into the PRG ESOP.” Id. at *7. The Court restricted its analysis to numerosity. It found that the class as defined was not too numerous for joinder. There were 18 class members who were named in the suit, and 15 possible additional class members. Plaintiffs offered no argument that the putative class members were geographically dispersed, that contact with them could not be made, or that their current addresses could not be determined. The Court rejected class certification due to a lack of numerosity. The Court reasoned that certifying a class would deprive unnamed class members of their right to control the course of litigation. Id. at *13. For this reason, the Court denied the motion for class certification.

(vi) Sixth Circuit

Durand, et al. v. The Hanover Insurance Group, Inc., 2013 U.S. Dist. LEXIS 142490 (E.D. Ky. Oct. 2, 2013). Plaintiffs, a group of former employees of Defendant Hanover and participants in Defendant Allamerica Financial Cash Balance Pension Plan (collectively, “Defendants”), alleged that Defendants underpaid their accrued retirement benefits by using an unlawful methodology to calculate pre-retirement lump sum distributions. Defendants’ cash balance pension plan (the “Plan”) created a hypothetical account for each participant who earned pay credits based on years of employment, and interest credits based on plan terms. In 2004 the Plan was amended. Before the 2004 change, the interest crediting rate was equal to the rate of return generated from the investment allocation selected by each participant from among a
401(k)-style menu. In the January 1, 2004 amendment, the plan discontinued this investment experience crediting, in favor, using the 30-year Treasury rate as set forth in § 417(e) of the Internal Revenue Code. Plaintiffs filed suit alleging that this amendment impermissibly reduced the interest crediting rate because the projected rate of return under the Plan’s 401(k)-style menu was greater than the 30-year Treasury rate. Plaintiffs sought certification of a class and two sub-classes (sub-class A and sub-class B) of plan participants who received early lump sum distributions between 1997 and 2006. At the same time, Defendants sought to oppose certification of either the overall class or sub-class B. Defendants did seek partial summary judgment challenging the claims of sub-class A, which consisted of participants who received lump sum distributions after the Plan had been amended in 2004. Defendants argued that summary judgment was appropriate as to this sub-class, because the 2004 Amendment fell within a recognized legal safe harbor. The Court agreed with Defendants, finding that “under IRS Notice 96-8, an ERISA plan may avoid whipsaw forfeiture in lump sum distributions if the plan uses an interest crediting rate that is no greater than the approved rates, e.g., 30-year Treasury rate.” Id. at *11. The Court went on to hold that as the amendment applied the 30-year treasury rate, the amendment did not violate the ERISA. The Court granted Defendants’ motion for summary judgment as to sub-class A, and granted Plaintiffs’ motion for certification of the overall class and sub-class B.

Pfeil, et al. v. State Street Bank & Trust Co., Case No. 09-CV-12229 (E.D. Mich. Jan. 4, 2013). In this putative ERISA stock drop class action, Plaintiff alleged that Defendant, an independent fiduciary, breached its fiduciary duty by retaining a company stock fund as an investment choice in two company 401(k) plans (the “Plans”) after the company’s stock had allegedly become an imprudent investment. The Court granted Plaintiff’s motion for certification of a class consisting of all persons who were participants in or beneficiaries of the Plans at any time during the defined class period, whose accounts included investments in the company stock fund and who suffered a loss. Regarding the Rule 23(a) prerequisites, the Court found that because the Plans had almost 600,000 participants, the class was so numerous that joinder of members was impracticable. Further, the Court determined that the issues at hand — including: (i) whether Defendant was a fiduciary within the meaning of the ERISA; (ii) whether Defendant breached its fiduciary duties to the Plans; and (iii) whether Defendant violated the ERISA — were central to the case and common to all class members’ claims. Id. at 11. The Court also held that all the claims of the class representatives arose from the same events, course of conduct, and legal theories as the claims of the class. The Court concluded that the class representatives were also adequate representatives as they were informed about the progress of the litigation and had retained experienced counsel to represent them. As to Rule 23(b), the Court opined that common issues predominated in the case as the key factual questions turned on Defendant’s conduct in retaining the company stock fund, and thus, a class action was superior to other available methods for the fair and efficient adjudication of the claims. Id. at 14. Accordingly, the Court granted class certification under Rule 23(b)(1)(B) and 23(b)(3).

(vii) Seventh Circuit

Abbott, et al. v. Lockheed Martin Corp., 752 F.3d 803 (7th Cir. 2013). In this class action under the ERISA, the Seventh Circuit reversed and remanded the District Court’s denial of class certification on claims filed by participants and beneficiaries of two defined-contribution plans. In doing so, the Seventh Circuit rejected the Defendant’s various arguments and also addressed the previous decision in Spano v. Boeing Corp. 633 F.3d 574 (7th Cir. 2011), in which the Seventh Circuit rejected class certification as to similar claims. The Seventh Circuit concluded that the class in Abbott was more carefully tailored than the one rejected in Spano. Plaintiffs alleged that Defendants breached their fiduciary duties in their management of two retirement savings plans. Specifically, Plaintiffs asserted that the stable value fund (“SVF”) offered to plan participants failed to conform to the general description of an SVF. Rather than containing a mix of short-term and intermediate-term investments, the SVF was heavily invested in short-term money market investments, which resulted in a low rate of return. After the Seventh Circuit’s decision in Spano, Plaintiffs modified their request for certification to conform to the standard set by Spano. In opposing the renewed motion for class certification, Defendants first argued that the District Court lacked subject-matter jurisdiction over the SVF claim because none of the original named Plaintiffs had Article III standing to bring the action. Defendant’s argument that only one Plaintiff was invested in the SVF during
the class period and was not injured as a result of that investment was rejected by the Seventh Circuit based on the notion that a Plaintiff’s difficulty in proving damages did not mean that he could not have been harmed. Further, in addressing the merits of the SVF claim, the Seventh Circuit rejected Lockheed's contention that Plaintiffs were only raising what was essentially a misrepresentation by omission claim, which is generally unsuited for class treatment. Finally, Defendants argued that differing views of the class members as to the right measure of underperformance would lead to an intra-class conflict and defeated class certification. The Seventh Circuit addressed its holding in Spano and concluded that a mere possibility of a trivial level intra-class conflict did not foreclose class certification entirely. The Seventh Circuit instead adopted Plaintiffs’ proposed class definition, which defined class membership based upon performance relative to a single benchmark, even though participants might ultimately want to use different benchmarks for remedy purposes. Moreover, the Seventh Circuit stated that the appropriateness of a class depends on the claims for which certification is sought. As such, the Seventh Circuit concluded that the likelihood of potential conflicts was small given the nature of a low-risk fund. Finally, the Seventh Circuit found that many of the defects in the rejected Spano class were not present and that the classes here were appropriately tailored to the claims at hand. As such, the Seventh Circuit reversed the District Court’s ruling declining class certification.

Spano, et al. v. The Boeing Co., 2013 U.S. Dist. LEXIS 133948 (S.D. Ill. Sept. 19, 2013). In this class action brought by Plaintiffs, a group of plan participants and beneficiaries, alleging that Defendants, the company and its employee benefits investment and plan committees, breached their fiduciary duties under § 409 and §§ 502(a)(2) of the ERISA. With respect to a 401(k) plan (the “Plan”), the District Court granted Plaintiffs’ amended motion for class certification. Initially, the Court certified a class comprising of all past, present, and future plan participants in the Plan. The Seventh Circuit, finding the class to be excessively broad, reversed the class certification order and remanded the matter. Plaintiffs then filed an amended motion for class certification, and the District Court certified the class and sub-classes. Plaintiffs alleged that Defendants breached their fiduciary duties by: (i) causing the Plan to pay excessive administrative fees; (ii) failing to disclose material information regarding administrative fees; and (iii) offering certain allegedly imprudent mutual funds as investment options. The District Court determined that Plaintiffs’ decision to create sub-classes (one for each of the mutual funds at issue) and to limit class membership to individuals who participated in the Plan during the time in which the alleged breaches occurred properly addressed the Seventh Circuit’s concern that the original class of all Plan “participants from the past and future” was impossibly “breathtaking in scope.” Id. at *9, 18. Specifically, the District Court found that the newly proposed class satisfied the numerosity requirements. The class also met the commonality requirement because the fiduciaries’ decisions allegedly affected all its participants. The District Court further found that the proposed class also satisfied the typicality requirement because the named Plaintiffs’ claims were typical of those of the putative class, now confined to a specific time period. Furthermore, the District Court determined that named Plaintiffs did not have any conflicts of interest with the members of the proposed class, which would prevent them from serving as adequate class representatives. The District Court also certified the four sub-classes, finding they met the Rule 23(a) prerequisites. The District Court determined that all the five claims and sub-classes met the Rule 23(b) requirements because a failure to certify the proposed sub-classes would result in inconsistent or varying adjudications with respect to individual members of the class, which would establish incompatible standards of conduct for Defendants, thereby making this action appropriate for class certification under Rule 23(b)(1)(A). In addition, adjudications with respect to individual members of each proposed class would be dispositive of the interests of the other members who were not parties to the adjudication or were substantially impaired of their ability to protect their interests, also making certification under Rule 23(b)(1)(B) appropriate.

(viii) Eighth Circuit

In Re Principal U.S. Property Account ERISA Litigation, Case No. 10-CV-198 (S.D. Iowa Sept. 30, 2013). Plaintiffs, a group of participants in employee pension plans whose assets were invested in an open-end, comingled real estate account (the “Account”), alleged that Principal Life Insurance Co. and Principal employees who were responsible for managing assets invested in the Account (collectively, “Principal”), breached their fiduciary duties by failing to implement an adequate liquidation strategy during
the real estate crisis that began in 2008. The Account was managed as a diversified real estate equity fund that acquired and held primarily high quality, well-leased real estate properties. However, starting in 2008, the unprecedented crisis in the real estate and credit markets materially impacted asset values, impaired liquidity, and significantly diminished commercial real estate transaction volume. In September 2008, Principal exercised its right to impose a withdrawal limitation on those seeking to remove or transfer their assets from the Account. Withdrawal requests were delayed until property could be sold to generate sufficient liquidity. According to Principal, the “queue” was necessary to avoid selling Account property at fire sale prices, as would have been required to satisfy all requests immediately. Id. at 9. Approximately one year later, the Account began making cash distributions to satisfy the delayed requests. Plaintiffs brought suit alleging that Principal breached its duties of prudence, loyalty, and exclusive purpose by recklessly and imprudently investing the assets of the Account in a manner contrary to its stated objectives. After consolidation and transfer from the U.S. District Court for the Southern District of New York, Plaintiffs filed a motion to certify a class of individuals who were placed in the queue and suffered loss during the class period as a result of Principal’s alleged mismanagement. The Court denied Plaintiffs’ motion for class certification. While Principal conceded that the putative class included approximately 140,000 individuals and, therefore, the numerosity requirement was satisfied, the Court concluded that the class failed to meet any other Rule 23(a) certification requirements. As to commonality, the Court remarked that although the breach claim appeared to be common to all class members, a problem arose when determining who was included in the class. Specifically, each of the individualized investment decisions made by putative class members, who were enrolled in thousands of plans, was unique. Furthermore, Plaintiffs’ “alternative investment” method for calculating damages was unworkable given the numerous investment options under the thousands of plans that invested in the Account and in light of the fact that some class members may have made economic gains by leaving their funds in the Account – as opposed to transferring their assets to their preferred alternative – during the queue. Id. at 15. The Court further concluded that these same issues of class membership and damages undermined typicality. As to adequacy, the Court found that the named Plaintiffs were likely in conflict with each other and other class members, as some of them had invested in the Account before the queue and never invested additional assets in the Account after, while others transferred assets into the Account despite notice of the queue. Finally, the Court found that Plaintiffs failed to satisfy Rule 23(b)’s predominance and superiority requirements because the liability and damages issues were so intertwined that individualized analyses permeated the case.

**Ruppert, et al. v. Principal Life Insurance Co., 705 F.3d 839 (8th Cir. 2013).** Plaintiff, the trustee of a retirement savings plan (the “Plan”), brought suit against a Plan’s service provider, alleging the service provider breached its fiduciary duty and engaged in prohibited transactions. The District Court denied Plaintiff’s request for class certification and pursuant to a settlement agreement reached by the parties, entered a consent judgment in favor of Plaintiff. The consent judgment incorporated the terms of the agreement, which purported to reserve a right to appeal the denial of class certification and allowed Plaintiff to seek additional recovery if the appellate court reversed or vacated the denial of class certification. Plaintiff accordingly appealed the District Court’s denial of class certification. On appeal, Plaintiff contended that the consent judgment was a final judgment. The Eighth Circuit disagreed and found that it lacked jurisdiction to hear Plaintiff’s appeal. The Eighth Circuit determined that the consent judgment was not final as it provided a mechanism that allowed Plaintiff to re-hear his individual claims. Id. at *8. The Eighth Circuit reasoned that if it were to reverse the District Court’s denial of class certification, Plaintiff would be permitted to petition the District Court for additional recovery. Alternatively, the Eighth Circuit held that Plaintiff’s voluntary dismissal of his individual claims also rendered the case moot. The Eighth Circuit found that there was no party before it with a sufficient personal stake in the case for challenging the District Court’s denial of class certification.

(ix) Ninth Circuit

No reported decisions.
No reported decisions.

No reported decisions.

Virtue, et al. v. International Brotherhood Of Teamsters Retirement & Family Protection Plan, 292 F.R.D. 8 (D.D.C. 2013). In this class action Plaintiffs alleged that the International Brotherhood of Teamsters (“IBT”) violated the ERISA’s anti-cut-back rule by adopting a plan amendment in 2001 that excluded certain employees from participation in IBT’s defined benefit pension plan. Plaintiffs moved for class certification. The Court declined to grant class certification because the class’ claims were time-barred. The Court determined that the District of Columbia’s three-year breach of contract statute of limitations applied to the claim for benefits in the case, and that this limitation period began to run when participants received notice of a clear repudiation of benefit rights. The Court noted that a clear repudiation did not require a formal benefit denial. IBT argued that the claims of all participants were clearly repudiated when they received a notification from IBT in May 2002, which informed them that they were not entitled to plan benefits. The Court agreed and found that the limitations period for all members of the putative class began to run in May 2002 and expired in May 2005. As suit was not brought until 2012, the Court concluded that the claims of the putative class were time-barred. Accordingly, the Court denied Plaintiffs’ motion for class certification.

B. Other Federal Rulings Affecting The Defense Of ERISA Class Actions

Throughout 2013, federal courts issued a wide variety of rulings on procedural and substantive matters in ERISA class action litigation. These rulings included litigation over consent decrees in ERISA class actions; breach of fiduciary duty issues in ERISA class actions; ERISA class action litigation over retiree/employee benefits; attorneys’ fees in ERISA class actions; settlement approval issues in ERISA class actions; discovery issues in ERISA class actions; standing issues in ERISA class actions; coverage issues in ERISA class actions; preemptive motions in ERISA class actions; statute of limitations issues in ERISA class actions; ERISA stock drop class actions; appeals in ERISA class actions; arbitration issues in ERISA class actions; summary plan descriptions in ERISA class actions; ESOP issues in ERISA class actions; COLA issues in ERISA class actions; anti-cut-back issues in ERISA class actions; pleading standards in ERISA class actions; pension calculation issues in ERISA class actions; and COBRA issues in ERISA class actions.

(i) Litigation Over Consent Decrees In ERISA Class Actions

Shy, et al. v. Navistar International Corp., 2013 U.S. Dist. LEXIS 46264 (S.D. Ohio Mar. 29, 2013). Plaintiff, the administrator and fiduciary of Defendant’s retiree health plans, alleged that Defendant had breached a 1993 class action settlement agreement, pursuant to which Defendant was to contribute to a trust to fund the retirees’ future health benefits. Defendant’s contributions to the trust waned over the years as its revenues and profits shrank, and Plaintiff sought to enforce Defendant’s disclosure and contribution obligations under the settlement agreement. Defendant moved to dismiss Plaintiff’s complaint, contending that Plaintiff lacked standing to enforce the settlement agreement, as it was not a party to it. The Court denied the motion to dismiss, holding that Plaintiff was not a non-party to the agreement, but instead a creation of the agreement and the trust and plans it established, with the express purpose and duty of enforcing the terms of the plans. The Court further determined that, pursuant to the ERISA’s civil enforcement provisions, Plaintiff had standing to enforce the terms of the plans as administrator. Defendant also contended that Plaintiff had failed to make use of the plans’ dispute resolution process, which Defendant asserted was Plaintiff’s only recourse for resolving a dispute under the plans. The Court
rejected this contention, finding that the plans’ dispute resolution process presupposed the proper disclosure of financial information by Defendant to Plaintiff, which had not occurred. The Court also granted Plaintiff’s motion to enforce the settlement agreement, and thereby ordered Defendant to disclose all financial information requested by Plaintiff within three weeks of Plaintiff’s request, or otherwise specify why the information requested is not relevant.

(ii) Breach Of Fiduciary Duty Issues In ERISA Class Actions

Board Of Trustees Of The Operating Engineers Pension Trust, et al. v. JP Morgan Chase Bank N.A., 2013 U.S. Dist. LEXIS 43746 (S.D.N.Y. Mar. 27, 2013). In this putative class action challenging the propriety of pension plan investments in Lehman Brothers (“Lehman”) before Lehman filed for bankruptcy, the District Court denied Defendant’s motion to dismiss the breach of fiduciary duty claims. Plaintiff claimed that Defendant violated its duty of care by not monitoring and selling the plan’s investment in Lehman and violated its duty of loyalty by placing its interests above those of the plan by making a risky investment. Id. at *20. Defendant asserted that Plaintiff could not state a claim for breach of the duty of care unless a fact-finder could determine that the only reasonable course of action for Defendant to have undertaken was to sell the plan’s Lehman holdings. Id. at *25-26. The Court disagreed. It found Plaintiff’s allegations sufficiently broad to encompass prudent actions short of a complete divestiture. The Court also noted that Plaintiff alleged that an investigation would have revealed that the investments were no longer appropriate and would have compelled some kind of action to mitigate the risk to the plan. Id. at *26. Plaintiff also alleged that Defendant took actions to reduce, or mitigate risk exposure associated with its own Lehman investments, while failing to take similar action for the plan’s Lehman investments. In the course of ruling on the motion, the Court refused to consider documents referenced in the operative pleading, which allegedly demonstrated that the Defendant monitored the investment and reasonably concluded that it should not be sold. Id. at *30-31. The Court also found that investment guidelines stating that Plaintiff acknowledged investment risk did not obviate Defendant’s obligation to comply with the prudent person standard. Id. at *34. The Court thus held that Plaintiff sufficiently alleged a breach of Defendant’s duty of care. Id. The Court also held that Plaintiff’s allegations that Defendant failed to mitigate the plan’s risk exposure while eliminating its own risks were sufficient to state a claim for the breach of duty of loyalty. Id.

In Re Meridian Funds Group Securities And ERISA Litigation, 2013 U.S. Dist. LEXIS 2806 (S.D.N.Y. Jan. 7, 2013). Plaintiff, a multi-employer ERISA pension plan, brought a putative class action alleging that Defendants, a group of investment managers of a fund used by the Plan, breached their fiduciary duties by investing in funds involved in the Ponzi scheme orchestrated by Bernard Madoff. Id. at *2. Plaintiff brought claims for securities fraud and various violations of the ERISA. The Court granted Defendants’ motion to dismiss in part and denied it in part. Defendants contended that Plaintiff lacked standing to bring various claims. Plaintiff had invested in the Meridian Diversified ERISA Fund, but alleged claims against seven other funds managed by Defendants that also lost money in Madoff’s Ponzi scheme. Id. at *5. The Court held that Plaintiff lacked standing to pursue claims relating to funds in which it did not actually invest. The Court also dismissed the Plaintiff’s claims of securities fraud because the Fund had not adequately alleged scienter. Id. at *8. Defendants further argued that Plaintiff’s claims under the ERISA should be dismissed. Plaintiff alleged that Defendants breached their fiduciary duties by failing to prudently manage plan assets and by engaging in prohibited transactions. The Court rejected Defendants’ argument that the ERISA did not apply because the fund at issue was organized off-shore on the grounds that the transactions at issue took place in the United States. Id. at *13. Indeed, the fund was named as an ERISA Fund and clearly marketed as such to potential domestic investors. The Court also rejected the argument that certain Defendants were not fiduciaries under the ERISA, as the Defendants in question were investment managers that had the power to control plan assets. Id. at *15. Two Defendants were deemed to not be fiduciaries because they did not possess the same authority over plan assets and Plaintiff essentially conceded that they were not fiduciaries. The Court also addressed Plaintiff’s ERISA-prohibited transaction claim, which was based upon the alleged diversion of plan assets into a segregated portfolio for the purpose of funding a lawsuit to recover losses suffered as a result of Madoff’s fraud. The Court noted that the lawsuit was engaged in for the benefit of Plaintiff to recover a portion of Plaintiff’s investment that
otherwise would be lost. The Court found this to be a proper exercise of Defendants’ fiduciary duties for the benefit of the fund, and accordingly dismissed this claim. Finally, the Court addressed Plaintiff’s claim that Defendants had violated the duty of prudence by making the investments in question. The Court noted that prudence was measured against hypothetical sophisticated and prudent investment professionals with experience controlling and managing large funds. Plaintiff had satisfied its burden to plausibly allege that Madoff’s returns, based on his advertised investment strategy, were mathematically impossible and that sophisticated investors like Defendants should have suspected that the investments were imprudent. Accordingly, the Court found that Plaintiff adequately alleged imprudence and denied Defendants motion to dismiss that claim.

In Re Morgan Stanley ERISA Litigation, 2013 U.S. Dist. LEXIS 48042 (S.D.N.Y. Mar. 28, 2013). In this consolidated class action brought by the participants in the Morgan Stanley 401(k) Plan (“401(k) Plan”) and the Morgan Stanley Employee Stock Ownership Plan (“ESOP”) (collectively, the “Plans”), Plaintiffs alleged that Defendants breached their fiduciary duties under the ERISA by failing to prudently and loyally manage the Plans. Defendants filed a motion to dismiss, which the Court granted. The motion relied heavily upon recent Second Circuit stock drop decisions, especially In Re Citigroup ERISA Litigation, 662 F.3d 128 (2d Cir. 2011). Defendants claimed that none of Defendants – except for a named fiduciary and Plan administrator – were fiduciaries with respect to the issue in litigation because they lacked the ability to add or eliminate investment funds or to veto investment options. The Court rejected this argument. It held that Plaintiffs sufficiently pleaded fiduciary status for all Defendants by alleging that they were de facto fiduciaries authorized to determine whether to make contributions in either cash or company stock. Id. at *12. As to Plaintiffs’ claim that Defendants failed to prudently and loyally manage Plan assets by investing in company stock, Defendants asserted that in light of cases including Citigroup, they were entitled to the presumption of prudence established in Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995). Plaintiffs claimed that the Moench presumption was inapplicable because Defendants had discretion to make contributions to the Plans in cash or company stock. The Court thus held that Defendants’ actions were presumed to be prudent. Defendants also argued that Plaintiffs could not overcome the Moench presumption because they did not allege when, or even that, the company was ever in dire circumstances. The Court, however, noted that even though there were limited instances in which the Plans’ fiduciaries could choose not to invest in company stock, the Plans strongly favored such investments. The Court thus held that Defendants’ actions were presumed to be prudent. It observed that even though the company sustained write-downs of $9.4 billion during the relevant timeframe, the company was valued at $85 billion, and such a loss would not compel Defendants to find the company was in a dire situation. The Court also noted that the company’s stock price dropped about 60% during the relevant timeframe, and similar stock declines in other cases were insufficient to overcome the Moench presumption. Id. at *19-20. The Court thus held that because no dire circumstances existed during the relevant period, Defendants did not breach their duty of prudence by continuing to hold company stock in the Plans during the relevant timeframe. The Court also found that Plaintiffs failed to sufficiently plead their remaining claims for breach of duty of loyalty, duty to avoid conflict of interest, and failure to monitor other fiduciaries. For these reasons, the Court granted Defendants’ motion to dismiss.

Kirkendall, et al. v. Halliburton, Inc., 2013 U.S. App. LEXIS 2009 (2d Cir. Jan. 29, 2013). Plaintiffs brought an ERISA class action to clarify their entitlement to future benefits under an ERISA-governed retirement plan, and asserted that the Defendants violated their fiduciary duties and improperly amended the plan’s terms under § 204(g) of the ERISA. Plaintiffs’ claims arose from the purchase of their former employer by a new company. Plaintiffs believed that they were still participants in their former employer’s pension plan. The new employer asserted that the acquisition terminated Plaintiffs’ employment as of the sale date such that Plaintiffs were no longer accruing benefits under their prior employer’s pension plan. Plaintiffs contended that their benefits should be calculated to the date on which they actually planned to retire. Plaintiffs brought suit seeking a clarification and recalculation of the benefits owed them upon retirement and alleging a breach of fiduciary duty and improper amendment to the plan. The District Court dismissed Plaintiffs’ claims for clarification of benefits and breach of fiduciary duty based upon their failure to exhaust administrative remedies. That District Court also entered summary judgment in favor of Defendants on the remaining improper plan amendment allegation. On appeal, the Second Circuit
reversed as to the claims for clarification of benefits and breach of fiduciary duty. However, the Second Circuit affirmed the District Court’s ruling that Plaintiff failed to allege an improper amendment to the plan. Specifically, the Second Circuit found that an ERISA plan participant is not required to exhaust administrative remedies where she reasonably believes and interprets the plan terms to mean that she is not required to do so. *Id.* at *3. The Second Circuit found that the plan mandated exhaustion only for “benefit claims” and for claims concerning clarification of future benefits. *Id.* at *15. The term “benefit claim” as set forth in the plan could be read to apply only when a plan participant was demanding benefits currently due. *Id.* at *16. The Second Circuit therefore held that Plaintiff was not required to exhaust her administrative remedies for her claims for a benefits redetermination and for breach of fiduciary duty. The Second Circuit affirmed as to Plaintiffs’ § 204(g) “anti-cut-back” claim. *Id.* at *23. The Second Circuit noted that there was never an actual change to the plan’s terms. Moreover, under a broader interpretation of “amendment,” the Second Circuit found that there was no improper reservation of discretion to deny benefits. *Id.* at *23-24. Plaintiffs only alleged that Defendants had made an incorrect factual determination as to their termination date. The Second Circuit thus determined that Plaintiffs’ allegation that of incorrect calculation of benefits was not an “amendment” and therefore affirmed the District Court’s dismissal of that claim. *Id.*

**Kopp, et al. v. Klein, 722 F.3d 327 (5th Cir. 2013).** Plaintiff, an employee of Idearc, Inc., and a participant in the Idearc Management Plan, brought an ERISA class action against various members of the company’s board of directors and officers, the Plan Benefits Committee, and the Human Resources Committee (“Defendants”). Among other claims, Plaintiff alleged that Defendants breached their fiduciary duties by allowing plan participants to buy and hold company stock after it was no longer prudent to do so. The District Court dismissed Plaintiffs’ claims. On appeal, the Fifth Circuit held that the presumption of prudence – from *Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995)* – applies at the motion to dismiss stage. *Id.* at 336. In applying this presumption, the Fifth Circuit focused on whether Plaintiff alleged sufficient facts to show that Defendants knew or should have known that the viability of the company was threatened or the stock was in danger of becoming worthless. The Fifth Circuit therefore addressed whether Defendants violated their duty by failing to liquidate Idearc stock or stop new Plan investments in company stock. It found that while Plaintiff pleaded sufficient facts to show that Idearc faced serious financial difficulties, the facts, if proven, would not show that the Defendants were aware (based on both public and private information) that Idearc’s stock was in danger of becoming essentially worthless or that Idearc’s viability as a company was threatened. Additionally, the Fifth Circuit held, based on the analysis of public information available during the relevant period, that Plaintiff did not allege sufficient facts to overcome the presumption that the Defendants acted prudently by choosing not to liquidate the Plan’s investments in Idearc stock. Accordingly, the Fifth Circuit rejected Plaintiff’s fiduciary duty claims and affirmed the District Court’s dismissal of the suit.

**Laboy, et al. v. Board Of Trustees Of Building Service 32 BJ SRSP Fund, 513 Fed. App’x 78 (2d Cir. 2013).** Plaintiff, a participant in an ERISA-governed plan (the “Plan”), on behalf of himself and others similarly-situated, alleged that Plan trustees breached their fiduciary duties under the ERISA when they failed to remove Plan assets from the allegedly underperforming default investment fund (the “Fund”). Under the Plan, participants had the option of self-directing investments or allowing their funds to be invested in the Fund. Plaintiff alleged that the Plan trustees had failed to implement a procedure to review the Fund’s performance and fee structure, to inform themselves of comparable alternatives, and to discontinue the Fund as the default fund even when it was clear that it was less advantageous for Plan participants than comparable options. The Plan moved to dismiss. The District Court granted this motion. On appeal, the Second Circuit affirmed. The Second Circuit held that allegations of poor results alone did not constitute allegations sufficient to state a claim for breach of fiduciary duties under the ERISA. Plaintiff merely relied on the Fund’s poor performance relative to comparable funds, and the Fund’s volatility and high management fees. The Second Circuit concluded that these facts were not so unreasonable as to render the Fund an improper investment, and thus maintaining the Fund as the default fund did not constitute a fiduciary breach.
Rinehart, et al. v. Akers, 722 F.3d 137 (2d Cir. 2013). Plaintiffs, a group of former Lehman Brothers employees and participants in a 401(k) plan, brought a putative class action under the ERISA alleging a fiduciary breach related to the offering of a Lehman Brothers stock fund in the 401(k) plan. The suit included both a claim for imprudence in maintaining the stock fund and a claim for misrepresentation and material non-disclosure insofar as the plan fiduciaries allegedly failed to communicate the risks associated with investment in this fund. The District Court dismissed Plaintiffs’ claims. With respect to the first claim, and consistent with its prior rulings, the Second Circuit applied a presumption of prudence and found that it could not be rebutted. The Second Circuit stated that there is no bright line rule regarding the amount of evidence necessary to rebut the presumption and reasoned that whether a fiduciary knew or should have known that Lehman Brothers was in a dire situation was to be based upon information available to the fiduciary at the time of the investment decision, not from the vantage point of hindsight. The Second Circuit stated that although Lehman Brothers’ share price had been exhibiting a downward trend, the daily stock price fluctuated widely, which the market arguably viewed as a “going concern.” Id. at 149. The Second Circuit also held that plan fiduciaries did not have a duty to investigate whether there was material, non-public information to show that Lehman Brothers was in fact in a “dire situation.” Id. at 150. With respect to the second claim involving disclosure, the Second Circuit held that the incorporation by reference of securities filings into a summary plan description makes the securities filings into fiduciary communications. The Second Circuit nevertheless affirmed dismissal of this claim because it found that Plaintiffs failed to identify specific portions of the securities filings that plan fiduciaries allegedly knew, or should have known, were false or misleading.

Slaymon, et al. v. SLM Corp., Case No. 10-4061 (2d Cir. Jan. 16, 2013). In this putative class action, Plaintiffs, a group of participants in an Employee Stock Option Plan (“ESOP”), alleged that Defendants, ESOP fiduciaries, breached their fiduciary duties under the ERISA. Defendants moved to dismiss. The District Court granted the motion. On appeal, the Second Circuit affirmed. Plaintiffs alleged that information known to Defendants during the class period would have led a reasonable fiduciary to divest the ESOP of company stock before the stock’s value fell drastically. Because the ESOP required that company stock be offered as an investment option, the Second Circuit applied a heightened presumption of prudence under which a fiduciary’s decision to retain employer stock in an ESOP will only be questioned upon a showing that the company’s situation was so dire that it was unreasonable to retain the stock. The Second Circuit found that the mere fact that the company possessed some allegedly risky assets during the class period was insufficient to rebut the presumption of prudence. The Second Circuit concluded that none of the circumstances surrounding the drop in stock price demonstrated that the company was actually in a “dire situation,” such that a reasonable fiduciary would have been compelled to divested the ESOP of company stock. Id. at 4. The Second Circuit also found that ERISA fiduciaries do not have a general duty to disclose non-public investment information to plan participants beyond what is called for in the ERISA’s “comprehensive set of reporting and disclosure requirements.” Id. at 5. As a result, the Second Circuit concluded that the ESOP plan documents satisfied the ERISA’s disclosure requirements, as they included a general warning that investing in undiversified stock is riskier than other investment options.

Smith, et al. v. Delta Air Lines, Inc., 510 Fed. App’x 806 (11th Cir. 2013). Plaintiff, an employee and participant in Delta Air Lines’ (“Delta”) Family Care-Savings Plan (“Savings Plan”), on behalf of himself and others similarly-situated, alleged that Delta, members of its Administrative and Benefit Fund Investment (“Investment”) Committees, along with key executives, violated the ERISA as a result of their actions related to offering Delta common stock as a Savings Plan investment vehicle. In particular, Plaintiff alleged that Defendants violated the ERISA in four ways, including: (i) by failing to prudently manage Savings Plan assets with regard to the employee stock ownership program (“ESOP”) component of the Savings Plan (“Count One”); (ii) by failing to give information and to review the actions of Investment Committee members (“Count Two”); (iii) by failing to disclose material information, hampering the class members’ ability to make informed investment decisions (“Count Three”); and (iv) by failing to engage independent fiduciaries to make independent judgments concerning the Savings Plan’s investment in Delta securities (“Count Four”). Defendants moved to dismiss. The District Court dismissed all four counts. The Eleventh Circuit vacated the holding on Count One as to certain Defendants. It held that an ESOP fiduciary abuses
his discretion when he continues to allow plan assets to be invested and retained in company stock even when he could not have reasonably believed that the plan’s creators would have intended for him to do so under the circumstances. The Eleventh Circuit remanded Count One to the District Court with instructions to determine whether Plaintiff’s complaint sufficiently alleged a breach under this standard. The Eleventh Circuit affirmed the District Court’s dismissal of Counts One and Three with regard to Delta, members of the Administrative Committee, and Delta executives, finding that Plaintiff had failed to adequately plead their fiduciary status. The Eleventh Circuit also affirmed the District Court’s dismissal of Count Two as to Delta and its executives and Count Four as to all Defendants because Plaintiff failed to plead sufficient factual allegations.

**Tate, et al. v. General Motors LLC, 2013 U.S. App. LEXIS 16503 (6th Cir. Aug. 6, 2013).** Plaintiffs, a group of General Motors retirees, brought a class action to challenge an adverse determination of their entitlement to benefits under a non-qualified, unfunded, deferred compensation plan. General Motors was required to cut certain retirement benefits as a condition of its bankruptcy and purchase by the United States Treasury. Defendants thus reduced retirement benefits over $100,000 by two-thirds. Plaintiffs challenged the language in the plan allowing for this reduction under the ERISA. Plaintiffs asserted that Defendants violated the ERISA by failing to provide Plaintiffs with required plan information within 30 days of their request. The District Court dismissed the claims. On appeal, the Sixth Circuit determined that Defendants did not act in an arbitrary and capricious manner in interpreting the provision in question to reduce Plaintiffs’ benefits. The Sixth Circuit held that Defendants’ interpretation, which reduced a participant’s benefits, if his or her combined retirement benefits exceeded $100,000, was the only plausible one based on the plain language of the provision and accepted principles of contract interpretation. The Sixth Circuit also rejected Plaintiffs’ argument that the District Court should have allowed more factual development of the record or extrinsic evidence before ruling on the motion to dismiss. The Sixth Circuit explained that extrinsic evidence should only be admitted after a provision has been found to be ambiguous. The Sixth Circuit thus affirmed dismissal of Plaintiffs’ claim for benefits. The Sixth Circuit also rejected Plaintiffs’ claim for statutory penalties under the ERISA because the plan administrator was untimely in issuing its benefit determinations and had misquoted the relevant plan language in issuing the benefit determinations. The Sixth Circuit reasoned that Plaintiffs failed to show that the technical and procedural errors they alleged had affected the substance of the decisions on their claims. Accordingly, the Sixth Circuit affirmed the District Court’s dismissal of Plaintiffs’ complaint in its entirety.

**Taveras, et al. v. UBS AG, 708 F.3d 436 (2d Cir. 2013).** Plaintiffs, a group of current and former employees of UBS AG and/or UBS Financial Services, Inc. (“UBS”), alleged that UBS and other named fiduciaries breached their fiduciary duties under the ERISA by allowing two UBS sponsored Plans (the Savings and Investment Plan (“SIP”) and the 401(k) Plus Plan (“Plus Plan”)) to continue to offer and hold UBS stock after its price fell significantly. Plaintiffs’ complaint specifically alleged: (i) a violation of the duty of prudence by continuing to offer UBS stock as an investment option to Plan participants; (ii) a violation of the duty of candor by making misstatements or omissions regarding UBS’ financial condition; (iii) failing to adequately monitor other fiduciaries; (iv) acting under a conflict of interest; (v) co-fiduciary liability; and (vi) liability in quantum meruit. Defendants moved to dismiss, and the District Court dismissed the claim in whole. On appeal, the Second Circuit affirmed the dismissal order of the District Court in part, vacated in part, and remanded the case for further proceedings. The Second Circuit affirmed the District Court’s conclusion that the presumption of prudence applied to the Plus Plan because the Plus Plan document clearly and explicitly limited the trustees’ discretion by requiring that the UBS Stock Fund be offered as an investment option. However, the Second Circuit refused to extend this presumption to the SIP. The Second Circuit noted that the SIP plan document neither required nor strongly encouraged investment in UBS stock or the UBS Stock Fund. The Second Circuit held that mere reference to UBS stock in the plan document was not enough to require or even encourage inclusion of the UBS Stock Fund as an investment choice. Therefore, the fiduciaries of the SIP were under no obligation to make UBS stock available for investment and could not benefit from a special presumption that they behaved prudently merely by
offering it to plan participants. Finally, the Second Circuit noted that Plaintiffs’ other claims should be reinstated to the extent they related to the SIP.

(iii)  ERISA Class Action Litigation Over Retiree/Employee Benefits

*Pilger, et al. v. Sweeney, 725 F.3d 922 (8th Cir. 2013).* In this class action, Plaintiffs challenged the reduction in monthly pension benefit payments and the recoupment of previous overpayments through withholdings by Defendant’s pension fund. Plaintiffs, a group of former union plumbers, sued their pension fund, its trustees, and its administrator. The dispute arose based on the contributions to the fund from the local union. In 1998, three local unions merged. At that time, the fund decided to require contributions of $1.05 per hour for all past service, and $1.95 per hour for all future service. When Plaintiffs retired, the fund erroneously paid them benefits based on the contribution rate of $1.95 per hour for all service. Defendant discovered the error, reduced Plaintiffs’ benefits to the correct amount, and withheld a portion of monthly payments to reimburse the fund for overpayments. Plaintiffs brought three claims under the ERISA, which the District Court dismissed on summary judgment. The Eighth Circuit affirmed the District Court’s grant of summary judgment to Defendants on all counts. Plaintiffs first made a claim for benefits under § 502(a)(1)(B) of the ERISA, alleging they were owed benefits based on the $1.95 per hour contribution rate. The Eighth Circuit noted that for purposes of a § 502(a)(1)(B) claim, it must borrow the most analogous state law statute of limitations. Defendant initially denied Plaintiffs’ appeal of the decision to apply the lower contribution rate in June 2000. Plaintiffs filed suit in 2011 and thus failed to meet Iowa’s 10-year statute of limitations for breach of contract. Plaintiffs brought a claim under § 502(a)(2) alleging that Defendant breached its fiduciary duties under the ERISA by refusing to base pension benefits on the $1.95 per hour contribution rate for Plaintiffs’ past service. The Eighth Circuit observed that § 502(a)(2) provides relief only for the benefit of the plan as a whole. Plaintiffs sought relief only for themselves individually. Accordingly, the Eighth Circuit affirmed the dismissal of this claim. Finally, Plaintiffs brought a claim for equitable estoppel under § 502(a)(3) alleging that Defendant falsely represented the value of its retirement benefits and that Plaintiffs relied upon those statements when making retirement decisions. The Eighth Circuit noted that this claim mirrored Plaintiffs’ claim for benefits. Where a Plaintiff is provided adequate relief by the right to bring a claim for benefits under § 502(a)(1)(B), the Eighth Circuit reasoned that Plaintiff does not have a cause of action to seek the same remedy under § 502(a)(3). Accordingly, the Eighth Circuit affirmed the order granting summary judgment to Defendant.

*Schumacher, et al. v. AK Steel Corp. Retirement Accumulation Pension Plan, 2013 U.S. Dist. LEXIS 105761 (S.D. Ohio July 29, 2013).* In this action alleging violation of the ERISA in “whipsaw” calculation of benefits, the District Court opined that the issue on the award of pre-judgment interest had not been fully presented in the parties’ briefs and directed Plaintiffs to file a revised class roster setting forth the corrected amount of pre-judgment interest to be paid to each class member. Plaintiffs, former class members in *West v. AK Steel*, Case No. 02-CV-001 (S.D. Ohio), were subsequently excluded due to their execution of a severance agreement and release. Plaintiffs thus brought this action seeking the same “whipsaw” benefits that Plaintiffs in *West* had been awarded on Plaintiffs’ lump sum pension payments. Earlier, the District Court had granted Plaintiffs summary judgment, and awarded Plaintiffs more than $3 million in unpaid pension benefits along with pre-judgment interest at a rate of 0.12%. The award of unpaid pension benefits was affirmed on appeal, but the District Court was found to have abused its discretion in automatically awarding pre-judgment interest at the exceedingly low 2012 statutory rate, and the case was remanded with instructions to fashion an award that considered and balanced the interests involved. *Id.* at *3. The Sixth Circuit had cited *Rybarczyk v. TRW, Inc.*, 235 F.3d 975 (6th Cir. 2000), where although pre-judgment interest was awarded at the greater of the statutory rate or the rate of return actually earned by the plan during the relevant time period, the Sixth Circuit had held that the statutory rate was not the only permissible rate. *Id.* at *4-5. *Rybarczyk* held that if the statutory rate was lower than Defendant’s actual rate of return, Defendant would arguably receive a windfall; thus, the Sixth Circuit observed that because the plan was a defined benefit plan, Defendant had to contribute only enough money to fund the plan’s defined obligations. *Id.* at *6. Further, the Sixth Circuit had also cited *Ford v. Uniroyal*, 154 F.3d 613 (6th Cir. 1998), and *United States v. City of Warren*, 138 F.3d 1083 (6th Cir. 1998). *Ford* rejected Plaintiffs’ request to award pre-judgment interest at the state’s statutory rate because that rate was intended to
compensate for delayed payment and for a prevailing party's litigation expenses, and instead awarded interest at the § 1961 rate. Id. at *7. In City of Warren, the Sixth Circuit had found no authority for using the consumer price index as a substitute for a market-based interest rate, and thus remanded to action to the District Court to determine a more appropriate rate. Id. The Sixth Circuit had instructed the District Court to evaluate and weigh the relevant case-specific factors to determine an appropriate rate of pre-judgment interest. Upon remand, the District Court observed that two of those factors sought to place Plaintiffs in the position they would have been if their lump sum payments had been properly calculated, and the closely related goal of compensating Plaintiffs for the lost interest value of the unpaid whipsaw benefits. Further, the District Court stated that those factors favored the use of a rate commensurate with what Plaintiffs would have earned had they received their whipsaw benefits with their lump sum payments, and that rate was undoubtedly higher than the currently § 1961 rate. The District Court acknowledged that it had failed to address that fact in its prior order. The District Court noted that a few case law authorities cited 26 U.S.C. § 6621(a)(1), the interest rate payable on certain tax overpayments, as one acceptable measure of the time value of money. Id. at *11. Additionally, the District Court stated that another relevant factor in setting a rate was to prevent unjust enrichment, which favored awarding interest at the rate actually earned by the Plan over the relevant period. Third, the District Court noted that Plaintiffs in West were awarded a 4.7% pre-judgment interest, and absent the releases signed by these Plaintiffs, they would have remained in the West class and would have received that rate of pre-judgment interest. The District Court remarked that thus these Plaintiffs could not be awarded a substantially higher rate than that awarded in West, particularly in view of the fact that Plaintiffs waited over four years after their exclusion from West to file this lawsuit. Finally, the District Court observed that Masters v. Supplemental Executive Retirement Plan, 2009 U.S. Dist. LEXIS 38194 (N.D. Ohio May 1, 2009), created an adjusted rate and held that using an adjusted annual rate recognizes the reasonableness of applying the federal statutory rate to pre-judgment interest calculations, and also recognizes the unusual economic circumstances which have contributed to a federal statutory rate for 2008 and 2009 that will not adequately compensate Plaintiff. Id. at *15-16. Accordingly, the District Court opined that a similar hybrid method here would appropriately balance all of the relevant case-specific factors that the Sixth Circuit directed it to consider, and that using the “hybrid” rate of 4.12% for 2008 and maintaining that annual rate through 2013, compounded annually, would yield interest returns that would adequately compensate Plaintiffs for the time value of the withheld benefits, would avoid unjust enrichment, and place Plaintiffs in a position comparable to the one they would have been in had they received their whipsaw benefits with their lump sum payments. Further, the District Court remarked that the yearly rates should be applied to each class members’ additional whipsaw benefit, beginning with the date they each received their lump sum payment through the date of final judgment, compounded annually. Accordingly, the District Court instructed Plaintiffs to file a revised class roster setting forth the corrected amount of pre-judgment interest to be paid to each class member.

(iv) Attorneys’ Fees In ERISA Class Actions

Drazin, et al. v. Horizon Blue Cross Blue Shield Of New Jersey, Inc., 2013 U.S. App. LEXIS 11830 (3d Cir. June 11, 2013). In a class action involving denial of health insurance coverage for the treatment of eating disorders under both ERISA and non-ERISA plans, two rival law firms filed three related class actions. The first attorney to file suit was Attorney David Mazie. Id. at *2. One month later, Nagel Rice LLP filed a similar action against Defendant. Shortly afterwards, Nagel Rice filed an identical class action against another insurer. Id. at *3. The actions were not consolidated. Prior to the 2006 filing of this matter, attorney Mazie was a member of Nagel Rice. He filed the action during the phase out period between his departure from Nagel Rice and his opening of a new firm. In 2008, Nagel Rice settled this lawsuit and the lawsuit filed against the other insurer. Id. Attorney Mazie did not participate in the settlement of either lawsuit; however, following the settlement he was left without a class so he voluntarily dismissed his claim. Following the settlement, the rival firms filed motions for attorneys’ fees. As part of its settlement of the lawsuit, Nagel Rice sought an attorneys’ fee award of $2.45 million. Id. at *5. Attorney Mazie sought an allocation of 50% of any counsel fees awarded to Nagel Rice, plus reimbursement of his litigation expenses. Id. The District Court rejected Mazie’s request, concluding that he had played no role in settling the matter and, in fact, had opposed the settlement. Id. at *6. The Third Circuit affirmed, stating
that it was undisputed that Mazie had neither won his case nor negotiated a settlement for his clients; thus he was not entitled to share in the award granted to his former law firm. *Id.*

The Court granted summary judgment to Plaintiff, a participant in Hilton's retirement plan, concluding that Defendants had violated the ERISA's anti-back-loading provision, that Defendants’ subsequent amendment to the retirement plan (“the 1999-1 Amendment”) did not moot that ERISA violation, and that Defendants also violated the plan’s vesting provisions. Plaintiff thereafter moved for an award of attorneys’ fees, seeking a percentage of the common fund allegedly created by the favorable ruling. Plaintiff also requested reimbursement for expenses totaling $603,000 and a $50,000 class representative incentive award. The parties’ central dispute regarding the requested fee award was whether the benefit increases resulting from Defendants’ 1999-1 Amendment should be included in the common fund for purposes of awarding attorneys’ fees. The Court concluded that the benefit increases resulting from the 1999-1 Amendment should be included for purposes of calculating the fee award because Defendants adopted the Amendment in response to the litigation initiated by Plaintiff and the relief provided by the 1999-1 Amendment directly responded to the violation Plaintiff had alleged. However, the Court ruled that it would not award attorneys’ fees on that portion of the Amendment benefit that had already been paid, as the ERISA prohibits the alienation of retirement benefits once they have been paid. The Court valued the common fund at $146.75 million and, after weighing several factors, awarded attorneys' fees totaling 15% of the common fund, the percentage that Plaintiff had requested. *Id.* at *27. The Court observed that these fees were warranted in light “of the skill and dedication exhibited by class counsel, the substantial length and complexity of this litigation, the risks assumed by counsel, and the substantial benefits secured by counsel for the class . . .” *Id.* at *40. The Court also awarded Plaintiff his requested reimbursement for expenses and incentive award, amounts that were not challenged by Defendants.

**The Board Of Trustees Of The Southern California IBEW-NECA Defined Contribution Plan, et al. v. The Bank Of New York Mellon Corp.,** Case No. 09-CV-6273 (S.D.N.Y. Mar. 21, 2013). Plaintiff brought a class action under the ERISA alleging that Defendants imprudently maintained Plaintiff’s assets in a floating rate note issued by Lehman Brothers Holding, Inc. (“Lehman note”) and failed to diversify Plaintiff’s collateral investments. Subsequently, the parties entered into a confidential mutual release agreement (“Settlement Agreement”) whereby Plaintiff agreed to settle the case for $630,000. Plaintiff then moved for an award of attorneys’ fees and expenses. Plaintiff’s counsel sought $3,259,220.25 in legal fees and $841,182.93 in costs, more than six and a half times the amount for which Plaintiff settled the case. The Court denied the motion because Plaintiff had failed to achieve some success on the merits. *Id.* at 2-4. The Court noted that the first amended complaint was dismissed because there were no factually supported assertions that Defendants actually or constructively knew about Lehman’s imminent collapse. *Id.* at 4-5. The Court stated that the denial of Defendants' summary judgment motion did not amount to some success on the merits for Plaintiff. The Court had denied Plaintiff’s motion to strike Defendant’s affirmative defenses because Plaintiff’s generalized and unsupported contention that not a single affirmative defense, as pled, had put Plaintiff on notice of the basis for the defense did not constitute a clear showing that the challenged defenses had no bearing on the subject matter of the case or that permitting the defenses to stand would prejudice Plaintiff. *Id.* at 6. The Court also found it significant that Plaintiff failed in its pursuit of class certification. *Id.* at 7. Plaintiff did not secure any relief for the proposed class, and the $630,000 settlement was the same amount Defendants offered to Plaintiff prior to filing suit. *Id.* at 7-8. Additionally, the Court analyzed whether attorneys’ fees were appropriate under the Second Circuit’s decision in *Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869 (2d Cir. 1987). The Court observed that Defendants did not act with any degree of culpability; likewise, Defendants denied any and all allegations of liability and denied any breach of any of their duties under the contract or under the securities lending program. The Court noted that Defendants could satisfy an award of attorneys’ fees, and any award would not deter other persons from acting similarly under like circumstances because there had been no admission or showing of wrong-doing, either generally or as to specific acts by any Defendant, so it was unclear exactly what behavior would be deterred. *Id.* Moreover, the settlement amount of $630,000 was small compared to the more than $1 billion sought by Plaintiff on behalf of the proposed 239-member
class; and Plaintiff had abandoned the vast majority of its demands to achieve an extremely modest settlement. Accordingly, the Court denied the motion for attorneys’ fees and costs.

Editor’s Note: The result in this litigation was unusual. Typically some measure of attorneys’ fees are awarded upon a settlement of a putative class action. The Court rejected the fee request because of Plaintiff’s acceptance of $630,000 — after being offered that amount before filing the lawsuit — and as Plaintiff sued for $1 billion and losing its class certification motion.

(v) Settlement Approval Issues In ERISA Class Actions


Plaintiffs, a group of participants in and beneficiaries of the Flagstar Bank 401(k) Plan (the “Plan”), filed a class action alleging that Flagstar Bancorp, Inc. (“Flagstar”) and certain of its officials had breached their fiduciary duties in violation of the ERISA when they offered Flagstar stock as an investment option to Plan participants. After extensive litigation, the parties settled and brought a motion to approve their settlement. The Court granted Plaintiffs’ motion for preliminary approval of a settlement. The Court based its decision on four considerations. First, the proposed settlement agreement provided for a settlement fund of $3 million and was supported by strong indicators of fairness throughout negotiations. Specifically, the Court noted that the proposed settlement resulted from extensive arms’ length negotiations. Further, the Court observed that class counsel had substantial experience with ERISA class actions and that the settlement agreement was executed only after class counsel’s appropriate evaluation of Plaintiffs’ claims. Accordingly, the Court concluded that the proposed settlement was fair, reasonable, and adequate to warrant sending notice of the proposed settlement to the class. Second, the Court certified a settlement class comprised of all current and former participants and beneficiaries of the Plan for whose individual accounts the Plan held shares of common Flagstar stock at any time between December 31, 2006 and May 2, 2013. Third, the proposed notice forms (i) fairly and adequately described the terms and effect of the proposed agreement and its components; (ii) notified the settlement class that class counsel would seek, from the settlement fund, attorneys’ fees and expenses, as well as case contribution awards of up to $5,000 for the two named Plaintiffs; (iii) apprised the settlement class of the time and place of the fairness hearing; and (iv) indicated how recipients might object to the proposed settlement. Finally, the Court noted that any settlement class member who wished to object to the agreement’s terms or components, to the proposed award of attorneys’ fees and expenses or to the case contribution awards to named Plaintiffs could file a timely objection. Thus, the Court granted preliminary approval of the settlement agreement and scheduled a date for a hearing on its final approval.

(vi) Discovery Issues In ERISA Class Actions


Plaintiffs, a group of participants in General Motors’ (“GM”) 401(k) plans, brought a class action alleging that Defendant State Street Bank & Trust Co., the plans’ trustee, breached its fiduciary duty by continuing to allow participants to invest in GM’s common stock, despite public information indicating that GM was headed for bankruptcy. Plaintiffs moved to compel production of documents listed on the privilege logs of Defendant and its outside litigation counsel, contending that the documents fell under the fiduciary exception to the attorney-client privilege. Plaintiffs asserted that the documents reflected legal advice provided to Defendant in its capacity as fiduciary of the plans, and consequently the legal advice belonged to the plans’ participants and beneficiaries and was thus discoverable by Plaintiffs. Defendant asserted that the documents reflected legal advice provided in anticipation of litigation regarding Defendant’s management of the plans. Notably, Defendant averred that the documents reflected legal advice provided by Defendant’s separate litigation counsel, not its plan counsel. The Court agreed with Defendant and denied Plaintiffs’ motion to compel, concluding that the documents at issue related to communications with outside litigation counsel seeking or reflecting legal advice sought to protect Defendant in the event of anticipated litigation. The Court further determined that two of the subject documents were protected by the attorney work product doctrine, as the documents were created by Defendant and/or its outside litigation counsel because of the genuine prospect of specific litigation.
Standing Issues In ERISA Class Actions

Arendt, et al. v. Harris, 2013 U.S. App. LEXIS 18295 (9th Cir. Sept. 3, 2013). Plaintiffs, a group of participants in the Washington-Idaho-Montana Carpenters-Employers Retirement Trust (the “Plan”), brought suit against the U.S. Secretary of Labor. They alleged that certain benefit changes made as part of a plan of rehabilitation of the under-funded Plan, in accordance with the Pension Protection Act of 2006 (the “PPA”) violated the U.S. Constitution. Prior to its rehabilitation, the Plan had offered an early retirement pension benefit. The rehabilitated Plan eliminated the early retirement subsidy on a prospective basis. Plaintiffs alleged that: (i) the elimination of subsidized early retirement option of the Plan violated the due process clause of the Fifth Amendment; and (ii) the distinction between early retirees already in “pay status” and those not yet retired amounted to a violation of the equal protection component of the due process clause. The District Court dismissed Plaintiffs’ complaint against the Secretary of Labor with prejudice. The Ninth Circuit vacated the order and remanded with instructions to dismiss without prejudice. The Ninth Circuit noted that underfunded plans in “critical status,” as defined by the PPA, are required to adopt a rehabilitation plan to ensure the viability of the fund, and as part of such a rehabilitation plan, subject to qualifications set forth within the PPA, a pension plan may cut adjustable benefits including early retirement benefits otherwise protected by the ERISA “anti-cut-back” rule. Id. at *2. The Ninth Circuit noted that although Plaintiffs alleged that the Plan eliminated early retirement benefits as part of a required rehabilitation plan, Plaintiffs did not allege that the Secretary of Labor was involved in the Plan’s decision to cut early retirement benefits or that the Secretary of Labor took action to enforce the PPA’s rehabilitation plan requirements against the Plan. The Ninth Circuit found that Plaintiffs had no standing to sue the Secretary of Labor for allowing an under-funded plan in critical status to cut back early retirement benefits as part of its rehabilitation plan. The Ninth Circuit opined that even assuming that Plaintiffs’ injury was traceable to an action by the Secretary of Labor, the injury was not redressable by a favorable ruling of the District Court. Specifically, the Ninth Circuit found that the Secretary of Labor was not responsible for the Plan’s changes and could not order the Plan administrator to reverse its decision to cut early retirement benefits. Rather, Plaintiffs would have to bring suit against the Plan administrator. Because Plaintiffs lacked standing to sue, the Ninth Circuit vacated the District Court’s order and remanded with instructions to dismiss the case without prejudice.

David, et al. v. Alphin, 2013 U.S. App. LEXIS 961 (4th Cir. Jan. 14, 2013). Participants in two retirement plans sponsored by Defendant Bank of America Corp. (“BAC”) brought an ERISA class action alleging that Defendants – BAC and individual members of BAC’s Corporate Benefits Committee – engaged in prohibited transactions and breached their fiduciary duties by selecting and maintaining BAC-affiliated mutual funds in the investment menu for the Pension and 401(k) Plans. Plaintiffs contended that these alleged violations reduced the value of their retirement investments. The District Court dismissed Plaintiffs’ claims related to the Pension Plan for lack of standing. The District Court also granted summary judgment for Defendants on Plaintiffs’ claims related to the 401(k) Plan because Plaintiffs failed to file suit within the limitations period. Plaintiffs appealed both orders. The Fourth Circuit affirmed. The Fourth Circuit found that Plaintiffs lacked standing on their Pension Plan claim. The Fourth Circuit noted that Plaintiffs had statutory standing to assert claims against Defendants on behalf of the Pension Plan under § 502(a)(2) of the ERISA. Id. at *10. Plaintiffs, however, lacked constitutional standing under Article III because they could not show that they had suffered an injury-in-fact. The Pension Plan was overfunded and the inclusion of BAC-affiliated funds had no bearing on whether participants would receive their pension benefits. The Fourth Circuit also affirmed the grant of summary judgment for Defendants on Plaintiffs’ claims related to the 401(k) Plan. Id. at *37. Plaintiffs argued that Defendants engaged in prohibited transactions by selecting and failing to remove certain BAC-affiliated mutual funds as investment options under the 401(k) Plan. The Fourth Circuit found that as the applicable limitations period was six years, and as the selection in question took place more than the six years prior to Plaintiffs bringing suit, Plaintiffs failed to timely bring this claim. The Fourth Circuit also rejected Plaintiffs’ argument that each meeting of the Plan’s committee constituted a new breach of fiduciary duty because the committee repeatedly failed to remove the funds in question from the menu of investment options. Id. at *43. The Fourth Circuit found instead that the original selection of the investment options was the only event that might constitute the...
alleged breach, as Plaintiffs did not allege that there was any material change in circumstances that altered the investments’ prudence after their initial selection.

Mance, et al. v. Quest Diagnostics, Inc. Voluntary Separation Plan, 2013 U.S. Dist. LEXIS 130039 (D.N.J. Sept. 11, 2013). In a class action alleging that Plaintiff, a District Sales Manager, and others similarly-situated were denied benefits under the Quest Diagnostics, Inc. Voluntary Separation Plan (the “Plan”), the Court granted Defendants' motion to dismiss the complaint for lack of standing. Plaintiff alleged that Quest Diagnostics, Inc. (“Quest”) had a longstanding, company-wide practice of providing severance benefits through the Plan to qualified employees with the title of District Sales Manager or higher as an alternative to being terminated or placed on a performance improvement plan. Plaintiff alleged that she was eligible to receive benefits under the Plan because she was subject to Quest’s performance management policy and was an employee who was terminated for poor performance. The Court noted that under § 502(a) of the ERISA, only a participant or beneficiary can institute an action for benefits against a plan administrator. Thus, the Court stated that an employee who might have become eligible under an ERISA plan but who never actually became eligible does not have standing. However, the Court observed that if an employee claims that his employer’s wrong-doing deprived him or her of the status as a participant or beneficiary and shows that he or she would have been a participant or beneficiary but for the alleged malfeasance of a plan fiduciary, there is standing. Here, although Plaintiff claimed that benefits under the Plan were offered to employees in exchange for voluntary termination, she also admitted that she was involuntarily terminated. The Court went on to note that while Plaintiff could not state a denial of benefits claim, she could have asserted a claim for breach of fiduciary duties. To make such a claim, Plaintiffs would have had to allege that she would have been a beneficiary “but for” the malfeasance of a Plan fiduciary at Quest. As Plaintiff made no allegation of a breach of fiduciary duty, the Court dismissed her claim for lack of standing.

Palmason, et al. v. Weyerhaeuser Co., 2013 U.S. Dist. LEXIS 120424 (W.D. Wash. Aug. 23, 2013). Plaintiffs, a group of participants in Defendant’s defined benefit pension plan (the “Plan”), brought a class action alleging that the Plan adopted an aggressive alternative investment strategy that resulted in a loss in value of $2.4 billion to Plan assets in 2008. Plaintiffs sought both legal relief in the form of money damages and equitable relief in the form of injunctions. The Court held that Plaintiffs did not have standing to pursue their claims for money damages. Plaintiffs were required to show a concrete and particularized injury that was not merely speculative in order to have a right to the money damages they demanded. This means that Plaintiffs must have shown that the alleged breaches “created an appreciable risk that the defined benefits would not be paid.” Id. at *10. The Court concluded that Plaintiffs failed to meet their burden. After considering expert testimony, the Court found that the Plan was under-funded by at most 1.5%, and that the alleged fiduciary breach “posed no threat to [Plaintiffs’] present or future benefit payments.” Id. at *29. In contrast, the Court held that Plaintiffs had standing to bring claims for equitable relief against the Plan’s fiduciaries because trust law allows an equitable remedy even where the beneficiary has suffered no personal loss or injury. A “bare allegation of breach of fiduciary duty” alone does not confer standing for equitable claims, but Plaintiffs did more than make a “bare” allegation – they alleged that Defendants failed to diversify the plan’s investments as required by ERISA. Id. at *20-21. Plaintiffs sought injunctive relief as a remedy and did not allege, for example, that the fiduciaries used Plan assets to profit personally. The Court allowed the claim for equitable relief to proceed, but did not address the scope of monetary equitable relief.

(viii) Coverage Issues In ERISA Class Actions

Rollins, et al. v. Dignity Health, 2013 U.S. Dist. LEXIS 174199 (N.D. Cal. Dec. 12, 2013). In this putative ERISA fiduciary breach class action, Defendant, a non-profit healthcare organization, sought dismissal by contending that the pension plan at issue was an ERISA-exempt “church plan.” The ERISA defines a “church plan” as a benefit plan established and maintained for its employees by a church or by a convention or association of churches. Id. at *8. The Court denied Defendant’s motion to dismiss. Defendant had argued that § 1002(33)(C)(i) of the ERISA allows a plan to qualify as a church plan regardless of what entity established the plan, so long as the plan is maintained by a tax-exempt non-profit
entity “controlled by or associated with a church or a convention or association of churches.” *Id.* at *5. Because Defendant was a tax-exempt entity associated with the Roman Catholic Church, and its pension plan was maintained by a sub-committee associated with the Church, Defendant argued that the plan qualified as a church plan. The Court rejected Defendant’s reading of the ERISA. It held that the plain language of the statute made clear that to qualify as a church plan, a church had to both establish and maintain the plan. *Id.* at *16. The Court further noted that Defendant disregarded the limiting language of § 1002(33)(C)(i), that a “church plan” organization must not only be associated with the church, but also must have as its “principal purpose or function the administration or funding of a benefits plan or program or the employees of a church.” *Id.* at *19. The Court held that the legislative history confirmed that the purpose of section § 1002(33)(C) was only to permit churches to delegate the administration of their benefits plans to specialized church pension boards without losing their church plan status, but was not meant to broaden the scope of organizations who could start a church plan. *Id.* at *20. Because Defendant was not a church or an association of churches, the Court concluded that Defendant did not have the statutory authority to establish its own church plan, and thus, was not exempt from the ERISA. *Id.* at *24. Accordingly, the Court denied Defendant’s motion to dismiss.

(ix) Preemptive Motions In ERISA Class Actions

*Santomenno, et al. v. Transamerica Life Insurance Co.,* 2013 U.S. Dist. LEXIS 72022 (C.D. Cal. May 21, 2013). In this putative class action, Plaintiffs, a group of participants in 401(k) plans that used Defendants’ annuity contract platform to provide investment options for the plans, alleged that Defendants charged excessive and unnecessary management fees in contravention of the ERISA. *Id.* at *2. The Court had previously denied Defendant’s motion to dismiss that contested its fiduciary status. After the Court denied the motion to dismiss, Defendants moved to strike the class definition. The gravamen of the motion was that the class definition improperly excluded the named fiduciaries of the employee benefit plans in which putative class members were participants. *Id.* at *3. Defendants argued that these fiduciaries needed to be included in the litigation as class representatives, so that they could advocate their position in the litigation. The Court denied this motion. It held that in litigation alleging a fiduciary breach claim against a non-plan fiduciary, the ERISA did not require that a named plan fiduciaries be included in the class, let alone that they serve as class representatives. *Id.* at *9.

(x) Statute Of Limitations Issues In ERISA Class Actions

*Bond, et al. v. Marriott International, Inc.,* 2013 U.S. Dist. LEXIS 112367 (D. Md. Aug. 9, 2013). In a class action alleging that Marriott International, Inc. (“Marriott”) and its Stock and Cash Incentive Plan (the “Plan”) failed to issue stock due to former Marriot employees under the Retired Deferred Stock Bonus Awards (“Retirement Awards”) and the ERISA, the Court found that Plaintiffs’ claims were not barred by a release agreement, the statute of limitations, or the doctrine of laches. Under the Retirement Awards program, Defendants provided deferred stock bonus awards, whose shares would vest in *pro rata* annual installments from the grant date until a recipient reached age 65. Vested shares would then be distributed in ten annual installments, beginning upon retirement, disability, or attainment of age 65. After 1990, DOL guidance clarified that the Plan was not ERISA-exempt, Defendants replaced the Retirement Awards with other stock awards that deferred payment until the recipient’s termination from Marriott, but continued to abide by the Retirement Awards’ terms for already paid benefits. Defendants last granted deferred stock bonuses in 1990 and the majority of bonus stock award recipients, like the named Plaintiffs, were paid out in full before the case was filed. Plaintiffs asked the Court to declare the Plan subject to the ERISA and order that Defendants should thereby distribute additional benefits under the reformed ERISA-compliant plan terms. Defendants argued that Plaintiffs’ claims were barred by the statute of limitations, doctrine of laches, and a release signed by a named Plaintiff. As to the statute of limitations, the Court applied Maryland’s three-year statute of limitations for breach of contract actions. In accordance with applicable precedent, the Court determined that an ERISA cause of action does not accrue until a claim of benefits has been made and formally denied. In this case, Defendants did not adopt an administrative claims procedure until after Plaintiffs filed suit, making it impossible for Plaintiffs to participate in any internal benefit claims determination or receive a formal denial, and thus making it impossible for a cause of action to accrue.
to accrue. The Court also rejected Defendants’ argument that the statute of limitations began to run earlier because they had “clearly repudiated” the ERISA’s vesting requirements. Id. at *26. The Court found that, at most, the 1978 Prospectus on which this argument was based contained indecipherable legalese concerning the ERISA’s applicability. Thus, Plaintiffs did not know that they were entitled to the ERISA’s substantive protections until they brought suit, and the Court granted Plaintiffs’ cross-motion for summary judgment on the issue. Defendants also argued that Plaintiffs’ claims for equitable relief were barred by the doctrine of laches because Plaintiffs had waited decades to sue after learning all relevant facts. The Court concluded that the doctrine of laches was inapplicable because Plaintiffs’ claims were statutory in nature and that the statute of limitations applied instead. The Court granted Plaintiffs’ cross-motion for summary judgment on the issue. Finally, the Court rejected Defendants’ argument that a named Plaintiff’s claims were barred because the three-year statute of limitations began to run when he signed a release and termination agreement in 1990. The Court refused to conclude without any factual support that the named Plaintiff knowingly and voluntarily waived the rights under the ERISA and accordingly, denied Defendants’ motion for summary judgment on the issue.

**Janese, et al. v. Scrufari, 2013 U.S. Dist. LEXIS 142888 (W.D.N.Y. Oct. 2, 2013).** Plaintiffs, a group of participants and beneficiaries of the Niagra-Genesee & Vicinity Carpenters Local 280 Pension and Welfare Funds (collectively the “Funds”), initiated an ERISA class action against various Managers and Trustees of the Funds. Plaintiffs sought to recover assets alleged to have been wrongfully depleted as a result of certain fiduciary breaches. Specifically, Plaintiffs alleged that Plan Managers, Santo and Russell Scrufari and General Agent, Gordon Knapp, misappropriated assets of the Funds. Plaintiffs further alleged that the Funds’ Trustees (“Trustee Defendants”) failed to diligently supervise or monitor the activities of Scrufaris and Knapp. The Trustee Defendants moved to dismiss the claims against them as time-barred under the applicable statute of limitations set forth in § 413 of the ERISA. The Court granted Trustee Defendants’ motion, finding that Counts I and II, which complained of conduct that occurred prior to 1997, were untimely because they occurred more than six years before the commencement of the action in 2009. The Court also found Count III to be time-barred. In Count III, Plaintiffs alleged that from 1998 to 2007, the Trustee Defendants failed to adequately monitor the Funds. Plaintiffs alleged that this failure allowed Defendant Russell Scrufari to engage in fraudulent transactions which resulted in a loss to the Funds. The Court found that the claim against Trustee Defendants was time-barred as it was devoid of any allegations indicative of “separate, repeated violations of fiduciary obligations.” Id. at *20. Rather, Plaintiffs alleged a single on-going violation which, due to its on-going nature, attached to each trustee upon his or her appointment. As the last Trustee Defendant was appointed in 2000, Plaintiffs should have filed suit before 2006, but the claim was not brought until 2009. The Court further rejected Plaintiffs’ attempt to use the ERISA’s fraud and concealment exception, as the allegations of fraud and concealment only related to the purported actions of the Fund Managers, and not of the Trustee Defendants. In the absence of allegations of fraud, specifically committed by the Trustee Defendants, the Court found the claims to be untimely.

**Stargel, et al. v. Suntrust Banks, Inc., 2013 U.S. Dist. LEXIS 132038 (N.D. Ga. Aug. 7, 2013).** In this putative class action, Plaintiffs alleged violations of the ERISA’s fiduciary duty and prohibited transaction provisions. The Court granted Defendants’ motion for partial summary judgment and motion to dismiss. Plaintiffs, former employees of Defendant SunTrust Banks and participants in the company’s 401(k) plan, brought suit in October 2012, alleged that the 401(k) committee breached its duties of prudence and loyalty to plan participants by offering and failing to remove SunTrust’s proprietary mutual funds as investment options. Those funds allegedly carried higher fees and had poorer performance than other similar investment vehicles. The Court granted Defendants’ motion for partial summary judgment, which covered all claims made by one of the two named Plaintiffs. The Court held that a release agreement signed by that Plaintiff explicitly barred all of her claims. The Court rejected Plaintiff’s argument that the release made an exception for her claims as they were claims for vested benefits under the ERISA. The Court noted that the claims brought were for breaches of fiduciary duties and were thus not excepted from the release. The Court then considered whether the remaining Plaintiff’s breach of fiduciary duty and prohibited transaction claims were barred by the ERISA’s statute of limitations. The Court held that the breach of fiduciary duty claims were barred by the statute’s six-year limitations period. Seven of the eight
funds at issue were added to the investment portfolio more than six years prior to the filing of the claim. The Court rejected Plaintiff’s argument that the 401(k) committee continued to breach its duties by failing to remove the funds from the investment menu, as Plaintiff failed to allege any new or different violations since the funds had first been made available through the plan. Plaintiffs did not contend that the funds performed worse in the class period than previously, that the fees were higher than they previously had been, or that a new conflict of interest arose. Those claims were thus dismissed as to seven of the eight funds at issue. Defendants also argued that Plaintiff’s fiduciary duty claim was barred under the ERISA’s three-year limitations period, which runs from actual knowledge of the alleged breach. Although the Court considered certain plan documents in ruling on the motion, it found that Defendants had not shown that Plaintiff had actual knowledge of the facts relevant to the breach of fiduciary duty claim because they could not show she actually received those documents. The Court thus held that the three-year limitations period was inapplicable. The Court also ruled that claims pertaining to the eighth and final fund were barred because Plaintiff did not have standing as she never invested in that fund. Plaintiff thus could not show any actual injury that would allow her to maintain the action. The Court dismissed all claims of breach pertaining to that fund. Finally, the Court dismissed three other claims raised by Plaintiffs, finding that they were derivative of the counts that had been found to be invalid.

(xi) ERISA Stock Drop Class Actions

Fisch, et al. v. Suntrust Banks, 511 Fed. App’x 906 (11th Cir. 2013). Plaintiffs, in this putative stock drop class action, alleged that Defendants, fiduciaries of eligible individual account plans (“EIAPs”), breached their fiduciary duties under the ERISA by failing to disclose to the plan participants material, negative and non-public financial information about the sponsor’s business and by continuing to allow investment in the sponsor’s securities when it was imprudent to do so. Defendants filed a motion to dismiss, which the Court granted in part and denied in part. Specifically, the District Court dismissed Plaintiff’s prudence claim because 29 U.S.C. § 1104(a)(2) exempts EIAPs that acquire and hold employer securities from the ERISA’s prudence requirement. The District Court denied Defendant’s motion to dismiss the remaining claims, finding that Plaintiffs had alleged sufficient facts to establish an obligation by the plan administrators to disclose non-public and negative, material information to the plan participants. Defendants filed an interlocutory appeal and the Eleventh Circuit reversed. The Eleventh Circuit found that the ERISA does not impose upon EIAP fiduciaries of plans that offer the plan sponsor’s publicly traded stock as an investment option a duty to disclose material, non-public financial information about the plan sponsor beyond the specific disclosures mandated by the ERISA and its implementing regulations. The Eleventh Circuit also held that 29 U.S.C. § 1104(a)(2) does not exempt fiduciaries of EIAPs from exercising their overarching duty of prudence under § 404(a)(1) of the ERISA. Thus, the Eleventh Circuit held that an EIAP fiduciary could be sued for continuing to hold or acquire imprudent employer securities. Finally, the Eleventh Circuit rejected Defendants’ argument that alternative grounds existed that would justify dismissal of the complaint because those grounds had not been properly presented for review. Accordingly, the Eleventh Circuit remanded the case to the District Court.

Harris, et al. v. Amgen, Inc., 717 F.3d 1042 (9th Cir. 2013). In this class action brought by the participants of the Amgen Retirement and Savings Plan (the “Amgen Plan”), and the Retirement and Savings Plan for Amgen Manufacturing, Ltd. (the “AML Plan”) (collectively, “the Plans”) alleging that Defendants breached their fiduciary duties by staying invested in the common stock even when the stocks dropped in value, the Ninth Circuit reversed the District Court’s order dismissing the complaint. Plaintiffs were current and former employees of Amgen, Inc., and its subsidiary Amgen Manufacturing Limited (“AML”), who participated in the two employer-sponsored pension plans. The plans were employee stock-ownership plans that qualified as eligible individual account plans (“EIAPs”), and all of Plaintiffs’ EIAPs included holdings in the Amgen Common Stock Fund, one of the investments available to the plan participants. The Amgen Common Stock Fund held only Amgen common stock. This litigation arose out of a controversy concerning Amgen drugs used for the treatment of anemia – Epogen, Procrit, and Aranesp – between 1989 until the case was filed in 2006. In the late 1990s and early 2000s, several clinical tests raised safety concerns regarding the use of erythropoiesis-stimulating agents (“ESAs”) to treat anemia. One of the trials under Amgen’s program was the Danish Head and Neck Cancer Group
DAHANCA“) 10 Trial. In 2006, DAHANCA investigators concluded that there was a small but significant poor outcome in patients treated with Aranesp, in that tumor growth was worse for patients who took Aranesp compared to patients who did not. Other clinical trials, the CHOIR and the CREATE, raised additional concerns about ESAs. Amgen responded to the CHOIR and the CREATE trials with substantial body of evidence, developed over 17 years, demonstrating that anemia associated with chronic kidney disease could be treated effectively with Epogen and Aranesp when administered according to FDA approved dosing guidelines. Id. at *11. By late 2005, Amgen’s common stocks were trading at $86.17. In February 2007, the Cancer Letter published an article entitled “Amgen did not tell Wall Street about Results of DAHANCA Study”. Id. at 1045. A month later, two sub-committees of the House of Representatives opened an investigation into safety profile of Aranesp and Epogen. By February 2007, the stocks sold for $66.73. Five Plaintiffs alleged that Defendants violated their fiduciary duty under the ERISA, but the District Court dismissed the complaint against Amgen finding that it was not a fiduciary. In a separate class action simultaneously pending before the same judge, the District Court concluded that investors had sufficiently alleged material misrepresentations and certified the class, which was affirmed by both the Ninth Circuit and the U.S. Supreme Court. In this order, the Ninth Circuit reversed the District Court’s decision in the ERISA case brought by five Plaintiffs. Defendants contended that they were entitled to a presumption of prudence under Quan v. Computer Science Corp., 623 F.3d 870 (9th Cir. 2010) Defendants asserted that if this presumption was applied, their action in continuing to provide Amgen stock as investment alternative was prudent. The Ninth Circuit, however, found that Defendants neither were required nor were encouraged by the terms of the Plans, as there was no language in the Plans requiring that a company stock fund be established, or to particularly invest in Amgen stock; thus, they were not entitled to a presumption of prudence. Id. at *27, 31. Defendants also argued that investments in Amgen stock during the class period were not imprudent because Amgen was not even remotely experiencing severe financial difficulties during that time, and remained a strong, viable and profitable company. The Ninth Circuit remarked that this argument was beside the point as it did not mean that the price of Amgen stock was not artificially inflated during class period. Defendants contended that had they removed the Amgen Fund as an investment option, it may have sent negative signal, and the stock prices would surely have dropped to the detriment of Plaintiffs. The Ninth Circuit rejected this argument, finding that had Defendants timely complied with their duties under the ERISA, there would have been little or no artificial increase in the share price before the Fund was removed as an investment option. Therefore, the Ninth Circuit concluded that Plaintiffs had stated facts sufficient to raise a claim for imprudence. Id. at *40. Similarly, the Ninth Circuit found that Plaintiffs had stated sufficient facts in their claim that Defendants violated their duty of loyalty and care by failing to provide material information to plan participants about investment in the Amgen Common Stock Fund. The Ninth Circuit explained that the facts alleged by Plaintiffs could be used to show that Defendants knew or should have known that the price of Amgen shares were artificially inflated, and to show that Plaintiffs presumptively and detrimentally relied on Defendants’ statements under the fraud-on-the-market theory. Id. at *44-45. Finally, Amgen argued that it was not a fiduciary under the Plan because it had delegated its discretionary authority. The Ninth Circuit noted that the Amgen Plan provided that Amgen was the named fiduciary, administrator, and plan sponsor of the Plan. Amgen argued that it had delegated authority to trustees and investment managers. The Ninth Circuit, however, noted that the Plan did not contain any clear delegation of exclusive authority, because the Plan merely authorized the Fiduciary Committee to act on behalf of Amgen, but did not provide exclusive authority to the Committee, nor precluded Amgen from acting on its own behalf. Accordingly, the Ninth Circuit reversed the District Court’s dismissal of Amgen from the case as a non-fiduciary.

In Re Pfizer Inc. ERISA Litigation, 2013 U.S. Dist. LEXIS 45868 (S.D.N.Y. Mar. 29, 2013). Plaintiffs, a group of participants and beneficiaries of Pfizer’s retirement savings plans, brought a class action contending that Defendants breached their fiduciary duties under the ERISA by continuing to invest in company stock when the stock’s price was inflated due to alleged undisclosed business risks concerning Celebrex and Bextra, two drugs sold by the company. The Court disagreed and dismissed the Plaintiffs’ claims. The Court noted that the savings plans strongly favored employee investment in company stock funds, and mandated that employer contributions be made in company stock. The Court thus concluded
that Defendants’ company stock acquisition and retention decisions were entitled to the Moench presumption of prudence (from Moench v. Robertson, 62 F.3d 553 (3d Cir. 1993)), and subject to review only for abuse of discretion. The Court further determined that the facts alleged by Plaintiffs did not demonstrate that Pfizer was ever in a “dire situation” given its large market capitalization and the fact that Celebrex and Bextra were only two of several blockbuster drugs contributing to Pfizer’s substantial revenues. Id. at *30. The Court also explained that the 52% decline in Pfizer’s stock price, while significant, did not amount to the sort of “catastrophic decline” necessary to rebut the presumption of prudence, especially given that Pfizer’s stock price never fell below $20 per share. Id. at *31.

In Re Wilmington Trust Corp. ERISA Litigation, 2013 U.S. Dist. LEXIS 63496 (D. Del. May 3, 2013). In this putative class action, the named Plaintiffs sued for violation of the ERISA on behalf of themselves and other similarly-situated class members who participated in a 401(k) plan. One of the funds offered by the plan was a Wilmington Trust Stock Fund. Each of the named Plaintiffs invested a portion of their plan contributions in this stock fund. Throughout 2007, Defendant increased its commercial real estate and construction loans. In April 2007, Defendant stated that there was “nothing on the horizon to suggest a change in credit quality” and the “economy in our Regional Banking footprint is healthy and stable.” Id. at *9. As the housing market began its decline in 2008, Defendant asserted that its real estate and construction loans were locally-based and not affected by the national market. Despite these assertions, the bank suffered a major financial decline, eventually leading to its stock being delisted and losing 90% of its value. Plaintiffs alleged: (i) imprudent investment for allowing the investment of plan assets in Defendant’s stock; (ii) misrepresentation for withholding material information from Plaintiffs that would have allowed them to make informed decisions regarding their investments; (iii) a breach of fiduciary duty of loyalty by not acting in the best interest of the plan; and (iv) breach of the duty of care based on failure to monitor and oversee the committee running the plan. Defendants moved to dismiss. With respect to Plaintiff’s duty of care claim, the Court applied the “Moench presumption” of prudence (based on Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995)), which provides a presumption of prudence to plan administrators who offer an investment in employer stock where the plan requires the plan to offer such an investment. Id. at *20-21. The Court, however, found that even in light of this presumption, Plaintiffs had stated a claim because of the precipitous stock price drop, but also because there was no evidence of any investigation into the prudence of the company’s investment decisions, especially in light of the housing market’s decline through 2009 and 2010. With respect to their duty of loyalty claim, the Court found that Plaintiffs’ allegations were sufficient to state a claim. Plaintiffs’ allegations that the individual Defendant’s pay was tied to the performance of the corporate Defendant’s stock price, coupled with the “rosy picture of the [corporate Defendant’s] financial condition they continued to paint as corporate officers,” was sufficient to survive a motion to dismiss and to allow Plaintiffs to take discovery on that claim. Id. at *29. The Court also denied Defendants’ motion to dismiss the duty to monitor claim as to the corporate Defendant, even though the company was not a named fiduciary. The Court concluded that Plaintiffs’ complaint contained allegations sufficient to plausibly state that the corporate Defendant retained control over the individual fiduciaries such that it had a duty to monitor their performance as fiduciaries. Finally, the Court dismissed the misrepresentation claims, stating that: (i) by informing Plaintiffs of the risks of investment, (ii) by not making any guarantees with respect to any investment, and (iii) by providing information regarding past performance, Defendants had not made any material misrepresentations or violated their ERISA duties.

Majad, et al. v. Nokia, Inc., 2013 U.S. App. LEXIS 12843 (2d Cir. June 21, 2013). In this ERISA stock drop class action, Plaintiffs, a group of participants in a 401(k) plan that offered Defendant’s common stock as an investment option, alleged that Defendant fiduciaries breached their duties of prudence and loyalty by retaining Defendant’s stock as an investment option during the class period. The District Court dismissed the lawsuit. On appeal, the Second Circuit affirmed. It rejected the prudence claim as Plaintiffs did not allege that plan fiduciaries knew about the company’s troubles any sooner than Plaintiffs. The Second Circuit was not willing to impute insider knowledge about possible financial difficulties to the plan fiduciaries. Id. at *7. With respect to Plaintiffs’ duty of loyalty claims, which were premised on Plaintiffs’ allegations that Defendants failed to relay complete and accurate information about the company’s business prospects to Plaintiffs, the Second Circuit concluded that the information sought by Plaintiffs was
outside of the scope of the information that ERISA fiduciaries are required to provide to plan participants. Id. at *9. Moreover, the Second Circuit concluded that to the extent any Defendant made a misrepresentation of corporate financial information to the investing public, those statements were not made in a fiduciary capacity and thus were not implicated by a fiduciary breach claim under the ERISA. Id. at *10.

Metyk, et al. v. KeyCorp, 2013 U.S. Dist. LEXIS 11786 (N.D. Ohio Jan. 29, 2013). Plaintiffs, on behalf of a putative class, brought claims against KeyCorp that mirrored those in Taylor v. KeyCorp, Case Nos. 10-4163, 10-4198 & 10-4199 (6th Cir. May 25, 2012). Specifically, they alleged that Defendants breached various fiduciary duties by imprudently investing plan assets in KeyCorp stock despite knowing of the company’s financial problems. In Taylor, the Sixth Circuit held that Plaintiff lacked standing because she did not suffer any actual loss on her KeyCorp investments. Id. at *10. She had sold most of her stock in KeyCorp during the period when its price alleged was artificially inflated, thereby realizing a net profit from the sale. The Sixth Circuit explicitly rejected Plaintiff’s alternative investment theory. Under that theory, her injury could be measured by comparing her earnings from her KeyCorp investments to what she would have realized had her money been invested in an entirely different investment option such as the S&P 500. Id. By contrast, here, Plaintiffs had purchased KeyCorp stock at the allegedly inflated price and later sold it after the price declined. Id. at *11. With Plaintiffs capable of showing an apparent injury, the jurisdictional issue was remedied and the Court was able to proceed and rule on whether Plaintiffs could satisfy the requisite pleading standard in an ERISA stock drop case. In analyzing that question, the Court adopted the Supreme Court’s standard enunciated in Dura v. Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336 (2005). Although Dura was a securities fraud case, the Court noted that “its common-sense analysis is equally applicable” in the ERISA context. Id. Under that standard, Plaintiffs must plead sufficient facts to show not only economic loss, but also that the loss was caused by the alleged breach of fiduciary duty. In other words, Plaintiffs must present facts showing that they bought the stock at the inflated price and that the market later learned the truth about the alleged misrepresentation, causing the share price to fall significantly. Id. Plaintiffs here did not identify any instance where the truth regarding an alleged misrepresentation was revealed to the market or in which KeyCorp’s stock price dropped as a result. Accordingly, the Court dismissed Plaintiffs’ claims.

Romero, et al. v. Nokia, Inc., 2013 U.S. Dist. LEXIS 149166 (N.D. Cal. Oct. 15, 2013). In this putative ERISA stock drop class action, the Nokia Retirement Savings and Investment Plan (the “Plan”) and a class of its participants (collectively “Plaintiffs”) brought three related ERISA fiduciary breach claims against the company and the Plan’s committee members. The crux of Plaintiffs’ claim was that Defendants should have known that the “company was in dire circumstances” such that continuing to invest Plan assets in the company’s stock was imprudent. Id. at *3. To support their claim of imprudence, Plaintiffs relied on the fact that Nokia’s stock significantly declined after the advent of the smartphone from an all-time high of $54 per share to $4 to $5 per share by the beginning of the class period in June 2012. Defendants moved to dismiss, arguing that the Plaintiffs failed to allege facts sufficient to establish a breach of fiduciary duty. The Court found that Defendants’ actions were “presumptively prudent” insofar as the Plan terms encouraged the fiduciary to invest primarily in employer stock. Id. at *8. When Plan terms so provide, the Court reasoned, then a presumption of prudence provides a “substantial shield” from liability. Id. at *9. To rebut the presumption and withstand dismissal, Plaintiffs must do more than simply allege that Defendants ignored a decline in stock price. Rather, Plaintiffs must allege facts sufficient to clearly implicate the company’s viability as an on-going concern, or to show a precipitous decline in the employer’s stock, “combined with evidence that the company is on the brink of collapse or is undergoing serious mismanagement.” Id. at *11. Applying this standard, the Court found that Plaintiffs did not allege facts sufficient to rebut the presumption of prudence. In particular, the Court rejected Plaintiffs’ contention that only the stock price decline that occurred during the class period was relevant to the prudence analysis, finding that prudence is “not determined in a vacuum.” Id. at *13. The relevant inquiry, the Court reasoned, was whether by the start of the class period in January 2012, it was reasonable for Defendants to believe that the company would overcome its problems, such that it was prudent for them to retain the stock. Considering the affirmative actions Defendants had taken by January 2012 to correct any
mismanagement (including a partnership with Microsoft to develop smartphones), the Court found Plaintiffs had not alleged sufficient facts to show that Defendants breached their duties during the relevant time period. The Court also dismissed the remaining two causes of action (for breach of duty of loyalty and co-fiduciary liability) as derivative of the prudence claim.

**White, et al. v. Marshall & Ilsley Corp.,** 714 F.3d 980 (7th Cir. 2013). In this ERISA putative class action, the Seventh Circuit affirmed the dismissal of a claim by 401(k) plan participants that plan fiduciaries breached their fiduciary duties under the ERISA by continuing to offer the employer’s stock as an investment option while the company’s stock experienced a steep decline. During the housing market collapse and subsequent stock market decline in 2008 and 2009, company stock price dropped by approximately 54%, as did the value of the employees’ investments in the company stock fund. The District Court granted Defendants’ motion to dismiss based on the presumption of prudence articulated in *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995). The Seventh Circuit affirmed, explaining that the ERISA’s duty of prudence is subject to the presumption set forth in *Moench*, absolving the fiduciaries of risk of liability when investing in company stock that later loses value. It further explained that Plaintiffs only can overcome the application of the *Moench* presumption by alleging and ultimately proving that the company faced impending collapse that could not have been foreseen by the sponsor of the plan. Here, after the company stock reached its lowest point in the proposed class period, it increased in value by more than 150% by the end of the class period, from an adjusted low price of $8.46 to an adjusted price of $21.43, a gain that was in line with the broader market recovery. Therefore, applying the *Moench* presumption to this case, the Seventh Circuit concluded that Plaintiffs made no allegations sufficient to indicate that company’s circumstances were either dire or nearing collapse, as the value of the employer stock remained in line with the rest of the stock market. Accordingly, the Seventh Circuit found that the allegations did not state a viable claim for breach of fiduciary duty of prudence during the proposed class period, and that the fiduciaries did not violate the ERISA by complying with the terms of the Plan that called for continued investment in the employer’s stock.

(xii) **Appeals In ERISA Class Actions**

**Durand, et al. v. The Hanover Insurance Group, Inc.,** 2013 U.S. Dist. LEXIS 176667 (W.D. Ky. Dec. 17, 2013). In this ERISA class action, Plaintiffs alleged that Defendants, Plaintiffs’ former employer and the employer-sponsored pension plan, underpaid accrued plan benefits. The action consisted of an overall class and two sub-classes. The sub-classes challenged Defendants’ alleged under-payments based on 1997 and 2004 amendments to the plan, respectively. The Court previously dismissed the claims of Plaintiffs representing the class challenging the 2004 amendment on various grounds, including the statute of limitations. Plaintiffs moved for relief under Rule 54(b). Id. at *1. They requested that the Court enter final judgment on the dismissed claims so that those claims would be immediately appealable. The Court granted Plaintiffs’ motion. It first noted that Rule 54(b) allows it to enter final judgment on any claims before full adjudication of all claims if it determines there is no just reason for delay. Id. at *4. The Court noted that a Rule 54(b) analysis ultimately turns on whether the needs of the parties outweigh the efficiency of having a single appeal at the conclusion of the case. Id. at *6. The Court determined that the outcome of the surviving claims had no bearing on the merits of the dismissed claims. Id. at *7. It further concluded that any risk that the later resolution of the surviving claim would moot the dismissed claim to be appealed was outweighed by judicial economy and Plaintiffs’ need for immediate relief. Id. at *8. The Court thus granted Plaintiffs’ motion for entry of a final order on the dismissed claims.

(xiii) **Arbitration Issues In ERISA Class Actions**

**Hendricks, et al. v. UBS Financial Services, Inc.,** 2013 U.S. App. LEXIS 22779 (5th Cir. Nov. 11, 2013). Plaintiffs bought two putative class actions against their former employer, alleging that Defendant violated the ERISA by deeming certain funds in a compensation plan forfeited upon plaintiffs’ separation from the company. The District Court consolidated the cases. During Plaintiffs’ employment, their employer issued annual compensation plans, including the Compensation Plan and the PartnerPlus Plan (collectively the “Plans”). The Compensation Plan contained arbitration and class waiver provisions, while
the PartnerPlus Plan contained only an arbitration provision. Plaintiffs claimed that vesting and forfeiture provisions in the PartnerPlus Plan violated the ERISA. The District Court denied Defendant’s motions to compel arbitration of the cases on the basis that the PartnerPlus Plan’s arbitration clause did not apply to class claims, and that the Compensation Plan’s broader arbitration provision was an unenforceable amendment to the PartnerPlus Plan. *Id.* at *5. On appeal, the Fifth Circuit reversed, and held that arbitration should have been compelled. Plaintiffs argued that the Compensation Plan was merely a summary of benefit plan and its arbitration clause thus did not apply to their claim under the PartnerPlus Plan. The Fifth Circuit, however, concluded that the arbitration provision in the Compensation Plan was an independent and enforceable provision. *Id.* at *9. Plaintiffs further argued that Compensation Plan provisions were unenforceable because they conflicted with the PartnerPlus Plan in violation of the ERISA. The Fifth Circuit noted that two of the alleged conflicts between the Plans were merely differences in terms both of which could be enforced. As to the third alleged conflict, that the PartnerPlus Plan’s arbitration clause did not include a class waiver while the Compensation Plan did, Plaintiffs argued that in light of Financial Industry Regulatory Authority’s (“FINRA”) prohibition against class litigation and the PartnerPlus Plan’s lack of a class waiver, their class claims must proceed in federal court. The Fifth Circuit rejected this argument, ruling that the PartnerPlus Plan’s lack of a class waiver did not relieve Plaintiffs of their independent obligation to submit their claim to arbitration based on the Compensation Plan. *Id.* at *9-10. The Fifth Circuit noted, however, that the FINRA arbitration panel could decide whether to allow class arbitration. The Fifth Circuit noted that Plaintiffs’ compensation claims fell squarely within the scope of the Compensation Plan’s arbitration clause. In light of the Compensation Plan’s arbitration clause’s application to all disputes except for claims for injunctive relief, Plaintiffs also argued that their claims were not arbitrable because they sought injunctive relief only. The Fifth Circuit noted that because Plaintiffs also sought other equitable relief under the ERISA, the claims should be sent to arbitration, with the panel to decide the scope of arbitration. *Id.* at *14. The Fifth Circuit thus reversed the denial of Defendant’s motions to compel arbitration.

**Van Pamel, et al. v. TRW Vehicle Safety Systems, Inc.,** 723 F.3d 664 (6th Cir. 2013). Plaintiffs, a group of retirees, sued their former employer and its parent company alleging that Defendants breached a contract in violation of the Labor Management Relations Act and denied benefits in violation of the ERISA. Both claims stemmed from a dispute over unilateral changes to prescription drug benefits provided under a series of collective bargaining agreements. The collective bargaining agreements contained arbitration clauses. After Plaintiffs filed suit, Defendants moved to compel arbitration. The District Court concluded that the dispute should be resolved through arbitration. On appeal, the Sixth Circuit stated that nothing in the collective bargaining agreements expressly excluded benefits disputes from arbitration. The Sixth Circuit found that the core issue for the ERISA claims – whether the benefits at issue had vested – was appropriate for arbitration because it turned on an interpretation of the collective bargaining agreements.

(xiv) **PBGC Issues In ERISA Class Actions**

**Davis, et al. v. Pension Benefit Guaranty Corp.,** 2013 U.S. App. LEXIS 22254 (D.C. Cir. Nov. 1, 2013). Plaintiffs, a group of retired US Airways pilots and their beneficiaries, challenged the Pension Benefit Guaranty Corp.’s (“PBGC” or “Defendant”) calculation of benefits payable under US Airways’ defined benefit Retirement Income Plan (the “Plan”). The District Court granted summary judgment to the PBGC. On appeal, the D.C. Circuit affirmed the grant of summary judgment to the PBGC. US Airways filed for bankruptcy and terminated the Plan, at which point the PBGC took over the Plan and began making estimated payments to the retired pilots in accordance with the six-tier priority scheme set forth in 29 U.S.C. § 1355. The applicable regulations provided that benefits in priority category 3 are limited to “the lesser of the lowest annuity benefit in pay status during the 3-year period ending on the termination date and the lowest annuity benefit payable under the plan provision at any time during the 5-year period ending on the termination date.” *Id.* at *5. Plaintiffs argued that the PBGC improperly excluded from category 3 the certain Early Retirement Incentive Plan (“ERIP”) benefits and ignored certain cost-of-living adjustments (“COLAs”). The D.C. Circuit disagreed, finding that the earliest date the ERIP benefit could be paid was one month after the 5-year period preceding Plan termination; and that COLAs were not payable until after the 5-year period began, and therefore only the lesser annuity benefit that was payable during that time.
period should be included in category 3. Id. at *17. Plaintiffs also asserted that the PBGC should not have fixed benefits as of the date the pilots could have taken retirement, but instead should have applied "actuarial equivalence" principles to compensate for the value lost. Id. at *18. The D.C. Circuit rejected this claim because the statute did not apply in this circumstance. Plaintiffs further argued that pursuant to the minimum benefit provisions, this should have affected benefit calculations. The D.C. Circuit rejected this claim as being based upon evidence outside of the administrative record and inconsistent with the Plan terms. Finally, Plaintiffs argued that the PBGC should have permitted alternative mechanisms to determine whether a pilot was "totally and permanently disabled", rather than relying solely upon a formal determination by Social Security Administration. Id. at *29. In rejecting this contention, the D.C. Circuit found that Plaintiffs could not demonstrate a legal basis for imposing obligations on the PBGC based on provisions of the Disability Plan, which was administered by US Airways and not the PBGC. Accordingly, the D.C. Circuit affirmed summary judgment for Defendant.

(xv) Notice Issues In ERISA Class Actions

_Bauer-Ramazani, et al. v. Teachers Insurance & Annuity Association Of America-College Retirement & Equities Fund, 290 F.R.D. 452 (D. Vt. 2013)._ Plaintiffs, a group of retirement account owners, brought an action under the ERISA, alleging breach of fiduciary duty. Plaintiffs moved for class certification and the Court granted the motion. Defendants moved for reconsideration of the Court’s order and Plaintiffs requested approval of their proposed class notice plan. The Court denied Defendants’ motion and granted Plaintiffs’ request. Regarding reconsideration, the Court noted the class certification order was subject to alteration or amendment, and thus refused to delay dissemination of the notice of class certification. Plaintiffs submitted a short form notice, long form notice, and an exclusion form. Defendants objected and requested the Court to be restrained from approving the plan until it had resolved the reconsideration motion, and if it did not, then to (i) revise the long form notice to include individual issues language, (ii) require the long form notice be both mailed and e-mailed, (iii) display the amended class definition on the website, and (iv) publish the short form notice in the New York Times or Wall Street Journal instead of the Chronicle of Higher Education. The Court stated that given the parties’ agreement, the notice plan should include e-mailing the long form notice without mailing unless Defendants paid the additional postage, and displayed the amended class definition on the internet website. Further, the Court agreed with Plaintiffs that publication in a trade specific journal was useful and might be the best notice that was practicable for those potential class members whose addresses were unavailable; thus, the short form notice should be published in the Chronicle of Higher Education as well. Accordingly, the Court denied the motion for reconsideration and granted Plaintiffs’ proposed class notice plan.

_Jensen, et al. v. Solvay Chemicals, Inc., 721 F.3d 1180 (10th Cir. 2013)._ In this ERISA class action, the Tenth Circuit affirmed the District Court’s determination that Plaintiffs were not entitled to any relief for their employer’s violation of § 204(h)’s notice requirements under the ERISA. The Tenth Circuit reasoned that Plaintiffs failed to establish that the notice deficiency was “egregious.” Id. at 1184. The Tenth Circuit also held that Plaintiffs could not maintain a claim for promissory estoppel pursuant to § 502(a)(3) of the ERISA because they could not demonstrate that they were misled by the notice’s deficiency. Specifically, the Tenth Circuit ruled that Defendant could not be liable under § 204(h), as the evidence showed that it intended to make all the disclosures the law required. The Tenth Circuit further found that any omission was accidental and simply an oversight in the process of drafting a complex statutorily-mandated notice. The Tenth Circuit credited testimony from company executives that they never intended to leave out details in the § 204(h) notice, and testimony from outside lawyers and actuaries that they were directed by the company to ensure the § 204(h) notice contained everything the ERISA required. The Tenth Circuit further credited the testimony of company executives that none ever pushed back against the recommendations from counsel and actuaries regarding what to include in the notice. The Tenth Circuit rejected the employees’ contention that Defendant had a financial motive to omit information and that at least some company executives were aware of the company’s disclosure obligations. The Tenth Circuit also affirmed the District Court’s finding that Defendant did not discover its unintentional notice deficiency until after Plaintiffs commenced their lawsuit, and that at that time Defendant immediately consulted with ERISA counsel to correct the omission. Plaintiffs alternatively brought a § 502(a)(3) claim for promissory estoppel.
asserting that the company’s § 204(h) notice also violated § 102(a) of the ERISA. Applying traditional equity principles, the Tenth Circuit determined that the employees were not able to recover under a promissory estoppel theory because they could not show that they were misled by the deficient notice given that were well aware that they were losing certain benefits under the new plan.

(xvi) Preemption Issues In ERISA Class Actions

_Wurtz, et al. v. The Rawlings Co., LLC, 833 F. Supp. 2d 490 (E.D.N.Y. 2013)._ Plaintiffs, a group of participants in Defendants’ health plans, brought a class action alleging violations of the ERISA because Defendants unlawfully enforced claims for reimbursement when a participant had recovered from a third-party tortfeasor the costs of healthcare services for personal injuries. Plaintiffs’ claims were premised on a state law enacted in 2009, New York General Obligations Law § 5-335 (“§ 5-335”), which they contended barred non-statutory reimbursement claims brought under Defendants’ health plans. The Court dismissed Plaintiffs’ claims, concluding that Plaintiffs’ claims based on § 5-335 were preempted by §§ 502 and 514 of the ERISA. The Court further determined that Plaintiffs’ claims could not be revived by § 514’s savings clause, as § 5-335 was a law of general applicability not specifically directed at insurance companies, and the law did not substantially affect risk pooling arrangements. The Court additionally concluded that § 514’s “deemer” clause was inapplicable, as the clause only comes into play if the state law at issue is saved from preemption in the first instance, which was not the case here. _Id._ at 506-07.

(xvii) Jury Trials In ERISA Class Actions

_Hellman, et al. v. Cataldo, 2013 U.S. Dist. LEXIS 117676 (E.D. Mo. Aug. 20, 2013)._ In this ERISA class action asserting breach of fiduciary duties of prudence and loyalty, the Court denied Defendants’ motion to strike Plaintiff’s demand for a jury trial. Plaintiff asserted that Defendants failed to act to protect the CPI Corp. Employees Profit Sharing Plan and Trust (the “Plan”) and its participants because they continued to offer CPI common stock as an investment option under the Plan when it was imprudent to do so and despite their knowledge of CPI’s dire financial condition. Plaintiff sought: (i) an order compelling Defendants to make the Plan whole for all losses resulting from the breach of their fiduciary duties; (ii) an order requiring Defendants to restore to the Plan all profits that the participants would have made if fiduciary obligations had not been breached; and (iii) the imposition of a constructive trust to the extent of Defendants’ unjust enrichment resulting from the breach. The Court noted that the right to jury trial was codified in the Seventh Amendment, which applies only to lawsuits in which legal rights are adjudicated, and not to actions in which only equitable rights and remedies are decided. The Court applied the two-pronged test outlined in _Granfinanciera v. Nordberg_, 492 U.S. 42 (1989), to determine whether a jury trial was appropriate. When applying that test in a statutory action, the Court first compares the statutory claim to analogous 18th-century actions brought in England prior to the merger of law and equity, and then determines whether the remedy sought is legal or equitable in nature by examining both the nature of the issues involved and the remedy sought. Comparing Plaintiff’s ERISA claim to analogous 18th-century actions, the Court found that claims for breach of fiduciary duty were traditionally within equity jurisdiction, and thus the first prong of the _Granfinanciera_ test weighed against Plaintiff’s right to a jury trial. The Court, however, also observed that Plaintiff sought compensation for losses resulting from Defendants’ breach of a legal duty, as Plaintiff was not only requesting that Defendants restore to the Plan particular funds now in the Defendants’ possession, but also sought to hold Defendants personally liable for money damages as compensation for losses to the Plan. Accordingly, the Court found that the second prong of the test weighed in favor of a jury trial. The Court reasoned that while Plaintiff also sought certain equitable remedies, where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims, which must not be infringed.

(xviii) Mootness Issues In ERISA Class Actions

_Penders, et al. v. Bank Of America Corp., 2013 U.S. Dist. LEXIS 117118 (W.D.N.C. Aug. 19, 2013)._ In this putative class action alleging that Defendant violated the ERISA by denying certain plan participants a separate retirement account for 401(k) assets, the Court granted Defendant’s motion for summary judgment because Plaintiffs’ claims were moot. Plaintiffs were participants in two retirement plans, a
401(k) plan and a defined benefit pension plan, originally offered by NationsBank, a predecessor of Bank of America. NationsBank later amended the pension plan to adopt a “cash balance formula.” Id. at *3. This change allowed 401(k) plan participants to transfer their assets into the cash balance plan (the “BAC Plan”). NationsBank eventually merged with another company to form Bank of America (“BoA”). BoA created a hypothetical transferred savings account (“TSA”) for each participant who elected to transfer his or her 401(k) assets into the BAC Plan. BoA commingled these assets with the assets of BAC Plan’s general trust and then invested the commingled assets in investments selected by the BAC Plan trustee. Each participant’s TSA was credited with returns based on the performance of options chosen by each participant rather than the actual investment returns generated by the BoA trustee. Additionally, BoA guaranteed the contributions to the BAC Plan against any investment loss. In 2000, the IRS opened an audit of the BAC Plan and found that the plan’s hypothetical investment credits failed to preserve the separate account feature required by the Internal Revenue Code for 401(k) plans. Pursuant to a settlement agreement with the IRS, as a result of the audit, BoA spent $10 million to move the retirees’ 401(k) assets into separate accounts in order to restore the separate account feature. The transferred TSA balance reflected a participant’s originally transferred 401(k) balance, plus hypothetical investment credits to date. In addition, BoA amended its BAC Plan to guarantee a minimum rate of return on transferred 401(k) assets that were invested in the BAC Plan. In the instant litigation, Plaintiffs first alleged that BoA’s conduct violated Plaintiffs’ right to a separate account for their 401(k) assets under the ERISA and the Internal Revenue Code. In response, Defendant contended, and the Court agreed that assuming a violation occurred, Defendant had already restored the separate account feature; thus mooting Plaintiffs’ claim for losses. The Court concluded that Defendant’s restoration of this feature completely and irrevocably eradicated the effects of the violation, and Plaintiffs had not experienced any injuries aside from the temporary loss of the separate account feature. Plaintiffs had also sought equitable monetary relief, arguing that many class members still suffered a redressable injury insofar as they have not received their past allocable share of the spread Defendant earned on the participants’ 401(k) assets because the IRS settlement was only on a forward-looking basis. The Court held that Plaintiffs lacked standing to bring this claim. Because the terms of the BAC Plan clearly stated that Defendant would retain such earnings to save the company money, the Court held that Defendant’s retentions of the spread could not constitute an invasion of Plaintiffs’ legally protected interests. Accordingly, the Court granted Defendant’s motion for summary judgment.

(xix) Severance Issues In ERISA Class Actions

Karamsetty, et al. v. Wells Fargo & Co., 2013 U.S. Dist. LEXIS 117281 (N.D. Cal. Aug. 19, 2013). In this putative class action, Plaintiff alleged that Defendant’s implementation of a policy not to renew immigrant visas was intended to interfere with Plaintiff’s right to severance benefits under its Salary Continuation Pay Plan (the “Plan”), and thus violated §§ 502(a)(1)(B) and 510 of the ERISA. Plaintiff, a citizen of India, was employed by Defendant from 2007 to 2010. When Plaintiff began to work for Defendant, he was eligible to work in the U.S. pursuant to an employer-sponsored H1-B visa, which was set to expire in June 2010. In March 2009, Defendant changed its policy regarding its sponsorship of employee visas. Under the new policy, it no longer sponsored visa renewals for its current employees. After submitting a claim for severance benefits, Plaintiff was informed that he was not eligible under the Plan because eligibility was contingent upon whether there was a qualifying event that met the definition of “position elimination,” and non-renewal of an H1-B visa did not constitute such an event. Id. at *14. Specifically, the Plan had defined position elimination as the “elimination of all or part of the position held by a Participant or any other form of reduction-in-force initiated by Defendant affecting a Participant’s position.” Id. at *15. In granting summary judgment for Defendant on Plaintiff’s § 502(a)(1)(B) claim, the Court found that Plaintiff’s job was not “eliminated” because Defendant hired a contractor to fill Plaintiff’s position after his resignation. Id. at *32. Upon these facts, the Court determined that Defendant did not abuse its discretion in denying Plaintiff’s claim for benefits. Plaintiffs explained that Defendant reasonably determined that Plaintiff’s position had not been eliminated, noting that “after [Plaintiff] submitted his resignation, Wells Fargo had to hire a contractor to fill [his] position, which is evidence that [his] particular job was not eliminated.” Id. As to his § 510 claim, the Court concluded that Defendant satisfied its burden of stating a legitimate, non-discriminatory reason for implementing the Policy. It had implemented the
policy due to the increased talent pool within the company and U.S. and, because of the increase in homegrown talent, Defendant chose to only sponsor H1-B visas affirmatively, where necessary, for a line of business. According to the Court, this was a business decision and it was unreasonable to infer from that decision that Defendant intended to interfere with employees’ right to severance benefits. Accordingly, the Court granted Defendant’s motion for summary judgment on both claims.

Consolidation Issues In ERISA Class Actions

*Nicolow, et al. v. Hewlett Packard Co.*, 2013 U.S. Dist. LEXIS 29876 (N.D. Cal. Mar. 4, 2013). In this action, the Court separately consolidated three sets of cases, consisting of seven derivative shareholder lawsuits, two non-derivative securities class actions, and three ERISA lawsuits. The actions all concerned a sharp drop in Defendant’s stock price after it announced that it would be taking an $8.8 billion write-down due to accounting improprieties by a company it had acquired. The issue before the Court was who would lead and/or represent the classes of Plaintiffs in the three different categories of cases. First, in the non-derivative securities class actions, the Court appointed PPGM Vermogensbeheer B.V. (“PGGM”) as lead Plaintiff and Bernstein Litowitz as lead counsel. The Court found that PPGM satisfied the requirements of Rule 23 and was presumptively the “most adequate Plaintiff” because it had the largest financial interest in the relief sought by the class. *Id.* at *14. Second, in the derivative shareholder suits, the Court noted that it was not required to appoint a lead counselor or a lead Plaintiff. However, given the size and complexity of the actions, the Court found appointment to be appropriate. The Court appointed Stanley Morrical as lead Plaintiff because he was a sophisticated investor with extensive relevant experience, and Cotchett, Pitre & McCarthy LLP as lead counsel because it demonstrated a superior ability to move litigation forward effectively and efficiently, and to otherwise best serve the interests of Plaintiffs. Finally, in the ERISA cases, the Court stated that it was not required to appoint interim lead counsel. The Court nevertheless chose to do so, finding it “necessary to protect the interests of the putative class.” *Id.* at *32. In deciding who to appoint, the Court considered the factors set forth in Rule 23(g)(1)(A), such as: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel’s knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. The Court appointed Zamansky & Associates as sole interim lead counsel, but stated it would entertain objections to that appointment as well as a revised stipulation among the ERISA Plaintiffs that identified an alternative lead interim counsel.

Summary Plan Descriptions In ERISA Class Actions

*Moyle, et al. v. Liberty Mutual Retirement Benefits Plan*, 2013 U.S. Dist. LEXIS 92324 (S.D. Cal. July 1, 2013). Plaintiffs, a group of plan participants, brought a class action against a retirement benefit plan, the plan’s administrator, and their employer. Plaintiffs alleged that Defendants violated the ERISA because when Defendants calculated Plaintiffs’ accrued retirement benefits they did not credit Plaintiffs for their years of service with their predecessor employer. Plaintiffs contended that they had been led to believe that they would receive these credits and were entitled to benefits based upon an alleged failure to disclose that prior service would not be counted for benefit purposes. The plan administrator filed a motion for summary judgment. The Court granted the motion, finding that the plan administrator’s denial of Plaintiffs’ claim for benefits did not constitute an abuse of discretion. In reaching this decision, the Court found that the plan administrator’s decision was reasonable in light of the plain language of the plan, reasoning that nothing in the plan promised additional credits to Plaintiffs. The Court also denied Plaintiff’s equitable relief claim, finding that it was impermissibly duplicative of the claim for benefits. The Court further denied Plaintiffs’ claim for statutory penalties, concluding that statutory penalties were unavailable, as a matter of law, for alleged violations of the ERISA’s full and fair review of regulations under § 503 of the ERISA. Lastly, the Court rejected Plaintiffs’ claim that Defendants violated the ERISA regulations governing the content of summary plan descriptions by not including a statement in the SPD that past service with a prior employer does not count interevenor benefit accrual purposes. The Court reasoned that the language in the summary plan description was consistent with the language in the plan. The Court further found that any claim of an ERISA violation was belied by the fact that Plaintiffs did not participate in
a defined benefit plan under the predecessor employer. The Court concluded that there was no principle to support the proposition that an employer violates the ERISA by failing “to include language that past service credit with a prior employer does not count intervener benefit accrual purposes, when such benefits were not offered by the prior employer.” Id. at *62-63.

(xxii) ESOP Issues In ERISA Class Actions

*Chesemore, et al. v. Alliance Holdings, Inc.*, 2013 U.S. Dist. LEXIS 80969 (W.D. Wis. June 4, 2013). The Court awarded $14.2 million to participants in two employee stock ownership plans (“ESOP”), the Alliance Plan and the Trachte Plan. The Court awarded the Alliance Plan roughly $7.8 million to be paid by Alliance Holdings, its President, and the plan trustee; $6.4 million was to be paid to the Trachte Plan by the ESOP’s trustees. The Court, however, required the trustee of the Alliance Plan to indemnify the Trachte ESOP trustees. The controversy arose from a complex leveraged buy-out orchestrated by Alliance Holdings and its President and plan trustee. At the direction of Alliance Holdings and this individual, a newly formed Trachte ESOP purchased Trachte’s stock. Defendants then spun-off the Alliance ESOP to merge with the newly formed Trachte ESOP. Soon after the transaction, the value of Trachte stock dropped and so did the account balances of Plan participants. Plaintiffs filed a class action in 2009 alleging that Alliance Holdings and various other individuals had engaged in a plan merger prohibited by § 208 of the ERISA, 29 U.S.C. 1058, and breached their fiduciary duties. After finding Defendants liable for breaches of fiduciary duty and prohibited transactions, the Court ordered Defendants to restore Plaintiffs’ accounts in the Alliance ESOP to their pre-transaction value. The Court also awarded damages to a class of Trachte ESOP Plaintiffs. The Court previously determined that the leveraging of Alliance ESOP accounts inflated the purchase price for Trachte and caused the Trachte ESOP to overpay for the company’s stock. The Court rejected Plaintiffs’ proposed measure of damages and found that in light of the 2008 financial crisis, Plaintiffs failed to show that the fiduciary breaches caused the company’s collapse. Plaintiffs did, however, show that the breaches caused the Trachte ESOP to overpay for the company by approximately $8.3 million. The Court also rejected Defendants’ argument that the value would have been wiped out by the financial crisis anyway, noting that whether Plaintiffs would have later lost the overpayment was beside the point. Since there was some overlap between damages to the class of all Plaintiffs and the Trachte sub-class, the Court reduced the overpayment to account for the reinstatement of the Alliance ESOP sub-class of Plaintiffs into the Alliance ESOP. The Trachte ESOP trustees were thus ordered to pay Plaintiffs over $6.4 million. Although the damages relating to overpayment stemmed from the breaches of the Trachte trustees, the Court ordered Alliance Holdings to indemnify the Trachte ESOP trustees. In doing so, the Court noted that the Alliance Holdings trustee was the more culpable party. To that end, beyond indemnification, the Court ordered him to disgorge the profits realized from his sale of phantom stock if Trachte would agree to return it to him and removed him as a trustee of the Alliance ESOP.

(xxiii) COLA Issues In ERISA Class Actions

*Lightfoot, et al. v. Arkema, Inc. Retiree Benefits Plan*, 2013 U.S. Dist. LEXIS 90415 (D.N.J. June 27, 2013). Plaintiffs, a group of retired participants in the Defendant’s defined benefit pension plan, alleged that the plan violated the ERISA by providing cost-of-living adjustments (“COLAs”) to participants who received monthly annuity payments, but excluded the equivalent value of the COLAs from lump sum distributions to pensioners who elected a single lump sum distribution. The Court granted Plaintiffs’ motion for partial summary judgment, and denied Defendants’ motion for summary judgment, holding that lump sum recipients were entitled to the equivalent value of the COLAs. The Court reasoned that as the plan promised COLAs to annuitants, the COLA became part of the annual benefit commencing at normal retirement age, and thus was an accrued benefit to which lump sum recipients would also be entitled. As such, the Court held that the failure to pay the actuarial equivalent of the COLAs benefits to lump sum recipients violated ERISA, and accordingly denied Defendants’ motion for summary judgment.
Anti-Cut-Back Issues In ERISA Class Actions

**Dennison, et al. v. MONY Life Retirement Income Security Plan For Employees, 710 F.3d 741 (7th Cir. 2013).** Plaintiffs filed a class action under the ERISA challenging the discount rates used by two ERISA plans – a pension plan and a top-hat plan – to convert a straight-life annuity into a lump sum payment. A higher discount rate implies a higher rate of growth over the period of an annuity. To account for that higher growth, the present value lump sum of the annuity will be lower. Conversely, a low discount rate results in a higher lump sum present value. Plaintiffs argued that two separate discount rates used by the plans should have been lower, increasing their current lump sum payments. The District Court granted summary judgment in favor of the plans. On appeal, the Seventh Circuit affirmed. It engaged in a straightforward interpretation of the plans’ language. For its discount rate, the pension plan used a segment rate – an interest rate calculated by the Treasury Department – of roughly 5.4%. Initially, the Seventh Circuit noted that the Pension Protection Act (“PPA”) permitted retroactive discount rate increases. The PPA caps retroactive rate increases for qualified plans at the segment rate used by the pension plan. The question then became whether the plan itself prohibited any type of rate increase. The plan did contain a “contractual anti-cut-back” provision, but this applied only to a participant’s “accrued benefits.” *Id.* at 744. These were defined by the plan as the value of a participant’s straight-life annuity. In other words, nothing in the plan prevented a retroactive reduction in a participant’s benefits if they opted for a lump sum payment. The top-hat plan in question used a higher, but equally permissible discount rate of 7.5%. As a non-qualified plan, it was not subject to the PPA’s cap on rate increases. It also did not violate any plan terms because the plan specifically provided for that discount rate for any plan or payment that was not tax-preferred. Since top-hat plans do not qualify for preferred tax treatment the rate used by the plan was appropriate. The Seventh Circuit also affirmed the District Court’s refusal to allow Plaintiffs to conduct discovery – including deposing benefits committee members – to determine whether the plans’ rejections of their claims were tainted by a conflict of interest. The Seventh Circuit signaled a disfavor for this type of discovery in general, as it would be burdensome to allow extensive discovery into administrators’ decisions. The Seventh Circuit suggested that only “exceptional” circumstances, where a Plaintiff can identify a specific conflict or instance of misconduct, should trigger this type of discovery. *Id.* at 746.

Pleading Standards In ERISA Class Actions

**Palmason, et al. v. Weyerhaeuser Co., 2013 U.S. Dist. LEXIS 60161 (W.D. Wash. April 26, 2013).** In an ERISA class action alleging that Defendants, Morgan Stanley and fiduciaries of the Weyerhaeuser Retirement Plan (the “Plan”), breached their fiduciary duties by imprudently investing Plan assets in risky alternative investments, the Court denied Defendants’ motion to dismiss. The proposed class action, filed by Plan participants, alleged that the Plan fiduciaries’ decision to invest more than 81% of plan assets in alternative investments such as hedge funds and private equity caused the plan to lose $2.4 billion in 2008 alone. Specifically, Plaintiffs alleged that the fiduciaries failed to adhere to the governing investment policy and guidelines with regard to the total exposure/risk of the trust’s portfolio, consistently miscalculated the level of risk inherent in the selected hedge fund and private equity investments, added additional risk to the portfolio by using derivatives and/or leverage, and selected so many complicated alternative investments for the plan that it was impossible to perform adequate due diligence on each to determine the actual level of risk. Defendants moved to dismiss on the basis of *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), arguing that Plaintiffs merely affixed general labels to their claims and inadequately pleaded breaches of fiduciary duties. The Court held that Plaintiffs adequately identified the alleged breaches of fiduciary duty and set forth specific facts in support of each breach. The Court remarked that, although the conclusions reached were clearly subject to debate, the factual allegations were not conclusory. Specifically, for purposes of Rule 8, the Court found that Defendants had adequate notice of the basis of the breach of fiduciary duty claims and the facts upon which they were based. *Id.* at *8. Given these specific allegations, the Court found the allegations sufficient to withstand the motion to dismiss.
Pension Calculation Issues In ERISA Class Actions

Clemons, et al. v. Norton Healthcare, Inc. Retirement Plan, 2013 U.S. Dist. LEXIS 156039 (W.D. Ky. Oct. 31, 2013). Plaintiffs, a group of early retirees, brought a class action under the ERISA alleging that Defendant underpaid their retirement benefits. Plaintiffs participated in a defined benefit pension plan (“the Plan”). The Plan was funded exclusively by contributions from the company and maintained in accordance with a written plan document, effective January 1, 1991. By its terms, the Plan provided for an early retirement to any employee who accrued ten years of service and attained age 55. Plaintiffs chose early retirement and elected to draw lump sum distributions, and alleged that the lump sum was less than the amount they were entitled. Specifically, Plaintiffs alleged that Defendant failed to include the value of the “increasing monthly income” (“cost of living”) and the value of early retirement subsidies in the calculation of participant lump sum and in participant “cash balance” starting balances, and that Defendant failed to calculate participant lump sum benefits according to the contractual formula. Id. at *5-6. Plaintiffs further alleged that Defendant incorrectly characterized their accrued benefit as a non-increasing benefit, that it failed to include the value of the five-year certain benefit as well as the increasing benefits when calculating the actuarial equivalent lump sum benefit, that it failed to provide the 212 lump sum minimum benefits, and that, for early retirees on or after January 1, 2004, it improperly reduced their lump sum benefit for early commencement contrary to the plan document. Id. at *50. The Court therefore ordered Defendant to calculate Plaintiffs’ Monthly Retirement Income (“MRI”) and corresponding lump sums. The Court noted that, prior to 2004, a class member’s MRI was subject to the provision of 4.05(b) of the Plan, under which there was a reduction formula based on the number of months a retiree retired early. Id. at *37-38. The Plan was, however, amended in 2004 and a phrase “effective prior to January 1, 2004” was inserted at the beginning of 4.05(b). The Court found that 4.05(b), by its own terms, no longer applied after January 1, 2004, for determining an early retiree’s MRI. Id. at *38. Further, throughout the Plan, there were references to a retiree’s “accrued benefits” as of December 31, 2013, and the reference required a retiree to receive MRI, not to be less than the member’s accrued benefit. The provision applicable for the determination of the accrued benefits ultimately directed the Court to § 4.03(a)(3), which contained instructions for converting a monthly amount into a “single sum,” as opposed to a lump sum, resulting in division by 212. Id. at *45-46. The Court did not replicate the calculation to tell the parties’ the proper amount, but merely instructed that 4.03(a)(3) was applicable in determining Plaintiffs’ MRI. Id. at *47. The Court also found that a reading of the Plan did not result in a reduction for early retirement because the reference to the accrued benefit was a reference only for purpose of determining a class member’s MRI, and there was no indication that it should impact the determination of their lump sum. Id. at *50. The Court therefore ordered Defendant to not to reduce Plaintiffs’ MRI for early retirement in recalculating the benefits due under the Plan. Id. at *53. The Court further ordered Defendant to treat Plaintiffs’ MRI as an increasing monthly income for 60 months certain in recalculating Plaintiffs’ benefits. Id. at *57. The Court determined that application of 4.02(b)(6) for calculation of Plaintiffs’ lump sums did not result in a reduction for early retirement. Id. at *64. Finally, the Court ordered Defendant to provide the actuarial equivalent lump sum, if necessary, when performing the recalculation. Id. at *68.

Frommert, et al. v. Conkright, No. 12-67 (2d Cir. Dec. 23, 2013). In this long-running ERISA class action, the Second Circuit weighed in for a third time on claims that Xerox had improperly used a “phantom account off-set” in determining pension benefits of employees who were re-hired after having received previous lump sum distributions of benefits under the Xerox plan based upon prior periods of employment. The Second Circuit analyzed whether the use of the off-set was a reasonable interpretation of the plan. Specifically, the plan administrator had converted prior lump sums into equivalent annuities using PBGC interest rates and then used that amount to reduce any subsequent benefits. The Second Circuit found that approach unreasonably put the affected participants in a worse position than similarly-situated participants who had not had a break in service. The Second Circuit also found that the plan administrator had violated the ERISA’s rules for summary plan descriptions (“SPD”) by not disclosing that it would use the off-set. Instead, the SPD merely said that an off-set “may” be used, which the Second Circuit found did
not put participants on notice of the likely reduction in their benefits. Given its previous rulings, the Second Circuit remanded the case yet again to the District Court for imposition of an appropriate remedy.

**COBRA Issues In ERISA Class Actions**

*Pierce, et al. v. Visteon Corp., 2013 U.S. Dist. LEXIS 88817 (S.D. Ind. June 25, 2013).* Plaintiffs, a group of former employees, brought a class action alleging that Defendants violated the Consolidated Omnibus Reconciliation Act (“COBRA”), when it failed to send timely notice of COBRA benefits to the class members. Plaintiffs asserted that they had contacted Defendants’ HR office to inquire about COBRA benefits. Plaintiffs claimed that they were laid-off, and when their benefits expired, they made several phone calls to the HR manager to inquire about COBRA notices. When Plaintiffs finally received the COBRA notice, they declined the COBRA benefits because they could not afford to pay the retroactive premiums due for four months in a single, lump sum payment. *Id.* at *21. Plaintiffs alleged that they delayed dentist checkups and doctor visits because they could not afford them. After a bench trial, the Court found that Defendants violated the COBRA, and awarded a statutory award in the total amount of $1,852,500, and reasonable attorneys’ fee. At the very outset, the Court noted that under the COBRA, after a qualifying event, an employer has a duty to provide notice to an employee of his or her right to elect continued insurance coverage for up to 18 months. *Id.* at *40. If a plan administrator fails to abide by the notice provisions of the COBRA, the Court may award a penalty of up to $110 per day from the date of the failure to provide timely notice. According to Plaintiffs, the class was comprised of the 1,593 individuals who did not receive notice from Defendants. The Court, however, noted that 54 individuals were never enrolled; four individuals received timely notice; 13 individuals waived or never lost coverage; three individuals never lost coverage; 770 individuals received notice; and eight Plaintiffs were in bankruptcy. *Id.* at *52. Accordingly, the Court concluded that the class was comprised of the remaining 741 individuals. As to these individuals, Plaintiffs argued that Defendants’ bad faith was evidenced by the unwieldy nature of Defendants’ COBRA notice system, its failure to provide regular oversight of their third-party administrator, and the lack of institutional knowledge about the status of its employees. Plaintiffs contended that Defendants’ behavior justified the maximum $110 per day penalty. Defendants asserted that the evidence did not justify statutory damages because it did not willfully violate the law, and the failure to send notices was the product of communication glitches between its third-party vendors, not something within its direct control. The Court found evidence that Defendants were indifferent to its employees’ rights to timely COBRA notice, and that had no system in place for tracking when retirees were entitled to a COBRA notice, which further supported the conclusion that Defendants turned a blind eye to full ERISA compliance. *Id.* at *58. Accordingly, the Court concluded that these facts compelled a conclusion that Defendants willfully violated the COBRA notice provision of the ERISA, or at best, was grossly negligent in performing its COBRA notice responsibilities. Although Defendants willfully violated the COBRA notice provision and that there was some prejudice to the class, the Court found that the class did not prove that it was entitled to equitable damages requiring monetary relief. *Id.* at *64. Accordingly, the Court concluded that a statutory penalty in the amount of $1,852,500 was warranted. The Court concluded that each class member would receive $2,500, which was substantially more than the award in the only other multi-plaintiff case the Court could locate. *Id.*
Over the last decade, plaintiffs’ lawyers have resorted to state court forums on an ever increasing basis to pursue employment-related class action litigation. The civil justice system in each state is obviously different, and the resulting impact on businesses often varies from county to county within certain jurisdictions. Some states and certain counties within those states are viewed by litigants as safe havens for opportunistic class action lawsuits, which position those jurisdictions as launching platforms for dubious claims or novel theories of recovery. Through a variety of factors – including forum shopping, discovery abuse, consolidation and joinder practices, lax evidentiary standards for experts, the absence of limitations on damages, and plaintiff-friendly class certification precedents – those jurisdictions tend to spawn more class action litigation. As reflected by the volume of rulings on class action issues, those jurisdictions in 2013 were clustered in California, Florida, Illinois, Massachusetts, Minnesota, New Jersey, New York, Pennsylvania, Texas, West Virginia, and Washington.

Wage & hour claims, in particular, have been filed in state courts at a precipitous rate. The most dominant trend has been a steep rise in the number of class action lawsuits filed in state courts alleging violations of California’s overtime laws or the California Labor Code and wage & hour regulations. This trend continued unabated in 2013. The rate of new case filings has continued to grow to the point where multiple class actions are filed in California every day.

The reasons for this trend are varied. First, California’s wage & hour laws differ from federal law in subtle yet important ways. This means that an employer might be compliant with federal law, but not California law. Second, California’s procedural rules make it easier to file a class action or collective action. In contrast, the Fair Labor Standards Act requires an “opt-in” procedure that is generally less lucrative to plaintiffs than a traditional “opt-out” class action. Third, California’s unfair competition law allows claimants to borrow violations of other laws but extend the statute of limitations to four years, which tends to make class actions more lucrative. Fourth, many California Labor Code provisions allow for the recovery of attorneys’ fees, creating additional incentives for plaintiff’s counsel to pursue class actions.

This Chapter analyzes reported class action rulings from all state jurisdictions, with an emphasis on the leading California, Florida, Illinois, New Jersey, New York, Pennsylvania, and Texas precedents.

A. Employment Discrimination Rulings

(i) District Of Columbia

*Wolf, et al. v. Sprenger & Lang, PLLC, 70 A.3d 225 (D.C. 2013).* Plaintiffs, two attorneys, brought an action seeking to vacate the arbitrator’s award of attorneys’ fees between several firms and individuals related to settlement of a group of age discrimination class actions for $75 million. The D.C. Court of Appeal affirmed the trial court’s denial of Plaintiffs’ motion to vacate and uphold the arbitrator’s decision dividing up attorneys’ fees. The Court of Appeal found that the arbitrator did not exceed his authority. The dispute stemmed from a 2010 settlement of class actions where major television networks and production studios and talent agencies paid $75 million to settle claims that they had intentionally and unintentionally discriminated against television writers older than 40. Plaintiff Attorneys Daniel Wolf and Maia Caplan Kats – then with Hughes Hubbard & Reed LLP (“Hughes Hubbard”) and Sprenger & Lang PLLC (“S&L”), respectively – alleged that they had investigated launching the case in 1999, and had subsequently reached a co-counsel agreement, covering the split of fees and costs arising from the case. The agreement was amended in 2001 to reflect the changes in law firm affiliation, Kats’ new employer, Wolf’s new role with S&L, and other additional counsel. The parties then lodged the class actions and eventually were awarded one third of the settlement funds as attorneys’ fees to be split among class counsel. *Id.* at 230. Plaintiffs, Wolf and Kats, argued over billing rates and the allocation of fees, leading to mediation, and ultimately arbitration. The arbitrator then split the award between the attorneys based on his interpretation of the co-counsel agreement. In March of 2011 both Wolf and Kats filed suit seeking to vacate the arbitration award. *Id.* at 233. Plaintiffs argued that the parties had agreed that the filing of their fee petition would have no effect on their fee allocation dispute and hence was a resolved issue that was beyond the scope of the arbitration proceeding. *Id.* at 234. Plaintiffs further asserted that each party had agreed that
its respective challenges to the attorney hours and rates claimed by another party would be resolved during the arbitration proceedings; nevertheless, the arbitrator addressed the resolved issue of the effect of the attorneys' fee petition on the allocation of fees and failed to consider the unresolved issue of the disputes about the parties' claimed hours and rates. Id. In addition, Wolf argued the arbitrator exceeded his authority because the arbitral award was based on the amended agreement which did not apply to him and by basing his award on notions of ethics instead of the co-counsel agreement. Id. at 234-35. The trial court rejected the challenge to the arbitration award. Wolf and Kats appealed. The Court of Appeal noted that the arbitrator’s award could only be challenged under the agreement and the amended agreement if the arbitrator exceeded his authority. Id. at 237. In light of such “extremely limited” review, the Court of Appeal held that the arbitrator reached his decision based upon the agreements signed by the parties. Id. The Court of Appeal observed that the arbitrator had submitted questions to the parties on two key paragraphs of the co-counsel agreements and had then specifically mentioned those paragraphs in his decision. Id. The arbitrator had also specifically mentioned that the parties had agreed to provide reasonable hours and reasonable rates a baseline upon which a fee award could be made and had correspondingly agreed that such hours and rates would constitute the basis upon which the fee award would be proportionately allocated among themselves. Id. The arbitrator had further observed that had the parties wanted a different allocation process, they could have further amended their agreement. Id. The Court of Appeal thus found that the arbitrator had construed the agreements and reached his decision after the interpretation of the same. According to the Court of Appeal, whether the interpretation of the contracts was correct or not was irrelevant, as it was not enough to show that the arbitrator committed an error. Id. at 240. The Court of Appeal reiterated that it would not set aside an arbitration award for errors of either law or fact made by the arbitrator. Id. Because the parties bargained for the arbitrator’s construction of their agreements, and because the arbitrator’s decision arguably construed or applied the contracts, the Court of Appeal concluded that such decision must stand, regardless of a court’s view of their demerits. Id. Accordingly, the Court of Appeal affirmed the judgment of the trial court denying Plaintiffs’ motion to vacate the arbitral award.

(ii) New Jersey

Schiavo, et al. v. Marina District Development Co., LLC, 2013 N.J. Super. Unpub. LEXIS 2093 (N.J. Law Div. July 18, 2013). Plaintiffs, a group of 22 female employees, filed a class action against their employer, a Las Vegas style hotel casino, alleging that they were forced to work in an atmosphere of sexual objectification. The trial court granted Defendant summary judgment, finding that the terms and conditions of Plaintiffs’ employment were lawful. Under its costumed beverage server (“CBS”) program, Defendant hired predominantly female beverage servers for its Atlantic City casino (known as “Borgata Babes”) through a highly competitive selection process. Under the offer letter given to the Borgata Babes, they were required to be attractive, follow costume requirements and personal grooming standards, were meant to be entertainers, and conform to high specifications in terms of their physical appearance. Specifically, under its personal appearance standards (“PAS”), Defendant established a hire weight and required that all of its male and female CBSs would be required to maintain a maximum weight of 7% over their personal hire weight. This was a condition of employment. Plaintiffs contended that they had been forced to work in an atmosphere of sexual objectification and that they had endured humiliating treatment through the enforcement of discriminatory standards based upon sexual and/or gender stereotypes. Id. at *20. Defendant argued that its unique position in the Atlantic City casino-hotel market and the image it had created required its CBSs to comply with reasonable standards regarding their appearance and weight. Further, the type of appearance, grooming, and clothing requirements expected of Plaintiffs was common in the casino-hotel workplace and that nothing demanded of Defendant’s employees was unreasonable. Id. at *19. The issue therefore before the trial court was if the terms and conditions of Plaintiffs’ employment as expressed in the offer letter and the PAS were reasonable workplace appearance, grooming, and dress standards. The trial court found that at the time of hiring staff for the casino, Defendant made it known that it intended to distinguish itself from its competitors in Atlantic City by providing its patrons with an experience not found in other local casinos. The audition invitation letter and the PAS (both of which were signed by Plaintiffs) provided to applicants for the position of Borgata Babe made clear that successful candidates must be physically fit with weight proportional to height. Defendant
explained that the standards and expectations for the Borgata Babes program were extremely high. The trial court stated that there was nothing which demonstrated that any of the Plaintiffs were legally incompetent, illiterate, were defrauded, subjected to duress, or coerced by Defendant to execute the clarified PAS. *Id.* at *31. The trial court found that Plaintiffs were informed that they would function as entertainers who served complimentary beverages to casino customers and be known as Borgata Babes. The trial court therefore determined that the terms of the offer and the clarified PAS were voluntarily accepted by Plaintiffs. The trial court also addressed whether Defendant’s appearance, grooming, and dress standards were unlawful gender stereotyping. Plaintiffs argued that unlawful gender stereotyping occurred whenever an employer requires females to appear attractive in a manner that they deem to be stereotypical, even if an equally burdensome request was made of males. The trial court rejected Plaintiffs’ argument. The trial court found that Defendant was permitted to show a preference for employees who possessed a sexually attractive appearance. *Id.* at *36. The trial court determined that Defendant established its weight standard in an attempt to objectively regulate appearance and applied it evenly to both sexes. *Id.* at *38. While the policy may advance a societal perception that fit people were more attractive than those who were overweight, that purported stereotype impacted both males and females equally and was not actionable.

(iii) Pennsylvania

**Friedman, et al. v. Corbett, 72 A.3d 255 (Pa. 2013).** Plaintiffs, a group of judges and the voters who elected them, brought a class action under Article I, §§ 1 and 26 of the Pennsylvania Constitution, claiming that Article V, § 16(b) of the state charter – which mandates that judges retire on December 31 of the year they turn 70 – should be struck down as contrary to Pennsylvania’s Declaration of Rights. Plaintiffs contended that § 16(b) deprived them of their inherent right to be free of age-based discrimination and the electors asserted that the provision denied them their right to elect and retain jurists of their choice and to have those candidates serve to the end of their commissions. Plaintiffs filed an application for relief, requesting appointment of a special master to receive relevant testimony and evidence and allow Plaintiffs to create a developed record in support of the claims raised in their complaint. Plaintiffs sought to introduce evidence supporting their claims that mandatory retirement at age 70 was irrational by showing that older Pennsylvania citizens were living and working longer, that the compensation package available to senior judges was less valuable than that provided to commissioned judges, and that individuals who voted for the judges in question believed that they were electing the judges to a 10-year term. The Pennsylvania Supreme Court denied the request. The Supreme Court noted that *Driscoll v. Corbett, 2013 Pa. LEXIS 1254 (Pa. June 17, 2013),* stated that in view of the inalienable and indefeasible right of the people to alter their government as they may think proper, a revision to the organic law of the Commonwealth would only be deemed to violate the Constitution that it amends where the challenger has shown that the amendment is so unreasonable as to be considered irrational. *Id.* at 257. The Supreme Court stated that Article V, § 16(b) did not fall into that category. *Id.* The Supreme Court clarified that a December 31 retirement date was not irrational. Instead it improves the orderly succession of judges or justices by standardizing the retirement date of an outgoing judge so that it occurred at the end of the calendar year. Thus, the Supreme Court determined that any evidence that Plaintiffs sought to introduce concerning demographic changes that had occurred since 1968 would have no material effect upon the issue of whether or not the mandate was so unreasonable as to be considered irrational. As such, the Supreme Court determined that evidence was unnecessary to the claim that the 70 year old retirement mandate was irrational because the claim represented a legal conclusion that was rejected in *Driscoll.* In *Driscoll,* the Supreme Court stated that judges who reach the constitutional retirement age are not elected to “regular” terms but instead, to terms that expire early due to the mandatory retirement provision. *Id.* at 258. Thus, the Supreme Court found that when the electors voted for the judges, they voted for them to serve a term that expired on December 31 of the year the judges turned 70. The Supreme Court noted that insofar as Plaintiffs sought to make an evidentiary record demonstrating that they were led to believe otherwise, such a record would be incapable of supporting their claim because an uninformed, confused, or otherwise irrational vote is just as much of a vote as a rational one. However, assuming that Plaintiffs could make such a showing, the Supreme Court remarked that the obvious remedy for such a circumstance would be to ensure that ballots were more informative, and that an alleged deficiency in how
election authorities presented a judicial ballot to the public did not have any effect on the constitutionality of
the judicial retirement provision. Finally, regarding the voters’ claims that they believed they were voting
jurists to a ten year term, the Supreme Court noted that although an elector may choose whom to vote for,
he was not entitled to the judicial services of the elector’s preferred candidate beyond that person’s term of
office. Id. Accordingly, the Supreme Court denied Plaintiffs’ application for relief.

B. Wage & Hour Rulings

(i) California

May 13, 2013). Plaintiff brought a class action alleging that Defendant, a temporary employment agency,
violated California law and the FLSA by failing to compensate workers who waited up to several hours to
get job assignments. Plaintiff alleged that Defendant regularly made employees wait at branch offices for
several hours before they were assigned temporary work at a company and forced them to return to a
branch office every day to drop off their timesheet. Id. at *3. The employees were not compensated for the
time spent at the premises waiting to be assigned or time returning to the branches. Plaintiff also accused
Defendant of paying employees with out-of-state checks, which they could not cash on demand, and
charging a fee for cash payment request. Id. Plaintiff further asserted that the employees who were
discharged or quit due to the unfair business practices were not paid all the wages. Id. In March 2011, a
California federal court in a related lawsuit had denied Plaintiff’s wait and travel claims, and remanded the
claims over the issuance of wages to California state court. Id. at *5. Defendant then moved to compel
arbitration under the terms of an employment application that Plaintiff had signed. Id. at *6. Plaintiff
opposed the motion, arguing that Defendant had waived its right to demand arbitration by waiting two years
to file the motion. Id. at *8. Plaintiff also argued that the arbitration agreement was unconscionable and
unenforcable because it required employees to waive their right to sue as a condition of employment and
the arbitration rules were not attached to the agreement. Id. The trial court granted Defendant’s petition to
compel arbitration. On appeal, the California Court of Appeal reversed the trial court’s order, finding
Defendant’s request untimely. The trial court had found that Defendant had not waived the right to compel
arbitration because doing so prior to the U.S. Supreme Court’s decision in AT&T Mobility LLC v.
Concepcion, 131 S. Ct. 1740 (U.S. 2011), would have been futile. Id. at *15. The Court of Appeal
acknowledged that Defendant might be correct in that it did not act inconsistently with seeking to compel
arbitration until Concepcion was decided on April 27, 2011. Id. at *16. However, Defendant had waited
until September 28, 2011, five months after Concepcion was decided, to file the motion to compel
arbitration. Id. Defendant offered no explanation as to why it did not immediately assert its request. Id.
According to the Court of Appeal, a five-month delay between the favorable change in law and the time the
motion was filed was not consistent with enforcing its arbitration rights. Id. at *17. Further, the Court of
Appeal noted that the litigation machinery had been invoked in a substantial manner in this action. While
the action was pending in federal court, Plaintiff had filed and Defendant had successfully defended against
Plaintiff’s class certification motion. Id. Defendant had also obtained partial summary judgment against
Plaintiff on merits of the federal and state law claims and the federal court had remanded the remaining
claims to the state court. Id. The Court of Appeal stated that, under the circumstances, if arbitration was
allowed, Defendant would have the advantage of a judicial forum resolving some disputes and arbitration of
the remaining claims. Id. The Court of Appeal therefore held that Plaintiff met his burden of establishing
that Defendant had waived the right to compel arbitration. Accordingly, the Court of Appeal reversed the
trial court’s order compelling arbitration.

brought a class action alleging that Defendant required them to perform work for which Defendant failed to
compensate them. Plaintiffs propounded special interrogatories on Defendant, and required Defendant to
identify every covered employee who worked for Defendant during the covered period. A covered
employee was an individual currently or formerly employed by Defendants within four years prior to the
filing of the complaint, who performed work as a driver. Defendant objected to the interrogatory, and
argued that it sought confidential personnel information pertaining to non-parties that was protected by the
privacy privilege set forth in Article I, § 1 of the California Constitution. Plaintiffs offered to enter into a protective order, which Defendant rejected. Plaintiffs then moved to compel the information, without the need for a notice and opt-out procedure. The Court granted the motion. Plaintiffs claimed that the putative class members retained only a minimal privacy interest in the information, there was no serious invasion of privacy given the proposed protective order, and that the balancing of the competing interests weighed heavily in Plaintiffs’ favor. Plaintiffs also argued that providing the information would enable them to contact percipient witnesses, which was necessary to marshal facts in support of class certification and presenting the case for trial. Defendant argued that putative class members had a reasonable expectation of privacy in their personal contact information when provided as a condition of employment, and advanced notice and an opportunity to opt-out was required to prevent the invasion of their privacy interest. The Court noted that in Belaire-West Landscape, Inc. v. Superior Court, 149 Cal. App. 4th 556 (2007), where Plaintiffs sought the names and contact information of all current and former employees, the trial court granted the motion to compel, ordered disclosure of the employees’ names, and adopted a proposed notice to those individuals that would have required them to object in writing in order to prevent information about them from being disclosed to the real parties-in-interest. Id. at ¶3. The Court opined that the Belaire procedures were appropriate here, and noted that the proposed protective order did not offer the protections outlined in Belaire. Accordingly, the Court granted the motion to compel to the extent the Belaire notice procedures were followed.

**Avidor, et al. v. Sutter’s Place, Inc., 212 Cal. App. 4th 1439 (Cal. App. 6th Dist. 2013).** Plaintiff brought a class action on behalf of current and former card dealers against Defendant, alleging that it unlawfully required the card dealers to contribute portions of their tips to an unlawful tip pool. Plaintiff asserted claims for money had and received; breach of contract; collecting and receiving employee wages in violation of § 221 of the California Labor Code; violation of the minimum wage law in § 1197 of the Labor Code; unfair business practices in violation of the Unfair Competition Law (“UCL”) resulting from a violation of § 351 of the Labor Code that addresses gratuities paid, given, or left for an employee; conversion; and failure to indemnify employees in violation of § 2802 of the Labor Code. Id. at 1444. The trial court granted Defendant’s request for a demurrer with respect to the breach of contract and § 221 claims. It also granted Defendant’s request for summary adjudication with respect to the minimum wage, conversion, and indemnification claims. At trial, the Court granted a non-suit with respect to the money had and received claim and granted the Defendant’s motion for judgment with respect to the UCL claim. Id. On appeal, the California Court of Appeal affirmed the trial court on all of its orders. First, it ruled that the trial court did not err by excluding evidence of tipper intent (that the tip was intended for the card dealer to whom the tip was given), holding that such intent was irrelevant to a determination of whether § 351 had been violated. Id. at 1445-48. The Court of Appeal also ruled that Defendant’s tip-pooling policy that required, as a condition of employment, that all card dealers contribute a portion of their tips to the pool to be shared among other employees did not violate § 351 as a matter of law. It reasoned that the purpose behind § 351 was to prevent an employer from taking gratuities intended for employees or from deducting that money from an employee’s wages. The Court of Appeal concluded that only if tip-pooling funds were distributed to an employer’s “agent,” as defined in § 350 of the Labor Code, can the policy be deemed a violation of § 351. Id. at 1450. The Court of Appeal also held that the trial court did not err in determining that none of the employees who received money from the tip pool were agents of the employer because none had management level authority and they did not supervise other employees. Id. at 1451-52. Accordingly, the Court of Appeal affirmed the trial court’s entry of judgment in favor of Defendant concerning Plaintiff’s UCL claim. The Court of Appeal also found that, as a condition of employment, the dealers had acknowledged and agreed that they would contribute a portion of their tips to the tip pool. Therefore, they could not establish ownership of such funds which was a condition to their conversion claim. Thus, the Court of Appeal affirmed summary adjudication of the conversion claim. Id. at 1453. The Court of Appeal also affirmed summary adjudication of the minimum wage claim because Plaintiff did not present sufficient evidence to raise an issue of fact that dealers had been paid less than the minimum wage. Id. at 1453-54. Finally, the Court of Appeal also affirmed the trial court’s non-suit awarded with respect to Plaintiff’s claim for money had and received. Plaintiffs failed to show that the money contributed to the tip pool by the card dealers belonged to the dealers and, in equity and good conscience, should be returned. The dealers had
agreed to contribute to the tip pool as a condition of employment, and the funds from the pool were distributed as had been intended. *Id.* at 1455-56.

**Avery, et al. v. Integrated Healthcare Holdings, Inc., 2013 Cal. App. Unpub. LEXIS 4609 (Cal. App. 4th Dist. June 27, 2013).** Plaintiffs, a group of hospital employees who continued their employment after the hospital was under new management, filed a class action alleging that Defendants failed to pay overtime wages to employees who worked 12-hour shifts. Before Defendants acquired the hospitals or medical centers at which Plaintiffs worked, Plaintiffs’ terms and conditions of employment were governed by the Employee Acknowledgment Form and Application for Employment, under which Plaintiffs agreed to arbitrate their employment claims under the Fair Treatment Process (“FTP”) set out in the previous owner’s employee handbook. After Defendants acquired the hospital, some Plaintiffs also signed a Transition Letter wherein they agreed to resolve employment related disputes with Defendants under the FTP. Four months after Plaintiffs filed their class action, Defendants unilaterally issued a new version of the Employee Handbook (“Integrated Employee Handbook”) without notifying Plaintiffs or any other employees. The Integrated Employee Handbook renamed the FTP as the Alternative Dispute Resolution Process (“ADR Process”) and added a class action waiver. Relying upon the FTP contained in the Tenet Employee Handbook and the ADR Process in the Integrated Employee Handbook, Defendants filed motions seeking to compel each Plaintiff to individual arbitration. The trial court denied all motions because Defendants failed to establish that Plaintiffs agreed to the specific arbitration agreement. On appeal, the California Court of Appeal affirmed. It determined that Defendants were limited to the FTP because they issued the Integrated Employee Handbook and its ADR Process after Plaintiffs’ claims accrued, and Defendants failed to notify Plaintiffs or any other employees about the Integrated Employee Handbook. *Id.* at *15. In this regard, the Court of Appeal noted that Defendants did not provide employees with a copy of the new handbook, they did not instruct employees to review the new handbook on the intranet page, and they did not even notify employees of the new handbook’s existence. *Id.* at *16. The Court of Appeal opined that an employer could not make unilateral changes to an arbitration agreement that applied retroactively to accrued or known claims because doing so would unreasonably interfere with an employee’s expectations regarding how the agreement applied to those claims. Similarly, it determined that the employer must give the employee reasonable notice regarding changes the employer made so the employee is aware of his or her rights under the agreement. The Court of Appeal determined that both of these rules prevented Defendants from applying the ADR Process to Plaintiffs’ claims. *Id.* at *17. Relative to Defendants’ argument that Plaintiffs filed their judicial complaints and joined this action after Defendants issued the Integrated Employee Handbook, the Court of Appeal explained that the critical point in time was when the claims accrued, not when the employee filed his or her judicial complaint. Plaintiffs alleged that Defendants engaged in the conduct giving rise to their claims before it issued the ADR Process. Therefore, the Court of Appeal concluded that the revised agreement was irrelevant because Defendants could not apply it retroactively to claims that existed before the revision was imposed. The Court of Appeal opined that the trial court was correct in denying the motions to compel arbitration because Defendants failed to show Plaintiffs and Defendants agreed upon the same thing in the same sense, i.e., to arbitrate Plaintiffs’ claims under the specific FTP that Defendants presented to the trial court as the controlling arbitration provision. *Id.* at *32-33. The Court of Appeal therefore declined to compel arbitration based on a document to which the parties did not agree.

**Baker, et al. v. Tognazzini Family, Inc., 2013 Cal. App. Unpub. LEXIS 8518 (Cal. App. 2d Dist. Nov. 25, 2013).** Plaintiffs, a group of former employees, brought a class action alleging that Defendants violated the wage & hour provisions of the California Labor Code. The trial court had granted Plaintiffs leave to amend their complaint adding Allison Cummings as the sole representative Plaintiff to recover civil penalties pursuant to the Private Attorneys General Act (“PAGA”). Defendants then moved to compel arbitration based on a dispute resolution policy (“DPR”) that Cummings signed. Cummings also signed an offer of employment and an acknowledgment that her employment was at-will. The trial court denied Defendant’s motion on the ground that the arbitration provision was vague and unconscionable, and that any implied waiver of the PAGA claim violated public policy. On appeal, the California Court of Appeal affirmed the order. The Court of Appeal stated that the PAGA cause of action was to recover civil penalties
on behalf of the state and current and former employees. Because Cummings was suing as a proxy of the state, she was functioning as a substitute for an action brought by the government itself; therefore, a judgment in that action binds all those, including non-party aggrieved employees, who would be bound by a judgment in an action brought by the government. Id. at *8. The Court of Appeal rejected Defendants’ contention that the DRP implicitly waived the right to bring a PAGA representative action, as this violated public policy because Defendants could not require prospective employees to waive their statutory remedies under the Labor Code. The Court of Appeal also noted that the agreement was both procedurally and substantively unconscionable because Cummings was required to sign the DRP and no one explained what it meant or what she was signing. Further, Cummings was also required to sign an acknowledgement of receipt, which provided that Defendants could change the DRP's policies and rules at any time, at its sole discretion, which rendered the agreement illusory and substantively unconscionable. Id. at *11. Finally, the Court of Appeal observed that in Gentry v. Superior Court, 42 Cal. 4th 443 (2007), the California Supreme Court had held that class action waivers were unenforceable in wage & hour cases if the trial court found that a class action would be more effective in vindicating the employees’ statutory rights. Id. at *12. Defendants relied on AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011), and argued that the FAA overruled state law and required that arbitration agreements be enforced as written, even if the arbitration agreement did not provide for class-based or representative arbitrations. Id. at *13. The Court of Appeal opined that although Concepcion implicitly disapproved the reasoning of Gentry, it did not directly address the precise issue presented in Gentry as to the PAGA. Therefore, the Court of Appeal determined that it was obliged to follow Gentry, and because Defendants failed to make a threshold showing that Cummings agreed to arbitrate individual and representative claims for unpaid work and the PAGA civil penalties, the Court of Appeal concluded that it need not comment on the continuing viability of Gentry. Accordingly, the Court of Appeal affirmed the trial court’s order denying Defendants’ motion to compel arbitration.

Benton, et al. v. Telecom Network Specialists, Inc., 220 Cal. App. 4th 701 (Cal. App. 2d 2013). Plaintiffs, a group of cell-phone tower technicians, brought a wage & hour class action under the California Labor Code, based on Defendant’s purported failure to adopt policies authorizing and permitting meal and rest breaks and paying overtime. Defendant provided experienced technical laborers to work on cell phone towers and other related equipment, most of whom were hired and paid by staffing companies that contracted with Defendant. The remainder of the technicians, approximately 15% of the proposed class, were hired and paid by Defendant directly. The trial court had denied class certification, finding that Plaintiffs could not establish Defendant’s liability through common proof. More specifically, the trial court had found that while Defendant’s declarations showed that some technicians worked on their own and had complete liberty to take breaks as they pleased, with no time or management pressure, Plaintiffs’ declarations showed that other technicians worked under severe time constraints that precluded them from taking meal and rest periods. Id. at 725. According to the trial court, as a result of such diverse working conditions, there was no single way to determine whether Defendant was liable to the class for failure to provide breaks. On appeal, the California Court of Appeal reversed the trial court’s order. The Court of Appeal found that the evidence that some employees worked under conditions that permitted them to take breaks was an insufficient basis for denying class certification. Id. at 726. Plaintiffs’ theory of recovery was that Defendant violated wage & hour requirements by failing to adopt a policy authorizing and permitting meal and rest breaks to its technicians. According to the Court of Appeal, the trial court improperly focused on whether individualized inquiries would be required to determine which technicians had missed their meal and rest breaks, rather than focusing on whether Plaintiffs’ theory of liability was susceptible to common proof. Id. The Court of Appeal explained that the employer’s liability arises by adopting a uniform policy that violates wage & hour laws, and the issue of whether or not the employee was able to take the required breaks goes to damages. Id. The Court of Appeal stated that the fact that individual inquiries might be necessary to determine whether individual employees were able to take breaks despite Defendant’s allegedly unlawful policy (or unlawful lack of a policy) was not a proper basis for denying certification. Id. The Court of Appeal therefore held that the fact that individual employees might have different damages did not require denial of the class certification motion. Id. The Court of Appeal further ruled that the evidence that staffing companies had diverse meal and rest period policies was not a...
sufficient basis for denying certification. The trial court had found that because class members were subject to different governing management policies, their meal and rest claims against Defendant would require individualized inquiries into the validity of each such policy. The trial court, however, did not make any findings as to whether Defendant required its staffing companies to adopt meal and rest break policies or to notify contractor technicians of their meal and rest break rights. Id. at 728. The trial court had not addressed whether Defendant was even aware that some staffing companies had meal and break policies in place. According to the Court of Appeal, the trial court’s reasoning was based on the assumption that, even if Defendant had failed to comply with its meal and rest policy, it would not be liable to any class member who was co-employed by a staffing company that had adopted a lawful meal and rest break policy. The Court of Appeal explained that such an assumption was not supported by the applicable wage order that impose an affirmative obligation on every employer to authorize and provide legally required meal and rest breaks. Id. Because the evidence showed that Defendant had, in fact, required its staffing companies to adopt polices ensuring technicians to take meal and rest periods, the Court of Appeal concluded that the mere fact that the staffing companies had diverse meal and rest break policies was not a proper basis for denying certification. Id. at 730. Accordingly, the Court of Appeal reversed the trial court’s order denying class certification.

*Bluford, et al. v. Safeway Stores, Inc., 2013 Cal. App. Unpub. LEXIS 3246 (Cal. App. 3d Dist. May 8, 2013).* Plaintiff, a truck driver, brought a class action alleging violations of the California Labor Code and Industrial Welfare Commission Wage Orders for failure to provide rest periods, earned meal periods, and sufficiently itemized wage statements. The collective bargaining agreements (“CBAs”) required Defendant to provide two paid rest periods of 15 minutes each for every eight-hour or 10-hour shift worked, and a 30-minute meal period. Defendant was also obligated to utilize an activity-based compensation system to determine the drivers’ wages. Plaintiff sought to certify three sub-classes consisting of: (i) those drivers who were denied paid rest periods; (ii) those who were denied required meal periods; and (iii) those who received inadequate wage statements. The trial court denied class certification. On appeal, the California Court of Appeal reversed the order and remanded for class certification. First, regarding the rest period sub-class, Plaintiff asserted that drivers were not paid for rest periods because the compensation system, based on miles driven and the performance of specific tasks, did not account for rest periods or provide an ability to be paid for them. Defendant argued that the Wage Order requires only that pay not be deducted for rest periods, and that it never deducted pay from its drivers for taking rest periods. Defendant also claimed that the Wage Order did not require employers who use a piece-rate or incentive-based compensation system to put employees on the clock just to pay for rest periods, and that pay for rest periods was considered part of the overall piece-rate compensation. Further, Defendant claimed that the mileage rates negotiated in the CBAs included paid time for rest periods. The Court of Appeal stated that rest periods were considered hours worked and must be compensated, and the piece-rate compensation formula that did not compensate separately for rest periods did not comply with the California minimum wage law. Id. at *14. Because Defendant’s activity-based compensation system did not separately compensate drivers for their rest periods, the Court of Appeal opined that the class should be certified. Id. at *17. Second, regarding the meal period sub-class, Plaintiff contended that Defendant’s meal period policy until 2006 did not include the required second meal period for drivers who worked more than 10 hours. Although Defendant acknowledged that the first CBA did not address second meal periods, it introduced evidence that it claimed established that second meal periods for employees who worked more than 10 hours was authorized. The Court of Appeal, however, remarked that the evidence did not establish that Defendant in fact authorized and permitted second meal periods to drivers who worked longer than 10 hours, and that there was no indication the drivers were aware they were entitled to take a second meal period if their shifts exceeded 10 hours. The CBA provided only one meal period, and the policy enforced by Defendant provided only one meal period. Thus, the Court of Appeal opined that this demonstrated a uniform policy and accordingly noted that the class should be certified. Id. at *23. Regarding the wage statement class, Plaintiff alleged a failure to provide wage statements, or pay stubs, and that the wage statements did not enable employees to verify that they had been properly paid. Although the drivers’ pay was based primarily on miles driven, the statements did not identify the rates applied to the mileage. A driver had to refer to his individual trip sheets and the mileage rates contained in the CBAs to determine if
Accordingly, the Court of Appeal ruled that the trial court did not abuse its discretion by examining the conflicting evidence on the merits. The Court of Appeal found that the trial court's order was sufficient to permit meaningful appellate review. As to predominance of common issues, the Court of Appeal noted that the core dispute was whether Defendant applied its business policies and practices uniformly required an individual analysis of each particular case, and therefore a common issue of law or fact did not predominate.

The Court of Appeal observed that Plaintiffs were required to show substantial evidence of both the existence of Defendant’s uniform policies and practices, and that the effects of Defendant’s conduct could be remedied within a class setting. Id. Plaintiff contended that the trial court applied improper criteria by focusing on the merits of conflicting testimony regarding potential variances in job duties, rather than determining whether Plaintiff put forth substantial evidence of uniform policies and procedures that would establish a class-wide basis of misclassification. Id. at 990. The Court of Appeal remarked that the trial court is permitted to credit one party’s evidence over the other’s in determining whether class certification requirements have been met. Id. at 991. Accordingly, the Court of Appeal ruled that the trial court did not abuse its discretion by examining the conflicting evidence on the merits. The Court of Appeal found that the trial court's order was sufficient to permit meaningful appellate review. As to predominance of common issues, the Court of Appeal noted that the core dispute was whether Defendant applied its business policies and practices uniformly required an individual analysis of each particular case, and therefore a common issue of law or fact did not predominate. Id. at 997.

Accordingly, the Court of Appeal affirmed the trial court’s decision to deny the motion for class certification. As to meal and rest break requirements, the Court of Appeal noted that in Brinker Restaurant Corp. v. Superior Court, 53 Cal. 4th 1004 (2012), the California Supreme Court held that an employer was required to make uninterrupted meal periods and rest breaks available, but was not obligated to ensure that they are utilized. Id. at 1000. The Court of Appeal found that the trial court did not abuse its discretion by denying the motion for certification because Plaintiff failed to present substantial evidence of a uniform policy or widespread practice requiring on-duty rest and meal breaks. Id. at 1002. Accordingly, the Court of Appeal affirmed the trial court’s decision to grant Defendant’s motion to preclude certification.


Dailey, et al. v. Sears, Roebuck & Co., 214 Cal. App. 4th 974 (Cal. App. 4th Dist. 2013). Plaintiff, an assistant manager, brought state wage & hour claims against Defendant for refusing to pay overtime compensation and for refusal to provide meal and rest breaks. Plaintiff moved to certify a class of similarly-situated managers and assistant managers. Plaintiff argued that managers and assistant managers were categorically classified as exempt from overtime and meal/rest break requirements. Defendant implemented uniform policies and practices that had the effect of requiring proposed class members to work at least 50 hours per week and spend the majority of their time performing non-exempt activities. Id. at 978. Defendant opposed the motion, arguing that the inquiry of how class members actually spent their time would require individualized evidence that could not be proven on a class-wide basis. Id. at 981. The trial court granted Defendant’s motion to preclude certification and denied Plaintiff’s motion for class certification. On appeal, the California Court of Appeal affirmed. Plaintiff first contended that the trial court failed to sufficiently explain its reasons for denying class certification. Id. at 985. The Court of Appeal noted that the trial court provided three reasons for its ruling, but only the third reason regarding Plaintiff’s suitability as the class representative was supported by factual findings. Id. The Court of Appeal conceded that the trial court’s order was succinct, and the opinion stated that individual issues predominated and the fact that Plaintiffs could bring individual claims justified the ruling. Id. at 986. In addition, the order also cited appropriate legal principles relevant to the predominance and superiority analysis. Id. Accordingly, the Court of Appeal concluded that the trial court’s order was sufficient to permit meaningful appellate review. As to predominance of common issues, the Court of Appeal noted that the core dispute was whether the managers and assistant managers were properly classified as exempt employees. Id. at 989. The Court of Appeal observed that Plaintiffs were required to show substantial evidence of both the existence of Defendant’s uniform policies and practices, and that the effects of Defendant’s conduct could be remedied within a class setting. Id. Plaintiff contended that the trial court applied improper criteria by focusing on the merits of conflicting testimony regarding potential variances in job duties, rather than determining whether Plaintiff put forth substantial evidence of uniform policies and procedures that would establish a class-wide basis of misclassification. Id. at 990. The Court of Appeal remarked that the trial court is permitted to credit one party’s evidence over the other’s in determining whether class certification requirements have been met. Id. at 991. Accordingly, the Court of Appeal ruled that the trial court did not abuse its discretion by examining the conflicting evidence on the merits. The Court of Appeal found that whether Defendant applied its business policies and practices uniformly required an individual analysis of each particular case, and therefore a common issue of law or fact did not predominate. Id. at 997.
participant in Defendant’s concession phone program. Plaintiff alleged violations of pertinent sections of the California Labor Code and moved for class certification. Plaintiff’s proposed sub-classes included: (i) a late meal period sub-class of employees who worked more than five hours without a meal period; (ii) a missed second meal period sub-class of employees who worked 10 hours without a second meal period; (iii) a missed rest break sub-class of employees; and (iv) an unreimbursed concession phone expenses sub-class of employees who incurred expenses due to Defendant’s concession phone program. Id. at *10-11. The trial court denied class certification because there was no commonality with respect to all the subclasses. On appeal, the California Court of Appeal found that the trial court’s ruling was consistent with Brinker Restaurant Corp. v. Superior Court, 53 Cal. 4th 1004 (2012), which held that an employer’s duty under both the Labor Code and the pertinent Wage Order to provide a meal period for an employee is satisfied if it relieves the employee of its duties, relinquishes control over their activities, and permits it a reasonable opportunity to take an uninterrupted break. Id. at *19. Defendant had a policy to provide a meal break for every five hours worked, and the Court of Appeal noted that there was no evidence of a company-wide practice to violate Defendant’s policy. Id. at *22-23. Thus, the Court of Appeal determined that every late meal period required an individualized inquiry to determine whether the time records actually reflected when the meal period was provided. Id at *23. Accordingly, the Court of Appeal affirmed the trial court’s decision. Regarding the second meal period claim, the Court noted that Plaintiff never stated that Defendant had a policy or practice of failing to provide a lunch period, but rather that he “at times” would not get a second meal period. The Court of Appeal opined that this also raised a question of individualized inquiries. Id. at *24-25. Accordingly, the Court of Appeal affirmed the trial court’s ruling to deny class certification for the second meal break sub-class because a common issue of fact or law did not predominate. Id. at *26. Plaintiff next argued that Defendant’s policies and practices concerning staffing effectively denied or prevented employees from taking timely and uninterrupted rest breaks. Id. at *28. Analogous to the second meal break sub-class, the Court of Appeal found that there was no evidence of a company-wide scheduling policy or staffing practice, and consequently, the claims required individualized inquiries that would predominate over any common question of fact or law. Id. at *28-29. Accordingly, the Court of Appeal also affirmed the trial court’s ruling to deny certification for the rest break sub-class.

Finally, concerning the unreimbursed concession phone expenses sub-class, Plaintiff alleged that Defendant required employees to pay for Defendant’s cellular phone service and equipment. Id. at *30. The Court of Appeal noted that an employer may use a lump sum payment method to reimburse employees, provided that the payment is reasonably sufficient to reimburse the employee for expenses incurred, and that the employee has a method to challenge the payment’s adequacy. Id. at *32. Here, Defendant provided a method to approve business-related expenses not covered under the program; consequently, the Court of Appeal noted that each Plaintiff would need to prove that the expenses incurred were necessary, business-related, that the employer knew or had reason to know that the employee incurred the business expense, and that the employee was denied reimbursement. Id. at *33-34. The Court of Appeal observed that each claim presented an individualized question because there was no common evidence that would satisfy all of the necessary Rule 23 elements. Id. at *34. Accordingly, the Court of Appeal affirmed the trial court’s ruling to deny certification for the unreimbursed concession phone expenses sub-class because the claims required individual inquires which were not subject to common proof.

Farmers Insurance Exchange v. Superior Court, 218 Cal. App. 4th 96 (Cal. App. 2d Dist. 2013). Plaintiffs, a group of claim adjusters or claims representatives, brought a class action alleging that Defendant violated the California Labor Code when it treated them as exempt administrative employees and failed to pay them overtime and failed to provide meal and rest breaks. Plaintiffs moved for class certification. Plaintiffs argued that all putative class members performed a finite and uniform grouping of job duties. Defendant argued that class certification was inappropriate because the job duties varied tremendously and therefore individual issues predominated over class issues. The California Court of Appeal then issued its published opinion in Harris v. Superior Court, which held that a class of claims adjusters was appropriately certified and that the members of the class were not exempt. Id. at 100. Plaintiffs argued that Harris controlled the disposition of the class certification motion. A petition for review was filed in Harris. The trial court then issued a tentative ruling and granted Plaintiffs’ class certification.
motion, holding that Plaintiffs were not exempt and the wage & hour laws applied to them. The trial court emphasized that *Harris* controlled the disposition of the motion. Subsequently, the California Supreme Court denied the petition for review in *Harris*, but ordered the opinion not to be officially published. Defendant filed motion to reconsider the trial court’s order on the class certification motion. The trial court denied the motion, concluding that de-publication of an opinion did not constitute a change in the law. *Id.* at 103-104. The trial court explained that it relied on *Harris* previously, because *Harris* was controlling precedent and because the logic of the opinion was authoritative. *Id.* Defendant filed a petition for writ of mandate, seeking relief from both the trial court’s denial of reconsideration and from its grant of class certification. The California Court of Appeal granted the petition. The Court of Appeal directed the trial court to vacate its order denying reconsideration and instead, to grant reconsideration and analyze the class certification motion in the absence of the now de-published *Harris* decision. The Court of Appeal noted that the trial court declined to grant reconsideration on the basis that the de-publication of the *Harris* opinion could not constitute a change of law within the meaning of § 1008(c) of the Code of Civil Procedure. It considered no other factors, and relied solely on Rule 8.1125(d) of the California Rules of Court, which provides that a de-publication order is not an expression of an opinion of the correctness of the result of the decision or of any law stated in the opinion. The Court of Appeal observed that although de-publication may not be an expression of disapproval by the Supreme Court, de-publication orders were not without effect. *Id.* at 109. A de-published opinion must not be cited or relied on by a trial court or a party in any other action per Rule 8.1115(a). It was well established that, under this rule, non-published opinions had no precedential value. *Id.* Without precedential value, a de-published opinion was no longer part of the law and thus ceased to exist. *Id.* Because de-publication renders the opinion non-citatable and removes its precedential value, it nullifies the opinion and renders it non-existent. *Id.* at 110. The Court of Appeal stated that here, *Harris* existed at the time of the trial court’s order granting class certification then subsequently was de-published, thereby disappearing from the law and changing the applicable legal context surrounding the decision. *Id.* Thus, it constituted a change in the law that had existed at the time of the order. Thus, the trial court erred in concluding that the de-publication of *Harris* could not constitute a change in the law sufficient to warrant reconsideration under § 1008(c). *Id.* at 111. Accordingly, the Court of Appeal granted Defendant’s petition.

Faulkinbury, et al. v. Boyd And Associates, Inc., 216 Cal. App. 4th 220 (Cal. App. 4th Dist. 2013). Plaintiffs, a group of security guards, brought a class action alleging non-payment of overtime as well as meal and rest break violations. Defendant placed Plaintiffs in a variety of different locations, and all Plaintiffs, when hired, had signed an on-duty meal agreement to take their meals on-duty. *Id.* at 225. Plaintiffs alleged that neither of them ever took an uninterrupted, off-duty meal break, and that they were instructed not to leave their posts and thus never took any off-duty rest breaks. *Id.* Defendant paid employees an allowance for the cost of cleaning their work uniforms and for gasoline as well as a non-discretionary bonus for longer-term employees. Defendant excluded these payments when calculating the guards’ overtime rate of pay, which Plaintiffs alleged was unlawful. *Id.* Plaintiffs filed a motion for class certification and proposed three sub-classes, including a meal break class, a rest-break class, and an overtime class. The trial court denied certification of all three sub-classes because individual questions predominated. On Plaintiffs’ appeal, the California Court of Appeal affirmed the trial court’s order denying certification of the meal break class and the rest break class, and reversed the denial of certification with respect to the claim alleging improper calculation of overtime. The California Supreme Court, however, granted review on the decision in light of its grant of review in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012). The action was thus remanded to the Court of Appeal to consider in light of the *Brinker* decision. Upon reconsideration, the Court of Appeal found that certification was appropriate as to all three sub-classes. The Court of Appeal reversed the trial court’s order denying class certification. Regarding meal breaks, Plaintiffs had alleged that Defendant had an unlawful, uniform policy of requiring employees to sign an on-duty meal period agreement and take on-duty meal periods. The Court of Appeal found evidence of a common policy of requiring all employees to sign an on-duty meal agreement and to take meals on duty. *Id.* at 233. Because the policy consistently applied to all class members, the Court found that the question of liability was a class-wide claim. *Id.* at 234. As to rest breaks, Plaintiffs had alleged that Defendant did not have a policy regarding provision of rest breaks, and had an express policy...
requiring security guards to remain at their posts at all times. The Court of Appeal found this claim also amenable to class treatment. *Id.* at 237. Plaintiffs’ theory of recovery was based on Defendant’s “lack of a rest and meal break policy” and its “uniform failure to authorize employees to take statutorily required rest and meal breaks.” *Id.* The Court of Appeal found the lack of a meal/rest break policy and the uniform failure to authorize such breaks as matters of common proof. *Id.* While Defendant offered declarations reflecting that certain security guards on certain shifts were authorized and permitted to leave their posts for rest breaks or to take rest breaks at their posts, the Court of Appeal stated that individualized questions over whether employees were actually prevented from taking breaks was a question relevant to damages, and not certification. *Id.* Finally, as to overtime pay, the Court of Appeal held that Defendant’s across-the-board application of the policy was suitable for class certification because Plaintiffs presented evidence that Defendant had a uniform policy of paying security guard employees an allowance for maintenance of work uniforms and of reimbursing the cost of gasoline. *Id.* at 238. Plaintiffs also presented evidence that Defendant had uniform, company-wide policies for determining entitlement to an annual bonus. *Id.* Accordingly, the Court of Appeal reversed the order denying class certification, and remanded with directions to grant the motion for class certification and to certify the meal break class, the rest break class, and the overtime class.


Plaintiffs brought a class action against Defendant alleging wage & hour violations. Following *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011), Defendant moved to compel arbitration pursuant to a dispute resolution agreement expressly waiving class arbitration signed by Plaintiffs as a condition of applying for employment. *Id.* at *1-2. The trial court granted Defendant’s motion, and the California Court of Appeal affirmed in part and reversed in part. The Court of Appeal rejected the Defendant’s argument that the trial court’s order compelling arbitration was not appealable. The Court of Appeal acknowledged that orders compelling arbitration are not ordinarily reviewable, but an exception applies if the decision effectively rings the death knell for the class claims. The Court of Appeal found that such was the case here. In reaching this conclusion, the Court of Appeal also held that it was unnecessary for Plaintiffs to provide evidence that they would not be able to pursue their individual claims without inclusion of the class claims. *Id.* at *9-10. The Court of Appeal upheld the trial court’s ruling that the Defendant had not waived its right to compel arbitration, even though the Defendant waited for approximately three years before moving to compel arbitration and during that time had obtained substantial discovery and had filed two successful motions for summary adjudication. The Court of Appeal noted that for two of the three years, a stay prevented any litigation. It also found that the discovery and summary judgment motions were not inconsistent with the right to arbitrate. The arbitration agreement allowed for discovery and for the parties to challenge the legal sufficiency of asserted claims. Furthermore, during this three-year period, the California Supreme Court’s decisions in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), and *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), made a motion to compel arbitration a “highly risky proposition,” and Defendant moved to compel arbitration only slightly more than a month after the U.S. Supreme Court overruled *Discover Bank in AT&T Mobility, LLC v. Concepción*, 131 S. Ct. 1740 (2011). Finally, the Court of Appeal also found that Plaintiffs had made no showing of prejudice. Thus, in light of the public policy favoring arbitration and the strong presumption against waiver, the Court of Appeal sustained the trial court’s conclusion that no waiver occurred. *Id.* at *16-17. The Court of Appeal also agreed with the trial court that the arbitration agreement, as a whole, was neither procedurally nor substantively unconscionable. However, the Court of Appeal disagreed with the trial court’s conclusion that *Concepción* effectively overruled *Gentry*. The Court of Appeal concluded that unlike *Discover Bank*, *Gentry* did not involve a consumer contract but rather an arbitration agreement between an employer and employee that, under some circumstances, could lead to a *de facto* waiver and would impermissibly interfere with the employees’ ability to vindicate unwaivable rights and to enforce the overtime laws. *Id.* at *22. Under *Gentry*, if a trial court finds that a class action is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, it must invalidate the class arbitration waiver to ensure that these employees can vindicate their unwaivable rights. According to the Court of Appeal, this finding requires a fact intensive analysis that the trial court did not undertake. Accordingly, it remanded the case so that the trial court could determine what additional
factual and legal inquiries are necessary to determine whether, after applying Gentry, the motion to compel should be granted or denied. *Id.* at *20.


Plaintiff, a store manager and team leader, brought a putative class action alleging that Defendant denied her and other workers overtime, meal breaks, and failed to reimburse certain work expenses. Defendant required all of its employees to wear black, non-denim pants and black, non-slip shoes. Plaintiff alleged that putative class members were either required to pay for the pants and non-slip shoes without reimbursement, or the cost would be deducted from their paychecks without express written authorization. Plaintiff also alleged that workers who were designated as persons in charge (“PIC”) were required to work and/or remain on store premises during their unpaid meal periods, and work off-the-clock to complete end-of-shift duties. *Id.* at 3. Plaintiff asserted violations of the California Labor Code and the Unfair Competition Law, and moved for certification for a class of persons who were employed by Defendants in California as team leaders and/or assistant store managers for a defined period. The Court denied the motion. First, the Court noted that the uniform and wage deduction claims were highly individualized inquiries. *Id.* at 10. Defendant illustrated that employees could place orders in a variety of ways such as asking their managers orally, filling out an order form, or calling shoes for crews directly and providing their personal information to place an order. *Id.* at 11. The Court thus noted that it would need to determine, on an individualized basis, whether each order satisfied the written authorization requirement. *Id.* at 13. Next, the Court found that Plaintiff’s theory of missed meal break periods also failed the commonality requirement. *Id.* at 14. While some PICs who worked as the only PIC on duty (“Solo PIC”) denied that they were required to stay on store premises during their meal periods, others testified that they understood that a Solo PIC may leave the premises to take his or her lunch break. *Id.* at 15. Plaintiffs alleged that PICs were prevented from leaving the store during their lunch breaks because company policy precluded a Solo PIC from leaving the store with the keys, or entrusting the keys to a non-PIC. *Id.* at 5. The Court, however, noted that many putative class members stated the key policy varied over time or directly contradicted Plaintiff’s allegations. *Id.* at 15. Plaintiff argued that Defendant’s currency verification and logging procedures required PICs to check and log every bill, which in turn caused non-managerial employees to interrupt Solo PIC’s breaks to verify and log large denomination currency. *Id.* at 15-16. The Court, however, noted that an overwhelming number of Defendant’s declarations stated that PICs were rarely Solo PICs, and most stores permitted non-PICs to verify currency. *Id.* at 16. The Court thus held that the class lacked commonality for their meal break claims. *Id.* at 16-17. Finally, the Court held that Plaintiff failed to show commonality for the policies for their overtime claims. *Id.* at 17. Plaintiff contended that management only permitted employees to record time that they were scheduled to work, and that PICs had certain duties which needed to be performed after their shift, such as filling out speed of service (“SOS”) reports, recording SOS reports, and responding to post-shift communications from area management. *Id.* at 15. Defendants, however, provided evidence that its written policy expressly forbade employees from working off-the-clock, and evidence showing that overtime was paid. *Id.* at 16. Further, numerous PICs declared that they performed their end-of-shift activities while still on the clock and some testified that closing activities were generally started before the end of a scheduled shift. *Id.* at 17. The Court held that Plaintiff’s handful of class members with a common question of law or fact were insufficient to establish a company-wide practice of violations. *Id.* The Court concluded that there was little benefit to trying the claims on a class-wide basis because the facts were unique to each case. *Id.* at 18. Accordingly, the Court denied Plaintiff’s motion for class certification.


Plaintiffs, a group of automotive service technicians, brought a wage & hour class action alleging that Defendant violated California law by not paying them a minimum wage for all hours worked. Plaintiffs also asserted claims for waiting time penalties because Defendant had failed to pay Plaintiffs all the wages they were due upon their termination. *Id.* at 40. The trial court ruled in Plaintiffs’ favor, concluding that California law required class members to be paid for their time waiting between work on repair orders. *Id.* at 41. On appeal, the California Court of Appeal affirmed. Defendant compensated its automobile service technicians on a piece-rate basis based upon repair tasks completed. Defendant assigned a flat rate for
each task and each task was assigned a certain number of “flag hours." Id. Technicians accrued flagged hours only when working on a repair, and were not paid for non-repair work, including time spent waiting for cars to repair, cleaning their work stations, attending meetings, travelling to other locations to pick up cars, reviewing service bulletins, and training. Id. Defendant also tracked the time a technician spent at work, whether or not working on a repair. At the end of a pay period, Defendant would calculate how much a technician would earn if paid an amount equal to total hours on the clock multiplied by the minimum wage. If the technician’s compensation fell below the minimum wage floor, Defendant supplemented the pay to meet the minimum wage. Id. Defendant argued that it complied with California law by ensuring, through its “minimum wage floor,” that each technician received an amount equal to or greater than the amount the technician would have earned if paid the minimum wage for all hours worked. Id. at 43. Defendant also argued that requiring employers to pay their piece-rate employees separately for any work not subject to the piece-rate would undermine the piece-rate system, which was intended to reward piece-rate workers for performing piece-rate tasks efficiently. Id. at 44. The Court of Appeal disagreed with Defendant and held that California law requires employees to be paid at least at the minimum wage rate for each hour of work, which effectively prohibits employers from averaging out the piece-rate compensation over an entire workweek. The Court of Appeal also concluded that this rule applied to piece-rate compensation systems and not just hourly paid compensation systems. Id. at 46. The Court of Appeal also affirmed the trial court’s award of waiting time penalties, finding substantial evidence in the record to support an implied finding of willfulness. Although Defendant had stated that its policy was to supplement its technicians’ pay when flag hour compensation fell below the minimum wage floor, the Court of Appeal found evidence that Defendant did not always follow its policy. Id. at 50. Defendant’s expert witness had testified that he reviewed technicians’ pay records and found instances when Defendant failed to cover shortfalls between piece-rate wages and the minimum wage floor. Id. at 51. The Court of Appeal found Defendant’s failure to be a sufficient basis for the imposition of penalties. Id. Accordingly, the Court of Appeal affirmed the trial court’s ruling and concluded that Plaintiffs were entitled to separate hourly compensation for the time spent waiting for repair work or for performing non-repair tasks directed by their employer during work hours as well as penalties.


Plaintiffs brought a class action alleging failure to provide rest and meal breaks in violation of the California Labor Code. Plaintiffs moved for class certification for the meal period sub-class, and Defendant moved to decertify an earlier order that certified the rest period sub-class. Id. at 1. In a tentative ruling, the Court granted Plaintiffs’ motion, and denied Defendant’s motion. Plaintiffs’ proposed meal period sub-class commenced October 1, 2000. Prior to 2002, Defendant had no written meal break policy. In 2002, following an audit by the California Department of Labor Standards Division (“DLSE”), Defendant adopted a written policy that advised employees that they were entitled to a meal period of 30 minutes when they worked a shift that is over five hours. In May of 2012, following a California Supreme Court decision, Defendant adopted a written policy that required employees to acknowledge that they were entitled to an unpaid, uninterrupted 30-minute meal period when they work a shift of over five hours and to a second unpaid uninterrupted 30-minute meal break when they work over 10 hours. Id. at 3. Plaintiffs’ theory was that the failure to have a written policy prior to 2002 violated the Labor Code, and that the two subsequent written policies facially violated the Labor Code. They argued that the facial legality of these policies was subject to common proof and established a basis for class certification. Id. at 3-4. The Court agreed. It rejected Defendant’s arguments that the policies were lawful, stating that was a merits question inappropriate for consideration at the class certification stage 1. Id. It also rejected Defendant’s argument that there was a wide variation in how the policies were applied in individual restaurants and that some employees may have been treated properly while others may not have been. The Court reasoned that whether an employee was able to take the required break was a damages question that did not require denial of class certification. Id. at 4. The Court also opined that Plaintiffs were entitled to choose their liability theory. The fact that some employees may have been denied meal breaks unlawfully even if the policies prove to be lawful was a question the employee must consider in deciding whether to opt-out of the class. Accordingly, the Court tentatively granted the Plaintiff’s motion to certify the meal break sub-class. Id. at 5. The Court also denied Defendant’s motion to decertify the rest break class. While noting that the

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Defendant was repackaging its arguments, the Court found that there was no new evidence or changed circumstances that justified decertification. *Id.* at 5-8.

**In Re Bowers Companies Wage & Hour Cases, 2013 Cal. App. Unpub. LEXIS 4536 (Cal. App. 4th Dist. June 27, 2013).** Plaintiffs, a group of non-exempt hourly employees of Defendant Bower Companies, Inc. and Pacific Ambulance, Inc., brought five consolidated class actions alleging that Defendants failed to pay straight and overtime wages and improperly reduced employees’ regular pay rate when they worked longer shifts. Plaintiffs sought to certify five classes, including: (i) an overtime class (consisting of people who were denied overtime pay); (ii) a regular rate class (consisting of people who were denied straight time, and overtime premium); (iii) a waiting time class (consisting of former employees who did not receive all wages due upon termination); (iv) a meal period class (consisting of people who were denied meal periods); and (v) a paystub class (consisting of people who were not provided pay stubs). The trial court denied class certification. Plaintiffs appealed. At the very outset, the California Court of Appeal noted that the trial court had denied Plaintiffs’ class certification motion once before, finding numerous procedural and evidentiary shortcomings in Plaintiffs’ papers. The trial court then denied Plaintiffs’ supplemental motion in its entirety, finding that the motion relied on incompetent evidence, on conclusory allegations, and on a litany of law and argument unsupported by evidence. On appeal, Plaintiffs argued that the regular rate class were comprised of all non-exempt California employees who worked more than an 8-hour shift and were not properly compensated because Defendants’ subjected them to a base hourly rate of pay cut when working those overtime shifts. The Court of Appeal found that the trial court erred in ruling that Plaintiffs failed to identify an ascertainable class because they did not present evidence connecting the class definition to Plaintiffs’ theory of recovery or showing Defendants engaged in the alleged wrong-doing during any particular time. The Court of Appeal concluded that the trial court applied an erroneous legal standard when it found Plaintiffs’ class definition failed to identify an ascertainable class because it did not consider whether the class definition could be modified to match the identifiable group of employees described by Plaintiffs’ theory of recovery. The Court of Appeal found that contrary to the trial court’s ruling, Plaintiffs presented evidence connecting their theory of recovery, Defendants’ alleged misconduct, and the time period Defendants engaged in that conduct. Defendants’ own declarations and deposition testimony specifically described the annualized pay plan, when each Defendant implemented it, and how Defendants uniformly applied it to all field employees. *Id.* at *29. Because the trial court applied an erroneous legal standard, and as the evidence suggested otherwise, the Court of Appeal concluded that regular rate class was ascertainable. Similarly, the Court of Appeal found that the annualized pay plan Defendants uniformly applied to field employees was unlawful because it paid a field employee a lower, regular hourly rate when he or she worked a 12-hour or 24-hour shift than when he or she worked an 8-hour or 10-hour shift. *Id.* at *36. Similarly, the Court of Appeal found that the typicality requirement was satisfied and overturned the denial of class certification of the regular rate class. As to the overtime class, the Court of Appeal also found that the trial court erred in denying the class certification motion. The Court of Appeal opined that the class was ascertainable. The Court of Appeal explained that Defendants conceded that they paid all field employees working 10-hour and 12-hour shifts in the same manner. *Id.* at *43. Defendants conceded they paid field employees their regular hourly rate for the first 10 hours of any 12-hour shift, one and one-half times their regular hourly rate for hours 11 and 12, and double their regular hourly rate for all hours beyond 12. Accordingly, the Court of Appeal determined that Plaintiffs’ theory of recovery and Defendants’ concessions identified common characteristics and transactional facts that establish an ascertainable overtime class with a purported right to recover from Defendants. *Id.* at *44. As to predominance, the Court of Appeal noted that the trial court refused to certify the overtime class because it found Plaintiffs failed to provide competent evidence showing common issues predominated or to establish the trial methodology Plaintiffs would use to show any common issues. The Court of Appeal found that the standard applied was erroneous, because its analysis was based on a conclusion that the class was not ascertainable. As a result, the Court of Appeal remarked that the trial court failed to recognize Plaintiffs based on their theory of recovery on Defendants’ conceded, uniform application of a pay schedule to all overtime field employees. *Id.* at *51. Plaintiffs therefore asserted a liability theory that presents a common question eminently suited for class treatment. Finally, the Court of Appeal found that substantial evidence supported the trial court’s denial of class certification of the waiting time class and the pay stub class.
Johnson, et al. v. California Pizza Kitchen, Inc., 2013 Cal. App. Unpub. LEXIS 9393 (Cal. App. 2d Dist. Dec. 30, 2013). Plaintiffs, on behalf of themselves and other similarly-situated non-exempt employees, filed a putative class action alleging that Defendant failed to compensate them for off-the-clock work, were denied meal and rest breaks, and were given inaccurate wage statements in violation of California state wage & hour laws. Subsequently, Plaintiffs moved for class certification of four putative sub-classes. The trial court denied Plaintiffs’ motion and held that Plaintiffs had not shown that common questions predominated. Plaintiffs then appealed the trial court’s order. With respect to Plaintiffs’ putative off-the-clock work sub-class, the California Court of Appeal observed that Defendant had an official policy prohibiting off-the-clock work. Id. at *26. Furthermore, the Court of Appeal noted that only 39 out of the 89 declarations submitted by Plaintiffs, only 42 declarants stated that they had ever worked off-the-clock. Id. at *27. The Court of Appeal opined that “[i]f off-the-clock work was widespread resulting in a company policy or practice enough to merit class treatment, one would think that most, if not all, of Plaintiffs’ small sample would have been able to report off-the-clock work.” Therefore, in light of the evidence, the Court of Appeal affirmed the trial court’s refusal to certify Plaintiffs’ off-the-clock work sub-class because common questions did not predominate. Id. at *28. With respect to Plaintiffs’ putative meal period sub-class, the Court of Appeal noted that because Defendant’s meal period policy was facially valid, the issue was whether, notwithstanding Defendant’s policy, there existed a systematic policy to deny employees the meal breaks to which they were entitled. Id. at *28-29. The Court of Appeal noted that only 39 out of the 89 declarations submitted by Plaintiffs offered anecdotal evidence regarding Defendant’s alleged failure to provide meal breaks. The Court of Appeal further observed that there were declarants that asserted that they self-managed their own breaks. Id. at *30. Thus, the Court of Appeal held that given the lack of uniformity among the putative class members, the trial court properly refused to certify the meal period sub-class. With respect to Plaintiffs’ putative rest period sub-class, the Court of Appeal noted that Plaintiffs contended that Defendant’s rest period policy failed to comply with the California Supreme Court’s decision in Brinker Restaurant Corp. v. Superior Court, 53 Cal. 4th 1004 (2012). In rejecting Plaintiffs’ argument, the Court of Appeal determined that Plaintiffs failed to develop a record to support their theory that a sub-class should be certified for Defendant’s employees who worked a shift of at least six hours but less than seven hours, and who were denied a second rest period. Id. at *33-34. Therefore, the Court of Appeal found that on the record presented, the trial court properly refused to certify the proposed rest period sub-class. With respect to Plaintiffs’ putative wage statement period sub-class, the Court of Appeal agreed with the trial court’s decision that Plaintiffs’ wage statement claim was “a derivative claim of the off-the-clock meal and rest claims because the claim for insufficient wage statements is based upon the claim that the wage statement was deficient because of violations of the off-the-clock work law and the meal break law.” Id. at *34. Accordingly, the Court of Appeal affirmed the trial court’s order denying Plaintiffs’ motion for class certification.

Jones, et al. v. Farmers Insurance Exchange, 2013 Cal. App. Unpub. LEXIS 7798 (Cal. App. 2d Dist Oct. 28, 2013). Plaintiff, a claims representative, brought a class action alleging that Defendant violated California wage & hour laws by failing to pay overtime and minimum wages, and to provide employees with accurate wage statements. Defendant’s claims representatives obtained their assignments on-line and travelled to their first assignment of the day from their homes. Plaintiffs alleged that the travel time to their first assignment was uncompensated unless it exceeded their normal travel time. Plaintiffs moved for class certification. Plaintiffs supported the motion with 51 declarations, which stated generally that they were entitled to compensation for work performed at home before the beginning of their scheduled shifts was a factual question that was common to all class members and amenable to class treatment. Id. at *6. The trial court denied Plaintiffs’ motion, finding that common issues did not predominate. Upon Plaintiffs’ appeal, the California Court of Appeal reversed the trial court’s order. The Court of Appeal found that the existence of an alleged uniform policy denying putative class members compensation for work performed at home before the beginning of their scheduled shifts was a factual question that was common to all class members and amenable to class treatment. Id. *17. Further, the issue of whether such a policy, if it existed, deprived employees of compensation for work for which they were entitled to compensation was a legal question that was common to all class members. Id. The trial court had found that common issues did not predominate because the parties disputed what tasks were required to be performed before the shift. Defendant’s evidence showed that it did not always deny
requests for overtime, and thus, according to the trial court, Plaintiffs had failed to demonstrate that Defendant had a class-wide policy of refusing to pay overtime. Id. at *10. The trial court had also found that whether a particular class member would have been approved for overtime if he or she had requested it, whether a class member had time to complete the required tasks after beginning of a shift and before his or her first appointment of the day, and whether the amount of time spent was de minimis were individual inquiries that showed that common questions did not predominate. The Court of Appeal found that the trial court applied improper criteria by focusing on individual issues concerning the right to recover damages rather than an evaluation of whether the theory of recovery was amenable to class treatment. Id. at *19-20. According to the Court of Appeal, Plaintiffs’ theory of recovery was based on the existence of a uniform policy denying compensation for pre-shift work, and Defendant’s liability depended on the existence of such a uniform policy and its overall impact on its claims representatives. The Court of Appeal thus found that Plaintiffs presented predominantly common issues of fact and law, and the trial court erred to the extent that its ruling was based on its evaluation of the merits of Plaintiffs’ claim as to the existence of such a uniform policy. Id. at *21. For the same reason, the Court of Appeal also concluded that the trial court erred in concluding that class certification would not provide substantial benefits to the litigants. The Court of Appeal agreed with the trial court that the named Plaintiff was not an adequate class representative. Substantial evidence supported the trial court’s finding that absent a declaration of the named Plaintiff stating that he understood his fiduciary obligation to the class, Plaintiffs failed to show that the named Plaintiff was willing and able to serve as an adequate class representative. Id. at *23-24. Because the lack of an adequate class representative did not justify the denial of class certification, the Court of Appeal held that Plaintiffs should be given an opportunity to amend their complaint to name a suitable class representative. Id. at *24. Accordingly, the Court of Appeal reversed the trial court’s order denying class certification with directions to allow Plaintiffs to name a new class representative.

Martinez, et al. v. Joe’s Crab Shack Holdings, 2013 Cal. App. Unpub. LEXIS 8142 (Cal. App. 2d Nov. 12, 2013). Plaintiffs, a group of salaried managerial employees, brought a putative class action alleging that they had been misclassified as exempt employees and were denied overtime pay. Plaintiffs worked for Defendants at their different restaurants in California, and Defendants expected them to work a minimum of 50 hours per week. Plaintiffs alleged that although they were told that they would be working 50 to 55 hours per week, they routinely worked more than 55 hours per week. Plaintiffs moved for certification of a class consisting of all persons employed by Defendants in California as a salaried restaurant employee in a Joe’s Crab Shack restaurant at any time since September 7, 2003. Id. at *4. The trial court denied Plaintiffs’ motion for class certification, relying on the fact that the different managers could not show that they shared common facts, including whether they performed exempt tasks more than 50% of the time. The class representatives admitted in their depositions that they were unable to estimate the amount of time spent on exempt and non-exempt duties and that their duties varied daily. Id. at *15. The trial court thus found that the variability among the different members of the class would require a time and resource consuming process by which every putative class member’s exemption would have to be adjudicated, and accordingly concluded that a class action would not be superior means of resolving the litigation. Id. at *16. On appeal, the California Court of Appeal reversed the trial court’s order. The Court of Appeal held that the trial court erred in denying class certification because it focused on the amount of time spent by managers working over 40 hours per week rather than the impact of Defendant’s policies and practices on Plaintiffs. The Court of Appeal noted that the trial court did not assess the means by which Plaintiffs’ theory of recovery could be proved through resolution of common questions of fact and law. The Court of Appeal based its analysis on the California Supreme Court’s decision in Brinker Restaurant Corp. v. Superior Court, 53 Cal. 4th 1004 (2012). Under Brinker, when deciding whether common issues predominate so as to merit class treatment, the trial court must direct its inquiry to Plaintiff’s theory of liability and not to the concerns often raised by Defendants, which generally go only to individualized damages. Plaintiffs’ theory here was that Defendants had a policy of classifying assistant managers as exempt executive employees, even though the bulk of their duties had all the indicia of non-exempt work. According to the Court of Appeal, the trial court should have decided whether Defendants properly classified members of the class as exempt from overtime pay requirements, and not to engage in a post hoc calculation for each employee as to hours worked in excess of the mandated 40-hour workweek. Id. at
*M25-28, 39. The Court of Appeal opined that any dispute over how employees actually spent their time had the potential to generate individual issues, but considerations such as the employer’s realistic expectations and the actual overall requirements of the job were likely to prove susceptible to common proof. *Id. at *29. The Court of Appeal therefore held that overtime exemption cases should proceed through analysis of the employer’s realistic expectations and classification of tasks rather than whether the employee can identify in retrospect whether, at a particular time, he or she was engaged in an exempt or non-exempt task. *Id. at *29-30. Further, the Court of Appeal noted that class relief would be appropriate if Defendants’ policies resulted in managerial employees being under-compensated for performing exempt work, even if some managerial employees’ work remained more than 50% managerial in nature. *Id. at *37. The Court of Appeal therefore stated that by re-focusing its analysis on the policies and practices of the employer and the effect those policies and practices have on the putative class, as well as by narrowing the class if appropriate, the trial court might in fact find that class adjudication might be a more efficient and effective means of resolving Plaintiffs’ overtime claim. *Id. at *39. Accordingly, the Court of Appeal reversed the trial court’s order denying class certification and remanded the action for further proceedings.


Plaintiffs, a group of security guards who spent nights at assigned job sites in residential-type trailers, brought an action alleging that Defendants denied them minimum wages and overtime wages in violations of the California Labor Code and Industrial Welfare Commission Wage Order No. 4 (“Wage Order No. 4”). The parties filed cross-motions for summary judgment, and the trial court found in favor of Plaintiffs, and granted a preliminary injunction requiring Defendants to compensate the employees for on-call time spent in the trailers. On appeal, the California Court of Appeal affirmed in part and remanded for further proceedings. The parties stipulated that state and federal governmental agencies had weighed in on the legality of Defendants’ on-call policy or the legality of predecessor policies with similar features. First, in 1996, the California Division of Labor Standards Enforcement (“DLSE”) conducted an investigation and audit of Defendants’ policy with regard to trailer guards and their night time posting. Under the policy then in place, trailer guards who wished to leave jobsite were required to request permission 12 hours in advance to enable Defendants to secure a reliever, and were not paid if no reliever was available. In an April 1997 letter, the Chief Deputy Director of the California Department of Industrial Relations and acting Labor Commissioner noted that both DLSE and the U.S. Department of Labor (“DOL”) had concluded that “hours worked” did not include sleep time, meal times, and all other times during which the employee was either free to leave the premises or was free to engage the private pursuits. *Id. at 858. After review, the DLSE found it appropriate to extend this rule to live-in security guards of Defendants under the facts presented, which included the fact that the guards were homeless and the trailer was essentially their only place of residence. In 1999, the DLSE reversed its position, and in 2003, the DLSE and Defendants entered a Memorandum of Understanding (“MOU”), wherein Defendants agreed to change the terms of employment for its trailer guards to include free time, and the trailer guards were free to leave the site at will during the free time, but under certain conditions. In 1997, Defendants had also requested a formal opinion from the DOL concerning the sleep time policy. In a letter, the DOL stated that the sleep time agreements complied with federal regulations and that the designated sleep time hours need not be compensated. *Id. at 859. The DOL had not changed its opinion in 2010 as well. The Court of Appeal noted that the issue here was whether the hours the trailer guards spent in the trailers between 9:00 p.m. and 5:00 a.m. should be construed as hours worked. The Court of Appeal noted that the term hours worked was defined in Wage Order 4 as the time during which an employee is subject to the control of the employer, and included all the time the employee was permitted to work, whether or not required to do so. *Id. at 864. Defendants asserted that hours were properly excluded from hours worked because: (i) the trailer guards were merely “on-call,” and free to engage in personal activities and not actively engaged in work unless and until an alarm sounds or they are otherwise actively engaged in investigation; and (ii) the period constitutes excludable “sleep time.” *Id. at 866. The Court of Appeal found that the pertinent factors supported the trial court’s finding that the trailer guards’ on-call hours represented hours worked for the purposes of Wage Order No. 4. *Id. at 867. The Court of Appeal determined that during the on-call period, the trailer guards were significantly limited in their ability to engage in personal activities. *Id. at 868. The Court of Appeal explained that they were required to live on the jobsite, they were expected to respond
immediately, in uniform, when an alarm sounded, or they heard suspicious noise or activity. Most importantly, the trailer guards did not enjoy the normal freedoms of a typical off-duty worker, as they were forbidden to have children, pets, or alcohol in the trailers and could not entertain or visit with adult friends or family without special permission. On this record, the Court of Appeal concluded that the degree of control exercised by the employer compelled the conclusion that the trailer guards’ on-call time fell under the definition of “hours worked” under California law. Id. at 869. As to the sleeping time, the Court of Appeal noted that California case law authority had long held that when an employee works a 24 hour shift, the employer and employee may exclude, by agreement, up to eight hours for sleep time. Here, the on-call agreements manifested the parties’ intent that the trailer guards not be compensated for the eight hours between 9:00 p.m. and 5:00 a.m. Although the agreements did not refer to this period as “sleep time,” it was the period when most human beings were likely to be asleep and according to the stipulated facts, the guards were permitted to sleep during this period, or to relax in other ways, and were provided a homelike trailer with adequate sleeping facilities. Id. at 875. The agreements further provided that the guards would be compensated for all the time their ability to sleep was interrupted by the necessity of conducting investigations, and that on any night a guard did not receive at least five hours of uninterrupted free time, the entire eight hours would be compensated. Id. Accordingly, the Court of Appeal concluded that the parties’ on-call agreements fulfilled the requirements that permit eight hours of sleep time to be excluded from their 24-hour weekend shifts.

Molina, et al. v. Lexmark International, Inc., 2013 Cal. App. Unpub. LEXIS 6684 (Cal. App. 2d Dist. Sept. 19, 2013). Plaintiffs, a group of employees, brought a class action alleging that Defendant’s vacation policy deprived them of earned wages in violation of state labor law. Defendant, a Delaware corporation which was spun off from IBM in March 1991, had pledged to honor vacation days employees had accumulated while working for IBM, and allowed employees who had been with the company for at least five years to carry over their vacation and personal days from year to year. Id. at *3. Defendant changed its rules effective May 1991 under which employees had to use all their time off by year’s end or forfeit it. Plaintiffs alleged that the new policy constituted a “use it or lose it” policy that was illegal under state law because it effectively deprived employees of earned wages. Plaintiffs asserted causes of action for unpaid wages for accrued vacation pay, unpaid wages for accrued vacation due upon termination, penalties for unpaid wages upon termination, unfair competition, and unpaid wages for commissions. Id. at *7. Plaintiffs also requested damages, injunctive relief, and attorneys’ fees. After bifurcating the liability and damages phases of the case, the trial court granted class certification, and determined that Defendant’s vacation policy violated the provisions of the California Labor Code prohibiting forfeiture of vacation and personal choice days and requiring payment upon termination of all vacation and personal choice day wages. Id. at *13. The trial court further ordered Defendant to develop and implement vacation and personal choice policies for California employees so that they might carry over vacation and accrue up to 240 hours of vacation and personal choice days without a business needs requirement. Id. at *14. Regarding damages, each party’s expert had disagreed on the methodology for calculation of damages. Ultimately, finding flaws in both party’s expert analysis and citing the poor records Defendant had maintained of its employees’ vacation usage, the trial court came up with its own estimate of compensations for the workers. Id. at *18-20. The trial court found a reasonable approximation of the forfeiture rate as 45.2% and awarded damages in the total amount of $8.29 million. Id. at *20. Plaintiffs were also awarded attorneys’ fees and costs in the amount of $5,722,008.07. Id. at *25. On appeal, the California Court of Appeal upheld the trial court’s ruling that Defendant’s vacation policy violated the law, but ordered recalculation of the $13.6 million judgment entered against Defendant. Defendant argued that the class should not have been certified, that its policy was lawful, and that the damages were excessive. The Court of Appeal, however, found that class certification was warranted because the evidence presented in support of the certification motion had showed that Plaintiffs and other class members had forfeited vacation and personal choice under the alleged illegal policy. Id. at *29. The Court of Appeal found no merit in Defendant’s contention that the certification motion should have been denied because the amount of damages varied with individual class members based on how many vacation days they might have forfeited. The Court of Appeal stated that a class action could be maintained even if individual claims of recovery and the amount of damages differed among the class members. Id. at *30. The Court of Appeal also rejected Defendant’s assertion of its
policy was a lawful “no additional accrual” vacation policy that simply imposed a limit on the amount of vacation time employees could bank. *Id.* at *36. The Court of Appeal ruled that Defendant’s policy was more than an accrual cap because it ultimately divested employees of already accrued vacation time. *Id.* at *38. The Court of Appeal further rejected Defendant’s assertion that the trial court improperly struck its affirmative defenses that certain class members were potentially barred by the statute of limitations, collateral estoppel or *res judicata* principles, voluntary releases, and status as current employees. The Court of Appeal determined that the trial court’s refusal to allow the statute of limitations as an affirmative defense was not an error because the trial court had relied on equitable tolling. *Id.* at *59-60. Defendant’s vacation policy violated the law and the undisputed evidence showed that since 1991, Defendant had advised its employees that they could not carry over vacation days, and had repeatedly misrepresented to its employees that they had a statutory right to be paid unused vacation on termination. *Id.* at *60. The Court of Appeal agreed with Defendant that the trial court had incorrectly calculated the vacation pay to which the employees were entitled based on their gross pay complete with commissions instead of their base rate of pay. *Id.* at *69-70. The California Labor Code states that on an employee’s termination, “all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy” and Defendant’s policy had always been that vacation pay was calculated at the base rate. *Id.* at *70. The Court of Appeal therefore held that the trial court had erred in concluding that the vacation pay should be calculated using the commission when Defendant’s policy provided otherwise. *Id.* Accordingly, the Court of Appeal affirmed the trial court’s judgment in all respects except for the damages calculated at the gross rate of pay rather than at the base rate.

*Nelson, et al. v. Southern California Gas Co.*, 2013 Cal. App. Unpub. LEXIS 3837 (Cal. App. 2d Dist. May 30, 2013). Plaintiffs, a group of field operations employees, brought a class action alleging that Defendant failed to provide meal and rest breaks and overtime wages in accordance with California law. Plaintiffs also alleged that Defendant required class members to perform work off-the-clock, such as donning and doffing coveralls, and booting up or shutting down computers. Based on those factual allegations, Plaintiffs brought seven causes of action, including violations of the Industrial Welfare Commission Wage Order No. 4, the California Labor Code, the Business and Professions Code (“UCL”), and claims under the Private Attorney General Act (“PAGA”). After Defendant filed a motion for an order declaring the suit inappropriate for class treatment and denying representative status for the PAGA claim, Plaintiffs sought to certify a class of non-exempt field operations employees. The trial court denied Plaintiffs’ motion for certification and granted Defendant’s motion to deny class treatment for the PAGA claims. On appeal, the California Court of Appeal affirmed the denial of class certification, but reversed the findings on the PAGA claims. In support of their motion for class certification, Plaintiffs provided copies of Defendant’s written policies, including an employee conduct and responsibilities manual, which included, among other things, a section on work schedules, coffee breaks, and lunch periods. In addition, Plaintiffs filed their declarations stating that Defendant required them to be available at all times during their shifts to respond to emergencies, including during meal and rest breaks, and that they could take rest breaks as work permitted. Plaintiffs also provided testimony of Defendant’s supervisors in support of their motion to show that they were indeed denied meal and rest breaks. *Id.* at *21. The trial court concluded that individual questions would likely predominate over common ones, and accordingly, denied Plaintiffs’ motion. The trial court further held that Plaintiffs could not bring their PAGA claims as a representative action because individual issues would predominate and a representative action would not be manageable. *Id.* at *23. On appeal, Plaintiffs argued that the evidence showed that Defendant’s policies were applicable to all putative class members, and based on those policies they were denied meal and rest breaks, and caused them to work off-the-clock. As to meal and rest breaks, the Court of Appeal noted that Plaintiffs theory hinged on whether field operations employees were relieved of all duties and whether Defendant’s restrictions on employee conduct converted meal periods into hours worked. Plaintiffs contended that Defendant’s policy required field operations employees to be available to respond to emergency contacts during their meal and rest breaks, and that Defendant uniformly applied other restrictions to putative class members on break periods, such that the breaks were transformed into on-duty periods. *Id.* at *35. The question was whether Plaintiffs presented substantial evidence of a systemic company policy that allegedly rendered break periods compensable as hours worked. The Court of Appeal remarked that it was mindful
of the standard of review that, in the absence of other error, a trial court ruling supported by substantial evidence cannot be disturbed unless: (i) improper criteria were used; or (ii) erroneous legal assumptions were made. Id. at *36. The Court of Appeal noted that although there was evidence establishing a company-wide policy requiring employees to stay in route, there also was evidence indicating there was no uniform definition of the term and variations among supervisors as to their interpretation of the requirement. Id. at *38. While some supervisors declared that employees were given leeway during breaks as long as they were heading in the same direction as their next order, others considered it acceptable for employees to drive a few minutes or few blocks out of the route during a break. Id. at *39. The Court of Appeal observed that although Plaintiffs purported to base their claims on Defendant’s policies, the written policies did not on their face support Plaintiffs’ claims. Accordingly, the Court of Appeal found no abuse of discretion with respect to the trial court’s order as to the meal/rest break claim. Similarly, the Court of Appeal found no substantial evidence that pointed to a uniformly applied, company-wide policy requiring employees to boot up or shut down their mobile computers while they were off-the-clock. Id. at *51-52. Accordingly, the Court of Appeal found no abuse of discretion by the trial court in denying certification of a class based on the off-the-clock donning and doffing claims. The Court of Appeal, however, found that the trial court abused its discretion in applying class action requirements to the PAGA claim. Id. at *53-54. The Court of Appeal remarked that Defendants failed to identify any California case authorities specifically considering whether the trial court may deny a representative PAGA claim on the ground that individual questions would make the litigation unmanageable. Therefore, the Court of Appeal concluded that the trial court abused its discretion in applying class action certification standards to evaluate the PAGA claim.

Sonic-Calabasas A, Inc. v. Moreno, et al., 57 Cal. 4th 1109 (2013). Plaintiff, a former employee, filed an administrative wage claim with the California Labor Commissioner for unpaid vacation pay. Defendant then petitioned the trial court to compel arbitration based on an employment agreement that Plaintiff had with Defendant. The trial court denied the petition to compel arbitration as premature relying on Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal. 4th 83 (2000). On Defendant’s appeal, the California Court of Appeal found that waiver of a Berman hearing (a hearing before the Labor Commission) was enforceable. On Plaintiff’s appeal, the California Supreme Court reversed the Court of Appeal’s (“Sonic I”) finding that although Plaintiff could be compelled to arbitrate, he could not be required to waive his right to a Berman hearing; as a result, it ordered reinstatement of the trial court’s denial of the petition to compel. Id. at 1127. Defendant then petitioned the U.S. Supreme Court, which vacated and remanded the case for further consideration in light of AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011). Upon remand, the California Supreme Court affirmed the Court of Appeal, and granted Defendant’s petition to compel arbitration. Sonic I had rejected Defendant’s argument that even if a non-arbitration clause that required a Berman hearing waiver was contrary to public policy, an arbitration clause containing the same waiver would not be because arbitration offered the same or similar advantages as did Berman hearing process. The Supreme Court had concluded an employee going directly to arbitration would lose a number of benefits and advantages, as: (i) he would not benefit from the Labor Commissioner’s settlement efforts and expertise; or (ii) he would have to pay his own attorneys’ fees and other costs. The Supreme Court had also found that the Berman waiver was unconscionable. Id. at 1132. The Supreme Court, however, noted that Concepcion reversed the finding in Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005), finding that class action waivers were unconscionable under California law, and should not be enforced. Concepcion held that the Discover Bank rule was preempted by the Federal Arbitration Act (“FAA”) and reasoned that the rule stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Id. at 1139. The Supreme Court, therefore, held that the FAA, as interpreted by Concepcion, preempted the prohibition of a Berman hearing waiver. Id. at 1142. The Supreme Court remarked that after Concepcion, unconscionability remained a valid defense to a petition to compel arbitration; however, what was new was that Concepcion clarified the limits the FAA placed on state unconscionability rules as they pertained to arbitration agreements. The Supreme Court explained that after Concepcion, the unconscionability doctrine still applied to arbitration agreements. The Supreme Court opined that the unconscionability doctrine was not preempted by the FAA. Instead, an employee’s surrender of Berman protections in their totality may be considered as a factor in determining whether an arbitration agreement is unconscionable, so long as the clause did not facially discriminate against
The Supreme Court concluded that where, as here, a particular class has been legislatively afforded specific protections in order to mitigate the risks and costs of pursuing certain types of claims, and to the extent those protections did not interfere with fundamental attributes of arbitration, an arbitration agreement requiring a party to forgo those protections may properly be understood not only to substitute one dispute resolution forum from another, but also to compel the loss of a benefit. Accordingly, the Supreme Court reversed the decision of the Court of Appeal granting the petition to compel arbitration, and remanded the case to the trial court for a new hearing.

Vuong, et al. v. Wells Fargo Bank, N.A., 2013 Cal. App. Unpub. LEXIS 4507 (Cal. App. 1st Dist. June 26, 2013). Plaintiffs, a group of Wells Fargo managers classified as Service Manager Two (“SM2”), alleged that Wells Fargo incorrectly classified them as exempt employees and brought a class action alleging non-payment for overtime, as well as meal break and rest break violations. Plaintiffs alleged that SM2s devoted more than 50% of their time to coaching their direct reports. Plaintiffs’ proposed class was comprised of all California residents who were current and former employees, holding positions as SM2, and who worked more the than eight hours in any given day and/or more than 40 hours in any given week during the class period, and who were not paid overtime compensation. The trial court denied class certification for failure to establish predominance. The trial court determined that the evidence showed that SM2s’ work varied according to the type of customer being served, whether other non-customer-related bank business was being conducted in the store, the size and location of the store, the performance and experience of the non-exempt employees, the SM2’s management style, and whether additional supervisory personnel were employed in the store. On appeal, Plaintiffs claimed that individual inquiries would not be necessary because every SM2 spent more than half of each workday on coaching tasks. They argued that the determination of the exempt/non-exempt status of coaching was a common issue that predominated over any individual issues, and that resolving the status of coaching would resolve the exempt/non-exempt status of all putative Plaintiffs, making the class action a superior method of adjudication. The California Court of Appeal, however, stated that even if SM2s spent more than 50% of their time coaching, this fact did not support class certification because coaching was not a single activity, but only a name ascribed to a bundle of managerial duties, and the time spent performing those duties and other exempt duties varied across all the SM2s depending on a number of factors. Further, the Court of Appeal determined that it was not possible to classify coaching as an exempt or non-exempt task, and that the relative inquiry would instead focus on the percentage of time expended on each of the duties that SM2s performed, including those that comprising coaching. Plaintiff Fleming testified that the duties she performed as an experienced SM2 were different from the duties of the less-experienced SM2 that she supervised. Fleming also conceded that a person’s experience, the store size, the manager’s and individual’s personality, and the support people they had working with them all determined what a particular SM2 did daily. Plaintiffs could not quantify the amount of time they spent on a daily or weekly basis performing their various SM2 duties. Moreover, store differences, including staffing, also affected the amount of time that an SM2 spent working the teller window, and seasonal differences in business volume and clientele differences also affected duties. The Court of Appeal found that although Defendant maintained uniform internal policies, the evidence showed that the manner in which those policies and standards were carried out by each SM2 varied, and thus, individual inquiries would be needed to determine the time spent performing each of the allegedly non-exempt duties that comprised stage-coaching. Accordingly, the Court of Appeal affirmed the trial court’s order denying class certification.

Williams, et al. v. Superior Court Of Los Angeles County, 2013 Cal. App. LEXIS 985 (Cal. App. 2d. Dec. 6, 2013). Plaintiff, an auto field adjuster, brought a class action alleging that Defendant, Allstate Insurance Co., failed to pay overtime wages to its auto field adjusters. Defendant employed several hundred auto field adjusters who traveled to sites such as body shops to inspect, and analyze the value of, damaged vehicles. Plaintiff alleged that Defendant had a policy and practice of not compensating adjusters for work performed before they arrived at their first vehicle inspection of the day and for the work performed after completing the last inspection of the day. Id. at *5. Finding evidence in support of Plaintiff’s allegation, the trial court had certified an “off-the-clock” class, defined as Defendant’s California-based hourly-paid auto field adjusters who were not paid for off-the-clock work for the specific tasks
Moreover, Id. provided the sole legal authority for the trial court's grant of class certification. at 100. The trial court had, however, certified the question for appellate review. Defendant had ordered that the opinion be de-published. Plaintiff filed a petition for writ of mandate. The California Court of Appeal granted the petition and directed the trial court to vacate its decertification order. The Court of Appeal found that Wal-Mart did not make the trial court's original certification order incorrect. The Court of Appeal noted that the concern expressed in Wal-Mart about the unmanageability of trying 1.5 million claims which depended on proof of the subjective intent of thousands of individual supervisors was not present here as Plaintiff had asserted that there was a company-wide policy to deny overtime pay. The trial court's decertification order had cited no new evidence in support of overturning its previous commonality finding. The alleged commonality was the practice of adjusters working off-the-clock, and the Court of Appeal found that an unlawful practice could create commonality even if the practice affects class members differently. Id. at *8-9. Defendant's defense included purported evidence that not all adjusters worked off-the-clock, and that even those who did, their time was de minimis. The trial court agreed with Defendant that Wal-Mart changed the relevant legal landscape, and held that a trial in which Defendant presented evidence of affirmative defenses to more than 200 individuals would be unmanageable, thereby making class certification inappropriate. Id. at *31-33. The Court of Appeal noted that class treatment does not require that all class members have been affected equally by the challenged practices, and it would suffice that the issue of whether the practice itself was unlawful was common to all. Id. at *33. Accordingly, the Court of Appeal ordered the the trial court to vacate its decertification order.

Wilson, et al. v. Farmers Insurance Exchange, 218 Cal. App. 4th 96 (Cal. App. 2d Dist. 2013). Plaintiffs, a group of claims adjusters, brought a class action alleging various violations of the California Labor Code, including a failure to pay overtime and a failure to provide meal and rest breaks. Plaintiffs moved for certification of a class of claims representatives paid as exempt employees during the class period. Defendants opposed the motion arguing that all adjusters were exempt. The trial court granted Plaintiffs’ motion, relying solely on Harris v. Superior Court, 207 Cal. App. 4th 1225 (Cal. App. 2d Dist. 2012), which was published after Defendant filed its opposition to class certification. Id. at 100. Harris had held that a class of claims adjusters was appropriately certified and that the members of the class were not exempt. Id. Defendant sought reconsideration as the California Supreme Court had later denied a petition for review in Harris, and had ordered that the opinion be de-published. Id. at 102. The trial court denied Defendant's motion on the ground that de-publication of Harris did not constitute a change in the law within the meaning of § 1008(c) of the Code of Civil Procedure. Id. at 103. Section 1008 (c) provides the trial court with discretion to reconsider a prior order at any time if it determines that there has been a change in the meaning of § 1008(c) of the Code of Civil Procedure. Id. at 109. The Court of Appeal noted that it is well-established that non-published opinions have no precedential value, and without precedential value, a de-published opinion is no longer part of the law, and thus ceases to exist. Id. Here, Harris existed at the time of the trial court’s order granting class certification and then subsequently was de-published, and thereby disappeared from the law and changed the applicable legal context surrounding the decision. Id. at 110. The trial court had reasoned that because de-publication did not express approval or disapproval by the Supreme Court, it was not a change of law. Id. The Court of Appeal, however, held that a change of law occurred simply from the fact that the existing body of precedent law had changed, irrespective of the Supreme Court's reasons for changing it. Id. Moreover, Harris provided the sole legal authority for the trial court’s grant of class certification. Id. at 111.
court had not only relied exclusively on *Harris*, but also had reasoned that because *Harris* controlled the decision, it was severely confined in terms of any independent legal analysis. The trial court did not even attempt to resolve Defendant’s dispute that *Harris* conflicted with other appellate opinions, and had rather “found that ‘it would be akin to trial court insubordination for it to reach some other result on some other ground,’ in light of *Harris*.” *Id.* Because *Harris* had ceased to exist for precedential purposes, the Court of Appeal held that the stated legal basis for the trial court’s class certification order had disappeared. *Id.* The Court of Appeals therefore found that the trial court erred in concluding that the de-publication of *Harris* did not constitute a change in the law sufficient to warrant reconsideration. *Id.* Accordingly, the Court of Appeal ordered the trial court to reconsider the class certification motion in the absence of the de-published *Harris* decision.

(ii)  Connecticut

*Cook, et al. v. Family Dollar Stores Of Connecticut, Inc.*, 2013 Conn. Super. LEXIS 598 (Conn. Super. Ct. Mar. 18, 2013). Plaintiffs, a group of former store managers (“SMs”), brought an action under the Connecticut General Statutes alleging they were misclassified as exempt employees and thereby denied overtime wages. Defendant provided detailed procedures manuals to SMs, and Defendant enforced the procedure directives through oversight, audits, and reporting procedures. The materials reflected extensive decision-making at the corporate level with respect to which SMs had little input and/or authority to alter. Each store had a SM who reported to a District Manager, who typically had several stores under their operational control. Each SM was given a labor budget with which to pay Assistant Store Managers and store clerks. SMs were responsible for the overall success of the store, for managing the store and its employees, and ensuring compliance with corporate directives. Their responsibilities included creating work schedules, doing payroll, reviewing inventory, and to varying degrees, hiring, disciplining, and firing employees. The actual work of the SM varied as between location, depending upon, among other things, the District Manager, the size of the store, the volume of the store’s business, and the location of the store. Plaintiffs moved for certification of a class comprised of individuals who were employed as Store Managers. The Court denied the motion for failure to establish predominance. At issue was whether Plaintiffs were misclassified as exempt *bona fide* executives, and the only factual dispute as to this classification was whether their primary duty consisted of the management of the enterprise. The Court stated that when analyzing the nature of an employee’s primary duty, the factors to consider included: (i) the relative importance of the management duties in comparison to the non-management tasks; (ii) the amount of time spent performing management and non-management tasks; (iii) the employee’s relative freedom from supervision; and (iv) the relationship between the employee’s salary and the wages paid to other employees for the non-management tasks performed by the employee. *Id.* at *17. The Court noted that while Defendant did direct and control, through mandate and oversight, what was required of the SMs, Defendant did not mandate how its directives should be carried out. Further, the Court observed that some SMs had broad discretion in the arena of hiring and firing and others required approval or involvement of the District Manager. The extent to which a District Manager was involved in the day to day operation of a store depended largely on the discretion of the District Manager. Thus, the Court found that different SMs would have had different levels of autonomy, or relative freedom from supervision. While SMs had strict protocols for various tasks, whether the SM performed that work himself or delegated that task was within the SM’s discretion. In a larger store with a greater number of employees, the SMs might not need to unload the truck or stock the shelves or perform other non-management tasks as often as an SM in a smaller store with less employees. The Court also determined that SMs’ salaries varied greatly. *Id.* at *19. Thus, the Court remarked that although some Plaintiffs or proposed class members could be misclassified insofar as their primary duty was not management of the enterprise, upon inquiry into the individual situation of each SM, a fact-finder could also determine to the contrary. Because this individual inquiry rendered certification of a class unwarranted, the Court denied the motion for class certification.

(iii)  Florida

Workers’ Compensation Act. Pursuant to the arbitration clause in the employee manual, Defendant moved to compel arbitration. The trial court granted Defendant’s motion to compel arbitration. On appeal, the Florida District Court of Appeal reversed the trial court’s order. Plaintiff argued that the arbitration agreement was not enforceable because it required sharing the initial costs of arbitration; Plaintiff also argued that previous case law provided a bright-line rule that any fee-splitting provision renders an arbitration clause unenforceable. Id. at *2. The District Court of Appeal, however, rejected the notion that Florida case law authorities had set forth such a bright-line rule. Plaintiff further argued that the arbitration agreement was unenforceable because it included a prevailing party attorneys’ fee provision that contradicted the attorneys’ fee provision under the FLSA. Id. at *3. The District Court of Appeal noted that the FLSA provides that a prevailing Plaintiff is entitled to an award of reasonable attorneys’ fees, but it does not allow for prevailing party fees for Defendant. Id. at *4. The arbitration agreement stated that the prevailing party was entitled to reimbursement of its share of costs and reasonable attorneys’ fees. Accordingly, the District Court of Appeal observed that if the arbitrator declared Defendant the prevailing party, Plaintiff would be obligated under the arbitration agreement to pay Defendant’s attorneys’ fees, which would render the potential cost of arbitration to be far greater to Plaintiff than the potential cost of civil litigation. While the parties’ agreement might not contravene any of Plaintiff’s rights under the FLSA, it exposed him to a potential liability to which he would not have been exposed if the litigation had occurred in the trial court because the federal statute specifically protected him from such liability. Therefore, the District Court of Appeal opined that exposing Plaintiff to such potential liability had a sufficient chilling effect as to defeat the remedial purpose of the FLSA, i.e., intending to encourage employees to seek redress when they believe they have been wronged by an employer. Id. at *5. Therefore, the District Court of Appeal reversed the trial court’s order granting Defendant’s motion to compel arbitration.

(iv) Hawaii

**Villon v. Marriott Hotel Services, Inc., 130 Haw. 130 (Haw. 2013).** Plaintiffs, a group of employees serving food and beverages, filed a class action in federal court alleging that although Defendant added a pre-set service charge to customers’ bills for food and beverages, it did not remit the total proceeds of the service charge as tip income to Plaintiffs. Plaintiffs asserted that Defendant did not disclose to the customers that the service charges were not remitted in full to Plaintiffs. Further, Plaintiffs alleged that as a result of Defendant’s unlawful failure to remit the total proceeds, Plaintiffs were deprived of income that constituted wages, which was actionable under Haw. Rev. Stat. §§ 388-6, 388-10, and 388-11. The federal court certified the following question of Hawaii state law to the Hawaii Supreme Court: may food or beverage service employees of a hotel or restaurant bring a claim against their employer based on an alleged violation of Haw. Rev. Stat. § 481B-14 by invoking Haw. Rev. Stat. §§ 388-6, 388-10, and 388-11 and without invoking Haw. Rev. Stat. §§ 480-2 or 480-13? Id. at 132. The Hawaii Supreme Court looked at the plain language of § 481B-14, which provides that any hotel or restaurant that applies a service charge for the sale of food or beverage services shall distribute the service charge directly to its employees as tip income or clearly disclose to the purchaser of the services that the service charge was being used to pay for costs or expenses other than wages and tips of employees. The Supreme Court stated that the provision clearly provided that when a hotel or restaurant distributed less than 100% of a service charge directly to its employees without disclosing this fact to the purchaser, the portion withheld constituted tip income synonymously phrased within § 481B-14 as wages and tips of employees. Id. at 134-35. The Supreme Court opined that the plain language of Ch. 388 also supported Plaintiffs’ contention that § 481B-14 was enforceable through §§ 388-6, 388-10, and 388-11. Looking at the definition of wages in § 388-1, the Supreme Court pointed out that for the purpose of enforcement under § 388-6, “wages” included service charges as “tips or gratuities of any kind.” Id. at 135. Section 388-6 prohibits an employer from retaining any part or portion of any compensation earned by the employee except authorized retentions. The Supreme Court explained that service charges must be compensation earned by the employee, as they were levied upon the consumer based upon labor or services rendered by an employee, usually in lieu of a traditional tip. Under § 388-10, a violation of § 388-6 subjected an employer to a civil penalty of twice the unpaid wages, plus interest. Section 388-11(a) gave employees standing to recover unpaid wages and § 388-11(c) further provided for an award of costs and attorneys’ fees to prevailing employees. The Supreme Court therefore determined that the plain language of § 481B-14 and Ch. 388 indicated that a
service charge was “compensation earned” as “tip income” or “wages and tips of employees.” Therefore, an alleged violation of § 481B-14 was enforceable through Ch. 388. Id. at 136.

(v) Indiana

Walczak, et al. v. Labor Works-Fort Wayne LLC, 983 N.E.2d 1146 (Ind. 2013). Plaintiff, a day laborer, brought a class action under the Indiana Wage Payment Act seeking to recover unpaid wages. Defendant’s employees were not required to report to work on any regular schedule; instead, laborers received daily job assignments by going to Defendant’s office and signing up to work. Assignments were not guaranteed, and often an employee did not receive an assignment even if they signed up. Plaintiff was hired on December 20, 2009, and was paid at the end of each working day. Plaintiff worked on January 27, 2010, but did not sign up for work the next day. On January 29, 2010, she signed up but did not receive a job assignment, and did not work another job for Defendant until February 2, 2010. She periodically accepted job assignments from Defendant until early March 2010. Plaintiff filed her action on February 1, 2010, a day when she neither sought nor obtained a work assignment. Defendant moved for summary judgment, arguing that Plaintiff’s claim properly arose under the Indiana Wage Claims Act because she was “separated from the payroll” within the meaning of Indiana Code § 22-2-9-2 at the time her complaint was filed. The Wage Payment Act applies to current employees as well as to employees who, either “permanently or temporarily,” “voluntarily leave their employment.” Id. at 1149. Subsequently, the Indiana General Assembly created a similar remedy for employees who had been “separated from the payroll” or whose work had been suspended as the result of an industrial dispute. Id. at 1149. Unlike the Wage Payment Act, the Wage Claims Act did not create a private right of action; rather, it created an administrative process. Thus, while the Wage Payment Act applies to, among others, those who keep or quit their jobs, the Wage Claims Act applies to those who are fired, laid-off, or on strike. Id. Defendant argued that the trial court lacked jurisdiction to hear Plaintiff’s claim; rather, she was required first to submit it to the Indiana Department of Labor (“DOL”). Plaintiff argued that the Wage Claims Act did not apply because she was never fired. The trial court granted summary judgment in favor of Defendant, and on appeal, the Indiana Court of Appeals reversed, holding that the determination of whether Plaintiff was separated from the payroll within the meaning of the Wage Claims Act was a question of fact that should be resolved by the DOL. Accordingly, it remanded the case to the trial court with instructions to dismiss Plaintiff’s complaint. On further appeal, the Indiana Supreme Court reversed the dismissal of Plaintiff’s claims and remanded. The Supreme Court stated that the resolution of whether Plaintiff was covered by the Wage Payment Act such that she should bring her case directly to the trial court or by the Wage Claims Act such that she should first exhaust the administrative process available to her depended upon what the drafters of the two statutes meant when they used the language “voluntarily leaves employment,” and “separates any employee from the payroll.” Id. at 1153. The Supreme Court observed that if Plaintiff was involuntarily separated from the payroll, the trial court had no jurisdiction over her claim, but if she voluntarily left her employment, the trial court had jurisdiction. Further, the Supreme Court noted that a Plaintiff is only required to exhaust her administrative remedies under the Wage Claims Act if, at the time she filed her complaint, she had been involuntarily separated from her employment. The Supreme Court stated that when an employee who did not leave her job on her own terms makes a claim for wages, her claim should be subject to administrative review before it may proceed directly to the trial court, and that such claims were more likely to be motivated by animus than claims made by current employees or former employees who left by choice. However, an employee who knew that she may soon resume her employment presumably would have less reason to feel animus. Thus, to properly effectuate legislative intent, the Supreme Court found that a day labor employee is not “separated from the payroll” for the purpose of the Wage Claims Act unless that employee has no immediate expectation of possible future employment with the same employee. Id. at 1155. Here, Plaintiff did have such an immediate expectation, and although she did not seek a job assignment from Defendant on the day she filed her complaint, she successfully sought assignments on the following four days, and she continued to work for Defendant on a sporadic basis for the next four weeks. Thus, the Supreme Court held that Plaintiff was not separated from the payroll and did not need to comply with the requirements of
the Wage Claims Act. Because the Supreme Court observed that drafters of the Wage Payment Act intended the statute to benefit the entire Indiana workforce, including day labor employees, it reasoned that Plaintiff could proceed in the trial court with her claim under the Wage Payment Act.

(vi) Kansas

Milano’s, Inc., et al. v. Kansas Department Of Labor, 296 Kan. 497 (Kan. 2013). Plaintiff, owner of Club Orleans, sought judicial review challenging the determination of the Kansas Department of Labor, which stated that its dancers were employees, not independent contractors, under the Kansas Employment Security Law (“KESL”). The dancers were not paid a weekly salary and earned tips from customers. Defendant’s hearing officer determined that the dancers’ tips qualified as wages, and because the dancers received wages, they were employees, unless they fell within the exception outlined in the statute. Plaintiff filed for judicial review, claiming that the hearing officer made findings of fact not supported by substantial competent evidence and disregarded undisputed facts, and that he incorrectly interpreted the statute. The Shawnee District Court agreed with the hearing officer, concluding that the tips were wages, and observed that a contract of hire existed because the dancers had to complete an application agreeing to abide by the house rules. Id. at 499. The Shawnee District Court noted that Plaintiff maintained a right to control the dancers and that their services were provided in the ordinary course of Plaintiff’s business, noting that it provided a place to perform, that the dancers’ customers were customers of Club Orleans from whom Plaintiff received a cover charge, that Plaintiff instituted a minimum tip policy without input from the dancers, that the dancers were required to accept drinks from customers, and that Plaintiff provided some supplies to the dancers. Further, the Shawnee District Court observed that one of the main purposes of Club Orleans was to entertain customers with the dancers’ performances, and the club’s advertisements included billboards and internet activity incorporating images of the dancers. The Kansas Court of Appeals affirmed the decision of the Shawnee District Court. On further appeal, the Kansas Supreme Court affirmed. The plain language of statute provided that employment is service provided by a person with the status of an employee as determined under common law rules. Id. at 502. The Kansas Supreme Court noted that case law authorities had focused primarily on evaluating common law factors indicating employment under state law, particularly stressing the importance of the purported employer’s right of control over the employee and his or her work. Id. Thus, if the dancers had the status of employees under the usual common law rules applicable in determining the employer-employee relationship, then they were employees under the KESL. Id. at 504. The evidence demonstrated that Plaintiff possessed such a right of control over the dancers, and that the house set various rules, and dancers’ violations of those rules were punishable by fines and termination. Accordingly, the Kansas Supreme Court affirmed the judgments holding that dancers were employees and not independent contractors.

(vii) Maryland

Pinsky, et al. v. Pikesville Recreation Council, 2013 Md. App. LEXIS 138 (Md. App. Oct. 30, 2013). Plaintiffs, a group of former school teachers, brought an action in the state court against Defendants – an unincorporated non-profit organization (“PRC”), and its board members – seeking back wages. After a bench trial, the trial court entered judgment against the association but not the members. The Maryland Court of Special Appeals granted Plaintiffs’ appeal only in part. According to Plaintiffs, Defendants breached their employment contract with them by terminating their employment. Plaintiffs argued that the individual officers and directors should be held liable for the PRC’s breach of contract. The Court of Special Appeals noted that at common law, an unincorporated association was not a separate entity from its members, and because it had no legal existence, it could not contract, sue, or be sued. Id. at *27. The Court of Special Appeals observed that although no law explicitly permits unincorporated associations to enter into contracts, Maryland case law indicated that this was a long-recognized controversial power. Id. at *32. The Court of Special Appeals noted that at common law, officers of an unincorporated association were personally liable for the debts of the association. Id. at *35. In addition, the Court of Special Appeals reasoned that Maryland case law indicated that officers could be held liable for their association’s breach of contract. The Court of Special Appeals indicated that an officer must be shown to have authorized, assented to, or ratified the contract in question in order to find him personally liable for the association’s
If an officer clearly disapproved the contract, the liability would not attach. The Court of Special Appeals found that the trial court did not ground personal liability on a showing that the individuals were officers who authorized, assented to, or ratified the contract; thus, the trial court erred in finding no liability to the individual board members. The Court of Special Appeals, however, found that the trial court did not err in not awarding the treble damages that Plaintiffs sought. The Court of Special Appeals determined that treble damages could not be attributed to the individual board members because they were specifically employed by PRC. In addition, the Court of Special Appeals found that Plaintiffs’ allegations against the individual board members were limited only to breach of contracts claims, and that Plaintiffs failed to show that the individual members met any of the factors of the economic reality test to establish employer status.

Massachusetts

Cook v. Patient Edu, LLC, 465 Mass. 548 (2013). Plaintiff, a former employee, brought an action under Massachusetts General Laws Ch. 149, § 150, alleging that he was owed over $68,000 in compensation under an employment contract. Plaintiff entered into a written employment agreement with Patient Edu, LLC, according to which he would serve as a director of business development and strategic partner development for a base salary of $70,000 and a guaranteed draw of $30,000 annually. Plaintiff alleged that he did not receive any payment during the first six months of his employment, and received salary checks sporadically thereafter. When he resigned, he was owed $61,538.56 in wages and $6,879.36 in unreimbursed expenses. The parties disputed whether individual Defendants, two managers named Steven Graziano and Michael Schulman, were persons having “employees in his service” and thus also subject to liability. Id. at 549. Defendants moved to dismiss, and the trial court granted the motion, holding that Ch. 149, § 148, did not, by its plain language, impose individual liability on the managers of an LLC. On appeal, the Massachusetts Supreme Judicial Court vacated the order of the trial court and remanded. At issue was whether managers of LLCs could be liable for violations of Ch. 149, § 148. The Supreme Judicial Court observed that § 148 requires every person having employees in his service to pay those employees their wages either weekly or bi-weekly, and that the Wage Act provides that the president and treasurer of a corporation, as well as officers or agents having the management of the corporation, shall be deemed to be the employers of the employees of the corporation within the meaning of this section. Id. at 552-53. Further, § 148 also imposes individual liability for payment of wages upon every public officer whose duty it is to pay money, approve, audit or verify pay rolls, or perform any other official act relative to payment of any public employees who fails to do so. Id. at 553. The statute, however, makes no explicit mention of managers of LLCs or managers of any other limited liability entity. The Supreme Judicial Court noted that when the provision of § 148, making corporate officers individually liable for payment of wages was added in 1932, the LLC did not exist as a form of business association; the LLC became an authorized form of business entity in the Commonwealth in 1996. The Supreme Judicial Court stated that the inclusion of the provisions on corporate officer liability and public officer liability illustrated the circumstances in which an individual may be deemed a person having employees in his service under § 148.13. Thus, the Supreme Judicial Court rejected Defendants’ argument that the corporate officer provision, by identifying only corporations, implicitly excluded managers of LLCs and other limited liability entities from the more general category of persons having employees in their service. Considering the inclusion of the provisions regarding corporate and public officer liability, the Supreme Judicial Court opined that there was a clear legislative intent to ensure that individuals with the authority to shape the employment and financial policies of an entity could be liable for the obligations of that entity to its employees. Id. at 553-54. Further, the Supreme Judicial Court stated that the legislative purpose would not be served by holding any officers or agents having the management of a corporation accountable for violations of the Wage Act, but not the managers of other limited liability business entities who similarly controlled policies and practices related to the timely payment of employees. The Supreme Judicial Court stated that the legislative intent of the Wage Act, to hold individual managers liable for violations, was clear, and there was no ambiguity. Thus, because a manager or other officer or agent of an LLC, limited liability partnership, or other limited liability business entity could be a person having employees in his service, and thus may be civilly or criminally liable for violations of § 148, if controlled, directed, and participated to a
substantial degree in formulating and determining policy of the business entity, the Supreme Judicial Court held that claims against named Defendants Graziano and Schulman should not have been dismissed.

**Editor’s Note:** Though not a class action, the ruling in *Cook* implicates class actions in Massachusetts and broadens individual liability of executives for wage & hour exposures.

**Taylor, et al. v. Eastern Connection Operating, Inc., 465 Mass. 191 (Mass. 2013).** Plaintiffs, a group of individuals who lived and worked in New York as delivery couriers for Defendant, brought a putative class action against Defendant, alleging that they were misclassified as independent contractors and not paid wages and overtime in violation the Massachusetts wage & hour statutes, as well as the Massachusetts independent contractor statute. Subsequently, Defendant moved to dismiss Plaintiffs’ complaint for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted. Defendant argued that the Massachusetts independent contractor statute did not have the geographical reach to apply to Plaintiffs because they live and work exclusively in New York regardless of the choice-of-law clause in the parties’ contracts. Plaintiffs responded that the choice-of-law clause in their contracts with Defendant required the application of Massachusetts law to their claims. The trial court dismissed the lawsuit, concluding that the Massachusetts independent contractor statute did not apply to non-Massachusetts residents working outside of Massachusetts and that, as independent contractors, the wage and overtime statutes did not apply to Plaintiffs. Plaintiffs subsequently appealed. On appeal, the Massachusetts Supreme Judicial Court (“SJC”) noted that there was nothing unfair or unreasonable about enforcing the parties’ choice-of-law provision and that the trial court had subject-matter jurisdiction over disputes of this nature. In analyzing whether Massachusetts or New York state law applied in deciding Plaintiffs’ claims, the SJC observed that where the parties had expressed a specific intent as to the governing law, Massachusetts law generally upholds the parties’ choice. *Id.* at 195. Furthermore, the SJC noted that under Restatement § 187(2), if the particular issue to which the choice-of-law clause was being applied was one which the parties could not have resolved by an explicit provision in the contract, the parties’ choice-of-law provision should be upheld, unless the chosen state had no substantial relationship to the parties or the transaction and there was no other reasonable basis for the parties’ choice, or application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state. *Id.* at 196. The SJC observed that the issue of whether Plaintiffs were independent contractors or employees was not one that the parties could resolve with an explicit provision in their contracts because under either New York or Massachusetts law, the trial court could conclude that Plaintiffs were employees regardless of their classification under the language of the contracts. Thus, the SJC applied the two-tiered analysis of § 187(2). First, because Defendant was headquartered in Massachusetts, the SJC determined that Massachusetts had a substantial relationship to the transaction, and that even if New York had a greater interest in the determination of the issue and New York law applied in the absence of an effective choice by the parties, application of Massachusetts law would not contravene a fundamental policy of New York. *Id.* at 197. Additionally, the SJC opined that both states protected workers by classifying them as employees, and granting them the benefits and rights of employment, where the circumstances indicated that they were employees. Therefore, the SJC held the parties’ express choice-of-law provision was enforceable. The SJC next rejected Defendant’s argument that the Massachusetts independent contractor statute had no application to work performed outside of Massachusetts by non-Massachusetts residents. The SJC observed that when a statute is silent as to its extra-state applicability, the trial court may and should as appropriately look to all the relevant choice-of-law considerations as if it were choosing between common law rules. *Id.* at *198. Because the Massachusetts independent contractor statute was silent as to its extraterritorial effect, the SJC relied on the functional choice-of-law principles in assessing the applicability of the statute to Plaintiffs’ claims. Given that the parties agreed to construe the contract in accordance with Massachusetts law, that there was no express limitation on the territorial reach of the Massachusetts independent contractor statute, and that there was no apparent reason to disregard the parties’ choice-of-law provision, the SJC ruled that the Massachusetts independent contractor statute applied to Plaintiffs’ misclassification claim. Accordingly, the SJC stated that it was erroneous to have dismissed Plaintiffs’ misclassification claim, and also because Plaintiffs could yet be deemed to be employees under the Massachusetts independent contractor statute, it was erroneous
to dismiss their wage and overtime claims on the ground that, as independent contractors, they failed to state claims under the Massachusetts wage statutes. Accordingly, the SJC vacated and remanded the action to the trial court.

(ix) Nevada

Wynn Las Vegas, LLC v. Baldonado, et al., 311 P.2d 1179 (Nev. 2013). Plaintiffs, a group of table game dealers, alleged that Defendant violated Nevada law by implementing its tip-pooling policy, which required Plaintiffs to share their tips with employees of different ranks. They brought a class action before the Nevada Labor Commission challenging the policy. The Labor Commissioner denied Plaintiffs class action status, dismissed all the unnamed complainants, and ruled that the Defendant’s tip-pooling policy was lawful. Plaintiffs petitioned the trial court to review the Labor Commissioner’s decision. The trial court held the new tip-pooling policy was unlawful because the policy directly benefited Defendant and thus set aside the Labor Commissioner’s decision. Further, the trial court determined that the Labor Commissioner erred in dismissing the unnamed complainants because the Commissioner had the power to hear a class action suit. The trial court also declined to review the Labor Commissioner’s decisions regarding NRS, § 608.100 and NRS, § 613.120 because it determined that its decision regarding NRS, § 608.160 was completely dispositive of the parties’ dispute. On appeal, the Supreme Court of Nevada reversed the trial court’s order. Id. at 1181. The Supreme Court stated that nothing in its prior decisions suggested that a direct-benefit test should be imposed to determine whether a tip-pooling policy violated NRS, § 608.160, and such a test was unworkable because every tip-pooling policy directly benefits the employer in some manner. The Supreme Court observed that Defendant distributed the tips among its employees, keeping none for itself; therefore its policy was in accordance with NRS, § 608.160. Id. at 1182. Regarding Plaintiffs’ claims under NRS, § 608.100 and NRS, § 613.120, the Supreme Court stated that the Labor Commissioner’s decision aggrieved Plaintiffs; thus, Plaintiffs were entitled to judicial review of all of the Commissioner’s decisions. Accordingly, the Supreme Court remanded the matter to the trial court to determine whether the tip-pooling policy violated NRS, § 608.100 or NRS, § 613.120. Finally, the Supreme Court agreed with the Labor Commissioner in dismissing all unnamed complaints because they did not comply with NAC, § 607.200, according to which a complaint filed with the Labor Commissioner must include the full name and address of all complainants. Moreover, the Supreme Court ruled that Nevada laws did not require the Labor Commissioner to grant class certification under any circumstances. Id. Accordingly, the Supreme Court remarked that the trial court erred in failing to defer to the Labor Commissioner’s decision to decline class certification in this matter.

(x) New York

Barenboim, et al. v. Starbucks Corp., 21 N.Y.3d 460 (N.Y. 2013). Plaintiffs, a group of employees, alleged that Defendant’s policy of including shift supervisors and excluding assistant store managers in its tip pools was illegal under § 196-d of the New York Labor Law. At each of its stores, Defendant maintained a policy of pooling tips and then distributing them weekly to its baristas and shift supervisors. In the first of two class actions, Plaintiffs alleged that shift supervisors were not entitled to tips because they were Defendant’s agents under § 196-d and therefore could not demand or accept any gratuities. The District Court granted Defendant’s motion for summary judgment, holding that Labor Law § 196-d did not bar shift supervisors from participating in tip pools because their limited supervisory responsibilities did not carry the broad managerial authority or power to control employees. In the second class action, Plaintiffs contended that the assistant store managers should be deemed similar to waiters and bus boys – and eligible to share in tips – so long as they did not have full or final authority to terminate subordinates. The District Court granted summary judgment to Defendant, holding that although § 196-d excluded an employer or its agent from retaining tips, it did not compel an employer to include any particular eligible employee in a tip pool. Plaintiffs appealed. The Second Circuit, recognizing that the two appeals presented unresolved questions of New York law, certified the following two questions to the New York Court of Appeals: (i) what factors determined whether an employee was an “agent” of his employer for purposes of § 196-d and, thus, ineligible to receive distributions from an employer-mandated tip pool; and (ii) did New York labor law permit an employer to exclude an otherwise eligible tip-earning employee under § 196-d from receiving
distributions from an employer-mandated tip pool. The New York Court of Appeals referred to the U.S. Department of Labor’s Hospitality Industry Wage Order, 12 NYCRR, 146-2.14 (e), which clarified that an employee’s ability to participate in a tip pool shall be based upon duties and not titles. Further, it limited tip-pool eligibility to workers who performed or assisted in performing personal service to patrons at a level that was a principal and regular part of their duties and not merely occasional or incidental. Id. at 471. The New York Court of Appeals explained that the DOL had consistently and reasonably maintained that employees who regularly provided direct service to patrons remained tip-pool eligible even if they exercised a limited degree of supervisory responsibility. Id. at 472. The New York Court of Appeals concluded that an employee whose personal service to patrons was a principal or regular part of his or her duties could participate in an employer-mandated tip allocation arrangement under § 196-d, even if that employee possessed limited supervisory responsibilities. At the same time, an employee granted meaningful authority or control over subordinates could no longer be considered similar to waiters and bus boys within the meaning of § 196-d and, consequently, was not eligible to participate in a tip-pool. Id. at 473.

Orgill, et al. v. Ingersoll-Rand Co., 110 A.D.3d 573 (N.Y. App. Div. 2013). Plaintiffs, a group of account managers, brought a class action under the New York Labor Law alleging that Defendants made improper deductions from their commissions. The trial court granted class certification to Plaintiffs, and the New York Appellate Division affirmed the trial court’s order. The Appellate Division observed that the record did not show that the shared general expense (“SGE”) that was deducted from certain employees’ total compensation, as argued by Defendants, was part of the commission calculation. The Appellate Division, however, stated that the record showed that until mid-July 2008, Plaintiffs did not properly understand the purpose of the deduction, and believed it to be a set-off for Defendants’ matching contributions to the employee benefits system. Only when Defendants stopped matching contributions, and after Plaintiffs inquired about it, Defendants advised that the SGE was not a deduction from gross commissions but a part of the calculation itself. Moreover, the commission reports issued by Defendants throughout the relevant period reflected that the commissions were earned before the SGE was deducted. The Appellate Division found that Plaintiffs satisfied the commonality requirement for class certification because all class members alleged the deprivation of money wrongfully deducted by Defendants as the SGE. Accordingly, the Appellate Division rejected Defendants’ contention that individual issues would predominate because the trial court would have to determine what each member of the class understood the SGE deduction to be and whether he or she objected to it. The Appellate Division noted that because Defendants intentionally treated all class members the same way, no individualized consideration would be required as to an implied agreement, and in any event, the other questions of law or fact common to the class would still predominate over any such individual question. In addition, the Appellate Division stated that Defendants’ remaining arguments in opposition to class certification were unavailing as all of them were premised on the contention that there was a lack of commonality. Accordingly, the Appellate Division affirmed the trial court’s order granting class certification.

Spann, et al. v. Bishop, Rosen, & Co., Inc., Case No. 651910/2011 (N.Y. Sup. Jan. 30, 2013). In this punitive class action seeking overtime compensation, Defendant moved to dismiss and compel arbitration. The Court granted Defendant’s motion to dismiss and directed the parties to proceed with arbitration. Plaintiff, a stockbroker, asserted overtime and wage claims on behalf of himself and others similarly-situated where his employment agreement called for arbitration of all employment-related disputes under Financial Industry Regulatory Authority (“FINRA”). Plaintiff sought to avoid FINRA arbitration by maintaining that the class claims were non-arbitrable under the arbitration agreement and FINRA rules, and litigation of the class action in the Court was required. The Court found that Plaintiff could not avoid a FINRA rule that prohibits the regulatory body from hearing class actions. The only issue that prevented the case from going to arbitration was the fact that it was brought as a punitive class action. Although FINRA expressly provides that claims like discrimination in the employment context or a class action could not be arbitrated, claims like labor wages, unpaid wages, and compensation, the claims which were asserted by Plaintiff, were at the heart of FINRA’s operation, and they were exactly what FINRA is designed to handle and address. Id. at 28-29. The Court stated that the issue of whether to compel arbitration turned on the language of the agreement between the parties. Id. at 52. The arbitration clause at issue provided that
any and all disputes or controversies arising out of or relating to the agreement or breach thereof shall be
settled by arbitration under the auspices of the National Association of Securities Dealers (“NASD”),
incorporated in New York, and in accordance with the rules then pertaining to the NASD. Id. at 53. The
issue was whether or not the clause provided a certain circumstance in which the case or the issue should
not be arbitrated. Because the FINRA rules specifically provide for no class actions, the Court held that a
class action should not be and could not be arbitrated. Id. The Court found it important to see how the
words were phrased in the subject arbitration clause. The words “under the auspices” came first and then
“in accordance with the rules” came next. Id. The Court noted that what was paramount in the agreement
was the fact that the forum selection or the forum in which the issues were to be resolved was the
arbitration forum, FINRA, and then came the rules that were to be applied. The Court explained that if the
rules had come first and then the forum, it would have meant that the FINRA rules would be applied no
matter which forum was chosen. Id. at 51. According to the Court, the words “under the auspices of the
NASD New York in accordance with the rules” meant that the FINRA rules should be followed. Id. at 32-
33. The Court held that bringing a class action was a procedural right because denying an individual or a
claimant of a class action did not mean that the individual or claimant no longer has the right to pursue
such claims, but it only takes away the vehicle upon which the claimant could bring the claim that he was
seeking to redress. Id. at 52-53. The Court remarked that by granting Defendant’s motions it was not
telling Plaintiff that he no longer had the right to sue or to litigate the wage & hour claims against
Defendant, but that he could not bring it as a class action and should go before the FINRA and litigate his
claims. Accordingly, the Supreme Court granted Defendant’s motion to dismiss and compel arbitration.

(xii) Pennsylvania

Jan. 14, 2013). Plaintiff, a former Certified Nursing Assistant, brought a class action alleging that
Defendant’s method of calculating overtime premium pay violated the Pennsylvania Minimum Wage Act
(“PMWA”). Plaintiff asserted that Defendant paid its employees pursuant to an “8/80 Rule” whereby
Defendant limited overtime premium pay to hours worked either in excess of eight hours in one 24 hour
period, or 80 hours in one 14 day pay period. The parties jointly retained the accounting firm, Deloitte &
Touche LLP, who determined that all 765 class members were underpaid as a result of the “8/80 Rule” for
a combined total underpayment of $679,711.76. Accounting for the nine class members who excluded
themselves from litigation, the total underpayment was $670,532.11. Both parties filed a motion for
summary judgment, and the Court granted Plaintiff’s motion and denied Defendant’s motion. Plaintiff
argued that Defendant’s use of the “8/80 Rule” violated the PMWA because the statute requires that
overtime premium compensation be paid whenever an employee works in excess of 40 hours during a
seven-day workweek. Id. at *6. Defendant, however, asserted that PMWA does not mandate a seven-day
workweek for calculating overtime, but rather expressly grants rulemaking authority to the Secretary of the
Department of Labor and Industry. Furthermore, Defendant contended that under the § 43(d)(3)
exception, the Secretary may allow an agreement between the employer and employee for a workweek
longer than seven days. The § 43(d)(3) exception stipulates that there must be an agreement or
understanding between the employer and employee prior to the performance of the work, overtime must be
paid at a rate no less than one and one-half times the rate established by the agreement for the basic rate,
the average hourly earnings of the employee for the workweek are not less than the minimum hourly rate
required, and extra overtime compensation is properly computed and paid on other forms of additional pay.
Id. at *7. Thus, Defendant contended that the Secretary is permitted to authorize a workweek longer than
the general seven-day period pursuant to the § 43(d)(3) exception. Id. at *7-8. Defendant also argued that
the “8/80 Rule” complied with the § 43(d)(3) exception. The Court noted that the express language of the
PMWA specifies that non-exempt employees are to receive overtime premium pay for all hours worked
over 40 in a seven-day workweek. Id. at *9. Thus, the Court opined that there was no need to look beyond
the words of the PMWA to conclude that Defendant’s use of the 8/80 Rule was not permitted, and that it
violated the PMWA’s clear and unambiguous mandate that employees receive overtime premium pay
whenever they work in excess of 40 hours during a seven-day workweek. Id. The Court noted Deloitte’s
conclusion that Defendant’s utilization of the 8/80 Rule resulted in an underpayment of $670,532.11. Id. at
*10. However, the Court stated that a Plaintiff who prevails on claims for unpaid wages under the PMWA is
entitled to pre-judgment interest; thus, Plaintiff was entitled to pre-judgment interest calculated at the annual rate of 6%. \textit{Id.} Also, the Court stated that Plaintiff was entitled to costs and reasonable attorneys’ fees pursuant to 43 P.S. § 333.113. \textit{Id.} Accordingly, the Court awarded $670,532.11 to Plaintiffs along with pre-judgment interest, attorneys’ fees, and costs.

\textit{Melvin, et al. v. Ranger Fire, Inc., 2013 Pa. Super. LEXIS 1765 (Pa. Super. May 2, 2013).} Plaintiffs, a group of sprinkler fitter workmen, brought a class action alleging that they were not paid a proper hourly wage rate, overtime, or the hourly fringe benefits. Plaintiffs moved for certification of a class comprised of all current and former employees that performed installation, maintenance, and/or repair work on automatic fire protection systems for Defendants on the Edinboro University Foundation Privatized Housing Project in Edinboro, Pennsylvania. The trial court denied the motion and Plaintiffs appealed. The Pennsylvania Superior Court affirmed the order of the trial court. The trial court noted that in addition to the five named Plaintiffs there were 13 putative class members, all of whom lived in Texas, and thus it would not be impracticable for the remaining potential Plaintiffs to join the lawsuit on an individual basis, and accordingly denied class certification. On appeal, Plaintiffs asserted that they never conceded that the 13 employees they listed was the entirety of the class, and that prior to the filing of the lawsuit, they sought the certified payroll list from the Edinboro University Project from Edinboro University as well as Defendants. Plaintiffs asserted that the class they sought to represent was unknown as they had been unable to obtain payroll records which would enable them to identify all class members who worked on the Edinboro University Project. Plaintiffs had asked the trial court to grant conditional certification and provide leave for them to ascertain the entirety of the class with some limited discovery. The Superior Court held that although the trial court could have entered a conditional order as requested by Plaintiffs, it did not abuse its discretion by not doing so. The Superior Court remarked that Plaintiffs were aware that Defendants’ position was that there were only 13 potential Plaintiffs when they filed their response to the motion for class certification, and that although Plaintiffs asserted that they asked Defendants for discovery, at no point did they file a motion with the trial court to obtain that discovery. Further, even at the hearings, Plaintiffs did not request a continuance until the discovery could be obtained. The Superior Court found that if it was ascertained that there were additional class members, Plaintiffs may request the trial court to reconsider its order denying class certification. Accordingly, the Superior Court stated that the trial court did not abuse its discretion in denying the motion for class certification.

\textit{(xii) Washington}

\textit{Hill, et al. v. Garda CL Northwest, Inc., 308 P.2d 635 (Wash. 2013).} Plaintiffs, brought a wage & hour action alleging violations of the Washington Industrial Welfare Act and the Washington Minimum Wage Act. Defendant required its employees to sign a labor agreement that contained a clause regarding grievance and arbitration. The trial court granted Plaintiffs’ motion for class certification, denied Defendant’s motion for summary judgment, and subsequently, ordered the arbitration to be pursued by the class it had certified. The Washington Court of Appeals affirmed the order to compel arbitration but held that the arbitration, must proceed on an individual basis. On further appeal, the Supreme Court of Washington reversed the order of the Court of Appeals and held that the arbitration clause was unconscionable. Plaintiffs argued that the arbitration clause in the labor agreement was unenforceable because of the 14-day limitations period, and two-month and four-month limitations on back pay damages, and a cost-prohibitive fee-sharing provision. First, regarding the 14-day limitations period, the Supreme Court previously had held that the shortening of the statute of limitations from three years to 180 days was substantively unconscionable. \textit{Id.} at 638. The Supreme Court observed that under state law, Plaintiffs would have a 3-year limitation period to bring the type of claims they contemplated, and that 14-day limitations period was unconscionable. \textit{Id.} Second, the Supreme Court stated that the provision stipulating a two-month and four-month limitations on back pay damages was one-sided because it unfairly favored Defendant by significantly curbing what an employee could recover against it compared to what the employee could recover under a statutory wage & hour claim. Further, the Supreme Court noted that these provisions had nothing to do with whether Plaintiffs could arbitrate as a class. Thus, the Washington Supreme Court observed that a limitation on back pay damages was unconscionable. Finally, the Supreme Court noted that the fee-sharing provision required that the employee union and Defendant would
each pay one-half of the fee charged by the arbitrator, the cost of the hearing room, the reporter's fee, and
the original copy of the transcript for the arbitrator. The Supreme Court stated that if a party provided
specific information about the arbitration fees it would be required to share, as well as information as to
why such fees would prohibit it from bringing its claims, such a showing would satisfy a party’s burden to
show that the fee-splitting provision was substantively unconscionable. Id. at 639. Plaintiffs presented
such evidence, setting out the high costs of individual arbitration as well as the limited resources of the
representative Plaintiffs and the union. The Supreme Court found that severing these unconscionable
clauses significantly altered both the tone of the arbitration clause and the nature of the arbitration
contemplated by the clause, and little would be left of the arbitration agreed to by the parties. Thus,
because the unconscionable terms pervaded the arbitration agreement, the Supreme Court held that the
arbitration clause was unenforceable.

(xiii) Wisconsin

group of hourly employees, brought a wage & hour class action alleging that they were entitled to
compensation for donning and doffing sanitary and protective equipment and clothing and for the time
spent walking to and from work stations. The trial court had granted summary judgment to Defendant,
finding that under the pertinent Department of Workforce Development (“DWD”) administrative code
provisions, donning and doffing the gear was not compensable because it was not “integral” and
“indispensable” to principal work activities of Plaintiffs. Id. at 383. Plaintiffs appealed. The Wisconsin
Court of Appeals reversed the trial court’s decision, finding that the donning and doffing constituted
“preparatory and concluding” activities that were “an integral part of a principal activity.” Id. The Court of
Appeals found no dispute that Defendant controlled and required the donning and doffing at issue.
Specifically, Defendant required its employees to don and doff hair nets, beard nets, color coded
frocks, vinyl gloves, vinyl sleeves, bump caps, safety glasses, ear plugs and captive shoes. Id. at 384.
The Court of Appeals noted that Defendant’s need to produce foods free of contamination was one of its
greatest needs, and Defendant gained significant management benefits from requiring employees to
wear color-coded frocks and hats. Id. at 393. The required practices of wearing clean clothing and
hairnets prevented contamination of food, food-contact surfaces, and food packaging materials. Although
some of the items donned and doffed benefitted employees as it kept their personal clothes from being
soiled or in preventing head injuries, the Court of Appeals pointed out Defendant’s obvious and significant
benefits of being able to attract able employees to a reasonably comfortable and safe workplace. Id.
Further, avoiding on-the-job injuries could save Defendant from a worker compensation losses. Id. The
Court of Appeals thus found that the required items for donning and doffing “primarily” benefited Defendant.
Id. Defendant argued that the donning and doffing were “several steps removed from actual execution” of,
and “have little to do with” the principal activities. Id. Defendant thus contended that the donning and
doffing was neither “integral” nor “indispensable” to the workers’ jobs. Id. The Court of Appeals, however,
disagreed with Defendant, noting that Defendant required the employees to don and doff the sanitary and
protective equipment and clothing on its premises for the purpose of allowing the employees to perform
their principal activities in a safe, sanitary, and efficient manner. Id. at 397. The donning and doffing were
thus obligatory and not merely for the comfort or advantage of employees. Id. The Court of Appeals thus
concluded that under the plain langue of the DWD, the donning and doffing at issue here was closely
related to the principal activities of the employees, and thus compensable. Because the parties did not
submit travel issue as separate legal issue, the Court of Appeals expressed no opinion on the same.
Accordingly, the Court of Appeals reversed the trial court’s order granting summary judgment to Defendant.

C. Rulings In Breach Of Employment Contract/Miscellaneous Workplace Claims

(i) California

former employees, brought a class action seeking: (i) the pro rata portion of vacation allotment they had
earned; (ii) 30 days of salary as waiting time penalties because Defendant willfully refused to pay them
immediately for the pro rata vacation time; and (iii) damages arising from these violations. Defendant
calculated a yearly vacation allotment based on each employee’s length of employment and the number of hours they worked the previous year. Pursuant to its collective bargaining agreement (“CBAs”), Defendant paid terminated employees for vacation time already allotted to them for the year of their termination, but did not pay them the vacation time they had accrued toward the next year’s allotment. Plaintiffs were laid-off on March 1, 2007, and Defendant paid their vacation allotment for 2007, but did not pay for vacation time they had accrued toward January 2008’s allotment between January 1 and March 1, 2007. The parties filed cross-motions for summary judgment. While the trial court denied summary judgment of Plaintiffs’ vacation pay and unfair competition claims, it granted summary judgment to Plaintiffs on their waiting time penalties claim. The trial court held that under the California Labor Code, Defendant was obligated to pay Plaintiffs for their pro rata vacation time immediately upon their termination and that the CBAs did not waive Plaintiffs’ rights to the pro rata vacation time in clear and unmistakable terms. The trial court also stated that Defendant had acted willfully in refusing to pay Plaintiffs. Accordingly, the trial court concluded that Defendant owed waiting time penalties. Subsequently, Plaintiffs dismissed their unpaid vacation claim because Defendant eventually paid them for the pro rata vacation time, and they dismissed their unfair competition claim to expedite appellate review. On appeal, the California Court of Appeal reversed and remanded. First, Defendant asserted that the union had waived Plaintiffs’ statutory right to the pro rata vacation and that the CBAs discussed what vacation pay terminated employees were to receive and limited that pay to the vacation allotment for the year of termination; consistent with the CBAs, Defendant had for decades paid terminated employees only the vacation allotment without any objection from the Union. The Court of Appeal, however, noted that a CBA validly waives a union member’s right to litigate federal or state claims in a judicial forum only if the waiver is clear and unmistakable. Id. at 1465. The Court of Appeal remarked that the same was true for waivers of substantive rights conferred by federal statute and for waivers of public employee’s rights conferred by California statute. Id. The Court of Appeal observed that waivers must be specific, and mention either the statutory protection being waived or, at a minimum, the statute itself. Id. at 1467. Here, the CBAs neither mentioned pro rata vacation pay. Defendant further argued that it had not willfully refused to pay Plaintiffs for their pro rata vacation time. The Court of Appeal stated that the trial court’s ruling that Defendant acted willfully was based in part on the premise that Defendant’s misunderstanding of the law governing waiver was unreasonable. The Court of Appeal noted that good faith reliance on a different waiver standard was accordingly reasonable, and that Defendant’s position did not prevail did not mean that its position was unreasonable. The parties stipulated that they had a long-standing practice of not paying pro rata vacation time to terminated employees, and that Defendant otherwise acted in good faith. Accordingly, the Court of Appeal found that summary judgment should be entered for Defendant on the waiting time penalties claim.

(ii) Florida

Scott, et al. v. Williams, 107 So.3d 379 (Fla. 2013). The Supreme Court of Florida reversed the trial court’s decision holding that certain provisions of Chapter 2011-68, Laws of Florida, enacting Senate Bill 2100, were unconstitutional. Those provisions converted the Florida Retirement System (“FRS”) from non-contributory by employees to contributory, required all current FRS members to contribute 3% of their salaries to the retirement system, and eliminated the retirement cost-of-living adjustment for creditable service after the effective date of the Act. From 1975 until the July 1, 2011, the FRS was non-contributory for most state and local employee members, meaning that the plan was funded entirely by public employer contributions. Further, prior to the 2011 amendments, the FRS plan provided for retired members to receive a cost-of-living adjustment (“COLA”) equal to 3% of the total monthly benefit, which was calculated once yearly. Plaintiffs challenged two facets of the 2011 pension amendments, including: (i) those sections of Chapter 2011-68, requiring current state and local members of the FRS to pay 3% of their gross compensation into the pension plan, and (ii) the amendment contained in § 17 of Chapter 2011-68 eliminating COLA adjustments for service performed by FRS members after June 30, 2011. The trial court relied on the fact that the FRS had been operating well above the 80% funding ratio recommended by experts, and according to the State Board of Administration, it was one of the most well-funded and healthiest public pension funds in the United States. The trial court noted that the legislature’s appropriations for 2011-12 left nearly $1.2 billion in general revenue unspent for the year, and that the amendments significantly reduced employer contributions to the FRS and that the amendments were not
enacted to make the FRS actuarially sound but were intended to respond to the State’s projected budget shortfall. With this factual background, the trial court relied primarily on the language contained in § 121.011(3)(d), Florida Statutes (1974), a provision known as the “preservation of rights” statute, and concluded that the rights of the members of the FRS were contractual in nature and could not be abridged in any way. Id. at 383. The trial court held that the Legislature substantially breached the employees’ contract rights guaranteed by the preservation of rights provision by requiring employee contributions to the FRS and by elimination of the COLA, and further held that this breach was not justified by the existence of a significant budget shortfall where other, reasonable alternatives existed to preserve the State’s contract with FRS members. Id. at 383-84. The Governor and other state officials appealed the trial court’s judgment to the Florida District Court of Appeal, which certified the issue of constitutionality to the Florida Supreme Court. The Supreme Court held that the preservation of rights statute was not intended to bind future legislatures from prospectively altering benefits for future service performed by all members of the FRS, and that the 2011 amendments were prospective changes within the authority of the Legislature to make. Id. at 391-82. Plaintiffs also argued that the amendments unconstitutionally impaired or abridged the right of public employees to bargain collectively on the issue of the retirement benefits. The Supreme Court, however, stated that nothing in Chapter 2011-68 prohibits public employees from collectively bargaining on the issue of retirement pensions or benefits. In addition, the Supreme Court observed that on a factual challenge to the amendments, it could not conclude that effective collective bargaining had been abridged or impaired on those issues, or that amendments rendered such bargaining futile. Id. at 390. Accordingly, the Supreme Court reversed the trial court’s order holding the amendments unconstitutional.

(iii) Georgia

Fulton County v. Lord, et al., 323 Ga. App. 384 (Ga. Ct. App. 2013). Plaintiffs, a group of law clerks, brought an action against Fulton County pursuant to the County’s civil-service policies, claiming that they were unfairly paid less than the staff attorneys employed by the County Attorney’s office (“CASAs”) despite performing similar work. Plaintiffs prevailed in claims submitted to arbitration pursuant to County’s policies, and were awarded injunctive relief and back pay. The trial court confirmed the arbitral award. Defendant appealed, arguing that award of back pay was barred by the doctrine of sovereign immunity. The Georgia Court of Appeals disagreed with the County and partly affirmed the trial court’s order. The Court of Appeals found that Plaintiffs’ claim for back pay arose under a contract and therefore, was not barred by sovereign immunity. Id. at 389. The Court of Appeals stated that “there is a definite contractual relation “between every employee and employer whether the employee is a public officer or not,” and that “the payment of salary to government employees is a perfunctory administrative duty not included under the category of government functions and not barred by any statutory immunity.” Id. at 389-90. The Court of Appeals held that Plaintiffs’ claim for back pay was not barred by the doctrine of sovereign immunity, and thus there was no manifest disregard of the law by the arbitrator. Defendant also argued that the trial court erred in denying the Defendant’s request for relief from a stipulation for calculating Plaintiffs’ back pay, and that the award of back pay was void because it violated the gratuities clause of the Georgia Constitution. Id. at 390. The Court of Appeals rejected the County’s arguments. The Court of Appeals noted that the County did not request to modify the arbitrator’s award until eight months after it was issued and nearly one month after it was confirmed. Id. at 391. The Court of Appeals thus found the County’s submission untimely and held that the County could not be allowed to circumvent the statute of limitation governing arbitration awards by now claiming that the award should be modified. Id. As to the violation of gratuities clause, the Court of Appeals refused to address the argument as the County had not raised the issue before either the arbitrator or the trial court. Id. The Court of Appeals further held that the trial court did not err in granting Plaintiffs’ motion for attorneys’ fees. Plaintiffs had sought attorneys’ fees, arguing that in contesting the motion to confirm the arbitration award, the County’s position that the trial court’s review to determine if the arbitrator manifestly disregarded the law regarding sovereign immunity was essentially a de novo standard of review. Id. at 394. Plaintiffs had contended that the County’s argument, in light of the vast amount of precedent to the contrary, demonstrated a complete absence of any justiciable issue of law and lacked substantial justification. Id. The trial court had agreed with Plaintiffs, finding that the County had shown nothing more than that the Arbitrator disagreed with the County’s position, and had accordingly granted the motion for attorneys’ fees. Id. Plaintiffs had also cross-appealed, arguing that the trial court
erred in stating that the County had to achieve pay parity between the law clerks and the CASAs as of the date of the confirmation order instead of the date of the arbitration award. Id. at 391. While entering the final judgment, the trial court had stated that “[p]ursuant to Arbitrator’s Award, Fulton County is hereby ordered . . . to henceforth maintain parity in salary, pension and benefits of employment . . . .” Id. at 392. Plaintiffs alleged that the trial court’s use of the term “henceforth” moved the effective date of the arbitral award by which the County must implement parity, and therefore had entered a judgment that was not in conformity with the arbitrator’s award. Id. The Court of Appeals reversed the part of the trial court’s judgment that required pay parity to Plaintiffs as of the date of that order, and remanded the action for further proceedings. Id. Accordingly, the Court of Appeals partly affirmed and partly vacated the trial court’s order confirming the arbitral award.

(iv) New Jersey

Belfiore, et al. v. City Of Hoboken, 2013 N.J. Super. Unpub. LEXIS 2520 (N.J. App. Div. Oct. 21, 2013). Plaintiffs, a group of retired employees, brought an action alleging breach of contract regarding the Voluntary Severance Incentive Program (“VSIP”) under which a city employee could resign from his or her current position in return for a severance payment. Plaintiffs signed their severance packages between April and August 2008. Subsequently, the VSIP was suspended, and in January 2009, Judy Tripodi, the fiscal monitor for the City, told the City not to budget funds to pay the Phase Two Plaintiffs who retired after October 2008 pursuant to a severance package. The trial court dismissed Plaintiffs’ claims, holding that relief was not available to them, and noted that the City claimed it revoked the offer or the offer was void as ultra vires. The trial court also observed that the City never contacted Plaintiffs individually to advise them of the change not offered to restore the status quo, and instead continued to pay the Phase One retirees their incentive bonuses under the same VSIP program. Because the VSIP was ultra vires in the primary sense and void, the trial court did not invoke the principles of equitable estoppel to provide a remedy for the perceived wrong. On appeal, the Appellate Division reversed the order. Although the Appellate Division agreed that to deny Plaintiffs the same agreed-upon severance payments was fundamentally unfair, it found that the doctrine of equitable estoppel must be utilized to redress the inequity in this case, notwithstanding the supposed strictures of the Local Budget Law. The Appellate Division stated that because a symbiotic relationship existed between the City’s budget and the VSIP, the implementation of Phase Two of the VSIP was not beyond the authority of the City, and certainly not ultra vires in the primary sense, despite the City’s lack of a budget. Every Phase One retiree elected to participate in the VSIP under the identical budgetary environment as the Phase Two retirees, and although Phase One retirees received their first severance payment without the benefit of a validly adopted budget, and continued to receive four more payments, Phase Two retirees stood on the sidelines. The Appellate Division observed that the VSIP was not created to intentionally foist more workers into an already beleaguered pension system at the expense of taxpayers; rather, the City’s elected officials were simply ill advised about the VSIP’s potential to trigger an unfunded liability to ensure that the City shouldered the proper responsibility for its actions. In the absence of fraud, accident, or mistake, the Appellate Division noted that it could not change or abrogate the terms of a contract. Id. at *17. The Appellate Division stated that when the City realized that the VSIP would likely trigger an unfunded liability, thereby eroding the program’s expected savings, it exercised self-help by disavowing its implied promise to budget for the severance payments, which breached the City’s implied covenant of good faith and fair dealing. Further, the Appellate Division remarked that although equitable estoppel is rarely invoked against a governmental entity, it would utilize it in an appropriate case, as here, in order to prevent manifest wrong and injustice. Id. at *18. The Appellate Division stated that it was an apt means of ensuring that government and its actors turn square corners and act fairly and with compunction and integrity. Id. One group of municipal employees was favored – the Phase One group, to the detriment and dismay of similarly-situated employees – the Phase Two group, and the Appellate Division found that the VSIP suspension which pre-dated Plaintiffs’ actual separation from government service was an insufficient watershed to differentiate between Phase One and Phase Two VSIP participants. The Appellate Division stated that the unique circumstances of this case forged by the City’s disparate treatment of its retiring workforce ineribly militated in favor of the application of an estoppel-like remedy that would restore equality to all participants in the VSIP. Although this result would not be without adverse fiscal consequences to the City, the Appellate Division reasoned that it did not
measure estoppel by how well the governmental action actually worked. Accordingly, the Appellate Division reversed the order of the trial court and remanded for entry of judgment in favor of Plaintiffs.

*New Jersey Education Association, et al. v. State Of New Jersey, 2013 N.J. Super. Unpub. LEXIS 1459 (Super. Ct. Law Div. June 13, 2013).* Plaintiffs, members of the state and local pension plans and health benefit programs as well as employee organizations and unions representing members of those pension plans and health benefit programs, brought a class action challenging the constitutionality under the U.S. and the New Jersey Constitutions of several provisions of the Chapter 78 of the Laws of 2011 (“Chapter 78”). Plaintiffs had previously brought an action in the federal court asserting many of the same claims including violation of due process rights. Plaintiffs here alleged that the increase in pension contributions for members of the Public Employees Retirement System (“PERS”), the Teachers’ Pension and Annuity Fund (“TPAF”), and the Police and Firemen’s Retirement System (“PFRS”) impaired contract rights in violation of the U.S. and the New Jersey Constitutions. The PERS, the PFRS, and the TPAF were funded by contributions from employees and employers, with employee contributions being set by statute as a percentage of salary. The contributions required by the State and other public employers were determined after the employee contributions were made. The more employees contributed, the more the employer’s obligations to contribute were reduced. N.J.S.A. 43:3C-9.5 (Chapter 113 of the Laws of 1997) requires the State and all other public employers to contribute to the pension system. Plaintiffs, however, contended that, from 2004 until the present, the State did not make this statutorily required contribution, resulting in a decrease in the funded ratios of the State PERS and the PFRS, and of the TPAF. Chapter 78 increased employee contributions in the TPAF and the PERS from 5.5% to 6.5%, with an additional contribution of 1% to be phased-in through equal installments over a period of seven years, and increased employee contributions in the PFRS from 8.5% to 10%. According to Plaintiffs, the State did not provide any off-setting or comparable benefits to the pension plan participants. Defendants filed a motion to dismiss for failure to state a claim, which the Court granted. The Court noted that as a federal court in New Jersey had previously dismissed most of Plaintiffs’ federal claims as being barred by the Eleventh Amendment, the same analogy would apply to Plaintiffs’ state constitutional claims. *Id.* at *33. Defendants also argued that Plaintiffs lacked standing to bring a claim challenging § 40 of Chapter 78, which requires employees with less than 20 years of service to make additional contributions to their retirement health program. Defendants argued that because this section of the pension expires four years after its enactment, and because the law only affects those with less than 20 years of service, Plaintiffs did not specifically show that this section would adversely affect anyone. The Court noted that § 40 only requires an increase in payment for health benefits for retirees after 25 years of service. *Id.* at *51. In addition, it only applied to those with less than 20 years of service and expired on June 30, 2015. Accordingly, the Court concluded that Plaintiffs failed to demonstrate in what manner any employee, whether covered by a collective bargaining agreement or not, who was entitled to benefits as a retiree, and could or would retire on or before June 30, 2015, would be affected and harmed by § 40. The Court also noted that both the U.S. and New Jersey Constitutions prohibit impairment of contractual obligations. The State in its motion to dismiss argued that Plaintiffs did not have any contractual right to a fixed pension contribution rate. The Court noted that New Jersey case law authorities had rejected characterizing the State’s public employees pensions as contractual, holding that it would be impermissibly cumbersome to impose such limitation on the Legislature, which must possess the power and flexibility to revise public retirement plans as necessary. Defendants argued that Chapter 78 has a significant and legitimate public purpose, as the Legislature determined that the pension and health benefits systems were in crisis and had to be reformed to ensure their long-term solvency and sustainability. The Court found that even at this stage, Plaintiffs had the burden to overcome the presumption of validity and show that the challenged legislation is constitutionally repugnant. *Id.* at *81. The Court noted that in their complaint, Plaintiffs discussed the fact that decreases in funded ratios of the various pension plans had resulted in a significant unfunded liability of the pension system. Accordingly, the Court granted Defendants’ motion to dismiss and found that the federal contracts clause and substantive due process claims in counts one through seven were barred by sovereign immunity. The Court similarly dismissed counts one and two challenging the constitutionality of Chapter 78.
New York

Kolbe, et al. v. Tibbetts, 2013 N.Y. LEXIS 3282 (N.Y. Dec. 12, 2013). Plaintiffs, a group of former employees, brought an action alleging that Defendants had violated the terms of their collective bargaining agreements (“CBAs”). The CBAs under which Plaintiffs retired described the health insurance plans available to employees. The CBAs also provided that employees could opt-in to a flexible spending benefit program that allowed them to contribute pre-tax dollars into an account to be used for healthcare expenses, including co-pays. After Plaintiffs retired, a successor CBA was executed which was retroactively effective to 2007 and set to expire in 2012. This 2007-2012 CBA resulted in an increase of co-pay charges and flexible spending caps. Plaintiffs alleged that the language in § 6.5.3 of the 2007-2012 CBA that applied to Plaintiffs entitled them to the same health insurance coverage they were receiving upon retirement, until they reached age 70, and that the co-pay increase violated that right. Both parties moved for summary judgment and the trial court granted Plaintiffs’ motion. The trial court opined that Plaintiffs’ right to insurance coverage equivalent to that in effect at the time each Plaintiff retired had vested upon retirement, and it rejected Defendants’ argument that Plaintiffs’ right had expired with the CBAs under which they had retired. The New York Appellate Division reversed the order of the trial court and determined that Defendants should have been granted summary judgment. On further appeal, the New York Court of Appeals reversed and held that the trial court should have denied Defendants’ motion for summary judgment. Section 6.5.3 of the CBA stated that the coverage provided would be the coverage that was in effect for the unit at such time as the employee retired. The Court of Appeals opined that this provision unambiguously established that Plaintiffs had a vested right to the same coverage during retirement as they had when they retired, until they reached age 70. The Court of Appeals stated that the phrase “at such time as the employee retires” was most logically read to qualify the immediately preceding phrase, “the coverage which is in effect for the unit,” and that the phrase “the coverage provided shall be” evinced the mandatory nature of the obligation, insulating it from unilateral alteration. Id. at *11. Regarding duration, this sentence appeared in the same CBA section affording retirees who retired as full-time employees under the New York State Employees Retirement System the right to use accumulated sick leave as a credit against health insurance premiums during retirement until the employee reached age 70. Given the sentence’s placement, the Court of Appeals opined that the parties intended the right to continued coverage to operate for the same period as the section as a whole, namely until the employee reached 70. Including the right to coverage in close proximity to this durational language further demonstrated that it should vest upon retirement rather than terminate with the expiration of the CBA. Because an issue of fact remained as to whether the parties intended for the right to the same coverage to preclude any modifications to the benefits or their attendant costs, including prescription co-pays, the Court of Appeals concluded that it was necessary to remit the case to trial court for a hearing on this issue. The Court of Appeals stated that the definitional breadth of “coverage” as well as the degree of precision with which the parties employed “same” as a qualifier, should also be determined. Id. at *20. Thus, the Court of Appeals modified the order of the Appellate Division by denying Defendants’ cross-motion for summary judgment.

Ohio

Haight, et al. v. Cheap Escape Co., 2013 Ohio App. LEXIS 130 (Ohio Ct. App. 2d App. Dist. Jan. 25, 2013). Plaintiffs, a group of sales representatives, brought a class action alleging that Defendant wrongfully withheld wages and/or commissions. Plaintiffs also brought claims for breach of contract and quantum meruit. Plaintiffs entered into an employment contract with Defendant, which contained an arbitration provision. Defendant moved to stay the proceedings and compel arbitration. The Ohio Court of Common Pleas denied Defendant’s motion, holding that the provision mandating arbitration only applied to claims arising from the contract’s non-compete/non-disclosure agreement. The Ohio Court of Appeals affirmed the Court of Common Pleas’ ruling. Defendant argued that the Court of Common Pleas erred when it relied on the “Outside Commission Salesperson-Employee Compliance Agreement” (“OCSECA”) document as the sole basis for Plaintiffs’ claims, rather than the actual arbitration agreement signed and executed by Plaintiffs included in their employment agreement. Id. at *3-4. Plaintiffs argued that the arbitration clause was restricted to the non-compete agreement, and that the claims before the Court of
Common Pleas were outside underlying contract’s scope. *Id.* at *5.* The Court of Appeals noted that Plaintiffs’ claims never referenced or implicated the non-compete provision discussed in the contract. *Id.* at *6.* Further, the exhibits attached to the contract did not expand the arbitration clause’s scope to other matters, nor a provision that governed every aspect of the Plaintiffs’ employment. *Id.* at *7.* The Court of Appeals noted that the non-compete/non-disclosure contract never referenced or cited the OCSECA, and that each document had a separate signature line and title heading. *Id.* at *8.* Thus, the Court of Appeals concluded that the provision mandating arbitration was applicable only to claims related to the employment contract’s non-compete/non-disclosure provisions, and that the claims before the Court of Common Pleas did not implicate the non-compete/non-disclosure provision. Thus, the Court of Appeals opined that the Court of Common Pleas did not err when it overruled Defendant’s motion. In the alternative, Defendant argued that the Court of Common Pleas erred by overruling the motions to stay and compel arbitration without first conducting an oral hearing pursuant to R.C. 2711.03(A) and a trial pursuant to R.C. 2711.03(B). *Id.* at *10.* The Court of Appeals found it significant that Defendant never requested an oral hearing, and that at least three other Ohio appellate courts have ruled that a party waives its right to an R.C. 2711.03 hearing when they fail to request one. *Id.* at *11.* Analogously, the Court of Appeals opined that Defendant waived its right to a hearing and submission of written evidentiary materials because it never requested one. Further, the Court of Appeals observed that it was unnecessary to conduct a trial pursuant to R.C. 2711.03(B) because the Court of Common Pleas was not required to hold a hearing pursuant to R.C. 2711.03(A), and that the enforceability of the arbitration agreement itself and Plaintiffs’ failure to arbitrate was no longer at issue. *Id.* at *12-13.* Accordingly, the Court of Appeals affirmed the Court of Common Pleas’ ruling, which denied Defendant’s motion to compel arbitration.

(vii) Texas

**City Of Houston v. Bates, et al., 406 S.W.3d 539 (Tex. 2013).** Plaintiffs, a group of retired Houston Fire Department (“HFD”) firefighters, brought an action against the City of Houston seeking reimbursement for overtime pay and for additional termination pay based on the City’s exclusion of premium pay from the calculation of their salaries for purposes of paying out the termination pay. The trial court entered judgment in favor of Plaintiffs and the Texas Court of Appeals affirmed. The City petitioned for review. On appeal, the Supreme Court of Texas reversed the Court of Appeals’ judgment as to the first claim related to the overtime pay and affirmed its judgment as to the second claim. The City argued that Plaintiffs were not entitled to overtime pay because § 142.0017(e)(2) of the Texas Local Government Code did not require the City to count hours a fire fighter was on unpaid leave for purposes of computing a fire fighter’s eligibility for overtime compensation. The Supreme Court analyzed the meaning of the phrase “any other authorized leave.” *Id.* at 544. The Supreme Court noted that the term “leave” was not expressly defined by Chapter 142 of the Texas Local Government Code. *Id.* It determined that neither did the dictionary meaning suggest that “leave” always meant only paid leave. *Id.* The Supreme Court opined that given the surrounding statutory scheme, the expression had the limited meaning of encompassing only other forms of paid leave. Further, the Legislature’s inclusion of only forms of paid leave and its omission of forms of unpaid leave in § 142.0017(e)(2) was purposeful. *Id.* at 546. The Supreme Court declined to construe “leave” based on §§ 142.0015 and 142.0017(a) because they did not apply to the City and were syntactically dissimilar from the provision at issue in this case. *Id.* The Supreme Court concluded that applying the narrow construction of “leave” in § 142.0017(e)(2), the City was not required to count each debit day’s final 8-hour shift when computing the hours Plaintiffs were required to work during a 72-day work cycle for purposes of overtime compensation because they were on unpaid leave. *Id.* Accordingly, Plaintiffs were not entitled to receive reimbursement for overtime pay. Regarding Plaintiffs’ termination pay claim, the City argued that the statutory scheme did not preempt its power to define the elements of “salary” for purposes of paying out termination pay because the Legislature did not expressly provide a definition of “salary” as the term was used in sections 143.115 and 143.116. *Id.* at 547. The Supreme Court looked at the dictionary meaning of “salary.” Applying the plain meaning of “salary” – compensation paid on a regular basis – within the context of the statutes, the Supreme Court opined that the Legislature clearly intended “salary” to encompass all of the components of compensation that a fire fighter received regularly, which necessarily included premium pay. *Id.* at 548. The Supreme Court reasoned that such a construction was also consistent with the overall legislative scheme related to a fire fighter’s compensation.
The plain language of § 143.110 demonstrated that the Legislature used “base salary” and “base pay” reciprocally. *Id.* The Supreme Court observed that the Legislature intended the term “base salary” or “base pay” in § 143.110 to be one of six potential components of a fire fighter’s salary — and not merely a term to be used interchangeably with §§ 143.115 and 143.116’s reference to “salary”. *Id.* The Supreme Court explained that while the Legislature had clearly given the City discretion to offer educational incentive pay and assignment pay, the City did not have discretion to define “salary” as it saw fit for purposes of termination pay. The Supreme Court determined that the provisions of the City’s ordinances that excluded forms of premium pay from the definition of “salary” for purposes of termination pay irreconcilably conflicted with §§ 143.115 and 143.116; therefore, they were unenforceable. *Id.* Accordingly, the Supreme Court held that Plaintiffs were entitled to recover additional termination pay.

**City Of San Antonio v. International Association Of Fire Fighters, Local 624, 2013 Tex. App. LEXIS 12277 (Tex. App. 4th Dist. Oct. 2, 2013).** Plaintiff, the union representing fire fighters employed by Defendant, brought a class action alleging that Defendant violated Chapter 174 of the Texas Local Government Code by unilaterally altering the prerequisites for health insurance coverage of fire fighters and their dependents without engaging in good faith collective bargaining with the union. Defendant filed a motion to abate, alleging that the union’s suit was subject to the arbitration procedure set forth in its collective bargaining agreement (“CBA”) because the lawsuit concerned the interpretation or application of the CBA. The trial court denied the motion, and also denied Defendant’s motion for reconsideration. Defendants filed an accelerated appeal seeking enforcement of the CBA’s arbitration procedure under the Federal Arbitration Act (“FAA”), and a petition for writ of mandamus seeking to compel the union to participate in the CBA’s arbitration procedure pursuant to Texas common law. The Texas Court of Appeals stated that the union’s complaint involved the interpretation or application of the CBA and was thus subject to arbitration. Because the union did not dispute that the FAA governed the CBA rather than Texas common law, the Court of Appeals stated that to the extent the CBA’s arbitration provision applied to the controversy, it was governed by the FAA. Accordingly, the Court of Appeals proceeded on Defendant’s interlocutory appeal, and denied the petition for a writ of mandamus. The Court of Appeals analyzed whether the union’s claim fell within the scope of the CBA’s arbitration agreement. On reviewing the terms of the CBA, the Court of Appeals noted the parties’ intention that disputes based solely on the interpretation and/or application of the CBA be submitted to the arbitration procedure; and employees had the choice to pursue claims based on a statutory violation using either the arbitration procedure or a judicial forum, even if related contract claims were also made. The union asserted that its claim was separate and distinct from the CBA and did not involve the interpretation or application of the CBA’s terms, and that its claim was based on the alleged violation of §§ 174.023 and 174.105 of the Local Government Code. When determining whether a party’s claims are within the scope of an agreement, the Court of Appeals opined that the focus would be on the complaint’s factual allegations rather than the legal causes of action asserted. *Id.* at *14. The union sought a judicial declaration that Defendant had, without authority, changed healthcare benefit eligibility without bargaining collectively. The Court of Appeals, however, observed that the trial court could not make such a declaration without first interpreting the current CBA provisions regarding healthcare benefits, and then determining whether the information or action required by the City altered or changed the CBA’s current provisions. *Id.* at *16. Thus, the Court of Appeals found that the claim was within the scope of the arbitration agreement. The Court of Appeals remarked that a judicial declaration and injunction were not appropriate because the union had once before obtained this very relief at the trial court level when addressing concerns about an earlier CBA. Absent legal principles not at issue here, the Court of Appeals stated that it was not bound by a trial court’s decision that had not been reviewed and upheld on appeal. Accordingly, the Court of Appeals abated the underlying lawsuit until the exhaustion of remedies provided for in the CBA had been completed to finality.

**Klumb, et al. v. Houston Municipal Employees Pension System, 405 S.W.3d 204 (Tex. App. Houston 1st Dist. 2013).** Plaintiffs, a group of former employees of the City of Houston (the “City”), brought a class action against the Houston Municipal Employees Pension System (“HMEPS”) and five members of its board of trustees asserting constitutional violations and breach of contract. The HMEPS, as a defined benefit plan, provided retirement, disability, and survivor benefits for eligible employees of the City. An
eleven member Board of Trustees, or pension board, had broad authority to administer, manage, and operate the HMEPS. The City was obligated to make a contribution intervener the pension fund that was related to the amount of its employees' salaries. The City devised a plan to reduce its budgetary obligations by having non-City employees perform services previously performed by the City employees. Plaintiffs asserted constitutional violations and breach of contract, and sought a declaratory judgment, and claimed that by continuing to define them as City employees, the HMEPS was violating Article 6243h of the Texas Revised Civil Statutes that established the HMEPS. The HMEPS filed a plea to jurisdiction and asserted that the claims emanated from the Board’s interpretation of Article 6243h, and specifically, its construction of whether Plaintiffs fit within the statutory definition of employee; Defendants argued, therefore, that the trial court lacked subject-matter jurisdiction over the interpretation of the statute. Id. at 214. After a hearing, the trial court granted the plea to the jurisdiction, and rendered judgment dismissing Plaintiffs’ claims for lack of jurisdiction. On appeal, the Court of Appeals of Texas affirmed the trial court’s order. Plaintiffs asserted that the trial court erred by granting the plea to jurisdiction with respect to their ultra vires claims requesting declaratory and injunctive relief. The City aligned with Plaintiffs with respect to the ultra vires claims. Plaintiffs and the City (collectively “Appellants”) argued that ultra vires suits seeking to require state officials to comply with statutory or constitutional provisions were not prohibited by sovereign immunity. The Trustees argued that their plea to the jurisdiction did not seek to dismiss Appellants’ claims for declaratory relief based on sovereign immunity; rather, they asserted that the trial court lacked subject-matter jurisdiction because the pension board had exclusive authority to interpret Article 6243h and to make decisions. The Court of Appeal noted that in determining whether the trial court had jurisdiction over the claims, that there is no right to judicial review of an administrative order unless a statute explicitly provides that right or the order violates a constitutional right. Id. at 216. Appellants alleged that the Trustees acted without authority by unilaterally amending Article 6243h’s definition of employee without entering into a meet and confer agreement pursuant to § 3(m). The Court of Appeal observed that to determine whether the Trustees engaged in ultra vires conduct, the inquiry was whether they acted without authority when they supplemented the statutory definition of employee under Article 6243h. The Court of Appeal noted that the Trustees had such an authority because Article 6243h expressly provided that the pension board may not only interpret and construe the statute, but may also correct any defect, supply any omission, and reconcile any inconsistency that appeared in the Act. Id. at 221. Accordingly, the Court of Appeal concluded that the Trustees acted statutorily. Appellants next contended that the Trustees committed an ultra vires act by adopting a construction of Article 6243h and the Pension Plan that failed to meet the qualification requirements of § 401 of the Internal Revenue Code, as required by § 2(x) of Article 6243h. The Court of Appeal concluded because the Trustees were authorized to make those determinations pursuant to Article 6243h, those decisions were not ultra vires but were discretionary decisions made by the pension board. Accordingly, the Court of Appeal affirmed the trial court’s order.

Wolff, et al. v. Deputy Constables Association Of Bexar County, 2013 Tex. App. LEXIS 8774 (Tex. App. San Antonio July 17, 2013). On appeal from the trial court, Defendants, a group of county officials, contended that the trial court erred in denying their plea to the jurisdiction because Plaintiffs, the deputy constable association, lacked standing to collectively bargain under Chapter 174 of the Texas Local Government Code. Pursuant to a dispute over which employee association should represent the majority of the Deputy Sheriffs in Bexar County, there was an election and selection, and the Commissioners Court of Bexar County recognized the Deputy Sheriff’s Association as the exclusive bargaining agent for collective bargaining under Chapter 174. The Deputy Sheriff’s Association has since served as the bargaining agent for the police officers of Bexar County. Plaintiffs contended that they requested collective bargaining from Bexar County in 2009 by sending written requests to David Kilcrease, former president of the Deputy Sheriff’s Association, and County Judge Nelson Wolff. Subsequently, Plaintiffs contended that they requested Bexar County to engage in collective bargaining with their association. After receiving no response, Plaintiffs alleged that Defendants violated the Fire and Police Employee Relations Act (“the Act”) by failing to enter into collective bargaining with them, and brought an action against Defendants in the trial court seeking a declaratory judgment and a writ of mandamus, arguing that Defendants violated Chapter 174 by failing to acknowledge their right to collective bargaining. The trial court denied Defendants’ plea to
jurisdiction and motion to dismiss. On appeal, Defendants contended that the trial court erred in denying the plea to the jurisdiction because Plaintiffs were not police officers under Chapter 174, and thus lacked standing to bring suit under the Act. In its opinion, the Texas Court of Appeals explained that in Texas, police officers have the right to organize and bargain collectively with their public employer as defined under Chapter 174. *Id.* at *7-8. The Court of Appeals noted that the Sheriff’s Office is the police department of a county, and that detention officers and jailers, as employees of the Sheriff’s Office, meet the criteria of being certified as set forth in the definition of policemen in the Act. *Id.* at *8. The Court of Appeals also observed, however, that *City of San Antonio v. San Antonio Park Rangers Association*, 850 S.W.2d 189, 192-93 (Tex. App. San Antonio 1992, writ denied), held that law enforcement officers, such as park rangers employed in the Parks Department of the City of San Antonio, were not police officers as defined by the Act because they were not employed in the police department. *Id.* at *9. Although the Court of Appeals acknowledged that Plaintiffs served in a law enforcement capacity, rendering a valuable service to the community and risking their own safety, it stated that they did not meet the definition of police officer under the Act because they did not serve in the police department of the County or the Sheriff’s Office. Rather, Plaintiffs were employed by the Constable’s Office of Bexar County. Because Plaintiffs were not police officers under the meaning of the Act, the Court of Appeals stated that they had no justiciable interest in the outcome of the lawsuit, and therefore lacked standing. Accordingly, the Court of Appeals reversed the trial court’s decision.

### D. Other State Law Rulings Affecting The Defense Of Workplace Class Action Litigation

#### (i) Arkansas

**Adams, et al. v. Cameron Mutual Insurance Co., 2013 Ark. 475 (2013).** Plaintiffs, a group of insureds, brought a class action in the U.S. District Court for the Western District of Arkansas alleging breach of their insurance policy when Defendant improperly applied a depreciation factor to the labor portion of repairs required at their dwelling when the policy at issue did not allow for such depreciation. Plaintiffs’ policy provided that any covered loss would be paid based on actual cash value, rather than replacement value. When Plaintiffs incurred a loss covered by the policy, Defendant’s adjuster valued the loss after inspecting the damage and calculating the repair costs and the depreciation of the items requiring repair. Included within those items were certain labor-only services. Plaintiffs asserted that Defendant’s depreciation of labor-only costs resulted in them receiving payment for their loss in an amount less than that to which they were entitled under their policy. Upon Plaintiffs’ motion, the District Court certified a question of law to the Arkansas Supreme Court, namely, whether an insurer in determining the “actual cash value” of a covered loss under an indemnity insurance policy may depreciate the costs of labor when the term “actual cash value” is not defined in the policy. *Id.* at 1. The Arkansas Supreme Court answered the question in the negative. Plaintiffs’ policy did not define the term “actual cash value,” and while Plaintiffs contended that only materials could be depreciated, Defendant argued that both materials and labor could be depreciated. Although Black’s Law Dictionary defines “actual cash value” as replacement cost minus normal depreciation, because the term as used in the policy was fairly susceptible to more than one reasonable interpretation, the Arkansas Supreme Court opined that the term was ambiguous. *Id.* at 5. The Arkansas Supreme Court noted that depreciation was a decline in an asset’s value because of use, wear, obsolescence, or age. To assert that depreciation was applicable to labor, Defendant relied on *Redcorn v. State Farm Fire & Casualty Co., 2002 OK 15 (Okl. 2002)*, which held that because a roof was a single product consisting of both materials and labor, depreciation of the whole product, including labor, was appropriate when determining actual cash value. *Id.* at 5. Not persuaded with majority opinion in *Redcorn*, the Arkansas Supreme Court found the dissenting opinion more convincing. The dissent in *Redcorn* had rejected the characterization of a roof as a single product, stating that a roof is not an integrated product but a combination of a product and a service, and that labor was not logically depreciable. *Id.* at 5-6. Additionally, the dissent opined that allowing the insurer to depreciate the cost of labor would leave the insured with a significant out-of-pocket loss, a result that was inconsistent with the principle of indemnity. *Id.* at 6. Accordingly, the Arkansas Supreme Court stated that labor did not fall within that which could be depreciable. Further, having found the term “actual cash value” ambiguous as used in the policy, the
Arkansas Supreme Court construed the policy liberally in favor of Plaintiffs. The Arkansas Supreme Court remarked that the costs of labor may not be depreciated when determining the actual cash value of a covered loss under an indemnity insurance policy that does not define the term “actual cash value.” *Id.* at 7.


Plaintiffs, Pine Bluff Advertising and Promotion Commission (the “Commission”), Jefferson County (the “County”), and the City of North Little Rock (the “City”), brought a class action against Defendants, a group of on-line travel companies, alleging that Defendants failed to collect, or collected and failed to remit, the full amount of gross-receipts taxes imposed by government entities on hotel accommodations. The trial court granted class certification to two classes, including class A consisting of all advertising and promotion commissions of Arkansas cities, including commissions that have or have had tax ordinances, and class B consisting of all Arkansas counties and cities that have or have had ordinances that provide for a tax on the gross receipts from retail sales. *Id.* at 5. Defendants had contracts with local hotels to get discounted prices on rooms, which they advertised on their websites at their determined rates. Subsequent to the booking of the advertised room, Defendants paid the hotel the negotiated price plus any owed taxes, with the hotel in turn sending the taxes to the appropriate government entities. Plaintiffs had claimed that Defendants were required to collect and send the full amount of taxes owed on Defendants’ set prices for hotel rooms, not just the tax amounts on the negotiated room prices. *Id.* at 2. Plaintiffs sought a declaratory judgment that Defendants were in violation of the tax ordinances and authorizing statutes by failing to remit the proper amount of taxes, and that Defendant’s failure to remit be deemed a debt owed to the appropriate authorities. *Id.* at 3. Upon the trial court’s grant of certification, Defendants appealed and argued that the trial court abused its discretion in finding that the predominance requirement was satisfied. Specifically, Defendants argued that differing ordinances from and around the state could result in individual issues predominating over questions of law or fact, and that Plaintiffs had not identified any common standard that could be used to determine liability on a class-wide basis. *Id.* at 11. The Arkansas Supreme Court noted that even if the ordinances of the commissions, counties, and cities contained any variances as claimed by Defendants, each ordinance was derived from the same statutes permitting commissions, counties, and cities to levy such taxes. *Id.* at 14. The Supreme Court thus held that a declaratory judgment as to whether Defendants’ business transactions fell within the scope of statutory language governing the tax was an overarching issue that could be resolved before a determination of whether the respective ordinances of each commission, county, or city contained the same language as the statutes on which they were premised. *Id.* at 14. The Supreme Court reiterated that the mere fact that individual issues or defenses might be raised regarding the recovery of individual class members could not defeat class certification where common questions exist that could be resolved for all class members. *Id.* The Supreme Court thus found that Plaintiffs had satisfied the predominance requirement. In opposing class certification, Defendants also had argued that Plaintiffs had failed to exhaust their mandatory administrative remedies. Defendants asserted that the Commission was required to follow the administrative process within its own ordinance by actually assessing Defendants with a tax, before the Commission was allowed to file an action for declaratory judgment. The Supreme Court disagreed, finding that the doctrine of exhaustion of administrative remedies had no application to the Commission. *Id.* at 9. The Supreme Court agreed that the rule requires a litigant to exhaust his or her administrative remedies before challenging the action of the administrative agency, but noted that the Commission was in no way a Plaintiff for whom relief was available from an administrative agency because the Commission itself was the administrative agency. *Id.* Regarding the County and the City, the Supreme Court found that exhaustion of administrative remedies would be futile because the issue of whether Defendants were subject to the statutes and ordinances have to be determined by the courts, and thus there was no remedy available at the administrative level. *Id.* at 10. The Supreme Court determined that Plaintiffs were not required to exhaust any administrative remedies. Accordingly, the Supreme Court affirmed the trial court’s order granting class certification.
Alaburda, et al. v. Thomas Jefferson School Of Law, Case No. 37-2011-00091898 (Cal. Super. Ct. Oct. 21, 2013). Plaintiffs, graduates of Thomas Jefferson School of Law (“TJSL”), claimed that they were misled by TJSL’s publication of false and inaccurate employment statistics. Plaintiffs brought a class action alleging intentional and negligent misrepresentation, negligence, and violations of the California Business & Professions Code and the Consumer Legal Remedies Act (“CLRA”). Plaintiffs alleged that TJSL routinely counted unemployed graduates as employed or unknown to improperly skew the data, reported unpaid volunteers and interns as employed, failed to record the source of the employment information it received, and used generally unreliable sources. Plaintiffs asserted that they would never have enrolled in the school if they knew that TJSL manipulated or inflated its employment data. Plaintiffs moved for certification of a class consisting of all TJSL graduates from the class of 2006 through 2013 who currently resided in California and who reviewed TJSL’s employment statistics in U.S. News & World Report’s Best Graduate Schools before deciding to enroll at TJSL. Id. at 1-2. The Court denied the motion for failure to establish predominance. The Court first noted that the class appeared to be unascertainable because it would require self-authentication without the ability of Defendant to challenge who was in the class. Id. at 3-4. Regarding negligent misrepresentation and negligence, Defendants provided 111 declarations of graduates from the applicable timeframe, who cited a number of reasons for attending TJSL, including TJSL’s location, financial aid, scholarship, and overall ranking. Given these vastly differing reasons for attending TJSL and the differing weight placed upon the U.S. News & World Report article, the Court stated that there were significant individual issues with respect to reliance and causation. Id. at 5. Second, the Court observed that to obtain relief under the CLRA, both the named Plaintiff and unnamed class members must have suffered some damage caused by a practice deemed unlawful under § 1770 of the Civil Code. Id. at 6. The Court opined that causation as to each class member is commonly proved more likely than not by materiality, and if the issue of materiality is a matter that would vary from consumer to consumer, the issue is not subject to common proof, and the action is properly not certified as a class action. Id. The declarations provided by Defendants indicated the factors influencing the graduates to attend TJSL, and less than 15% of the declarants identified employment statistics as important. Differences also existed with respect to harm, and several of the putative class members reported they were satisfied with their legal education and that it had helped them achieve their goals. Thus, given these differences, the Court remarked that individual issues predominated as to materiality. Id. at 6-7. Third, the Court observed that to obtain class-wide restitution under the UCL, Plaintiffs need establish not only a practice likely to deceive members of the public, but also the existence of a measurable amount of restitution supported by the evidence. Id. at 13. The Court opined that when individual issues predominate as to the measure of restitution, then class certification is not appropriate. Id. Here, entitlement to restitution was subject to individual proof. Although Plaintiffs sought restoration of tuition and fee payments, the Court noted that some graduates reported that their TJSL education not only helped them achieve their goals, but also was valuable as an end in itself. Because the students were in different positions with respect to job status and other factors, the amount of restitution would depend upon an individual student’s situation. Id. at 13-14. Thus, the Court held that predominance of individual issues over common issues as to all the relief sought precluded class certification. Given the multiple individual issues, the Court opined that class treatment was not a superior form of adjudication.
on-line credit transactions from its reach. Subsequently, the California Court of Appeal denied Defendant’s petition for writ of mandate seeking review of the trial court’s order. Id. On further appeal, the California Supreme Court reversed the decision, holding that the Act does not apply to on-line purchases of electronically downloadable products. The Supreme Court began by examining the text of the Act, specifically § 1747.08, which provides that, subject to several exceptions, a retailer shall not request or require, as a condition to accepting a credit card as payment, that the cardholder write any personal identification information, provide personal identification information that the retailer writes or records, or utilize a credit card form containing pre-printed spaces designated for filling in personal identification information. Id. at 140. The Supreme Court noted that the plain language of the Act did not answer the precise question because the Act, which was enacted almost a decade before on-line commercial transactions became widespread, made no reference to on-line transaction or the internet. Id. at 136. The Supreme Court thus held that the plain meaning of the statute’s text was not decisive, and an examination of the statutory scheme as a whole was necessary. Id. at 139. Upon such examination, the Supreme Court determined that the Legislature enacted the Act to protect consumer privacy. The Supreme Court, however, also noted various exceptions to the prohibition outlined in the Act. Specifically, the Supreme Court’s reading of the Act turned on a section that permits a brick-and-mortar retailer to require cardholders to show a driver’s license or other reasonable forms of positive identification as a condition of accepting a credit card, and to record the driver’s license number if the cardholder refuses to make the card available for verification. Id. at 140. Furthermore, § 1747.08(d) specifically states that the Act does not prohibit retailers from requiring safeguards, in the form of reasonable forms of positive identification, as a pre-condition to a credit card transaction. Id. The Supreme Court described the provision as a “key anti-fraud mechanism” and read into it a legislative judgment that consumers and retailers had an interest in combating fraud. The Supreme Court, however, held that the key anti-fraud mechanism provision was not available to the on-line retailer selling an electronically downloadable product because an on-line retailer could not visually inspect the credit card, the signature, or the customer’s photo. Id. The Supreme Court thus held that the key anti-fraud mechanism in the statutory scheme had no practical application to on-line transactions involving electronically downloadable products. The Supreme Court stated that the Legislature did not intend to achieve privacy protection without regard to exposing consumers and retailers to undue risk of fraud. Id. at 139. The Supreme Court further stated that the statutory scheme and legislative history made clear the Legislature’s concern that there be some mechanism by which retailers could verify that a person using a credit card was authorized to do so, and no such mechanism would exist in the context of on-line purchases of electronically downloadable products if the statute were read to apply to such transactions. Id. at 143. Thus, because the statutory scheme provided no means for on-line retailers selling electronically downloadable products to protect against credit card fraud, the Supreme Court concluded that the Legislature could not have intended § 1747.08 to apply to the on-line transaction that involved electronically downloadable products. Id. at 150. The Supreme Court thus concluded that the Act sought to protect privacy but not at the cost of creating an undue risk of credit card fraud.

Boorstein, et al. v. CBS Interactive, Inc., 2013 Cal. App. LEXIS 1025 (Cal. App. 2d Dist. Dec. 19, 2013). Plaintiff, a subscriber to Defendant’s sports fantasy game website, brought a putative class action alleging violations of the Shine The Light Law (“STL”), Civ. Code § 1798.83, et seq., and California’s Unfair Competition Law (“UCL”). Plaintiff alleged that because Defendant shared users’ personal information with third-parties for direct marketing purposes, it was required to comply with the STL, and willfully violated the STL by failing to provide a link on its website home page to a page that set out customers’ rights and methods for getting information about Defendant’s practices. Id. at *3. The STL requires businesses that share customers’ personal information with third-parties for direct marketing to disclose, upon a customer’s request, the names and addresses of third-parties who have received personal information and the categories of personal information revealed. Id. at *10. The STL also requires businesses to make their contact information available to customers in one of three statutorily prescribed ways, and it provides that businesses need not make the mandated disclosures if they instead give customers the opportunity to opt-in or opt-out of the disclosure of their personal information. Id. at *10-11. The trial court had granted Defendant’s demurrer without leave to amend, finding that Plaintiff had failed to state a claim. Specifically, the trial court had found that Plaintiff had failed to allege that Defendant actually disclosed his personal.
information to any third-parties, that he even tried to request any STL disclosures, or that Defendant failed to give a complete, accurate or timely response to such a request. Id. at *6-7. Because the UCL claim was derivative of the STL claim, the trial court also had found that Plaintiff had no standing under the UCL. Plaintiff contended that a disclosure request was not necessary, and it was enough that Defendant failed to make its contact information available as the STL required. On appeal, the California Court of Appeal disagreed with Plaintiff, and affirmed the trial court’s holding that Plaintiff lacked standing to seek relief under either the STL or the UCL. The Court of Appeal agreed with Defendant that a Plaintiff must have suffered a statutory injury in order to demonstrate standing to assert a cause of action under the STL. Id. at *15. The STL expressly creates a private right of action in any customer “injured by a violation of this title,” meaning that a Plaintiff must be a customer who has been injured by a violation of the statute. Id. Plaintiff admittedly did not make any disclosure request, and according to the Court of Appeal, deprivation of information, standing alone, was not a cognizable injury. Plaintiff contended that a failure to comply with any provision of the statute constituted an actionable violation. The Court of Appeal disagreed. The Court of Appeal noted that the statute speaks of penalties “per violation,” suggesting that the Legislature had in mind distinct violations, such as a failure to timely, accurately, or completely respond to a disclosure request. According to the Court of Appeal, continuing violations, such as Defendant’s alleged on-going failure to post information on a website, was not a violation that could be readily quantified for purposes of calculating the penalties available under the STL. The Court of Appeal therefore held that a continuing violation of such kind was not an actionable violation of the statute. Id. at *22. The Court of Appeal found its reading of the STL consistent with other components of the statute and federal case authority that had addressed claims under the statute, and held that Plaintiff’s contention that he need not allege that he sought a STL disclosure went against established precedents requiring Plaintiffs to request information to suffer an injury. Id. at *28. Because it was undisputed that Plaintiff had not alleged, or could not allege, that he made or attempted to make a disclosure request for purposes of the STL, the Court of Appeal concluded that Plaintiff lacked standing to state a claim under the STL.

**Brown, et al. v. The American Tobacco Co., Case No. JCCP 4042 (Super. Ct. San Diego County, Cal. Sept. 23, 2013).** Plaintiffs, a group of consumers, brought a class action alleging various state law claims relating to the marketing of Defendants “light” cigarettes. During the course of the litigation one class claim survived against one Defendant. That claim was that the Defendant Philip Morris Inc. falsely advertised its Marlboro Light cigarettes in violation of the California Unfair Competition Law (“UCL”). Id. at 1-6. On June 11, 2013, the Court redefined the class to include California residents who smoked one or more Marlboro Light cigarettes in California and were exposed to Defendant’s marketing and advertising in California. Id. at 4. Defendant moved to decertify the redefined class. The Court denied Defendant’s motion. The Court found that the class representative was misled by the descriptors in packages of Marlboro Lights stating “Lights” and “lowered tar and nicotine,” which led her to believe that Marlboro Lights were less harmful than full-flavored cigarettes such as Marlboro Reds. Id. at 5. The Court found that Defendant’s executives had admitted that they knew Marlboro Lights were just as harmful as its other full-flavored cigarettes, and its own research had revealed that Marlboro Lights provided no significant reduction in the amount of tar and nicotine ingested by most smokers. Id. at 6-7. Defendant failed to disclose the information to consumers during the class period, although, after the class period, it had placed inserts on 55 million packs of Marlboro Lights sold in California which stated that Marlboro Lights did not reduce the likelihood of disease and did not offer any health benefits. Id. at 6. The Court thus found that Defendant made misrepresentations during the class period. The Court, however, also found that Plaintiffs were not entitled for any restitution award. Plaintiffs had relied exclusively on a survey employing a conjoint analysis in an attempt to quantify the restitution. Id. at 9. The Court found that Plaintiffs’ proposed model suffered from several fundamental flaws. Id. at 11. Under California law, restitution is measured based on the market value paid minus the value of the product received, and Plaintiffs’ model did not even attempt to measure the value of the product received discounted for any misrepresented health benefit. Id. The Court further noted that the conjoint analysis was not generally accepted by the relevant expert community to assign monetary value to a particular product attribute. Id. at 12. According to the Court, the survey methodology was also flawed because many of the survey respondents were not class members and all respondents who completed the survey received a monetary
Plaintiffs, a group of network lenders, brought an action alleging violations of California’s wage & hour laws. The parties proceeded through litigation on a class-wide basis for 10 months. However, pursuant to the U.S. Supreme Court’s order in Concepcion v. AT&T Mobility LLC, 131 S. Ct. 1740 (2011), Defendant moved to compel arbitration pursuant to the parties’ arbitration agreement. Id. at 1309. The parties’ arbitration agreement contained a class and representative action waiver, which required arbitration to proceed on an individual basis. The trial court granted Defendant’s motion and Plaintiffs appealed, arguing that Defendants could not compel arbitration. The California Court of Appeal determined that Defendant had not waived or abandoned its right to enforce arbitration. Although Defendant actively litigated the action for 10 months on a class-wide basis before raising its arbitration defense, the Court of Appeal opined that it was reasonable for Defendant to believe that it did not have the right to enforce the individual arbitration at issue in light of Gentry v. Superior Court 42 Cal. 4th 443 (2007). Id. at 1316. Gentry made class action waivers unenforceable in wage & hour cases if the trial court found that a class action would be more effective in vindicating the employees’ statutory rights. Id. at 1310. This state of the law changed when the U.S. Supreme Court decided Concepcion. In Concepcion, the Supreme Court opined that “notwithstanding the FAA’s savings clause, courts may not invalidate an arbitration agreement based upon generally applicable contract principles, such as unconscionability, if those principles are applied in a fashion that disfavors arbitration.” Id. at 1312. Defendant argued that until Concepcion was decided, case law in California had held that a class action waiver like the one at issue was unenforceable. Given the breadth of the Gentry rule and the nature of Plaintiffs’ claims, the Court of Appeal found that it was reasonable for Defendant to believe that, prior to Concepcion, a motion to compel individual arbitration would likely fail. Id. at 1315. Given that Defendant filed its motion to compel arbitration 20 days after the decision in Concepcion was issued, the Court of Appeal determined that Defendant was not involved in the litigation in order to take advantage of the judicial process prior to demanding arbitration. Id. at 1316. Moreover, Plaintiffs did not allege that any evidence had been lost by the 10-month delay or that Defendant’s actions have impaired Plaintiffs’ ability to have their individual disputes resolved fairly through arbitration. Id. at 1316-17. However, with regard to Plaintiffs’ PAGA claim, the Court of Appeal found that the Federal Arbitration Act (“FAA”) did not permit arbitration agreements to override the statutory right to bring representative claims under the PAGA. Id. According to the Court of Appeal, a Plaintiff suing for PAGA civil penalties was suing as a proxy for the State and a PAGA claim was necessarily a representative action intended to advance a predominately public purpose. Id. at 1319 The Court of Appeal thus held that class action waiver could not be enforced as to the PAGA claim because it “wholly prevents the exercise of a statutory right intended for a predominately public purpose.” Id. at 1320. Accordingly, the Court of Appeal affirmed the order compelling arbitration with respect to all of Plaintiff’s claims except the claim for civil penalties under the PAGA and stayed the action as to all of Plaintiff’s claims, including the claim under the PAGA, pending resolution of the arbitration.
deal with LendingTree. Plaintiffs asserted that although potential borrowers still received four bids from competing banks, Defendant allegedly fabricated three of the bids, making its bid the best one. Defendant moved for summary judgment, and the trial court granted the motion. On appeal, the California Court of Appeal affirmed. Regarding the interference with contractual relations claim, the Court of Appeal noted that the only evidence regarding LendingTree’s practices in distributing leads came from a LendingTree representative and from a vice president of Defendant who testified that LendingTree was solely responsible for determining which leads went to which lenders. The LendingTree representative also testified that the special deal between it and Defendant was the product of arm’s length negotiations, not any threats, inducements, or deceptions by Defendant. Accordingly, the Court of Appeal found that Plaintiffs provided no evidence that would create a triable issue of fact as to any intentional act by Defendant designed to disrupt a contractual relationship with other lenders. Regarding the claim for interference with prospective economic advantage, the Court of Appeal observed that Plaintiffs failed to present evidence that it had the required economic relationship with some third-party. Further, the Court of Appeal remarked that Plaintiffs could not state a cause of action for interference with prospective economic advantage with respect to LendingTree because it had a contract with LendingTree. The Court of Appeal observed that to state a cause of action for interference with prospective economic advantage, Plaintiffs must allege the existence of an economic relationship with some third-party that contains the probability of future economic benefit to Plaintiffs. Id. at “9. Plaintiffs merely speculated that if it had received more leads from LendingTree, a potentially beneficial relationship with a borrower might have arisen. Accordingly, the Court of Appeal opined that summary judgment was properly granted to Defendant.

Chapman, et al. v. Skype, Inc., 220 Cal. App. 4th 217 (Cal. App. 2d. Dist. 2013). Plaintiff, a customer, brought a putative class action alleging that Defendant falsely advertised its calling plans as “unlimited.” Id. at “1. Plaintiff claimed she had purchased the unlimited calling plan from Defendant that included limits on both the number of calls made and minutes used. Plaintiff alleged violations of the California Unfair Competition Law (“UCL”), the False Advertising Law, and the Consumer Legal Remedies Act (“CLRA”), and claims for intentional and negligent misrepresentation, and unjust enrichment. Defendant asserted that it had provided a disclaimer on its website, and the disclaimer had explained that the plan had limits. The trial court dismissed the complaint, finding that Defendant had clearly disclosed the terms of its usage, and Plaintiff had agreed to the terms. Id. at 224. On appeal, the California Court of Appeal reversed the trial court’s dismissal order. The Court of Appeal found that Plaintiff had sufficiently argued that consumers were likely to be deceived. Id. at 227. Defendant’s website informed consumers of the limits of the plan in a disclaimer on the same page users visit when they make their purchase, and next to the word “unlimited” was a superscript number that linked to Defendant’s “fair use policy,” which outlined the limits in the “unlimited” plan. Plaintiff asserted that an ordinary user would never see that disclaimer, and that naming the plan “unlimited” when it included usage caps was an action that was meant to be deceptive. Id. The Court of Appeal agreed with Plaintiff. The Court of Appeal found that the trier of fact could reasonably conclude, based on the facts alleged in the complaint and those judicially noticed, that consumers were likely to believe that Defendant’s “Unlimited U.S. & Canada” calling plan offered unlimited calling within the United States and Canada for a fixed monthly fee, and that they would fail to notice the disclosure to the contrary in the fair usage policy. Id. The Court of Appeal also stated that a reasonable interpretation of the words “fair usage policy” would suggest a policy to protect against misuse of the service provided, and would not necessarily suggest to an ordinary consumer that the “unlimited” plan was actually limited as to the number of minutes and number of class. Id. According to the Court of Appeal, such words would not necessarily, and as a matter of law, alert a reasonable consumer to the need to follow the link to learn the details of such limits. Id. The Court of Appeal thus concluded that a fact-finder could reasonably conclude that consumers would fail to notice the disclosure and be deceived. Defendant argued that Plaintiff failed to allege facts showing that she suffered injury-in-fact, and lost money or property as a result of the alleged violation. The Court of Appeal, however, held that the materiality of Defendant’s alleged representation that the calling plans were “unlimited” was a question of fact that could not be decided as a question of law, and therefore concluded that by alleging a material misrepresentation, Plaintiff had adequately alleged actual reliance for purposes of the UCL and the False Advertising Law. Id. at 229-30. For the same reasons, the Court of Appeal also concluded that Plaintiff had adequately alleged deceptive advertising for
purpose of the CLRA. Because the Court of Appeal could not conclude that the limits disclosed in the fair usage policy were so conspicuous and apparent as to compel the conclusion as a matter of law that Plaintiff’s reliance on the representation that the plan was “unlimited” was unjustified, it granted Plaintiff leave to amend her complaint with regards to her claims of unjust enrichment, and negligent and intentional misrepresentation. Accordingly, the Court of Appeal reversed the trial court’s decision.

**Ellis, et al. v. Toshiba America Information Systems, Inc., 218 Cal. App. 4th 853 (Cal. App. 2d Dist. 2013).** Plaintiffs, a group of consumers, brought a class action against Defendant alleging that Toshiba laptops had electrostatic discharge problems with the top covers. Plaintiffs eventually settled and Defendant provided each consumer an extended warranty or a $50 credit voucher. After the settlement, Lori J. Sklar, class co-counsel, requested over $24 million in attorneys’ fees. Sklar had eventually filed a fee petition, requesting for a lodestar amount of $12 million. The trial court rejected Sklar’s petition. On appeal, the California Court of Appeal affirmed the trial court’s order completely denying Sklar’s fee request and affirmed the monetary sanctions imposed against her. Defendant, who had agreed in the settlement agreement to pay other class counsel’s fee of $1.12 million, opposed Sklar’s request, and had sought discovery. A discovery battle ensued with Defendant seeking Sklar’s timesheets, which claimed would have to show that Sklar worked for roughly 17 hours a day, seven days a week, including holidays, for 22 months in order to justify the amount she was seeking. Sklar violated several orders to produce materials. Despite repeated orders, Sklar delayed the forensic search of her office hard drives, claiming initially that she had deleted original copies of the timesheets, and then disagreeing on a neutral expert to inspect the hard drives. Concluding that Sklar’s request lacked credibility, the trial court had completely denied her fee request and imposed sanctions of $165,000 against Sklar. *Id.* at 867-68. The Court of Appeal found that the record was rife with evidence supporting a conclusion that Sklar’s disobedience and her misuse of the discovery process were wilful. *Id.* at 878. Sklar admitted that she refused the trial court’s order for the inspection, but argued that her refusal was justified as her hard drives contained privileged material. *Id.* The Court of Appeal, however, pointed out that the trial court had “entered a stipulated protective order providing that the production of any electronic information did not waive any of the producing party’s claims of privacy, confidentiality, or privilege, and the court made it clear that no privileges were waived.” *Id.* The Court of Appeal found from the record that Sklar did not cooperate in creating a protocol, and the purpose of Sklar’s behavior was to generally obstruct the self-executing process of discovery. *Id.* at 879. The fact that Sklar disputed details of the protocol did not provide substantial justification for her open defiance of an order requiring inspection. *Id.* The Court of Appeal thus concluded that the trial court acted within its discretion in imposing sanctions based on Sklar’s misuse of the discovery process. The Court of Appeal further concluded that the trial court did not abuse its discretion when it based its sanction order in part on Sklar’s refusal to meet and confer with Defendant regarding the ordered inspections. *Id.* The record showed that while Defendant repeatedly attempted to discuss a protocol for the inspections, Sklar did not reciprocate in a constructive fashion. *Id.* The Court of Appeal thus held that Sklar could not rely on the absence of a detailed protocol, a circumstance she contributed to by failing to meet and confer with Defendant, as substantial justification for disobeying the order to allow the inspection. *Id.* at 880. The Court of Appeal further held that trial court did not exceed its jurisdiction when it authorized Defendant’s inspection of Sklar’s hard drives to determine whether any of the electronically-stored information survived her destruction of the files. According to the Court of Appeal, the sizeable nature of Sklar’s fee request and her resistance to the trial court’s inquiries regarding her seemingly excessive rates made the inspection orders reasonable and necessary. *Id.* at 881. Sklar also argued that the trial court did not use the lodestar method in deciding what fees Sklar was due under the terms of the settlement agreement. The trial court had discussed the lodestar method in detail, but had concluded that Sklar’s billing records were “unusable” for the purpose of calculating the lodestar. *Id.* at 883. Specifically, the trial court had noted that the records were inconsistent, contained omissions, and billing entries were inaccurate and even contradictory. *Id.* Moreover, the number of hours claimed were excessive, and Sklar’s hours included activities that should have been handled by an expert witness, fact investigator, or paralegal. The trial court had concluded that the contradictory and multiple billing destroyed Sklar’s credibility as to the hours she claimed to have spent during the entire litigation, and thus there was no credible evidence supporting a lodestar amount. *Id.* The Court of Appeal refused to assess the trial court’s credibility determination,
stating that “[s]uch a credibility determination is uniquely the province of the trial court. Just as we may not reweigh the evidence, we do not reassess credibility determinations.” Id. at 884. The Court of Appeal also rejected a number of procedural objections, holding the trial court could permissibly rely on the adverse inferences provided by § 412 of the Evidence Code, and that it did not abuse its discretion in excluding the belatedly produced handwritten billing records. Id. at 886. The Court of Appeal, however, affirmed the trial court’s award of fees for Sklar’s office staff, even though they did not meet California educational requirements for paralegals, upholding the finding that the records that formed the basis for such award were in order, although ordered for a minor recalculation of the fees on remand. Id. at 888. The Court of Appeals also remanded the action for a calculation of costs but limited the award to the $114,900 that was contained in the settlement agreement, rejecting Sklar’s demand for over $900,000. Id. at 890. Accordingly, the Court of Appeal affirmed monetary sanctions against Sklar and limited the fee award to costs and fees incurred by Sklar’s staff.

Flores III, et al. v. Chevron U.S.A., Inc., 217 Cal. App. 4th 337 (Cal. App. 2d Dist. 2013). Plaintiffs, a group of customers, brought a class action alleging that when they used credit cards to buy gasoline at Chevron gas stations, Defendant violated the California Credit Card Act by requiring class members to provide their zip codes as a condition to accepting their credit card as payment. In Pineda v. Williams-Sonoma Stores, Inc., 51 Cal. 4th 524, 527 (2011), the Supreme Court held that ZIP codes constitute personal identification information within the meaning of the Credit Card Act. Id. at 340. Defendant moved for summary judgment, arguing that its conduct fell within a statutory exception that preceded Pineda. Under Civil Code § 1747.08 (c)(4), requesting or requiring personal identification information does not violate the Act if personal identification information is required for a special purpose that is incidental but related to the individual credit card transaction. Id. at 341. Defendant argued that its use of personal identification information was required for the special purpose of preventing fraud. For example, only Defendant’s stations located in high fraud areas or that had experienced high levels of fraud prompted customers to enter their ZIP codes at the pump for fraud prevention purposes. As a result of Defendant’s actions, it reduced the number of fraudulent transactions by over 80%. Moreover, Defendant did not use customer ZIP codes for any other reason except to prevent/reduce fraud. Specifically, Defendant did not use ZIP codes for any marketing purpose; did not sell, transfer, assign, or provide access to customers’ personal information to any third-party; and did not use this information to solicit customers in any manner nor to promote its products. Additionally, Defendant purged the ZIP code information from its records after 90 days once it reconciled all credit card transactions. The trial court granted Defendant’s motion, holding that the special purpose exception under of § 1747.08 (c)(4) applied to Defendant’s conduct. On appeal, the California Court of Appeal affirmed. Plaintiffs asserted that the exception applies only if personal identification information was required to complete the transaction. Because Defendant admitted that credit card transactions could be completed without such information, Plaintiffs asserted that the exception did not apply. The Court of Appeal observed that the exception is not limited to circumstances in which personal identification information is required to complete the credit card transaction; rather, the exception applies if personal identification information is required for a special purpose incidental but related to the individual credit card transaction. Id. at 342. Further, the Court of Appeal reasoned that preventing fraud was a special purpose incidental but related to the individual credit card transaction. The Court of Appeal concluded that it is incidental because it is possible for the seller to complete the transaction without attempting to ensure that the transaction is not fraudulent and it is related to the individual credit card transaction in that the seller is trying to ensure that that particular transaction is not fraudulent. Id. at 342. Accordingly, the Court of Appeal affirmed the trial court’s order granting Defendant’s motion for summary judgment.

Guerrero, et al. v. Superior Court Of Sonoma County, 213 Cal. App. 4th 912 (Cal. App. 1st Dist. 2013). Plaintiff, a caregiver, brought a class action against Defendants, the In-Home Support Services Public Authority and the County (“Public Authorities”) and various individuals, alleging violations of the FLSA and the California Labor Code, as well as Industrial Welfare Commission Wage Order No. 15-2001. Plaintiff sought unpaid overtime and minimum wages in addition to alleging breach of contract claims. Plaintiff contended that the Public Authorities were her joint employers for purposes of her federal and state
wage & hour claims. The Public Authorities demurred to the complaint, arguing that they were not Plaintiff’s employer for purposes of her state and FLSA wage & hour claims, and alternatively that her state law claims failed because the relevant portions of the California Labor Code did not apply to public entities. Id. at 917. The trial court sustained the demurrer, and Plaintiff filed a petition for extraordinary relief. Id. Plaintiff contended that the trial court erred in finding that the Public Authorities were not her “employers” or “joint employers” for purposes of her federal and state wage & hour claims, and by failing to consider whether real parties acted “in the interest of an employer in relation to her” under the FLSA. Id. at 918. Plaintiff further contended that the trial court erred in sustaining the demurrer to her claims for unpaid wages when it determined that her job classification was exempt from federal and state wage & hour laws, and that California wage & hour laws did not apply to public entities. Id. The California Court of Appeal reversed the trial court’s order. The Court of Appeal applied a four factor test to determine whether a party is an employer under the FLSA, i.e., whether the party: (i) has the power to hire and fire; (ii) supervises and controls the employee’s work schedule or conditions of employment; (iii) determines the rate and method of payment; and (iv) maintains employment records. The Court of Appeal concluded that the Public Authorities were Plaintiff’s employers. Id. at 924. The Court of Appeal noted that the first factor favored classifying the Public Authorities as employers because they controlled disbursement of the funds necessary to pay Plaintiff, even though they lacked the actual ability to hire and fire her. Id. at 929. The Court of Appeal also observed that the second factor favored classifying the Public Authorities as employers because they determined the amount and method of Plaintiff’s payment. Id. at 930. The Court of Appeal noted that the third factor favored classifying the Public Authorities as employers because they maintained employment records, such as a database of timesheets, and investigated any inquiry or grievance of workers. Id. at 935. Finally, the Court of Appeal determined that the fourth factor favored classifying the Public Authorities as employers because they were required to approve Plaintiff’s work schedule and requests for overtime. Id. at 936. Accordingly, the Court of Appeal reversed the trial court’s ruling, and found that the Public Authorities were Plaintiff’s employers under the FLSA. The Court of Appeal further found that the Public Authorities were not exempt from the provisions of Wage Order No. 15-2001, the state law that generally applies to individuals employed in household occupations. Id. at 952. Although Wage Order No. 15-2001 is not expressly applicable to public entities, the Court of Appeal relied on Wells v. One2One Learning Foundation, 39 Cal. 4th 1164, 1992 (2006), which held that government agencies are only excluded from statutory provisions if their inclusion would result in an infringement upon sovereign governmental powers. The Court of Appeal reasoned that agencies have been held subject to legislation that applies to everyone unless explicitly exempted. Id. Here, Wage Order No. 15-2001 did not expressly exempt public agencies, unlike 14 of the other 17 wage orders promulgated by the Industrial Welfare Commission (“IWC”). Id. at 954. Accordingly, the Court of Appeal held that the IWC did not intend to exempt public agencies or political sub-divisions. Id. at 955. Accordingly, the Court of Appeal reversed the trial court’s order sustaining the demurrer.

Hendleman, et al. v. Los Altos Apartments, L.P., 218 Cal. App. 4th 1380 (Cal. App. 4th Dist. 2013). Plaintiffs, a group of apartment tenants, brought a class action alleging that Defendant failed to repair and maintain the property in a safe and habitable condition, unlawfully demanded increased rents, and retaliated against the tenants for exercising their rights. Plaintiffs alleged violations of two Los Angeles housing ordinances (the Rent Escrow Account Program (“REAP”) and the Los Angeles Rent Stabilization Ordinance (“RSO”)), breach of the implied warranty of habitability, nuisance, and abuse of process. Plaintiffs sought to certify a class of all tenants from 2005 to present as well as sub-classes of tenants who received three-day notices to pay rent or quit, notices to pay full rent over the REAP amount, and notices that rent was past due. The trial court denied Plaintiffs’ motion, finding that as to each of the causes of actions, individual issues predominated. Plaintiffs appealed. Plaintiffs asserted that common questions predominated because their claims addressed code violations and habitability issues that affected the whole building as well as building-wide practices related to improper notices and demands for overpayment of rent. Id. at 1384. Defendants opposed and argued that various tenant-specific issues precluded certification. The California Court of Appeal affirmed the trial court’s order finding that class treatment was inappropriate. First, addressing Plaintiffs’ cause of action for breach of warranty of habitability, the Court of Appeal found that Plaintiffs had alleged a variety of housing code violations and service restrictions, but
they failed to show that such violations and restrictions impacted each of the building tenants equally. *Id.* at 1393-94. As Defendant demonstrated, some of the tenants did not notice and were not affected by some of the alleged code violations and service reductions. The Court of Appeal found that differences among two named Plaintiffs about the reported problems with the trash bins and the conditions of elevator alone revealed the need for individual proof of impact on each Plaintiff. The Court of Appeal further noted that weatherproofing problems that affected one tenant might go entirely unnoticed by tenants living in another part of the building. *Id.* at 1393. The Court of Appeal thus found that “whether and how each tenant was affected by the alleged code violations and service reductions, and the extent and type of harm suffered, so as to establish that these conditions are ‘substantial’ and thus actionable, was thus not subject to common proof.” *Id.* According to the Court of Appeal, it was not simply a question of calculating damages as the individual issues pervading the cause of action determined each tenant’s entitlement to recover, and a class action could not be maintained where each member’s right to recover depend on facts peculiar to his or her case. *Id.* at 1394. The evidence of numerous, substantial, and individualized facts showed that it would be necessary for each tenant to establish his or her individual right to recover, thus rendering class litigation inappropriate. *Id.* Second, as to violation of the RSO, Plaintiffs had alleged that Defendants reduced services affecting the entire property without correspondingly reducing rent, which constituted an impermissible rent increase under the RSO. The trial court had found that by alleging reduced housing services, Plaintiffs had injected the same individualized habitability questions raised in their cause of action for breach of the implied warranty of habitability. *Id.* at 1395. The Court of Appeal agreed with the trial court that the RSO claims, which were premised on reductions of services and not increased rents, implicated individual questions of the levels in which the services were allegedly reduced. Third, the Court of Appeal found that the REAP retaliation claims also turned on individualized tenant decisions involving the regulatory particulars of the REAP ordinance. The trial court had denied certification of Plaintiffs’ retaliation claim, finding that REAP program gives tenants the choice of paying full or reduced rent to the landlord or to the City, and Defendants had shown that some tenants voluntarily chose to continue paying their full rent to the landlord. *Id.* Plaintiffs cited no provision of the REAP that precluded landlords from accepting and tenants from paying the full amount of rent. *Id.* at 1397. The Court of Appeal therefore found that individual issues predominated about who paid the full amount voluntarily and who did so because they were intimidated. *Id.* Fourth, the Court of Appeal held that the trial court did not err in finding that Plaintiffs’ nuisance cause of action lacked commonality. Like the habitability issue, the issues as to whether a tenant suffered discomfort and annoyance from an intermittently operating elevator, defects in the garage security, trash, inoperable fire-exit door, or weatherproofing problems, or was intimidated by the landlord depended on facts specific to each particular tenant, and thus, individual factual and legal issues predominated. *Id.* at 1399. Finally, the Court of Appeal found that the abuse of process claims did not merit certification for lack of numerosity given that only seventeen tenants received three-day notices to quit and many of those paid their rent before unlawful detainer proceedings were initiated. *Id.* Thus, in concluding that individual issues precluded class treatment, the Court of Appeal held that the trial court properly denied Plaintiffs’ motion for class certification.

**Hutton, et al. v. Fidelity National Title Co., 2013 Cal. App. 4th 486 (Cal. App. 5th Dist. 2013).** Plaintiff, a borrower, brought a class action for violation of California’s Unfair Competition Law (“UCL”) and unjust enrichment alleging that Defendant, an escrow company, charged a notary fee in excess of the amount permitted by § 8211.1 of the California Government Code. *Id.* at 488. Under that statute, a notary may not charge more than $10 per signature to “take an acknowledgment.” *Id.* Plaintiff asserted that Defendant violated the statute by charging him $75 for services that only required two acknowledgments. *Id.* Defendant moved for summary judgment on two grounds, including: (i) that the $75 fee was not a violation of § 8211 because that section only limited fees for specific services and the notary involved here performed different services; and (ii) that the $75 fee was charged and retained by an independent third-party contractor, not by Defendant, even though Defendant, as escrow holder, disbursed the funds for such services. *Id.* at 495. The trial court granted Defendant’s motion. On appeal, the California Court of Appeal affirmed the trial court’s ruling. The Court of Appeal noted that on its face, the statute only applies to certain types of notary services, and that fees for taking an acknowledgement were enumerated in the statute. *Id.* Conversely, the statute does not regulate fees for services not enumerated in the statute. *Id.*
The Court of Appeal noted that Plaintiff’s entire complaint was founded on a single theory of liability, i.e., that Defendant overcharged Plaintiff for notary services under the provisions of § 8211 (a). Id. The Court of Appeal affirmed the trial court’s ruling that based on alleged causes of action, Plaintiff’s only claim was that Defendant overcharged him for the notary fees. Id. at 496. Thus, the Court of Appeal stated that it did not need to address any other causes of action because Plaintiff pleaded only one theory of liability. Id. In the alternative, Plaintiff asserted that Defendant failed to meet its burden as the moving party because there were other potential theories of liability that Defendant’s motion failed to address. Id. at 497. The Court of Appeal stated that for purposes of a summary judgment motion, the pleadings set the boundaries of the issues to be resolved. Id. at 499. Therefore, Defendant met its burden as the moving party when it negated the sole basis of Plaintiff’s claims, and was not required to refute liability on theoretical possibilities not included in the pleadings. Id. The Court of Appeal remarked that Plaintiff could not use opposition papers as a substitute for an amended pleading. Id. Accordingly, the Court of Appeal held that summary judgment was properly granted.

Kaplan, et al. v. Fidelity National Home Warranty Co., 2013 Cal. App. Unpub. LEXIS 9069 (Cal. App. 4th Dist. 2013). Plaintiffs brought a class action against their home warranty company, alleging that Defendant engaged in claims handling practices and other actions that violated consumer statutes and breached the parties’ contracts and the implied covenant of good faith and fair dealing. One year after certifying the class, the trial court granted Defendant’s motion for judgment on the pleadings on two causes of action in Plaintiffs’ second amended complaint, including an unfair competition claim (“UCL”) and a Consumers Legal Remedies Act claim (“CLRA”). The trial court dismissed the CLRA claim with prejudice and provided leave to amend the UCL claim. One month later, Plaintiffs filed a fourth amended complaint that greatly expanded the class definition, added several fraud based claims, and supplemented the predicate allegations for the UCL claim. The trial court granted Defendant’s motion and struck the new allegations because they exceeded the scope of the order allowing Plaintiffs to file an amended complaint. It also refused to allow Plaintiffs leave to file an amended complaint that was consistent with the prior order. It then dismissed the entire action and entered judgment in Defendant’s favor. On appeal the Plaintiffs challenged the trial court’s orders: (i) dismissing the CLRA claim with prejudice; (ii) dismissing the UCL claim with leave to amend; (iii) granting the motion to strike the fourth amended complaint; and (iv) denying leave to file a corrected or amended complaint. Id. at *2. The California Court of Appeal held that the trial court correctly dismissed the CLRA claim, that Plaintiffs waived their right to appeal the dismissal of the UCL claim without prejudice, and was within its discretion in striking the fourth amended complaint, but committed error in not allowing Plaintiffs to file a corrected amended complaint. Regarding the CLRA claim, the Court of Appeal held that the statute applied only to goods or services, and the warranty contracts at issue were neither. Instead, the Court of Appeal held that the warranty contracts were insurance agreements and that insurance agreements are not covered by the CLRA. Accordingly, it sustained the trial court’s dismissal of the CLRA claim with prejudice. Id. at *26. Relying on Zhang v. Superior Court, 57 Cal. 4th 364 (2013), a California Supreme Court case that was decided after the matter was fully briefed on appeal, Plaintiffs argued that the trial court erred in dismissing its UCL claim with leave to amend. However, the Court of Appeal ruled that Plaintiffs waived this argument by amending the UCL claim in its fourth amended complaint. Id. at *38-39. The Court of Appeal also held that the trial court was within its discretion in striking the fourth amended complaint because it greatly exceeded the limitations contained in the order allowing the amendment. Id. at *42. However, the Court of Appeal held that the trial court abused its discretion in not permitting Plaintiffs to file another amended complaint. Since Plaintiffs could clearly plead a valid cause of action for violation of the UCL, the trial court erred in refusing to permit the amendment. Accordingly, the Court of Appeal reversed the judgment dismissing the entire action and remanded with instructions to permit Plaintiffs to amend or correct the fourth amended complaint. Id. at *47.

The DRP required parties to seek to resolve a dispute through four steps, the fourth and final step being binding arbitration. Plaintiffs signed a DRP acknowledgment on the day they began employment with Defendant, stating that they had received and reviewed the DRP booklet. Plaintiffs opposed the motion to compel arbitration, arguing that they were required to sign the DRP acknowledgment as a condition of employment and they had no choice. The trial court denied Defendant’s motion to compel arbitration, finding that the arbitration agreement was unconscionable. Upon Defendant’s appeal, the California Court of Appeal reversed the trial court’s order. The Court of Appeal specified that both procedural and substantive unconscionability must be present in order for a trial court to refuse to enforce an arbitration contract. Id. at 483. Because Plaintiffs were required to sign the DRP acknowledgment as a condition of employment, could not negotiate the terms of the DRP, and had no meaningful choice in the matter, the Court of Appeal concluded that the DRP was procedurally unconscionable. Id. at 484. The Court of Appeal, however, disagreed with Plaintiffs that the agreement was also substantively unconscionable. In other words, the DRP was not so one-sided as to “shock the conscience.” Id. at 495. Plaintiffs argued substantive unconscionability was present in five respects, including a class action waiver. The Court of Appeal rejected these lines of attack based on AT&T Mobility v. Concepcion, 131 S. Ct. 1740 (2011). The Court of Appeal dismissed each argument in turn. Accordingly, the Court of Appeal reversed the trial court’s denial of Defendant’s motion to compel arbitration and remanded the case to the trial court with instructions to grant Defendant’s motion to compel arbitration.

Lingo, et al. v. Microsoft Corp., 2013 Cal. App. Unpub. LEXIS 7931 (Cal. App. 1st Dist. Oct. 31, 2013). Plaintiffs, a group of individuals and businesses that bought Microsoft operating systems and software, brought an antitrust class action alleging that Defendant abused its market dominance and overcharged for its products. The parties subsequently settled the action by executing a settlement agreement that required Defendant to pay up to $1.1 billion to Plaintiffs who had purchased licenses for certain of Defendant’s products and who submitted settlement claims. The amount awarded to each claimant was to be determined by the number of eligible software licenses purchased by class members from 1995 to 2001. A settlement claims administrator appointed by the trial court was authorized to review the records and calculate the settlement award based on established amounts for each type of license purchased. Id. at *2. The claims submission period closed in January 2005, and the administrator had received over 4,550 volume claims encompassing over 20 million licenses. Id. at *3. The transaction records used to document the license were derived from the claimants’ own purchase records, Defendant’s volume licensing records gathered from its end user database, and “other credible written evidence” of eligible software purchases submitted by the claimants and accompanied by a sworn declaration made under penalty of perjury. Id. Plaintiffs subsequently raised the idea of supplementing some volume claims using the software purchase records derived from some third-party reseller data. The administrator was then given the responsibility to reconstruct an accurate accounting of the volume claimants’ purchases, and subsequently issued settlement vouchers to 1,391 volume licensee claimants after the parties approved its calculations. Id. at *5. Defendant, however, found later that the reseller data was incomplete and/or inconsistent, as the administrator’s procedures were unsatisfactory in determining whether the licenses in the reseller records were the same as the licenses catalogued in Defendant’s end user database (the License Information Repository (“LIR”)). Id. at *6. The parties then memorialized a written addendum, which included instructions on the procedures to be used in determining whether a license found in the reseller data could be deemed a duplicate of a license found in Defendant’s records. Id. at *7. A dispute arose when Plaintiffs asserted, in 2011, that the administrator was required to consider other criteria in addition to date, product name, and quantity. Plaintiffs asserted that the reseller licensing records could not be treated as duplicates unless all of the additional information matched exactly, and that other information, including individual contact names and address, had to match exactly for the records to be considered duplicates. Id. at *9. Plaintiffs filed a motion for resolution of the dispute. The trial court issued an order determining that the de-duplication procedures set forth in the addendum were to govern the claims-processing task. Id. at *10. Plaintiffs appealed and contended that the order must be overturned as the authorized procedure deprived class members of their substantive rights and their promised share. The California Court of Appeal affirmed the trial court’s order. The Court of Appeal found that the trial court’s order did not violate the settlement agreement as it merely implemented the addendum. Id. at *12.
The settlement agreement allowed the parties to determine the claims process and award, and in accordance with the agreement, the parties negotiated, agreed, and approved the three-factor process used by the administrator. Further, in adherence to the terms of the settlement agreement, the parties’ dispute was submitted to the trial court. The Court of Appeal thus found that the agreement functioned exactly as the parties intended. *Id.* at *13. The Court of Appeal also determined that the trial court had properly interpreted the addendum. *Id.* at *18. Accordingly, the Court of Appeal affirmed the trial court’s order.

*Margolin, et al. v. Vital Pharmaceuticals, Inc.*, 2013 Cal. App. Unpub. LEXIS 1896 (Cal. App. 4th Dist. Mar. 15, 2013). Plaintiff, a consumer, brought a class action alleging that Defendant manufactured and falsely marketed and sold NO Shotgun, a creatine-based dietary supplement, in violation of the California Consumers Legal Remedies Act, the Unfair Competition Law, and the false advertising law. Plaintiff claimed that Defendant falsely claimed that NO Shotgun contained an esterified form of creatine (creatine ethyl ester) that was superior to the common form (creatine monohydrate), which caused explosive muscle growth. Plaintiff alleged that he read the product label and marketing information on Defendant’s website, relied on the claims, used the product for two years, but noticed no extraordinary increase in muscle mass or any effect that was not attributable to his normal workout regimen. Plaintiff filed a motion for class certification, which the trial court denied because there was insufficient evidence as to the ascertainable nature of the class. On Plaintiff’s appeal, the California Court of Appeal affirmed the trial court’s order. At the very outset, the Court of Appeal observed that for a class to be ascertainable: (i) the class definition must state precise and objective criteria that allow identification of persons who have claims and will be bound by the result of the litigation; and (ii) there must be a way to identify those persons and give them notice of litigation without undue expense or time. *Id.* at *13-14. Plaintiff had defined the class as including all individuals in California who purchased NO Shotgun during the class period. The Court of Appeal remarked that the basic problem with this definition was that it did not describe a cognizable class of persons who were similarly-situated to Plaintiff in that they sustained similar damage as a result of Defendant’s alleged misconduct. The Court of Appeal remarked that there were plethora of cases involving UCL, FAL, and fraud claims, where the trial court had found the class to be overbroad and not ascertainable because the majority of purchasers were not exposed to the alleged misrepresentations. The Court of Appeal opined that the proposed class suffered from the similar problems. Plaintiff alleged that Defendant duped him and other putative class members into buying NO Shogun at inflated prices by means of statements on its leading labeling. The Court of Appeal, however, noted that Defendant submitted evidence suggesting that many, if not most, putative class members had no such claims because they likely bought NO Shotgun for reasons wholly unrelated to the statements about which Plaintiff complained. Accordingly, the Court of Appeal concluded that because the class definition did not describe an identifiable group that was harmed by Defendant, the class was not ascertainable. Plaintiff also failed to offer a means by which those class members who had claims could be separated from those who should not be included in the class. *Id.* at *22. In addition, the Court of Appeal found that an essential legal premise underlying Plaintiff’s argument for a class-wide presumption of reliance, causation, and injury also was missing because he presented no evidence that the labeling statements upon which he allegedly relied were material to all other purchasers of NO Shotgun. *Id.* at *43-44. Therefore, the Court of Appeal upheld the ruling as to the issue of ascertainability. The Court of Appeal also observed that in his class certification motion, Plaintiff argued that the trial court had to accept the allegation in his complaint that the class contained at least 100 members and therefore, satisfied the numerosity requirement. The Court of Appeal reasoned that although a trial court must accept class action allegations as true when a Defendant demurs to them, when a Plaintiff moves to certify a class, he has the burden to establish that in fact the requisites for continuation of the litigation in that format are present. *Id.* at *49. The Court of Appeal, however, noted that the evidence on record suggested that the putative class members that Plaintiff sought to represent filed declarations stating that they bought NO Shotgun for reasons unrelated to the efficacy of creatine ethyl ester at building muscle. Accordingly, the Court of Appeal affirmed the trial court’s finding that the numerosity requirement was not satisfied.
Mercedes-Benz Financial Services USA LLC v. Okudan, et al., 2013 Cal. App. Unpub. LEXIS 2478 (Cal. App. 4th Dist. April 8, 2013). In an action brought by Plaintiff, a financial company, seeking to collect the deficiency balance owed on a vehicle purchased by Defendant, the Court of Appeal of California concurred with the California Superior Court’s finding that the arbitration clause was unconscionable, and therefore not enforceable. Plaintiff moved to compel arbitration under an arbitration clause in Defendant’s installment sale contract. Defendant argued that the Court of Appeal should deny Plaintiff’s motion to compel because the arbitration agreement was identical to an arbitration clause found procedurally and substantively unconscionable in Sanchez v. Valencia Holding Co. LLC, 201 Cal. App. 4th 74 (2011). Sanchez had found four portions of the arbitration clause to be unconscionable, including: (i) providing the parties with the right to a second arbitration before a three-arbitrator panel if the award exceeds $100,000; (ii) providing the parties with the right to a second arbitration before a three-arbitrator panel if the award includes injunctive relief; (iii) the requirement that the appealing party advance all arbitration costs; and (iv) the exemption for self-help remedies (e.g., repossession). Id. at *9-10. With respect to substantive unconscionability, the trial court followed the holding in Sanchez that the four challenged portions of the arbitration provision were unfairly one-sided and oppressive, and denied Plaintiff’s severance request. After Plaintiff appealed, the Court of Appeal decided Goodridge v. KDF Automobile Group, Inc., 209 Cal. App. 4th 325 (2012), in which an identical arbitration provision was found to be procedurally and substantively unconscionable based on the Sanchez analysis. Id. at *11-12. The Court of Appeal noted that the entire sales agreement was contained on a single sheet of paper that was about 26 inches long with numerous provisions close together on the front and back side. The arbitration provision was located on the bottom of the back side and was outlined in black lines, as were several other provisions. Defendant signed only the front of the document, and placed his initials next to several clauses. The Court of Appeal found that these facts supported the finding that there was lack of negotiation or meaningful choice before Defendant signed the contract. Plaintiff argued that Defendant could not have been surprised by the arbitration requirement because a clause on the front side of the contract alerted him to the arbitration provision on its reverse side. The Court of Appeal, however, found that this clause would not have notified a reasonable consumer of the existence of the arbitration clause, and that there was no provision for Defendant’s signature or initials adjacent to that language. Accordingly, the Court of Appeal agreed with the trial court’s analysis that the purchase agreement was procedurally unconscionable. Plaintiff also contended that the trial court erred in finding four portions of the arbitration were substantively unconscionable – three concerned the finality of the arbitrator’s decision and one concerning the parties’ right to seek relief outside the arbitration process thorough self-help remedies or small claims court. Id. at *21. The Court of Appeal explained that a contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be so one-sided as to shock the conscience. Id. at *22. The Court of Appeal found that Plaintiff’s contention had merit with respect to the self-help and small claims court remedies only. The Court of Appeal also concluded that the remaining challenged provisions pertaining to the finality of the arbitration decision were moderately unconscionable because they primarily benefited the economically stronger party, which in this case was Plaintiff, and that those provisions could not be enforced. Id. The Court of Appeal nevertheless found that the objectionable provisions were contained solely in two sentences of the lengthy arbitration agreement and pertained to a single part of the arbitration clause, and that they could be potentially severed from the remaining portions of the agreement. Therefore, the Court of Appeal remanded for the trial court to exercise its discretion on the severance issue.

Miller, et al. v. Bank Of America, N.A., 213 Cal. App. 4th 1 (Cal. App. 1st Dist. 2013). Plaintiff, a customer, brought a class action challenging Defendant’s allegedly unlawful practice of setting-off funds from accounts into which Social Security and other public benefit payments had been directly deposited against overdrafts and bank fees. Plaintiff moved for certification of a class of hundreds of thousands of Bank customers affected by its alleged cross-account collection activities. The trial court denied Plaintiff’s motion for class certification, and the California Court of Appeal affirmed that order. Id. at 4. The trial court determined that Plaintiff failed to define an identifiable class of bank customers whose accounts were debited unlawfully. The Court of Appeal agreed. Plaintiff’s proposed class extended to all individuals who had at least two accounts with the Bank, one of which received electronically deposited exempt funds from
which the Bank seized exempt funds to collect sums allegedly owed from a separate account. The Court of Appeal opined that this encompassed a far broader range of transactions than the consumer debt set-offs regulated by Financial Code. The proposed class description brought into the class whole categories of legal set-offs. Id. at 8. Plaintiff’s contention that the Financial Code does not limit the prohibition of set-offs from accounts holding exempt funds ignored the California Supreme Court’s explicit recognition in Miller et al. v. Bank of America, NT, 46 Cal. 4th 630 (2009) (“Miller I”) that former § 864 of the Financial Code comprehensively regulates the legality of bank set-offs. Id. The Court of Appeal stated that the prohibition of set-offs against exempt funds was statutorily confined to the consumer debt context delimited by § 864. Id. The Court of Appeal remarked that it was not enough for Plaintiff to identify accounts that received exempt funds and were subjected to set-offs for obligations arising in a separate account; he must also be able to show which of those set-offs were in violation of § 864. Id. at 8-9. Because Plaintiff failed to show that any means existed to identify a class of bank customers who had been subjected to unlawful setoffs, the Court of Appeal opined that class certification was correctly denied. The Court of Appeal rejected Plaintiff’s argument that in ruling on class certification the trial court impermissibly ruled on the merits of his claim. The Court of Appeal noted that issues affecting the merits of a case may be enmeshed with class action requirements, such as whether substantially similar questions are common to the class and predominate over individual questions or whether the claims or defenses of the representative plaintiffs are typical of class claims or defenses. Id. at 11. The Court of Appeal opined that the trial court had correctly decided the issues of over breadth, ascertainability, commonality, and numerosity raised in opposition to class certification. Accordingly, the Court of Appeal affirmed the decision of the trial court. Id. at 12.

Natalini, et al. v. Import Motors, Inc., 2013 Cal. App. Unpub. LEXIS 81 (Cal. App. 1st Dist. Jan. 7, 2013). Plaintiff, a car buyer, brought a class action alleging that Defendant sold cars and tires as new when in fact they were used, in violation of the California Consumer Legal Remedies Act and the Rees-Levering Motor Vehicle Sales and Finance Act. The sales contract between the parties contained an arbitration clause, which stipulated resolution of disputes by arbitration. The arbitration provision also stated that the buyer would not participate as a class representative or class member in any class. The trial court denied Defendant’s motion to compel arbitration, holding that the arbitration provision was unconscionable. On appeal, the California Court of Appeal affirmed the decision of the trial court. The Court of Appeal observed that the procedural element of the unconscionability analysis concerned the manner in which the contract was negotiated and the circumstances of the parties at that time. Id. at *12. Plaintiff submitted a declaration averring that he was not permitted to negotiate the terms of the sales contract. The Court of Appeal remarked that because the sales contract was adhesive, it demonstrated a minimal degree of procedural unconscionability. Id. Further, Plaintiff also stated that Defendant’s employees spent only enough time on the contract to point out where to sign, he was not allowed to read the back of the contract, he and Defendant’s employees did not discuss anything on the back of the contract, and he was not aware of any arbitration clause or waiver of rights at or before the purchase. Further, the Court of Appeal opined that the arbitration provision was substantively unconscionable because it was designed to favor Defendant. The provision authorized an appeal resulting in a new arbitration before a three-arbitrator panel only for an award of $0 for a party or in excess of $100,000 against a party. The Court of Appeal stated that this type of provision, although neutral on its face, had the effect of benefiting the party that drafted the contract — in this instance, Defendant. Id. at *15. The Court of Appeal noted that the buyer would rarely benefit from the clause permitting an appeal of an award exceeding $100,000 because the buyer, not the dealer, was more likely to recover an award of that size. Id. at *17. The Court of Appeal stated that there was no justification for the $100,000 threshold, other than to relieve the car dealer of liability it deemed excessive. Next, the arbitration provision authorized an appeal resulting in a new arbitration before a three-arbitrator panel if the award included injunctive relief. The Court of Appeal observed that this provision burdened the buyer because the buyer, not the car dealer, was more likely to obtain an injunction. The arbitration provision allowed Defendant to delay the effect of an injunction by commencing a new arbitration. The Court remarked that by authorizing appeals from injunctive relief, only Defendant benefited, making the clause one-sided. Further, the arbitration provision exempted self-help remedies, including repossession, the most significant remedy from
Defendant’s perspective. The buyer had no effective self-help remedies, and none of his remedies were exempt from arbitration; yet one of the most important remedies to a consumer, injunctive relief, was subject to arbitration. Thus, the Court of Appeal opined that the arbitration provision was substantively unconscionable because it was systematically structured to maximize the utility of arbitration in resolving only buyer’s claims, while allowing Defendant to appeal from a large award or injunctive relief and allowing Defendant to continue to pursue its primary repossession remedy outside of arbitration. *Id.* at *22. The Court of Appeal held that the arbitration provision was procedurally and substantively unconscionable, and therefore stated that the trial court did not abuse its discretion in declining to sever the unconscionable aspects of the provision. *Id.* at *24-25. Accordingly, the Court of Appeal affirmed the order of the trial court and denied Defendant’s motion to compel arbitration.

_Nguyen, et al. v. Inter-Coast International Training, Inc., 2013 Cal. App. Unpub. LEXIS 5803 (Cal. App. 2d Dist. Aug. 21, 2013)._ Plaintiff, a former employee, brought a putative class action alleging wage & hour violations, and sought to certify a class of all non-exempt employees employed by Defendant for the four years prior to the filing of his complaint. Thereafter, Defendant entered into an arbitration agreement with its current employees. Defendant, however, had no arbitration agreement with Plaintiff, and only 59 out of the putative class of 220 individuals signed the arbitration agreement. Defendant moved to compel arbitration and stay the litigation. Plaintiff argued that he did not sign an arbitration agreement, and that until a class was certified he was the only Plaintiff, and Defendant’s agreements with the putative class members to arbitrate could not be enforced. The trial court denied the motion, holding that it lacked jurisdiction over individuals who were not before the Court. On appeal, the California Court of Appeal affirmed. The Court of Appeal observed that the arbitration agreement was signed by a portion of the putative class but not by the prospective lead Plaintiff, and the motion to compel arbitration was filed before the class was certified. The Court of Appeal stated that these facts were significant because the class was not certified when the motion to compel arbitration was heard and the trial court lacked personal jurisdiction over the putative class members; moreover, until a class was certified, Plaintiff could amend the class definition to exclude those who were parties to the arbitration agreement. Regardless of whether the class definition was amended, the Court of Appeal reasoned that the class certification motion could be denied for other reasons and, if that occurred, the motion to compel arbitration would be moot. Additionally, the Court of Appeal found that Defendant’s argument that Plaintiff attempted to actively pursue the claims of others with arbitral obligations by demanding their employee records for his case, and that at least one putative class member made a general appearance by arguing the merits of the case and seeking personal relief, was unpersuasive because the request for employee records did not result in the joinder of new parties to this action. Further, the submission of the putative class member’s declaration did not constitute a request for affirmative relief that could be granted only if she were a party to this action. Accordingly, the Court of Appeal held that the motion to compel arbitration and stay this litigation was properly denied as premature.

_Outland, et al. v. Macy’s Department Stores, Inc., 2013 Cal. App. Unpub. LEXIS 356 (Cal. App. 1st Dist. Jan. 16, 2013)._ Plaintiff brought a wage & hour class action on behalf of group sales managers. Plaintiff’s employment agreement contained an arbitration provision precluding class relief. The trial court dismissed her class claims and ordered arbitration under the Supreme Court’s decision in _AT&T Mobility, LLC v. Concepcion_, 131 S. Ct. 1740 (2011), which holds that the Federal Arbitration Act (“FAA”) preempts California decisional law holding certain class action waivers unenforceable. Upon Plaintiff’s appeal, the California Court of Appeal affirmed the order. Relying on _Gentry v. Superior Court_, 42 Cal. 4th 443 (2007), and _D.R. Horton, Inc.,_ 357 NLRB No. 184 (Jan. 3, 2012), Plaintiff contended that _Concepcion_ did not require dismissal of her class claims. The Court of Appeal noted that in _Discover Bank v. Superior Court_, 36 Cal. 4th 148 (2005), the California Supreme Court held that a waiver of class action arbitration in a consumer contract is unenforceable under the unconscionability doctrine. *Id.* at *4. Essentially the same rationale was used in _Gentry_ in holding a class action arbitration waiver unenforceable in an employment agreement. *Id.* at *4-5. _Concepcion_ effectively overruled _Discover Bank_, holding it was preempted by § 2 of the FAA because requiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA. *Id.* The Court of Appeal noted that...
although Concepcion did not discuss Gentry, its rationale applied equally to Gentry. Id. at *7. The Court of Appeal held that this reasoning applied equally whether the contract imposing class-wide arbitration is a consumer contract, as in Discover Bank, or an employment contract, as in Gentry. Id. The Court of Appeal recognized that Truly Nolen of America v. Superior Court, 208 Cal. App. 4th 487 (2012), concluded that Concepcion was inconsistent with Gentry, and elected to follow Gentry until the California Supreme Court had the opportunity to review the decision in light of Concepcion and Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758 (2010). The Court of Appeal followed Concepcion in this case because although the Supreme Court did not mention Gentry in Concepcion, the interpretation of the FAA preemption announced in Concepcion directly and conclusively undercut Gentry’s rationale. Id. at *10. Plaintiff also argued that the Court of Appeal should follow Horton and hold that federal labor law trumps the FAA in the context of wage & hour litigation. In Horton, the Board determined it was a violation of the National Labor Relations Act (“NLRA”) to require employees as a condition of employment to waive the filing of class action or other joint or collective claims regarding wages, hours, or working conditions in any forum, arbitral or judicial. Id. The Board further found in Horton that its interpretation of the NLRA to bar mandatory waivers of class arbitration over wages, hours, and working conditions did not conflict with the FAA or with Concepcion and Stolt-Nielsen. Id. at *11. Concepcion involved a conflict between the FAA and state law which, under the supremacy clause, had to be resolved in favor of the FAA; by contrast, the NLRA reflected federal substantive law, removing supremacy clause considerations from the equation. Id. at *12. The Court of Appeal concluded that a federal statute will not be found to override an arbitration agreement under the FAA unless such a congressional intent can be shown with clarity in the statute’s language or legislative history and there is no language in the NLRA demonstrating that Congress intended the employee concerted action rights therein to override the mandate of the FAA. Id. at *14. Accordingly, the Court of Appeal affirmed the judgment of trial court.


Plaintiff and other minority shareholders in Siliconix Inc., brought a class action and shareholder’s derivative suit in against Defendants, Vishay Intertechnology, Inc., the majority shareholder, and individuals and entities associated with Vishay, alleging that Defendants breached their fiduciary duties and misappropriated Siliconix’s assets. Plaintiffs also claimed that Vishay’s auditor, Ernst & Young, LLP (“E & Y”), helped Vishay to hide its misappropriations from Siliconix’s minority shareholders and the SEC. Plaintiffs appealed against the dismissal of the action by the trial court based on a prior adjudication of related claims in a Delaware court. The California Court of Appeals affirmed the trial court’s application of collateral estoppel to the Delaware court’s adjudication of the issues. After Plaintiff had filed the complaint, Defendant announced its intention to make a tender offer and several minority shareholders had joined in a class action shareholders’ suit against Vishay in the Delaware Court of Chancery, alleging that Vishay breached its fiduciary duties to the shareholders by making an unfair tender offer. Id. at 1264. The minority shareholders and Vishay reached an agreement and in October 2005, the Delaware court issued a final judgment dismissing the action with prejudice and releasing Vishay’s liability pursuant to the settlement agreement. Id. at 1265. Plaintiff, who did not participate in the Delaware proceedings, then filed an amended complaint in California alleging similar claims and a new cause of action for quasi-appraisal of shares. Defendants filed demurrers to the complaint, arguing that the Delaware judgment precluded the California action. Vishay also petitioned the Delaware court for a permanent injunction to enforce the final judgment and settlement. On June 13, 2006, the Delaware court issued the injunction prohibiting all Plaintiffs in the Delaware action from pursuing the California action. Id. at 1266. Then the California trial court, however, advised Plaintiffs to seek relief from the Delaware court as it could not decide whether Plaintiffs were properly enjoined. In the meantime, E & Y removed the action to federal court and moved to dismiss. The case against E & Y was dismissed and summary judgment in favor of Vishay was granted. The Ninth Circuit, however, partially overturned the order and held that the class action claim for breach of fiduciary duty was precluded by the Securities Litigation Uniform Standards Act. Id. at 1267. The Ninth Circuit stated that while the Delaware settlement might have a preclusive effect on the federal action, the Delaware court could not enforce such effect via an injunction that constrained the workings of the federal court. Id. The Ninth Circuit therefore directed the case back to the California trial court. Plaintiffs then filed another amended complaint eliminating the previous class action for breach of
fiduciary duty, but asserting a shareholder derivative claim against all Defendants and quasi-appraisal of shares against Vishay. Id. Defendants demurred again, and relying on the injunction, they asserted the bar of res judicata. The California trial court rejected Plaintiffs' assertions of judicial estoppel, law of the case, due process, extrinsic fraud, and lack of subject-matter jurisdiction by the Delaware court and held that collateral estoppels barred Plaintiffs' cause of action. Id. at 1268. Plaintiffs appealed and argued that the Delaware injunction was void because it exceeded its subject-matter jurisdiction. Id. Plaintiffs also argued that it was a reversible error for the California trial court to afford it full faith and credit without even considering whether the Delaware court was correct on the merits. Id. Plaintiffs further argued that the Delaware injunction should not have been enforced because the quasi-appraisal claim was outside the scope of the settlement. Id. at 1269. The Court of Appeal, however, disagreed with all of these arguments. The Court of Appeal stated that if the Delaware court had exceeded its jurisdiction by ruling incorrectly that the quasi-appraisal claim was encompassed in the settlement, that error did not preclude the application of collateral estoppel, as it might apply even where the issue was wrongly decided in the first action. Id. at 1270. The Court of Appeal further stated that the Delaware court’s subject-matter jurisdiction was beyond dispute as the final settlement order clearly reserved jurisdiction over all matters relating to the administration and consummation of the settlement. Id. Further, Plaintiffs did not cite any authority that precluded a second court from finding issues determined in the foreign court’s decision to be res judicata. Id. at 1271. The Court of Appeal stated that it was not the Delaware injunction that operated on the California trial court, but the collateral estoppel effect of the issues adjudicated by the Delaware court on Vishay’s motion for a permanent injunction that compelled the ruling against Plaintiffs. Id. at 1272. Because Plaintiffs failed to point to any error in the applicability of collateral estoppel, the Court of Appeal agreed with the California trial court that the doctrine precluded re-litigation of the issue of whether quasi-appraisal was encompassed in the settlement and judgment. Id. at 1273. The Court of Appeal further noted that Plaintiffs had a full and fair opportunity to litigate the issues presented in the injunction motion but expressly chose to take no position. Id. at 1275. The Court of Appeal therefore held that it was unnecessary to weigh on the merits of the parties’ debate over the scope of settlement and judgment, and accordingly, affirmed the California trial court’s order dismissing Plaintiffs’ action.

Regents Of The University Of California v. Superior Court, 220 Cal. App. 4th 549 (Cal. App. 2d Dist. 2013). Plaintiff, a patient, brought a class action alleging that the Regents of the University of California, through its UCLA Health System, breached the Confidentiality of Medical Information Act (“CMIA”) when it lost the hard drive containing Plaintiff’s medical information. In 2001, a doctor in the UCLA faculty practice group took home an external hard drive containing personally identifiable medical information of some patients, and the hard drive was stolen as part of a home invasion robbery. Although the hard drive was encrypted with a password, an index card with the password placed next to the hard drive was also missing. Plaintiff alleged that she had been treated on numerous occasions at UCLA Medical Center and was one of more than 16,000 UCLA Health System patients who had been notified by Defendant of the loss of the hard drive and the related password. Id. at 554. In her class action, Plaintiff sought statutory damages from Defendant alleging unlawful disclosure of confidential medical information in violation of the CMIA. Specifically, Plaintiff alleged that Defendant failed to exercise due care to prevent the release or disclosure of her private medical information and that of the other putative class members without their written authorization. Id. at 555. Defendant responded with a demurrer asserting that Plaintiff had not sufficiently claimed that it breached the CMIA because it had not “disclosed” or “released” any information. Id. Defendant asserted that “disclosure” or “release” by a healthcare provider under the CMIA occurs only when the provider actively communicates medical information to a third-party without the patient’s authorization, and a “disclosure” or “release” within the meaning of the CMIA does not occur when a third-party – through burglary, computer hacking or otherwise – wrongfully obtains such information against the healthcare provider’s will. Id. The trial court had overruled the demurrer, finding that Plaintiff had stated a claim because she had alleged that Defendant failed to have reasonable systems and controls in place to prevent the removal of protected health information from the hospital premises and, as a result, negligently lost possession of the hard drive and encryption passwords. Id. at 556. Because Plaintiff had not alleged any affirmative disclosure of confidential information by Defendant, the trial court struck the portion of Plaintiff’s claim premised on the allegation that Defendant had failed to exercise due care to prevent the
release or disclosure of private medical information of Plaintiff and the class members without their written authorization. Id. Defendant then petitioned the California Court of Appeal for a writ of mandate. The Court of Appeal granted Defendant's petition. The Court of Appeal found that a private right of action for statutory damages under § 56.101(b) of the CMIA, based on negligent storage or maintenance of confidential medical information, requires that the negligence resulted in unauthorized or wrongful access to the information. Plaintiff had failed to allege this in the trial court. Id. Plaintiff also had not alleged that her medical records were, in fact, viewed by an unauthorized individual, and no one knew what happened to the encrypted external hard drive and the password for the encrypted information. Id. The Court of Appeal did not dispute that Plaintiff had adequately alleged that Defendant violated the duty imposed by § 56.101 (a) of the CMIA, which requires maintenance and storage of medical information in a manner that preserves the confidentiality of that information. Id. at 560. The Court of Appeal, however, found that pleading negligent maintenance and loss of possession of confidential medical information was insufficient to state a cause of action under §§ 56.101 and 56.36(b), which required pleading and proof that confidential information has been released in violation of the CMIA to bring a private cause of action for nominal and/or actual damages. Id. at 564. The Court of Appeal noted that “disclose” and “release” were not synonymous, because under the usual and ordinary meaning of the statutory language, a healthcare provider who has negligently maintained confidential medical information and thereby allowed it to be accessed by an unauthorized third person – that is, permitted it to escape or spread from its normal place of storage – might have negligently released the information within the meaning of the CMIA. Id. at 565. The Court of Appeal also noted that “[n]ot all releases of information necessarily involve a disclosure, that is, an affirmative communicative act.” Id. at 567. After analyzing the statute, the Court of Appeal determined that the Legislature intended in § 56.36 (b), as incorporated into § 56.101, more than an allegation of loss of possession by the healthcare provider to state a cause of action for negligent maintenance or storage of confidential medical information. Id. at 570. According to the Court of Appeal, what was required was pleading, and ultimately proving, that the confidential nature of Plaintiff's medical information was breached as a result of the healthcare provider's negligence. Because Plaintiff had failed to assert any such allegation, the Court of Appeal concluded that Defendant's demurrer should have been sustained. Id. Accordingly, the Court of Appeal directed the trial court to enter a new order sustaining the demurrer without leave to amend and dismissing Plaintiff's action.

Thompson, et al. v. Automobile Club Of Southern California, 2013 Cal. App. Unpub. LEXIS 4014 (Cal. App. 4th Dist. June 7, 2013). Plaintiff, a member of the Automobile Club of Southern California, brought a class action alleging breach of contract, unjust enrichment, and violations of the California Unfair Competition Law and the Consumer Legal Remedies Act. Under Defendant's policy, a member who fails to renew a membership enjoys a 95-day grace period from the expiration date to renew, and if the member renews at any point during that period, the renewal is treated retroactive to the date of the expiration. After the 95th day, the member’s file is closed, and new membership is subjected to the $20 new membership fee. When Plaintiff’s membership expired, he received a mailed notice that his membership was not renewed. Plaintiff renewed his membership by phone and asked the representative if his membership started right then and went for 12 months forward. Plaintiff was informed that the membership could only be started from that date if he paid a $20 new membership fee, otherwise it went back to the date of the expiration. Plaintiff alleged that this renewal policy was depriving late-renewing members of receiving 12 months of benefits, that members were not informed of the policy, and that late-renewing members were being monetarily damaged. Plaintiff moved for certification of a class consisting of all individuals who, at any time on or after July 17, 2005, purchased and paid for a new term of membership after their prior membership term expired, and whose new membership term was deemed to have begun on or about the prior expiration date. The trial court denied the motion. On appeal, the California Court of Appeal affirmed the order. The trial court determined that the putative class was not ascertainable because the proposed class was overbroad as it contained members who would not be entitled to relief because the members received services during their delinquency, had the renewal policy explicitly disclosed to them, and/or were not injured by the renewal practices. Defendant produced a spreadsheet of records showing members who received benefits during the delinquency period during the past year and also presented evidence that 67% to 80% of delinquent members renewed during the first 30 days after expiration. Further, the
Evidence showed that Defendant trained its customer service agents to discuss renewal practices when appropriate and Plaintiff also testified that the agent discussed the renewal practices with him. Thus, the Court of Appeal noted that at least some percentage of the putative class knew about the renewal policy. Because the proposed class included everyone who renewed late after July 17, 2005, regardless of any other facts, and a significant number of these people would have no right to recover, the Court of Appeal found that the class was overbroad and not ascertainable. Second, Plaintiff argued that common issues predominated because the same contract terms and renewal policy was applied to all members. The Court of Appeal, however, stated that mere existence of a form contract was insufficient to determine that common issues predominate when the questions of breach and damage were essentially individualized. Proof with respect to each individual class member would be needed to determine what benefits were received during the delinquency period, whether the renewal practice saved money over paying the $20 new member fee, and whether the member was aware of the renewal policy. Thus, the Court of Appeal determined that individual issues predominated over common ones. Third, the trial court noted that typicality was not established because Defendant’s renewal practice was explicitly disclosed to Plaintiff and he elected to renew his membership pursuant to the practice rather than beginning a new membership on his payment date. Plaintiff’s decision to renew his membership after being told about the renewal practice showed that this information was not material to him, as Plaintiff alleged it would be to the reasonable class member. The Court of Appeal reasoned that because individual issues of whether the renewal practice was adequately disclosed to each class member, whether each class member sought and received service during the class period, whether individual class members who did not seek services during the class period were nonetheless aware that services were available, and whether individual class members suffered any injury as result of the renewal policy predominated, the class action mechanism was unmanageable and hence not a superior means of adjudication. Accordingly, the Court of Appeal affirmed the trial court’s order denying Plaintiff’s motion for class certification.

Vargas, et al. v. Sai Monrovia B, Inc., 216 Cal. App. 4th 1269 (Cal. App. 2d Dist. 2013). Plaintiffs, a group of customers who purchased cars from Defendant, brought a class action alleging violations of the California Consumers Legal Remedies Act (“CLRA”), the Automobile Sales Finance Act, the Unfair Competition Law, and the Song-Beverly Consumer Warranty Act. Plaintiffs purchased the car from Defendant Assael BMW Mini of Monrovia (Assael BMW), and the retail installment sale contract contained an arbitration clause. Defendants moved to compel arbitration, and the trial court granted Defendants’ motion as to the first eight of the nine causes of action. On appeal, the California Court of Appeal reversed the order of the trial court. The Court of Appeal opined that the arbitration provision satisfied the elements of both procedural and substantive unconscionability. With regard to procedural unconscionability, the Court of Appeal determined that by placing an arbitration clause on the back of a dense pre-printed form where the purchaser was not required to sign, Defendants did not notify the consumer that such a clause existed, and that by telling Plaintiff where to sign, the contract was presented on a take-it-or-leave-it basis. The Court of Appeal also determined that a contract term was substantively unconscionable because it was overly harsh and so one-sided as to shock the conscience. Id. at 1287. The Court of Appeal noted that four clauses in the arbitration provision were unconscionable. First, under the sale contract, either side could appeal to a three-member panel an adverse award exceeding $100,000. Given the remedies available under the consumer protection laws, the Court of Appeal noted that an award in a buyer’s favor could readily exceed $100,000, and there was no justification for the $100,000 threshold, other than to relieve the car dealer of liability. Second, under the sales contract, either side could appeal if an award against it contained injunctive relief. The Court of Appeal observed that the buyer would usually be the party seeking preliminary or permanent injunctive relief, primarily to enforce consumer protection laws like the CLRA. The Court of Appeal stated that by subjecting injunctive relief to an appeal process, only the car dealer was benefited, making the clause overly harsh on consumers and undermining the purpose of the CLRA to protect consumer rights. Third, the arbitration provision provided that the appealing party must pay, in advance, the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs. Here, because the arbitration provision did not inform the buyer about the amount to be paid in advance and permitted apportionment at the conclusion of arbitration, the Court of Appeal determined that it discouraged buyers from pursuing an appeal and enforcing their rights under the...
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CLRA. Finally, the Court of Appeal noted that by exempting repossession from arbitration, while subjecting a request for injunctive relief to arbitration, the sale contract created an unduly oppressive distinction in remedies, especially because the California Arbitration Act exempts TROs and preliminary injunctions from arbitration, allowing an application for provisional remedies to be filed directly in the trial court. Id. at 1295-96. Given that repossession could be either a self-help remedy or a judicial remedy, the Court of Appeal stated that Assael BMW could not justify exempting self-help remedies from arbitration while requiring that injunctive relief be sought only in arbitration. Because the arbitration provision was permeated by unconscionability, the Court of Appeal found that the trial court erred in granting the motion to compel arbitration, and thus reversed the order.

Wallace, et al. v. Monier, LLC, Case No. 12-CV-16410 (Cal. Super Ct. Jan. 28, 2013). Plaintiffs brought a class action under the California Consumer Legal Remedies Act (“CLRA”) and the Unfair Competition Law (“UCL”) alleging misrepresentation to California consumers about the qualities and characteristics of slurry-coated concrete tiles and failure to disclose that these tiles eroded to bare concrete substantially before their represented 50 year life. The Court certified a class of all individuals in California who own structures with slurry-coated roof tiles sold by Defendants, Monier Company, Monier Roof Tile, Inc., or Monier Inc. between January 1, 1978, and August 14, 1997, and all California individuals who owned such homes for personal family or household use and who paid to replace or repair tiles. Id. at 2-3. The Court limited class membership to those who prior to purchasing or obtaining their Monier roof tiles product were exposed to a statement indicating that the tiles would have a 50 year life, permanent color, or would be maintenance free. Id. at 3. Thereafter, the Court granted Defendant’s motions challenging Plaintiff’s expert testimony, and a motion for non-suit. Because Defendant sold the tiles to developers, roofing supply distributors, and contractors, Defendant did not have records showing where and how many homes the tiles were installed in during the class period. Plaintiffs used an expert to statistically analyze the gross production and sales records for Defendant’s California tile manufacturing plants. The expert made adjustments and assumptions based on waste, market share, and individual plant production, and arrived at a figure of 127,746 homes. The methodology Plaintiff sought to use to prove the class size was to have 22 individual homeowners randomly selected from the potential class of 127,746 homes. Sixteen from this sample group testified and Plaintiff contended that it was the role of the fact-finder to determine whether they actually satisfied the proviso. Plaintiffs then relied on its expert Gary Lorden, a former statistics professor who explained that this particular methodology was based on statistical sampling. According to Lorden’s methodology: (i) a sample group of individual homeowners are randomly selected from the much larger group of potential class members; and (ii) the sample homeowners testify as to the facts and circumstances about their purchase or acquisition of the tiles and its subsequent performance to demonstrate satisfaction. Thereafter, the jury would use simple statistical extrapolation to determine the actual size of the class and the amount of aggregate damages. The Court noted that Plaintiffs were unable to cite any reported case in which this particular methodology was approved or endorsed as an acceptable means of proof for either determination of actual class size or liability or both. Further, the Court was unable to find any reported case or even a favorable reference to this methodology in any standard guides or reference materials. Additionally, the essential element of the methodology in question was not developed by Lorden or even based on any prior studies or research by experts in the relevant fields of statistics or surveys; rather, Lorden adopted the concept after discussions with Plaintiffs’ counsel. Further, this methodology employed 16 mini-trials and the testimony of the 16 potential class members could be influenced by the fact that they have to persuade a jury that they met the class definition. The Court stated that for the purpose of explaining and supporting a methodology that uses statistical sampling to establish class size, Defendant’s liability, and damages, Lorden’s testimony was legally irrelevant and must be excluded. Id. at 16. The Court also opined that Plaintiff’s proposed statistical sampling methodology was inappropriate. Thus, the Court granted Defendant’s motion objecting to the expert opinion. Because there was no legally relevant evidence as to the class size, Defendant’s liability, or the amount of damages, the Court granted Defendant’s motion for non-suit on the CLRA action, and for judgment on the UCL action.
In Re BJ’s Wholesale Club, Inc. Shareholders Litigation, 2013 Del. Ch. LEXIS 28 (Del. Ch. Jan. 31, 2013). Plaintiffs, a group of individual and institutional former corporate shareholders (“FSHs”), filed a class action against Defendant BJ’s Wholesale Club, Inc.’s (“BJ’s”) former board of directors (the “Board” or “Defendant Directors”), for breach of fiduciary duties in connection with the September 30, 2011 sale of all of the BJ’s outstanding shares to two private equity firms – Defendant Leonard Green & Partners, L.P. (“LGP”) and Defendant CVC Capital Partners (“CVC”) – for $51.25 per share (“buy-out”). Plaintiffs also alleged that LGP and CVC, and Defendant Beacon Holding, Inc., an affiliate of LGP and CVC (“Beacon Holding”), and Defendant Beacon Merger Sub, used to effectuate the buy-out (collectively, the “Buy-Out Group”), aided and abetted the Defendant Directors’ breach of fiduciary duties. Defendants filed a joint motion to dismiss, which the Court of Chancery granted. At the very outset, the Court of Chancery noted that a fundamental principle of Delaware law is that directors of a corporation manage and direct the business and affairs of the company. Id. at *18. In exercising those powers, directors are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders. Where, as in this case, a corporation’s certificate of incorporation contained an exculpatory provision authorized by 8 Del. C. § 102(b)(7), which immunizes directors from damages arising from a breach of duty of care, Plaintiffs must plead sufficient facts to show that a majority of the Board of Directors breached the fiduciary duty of loyalty. Id. at *19. The Court of Chancery noted that Plaintiffs did not seriously challenge the disinterestedness and independence of the Board. The buy-out was approved by all nine of BJ’s directors. Plaintiffs offered only conclusory allegations that management influenced BJ’s disinterested directors, and therefore the Court of Chancery concluded Plaintiffs did not plead a duty of loyalty claim against the Defendant Directors arising from any disabling interest or lack of independence. The Court of Chancery concluded that in order for Plaintiffs to succeed on a claim that the Board acted in bad faith, they must allege that the decision to sell the company was so far beyond the bounds of reasonable judgment that it seemed essentially inexplicable on any ground other than bad faith. The Court of Chancery found that Plaintiffs’ complaint lacked sufficient allegations to support their arguments. The Court of Chancery held that the complaint failed to allege a reasonably conceivable set of circumstances that the Board acted in bad faith. Moreover, the Board’s decision to sell the company at a 38% premium to its unaffected stock price and after a lengthy sales process was not so far beyond the bounds of reasonable judgment that it seemed essentially inexplicable on any ground other than bad faith. The Court remarked that adequately pleading a breach of the duty of loyalty was especially difficult where, as here, the Board consisted of a majority of disinterested and independent directors, and it actively solicited interest from other bidders, the Special Committee – in good faith – relied upon financial and legal advisors, no other topping bids emerged after a lengthy public sales process, the Board drove the price up, and the shareholders received a 38% premium for the company’s unaffected stock price. The bad faith inferences that Plaintiffs would have the Court of Chancery draw were simply not reasonable in light of the rational explanations for the Board’s conduct. Based on the facts in the complaint, it was not reasonably conceivable that the Board acted in bad faith or that the Buy-Out Group knowingly participated in a breach of fiduciary duty. Accordingly, the Court of Chancery granted Defendants’ joint motion to dismiss the complaint.

In Re Paetec Holding Corp. Shareholders Litigation, 2013 Del. Ch. LEXIS 72 (Del. Ch. Mar. 19, 2013). Plaintiffs, a group of shareholders, brought a class action alleging that Defendant, Paetec Holding Corp., breached its fiduciary duties by selling the company for an inadequate price through a flawed sales process, and that Defendant Windstream Corp., aided and abetted the breaches of fiduciary duty. Windstream had acquired all outstanding shares of Paetec through a stock-for-stock merger for approximately $2.3 billion or $5.52 per share. Id. at *2. Plaintiffs supported their allegations of inadequate pricing by citing Paetec’s on-going strategy of expansion by acquisition that yielded impressive dividends to stockholders, with robust revenue growth in early 2011, as well as an increase in Paetec’s stock price from $3.07 in March 2011 to $4.78 in July 2011. Id. Plaintiffs further alleged that the merger agreement unlawfully precluded the board of directors from obtaining the best price for the company because certain directors and officers of Paetec, who collectively owned 6.7% of the company, signed a voting agreement promising to vote their shares in favor of the merger. Plaintiffs further alleged that the sales process was
flawed because the merger agreement contained a no solicitation clause, which prohibited Paetec from inviting additional bids and gave Windstream the right to match a competing offer. *Id.* at *3. Finally, the merger agreement included a $40 million termination fee payable to Windstream in the event the board of directors accepted another offer. *Id.* Plaintiffs sought injunctive relief and damages. After substantial litigation, the parties settled. The Delaware Court of Chancery approved the settlement, including Plaintiffs’ attorneys’ fees and costs of $500,000. At the time of settlement, the only claim which demonstrated a reasonable probability of success on the merits was breach of fiduciary duty based on allegations of inadequate and misleading disclosures in Windstream’s proxy filing. *Id.* at *5. After the parties agreed to settle, Windstream made several corrective disclosures. *Id.* at *9-10. The Chancery Court noted that the settlement provided a single material disclosure, which was obtained by competent, experienced counsel who prosecuted the case on a contingency fee basis through extensive expedited discovery and moderate pre-trial motion practice, which directly caused Defendants’ supplemental disclosures. *Id.* at *30. The Chancery Court held that the facts did not compel an adjustment of legal fees. *Id.* Specifically, the Chancery Court rejected Plaintiffs’ argument that judicial scrutiny of an “agreed-to” fee award was generally inappropriate. *Id.* at *15. The Chancery Court noted that Defendants had not agreed to the amount requested by Plaintiffs’ counsel, but had agreed not to oppose a fee request above $500,000. *Id.* at *16. The Chancery Court found Plaintiffs’ contention unsupported that Defendants actually engaged in an analysis of determining an appropriate award in light of the efforts of Plaintiffs’ counsel and the “benefit” of the additional disclosure. *Id.* The Chancery Court further noted a long-standing practice of exercising judicial scrutiny over attorneys’ fees, even in cases where the fee request was uncontested by Defendant or by any members of the stockholder class. *Id.* at *17. The Chancery Court determined that the time and effort Plaintiffs’ counsel expended prosecuting the action served as a cross-check on the reasonableness of the fee award suggested by the benefit conferred. *Id.* at *28. Plaintiffs’ counsel engaged in extensive discovery on an expedited basis, including taking key depositions that lead to valuable supplemental disclosures. *Id.* at *29. Plaintiffs’ counsel further expended approximately 1,100 hours of labor, and incurred $47,962 in direct expenses while prosecuting the action, which meant that the requested $500,000 fee corresponded to an hourly rate of approximately $411. *Id.* The Chancery Court found such an hourly rate within a reasonable range of billing rates and that it did not compel any adjustment determined by the benefit of the disclosure to the shareholder class. *Id.* Accordingly, the Chancery Court awarded Plaintiffs’ counsel $500,000 in fees and costs.

**In Re Quest Software Inc. Shareholders Litigation, 2013 Del. Ch. LEXIS 167 (Del. Ch. July 3, 2013).**

Plaintiffs, a group of stockholders who brought a class action seeking to enjoin a proposed management buy-out of the stockholders’ interest in Quest Software Inc., sought to compel the discovery of privileged documents regarding the litigation in order to recover attorneys’ fees under the corporate benefit doctrine. The Quest Board of Directors received an expression of interest in a merger from Insight Venture Management LLC. The Board formed a special committee (the “Special Committee”) to review, recommend, and negotiate any potential merger agreement. Then the Special Committee negotiated a merger agreement with Insight (the “Insight Agreement”), which contained deal terms that encouraged a third-party to make a higher bid, including a 60 day go-shop period and a top-up option allowing a third-party to acquire a 19.9% interest in Quest in the event the Board were to reject a superior offer from that third-party. Plaintiffs brought an action seeking to enjoin the merger during the “go-shop” period. Subsequently, Dell, Inc. submitted an all-cash offer to purchase Quest, and Quest entered into an agreement with Dell (the “Dell Agreement”) and the Quest Board terminated the Insight Agreement. Although the parties stipulated to an order dismissing the litigation as moot, Plaintiffs sought attorneys’ fees under the corporate benefit doctrine, arguing that the litigation induced the Quest Board to seek and accept the offer from Dell. Plaintiffs moved to compel discovery of otherwise privileged documents, including unredacted versions of the notes, minutes, and draft minutes of the special committee meetings, communications with counsel concerning the litigation that reflected discussions with any of the Defendants, and all litigation updates provided to the special committee. Plaintiffs asserted that Quest Defendants placed at issue privileged and confidential communications and failed to preserve their attorney-client privilege in opposing the fee application, entitling Plaintiffs to the requested discovery. Plaintiffs also sought certain communications that Defendants withheld under the attorney-client privilege...
on the ground that the privilege was waived when the communications were shared with third-parties. The Court denied the motion. It opined that the “at issue” exception to the attorney-client privilege exists where either a party injects the privileged communications themselves into the litigation, or a party injects an issue into the litigation, the truthful resolution of which requires an examination of confidential communications. *Id.* at *6-7. The Court determined that the exception rested upon a fairness rationale and recognized that a party cannot use the attorney-client privilege as both a shield from discovery and a sword in litigation. *Id.* at *7. Further, the Court noted that where a Defendant opposes a Plaintiff’s request for attorneys’ fees on the grounds that the litigation did not produce a corporate benefit, Defendant does not place attorney-client privileged communication “at issue” simply by indicating that its counsel provided updates on the status of litigation. *Id.* at *8. Here, Defendants conceded that the Special Committee received briefings on the status of the litigation, but Defendants represented, via an affidavit from H. John Dirks (the chairman of the Special Committee), that the status updates did not influence its negotiation strategy or tactics. The trial court stated that this negation was not the equivalent of a reliance on advice of counsel that put the substance of the communication at issue in this litigation. Thus, the Court opined that the at-issue exception did not apply. Defendants also argued that all third-party communications that had not been produced to Plaintiffs were protected by the common-interest doctrine. The Court observed that a party waives the attorney-client privilege by communicating privileged information to a third-party, and an exception to this waiver exists under the common-interest doctrine, which provides that communications by the client or the client’s lawyer to a lawyer representing another in a matter of common interest may be exempt from discovery if the communication was made for the purpose of facilitating the rendition of professional legal services. *Id.* at *13. Plaintiffs alleged that communication between Latham & Watkins and Potter, Anderson & Corroon constituted a waiver of privilege because they allegedly were not counsel to the Special Committee and some communications occurred outside formal Board meetings. The Quest Defendants, however, asserted that Latham & Watkins was in fact counsel of record to the Special Committee. Thus, because these communications were not actually disclosed to third-parties, the trial court opined that these were privileged and not subject to discovery. Further, Plaintiffs contended that the unredacted copies of the Special Committee’s meeting minutes and notes were subject to discovery because non-Special Committee Quest Board members and counsel to Morgan Stanley, financial advisors for the Special Committee, attended these meetings, and therefore privilege was waived. The Court noted that these parties attending the meeting and the parties all shared a legal interest in the potential legal risk from issuing the 19.9% Option or accepting the Dell deal, because the entire Board would have to approve the Option before its implementation or agree to the Dell deal before its acceptance. Thus, the Court determined that the redacted portions of these minutes were protected under the common-interest doctrine. Finally, the Court opined that draft minutes from the Special Committee meetings were approved by written consent of the board, and determined that preliminary drafts of board meeting documents are protected by the attorney-client privilege and work-product doctrine.

(iv) Florida

*Baker, et al. v. Baptist Hospital, Inc.*, 115 So.3d 1123 (Fla. Dist. Ct. App. 1st Dist. 2013). Plaintiffs, a group of patients who had hospital liens asserted against them in Escambia County for medical care received in Santa Rosa County, brought a class action alleging unjust enrichment and violations of the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”). Plaintiffs alleged that Defendant’s practice of filing hospital liens was not authorized by Chapter 30733, which is a law specific to Escambia County, and was an unfair and deceptive practice in the conduct of trade and commerce, and thus unlawful under FDUTPA. The trial court found that Defendant’s practice of filing liens in Escambia County for care rendered in Santa Rosa County was not authorized by Chapter 30733 and directed Defendant to lift any such liens and enjoined it from filing such liens in the future. However, contrary to Plaintiffs’ assertions, the trial court determined that the practice was a form of debt collection not within the definition of trade or commerce, and thus not subject to the FDUTPA. On appeal, the Florida District Court of Appeal affirmed the trial court’s decision, but disagreed with the trial court’s determination that the Defendant’s assertion of liens was a form of debt collection. The District Court of Appeal noted that in *Schauer v. General Motors Acceptance Corp.*, 819 So.2d 809 (Fla. 4th Dist. Ct. App. 2002), a Plaintiff had properly stated a cause of action under the FDUTPA sufficient to survive a motion to dismiss because Defendant had extended credit,
which enabled Plaintiff to purchase the car, and then violated the Act by willfully harassing Plaintiff with respect to the collection of its debt. Id. at 1125. In Schauer there was a trade or commerce relationship between the parties before Defendant attempted to collect the debt through means unconnected to the legal process. However, the District Court of Appeal observed that this case involved a hospital lien, not an extension of commercial credit or general collection practices unconnected to the legal process. Id. Further, the District Court of Appeal observed that although the filing of the lien facilitates obtaining payment on a debt, it does not itself make demand for payment. Rather, the recorded hospital lien puts parties on notice of the lienor’s secured interest and is part of the exercise of legal remedies. The District Court of Appeal stated that the filing of a hospital lien was the pursuit of a legal remedy and, thus did not fall within the definition of debt collection. The District Court of Appeal opined that a lien was a legal right or interest that a creditor has in another’s property, lasting usually until a debt or duty that it secures is satisfied. Id. at 1126. Thus, although the District Court of Appeal affirmed the trial court’s determination that Defendant’s actions were not permitted, it stated that the filing of a hospital lien did not meet the definition of debt collection and corrected the trial court’s basis for its ruling.

Bleich, et al. v. Chicago Title Insurance Co., 117 So.3d 1163 (Fla. Dist. Ct. App. 3d Dist. 2013). Plaintiffs, a group of mortgagors, brought a class action alleging that Defendant uniformly overcharged for title insurance in mortgage refinance transactions. The trial court granted summary judgment in favor of Defendant. On appeal, the Florida District Court of Appeal affirmed. The issue before the District Court of Appeal was whether the trial court correctly interpreted the Florida Administrative Code, which provides conditions under which a homeowner may qualify for a lower premium on title insurance in a refinance transaction. Id. at 1164. The District Court of Appeal observed that the Florida Financial Services Commission had created a rate scheme for title insurance premiums, pursuant to which title insurers and agents were prohibited from knowingly quoting, charging, or collecting a premium different from the rate set by the Commission. Id. Further, the District Court of Appeal noted that the reissuing agent and the reissuing underwriter shall charge the lower premium rate if a previous owner’s policy had been issued insuring the seller or the mortgagor in the current transaction and if both the reissuing agent and the reissuing underwriter retained for their files copies of the prior owner’s policy. Id. Only upon satisfaction of both these requirements did the regulation permit and require the insurer to charge the lower premium. Although Plaintiffs argued that this second provision required the insurer to conduct a reasonable search for prior policies to protect eligible homeowners from being overcharged, the District Court of Appeal stated that there was no reasonable interpretation of this regulation that would mandate the insurer to conduct such a reasonable search. The District Court of Appeal remarked that to so hold would require it to look behind the face of the regulation for a legislative intent, which would exceed the scope of power granted to it in interpreting an unambiguous statute, and also impose a duty on the judiciary to rewrite the regulation that was not a function of the judiciary. Finally, Plaintiffs asserted that the holding would render the reissue rate illusory by permitting the insurer to be willfully blind when presented with a prior policy. The District Court of Appeal, however, found that if this claim proved true, it was more properly addressed on an individual basis based on specifically pled allegations, and that crafting a statute to curb the potential abuse demonstrated that this was the province of the legislature and not the judiciary.

Board Of Trustees Of The City Pension Fund For Firefighters And Police Officers v. Parker, et al., 113 So.3d 64 (Fla. Dist. Ct. App. 2d Dist. 2013). Plaintiff, a retired firefighter for the City of Tampa and a beneficiary of the City Pension Fund for Firefighters and Police Officers in the City of Tampa, brought a class action challenging the Board’s decision not to issue a supplemental benefit, the “13th check,” for fiscal year 2004. The trial court certified Plaintiff as a class representative for other beneficiaries of the 13th check program, and 243 beneficiaries opted-out of the litigation. Thereafter, once the Board determined its decision not to issue the 13th check was erroneous, the parties settled the case, which was approved by the trial court. Id. at *2. The trial court awarded attorneys’ fees with a contingency fee multiplier of 2.0, holding the fees were authorized by fee shifting provisions of §§ 175.061 and 185.05 of the Florida Statutes, and the substantial benefit doctrine. On appeal, the Florida District Court of Appeal reversed, concluding that the common fund doctrine governed the case, and the application of chapters 175 and 185 and the substantial benefit doctrine were erroneous. Pursuant to chapter 31310, Laws of
Florida, as amended by 2001-288, Laws of Florida, ("Special Law"), the City of Tampa was authorized to enter into a contract with its firefighters and police officers for their pensions. Subsequently, the legislature added the 13th check program, a supplemental pension distribution for all retired members who have terminated employment and who were eligible to receive pension benefits for at least 1 year. The provisions of the 13th check program, however, did not apply to all of the pensioners generally. The District Court of Appeal observed that Florida case law authority followed the “American Rule" that attorneys’ fees may only be awarded pursuant to an entitling statute or agreement among the parties, and this case was governed by neither. Id. at 67. Plaintiff had challenged the Board’s payments under the Special Law’s 13th check program, unique to the City of Tampa, and the District Court of Appeal noted that the Special Law was not part of the general statutory construct of chapters 175 and 185, it did not apply state-wide, and it had not often been reproduced in other jurisdictions. Id. The District Court of Appeal opined that Florida Legislature did not intend that a unique program, established solely by a special law specific to one jurisdiction, be controlled by an attorneys’ fee provision found in a regimen governing pension funds state-wide. Accordingly, the Court of Appeal stated that chapters 175 and 185 did not control the award of attorneys’ fees here. The District Court of Appeal considered whether the substantial benefit doctrine or the common fund doctrine applied. The District Court of Appeal opined that Florida Legislature did not intend that a unique program, established solely by a special law specific to one jurisdiction, be controlled by an attorneys’ fee provision found in a regimen governing pension funds state-wide. Accordingly, the Court of Appeal stated that chapters 175 and 185 did not control the award of attorneys’ fees here. The District Court of Appeal considered whether the substantial benefit doctrine or the common fund doctrine applied. The District Court of Appeal noted that the substantial benefit doctrine is more in the nature of fee-shifting between adversaries, and had not been adopted in Florida. The District Court of Appeal likewise declined to do so here. Id. at 68-69. However, the District Court of Appeal found that both conditions for application of the common fund doctrine were met in this case, i.e., the presence of a separate fund, and a pecuniary benefit to a party. Accordingly, the District Court of Appeal held that the common fund doctrine applied. Id. at 69. Finally, the District Court of Appeal affirmed the contingency fee risk multiplier award because the trial court had made its determination after receiving competent, substantial evidence to support the application of the multiplier. Id. at 70.

Florida Department Of Agriculture & Consumer Services v. Lopez-Brignoni, et al., 114 So.3d 1135 (Fla. Dist. Ct. App. 3d Dist. 2013). Plaintiffs, a group of homeowners, brought a class action seeking compensation for the destruction of healthy residential citrus trees by Defendant Florida Department of Agriculture and Consumer Services pursuant to its Citrus Canker Eradication Program ("CCEP"). The trial court certified a class comprised of all owners of citrus trees situated within Miami-Dade County which were not infected with citrus canker and were destroyed under the CCEP on or after January 1, 2000. The Florida District Court of Appeal affirmed the order, finding that the trial court did not abuse its discretion by using replacement cost as the measure of damages in determining whether to certify the class. Defendant then sought en banc hearing, which the District Court of Appeal denied. The dissent, however, opined that this case warranted en banc review. The homeowners’ appraiser was tasked with calculating the value of each citrus tree owned by a class member and destroyed pursuant to the CCEP. The appraiser adopted a method of valuation relying upon height, condition, and location of each tree. The appraiser testified that he had information from Defendant for each tree’s height and condition, but that he had no information regarding any tree’s location. Thus, instead of using the actual information regarding each tree’s location, the appraiser manufactured a generic factor of .75 to adjust for the value attributable to the tree’s location. The dissent observed that in eminent domain litigation, no weight may be accorded to an expert’s opinion which is conclusory in nature and is unsupported by any discernible, factually-based chain of underlying reasoning. Id. at 1139. Thus, the dissent noted that the testimony of the homeowners’ appraiser was defective as a matter of law. Second, the dissent observed that even if the appraiser could explain how he arrived at his generic factor of .75, such a “one-size-fits-all” adjustment could not reasonably be expected to arrive at the actual value of individual trees whose value would vary based upon their different locations according to the appraiser’s own methodology. Id. at 1137-38. The dissent stated that the appraiser’s attempt to substitute actual location information specific to each tree by using a generic adjustment of .75 only guaranteed an inaccurate result. Further, the dissent remarked that using a generic, one-size-fits-all adjustment for location would give rise to inaccurate results because some trees would be overvalued, some trees undervalued, and no tree was likely to receive its actual fair market value. Thus, the dissent opined that this inherent flaw caused the proposed method of valuation to fall short of the objective and
Florida Department of Agriculture & Consumer Services v. Mendez, et al., 2013 Fla. App. LEXIS 16396 (Fla. Dist. Ct. App. 4th Dist. Oct. 16, 2013). Plaintiffs, a group of tree owners, brought a class action seeking compensation as a result of the Department’s destruction of thousands of citrus trees in Palm Beach County during the Citrus Canker Eradication Program (“CCEP”), which identified and destroyed diseased trees, as well as surrounding exposed trees. In Florida Department of Agriculture & Consumer Services v. Mid-Florida Growers, Inc., 521 So.2d 101, 102-03 (Fla. 1988), the Florida Supreme Court held that the state had to compensate owners for the destruction of healthy trees which were not diseased. The Department first adopted a rule, followed by the enactment of § 581.184, Florida Statutes (2003), requiring the destruction of infected trees and all trees within a 1,900-foot radius of an infected tree. The statute specifically provided that the compensation provided in the statute did not limit the amount which may be provided by a trial court order for trees destroyed through the program. Id. at *4. Here, the trial court had opined that the Department had not proved that all non-infected trees within the 1,900-foot radius would become infected with the canker virus, and thus, the destruction of the trees constituted a taking, and exposed trees did not constitute a public nuisance. Thereafter, the jury awarded Plaintiffs compensation based upon an average per-tree value of $210, resulting in a final judgment of $19,222,490.52. On appeal, the Florida District Court of Appeals affirmed the order on liability but reversed the final judgment on compensation. Section 11.066(2), Florida Statutes, provides that when the state exercises its police power, it is presumed to have acted to prevent public harm, and the presumption can be overcome only with clear and convincing evidence. The Department claimed that the trial court failed to apply the presumption, as well as the burden of proof to overcome it. Plaintiffs, however, argued that the statute did not apply because they did not contest the fact that the State was exercising its inherent authority pursuant to the police power in destroying the citrus trees. The District Court of Appeals stated that even if the presumption applied, it did not make the destroyed trees valueless for purposes of a constitutional takings claim, and that only where the property is imminently dangerous may the state take the property without compensation. Thus, the District Court of Appeals ruled that the presumption of mere harm, as opposed to imminent dangerousness, did not render the taking non-compensable. However, the District Court of Appeals concluded that the trial court did err by excluding the scientific evidence regarding the citrus canker, as well as other citrus pests, and their effects, because the scientific evidence regarding the diseases faced by citrus trees was relevant to the evaluation of the various appraisers’ determinations of value. The District Court of Appeals observed that a jury in an eminent domain proceeding should receive all evidence relevant to the value of the property being taken, and that any factor, including public fear, which impacts on the market value of land taken for a public purpose may be considered to explain the basis for an expert’s valuation opinion. Thus, the District Court of Appeals opined that the trial court erred in entering a blanket exclusion of all six scientists and all of their testimony. Accordingly, the District Court of Appeals affirmed the order on liability but reversed the final judgment on compensation. Id. at *22-26.

McKenzie Check Advance of Florida, LLC, et al. v. Betts, 112 So.3d 1176 (Fla. 2013). Plaintiff, a former customer of Defendant, brought a putative class action alleging that Defendant, by and through the actions of certain officers, directors, and employees, engaged in unfair and deceptive trade practices in violation of the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”), the Florida Consumer Finance Act, and the Florida Civil Remedies for Criminal Practices Act (“FCRCPA”). Plaintiff alleged that Defendants, under the deceptive guise of a check cashing service, were in reality loaning money at usurious and exorbitant rates. Id. at 1178. Defendants moved to compel arbitration pursuant to a written contract entered into by Plaintiff that contained an arbitration clause and a class action waiver. The trial court found the class action waiver unenforceable; it held that the waiver was against public policy. Id. at 1180. The Florida District Court of Appeal subsequently upheld the trial court’s decision, concluding the class action waiver prevented consumers from vindicating their statutory rights, and thus violated public policy. Id. Defendant appealed in light of AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740 (2011), issued after the District Court of Appeal’s decision, which held that the FAA preempted state laws invalidating arbitration agreements that require arbitration on an individual basis, and thus required
enforcement of the class action waiver. *Id.* On further appeal, the Florida Supreme Court rejected Plaintiff’s argument that *Concepcion* did not apply and concluded that in light of *Concepcion*, the class action waiver was enforceable. Plaintiff had argued and the Court of Appeal had held that Defendant’s class action waiver violated public policy because consumers would be unable to obtain competent counsel if their small-value claims could not be brought in a class action proceeding, and that such a result would prevent a consumer from vindicating the rights that the FDUTPA and the FCRCPA are designed to create and nurture. *Id.* at 1183. The Supreme Court, however, noted that *Concepcion* had expressly rejected the notion that the state law should not be preempted because the class action waiver would effectively shield Defendant from liability. *Id.* at 1187. The Supreme Court further noted that the evidence presented by Plaintiff, which included the expert testimony of three attorneys demonstrating that she would be unable to obtain competent counsel absent class action and therefore would be unable to vindicate her statutory rights, actually substantiated the public policy arguments rejected in *Concepcion*. *Id.* at 1188. The Supreme Court thus concluded that the FAA preempted invalidating the class action waiver on the basis of the waiver being void as against public policy. It therefore reversed the decision of the Court of Appeal. *Id.*

**Philip Morris USA, Inc., et al. v. Douglas, 110 So.3d 419 (Fla. 2013).** Plaintiff, the personal representative of the Estate of Charlotte M. Douglas, brought an action against Defendants, several tobacco companies, seeking damages on claims based on Mrs. Douglas’ smoking-related death. Mrs. Douglas began smoking in the mid-1960s as a teen, and the complaint alleged that it was her addiction to cigarettes manufactured by Defendants that caused her to develop chronic obstructive pulmonary disease (“COPD”) and lung cancer, which ultimately led to her death in 2008 at the age of 62. The trial court applied the Phase I findings of *R.J. Reynolds Tobacco Co. v. Engle*, 672 So.2d 39 (Fla. Dist. Ct. App. 3d Dist. 1996) (“Engle I”), to establish the defect and conduct of Plaintiff’s strict liability and negligence claims, and the jury awarded Plaintiff damages. *Id.* at 425-26. On appeal, the Florida District Court of Appeal affirmed but certified the question – whether accepting Phase-I findings in *Engle* violated Defendants’ due process rights – to the Florida Supreme Court. *Id.* at 427. The Florida Supreme Court also rejected Defendants’ arguments and affirmed the trial court’s finding. *Engle I* was a class action brought by smokers and their survivors against cigarette companies seeking damages caused by smoking-related injuries. The trial court developed a three-phase trial plan, and in Phase I, the jury was to decide issues common to the entire class, including general causation, Defendants’ common liability to the class members for the conduct alleged in the complaint, and the class’ entitlement to punitive damages. If the jury ruled against Defendants at Phase I, the same jury would then decide individual causation and damages for the class representatives and the amount of punitive damages to be awarded to the entire class in Phase II. *Id.* at 423. Defendants argued that because the jury in *Engle* did not adopt a common theory of liability for why their cigarettes were defective or for why their conduct was tortious, the Phase I findings were too general to be binding in subsequent individual actions. *Id.* at 427. Instead, Defendants argued that the Phase I findings at most established that some of their cigarettes were defective for some unspecified reason and that they engaged in some unspecified tortious conduct. The Supreme Court noted that in *Engle v. Liggett Group, Inc.*, 945 So.2d 1246 (Fla. 2006), it had held that the Phase I trial process was not an abuse of the trial court’s discretion, and that certain common liability findings could stand. *Id.* at 427-28. Because those findings went to Defendants’ underlying conduct, which was common to all class members and would not change from case to case, the Supreme Court had found that those approved Phase I common core findings would have *res judicata* effect in class members’ individual damages actions. Accordingly, the Supreme Court rejected Defendants’ argument that the Phase I findings were too general to establish any elements of Plaintiff’s claims. In addition, the Supreme Court found that the class action trial plan put Defendants in *Engle* on notice that if the Phase I jury found against them, the conduct elements of the class’ claims would be established, leaving only Plaintiff-specific issues for individual trials. The Supreme Court remarked that its holding allowing the common liability findings to stand would serve no purpose and would in fact be obliterated if Defendants in *Engle* were permitted to re-litigate matters pertaining to their conduct. *Id.* at 429. The Supreme Court added that Defendants had the same procedural safeguards against the arbitrary deprivation of property as were present in any other case, namely that each Plaintiff must prove *prima facie* case against each Defendant. The Supreme Court concluded that merely because certain elements of the *prima facie* case were established by the Phase I
findings did not violate Defendants’ due process rights because they were parties to and had notice and opportunity to be heard in the class action where those elements were decided.

**Philip Morris USA, Inc. v. Hallgren, et al., 2013 Fla. App. LEXIS 16640 (Fla. Dist. Ct. App. 2d Dist. Oct. 18, 2013).** Plaintiff, a personal representative of the estate of Claire Hallgren, was a class member in *Engle v. Liggett Group, Inc.*, 945 So.2d 1246 (Fla. 2006), which was filed against Philip Morris USA, Inc., and R.J. Reynolds Tobacco Company (collectively the “Tobacco Companies”). Mrs. Hallgren died from lung cancer following her 60-year use of tobacco products manufactured by the Tobacco Companies. Plaintiff asserted claims of strict liability, fraudulent concealment, conspiracy to commit fraudulent concealment, and negligence. In *Engle*, the Florida Supreme Court decertified a class action brought against several cigarette manufacturers, and provided a one-year period in which former class members could initiate individual actions against the Tobacco Defendants. Further, the Supreme Court provided that several factual findings common to all class members would be given *res judicata* effect in those individual actions. In Phase I, the jury found that Mrs. Hallgren was a member of the *Engle* class and found in favor of Plaintiff on all counts. The trial court reduced the compensatory damages award to about $1 million based on Mrs. Hallgren’s comparative fault, and opined that Plaintiff was also entitled to punitive damages. On appeal, the Florida District Court of Appeals affirmed. First, the Tobacco Companies argued that the trial court erred by denying their motion for judgment notwithstanding the verdict on Plaintiff’s claims for fraudulent concealment, and conspiracy to commit fraudulent concealment because those claims were barred by the statute of repose. The District Court of Appeals noted that the statute of repose begins to run on a claim for fraudulent concealment based on an on-going pattern of concealment when the last act of concealment on which Plaintiff relied occurs, and as to the conspiracy claim, the critical date for statute of repose purposes should be the date of the last act done in furtherance of the conspiracy. *Id.* at *5-6*. Here, the record contained evidence of not only the Tobacco Companies’ misleading advertising campaigns and the false controversy perpetrated by the tobacco industry that continued until the late 1990s, but also of Mrs. Hallgren’s direct reliance on that misleading advertising. Further, the District Court of Appeals observed that the element of reliance for fraudulent concealment may be inferred from evidence of the pervasive and misleading advertising campaigns perpetuated by the Tobacco Companies. *Id.* at *6*. Accordingly, the District Court of Appeals stated that the theories of liability for both the fraudulent concealment and conspiracy claims were inextricably intertwined and affirmatively demonstrated that Plaintiff’s claims were not barred by the statute of repose. Second, the Tobacco Companies contended that if Plaintiff was to take advantage of the *res judicata* effect of the *Engle* Phase I findings, then he was proscribed from seeking punitive damages on his negligence and strict liability claims because the *Engle* Plaintiffs did not seek punitive damages under those theories of liability. The District Court of Appeals remarked that although the *Engle* class was benefited by the *res judicata* effect of the Phase I findings, such benefit did not preclude an *Engle* progeny Plaintiff from seeking a remedy barred as untimely by the *Engle* trial court for mere procedural deficiencies. Further, the District Court of Appeals observed that the Florida Supreme Court had held that class members could choose to initiate individual damages actions and the Phase I common core findings would have *res judicata* effect in those trials, thereby indicating that the rejected findings would not have the same *res judicata* effect as is generally the case when litigation is declared *res judicata*. *Id.* at *10-11*. Further, Plaintiff had also proved through direct evidence that the Tobacco Companies were liable for punitive damages. Although Plaintiff asserted identical claims to those asserted in *Engle*, the extent of the remedy sought was different. The District Court of Appeals, however, remarked that adding a claim for punitive damages does not materially alter the claims for negligence and strict liability. The Tobacco Companies argued that permitting Plaintiff to add the remedy of punitive damages to his claims for negligence and strict liability resulted in substantial prejudice because he had benefited from the tolling of his claims during the *Engle* litigation. The District Court of Appeals remarked that because Plaintiff’s substantive claims were timely under the *Engle* mandate, so too was the addition of his remedy for punitive damages. The District Court of Appeals also stated that Plaintiff was entitled to assert a claim for punitive damages on his claims for negligence and strict liability because he was in the same position class members would have been in had they filed a complaint identical to the *Engle* class action complaint on the same date the original complaint was filed. *Id.* at *17-18.*
**R.J. Reynolds Tobacco Co. v. Ciccone, 123 So.3d 604 (Fla. Dist. Ct. App. 4th Dist. 2013).** Plaintiff, the widow of a lifelong smoker, brought a wrongful death action against Defendant asserting claims for strict liability, breach of express warranty, breach of implied warranty, civil conspiracy to fraudulently conceal, fraudulent concealment, gross negligence, and negligence. Following the decision of *Engle v. Liggett Group Inc.*, 945 So.2d 1246 (Fla. 2006), Plaintiff amended her complaint to reflect her action as an *Engle* progeny case. “*Engle* progeny” referred to cases stemming from a class action lawsuit originally filed against cigarette makers in 1994. The class was decertified after a $145 billion punitive damages verdict, but the Florida Supreme Court had ruled that the individual cases could proceed using liability findings from the class trial as preclusively established. *Id.* at 609. The cut-off date for membership in the *Engle* class was November 21, 1996. *Id.* at 610. Plaintiff alleged that her husband developed peripheral vascular disease (“PVD”), a smoking-related illness that resulted in the thinning of arteries and lack of circulation in the extremities. In order to claim membership in the *Engle* class, Plaintiff had to show that her husband’s PVD manifested itself before 1996, even though he was not diagnosed with it until 1999. Plaintiff succeeded on her claims at the trial court. On Defendant’s appeal, the Florida District Court of Appeal upheld a jury award of compensatory damages, but vacated the $50,000 punitive damages award. The District Court of Appeal agreed that Plaintiff was an *Engle* class member. Defendant argued that the trial court abused its discretion by erroneously instructing the jury that the deceased’s manifestation of PVD occurred when he had “symptoms” of the disease, instead of when the deceased was on notice of the causal connection between his smoking and his PVD. *Id.* at 609. The District Court of Appeal scrutinized the *Engle* cases and found that the key point in determining *Engle* class membership was pinpointing when a Plaintiff began “suffering” from the smoking related illness or when the illness “manifested.” *Id.* at 615. The District Court of Appeal stated that the Florida Supreme Court’s use of the term “manifested” in *Engle* signified an event that was neither dependent on the skill of the treating physician nor the sophistication of the patient, and it was enough that the decedent suffered a medical condition that first became symptomatic before November 21, 1996. *Id.* at 614. To establish when the deceased began “suffering” from PVD, Plaintiff presented the testimony of two expert witnesses who agreed that the first indication of the deceased’s PVD arose in 1991 when his lumbar spine MRI showed aortic sclerosis, a common early sign of PVD. *Id.* at 616. The District Court of Appeal therefore held that the trial court did not err in finding that Plaintiff was an *Engle* class member. The jury had awarded Plaintiff $3.2 million in compensatory damages, but the District Court of Appeal reduced the verdict to $960,000 to reflect the deceased’s share of fault. *Id.* at 608. The District Court of Appeal also found that the trial court erred in allowing Plaintiff to recover punitive damages under the theory of gross negligence when such cause of action was not pled in the original *Engle* action. *Id.* at 616. The *Engle* class pled recovery for punitive damages only on its intentional tort claims. *Id.* at 617. Accordingly, the District Court of Appeal affirmed the compensatory damages award and remanded the action for the entry of the final judgment that eliminated the award of punitive damages.

**R.J. Reynolds Tobacco Co. v. Buonomo, 2013 Fla. App. LEXIS 19638 (Fla. Dist. Ct. App. 4th Dist. Dec. 11, 2013).** Matthew Buonomo, a smoker, had brought an action against Defendant alleging strict liability, negligence, conspiracy, and fraudulent concealment. After Buonomo died due to smoking-related medical conditions, his wife, as representative of his estate, was substituted as Plaintiff. The court had found that Defendant’s negligence and intentional misconduct were the legal cause of Buonomo’s death, and that Buonomo had reasonably relied upon Defendant’s concealment or omission of material information concerning the health effects and addictive nature of cigarettes. The court had apportioned 77.5% of the fault to Defendant and 22.5% to Buonomo, and awarded $405,000 for medical and funeral expenses, $4.83 million for Plaintiff’s past and future pain and suffering and her loss of companionship, and $25 million in punitive damages. *Id.* at *1-2. Subsequently, on Defendant’s motions for remittitur, the trial court reduced the compensatory damages award by the 22.5% fault the jury attributed to Buonomo and reduced the punitive damages to $15,705,000, *i.e.*, three times the amount of compensatory damages awarded by the jury. On appeal, the Florida District Court of Appeal affirmed in part. Defendant sought to avoid liability for the fraudulent concealment and conspiracy to commit fraudulent concealment claims by asserting a statute of repose defense. Defendant asserted that Plaintiff’s claims were barred as Plaintiff could not demonstrate detrimental reliance upon any statements made by Defendant 12 years prior to the
The trial court had struck this defense prior to the trial. The District Court of Appeal, however, stated that the trial court erred in striking the defense because statute of repose is an individualized defense that was not foreclosed by Engle and that must be decided on a case-by-case basis. Id. at *5-6. The District Court of Appeal remarked that because fraud could not be committed absent detrimental reliance by Plaintiff, whether a fraudulent act was committed within 12 years of the filing of an action could only be determined based on the timing of a particular Plaintiff's alleged reliance. The District Court of Appeal opined that while the record contained evidence that could support a finding of reliance, the trial court erred in precluding a jury determination on the issue and depriving Defendant of the defense. Id. at *7. Further, regarding the reduction of the punitive damages, the District Court of Appeal noted that the trial court reduced the punitive damages believing that § 768.73(1)(a)1 of the Florida Statutes required it to do so. The District Court of Appeal, however, stated that the § 768.73 did not have a sub-section (1)(a)1 until after the 1999 amendments and it was the 1995 version of the statute that governed the instant case, under which the trial court was free to exceed the three-times-compensatory cap on punitive damages if Plaintiff demonstrated by clear and convincing evidence that the award was not excessive in light of the facts and circumstances which were presented to the trier of fact. The District Court of Appeal found that neither $25 million in punitive damages initially awarded by the jury nor the reduced amount of $15,705,000 was so excessive as to violate due process. Id. at *9-10. Thus, the District Court of Appeal remanded the matter to the trial court to exercise the discretion afforded it by the governing 1995 version of § 768.73.3 and accordingly affirmed the order in part and reversed in part.

Scimone, et al. v. Carnival Corp., Case No. 12-CA-26072 (Fla. Miami-Dade Ct. July 19, 2013). After a shipwreck, Plaintiffs, a group of passengers, brought a class action alleging negligence, professional negligence on the part of the ship's architect, and intentional torts. The ship traveled under an Italian flag, boasted an Italian crew, and wrecked in Italian waters just off of the Italian island of Giglio. Defendants moved to dismiss for forum non conveniens. Seventeen Plaintiffs were U.S. residents, two of whom were Florida residents. The Court noted that Italy was an adequate and available alternative forum as Defendants were amenable to process there and Italian courts could process personal injury claims. Defendants also argued that if Italian courts refused jurisdiction, Plaintiffs' claims could be reinstated in the United States through return jurisdiction. The Court stated that in weighing the private interest factors, it must consider adequate access to evidence and relevant sites, adequate access to witnesses, adequate enforcement of judgments, and the practicalities and expenses associated with litigation. Defendants argued that Italy offered superior access to evidence and relevant sites. Moreover, the problem of physical access to the site was eliminated by the existence of photographic and documentary evidence readily available and translated into English. In addition, Defendants also pointed out the difficulty and expense of flying key witnesses from Italy to the United States, and the inability of the Court to compel the attendance of non-party witnesses. The Court stated that Plaintiffs would face the same problem in supporting their claims in an Italian court because Defendants had its place of business in Florida and part of the Defendants' conduct arose in Florida. Further, the Court observed that enforceability of the judgment was equally as problematic for a Florida or Italian forum because of the location of Defendants in the United States, England, and Italy. The Court observed that the public interest also did not weigh in favor of dismissal of Florida and U.S. Plaintiffs' claims, but did regarding the claims of the non-U.S. Plaintiffs. The Court stated that it would not be overly burdened because the relevant evidence had been made available by Italian authorities and had been translated into English. Finally, regarding Plaintiffs' ability to reinstate their claims in Italy, the Court stated that removing the case to Italy for the 17 American Plaintiffs would create the burden of transporting and translating all the evidence available in the U.S. for use in an Italian court. Thus, the Court found that the private and public interest factors weighed in favor of Florida and the U.S. Plaintiffs' choice of a Florida forum. Accordingly, the Court denied Defendants' motion as to the 17 Florida and U.S. Plaintiffs and granted it as to the 35 international Plaintiffs.

granted class certification. On appeal, the Florida Court of Appeals relied on Law Offices of David J. Stern, P.A. v. Banner, 50 So. 3d 1221 (Fla. Dist. Ct. App. 4th Dist. 2010), which it found to be indistinguishable from this case, and affirmed the order granting certification. In Banner, Plaintiffs, a group of homeowners in default of their residential mortgages, brought a class action alleging that Defendants’ transmission of reinstatement letters to Plaintiff demanding payment of fees and costs were unreasonable, excessive, or not currently due or owing. Plaintiffs in Banner argued that each class member defaulted on their residential mortgage and requested reinstatement, and that Defendants acted similarly intervener each class member. Plaintiffs also asserted that both the factual and legal issues arising were similarly identical to each class member. Banner held that commonality and typicality requirements had been met under of the Florida Rules of Civil Procedure 1.220 (a), and that injunctive and declaratory relief that Plaintiffs sought met the Rule 1.220 (b)(2) requirements. Further, regarding Rule 1.220 (b)(3) requirement, the District Court of Appeal had observed that common questions of law and fact predominated over any individual issues. It reasoned that the nature of the case and the elements of Plaintiffs’ claims primarily involved issues focusing on Defendants’ acts and not those of the class members. Accordingly, Banner had certified the class. Base on Banner, here the District Court of Appeal dismissed Plaintiffs’ argument that the class representative’s claim was atypical because he did not pay any of the reinstatement charges. Although, the District Court of Appeal refrained from giving its opinion on whether Plaintiffs’ complaint stated a cause of action for a FDUTPA claim, it noted previous decision in which it had upheld a trial court’s order quashing a subpoena seeking production of documents related to a law firm’s representation of lending institutions in foreclosure cases. In that case, the District Court of Appeal had observed that the alleged conduct of the law firm did not fall within the rubric of ‘trade or commerce’ as required for civil investigative subpoenas under FDUTPA. Id. at 490-91. The District Court of Appeal held that any future determination on whether the FDUTPA claim was viable would not affect the trial court’s determination as to class certification of the FCCPA claim, and accordingly affirmed the order of class certification.

(v) Illinois


Plaintiff, a property owner, brought a class action alleging that the ordinance creating Special Service Area 45 (“SSA 45”) caused real estate taxes to skyrocket, and that SSA 45 was duplicative of the services the City of Chicago taxed for, and should be providing to, its residents. Subsequently, on the City’s motion, the trial court transferred the case from the Chancery Division to the County Division. About the same time, all three Defendants also filed combined motions to dismiss Plaintiff’s amended complaint. The trial court granted Defendants’ motions to dismiss pursuant to § 2-619(a)(5), holding that the case was essentially an untimely filed tax objection, and that Plaintiff could have obtained relief under the Property Tax Code by way of a timely challenge to the validity of SSA 45. On appeal, the Illinois Appellate Court reversed the order. Plaintiff asserted that his challenge to the SSA 45 ordinance was properly brought as a declaratory judgment action because such a challenge fell under the “unauthorized by law” exception to the general rule requiring a taxpayer to seek the relief provided by statute. Id. at *9. The Appellate Court noted that Plaintiff had initially filed a two-count class action complaint in the Chancery Division wherein he sought to void the ordinance creating SSA 45, and raised a tax objection to the 2009 taxes paid by owners of record in SSA 45. While the City’s motion to transfer the case out of the Chancery Division was pending, Plaintiff filed an amended complaint removing the tax objection count. The trial court transferred the case and eventually dismissed Plaintiff’s amended complaint. Although the Appellate Court stated that the trial court acted within its discretion when it transferred the action, it found that the trial court erred in applying the time limitations of Article 23 to bar Plaintiff’s claim. The Appellate Court noted that Article 23 of the Code set the procedures for filing and adjudicating tax objections, and § 23-5 provides that if any person desires to object to all or any part of a property tax for any year, for any reason other than that the property is exempt from taxation, he shall pay all of the tax due within 60 days from the first penalty date of the final installment of taxes for that year. Id. at *12. Further, the Appellate Court observed that after making such payment, a person may then file a tax objection complaint in the trial court of the county in which the subject property is located within 165 days after the first penalty date of the final installment of taxes for the year in question. Id. at *12-13. Accordingly, the Appellate Court opined that Article 23 applies when a taxpayer is seeking to challenge a tax, assessment, or levy. Id. at *13. Here, Plaintiff did not object to any
tax, assessment, or levy in his amended complaint; rather he specifically omitted a tax objection claim from his amended complaint and solely challenged the ordinance creating SSA 45. The relief he sought was not a refund of taxes, but a declaratory judgment voiding the ordinance for SSA 45. Thus, the Appellate Court stated that the trial court erred when it interpreted Plaintiff’s amended complaint as a tax objection. The Appellate Court further observed that there was no indication that a declaratory judgment action was an improper vehicle for challenging the validity of a special service area ordinance, and stated that it did not note a single case law authority holding that a challenge to an SSA ordinance must be brought as a tax objection. Thus, the Appellate Court also rejected the trial court’s ruling that Plaintiff’s challenge to the SSA 45 ordinance could only be brought under the Tax Code. Accordingly, the Appellate Court reversed the order of the trial court dismissing Plaintiff’s amended complaint, and remanded for further proceedings.

**Nava, et al. v. Sears, Roebuck & Co., 995 N.E.2d 303 (Ill. App. 1st Dist. 2013).** Plaintiff filed a class action under the Illinois Consumer Protection and Deceptive Business Practices Act (and later elected to proceed in his individual capacity), alleging that Defendant, a seller of consumer goods, had illegally collected sales tax on the full amount of his converter box purchase that included the amount that was subsidized by a federal consumer voucher program. Plaintiff sought damages for violations of the Act, recovery under other legal theories, and attorneys’ fees and costs. The parties filed cross-motions for summary judgment. The trial court denied Plaintiff’s motion and granted Defendant’s motion for summary judgment. Upon Plaintiff’s appeal, the Illinois Appellate Court reversed the order. Under the federal program, consumers were provided vouchers that retailers could submit to the federal government for reimbursement. Plaintiff alleged that Defendant assessed sales tax on the full gross purchase price of the boxes despite a ruling from the Illinois Department of Revenue stating that the federally subsidized amount was not subject to state sales tax. Defendant argued that Illinois law mandated the collection of the taxes at issue. The Illinois Appellate Court found that the sales taxation scheme was comprised of two interlocking statutes, including the Retailers Occupation Tax Act (“ROTA”), which imposes a tax on persons engaged in the business of selling tangible personal property at retail, and the Use Tax Act, which imposes a tax on the privilege of using tangible personal property, purchased at retail, in the state. *Id.* at 308. The Appellate Court explained that under this scheme, although a single sale and purchase at retail of tangible personal property triggered the imposition of two taxes, one on the retailer and one on the purchaser, only one tax was remitted to the Department, and the single payment satisfied both taxes. A retailer’s tax liability both under the ROTA and the Use Tax Act was computed as a percentage of its gross receipts, or selling price, and the tax rates under those statutes were set at an identical 6.25%. Under 35 ILCS 120/2–5(11), the ROTA tax did not apply to government purchasers, and under 35 ILCS 105/3–5(4), the Use Tax Act did not apply to government purchasers. *Id.* at 309. The Appellate Court noted that here, the purchase price of the digital converter box was satisfied in part by a voucher funded by the federal government. The Appellate Court looked at the plain and ordinary meaning of the relevant regulation regarding taxation of coupon or voucher purchases. The regulation provides that, in the case where a purchaser uses a coupon or voucher, ROTA tax liability applies to both the customer’s payment and to the coupon reimbursement amount. Accordingly, in the typical case where the reimbursing entity is a manufacturer or other taxable entity, this regulation would dictate that the ROTA tax be imposed on the full gross purchase price. *Id.* at 310. Here, however, the reimbursing entity was the federal government, which was exempt from the ROTA tax. Thus, the ROTA tax could not be applied to the federal government voucher. Likewise, the Use Tax Act could not be applied to the federal government voucher. In short, because the federal government was exempt from sales tax, its voucher reimbursement could not be taxed as would the typical manufacturer’s coupon, and, indeed, could not be taxed at all. *Id.* Accordingly, the Appellate Court agreed with Plaintiff that Defendant was not statutorily authorized to collect sales tax on the full gross price of the converter boxes. The Appellate Court then analyzed whether Plaintiff created a genuine issue of material fact as to each of the elements of his claim. The Appellate Court stated that if, as Plaintiff alleged, Defendant charged a tax neither it nor Plaintiff was bound to pay, it could be found to have engaged in a deceptive act. There was also substantial evidence that Defendant intended that Plaintiff rely on the deception, as Plaintiff’s paying the tax was a natural and predictable consequence of its asking Plaintiff to do so. There was no dispute that Defendant’s actions related to trade or commerce. The record established that Plaintiff suffered actual damage in the form of his excessive sales tax payment. In
analyzing whether Plaintiff’s damage had been caused by deception, the Appellate Court noted Plaintiff’s testimony that at the time he purchased the converter box from Defendant, he was unaware that he was being overcharged. The Appellate Court stated that Plaintiff’s testimony created at least a genuine issue of fact regarding whether Defendant’s actions caused his injury. The Appellate Court observed that the trial court may have been correct that Defendant’s failure to seek a refund caused his injury, but that revelation did not mean that Defendant’s actions also were not a cause of the injury. Id. at 311. The Appellate Court therefore concluded that Plaintiff had created at least a genuine issue of material fact as to each of the elements of his claim under the Act. Finally, the Appellate Court explained that Defendant could not invoke the voluntary payment doctrine to defeat Plaintiff’s claim because although the doctrine barred suits against retailers for tax refunds, it did not apply where the payment was procured by deception or fraud.

**Standard Mutual Insurance Co. v. Lay, et al., 989 N.E.2d 591 (Ill. 2013).** Locklear Electric, Inc. ("Locklear") brought a class action against Ted Lay Real Estate Agency ("Lay"), a small real estate agency, alleging that it had received an unsolicited fax from Lay in violation of the Telephone Consumer Protection Act ("TCPA"). Lay’s fax was one of approximately 3,500 faxes that Locklear alleged were sent without the recipients’ prior express consent. Id. at 594. Locklear sought approximately $1.75 million in damages, or $500 per violation. Id. Lay settled with Locklear by allowing judgment to be entered against Lay for $1,737,500 plus costs with the caveat that Locklear would seek satisfaction of the judgment only from Lay’s insurance proceeds. Id. Locklear agreed not to execute against Lay’s non-insurance assets even if a determination was made that Lay’s insurance policy did not cover the damages. Id. Lay’s insurer, Standard Mutual Insurance Co. ("Standard"), sought relief in Illinois state court, seeking a declaration that, among other things, the TCPA damages were punitive in nature and, therefore, uninsurable under Illinois law as a matter of public policy. Id. at 595. The trial court entered summary judgment in favor of Standard and the Illinois Appellate Court affirmed. Id. at 597. The Illinois Appellate Court ruled that the TCPA was a penal statute because actual damages incurred under the TCPA are small, often amounting only to the cost of wasted paper and toner, as well as the nuisance associated with receiving an unsolicited fax or telephone call. Id. at 599-600. Given the disparity between actual and statutory damages, the Appellate Court ruled that the $500 per violation damages provision must be understood as “a predetermined amount of damages [that] is clearly not meant to compensate for any actual harm.” Id. at 599. Because it found that the statute was penal in nature, the Appellate Court ruled that the $500 statutory damages were punitive and therefore not insurable in Illinois as a matter of public policy. Id. at 600-01. The Illinois Supreme Court granted Lay’s petition for leave to appeal and reversed the Appellate Court’s decision. Examining the legislative intent behind the TCPA, the Supreme Court ruled that Congress primarily intended that the statutory damages provision compensate individuals who received unwanted faxes and telephonic communications. Id. The Supreme Court reasoned that the “harm[s] identified by Congress, e.g., loss of paper and ink, annoyance and inconvenience, while small in reference to individual violations of the TCPA are nevertheless compensable and are represented by a liquidated sum of $500 per violation.” Id. at 600. Further, the Supreme Court found that the $500 per violation statutory damages provision was intended by Congress to incentivize private parties to enforce the statute. Id. The possible imposition of treble damages under the TCPA did not make the statute penal in nature because it was “intended as a supplemental aid to enforcement rather than as a punitive measure.” Id. Accordingly, the Supreme Court held that “[w]hether we view the $500 statutory award as a liquidated sum for actual harm, or as an incentive for aggrieved parties to enforce the statute, or both, the $500 fixed amount clearly serves more than punitive or deterrent goals.” Id. at *11. Because the TCPA was not penal in nature, the Supreme Court ruled that the settlement for $500 per violation entered by Lay was not uninsurable as a matter of Illinois law.

**Uesco Industries, Inc. v. Poolman Of Wisconsin, Inc., 993 N.E.2d 97 (Ill. App. Ct. 1st Dist. 2013).** Plaintiff, a manufacturing and distributing company, brought a putative class action alleging that Defendant violated the Telephone Consumer Protection Act (the “Act”) by sending unsolicited fax advertisements. Plaintiff alleged that by sending Plaintiffs and others an unsolicited fax advertisement of swimming pool and hot tub pumps and parts, Defendant improperly and unlawfully converted the fax machines, toner, paper, and employee time to Defendant’s own use. Plaintiff moved for class certification, which the trial court
granted. Defendant appealed. The Illinois Appellate Court reversed the trial court’s grant of class certification. The Appellate Court found that Plaintiff failed to state a valid claim against Defendant. Defendant admitted that it authorized B2B, a third-party fax broadcaster, to send fax advertisements for its first advertising campaign in March 2006, but only to small electric motor repair and service companies. Defendant asserted that aside from directing B2B to advertise solely to small electric motor repair and service companies and approving the advertising design, it was not involved with the advertising campaign, did not create or see the list of fax recipients, and never received confirmation that the faxes were sent. Defendant thus argued that it could not be held liable under the Act because it did not authorize or instruct B2B to send the fax advertisement to Plaintiff and because the facts established that B2B exceeded its authority. Plaintiff argued that once an agency relationship was established, the Act conferred strict liability for all the faxes ultimately sent. Id. at 113. Defendant, however, asserted that the Act did not abrogate traditional rules of agency, and therefore, the Act makes an entity liable only for faxes sent on the entity’s behalf that were within the agent’s authority. Id. Defendant presented compelling evidence of its intention to limit the scope of B2B’s authority and the record contained handwritten instructions explicitly instructing B2B to only market to small electric motor repair plus service companies. The Appellate Court found that B2B exceeded the scope of its authority when it sent fax advertisements to persons or companies other than those that service and repair small electric motors, and that liability could not be imputed to Defendant for any fax advertisement received by those outside the authorized scope. Id. at 114. The Appellate Court did not determine whether Defendant was liable for the small number of faxes sent on its behalf to persons or companies that service and repair small electric motors as part of the March 2006 fax advertising campaign because Plaintiff was not the adequate representative for the class of recipients of the March 2006 faxes. Id. Because Plaintiff was not a company that serviced or repaired small electric motors, the Appellate Court held that he was outside the scope of fax recipients authorized by Defendant for the March 2006 advertising campaign. Id. The Appellate Court further found that Plaintiff was not an appropriate class representative even for those who received unsolicited faxes from Defendant through its second advertising campaign in December 2006 because Plaintiff received only one fax advertisement from Defendant in March 2006. Id. The Appellate Court concluded that the trial court abused its discretion by granting Plaintiff’s motion for class certification, and accordingly, reversed and remanded.

(vi) Kansas

Coulter, et al. v. Anadarko Petroleum Corp., 292 P.3d 289 (Kan. 2013). Plaintiffs, a group of royalty owners who were entitled to receive a share of the production of natural gas in Hugoton gas field in Kansas, brought a class action claiming that Defendant and its affiliates had underpaid royalties required by Plaintiffs’ respective oil and gas leases. The petition was originally filed in 1998. Subsequently, the parties reached a settlement for $33 million in damages; a release of all claims against Defendant; and a policy dictating how Defendant would calculate and pay future royalties. Id. at 296. Of the 6,000 class members, only one, Stan Boles, objected to the settlement agreement. Boles asserted that class counsel inadequately represented class members by failing to investigate certain claims when the release of liability in the settlement applied to all claims, including those which were not fully investigated. Specifically, Boles argued counsel’s failure to investigate “non-gathering claims,” lead to an inadequate settlement. Id. at 297. Ultimately, the trial court rejected Boles’ arguments, and approved the settlement. Boles appealed, and the Supreme Court of Kansas affirmed the order approving the settlement. Boles argued that any challenge by a class member to class certification required heightened attention and rigorous analysis by the trial court. Id. at 300. The Supreme Court rejected this argument, finding that class certification was subject to adversarial testing during litigation, which provided sufficient scrutiny. Id. In addition, the Supreme Court remarked that Boles failed to explain how class certification had an effect on his claim that counsel should have investigated non-gathering claims for either the original or the expanded class members. Id. at 301. Furthermore, the Supreme Court noted that Boles’ claim was addressed in Littell v. Oxy U.S.A., Inc., No. 100,349. The Supreme Court remarked that although the intervener voluntarily dismissed the case, the arguments about non-gathering claims were nearly identical to the case at bar. Id. at 302. One of the Littell class attorneys testified that the release of the non-gathering claims enabled the class to get a better settlement on the gathering claims. In addition, the Supreme Court found that the discovery in this action was extensive, spanning at least two years, and the class counsel expended considerable work in
identifying and investigating potential claims. Id. Accordingly, the Supreme Court agreed with the trial court’s finding that the class counsel adequately represented the class members. Id. Although Boles’ expert opined that the class should have settled the gathering claims for $40 million instead of $33 million, the Supreme Court noted that Boles did not appeal the trial court’s approval of the settlement agreement for fully litigated gathering claims, but only the non-litigated claims. Id. at 304. Boles also contended that there was no adverse litigation between the class and Defendant regarding the non-gathering claims because they were not fully litigated during the bench trial. Id. at 305. Both parties cited Sternberger v. American Home Products, 257 Kan. 315 (1995), which concerned the allocation between lessors and lessees of post-production expenses for natural gas wells. The Supreme Court found that this case was a textbook example of an identical factual predicate, and showed the efficacy of the Sternberger rule. The Supreme Court then applied the four enumerated factors elucidated in Jones v. Nuclear Pharmacy, Inc., 741 F.2d 322, 324 (10th Cir. 1984), including: (i) whether the proposed settlement was fairly and honestly negotiated; (ii) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (iii) whether the value of an immediate recovery outweighed the mere possibility of future relief after protracted and expensive litigation; and (iv) the judgment of the parties that the settlement was fair and reasonable. Id. at 308. Applying these factors, the Supreme Court found that the settlement was fair and reasonable, and dismissed Boles’ appeal.

(vii) Kentucky

Abbot, et al. v. Chesley, 2013 Ky. LEXIS 367 (Ky. Aug. 29, 2013). Plaintiffs who litigated and settled their claims in Guard v. American Home Products, also known as Moore v. American Home Products, brought a class action alleging that Defendants, their former attorneys, breached their fiduciary duties by wrongfully retaining or by improperly disbursing a substantial portion of the Guard settlement money that should have gone to Plaintiffs. Moore was brought by Kentucky residents who had taken the diet drug known as Fen-Phen after discovering that the drug was linked to heart damage and other dangerous side-effects. When the Guard class was certified, Defendant Stanley M. Chesley had only a few Fen-Phen clients, but he had experience in the settlement of Fen-Phen proceedings, having served on the management committee of the national Fen-Phen class action litigation. Because of Chesley’s experience and national reputation, Defendants Cunningham, Gallion, and Mills (“CGM”) agreed to his participation in the Guard case. Chesley entered into a written agreement, wherein it was agreed that if a negotiated settlement was achieved, Chesley would take a 21% share of the combined attorneys’ fees, and CGM would split the 74% of the total fee among themselves and their associates, and an attorney from Cincinnati named Richard Lawrence would take 5%. Eventually, American Home agreed to pay an aggregate of $200 million to settle the claims of all of the Guard claimants. Contrary to the terms of the settlement agreement, none of the Plaintiffs were informed of the terms of the settlement, and they were also not told that their attorneys were determining how to apportion the settlement fund. Instead, each Plaintiff was falsely told that American Home had made a specific, individualized offer to settle, and ultimately distributed $73.3 million with no order of approval from the Court. It was eventually discovered that the attorneys’ fees retained by Defendants far exceeded the 30% to 33% allowable under the contingent fee agreements. Accordingly, Plaintiffs filed suit demanding an account of the Guard settlement money. Later, the trial court granted Plaintiffs’ motion for partial summary judgment, holding that CGM breached their fiduciary duty, and later held them jointly and severally liable and issued judgment in the sum of $42 million, plus interest at 8%. On appeal, the Kentucky Court of Appeals reversed, and Plaintiffs appealed to the Supreme Court of Kentucky, which affirmed the order in part. At the very outset, the Supreme Court of Kentucky agreed with the Court of Appeals’ conclusion that denial of the motion for summary judgment against Chesley was interlocutory and not appealable, and therefore, affirmed in that respect. The Supreme Court noted that the trial court had awarded baseline damages, finding CGM jointly and severally liable; however, as the Court of Appeals had reversed the summary judgment, it had not addressed this issue. On the question of joint and several liability, CGM argued that it was barred in this case by KRS § 411.182, which requires that in tort actions, fault must be apportioned among the individual parties at fault, and that damages must be allocated severally among the tortfeasors. The Supreme Court noted that Plaintiffs’ claim was essentially contractual, based upon CGM’s breach of attorney-client contracts. The Supreme Court found that § 411.182 did not apply to breach of contract cases. Id. at *25.
Second, by the manner in which they combined their efforts in the Fen-Phen litigation, CGM engaged in a joint enterprise for which joint and several liability was properly assessed pursuant to § 362.220. A joint enterprise is an informal partnership, existing for a limited purpose and duration. The Supreme Court noted that CGM did not simply agree to collaborate for mutual support in their respective lawsuits, but entered into a written agreement with each other for the common purpose of litigating the Fen-Phen claims of all of their clients. In effect, they formed an ad hoc partnership for commercial purposes that precisely fit the definition of a joint enterprise. Therefore, the Supreme Court observed that their liability was governed by partnership principles. Id. at *28. The Supreme Court found that § 362.220 provided that all partners shall be liable jointly and severally for everything chargeable to the partnership under §§ 362.210 and 362.215. Id. at *28-29. Further, § 362.210 provides that when, by any wrongful act or omission of any partner, loss or injury is caused to any person, the partnership is liable to the same extent as the partner acting or omitting to act. Id. at *29. Accordingly, the Supreme Court concluded that the trial court properly awarded damages jointly and severally because the undisputed evidence established that CGM was engaged in a joint enterprise. Accordingly, the Supreme Court affirmed in part the Court of Appeals’ order and remanded the case to the trial court for further proceedings.

(viii) Maryland

Frazier, et al. v. Castle Ford, Ltd., 59 A.3d 1016 (Md. 2013). Plaintiff, a car owner, brought a class action against Defendant, an automobile dealer, asserting unfair and deceptive trade practices in violation of the Maryland Consumer Protection Act, and common law fraud. Plaintiff alleged that the car dealer sold him an extended warranty for his vehicle which the dealer said would last for 48 months from the date of purchase or 100,000 miles, whichever occurred first. However, because the warranty in fact was calculated from the build date of the automobile, it expired two years earlier than Plaintiff had been led to believe. The complaint sought compensatory and punitive damages, declaratory and injunctive relief, and attorneys’ fees. After the complaint was filed, Defendant paid to extend the warranty for the full period claimed by Plaintiff. It also sent him a check for the amounts that Plaintiff had paid for all repairs during the period that his car would have been covered by the warranty as alleged. Plaintiff did not cash the check. Defendant then filed a motion for summary judgment and a motion to deny class certification. The trial court granted the motion for summary judgment in part on the grounds of mootness leaving open the issue of the amount of Plaintiff’s attorneys’ fees. It also granted the motion to deny class certification, in part, because Plaintiff had been made whole, and therefore, had no interest in common with the class. At the time of the trial court’s ruling, Plaintiff had not filed a motion for class certification. The trial court’s decision was affirmed by the Maryland Court of Special Appeals, and subsequently, the Maryland Court of Appeals granted the Plaintiff’s request for review. Id. at 1020-21. The Court of Appeals reversed the decision denying class certification. It held that a tender of individual relief to a class representative does not moot a class action if the individual Plaintiff has not had a reasonable opportunity to seek class certification including discovery. It remanded with instructions that the trial court determined whether such an opportunity had been provided. Id. at 1026. It also reversed the award of summary judgment with respect to Plaintiff’s claim for punitive damages, holding that a tender of compensatory damages does not foreclose a claim for punitive damages. Id. at 1026-27.

(ix) Massachusetts

Feeney, et al. v. Dell Inc., 989 N.E.2d 439 (Mass. 2013). Plaintiffs, a group of consumers, brought a putative class action alleging that Defendant engaged in unfair or deceptive acts or practices in violation of the Massachusetts Consumer Protection Act by systematically charging and collecting from customers a charge falsely characterized as a “sales tax” on the purchase of optional service contracts for Dell computers. Id. at 442. Defendant moved to compel arbitration in accordance with Defendant’s “Terms and Conditions of Sale,” a purchase agreement that contained terms compelling individual arbitration of any claims against Defendant and that precluded customers from bringing a class action. Id. Plaintiffs opposed the motion, arguing that the prohibition on class arbitration was unconscionable and that it undermined the purpose of the Massachusetts Consumer Protection Act. The Massachusetts Supreme Judicial Court refused to enforce the class action waiver provision in the arbitration agreement, and
ordered the class action to proceed in the trial court. The trial court had earlier allowed Defendant’s motion to compel arbitration, following which Plaintiffs had sought interlocutory review. After a single justice of the Massachusetts Appeals Court denied Plaintiffs’ petition, Plaintiffs had filed their arbitration claims “under protest.” Id. at 443. The arbitrator had, however, concluded that the parties waived class action relief by signing the agreement. Id. Plaintiffs then again sought relief in the trial court by filing a motion to vacate the arbitration award and to reconsider the order allowing Defendant’s motion to compel arbitration. Id. Plaintiffs’ motion was denied and the case was dismissed with prejudice. The Massachusetts Supreme Judicial Court then granted direct appellate review and issued a decision reversing the order to compel arbitration, but dismissed Plaintiffs’ complaint, without prejudice, for failure to state a claim. Id. In its ruling striking the arbitration clause, the Massachusetts Supreme Judicial Court had concluded that the class action prohibition contravened Massachusetts public policy (“Feeney I”). Id.at 444. Plaintiffs then filed an amended complaint, but before the case could proceed further, the U.S. Supreme Court issued its opinion in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), where it ruled in favor of enforcement of the class waiver in an arbitration agreement. Defendant then filed a renewed motion to confirm the arbitration award arguing that *Concepcion* abrogated the Massachusetts Supreme Judicial Court’s decision in *Feeney I*. Id. The Massachusetts Supreme Judicial Court found that the arbitration agreement was properly invalidated. The Massachusetts Supreme Judicial Court stated that, after *Concepcion*, a general public policy-based prohibition on class action bans could not be sustained. Id. at 441. Nevertheless, the Massachusetts Supreme Judicial Court believed that Defendant’s class waiver remained unenforceable under the “vindication of statutory rights” doctrine, the principle that arbitration procedures must not effectively preclude Plaintiffs from pursuing their claims. Id. at 457. The Massachusetts Supreme Judicial Court found that if a person can prove that he or she could not realistically bring a case individually, because the cost and complexity of the case far exceeds the potential recovery of individual damages, then the class action waiver was void. The Massachusetts Supreme Judicial Court reasoned that Congress enacted the FAA to “preserve the availability of an arbitral forum and remedy for the resolution of disputes between parties to a commercial contract,” and that it would be “contrary to Congressional intent to interpret the FAA to permit arbitration clauses that effectively deny consumers any remedy for wrongs committed in violation of other Federal and state laws intended to protect them.” Id. at 441. Accordingly, in situations where a trial court determines, following an individualized factual inquiry, “that class proceedings are the only viable way for a consumer Plaintiff to bring a claim against a Defendant, as may be the case where the claims are complex, the damages are demonstrably small and the arbitration agreement does not feature the safeguards found in the *Concepcion* agreement, a court may still invalidate a class waiver.” Id. at 461. The Massachusetts Supreme Judicial Court found support in the record to conclude that Plaintiffs’ claims were non-remediable in individual arbitration pursuant to the terms of the agreement. Defendant’s arbitration agreement, which the Supreme Court opined were “in stark contrast to the AT&T agreement in *Concepcion*,” met that burden by rendering Plaintiffs’ claims non-remediable. Id. at 463. The agreement provided no pro-consumer incentives to arbitrate. Moreover, the complex nature of the claims, which required advanced knowledge of the tax codes, the small individual damages ($14 and $216 for the named Plaintiffs), and the lack of any mandatory fee-shifting provisions in the statute, showed that there was no realistic individual claim arbitration process that the FAA could promote and that the arbitration clause effectively precluded relief for many individual Plaintiffs. Id. The Massachusetts Supreme Judicial Court thus concluded that a case-specific factual showing that a class action ban would preclude Plaintiffs from obtaining remedies to which they were entitled under state law would suffice to permit invalidation of an arbitration agreement. Id. at 456. Accordingly, the Massachusetts Supreme Judicial Court remanded the action to the trial court for further proceedings.

*Feeney, et al. v. Dell Inc.*, 466 Mass. 1001 (Mass. 2013). Plaintiffs asserted that they and other Massachusetts customers suffered damages because they had to pay for a tax that had not been imposed by any Massachusetts taxing authority. Defendant moved to compel arbitration. The terms and conditions of sale contained an arbitration clause compelling arbitration of any claim and mandating that any such claims be arbitrated on an individual basis. Earlier, in *Feeney v. Dell Inc.*, 465 Mass. 470 (2013) (*Feeney II*), the Massachusetts Supreme Judicial Court affirmed the ruling of the trial court invalidating a class action waiver in the parties’ arbitration agreement. Id. at 1001. Subsequently, the Supreme Court in
American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2312 (2013) (Amex), held that a class action waiver in an arbitration agreement is enforceable under the FAA even if a Plaintiff proves that the class waiver, combined with other onerous terms of the agreement, effectively precludes Plaintiff from vindicating his or her federal statutory rights. \textit{Id.} Defendants thus filed a petition for rehearing, and the Supreme Judicial Court opined that its analysis in \textit{Feeney II} no longer comported with the U.S. Supreme Court’s interpretation of the FAA. In \textit{Feeney II}, the Supreme Judicial Court had interpreted and applied \textit{AT&T Mobility LLC v. Concepcion}, 131 S. Ct. 1740 (2011), which held that the FAA preempted a California rule that deemed most class arbitration waivers in consumer contracts as unconscionable because they stood as an obstacle to the accomplishment and execution of the full purposes and objectives of the FAA to ensure the enforcement of agreements to arbitrate according to their terms. \textit{Id.} The Supreme Judicial Court in \textit{Feeney II} had opined that \textit{Concepcion}, while constraining the grounds on which a trial court could invalidate a class waiver in an arbitration agreement as unconscionable or against public policy, permitted the invalidation of a class waiver where that waiver operates in practice to deny a willing Plaintiff any and all practical means of pursuing a claim against a Defendant. \textit{Id.} at 1002. The Supreme Judicial Court observed one critical difference between \textit{Amex} and \textit{Concepcion} was that Plaintiff in \textit{Amex} had actually demonstrated that the cost of individually arbitrating their dispute would be prohibitive, effectively depriving them of the statutory protections of the antitrust laws. The U.S. Supreme Court in \textit{Amex} rejected the argument that class arbitration was necessary to prosecute claims, and held that the FAA favors the absence of litigation when that is the consequence of a class action waiver, as its principal purpose, is the enforcement of arbitration agreements according to their terms. \textit{Id.} Further, the Supreme Judicial Court noted that per \textit{Amex}, the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy, and that as long as an arbitration agreement does not expressly forbid the assertion of certain federal statutory rights or perhaps require the payment of filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable, a Plaintiff is not deprived of his or her right to pursue statutory remedies. \textit{Id.} at 1002-03. The Supreme Judicial Court noted that \textit{Amex} made clear that its discussion in \textit{Concepcion} of the likelihood that those Plaintiffs’ claims could be resolved in individual arbitration did not contribute to its holding in that case, and thus upset the reliance in \textit{Feeney II} on that discussion. \textit{Id.} at 1003. Accordingly, the Supreme Judicial Court observed that the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims. Thus, because the Supreme Judicial Court opined that a class waiver may not be invalidated on the grounds that it effectively denied Plaintiffs a remedy, it reversed the order of the trial court.

(x) Michigan

\textit{Ahmed, et al. v. McDonald’s Corp., Case No. 11-14559} (Mich. Cir. Ct. Mar. 12, 2013). Plaintiff brought a class action alleging that Defendants falsely advertised and served its chicken products as being Halal. Parties agreed to settle the matter and Defendant agreed to pay $700,000 to a settlement fund, of which $274,000 would be paid to a health clinic serving a predominantly Muslim clientele, and approximately $172,000 would go to the Arab-American National Museum at Dearborn. The settlement agreement also provided for $233,333 in attorneys’ fees and a $20,000 incentive award for named Plaintiff. Further, the settlement stipulated that a notice of proposed class settlement would be published for a period of 28 days. The Court granted preliminary approval to the settlement. Defendant then moved to reopen the class period for 28 days and effectuate curative supplemental notice. The Court approved the proposed supplemental notice and reopened the class period for 28 days commencing March 12, 2013 and ending April 8, 2013. Notices were provided to all persons: (i) who had purchased, received or consumed any food products or items, including but not limited to Chicken McNuggets or McChicken Sandwich products, which were represented, stated, labeled, sold, advertised or offered in any manner as “Halal” or otherwise in compliance with dietary restrictions under Islamic law, and sold since September 1, 2005 at the McDonald’s restaurants located at 13158 Ford Road, Dearborn, Michigan and 14860 Michigan Avenue, Dearborn, Michigan; (ii) who purchased, received, or consumed such products due to dietary restrictions, concerns, or any considerations of any kind, whether religious, moral, ethical, or philosophical; and (iii) who do not opt-out of the settlement class. The Court stated that class members could exercise their rights by
Meier, et al. v. Yasser Awaad, M.D., 832 N.W.2d 251 (Mich. Ct. App. 2013). Plaintiffs, minors through their next friends, brought an action against Defendant, a medical practitioner, and various corporate entities associated with Defendant, alleging claims of medical malpractice, negligent credentialing, negligent supervision, fraud, battery, conspiracy and violation of the Michigan Consumer Protection Act (“MCPA”). Plaintiffs alleged that Defendant intentionally misdiagnosed them with either epilepsy or seizure disorder for the purpose of increasing his billings, and as a result, Plaintiffs were subjected to unnecessary and inappropriate medication, treatment, and medical testing. In the course of discovery, Plaintiffs subpoenaed the Michigan Department of Community Health (“MDCH”), requesting the names and addresses of all Medicaid beneficiaries who were treated by Defendant and coded as having been diagnosed with epilepsy or seizure disorder. The MDCH refused to comply without a court order. Pursuant to Plaintiffs’ motion to show cause, the trial court ordered the MDCH to comply with the subpoena and issued a protective order that limited access to the information to Plaintiffs’ attorneys and any associated law clerks, paralegals, and secretaries. Id. at 256. On appeal, the Michigan Court of Appeals reversed finding that the trial court’s ruling violated Michigan’s statutory physician-patient privilege. The Court of Appeals stated that the privilege exists until waived by the patient, and it rejected the trial court’s conclusion that the privilege applied only to disclosures by healthcare providers, not third-parties such as the MDCH. Id. at 260. The Court of Appeals held that the physician-patient privilege protected the identity of non-party patients regardless of need, and that there are no exceptions under Michigan law for providing random patient information related to any lawsuit. Id. at 263. Defendant requested sanctions, such as disqualifying Plaintiffs’ counsel from further engaging in representation or ordering the payment of fees and costs, as Plaintiffs had already sent out the letters to the non-party patients upon the receipt of the subpoenaed information. The Court of Appeals refused this request, finding that the disclosure was not the result of unilateral action by Plaintiffs because it was ultimately the trial court’s decision that resulted in the improper disclosure. Id. The Court of Appeals, however, also found that compliance with the trial court’s subpoena enforcement order did not moot Defendants’ appeal as it could fashion some form of meaningful relief in the given circumstances. Id. at 264. The Court of Appeals stated that although Defendant had the right to invoke the physician-patient privilege in the lawsuit, it was ultimately the patients themselves that hold the privilege, and the Court of Appeals could not tread on their rights through the imposition of remedies resulting from the trial court’s error. Id. According to the Court of Appeals, if the patients wish to waive the privilege and engage in litigation against Defendant, whether in the same action, or in a separate suit, they must be permitted to do so. Id. The Court of Appeals therefore ordered Plaintiffs to return all copies of the privileged information to the MDCH and to destroy all electronic files containing the information, subject to an exception with respect to information concerning those patients who stepped forward in response to Plaintiffs’ letters and who were prepared to waive the physician-patient privilege. Id. at 265. The Court of Appeals held that Plaintiffs might use information obtained through the disclosure, but only as it related to patients who waived the privilege. Id. Accordingly, the Court of Appeals reversed the trial court’s orders and remanded the action for the implementation of conditional remedial measures.

(xii) Minnesota

Graphic Communications Local 1B Health & Welfare Fund A, et al. v. CVS Caremark Corp., 833 N.W.2d 2013 (Minn. Ct. App. 2013). Plaintiffs, a group of union-sponsored health-benefit plans, brought a class action alleging that Defendant pharmacies violated the Minnesota Statute § 151.21, and the Minnesota Prevention of Consumer Fraud Act (“CFA”), when they refused to pass on to purchaser Plaintiffs any cost savings realized by the sale of generic versions of the patent-expired brand-name drugs. The trial court dismissed Plaintiffs’ complaint, finding that Plaintiffs had no private right of action and that Plaintiffs failed to plead an actionable claim. Upon Plaintiffs’ appeal, the Minnesota Court of Appeals reversed the order in part. The Court of Appeals analyzed whether the trial court erred by concluding that Plaintiffs failed to adequately plead a claim under the CFA and the private attorney general statute. Plaintiffs argued that they pled a legally sufficient claim for consumer fraud under the CFA and the private attorney general statute. The Court of Appeals disagreed with the trial court’s observation that Plaintiffs’ complaint failed to
The Court of Appeals observed that because this was a consumer fraud action, at this stage of the litigation, Plaintiffs' complaint need only allege that Defendants' failure to disclose acquisition costs and subsequent overcharges were material omissions. Id. at 411. The Court of Appeals rejected the trial court’s policy rationale that finding an actionable claim based on undisclosed acquisition costs would open the floodgates to CFA claims in any consumer transaction. The Court of Appeals determined that because the CFA was to be liberally construed in favor of protecting consumers, the trial court erred by dismissing Plaintiffs’ claim on this basis. The Court of Appeals also considered the trial court’s determination that Plaintiffs’ CFA claim failed to plead a causal nexus because it did not allege a connection between the alleged omissions and the alleged overcharges. The Court of Appeals noted that because Defendants neither disclosed their acquisition costs, nor ceased selling the generic prescription drugs at inflated prices, Plaintiffs continued to pay inflated prices for generic prescription drugs without knowing they were being overcharged in violation of Minnesota law. Id. at 412. Plaintiffs also alleged specific instances in which they were overcharged; further, they set forth specific pharmacies, dates, quantities, brand-name acquisition costs, generic acquisition costs, brand-name sales prices, generic sales prices, and overcharge amounts. Id. at 413. Finally, the Court of Appeals considered the trial court’s determination that Plaintiffs’ complaint did not meet the public benefit requirement under the CFA because it pled one-on-one transactions and the relief sought was primarily money damages. The Court of Appeals observed that Defendants sold generic prescription drugs to the public and, since 2003, had engaged in over 200,000 prescription-drug transactions with Plaintiffs. Id. at 414. The Court of Appeals determined that Plaintiffs’ allegations that Defendants had deceptively overcharged purchasers of generic prescription drugs in Minnesota since 2003 involved a public benefit. The Court of Appeals concluded that Plaintiffs had sufficiently pled a CFA claim and that the trial court erred by dismissing this claim under Rule 12.

Missouri

Rowling, et al. v. Nestlé Holdings, Inc., 2013 Mo. App. LEXIS 1199 (Mo. App. Oct. 15, 2013). Plaintiff, a shareholder with Ralston Purina Co. and a third-party beneficiary under the merger agreement entered between Nestlé Holdings, Inc. and Ralston, brought a class action alleging that Nestlé breached the merger agreement by failing to timely pay for his shares. The merger agreement contemplated that at the time of the merger, all Ralston stock would be converted to $33.50 per share. Defendant moved to dismiss, and the trial court granted the motion, holding that because Plaintiff's petition alleged a breach of incidental or implied terms of a contract, the claim was untimely as it was governed by a five-year statute of limitations. On appeal, the Missouri Court of Appeals affirmed. Plaintiff argued that his action arose from a contract containing a promise to pay money, and thus, fell under Missouri's 10-year statute of limitations in § 516.110(1). The Court of Appeals noted that under § 516.120(1), all actions upon contracts, obligations, or liabilities, express or implied, except those mentioned in § 516.110, must be brought within five years. Id. at *5-6. Section 516.110(1) provides ten years in which to bring an action upon any writing, whether sealed or unsealed, for the payment of money or property. Id. at *6. Thus, the threshold issue in determining whether the 10-year statute applied was whether the underlying writing at issue contained a promise to pay money. The Court of Appeals observed that statute’s application is broad, and that it applies to every suit to recover money promised in a written contract, whether or not extrinsic evidence is needed to prove the specific amount owed under the contract. Id. The Court of Appeals noted that the question here was whether the fact that the merger agreement met that threshold requirement allowed any type of claim arising from the agreement to be subject to the 10-year statute of limitations, or whether the suit must be to recover the promised $33.50 per share in order to fall under § 516.110(1). The Court of Appeals opined that in order for the 10-year statute of limitations to apply, the money sued for must be the same money promised by the writing, and not based on an ancillary contract term. Id. at *13. The Court of Appeals reasoned that both the five-year and the 10-year statute may apply to the same contract for the payment of money, depending on which provision of the contract provided the basis of the lawsuit. Plaintiffs sought damages for the breach of the timeliness provision, in the form of statutory interest, and the Court of Appeals stated that this action fell within § 516.110(1), because the threshold requirement had been met in terms of the writing containing a promise to pay money. Accordingly, the Court of Appeals affirmed the trial court’s conclusion that the 10-year statute did not apply here for damages in the form of
statutory interest. However, because application of § 516.110(1) was inconsistent among the Missouri appellate districts, the Court of Appeals transferred the action to the Missouri Supreme Court. Second, Plaintiff argued in the alternative that the five-year statute of limitations was tolled due to the pendency of a class action lawsuit against Defendant in the State of Ohio. The Court of Appeals noted that the statute of limitations may be suspended or tolled only by specific disabilities or exceptions enacted by the Legislature and the judiciary is not empowered to extend those exceptions. *Id.* at *19. The only equitable tolling exceptions recognized by Missouri law were where either pending litigation elsewhere prevented Plaintiff from bringing suit earlier, or where Defendant prevented Plaintiff from timely bringing suit. *Id.* Because Plaintiff did not demonstrate that any of these equitable exceptions applied, the Court of Appeals found that the five-year statute of limitations was not tolled under Missouri law.

(xiii) Montana

*Kelker, et al. v. Geneva-Roth Ventures, Inc.*, 303 P.2d 777 (Mont. 2013). Plaintiff brought a class action against Defendant for charging an interest rate higher than the 36% APR permitted by the Montana Consumer Loan Act for payday loans. Defendant filed a motion to compel arbitration pursuant to the arbitration clause in Plaintiff’s loan agreement. The trial court found the arbitration clause unenforceable and denied Defendant’s motion. Defendant appealed, and the Montana Supreme Court affirmed. *Id.* at 799. Defendant argued that *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2012), preempted the analysis of the FAA set forth in Montana Supreme Court in *Kortum-Managham v. Herbergers NBGL*, 2009 MT 79 (Mont. 2009). The Montana Supreme Court disagreed. It held that in *Concepcion* was consistent with *Kortum-Managham*. Both rulings determined that generally applicable contract defenses are available to challenge arbitration clauses and that such clauses cannot be challenged by defenses uniquely applicable to arbitration clauses or which derive their meaning from the fact that an agreement to arbitrate is at issue. *Id.* at 780. Under Montana law, a contract is unconscionable if it is a contract of adhesion and the contractual terms unreasonably favor the drafter. *Id.* at 781. In this case, Plaintiff entered into the contract on-line and was given no opportunity to reject any particular clauses, including the arbitration provision. *Id.* at 783. The Supreme Court also agreed with the trial court that the terms of the arbitration clause unreasonably favored Defendant. It was undisputed that Plaintiff did not understand the arbitration agreement. No bold or capital letters highlighted the arbitration provision. Plaintiff entered into the agreement without counsel and without speaking to any representative of Defendant. Further, there was no evidence to suggest that Plaintiff qualified as a sophisticated party with significant business experience, and there was evidence that economic duress compelled Plaintiff to enter into the agreement. *Id.* The arbitration clause was also ambiguous as to whether Plaintiff waived her right to pursue her claim in court. The Supreme Court noted that it generally construed ambiguities in contracts against the party who drafted it. *Id.* at 784. For these reasons, the Supreme Court found that the arbitration clause was unconscionable and affirmed the decision of the trial court. *Id.*

(xiv) New Jersey

*Blaine, et al. v. Pressler & Pressler, LLP*, 2013 N.J. Super. Unpub. LEXIS 1312 (N.J. Super. Ct. App. Div. May 31, 2013). Plaintiffs, a group of debtors, brought a class action alleging that Defendant had filed false and deceptive complaints against them on behalf of Midland Funding LLC. The complaints alleged that Midland had become the owner of Chase Bank USA accounts on which Plaintiffs owed money, and that Plaintiffs were now indebted to Midland on the accounts, and that as provided by contract, Midland was entitled to attorneys’ fees of 25% of the amount due. Defendant moved to stay the litigation and to compel arbitration, arguing that the Chase card member agreements that formed the basis for the complaints it filed for Midland required arbitration. Plaintiffs argued that because the agreement included debt collectors within the arbitration clause only where they were named as a co-Defendant in any suit against Chase or, here, Midland, and because their complaint asserted no claim against either Chase or Midland, Defendant could not invoke arbitration under the contract. The New Jersey Superior Court denied Defendant’s motion. On appeal, the New Jersey Appellate Division affirmed. The Appellate Division stated that because the Cardmember Agreement expressly excluded a debt collector from the parties entitled to require arbitration, unless Chase or the purchaser of its account was also named as a party to the claim,
Defendant could not be considered a party covered under the arbitration clause. *Id.* at *7.* Further, the Appellate Division noted that Defendant must be treated as a debt collector rather than as a general agent of Midland because Defendant functioned only to serve Midland for the purpose of collecting overdue credit card debts; and for the purposes of the arbitration clause at issue here, a debt collector cannot be an agent. Accordingly, the Appellate Division excluded Defendant from the benefits of the arbitration agreement because it was a debt collector, and affirmed the denial of Defendant’s motion to compel arbitration.

**Gambrell, et al. v. Hess Corp., Inc., 2013 N.J. Super. Unpub. LEXIS 2995 (N.J. Super. Law. Div. Nov. 12, 2013).** Plaintiffs, a group of consumers, brought a putative class action alleging that Defendant mislabeled diesel fuel as regular gasoline, sold it to consumers, and caused damage to their vehicles. Defendant responded by tendering offers of judgment to the two named Plaintiffs in the amount of $20,000 each. Plaintiffs moved to strike the offers of judgment and to impose sanctions against Defendant, contending that Defendant’s offers of judgment were improper in light of Plaintiffs’ claims for declaratory and injunctive relief. Plaintiffs further contended that the offers of judgment were inappropriate in a putative class action because allowing Defendant to “pick off” a representative Plaintiff with an offer of judgment would undercut the viability of the class action procedure and frustrate the objectives of the procedural mechanism for aggregating small claims. *Id.* at *3.* Defendant filed a cross-motion to strike Plaintiffs’ requests for declaratory and injunctive relief, and contended that its offers should not be stricken because the settlement of litigation is consistent with New Jersey’s public policy. *Id.* at *1-3.* The Court granted Plaintiffs’ motion to strike, concluding that “from this point forward, no offers of judgment may be tendered in class actions, whether putative or certified, for reasons of public policy.” *Id.* at *2.* The Court determined that issue could be resolved by reference to the limited scope of the offers of judgment procedure in New Jersey Rule 4:58-1, which is expressly unavailable in cases in which Plaintiffs seek non-monetary relief. Because Plaintiffs had asserted claims for declaratory and injunctive relief, which the Court had refused to strike pursuant to Defendant’s cross-motion, the offers of judgment were deemed improper. *Id.* The Court, however, found a more compelling reason to strike Defendant’s offers. The Court stated that allowing Defendant to engage in the judicial equivalent of “Whac-A-Mole” by tendering offers of judgment on successive named representatives of a putative class would undermine the New Jersey Consumer Fraud Act (“CFA”) and similar remedial statutes because it would give rise to conflicts of interest between the representatives and the class they represent. *Id.* at *11.* The Court relied on the Third Circuit’s decision in *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004), as well as a number of other case law authorities in concluding that a conflict of such nature was intolerable and must be scrupulously guarded against to protect the integrity of the class action procedure. *Id.* at *11.* The Court noted that allowing Defendant to “pick off” putative class representative contravenes one of the primary purposes of class actions – the aggregation of numerous similar small claims in a single action, and place a representative’s own personal interests at odds with those of its class members. *Id.* at *4.* While the Court recognized that the settlement of litigation and the conservation of limited judicial resources rank high in New Jersey’s public policy, it also observed that the Legislature enacted the CFA and similar statutes to eradicate consumer fraud, and one of the most common methods of enforcing such remedial statutes was by class action litigation. *Id.* at *17.* The Court therefore concluded that Defendant in a putative class action could not “pick off” a class representative by filing an offer of judgment that would effectively satisfy the representative’s individual monetary claim. *Id.* The Court, however, denied Plaintiffs’ application for sanctions, finding that Defendant’s conduct did not evidence bad faith or a desire to harass or delay. *Id.* at *18.* Accordingly, the Court granted Plaintiffs’ motion to strike Defendant’s offers of judgment, but denied imposition of sanctions against Defendant.

**Local Baking Products, Inc., et al. v. Westfield Rental-Mart, Inc., 2013 N.J. Super. Unpub. LEXIS 457 (N.J. App. Div. Feb. 28, 2013).** Plaintiff brought a class action under the Telephone Consumer Protection Act (“TCPA”) and the common law tort of conversion, alleging that Defendant sent a mass transmission of unsolicited facsimile advertisements. Defendant was an insured under a business owners policy issued by Farmers Insurance Company of Flemington (“Farmers”) who told Defendant that it was taking no action to protect Defendant in this legal matter and advised that the policy excluded all coverage for knowingly
violating the law. Farmers also responded to Plaintiff stating that it would not defend or indemnify Defendant; would not agree to a settlement demand, and made no offer to settle. Subsequently, the parties entered into a settlement. Defendant agreed to allow judgment to be entered in the amount of $14.9 million against it. Plaintiff and the class agreed not to execute against Defendant’s non-insurance assets, even if a determination were made that Defendant’s insurance carriers did not owe coverage or indemnity for the claims made in the litigation, and that the judgment would be enforceable only against the proceeds of Defendant’s insurance policies. Further, Defendant assigned to the class all of its rights under all applicable insurance policies and against the insurers. Id. at *4. The trial court granted preliminary approval to the class action settlement. On receiving a copy of the order granting preliminary approval, Farmers filed a declaratory judgment complaint against the parties alleging that under the policy and state law, Defendant was not entitled to coverage or a defense for the TCPA class action claims. Farmers also asserted that Defendant’s assignment to Plaintiff of its right to the insurance policy was a violation of the terms of the policy. Farmers moved to intervene under Rule 4:33-1 or Rule 4:33-2, and to decertify the class action. Farmers claimed that by entering into a settlement, the parties directly placed Farmers’ property at issue. Farmers also claimed it had no representation in the lawsuit, its interests were not protected at all as the parties’ interests were directly adverse to Farmers, and the parties consciously chose not to notify Farmers or obtain its approval before entering into a settlement which violated the language of the policy and purported to give an assignment of the policy in violation of its express provisions. The trial court granted Farmers’ permissive intervention, decertified the class action, and dismissed the Plaintiff’s complaint with prejudice. On Plaintiff’s appeal, the Appellate Division remanded Rule 1:7-4 states that in all actions tried without a jury, on every motion decided by a written order that is appealable as of right, the trial court shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon. Id. at *13. The Appellate Division expressed concerns of the trial court’s apparent indifference to Rule 1:7-4, and its failure to provide any explanation whatsoever for its ruling. Id. at *14. The Appellate Division remarked that the trial court’s failure to fulfill this obligation constituted a disservice to the litigants, attorneys, and the trial court. Id. In the absence of oral argument or any explanation for the trial court’s order, the Appellate Division could not ascertain what facts or law were considered by the judge in making his determination. Further, considering the circumstances of this case, including that fact-finding may be necessary to resolve the matter, the Appellate Division declined to exercise original jurisdiction. Accordingly, the Appellate Division remanded the matter to the trial court to reconsider Farmer’s motion and make findings and conclusions as required by Rule 1:7-4. Id. at *15-16.

Mazie Slater Katz & Freeman, LLC, et al. v. Krugman, 2013 N.J. Super. Unpub. LEXIS 1049 (N.J. App. Div. May 6, 2013). Plaintiff, a law firm, had brought a class action against Delta Dental of New Jersey, Inc., an insurance carrier, on behalf of a class of New Jersey dentists complaining of inadequate reimbursements in Kirsch v. Delta Dental, Case No. 07-CV-186 (D.N.J. 2006). Defendant was a member of the class in the Kirsch action, which had ultimately settled. In Kirsch, although Defendant had filed an objection to the settlement limited to the fees sought by class counsel, the District Court had granted final approval to the settlement and had approved counsel’s fee request in its entirety. Defendant had appealed the attorneys’ fee award to the Third Circuit, and the appeal has been submitted to a panel where the matter remains pending. Thus, because of that pending appeal, class counsel had not been paid their fee award. Subsequently, Plaintiff, class counsel, sued Defendant in New Jersey state court alleging that the appeal constituted tortious interference with Plaintiff’s contract with Delta Dental and tortious interference with Plaintiff’s prospective economic advantage in receiving its fee award. Defendant moved to dismiss the complaint, and sought sanctions and attorneys’ fees. The trial court dismissed the complaint without prejudice pending the outcome of the pending federal appeal. On appeal, Defendant contended that the complaint should have been dismissed with prejudice because class counsel may not sue one of its own client class members who exercised a right to object to the settlement negotiated on his behalf by class counsel. The New Jersey Appellate Division affirmed the order. The Appellate Division observed that the procedural and substantive merits of Defendant’s objection, however, were currently under consideration by the Third Circuit, and thus out of respect for that federal court and in accommodation of its work, the trial court voluntarily refrained from exercising jurisdiction to hear Plaintiff’s complaint, as it involved a matter
falling within the Third Circuit’s purview. The Appellate Division stated that because a dismissal without prejudice adjudicates nothing, Plaintiff was free to re-file its claims after disposition of the federal appeal, and Defendant would also be free to make a motion to the trial court to dismiss the claims with prejudice at that time. *Id.* at *5. The Appellate Division accordingly affirmed the order of the trial court.

(xv) New York

**Austin, et al. v. Albany Law School Of Union University, 957 N.Y.S.2d 833 (N.Y. Sup. Ct. 2013).**

Plaintiffs, a group of law graduates, brought a putative class action alleging that Defendant, a law school, misrepresented employment data, leaving graduates with mounting debt and limited job prospects. Plaintiffs claimed that they enrolled at Defendant and paid thousands of dollars in tuition because they relied on the allegedly false and misleading salary and employment data contained in the Defendant’s marketing materials posted on its website. Specifically, Plaintiffs alleged, among other things, that they relied on Defendant’s representations that approximately 95% of its graduates were employed within nine months of graduation, without disclosing that these rates included temporary and part-time employment and/or employment for which a law degree was not required or preferred, and graduates who were forced to start solo practices due to their inability to find other employment. Plaintiffs alleged that had they known that the published aggregated employment rates included temporary, part-time and non-legal employment, they would have elected to pay less tuition or not enrolled at all. Plaintiffs alleged that Defendant’s conduct violated § 349 of the New York General Business Law, which prohibits the publishing of information that is likely to mislead a reasonable consumer, as well as § 350, which holds businesses liable for damages incurred as a result of false advertising. The Court dismissed Plaintiffs’ claims. The Court stated that law students, unlike general consumers, were a reasonably well-educated group who were called upon to make a major life decision, and that reasonable college graduates grappling with major life decisions concerning a career and the pursuit of a professional degree would not read a host of assumptions about legal employment into the unembellished “employment rate” published by Defendant without confirming that the summary statistics fit their specific needs. *Id.* at 842. Thus, according to the Court, the decision to enroll at a particular school should be based upon much more information than a single set of employment statistics. The Court found that the challenged representations constituted “unadorned percentages of recent” graduates who obtained “employment” as the term is commonly and ordinarily understood, but that Plaintiffs adopted a subjective construction of the term “employment” which excluded temporary or part-time employment. *Id.* at 841. Given the elaborate and somewhat subjective nature of Plaintiffs’ definition of employment, the Court found it difficult to envision how Plaintiffs could have reasonably expected any published statistic to comport with all of their assumptions and expectations regarding legal employment. *Id.* For example, excluding law school graduates who started solo practices with little results because they could not find other employment would require a multi-factor test requiring individualized consideration of the extent to which starting a solo practice was the graduate’s preference, the other employment options available to the graduate, and the financial success of the graduate’s new venture. *Id.* The Court held that it was incumbent upon Plaintiffs to ascertain whether Defendant’s published data fit their particular assumptions and met their specific needs because Defendant had no duty to ascertain the types of individualized needs and guarantee that its published employment statistics suit each prospective or current student. *Id.* The Court also rejected Plaintiffs’ common law fraud claim premised on allegations of concealment because Plaintiffs failed to establish that Defendant had a fiduciary duty to disclose information. *Id.* at 844. The Court found that Plaintiffs’ reliance on the special-facts doctrine also was unavailing because they could have ascertained the true nature of the employment statistics published by Defendant and the limitations associated therewith through the exercise of reasonable diligence. *Id.*


Plaintiff, a tenant in a building owned by Defendant, brought a class action in the Supreme Court of New York County. Plaintiff alleged that she and other tenants of the building were charged market rate rents for their apartments while Defendant had been receiving tax benefits under New York City’s J-51 tax abatement program. The J-51 program granted owners of affordable housing projects, who performed certain major capital improvements to their buildings, a 34-year exemption from an increase in real estate taxes and other benefits under the luxury decontrol provisions of the Rent Stabilization Law (“RSL”) for the duration of
the exemption period. On behalf of herself and the putative class, Plaintiff sought a monetary award for the rent overcharges and attorneys’ fees pursuant to the RSL. Plaintiff moved for class certification; the trial court granted the motion. On Defendant appeal, the Appellate Court affirmed the trial court’s order certifying the class. Under New York law, specifically CPLR 901(b), a class action is prohibited in a case seeking to recover a penalty, unless the statute creating or imposing the penalty specifically authorizes recovery of the penalty in a class action. Id. at 119-20. The Appellate Court concluded that Plaintiff’s rent overcharge claim did not seek a “penalty” within the meaning of CPLR § 901(b), because she waived her right to treble damages under RSL § 26-516(a), on behalf of herself and the class. Id. at 119. The waiver was effective because treble damages were not the sole measure of recovery, and an owner found to have overcharged could submit evidence to overcome the statutory presumption of willfulness. The Appellate Court also noted that Plaintiff’s claim for reimbursement of alleged overcharges and interest did not render her action one for a penalty for purposes of CPLR 901(b), even though such recovery was denominated a penalty by the RSL. The remedy of reimbursement and interest lacked a punitive, deterrent, and litigation-incentivizing purpose and were, in fact, compensatory. Finally, the attorneys’ fees requested did not seek a penalty, as the general right to attorneys’ fees in landlord-tenant proceedings (per § 234 of the Real Property Law) did not apply to administrative proceedings and the RSL provision had to be understood as having the same non-punitive purpose as the statute applicable to actions and summary proceedings. The Appellate Court rejected Defendant’s contention that Plaintiff was required to provide an affidavit focused solely on her financial ability to adequately represent the class, which was adequately shown by counsel’s assumption of the risk of costs and expenses in the litigation. Id. at 120.

M.G.M. Insulation, Inc. v. Gardner, et al., 962 N.Y.S.2d 600 (N.Y. 2013). Plaintiffs, a group of general contractors who entered into a construction contract with the Bath Volunteer Fire Department (“BVFD”) to construct a new firehouse, brought an action seeking review of a determination of an administrative hearing on the applicability of the prevailing wage law, New York Labor Law § 220, to the firehouse project. The Hearing Officer at the administrative hearing determined that the project was subject to the prevailing wage law, concluding that volunteer fire corporations, such as BVFD, were the functional equivalents of municipal corporations and were therefore covered entities under § 220. Id. at 601. Alternatively, the Hearing Officer reasoned that even if a volunteer fire corporation did not generally satisfy the public entity test, the protection services agreement between BVFD and the Village of Bath satisfied the first prong of the test. Id. at 602. Further, because the Village authorized and supported the firehouse project, and the object of the project entailed provision of fire protection services for the community, the project satisfied the “public works” requirement. Id. On appeal, the New York Appellate Division confirmed the determination and dismissed the petition. On further appeal, the New York Court of Appeals reversed. The Court of Appeals noted that the prevailing wage law covers contracts involving each of four specific public entities, including the state, a public benefit corporation, a municipal corporation, or a commission appointed pursuant to law. Id. The Court of Appeals stated that if the Legislature intended to include volunteer fire corporations under the statute, it could have done so. The Legislature expanded the statute’s coverage in 2007 to include contracts involving other types of entities, but only when it can be shown they were acting on behalf of a public entity. Id. Although certain volunteer fire department contracts fell under the prevailing wage law based on the amendment language, at the time of this contract, however, the 2007 amendment of the prevailing wage law did not exist. Id. Because the service agreements did not include any provision contemplating the construction of a new firehouse, the service agreements were not a contract for public work within the meaning of the prevailing wage law. Id. at 603. Accordingly, the Court of Appeals reversed the order of the Appellate Division.

Hess, filled their tanks with oil that had already been used for some other purpose, and then proceeded to Hess to fill the rest of their tanks with Hess’ heating oil. This mixture of third-party used oil and Hess’ oil would then be delivered to Hess’ customers. Hess moved to dismiss the complaint in its entirety, and the Court granted the motion with leave to replead the breach of warranty and UCC claims. Id. at *9, 12, 18.

Concerning the breach of warranty claim, the Court noted that Plaintiffs burned the oil without complaint for years until their counsel told them it was defective, and their complaint did not allege what injury they suffered as a result of the alleged breach. Thus, the Court dismissed the breach of warranty claim with leave to replead. Id. at *9. The Court also dismissed, without prejudice, the UCC violation claim because the complaint did not allege that timely notice of breach had been given, which is a condition precedent to the UCC claim. Id. at *11-12. The Court stated that the Magnuson-Moss Warranty Act and General Business Law § 349 were both consumer protection statutes and applied only to products normally used for personal, family, or household purpose. Id. at *13. The oil at issue here was sold to businesses, like Plaintiffs, for use in boilers of large buildings. Thus, the Court dismissed these two claims with prejudice. Id. at *16. The Court also dismissed the unjust enrichment claim because the parties had a written contract, and the negligence claim because there was no alleged breach of a legal duty apart from the contract. Id. at *16-18.

Roberts, et al. v. PCV St. Owner LP, Case No. 100956/07 (N.Y. Sup. Ct. April 10, 2013). Plaintiffs brought a class action alleging that Defendant wrongfully charged tenants of Stuyvesant Town and Peter Cooper Village apartment complexes rents exceeding permissible stabilized rent levels, while at the same time receiving tax benefits under § 11-243 of the New York City Administrative Code, commonly referred to as J-51 tax benefits. Subsequently, the parties settled the action and the Court granted preliminary approval to the settlement. The Court later held a settlement hearing and granted final approval to the class action settlement. The Court certified a settlement class comprised of all individuals who signed unit leases in effect as of January 22, 2003, up to the date of entry of the preliminary approval order. The Court also approved the agreed upon declaratory relief, which provided that the maximum legal regulated rent permitted to be charged pursuant to the RSL and RSC (“Legal Rent”) for each of the units would be calculated using a base date of January 22, 2003 (the “Base Date”). The amount of rent set out in the lease for each individual unit as of the Base Date would be the “Base Date Amount,” even if a lesser or greater amount was actually charged and/or paid as of that date. Id. at 5. In the event there was no lease in effect on the Base Date, the Base Date Amount would be the rent reserved in the lease first executed after the Base Date. Further, the agreed upon declaratory relief provided that the Legal Rent for each Unit would be determined by increasing the Base Date Amount for each unit by all of the following that occurred for that unit from the Base Date to the date of the final judgment, i.e., all standard vacancy increases; all long-term vacancy increases; all individual apartment improvement increases; all rent guidelines board increases, all intercom surcharges; all air conditioning surcharges; all major capital improvements; and all other rent adjustments permitted under the RSL and RSC. Finally, the Court awarded attorneys’ fees for $18,906,250, equaling 27.5% of the cash component of the settlement, and expenses of $209,190.59. Id. at 10. The Court also awarded each class representative $25,000, and granted the claims administrator’s fees and costs for the continuing administration of the settlement in the amount of up to $900,000. Id. at 11.

Sabattini, et al. v. Saks Inc., Case No. 652817/2013 (Supreme Ct. N.Y. County, NY Sept. 5, 2013). In this multiple party putative class action contesting acquisition of Defendant by Hudson’s Bay Co., the trial court adjudicated the parties’ dispute about appointment of lead counsel. Each group of Plaintiffs filed separate class actions, which the trial court consolidated. The law firms of each group of Plaintiffs, however, disagreed on who should be designated as a lead counsel; therefore, the trial court did not designate anyone as a lead counsel. The trial court remarked that because multiple party litigation was commonplace in the Commercial Division, there was no prospect of real prejudice to having counsel to continue to appear as they had so far. The trial court also stated that it would guide the parties through the discovery process with a minimum of waste, duplication of effort, or delay. In addition, the trial court found that there was a looming issue of liability. Defendants indicated that the issue of liability would most likely turn on the business judgment rule. Therefore, the trial court cautioned Plaintiffs’ counsel that it would not
approve attorneys’ fees if the case proved meritorious. The trial court clarified that it would not reward counsel unless the recovery or settlement was meaningful and not merely a vehicle to justify an award of fees.

Saska, et al. v. Metropolitan Museum Of Art, 2013 N.Y. Misc. LEXIS 4953 (N.Y. Sup. Ct. Oct. 30, 2013). Plaintiffs, a group of patrons, brought a putative class action against Defendant alleging that its “pay what you wish” admission policy violated the 19th century statute that provided funding to the Museum, Chapter 476 of the laws of 1893 (the “1893 Act”), and the lease between the Museum and the City of New York (the “City”), executed in 1878. Id. at *1. The New York State Legislature created the Museum in 1870 “for the purpose of . . . encouraging and developing the study of fine arts, and the application of arts to the manufacture and practical life, of advancing the general knowledge of kindred subjects, and, to that end, of furnishing popular instruction to recreation.” Id. at *4. In 1878, the City granted a perpetual, rent-free lease to the Museum, which was located in Central Park. The lease provided that the Museum be kept open on certain days and that it be accessible to the public free of charge. Id. at *7. A significant budget deficit in 1970 caused the Museum to make a request to the Parks Department to charge patrons an admission fee so that it could continue to provide reasonable public access to the facility. The City agreed to the Museum’s request, but required that the amount of the fee be entirely in the patron’s discretion and that notice to that effect be conspicuously posted. Id. at *7-8. Plaintiffs claimed that Defendant’s signs suggested a mandatory, rather than optional admission fee, and that Defendant intentionally misled the public to that effect. Id. at *13. Defendant brought a motion to dismiss. The Court granted Defendant’s motion. Because the City was not part of the action, the Court found that the relevant inquiry was whether Plaintiffs had standing to sue the Museum for its failure to admit all members free of charge, which they argued violated the 1893 Act and the lease agreement with the City. Id. Defendant contended that there was no private right of action under the 1893 Act, and that Plaintiffs could not sue for breach of the lease as third-party beneficiaries. Id. The Court agreed with Defendant on both issues. The Court found that the 1893 Act was intended to benefit both Plaintiffs and the Museum, and as the policy stands, admission to the Museum was de facto free for all. The Court found that “actual access, provided in a way that nudges visitors to donate, is not incompatible with the 1893 Act” because such a policy furthered the goal of the 1893 Act, which was providing sufficient funding to ensure access to all. Id. at *17. The Court further determined that Plaintiffs could not sue under 1893 Act, which is defined as an Appropriations Act, when the government has the remedy of denying funding. Id. at *18. The Court also found that Plaintiffs could not maintain a claim against Defendant under the lease. The City always knew that the Museum had been charging an admission fee, and had never objected to it. The also City had consistently sanctioned the Museum’s admission policy, which began with the Parks Department’s explicit approval and still continued to be overseen by the Commissioner of Cultural Affairs, who approved the exact amount of the Museum’s suggested donations. Id. at *23. The Court further held that, even assuming arguendo that Plaintiffs were intended beneficiaries of the lease, they could not compel specific performance that differed from the remedy provided for in the lease. Id. at *25. Service of a proper notice to cure, and if no cure, eviction, was the remedy under the lease, and according to the Court, Plaintiffs could not force the Museum to abide by the terms of the lease in a manner that contravenes the express wishes of its landlord. Id. Accordingly, the Court granted Defendants’ motion to dismiss.

Warmhold, et al. v. Zagarino, 965 N.Y.S.2d 359 (N.Y. App. Div. 2d Dep’t 2013). Plaintiff, a consumer, brought a class action against a number of Defendants, including Countrywide Financial Corporation, Countrywide Home Loans, Inc., and Bank of America Corporation, as assignee (hereinafter collectively “Countrywide Defendants”), alleging that they employed relaxed underwriting standards, insufficient documentation requirements, and false appraisals for the purpose of consummating high-cost home loans. The Countrywide Defendants moved to dismiss Plaintiff’s amended complaint, arguing that the action was barred by a release contained in a repayment plan agreement executed by Plaintiff. The trial court denied Defendants’ motion to dismiss. On appeal, the New York Appellate Division affirmed that order. The Appellate Division stated that although Plaintiff’s execution of the release in favor of Defendants was an act of significance, a motion to dismiss should be denied where fraud or duress in the procurement of the release was alleged. Id. at 360. Plaintiff sufficiently alleged that the Countrywide Defendants procured the
release by means of fraud or duress, so as to warrant denial of their motion. Further, the Appellate Division ruled that the Countrywide Defendants’ contentions regarding the class action allegations were not properly before it because they did not properly seek the relief they were requesting before the trial court. Accordingly, the Appellate Division upheld the denial of the Countrywide Defendants’ motion.

(xvi) North Carolina

\textit{Blitz, et al. v. Agean, Inc.,} 743 S.E.2d 247 (N.C. Ct. App. 2013). Plaintiff brought a class action under the Telephone Consumer Protection Act (“TCPA”) alleging that although he did not request or give permission for Defendant to send him fax transmissions, it sent him five one-page fax transmissions containing restaurant coupons. Defendant purchased a list from InfoUSA (“InfoUSA list”) of approximately 983 business fax numbers in the three zip codes surrounding the restaurants. Defendant then contracted with a fax broadcaster to fax coupons to the numbers on the InfoUSA list. Earlier, Plaintiff moved for class certification consisting of a class of all persons and other entities to whom Defendant sent or caused to be sent, one or more facsimile advertisements promoting the restaurants of Defendant during the class period. The trial court denied the motion. On appeal, the North Carolina Court of Appeal reversed and remanded the order denying class certification in \textit{Blitz v. Agean, Inc.,} 677 S.E.2d 1 (2009) (“Agean I”). Thereafter, Plaintiff filed amended class action complaint, and defined the class as the holders of the 978 telephone numbers contained in the InfoUSA database during the class period. The trial court again denied Plaintiff’s motion holding, that Plaintiff failed to establish the existence of a class. On appeal, the Court of Appeal affirmed. The Court of Appeal stated that a viable class exists when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over the issues affecting only individual class members. \textit{Id.} at 249. The Court of Appeal noted that the primary issue regarding class certification involving the TCPA is whether, under the commonality and typicality prong of the test, individualized issues concerning whether fax advertisements were unsolicited predominated over issues of law and fact common to the proposed class members. \textit{Id.} at 250. Further, the Court of Appeal observed that the only statutory defense to a cause of action based on an unsolicited fax advertisement was a Defendant’s prior express invitation or permission, which could not be inferred from an established business relationship. \textit{Id.} Here, Plaintiff’s amended class definition was not limited to individuals or businesses receiving unsolicited fax advertisements because it included every number purchased on the InfoUSA list. The trial court found that because the restaurants received numerous requests to fax and e-mail materials concerning its hours, accommodations, and its menus, it was difficult to discern whether members in Plaintiff’s proposed class previously consented to receive the faxes. Although it was Plaintiff’s burden to exclude the numbers of persons that had authorized receipt of the faxes, he failed to do so. The trial court determined that there was no common source from which it could determine consent, and because Plaintiff was unable to articulate a theory of generalized proof, the litigants’ efforts would be focused on individual questions of whether each class member consented rather than any common questions the class might share. Accordingly, the trial court concluded that Plaintiff failed to establish the existence of a class. The Court of Appeal agreed with this analysis. Further, although Plaintiff asserted that because he limited the class to those businesses on the InfoUSA list, the question of whether the class members in the instant case consented to receive faxes from Defendant was common to all potential class members, the trial court found that there was a likelihood of some overlap between numbers from the InfoUSA list and Defendant’s customer list. The Court of Appeal noted that because Plaintiff was the only individual of the 978 recipients who came forward complaining about the fax transmissions, the individualized issues concerning whether sent fax advertisements were unsolicited predominated over issues of law and fact common to the proposed class members. Thus, the Court of Appeal concluded that Plaintiff failed to define a class that was subject to generalized proof and affirmed the trial court’s denial of Plaintiff’s motion for class certification.

(xvii) Ohio

\textit{Cullen, et al. v. State Farm Mutual Automobile Insurance Co.,} 2013 Ohio LEXIS 2542 (Ohio Nov. 5, 2013). Plaintiff brought a class action alleging that Defendant failed to disclose all benefits available to policyholders who made claims for damaged windshields. Plaintiff had contacted Defendant, an
automobile insurance carrier, to report damage to the windshield of his car and spoke to a representative that had been handling windshield claims for Defendant. Plaintiff's windshield was repaired. Two years later, Plaintiff brought his class action asserting that although Defendant's policy promised its insureds the option of receiving a cash payment of the replacement cost of the windshield, less any deductible, it prepared a script for representatives to induce policyholders to repair their windshields without disclosing the cash-out option. *Id.* at *7. Plaintiff requested a declaratory judgment that Defendant's practices were illegal and violated obligations owed by fiduciaries pursuant to Ohio law. The complaint defined the class to include all of Defendant's policyholders on or after February 18, 1990, who alleged that Defendant had denied them full payment on windshield claims because, instead of replacing windshields, it repaired some windshields with a chemical compound that it knew or should have known was "only temporary, not entirely translucent and incapable of restoring the windshield to its pre-accident condition" and that Defendant was not "paying the insured to replace the glass," less any deductible. *Id.* at *6. The trial court granted Plaintiff's motion for class certification, and the Ohio Court of Appeals affirmed the trial court's order. Defendant appealed again. The Ohio Supreme Court reversed the judgment of the Court of Appeals, and held that the action did not satisfy Rule 23 (b)(2) because injunctive relief was only incidental to the monetary relief sought, or Rule 23 (b)(3) because a rigorous analysis demonstrated that individual questions predominated over issues common to the class. *Id.* at *36. Relying upon the decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Ohio Supreme Court held that Plaintiff's claim fell short of the 23(b)(2) standard, which prohibits class certification where class members are entitled to individualized awards of money damages. The Supreme Court noted that, although money damages are permissible in class actions when incidental to the requested declaratory relief under Rule 23(b)(2), the damages in this case were not merely incidental to declaratory relief, as they were the primary relief sought. *Id.* at *22. The Supreme Court held that Plaintiff's action seeking a declaration that Defendant's practices were illegal and violated fiduciary obligations merely laid a foundation for a subsequent individual determination of liability, and did not satisfy the requirements for class certification pursuant to Rule 23(b)(2). *Id.* at *23. The Supreme Court further held that Plaintiff failed to meet his burden under Rule 23(b)(3) because individualized issues overwhelmed questions common to the putative class. *Id.* at *27. While the action was premised on Defendant's alleged failure to disclose policy benefits, there was no common proof of what any individual policyholder knew when consenting to windshield repair. Further, different versions of the policy covered putative class members on claims that span a period greater than 20 years, and therefore individual issues existed as to which of the policies a class member actually had. Individual issues also existed as to the costs to repair or replace a particular windshield because it varied by make, model, and year of the covered vehicle and by time and place of repair. Plaintiff had offered expert testimony in support of its argument that there was common proof that windshield repairs failed to return all windshields to pre-loss conditions. The Supreme Court held that Plaintiff's experts "asserted that the repair could not restore a windshield to pre-loss condition, but neither had sufficient evidentiary foundation for those opinions," and without evidentiary foundation, such opinions could not carry Plaintiff's burden of showing that common issues predominated over individualized issues. *Id.* at *34. Accordingly, the Supreme Court reversed the Court of Appeals' judgment and remanded the matter to the trial court for further proceedings.

George, et al. v. R. Good Logistics, LLC, 2013 Ohio App. LEXIS 10 (Ohio Ct. App., Preble County Jan. 7, 2013). Plaintiffs, a group of Camden, Ohio residents, brought a putative class action alleging they suffered damages from using and consuming contaminated water from Camden's public water system. Plaintiff sued R. Good Logistics, LLC, owner of Rod Good, and related business entities, as well as Cargill, Inc. and Central Salt, LLC, which hired Good to store and manage their road deicing salt. After residents of Camden began complaining of salty-tasting water, the Ohio EPA discovered elevated levels of chlorides and ordered Camden to connect to the Southwest Regional Water System. Camden, however, connected to a local water source known to contain elevated levels of dissolved iron ("Klapper well"). Although the EPA had cautioned that elevated iron levels could cause discoloration and staining, Camden continued providing water from the Klapper Well, even after the EPA's temporary approval expired. *Id.* at *5. Plaintiffs alleged that Defendants improperly stored the road salt, which contaminated the water. *Id.* at *6. Plaintiffs alleged negligence, negligence *per se*, strict liability, nuisance, and trespass. Plaintiffs moved for
class certification, proposing a class of all persons and businesses who resided in the Village of Camden and received water from Camden’s public water system from August 1, 2010 to the present. Id. at *7. The trial court certified the class, and Defendants appealed. Id. The Ohio Court of Appeals reversed and vacated the trial court’s decision. The Court of Appeals found that the trial court’s opinion was similar to Howland v. Purdue Pharma L.P., 104 Ohio St.3d 584 (2004), because the trial court dismissed the majority of Cargill and Central Salt’s arguments without providing a factual analysis. Id. at *12. Furthermore, the Court of Appeals noted that reversal was necessary because several prerequisites of Rule 23 were not satisfied. Id. First, the Court of Appeals held that a class consisting of any person or business who resided in Camden and drank water provided by the public water system was unmanageable and indefinite. Id. at *16-17. The Court of Appeals noted numerous intervening acts, such as the city’s actions that may have contributed to the water conditions, which would require an individualized inquiry into each case to establish proximate cause. Id. at *17-18. Further, the proposed class included those who moved to Camden after the city stopped using water from the contaminated well. Id. at *16. The Court of Appeals thus held that the class definition was impermissibly indefinite and ambiguous. Id. at *17. The Court of Appeals also found that the class was not so numerous that joinder of all members was impracticable. Id. Although the trial court noted that there were 2,300 potential class members, the record did not indicate that any class members were actually harmed by the contamination. Id. The Court of Appeals stated that the possibility of a large class is insufficient to satisfy the numerosity requirement. Id. Finally, regarding predominance, the Court once again noted that determining damages would be unique to each Plaintiff and a common question of law or fact would not resolve a significant aspect of litigation for all members in a single adjudication. Id. at *20. The Court of Appeals observed that Plaintiffs had sued three different Defendants and that there was no common action which Plaintiffs alleged caused the harm. Id. The Court of Appeals specifically noted that one Plaintiff testified that each resident of Camden had “their own story to tell,” and the record reflected that each resident of Camden was exposed to different types of levels of water contamination. Id. at *21. The Court of Appeal thus held that it would be necessary for each Plaintiff to demonstrate how he or she had been harmed by each Defendant. Id. at *22. Thus, concluding that individual questions predominated, the Court of Appeals held that the trial court abused its discretion in certifying the class.

State ex rel. Caszatt, et al. v. Gibson, 2013 Ohio App. LEXIS 168 (Ohio Ct. App., Lake County Jan. 28, 2013). Asset Acceptance LLC (“Asset”), which was engaged in the business of purchasing charged-off consumer debts and enforcing the debts in courts of various states, filed suit against Sean C. Caszatt (“Caszatt”) to collect a credit card debt. Id. at *1. Caszatt brought a class action counterclaim on behalf of himself and other credit card holders alleging that Asset’s practice of filing time-barred lawsuits against consumers to collect credit card debt violated consumer protection statutes, including the Fair Debt Collection Practices Act (“FDCPA”). Summary judgment was eventually awarded to Caszatt on Asset’s debt collection claim on the grounds that it was time-barred, and a class was certified on Caszatt’s FDCPA claim. Id. at *3. After extensive litigation involving two appeals, Asset decided to seek removal. Since removal to federal court is available only to a Defendant, Asset filed a motion to realign the parties. The trial court granted the motion and ordered Caszatt to file an amended complaint naming Caszatt as Plaintiff and Asset as Defendant. Id. at *5. Caszatt and the certified class of consumers (“Relators”) then filed a verified petition and complaint for writ of mandamus, writ of procedendo, writ of prohibition, and injunctive relief against the judge and the trial court (collectively “Respondents”), seeking vacation of the order facilitating the transfer of the case and a prohibition from proceeding with different party designations and an injunction prohibiting Respondents from suspending the order, pendent lite, and permanently. Id. at *6. The Ohio Court of Appeals granted the writ of mandamus and procedendo and vacated the order realigning the parties and requiring the filing of an amended complaint. It denied the writ of prohibition and request for an injunction. The Court of Appeals found that the trial court’s order was clearly and patently not authorized by the Rules of Civil Procedure. Id. at *16. The Court of Appeals stated that Ohio civil rules do not allow the parties or the trial court to transform a counterclaim into a complaint. Id. Because Caszatt had never filed a complaint, the Court of Appeals found that Caszatt could not amend a pleading he had not filed in the first instance. Id. at *17. The Court of Appeals thus held that Respondents exceeded their legal authority in ordering Caszatt to file an amended complaint. The Court of Appeals also determined
Oregon

Pearson, et al. v. Philip Morris, Inc., 306 P.3d 665 (Ore. Ct. App. 2013). Plaintiffs, a group of Marlboro Lights cigarette consumers, brought a class action alleging that Defendant violated the Oregon Unlawful Trade Practices Act (“UTPA”) by misrepresenting the characteristics of Marlboro Lights and that, as a result of those misrepresentations, they had suffered economic losses. Plaintiffs filed a motion to certify the action as a class action, with a class consisting of approximately 100,000 people who had purchased Marlboro Lights in Oregon from 1971 until 2001. As an alternative, Plaintiffs sought to certify a class to litigate common issues in the case. The trial court denied Plaintiffs’ motion, finding that the question as to whether Plaintiffs and other putative class members had suffered ascertainable losses, and if so, whether those losses had resulted in Defendants’ misrepresentation, were questions that could not be resolved based on evidence common to the class, and therefore, common questions did not predominate over individual rights. The trial court then granted Defendant summary judgment, finding that Plaintiffs’ claims were preempted by the Federal Cigarette Labeling and Advertising Act (“FCLAA”). On appeal, the Court of Appeals of Oregon reversed and remanded. Plaintiffs asserted that the trial court erred in granting Defendant’s motion for summary judgment on the ground that their claims were preempted by federal law. After the trial court entered its judgment, the U.S. Supreme Court decided Altria Group, Inc. v. Good, 555 US 70 (2008), holding that claims similar to Plaintiffs were not preempted by the FCLAA. Id. at 681. The Court of Appeals ruled that therefore the trial court erred in granting Defendant’s motion for summary judgment. Plaintiffs also contended that the trial court erred in denying their class certification motion. They asserted that the trial court erred in determining both the facts that they would need to prove to establish the elements of damages and causation and whether those facts could be proved on a class-wide basis. The Court of Appeals found that to establish damages under the UTPA, i.e., they had suffered an ascertainable loss of money or property, Plaintiffs would have to prove: (i) that the Marlboro Lights that they and other putative class members purchased were inherently light; and (ii) that inherent lightness was a feature that had value. The Court of Appeals concluded that Plaintiffs had demonstrated that, given the theory of their case, whether they and the putative class members suffered ascertainable losses could be litigated on a class-wide basis. Id. at 683. The Court of Appeals explained that Plaintiffs’ claim was that they purchased a product that was represented to have a feature of value but that did not actually have that feature, and their loss was, at a minimum, the value of that feature. Id. at 683-84. The Court of Appeals further found that in order to establish causation, Plaintiffs would have to show that they relied upon those misrepresentations when they bought Marlboro Lights. Id. at 688-89. The Court of Appeals ruled that Plaintiffs could prove reliance through evidence common to the class as a whole. At the outset, the Court of Appeals noted that the fact that a person may have relied on the representations initially, but later stopped, was relevant to the amount of the person’s damages, not liability. Id. at 696. The Court of

Seyfarth Shaw LLP
Appeals determined that the uniform nature of Defendant’s representations, Defendant’s design and extensive marketing of the cigarettes, and studies and surveys that indicated that many persons who smoked light cigarettes believed that they were safer than regular cigarettes convinced it that Defendant’s representations were a substantial factor in the vast majority of the class members’ purchases of at least one pack of Marlboro Lights. \textit{Id.} Defendants argued that determining class membership would require individual inquiries because consumers were unlikely to maintain receipts from their purchases. Although the Court of Appeals agreed with Defendant, it nevertheless found that individual questions would arise only after a jury had determined the central question of Defendant’s liability to the class. \textit{Id.} at 700. Similarly, the Court of Appeals found that Plaintiffs established that the class action was the superior mode of adjudication. Plaintiffs also challenged the trial court’s denial of their request for certification of an issue class. As an alternative to certification of all the issues in the case, Plaintiffs moved for certification of the class as it related to all specific common issues. The trial court had found that each of the three elements of Plaintiffs’ UTPA claim – an unlawful trade practice, causation, and damages – had some component that could be resolved only through individual evidence. The Court of Appeals, however, disagreed, finding that all three elements could be proved through common evidence. \textit{Id.} at 702. Accordingly, the Court of Appeals reversed and remanded the trial court’s order.

(xix) \textbf{Pennsylvania}\

\textit{Albert, et al. v. Erie Insurance Exchange}, 65 A.3d 913 (Pa. Super. Ct. 2013). Plaintiff, an insured, brought a class action alleging that Defendant’s failure to reimburse her for lost wages and travel expenses was a breach of her insurance contract. She sought a declaratory judgment that under the insurance policy Defendant had an affirmative obligation to notify policyholders of the provisions related to lost wages and expenses. Plaintiff was involved in a motor vehicle accident covered by an automobile insurance policy issued by Defendant. The policy provided benefits to insureds for costs incurred in helping Defendant investigate or defend covered claims. Defendant hired legal counsel to defend Plaintiff in the lawsuit, and through counsel, requested Plaintiff to appear for a deposition. Plaintiff incurred lost wages and travel expenses in attending the deposition. Nowhere in Plaintiff’s second amended complaint or in her other pleadings did she allege that she made a claim to Defendant for reimbursement as required by the policy. The trial court thus found that Plaintiff failed to establish a cause of action for breach of contract, and that this failure was fatal to her bad faith claim and request for declaratory relief. Accordingly, it sustained Defendant’s preliminary objections and dismissed Plaintiff’s second amended complaint. \textit{Id.} at 926. On appeal, the Superior Court affirmed. Plaintiff argued that she did not include an allegation in her complaint that she made a claim for reimbursement because she sought to tailor her complaint to state a claim typical of the greatest number of class members. The Superior Court rejected that argument, stating that the unverified statement of the Plaintiff that she made a claim to Defendant for reimbursement as required by the policy was legally insufficient based on the language of the policy. \textit{Id.} at 929. Plaintiff also claimed that Defendant had an implied duty to advise its insureds of potential reimbursement under the policy, and the failure to do so constituted a breach of contract. The Superior Court, however, noted that absent evidence of fraud or intentional deception, an insurer has no affirmative duty to advise its insured of every potential claim or benefit that could exist under a policy. \textit{Id.} at 929-30. Here, Plaintiff did not allege that Defendant persuaded her not to engage her own counsel regarding her rights under the policy, or deceived her as to the reimbursement benefit under her policy; instead, Plaintiff alleged that Defendant failed to advise her of the reimbursement benefit despite the fact that it is set forth unambiguously in the policy. The Superior Court noted that the policy set forth the obligation that the insurer had undertaken to provide an attorney to defend the insured, but nothing in the policy would lead an insured to believe that, assuming her defense in litigation, counsel was obligated to advise her with respect to other matters. \textit{Id.} at 930. Thus, the Superior Court opined that Plaintiff failed to establish a duty on the part of Defendant and/or its counsel to advise her regarding the reimbursement provision of the policy, and in the absence of a breach, Plaintiff’s claims failed.

\textit{In Re Sheriff’s Excess Proceeds Litigation}, 2013 Phila. Ct. Com Pl. LEXIS 80 (Pa. C.P. Mar. 12, 2013). Two audits showed that, for many years, the Sheriff’s Office of Philadelphia County failed to distribute
millions of dollars in excess proceeds from foreclosure sales of real property to the former owners of such property. Plaintiffs, Joseph O’Hara and his company, Finn Land Corp., brought two class actions, that were subsequently consolidated, against the Sheriff’s Office, two former Sheriffs, and the City of Philadelphia seeking recovery of the excess proceeds plus interest. Id. at *2. The Court denied Plaintiffs’ motion for class certification. Id. at *4. The Court first addressed whether a class action was a fair and efficient method for adjudicating the controversy. The Court noted that owners of foreclosed properties have a right under the Pennsylvania Rules Of Civil Procedure to apply to the Sheriff’s Office to recover excess funds. After five years any excess funds not disbursed are transferred to the Treasurer under Pennsylvania’s Disposition of Abandoned and Unclaimed Property Act (“DAUPA”). Under the DAUPA, any person claiming an interest in any property delivered to the Treasurer may file a claim with the Treasurer to recover it. If the claim is denied, the property owner may file suit in the Commonwealth Court. The Court found there was no need for the putative class members to assert their claims in a class because of the availability of these other remedies. Id. at *7-8. The Court also concluded that management of the class would be too difficult. The purported classes were not well defined and it was difficult to determine which former property owners were members of the class. Id. at *9-10. The Court further determined that Plaintiffs’ claims were not typical and that they could not adequately represent the class. Plaintiff O’Hara and his wholly-owned subsidiary were real estate investors. They sometimes acted as mortgage holders and caused people’s homes to be sold at a Sheriff’s sale. On other occasions they acted as property owners and made business decisions not to pay real estate taxes and allowed their investment properties to be sold at a Sheriff’s sale. Plaintiffs successfully obtained excess proceeds due to them from such sales. The Court also found that O’Hara acted as a “finder” for people whose homes were sold in foreclosure sales. Id. at *16. In so doing, he charged his clients a fee for reuniting them with the excess proceeds, and profited from the purported class members’ ignorance of the refund system. Based on these facts, the Court found Plaintiffs to be savvy speculators who understood and benefited from the system and were not representative of the class of people who lost their homes due to their inability to pay real estate taxes and/or make timely mortgage payments. The Court also concluded that their claims were not typical of the class members. The Sheriff denied that there were any excess proceeds due to Plaintiffs, but conceded that excess proceeds were due to many putative class members. The Court noted that it would take a case-by-case inquiry to determine who is entitled to excess funds. Because Plaintiffs’ claims were substantially different from those of the absent class members, the Court held that they were not proper representatives of the classes. Id. at *17-18. For these reasons, the Court denied class certification.

McGrogan, et al. v. First Commonwealth Bank, 74 A.3d 1063 (Pa. Super. 2013). Plaintiffs, two customers, brought a class action alleging that Defendant breached its promise to automatically renew IRA market rate savings accounts after each 90 day maturation period. Plaintiffs contended that in March 1983, Defendant’s executives approached them and informed them that the Bank was offering a variety of Individual Retirement Account (“IRA”) investment products. One of those products was named the IRA Market Rate Savings Account. Plaintiffs contended that the Bank executives orally promised that the yield would be higher than 8%; that the account matured after 90 days; that the account would automatically continue after 90 days; and that it would never fall below 8%. Based on those promises, Plaintiffs opened a IRA market rate savings account. Plaintiffs signed substantively identical written contracts called an Individual Retirement Custodial Account (“Custodial Agreement”). The Custodial Agreement did not declare that the account would be continued automatically or rolled over after the 90 day term. According to Plaintiffs, from the time they opened their accounts until the fall of 2008, Defendant paid them a minimum interest rate of 8% and, after each 90-day maturation period, the Bank automatically continued the account. However, in the fall of 2008, Defendant sent letters to Plaintiffs notifying them that the Bank was exercising its right to resign as IRA Custodian. Immediately thereafter, Plaintiffs initiated their class action, and sought to represent a class of people who established an IRA, and who received resignation letters. Defendant filed preliminary objections in the nature of a demurrer to the eight counts asserted by Plaintiffs, which the trial court sustained in part. Following the trial court’s ruling, Plaintiffs filed a motion for class certification. The trial court, however, denied class certification as to the fraud in the execution (Count 1), and violation of the Unfair Trade Practices and Consumer Protection Law (“UTPCPL”) (Count 5)
claims because there were significant issues of law and fact that were not common to the class. *Id.* at 1072. However, the trial court granted class certification for the breach of contract claim (Count 3). *Id.* Plaintiffs then filed a motion for partial summary judgment, arguing that Defendant resigned as Custodian and closed the accounts; therefore, it breached the relevant contracts as a matter of law. Defendant filed a cross-motion for summary judgment, arguing that it simply exercised its contractual right as Custodian over the accounts. The trial court granted Defendant’s motion, and dismissed Count 3 in its entirety, but the order did not concern Plaintiffs’ individual claims on Counts 1 and 5. Both parties appealed, and the Superior Court of Pennsylvania affirmed the order of the trial court. As to Defendant’s appeal, the Superior Court noted that its jurisdiction extends only to review of final orders, which was defined as any order that: (i) disposes of all claims and of all parties; (ii) is explicitly defined as a final order by statute; or (iii) is entered as a final order pursuant to Pennsylvania Rule of Appellate Procedure 341(c). *Id.* at 1075. Because Plaintiffs’ individual claims were neither dismissed by the trial court nor discontinued by Plaintiffs themselves, those claims remained viable and were on-going. Because the trial court’s order did not fall under any of the three definitions of a final order, it was not appealable under Rule 341. *Id.* at 1076. Plaintiffs argued that the trial court erred in denying their motion for class certification as it mistakenly held that the necessary element of reliance in both Counts 1 and 5 varied from person to person. According to Plaintiffs, because Defendant owed a fiduciary duty to the savings account holders, detrimental reliance was presumed, and such reliance need not be shown separately for each class member. The Superior Court, however, noted that the trial court denied class certification as the claims in Count 1 and 5 because three significant issues of law and fact that were not common to the class. The Superior Court observed that here, Plaintiffs had taken issue with only one of the trial court’s three independent grounds for denying the motion for class certification. As it was well established that it may neither litigate for the parties nor reverse a trial court judgment on a basis that was not properly raised and preserved by the parties, the Superior Court found that Plaintiffs’ appeal necessarily failed. *Id.* at 1080. Accordingly, the Superior Court affirmed the trial court’s order.

(xx) Rhode Island

Alves, et al. v. Cintas Corp., 2013 R.I. Super. LEXIS 125 (R.I. Super. Ct. July 8, 2013). Plaintiffs, a group of employees, brought a class action alleging that Defendant, along with its individual employees, illegally subjected them to workplace drug testing in violation of the Rhode Island Drug Testing Statute (“DTS”), G.L. 1956 § 28-6.5-1, et seq. Defendants filed a motion for judgment on pleadings seeking dismissal against all Defendant employees under sections §§ 28-6.5-1 and § 9-1-2 and dismissal against all Defendants under § 9-1-28.1. The trial court granted Defendants’ motion in full. However, it denied Defendants’ motion for partial summary judgment because the DTS did not prohibit the recovery of damages for purely emotional distress. Plaintiffs alleged that all Defendants, including individual employees, who were involved in the administration of the alleged workplace drug testing were unambiguously subject to civil liability under § 28-6.5-1(a), which specifically referred to the “agent of any employer.” *Id.* at *6. The trial court explained that it was a long-settled rule that an agent acting on behalf of a disclosed principal was not personally liable to a third-party for acts performed within the scope of his authority. Plaintiffs also argued that because the individual employee Defendants were subject to criminal liability under the Drug Testing Statute, § 28-6.5-1(b), they were subject to civil liability under § 9-1-2. Plaintiffs specifically argued that because § 28-6.5-1(b) refers to an employer as “him or her” and because it provides for a jail sentence, the statute necessarily contemplated individual criminal liability for agents or other employees. *Id.* at *13. The trial court opined that nothing in the statute contemplated that an employer be a corporation or some form of similar business entity. The trial court explained that § 28-6.5-1(b)’s reference to “him or her” and its provision for a jail sentence was entirely consistent with the existence of employers who were neither corporations nor similar business entities. *Id.* at *19. It therefore determined that individual employees or agents of an employer were not subject to civil liability under § 9-1-2 for criminal violations of the DTS. Plaintiffs further alleged that all Defendants were liable for invasion of their right to privacy in violation of § 9-1-28.1. Defendants contended that the claim was barred by the exclusivity provision of the Rhode Island Workers’ Compensation Act (“WCA”), § 28-29-20. The trial court stated that the WCA’s exclusivity provision clearly intended to preclude any common law action against an employer, substituting a statutory remedy at the election of the employee when he or she entered
employment. The trial court rejected Plaintiffs’ analogy to the law of defamation because precedential Rhode Island case law specifically indicated that claims alleging violation of the right to privacy were barred by the exclusivity provision of the WCA. Finally, the trial court analyzed Defendants’ motion for partial summary judgment seeking a ruling that emotional distress damages were not recoverable under § 28-6.5-1(c)(1). Plaintiffs contended that actual damages included recovery for emotional distress. The trial court rejected Defendants’ reliance on F.A.A. v. Cooper, 132 S. Ct. 1441 (2012), for the proposition that the term “actual damages” should not be interpreted to include damages for emotional distress, stating that Cooper was premised almost entirely on principles of sovereign immunity that were inapplicable in the present context. Id. at *28. The trial court determined that the civil liability portion of the DTS was plainly remedial, which showed that the intention of legislature was that the term actual damages encompassed awards for purely emotional distress. Further, it opined that such a finding was consistent with prevailing Rhode Island case law on cases involving recovery for emotional distress damages.

(xxi) Texas

Phillips Petroleum Co. v. Yarbrough, et al., 405 S.W.3d 70 (Tex. 2013). Plaintiffs, a group of royalty owners, filed a class action alleging that Defendants, a group of petroleum and gas trading companies, made underpayments of oil and gas royalties. The trial court certified three sub-classes of royalty owners. On interlocutory appeal, the Texas Court of Appeals reversed and remanded. Upon an amended motion of certification, the trial court in Bowden v. Phillips Petrol. Co., 247 S.W.3d 690 (Tex. 2008), again certified three sub-classes of royalty owners, which the Court of Appeals reversed on the basis that individual issues of liability predominated over common issues. The Supreme Court of Texas affirmed the Court of Appeals’ decertification order in part and reversed in part. The Supreme Court affirmed as to the two sub-classes that asserted claims for breach of the implied covenant to market, and reversed the decertification order as to the third sub-class, which alleged breach of a uniform express royalty provision contained in gas royalty agreements (“GRAs”) that amended the class members’ leases. The Supreme Court also directed the trial court to conduct a res judicata analysis in determining whether certification was appropriate under former Texas Rule 42(b)(4). On remand, Yarbrough, a class representative, alleged that Defendants breached the implied covenant to market, which in turn contributed to their underpayment of royalties under the GRAs. Defendants filed several motions seeking a ruling from the trial court that there was no class claim for breach of the implied covenant to market, arguing that a new certification motion and hearing were required to determine whether the claim was an appropriate class claim under Rule 42(b)(3). The trial court denied the motions. Defendants then filed both a notice of interlocutory appeal and a petition for writ of mandamus. The Court of Appeals dismissed the interlocutory appeal for lack of jurisdiction and denied the petition for writ of mandamus. Defendants then filed a petition for review and a petition for writ of mandamus in the Supreme Court. The Supreme Court reversed and remanded, holding that the Court of Appeals erred in dismissing the interlocutory appeal for lack of jurisdiction, that the trial court abused its discretion in allowing the addition of a class claim for breach of the implied covenant to market without an amended motion for class certification or holding a certification hearing, and that the trial court abused its discretion in failing to conduct a rigorous analysis of res judicata in contravention of the mandate in Bowden. The Supreme Court also dismissed as moot Defendants’ petition for writ of mandamus. Before the Supreme Court, Yarbrough, the class representative, argued that the orders being appealed here, which effectively allowed the GRA class to pursue a class claim for breach of the implied covenant to market, did not alter the fundamental nature of the GRA class, but merely modified the scope of the class’ underpayment damages under the GRAs. Id. at 77. Defendants argued that the inclusion of an implied covenant claim on remand changed the fundamental nature of the class upheld in Bowden, which was a class asserting only one claim for breach of express provisions of the uniform GRAs. The Supreme Court noted that in Bowden, with respect to the GRA class, the claim it analyzed was that Defendants failed to properly calculate royalties under the formula contained in the express provisions of the GRAs, which required multiplying the weighted average price by the volume of gas produced and adjusting for the interest owned. The Supreme Court found that Yarbrough now alleged not only that Defendants breached the express royalty provisions of the GRAs, but also that Defendants failed to comply with their implied obligation to diligently market the GRA gas production so as to obtain the best weighted average price reasonably obtainable. Id. at 78. The Supreme Court determined that Yarbrough
significantly overstated the scope of the original GRA claim it analyzed in *Bowden*. The Supreme Court explained that while the claim it addressed in *Bowden* involved whether Defendants took the proper gas sales into account in calculating the weighted average price, the implied covenant claim Yarbrough added on remand required consideration of whether the weighted average price, as properly calculated under its interpretation of the GRAs, was nevertheless not the highest weighted average price reasonably obtainable because of Defendants’ failure to market the gas. The Supreme Court therefore ruled that the trial court changed the fundamental nature of the class in allowing the addition of the claim. The new implied covenant claim required different proof of different conduct than did the claim evaluated in *Bowden*.

Further, the new claim raised concerns about the propriety of certification that, regardless of whether certification was ultimately ordered or upheld, were not present or considered with respect to the class claim affirmed in *Bowden*. *Id.* at 80. Accordingly, the Supreme Court remanded to the trial court the assertion by Yarbrough of an implied covenant claim on behalf of the GRA class.

**Port Of Houston Authority v. Aaron, et al., 2013 Tex. App. LEXIS 11427 (Tex. App. Houston 1st Dist. Sept. 5, 2013).** Plaintiffs, a group of property owners, filed a class action against Defendant alleging that its construction and operation of the Bayport Terminal (which handled containerized cargo) generated noise, light, and air pollution that substantially interfered with the use, enjoyment, and benefits of their surrounding residential property. Plaintiffs asserted that common legal and factual questions predominated and the losses claimed were almost identical. Defendant answered the lawsuit and filed two pleas to the trial court’s jurisdiction. One plea argued that the Port Authority retained its governmental immunity from suit because the property owners failed to plead a valid inverse condemnation or intentional nuisance claim by alleging only non-compensable community damages. The other plea disputed whether the property owners established that their properties were uninhabitable and no longer suitable for residential purposes. The trial court granted both of the Port Authority’s pleas and dismissed Plaintiffs’ claims with prejudice. On Plaintiffs’ appeal, Texas Court of Appeals affirmed, agreeing with the trial court that Plaintiffs failed to establish constitutionally compensable damages. Specifically, Plaintiffs alleged that they were unable to sleep in their homes, unable to enjoy their yards, and unable to maintain normal and routine lifestyles. Further, Plaintiffs alleged that the value of their properties had been reduced as a result of their proximity to the Bayport Terminal. Plaintiffs argued that the trial court had subject-matter jurisdiction because the noise, light, and air pollution generated by the Bayport Terminal substantially interfered with the use and enjoyment of their properties and thereby constituted a taking for which compensation was required under article I, section 17 of the Texas Constitution. Generally, governmental immunity protects sub-divisions of the State. However, Article I, Section 17 of the Texas Constitution waives governmental immunity from suit and liability for inverse condemnation claims. *Id.* at *7. The issue before the Court of Appeals was whether Plaintiffs had alleged facts that established their property was damaged in a constitutional sense. The Court of Appeals opined that Texas case law authorities had construed Article I, Section 17 to allow recovery only if the injury was not one suffered by the community in general, *i.e.*, compensation was required only for those injuries peculiar to a given property. The Court of Appeals looked at the nature of the injury – whether the injury Plaintiffs claimed were suffered by the community as a whole or by them in some special or unique way – and concluded that it was compensable in a constitutional sense. The Court of Appeals stated that the noise, light and air pollution generated by a public work was suffered by the community surrounding the public work as a whole. *Id.* at *12. The Court of Appeals perceived no meaningful distinction between Plaintiffs’ damage allegations and those damages that Texas case law authorities had already held to be non-compensable in the construction and operation of other public works. *Id.* at *14. The Court of Appeals pointed out that here the nearest property was almost 1,000 feet from the Bayport Terminal. The Court of Appeals therefore concluded that the injuries of which Plaintiffs complained were, by their nature, a consequence of the Bayport Terminal’s operation and were shared by the surrounding area; therefore, the damages claimed by Plaintiffs were not compensable. Because Plaintiffs’ allegation of injuries was shared identically among all of the 500 purported class members in the community, the Court of Appeals concluded that the deficiencies in their pleadings could not be cured by amendment.
**Stewart Title Guaranty Co. v. Mims, et al., 405 S.W.3d 319 (Tex. App. Dallas 2013).** Plaintiffs, a group of homeowners, brought an action alleging that Defendant required them to purchase a mortgage title policy or lender title policy in the amount of the note on their home when they closed the mortgage loan they had on their homes, and as a result, they were unjustly enriched. Plaintiffs moved for class certification, which the trial court granted. On Defendant’s appeal, the Court of Appeals of Texas reversed and remanded. Defendant first contended that the trial court erred because the predominance requirement of Local Rule 42 was not satisfied. The Court of Appeals noted that the trial court stated in its order that under the “proxy indicator” theory, liability for breach of implied contract was predicated on the existence of implied-in-fact contracts between class members and Defendant, for Defendant to provide the Rate Rule R-8 discount whenever one or more of the three proxy indicators were present in class members’ underwriting files. *Id* at 339. The Court of Appeals concluded that determining Defendant’s liability for breach of implied contract under the “proxy indicator” theory would require an examination by the jury as to whether each putative class member agreed to the implied contract Plaintiffs posited. *Id*. Accordingly, the Court of Appeals concluded that individual issues would predominate over any common issues as to that determination. Defendant also contended that common questions would not predominate on any of Plaintiffs’ claims under the circumstantial prior insured mortgage theory. Defendant argued that obtaining the necessary information regarding the three proxy indicators in this case posed insurmountable manageability issues, because it would require securing files from hundreds of agents and lenders involved in the putative class members’ prior transactions. The Court of Appeals noted that the jury would have to engage in file-by-file review to determine whether individual Plaintiffs had original mortgages covered by title insurance and met the other R-8 criteria. *Id.* at 343. Accordingly, the Court of Appeals concluded that Plaintiffs did not meet their burden to show predominance of questions common to members of the class with respect to the circumstantial insured prior mortgage theory. Finally, Defendant challenged the predominance theory under the definitive prior insured mortgage theory. According to Defendant, such a theory was not even a proposal for class adjudication, as it would require the trial court to adjudicate whether each borrower had prior insured mortgage. The Court of Appeals agreed, and reversed and remanded the case for further proceedings on that basis.

(xxii) **Washington**

**Gandee, et al. v. LDL Freedom Enterprises, Inc., 293 P.3d 1197 (Wash. 2013).** Plaintiff, a borrower, brought a class action alleging violations of the Washington Debt Adjusting Act and the Consumer Protection Act (“CPA”), for excessive fees for debt adjusting. Plaintiff’s debt adjustment contract contained an arbitration clause, which stipulated that all disputes or claims would be submitted to binding arbitration in accordance with the rules of the AAA within 30 days from the dispute date or claim and that any arbitration proceedings brought by the client would take place in Orange County, California. The arbitration clause also stated that the prevailing party would be entitled to recover reasonable legal fees and costs, including attorneys’ fees. The contract also contained a severability clause. Defendant moved to compel arbitration. The trial court denied Defendant’s motion as untimely, denied the requirement that arbitration occur in Orange County as unconscionable, and severed the attorneys’ fee provision. *Id.* at 1199. On appeal, the Washington Supreme Court affirmed. Under Washington law, either substantive or procedural unconscionability is sufficient to void a contract. *Id.* Plaintiff alleged substantive unconscionability. The Supreme Court noted that severance was the usual remedy for substantively unconscionable terms, but where such terms pervade an arbitration agreement, those provisions would not be severed but the entire agreement would be declared void. *Id.* at 1199-200. Plaintiff also challenged the venue provision, arguing that it effectively denied her the ability to vindicate her rights. Plaintiff’s underlying claim involved $3,500 in actual damages. Plaintiff presented affidavits showing cost of air transportation to Orange County at approximately $334, hotel costs at $123 per night, and incidental costs of $71 per day. Further, Plaintiff presented evidence that the AAA fees would be $4,775. Considering that Plaintiff was unemployed and struggled financially, and that the costs of arbitrating in California would exceed her claim, the trial court opined that there was a *prima facie* case for a prohibitive-cost defense. Although Defendant argued that the clause did not require arbitration with the AAA but only that its rules be followed, it failed to present evidence as to what other arbitration organizations could be used or what they would cost. Further, although Defendant argued that Plaintiff failed to consider or include the cost savings of arbitration as...
opposed to litigation, none of the cases it relied upon acknowledged that potential savings should be considered in this context. The Supreme Court observed that because the fee-shifting provision benefitted only Defendant and, contrary to the legislature’s intent, effectively chilled Plaintiff’s ability to bring suit under the CPA, it was one-sided and overly harsh. Id. at 1201. Accordingly, the Supreme Court opined that this provision was substantively unconscionable. The Supreme Court further observed that generally, a private statute of limitations will control over general statutes of limitation, unless prohibited by statute or public policy or unless it is unreasonable. Id. Here, the provision shortened the statute of limitations from the four years provided by the CPA to 30 days. The Supreme Court held that this limitation was substantively unconscionable. The unconscionable terms pervaded the entire arbitration clause, and severing three out of four provisions would require a rewriting of the arbitration agreement. Id. at 1201-02. Thus, the Supreme Court observed that arbitration clause could not be severed from the overall contract. Defendant offered to waive the objectionable provisions, and suggested that this mooted Plaintiff’s challenges. The Supreme Court, however, stated that contracts were generally interpreted as of the time of contracting, making any subsequent offer to waive unconscionable terms irrelevant. Id. at 1202. The Supreme Court remarked that given its determination that the provisions were substantively unconscionable, Defendant had no choice but to waive them. Id. Because the overall clause remained unconscionable, the Supreme Court determined that the arbitration clause was unenforceable. Id. Finally, the Supreme Court observed that the arbitration clause at issue contained numerous unconscionable provisions based on the specific facts at issue. The Supreme Court thus opined that AT&T Mobility LLC v. Concepcion, et al., 131 S. Ct. 1740 (2011), provided no basis for preempting the relevant case law nor did it require the enforcement of Defendant’s arbitration clause. Id. at 1203. Accordingly, the Supreme Court affirmed the decision to deny the motion to compel arbitration.

Allen, et al. v. Monsanto Co., 2013 W. Va. LEXIS 1384 (W. Va. Nov. 22, 2013). Plaintiffs brought a class action alleging that Defendant’s operations resulted in air inhalation exposure to dioxin and elevated blood serum dioxin levels to individuals, and dioxin being deposited on the ground and in houses of the putative class. Plaintiffs sought certification of a property damage class as well as a medical monitoring class for possible physical injuries. Although the trial court certified a medical monitoring class and a property class, it subsequently decertified the property class. Id. at *7. Thereafter, the parties settled the action. Because the negotiations involved the property class Plaintiffs, the trial court conditionally vacated its decertification order. Regarding the medical monitoring class, the settlement provided a fund to provide testing for class members over a 30-year period; contribution of at least $3 million for seven screening periods; and contribution of an additional $63 million if certain benchmarks were triggered. Regarding the property class, the settlement provided for a fund to be used to pay for cleaning the interior surfaces of living spaces within eligible residences; contribution of $3 million per year over a three-year period; and any unused funds being returned to Defendant. The trial court granted final approval of the settlement. On appeal by three groups of objectors (“Petitioners”), the West Virginia Supreme Court affirmed the order of the trial court. Petitioners argued that the trial court erred by refusing to conduct a hearing when it vacated its decertification order. The Supreme Court noted that the property class was decertified based on the exclusion of the expert opinion of the class representatives, which rendered it impossible for the property class to prove damages, and that the decertification order was based on the merits of the class claim, not the prerequisites for certification under Rule 23. Thus, the Supreme Court opined that a second Rule 23 hearing was not required. Regarding the trial court’s refusal to grant Petitioners an opportunity to opt-out of the property class after the decertification order was vacated, the Supreme Court opined that Petitioners’ argument was based on a false premise that the vacatur of the decertification order created a new class that never existed. The Supreme Court opined that given the vacatur, the decertification essentially never happened, and the class did not change after the vacatur. Id. at *21-22. Petitioners contended that although the medical monitoring class settlement provided benefits for only 5,000 class members out of more than 80,000 alleged class members, every class member forever gave up their right to sue Defendant while receiving no benefit from the settlement. The Supreme Court, however, remarked that Petitioners erroneously contended that a class settlement cannot be approved unless all class members benefit; instead, all that matters is that the class members are included in the class. Id. at *24. Petitioners also
argued that the trial court denied them discovery related to the parties’ mediations which would have led to discovery of admissible evidence of collusion. The Supreme Court rejected this contention, and remarked that collusion was not evidenced by the difference between the opening settlement offer and the final agreement, and that there was nothing about the negotiations that created the rare circumstance necessary for intrusion into confidential mediations. *Id.* at *35. Finally, Petitioners argued that the trial court erred by failing to strike purported agreements that class counsel required several of his experts to sign that prevented them from participating in any future actions against Defendant as a term of the settlement. The Supreme Court opined that the trial court did not abuse its discretion, and that it had engaged in a proper analysis between access to evidence and the preference for settlement, and determined that parties may include settlement terms restricting access to expert testimony as a condition of their settlement. *Id.* at *38.

(Wisconsin)


Plaintiffs, a group of consumers, brought an action against Payday Loan Store of Wisconsin, Inc. (“PLS”) alleging violation of the Wisconsin Consumer Act. In its answer to the complaint, PLS asserted that some or all of the claims were subject to arbitration. Thereafter, PLS initiated separate lawsuits in a separate branch of the Brown County Circuit Court for arbitration against Plaintiffs, Nicole Krueger and Van Natta Williams, Sr., seeking to compel arbitration of their claims pursuant to Wisconsin Statutes § 788.03. Plaintiffs moved to dismiss arbitration petitions pursuant to Wisconsin Statutes § 802.06(2)(a)10, which permit dismissal when there is another action pending between the same parties for the same cause. The trial courts dismissed PLS’ lawsuits, concluding that they were barred by the prior pending action defense, and that PLS should have moved to compel arbitration in the underlying lawsuit. *Id.* at 588. On appeal, the Court of Appeal affirmed. The Wisconsin Court of Appeal disagreed with Plaintiff that the underlying lawsuit and the arbitration petitions did not involve the same cause. The arbitration petitions were based on the same facts and circumstances that would be brought out in the underlying lawsuit to adjudicate PLS’ arbitration defense. The petitions thus involved the same cause as the underlying lawsuit. Further, dismissal of the petitions would allow the arbitration issue to be resolved in the underlying lawsuit, which also weighed in favor of dismissal. PLS argued that the trial courts erred because Wisconsin Statutes § 788.03 explicitly permitted it to initiate separate actions to compel arbitration. Section 788.03 provides that the party aggrieved by the alleged failure, neglect, or refusal of another to perform under a written agreement for arbitration may petition any court of record having jurisdiction of the parties or of the property for an order. *Id.* at 589. Thus, PLS contended that § 788.03 allows a party to file the petition in a court other than one where an underlying lawsuit is pending. The Court of Appeal, however, observed that relief under § 788.03 is only available when an underlying lawsuit has not yet been filed. *Id.* The Court of Appeal stated that when a lawsuit is already initiated, the party seeking arbitration must instead move to stay the litigation pursuant to § 788.02. *Id.* at 590. The party also can move to compel arbitration, but it must do so in the pending lawsuit, and it may not avail itself of the special procedure set forth in § 788.03. *Id.* Further, the Court of Appeal also noted that when a lawsuit is pending, judicial economy demands that the party seeking to compel arbitration do so in the existing suit, rather than by filing a separate action. *Id.* at 591. Additionally, the Court of Appeal stated that determining whether arbitration was required would depend on whether PLS waived its right to demand arbitration when it stipulated to the dismissal of its arbitration defense in the underlying suit. The Court of Appeal stated that to resolve this issue, the trial courts in the underlying actions could take evidence on and interpret PLS’ conduct in the underlying actions more efficiently than a separate trial court. Accordingly, the Court of Appeal affirmed the order of the trial courts.
President Bush signed the Class Action Fairness Act (“CAFA”) into law on February 18, 2005. The law facilitates removal of class actions from state court to federal court. In addition, it regulates the selection of class counsel, tightens control of attorneys’ fees awarded to class counsel, toughens pleading standards, reduces the ability of class counsel to dictate the choice of forum, facilitates interlocutory appeals of class certification rulings, and regulates settlements of class actions. In large part, the CAFA has significantly altered forum-selection and claim-selection strategies of plaintiffs’ lawyers in litigating class actions.

The CAFA continues to play a large role in many class actions filed against employers. The CAFA responded to the abuses of state court judges in certifying class action lawsuits involving plaintiffs who filed their claims in states with a reputation for a lack of fairness toward out-of-state defendants. The CAFA modifies the rules for federal court jurisdiction over class actions based on the diversity of citizenship test. Before the CAFA, all named plaintiffs in a class action had to be citizens of states differing from those of all defendants, a situation that typically would not be met in class actions seeking nationwide classes. In addition, there was a minimum monetary threshold of $75,000 to be met by every plaintiff in the case.

With the advent of the CAFA, the rules for diversity jurisdiction have eased, though for class actions only, so that diversity of the parties can be achieved if any class member is a citizen of a different state from any defendant and if the aggregated, not individual, amount-in-controversy for all class members is at least $5 million, and the class involves more than 100 people. As a result, the CAFA relaxes the historic strict standard for diversity jurisdiction to allow defendants to remove what were formerly “non-diverse” state law-based class actions.

The CAFA also has prompted plaintiffs’ class action lawyers to file “single-state” class actions in state court to avoid removal under the CAFA. For example, it is increasingly more common for plaintiffs to sue on behalf of “all employees in California” in an effort to plead around the CAFA’s provisions triggering federal jurisdiction. Likewise, plaintiffs’ class action lawyers are also filing multiple single-state class actions in a staggered fashion to avoid the CAFA.

The CAFA’s impact in 2013 was significant. More class actions are being filed in federal courts, and more intrastate class actions are being heard in federal courts through the removal mechanisms under the CAFA. Because the law’s provisions are designed to prevent plaintiffs’ counsel from keeping class actions in state court that are more appropriately litigated in federal court, the CAFA forecloses the pleading tactic of requesting damages of less than $75,000 per class member (the jurisdictional limit for a federal court to hear a claim involving plaintiffs and defendants of different states) to stymie a defendant from removing the lawsuit to federal court. Over the last year, employers repeatedly invoked the statute to remove class actions filed in state court to federal court. In turn, federal courts addressed several novel issues arising under the CAFA.

Key among these developments was Standard Fire Insurance Co. v. Knowles, 133 S. Ct. 1345 (2013), the Supreme Court’s first ruling on the CAFA. Knowles rejected Plaintiffs’ strategy of stipulating that damages are $4.99 million or less to avoid the CAFA’s minimum amount-in-controversy requirement. The Supreme Court held that Plaintiffs could not bind members of a proposed class with such a stipulation before a class is certified. This, in effect, closes a door on a strategy that employers had faced with increased frequency.

The CAFA has had profound effects on considerations underlying case strategy and the structuring of class actions. In this context, the CAFA’s impact on workplace class actions is both varied and evolving. Class actions and collective actions under Title VII, the ADEA, the FLSA, and ERISA typically are brought in federal court. The CAFA may have limited impact on strategic decisions in those cases relative to choice of venue in a federal court or state court. Class actions in state law-based wage & hour litigation are another matter. The plaintiffs’ bar and defense bar alike continue to confront novel CAFA issues in these types of cases, for the fight over venue is often a key driver of exposure and risk. On the one hand, employers sued in state law wage & hour class actions are increasingly confronted by plaintiffs’ lawyers seeking to avoid removal to federal court by various stratagems, including prayers for relief of less than $5
million, the filing of multiple “baby” class claims on behalf of less than 100 plaintiffs, and limiting the scope of the class to residents of one state. On the other hand, defense counsel seeking (often successfully) to dismiss state law claims pursued by plaintiffs with FLSA claims in “hybrid” wage & hour class actions in federal court also argue that judges should not exercise supplemental jurisdiction over the state law claims; in turn, federal courts are increasingly confronted with questions of whether original jurisdiction exists under the CAFA over such hybrid state law claims, and employers also may face a two-front litigation war – one in federal court and the other in state court – depending on resolution of those CAFA issues. These litigation issues are likely to shape class action practice and defense strategy for the foreseeable future.

More than any other jurisdiction, the Ninth Circuit has confronted – and ruled on – more issues under the CAFA than any other federal circuit. This is primarily the result of the high volume of class action litigation in California state courts, and the corresponding removal of those lawsuits to federal courts in California. In this respect, the Ninth Circuit’s CAFA jurisprudence has had a significant impact on other circuits, as issues already decided in the Ninth Circuit are confronted by courts in other areas of the country.

In 2013, federal courts decided many CAFA-related cases. This Chapter does not canvas them all, but instead focuses on major appellate cases and a number of noteworthy district court rulings – in both employment and non-employment cases – that interpreted the CAFA.

(i) First Circuit

Composite Co., Inc., et al. v. American International Group, Inc., 2013 U.S. Dist. LEXIS 131913 (D. Mass. Sept. 16, 2013). Plaintiff, on behalf of itself and a class of other similarly-situated companies, brought a putative class action in state court alleging Defendants failed to revise underwriting figures and adjust reserves for workers' compensation insurance policies, which constituted common law breach of contract and unjust enrichment. Subsequently, Defendants removed the case. Plaintiff then moved to remand on the ground that Defendant did not satisfy the $5 million amount-in-controversy requirement under the CAFA. The Court first observed that under the “reasonable probability” standard, Defendants must establish that it is more likely than not that the amount-in-controversy exceeded the jurisdictional amount. Id. at *22. The Court noted that Defendants could satisfy their burden by: (i) relying on the face of Plaintiff's complaint; (ii) alleging facts in their notice of removal to support its amount-in-controversy allegation; or (iii) submitting “summary-judgment type evidence.” Id. at *22-23. In opposition to Plaintiff's motion to remand, Defendants pointed to the existence of an almost identical action filed in South Carolina, entitled Thrift Development Corp. v. American International Group, Inc., No. 12-CV-861(D.S.C.) (“Thrift”), which asserted similar claims predicated upon similar alleged conduct, but, unlike this case, the complaint filed in Thrift expressly contained an amount-in-controversy estimate exceeding $5 million. The Court observed that in deciding whether there is federal jurisdiction over a matter, the CAFA explicitly permits consideration of “whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.” Id. at *23-24 (citing 28 U.S.C. § 1332(d)(3)(F)). Furthermore, the Court observed that other decisions had found that removing Defendants had met their burden of proving that the amount-in-controversy exceeded the jurisdictional threshold by showing that many of same Plaintiffs had pleaded damages of up to $5 million in other forums for the same injuries. Id. at *24. The Court noted that the only two differences from Plaintiff’s complaint and the complaint filed in Thrift was that the Thrift complaint specifically alleged that there was federal jurisdiction over the matter pursuant to the CAFA and that Plaintiff’s complaint included an additional Massachusetts state law cause of action against the Defendants. Id. at *25. Other than those two differences, the Court determined that the complaints contained the same substantive allegations brought on behalf of putative classes of policyholders insured by Defendants that had a workers’ compensation claim filed in the state in which the action is pending, “for which a subsequent recovery was made from a responsible third-party which was not properly reported by Defendants” to the designated rating agency. Id. Furthermore, the Court noted that the census data suggested that the putative class was likely to be larger in Massachusetts than in South Carolina. Id. On this basis, the Court found that Defendants had met their burden of demonstrating a reasonable probability that the aggregate
claims of the putative class were greater than $5 million at the time of removal. Accordingly, the Court denied Plaintiff’s motion to remand.

(ii) Second Circuit

**Gold, et al. v. New York Life Insurance Co., 730 F.3d 137 (2d Cir. 2013).** Plaintiff, a former insurance agent, brought a class action under New York state law seeking unpaid overtime wages and recovery of improper wage deductions. Plaintiff’s main responsibility was to sell insurance as an outside salesman and he was not entitled to overtime pay. Plaintiff predicated jurisdiction on the CAFA, and asserted that because he was responsible for making investment recommendations to clients, he was misclassified. Further, Plaintiff asserted that Defendant’s payment system under which an agent, including registered representative, would receive credits for commissions he earned and debits for expenses he incurred violated § 193 of the New York Labor Law (“NYLL”). After the District Court granted Defendant summary judgment on Plaintiff’s overtime claim, Plaintiff proceeded on the wage deduction claim alone, and moved to add a claim for liquidated damages under New York Labor Law. The District Court permitted Plaintiff to add the liquidated damages claim and denied summary judgment on his wage deduction claim. Subsequently, Defendant discovered that more than two-thirds of the putative class members were New York citizens, and thus, arguing that the requirements of the CAFA’s home state exception had been met, moved to dismiss the complaint for lack of subject-matter jurisdiction, or in the alternative, for the District Court to decline jurisdiction. Because it was not disputed that the home state exception applied if the issue had not been waived, the District Court declined to exercise jurisdiction and dismissed the complaint. The District Court found that the exception was not jurisdictional and that New York Life had not waived the issue because its delay was justified by the discovery schedule. On appeal, the Second Circuit affirmed. First, the Second Circuit noted that under 28 U.S.C. § 1332(d)(4)(B), a District Court shall decline to exercise jurisdiction over a class action in which two-thirds or more of the members of all proposed Plaintiff classes in the aggregate, and the primary Defendants, are citizens of the State in which the action was originally filed. *Id.* at 141. The Second Circuit agreed with the District Court that the home state exception was not jurisdictional because the “decline to exercise” language inherently recognizes that the District Court has subject-matter jurisdiction but must actively decline to exercise it if the exception’s requirements are met. *Id.* Plaintiff argued that if the exception was not jurisdictional, Defendant had waived the exception because it failed to raise it within a reasonable time. The Second Circuit observed that the application of the exception was, to a certain extent, complicated by the discovery schedule. The District Court had granted Plaintiff’s request to allow individual discovery prior to class discovery, and only through class discovery Defendant learned that more than two-thirds of the class were New York citizens. The District Court had stated that because of this bifurcated discovery plan, Defendant had not had the opportunity to discover the citizenship of class members until it conducted class discovery, and thus Defendant’s delay was excused. Accordingly, the Second Circuit stated that the District Court had not abused its discretion. In addition, the Second Circuit noted that the liquidated damages provision of the NYLL was amended in 2009 to impose a presumption of liquidated damages, but permit an employer to avoid the penalty by establishing that it had acted in good faith. *Id.* at 143. The amendment expressly stated that it would only apply to offenses committed on or after such effective date. *Id.* The statute was again amended in 2011 to raise the amount of recoverable liquidated damages, however, unlike the 2009 amendment, this amendment included no language providing that it would have only prospective effect and, consequently, Plaintiff argued that the amendment was retroactive. *Id.* Because there was no support for retroactivity in either the text or the legislative history, the Second Circuit agreed with the District Court that the 2011 amendment was not retroactive. Finally, the District Court had held that there was no genuine dispute of a material fact that Plaintiff’s primary responsibility was to sell insurance and that, consequently, he was properly classified as an outside salesman. The Second Circuit noted that Plaintiff’s primary duty was selling insurance, and that he was hired and trained by Defendant to sell insurance. Further, Plaintiff’s compensation and his continued affiliation with Defendant was tied exclusively to his sales. Thus, because the FLSA regulations explicitly provide that the determination of an employee’s exemption status must be based on the specific employee’s actual primary duties, not on his or her title or position, the Second Circuit affirmed the order of the District Court.
Purdue Pharma L.P. v. Commonwealth Of Kentucky, 704 F.3d 208 (2d Cir. 2013). The Commonwealth of Kentucky, through its attorney general and Pike County, brought an action in Kentucky state court alleging that Defendants violated Kentucky law by misleading healthcare providers, consumers, and government officials regarding the risks of the prescription drug OxyContin. Defendants removed the action under the CAFA, arguing that Plaintiffs’ claims constituted a putative class action. The District Court found that it lacked subject-matter jurisdiction because all claims arose exclusively under Kentucky state law, and remanded the case. Id. at 211. On appeal, the Second Circuit affirmed the order remanding the case. The Second Circuit noted that as Defendants removed this action under the CAFA, the threshold inquiry was whether the action satisfied the CAFA’s definition of a class action. Id. at 214. The Second Circuit remarked that States generally file suit in one of three capacities, including: (i) proprietary suits in which the State sues much like a private party suffering a direct, tangible injury; (ii) sovereignty suits requesting adjudication of boundary disputes or water rights; or (iii) parens patriae suits in which States litigate to protect quasi-sovereign interests. Id. 215. Plaintiffs claimed to bring this suit in both proprietary and parens patriae capacities, seeking restitution and reimbursement for damages suffered directly by the Commonwealth and the County as a result of unnecessary prescription costs and Medicaid claims paid out of the State’s treasury. Plaintiffs sought to enforce those various claims under two different state law statutory provisions. Id. The Second Circuit noted that neither Kentucky statute authorizes a suit as a class action or bears any resemblance to Rule 23. For example, neither of the two statutes imposed any of the familiar hallmarks of Rule 23 class action, such as numerosity, commonality, typicality, or the adequacy requirement. The Second Circuit, however, conceded that while a similar state statute or rule need not contain all of the other conditions and administrative aspects of Rule 23, it must, at a minimum, provide a procedure by which a member of a class whose claims is typical of all members of the class can bring an action. Id. at 217. The Second Circuit observed that this suit was filed by the Attorney General on behalf of a sovereign, and unlike class members, the Attorney General was not a designated member of the class whose claim would be typical of class members. Accordingly, the Second Circuit concluded this action did not qualify as a class action within the meaning of the CAFA. Defendants urged the Second Circuit to look past the pleadings, the named parties, and the stated causes of action to deduce the true nature of this proceeding. Defendants pointed to the relief claimed by Plaintiffs, which sought restitution and reimbursement for all prescription costs that consumers incurred in excessive and unnecessary prescription costs related to OxyContin. Building on this claim-by-claim approach, Defendants asserted that the CAFA’s requirements for minimal diversity, numerosity, and amount-in-controversy were satisfied. The Second Circuit opined that the claim-by-claim approach had been roundly criticized and the whole-complaint approach had emerged as the majority rule. The Second Circuit observed that it had not yet issued a ruling on whether the real-party-in-interest inquiry should be made on the basis of the whole-complaint or claim-by-claim, and District Courts within the Second Circuit appeared to be split on the issue. The Second Circuit ruled that it need not decide this in this case, as it had already found that this case did not qualify as a class action within the meaning of the CAFA. Accordingly, the Second Circuit affirmed the District Court’s order remanding the action.

(iii) Third Circuit

Erie Insurance Exchange, et al. v. Erie Indemnity Co., 722 F.3d 154 (3d Cir. 2013). Plaintiff, a reciprocal insurance exchange, brought an action in a Pennsylvania state court alleging that Defendant misappropriated funds that properly belonged to the exchange. Defendant served as Plaintiff’s attorney-in-fact. The exchange’s members purchased insurance policies and received indemnification for losses out of the exchange’s pool of funds. To receive insurance, each exchange member was required to sign an identical agreement (the “Subscriber’s Agreement”) appointing Defendant as attorney-in-fact on behalf of the exchange. Plaintiff alleged that beginning in 1997, Defendant began to retain for itself service charges that certain members paid to exchange, which monies belonged to exchange, and that, beginning in 2008, Defendant misappropriated late payment and policy reinstatement fees, totaling over $300 million dollars. The complaint was brought by certain members of the exchange, naming the exchange as the Plaintiff, and asserting that it was brought on behalf of the exchange and its members. Defendant removed the action, arguing that the case constituted a class action within the meaning of the CAFA. The District Court granted Plaintiff’s motion to remand, and the Third Circuit affirmed. The Third Circuit first noted that the CAFA
defines a class action as any civil action under Rule 23 or similar state statute authorizing an action to be brought by 1 or more representative persons as a class action. *Id.* at 158. Here, Defendant did not attempt to argue that this dispute met the statutory definition of a class action. This action was originally brought pursuant to Rule 2152 of the Pennsylvania Rules of Civil Procedure (“Rule 2152”), which allows suits on behalf of an unincorporated association to be prosecuted by its members. The Third Circuit, however, noted that Rule 2152 did not contain any of the defining characteristics of Rule 23, such as numerosity, commonality, or predominance requirements. Defendant noted that Rule 2152 was not the proper vehicle for a lawsuit by an insurance exchange, and that such an entity must bring an action under Rule 2177, which required suits by insurance exchanges to be filed in their corporate name. The Third Circuit remarked that if that were the case, Rule 2177 was even less like Rule 23 in that it contained none of Rule 23’s class-related requirements. *Id.* at 159. The Third Circuit remarked that if the case was procedurally unsound under Pennsylvania’s rules, the Commonwealth’s courts were best suited to correct the problem. The Third Circuit further remarked that by contrast to Rules 2152 and 2177, Rules 1701 through 1704 contained specific requirements for a lawsuit to be brought as a class action under state law. *Id.* The Third Circuit thus concluded this suit was by an entity and not a class of individuals. *Id.* at 160. Unable to meet the clear statutory definition of a class action, Defendant resorted to a series of extra-textual arguments and to a complicated analysis of the complaint, in an attempt to meet its burden of establishing removal. Defendant pointed to the CAFA’s legislative history, and contended that the CAFA’s application of class actions should not be confined solely to lawsuits that were labeled class action. The Third Circuit rejected this argument, finding that its decision was not based on the missing label of class action in the complaint; rather, it turned on the fact that this case was not brought pursuant to any rule sufficiently similar to Rule 23, and that Defendant did not point to any rule that would even permit a suit by an exchange through its members to be brought as a class action under Pennsylvania law. *Id.* Accordingly, the Third Circuit affirmed the District Court’s order remanding the case to the state court.

**Vodenichar, et al. v. Halcon Energy Properties, Inc., 733 F.3d 497 (3d Cir. 2013).** In a putative class action alleging breach of oil and gas line lease agreements between Plaintiffs and an energy company, the Third Circuit upheld the remand order of the District Court. Under the agreement, Defendants, Morascyzk & Polochak (“M&P”) and CX-Energy (“CX-Energy”), had agreed to act as Plaintiffs’ agent to negotiate leases of their oil and gas interests to energy companies in exchange for a “transaction fee.” *Id.* at 501. M&P and CX-Energy entered into a letter of intent with Defendant Halcón Energy Properties, Inc. (“Halcon”), an oil and gas company, pursuant to which Halcon leased up to 60,000 acres of oil and gas rights from landowners who submitted lease documents. *Id.* Plaintiffs asserted that Halcon had agreed to accept the leases absent a title defect, an adverse environmental claim, or restrictions on the ability to explore, drill for, or produce oil, gas, or hydrocarbons. Halcon, however, rejected many of the leases for reasons other than those permitted under the agreement. Halcon asserted that the word “geology” was fraudulently omitted from the list of grounds upon which it declined to lease the property. *Id.* Plaintiffs asserted that it was the fault of M&P and CX-Energy. Plaintiffs initially filed the action against only Halcon in the U.S. District Court for the Western District of Pennsylvania. While the action was pending and discovery was on-going, Halcon disclosed its intention to join M&P and CX-Energy as Defendants, and Plaintiffs expressed a desire to add them as direct Defendants. Plaintiffs filed a motion to dismiss the first action with the intent of pursuing the claims against all Defendants in state court. On the same day, Plaintiffs filed a state court class action alleging the same facts and claims. The District Court had granted Plaintiffs’ motion, reasoning that the parties agreed that the claims should proceed in one forum in which subject-matter jurisdiction indisputedly existed. The District Court had also ordered the parties to participate in ADR and to retain discovery produced to both facilitate the ADR process and assist in the state court case. *Id.* at 502. Halcon then removed the second filed action to the same District Court, indicating that the second filed action was related to the first action. Plaintiffs filed a motion to remand the second filed action based upon the CAFA’s local controversy exception. Although the District Court found that the local controversy exception did not apply, it remanded the action finding that the CAFA’s home state exception applied. *Id.* On appeal, the Third Circuit held that remand was warranted, but under the local controversy exception. *Id.* at 503. The CAFA requires remand under the home state exception only if all primary Defendants are citizens of the same state. *Id.* at 506. The District Court had concluded that the
home state exception applied because M&P and CX-Energy were the only primary Defendants and Halcon was not because it had denied liability. \textit{Id.} at 504. The Third Circuit, however, found that Halcon was the primary Defendant because the claims against Halcon were significant in that Plaintiffs had alleged that Halcon breached its lease agreement with more than 1,000 landowners and owed damages exceeding $50,000 to each class member. Because Halcon was a primary Defendant and was not from the same state as the Pennsylvania class member, the Third Circuit concluded that the home state exception did not apply. \textit{Id.} The Third Circuit found that local controversy exception was appropriate because “no other class action” had been filed as contemplated under the CAFA. \textit{Id.} at 506. The Third Circuit held that close scrutiny of the two cases showed that the first action was not an “other class action,” but rather the same case, albeit enlarged. \textit{Id.} at 509-10. According to the Third Circuit, the fact that the District Court had ordered retention of the discovery that the parties exchanged in both the ADR and case that joined M&P and CX-Energy showed that it considered the second filed action as a continuation of the first action and took practical steps to ensure that the act of filing the second complaint did not delay the parties’ ability to proceed. \textit{Id.} at 509. The Third Circuit opined that treating the second filed action in such way was consistent with the goal of the local controversy exception of ensuring that the Defendants were not subject to similar claims in different forums and allowing all claims against them to proceed in a coordinated fashion. \textit{Id.} The Third Circuit found that Plaintiffs’ actions were no different from a situation where a party amended a pleading to join parties to an existing case, and that Halcon was defending the same case that it had been defending with the exception of the addition of the other parties Halcon intended to join. \textit{Id.} The Third Circuit concluded that the first filed action was not an “other class action” as contemplated under the CAFA. Finding that each element of the local controversy exception was met, the Third Circuit concluded that remand pursuant to the local controversy exception was appropriate. Accordingly, the Third Circuit affirmed the District Court’s remand order.

(iv) Fourth Circuit

\textit{Quicken Loans Inc. v. Alig, et al.,} 2013 U.S. App. LEXIS 25224 (4th Cir. Dec. 19, 2013). Plaintiffs, citizens of the State of West Virginia, filed a class action in state court on behalf of themselves and a class of West Virginia citizens against Defendant Quicken Loans and three individual appraisers on behalf of themselves and a class of West Virginia real estate appraisers. \textit{Id.} at *3-4. Plaintiffs claimed that the appraisers appraised their property at the value suggested by Quicken Loans. As a result, Plaintiffs and class members closed on loans that were underwater from the outset. \textit{Id.} at *5. Quicken Loans removed the case pursuant to the CAFA. Plaintiffs filed a motion to remand, arguing that the local controversy exception applied. The District Court granted the motion, and Quicken Loans petitioned to appeal. \textit{Id.} The Fourth Circuit granted the petition, vacated the order, and remanded the case to the District Court for determination of whether Plaintiffs could satisfy the “at least one Defendant” requirement of the local controversy exception. \textit{Id.} at *2. There was no dispute that the initial requirements of the CAFA were satisfied. The Fourth Circuit noted that the elements of the local controversy exception include: (i) more than two thirds of the members of the proposed class are citizens of the state where the suit was originally filed; (ii) at least one Defendant is a Defendant from whom members of the class are seeking “significant relief,” is a Defendant whose conduct “forms a significant basis” for the proposed class claims, and is a citizen of the state in which the action originally was filed; (iii) the principal injuries stemming from the conduct alleged in the complaint occurred in the state where the action was filed originally; and (iv) in the three years before the filing of the complaint, no other similar class action was filed against any of Defendants on behalf of the same or other class. \textit{Id.} at *7. The parties agreed that each of these elements except for the “at least one Defendant” requirement was satisfied. \textit{Id.} at *7-8. Quicken Loans argued that the District Court erred by aggregating the appraisers as a group to satisfy the at least one Defendant requirement, and even if it could, unidentified members of an uncertified purported class are not Defendants. The Fourth Circuit rejected Quicken Loans’ argument that the one Defendant requirement must mean “only one Defendant,” noting that under common parlance, the term “at least” permits a reading that more than one Defendant could satisfy the stated criteria. \textit{Id.} at *10. The Fourth Circuit agreed that an unnamed member of a proposed but uncertified class is not a party to the litigation. \textit{Id.} at *13. Accordingly, the Fourth Circuit vacated the District Court’s order and remanded the case to determine
whether the three named Defendant appraisers satisfied the “at least one Defendant” element of the local controversy exception. *Id.* at *13-14.

**State Of West Virginia, ex rel. v. Cardinal Health, Inc., 2013 U.S. Dist. LEXIS 44178 (S.D. W. Va. Mar. 27, 2013).** The West Virginia Attorney General alleged that prescription drug abuse cost West Virginia hundreds of millions of dollars annually. Accordingly, the Attorney General brought this class action against Defendant, a party whom the Attorney General identified as having substantially contributed to and benefited financially from the prescription drug abuse problem in West Virginia. The Attorney General alleged that Defendant contravened state law by distributing prescription drugs, which were closely identified with the prescription drug problem. The Attorney General contended that Defendant was on notice of the growing epidemic from the abuse of those drugs, and accordingly, Defendant was answerable in damages to the State and was susceptible to such other relief. Defendant removed the action, arguing that the action qualified as both a class action and a mass action under the CAFA. Defendant further contended that the complaint alleged private claims that the Attorney General was unauthorized to bring as *parens patriae*, and the real parties-in-interest were the affected citizens of the State who obtained the prescription medications. The Attorney General sought remand, which the Court granted. At the very outset, the Court noted that to satisfy the minimal diversity requirement, any one member of the class of Plaintiffs must be a citizen of a state different from any Defendant. *Id.* at *16. It was clear that the State was not a citizen for diversity purposes. *Id.* The Court also noted that the definition of a CAFA class action was any civil action filed under Rule 23 or similar State statute or rule of judicial procedure authorizing an action to be brought by one or more representative persons as a class action. *Id.* at *17. The Court also observed that a mass action was one that must satisfy the CAFA’s minimal diversity requirement, its numerosity requirement of 100 or more persons, and its amount-in-controversy requirement that all claims, when aggregated, must exceed $5 million and that an individual claim must exceed $75,000. *Id.* The Court noted that the State wanted the prescription drug epidemic halted, and sought compensation for the past harms upon its social welfare, healthcare, and justice systems because of the epidemic. The Court observed that to the extent individual damages might be theorized, they would play a minimal role at most in the litigation. The Court found that the purpose of the litigation was protection of the State’s citizens and upholding the integrity of West Virginia law. The Court also found that the State was enforcing its own statutes in seeking to protect its citizens. Accordingly, the Court concluded that the State was the real party in interest, and inasmuch as it was not deemed a citizen for subject-matter jurisdiction purposes, minimal diversity was absent. Therefore, the Court found that this case qualified neither as a class action nor as a mass action under the CAFA, and remanded the case to state court.

(v) **Fifth Circuit**

**Hood, et al. v. Bristol-Myers Squibb Co., 2013 U.S. Dist. LEXIS 90540 (N.D. Miss. June 27, 2013).** Plaintiff, the Attorney General of the State of Mississippi, brought an action in state court under the Mississippi Consumer Protection Act (the “MCPA”) alleging that Defendants unfairly, falsely, and deceptively labeled and promoted the prescription drug Plavix as more effective than aspirin and other competitor products. Defendants removed the action and Plaintiff moved for remand asserting lack of subject-matter jurisdiction. The District Court denied Plaintiff’s motion. First, Defendants argued that the action was removable based on diversity jurisdiction. Although parties did not dispute that the amount-in-controversy was satisfied, they disputed whether the parties were completely diverse. Plaintiff argued that it was bringing a *parens patriae* suit on behalf of the State of Mississippi under the MCPA, not a suit on behalf of the individual users of Plavix under the MCPA, and that because the State was not a citizen for purposes of diversity jurisdiction, diversity was not a valid basis for removal. The Court noted that a State may bring a *parens patriae* action to vindicate a quasi-sovereign interest in the health and well-being of its residents in general, and in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign law-making powers. *Id.* at *12-13. Further, the Court observed that under the MCPA, the Attorney General may bring a suit to obtain injunctive relief in the name of the State for the use of such method, act, or practice as violates the MCPA, and that an individual
consumer may also bring an action under the MCPA. *Id.* at *15. Although several statements throughout the complaint referred to the injury as a generalized harm to the State as a whole, numerous other statements in the complaint indicated that the injury complained of was suffered by the user or purchaser or consumer, as well as Mississippi. Thus, the Court found that the real parties-in-interest included not only the State, but also individual consumers residing in Mississippi. The Court opined that although the State brought this suit pursuant to the MCPA, the MCPA did not give the State sole authority to recover for particularized injuries suffered by consumers. Further, because the statute did not authorize public collection of private damages, the Court held that the action was removable on the basis of diversity jurisdiction. Second, Defendants asserted that the action was removable based on federal question jurisdiction because the action presented federal questions pertaining to the Federal Medicaid Act and the Federal Food, Drug, and Cosmetic Act (the “FDCA”) that must be answered to resolve the case. The Court, however, stated that the primary issue raised in the complaint was whether Plavix was marketed through false, fraudulent, and misleading practices, which did not rest on whether Defendants violated the FDCA and/or the FDA regulations in their promotion and marketing of Plavix, but whether Defendants violated Mississippi law. The Court noted that the action presented clear state law claims for violations of the MCPA, and to prevail in this litigation, Plaintiff would have to prove the elements of its state law claims, but would not necessarily have to prove that any violation of federal laws occurred to prove the elements of its state law claims. Further, the Court observed that the fact that Congress provided no private right of action in the Federal Medicaid Act presented compelling evidence that a finding of federal jurisdiction would be inconsistent with congressional judgment about the sound division of labor between the state and federal court systems. *Id.* at *26. Accordingly, the Court stated that the action was not removable under federal jurisdiction. Finally, Defendants argued that the action was removable under the CAFA as a class action or a mass action. As to that contention, the Court noted that Plaintiff did not bring this suit under Rule 23 or a rule of judicial procedure, and Mississippi law precludes class actions. Further, because the suit was brought under the MCPA, which forbids class actions, the Court found that the suit did not qualify as a class action under the CAFA. The Court, however, concluded that the action was removable under the CAFA because it was a mass action. It involved the monetary claims of 100 or more Mississippi citizens; the claims involved common questions of law or fact; and the amount-in-controversy was stated to be in the hundreds of millions of dollars. *Id.* at *30-31. Accordingly the Court denied Plaintiff’s motion for remand.

*Lefevre, et al. v. Connextions, Inc., 2013 U.S. Dist. LEXIS 169932 (N.D. Tex. Dec. 3, 2013).* Plaintiffs, a group of insurance sales people recruited by Ayava Staffing to work for Connextions, Inc., brought a class action for breach of contract and common law wages alleging that they only received hourly wages and were never paid commissions on the sales of two specific drug plans. Connextions removed the case under the CAFA. Plaintiffs moved to remand, asserting that the CAFA’s local controversy exception applied. The Court denied the motion. The parties focused on the issue of whether Ayava was a significant Defendant. First, the Court examined whether the relief sought against Ayava was a significant portion of the entire relief sought. *Id.* at *8. The Court noted that the complaint sought damages equally from Ayava and the other Defendants. Further, although Ayava appeared to be a limited partnership whereas Connextions was a corporation, the Court remarked that this was insufficient to raise an inference that Ayava was merely a nominal Defendant, or that Ayava had so few assets that Plaintiffs were not seeking significant monetary relief from it. Accordingly, the Court found that Plaintiffs showed that Ayava was a local Defendant from whom significant relief was sought by the class members. Second, the Court examined whether Ayava’s alleged conduct formed a significant basis for the claims asserted by the class members. The Court stated that the CAFA did not require that the local Defendant’s alleged conduct form a basis of each claim asserted; it required only that the alleged conduct form a significant basis of all the claims asserted. *Id.* at *9. The Court noted that the complaint included allegations that distinguished the conduct of Ayava from that of the other Defendants. The complaint alleged that Ayava recruited Plaintiffs and the class members to work for Connextions, suggesting that Ayava was a recruiting organization whereas Connextions was the actual employer. Further, the complaint stated that Connextions hired Plaintiffs and the class members to sell insurance products, without mentioning that Ayava ever hired any Plaintiffs to sell insurance products. The Court, however, opined that these distinctions were insufficient to
prove by a preponderance of the evidence that Ayava was a significant Defendant. Although the complaint asserted that Plaintiffs and the class members worked for Connextions and Ayava, it did not allege that Ayava hired any Plaintiff or that Plaintiffs ever sold any products for Ayava; instead, the amended complaint asserted that Connextions hired Plaintiffs and the class members, and that Plaintiffs were involved in selling insurance products for Connextions. Most of the complaint did not distinguish conduct by Ayava from conduct by the other Defendants, and, to the extent it did, the Court found that these distinctions raised the inference that Ayava’s conduct did not form a significant basis of the claims asserted because it appeared that Ayava was nothing more than a recruiting organization that did not enter into an employment relationship with Plaintiffs. Thus, Court concluded that Plaintiffs failed prove by a preponderance of the evidence that Ayava was a local Defendant whose alleged conduct formed a significant basis for the claims asserted by the proposed class. Accordingly, the Court denied the motion to remand.

State Of Louisiana, et al. v. American National Property, 2013 U.S. Dist. LEXIS 129961 (E.D. La. Sept. 11, 2013). The Plaintiff, the state of Louisiana, brought a class action on behalf of homeowners against the Defendant insurance companies (the “Road home” litigation). In the aftermath of Hurricanes Katrina and Rita, Plaintiff, funded by the federal government, provided funds to Louisiana homeowners to assist in the reconstruction of their homes. As a condition to receiving funds, the homeowners were required to sign subrogation/assignment agreements assigning to Plaintiff the homeowners’ rights against their insurance companies. The Road Home litigation was brought in Louisiana state court by Plaintiff against over 200 insurers to obtain the funds assigned to it by the homeowners and for subrogation. Id. at *2-3. The case was removed under the CAFA. The Court denied Plaintiff’s motion to remand, and the decision was affirmed on appeal. Id. at *4-5. In subsequent proceedings, the class allegations were dismissed, and Plaintiff filed another motion to remand. The Court denied the motion, holding that the CAFA jurisdiction is determined at the time of removal. Id. at *8-9. In a subsequent case management order, the Magistrate Judge severed the Road Home litigation into individual suits, determining that the assignment/subrogation claims needed to be analyzed individually based on policy language. The severance order required Plaintiff to file separate complaints for each insured. Id. at *10. Plaintiff then argued that the Court did not have jurisdiction over the amended complaints. The Court agreed. It ruled that each of the severed actions required separate jurisdictional bases. Finding none here, it remanded the case to Louisiana state court. Id. at *17-18.

(vi) Sixth Circuit

Brown, et al. v. Paducah & Louisville Railways, Inc., 2013 U.S. Dist. LEXIS 132608 (W.D. Ky. Sept. 17, 2013). Plaintiffs brought an action alleging substantial damages due to a train derailment that released a large quantity of hazardous chemicals into the surrounding environment. Defendants removed the action under the CAFA. Plaintiffs moved for remand, and the Court denied the motion. The Court noted that under the CAFA, minimal diversity requires only that at least one Plaintiff is a citizen of a state that is different from the state of citizenship of at least one Defendant. Id. at *7-8. Here, the four representative Plaintiffs were all citizens of Kentucky, and Defendant CSX Transportation, Inc. was a citizen of Virginia and Florida, and Defendant P&L Transportation, Inc. was a citizen of Delaware. Thus, the Court found that the minimal diversity requirement had clearly been satisfied. Further, in addition to compensatory damages for personal injuries, property damage, and economic losses, Plaintiffs also sought an injunction requiring Defendants to make Plaintiffs’ property and places of business safe. Because these damages were sought on behalf of thousands of class members, and because the injunction required Defendants to spend substantial sums of money, the Court opined that the amount-in-controversy would likely exceed $5 million based on these remedies alone. Plaintiffs also sought punitive damages, and because Kentucky law permits the recovery of punitive damages in tort actions, the Court noted that Plaintiffs could recover an amount of damages far in excess of the amount of compensatory damages they were awarded. Thus, the Court opined that the amount-in-controversy would likely exceed $5 million. Accordingly, the Court stated that Defendants had successfully established that removal was proper under the CAFA. The Court also analyzed the three exceptions to the CAFA, i.e., the home state exception, the local controversy exception, and the discretionary exception. Each exception requires that a certain
Both the home state and the local controversy exceptions require that at least two-thirds of the proposed class members be citizens of the forum state. *Id.* at *17. Here, Plaintiffs’ proposed class did not restrict the geographic scope of the businesses or commercial entities that it potentially encompassed. The potentially thousands of out-of-state class members in the class rendered the aggregate proportion of Kentucky-citizens to non-Kentucky-citizen class members well below the threshold necessary to defeat federal jurisdiction under the CAFA’s exceptions. *Id.* at *16-17. Further, the home state exception did not apply for the additional reason that none of Defendants were citizens of Kentucky. *Id.* at *23. The local controversy exception did not apply for the additional reason that all or nearly all of the damages caused by Defendants alleged conduct did not occur in the forum state. *Id.* at *26. Finally, the Court ruled that the discretionary exception did not apply because it was unlikely that one-third of the class members were Kentucky citizens. *Id.* at *26-27. Accordingly, the Court denied Plaintiffs’ motion to remand.

**In Re McKesson Corp., No. 13-504 (6th Cir. Oct. 30, 2013).** Plaintiffs brought a class action in California state court alleging injuries related to the ingestion of propoxyphene, an ingredient found in the Darvocet and Darvon pain medications and in their generic brand counterparts. Defendants removed the case and it was transferred to the U.S. District Court for the Eastern District of Kentucky. The District Court then remanded the action to state court, and Defendants appealed that order. The Sixth Circuit denied the appeal. In its notice for removal, Defendants had asserted that the case was a mass action, which is one where monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that Plaintiffs’ claims involve common questions of law or fact. *Id.* at *1. The Sixth Circuit observed that review of the remand order would require a determination of whether the District Court correctly concluded that the action was not a CAFA mass action as a result of the filing by Plaintiffs in other California state court propoxyphene actions of a petition for coordination pursuant to § 404 of the California Code of Civil Procedure. The Sixth Circuit noted that the Ninth Circuit had previously held that the petition for coordination did not propose a joint trial of the propoxyphene actions, and thus, did not result in a CAFA mass action. *Id.* at *1-2. Although the CAFA authorizes a discretionary appeal of rulings on motions to remand actions removed under its provisions, the Sixth Circuit declined to grant such an appeal here because it found that an appeal would require it to resolve a factual dispute that had been addressed by numerous District Courts in California and by the Ninth Circuit. Further, the Sixth Circuit remarked that an appeal of the remand order would not significantly facilitate the development of its body of law interpreting the CAFA.

**Kuns, et al. v. Ford Motor Co., 2013 U.S. App. LEXIS 23366 (6th Cir. Nov. 19, 2013).** Plaintiff, an owner of a 2010 Mercury Mariner purchased from a Ford dealership, brought a class action alleging violations of the Magnuson-Moss Warranty Act ("MMWA"), breach of express warranty, and breach of implied warranty. When the vehicle’s window shattered while closing the rear lift gate, Plaintiff replaced the glass at a repair shop not associated with Ford because the warranty supplied by Ford would not cover the damage. After a month, the window shattered again. About the same time, Plaintiff observed that other owners of the 2010 Mariner had experienced similar breakages. Although the dealership initially refused to replace the window since the initial repair had not been made by a Ford authorized entity, Ford replaced the window when Plaintiff spoke with another Ford representative and threatened to stop making payments on the vehicle. In the course of the litigation, Plaintiff discovered that Ford was aware of problems with the rear lift gate glass, and subsequently, issued several Technical Service Bulletins ("TSBs") notifying Ford dealerships and the National Highway Traffic Safety Administration of the defect and instructing dealerships to replace the glass. Although the District Court initially determined that it did not have jurisdiction under the MMWA, which requires a class to consist of at least 100 named Plaintiffs, it found that it had jurisdiction under the CAFA after it allowed Plaintiff to file an amended complaint. The Sixth Circuit reasoned that even if federal jurisdiction was not provided by the MMWA, the CAFA’s requirements were met, and the District Court correctly held that it had jurisdiction under the CAFA. *Id.* at *7-8. Thereafter, the District Court granted Ford’s motion for summary judgment. Plaintiff appealed the dismissal of her claims based on the MMWA and an express warranty. The Sixth Circuit affirmed the order of the District Court. The Sixth Circuit noted that to state a claim under the MMWA, a Plaintiff must demonstrate that the item at issue was subject to a
warranty; the item did not conform to the warranty; the seller was given reasonable opportunity to cure any defects; and the seller failed to cure the defects within a reasonable time or a reasonable number of attempts. *Id.* at *10. Here, Plaintiff did not give Ford the opportunity to cure the initial defect in her rear window following the first breakage. Rather, Plaintiff’s husband reviewed the written warranty provided, concluded that the damage was not covered, and repaired the vehicle at a repair shop not authorized by Ford. Although Plaintiff argued that any request for a cure would have been futile in light of Ford’s policy that window breakages were not typically covered by the new vehicle warranty, the Sixth Circuit reasoned that that this statutory requirement can be waived if Plaintiff subjectively determines that a demand would be futile and does not request the seller to cover the necessary repair. *Id.* at *12. At the time of the first breakage, Ford had already issued TSBs instructing its dealers that problems with the rear lift gate window were covered by the warranty. Thus, the Sixth Circuit found that it need not reach the question of whether Ford’s warranty or other disclosures met the requirements of the MMWA, and that Plaintiff had no cognizable claim for the first breakage. The Sixth Circuit also observed that Ford’s warranty stated that if the vehicle was properly operated and maintained, and was taken to a Ford dealership for a warranted repair during the warranty period, then authorized Ford dealers, would, without charge, repair, replace, or adjust all parts on the vehicle that malfunctioned or failed during normal use during the applicable coverage period due to a manufacturing defect in factory supplied materials or factory workmanship. Further, it stated that the warranty would not cover any damage caused by the installation or use of a non-Ford part. Regarding the second damage, although Plaintiff had to persist on the repair, Ford repaired the second breakage without charge. The Sixth Circuit thus declined to find a genuine issue of material fact as to whether the dealership failed to cure the defects within a reasonable time and a reasonable number of attempts. Further, considering that the broken window was a non-factory part, the Sixth Circuit held that the dealership’s initial refusal to replace it was reasonable, and it was uncontroverted that Plaintiff’s vehicle was repaired within a week of the breakage. Accordingly, the Sixth Circuit affirmed the District Court’s grant of summary judgment to Ford on Plaintiff’s MMWA claims. Finally, because the elements a Plaintiff must show to pursue a breach of warranty claim in Ohio are the same as those required by the MMWA, the Sixth Circuit affirmed the dismissal of Plaintiff’s state law claim.

Norrising, et al. v. People’s Credit Co., Inc., 2013 U.S. Dist. LEXIS 139327 (N.D. Ohio Sept. 27, 2013). Plaintiff, a vehicle purchaser, brought a class action in state court alleging Consumer Sales Practices Act (“CSPA”) violations, Usury, Retail Instalment Sales Act (“RISA”) violations, derivative liability, and conspiracy claims. Defendant removed the action under the CAFA. Plaintiff moved for remand, asserting that the amount-in-controversy was not met. Defendant attested that there were 2,329 contracts totaling $13,185,925 purchased from Ohio dealers in the class timeframe, and that Plaintiff’s actual damages would be $4,302,943.95. Defendant supported its position with an affidavit of its Vice President, Elizabeth Barnett, attesting to the number of transactions at issue and the value of those contracts. Although Plaintiff disputed that all the transactions would ultimately be applicable to her class claims, the Court focused on the claims contained in the complaint at the time of the removal. The Court observed that jurisdiction is determined at the time of removal, and subsequent events, whether beyond Plaintiff’s control or the result of her volition, do not oust the Court’s jurisdiction once it has attached. *Id.* at *15. Although Plaintiff claimed she was not entitled to rescission of all class claims, she provided no case authority for her position, and she merely represented such a conclusion in her motion to remand that she would not be entitled to it on a class basis. The Court, however, observed that even claims that were subsequently dismissed must be factored into the amount-in-controversy if they were present in the complaint at the time of removal, and that claims present when a suit is removed but subsequently dismissed from the case thus enter into the amount-in-controversy calculation. *Id.* at *16. Based on Defendant’s evidence, the Court remarked that the cost of rescission exceeded the statutory amount-in-controversy limitation. Moreover, the Barnett affidavit demonstrated that Plaintiff’s actual damages, which were assumed to be typical of the putative class, totaled $4,302,943.95. This amount did not take into account punitive damages, attorneys’ fees, or the cost of credit correction sought by Plaintiff. Further, Defendant argued that the RISA claim entitled Plaintiff to an 8% add-on rate for adjustments to the finance rate in her contract, which when applied to Plaintiff’s claims, resulted in $1,233.50 additional recovery. When applied to the class that figure totaled $2,872,821.50, and when added to Plaintiff’s alleged actual damages, the amount easily exceeded...
the $5 million statutory amount. Thus, the Court held that Defendant had shown that the amount-in-controversy was met. Accordingly, the Court denied Plaintiff’s motion for remand.

(vii) Seventh Circuit

Addison Automatics, Inc., et al. v. Hartford Casualty Insurance Co., Case No. 13-CV-1922 (N.D. Ill. June 25, 2013). Plaintiff brought a class action in state court seeking a declaration that Defendants, a group of insurance companies, had a duty to defend and indemnify Domino Plastics, Inc. Plaintiff had earlier brought an action against Domino alleging that it had sent unsolicited faxes in violation of the Telephone Consumer Protection Act and the Illinois Consumer Fraud Act. Subsequently, the parties reached a settlement whereby Domino agreed to the entry of a judgment of $17,751,363.81, and also assigned to the class all of its claims and right to payment from insurance policy issued by Defendants. The state court approved the settlement and the settlement class (the “State Class”). Defendants removed the present action, asserting that federal jurisdiction was proper under the CAFA. Plaintiff moved for remand, arguing that because the lawsuit was filed solely on its own behalf and not on the behalf of the State Class and thus the CAFA did not apply. The Court granted the motion. Defendants contended that the CAFA jurisdiction was appropriate and the case should be considered a class action because the relief sought would benefit the entire State Class. Further, Defendants asserted that the assignment of Domino’s right was to the entire State Class, and Plaintiff did not have the standing to assert an individual claim. The Court noted that Plaintiff’s complaint did not assert a class action, it expressly stated that it was not a class action, and that it was not filed under Rule 23 or any similar statute or rule of judicial procedure. Accordingly, the Court opined that jurisdiction did not exist under the CAFA. Further, the Court stated that it was not clear whether Plaintiff had standing to bring an individual claim based upon the assignment executed between Domino and the State Class. The Court remarked that even if Plaintiff succeeded and judgment was entered in its favor, it was uncertain whether and to what extent any of the other State Class members would be able to enforce the judgment in order to obtain their portions of the indemnification proceeds. Moreover, it was also not clear whether and to what extent Plaintiff owed duty to the State Class, as the Court-appointed representative. The Court found that because federal jurisdiction was lacking, all of these issues should be raised before the state court. Accordingly the Court granted Plaintiff’s motion to remand.

Addison Automatics, Inc., et al. v. Hartford Casualty Insurance Co., 731 F.3d 740 (7th Cir. 2013). Plaintiff brought a class action in state court seeking a declaration that Defendants, a group of insurance companies, had a duty to defend and indemnify Domino Plastics, Inc. Plaintiff had earlier brought an action against Domino alleging that it had sent unsolicited faxes in violation of the Telephone Consumer Protection Act and the Illinois Consumer Fraud Act. Subsequently, the parties reached a settlement whereby Domino agreed to the entry of a judgment of $17,751,363.81, and also assigned to the class all of its claims and right to payment from insurance policy issued by Defendants. The state court approved the settlement and the settlement class (the “State Class”). Defendants removed the present action, asserting that federal jurisdiction was proper under the CAFA. Plaintiff moved for remand, arguing that because the lawsuit was filed solely on its own behalf and not on the behalf of the State Class, the CAFA did not apply. The District Court granted the motion. Upon appeal, the Seventh Circuit reversed the order, concluding that it was a class action. First, the Seventh Circuit found that the terms of the class settlement approved in state court made clear that Addison had standing to pursue relief from Hartford only in its capacity as class representative. Unlike the District Court, the Seventh Circuit reached the question of standing because it went directly to the characterization of Addison’s claim as a class action, a threshold inquiry for deciding federal jurisdiction under the CAFA. The complaint sought a ruling on Hartford’s duties to Domino on a claim that Domino assigned to the State Class. Such a ruling would determine Hartford’s liability not just to Plaintiff, but also for the entire $18 million judgment that the state court entered in favor of the State Class. Moreover, the Seventh Circuit opined that only Plaintiff had standing to pursue this relief on behalf of the class certified by the state court because the settlement gave other class members no right to pursue such relief on their own, as it assigned Domino’s claims against its insurers only to the State Class as represented by Plaintiff. Id. at 742. Second, the Seventh Circuit maintained that a class representative’s fiduciary duty to class members carries over to separate litigation affecting the class. The
Seventh Circuit found that Plaintiff owed fiduciary duties to the class in pursuing relief against Hartford. The Seventh Circuit remarked that if it were to treat Plaintiff as anything other than a class representative, the interests of the class would be in danger. Plaintiff, however, urged the Court to consider the present suit in a vacuum, arguing that there was no need to “reconstitute” the class here. Id. at 743. On the contrary, the Seventh Circuit observed that the class had been and remained certified pursuant to Illinois law, and Plaintiff and its counsel were responsible for trying to obtain relief on the class’ behalf under the very assignment Addison now wanted to pursue for itself. Thus, by pursuing the rights assigned to it as class representative in the state court class action, Plaintiff was necessarily continuing that class action. Thus, concluding that Plaintiff’s pleading in this case could not disguise the true nature of its claim or avoid its fiduciary duties to the class it represented, the Seventh Circuit reversed the District Court’s order remanding this action to state court.

**Walker, et al. v. Trailer Transit, Inc., 727 F.3d 819 (7th Cir. 2013).** Plaintiff, an owner and operator of a long-haul truck, brought a class action in state court asserting that Defendant violated its lease agreements, and that Defendant charged add-on fees to customers which exceeded the cost of providing special services. Plaintiff contended that the truckers were entitled to a portion of these fees under the lease agreement. In response to Defendant’s summary judgment motion, Plaintiff argued how a jury could award damages based on either Defendant’s profits or based on the entire fees. When Defendant’s counsel sought clarification on whether the class was seeking 71% of the entire fees or of the profits from Plaintiff’s fees, Plaintiff’s attorney responded by copying and pasting the same argument from their summary judgment response. Only when Defendant formally requested clarification of the theory of damages, Plaintiff’s attorney admitted that the class was seeking 71% of the entire fees. Thereafter, Defendant removed the action under the CAFA, and its notice of removal included an affidavit from an executive which stated that the possible damages could exceed $5 million if the class sought 71% of the entire amount of the disputed fees, but not if the class sought 71% of the profits from those fees. Although Plaintiff acknowledged that the amount-in-controversy requirement was satisfied, he moved for remand contending that removal was untimely because the 30-day removal period started when he filed his summary judgment response, or at the latest, when his attorney responded to Defendant’s e-mail (both of which occurred more than 30 days before removal). The District Court denied Plaintiff’s motion for remand. The Seventh Circuit granted Plaintiff’s petition to appeal, but affirmed the District Court’s ruling. The Seventh Circuit observed that the 30-day removal clock does not begin to run until a Defendant receives a pleading or other paper that affirmatively and unambiguously reveals that the predicates for removal are present, and stated that with respect to the amount-in-controversy in particular, the pleading or other paper must specifically disclose the amount of monetary damages sought. Id. at 824. Further, the Seventh Circuit stated that assessing the timeliness of removal should not involve a fact-intensive inquiry about what Defendant subjectively knew or should have discovered through independent investigation. Id. at 825. Neither Plaintiff’s summary judgment response nor the follow-up e-mail of Plaintiff’s counsel was sufficient to start the removal clock. The summary judgment response intimated for the first time that the class was seeking 71% of the entire disputed fees rather than just 71% of Defendant’s profits from those fees. The Seventh Circuit noted that while this response alerted Defendant that the class might be pursuing a new theory of damages, it was ambiguous, and did not affirmatively reveal that the damages could be greater than $5 million. Further, the District Court remarked that the follow-up e-mail from Plaintiff’s counsel did not resolve the ambiguity; instead, it only reiterated what was in the summary judgment response. The Seventh Circuit opined that the removal clock was first triggered when Plaintiff responded to Defendant’s requests for admission seeking formal clarification of the theory of damages. The Seventh Circuit, however, stated that even this document did not affirmatively specify a damages figure under the class’ new theory, and thus the removal clock never actually started to run. Accordingly, the Seventh Circuit opined that removal was not untimely, and that the District Court had properly denied the motion to remand.

(viii) **Eighth Circuit**

sustained as a result of the implantation of transvaginal mesh products manufactured by Defendant. Plaintiffs moved for assignment of trial judge, noting that there were several separate state actions presently pending against four manufacturers of transvaginal mesh products in the Twenty-Second Judicial Circuit. Although Plaintiffs asked that this case be assigned to a single judge for purposes of discovery and trial, they did not seek consolidation of these separately pending cases. Plaintiffs in *Taylor v. Boston Scientific* and *Evans v. Boston Scientific* also filed motions for assignment of trial judge, asking the court to consider assigning all three Boston Scientific cases to a single judge, and stressing that they were not requesting consolidation of the cases. Boston Scientific removed the present action and Evans cases along with *Johnson v. Coloplast Corp.*, No. 1222-CC10381, pursuant to the mass action provision of the CAFA. Plaintiffs moved for remand. The Court granted the motion. The Court noted that Congress anticipated that Defendants might attempt to consolidate several smaller state court actions into one mass action, and specifically provided that such a consolidated action was not a mass action eligible for removal under the CAFA. *Id.* at *10. Here, the purpose of Plaintiffs’ motion to the assignment judge was to obtain assignment, outside the usual practice, to a single judge to handle pre-trial matters and trial. Plaintiffs explicitly stated, and the Court explicitly found, that they were not seeking consolidation of the separate cases for trial. Similarly, at the hearing on the motion, counsel for all Plaintiffs reiterated that their goal was to have the trial judge handle pre-trial matters, rather than a judge in the civil motion division. All counsel specifically stated that they were not requesting consolidation for trial. Defendant, however, argued that a proposal to consolidate actions for trial can be implicit, and relied on *In Re Abbott Laboratories, Inc.*, 698 F.3d 571 (7th Cir. 2012), which observed that a proposal for joint trial can be implicit, and that Plaintiffs’ motion to consolidate their cases through trial constituted an implicit proposal for joint trial. *Id.* at *13. Defendant argued that Plaintiffs implicitly proposed consolidation of the actions for trial hearing, and cited a statement by the attorney for the Atwell Plaintiffs. The Court, however, remarked that the statement at issue did not establish that Plaintiffs implicitly proposed a joint trial. Further, assuming *arguendo* that counsel was speaking for Plaintiffs he did not represent, the Court stated that it was clear from the context that he merely requested assignment of one judge, rather than two, for pre-trial and trial. The Court found that nothing in this statement constituted a request for consolidation through trial. The Court reasoned that Defendant’s argument that these three cases be treated as one action was tantamount to a request to consolidate them, and that the 94 Plaintiffs in this present action were not sufficient to meet the jurisdictional requirements of the CAFA. Accordingly, the Court remanded the action to state court.


Plaintiffs brought a product liability action in state court seeking damages from injuries they allegedly sustained as a result of the implantation of transvaginal mesh products manufactured by Defendant. Plaintiffs moved for assignment of a trial judge, noting that there were several separate state actions presently pending against four manufacturers of transvaginal mesh products in the Twenty-Second Judicial Circuit. Plaintiffs in *Taylor v. Boston Scientific* and *Evans v. Boston Scientific* also filed similar motions proposing that the state court assign each group to a single judge for purposes of discovery and trial. Thereafter, Defendant removed all three actions asserting the mass action provision of the CAFA. Plaintiffs moved for remand, and the District Court granted the motion, holding that no case included more than 100 Plaintiffs and Plaintiffs had not proposed that the actions be tried jointly. Defendant petitioned for permission to appeal, arguing that the three groups of Plaintiffs had proposed to try their cases jointly within the meaning of 28 U.S.C. § 1332(d)(11)(B)(i), transforming their cases into a single mass action subject to federal jurisdiction. The Eighth Circuit granted the petition. At issue was whether the three groups of Plaintiffs proposed that their claims be tried jointly, in which case § 1332(d)(11)(B)(i) applied and the cases were removable, or simply sought consolidation or coordination solely for pre-trial proceedings, in which case § 1332(d)(11)(B)(ii)(iv) applied and the cases were not removable. The Atwell Plaintiffs first moved to have their case assigned to a single judge for purposes of discovery and trial, and their motion did not request a common assignment with other similar Plaintiffs. They cited Rule 6.2.4 and noted that the issues in the transvaginal mesh cases raised the potential for conflicting rulings through the discovery and motion process. Thereafter, the Taylor Plaintiffs filed a motion resembling the Atwell motion, and then amended its motion to conform to the motion of the Evans group motion. Relying on Rules 6.2.1 and 6.2.4, the Evans and Taylor Plaintiffs moved to have other similar cases assigned to a single judge for both pre-

Plaintiffs brought a class action in state court alleging that certain cars manufactured by Nissan had defective dashboards. The complaint stated a claim under the Missouri’s Merchandising Practices Act (“MMPA”) and mentioned punitive damages once in the context of a right to private action, but pled only compensatory damages, costs, and attorneys’ fees. After Nissan’s unsuccessful attempt at removal, Plaintiffs amended the complaint twice but did not change the allegations concerning punitive damages. When the case was set for trial, Plaintiffs submitted proposed jury instructions on punitive damages. Nissan then removed the action, stating that removal pursuant to the CAFA was appropriate. Plaintiffs moved for remand, which the Court granted, finding that although removal was timely under 28 U.S.C. § 1446(b)(3) (as it was first ascertainable that this case had become removable when Plaintiffs submitted their proposed jury instructions), Nissan did not establish the required amount-in-controversy. The Court noted that under 28 U.S.C. § 1446(b)(3), a notice of removal may be filed within 30 days after receipt by Defendant of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable. Id. at *5. Plaintiffs, however, argued that removal was untimely because the jury instruction on punitive damages was not an “amended pleading, motion, order, or other paper.” Id. at *6. Plaintiffs contended that the complaint and amended complaints sought punitive damages, and thus it was ascertainable that this lawsuit was removable from when it was first filed in late 2009. The Court noted that while remanding this action previously, it did not include punitive damages for calculation of amount-in-controversy because the complaint did not unequivocally indicate that Plaintiffs were seeking punitive damages. The Court found that it first became ascertainable with certainty that this case had become removable when Nissan received Plaintiffs’ proposed punitive damages jury instruction. The Court maintained that recovering punitive damages under the MMPA requires pleading facts supporting a finding that the Defendant’s “conduct was outrageous due to Defendant’s evil motive or reckless indifference to the rights of others.” Id. at *9-10. The complaint, however, did not meet this pleading standard, and the prayer for relief also did not seek punitive damages. Accordingly, the Court concluded that the proposed jury instructions that provided information relating to the amount-in-controversy was “other paper” under § 1446(b)(3) and provided a basis for removal. Id. at *9. Thus, the Court found that removal was timely. The Court, however, determined that the amount in dispute would not exceed the required $5 million threshold. The Court stated that if Plaintiffs were allowed to seek punitive damages, the amount in dispute here would easily exceed $5 million. The Court noted that Missouri case law authorities have consistently held that where punitive damages are not adequately pled in the petition, they may not be recovered at trial. Id. at *11-12. Because punitive damages were not adequately pled in the petitions, the Court found that Plaintiff might not recover punitive damages at trial.
Consequently, the Court was left with the conclusion reached in its initial order granting remand, that the amount in dispute here was at most $2,858,000, less than the CAFA’s jurisdictional threshold. Accordingly, the Court granted Plaintiffs’ motion to remand.

**Hurst, et al. v. Nissan North America, Inc., 511 Fed. App’x 584 (8th Cir. 2013).** Plaintiffs brought a class action in state court alleging that certain cars manufactured by Nissan had defective dashboards. The complaint stated a claim under the Missouri Merchandising Practices Act ("MMPA") and mentioned punitive damages once in the context of a right to private action, but pled only recovery of compensatory damages, costs, and attorneys’ fees. Nissan removed the action under the CAFA, and Plaintiff sought remand to state court. The District Court granted Plaintiff’s motion for remand, holding that the amount-in-controversy fell short of the CAFA’s $5 million jurisdictional requirement. Thereafter, three weeks before trial, Plaintiff’s counsel submitted proposed jury instructions for punitive damages. Nissan promptly removed the action to the District Court again, contending that, considering the requested instruction for punitive damages, the amount-in-controversy requirement was now satisfied. The District Court stated that because Plaintiff’s petition failed to adequately plead punitive damages, under Missouri law the damages were unrecoverable at trial and therefore the CAFA’s amount-in-controversy requirement was not met. On appeal, the Eighth Circuit affirmed the order. Nissan argued that the District Court erred in deciding that because Plaintiff’s request for punitive damages was made on the eve of trial, the state court would necessarily deny a request to amend the petition to add a claim for punitive damages. The Eighth Circuit remarked that the jurisdictional consequence of a motion to amend to add punitive damages was now satisfied. The District Court stated that because Plaintiff’s petition failed to adequately plead punitive damages, under Missouri law the damages were unrecoverable at trial and therefore the CAFA’s amount-in-controversy requirement was not met. On appeal, the Eighth Circuit affirmed the order. Nissan argued that the District Court erred in deciding that because Plaintiff’s request for punitive damages was made on the eve of trial, the state court would necessarily deny a request to amend the petition to add a claim for punitive damages. The Eighth Circuit remarked that the jurisdictional consequence of a motion to amend to add punitive damages was neither before the District Court nor before it on appeal, as no motion had been made. The Eighth Circuit stated that the District Court had properly considered whether Plaintiff had established to a legal certainty that, under state law, a fact-finder cannot award more than $5 million. Accordingly, the Eighth Circuit affirmed the District Court’s order of remand.

(ix) **Ninth Circuit**

**Brandle, et al. v. McKesson Corp., 2013 U.S. Dist. LEXIS 112931 (N.D. Cal. Mar. 28, 2013).** Plaintiffs brought a pharmaceutical product liability class action against Defendants, a group of pharmaceutical manufacturers, in state court alleging injuries from ingesting propoxyphene. Subsequently, Plaintiffs, along with others in the similar actions, filed a motion for coordination before the California Judicial Counsel, and Defendant removed the action under the CAFA. Plaintiffs moved to remand. The Court granted the motion, concluding that removal under the CAFA was improper. Defendants asserted that Plaintiffs, by petitioning for coordination, collectively qualified as a mass action under the CAFA because they numbered over 100 in the aggregate. The Court observed that although the coordination petition included the language “for all purposes,” that particular section quoted California Civil Procedure Code § 404.1 as the basis for the petition, and thus could not be reasonably construed as Plaintiffs’ intent to pursue a joint trial. *Id.* at *4. The Court also noted that under 28 U.S.C. 1332(d)(11)(B)(ii), a “mass action” excluded any civil action in which the claims have been consolidated or coordinated solely for pre-trial proceedings. *Id.* Moreover, Congress intended to limit the numerosity component of mass actions by only including claims where the trial itself would address at least 100 Plaintiffs. *Id.* Plaintiffs claimed that they filed the coordination petition for pre-trial purposes, and the Court found that the claims did not qualify as a class action because the petition did not contain an explicit request for the claims to be tried jointly. *Id.* at *4-5. Defendant cited *In Re Abbott Labs, Inc.*, 698 F.3d 568 (7th Cir. 2012), arguing that it held that a coordination petition should be construed as a proposal for joint trial, even when it is not expressly requested. *Id.* at *5. The Court noted that unlike this case, Plaintiffs in *In Re Abbott* specifically requested consolidation through trial. *Id.* Accordingly, the Court concluded that removal under the CAFA was premature. Alternatively, Defendant asserted that removal was proper under federal question and supplemental jurisdiction. *Id.* at *6. Defendant cited decisions stating that when certain state claims turn on federal law, removal can be proper. The Court, however, observed that the mere presence of a federal issue in a state cause of action does not automatically confer federal question jurisdiction. *Id.* Defendant contended that federal question jurisdiction existed because Plaintiffs cited Defendants’ alleged failure to comply with “federal standards and requirements” throughout their complaint, and the allegations against Defendants revolved around the “federal duty of sameness.” *Id.* The Court noted that vague references to
federal laws and regulations do not create a federal question, and remarked that Plaintiffs presumably pleaded state law causes of action to avoid removal. Id. at *8. The Court also observed that Plaintiffs tailored their complaint against generic manufacturers by alleging state causes of action to avoid removal. Id. at *12. Further, the Court stated that even if the parties were not diverse and Plaintiffs' complaint implicated a federal issue, the case may still be improper for removal because the California Supreme Court has not treated federal question jurisdiction as a password for removal of any state action embracing a point of federal law. Id. Additionally, the Court found that if there is a state cause of action, federal jurisdiction is unavailable unless it appears that some substantial, disputed question of federal law must be interpreted before determining the state claim. Id. Here, the federal duty of sameness was incidental to Plaintiffs' state law claims, and did not need to be interpreted to adjudicate the state cause of action. Accordingly, the Court granted Plaintiffs' motion for remand.

Kogok, et al. v. T-Mobile USA, Inc., 2013 U.S. Dist. LEXIS 149030 (S.D. Cal. Oct. 15, 2013). Plaintiffs, a group of California Retail Sales Associates (“RSAs”), brought a wage & hour class action for failure to pay them for their commissionable transactions. Defendant removed the action on the basis of the CAFA. Thereafter, the Court remanded the action, finding that Defendant had not met its burden to show that the amount-in-controversy exceeded $5 million. Subsequently, Plaintiff filed a first amended complaint (“FAC”) in state court alleging failure to pay all wages when due; failure to pay all overtime; failure to provide accurate itemized employee wage statements; and failure to provide signed copies of the commission contracts and obtain signed receipts of the same. Defendant again removed the action. Plaintiff moved for remand, arguing that Defendant failed to establish minimal diversity or that the amount-in-controversy exceeded $5 million. The Court granted the motion. Defendant argued that the amount-in-controversy exceeded $5 million for the claim under § 203 under the California Labor Code, the § 2751 claim, and the § 226 claim. First, Plaintiffs alleged they were owed penalties under § 203 because they were not paid timely on being discharged from their employment. Defendant asserted that the waiting-time penalties amounted to $5,067,090. The Court, however, noted that Defendant erroneously assumed that every terminated employee never received timely final paychecks containing all wages owed. The FAC did not allege that every terminated employee received a late final paycheck, rather sub-class 4 was limited to those terminated employees who were not timely paid all wages due to them upon separation of their employment with Defendant. Thus, the Court stated that Plaintiffs’ allegations did not establish that over $5 million was in controversy for the alleged violations. Second, Plaintiffs alleged violation of § 226 and § 2751 because Defendants did not obtain or maintain copies of the compensation policy documents that were signed by those officers and directors charged with ratifying the compensation policy documents, nor did Defendant provide a signed copy of the compensation policy documents. The Court observed that Defendant erroneously assumed that the § 2751 violation applied to every RSA because the FAC did not allege that every RSA did not receive a signed compensation policy document, or that every RSA did not sign a receipt of such a compensation policy document. Thus, the Court remarked that Defendant did establish by a preponderance of the evidence that over $5 million was in controversy for the alleged violations of § 2751. Defendant also erroneously assumed that the wage statements were devoid of the applicable hourly rate and total hours worked, and accordingly, calculated penalties for every single RSA who had received overtime regardless of whether or not the hourly rate and hours worked appeared on the corresponding wage statement. The Court stated that Defendant did not present any evidence that this was an accurate assumption, nor did such an allegation appear in the FAC. Thus, the Court found that Defendant failed to establish a preponderance of the evidence that over $5 million was in controversy for the alleged violations of § 226. Thus, the Court found that the CAFA requirements were not met, and accordingly, remanded the action.

Quintana, et al. v. Claire’s Stores, Inc., 2013 U.S. Dist. LEXIS 58289 (N.D. Cal. April 22, 2013). Plaintiffs, a group of employees, brought a class action in state court alleging violations of the California Labor Code for failure to record and pay hourly wages, failure to provide required meal and rest breaks, and failure to pay wages upon termination. Plaintiffs’ claims included claims for penalties under the Private Attorney General Act (“PAGA”). Plaintiffs sought damages, restitution, penalties, injunctive relief, and attorneys’ fees in excess of $25,000 but not to exceed $5 million, and also reserved the right to amend
their prayer for relief to seek a different amount. Defendants removed the action, and subsequently Plaintiffs moved for remand, arguing that Defendants had not shown with legal certainty that the amount-in-controversy exceeded $5 million. The Court denied the motion. The Court observed that if the amount of damages is ambiguous when considering the entire complaint, a claim that the amount-in-controversy falls below the jurisdictional amount does not require application of the legal certainty standard. \textit{Id.} at *8.

Plaintiffs failed to include in their assessment of their damages or the amount-in-controversy all of the potential remedies they sought in their complaint; they also made no assertion that the language in either their jurisdiction statement or their prayer for relief included their PAGA claims. Instead Plaintiffs stated that not only did they not include their PAGA claims in the requests for relief, but also that because the PAGA claim was not a class action and could not be removed under the CAFA, they left the PAGA representative action out of the amount-in-controversy averment for their class action. The Court stated that the CAFA requires that PAGA claims should be part of the amount-in-controversy analysis and the claims of the individual class members should be aggregated to determine whether the amount-in-controversy exceeds the sum or value of $5 million exclusive of interest and costs. \textit{Id.} at *11. Further, the Court noted that because Plaintiffs were members of the class they sought to represent, their PAGA representative claims should be included in the Court's aggregation of claims for determination of whether the CAFA jurisdiction exists. Because Plaintiffs admitted that their jurisdiction and damages statements did not account for all of the claims that they raised in their complaint, the Court found their statements ambiguous, and thus stated that application of the preponderance of evidence standard was proper.

Accordingly, Defendants calculated potential damages for four of Plaintiffs' claims. First, regarding the overtime claims, the Court observed that according to Defendants' declarant, store managers and assistant store managers were regularly scheduled to work eight hour days and that assistant store managers were regularly scheduled to work at least 30 hours per week. Considering Plaintiffs' allegations that Defendants systematically failed to pay overtime, the Court stated that this evidence showed that Defendants reasonably estimated that every class member failed to receive an hour of overtime every pay period, and accordingly, credited Defendants' overtime calculations of $1,568,958. Second, keeping in mind Plaintiffs' allegations that class members often had to forego meal or rest breaks because of Defendants' policy and/or practice of failing to adequately staff their stores while also discouraging overtime and requiring that work be finished within the shift, the Court found that Defendants' estimates of one meal or rest break violation per week was an acceptable method to calculate possible damages for these claims, and accordingly credited Defendants' calculation of $1,045,000 for these claims. Third, regarding the waiting time allegations, Defendants estimated that each of the 454 class members potentially suffered at least one violation. Given Plaintiffs' allegations that Defendants failed to pay wages for work performed outside of the scheduled hours, Defendants showed that the amount-in-controversy from the waiting time claims more likely than not was at least $1,271,835.60. Finally, the Court stated that for at least the overtime, meal and rest break, and waiting time claims, Defendants had satisfied their obligation to show that it was more likely than not that the PAGA claims for those violations would be $2,844,750. The Court concluded that PAGA claims could be counted in full in the amount-in-controversy analysis. \textit{Id.} at *26. Accordingly, the Court concluded that Plaintiffs' claims exceed the CAFA's $5 million threshold, and it denied the motion to remand.

\textit{Rodriguez, et al. v. AT&T Mobility Services LLC, 728 F.3d 975 (9th Cir. 2013).} Plaintiff, a retail sales manager, brought a class action under California law asserting claims for unpaid wages, overtime compensation, and damages for statutory violations. Defendant removed the case under the CAFA. Plaintiff moved to remand, arguing that the total amount-in-controversy did not exceed $5 million, the minimum amount for federal jurisdiction. Plaintiff pointed to his first amended complaint, in which he alleged that the aggregate amount-in-controversy was less than $5 million. Plaintiff also waived seeking more than $5 million regarding the aggregate amount-in-controversy for the class claims alleged. To establish that the amount-in-controversy exceeded $5 million, Defendant submitted several sworn declarations from its representatives regarding the potential number of class members and the size of their claims, and argued that Plaintiff's allegations and the sworn declarations established that the amount-in-controversy could not be less than roughly $5.5 million. The District Court remanded the action, holding that Plaintiff's disclaimer of any recovery exceeding $5 million effectively foreclosed the jurisdictional issue.
On appeal, the Ninth Circuit reversed and vacated the order of the District Court. First, the Ninth Circuit observed that the Supreme Court has held that a lead Plaintiff could not foreclose a Defendant’s ability to establish the $5 million amount-in-controversy by stipulating prior to class certification that the amount-in-controversy is less than $5 million. *Id.* at 978. The Ninth Circuit thus stated that a Plaintiff’s pre-certification stipulation does not bind anyone but himself, and requiring District Courts to ignore a non-binding stipulation requires the federal judge to aggregate the claims of the individual class members. *Id.* Because the order to remand the case relied solely on Plaintiff’s waiver, the Ninth Circuit opined that it must be vacated and the matter remanded for further consideration. The Ninth Circuit also noted its previous decision that when a class action complaint alleges damages below the jurisdictional minimum, the removing Defendant must establish to a legal certainty that the amount-in-controversy in fact exceeded the jurisdictional requirement. *Id.* Defendant contended that it needed only establish that the amount-in-controversy exceeded $5 million by a preponderance of the evidence, the standard that ordinarily applies where a Plaintiff fails to plead a specific amount of damages. *Id.* at 980. The Ninth Circuit observed that the Supreme Court has held that a Plaintiff seeking to represent a putative class could not evade federal jurisdiction by stipulating that the amount-in-controversy fell below the jurisdictional minimum. *Id.* at 981. Thus, the Ninth Circuit stated that a Plaintiff in a class action no longer had the prerogative to forgo a potentially larger recovery to remain in state court, and that Plaintiff could not sue for less than the amount she may be entitled to if she wishes to avoid federal jurisdiction. Accordingly, the Ninth Circuit concluded that the legal certainty standard no longer applied to Defendant’s burden of proof on remand, and Defendant merely needed to demonstrate, by a preponderance of evidence, that the aggregate amount-in-controversy exceeded the jurisdictional minimum because Plaintiff did not plead a specific amount-in-controversy.

**Romo, et al. v. Teva Pharmaceuticals USA, Inc., 731 F.3d 918 (9th Cir. 2013).** Plaintiffs brought an action in state court alleging injuries related to the ingestion of propoxyphene, an ingredient found in the Darvocet and Darvon pain medications, and in their generic brand counterparts. More than 40 actions were filed in California state courts regarding products containing propoxyphene. Subsequently, a group of attorneys responsible for many of the propoxyphene actions filed a petition asking the California Judicial Council to establish a coordinated proceeding for all California propoxyphene actions pursuant to § 404 of the California Code of Civil Procedure. Thereafter, Defendant removed the case under the CAFA’s mass action provision. The District Court, however, found that there was no federal jurisdiction under the CAFA because Plaintiffs’ petition for coordination did not constitute a proposal to try the cases jointly, and thus, remanded the case. On appeal, the Ninth Circuit affirmed the order of the District Court. Plaintiffs’ memorandum of points and authorities in support of the petition for coordination stated that their counsel anticipated that the actions would involve duplicative requests for the same Defendant witness depositions and the same documents related to development, manufacturing, testing, marketing, and sale of the Darvocet product. Absent coordination of these actions by a single judge, Plaintiffs asserted that there was a significant likelihood of duplicative discovery, waste of judicial resources, and possible inconsistent judicial rulings on legal issues. Plaintiffs also asserted that use of committees and standardized discovery in a coordinated setting would expedite resolutions of these cases, avoid inconsistent results, and assist in alleviating onerous burdens on the courts as well as the parties. The Ninth Circuit noted that the obvious focus was on pre-trial proceedings such as discovery matters, with no mention of a joint trial. Because Plaintiffs’ petition for coordination did not constitute a proposal to try the cases jointly, the Ninth Circuit affirmed the order granting Plaintiffs’ motion to remand.

**Taylor, et al. v. CoxCom, Inc., 2013 U.S. Dist. LEXIS 11947 (C.D. Cal. Jan. 29, 2013).** Plaintiff brought a wage & hour class action in the Santa Barbara County Superior Court of California, alleging that Defendants failed to provide their field service technicians meal and rest breaks or pay minimum wage in violation of the California Labor Code. Defendants removed the action pursuant to the CAFA. Plaintiff moved to remand, arguing that the CAFA’s amount-in-controversy requirement was not met. The Court granted the motion to remand. Defendants contended that the preponderance of the evidence standard applied because Plaintiff did not allege the amount-in-controversy in good faith and the jurisdictional limitation was not repeated in the prayer for relief of Plaintiff’s pleading. The Court found that there was no
ambiguity that Plaintiff’s first amended complaint specifically plead an amount-in-controversy that did not exceed $5 million because the “amount-in-controversy” allegation explicitly referred to “the entire case,” which was reasonably interpreted to include all forms of relief. *Id.* at *8*. The Court held that Plaintiff’s jurisdictional statement was not limited to damages, but averred that the amount-in-controversy for the entire case fell below the CAFA’s jurisdictional minimum. The Court remarked that although Plaintiff did not repeat his amount-in-controversy allegation in his prayer for relief, nothing in the prayer contradicted the alleged amount-in-controversy and no ambiguity was created because of this omission. Defendants, however, maintained that the preponderance of the evidence standard applied because Plaintiff had acted in bad faith. The Court stated that bad faith would alter the applicable standard of review where Plaintiff pleads in such a way as to avoid federal jurisdiction, but does so knowing that the claims made actually seek an amount above the jurisdictional threshold. *Id.* at *8*. In the CAFA context, good faith “is entwined with the ‘legal certainty’ test,” and the Court determined that Defendant must generally show bad faith by proving that Plaintiff is actually pleading more than $5 million, essentially collapsing the inquiry into bad faith and the amount-in-controversy. *Id.* at *8-9*. Defendants argued that Plaintiff, who sought to represent a class of approximately 600 people, had very little information about the class and that the total damages could far exceed $5 million. The Court found that Defendants’ allegations were insufficient to establish bad faith because they did not establish to a legal certainty that Plaintiff was actually pleading more than $5 million. Further, Plaintiff argued that he pleaded the amount-in-controversy based on his counsel’s extensive experience in wage & hour cases. Accordingly, the Court concluded that “legal certainty” standard applied. *Id.* at *9*. In applying the legal certainty standard, the Court found that the evidence provided by Defendants in support of their calculations was far too limited to persuade the Court that Plaintiff acted in bad faith. Accordingly, the Court remanded the action to state court.

**Visendi, et al. v. Bank Of America, 733 F.3d 863 (9th Cir. 2013).** Plaintiffs, a group of 137 creditors, brought a class action against 25 financial institutions in state court alleging that the value of their homes, their credit scores, and privacy suffered because of deceptive mortgage lending and securitization practices. Bank of America removed the action under the CAFA’s mass action provision. Plaintiffs’ first amended complaint added and dropped multiple parties, resulting in a total of 160 named Plaintiffs asserting claims against 15 Defendants, and abandoning the original causes of action for three new state law claims. Thereafter, Defendants moved to dismiss the first amended complaint, asserting misjoinder and failure to state a claim. The District Court, however, remanded the action, and denied the motion to dismiss as moot. On appeal, the Ninth Circuit reversed the order. First, the Ninth Circuit noted that the CAFA’s mass action provisions apply only to civil actions in which monetary relief claims of 100 or more persons are proposed to be tried jointly. *Id.* at 868. Thus, because Plaintiffs proposed a joint trial in state court, the Ninth Circuit opined that the removal was proper. Further, the Ninth Circuit remarked that it was irrelevant whether Plaintiffs’ claims ultimately proceeded to a joint trial, as post-filing developments do not defeat jurisdiction if jurisdiction was properly invoked as of the time of filing. *Id.* Thus, the Ninth Circuit opined that the District Court’s post-removal conclusion that Plaintiffs’ claims were improperly joined did not affect the District Court’s jurisdiction, because Plaintiffs had proposed a joint trial at the time of removal. Further, the Ninth Circuit observed that Plaintiffs filed a single state court complaint that named over 100 Plaintiffs that provided that each of them demanded a jury trial. Plaintiffs alleged that they were victims of a common plan and scheme, and they specifically sought damages in excess of $75,000 each, with the specific amount to be determined at trial. Thus, the Ninth Circuit opined that Plaintiffs’ initial complaint presented monetary relief claims of 100 or more persons proposed to be tried jointly on the ground that Plaintiffs’ claims involved common questions of law or fact. Second, although they did not challenge numerosity, Plaintiffs contended that the initial complaint concerned only 95 properties, and that many of the named Plaintiffs were included only in their capacities as spouses or other related titleholders to the properties. The Ninth Circuit observed that language of the CAFA concerns “persons,” not properties, and because the initial complaint named 137 “persons” as Plaintiffs, it satisfied the CAFA’s numerosity requirement. *Id.* at 869. Moreover, the Ninth Circuit remarked that Plaintiffs’ assertion was inaccurate that only one claim existed per property. Because at least four of the original claims, including fraudulent concealment, intentional and negligent misrepresentation, and violation of privacy, related expressly to each named Plaintiff, the Ninth Circuit determined that all named Plaintiffs were real parties to the
controversy, and the District Court had jurisdiction under the CAFA. Plaintiffs argued that the action fell within the CAFA’s local controversy exception. Although the local controversy exception provides that a District Court shall decline to exercise jurisdiction in certain circumstances, the Ninth Circuit opined that implicit in the statutory text was that “the [District] Court has jurisdiction, but the [District] Court must decline to exercise such jurisdiction.” Id. Accordingly, the Ninth Circuit declined to consider Plaintiffs’ local controversy argument because they did not raise it in the District Court. Finally, the Ninth Circuit granted Defendants’ motion to dismiss for misjoinder, finding that the factual disparities were too great to support permissive joinder. For these reasons, the Ninth Circuit remanded the action to the District Court with instructions to dismiss without prejudice the claims of all Plaintiffs but the first named Plaintiff. Id. at 871.

Watkins, et al. v. Vital Pharmaceuticals, Inc., 720 F.3d 1179 (9th Cir. 2013). Plaintiff, a consumer, brought a class action in state court alleging unjust enrichment, breach of contract, and violations of the California Unfair Business Practice Act and Consumer Legal Remedies Act. Plaintiff alleged that Defendant’s Zero Impact protein bars were erroneously marketed and labeled as having little or no impact on blood sugar or insulin, when in fact they contained large amounts of undisclosed sugars and carbohydrates. Defendant removed the action to the District Court under the CAFA, and the District Court sua sponte remanded the action to the state court for failure to establish the amount-in-controversy. On appeal, the Ninth Circuit reversed the order and remanded to the District Court with instructions to exercise jurisdiction over the case. Defendant filed two declarations supporting its assertions that the $5 million amount-in-controversy requirement was met. First, Defendant submitted a declaration of its counsel, David Vendler, stating that the amount-in-controversy was in excess of $5 million because Plaintiff’s complaint alleged damages in the millions and sought restitution, disgorgement of profits and attorneys’ fees based upon the sales of the bars to thousands of consumers. Second, Defendant submitted a declaration by Richard Cimino, Defendant’s controller. The District Court determined that Defendant did not meet its burden to show the amount-in-controversy requirement because Defendant merely stated in its notice of removal that total sales of the bars in the last four years exceeded $5 million, and because Vendler’s affidavit vaguely and conclusorily alleged that the amount-in-controversy was met. The District Court did not address the Cimino declaration. The Ninth Circuit observed that the undisputed Cimino declaration was sufficient to establish that the CAFA’s requirements were met. The District Court had cited to the specific paragraph in the notice of removal that discussed the statement in Cimino declaration’s that total sales exceeded $5 million. Accordingly, the Ninth Circuit reversed and remanded the case to the District Court.

(x) Tenth Circuit

Dart Cherokee Basin Operating Co., LLC v. Owens, et al., 730 F.3d 1234 (10th Cir. 2013). Plaintiff, a royalty owner, brought a class action against Defendants Dart Cherokee Basin Operating Co., LLC and Cherokee Basin Pipeline, LLC for under-paid royalties. Plaintiff alleged breach of contract and unjust enrichment claims, and although he did not state a specific amount as damages, Plaintiff sought compensatory damages, costs, and such further relief deemed just and proper. Defendants removed the action under the CAFA, alleging that the amount-in-controversy exceeded $8 million. Subsequently, the District Court granted Plaintiff’s motion to remand, holding that the notice of removal had failed to provide evidentiary support for the $8 million figure. Thereafter, Defendants requested permission to appeal to the Tenth Circuit but a divided panel denied permission. Defendants then filed a petition for rehearing en banc, and the Tenth Circuit denied the petition. The dissent, however, opined that the District Court had imposed an evidentiary burden on the notice of removal that was foreign to federal practice, and which had never been imposed by a federal circuit. The dissent observed that under the procedural system, all a party must do in initiating a case in the federal system is to submit a pleading that contains a short and plain statement of the grounds for jurisdiction, and a short and plain statement of the claim showing that the pleader is entitled to relief. Id. at 1235. Further, the dissent stated that the party need not produce proof of an allegation in the pleading until the allegation is challenged, wherein the party must establish the alleged fact under the applicable burden of persuasion, ordinarily the preponderance of the evidence. Id. Similarly, although the removing party must establish controverted jurisdictional allegations by a preponderance of the evidence, the dissent remarked that nothing in the removal statutes or Supreme
Court decisions, or any holdings of the Tenth Circuit, required submission of such evidence before the jurisdictional allegations are challenged. *Id.* Here, Plaintiff challenged the notice of removal and Defendants responded with a declaration by an officer setting forth a calculation showing a potential liability far exceeding $5 million. The dissent noted that the notice of removal adequately alleged jurisdiction, Defendants’ evidence of jurisdiction was more than adequate, and there was no basis for requiring them to submit that evidence before the adequacy of the notice was challenged. The District Court had relied on *McPhail v. Deere & Co.*, 529 F.3d 954 (10th Cir. 2008), which held that a Defendant who removes a case under diversity jurisdiction must establish the amount-in-controversy by a preponderance of the evidence. *Id.* at 1237. The dissent, however, stated that the preponderance-of-the-evidence standard is the typical standard by which an allegation in a pleading must be proved for the pleading party to prevail, and applying that standard of proof does not change the typical requirements for pleading, and *McPhail* did not change them. The dissent opined that *McPhail* did not address the questions presented here, i.e., how much needed to be alleged in the notice of removal; and after the notice is challenged, in what circumstances, if any, can the removing party rely on supporting evidence not submitted with the notice of removal. Further, the dissent opined that its view of the procedural requirements for establishing the amount-in-controversy for purposes of removal was shared by the drafters of the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (the “JVCA”), which amended 28 U.S.C. § 1446(c)(2). The dissent, however, stated that the JVCA explicitly applies to standard diversity removals but apparently does not apply to removals under the CAFA. Although removal under the CAFA is governed by § 1332(d), the dissent opined that there was no logical reason why more should be demanded from a Defendant under the CAFA than other parties invoking federal jurisdiction. *Id.* at 1238. Accordingly, the dissent opined that a Defendant seeking removal under the CAFA need only allege the jurisdictional amount in its notice of removal and must prove that amount only if Plaintiff challenges the allegation.


Plaintiffs, a group of Oklahoma residents, brought a class action in state court alleging that they purchased an allegedly defective booster seat manufactured by Defendants, and that the seat failed to meet the Federal Motor Vehicle Safety Standard 213. Defendants removed the action under the CAFA, and the Court denied Plaintiffs’ motion to remand because Defendants had demonstrated all three jurisdictional prerequisites of the CAFA. Regarding the amount-in-controversy, the Court held that Defendants had demonstrated that the amount-in-controversy for compensatory damages was approximately $3,976,830 and that the potential for punitive damages brought the amount-in-controversy well over the $5 million threshold required by the CAFA. Subsequently, the Court dismissed Plaintiff’s request for punitive damages on her contract-based claims, because such a recovery was barred by Oklahoma law. Plaintiffs again moved for remand asserting that without the possibility of punitive damages, the amount-in-controversy fell short of the CAFA’s requirement. The Court rejected Plaintiffs’ argument, and opined that because there was still a possibility of punitive damages on Plaintiffs’ fraud claim, the CAFA’s amount-in-controversy requirement remained fulfilled. Accordingly, the Court denied the motion to remand.


Plaintiffs, a group of California residents, brought a class action alleging breach of the duty of good faith and fair dealing, unjust enrichment, violation of the California Unfair Competition Law, and seeking to represent California residents who purchased motor fuel at a temperature greater than 60 degrees Fahrenheit from Defendants in California. The complaint alleged minimal diversity jurisdiction under the CAFA since all class members were residents of California, and except for Costco Wholesale Corporation all Defendants were citizens of California. Subsequently, Costco settled and the Court granted final class certification and settlement approval. Dansk Investment Group, Inc. also settled and the Court granted conditional class certification and preliminary settlement approval. Thereafter, the Court severed Plaintiffs’ claims against Chevron USA, Inc., and stayed proceedings as to the other non-settling Defendants, and confirmed Plaintiffs’ claims against Chevron in three California cases. Subsequently, the Court certified Plaintiffs’ claims for class treatment under Rule 23. Chevron moved to dismiss arguing that the Costco settlement and the severance of Plaintiffs’ claims deprived the Court of jurisdiction under the home-state exception to minimal diversity jurisdiction under the CAFA. The Court denied the motion.
issue was where the Court acquires jurisdiction under the CAFA and the parties later change, should the Court determine the applicability of the home-state exception based on the roster of parties at the time the action was filed or based on the roster of parties as they exist after the change. Plaintiffs argued that under the general time-of-filing rule, the Court should ignore any post-filing change of parties and apply the home-state exception based on the parties’ original makeup. Based on a change-of-parties exception to the general time-of-filing rule, Chevron argued that the home-state exception stripped the Court of jurisdiction whenever its requirements become satisfied during the course of litigation due to a change of parties. Chevron’s argument was premised on the assumption that because Plaintiffs settled with Costco and Plaintiffs’ claims against Chevron was severed, Chevron was no longer a primary defendant for purposes of the home-state exception. The Court, however, noted that although the Costco settlement had been approved, it had not entered judgment against Costco or dismissed it from the case. Plaintiffs’ motion for an award of attorneys’ fees from Costco remained pending. Further, Chevron cited no basis for finding that the settlement, without dismissal of Costco, made Costco no longer a primary Defendant for jurisdictional purposes. The Court also reasoned that severance was used as a procedural tool to structure the California cases in the most efficient way. Because Costco remained in the case, and the parties remained the same, the Court found that it need not reach the merits of Chevron’s argument regarding the change-of-parties exception to the time-of-filing rule. The Court ruled that under the home-state exception, Chevron offered no basis for finding that Costco was not a primary Defendant at this time, and accordingly, denied the motion to dismiss.

(xi) Eleventh Circuit


Plaintiffs, a group of landowners, brought a class action in the Fulton County Superior Court of Georgia alleging that Defendants released a toxic chemical into the Ogeechee River from its manufacturing plant in Dover Georgia, which caused significant damage to their downstream property. In addition, Plaintiffs claimed that certain individuals who swam in the Ogeechee River suffered from physical injuries due to the release. Plaintiffs purported to represent a property damage class, and a personal injury class. Defendants removed the case pursuant to the CAFA, and Plaintiffs filed a motion to remand pursuant to the local controversy exception to CAFA jurisdiction. The Court denied Plaintiffs’ motion. The Court noted that a local controversy is defined by the CAFA as a class action in which: (i) greater than two-thirds of the class members are citizens of the state in which the action was originally filed, (ii) at least one significant Defendant is a citizen of the state in which the action was filed and (iii) the principal injuries alleged in the action were incurred in the state in which the action was filed. Id. at *5. Plaintiffs asserted that 654 out of 932 class members (70.2%), consisting of 912 owners of affected property and 20 individuals who suffered personal injury, were Georgia citizens. The Court found that the landowner evidence was defective because where property was owned by business entities, and there was no evidence of the entities’ principal place of business. Further, many of the affidavits of individuals were too imprecise to identify individuals who had been harmed who were Georgia citizens. Plaintiffs’ class definition was broadly worded to include all land and persons directly or indirectly impacted by the release. As a result, there may be many more property owners and individuals in the class than those identified by Plaintiffs. Id. at *13. Plaintiffs filed a motion to amend the complaint for the purported purpose of changing the class definitions to qualify for the local controversy exception. The Court denied the motion concluding, among other things, that jurisdiction must be judged at the time of removal. Id. at *19-21.


Plaintiffs, a group of Florida residents who purchased Defendant’s Long Term Care Policies (“LTC Policies”) before their relocation to Florida, brought a class action in state court asserting that Defendant could only charge them Florida-approved rates. Several states, including Connecticut, had authorized Defendant to increase its premium rates, but Florida was not one of those states. Plaintiff bought their LTC Policies when they were living in Connecticut. On becoming permanent Florida residents, they continued to pay Connecticut rates. Defendant removed the action to the District Court under the CAFA. In support of the amount-in-controversy requirement, Defendant submitted an affidavit of Pamela Tait, who determined that the putative class consisted of 2,194 individuals, who from 2008 to 2012 collectively paid $2,997,911 more
Plaintiffs dismissed their action, and two at 856. Further, the Eleventh Circuit noted that an injunction in this case may not necessarily trigger a flow of money to Plaintiffs, because even Defendant conceded that the LTC Policies were renewable each year. Id. at 857. The Eleventh Circuit also opined that the inclusion of optional insurance purchases in an amount-in-controversy calculation was forbidden and such valuation was speculative. Id. Accordingly, the Eleventh Circuit affirmed the District Court’s remand order.

Scimone, et al. v. Carnival Corp., 720 F.3d 876 (11th Cir. 2013). Plaintiffs, a group of cruise ship passengers aboard the Costa Concordia, brought an action against Defendants alleging claims for negligence, professional negligence on the part of the ship’s architect, and intentional torts. Costa Concordia hit an underwater rock and was shipwrecked, resulting in the loss of 32 lives. Several lawsuits were filed after the accident including one by named Plaintiff Geoffrey Scimone (“Scimone I”) along with 39 other plaintiffs in the Circuit Court of the Eleventh Judicial Circuit of Florida. The Scimone I Plaintiffs voluntarily dismissed their complaint when the total number of persons who joined the action exceeded 100. The original 39 plaintiffs from Scimone I divided themselves into two groups and distributed the additional 65 Costa Concordia passengers between those two groups, who then filed two separate actions in the state court, each of which named less than 100 Plaintiffs. Scimone II contained 48 Plaintiffs, and the second case, Abeid-Saba, contained the remaining 56 Plaintiffs. The two complaints contained essentially the same allegations against Defendants, and there was no question that all 104 Plaintiffs’ claims concerned common questions of law or fact. Defendants removed both actions under the CAFA’s mass action jurisdiction. Plaintiffs moved to remand and the District Court granted Plaintiffs’ motion. The Eleventh Circuit granted Defendant’s petition to appeal and affirmed. Id. at 880. The Eleventh Circuit noted that the definition of mass action contains several requirements that were not in dispute in this case. The parties agreed that Plaintiffs’ claims involved common questions of law or fact, they all arose out of the same accident, and that at least some Plaintiffs’ claimed damages exceeding the amount-in-controversy requirement. The only point of dispute between the parties was whether the 100 or more persons numerosity requirement of the CAFA had been satisfied. Id. at 881. In the state court Plaintiffs filed two separate cases, each of which contained less than 100 Plaintiffs, and therefore, could not satisfy the numerosity requirement standing alone. Therefore, the Eleventh Circuit noted that to satisfy numerosity, Defendants had to establish that the two cases could be tried jointly prior to removal. The Eleventh Circuit noted that the text of the statute made it clear only Plaintiffs could propose a joint trial, either by naming 100 or more Plaintiffs in a single complaint or by their litigation conduct at any time prior to Defendants’ removal of their action. The Eleventh Circuit explained that if, for instance, Plaintiffs initially filed multiple lawsuits but then, on the eve of trial moved to consolidate their cases, their belated proposal would nonetheless fail within the meaning of the statute. Absent a proposal or perhaps a sua sponte determination, the Eleventh Circuit found that the District Court lacked subject-matter jurisdiction over Plaintiffs’ claims. Id. at 882. Based on the undisputed record, the Eleventh Circuit found that Defendants could not demonstrate that Plaintiffs in the two actions proposed a joint trial of their claims, in whole or in part, in state court. The Eleventh Circuit explained that in Scimone I, six Plaintiffs filed a complaint, and was later amended to add 33 more Plaintiffs, and yet another 65 passengers indicated that they wanted to join the action. Instead of naming 104 Plaintiffs, the Scimone I Plaintiffs dismissed their action, and two actions were filed. At no point in the procedural history did 104 Plaintiffs in these two actions ever file a single complaint that named 100 or more Plaintiffs. Id. at 883. Moreover, the Eleventh Circuit remarked that the statutory language required a proposal, not mere a suggestion, and in cases such as here, where Plaintiffs choose to voluntarily dismiss a single complaint and file two separate complaints, they were actually proposing two separate trials rather than a joint trial. Id. Because Plaintiffs never proposed a joint
trial, the Eleventh Circuit found that the District Court was correct in finding that the cases did not qualify as a mass action, and accordingly, affirmed the remand.

(xii) District Of Columbia Circuit


Plaintiff brought an action in state court alleging that Defendant engaged in unlawful trade practices in violation of the District of Columbia’s Consumer Protection Procedures Act (“DCCPPA”) by failing to disclose and by misrepresenting the adverse health effect of Defendant’s Energy drinks. Defendant removed the action, arguing that the Court had diversity jurisdiction over the matter, or alternatively, that it had jurisdiction under the CAFA. *Id.* at *1. Plaintiff moved to remand, and the Court granted Plaintiff’s motion. The Court held that it lacked jurisdiction of the dispute under the CAFA. The DCCPPA specifically authorizes a private attorney general suit without any reference to class action requirements. Because Plaintiff did not attempt to comply with Rule 23 of the D.C. Superior Court Rules of Civil Procedure, did not seek class action certification, and had specifically stated that he was bringing the action as a representative action under the DCCPPA, the Court found that the action was a “separate and distinct procedural vehicle from a class action,” and thus did not qualify as a class action under the CAFA. *Id.* at *27. The Court stated that it could not convert Plaintiff’s complaint into a class action on the assumption that, faced with possible dismissal of the damages claim on behalf of the general public, he could have chosen to file the case under Rule 23. *Id.* at *30. The Court therefore concluded Plaintiff did not file a class action and therefore, his claim fell outside the CAFA. *Id.* The Court also held that it did not have diversity jurisdiction over the action based on the amount-in-controversy. Combining statutory damages and attorneys’ fees along with restitution claims, Plaintiff’s requests for relief added up to $40,060 – well below the $75,000 jurisdictional minimum. Accordingly, the Court remanded the action.

(xiii) U.S. Supreme Court

**Standard Fire Insurance Co. v. Knowles, et al.,** 133 S. Ct. 1345 (2013). Plaintiff, on behalf of himself and similarly-situated policyholders, filed a putative class action in Arkansas state court alleging that Defendant unlawfully underpaid claims for loss or damage to real property pursuant to homeowners' policies because Defendant had not covered the costs of hiring a general contractor. In his complaint, Plaintiff stipulated that the class would seek less than $5 million in damages. Subsequently, Defendant removed the case under the CAFA's jurisdictional provision. Plaintiff argued for remand on the ground that the District Court lacked jurisdiction because the sum or value of the amount-in-controversy fell beneath the $5 million threshold for federal jurisdiction set by the CAFA. *Id.* at 1348. In response, Defendant contended that Plaintiff’s claims of the class members could exceed $5 million and that Plaintiff’s stipulation was ineffective because he lacked authority to act on behalf of the unnamed class members of a putative class before class certification. The District Court remanded the case on the basis that, although the amount-in-controversy would have exceeded $5 million in the absence of Plaintiff’s stipulation, in light of the stipulation, the amount fell beneath the CAFA’s threshold. *Id.* The Eighth Circuit declined to hear the appeal, but the Supreme Court granted Defendant’s petition for a writ of certiorari. The Supreme Court noted that although federal case law has permitted individual Plaintiffs to avoid removal by stipulating that amounts at issue fall below the federal jurisdictional requirement, the “key characteristic” of those stipulations is that they are “legally binding on all Plaintiffs.” *Id.* at 1347. Here, the Supreme Court found Plaintiff’s stipulation immaterial because “a Plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified.” *Id.* at 1349. Consequently, the Supreme Court noted that because Plaintiff’s pre-certification stipulation did not bind anyone but himself, Plaintiff could not “reduce[] the value of the putative class members’ claims” in part because a “non-binding, amount-limiting, stipulation may not survive the class certification process.” *Id.* at 1349-50. Furthermore, the Court recognized that, although a District Court might find it simpler to value the amount-in-controversy using a stipulation, to ignore a non-binding stipulation “does no more than require the federal judge to do what she must do in cases without a stipulation and what the [CAFA] requires, namely, ‘aggregat[e]’ the ‘claims of the individual class members.’” *Id.* at 1350. Therefore, the Supreme Court held that Plaintiff’s
The stipulation did not destroy federal jurisdiction under the CAFA because the stipulation at issue could not resolve the amount-in-controversy question in light of Plaintiff’s inability to bind the putative class. Accordingly, the Supreme Court vacated the judgment of the District Court and remanded for further proceedings.

**Editor’s Note:** The Supreme Court’s ruling in *Knowles* is of enormous significance to employers that may be targeted by class actions. One of the overarching purposes of the CAFA was to ensure a neutral federal forum, rather than certain plaintiff-friendly state courts, for class actions. Consistent with that goal, the Supreme Court’s decision in *Knowles* shuts down a significant opportunity by the plaintiffs’ class action bar to stipulate away unnamed plaintiffs’ damages or gerrymander class definitions in an effort to avoid federal jurisdiction and subvert the CAFA’s purposes. The ruling in *Knowles* makes clear that named Plaintiffs may not evade federal jurisdiction by simply stipulating, prior to class certification, that their damages will fall beneath the $5 million threshold for federal jurisdiction set by the CAFA.
Throughout 2013, federal courts issued key rulings in class action lawsuits and on Rule 23 issues that significantly impact the defense of workplace class actions. Those rulings included class certification procedural issues and proof requirements; preemptive motions to strike or dismiss class allegations; the numerosity requirement for class certification; the commonality requirement for class certification; the typicality requirement for class certification; the adequacy of representation requirement for class certification; the predominance requirement for class certification; the superiority requirement for class certification; workplace class action arbitration issues; non-workplace class action arbitration issues; litigation over class action consent decrees; ascertainability under Rule 23; class actions involving unions; attorneys’ fee awards in class actions; intervention rights in class actions; collateral estoppel, res judicata, and settlement bar concepts under Rule 23; notice issues in class actions; multi-party litigation over modification of employee benefits; civil rights class actions; class action discovery issues; class-wide proof in class actions; multi-party litigation under the WARN Act; class definition issues; claim preclusion issues in class action litigation; settlement approval issues in class actions; mootness issues in class action litigation; experts in class certification proceedings; sanctions in class action litigation; class communications in class action litigation; issues with the judicial panel on multi-district litigation in class actions; standing issues in class actions; employee testing issues in class actions; application of tolling principles in class actions; exhaustion principles in class actions; appointment of class counsel and lead plaintiffs; workplace RICO class actions; public employee class actions; injunctions in class actions; class actions in bankruptcy; FACTA and FDCPA class actions; TCPA class actions; the cy pres doctrine in class actions; abstention in class actions; objectors in class actions; privacy class actions; choice-of-law issues in class actions; insurance-related class actions; disparate impact issue in class actions; ADA class actions; government enforcement litigation; alien tort statute class actions; workplace antitrust class actions; stays in class action litigation; FCRA class actions; appeals in class action litigation; foreign worker class action litigation; ethical issues in class action litigation; venue issues in class actions; bifurcation issues in class actions; joinder and severance issues in class actions; special masters in class actions; sealing issues in class actions; breach of contract class actions; amendments in class action litigation; issues with class conflicts in class actions; punitive damages in class actions; state law procedural requirements in class actions; mandamus issues in class actions; disqualification of counsel in class actions; statute of limitations issues in class actions; medical monitoring class actions; opt-outs in class actions; certification of defendant classes; consumer fraud class actions; recusals in class actions; and settlement administration issues in class actions.

These rulings of 2013 added to the evolving case law interpreting Rule 23, and significantly impact the defense of workplace class actions.

(i) Class Certification Procedural Issues And Proof Requirements

Anwar, et al. v. Fairfield Greenwich Ltd., Case No. 09-CV-118 (S.D.N.Y. April 4, 2013). Plaintiffs sought a pre-motion conference to address a motion for reconsideration of the Court’s earlier order approving a partial settlement in this class action. The Court denied the motion. The Court observed that the major grounds justifying reconsideration are an intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice. Further, a request for reconsideration must demonstrate controlling law or factual matters put before the Court in its decision on the underlying matter that the movant believes the Court overlooked and that might reasonably be expected to alter the conclusion reached by the Court. Id. at 2. Plaintiffs asserted that the U.S. Supreme Court’s recent decision in Comcast Corp. v. Behrend, 144 S. Ct. 1426 (2013), justified the motion for reconsideration. The Court noted that Comcast held that a class action was improperly certified where Plaintiffs’ certification theory failed to link to a proper class-wide damages model. Id. at 2-3. The Court opined that because Comcast did not address class action settlements or the specific issues relevant to the approval of the partial settlement, Plaintiffs failed to identify any controlling law or factual matters put to the Court on the underlying motion which it did not consider. Accordingly, the Court denied the motion. Id.
Authors Guild, Inc., et al. v. Google Inc., 2013 U.S. App. LEXIS 13389 (2d Cir. July 1, 2013). Plaintiffs, an association of authors, as well as several individual authors, brought a class action alleging that Defendant committed copyright infringement through its Google Books search tool by scanning and indexing more than 20 million books and making snippets available to the public. After the District Court denied approval of a settlement between the parties, Plaintiffs moved to certify a proposed class consisting of all individuals residing in the United States who held a United States copyright interest in one or more books reproduced. The District Court granted the motion for class certification. On appeal, the Second Circuit vacated the order of the District Court. Google argued that it intended to assert a fair use defense, which could moot the litigation, and claimed that Plaintiffs could not establish adequacy of representation. To determine whether the use of a work is a fair use, the Second Circuit reasoned that the District Court should consider the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work. Id. at *4-5. The Second Circuit stated that the resolution of Google’s fair use defense in the first instance would necessarily inform and perhaps moot the analysis of many class certification issues, including those regarding the commonality of Plaintiffs’ injuries, the typicality of their claims, and the predominance of common questions of law or fact. Id. at *6. Further, the Second Circuit reasoned that holding the issue of class certification in abeyance until Google’s fair use defense had been resolved would not prejudice the interests of either party during the projected proceedings before the District Court following remand. Accordingly, the Second Circuit vacated the District Court’s order certifying Plaintiffs’ proposed class, and remanded the case to the District Court for consideration of the fair use issues.

Cochran, et al. v. Volvo Group North America, LLC, Case No. 11-CV-927 (M.D.N.C. Oct. 29, 2013). Plaintiffs, a group of truck owners, brought a class action alleging that Defendant breached express and implied warranties of merchantability as to certain Volvo trucks. The Court had denied Plaintiffs’ motion to certify a nationwide class, concluding that Plaintiffs had failed to show what law would apply to the claims of the class members. Plaintiffs again moved for certification of a nationwide class consisting of all owners and/or lessees of a Volvo truck with a US04 or US07 Volvo D13 or D16 engine. The Court denied the second motion to certify because it was outside the scope of the Court’s order granting Plaintiffs permission to file a second class certification motion. The Court noted that when Plaintiffs sought leave to file a second motion, they stated only that they would seek certification of a limited number of state-wide classes, each having a class representative from that state. Despite this, Plaintiffs’ second motion to certify did not mention any state-wide classes, and it sought certification of a nationwide class. Plaintiffs suggested that the Court should apply North Carolina law to all claims, unless it later determined that there were conflicts between North Carolina law and the laws of other states. Plaintiffs further asserted that if the Court found any meaningful differences between the laws of any of these states, a separate sub-class could be created for the residents of any such state. The Court stated that a reference in a brief to the possibility of separate sub-classes was not a motion to certify state-wide classes. Finally, the Court ruled that the renewed motion did not even resolve issues identified by the Court in denying the original motion for class certification, i.e., how resolution of their proposed common questions would resolve an issue central to the validity of the claims. Accordingly, the Court denied Plaintiffs’ second motion for class certification. Id. at 1-2.

Delgado, et al. v. Collecto, Inc., 2013 U.S. Dist. LEXIS 171607 (M.D. Fla. Dec. 5, 2013). Plaintiff, a debtor, brought a putative class action alleging that Defendant violated the Fair Debt Collection Practices Act (“FDCPA”), and the Florida Consumer Collection Practices Act (“FCCPA”) by sending her an improper debt collection letter. Defendant moved to dismiss the complaint for lack of jurisdiction asserting that the action was rendered moot when Defendant offered to Plaintiff an offer of judgment under Rule 68 in the amount of $2,001, which Plaintiff rejected. The Court granted the motion. Plaintiff asserted that because she had yet to file a motion for class certification, her action was not moot because she represented a putative class of individuals who were harmed by Defendant’s alleged violations of the FDCPA and the FCCPA. Id. at *6. The Court found that Plaintiff’s putative class action was rendered moot when she was
offered a full and complete judgment under Rule 68. Further, the Court observed that *Genesis Healthcare v. Symczyk*, 133 S. Ct. 1523 (2013), held that a putative FLSA collective action became moot when the lone Plaintiff was served with a Rule 68 offer of judgment. *Id.* at *8. The Court reasoned that although *Genesis* was decided in the context of a FLSA collection action, rather than a Rule 23 putative class action, it could see no reason to confine the discussion of constitutional principles narrowly so as to encompass only FLSA cases. Rather, the Court reasoned that the prudential doctrines of standing and mootness apply to all cases with equal force. *Id.* at *9. Accordingly, the Court determined that Plaintiff’s personal stake in this action was eliminated by Defendant’s full and complete offer of judgment, and that the offer of judgment rendered Plaintiff’s complaint moot. Additionally, the Court stated that Plaintiff’s purported interest in prosecuting this action on behalf of a putative class was insufficient to present an Article III case or controversy because her own standing was eviscerated before a motion for class certification was presented to the Court. Thus, the Court granted Defendant’s motion to dismiss the complaint.

*Denicola, et al. v. Allied Collection Services, Inc.*, 2013 U.S. Dist. LEXIS 52834 (E.D.N.Y. April 11, 2013). In this class action under the Fair Debt Collection Practices Act (“FDCPA”), Defendant failed to respond to Plaintiff’s complaint and summons. Plaintiff moved to proceed with class discovery to acquire information in order to move for class certification pursuant to Rule 23 prior to moving for a default judgment against Defendant. Plaintiff sought to proceed with discovery under Rule 45, stating he needed to acquire certain additional information to move for class certification and to help establish statutory damages. Plaintiff’s counsel received a letter from an attorney in Nevada who purported to represent Defendant, acknowledging an awareness of the lawsuit. Plaintiff asserted that Defendant could be strategically defaulting to avoid class certification, a stratagem that has been recognized in other FDCPA class actions. This is because a Court generally cannot certify a class “upon mere default or admission,” since a Plaintiff must establish the prerequisites of Rule 23 to secure a class certification order. *Id.* at *2. Although there was questionable authority to support the relief Plaintiff sought, the Magistrate Judge granted the motion to conduct discovery under Rule 45, stating that it was required to protect absent class members whose rights could be affected by the prospect of class certification, and that while Plaintiff could or could not be successful in its efforts to gather sufficient evidence to move for class certification, the considerations weighed in favor of affording Plaintiff the opportunity to try. *Id.* at *3-4.

*Garibaldi, et al. v. Compass Group USA, Inc.*, 2013 U.S. Dist. LEXIS 49265 (C.D. Cal. April 4, 2013). In this action, the Court ordered Plaintiff to show cause why the class allegations should not be stricken for failure to comply with Local Rule 23-3, which requires that a motion for class certification be filed within 90 days after service of a pleading purporting to commence a class action. Pursuant to the Court’s order, a scheduling conference was set for April 8, 2013, and counsel were to confer and to file a joint Rule 26(f) report no later than seven days before the scheduling conference. *Id.* at *2. The parties failed to comply with the order, and the Court vacated the date previously set for the scheduling conference. Further, the Court directed Plaintiff to show cause in writing no later than April 15, 2013, why this action should not be dismissed, and ordered both counsel to demonstrate why sanctions should not be imposed. *Id.* In the interest of the putative class and of judicial economy, the Court required Plaintiff’s counsel to show cause why he would be adequate counsel to represent the class if a class were certified. *Id.* at *3. The Court stated that counsel’s response should also provide any agreement between Plaintiff and counsel, any agreement relating to this action with any other person or entity, and counsel’s proposal for terms for attorneys’ fees and non-taxable costs.

*Glaberson, et al. v. Comcast Corp.*, 2013 U.S. Dist. LEXIS 160892 (E.D. Pa. Nov. 12, 2013). Plaintiffs, a group of cable television customers, brought a class action alleging that Defendant acquired cable systems and cable subscribers from its competitors in the Chicago cable market until the number of competing cable providers in those markets was substantially reduced. Plaintiffs asserted that Defendant willfully obtained and maintained monopoly power in the relevant Philadelphia geographic market and, through its predecessor in interest, AT&T, in the relevant Chicago geographic market. Earlier, the District Court had certified a Philadelphia class which was affirmed by the Third Circuit. On further appeal, the Supreme Court, however, reversed the order of the Third Circuit, stating that Plaintiffs failed to satisfy the
predominance requirement with regard to antitrust impact because they failed to present a methodology that limited the damages to only the overbuilding theory. Further, although the Supreme Court stated that the judgment of the Third Circuit was reversed, it did not specifically state that the case was remanded for further proceedings. The Supreme Court, however, stated that the action was remanded to the District Court for proceedings consistent with its opinion. In a joint status conference statement, Defendant argued that under the rule of mandate, an inferior court has no power or authority to deviate from the mandate issued by an appellate court, and the Supreme Court’s outright reversal was completely dispositive of whether the class could ever meet Rule 23(b)(3). Thereafter, Plaintiffs submitted a motion to re-certify the Philadelphia class, and Defendant moved to strike the motion. The District Court denied Defendant’s motion. The District Court noted that there was no binding authority from the Third Circuit on how the law of mandate applies to a motion for class certification following the reversal of an earlier certification decision. Id. at *15-16. The Supreme Court stated that nothing in its decision precluded Plaintiffs from returning to the District Court to seek certification of a more modest class according to the standards it had outlined. Id. at *16. The District Court noted that Dukes v. Wal-Mart Stores, Inc., No. 01-CV-2252 (N.D. Cal. Sept. 21, 2012), presented a similar issue of whether Plaintiffs could seek re-certification of a narrowed class after the Supreme Court reversed the initial certification order. Id. at *21. Similar to this action, the Supreme Court in Wal-Mart had ordered reversal of the judgment of the Court of Appeals, without specifically providing for further proceedings thereafter on remand. Id. at *22. The District Court noted that Wal-Mart held that it was obliged to execute the terms of a mandate and was free as to anything not foreclosed by the mandate, and that failure to explicitly remand the case did not necessarily curtail the discretion of the District Court. Id. at *23. Thus, because the Supreme Court only decided that there was insufficient evidence to establish a nationwide policy of discrimination, the District Court in Dukes concluded that Plaintiffs could bring a narrower class action claim, which the Supreme Court had not considered and did not foreclose. Id. at *23-24. Accordingly, the District Court opined that the Supreme Court’s mandate did not preclude a new motion on behalf of Plaintiffs for certification of a narrowed class based on a revised antitrust impact analysis. The District Court noted that any issue left open by an appellate court may be addressed at the discretion of the District Court, as long as it is consistent with the appellate court’s decision, irrespective of an explicit order remanding the matter for further proceedings. Id. at *24. The District Court observed that the Supreme Court had reversed its prior certification order because Plaintiffs’ offered evidence on antitrust impact was not limited to the overbuilding theory, and thus failed the predominance requirement. The Supreme Court had not decided as a matter of law that class-wide proof could never be established; rather, in a footnote, the Supreme Court’s opinion clearly contemplated that a damages model that measured only the antitrust impact of the overbuilding theory, and also plausibly showed that the extent of overbuilding, absent deterrence, would have been the same in all counties, or that the extent was irrelevant to any effect upon Defendant’s ability to charge supra-competitive prices, and could be common, class-wide evidence. Id. at *25. The District Court opined that Plaintiffs’ ability to certify a significantly narrowed class based on a more limited antitrust impact model that satisfied the footnote was a matter left open by the mandate, since it was not decided by the Supreme Court in the first appeal and deemed finally settled. Accordingly, because Plaintiffs’ proposed motion for certification of a narrowed class with a revised antitrust impact analysis consistent with the Supreme Court’s decision was not precluded as a matter of law, the District Court denied Defendant’s motion to strike.

Haight, et al. v. Bluestem Brands, Inc., 2013 U.S. Dist. LEXIS 179885 (M.D. Fla. Sept. 26, 2013). Plaintiff brought a class action under the Telephone Consumer Protection Act alleging that Defendant placed automated calls to his cellular phone even after he informed Defendant that it was calling the wrong number. Plaintiff moved for class certification, and requested the Court not to rule on the motion pending service of process on Defendant until after class action discovery. The Court noted that Plaintiff’s counsel feared that Defendant would make a Rule 68 offer of judgment to Plaintiff before a class was certified which, if accepted, would result in dismissal of the case as moot. The Court remarked that a number of decisions had held that a Rule 68 offer of full relief by Defendant after the filing of a motion for class certification did not moot the class action. Id. at *2-3. Moreover, the Court observed that there was no evidence that Defendant was aware of the pendency of this case, that Defendant had indicated that it
intended to serve such an offer, or that Plaintiff had any present intent to accept an offer of judgment he had not yet received. *Id.* at *3. Further, the Court stated that the certificate of service filed along with the motion was inadequate as it did not reflect upon whom the motion was served or the date of such service. The Court ruled that Plaintiff could file a renewed motion after showing that service of process on Defendant had been supported by a certificate of service showing the date and manner in which the motion was served and identifying the person served. In addition, the Court stated that the motion should not be filed until Plaintiff’s counsel had adequate facts and legal authority to support the motion consistently with the requirements of Rule 23. Accordingly, the Court denied the motion for class certification without prejudice on procedural grounds.

**Sandusky Wellness Centre LLC, et al. v. Medtox Scientific, Inc., 2013 U.S. Dist. LEXIS 33794 (D. Minn. Mar. 12, 2013).** Plaintiff, a healthcare center, brought a class action under the Telephone Consumer Protection Act (“TCPA”) alleging that Defendants sent an unsolicited facsimile which constituted material furnished in connection with Defendants’ work or operations. Plaintiff asserted that it did not solicit or give permission for the facsimile, and that the facsimile was sent to 39 other recipients. Plaintiff moved for class certification and Defendants moved to dismiss. The Court ruled that Plaintiff could file a renewed motion after showing that service of process on Defendant had been supported by a certificate of service showing the date and manner in which the motion was served and identifying the person served. In addition, the Court stated that the motion should not be filed until Plaintiff’s counsel had adequate facts and legal authority to support the motion consistently with the requirements of Rule 23. Accordingly, the Court denied the motion for class certification without prejudice on procedural grounds.

**Small, et al. v. KMart Holding Corp., 2013 U.S. Dist. LEXIS 38419 (E.D. Mich. Mar. 20, 2013).** Plaintiff brought a class action under the Telephone Consumer Protection Act (“TCPA”) alleging that he and 39 other individuals received two unsolicited facsimile messages from Defendants. Further, Plaintiff alleged that he had no reasonable means of avoiding the facsimiles and they did not display a proper opt-out notice as required by 47 C.F.R. § 64.1200. Defendant moved to dismiss the action and in the alternative to strike the class allegations. The Court observed that in determining whether class certification was proper, it must make a limited preliminary inquiry, looking behind the pleadings. *Id.* at *5. The Court noted that here, no discovery had taken place and that the motion for class certification was filed merely as a placeholder. Thus, the Court opined that the motion was untimely because it was unclear whether a request for class certification would eventually be warranted, and accordingly denied the motion for certification.
specifically authorizes its recovery in a class action. *Id.* at *6. The Court stated that because the TCPA had recognized federal-question jurisdiction, a state law could not preclude the application of Rule 23 to a TCPA class action. *Id.* Accordingly, the Court held that it had jurisdiction to consider a claim arising under the TCPA and was required to apply Rule 23 to determine whether the action could be maintained as a class, notwithstanding Michigan law.

**Taylor, et al. v. Acquinity Interactive, LLC, Case No. 13-CV-61088 (S.D. Fla. May 17, 2013).** Plaintiff brought a class action to stop Defendants’ practice of making unsolicited text message calls to cellular telephones of consumers nationwide, and to obtain redress for all persons injured by their conduct. Plaintiff alleged that Defendants obtained cell phone numbers of Plaintiff and the class members by purchasing lists of phone numbers from a third-party and/or simply dialing numbers at random. Plaintiff sought certification of a class comprised of all individuals in the United States who received a text message on their cellular telephone encouraging the recipient to log on to the website www.starbucksfor.me and enter a code for a free Starbucks drink. Plaintiff moved for class certification on the same date that he filed his complaint. The Court denied the motion without prejudice because Plaintiff had not yet served Defendant. Thereafter, Plaintiff served Defendant and renewed his motion for certification two days later. The Court opined that a motion for class certification was extremely premature at that stage in the litigation. *Id.* at 1. The Court noted that no responsive pleadings had been filed, and no discovery had taken place. The Court acknowledged that Plaintiff was filing this motion at the outset of the litigation to prevent Defendants from attempting a so-called “buy off” to moot his named Plaintiff’s claims. *Id.* at 2. The Court, however, observed that the early practicable time contemplated by Rule 23(c)(1)(A) did not contemplate such a motion being filed at the outset of the litigation, where there was insufficient information in the record for the Court to make a proper determination of whether to certify the action as a class action. *Id.* Accordingly, the Court denied Plaintiff’s renewed motion for class certification as premature because it was procedurally defective, without making any conclusions regarding the substance of the motion.

(ii) **Preemptive Motions To Strike Or Dismiss Class Allegations**

**Baker, et al. v. Home Depot U.S.A. Inc., 2013 U.S. Dist. LEXIS 9377 (N.D. Ill. Jan. 24, 2013).** Plaintiffs brought a class action alleging that Defendant promoted the manufacture of, purchase, and sale of wood treated with chromium copper arsenate (“CCA Treated Wood”) for residential use. CCA Treated Wood allegedly contains arsenic and hexavalent chromium, known carcinogens. Plaintiffs alleged that although Defendant knew of the dangers associated with CCA Treated Wood, it did not communicate such information to its buyers; instead it allegedly made representations to the public indicating that CCA Treated Wood was safe. Plaintiffs alleged that they had decks built on their properties using CCA Treated Wood purchased from Defendant. Plaintiffs’ complaint included a strict liability-design defect claim (Count I), a strict liability-failure to warn claim (Count II), a negligence-defective product claim (Count III), a negligence-failure to warn claim (Count IV), and a claim alleging a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (“ICFA”) (Count V). Defendant moved to dismiss all claims, to strike the class allegations, and for sanctions. The Court granted in part and denied in part the motion to dismiss, granted the motion to strike the class allegations, and denied the motion for sanctions. Concerning its motion to strike the class allegations, Defendant argued that where pleadings are facially defective and definitively establish that a class action cannot be maintained, the Court can properly grant a motion to strike class allegations at the pleadings stage. *Id.* at *11-12. Defendant pointed to five other rulings across the country and the Illinois Appellate Court that the Court here found were materially similar cases. *Id.* at *14. Based upon these decisions, the Court concluded that individual issues of fact and law would predominate with respect to issues of causation, the extent of each class members’ injuries and the potential for individual affirmative defenses to apply to each class member’s claims. Accordingly, the Court granted the Defendant’s motion to strike the class allegations. *Id.* at *15-16.

**Bank, et al. v. R & D Strategic Solutions, LLC, 2013 U.S. Dist. LEXIS 39496 (E.D.N.Y. Mar. 20, 2013).** Plaintiff, an attorney appearing *pro se*, brought an action alleging that Defendant transmitted a deceptive electronic mail advertisement to him in violation of Massachusetts General Laws, Chapter 93A. Defendant moved to dismiss the action contending that Plaintiff, acting on a *pro se* basis, could not serve as
representative of the purported class. The Court denied the motion. The Court noted that a pro se Plaintiff may not represent the interests of third-parties, and a pro se class representative cannot adequately represent the interests of other class members. Id. at *2. The Court, however, also noted that Steinberg v. Nationwide Mutual Insurance Co., 224 F.R.D. 67 (E.D.N.Y. 2004), certified a class where Plaintiff had commenced the action on a pro se basis, but subsequently retained counsel prior to moving for class certification. Id. at *2-3. Here, the action was still in the pleading stage. Plaintiff had not yet moved for class certification, nor had he indicated that he intended to seek appointment as counsel to the putative class. Thus, the Court declined to address Defendant’s arguments concerning the adequacy of representation requirement at this stage, because they were more properly considered upon a motion for class certification under Rule 23. Accordingly, the Court denied Defendant’s motion to dismiss. Id. at 3.

Cowit, et al. v. CitiMortgage, Inc., 2013 U.S. Dist. LEXIS 32219 (S.D. Ohio Mar. 8, 2013). Plaintiff brought a putative class action alleging that Defendant overcharged customers foreclosure fees. Plaintiff had entered into a note and mortgage with Defendant that required Plaintiff to pay any costs or expenses incurred by Defendant in enforcing them. When Plaintiff failed to make payment under the note, Defendant initiated a foreclosure and paid certain costs. After the dismissal of the foreclosure, Defendant received $33 as refunded costs, which it did not return to Plaintiff. Id. at *2. Plaintiff moved for class certification, proposing a class consisting of borrowers who paid costs to Defendant and who received a refund which was not returned to borrowers. Id. at *3. Defendant moved to strike the class allegations. The Court partially denied Defendant’s motion. Defendant argued that determining membership in the putative class and sub-class would require highly individualized inquires and thus the alleged class and sub-class were indefinite and ambiguous. Id. at *7. The Court, however, found the class objectively defined and ascertainable. The Court noted that class members could be determined by ascertaining whether the person was a borrower who was charged costs, whether a portion of the costs was refunded to Defendant, and whether Defendant failed to pay the refund to the borrower. Id. at *10. The Court found that all the factors could be determined from Defendant’s own records. Id. Defendant next argued that Plaintiff could not maintain a class under any of the Rule 23 requirements. Id. at *12. The Court, however, found that Plaintiff’s class met Rule 23(b)(3)’s requirements. The class involved a single common issue of whether Defendant knowingly failed to refund or credit refunded costs to its most vulnerable borrowers. Id. at *18. The Court found that based on Plaintiff’s class theory in the complaint, no individualized facts relating to class members’ conduct or state of mind and the only documents that needed to be examined were Defendant’s records in connection with the legal actions. Id. The Court held that the common issue of Defendant’s conduct predominated. The Court further noted that Plaintiff met the commonality requirement because the common questions of facts included whether Defendant charged delinquent borrowers for costs, whether Defendant received a refund of a portion of those costs, and whether Defendant failed to refund or legally credit that portion to the class members. Id. at *25. Because the issues called for a class-wide resolution, i.e., return of the refunded costs, the Court also noted that the class action would provide an efficient vehicle for the resolution of the issue. Id. at *23. The Court, however, ordered the selection of a new class representative because the named Plaintiff had alleged that he had paid off his loan to Defendant and he was not at risk of any future harm from Defendant’s alleged practices. Id. at *26. The Court stated that if Plaintiff had no stake in whether injunctive relief was awarded or not, he would not be particularly interested in that aspect of the case, and his lack of interest would be antagonistic to those who might benefit from injunctive relief. Id. at *27. The Court thus held that Plaintiff had no standing to pursue a prospective injunction on behalf of himself or the proposed class. The Court further struck Plaintiff’s nationwide class allegations for fraud, promissory estoppeels, unjust enrichment, conversion, and negligent misrepresentation due to the considerable variation in the state laws governing them. Id. at *19. The Court noted that each putative class member’s common law claims would likely be governed by the state in which the property securing the loan was located. Id. at *20. Further, Plaintiff did not deny that the Court would need to apply the laws of different states in the putative nationwide class action or that the laws varied across jurisdictions. Id. Plaintiff’s nationwide breach of contract claim, however, survived Defendant’s motion to strike because the Court found that the interpretation of a form contract was particularly suited for class treatment, and breach of contract cases were routinely certified. Id. at *21.
Duvio, et al. v. Viking Range Corp., 2013 U.S. Dist. LEXIS 38592 (E.D. La. Mar. 20, 2013). Plaintiffs, a group of purchasers of Viking home appliances, brought a class action against Defendants Viking Range Corp. (“Viking”) and Hadco Cooking Systems, LLC (“Hadco”). Plaintiffs alleged that all Viking appliances were unreasonably defective, and that Defendants were engaged in an on-going tortious scheme to defraud their consumers. Defendants moved to dismiss, or alternatively to strike all class allegations, arguing that class treatment was inappropriate given the varied state law regimes and multiple legal and factual questions at play. The Court granted Defendants’ motion. Id. at *2-3. The Court noted the propriety of a Rule 23(d)(1)(D) motion to strike class allegations where a complaint fails to plead the minimum facts necessary to establish the existence of a class. Id. at *9. The Court observed that, among other things, the putative class had problems with commonality. There were currently 27 different types of Viking appliances in 187 models in varying designs, features, and options. Plaintiffs did not specify a time period for the manufacture or purchase of these products, which complicated the matter because some Viking appliances that were manufactured and sold had been discontinued. The Court reasoned that proving the defectiveness of each and every Viking product ever sold in the United States would entail numerous engineering experts and individual trials to determine causation, which presented efficiency problems inconsistent with the purpose of class actions, and defeated the requirement of commonality because there was not a common question among the members of the purported class. Id. at *12-13. Moreover, each appliance came with a warranty tailored to that specific appliance, which varied in length and scope. The Court remarked that the variety of warranties was implicated because Plaintiffs alleged both breach of implied warranty and breach of contract claims. Although individualized analyses were not fatal to certification, the Court stated that the numerous types and models of appliances and their alleged defects involved a process that would turn the class action into a series of individual trials. Id. at *13. Further, the Court opined that a common question was lacking because Plaintiffs did not allege any facts in support of their conclusory allegations, and Plaintiffs’ complaint was devoid of any fact detailing how Defendants’ products were defective, much less whether there was any commonality among the vast array of appliances and their alleged defective qualities. Id. at *14. Although Plaintiffs attached recall notices and incident reports to their complaint as evidence that Viking’s products were defective, the Court noted that these were insufficient to show commonality because each report detailed varying problems with different appliances, with different importers, with the problems resulting in different injuries, with differing resolutions to the problems, and over varied locations and periods of time. The Court also observed that proof that some of Vikings products were recalled or that some of their consumers filled out incident reports did not amount to proof that Defendants were operating under a general policy to defraud its consumers and manufacture defective products. Id. at *15. Accordingly, the Court concluded that the commonality requirement was lacking, granted Defendants’ motion, and struck Plaintiffs’ class allegations.

Friedman, et al. v. Dollar Thrifty Automotive, 2013 U.S. Dist. LEXIS 140691 (D. Colo. Sept. 27, 2013). Plaintiff brought a class action alleging that Defendant organized a scheme to defraud consumers to increase revenues by tricking consumers into buying insurance or other add-on products they did not want or did not actually purchase. Plaintiff had visited Defendant’s facility to pick up a car and had declined an offer regarding insurance and other service options. Plaintiff later discovered that he had been charged for insurance that he had specifically declined and roadside assistance which had not even been proposed or offered to him. Plaintiff claimed that it was not an isolated incident but a pattern of conduct that had occurred at a number of Defendant’s locations throughout the United States. Plaintiff, on behalf of himself and all other consumers similarly-situated, asserted claims under the Colorado Consumer Protection Act (“CCPA”), the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”), and the Oklahoma Consumer Protection Act (“OCPA”), and claims for breach of contract, unconscionability, unjust enrichment, and injunctive and declaratory relief. Defendant moved to strike the class allegations. The Court denied Defendant’s motion, finding that striking the class allegations was not warranted at the current stage of proceeding. Defendant had asserted that no class could be certified because all the causes of action depended upon proof of individualized, oral interactions between renters and Defendant’s employees. The Court disagreed with Defendant. Plaintiff had alleged a uniform practice and policy implemented by Defendant, which was applied consistently to all members of the class during the relevant period. Id. at *9. Plaintiff also alleged the similarity of complaints by consumers of the practice and policy occurring at
Defendant’s rental offices around the country and the uniform or canned responses by Defendant. *Id.* at *9*-10. The Court noted that if Plaintiffs could establish that the disclosures provided by Defendant uniformly did not comply with consumer protection laws such as the CCPA, such a showing could constitute a *per se* deceptive business practice and uniform conduct that could be established on a class-wide basis based on common evidence. *Id.* at *10. The Court thus found that the class claims could not be stricken based on Defendant’s argument that individualized inquiries predominated. In addition, Plaintiff had also alleged that Defendant’s acts and practices in connection with the sale of the services were deceptive within the meaning of state consumer protections laws, constituting a systematic breach of contract, and were part of a uniform scheme to unjustly enrich Defendant at the expense of and to the detriment of Plaintiff and other putative class members. *Id.* at *11. The Court held that Plaintiff should be allowed to conduct discovery before reaching the merits of class certification. *Id.* at *12.

**Gallardo, et al. v. AT&T Mobility, LLC, 2013 U.S. Dist. LEXIS 46028 (N.D. Cal. Mar. 29, 2013).** Plaintiffs, a group of retail sales consultants (“RSCs”), brought a class action alleging violation of California Labor Code for failure to provide seating in violation of Wage Order 7-2001, § 14. Included among Plaintiffs’ claims was a cause of action for injunctive relief under California’s Unfair Competition Law (“UCL”) on behalf of Plaintiffs and other current and former RSCs. Defendant filed a motion to dismiss or strike, including a request that the UCL claim be dismissed to the extent it sought relief on behalf of Plaintiffs and the current and former employees they represent. *Id.* at *21. Defendant argued that the complaint’s allegations did not satisfy the class certification elements under Rule 23 as a matter of law. The Court noted that while it could entertain Rule 12(f) motions to strike class allegations, it is rare that class allegations are stricken at the pleading stage. Plaintiffs alleged that they represent current or former employees of Defendant who worked or are currently working as RSCs at Defendant’s stores throughout the State of California. The Court held that this was sufficient to put Defendant on notice of Plaintiffs’ proposed class and this was sufficient at the pleading stage. The Court stated that Defendant would have an opportunity to challenge Plaintiffs’ class claims when Plaintiffs moved for class certification. *Id.* at *22-23. Accordingly, the Court denied Defendant’s motion to dismiss or strike the class allegations.

**Hill, et al. v. Wells Fargo Bank, N.A., 2013 U.S. Dist. LEXIS 73750 (N.D. Ill. May 24, 2013).** Plaintiffs, a group of property owners, brought a class action alleging violation of the Fair Debt Collection Practices Act (“FDCPA”), the Illinois Consumer Fraud and Deceptive Business Practices Act (“ICFA”), common law trespass, and invasion of privacy. Defendant, the mortgagee and mortgage servicer on Plaintiffs’ properties, commenced a foreclosure action against Plaintiffs and retained Defendant LPS Field Services, Inc., to act as its agent with instructions to make entries onto the property. *Id.* at *3*-4. LPS broke into Plaintiffs’ property while Plaintiffs were still defending the foreclosure action. In particular, LPS broke into Plaintiffs’ home while they were away, and during some of the break-ins LPS vandalized the home and sought to render it inaccessible to or uninhabitable by Plaintiffs by replacing the locks, draining and wrecking the hot water tank, and dumping antifreeze in the toilet, and during at least one break-in, stole some of Plaintiffs’ personal property. *Id.* at *21. Plaintiffs filed a police report, an insurance claim, and a complaint with the Attorney General of Illinois. Following a status hearing in the foreclosure case and before any judgment on the claim, LPS repeatedly visited Plaintiffs’ home and posted various stickers and forms on their windows and doors. *Id.* at *5. Plaintiffs then brought the instant action asserting FDCPA and ICFA claims on behalf of a putative class. Plaintiffs proposed a class consisting of “all persons in the State of Illinois to whom: (a) Defendants and their agents threatened to take or did take non-judicial action to effectuate the non-judicial dispossession or disablement of homes prior to the entry of any order which: (i) determined the property had been abandoned; or (ii) ordered possession or a judgment of foreclosure, sale, and confirmation of sale pursuant to 735 ILCS 5/15-1508.” *Id.* at *34. Defendants moved to strike the class allegations. The Court granted Defendants’ motion. Because the Court dismissed the FDCPA claim for failing to state a claim, and determined that materials posted on Plaintiffs’ property did not violate the ICFA, the only issue before it was whether an ICFA unfair conduct class could proceed. The Court found it could not because individual questions predominated over questions of law or fact common to the members of the putative class. Specifically, the Court noted that questions – such as what actions Defendants took against particular class members; did they change the locks, board up the doors, or
windows or did something else like vandalizing hot water tanks, or merely entered the homes without doing anything in particular inside it, or merely trespassed without entering any structure; when did each act take place, and were they within the applicable statute of limitations; did the particular actions amount to an attempt to drive the class member out of his home or did they in some other way constitute unfair practices under the ICFA; and did Defendants have an order entitling them to dispossess the class member – were to be presented individually with respect to each class member. Id. at *39-40. Moreover, Plaintiffs did not plead that Defendants actually dispossessed them of their property, but rather pled that Defendants “attempted” to dispossess them by taking certain actions while they were away from home. Id. at *37. Plaintiffs were able to return to their home after each break-in. The Court thus found that the conduct under the ICFA depended on a case-by-case analysis. Id. at *40. According to the Court, what Defendants did to a given class member and whether it was unfair under the applicable legal standard were the core of the liability case, and were the questions that predominated. Id. Because such questions were individual questions rather than class questions, the Court held that it precluded the proposed class from meeting Rule 23(b)(3)’s predominance requirement. Id. at *40-41. Accordingly, the Court concluded that class certification would be inappropriate in this action.

Hull, et al. v. Viega, Inc., 2013 U.S. Dist. LEXIS 26729 (D. Kan. Feb. 27, 2013). Plaintiffs, a group of Nevada residents and Las Vegas residential property owners, brought a class action alleging damages and potential future damage to class members’ homes resulting from failure or potential failure of “yellow brass” plumbing fittings and components, which were manufactured by Defendants. Plaintiffs Meyer, O’Brien, and Tessier were class members in a separate suit which alleged the same claims, against the same Defendants, represented by the same counsel in Waterfall Homeowners Association v. Viega, Inc., et al., Case No. 11-CV-1498 (“Waterfall”). Id. at *6. In Waterfall, the Court denied Defendants’ motion to strike Plaintiff’s class allegations as premature, and granted in part Defendants’ motion to dismiss by dismissing five of Plaintiffs’ causes of action while leave to amend. Id. at *8. The Court in Waterfall also denied Defendants’ motion to dismiss for lack of standing, holding that the pipe corrosion was a sufficient injury-in-fact, and that Plaintiffs could satisfy Article III standing requirements if they identified and joined individual homeowners as named Plaintiffs. Id. In this case, Defendants now moved to dismiss and strike Plaintiffs’ class allegations, arguing that Plaintiffs were unable to satisfy to the Rule 23 requirements. Id. at *11. The Court denied Defendants’ motions. The Court expressed concern over Defendants’ motion to strike the class action allegations at the pleadings stage, but noted that in some claims the issues are clear enough from the pleadings stage to demine whether the interests of absent parties are fairly encompassed. Id. at *12. The Court observed that Defendants’ motion raised legitimate concerns over whether Plaintiffs could satisfy Rule 23(b)(3), which requires that a question of common fact or law predominate over any other questions effecting individual class members. Id. at *14. The Court opined that Kansas’ lex loci test would require it to apply laws from all 50 states to each respective Plaintiff for a nationwide class action. Id. at *15. Further, Plaintiffs attempted to apply Nevada negligence and strict liability laws nationwide, which Defendants asserted was limited to Nevada homeowners. Id. Accordingly, the Court noted that it would need to apply each state’s negligence and strict liability laws to determine whether the economic loss doctrine barred such claims because many putative class members were not Nevada homeowners. Id. Finally, Defendants argued that the class was not ascertainable because it included Plaintiffs with latent or unmanifested defects that required proof of injury on an individual basis. Id. Plaintiffs contended that the Court should allow for discovery and class certification, at which time Defendants could challenge their class claims; nonetheless, the Court observed that Plaintiffs failed to address that the motion to strike was procedurally permissible, particularly in light of the 23(b)(3) issues. Id. at *17. The Court also opined that discovery would not remedy the choice-of-law problems Defendants identified. The Court noted that Plaintiffs’ response only addressed the procedural and not the substance of Defendants’ motion to strike, and that many of the Rule 12(b) issues raised by Defendants were curable by amending the Complaint. Id. Accordingly, because the Court possessed broad discretion to control proceedings and frame issues for class certification consideration under Rule 23, it denied Defendants’ motions without prejudice to renew.

It won’t cure a cold, but vitamin C can help blunt its effects,” violated the New Jersey’s Consumer Fraud Act (“NJCFA”). Id. at *2. Plaintiff alleged that Defendant made the statement in relation to Vicks® DayQuil® Plus Vitamin C and NyQuil® Plus Vitamin C products (collectively, the “Products”). On Defendant’s motion, the Court dismissed the complaint in its entirety. That order was reversed on appeal as to the portion of the judgment dismissing Plaintiffs’ claims under the NJCFA predicated on Defendant’s statement in its advertisement. On remand, Defendant then moved to strike the class allegations, asserting that the class was overbroad, could not meet the commonality or typicality requirements, and that individual issues predominated. The Court granted the motion. Plaintiffs argued that Defendant’s motion was premature, and that discovery would demonstrate that class certification was appropriate. In its motion, Defendant provided all of the actual packaging and advertisements for the Products, which demonstrated that the statement at issue was not an advertising claim and did not appear in any of the advertisements or packaging for the Products. Defendant also provided the Vicks.com tips pages, which was the only place where the disputed statement appeared. The web pages showed that the statement appeared on a page embedded in the “StayWell” section of the Vicks.com website, for a period of months, with numerous other general health and wellness tips. Id. at *7. The Court remarked that the hypothetical existence of any materially identical representations in the advertising or packaging of the product was irrelevant because the case was expressly limited to Plaintiffs’ claim under the NJCFA that Vitamin C won’t cure a cold, but can help blunt its effects. Id. at *9. Thus, the Court opined that further discovery and briefing on the certification issue would simply postpone the inevitable conclusion that the putative class could not be certified. The proposed class included all New Jersey residents who purchased the Products. The Court, however, noted that the majority of consumers who purchased the Products did not have Article III standing because they did not suffer an injury that was causally connected to the statement at issue. Since the Products’ advertisements showed that the statement at issue was not an advertising claim made in connection with the Products, the Court opined that Plaintiffs could not prove that all consumers in New Jersey paid a price premium caused by that statement. Id. at *11. The statement at issue appeared as one of approximately a dozen general health and wellness tips on a Vicks.com web page that received 2,167 total page views, and therefore only a few thousand individuals were exposed to it. Id. at *12. The Court remarked that even if it assumed that each of the 2,167 page views represented a unique viewer, and that each of those individuals actually purchased the Products, less than 1/4 of 1% of all purchasers of the Products nationwide were exposed to that statement. Accordingly, the Court held that the class was overbroad. Id. The Court noted that commonality was lacking because there was no actionable representation that was uniformly communicated to all or most putative class members. The Court opined that typicality was also lacking because very few, if any, putative class members were ever even exposed to, let alone injured by the statement at issue, and therefore had no claim against Defendant. Id. at *15. Finally, the Court observed that it would have to make individual inquiries of each class member to determine whether they were one of the 2,167 individuals exposed to the statement, and whether that statement played a role in their decision to purchase the Products. Accordingly, the Court opined that a class action could not be maintained, and thus granted Defendant’s motion to strike the class allegations.

**Love, et al. v. Wal-Mart Stores, Inc., 2013 U.S. Dist. LEXIS 143234 (S.D. Fla. Sept. 23, 2013).** Plaintiffs, a group of female employees, brought an action under Title VII alleging that Defendant engaged in sex discrimination in three regions located in the southeast. Plaintiffs were members of the original class decertified by the U.S. Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Plaintiffs’ new lawsuit asserted class claims for a regional sub-class that was part of the nationwide class certified and then decertified in *Wal-Mart*. Defendant moved to dismiss or strike the class allegations, arguing that the class claims were barred by the limitations period and that the class claims could not meet the commonality requirement. The Court granted the motion. The Court stated that although the limitations period was tolled for individual claims while a class action suit was pending, the Eleventh Circuit in *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994), categorically refused to toll the limitations period for subsequent class actions by members of the original class once class certification was denied in the original suit. Id. at *6. Thus, while an individual could file a new suit once previously filed class claims were rejected, the individual could not piggy-back one class action onto another class action. Id. Accordingly, the Court found that Plaintiffs’ class claims were time-barred, the limitations period for class
claims was not tolled, and Plaintiffs could not assert class claims that were previously rejected in Wal-Mart. Plaintiffs argued that Griffin was factually distinguishable because it addressed whether tolling applied where the subsequent class claims were identical to those asserted in the initial lawsuit, while the class claims asserted here are different from those asserted in Wal-Mart. The Court noted that Plaintiffs’ sex discrimination class claims were previously asserted in Wal-Mart and these were identical claims that Plaintiffs’ sought to press as class claims here. Although, the scope of the proposed class was narrower than the nationwide class in Wal-Mart and the complaint also contained new region-specific allegations, limiting a class by geographic regions did not transform the class claims into something different from the class claims asserted in Wal-Mart. Id. at *8. The Court reasoned that even assuming Plaintiffs’ class claims were different from those asserted in Wal-Mart, Griffin would still bar Plaintiffs from pursuing class claims here, because the Eleventh Circuit’s rationale for adopting the no piggy-backing rule prevented previous class members from pursuing their claims as class claims, regardless of whether the class was framed in a different manner or the class itself was different. Id. at *9. Plaintiffs also argued that two Supreme Court cases – Shady Grove Orthopedic Associates v. Allstate Insurance Co., 559 U.S. 393 (2010), and Smith v. Bayer Corporation, 131 S. Ct. 2368 (2011) – overruled Griffin because they established a bright-line rule that, so long as Rule 23 requirements were satisfied, a class action might proceed whenever an individual claim might proceed. Id. at *9-10. The Court noted that Shady Grove concerned whether a New York law prohibiting certain claims from proceeding as class actions in state court similarly prohibited those claims from proceeding as class actions in federal court. In Bayer, the Supreme Court found that a federal district court could not enjoin a state court from considering a request for class certification after the federal court denied a similar class-certification request by a different Plaintiff. The Court found that neither Shady Grove nor Bayer directly addressed whether the pendency of a class action would toll the limitations period for successive class actions, instead, both addressed discrete issues of federalism, and therefore Griffin was controlling. Id. at *11. Accordingly, the Court granted Defendant’s motion to dismiss.

Editor’s Note: The Love litigation stemmed from the decertified class in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2001), and involved claims by Florida-based employees. The Court’s ruling demonstrates the wide-ranging implications of Wal-Mart, and how employers can utilize defense arguments to eliminate class claims at the motion to dismiss stage.

Semenko, et al. v. Wendy’s International, Inc., 2013 U.S. Dist. LEXIS 52582 (W.D. Pa. April 12, 2013). Plaintiff brought a class action under the Americans With Disabilities Act (“ADA”) and the Pennsylvania Human Relations Act (“PHRA”) alleging denial of employment and failure to accommodate on the basis of her disability. Plaintiff suffered from degenerative arthritis and took an approved long-term disability leave. Upon being released by her treating physician to return to work full-time with restrictions, Plaintiff requested to return to work with accommodations. Plaintiff’s request was allegedly denied and Plaintiff was subsequently terminated. Defendant moved to strike the class allegations, and Plaintiff argued that she had alleged viable class claims and the motion to strike should be denied as premature since Plaintiff had yet to file a motion for class certification and the parties had not engaged in any pre-certification discovery. Id. at *3. The Court noted that in rare cases where it was clear from the complaint itself that the requirements for maintaining a class action cannot be met, a Defendant may move to strike the class allegations before a motion for class certification was filed. Id. at *8. The Court observed that there was precedent for treating a Rule 12(f) motion to strike class allegations as a motion to deny class certification. Id. at *9. Because the Court determined that issues in this particular case were clear and discovery on class certification was unnecessary, it stated that the motion to strike and its opposition would be treated as a motion for class certification and its opposition without permitting discovery or waiting for a certification motion to be filed. Regarding class certification, the Court noted that Plaintiff’s putative class consisted of all individuals who had been terminated or separated from employment following a leave of absence and/or otherwise not accommodated by Defendant’s failure to transfer to vacant and funded positions. Id. This class was later limited to those individuals with permanent medical restrictions who applied for long-term disability benefits. The Court, however, found that the commonality requirement could not be met. The Court opined that in an ADA case, it must determine not just whether the employer acted improperly, but
also whether class members were qualified before a class-wide determination of unlawful discrimination could be reached. *Id.* at *16. In order to determine whether each claimant was subjected to prohibited discrimination, the Court stated that it needed to resolve whether the claimant was a qualified individual with a disability, whether the individual could perform the essential functions of the job with or without accommodation, whether the class member alleged a failure to accommodate and if so, was the requested accommodation reasonable, whether the requested accommodation imposed an undue hardship on the employer, and whether the class member suffered prohibited discrimination. Additionally, the Court noted that a variety of individualized defenses would have to be analyzed that Defendant might have in response to the claims of class members, including whether the class member was judicially estopped from asserting a disability discrimination claim; whether the class member pursued Social Security disability benefits; and/or whether the class member pursued short-term or long-term disability insurance benefits. *Id.* at *21.

The Court opined that in these circumstances, the commonality requirement could not be met because each class member would have to prove that he or she was a qualified individual with a disability, which was a highly individualized analysis requiring a number of individual mini-trials. The Court noted that the facts and evidence needed to prove the claims of each class member would be unique to each claimant, and determining whether each claimant was entitled to recover under the ADA would be a highly individualized inquiry. Thus, because proof of Plaintiff’s individual claims would not prove the claims of other class members, the Court concluded that typicality was lacking. *Id.* at *23. Finally, the Court noted that Plaintiff sought a variety of monetary damages on behalf of the proposed class, and the requested monetary damages were not subject to across-the-board relief, but required individualized inquiries to determine the individual back pay, the individual compensatory damages, and the individual punitive damages. Thus, the Court opined that the class would become unmanageable, mandating multiple sub-trials to resolve all outstanding issues. Further, the Court noted that because of the highly individualized inquiries a class action was not a superior form of adjudication. *Id.* at *31. Accordingly, the Court held that the requirements of Rule 23(b)(2) or Rule 23(b)(3) were not satisfied.

**Swires, et al. v. Incredible Scents, Inc., 2013 U.S. Dist. LEXIS 117592 (S.D. Ill. Aug. 20, 2013).** Plaintiff brought a class action alleging that Defendant had violated the consumer fraud statutes of various states, breached an express warranty, and was unjustly enriched. Plaintiff claimed that the device Silent Snooz, a nasal breathing product Defendant manufactured, did not reduce snoring and had not been clinically proven or patented to achieve the benefits it promised. Plaintiff sought to represent a class of all persons who purchased Silent Snooz anytime from August 30, 2007 to the date a class was certified. *Id.* at *2. Defendant moved to strike Plaintiff’s allegations contained in the amended complaint in support of class allegations. The Court denied the motion. Defendant argued that the class allegations in the amended complaint should be stricken pursuant to Rule 12(f) and 23(d)(1)(D) because nationwide fraud and warranty cases could not proceed as class actions as a matter of law. Plaintiff argued that the motion to strike was premature in light of the schedule set for discovery and briefing regarding class certification issues and, alternatively, the motion had no merit. The Court stated that under Rule 12(f), upon a motion or upon its own initiative, the Court could strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. *Id.* at *3. The Court noted that a party must show prejudice to succeed on a motion to strike. The Court observed that under Rule 23(d)(1)(D), it might require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly. The Court noted that some decisions grant motions to strike under the theory that where it was clear from the face of a complaint that it could not satisfy class certification requirements, the Court should remove that issue from the case as early as it can. *Id.* at *4. Here, the Court stated that it was unable to detect any prejudice Defendant would suffer from allowing the class allegations to remain in the complaint and thus denied without prejudice Defendant’s motion to strike.

**Williamson, et al. v. Fermi National Accelerator Laboratory, 2013 U.S. Dist. LEXIS 159342 (N.D. Ill. Nov. 7, 2013).** Plaintiff, an administrative assistant, brought a class action alleging that Defendant violated the Genetic Information Nondisclosure Act (“GINA”) by requiring all new employees to submit to a physical
Plaintiff also alleged that Defendant terminated her employment because she suffered from post-traumatic stress disorder in violation of the ADA. Defendant moved to dismiss the class allegations for failure to exhaust administrative remedies with the EEOC because Plaintiff did not explicitly make allegations of class-wide discrimination. \textit{Id.} at *2. Plaintiff’s charge to the EEOC merely alleged that Defendant had discriminated against her in violation of both the ADA and GINA. The Court denied the motion. The Court stated that although as a general rule, a Plaintiff could not bring a discrimination claim in a lawsuit that was not included in her EEOC charge, a Plaintiff need not allege in an EEOC charge each and every fact that forms the basis of each claim in her complaint. \textit{Id.} at *7. Similarly, the charge need not explicitly state that Plaintiff intended to pursue a representative action. \textit{Id.} at *7-8. Defendant asserted that although the EEOC’s determination letter contained findings of class-wide discrimination, Plaintiff’s initial charge to the EEOC did not. The Court noted that the EEOC, in its determination letter, not only indicated a mere belief that Defendant discriminated against a class, but stated that Defendant discriminated against a class of individuals that was sufficient to put Defendant on notice that Plaintiff and/or a broader class of individuals might pursue legal action against Defendant. \textit{Id.} at *11. Thus, the Court found that it was not appropriate to dismiss Plaintiff’s class allegations because it was clear from the determination letter that after Plaintiff filed her initial charge, the EEOC found something indicating class-wide discrimination, and the letter provided adequate notice to Defendant of the existence of a potential class. \textit{Id.} at *12. Alternatively, Defendant argued that the class period should be limited to 300 days before the EEOC’s determination letter, which was dated September 28, 2012. The Court stated that at this early stage, it was not apparent when Defendant became aware of existence of a potential class. The Court noted that the EEOC charge was dated on July 26, 2010 and contained no class allegations, and the determination letter was dated September of 2012 which summarized the EEOC’s investigation and finding of class-wide discrimination. The Court stated that this notice occurred at the latest with the letter dated September 28, 2012, but quite possibly before and at this early stage there was not enough information to set this date specifically. \textit{Id.} at *14. Therefore, the Court denied Defendant’s alternative motion to limit the period to 300 days before September 28, 2012 without prejudice.

\begin{quote}
\textbf{(iii) The Numerosity Requirement For Class Certification}
\end{quote}

\textit{Forde, et al. v. Waterman Steamship Corp.}, 2013 U.S. Dist. LEXIS 135307 (S.D.N.Y. Sept. 18, 2013). Plaintiffs, a group of employees, brought an action for overtime and vacation pay components of unearned wages to which they alleged they were entitled after they suffered illness or injury in the service of Defendant’s vessels. Plaintiffs moved for certification of a class comprising of seamen who were not paid the overtime wages that they would have otherwise earned under Defendant’s employment in the service of its vessels. The Court denied the motion. Earlier, Plaintiffs’ counsel had filed \textit{Smith v. Waterman S.S. Corp.}, 2012 U.S. Dist. LEXIS 18783 (E.D. Mich. Feb. 15, 2012), a virtually identical class action in the U.S. District Court for the Eastern District of Michigan. \textit{Id.} at *4. The Court in \textit{Smith} had granted summary judgment for Defendant and dismissed Plaintiffs claim for unearned wages inclusive of overtime with prejudice, and also denied Plaintiffs’ pending motion to certify a class as moot. Here, the Court noted that on July 1, 2012, the Standard Freightship Agreement between Defendant and the employee union – the Seafarers International Union (“SIU”) – became effective, which constituted a valid collective bargaining agreement (“CBA”). Defendant submitted a spreadsheet showing all merchant seaman who became unfit for duty while working aboard any of Defendant’s vessels from October 1, 2007 to June 30, 2012, which reflected a potential class size of 32 individuals, six of which were already Plaintiffs in this action. \textit{Id.} at *8. Plaintiffs contested two limitations, namely the July 1, 2012 end date after which potential claims may not accrue due to the effective date of the agreement, and the three-year statute of limitations period applicable to these claims. Further, Plaintiffs argued that the agreement did not set an actual or maximum rate of unearned wages, and that the appropriate statute of limitations was six years. The Court found that because the agreement clearly defined unearned wages as base wages and excluded overtime, individuals who became entitled to unearned wages after July 1, 2012 were not properly included in Plaintiffs’ proposed class, which sought recovery for overtime as a part of unearned wages. \textit{Id.} at *12. The Court observed that a three-year statute of limitations is often used as the analogous statute of limitations in cases such as this because three years is the statute of limitations found in other federal maritime statutes.
Id. at *14. Plaintiffs’ complaint made clear that this action was brought in federal court because of subject-matter jurisdiction founded on federal maritime law, and only one of the 16 named Plaintiffs had a residence in New York. Id. at *15. The Court remarked that Plaintiffs’ argument that the applicable statute of limitations should be tolled because of the filing of a virtually identical class action in the Eastern District of Michigan was unavailing. The Court noted that Plaintiffs may not piggy-back one class action onto another and thus toll the statute of limitations indefinitely, and expressed concern here, where Plaintiffs’ counsel filed a prior class action in another jurisdiction, lost the case, and then re-filed in the Southern District of New York two and a half months later. Id. at *16. Thus, the Court found that Plaintiffs’ proposed class was limited to the 32 individuals, which fell below the presumptive 40-member threshold, where six of the potential class members had already been joined as named Plaintiffs, and Plaintiffs’ counsel had had the names and addresses of all but two proposed members for months. The Court thus held that numerosity was not established, and denied Plaintiffs’ motion for class certification.


Plaintiffs, a group of customers, brought an action under the Equal Credit Opportunity Act (“ECOA”) alleging discriminatory loan practices. The ECOA makes it unlawful to “discriminate against any applicant, with respect to any aspect of a credit transaction” on the basis of several protected categories, including age. Id. at *1. Plaintiffs had received a residential mortgage loan from Wachovia Mortgage Corp., the predecessor in interest of Defendant. Plaintiffs then applied for refinancing of their mortgage through Defendant’s Home Affordable Refinancing Program. Plaintiffs were under 59.5 years of age at the time. Defendant’s representative informed Plaintiffs that the application had been denied because the Individual Retirement Plan (“IRA”) income would not be considered income supporting the application, and that their retirement income did not qualify for the application because Plaintiffs were not of retirement age. Id. at *4. At the same time, Plaintiffs also attempted to secure a Home Affordable Modification Program (“HAMP”) loan modification from Defendant, but Defendant’s underwriter stated that the SEPP IRA income could not be used as income to qualify for the HAMP program. Id. Plaintiffs moved for class certification consisting of a class of all individuals who have applied or would apply for a home loan, loan modification, or loan refinancing from Wells Fargo, at any time since March 16, 2010, who at the time of application were or would be under the age of 59.5, and included or would include income drawn from an IRA, 401(k), 403(b), Keogh Plan, or other qualified retirement plan in support of their applications. The Court denied the motion, finding that Plaintiffs did not meet the numerosity requirement despite having had an opportunity for additional discovery and to submit supplemental briefs regarding how to identify individual class members and how to determine whether such individuals were treated unfairly. The Court stated that the additional discovery revealed that it was not possible to identify class members solely on the basis of Defendant’s electronic files, and whether a sufficient number of class members could have been identified using more traditional methods was not apparent from the record. Id. at *14. Moreover, the Court remarked that Plaintiffs had not submitted any evidence regarding the constituents of the proposed class. Id. at *15. The Court stated that presumably, a large number of individuals under the age of 59.5 had applied to Defendant for home loans or refinancing since March 16, 2010, or would do so in the future, yet those who also relied or would rely on retirement income – even if the number or percentage were known – might not be similarly-situated. For example, individuals whose retirement income was subject to early withdrawal penalties were not necessarily on the same playing field as Plaintiffs, whose SEPP IRA income could be withdrawn without penalty. The Court stated that a more complete understanding of the proposed class would show whether class definition could be used as was, or whether sub-classes were necessary for commonality under Rule 23(a)(2), and it would also show whether the individuals in the class or sub-classes were sufficiently numerous, and whether Plaintiffs experience was typical under Rule 23(a)(3). The Court, however, found that these questions could not be answered on the present record. Accordingly the Court denied the motion for class certification.


Plaintiffs, a group of individuals, brought a class action alleging that Defendants violated state and federal due process protections. Plaintiffs moved for class certification under Rule 23(b)(2) for a class consisting of all persons whose vehicles were seized under the Philadelphia Live Stop Program, who were later found not
guilty, and who were not reimbursed for the towing and storage fees or costs as a result of the not guilty determination. *Id.* at *5. Plaintiffs also proposed certification under Rule 23(b)(3) for two separate classes. The Court denied the motion for failure to satisfy the numerosity requirement. The Court noted that although Rule 23(a)(1) does not require Plaintiffs to offer direct evidence of the exact number and identities of the class members, Plaintiffs still must show sufficient circumstantial evidence specific to the products, problems, parties, and geographic areas actually covered by the class definition to allow the Court to make a factual finding. *Id.* at *18. Plaintiffs asserted that the proposed class consisted of people subjected to the policies and practices that were in dispute, and that the Live Stop Program involved towing and storage fees for thousands, and that each year a number of those stopped would be found not guilty of the charges. Plaintiffs asserted that given the pleadings in this case, with thousands of Live Stops that had been and would be conducted in the future, and with hearings that result in dismissals of some of these charges, the class would number in the hundreds if not more. *Id.* at *18. The Court noted that such conclusory and speculative arguments were not enough to support class certification. *Id.* at *19. The Court held that Plaintiffs offered neither direct nor circumstantial evidence of the number of potential class members, and thus failed to demonstrate numerosity. Accordingly, the Court denied Plaintiffs’ motion for class certification.

(iv) The Commonality Requirement For Class Certification

*Chieftain Royalty Company, et al. v. XTO Energy, Inc.*, 2013 U.S. App. LEXIS 13837 (10th Cir. July 9, 2013). Plaintiffs brought a class action alleging breach of contract, breach of fiduciary duty, fraud, and conversion claims in violation of Oklahoma law, claiming that Defendant had underpaid royalties by improperly deducting costs incurred to transform the wellhead gas into a marketable condition. Under Oklahoma law, lessees have an implied duty of marketability (“IDM”); absent lease language negating the IDM or permitting certain deductions, the lessee must bear the full cost of services undertaken to place gas in marketable condition, such as gathering, compression, dehydration, treatment, and processing. Although the District Court found that Defendant employed a uniform royalty payment methodology that did not take into account individual lease language, and that a different payment methodology was used for at least one of the sample wells, it held that the uncertainty of the royalty payment methodology did not prevent certification in light of the substantial evidence of a uniform policy on the remaining wells. The District Court held that the commonality requirement was satisfied because all claims were based on the assertion that improper deductions had been made to transform wellhead gas into a marketable condition for sale. Further, all putative class members possessed the same interest and suffered the same injury, arising from the application of the implied duty of marketability and the uniform royalty payment methodology. Defendant appealed the District Court’s order certifying a class of over 16,000 well royalty owners, covering approximately 14,300 leases, and roughly 2,300 wells. The Tenth Circuit vacated the District Court’s order and remanded for failure to establish commonality. The Tenth Circuit found the District Court did not examine whether the variations in the lease language destroyed the possibility of resolving the common question on a class-wide basis, as the legal validity of XTO’s uniform payment methodology might differ greatly among class members if certain leases negated or abrogated the IDM. The Tenth Circuit also noted that although the legal effect of lease language was a merits question that was capable of resolution at the summary judgment stage, it was also an issue that bore directly on Rule 23’s criteria, and that the District Court needed to address the lease language issue as it related to Rule 23 before certifying the class. *Id.* at *10. Further, the Tenth Circuit found that Defendant’s sampling reflected only a fraction of the class’ leases, and that the District Court did not engage in any substantive analysis of lease terms that was necessary because some leases expressly abrogated and even negated the IDM. *Id.* at *11. The Tenth Circuit directed the District Court to address the marketability question directly in its commonality analysis, while taking into account that under Oklahoma law, there is a possibility that some gas could be in marketable condition at the well. Finally, the Tenth Circuit remanded for reconsideration the predominance requirement in light of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432-33 (2013), which held that Rule 23(b)(3)’s even more demanding criterion frequently will require a District Court to consider issues that overlap with the merits of Plaintiff’s underlying claim. The Tenth Circuit remarked that the District Court did not address the elements of the underlying causes of action in its predominance analysis, and directed it to give a fuller explanation. *Id.* at *12-13.
In Re Countrywide Financial Corp. Mortgage Lending Practices Litigation, 2013 U.S. App. LEXIS 924 (6th Cir. Jan. 15, 2013). Plaintiffs, a group of customers, brought a class action challenging the subjective component of Countrywide Bank’s loan-pricing policy, which they claimed disparately impacted minority borrowers. Plaintiffs sought certification of a class consisting of all African-American and Hispanic borrowers to whom Defendant originated a residential-secured loan, including correspondent loans, between January 1, 2002 and the present. Plaintiffs sought damages, injunctive relief, and declaratory relief for alleged violations of the Equal Credit Opportunity Act, the Fair Housing Act, and the Civil Rights Act. The District Court denied certification, holding that the proposed class did not satisfy the commonality requirement. On appeal, the Sixth Circuit affirmed the order of the District Court. Plaintiffs contended that the District Court abused its discretion by failing to distinguish their challenge to the subjective loan-pricing policy from the failed challenge to Wal-Mart’s subjective pay-and-promotion practices in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 U.S. (2011). The Sixth Circuit stated that the District Court did not abuse its discretion in finding that Wal-Mart foreclosed the proposed class from establishing commonality. The Sixth Circuit noted that both cases challenged policies that granted broad discretion to local agents, i.e., Countrywide to local agents who varied home-loan prices, and Wal-Mart to managers who made pay-and-promotion decisions. Id. at *9. The Sixth Circuit stated that the exercise of discretion was cabined inside clear boundaries where Defendant’s agents could vary home loans only within a specified range of the predetermined par rate. Plaintiffs did not allege that local actors exceeded these boundaries, nor did they assert that a uniform policy or practice guided how local actors exercised their discretion. Plaintiffs claimed that the discretion Defendant gave its sales force was exercised in a common way by limited variation of the par rate. The Sixth Circuit observed that Defendant placed clear boundaries on how far a local exercise of discretion could go, but Plaintiffs did not demonstrate that this range, rather than discretionary decisions made within this range, disparately impacted the proposed class. Id. at *10. Wal-Mart held that class members must unite acts of discretion under a single policy or practice, or through a single mode of exercising discretion, and the mere presence of a range within which acts of discretion take place will not suffice to establish commonality. Id. at *10-11. Plaintiffs relied on McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 490 (7th Cir. 2012), involving a class that fell on the opposite side than did Wal-Mart of the line that separates a company-wide practice from an exercise of discretion by local managers. The Sixth Circuit, however, stated that even under McReynolds’ approach to Wal-Mart, Plaintiffs would fail to satisfy commonality. Id. at *11. Here, the Sixth Circuit noted that essential to McReynolds, and missing from the instant litigation, were company-wide policies that contributed to the alleged disparate impact that arose from the delegation of discretion to individual brokers. Id. at *13. No uniform policy existed outside of that held to be legally insufficient in Wal-Mart that contributed to the disparate pricing of home loans. Id. The Sixth Circuit remarked that without a similar policy to provide a common contention, Plaintiffs must show that a common mode of decision-making united individual acts of discretion by Defendant’s agents, which they had not done. Id. Because Plaintiffs failed to establish either a uniform policy or practice or a common mode of decision-making amidst the various acts of discretion that caused the alleged disparate impact, the Sixth Circuit agreed with the District Court that the commonality requirement was not met.

Puerto Rico College Of Dental Surgeons, et al. v. Triple S Management Inc., 2013 U.S. Dist. LEXIS 36300 (D.P.R. Mar. 13, 2013). Plaintiffs, the College of Dental Surgeons and nine individual dentists, brought a class action alleging that Defendants, 22 insurance companies providing dental insurance and other health-care plans, committed a wide-ranging series of actions that breached the contract allegedly entered into by Plaintiffs with Defendants. Plaintiffs’ claims arose from Defendants’ allegedly fraudulent scheme designed to systematically deny, delay, and decrease payments to dentists accomplished through contracts of adhesion, manipulation of billing codes, acts of intimidation and coercion, and unfair business practices. Id. at *11. Plaintiffs sought $150 million in damages and injunctive relief. Plaintiffs moved for class certification. The Court denied Plaintiffs’ motion. The Court found that Plaintiffs failed to meet to the commonality and predominance requirements of Rule 23. Plaintiffs argued that they met the commonality requirement because all claims against Defendants were directly related to Defendants actions in breach of the contractual relationships exiting with the proposed class members, which actions allegedly violated the provisions of Articles 1207, 1208, 1054, 1059, 1795, and 1796 of the Puerto Rico Civil Code. Id. at *22.
Plaintiffs listed an incredibly long and varied, non-exhaustive list of the actions that Defendants allegedly took, such as requiring Plaintiffs to enter into boilerplate adhesion contracts that established terms of payments, audit proceedings, solution of grievance proceedings; unjust changing of invoicing codes; failure to comply with payments; delay and denial of payments for different reasons; changing dentists’ clinical criteria based on economic interests; and retaliation against class members. *Id.* Defendants described the many different types of injuries and contractual arrangements that made up Plaintiffs’ case to demonstrate that Plaintiffs could not meet the commonality requirement. *Id.* at *23. The Court agreed with Defendants and found that Plaintiffs failed the commonality requirement. The Court was unclear as to what common questions of law or facts bound together Plaintiffs’ disparate claims. *Id.* at *22. Plaintiffs contended that commonality was shown by the fact that Defendants’ actions not only resulted in economic losses to class members, but also were detrimental to patient interests and adversely affected the profession as a whole. Although Plaintiffs argued that Defendants had engaged in class-wide practices that hurt the dentist profession as a whole and that Defendants had adopted a practice of automatically bundling and down-coding certain codes for services provided by dentists, irrespective of the terms of contracts, Plaintiffs provided no detail or set of facts that explained how Defendants committed the alleged practices. *Id.* at *23. The Court found that the wide-ranging nature of allegations militated against a finding of commonality. The Court further found that abundant factual distinctions had the potential to impede common answers. *Id.* at *28. Plaintiffs themselves acknowledged that Defendants refused to pay their claims for different reasons, and each Defendant had different reasons for underpaying a particular claim. The Court thus found Plaintiffs’ “bold and brief assertion” of class-wide injury completely unsupported by any factual detail, and thus insufficient to demonstrate commonality. *Id.* at *27. Accordingly, the Court denied Plaintiffs’ motion for class certification.


Plaintiff, a financial services company, brought a class action alleging that by the imposition of the Credit Agreement by which the Government obtained a 79.9% equity interest in American International Group, Inc. (“AIG”), and the reverse stock split by which shareholders were denied a separate vote, the Government effected a taking or illegal exaction of the property of shareholders in violation of the Fifth Amendment of the U.S. Constitution. Plaintiff sought class certification for each of its claims relative to these government actions. The Court of Federal Claims certified a credit agreement class and a stock split class. The credit agreement class was comprised of all persons or entities who held shares of AIG Common Stock on or before September 16, 2008 and who owned those shares as of September 22, 2008. The stock split class consisted of all persons or entities who owned shares of AIG Common Stock on June 30, 2009 and were eligible to vote those shares at the annual shareholder meeting held on that date. *Id.* at *1-4. In finding that the requirement of commonality was satisfied, the Court noted that the claims of the members within each putative class were based on the same government action, either the Credit Agreement or the reverse stock split. The Court stated that Plaintiff sufficiently identified that the imposition of the Credit Agreement was a government action allegedly requiring compensation. The Credit Agreement affected all putative members, and the acquisition of 79.9% of equity interest in AIG was the wellspring of all the putative class members’ claims. Thus, the Government acted on grounds applicable to the entire class. *Id.* at *5. The Court found that because the resolution of the Credit Agreement issue would affect all putative class members, the putative class shared a common question of law or fact. Moreover, the determination of whether the Credit Agreement was a taking or an illegal exaction predominated over any individual variations within the class, and its resolution would not require individualized proof. All putative class members shared the same core legal question of whether the Credit Agreement was a government action requiring just compensation, and resolution of this question could be achieved through generalized proof. Similarly, the Court of Federal Claims found that the putative stock split class members shared the core legal question of whether the reverse stock split constituted a taking or an illegal exaction without just compensation of the equity and voting power associated with Plaintiff’s shares of common stock. The reverse stock split gave rise to the putative class members’ claims, and the resolution of whether it constituted a government action requiring just compensation would affect all putative class members, and thus, the stock split class also shared common questions of law and fact. *Id.* at *4-6.
The Typicality Requirement For Class Certification

Football Association Premier League, et al. v. YouTube, Inc., 2013 U.S. Dist. LEXIS 69401 (S.D.N.Y. May 15, 2013). Plaintiffs, a group of copyright holders, brought a class action against Defendants for direct and secondary copyright infringement. Plaintiffs sought to represent a class consisting of every person and entity in the world who owned “infringed copyrighted works,” and who had/would register them with the U.S. Copyright Office as required. Id. at *6. Plaintiffs sought certification of two classes of individuals or entities whose work: (i) was subject to prior infringement which was blocked by Defendant, but suffered additional infringement through subsequent uploads (the “repeat infringement class”) and; (ii) musical compositions which Defendants tracked, monetized, or identified and allowed to be used without proper authorization (the “music publisher class”). Id. Plaintiffs asserted that there were thousands of class members in the repeat infringement class, and hundreds in the music publisher class. Plaintiffs sought class certification, which the Court denied. The Court noted that Plaintiffs did not offer any explanation as to how the worldwide members of this proposed class were to be identified, how they were to prove copyright ownership by themselves, or how they would establish that Defendants became aware of the specific video clips that allegedly infringed potentially tens of thousands of musical compositions. Id. at *7. The Court observed that unless an exception applied, the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. 512(c), requires that YouTube have legal knowledge or awareness of the specific infringement to be liable for it. Id. The Court observed that YouTube did not generate infringing material; it merely offered a website on which others posted video clips, some of which infringed material in copyrighted works. Thus, YouTube was mainly alleged to be secondary liable for its users’ uploading an infringing clip onto the service. Id. The Court remarked that generally, copyright claims were poor candidates for class action treatment, as they only had superficial similarities. The Court explained that issues foreseeably arising with repetitive frequency in the nature of this litigation were validity and ownership of the copyright, its licensing and authorization of the party asserting it, and amount of injury and damages, as well as the overarching questions of substantial similarity and fair use. Id. at *10-11. These issues, the Court remarked, arise from facts peculiar to each protected work and each claimed infringement of it. Id. at *11. The Court opined that these similarities within the proposed class prevented the adjudication of claims en masse. Id. The Court noted that the repeat infringement class depended on the position that YouTube readily could have identified, by the use of its own screening tools, the identity and location of later infringement works whose earlier claimed infringements had been removed based on a takedown notice. Accordingly the Court remarked that this left little or nothing to the claim of the class. Simply stated, Plaintiffs’ claims lacked typicality “in the sense of providing common answers, and leaves the ‘class’ no more than a diverse and unmanageable aggregation of individual claims . . .” Id. at *17. Therefore, even if Plaintiffs were to prevail on the claim, each of the claims would have to proceed on the individual issues of infringement. Id. at *16. Similarly, the Court found that the music publisher class would have to show that it owned the copyright in the infringed work, and that the copying was not authorized and was not a fair use even if the class members overcame the safe harbor defenses. Id. at *17. Therefore, the Court refused to certify the two classes.

Gormley, et al. v. Nike Inc., 2013 U.S. Dist. LEXIS 11278 (N.D. Cal. Jan. 28, 2013). Plaintiffs, on behalf of themselves and a class of consumers, brought a putative class action alleging that Defendant’s information capture policy of requesting ZIP codes from credit card consumers violated California’s Song-Beverly Act. Subsequently, Plaintiffs moved to certify a state-wide class. With respect to Rule 23(a)(3)’s typicality requirement, the Court observed that Plaintiffs’ complaint challenged Defendant’s “Information Capture Policy, and yet all of the named [P]laintiffs testified that their experiences were not consistent with that policy.” Id. at *23-24. The Court noted that three named Plaintiffs contended that Defendant’s cashiers requested their ZIP code information before the sale went through, but argued that the timing did not matter for class certification purposes because the Song-Beverly Act prohibits any request for personal information in conjunction with a credit card purchase. Id. at *24. The Court rejected Plaintiffs’ argument and opined that because the legality of Defendant’s policy depended on whether a consumer would perceive the store’s request for a ZIP code as a condition of the use of a credit card, the timing of that request was relevant. Id. at *24-25. Furthermore, the Court noted that it was Defendant’s policy to request ZIP codes after giving their customers their receipts and merchandise. Thus, the Court found that
Defendant did not violate the statute if a customer provides the ZIP code voluntarily for reasons unrelated to a credit card purpose. *Id.* at *25. Therefore, the Court held that the claims of the named Plaintiffs were not typical because their experiences were not consistent with Defendant’s information capture policy. Accordingly, the Court denied Plaintiffs’ motion for class certification.


Plaintiffs, a group of homeowners, brought an action under the North Carolina Unfair and Deceptive Trade Practices Act (“UDTPA”) alleging that Defendant negligently designed and manufactured Trimboard, a composite building product designed and marketed for use as exterior trim around windows and doors. The Court previously had granted a motion for class certification. Subsequently, Defendant sought decertification and summary judgment in light of recent North Carolina Court of Appeals decision that clarified the applicable statute of repose. The Court granted the motion for summary judgment and decertified the class. *Id.* at *3, 6-7. As to certification, the Court stated that its previous order certifying the class was based upon its understanding that the statute of repose would not bar an action for damages under the express warranty for Plaintiffs or the class members. However, the recent North Carolina Court of Appeals decision clarified that the statute of repose does bar an action for damages, even if the warranty extends passed the period of repose. *Id.* at *7. Thus, individualized inquiries would have to be made to determine the last act or omission of the Defendant that gave rise to each class member’s claim. The Court concluded that this “destroy[ed] typicality.” *Id.* at *6. Accordingly, the Court granted the motion for decertification. *Id.* at *8.


Plaintiffs, a group of purchasers or lessees of 2010 Toyota Prius or 2010 Lexus HS 250h (collectively, the “class vehicles”), brought a class action alleging that a defect in the anti-lock brake system (the “ABS”) caused the ABS to improperly engage when not needed, resulting in increased stopping time and distance. Subsequently, Defendants voluntarily recalled the class vehicles and offered to install a software update to remedy the braking defect. *Id.* at *9. Despite the recall, Plaintiffs claimed that the braking defect was not cured, and they suffered ensuing monetary and property damage. Plaintiffs asserted violations of the California Consumer Legal Remedies Act (“CLRA”), the Unfair Competition Law (“UCL”), the False Advertising Law (“FAL”), common law breach of implied warranty of merchantability, and common law breach of contract. Plaintiffs sought certification of a class consisting of individuals who purchased or leased the class vehicles in California or Texas prior to February 8, 2010. *Id.* at *41. The Court denied Plaintiffs’ motion. The Court noted that the issue was whether there was a manifest defect in the ABS that caused an actual injury to each member of the proposed class. The Court also observed that Plaintiffs sought to certify a class in which the substantial majority of class members never suffered an actual injury that was caused by a manifest defect in the ABS. *Id.* at *19. Further, Defendants presented substantial evidence that the updated software installed in the vehicles as part of the national recall rectified any actual or perceived problem with the braking performance of the ABS. Plaintiffs did not present any contradictory evidence nor did they retain an expert to render an opinion on the safety and performance of the ABS post-recall. *Id.* Plaintiffs merely argued that they suffered an actual injury because they would not have paid the same purchase price for each of their vehicles had they known of the problem with the ABS. The Court opined that by only offering a creative damages theory did not establish the actual injury that was required to prevail on their product liability claims. *Id.* at *20. The Court opined that named Plaintiffs Kramer, Del Real, Choi, and presumably the majority of the purported class they sought to represent, received exactly what they paid for, *i.e.*, a vehicle with a safe and operable ABS. Because Plaintiffs never incurred any expense as a result of any problem with the ABS in their vehicles, the Court remarked that they suffered no actual injury, let alone a common one resulting from the same manifest defect. Further, with regards to the few members of the purported class like named Plaintiff Scholten who claimed to have suffered an actual injury or incurred damages because of a problem with the ABS in their vehicles, the Court observed that their injury or damages could have been caused by a variety of factors, some of which such as human driver error, would not result in liability for Defendant and the determination of the actual cause of the injury or damages would require highly individualized, fact-intensive inquiries. *Id.* at *22-23. Additionally, the Court noted that because the number of members of the
proposed class that allegedly suffered an injury was small, Plaintiffs’ proposal to certify a class of thousands of vehicles owners, then determine which few suffered an actual injury resulting from a manifest defect in the ABS, would render the class action device nothing more than a façade for conducting a small number of highly individualized, fact-intensive cases. Id. at *23-24. The Court concluded that such a class action was not a superior, fair, and efficient method for resolving the parties’ controversy. Accordingly, the Court denied Plaintiffs’ motion for class certification.

Major, et al. v. Ocean Spray Cranberries, Inc., 2013 U.S. Dist. LEXIS 81394 (N.D. Cal. June 10, 2013). Plaintiff, a consumer, brought a class action alleging that Defendant’s products contained packaging and labeling that were unlawful, false, or misleading. Plaintiff alleged violations of California’s Unfair Competition Law, False Advertising Law, the Consumers Legal Remedies Act, unjust enrichment, breach of warranty in violation of the Song-Beverly Act, and the Magnuson-Moss Act. Plaintiff’s amended complaint defined the putative class as all persons in California who, within the last four years, purchased any of Defendant’s products labelled: (i) “No Sugar Added,” but which contained concentrated fruit juice and/or provided more than 40 calories per reference amount; (ii) represented to contain no artificial colors, flavors, or preservatives, but which contained artificial colors, flavors, or preservatives; (iii) represented to be healthy, but which contained no qualifying nutrient at the mandated 10% DV threshold; or (iv) represented to contain or be a source of an antioxidant or nutrient for which either no RDI exists or which is present in the food at less than the 10% DV threshold. Id. at *3. Plaintiff moved for certification of a class consisting of all individuals in California who purchased any products from various product lines of Defendant, including 100% Juice, Juice Drinks, Sparkling, or Cherry. The Court denied the motion for failure to establish typicality. The Court stated that the test for typicality was whether other class members had the same or similar injury, whether the action was based on conduct which was not unique to the named Plaintiffs, and whether other class members had been injured by the same course of conduct. Id. at *8. The Court noted that in cases involving several products at issue, case law authorities had held that the typicality requirement was not met where the named Plaintiff purchased a different product than that purchased by unnamed Plaintiffs. Id. at *10. The Court observed that Plaintiff’s proposed class as described in the amended complaint was different from the one described in her class certification motion; although both vaguely referred to a variety of Defendant’s products, the pleadings did not identify specific and particular products that were alleged to have been purchased by Plaintiff. Further, the Court found that the typicality was not satisfied because both of Plaintiff’s proposed classes were too broad and indefinite. Although Plaintiff asserted that she purchased five of Defendants’ products, the putative classes that she sought to certify included not only purchases of these products, but also encompassed products that Plaintiff had nothing to do with. The Court remarked that neither did Plaintiff link any of those products to any alleged misbranding issue, nor did she make an allegation that she purchased all of the products in these product lines. Further, the Court stated that typicality was not established because the labels and nutrition claims on each of Defendant’s products would be unique to that product itself. The Court noted that the content that purportedly gave rise to Plaintiffs claims was unique to the specific and particular product she purchased and had no applicability to other products within the same line. Accordingly, the Court denied Plaintiff’s motion for class certification.

(vi) The Adequacy Of Representation Requirement For Class Certification

Bohn, et al. v. Pharmavite, LLC, 2013 U.S. Dist. LEXIS 125006 (C.D. Cal. Aug. 7, 2013). Plaintiff, a consumer, brought a class action under the California Unfair Competition Law (“UCL”), the California Consumer Legal Remedies Act (“CLRA”) and the Illinois Consumer Fraud Act (“ICFA”), alleging that the representations on the label of Defendant’s Vitamin E products were false or misleading because clinical studies had shown that Vitamin E did not benefit the heart. Id. at *2. Plaintiff moved to certify a 17-state UCL and CLRA class comprised of all consumers who purchased Defendant’s Vitamin E products. Id. at *3. Alternatively, Plaintiff sought to represent a California-only UCL and CLRA class and an Illinois-only ICFA class. The Court denied the motion for failure to establish adequacy of representation. Plaintiff testified that she purchased the Vitamin E at Costco in December of 2011 because of the heart healthy claim on the label. Id. at *5. Plaintiff stopped taking the Vitamin E after 10 to 14 days because she did not feel any effects. After Defendant pointed out that it stopped selling the product at issue to Costco after
January 2009, Plaintiff obtained a printed receipt of her purchase that showed that the purchase was actually made on February 2, 2009. Plaintiff conceded that she misremembered when she made her purchase but that she was still certain she purchased the Vitamin E product and had read and relied upon the “helps maintain a healthy heart” statement in making her purchase. *Id.* at *6. The Court stated that the inconsistencies in Plaintiff’s statements regarding her purchase raised serious questions about her standing to assert the UCL and CLRA claims and her ability to prove a key element of the ICFA claim. The Court remarked that to assert claims under UCL and CLRA, Plaintiff must establish that she actually relied on the heart health claim in making the purchase, and that for the ICFA claim, Plaintiff must prove that she was actually deceived by the misrepresentation to establish the element of proximate causation, which at minimum, required Plaintiff to prove that she read and considered the heart health claim in making her purchase. *Id.* at *7. Because Plaintiff admitted to misremembering almost every other circumstance of her purchase, the Court determined this significantly undermined her assertion that she was still certain she read and relied on the heart health claim in making her purchase, especially when the label included several other benefits claims, including “antioxidant” and “helps support the immune system.” *Id.* at *8. Further, the Court stated that Plaintiff based her initial testimony on a memory that reconstructed the relevant events around her discussions with class counsel, when in fact the purchase took place nearly three years ago. The Court noted that this indicated that Plaintiff had, at least unknowingly, tailored aspects of her memory to fit the narrative of this action, which further increased the chances that she could have also unknowingly tailored other facts about her purchase such as reliance and deception based on the requirements of the suit. *Id.* The Court also stated that Plaintiff’s credibility would undermine the interests of the classes. Because Plaintiff did not conduct any due diligence on the purchase that formed the very basis of her claims, and instead testified based on unverified memories that turned out to be mostly incorrect, the Court raised concerns over Plaintiff’s interest and commitment to protecting the interest of the classes. The Court noted that these issues were made even more troubling considering Plaintiff’s close personal relationship with her attorney. *Id.* at *12. The Court observed that such a relationship warranted scrutiny because it posed the danger of champterty, especially when the attorneys’ fees would vastly exceed what any of the class members would receive. Accordingly, considering Plaintiff’s inconsistent testimony regarding her purchase, her failure to conduct basic due diligence, and her close personal friendship with class counsel, the Court found that Plaintiff could not adequately represent the class, and denied the motion for class certification.

*Evans, et al. v. Potter*, 2013 U.S. Dist. LEXIS 27271 (S.D. Ind. Feb. 14, 2013). Plaintiffs, a group of prisoners at the Pendleton Correctional Facility, brought a class action alleging that the Indiana Department of Correction (“IDOC”) violated their First Amendment rights when it banned all Indiana prisoners from obtaining a book authored by named Plaintiff Ty Evans. *Id.* at *1. Plaintiffs filed a motion for class certification of all current and future prisoners confined in IDOC. *Id.* The Court denied Plaintiffs’ motion for class certification. The Court noted that the adequacy requirement is a two prong test, which requires a lack of conflict of interest between the named Plaintiff and the absent class members, and that the named Plaintiff secure counsel that is qualified, experienced, and generally capable of conducting the proposed litigation. *Id.* at *2. The Court determined that Plaintiff failed to satisfy both prongs of the adequacy requirement. *Id.* at *3. First, Plaintiff was a member of the class seeking certification and also sought to represent that class as counsel. *Id.* The Court noted that the potential for a conflict of interest increases when a member seeks to act as class representative. *Id.* Further, the Court noted that case law authorities reflect a reluctance to certify a class represented by a class member because a layman does not ordinarily possess the legal training and expertise necessary to protect the interests of a proposed class. *Id.* Accordingly, the Court denied Plaintiffs’ motion for class certification.

*Jamison, et al. v. First Credit Services, Inc.*, 2013 U.S. Dist. LEXIS 43978 (N.D. Ill. Mar. 28, 2013). Plaintiff, a convicted felon, brought an action under the Telephone Consumer Protection Act (“TCPA”), alleging that Defendant First Credit Services, Inc. (“FCS”) called his cell phone multiple times using an automated dialing system in order to collect a debt. Plaintiff’s sister, who was indebted to Defendant American Honda Finance Corporation (“Honda”), had failed to pay the monthly installments on her loan. Thus, Honda referred the collection of her account to FCS, who ran a skip-trace on Plaintiff’s sister, which
yielded the number for Plaintiff’s cellular telephone. In a similar action entitled *Pesce v. First Credit Services, Inc.*, No. 11 C 1379 (N.D. Ill. 2011), the Court had decertified the class, and during discovery, Plaintiff was identified as a potential class member. Plaintiff sought leave to intervene in the *Pesce* action to be named the new class representative. The Court denied that motion because the class had been decertified. *After Pesce* settled, Plaintiff filed the instant case in which he modified the definition of the putative class. *Id.* at *2-6. Plaintiff then moved for class certification and the Court denied the motion because Plaintiff was not an adequate class representative. The Court observed that a fraud conviction undermines a proposed class representative’s adequacy to represent the class. *Id.* at *37. Here, Plaintiff had pled guilty in 2008 to a felony fraud charge. The conviction was admissible and could be offered to impeach his credibility with a fact-finder. Further, although Plaintiff sought approximately $16,000 in statutory damages, it was not determined whether Plaintiff or his mother paid the bill for the cellphone that was allegedly called. *Id.* Thus, the Court stated that determining whether Plaintiff suffered any monetary loss as a result of Defendants’ alleged conduct would be an issue at trial. The Court remarked that the fraud conviction combined with the question of whether Plaintiff paid the cellphone bill in question could lead the jury to focus on Plaintiff’s credibility as opposed to the claims of absent class members. The Court opined that the jury could conclude that Plaintiff was a convicted fraudster who was seeking a windfall in litigation despite the fact that he never suffered any monetary loss, and that the jury would hold this against the class even though a large percentage of the class had never committed a crime and was damaged by Defendants’ conduct. Accordingly, the Court concluded that Plaintiff failed to establish adequacy and denied the motion for class certification. *Id.* at *37-38.

*Jamison, et al. v. First Credit Services, Inc.*, 2013 U.S. Dist. LEXIS 105352 (N.D. Ill. July 29, 2013). Plaintiff, a convicted felon, brought a class action under the Telephone Consumer Privacy Act ("TCPA"), alleging that First Credit Services, Inc. ("FCS") called his cell phone multiple times using an automated dialing system in order to collect a debt owed by his sister to American Honda Finance Corp. ("Honda"). Honda ran a skip-trace on Plaintiff’s sister, which yielded the number for Plaintiff’s cellular telephone. The account for the wireless phone number that was allegedly called was in the name of Plaintiff’s mother, and the bills were sent to her house. Earlier, Plaintiff had moved for certification of a nationwide class of all those to whom FCS or Honda placed an automatic telephone call using an artificial or pre-recorded voice with respect to a debt allegedly owed to Honda, where FCS or Honda obtained the number via skip-trace methods. After the Court denied the motion for class certification, Plaintiff then moved for reconsideration of the order, which the Court denied. The Court found that Plaintiff was an inadequate class representative because his recent fraud conviction was admissible under Rule 609 of the Federal Rules of Evidence, and it would impeach his credibility with the jury and detract from the claims of the class. The Court also noted that since Plaintiff’s mother, and not Plaintiff, paid the phone bill, the fact that Plaintiff did not suffer any monetary loss as a result of the alleged conduct further damaged his credibility. *Id.* at *11. Further, the Court opined that Plaintiff did not meet his burden to demonstrate that questions of law or fact common to class members would predominate over individual issues, and that, on the contrary, individual issues of consent could predominate to prevent class certification. Since Honda produced evidence that many of the potential class members consented to receiving calls on their wireless phone numbers, class certification would only be proper if Plaintiff offered a method of employing generalized proof to determine whether class members gave their consent. Although Plaintiff attempted to amend the class definition to exclude individuals who may have given their consent, the Court observed that the predominance issue remained, because it now have to determine whether each class member’s wireless number appeared in Honda’s records. Because Plaintiff failed to articulate a method of employing generalized proof for determining whether various class members’ wireless telephone numbers appeared in Honda’s records, the Court opined that Plaintiff failed to meet his burden because individual issues predominated over common ones. Finally, because Plaintiff’s proposed class potentially included thousands of individuals who consented to receiving calls on their cellphones and thus had no grievance, the Court opined that the class was overbroad, stating that there was evidence in the record at the time certification was decided that a large percentage of the potential class did consent to receiving calls on their wireless numbers, and thus the proposed class was not ascertainable. Thus, the Court reasoned that Plaintiff failed to identify any error on
the part of the Court that would warrant reconsideration of the order denying class certification, and accordingly denied Plaintiff’s motion for reconsideration.

**Phillips, et al. v. Asset Acceptance, LLC, 2013 U.S. App. LEXIS 23984 (7th Cir. Dec. 2, 2013).** Plaintiff, debtor, brought an action under the Fair Debt Collection Practices Act (“FDCPA”) and Illinois laws alleging that Defendant brought a time-barred lawsuit against her in state court to collect a purported debt she owed for the purchase of natural gas. The District Court had denied Plaintiff’s motion for class certification, stating that the class had 793 members, out of whom 343 resided in Illinois. The Court had information only on the Illinois residents and of those 343, 290 were sued between four and five years after the claims against them accrued and 45 were sued more than five years after accrual. There was no information about the remaining 8. Out of the 45, 23 were served and 22 were not. The statute of limitations applicable to the 335 (290 and 45) Illinois-based claimants was either four or five years; Plaintiff stated four years, but Defendant argued five years. Indisputably, Plaintiff was sued more than five years after the claim against her accrued. Therefore, the District Court opined that Plaintiff was indifferent to whether the statute of limitations was four or five years and thus, she lacked an adequate incentive to litigate on behalf of the 290 claimants who were victims of untimely suits only if the statute of limitations was four years. Thus, the District Court discarded the 290 claimants, which shrank the class to 23; the District Court opined that 23 claimants was too small a number of claimants to justify a class action. On appeal, the Seventh Circuit reversed the District Court’s order. The Seventh Circuit stated that the District Court’s ruling that 23 was too small a number to justify a class action knocked out the Illinois state law claims, but not the federal ones because they were not limited to Illinois residents. The Seventh Circuit disagreed with the District Court that Plaintiff was not an adequate representative of the debtors sued more than four but fewer than five years, since her claim was solid whether the statute of limitations was four years or five. The Seventh Circuit opined that to question Plaintiff’s adequacy was to be unrealistic about the role of the class representative in a class action. **Id.** at *6. The Seventh Circuit reasoned that the role of a class representative was nominal. Instead, the class action attorneys are the real principals, and if they succeed in the action, they receive much greater compensation than the class representatives. **Id.** at *6-7. The Seventh Circuit noted that Plaintiff’s modest services to the class would be greater, and her incentive award likely therefore to be greater, if the suit was more complex. It would be more complex if the class included the four-year as well as the five-year debtors. Thus, the Seventh Circuit concluded that Plaintiff had a reason to assist in the claims of the four-year debtors. Further, the Seventh Circuit remarked that if the District Court had a concern that Plaintiff would not gain from establishing that the governing statute of limitations was four years, and thus, her claims were not typical of the entire class, the District Court could have created a sub-class consisting of the four-year class members and directed class counsel to designate a representative for it instead of refusing to certify the class. Moreover, if the statute of limitations was four years, and if the District Court was unwilling to appoint a second class representative for all the Illinois class members, the Seventh Circuit remarked that the District Court should have ruled on whether the statute of limitations was four years or five years. Although generally the statute of limitations was a merits issue rather than one of class action procedure, the Seventh Circuit stated that in this case, it was both, because resolving it would determine the composition of the class and might determine whether the suit could be maintained as a class action at all. **Id.** at *8-9. Because the statute of limitation is a pure question of law, the Seventh Circuit decided that issue and found that the applicable statute of limitations was four years; thus, all the debt collection suits against the class members were time-barred and hence violated the FDCPA. Accordingly, the Seventh Circuit concluded that all 343 Illinois residents were proper class members, and were adequately represented by Plaintiff. **Id.** at *16-17. It therefore reversed the denial of class certification.

**Rapcinsky, et al. v. Skinnygirl Cocktails, LLC, 2013 U.S. Dist. LEXIS 5635 (S.D.N.Y. Jan. 9, 2013).** Plaintiff, a purchaser of Skinnygirl Margarita, brought an action under New York General Business Law, New York Agriculture and Markets Law, and state common law, alleging that Defendants caused millions of purchasers of Skinnygirl Margarita to purchase the product under the false pretense that it was all-natural and contained only 100% Blue Agave tequila, Agave nectar, and caramel color. Plaintiff alleged that Defendants’ entire marketing campaign, advertisements, and labeling were based on falsehoods. Plaintiff
sought certification of a class comprised of all individuals who purchased Defendants’ Skinnygirl Margarita from March 1, 2009 until the date of notice dissemination.  Id. at *2. The Court denied Plaintiff’s motion.  Plaintiff admitted that he purchased two bottles of Skinnygirl in Massachusetts. The Court observed that a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.  Id. at *18. Here, the Court found that while the nature of the alleged injury may be the same, Plaintiff having not purchased his products in New York made him an atypical representative of the New York class he purported to represent.  Id. While Plaintiff sought to represent a class of both Massachusetts and New York residents, he attempted to assert the class’ rights under at least two statutes that did not guard against the transactions that allegedly caused him injury, namely, transactions that occurred outside of New York. Hence, as Plaintiff purchased the product at issue in Massachusetts, he could not be the typical representative of a class asserting claims under New York law.  Id. at *19. Accordingly, the Court denied Plaintiff’s motion for class certification.

(vii)  The Predominance Requirement For Class Certification

Amgen, Inc., et al. v. Connecticut Retirement Plans & Trust Funds, 133 S. Ct. 1184 (2013). Plaintiff, an investment fund, brought a class action against a biotechnology company and several of its officers, alleging that Defendants misrepresented the safety and efficacy in the marketing of two of its flagship drugs and artificially inflated the company’s stock price, in violation of § 10(b) of the Securities Exchange Act, and 17 C.F.R. § 240.10b-5. The District Court granted Plaintiff’s motion to certify the class under Rule 23(b)(3) on behalf of all investors who purchased the company stock. On appeal to the Ninth Circuit, Defendants contended that before certifying a class, the District Court: (i) should have required Plaintiff to prove that the alleged misrepresentations and omissions were material; and (ii) erred by refusing to consider certain rebuttal evidence that Defendants had offered in opposition to Plaintiff’s class certification motion. The Ninth Circuit rejected both those contentions. Concerning the first point, the Ninth Circuit reasoned that materiality is an element of the merits of a securities fraud claim and proof of materiality was not necessary to ensure compliance with Rule 23(b)(3)’s requirement that common questions predominate. With respect to the second argument, the Ninth Circuit determined that Defendants’ rebuttal evidence was merely a method of attempting to refute the materiality of the misrepresentations, which is inappropriate at the class certification stage.  Id. at *16-18. Subsequently, the U.S. Supreme Court granted certiorari, and affirmed certification of the class. Defendants contended that it was an error to not require Plaintiff to prove the materiality of Defendants’ alleged misrepresentations at the class certification stage. Defendants contended that materiality was not only an element of the Rule 10b-5 cause of action, but also it is an essential predicate of the fraud-on-the-market theory. The Supreme Court found that although materiality was an essential predicate of the fraud-on-the-market theory, proof of materiality was not needed to ensure that the predominance requirement was satisfied. First, because the question of materiality was an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor, materiality could be proved through evidence common to the class. Consequently, the Supreme Court concluded materiality was a common question for the purposes of Rule 23(b)(3).  Id. at *22. Second, there was no question that a failure of proof on the common question of materiality would result in individual questions predominating.  Id. The Supreme Court explained that because materiality was an essential element of a Rule 10b-5 claim, Plaintiff’s failure to present sufficient evidence of materiality to defeat a summary judgment motion or to prevail at trial would not cause individual reliance questions to overwhelm the questions common to the class. Instead, the failure of proof on the element of materiality would end the case (unfavorably) for all investors.  Id. at *22-23.

Butler, et al. v. Sears, Roebuck & Co., 2013 U.S. App. LEXIS 17748 (7th Cir. Aug. 22, 2013). Plaintiffs, a group of washing machine owners, brought a class action alleging breach of written and implied warranties, violation of their respective home states’ consumer protection statutes, and unjust enrichment. Plaintiffs claimed that the washing machine they bought from Defendant suffered from electronic control board failure, and a design defect that prevented adequate water drainage and proper self-cleaning, which resulted in foul odors and the washing machines being virtually unusable. The District Court denied certification of the class complaining about the defect that caused mold (the “mold claim”), and granted class certification of the class complaining about the defect that caused the sudden stoppage (the “control
On appeal, the Seventh Circuit reversed the denial of class certification regarding the mold claim and affirmed the grant of class certification regarding the control unit claim. The U.S. Supreme Court then vacated the Seventh Circuit’s order, and remanded the case for reconsideration in the light of Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013). Id. at *2. Comcast held that a damages suit could not be certified to proceed as a class action unless the damages sought were the result of the class-wide injury that the suit alleged, and that a methodology that identifies damages that are not the result of the class-wide wrong is an impermissible basis for calculating class-wide damages. Id. at *7-8. The Seventh Circuit noted that unlike Comcast, here there was no possibility that damages could be attributed to acts of Defendant that were not challenged on a class-wide basis; all members of the mold class attributed their damages to mold and all members of the control-unit class attributed their damages to a defect in the control unit. Id. at *8. Defendant asserted that the design changes that could have affected the severity of the mold problem to the different antitrust liability theories in Comcast. The Seventh Circuit noted that it was not the existence of multiple theories in Comcast that precluded class certification, but rather it was Plaintiffs’ failure to base all the damages they sought on the antitrust impact – the injury – of which Plaintiffs were complaining. Here, however, any buyer of a washing machine who experienced a mold problem was harmed by a breach of warranty alleged in the complaint. The Seventh Circuit also noted that unlike Comcast, here the District Court was neither asked to decide nor did decide whether to determine damages on a class-wide basis. Id. at *10. The Seventh Circuit observed that McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 491-92 (7th Cir. 2012), held that a class action limited to determining liability on a class-wide basis, with separate hearings to determine – if liability was established – the damages of individual class members, or homogeneous groups of class members, was permitted by Rule 23(c)(4). Id. Thus, considering the differences between Comcast and the present action, the Seventh Circuit opined that the Supreme Court had remanded the action to it because of the emphasis that the majority opinion places on the requirement of predominance and on its having to be satisfied by proof presented at the class certification stage rather than deferred to later stages in the litigation. Id. Although Defendant argued that predominance was determined by evaluating whether there were more common issues or more individual issues, regardless of relative importance, the Seventh Circuit opined that an issue central to the validity of each one of the claims in a class action, if it could be resolved in one stroke, justifies class treatment. Id. at *12. The Seventh Circuit remarked that although Rule 23(b)(3) did not impose such a heavy burden, the District Court had asked not for a showing of common questions, but for a showing of common answers to those questions. Further, the Seventh Circuit opined that if the issues of liability were genuinely common issues, and the damages of individual class members could readily be determined in individual hearings, in settlement negotiations, or by creation of sub-classes, and the fact that damages were not identical across all class members should not preclude class certification. Id. at *13. The Seventh Circuit reasoned that there was a single, central, common issue of liability of whether the washing machines were defective, and although complications would arise from the design changes and from separate state warranty laws, it could be handled by the creation of sub-classes. Accordingly, the Seventh Circuit reinstated its decision of granting class certification to both classes.

Editor’s Note: The Seventh Circuit’s ruling in Butler is one of the more significant class action rulings of 2013. It could limit the impact of Comcast Corp. and provide an avenue of opportunity for the plaintiffs’ class action bar to evade the more rigorous application of the predominance requirement. The defense in this case filed a petition for certiorari with the U.S. Supreme Court on October 7, 2013.

Cannon, et al. v. BP Products North America, Inc., 2013 U.S. Dist. LEXIS 142934 (S.D. Tex. Sept. 30, 2013). Plaintiffs, five homeowners in the Texas area, brought a putative class action alleging that numerous chemical releases and emissions events that occurred at Defendant’s refinery caused thousands of surrounding residential properties to decrease in value. Plaintiffs brought common law claims of negligence, trespass to property, and nuisance. Plaintiffs moved for certification of a class of all persons who own or owned any piece of real properly classified as residential property in the area (“class area”) identified as affected by the air pollution plume of impact (“Plume”) modeled by Dr. Paul Rosenfeld in his report since December 2008.” Id. at *2. The Court denied Plaintiffs’ motion, finding that Plaintiffs failed to show that questions of law or fact common to the class predominated over individual ones. Id. at *3.
Plaintiffs relied on two experts, Dr. Paul Rosenfeld and Dr. Robert Simons, to create a class model. Dr. Rosenfeld, an environmental chemist, conducted a preliminary evaluation of air pollution emissions from the refinery for 2009 and 2010, and modeled Defendant’s sulfur dioxide (SO2) emissions during the timeframe and generated a plume of impact where the SO2 emissions reached a certain threshold. *Id.* at *2-3. Dr. Simons, a real estate economist, conducted a hedonic regression analysis, a real estate trends analysis, a contingent valuation analysis, and property owner survey, and concluded that Defendant’s airborne chemical releases resulted in permanent economic losses to all residential class properties ranging between 5% and 20% of the property value. *Id.* at *3. The Court found that Dr. Simons’ opinion was unreliable. Simons’ real estate trends analysis and hedonic regression analysis were both premised on a comparison between the class area and the control area, and the characteristic that distinguished the class area from other properties outside the boundary was that Dr. Rosenfeld had modeled a certain level of SO2 emissions within the class area. *Id.* at *20-21. The Court noted that Dr. Simons did not isolate the effects of SO2 emissions, but had more generally isolated the effects of the activity of releases from Defendant, and thus he could not know exactly what characteristic he had isolated with his regression model. *Id.* at *21. The Court further noted that Simons’ model was also flawed because it did not show that SO2 emissions were worse in the class area than the control area. *Id.* at *22. In addition, Simons’ regression model was structurally flawed by failing to compare the change in class area property values that occurred after December 2008 with the change in control area property values after that date. *Id.* at *26. The Court found that comparing the property values of the class “before and after” with the control group’s “before and after” property values was key to determining the effect of Defendant’ purported change in conduct after December 2008, and Simons’ regression model was unable to properly account for that change. *Id.* at *28. The Court further found that Simons’ real estate trends analysis also failed as a mechanism for showing causation or damages on a class-wide basis. Simons’ real estate trends analysis was intended to compare real estate sales patterns in the class area and the control areas from a period prior to the events investigated to a period when knowledge of the event became widespread in the community. *Id.* at *36. Dr. Simons, however, analyzed the wrong class area as he used the old, zip-code based area rather than the plume-based area, and Simons admitted that the three zip codes contained properties not included in the plume-based boundary. The Court thus found that Simons’ real estate trends analysis was also not a reliable indicator of properly value diminution in the class area. The Court similarly found that Simons’ contingent valuation analysis was not a reliable or formulaic model to establish causation or calculate damages for the class. Thus, it was unclear to the Court as to how the contingent valuation analysis, standing alone, could calculate damages on a class-wide basis. *Id.* at *46. The Court therefore concluded that Dr. Simons’ analysis was unreliable. As a result, the Court denied class certification because Plaintiffs’ class theory, as a whole, was highly dependent on Dr. Simons’ report.

Plaintiffs relied on Dr. Simons to prove on a class-wide basis that Defendant’s wrongful conduct caused a diminution in property value, and for calculating damages formulaically. Plaintiffs provided no alternatives to Simons’ methodologies to prove causation or damages, and according to the Court, each of the roughly 14,300 putative Plaintiffs would have to prove damages by presenting appraisal figures before and after December 22, 2008, and would have to prove causation by presenting evidence that Defendant’s wrongful conduct, and not some other source, caused the diminution in their property value. *Id.* at *48-49. The Court thus found that, without the aid of Simons’ testimony, Plaintiffs would not be able to show that the question of law of fact common to class members predominated over any questions affecting only individual members. *Id.* at *50. Accordingly, the Court denied Plaintiffs’ motion for class certification.

Daniel, et al. v. Ford Motor Co., 2013 U.S. Dist. LEXIS 85641 (E.D. Cal. June 18, 2013). Plaintiffs, a group of car owners, brought a class action alleging that 2005 to 2011 Ford Focus vehicles had a rear suspension alignment defect leading to premature tire wear, which in turn led to safety hazards. Earlier, the Court had granted Defendant’s motion for summary judgment on all claims except named Plaintiff Margie Daniel’s claims for breach of the Song-Beverly Act, implied warranty, and violation of the Magnuson-Moss Warranty Act. Plaintiff Daniel then moved for certification of a class consisting of all individuals who purchased or leased any 2005 through 2011 Ford Focus vehicle in California and who currently resided in the United States. *Id.* at *1-2. The Court denied the motion for failure to establish predominance of common issues. First, Plaintiff Daniel argued that the suspension defect created an
unmerchantable vehicle because the defect led to premature tire wear, which in turn led to safety concerns such as loss of control. The Court noted that according to Plaintiff Daniel’s theory, whether a vehicle was rendered unmerchantable by the alleged suspension defect would entail the individualized comparison between the mileage at which a tire needed replacing and its otherwise expected mileage. Id. at *12. Plaintiff Daniel produced evidence that her Hankook tires required replacement at 20,723 miles, well under their estimated mileage of 60,000 miles. The Court found that a class member’s implied warranty claim would require an individual determination of whether a vehicle was fit for its ordinary purpose given the defect could render certain vehicles more inoperable than others, and was therefore not a question common to the class. Id. at *13. Further, the parties did not dispute that, due to the express warranties at issue, Plaintiff Daniel’s implied warranty under the Song-Beverly Act had a one-year duration. The Court observed that assuming that replacing, or being told to replace, a set of tires before their expected tire mileage was a manifestation of the alleged suspension defect, the alleged suspension defect became manifest in Plaintiff Daniel’s vehicle, and therefore her vehicle allegedly became unmerchantable, within the one-year implied warranty period. Id. at *12. Because the proposed class was not limited to those individuals who were told to replace their tires within the one-year period, the Court opined that the class included members whose alleged defect arose after the one-year period had expired, if it arose at all. Id. Accordingly, the Court found that whether the proposed class members’ defects arose within the implied warranty period was not a common question. Finally, while Plaintiff Daniel presented evidence that her rear tires experienced the type of tire wear allegedly associated with the suspension defect, her experts admitted that driving habits, failure to properly maintain the vehicle, and other actions by a vehicle’s owner could cause premature tire wear. Id. at *18. The Court remarked that resolving whether the alleged suspension defect caused the tire wear in Plaintiff Daniel’s vehicle would not resolve the same question for other class members who might have experienced different types of tire wear caused by different factors. Id. Thus, the Court noted that whether the alleged suspension defect caused the proposed class members’ injuries was not a common question. Thus, because individual questions predominated over questions common to the class, the Court denied class certification.

Faulk, et al. v. Sears Roebuck & Co., 2013 U.S. Dist. LEXIS 57430 (N.D. Cal. April 19, 2013). Plaintiff, a tire purchaser, brought an action alleging that Defendant Sears had a policy of denying responsibility under both its express warranty and Road Hazard Plus Agreement to any customer who could not prove that he or she had their tires rotated at specific intervals and had a wheel alignment at least once per year. Id. at *3. When Sears refused to honor both of Plaintiff’s warranties, Plaintiff purchased two new tires along with the optional Road Hazard Plus coverage for the two new tires. Thereafter, when Sears refused to perform an wheel alignment unless the final tire was replaced, and refused to provide warranty coverage for the same reason as given earlier, Plaintiff purchased two more tires and the Road Hazard Plus coverage. Plaintiff alleged violations of the California Song-Beverly Consumer Warranty Act, the California Unfair Competition Law (“UCL”), the California Consumers Legal Remedies Act (“CLRA”), and the Magnuson-Moss Warranty Act (“MMWA”). Plaintiff sought certification of a California class consisting of all persons who purchased a Road Hazard Plus Agreement issued by Sears and/or tires that were covered by a Limited Tire Warranty issued by Sears. Plaintiff also sought certification of a nationwide class comprised all persons who purchased a Road Hazard Plus Agreement and/or tires that are covered by a Limited Tire Warranty. The Court denied the motion for failure to establish predominance. The Court noted the existence of a common question as to whether Sears disclosed all terms and conditions in its standard written warranties, and stated that this common question related to each of the claims for which Plaintiff sought class certification. Id. at *22. Regarding the warranty claims under MMWA and the California Song-Beverly Consumer Warranty Act, although Plaintiff argued that common questions regarding injuries sustained predominated as a result of Sears’ failure to disclose all warranty terms, the Court observed that he did not identify the injury, the remedy for the injury, or the common questions regarding the injury. The Court opined that because Plaintiff failed to show that a common question regarding liability predominated over any questions affecting individual members, including questions with respect to the injury sustained under the MMWA and the California Song-Beverly Consumer Warranty Act, Plaintiff did not demonstrate predominance as to either of his warranty claims. Regarding the CLRA claim, the Court observed that Plaintiff did not identify evidence or explain how such unidentified evidence was capable of proving the
claims of all class members in one stroke. Id. at *29. The Court remarked that because Plaintiff continued to purchase Sears tires and the Road Hazard Plus warranty even after he became aware of the allegedly unlawful policy to deny warranty coverage showed, at least as to Plaintiff, materiality would not be susceptible to proof by objective criteria. Id. at *30. Accordingly, the Court found that Plaintiff did not establish predominance as to his CLRA claim. Although Plaintiff argued that Sears systematically breached its contracts with consumers and the general public by conditioning service under both its express warranty and Road Hazard Plus Agreement upon terms not contained in the written agreements, the Court reasoned that Plaintiff failed to show that systematic breaches of contract were susceptible to common proof or that systematic breaches of contract could be resolved on a class-wide basis. Plaintiff predicated his UCL claim on the alleged violations of the warranty laws and the CLRA. The Court stated that the proof necessary to establish violations of those other laws, including reliance, causation, and damages, was the same proof that would establish a violation of the unlawful prong of the UCL. Id. at *33. However, because Plaintiff failed to show these other claims were suitable for class-wide treatment, it followed that his UCL claim also was not suitable for class-wide treatment. The Court thus held that Plaintiff did not demonstrate predominance as to his UCL claim.

**Glazer, et al. v. Whirlpool Corp., 2013 U.S. App. LEXIS 14519 (6th Cir. July 18, 2013).** In a multi-district consolidated class action alleging defective designs in Defendant's front-loading washing machines, the Sixth Circuit, for a second time, affirmed the District Court's class certification ruling in light of the U.S. Supreme Court's ruling in **Comcast Corp. v. Behrend**, 133 S. Ct. 1426 (2013). Plaintiffs, who had purchased front-loading washers manufactured by Defendant, noticed the smell of mold or mildew coming from the machines and from laundry washed in the machines. Id. at *8. Plaintiffs alleged tortious breach of warranty, negligent design, and negligent failure to warn. The District Court had certified a liability class comprised of Ohio residents who purchased one of the specified machines in the state primarily for personal, family, or household purposes and not for resale. Id. at *2. Pursuant to Defendant's interlocutory appeal of the class certification decision, the Sixth Circuit had affirmed class certification, with proof of damages reserved for individual determination. Id. at *3. Defendant then filed a petition for a writ of certiorari, and in granting the petition, the Supreme Court directed the Sixth Circuit to reconsider the appeal in light of Comcast. Id. Comcast reversed certification of a class alleging federal antitrust claims on the ground that Plaintiffs' damages theory did not fit their theory of liability, and questions of individual damage calculations would inevitably overwhelm questions common to the class. Upon remand, the Sixth Circuit held that Plaintiffs' claims were properly certified notwithstanding Comcast. The Sixth Circuit found that the instant action was different from Comcast because here the District Court had certified only a liability class and reserved all issues concerning damages for individual determination whereas Comcast had certified a class to determine both liability and damages. Id. at *49. According to the Sixth Circuit, the decision in Comcast – to reject certification of a liability and damages class because Plaintiffs failed to establish that damages could be measured on a class-wide basis – had limited application where determinations on liability and damages have been bifurcated. Id. at *49-50. The Sixth Circuit stated that Comcast "reaffirms" the settled rule that "liability issues relating to injury must be susceptible to proof on a class-wide basis" to establish predominance. Id. at *60. The District Court had found previously and the Sixth Circuit had affirmed that Plaintiffs shared common questions about the machines' alleged design flaws. The common questions included whether a design defect caused mold to develop in machines, and whether the manufacturer breached a duty to warn consumers about the mold growth. Id. at *29-30. The evidence confirmed that the issues regarding alleged design flaws were common to the class and the proof would produce a common answer about whether the alleged design defects proximately caused mold or mildew to grow in the machines. Id. at *33. The Sixth Circuit noted that a class need not prove that each element of a claim can be established by class-wide proof. Instead, Rule 23 requires that common questions "predominate over any questions affecting only individual [class] members." Id. at *44. Quoting the dissent in Comcast, the Sixth Circuit stated that when "adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate." Id. at *51. In further support, the Sixth Circuit cited the Seventh Circuit's decision in **Butler v. Sears, Roebuck & Co.,** 702 F.3d 359 (7th Cir. 2012), another case
alleging mold and odor problems with front-loading washing machines. Id. at *31. Butler likewise had held that individualized issues of damages did not preclude class treatment. Id. Moreover, Defendant did not point to any “fatal dissimilarity” among the members of the certified class that could render the class action mechanism unfair or inefficient for decision-making. Id. at *46. The Sixth Circuit therefore concluded that class certification was the superior method to adjudicate the case fairly and efficiently.

Hernandez, et al. v. Chipotle Mexican Grill, Inc., 2013 U.S. Dist. LEXIS 172607 (C.D. Cal. Dec. 2, 2013). Plaintiff, a customer, brought a class action alleging that Defendant engaged in a practice of serving conventionally raised meats on occasions when “naturally raised” meats were not available, although it had heavily advertised its use of naturally raised meats. Id. at *1. Plaintiff also contended that Defendant’s point-of-purchase (“POP”) signs, which publicized supply shortages of naturally raised meats, insufficiently informed customers that certain stores served conventionally raised meats. Plaintiff moved to certify a nationwide class consisting of persons who were exposed to Defendant’s in-store menus that used the phrase “naturally raised” to describe Defendant’s meats, and who also saw a POP sign regarding naturally raised meats, and who purchased menu items containing conventionally raised meats at any time during the period from June 26, 2008, to the final judgment. The Court denied Plaintiff’s motion. The Court stated that while there were some common questions, many key issues only could be handled individually. Most primarily, the questions of when a class member ate at Defendant’s store, the exact location where he or she ate, and which meat he or she ate were all not subject to class treatment. The Court stated that the dispute concerned a very low price transaction that neither the class members nor Defendant maintained any specific record of or could be expected to recall. Further, the Court opined that in many class actions the specific date of a transaction or its particular location might not be very important, but here it was critical because certain stores were serving certain conventional meats only at certain times. Id. at *3. Further, the Court reasoned that the important question of whether a class member saw a POP sign when a particular purchase was made could not be handled on a class-wide basis because for each purchase when naturally raised meat was not being served, there were at least four possibilities, including: (i) the sign was there and the class member saw it, (ii) the sign was there and the class member did not see it due to Defendant’s negligence, (iii) the sign was there and the class member did not see it due to the class member’s negligence, and/or (iv) the sign was not there. Id. at *4. Thus, the Court concluded that common questions did not predominate over individual issues, and the class action device was not a fair and efficient way to provide a fair opportunity for class members to obtain relief or for Defendant to defend itself against claims. Accordingly, the Court denied the motion for class certification.

In Re Rail Freight Fuel Surcharge Antitrust Litigation, 2013 U.S. App. LEXIS 16500 (D.C. Cir. Aug. 9, 2013). Plaintiffs, a group of shippers, brought a putative antitrust class action alleging that Defendants, four major freight railroads, engaged in a price-fixing conspiracy with respect to fuel surcharges in violation of § 1 of the Sherman Act. Plaintiffs had obtained certification of a class including all similarly-situated shippers who paid surcharges during the relevant period. Defendants moved to decertify, via an interlocutory appeal, arguing that separate trials were needed to distinguish the shippers injured from the alleged conspiracy from those who were not injured. Id. at *2. The D.C. Circuit granted Defendants’ motion and remanded the action to permit the District Court to reconsider its certification decision in light of Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013). In Comcast, the Supreme Court made clear that class certification would be inappropriate if the Plaintiffs’ injury model does not fit their liability theory. Plaintiffs here had moved for class certification by offering two statistical models that in conjunction showed predominance, including the damages. Id. at *9-10. Defendants contended that Plaintiffs’ damages model was defective because it not only purported to quantify the injury-in-fact to all class members attributable to Defendants’ collusive conduct, but also detected injury where none could exist. Id. at *18. When applied to shippers who were bound by rates negotiated before any conspiratorial behavior was alleged to have occurred, the methodology yielded similar results. Id. Plaintiffs also conceded that the damages model measured overcharges to legacy shippers and class members alike. The District Court had nevertheless certified the class because in its view, Plaintiffs’ regression models were plausible. The District Court never addressed Defendants’ concern that the damages model yielded false positives with respect to legacy shippers. On appeal, the D.C. Circuit applied the principles in Comcast, and held that class
certification under Rule 23(b)(3) requires a rigorous scrutiny of statistical models to satisfy the predominance requirement, even when doing so “requires inquiry into the merits of the claim.” Id. at *21. The D.C. Circuit opined that if the damages model could not withstand such scrutiny, then it was not just a merits issue. Id. Plaintiffs’ proposed models were essential to their claim that they could offer common evidence of class-wide injury. In addition to the admitted flaw in Plaintiffs’ damages model, the D.C. Circuit noted that it had no way of knowing whether the overcharges the damages model calculated for class members were any more accurate than the obviously false estimates it produced for legacy shippers. Id. at *23. The D.C. Circuit thus found that the damages model advanced by Plaintiffs did not reliably prove class-wide injury. Plaintiffs suggested that Defendants’ price-fixing conspiracy pre-dated the start of the class period, and thus antitrust violations could have tainted even legacy contracts. Id. Plaintiffs, however, failed to adduce specific evidence for such a possibility. Plaintiffs’ position directly countered the District Court’s factual finding that “the fuel surcharge programs applied before the class period were nothing like the widespread and uniform application of standardized fuel surcharges during the class period” because “before the alleged conspiracy, Defendants’ differentiated fuel surcharges were subject to competition and negotiation with shippers, were less aggressive, and were applied only sporadically.” Id. at *24. Plaintiffs argued that the D.C. Circuit could only review the District Court’s ruling for clear error. The D.C. Circuit, however, held that there was no factual finding to which it could defer, because the District Court had never analyzed the argument concerning legacy shippers. Id. The D.C. Circuit recognized that the District Court lacked the benefit of Comcast’s guidance and before Comcast, the case law was far more accommodating to class certification under Rule 23(b)(3). Id. at *25. The D.C. Circuit held that under Comcast, “it is now clear that Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance – the rule commands it.” Id. at *25-26. Because the District Court had never considered the damages model’s flaw in its certification decision, the D.C. Circuit vacated the District Court’s decision and remanded the action for reconsideration in light of Comcast.

Leebove, et al. v. Wal-Mart Stores, Inc., Case No. 13-CV-1024 (C.D. Cal. Oct. 4, 2013). Plaintiff brought an action alleging that Defendant violated § 1747.08 of California’s Song-Beverly Act by requiring customers to provide personal information as part of a credit card transaction. Plaintiff moved to certify a class of Wal-Mart customers who had made credit card purchases since February 2012 and had to provide either a phone number or an address or both in order to make a purchase that would be delivered to them or that they would pick up from the store. The Court denied the motion. The Court noted that § 1747.08 only prohibited collection of certain information from a cardholder and in interpreting the language of § 1747.08, the California Court of Appeal had previously decided that the purpose for which the card was issued, rather than the way in which the card was used, was the relevant inquiry in classifying the class. Id. at *2. Therefore, before liability could be established with respect to each class member, individualized proof regarding whether each class member’s credit card was issued as a consumer or as a business card would have to be produced. Moreover, individual questions unique to each member in the proposed class with respect to whether Defendant was justified in requesting the personal information pursuant to § 1747.08 should also be answered before liability could be established for each member. Further, the Court opined that the prohibition against collecting information did not apply if the personal identification information was required for a special purpose incidental but related to the individual credit card transaction, including information relating to shipping, delivery, servicing, or installation of the purchased merchandise or for special orders. For example, Plaintiff contended that the shipping sub-class should not have been required under the law to furnish their phone numbers, but Defendant produced evidence that many delivery carriers required a customer phone number so that they could speak to the addressee if there was a problem completing the delivery. Thus, the Court stated that in order to determine whether a class member’s claim was barred under the special purpose exception for shipping, individualized findings regarding whether a phone number was, in fact, required for the purpose of shipping would need to be adduced and this would entail factual inquiries, including the type of products shipped, the carrier, and the nature of the residence. Because questions common to the class did not predominate over questions affecting only individual members, certification under Rule 23 was inappropriate, and accordingly the Court denied Plaintiff’s motion to for class certification.
**Martin, et al. v. Ford Motor Co., 2013 U.S. Dist. LEXIS 92572 (E.D. Pa. July 2, 2013).** Plaintiff brought a class action asserting claims for breach of express and implied warranties, unjust enrichment, and violations of the state consumer protection laws. Plaintiff alleged that the rear axle on his 2001 Ford Windstar unexpectedly cracked as a result of premature metal fatigue caused by a poorly designed axle. Plaintiff sought certification of four classes, including: (i) an express warranty class; (ii) an implied warranty class; (iii) a consumer protection class; and (iv) an unjust enrichment class. The Court denied Plaintiff’s motion. Among other deficiencies, the Court ruled that Plaintiff could not satisfy the predominance requirements of Rule 23 with respect to any class. Concerning the express warranty class, the Court noted that the class members were from 23 states and the District of Columbia. Although Plaintiff argued that the express warranty laws of each of the states and the District of Columbia were based on the Uniform Commercial Code and were substantially the same, the Court disagreed due to a number of differences among the various laws. *Id.* at *49-56. Moreover, the Court concluded that even if states with differing laws were excluded, common issues would not predominate. The Court noted that the vast majority of the class members – approximately 83.2% – had not experienced any problems with their rear axles in the 7 to 12 years after their vehicles were manufactured. Thus, the jury would have to examine the situation with each class member to determine whether the rear axle of the class member’s vehicle was in fact free from defects in material and workmanship. *Id.* at *58-60. The Court also concluded that determining the amount of damages that each class member suffered could not be done without individualized inquiries into each claim. *Id.* at *60-65. Thus, Plaintiff failed to satisfy the predominance requirement with respect to the express warranty class. Concerning the implied warranty class, to show a breach, Plaintiff would have to demonstrate that the vehicles were not fit for the ordinary purposes for which they are used. *Id.* at *70-71. Yet, as with the express warranty class, demonstrating that breach required an examination of each class member’s individual experience. Calculating damages also would require individualized determinations. With regard to the consumer protection class, the Court initially noted predominance issues caused by differences in the laws of the applicable states. *Id.* at *72-77. However, even if those differences were ignored, the Court ruled that Plaintiff would encounter insurmountable obstacles in his attempt to prove a class-wide “ascertainable loss” suffered “as a result of” Defendant’s conduct and class-wide damages, for the same reasons discussed with respect to the express and implied warranty classes. *Id.* at *77-78. Finally, the Court also concluded that predominance could not be satisfied with respect to the unjust enrichment class. After initially noting problems with crafting jury instructions due to differences among the laws of the applicable states, the Court concluded, among other things, that whether it would be unjust for Defendant to retain money provided by class members when they purchased the vehicles would require individual examination of each class member’s experience. It would not be unjust for Defendant to retain the money paid if the axle, in fact, was not defective. As noted with respect to the other classes, determining whether a class member’s axle was defective would require a case-by-case analysis. *Id.* at *86-87. Accordingly, the Court held that predominance was not satisfied with respect to any proposed class.

**Martinez, et al. v. Nash Finch Co., 2013 U.S. Dist. LEXIS 45576 (D. Colo. Mar. 29, 2013).** Plaintiffs, a group of customers, brought an action alleging violation of the Colorado Consumer Protection Act (“CCPA”), common-law fraud, and civil theft. Plaintiffs alleged that Defendant promoted itself through flyers and advertisements bearing the phrase “A great way to save – plus 10% at the register!” *Id.* at *4. Plaintiffs stated that they understood those advertisements to promise that they would save 10% off the stated prices at the time of checkout, but in actuality, Defendant was adding an additional 10% to its stated prices at the time customers checked out. Plaintiffs moved for class certification. The Magistrate Judge concluded that because the fraud-type claims asserted by Plaintiffs involved individualized application of the law to the facts of each Plaintiff’s transactions, individualized issues would predominate over common issues. *Id.* at *6. On Rule 72 objections, the Court adopted the Magistrate Judge’s recommendations and denied Plaintiffs motion for class certification. The common law fraud and civil theft claims had several key elements, including that Defendant made a false representation, and that Plaintiffs justifiably relied on that misrepresentation to their detriment. *Id.* at *18. The Court noted that there were common factual questions, such as the forms of advertising used, the contents of those advertisements, and the timeframes and locations in which they were used, and that there was one common legal question of whether that
advertising contained a false representation. The Court opined that these factual questions were not likely to be in material dispute, and the only common issue that was likely to be contested was whether the advertising was false or deceptive. \textit{id.} The issue of justifiable reliance, however, presented a multitude of issues that had to be examined on an individualized basis. First, the Court noted that whether each Plaintiff or class member was aware of the advertising in question had to be determined. The proposed class encompassed every single shopper who patronized Defendant during the time period at issue, making no allowance whatsoever for shoppers who did so without any regard to Defendant’s advertising. \textit{id. at *20.} For those that did see the advertising, the Court reasoned that how each individual Plaintiff or class member construed it had to be determined. Some Plaintiffs who were deposed testified that they understood the signs as Defendant did, \textit{i.e.}, that a 10% surcharge would be added to posted prices at the time of checkout. For those that both saw the advertisements and misunderstood their true meaning, the Court stated that it had to be determined whether the advertisement’s apparent promise of savings was a substantial factor in the shopper’s decision to purchase. \textit{id. at *21.} The Court opined that a shopper who was determined to purchase certain items regardless of their cost or potential savings could not have relied upon Defendant’s alleged misrepresentations. The Court observed that whether such reliance was justifiable required even more individualized assessments. The Court remarked that any Plaintiff with actual notice of the 10% charge could no longer claim to have justifiably relied upon misleading advertising for subsequent purchases, and thus, those Plaintiffs or class members’ claims would be limited to purchases made before discovering the surcharge. \textit{id. at *22.} Further, each Plaintiff or class member's damages would require an individualized assessment. Thus, the Court held that individualized questions of reliance predominated over the common questions of fact and law relating to whether Defendant's representations were misleading, and accordingly denied the motion for class certification.

\textbf{Neale, et al. v. Volvo Cars Of North America, LLC, 2013 U.S. Dist. LEXIS 43235 (D.N.J. Mar. 26, 2013).} Plaintiffs, representing a nationwide class of Volvo vehicle owners and lessees, brought a putative class action alleging a uniform design defect in the sunroof drainage systems of various vehicle models designed and manufactured by Defendant. Plaintiffs also alleged that Defendant had longstanding knowledge of a material design defect in the vehicles’ sunroof, as Defendant had issued several technical service bulletins in an attempt to address the problem. \textit{id. at *4.} Plaintiffs sought certification of either a nationwide class of all individuals or entities in the United States who were the owners and/or lessees of a class vehicle (the “Nationwide Class”), or state-wide classes of all persons or entities in Massachusetts, Florida, Hawaii, New Jersey, California, and Maryland, who were the owners and/or lessees of a class vehicle (the “State-wide Classes”). \textit{id. at *12.} The Court denied certification of the Nationwide Class, but granted certification of the State-wide Classes. Because Plaintiffs’ claims were brought under the New Jersey Consumer Fraud Act, the Court held that it would not be appropriate to apply New Jersey law to the Nationwide Class, and therefore, the Nationwide Class could not be certified. \textit{id. at *16.} However, the Court granted certification of the proposed State-wide Classes. Regarding predominance, the Court noted that the inquiry focuses on whether the Defendant’s conduct was common to all class members and whether the common issue predominated over individual differences between Plaintiffs. \textit{id. at *32-33.} The Court noted that the proper focus of the inquiry would be on Defendant’s conduct in designing and marketing the class vehicles, which all contained defective sunroof drainage systems, and not the conduct of Plaintiffs. \textit{id. at *33.} The defect alleged by Plaintiffs was the sound traps at the bottom of the drainage tubes used in all class vehicles, which had a narrow, plus-shaped slit opening. \textit{id.} The Court noted that, despite the slight variations in some of the vehicle models within the State-wide Classes, of all the proposed class vehicles had sunroof drainage systems with a uniform design. \textit{id.} Thus, according to the Court, the issue was whether the design of the sunroof drainage system was defective, and not whether the existence of the alleged defect resulted in a clogged drain tube causing water to spill into the vehicle. \textit{id.} Because all of the claims asserted by Plaintiffs were based upon defectively designed sound traps contained in the sunroof drainage systems, and Defendant’s uniform omissions concerning those systems, the Court concluded that predominance requirement was readily met. \textit{id. at *33-34.} Accordingly, the Court granted Plaintiffs’ motion for certification of the State-wide Classes, and denied certification as to the Nationwide Class.
Plaintiff, an individual injured in an automobile accident, brought an action on behalf of a class of those injured in Alaska by individuals or entities insured by Defendants. When Plaintiff met with a person insured by USAA Casualty Insurance Company (“USAA CIC”), she received the $50,000 policy limit, with $1,519.86 in interest, plus attorneys’ fees of $7,651.99, for a total of $59,171.85. The fee award was calculated as a percentage of the settlement amount, a method known as limited Rule 82 fees. Plaintiff asserted that the fee award should have been calculated as a percentage of her total damages, a method known as unlimited Rule 82 fees. Plaintiff moved for class certification, and the Court denied the motion for not meeting the predominance requirement. Although Plaintiff conceded that the damages due for each class member would be an individualized issue, she maintained that the rule within the Ninth Circuit was that the amount of damages was invariably an individual question that nonetheless did not defeat class action treatment. The Court observed that Comcast Corp. v. Behrend, 133 S. Ct. 1433, (2013), held that where a proposed Rule 23(b)(3) class involves individualized damages, Plaintiff must provide a method that is capable of measuring damages on a class-wide basis, without which the predominance requirement of Rule 23(b)(3) cannot be met, as questions of individual damage calculations will inevitably overwhelm questions common to the class. Id. at *13. Thus, the Court stated that certain categories of cases, such as those involving significant personal injury damages, are inappropriate for class action treatment because of the extent of the individualized damages evaluations necessary, which prevents them from meeting the requirements of Rule 23(b)(3). Id. at *14. Here, the necessary damage calculations would involve separate and significant personal injury damages evaluations for each of the proposed 136-plus class members. Further, each proposed class member was injured in a separate accident and suffered unique injuries. Thus, the Court observed that the amount of damages allegedly due to each class member would differ significantly based on the specific nature of each proposed member’s injury. Because Plaintiff did not provide the Court with any common method of determining the amount of each proposed class member’s actual damages, the Court stated that she failed to demonstrate that damages were capable of measurement on a class-wide basis. To calculate damages, the Court noted that it would be required to conduct a separate evidentiary proceeding for each class member to determine the cause of each member’s accident and the amount of damages suffered by each of them. Thus, because the individual questions of fact implicated in the determination of damages for the proposed class would inevitably overwhelm the common questions of law, the Court concluded that the proposed class did not meet the predominance requirement of Rule 23(b)(3), and thus denied Plaintiff’s motion.

(viii) The Superiority Requirement For Class Certification

Phillips, et al. v. Kroger Co., Case No. 11-CV-10463 (E.D. Mich. Mar. 14, 2013). Plaintiffs brought an action alleging that their German Shepard was rendered ill and died as a result of consuming OldYeller brand dog food manufactured and sold by Defendant. Plaintiffs sought to certify a class of pet owners who had allegedly sustained damages as a result of their pets’ consumption of dog food subject to Defendant’s recall. The Court denied the motion. Defendant had recalled all of the pet food that could have been contaminated, and in its settlement program, administered by Sedgwick, a third-party claims administrator, Defendant announced a recall, notified customers on cash register receipts, and made calls to loyalty cardholders who purchased any of the affected pet food products, regardless of whether those purchases involved recalled products. After Sedgwick set up individual customer claims accounts, a team of claims examiners contacted customers identified in the individual claims files. Of the 604 customer files assigned to the claims examiners, they were able to work through 92% of the files, and out of the 557 files on which customer contact was attempted, the examiners made contact with 46% of them. Of the 256 customers contacted, the examiners were able to resolve 80% of those files. Id. at 2. Three months after the recall, Sedgwick continued to contact customers and to respond to inquiries and resolve claims. Defendant asserted that as of April 8, 2011, only four pet food recall claims remained unresolved; and as of January 31, 2012, only two claims, including that of Plaintiffs, remained unresolved. As of that date, 614 claims had been paid. The Court thus found that maintenance of the action as a class was not superior method of adjudication because so many in the putative plaintiff class had resolved their claims through Defendant’s claims process, and only two cases remained unresolved. Accordingly, the Court denied the motion.
Thurston, et al. v. Bear Naked, Inc., 2013 U.S. Dist. LEXIS 151490 (S.D. Cal. July 30, 2013). Plaintiffs, a group of purchasers of certain Bear Naked food products, brought a class action alleging that the labelling and advertisements for the products were deceptive and misleading. Plaintiffs alleged that although Defendant packaged, marketed, distributed, and sold these products as being 100% Pure & Natural or 100% Natural, certain ingredients or processes used to manufacture the food products were not natural, but rather were synthetic. Plaintiffs asserted violation of various California statutes. Plaintiff moved to certify a nationwide class, or alternately multi-state or state-wide classes, for customers who purchased any of the identified Bear Naked products on or after September 21, 2007. Id. at *2-4. The Court granted Plaintiffs’ motion, but only with respect to California consumers. The Court found that the California class met the superiority requirements, as class-wide litigation of common issues would reduce litigation costs and promote greater efficiency. The Court noted that if each class member must litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not superior. Id. at *32-33. Here, the claims were common, involved small sums, and did not depend on individual determinations. Where a case involves multiple claims for relatively small individual sums, some Plaintiffs may not be able to proceed as individuals because of the disparity between their litigation costs and what they hope to recover. The Court determined that it would not be economically feasible for each class member to obtain relief given the small size of each class member’s claim. Thus, the Court concluded that a class action was clearly superior to ensure a fair and efficient adjudication of the class claims. Id. at *33-34.

(ix) Workplace Class Action Arbitration Issues

Apple American Group LLC Applebee’s v. Essling, et al., 2013 NLRB LEXIS 650 (NLRB Sept. 30, 2013). Pursuant to an unfair labor practice charge filed by an employee alleging that Respondent maintained an employee handbook rule containing a mandatory arbitration clause that could reasonably be understood as prohibiting employees from asserting a collective or class-wide legal action in any forum, the National Labor Relations Board (“NLRB”) determined that Respondent violated § 8(a)(1) of the National Labor Relations Act (the “Act”). The NLRB analyzed the Respondent’s dispute resolution program, which provided the terms of arbitration for work-related issues, and found that Respondent violated the Act. Although Respondent’s program specifically provided that it did not prohibit employees from filing workers’ compensation claims, unemployment insurance claims, or claims before the NLRB, any state or federal department of labor, or the EEOC, it did not have an “opt-out” provision wherein employees have the right to refuse to participate in the program. Id. at *24. The NLRB’s General Counsel argued that the fact that the Program specifically provided that the employees did not waive their rights to bring actions before the Board or other governmental agencies did not change the result that Program’s restrictions violated § 8(a) of the Act because the Board, in D.R. Horton, 357 NLRB No. 184 (2012), had made it clear that “if the Act makes it unlawful for employers to require employees to waive their right to maintain class or collective actions in all forums,” Id. at *26. In D.R. Horton, the NLRB had found the arbitration provision unlawful because it “clearly and expressly bars employees from exercising substantive rights that have long been protected by § 7 of the NLRB.” Id. The Board in D.R. Horton had clearly stated that § 7 rights included the right to collectively bring court and arbitral actions. Id. The NLRB thus found that the restriction contained in the Program was unlawful even with the proviso that employees maintained their right to file charges with the Board, departments of labor, or the EEOC; therefore, the Program did not require employees to “waive the right to maintain class or collective actions in all forums.” Id. at *26. In D.R. Horton, the NLRB had found the arbitration provision unlawful because it “clearly and expressly bars employees from exercising substantive rights that have long been protected by § 7 of the NLRB.” Id. The Board in D.R. Horton had clearly stated that § 7 rights included the right to collectively bring court and arbitral actions. Id. The NLRB thus found that the restriction contained in the Program was unlawful even with the proviso that employees maintained their right to file charges with the Board and other governmental agencies. Id. at *27. To establish that D.R. Horton was decided incorrectly, Respondent made a number of arguments, including that the complaint contravened the Federal Arbitration Act, that class or collective actions were not necessarily concerted unless the other employees affirmatively consented to, or joined with the complaining party, and that even if the Program prohibited employees from filing class or collective actions, it did not limit arbitrator’s ability to consolidate claims or issue collective relief. The Administrative Law Judge (“ALJ”) held that unless and until the Board
or the Supreme Court determines that *Horton* was incorrectly decided, it was bound by that decision. Accordingly, the ALJ concluded that Respondent’s dispute resolution program violated § 8(a)(1) of the Act.

**Bloomingdale’s, Inc. v. Mohammadi, et al., Case No. 31-CA-71281 (NLRB June 25, 2013).** Plaintiff, a former sales associate, brought a wage & hour action under the California Labor Code. Defendant moved to compel arbitration, arguing that Plaintiff failed to opt-out of the Solutions InStore ("SIS") arbitration provisions within the prescribed 30 days after she was hired and thereby explicitly waived both the right to sue in court and the right to bring class claims on behalf of other employees. Thereafter, Plaintiff filed an unfair labor practice charge with the NLRB alleging that, by invoking the SIS class action ban in the court case, Defendant was unlawfully interfering with the right of employees to engage in protected concerted activities. The Court granted the motion to compel arbitration and dismissed Plaintiff’s suit without prejudice. Plaintiff filed an appeal, which remains pending. Subsequently, the NLRB Regional Director issued a complaint against Defendant alleging violation of § 8(a)(1) of the National Labor Relations Act ("NLRA"). The Administrative Law Judge ("ALJ") noted that although the governing plan documents specifically excluded claims under the NLRA from arbitration, this exclusion was not mentioned in any of the company brochures, booklets, or other documents discussing the SIS program. Instead, both the brochures/booklets and the current acknowledgment form indicated that such claims were covered. The ALJ stated that this conflict between the plan descriptions and the summary brochures/booklets and acknowledgment form created an ambiguity that could lead employees to believe that their right to file unfair labor practice charges with the Board was prohibited or restricted. The ALJ opined that where employers provide employees with a summary plan, they must avoid inconsistencies which impact employee statutory rights. *Id.* at 7. The ALJ observed that mandatory arbitration plan summaries should clearly and consistently indicate that there are exceptions or exclusions, and direct employees to the governing plan documents to find them. *Id.* Here, both the summary brochures/booklets, and the acknowledgment form incorrectly indicated that there were no exceptions or exclusions, and only generally referred employees to the plan documents for more specific details of the SIS program. Thus, the ALJ found that Defendant violated § 8(a)(1) of the NLRA by maintaining and distributing to employees the overbroad SIS summary brochures/booklets and acknowledgment form. *Id.* Defendant’s mandatory arbitration provisions permitted employees to opt-out of arbitration altogether, and preserve their right to pursue future claims in court on either an individual or collective/class basis. The ALJ noted that the opt-out procedure was sufficient to render the individual arbitration program voluntary. Although Defendant’s overall SIS presentation was one-sided, the ALJ stated that Defendant had adequately notified employees about the class action ban. Further, some of the SIS brochures encouraged employees to educate themselves about both the benefits and limitations of arbitration. Further, new hires were given 30 days in which to do so, which the ALJ found was not insubstantial or unjustifiable period of time. *Id.* at 9. Further, the ALJ observed that a one-time requirement that employees sign and post a preprinted election form, by regular mail in a pre-addressed envelope, was a minimal administrative burden. As for the possibility that new employees in particular would be reluctant to opt-out due to fear of retaliation, the ALJ stated that the SIS mail-in procedure addressed this concern by having employees return the form remotely and impersonally to the corporate SIS office, rather than directly and personally to their immediate store supervisor or manager. *Id.* at 10. Regarding whether arbitration was a benefit of such overriding federal importance that the Board must or should look away when employees voluntarily enter into mandatory arbitration agreements, even if they are conditioned on employees completely and irrevocably relinquishing their right under the NLRA to engage in collective legal action against their employer, the ALJ noted that this concern could be addressed by requiring only that such voluntary agreements permit employees to pursue class claims in arbitration. *Id.* at 11. Accordingly, the ALJ held that Defendant did not violate § 8(a)(1) of the NLRA by maintaining and enforcing against Plaintiff the individual arbitration provisions of the SIS plan. As a result, the ALJ ordered Defendant to rescind or revise the SIS summary brochures/booklets and acknowledgment form to be consistent with the governing SIS plan documents with respect to the exclusion of unfair labor practice allegations under the NLRA and the right of employees to file charges with the Board.
Plaintiff, a former deli clerk, brought a class action on behalf of herself and a group of grocery employees alleging various wage & hour violations of the California Labor Code. Defendant sought to compel arbitration of Plaintiff’s individual claim pursuant to an arbitration policy Plaintiff accepted as part of her employment application. The District Court denied Defendant’s motion, finding the arbitration agreement unconscionable under California law. Upon Defendant’s appeal, the Ninth Circuit affirmed the District Court’s holding. The Ninth Circuit found that the agreement was invalid under California’s generally applicable law of unconscionability. The agreement was presented on a take-it-or-leave-it basis, and its terms were not given to the employee until three weeks after the employee had agreed to be bound by the terms. Id. at *13-14. Also, several terms of the agreement rendered the arbitration agreement substantively unconscionable. The arbitrator selection provision provided that it would always produce an arbitrator proposed by Defendant, and had specifically excluded JAMS and AAA, which have established rules and procedures to select a neutral arbitrator. Further, the agreement gave the arbitrator the power to apportion the arbitration costs up front. Id. at *18. The agreement also provided that the arbitrator must decide disputes over the arbitrator fees, and that the arbitrator could consider only U.S. Supreme Court authority in deciding how to apportion the fees. The Ninth Circuit found the provision illegal as it ignored the California law and lower federal court decisional law. The Ninth Circuit found no justification to ignore a state cost-shifting provision, except to impose upon the employee a potentially prohibitive obstacle to having her claim heard. Id. at *22. The Ninth Circuit noted that Defendant’s terms required that the arbitrator impose significant costs on the employee up front, regardless of the merits of the employee’s claims, and severely limited the authority of the arbitrator to allocate arbitration costs in the award. Id. at *24. The Ninth Circuit therefore held that the District Court was correct in finding the arbitration agreement unconscionable. Defendant argued that the Federal Arbitration Act (“FAA”) preempted the District Court’s unconscionability analysis. The Ninth Circuit held that AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), and subsequent U.S. Supreme Court decisions did not affect the continued validity of state law unconscionability doctrine as a means for invalidating an agreement. In Concepcion, the Supreme Court stated that the FAA can preempt state laws having a “disproportionate impact” on arbitration. The agreement at issue contained a problematic cost provision, where the arbitrator would allocate significant fees to both the employer and employee at the beginning of the arbitration, regardless of the merits. In addition, the policy contained a provision that unilaterally assigned one party (mostly Defendant), the power to select the arbitrator whenever an employee brings a claim. Id. at *28. The Ninth Circuit explained that any state law that invalidated the provision would of course have a “disproportionate impact” on arbitration because the provision was arbitration specific. Id. The Ninth Circuit, however, held that the invalidation of the term would not disfavor arbitration as invalidating it would simply make the arbitration fair. The Ninth Circuit reasoned that the federal law favoring arbitration was not a license to tilt the arbitration process in favor of the party with more bargaining power, and the application of California law regarding unconscionable contracts would reflect a generally applicable policy against abuses of bargaining power. Id. at *29. Accordingly, the Ninth Circuit affirmed the District Court’s decision denying Defendant’s motion to compel arbitration.

Plaintiff, a former deli clerk, brought a class action on behalf of herself and a group of grocery employees alleging various wage & hour violations of the California Labor Code. Defendant sought to compel arbitration of Plaintiff’s individual claim pursuant to an arbitration policy Plaintiff accepted as part of her employment application. The District Court denied Defendant’s motion, finding the arbitration agreement unconscionable under California law. Upon Defendant’s appeal, the Ninth Circuit affirmed the District Court’s holding. The Ninth Circuit found that the agreement was invalid under California’s generally applicable law of unconscionability. The agreement was presented on a take-it-or-leave-it basis, and its terms were not given to the employee until three weeks after the employee had agreed to be bound by the terms. Id. at *13-14. Also, several terms of the agreement rendered the arbitration agreement unconscionable. The arbitrator selection provision provided that it would always produce an arbitrator proposed by Defendant, and had specifically excluded JAMS and AAA, which have established rules and procedures to select a neutral arbitrator. Further, the agreement gave the arbitrator the power to apportion the arbitration costs up front. Id. at *18. The agreement also provided that the arbitrator must decide disputes over the arbitrator fees, and that the arbitrator could consider only U.S. Supreme Court authority in deciding how to apportion the fees. The Ninth Circuit found the provision illegal as it ignored the California law and lower federal court decisional law. The Ninth Circuit found no justification to ignore a state cost-shifting provision, except to impose upon the employee a potentially prohibitive obstacle to having her claim heard. Id. at *22. The Ninth Circuit noted that Defendant’s terms required that the arbitrator impose significant costs on the employee up front, regardless of the merits of the employee’s claims, and severely limited the authority of the arbitrator to allocate arbitration costs in the award. Id. at *24. The Ninth Circuit therefore held that the District Court was correct in finding the arbitration agreement unconscionable. Defendant argued that the Federal Arbitration Act (“FAA”) preempted the District Court’s unconscionability analysis. The Ninth Circuit held that AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), and subsequent U.S. Supreme Court decisions did not affect the continued validity of state law unconscionability doctrine as a means for invalidating an agreement. In Concepcion, the Supreme Court stated that the FAA can preempt state laws having a “disproportionate impact” on arbitration. The agreement at issue contained a problematic cost provision, where the arbitrator would allocate significant fees to both the employer and employee at the beginning of the arbitration, regardless of the merits. In addition, the policy contained a provision that unilaterally assigned one party (mostly Defendant), the power to select the arbitrator whenever an employee brings a claim. Id. at *28. The Ninth Circuit explained that any state law that invalidated the provision would of course have a “disproportionate impact” on arbitration because the provision was arbitration specific. Id. The Ninth Circuit, however, held that the invalidation of the term would not disfavor arbitration as invalidating it would simply make the arbitration fair. The Ninth Circuit reasoned that the federal law favoring arbitration was not a license to tilt the arbitration process in favor of the party with more bargaining power, and the application of California law regarding unconscionable contracts would reflect a generally applicable policy against abuses of bargaining power. Id. at *29. Accordingly, the Ninth Circuit affirmed the District Court’s decision denying Defendant’s motion to compel arbitration.

Chavarria, et al. v. Ralphs Grocery Co., 2013 U.S. App. LEXIS 21959 (9th Cir. Oct. 28, 2013). Plaintiff, a former deli clerk, brought a class action on behalf of herself and a group of grocery employees alleging various wage & hour violations of the California Labor Code. Defendant sought to compel arbitration of Plaintiff’s individual claim pursuant to an arbitration policy Plaintiff accepted as part of her employment application. The District Court denied Defendant’s motion, finding the arbitration agreement unconscionable under California law. Upon Defendant’s appeal, the Ninth Circuit affirmed the District Court’s holding. The Ninth Circuit found that the agreement was invalid under California’s generally applicable law of unconscionability. The agreement was presented on a take-it-or-leave-it basis, and its terms were not given to the employee until three weeks after the employee had agreed to be bound by the terms. Id. at *13-14. Also, several terms of the agreement rendered the arbitration agreement unconscionable. The arbitrator selection provision provided that it would always produce an arbitrator proposed by Defendant, and had specifically excluded JAMS and AAA, which have established rules and procedures to select a neutral arbitrator. Further, the agreement gave the arbitrator the power to apportion the arbitration costs up front. Id. at *18. The agreement also provided that the arbitrator must decide disputes over the arbitrator fees, and that the arbitrator could consider only U.S. Supreme Court authority in deciding how to apportion the fees. The Ninth Circuit found the provision illegal as it ignored the California law and lower federal court decisional law. The Ninth Circuit found no justification to ignore a state cost-shifting provision, except to impose upon the employee a potentially prohibitive obstacle to having her claim heard. Id. at *22. The Ninth Circuit noted that Defendant’s terms required that the arbitrator impose significant costs on the employee up front, regardless of the merits of the employee’s claims, and severely limited the authority of the arbitrator to allocate arbitration costs in the award. Id. at *24. The Ninth Circuit therefore held that the District Court was correct in finding the arbitration agreement unconscionable. Defendant argued that the Federal Arbitration Act (“FAA”) preempted the District Court’s unconscionability analysis. The Ninth Circuit held that AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), and subsequent U.S. Supreme Court decisions did not affect the continued validity of state law unconscionability doctrine as a means for invalidating an agreement. In Concepcion, the Supreme Court stated that the FAA can preempt state laws having a “disproportionate impact” on arbitration. The agreement at issue contained a problematic cost provision, where the arbitrator would allocate significant fees to both the employer and employee at the beginning of the arbitration, regardless of the merits. In addition, the policy contained a provision that unilaterally assigned one party (mostly Defendant), the power to select the arbitrator whenever an employee brings a claim. Id. at *28. The Ninth Circuit explained that any state law that invalidated the provision would of course have a “disproportionate impact” on arbitration because the provision was arbitration specific. Id. The Ninth Circuit, however, held that the invalidation of the term would not disfavor arbitration as invalidating it would simply make the arbitration fair. The Ninth Circuit reasoned that the federal law favoring arbitration was not a license to tilt the arbitration process in favor of the party with more bargaining power, and the application of California law regarding unconscionable contracts would reflect a generally applicable policy against abuses of bargaining power. Id. at *29. Accordingly, the Ninth Circuit affirmed the District Court’s decision denying Defendant’s motion to compel arbitration.

Chesapeake Energy Corp. v. Escovedo, et al., 2013 NLRB LEXIS 693 (NLRB Nov. 8, 2013). Plaintiff, a reservoir engineering manager at Chesapeake Operating Inc., filed a complaint based upon an unfair labor practice charge alleging that Chesapeake promulgated and maintained individual agreements with their current and former employees binding them to its Dispute Resolution Policy (“DRP”) that precluded class or collective actions to be arbitrated pursuant to the DRP. The DRP also required employees and former employees to submit all employment related disputes and claims to binding arbitration, and further required that all claims or disputes in any way related to or arising out of an employee’s employment, including claims under the National Labor Relations Act (“Act”), were subject to binding arbitration. The NLRB noted that D.R. Horton, Inc., 357 NLRB No. 184 (2012), had held that a mandatory arbitration agreement was unlawful because it did not contain an exception for unfair labor practice allegations, and thus would reasonably lead employees to believe that they could not file unfair labor practice charges with the Board, and it required employees to waive their substantive right under the Act to pursue concerted legal action in any forum, arbitral or judicial. Id. at *16. At issue here was whether Defendant also violated § 8(a)(1) of
the Act by the provisions in the DRP that prohibited employees from bringing any dispute as a class or collective action and requiring them to pursue any claims they have solely on an individual basis through arbitration. The action also raised the issue of requiring employees to submit all employment-related disputes and claims to binding arbitration, including claims under the Act, thereby precluding unfair labor practice charges to be filed with the Board. Defendant argued that the Supreme Court’s decision in American Express Co. v. Italian Colors Restaurants, 133 S. Ct. 2304 (2013), contravened the holding in D.R. Horton that a policy or agreement that precludes employees from filing employment-related collective or class claims against their employer, as in this case, restricted employees’ § 7 right to engage in concerted action for mutual aid or protection, and therefore violated § (a)(1) of the Act. Id. at *22. The NLRB, however, observed that the Supreme Court noted in the American Express that no contrary congressional command required the rejection of the waiver of class arbitration and the Sherman and Clayton Acts – at issue in the Supreme Court case – made no mention of class actions. Id. at *23. The NLRB reasoned that the Sherman and Clayton Acts were enacted before the advent of Rule 23, which was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individually named parties only. Id. Regarding the part of the complaint which alleged the DRP directly interfered with employees’ access to the Board and its processes, the NLRB noted that § (a)(1) of the Act had been violated. Accordingly, the NLRB opined that by maintaining and distributing its DRP that prohibited employees from exercising their right to file unfair labor practice charges with the Board, Defendant had engaged in unfair labor practices within the meaning of § (a)(1) of the Act. The NLRB, however, determined that Defendant had not otherwise violated § 8(a)(1) of the Act by maintaining and enforcing the DRP against employees. The NLRB directed Defendant to rescind or revise the DRP with respect to the exclusion of unfair labor practice allegations under the Act, and the right of employees to file charges with the Board.

D.R. Horton, Inc. v. National Labor Relations Board, 2013 U.S. App. LEXIS 24073 (5th Cir. Dec. 3, 2013). Pursuant to an unfair labor practice charge filed against D.R. Horton alleging that the mandatory arbitration agreement requiring an employee to waive his or her right to bring class claims violated the National Labor Relations Act (“NLRA”), the Fifth Circuit reversed the National Labor Relations Board’s (“NLRB”) ruling that class action waivers in arbitration agreements violated NLRA. The controversy arose in early 2012 when the NLRB concluded that D.R. Horton, a home builder, violated §§ 7 and 8(a)(1) of the NLRA by requiring employees to sign a mutual arbitration agreement that precluded employees from filing class or collective claims related to their wages, hours, or other working conditions. The NLRB had found that requiring an employee to agree not to bring an FLSA collective action constituted an unfair labor practice in violation of § 7 of the NLRA by denying employees the right to engage in concerted activity. The NLRB had also found that the general language of the arbitration agreement violated § 8(a)(1) of the NLRA because it led employees to believe that they were prohibited from filing unfair labor practice charges before NLRB. Id. at *5-6. D.R. Horton filed a petition to the Fifth Circuit to review the NLRB decision. D.R. Horton argued that the NLRB’s interpretations of the NLRA impermissibly conflicted with the Federal Arbitration Act (“FAA”) by prohibiting the enforcement of an arbitration agreement. The Fifth Circuit agreed that the NLRB’s position was inconsistent with the FAA. The Fifth Circuit began with the premise that the FAA requires enforcement of arbitration agreements according to their terms, and then noted the two exceptions to the rule: (i) an arbitration agreement may be invalidated on any ground that would invalidate a contract under the FAA’s “saving clause;” or (ii) application of the FAA may be precluded by another statute’s contrary congressional command. Id. at *33-34. The NLRB had found that the arbitration agreement violated the collective action provisions of the NLRA, making the saving clause applicable. The Fifth Circuit, however, relied on the U.S. Supreme Court’s decision in AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), and determined that NLRB failed to fit its rationale into the FAA’s “saving clause.” Id. at *33. The Fifth Circuit stated that while the NLRB’s interpretation invalidating class action waivers was facially neutral – requiring only that employees have access to collective procedures in an arbitral or judicial forum – the effect of this interpretation was to disfavor arbitration. Id. at *36. The Fifth Circuit thus found that the NLRB’s interpretation prohibiting class action arbitration waivers interfered with the fundamental attributes of arbitration and thus created a scheme inconsistent with the FAA. Id. at *37. According to the Fifth Circuit, requiring a class mechanism was an actual impediment to arbitration and...
violates the FAA, and the saving clause was not a basis for invalidating the waiver of class procedures in the arbitration agreement. *Id.* In examining the NLRA’s text, legislative history, and purpose, the Fifth Circuit concluded that the NLRA does not contain a congressional command overriding application of the FAA. As the Fifth Circuit observed, the NLRA does not explicitly provide for a collective action, much less the procedures such an action would employ. *Id.* at *39. The type of collective action provided for and protected by the NLRA was aimed at equalizing bargaining power between employees and employers, which the Fifth Circuit found insufficient to override the FAA. *Id.* The Fifth Circuit also noted that the legislative history of the NLRA offered no hint that Congress intended to restrict arbitration or to provide a substantive right to class actions. *Id.* at *40-41. The Fifth Circuit therefore concluded that the NLRA has no inherent conflict with the FAA. The Fifth Circuit also held that the NLRB’s decision was not entitled to judicial deference because it purported to affect a federal statute (the FAA) unrelated to the NLRA. Because neither the FAA’s savings clause nor any congressional command mandated the NLRB’s interpretation prohibiting class action waivers, the Fifth Circuit held that the arbitration agreement must be enforced according to its terms under the FAA. The Fifth Circuit, however, upheld the NLRB’s finding that the arbitration clause violated § 8(a)(1), since an employee could reasonably read the agreement as precluding unfair labor practice charges. *Id.* at *47. The mutual arbitration agreement required arbitration of broadly defined claims, and its four specific exemptions did not mention the right to bring unfair labor practice charges before the NLRB. The Fifth Circuit therefore upheld the NLRB’s order that the employer revise its agreement. Accordingly, the Fifth Circuit partly reversed the NLRB’s order finding that arbitration agreements containing class action waivers do not violate the NLRA.

**Editor’s Note:** The Fifth Circuit’s ruling is a significant victory for employers, and removes a possible impediment to enforcement of workplace arbitration agreements to control and mitigate class action exposures.

_Daniels, et al. v. Sears Holding Corp., 2013 NLRB LEXIS 713 (NLRB Nov. 19, 2013)._ Plaintiff, an employee, filed an unfair labor practice against Defendants, a parent holding company and one of its subsidiaries, alleging that they maintained an arbitration policy in violation of § 8(a)(1) of the National Labor Relations Act (the “Act”). Defendants maintained an arbitration policy/agreement which provided that all claims between an employee and the employer that were not resolved informally shall be resolved by binding arbitration. The agreement prohibited any employee from filing, opting-in to, becoming a class member in, or recovering through a class action, collective action, representation action or similar proceeding. The agreement also provided that employee who does not wish to be bound by the agreement must opt-out within 30 days of receipt of the agreement, and had set forth the procedure for an employee to opt-out. The arbitration policy had been in effect unchanged since its introduction in April of 2012. After the initial opt-out opportunity, the policy and its ban on collective actions applied irrevocably to the employees. The NLRB held that the arbitration policy violated § 8(a)(1) of the Act, and the inclusion of a limited initial opportunity to opt-out – crafted to avoid the rule prohibited in _D.R. Horton_, Inc., 357 NLRB No. 184 (2012) – did not avoid a violation of the Act. *Id.* at *2-3. The NLRB held that “an employer can no more make such a binding agreement (or purport to make such a binding agreement) with an individual employee that it can purport to obtain an employee’s agreement to waive irrevocably his or her future right to join a union, go on strike, or file charges with the Board,” as they were all illegitimate impingements and restrictions on § 7 activity. *Id.* at *18-19. The agreement had provided that the failure of an employee to opt-out constituted a voluntary agreement to the policy, and according to the NLRB, the inducement to individuals to irrevocably waive their rights was not the one an employer has the right to provide. *Id.* at *20-21. The NLRB stated that Defendants might not reach agreements with individuals that conflict with rights protected by the Act. *Id.* at *22. The NLRB further noted that there was no conflict with this result relative to the Federal Arbitration Act (“FAA”) or the federal policy favoring arbitration because the FAA and its policy preference for arbitration did not privilege enforcement of such agreements when the terms contravene substantive protections under the Act. *Id.* at *29-30. The NLRB stated that _D.R. Horton_ had affirmed the settled principle that a “categorical prohibition of joint, class, or collective federal state or employment law claims in any forum directly violates substantive rights vested in employees by Section 7 of the NLRA.” *Id.* at *31-32. The NLRB therefore concluded that Defendants’ arbitration policy unlawfully
Seyfarth Shaw LLP was wrongly decided because it had ignored the requirement of a “congressional command” to that Concord Honda violated § 8(a)(1) of the National Labor Relations Act (the “NLRA”) by 2013 NLRB is a precedent that had not been Id. Horton at *35. D.R. Horton at *35. Concord asserted that at *2. A dispute arose when Concord implemented a bonus plan and changed the bargaining unit employees’ work schedule without bargaining with the union, and held workweek elections, bypassing the union. When the parties failed to reach agreement on a final contract as to the work schedule and elections, the union intended to arbitrate the claims on a class-wide basis and identified three class representatives. Concord then took the position that class arbitration was inappropriate under the Federal Arbitration Act (“FAA”) because the arbitration agreements did not authorize class arbitration. Concord, however, proposed to consolidate the 19 separate individual arbitration actions, but the union insisted on either class action arbitration or separate individual arbitrations. The mandatory arbitration agreement (“MAA”) at issue provided that any claim, dispute, and/or controversy that either party may have against one another will be decided through binding arbitration. The NLRB found that Concord violated § 8(a)(1) of the NLRA. Section 8(a)(1) of the NLRA provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 7 and the rights guaranteed in § 7 include the right “to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Id. at *49. Although the MAA did not expressly restrict § 7 activity, the issue before the NLRB was whether employees would reasonably construe the MAA’s language to prohibit § 7 activity. Concord asserted that by incorporating the California Code of Civil Procedure (“CCP”), which permits joinder of claims, the MAA was distinguishable from the agreement found unlawful in D.R. Horton, Inc., 357 NLRB No. 184 (2012). The MAA did not incorporate the entire CCP, but instead referred to and incorporated certain provisions by description and/or section numbers. While it did incorporate the procedures of the California Arbitration Act and cited its mandatory and permissive rights to discovery, it did not expressly refer to § 1281.3 of the CCP, which addresses consolidation of arbitration claims. Id. at *52. The MAA neither mentioned the word “joinder” nor incorporated § 378 of the CCP, which permits joinder in civil court actions. Id. at *53. The NLRB noted that the MAA’s lack of any direct reference to joinder or consolidation as well as the absence of any specific citation to procedures that permit it rendered the MAA silent on the matter for the average employee/technician. Id. The NLRB therefore found that employees could reasonably construe the MAA as permitting individual arbitration actions only. Id. Concord asserted that D.R. Horton was wrongly decided because it had ignored the requirement of a “congressional command” to override the Federal Arbitration Act (“FAA”). Id. at *55. The NLRB, however, found that this argument failed because Horton had found that § 7 substantively guarantees employees the right to engage in collective action, including collective legal action, for mutual aid and protections concerning wages, hours, and working conditions. Id. at *57. Further, because D.R. Horton is a precedent that had not been overturned by the Supreme Court, the NLRB was bound to follow it. Concord also argued that D.R. Horton was void because the NLRB lacked a quorum when it issued the decision. The NLRB noted that the argument had been rejected earlier, and thus this argument also failed. The union asserted that the FAA, which derives its authority form the commerce clause, did not apply here because the manner in which the parties resolved the instant dispute did not impact interstate commerce. The NLRB disagreed with the union. The NLRB noted that the Supreme Court had focused on whether the work the employees at issue perform involved interstate commerce in determining whether employment contracts with arbitration clauses were subject to the FAA, and thus the proper inquiry here would be whether the technicians’ work activity affected commerce, not whether their choice of dispute resolution forum affected commerce. Id. at *60. The NLRB found no authority to support the union’s assertion that it should consider the choice of forum for the employment dispute resolution rather than the technicians’ employment itself. Id. at *60-61.
Accordingly, the NLRB concluded that Concord violated § 8(a)(1) of the NLRA by maintaining and enforcing the MAA, which required employees to resolve employment-related disputes exclusively through arbitration proceedings and by enforcing that agreement to preclude resolution of such disputes through class actions.

**GameStop Corp. v. Krecz-Gondor, et al., Case No. 20-CA-80497 (NLRB Aug. 29, 2013).** Plaintiffs, a group of employees of Defendants, brought an action before the National Labor Relations Board (“NLRB”) alleging that Defendants violated § 8(a)(1) of the National Labor Relations Act (the “Act”). Plaintiffs alleged that Defendants implemented a mandatory Arbitration Program (“Program”), which provided that all employees must agree, as a condition of employment, to resolve all covered workplace disputes, as defined in the Program, through binding individual arbitration and to waive the right to resolve disputes through class or collective actions. *Id.* at 8-10. The Program also provided for an opt-out option to California-based employees. Plaintiffs alleged that Defendants’ conduct violated § 8(a)(1) of the Act. The Administrative Law Judge (“ALJ”) agreed. The ALJ noted that, in *D.R. Horton*, 357 NLRB No. 184 (2012), the Board had explained that an employer violates § 8(a)(1) of the Act by imposing, as a condition of employment, a mandatory arbitration agreement that precludes employees from “filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial.” *Id.* at 11. There was no dispute here that the Program was a mandatory condition of employment and it prohibited collective and representative actions entirely. The ALJ thus found *D.R. Horton* directly applicable and the Program unlawful. Defendants argued that the excepted language of “matters within the jurisdiction of the NLRB” distinguished their case from the facts in *D.R. Horton*. The ALJ, however, found that the Program was unlawful not because it restricted or barred the filing of NLRB charges, but because it interfered with and restricted employees from engaging in protected concerted conduct. *Id.* at 12. The Program restrained and interfered with the employees’ rights by illegally preventing them from engaging in protected concerted activity by pursuing class or collective actions in all forums. The ALJ thus found that Defendants violated the Act as alleged as to its non-California employees. The ALJ also found the Program unlawful as to California-based employees because it required California-based employees to affirmatively opt-out, and the right to opt-out was ambiguous. *Id.* at 13. The ALJ also determined that the confidentiality provision that prevented discussion of arbitration proceedings was unlawful under § 8(a)(i) because it prevented employees from sharing information related to wages, hours, and working conditions. *Id.* at 18-19.

**Haro, et al. v. Nijjar Realty, Inc., 2013 NLRB LEXIS 746 (NLRB Dec. 4, 2013).** Plaintiff, a former employee, filed a charge against Defendant for unfair labor practices, alleging that Defendant violated § 8(a)(1) of the National Labor Relations Act (the “NLRA”) by maintaining an agreement that contained provisions that precluded employees from participating in collective and class litigation to resolve disputes arising out of employment, and prohibiting employees from arbitrating disputes as a class. Plaintiff was required to sign a Comprehensive Agreement and Applicant’s Statement of Agreement (“CAASA”) in December 2011, to continue working for Defendant. *Id.* at *7. The CAASA contained provisions that precluded employees from arbitrating disputes as a class, and required new and existing employees to execute the CAASA forms providing that employees would resolve all disputes arising out of employment through arbitration unless they opted-out by checking a box on the CAASA forms. Later, in June 2012, Plaintiff brought a class action against Defendant alleging that Defendant violated § 8(a)(1) of the National Labor Relations Act (the “NLRA”) by maintaining an agreement that contained provisions that precluded employees from participating in collective and class litigation to resolve disputes arising out of employment, and prohibiting employees from arbitrating disputes as a class. Plaintiff was required to sign a Comprehensive Agreement and Applicant’s Statement of Agreement (“CAASA”) in December 2011, to continue working for Defendant. *Id.* at *7. The CAASA contained provisions that precluded employees from arbitrating disputes as a class, and required new and existing employees to execute the CAASA forms providing that employees would resolve all disputes arising out of employment through arbitration unless they opted-out by checking a box on the CAASA forms. Later, in June 2012, Plaintiff brought a class action against Defendant alleging that it violated the NLRA by requiring its employees to sign the CAASA documents on April 26, 2012. Defendant then filed a petition to compel arbitration, claiming that there was no showing that it required any employees to sign the forms or that it actually hired any employees after April 26, 2012. *Id.* at *18. Defendant also argued that the complaint was time-barred under § 10(b) of the NLRA, which requires that alleged violations occur within six months of the filing of a charge. The National Labor Relations Board (“NLRB”) found that the CAASA violated the NLRA. The NLRB held that by maintaining the CAASA and enforcing the arbitration provisions, Defendant engaged in unfair labor practices affecting commerce within the meaning of §§ 2(6) and (7) of the NLRA, and thus violated § 8(a)(1) of the NLRA. The NLRB noted that Defendant had required its current employees to execute the CAASA forms on December 29, 2011, under the penalty of not being paid or allowed to continue working, and had maintained the forms at least until December 14, 2012, at which time
it utilized Plaintiff’s forms in the state court class action. *Id.* at *21-22. The NLRB therefore found that the continued maintaining and enforcing of the CAASA forms established that Defendant’s § 10(b) defense was without merit. Defendant argued that the opt-out provision of the CAASA forms, which allowed employees to entirely opt-out of the waiver relating to the right to bring class and collective actions, rendered the waiver lawful. The NLRB, however, rejected that contention. The NLRB found that the opt-out provision did not render the waiver of class and collective action voluntary; rather, it unlawfully burdened employees by requiring them to prospectively trade away their statutory right to engage in collective or class actions, including litigation in any forum, that might arise in the future. *Id.* at *30.

Specifically, the NLRB noted that the CAASA waiver unlawfully compelled employees to affirmatively act, by checking the opt-out box, in order to maintain rights they already had under § 7 of the Act. *Id.* at *29. The NLRB further relied on *D.R. Horton Inc.*, 357 NLRB No. 184 (2012), in concluding that finding restrictions on class or collective action unlawful under the NLRA would not necessarily conflict with the Federal Arbitration Act (“FAA”). The NLRB noted that *D.R. Horton* had considered the policies underlying the FAA and the NLRA as part of the balancing test required to determine if a term of a contract was against public policy and invalid under § 2 of the FAA, and had then concluded that an employer violate the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective redress in both judicial and arbitral forums. *Id.* at *31-32. The NLRB therefore held that FAA did not preclude its finding that the waiver here was invalid. Accordingly, the NLRB concluded that Defendant violated § 8(a)(1) of the NLRA by filing its petition to compel Plaintiff and his co-workers to individually arbitrate their class-wide wage & hour claims.

**JP Morgan Chase & Co. v. Ryan, et al., Nos. 02-CA-088471 & 02-CA-098118 (NLRB Aug. 21, 2013).**

Plaintiffs, a group of employees of Defendant JP Morgan Chase, brought an action before the National Labor Relations Board (“NLRB”) alleging that Defendant violated § 8(a)(1) of the National Labor Relations Act (“NLRA”) by maintaining individual binding arbitration agreements (“BAA”), requiring employees to sign the BAAs as a condition of employment, and then seeking to compel arbitration in a collective action brought by Plaintiffs. Plaintiffs had entered into BAAs as a condition of their employment with Defendant. The BAAs precluded employees from pursuing class actions in either arbitral or court forums and provided that any claims must be resolved solely on an individual basis in arbitration. On various dates from November 2012 through January 2013, Plaintiffs, including Tiffany Ryan, had joined in a collective lawsuit against Defendant in federal court alleging violations of the FLSA. In response to Plaintiffs’ action, Defendant sought to dismiss or stay the claims, and to compel Plaintiffs to arbitrate. Plaintiffs alleged that Defendant’s conduct interfered, restrained, and coerced employees in the exercise of their rights guaranteed by § 7 of the NLRA in violation of § 8(a)(1) of the Act. *Id.* at *5-6. The Administrative Law Judge (“ALJ”) ruled that Defendant had violated the NLRA. The ALJ held that Defendant engaged in unfair labor practices by maintaining and requiring its employees to sign BAAs as a condition of employment. The ALJ noted that similar conduct of an employer had been found to be unlawful by the Board in *D.R. Horton*, 357 NLRB No. 184 (2012). In *D.R. Horton*, the Board found that D.R. Horton had violated § 8(a)(1) of the NLRA by maintaining the mandatory arbitration agreement as a condition of employment for its employees and that the agreement was unlawful because it interfered with employees’ rights to engage in protected concerted activity, including the right to participate in class or collective actions on work-related claims. *Id.* at *8. Defendant argued that *D.R. Horton* could be distinguished due to the fact that the BAA at issue, unlike in *D.R. Horton*, specifically excluded claims arising under the NLRA and protected employees’ rights to file NLRB charges. The ALJ disagreed. The ALJ found that the BAA was unlawful not because it restricted or barred the filing of NLRB charges, but rather because it interfered with and restricted employees from engaging in protected concerted conduct. *Id.* at *10. Defendant also argued that *D.R. Horton* was wrongly decided and should be overturned. The ALJ, however, stated that he was bound by *D.R. Horton* unless and until the Supreme Court or the Board overturns it. *Id.* at *11. The ALJ therefore determined that Defendant violated § 8(a)(1) by enforcing its BAA by filing motions to dismiss or stay Plaintiffs’ class action lawsuit and to compel individual arbitration. Because Defendant’s conduct was an unfair labor practice, the ALJ ordered Defendant to rescind or revise its BAA to make it clear to its employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions and to notify its employees of the rescinded or revised
agreement. *Id.* at *15. The ALJ further ordered Defendant to file a motion with the District Court to withdraw its motion to dismiss or stay Plaintiffs’ claims and to compel arbitration of their claims. *Id.*

**Morrison, et al. v. Volkswagen Tulsa, LLC, 2013 U.S. Dist. LEXIS 8974 (N.D. Okla. Jan. 23, 2013).** Plaintiff, a sales associate, brought a class action alleging race discrimination, hostile work environment, gender discrimination, and retaliation under Title VII of the Civil Rights Act of 1964 and violations of wage & hour laws. Parties had entered into an arbitration agreement that stipulated that any dispute arising out of a worker’s employment would be settled by final and binding arbitration. The Court granted Defendant’s motion to compel arbitration. Plaintiff argued that the agreement was unenforceable because the Agreement’s fee and cost terms and one year limitations period unreasonably favored Defendant. The Agreement stated that all filing fees and related administrative costs would be awarded to the prevailing party. Defendant asserted that the Commercial Arbitration Rules of the American Arbitration Association (“AAA”) provided that the AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees. *Id.* at *7. Additionally, Defendant agreed to pay the costs of the arbitration, and waived any right it may have had under the Agreement to recoup the costs or its own attorneys’ fees, regardless of the outcome of the arbitration. Further, Defendant asserted that it would not seek to enforce the one year limitations period against Plaintiff. The Court opined that the one year limitation provision and the fee and cost provisions of the Agreement did not prevent arbitration of Plaintiff’s claims. The Court also stated that, if enforced, the one year limitation period would significantly diminish Plaintiff’s statutory rights under Title VII, and that one year limitation was therefore unenforceable. *Id.* at *8-9. Because the primary and essential purpose of the Agreement was to provide a mechanism to resolve disputes between the parties which arose either directly or indirectly from Plaintiff’s employment, the Court found that the one year limitation was not the Agreement’s essential feature or purpose and was thus severable. *Id.* at *10. The Court observed that Defendant’s agreement regarding the costs of the arbitration and attorneys’ fees mooted Plaintiff’s objection to the fee and costs provision because it no longer nullified her right to bring suit without risk of paying her opponent’s fees. Additionally, the Court noted that even if Defendant had not agreed to pay all the costs and its own attorneys’ fees, any fee-shifting provision would be unenforceable against Plaintiff, and it would be severable from the Agreement because a fee provision is not the main or essential feature or purpose of the Agreement. *Id.* at *12. Accordingly, the Court granted Defendant’s motion to stay and compel arbitration.

**Securitas Security Services USA, Inc. v. Dunaway, et al., 2013 NLRB LEXIS 692 (NLRB Nov. 8, 2013).** Plaintiffs, a group of former employees, filed an unfair labor practice charge alleging violation of the National Labor Relations Act (“Act”). After Plaintiffs had filed a class action in a California state court in 2009, Defendant implemented the Securitas USA Dispute Resolution Agreement (“the new hire agreement”), which was distributed to employees hired after June 14, 2011. Defendant also implemented the Securitas Security Services USA, Inc. Dispute Resolution Agreement (“the current employee agreement”), which was distributed to employees who were employed on June 14, 2011. *Id.* at *3. Although the new hire agreement did not include an opt-out provision, employees could opt-out of the current employee agreement. Both agreements provided that all employment disputes would be resolved by final and binding arbitration and not by way of a jury trial, and that no dispute could be brought, heard, or arbitrated as a class, collective, or representative action. The NLRB noted that *D. R. Horton, Inc.*, 357 NLRB No 184 (2012), held that employers may not compel employees to waive their NLRA right to pursue litigation of employment claims collectively in all forums, arbitral and judicial. *Id.* at *17. Because the new hire agreement did precisely that, the NLRB opined that it was unlawful. The NLRB determined that the current employee agreement was a mandatory condition of employment because it was effective immediately, i.e., before the employee had made any decision to opt-out of arbitration. *Id.* at *18. Further, the NLRB ruled that if the employee did not opt-out, the current employee agreement required the employee to forego participation in all future class action lawsuits, and was irrevocable. Further, the NLRB concluded that as the employee was permanently locked into this decision and could not change his or her mind, this placed a severe restriction on the right to engage in concerted activity guaranteed by the NLRA, and was thus unlawful. *Id.* at *21. The NLRB noted that the employees were simply required to sign for the receipt of the document, but were not required to acknowledge that they read, understood, or agreed to
it. Thus, the NLRB stated that as with the new hire agreement, the holding in *D. R. Horton* was directly applicable to the current employee agreement, and that the agreement was unlawful solely because there was no attempt made by Defendant to ensure that employees were cognizant of the fact that it was anything but a mandatory arbitration agreement. *Id.* at *27. Accordingly, the NLRB opined that Defendant violated § (a)(1) of the Act. Finally, both agreements stated that the mandatory agreement to arbitrate disputes applied to any dispute arising out of or related to the employee’s employment, and mandated that claims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. *Id.* at *28. Read together, the NLRB remarked that employees would construe the latter language to place an ambiguous limitation and restriction on claims and access to the Board, and that this language would reasonably tend to inhibit the filing of unfair labor practice charges with the Board. Thus, the NLRB opined that this language violated § (a)(1) of the Act.

(x) **Non-Workplace Class Action Arbitration Issues**

*Adams, et al. v. AT&T Mobility, LLC, 2013 U.S. App. LEXIS 7741 (9th Cir. April 17, 2013).* Plaintiffs brought a class action alleging that AT&T Mobility (“ATTM”) sent unsolicited text messages violating the Federal Communications Act’s (“FCA”) ban on certain automated messages. The District Court granted Defendant’s motion to compel arbitration and one Plaintiff appealed. The Ninth Circuit held that ATTM had a contractual right to invoke the arbitration clause in Plaintiff’s wireless contract because it was the parent company of New Cingular Wireless PCS (“Cingular”) and Cingular was the successor to Plaintiff’s wireless provider, Unicel. The Ninth Circuit rejected Plaintiff’s argument that the terms “we” and “us” in the wireless contract referred only to Unicel, holding that at a minimum, they included Unicel’s successors. *Id.* at *1-3. The Ninth Circuit also concluded that the terms “us” and “we” encompassed ATTM, Cingular’s parent company. The Ninth Circuit also agreed with the District Court that Plaintiff fell well short of establishing that the costs of individual arbitration would leave her no effective means of vindicating her rights. The Ninth Circuit noted that evidence as to Plaintiff’s prospective arbitral costs explained only that she would be required to engage in significant discovery to prove her case, and her declaration contained no specific details about the expenses she would incur in arbitration. Further, under the arbitration terms, ATTM would bear whatever arbitration costs Plaintiff incurred. Thus, the Ninth Circuit opined that Plaintiff had not met her burden of showing the likelihood of incurring prohibitively expensive costs. Accordingly, the Ninth Circuit affirmed the District Court’s order. *Id.* at *4-5.

*American Express Co. v. Italian Colors Restaurant, et al., 133 S. Ct. 2304 (2013).* Plaintiffs, a group of merchants who accept American Express cards, filed a series of antitrust class actions suit against Amex alleging that Amex used its monopoly power in the market for charge cards to force them to accept credit cards at rates approximately 30% higher than the fees of its competitors. *Id.* at 2308. Plaintiffs’ agreement with Amex contained a clause that required all disputes between the parties to be resolved by arbitration. The agreement provided that “there shall be no right or authority for any claims to be arbitrated on a class basis.” *Id.* at 2306. Amex moved to compel individual arbitration under the Federal Arbitration Act (“FAA”). In opposition to the motion, Plaintiffs submitted a declaration from an economist stating that the cost of an expert analysis necessary to prove the antitrust claims would be “at least several hundred thousand dollars,” while the maximum recovery for an individual Plaintiff would be $12,850, or $38,549 when trebled. *Id.* at 2308. The District Court granted the motion and dismissed the suit. The Second Circuit reversed, holding that, because Plaintiffs showed that they would incur prohibitive costs if compelled to arbitrate on a bilateral basis, the class action waiver was unenforceable and arbitration could not proceed. *Id.* The U.S. Supreme Court initially vacated the judgment and remanded for further consideration in light of its decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010), but on remand, the Second Circuit stood by its reversal. *Id.* The Supreme Court then granted *certiorari* for a second time to consider whether the FAA permits arbitration agreements to be invalidated because they do not permit class arbitration of federal claims. *Id.* The Supreme Court upheld the validity of Amex’s class action waiver and reversed the Second Circuit by a five to three decision. At the outset, the Supreme Court noted that arbitration is a matter of contract and that District Courts must “rigorously enforce” arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and the
rules under which the arbitration will be conducted. *Id* at 2309. The Supreme Court rejected Plaintiffs’ argument that requiring them to litigate their claims individually – as they contracted to do – would contravene the policies of the antitrust laws, noting that the antitrust laws “do not guarantee an affordable procedural path to the vindication of every claim.” *Id*. The Supreme Court also rejected Plaintiffs’ argument that congressional approval of Rule 23 established an entitlement to class proceedings. The Supreme Court noted that “it is likely” that such an entitlement would “abridge or modify” a substantive right – something forbidden by the Rules Enabling Act. *Id*. at 2309-10. It found no evidence of such an entitlement in any event because the Rules impose “stringent requirements for certification that in practice exclude most claims.” *Id*. at 2310. Finally, the Supreme Court addressed the “judge-made” exception to the FAA which allows District Courts to invalidate agreements that prevent the “effective vindication” of federal statutory rights. *Id*. The Supreme Court clarified that the exception applies to arbitration agreements that “operat[e] . . . as a prospective waiver of a party’s right to pursue statutory remedies.” *Id*. The Supreme Court held that, whereas this exception “would certainly cover” a provision forbidding the assertion of certain statutory rights – and perhaps cover unreasonably high filing and administrative fees attached to arbitration – “the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.” *Id*. at 2310-11.

**Editor’s Note:** The Supreme Court’s decision in *AMEX* is perhaps the most important non-workplace class action ruling in 2013 impacting employers. Lower federal courts began applying *AMEX* to wage & hour class actions almost immediately.

**Brown, et al. v. DIRECTV, LLC, 2013 U.S. Dist. LEXIS 90894 (C.D. Cal. June 26, 2013).** Plaintiff, a customer, brought an action under the Telephone Consumer Protection Act (“TCPA”) and the California Unfair Competition Law (“UCL”), alleging that he received automated phone calls from Defendant Credit Management, L.P. when Defendant DIRECTV LLC transferred Plaintiff’s account for collection. Plaintiff had completed an on-line order for DIRECTV’s satellite television service. Before finalizing orders on the DIRECTV website, all new subscribers were directed to a payment page for payment confirmation. The payment page contained terms and conditions, which included an arbitration clause. Before completing the payment process, a customer had to check a box affirming that he read and accepted all of the terms and conditions, including the customer agreement. *Id*. at *4*. During checkout, the title of the agreement appeared as a hyperlink, which directed the customer to the agreement’s text. The customer could not complete the process without checking the box. When technicians installed equipment at Plaintiff’s residence, he signed a DIRECTV Equipment Lease Addendum form which also contained an arbitration clause. DIRECTV moved to compel arbitration, and the Court granted the motion. First, the Court noted that while purchasing service and in the Equipment Lease, Plaintiff expressly assented to the terms of the agreement and the arbitration clause. *Id*. at *5*. DIRECTV’s evidence demonstrated that Plaintiff encountered language alerting him both to the existence of the agreement and the arbitration clause specifically, as well as a hyperlink that would have brought him directly to the agreement. On the Equipment Lease, the provision was even more obvious, located immediately above the signature line. *Id*. at *11*. Second, the Court observed that Plaintiff saw or could have seen three different versions of the arbitration requirements. The arbitration provision in the on-line checkout page summarized its scope to include any dispute arising under or relating to agreements or service with DIRECTV. The arbitration provision of the Equipment Lease included any dispute arising under the Equipment Lease Addendum, the customer agreement or any other addendum, or regarding the DIRECTV programming service. The Court noted that collection calls were related to unpaid credit card contracts. *Id*. at *18-19*. Thus, the Court held that the ability to collect on an unpaid contract was related to that contract and, here, that was all that was required for the claims against DIRECTV to fall within the scope of the arbitration clause. Similarly, because the UCL claim relied on and was derivative of the TCPA claim, it too related to the agreement. Third, Plaintiff argued that the arbitration clause was unenforceable because it was unconscionable. The Court stated that procedural unconscionability focused on the factors of surprise and oppression. *Id*. at *22*. Although Plaintiff had at least two opportunities to review the agreement and reject it with no penalty, both times he assented to the terms of the agreement. Thus, the Court remarked that Plaintiff could not at this point contend that he was surprised by the arbitration clause. The Court also observed that
substantive unconscionability addressed the fairness of the term in dispute. *Id.* at *24. The Court observed that neither party could initiate a formal dispute without first attempting informal resolution, and both parties had to arbitrate all claims relating to the contract, except those explicitly excluded. Thus, the Court noted that the arbitration provision was perfectly symmetrical. Plaintiff further pointed out that the requirement of confidentiality was a basis to find unconscionability. The Court, however, opined that JAMS Rule 26, to which Plaintiff cited, only required confidentiality on the part of the arbitrator and JAMS, not the parties themselves. Further, the Court remarked that the concern over confidentiality was mitigated where the parties to arbitrations were free to speak or to mutually negotiate for confidentiality as a term of a settlement. Accordingly, the Court opined that the arbitration clause was not unconscionable and thereby granted the motion to compel arbitration.

**Cayanan, et al. v. Citi Holdings, Inc., 2013 U.S. Dist. LEXIS 28597 (S.D. Cal. Mar. 1, 2013).** Plaintiffs, a group of consumers, brought a putative class action alleging that Defendants, Citibank and affiliates, violated the Telephone Consumer Protection Act (“TCPA”). Pursuant to terms stipulated in Plaintiffs consumer credit accounts, Defendants moved to compel Plaintiffs’ class action to individual arbitrations. *Id.* at *2. The Court granted Defendants’ motion. Plaintiff Elsie Cayanan obtained two personal loans from CitiFinancial and signed two documents entitled “Disclosure Statement, Note and Security Agreement” (the “2007 Note”), which included an arbitration agreement. *Id.* at *3. Plaintiff Kimberly Baker maintained three credit card accounts serviced by Citibank and later obtained a “GTE” brand credit card, which was eventually converted to a Citibank Thank You Credit Card (the “Thank You Card”). *Id.* at *6. Citibank periodically mailed Baker several change of terms notices, one of which stated that Baker would be bound by the new card member agreement, which included an arbitration clause. *Id.* at *7. The notice also stated that Baker could notify Defendant in writing if she did not wish to be bound by the new card member agreement. *Id.* Plaintiff Jesse McKay, a resident of Connecticut, submitted an electronic application for a student loan using Citibank’s website, and the promissory note contained an arbitration clause. *Id.* at *12. When Plaintiffs defaulted on their payments, they began receiving collection calls at all times of the day and in rapid succession. Plaintiffs argued that McKay did not knowingly agree to arbitrate any claims with Citibank because he did not sign or receive an arbitration agreement and did not sign the actual document containing the arbitration agreement. *Id.* at *27. The Court noted that McKay was required to view the promissory note and arbitration agreement before he could electronically sign the loan application. *Id.* at *28. Accordingly, the Court concluded that McKay agreed to arbitration. Nevertheless, the Court ruled that the arbitration agreement was procedurally unconscionable because McKay was required to assent to Defendant’s arbitration agreement on a take-it-or-leave-it basis before he could apply for a loan. *Id.* at *32. Plaintiffs also argued that McKay’s arbitration agreement was substantively unconscionable because it exposed credit holders to expenses unique to arbitration such as filing fees, arbitrator’s fees, and cost of Plaintiffs’ own counsel and experts. *Id.* The Court rejected Plaintiffs’ argument, noting that the arbitration agreement actually allowed McKay to obtain fee waivers, shift fees and costs to Citibank according to applicable law, and did not force McKay to bear expenses unique to litigation. *Id.* at *34. Accordingly, the Court found that the agreement was not substantively unconscionable, and that McKay’s arbitration agreement was legally enforceable. *Id.* at *35. Plaintiff Baker argued that *Badie v. Bank of America*, 67 Cal. App. 4th 779 (1998), stood for the proposition that an arbitration clause could not be unilaterally added to an agreement under a change of terms provision. *Id.* at *41. The Court, however, observed that *Badie* did not hold that ‘bill stuffer’ notices were *per se* invalid, but rather that the particular notice in that case failed to provide consumers with a realistic opportunity to terminate their account before the new terms took effect. *Id.* at *41. Accordingly, the Court concluded that Baker agreed to arbitrate her claims. Analogous to McKay’s agreement, the Court found that Baker’s agreement was not substantively unconscionable, and ruled that the agreement was legally enforceable. Similarly, the Court found that Plaintiff Cayanan’s agreement was legally enforceable. As a result, the Court granted Defendants’ motion to compel.

**CMH Homes, Inc. v. Goodner, et al., 2013 U.S. App. LEXIS 18450 (8th Cir. Sept. 5, 2013).** Plaintiffs, a group of manufactured homes purchasers, brought a class action in Arkansas state court claiming violations of the Arkansas Deceptive Trade Practices Act, the Arkansas Unfair Practices Act, as well as unjust enrichment and constructive fraud. Plaintiffs alleged that Defendant CMH Homes Inc. referred
buyers of its manufactured housing to Defendant Vanderbilt Mortgage & Finance, Inc. for financing without disclosing that CMH Homes received a commission from Vanderbilt of 4% of CMH Homes’ gross profits on each home sale. Defendants removed the action to the District Court pursuant to the CAFA and Defendants Vanderbilt and CMH Homes also petitioned to compel arbitration, pointing to an arbitration clause in the parties’ home-purchase contract. Subsequently, the District Court granted Plaintiffs’ motion to remand and dismissed Defendants’ petition to compel arbitration, concluding that federal question jurisdiction did not exist and that the amount-in-controversy was not established for diversity jurisdiction.

On appeal, the Eighth Circuit vacated the order of the District Court. The Eighth Circuit observed that the Federal Arbitration Act (“FAA”) itself confers no federal jurisdiction, but instead requires an independent jurisdictional basis. Id. at *7. Further, the Eighth Circuit stated that § 4 of the FAA directs a District Court to assess whether, absent an arbitration agreement, it would have jurisdiction under Title 28 over the controversy presented and that this direction did not depend on which section of Title 28 might be the basis for jurisdiction. In this case, federal diversity jurisdiction was asserted and that required diversity of citizenship and an adequate sum or amount-in-controversy. The Eighth Circuit opined that District Courts are to “look through” to the underlying controversy to determine whether jurisdiction exists including determining the amount-in-controversy. Id. at *7-10. Plaintiffs had stipulated that they sought no more than $75,000 individually and no more than $4,999,999 for the entire class. On that basis, the District Court had held that it would not, “save for” the arbitration agreement, have jurisdiction over a suit arising out of the controversy between the parties, and dismissed Defendant’s petition. Id. at *15. Although Defendants sought to arbitrate only the individual claims, the Eighth Circuit stated that the District Court should not focus merely on the claims at issue in arbitration, but rather on the full-bodied controversy, even if the claims at issue in arbitration by themselves might otherwise be adjudicated in state court. Id. at *16. The Eighth Circuit concluded that the entire controversy in this case was Plaintiffs’ putative class action lawsuit in Arkansas state court, and although the unnamed members of the uncertified class were not parties to the state court action, the putative class action was a controversy, and the parties to that controversy were Plaintiffs and Defendants. The Eighth Circuit nonetheless remanded the case to the District Court to calculate the amount-in-controversy and to determine on that basis whether it had jurisdiction over the putative class action, noting that the Plaintiffs stipulation did not bind absent putative class members. Id. at *17-18.


Plaintiffs, a group of former students, brought an action against Defendant Corinthian Colleges, Inc., the parent company of the schools they attended, asserting various claims under California law. Plaintiffs alleged that Defendant misrepresented the quality of its education, its accreditation, the career prospects for its graduates, and the actual cost of education at one of its schools. Plaintiffs’ enrollment agreements contained an arbitration clause. Accordingly, Defendant moved to compel arbitration. The District Court granted the motion with respect to most of Plaintiffs’ claims and stayed those claims pending arbitration. Further, applying California’s Broughton-Cruz rule, the District Court declined to compel arbitration of Plaintiffs’ requests for injunctive relief under the UCL, FAL, and CLRA, although it sent Plaintiffs’ requests for damages under those statutes to arbitration. Id. at *4. On appeal, the Ninth Circuit reversed the District Court’s order denying the motion to compel arbitration of Plaintiffs’ claims for injunctive relief. The Ninth Circuit observed that in Broughton v. Cigna Healthplans of California, 21 Cal. 4th 1066 (Cal. 1999), because of an inherent conflict between arbitration and the purposes of the CLRA, the California Supreme Court held that arbitration could not be compelled for claims for an injunction. Id. at *9. The Ninth Circuit stated that when state law prohibits outright the arbitration of a particular type of claim, the conflicting rule is displaced by the Federal Arbitration Act (“FAA”). Id. at *15. The Ninth Circuit disagreed that because an injunction is technically a remedy rather than a cause of action, the Broughton-Cruz rule is insulated from the FAA. Further, the Ninth Circuit stated that the FAA preempts state laws requiring judicial resolution of claims involving punitive damages. In applying the Broughton-Cruz rule, the District Court apparently intended to determine for itself in the first instance whether Defendant was liable under the UCL, FAL, and CLRA, and then, if it found liability, to consider whether an injunction was warranted. The Ninth Circuit opined that under those circumstances, the effect of the Broughton-Cruz rule was to prohibit outright arbitration of three particular types of claims, so long as Plaintiffs sought an injunction under those causes.
of action, which violated the FAA. *Id.* at *18. Accordingly, the Ninth Circuit stated that the FAA preempts the *Broughton-Cruz* rule. Alternatively, Plaintiffs argued that they should not be required to arbitrate their injunction claims because those claims do not fall within the scope of their arbitration. Because the scope of an arbitration agreement is a matter of contract, the Ninth Circuit turned to the express terms of the agreements at issue to determine whether the parties intended that injunction claims be arbitrated. Plaintiff Ferguson’s enrollment agreement stated that both parties were irrevocably waiving rights to a trial by jury, and selecting instead to submit any and all claims to the decision of an arbitrator. *Id.* at *25. His enrollment agreement addendum further stated that any dispute arising from his enrollment shall be resolved by binding arbitration under the FAA. Plaintiff Muniz’s enrollment agreements provided that any dispute arising from enrollment would be resolved by binding arbitration. *Id.* The Ninth Circuit found that those terms were sufficiently broad to cover Plaintiffs’ injunction claims. Accordingly, the Ninth Circuit reversed the order of the District Court, and directed the District Court to grant the motion as to all claims, including Plaintiffs’ injunctive relief claims, and to stay the lawsuit pending arbitration.

*In Re A2P SMS Antitrust Litigation, 2013 U.S. Dist. LEXIS 132303 (S.D.N.Y. Sept. 16, 2013).* Application-to-person (“A2P”) text messages are messages sent from businesses or institutions to individuals, and are often sent simultaneously to a large number of recipients. Most A2P messages are sent using common short codes (“CSCs”) that are five or six digit numbers that are leased to business or institutions. CTIA is the cellular telecommunications and wire services trade association. Plaintiffs allege that five or six of the largest wireless service providers in the nation appointed CTIA as their CSC Administrator and CTIA granted Defendant Neustar an exclusive license to lease the CSCs. In order to obtain a CSC lease, the lessee must sign a registrant sub-license agreement (“RSA”) with Neustar. Among other things, the RSA contained an agreement to arbitrate. *Id.* at *5-8. Plaintiffs, as the CSC lessees, brought a class action alleging that the Defendants’ wireless carriers, CTIA, Neustar and others engaged in a conspiracy in violation of §§ 1 and 2 of the Sherman Act. *Id.* at *4-5. Some of Defendants, including the wireless carriers, filed a motion to stay and compel arbitration and the Court granted the motion as to some Defendants. *Id.* at *5. Defendants argued that although they were not signatories to the RSA, they could still enforce the arbitration clause under the common law principle of equitable estoppel. The Court held that estoppel could apply to force a signatory to arbitrate with a non-signatory if: (i) the signatory’s claims arise under the subject matter of the arbitration agreement, and (ii) there is a close relationship between the signatory and the non-signatory parties. *Id.* at *20-21. The Court found that the first prong was satisfied because the factual allegations, among other things, demonstrated that the claims arose directly from the RSA. *Id.* at *23. Specifically, among other things, Plaintiffs alleged that to effectuate their anti-competitive scheme, Defendants voted to create and implement the CTIA system; forced businesses into using the new five digit CSCs; only permitted A2P texts to be transmitted through CSCs; and refused to deal with any CSC lessee seeking to use non-CSC members. The Court also found that the second prong was satisfied because Plaintiffs’ relationship with the carrier Defendants, CTIA, and others was sufficiently close to justify stopping Plaintiffs from denying their contractual obligation under the RSA to arbitrate disputes of this kind. The District Court explained that Defendants were not only mentioned in the RSA, but also they were vested with rights and responsibilities. *Id.* at *30. Accordingly, the Court concluded that equitable estoppel applied.

*In Re Online Travel Co. Hotel Booking Antitrust Litigation, 2013 U.S. Dist. LEXIS 84842 (N.D. Tex. June 15, 2013).* Plaintiffs, a group of customers, brought a class action alleging that on-line travel companies and hotel companies conspired to set hotel room resale prices, thereby deceiving customers by advertising the best or lowest prices, when in fact all companies were offering the same price. Defendants Travelocity.com LP and Sabre Holdings Corp. (collectively “Travelocity”) argued that every user completing transactions on Travelocity’s website as of February 4, 2010 agreed to its User Agreement, containing an arbitration clause which also contained a class action waiver provision. Accordingly, Travelocity moved to compel arbitration. The Court granted the motion. First, to the extent that Plaintiffs’ transactions occurred on or after February 4, 2010, the Court noted that Plaintiffs and all Travelocity users assented to the User Agreement by clicking on a button that said “Agree and Complete Reservation.” *Id.* at *13. This button was located above a notice explaining that, by clicking the button, the user agreed to the policies in the
User Agreement, which was accessible via a hyperlink. Further, three similar versions of Travelocity’s User Agreement that had been in force at different times all contained the same arbitration provision and class action waiver provision. Accordingly, the Court found that Plaintiffs assented to the User Agreement, including its arbitration provision and class action waiver, even though Travelocity had not provided transaction-specific evidence as to each Plaintiff. Plaintiffs argued that the User Agreement was unenforceable and an illusory browse wrap agreement. *Id.* at *18. The Court stated that it was impossible to complete a transaction on the Travelocity website in the absence of affirmative assent to the User Agreement, and because the User Agreement was conspicuously presented and Plaintiffs assented to the User Agreement, it is a valid click wrap agreement. Plaintiffs further argued that because Travelocity could at any time unilaterally modify the User Agreement and substantially change or revoke the arbitration clause, that clause, including its class action waiver, was illusory and unenforceable. The Court remarked that the crux of this issue was whether the promisor has the power to make changes to its arbitration policy that have retroactive effect. *Id.* at *20-21. Here, Travelocity’s User Agreement stated that Travelocity could at any time modify this User Agreement and the continued use of this site or Travelocity’s services would be conditioned upon the terms and conditions in force at the time of use. Thus, Travelocity’s clause explicitly precluded retroactive application of any changes. Plaintiffs did not contest that their dispute was included in the scope of this clause. Thus, after finding that the arbitration provision was valid, enforceable, and within the scope of the agreement, the Court analyzed whether a federal statute or policy precluded arbitration here. Plaintiffs contended that the arbitration clause and its class waiver provision should not be enforced because such enforcement would be at odds with the purposes of the federal antitrust policy. The total fees for individual arbitrations were capped at $200. Further, the AAA’s Consumer Arbitration Rules provide that the daily arbitrator fee will be paid by the business seeking to enforce an arbitration provision against a consumer. *Id.* at *28. Travelocity agreed to pay all arbitrator expenses, including required travel and other expenses, and any AAA expenses, as well as the costs relating to proof and witnesses produced at the direction of the arbitrator. Accordingly, the Court found that Plaintiffs failed to meet their burden of providing some individualized evidence that they would face prohibitive costs in arbitration and that they were financially incapable of meeting those costs. Plaintiffs provided no persuasive information on the issue of arbitral forum, and failed to cite a single case invalidating an arbitration clause for unfair forum. Accordingly, the Court granted Defendant’s motion to compel arbitration.

**Lombardi, et al. v. DIRECTV, Inc., 2013 U.S. App. LEXIS 23952 (9th Cir. Dec. 2, 2013).** Plaintiffs, a group of subscribers to Defendant’s satellite television service, brought multi-district class action litigation challenging the propriety of Defendant’s early cancellation fees policy. Earlier, the District Court, finding that the class action waiver in Defendant’s arbitration agreement was unconscionable under California, Arizona, Florida and Pennsylvania law, had denied Defendant’s motion to compel arbitration. On appeal, the Ninth Circuit reversed. The Ninth Circuit noted that the Federal Arbitration Act prevented states from invalidating arbitration agreements based on the availability of class action procedures. *Id.* at *4. Plaintiffs argued that the District Court’s decision should be affirmed because the arbitration agreement was unconscionable and unenforceable. The Ninth Circuit determined that the arbitration agreement was enforceable under Arizona and Illinois law as it was supported by adequate consideration, including Defendant’s reciprocal promise to arbitrate any claims outside of the exceptions for theft of service. Because the arbitration agreement did not require customers to surrender any claims or damages they could seek in court, it was not substantively unconscionable under Florida law either. Under Pennsylvania law, the party seeking to invalidate an arbitration agreement bears the burden of proving that it was unconscionable and the unilateral reservation of judicial remedies for some claims but not others did not create a presumption of unconscionability. The Ninth Circuit concluded that Plaintiffs had failed to meet this burden because their argument rested solely on the relative availability of litigation and arbitration; they had identified no arbitral terms that unfairly benefited Defendant or prevented them from fully presenting their claims in arbitration. Finally, the Ninth Circuit stated that Plaintiffs had not argued that the arbitration agreement was unconscionable under Virginia law, and of the relevant states, only Illinois recognized circumstances in which a contractual provision was not enforceable due to procedural unconscionability alone. Further, the Ninth Circuit noted that there was no evidence supporting Plaintiffs’ contention that
Defendant charged an early cancellation fee when a customer rejected the arbitration agreement. In fact, Defendant’s confirmation letter explained that disputes were subject to arbitration, provided a URL for the customer agreement, and informed the customer that it would issue a full refund if service was cancelled before installation. Although the arbitration agreement was an adhesion contract and there were circumstances that evidenced a degree of procedural unconscionability, that degree was insufficient to render the arbitration provision unenforceable. Accordingly, the Ninth Circuit reversed the District Court’s order denying Defendant’s motion to compel arbitration.

Lowry, et al. v. JP Morgan Chase Bank, N.A., 559 U.S. 662 (2010). Plaintiff, a debtor, brought an action alleging violations of the Clayton Act, an Ohio statute, and breach of agency for assessing improper fees, charging an inflated interest rate, and receiving illegal kickbacks. Plaintiff entered into a loan agreement with Defendant for the purchase of a car. Id. at 282. The loan agreement contained an arbitration agreement, which included a class action waiver. Defendant moved to compel arbitration, dismiss the class allegations, and dismiss or stay the case. The District Court granted the motion to compel arbitration of all claims, but denied the motion to dismiss the class claims. On appeal, the Sixth Circuit affirmed the order of District Court. Defendant argued that the class claims were not arbitrable because of waiver of class claims in the arbitration agreement and that the District Court should have dismissed the class claims instead of submitting them to arbitration. Id. at 283. The Sixth Circuit noted that the District Court should determine whether an arbitrator has jurisdiction over the merits of a dispute unless the parties have clearly and unmistakably agree that an arbitrator is to resolve issues of arbitrability. The reason for this rule is that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit. Id. The District Court had found the agreement explicitly mandated that the parties submit the question of a claim’s arbitrability to arbitration. Defendant, however, ignored this provision of the agreement and argued that the class action waiver was unambiguous. The Sixth Circuit stated that although the agreement contained an unambiguous class action waiver, the provision which required an arbitrator to resolve the disputes about the arbitrability of claims did not exclude class claims. Id. In addition, the Sixth Circuit observed that the parties clearly and unmistakably agreed to submit any disputes including class claims to arbitration. Thus, the Sixth Circuit opined that the District Court did not err when it submitted the dispute regarding the arbitrability of class claims to arbitration, and accordingly affirmed the order of the District Court.

Oxford Health Plans LLC v. Sutter, et al., 133 S. Ct. 2064 (2013). Plaintiff, a physician who provided medical services under a contract with Defendant, brought a class action on behalf of himself and other doctors alleging violation of the contract and New Jersey state laws. Plaintiff alleged that Defendant violated its contract by failing to make full and prompt payment to the doctors for the medical services they provided. Defendant moved to compel arbitration pursuant to the provision in the contract that provided that any disputes arising under it would be decided by an arbitrator. The state court granted Defendant’s motion to compel arbitration. Id. at 2067. Because the contract never explicitly mentioned class proceeding, both the parties agreed that the arbitrator should decide whether their contract authorized class arbitration. At arbitration, the arbitrator decided that the contract did. Id. Defendant then filed a motion in District Court to vacate the arbitrator’s decision on the ground that the arbitrator exceeded his powers under § 10(a)(4) of the Federal Arbitration Act (“FAA”). The District Court denied the motion and the Third Circuit affirmed. Id. In the interim, the Supreme Court issued its decision in Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010), which held that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. Defendant sought reconsideration in light of Stolt-Nielsen. The arbitrator reiterated that class arbitration was available. Id. Defendant once again sought judicial review. Both the District Court and the Third Circuit again affirmed the arbitrator’s decision. Id. at 2068. The issue reached the U.S. Supreme Court through writ of certiorari. The Supreme Court unanimously affirmed and held that the arbitrator was not acting outside the scope of his powers. Because both Defendant and Plaintiff had agreed to allow the arbitrator to determine the scope of the arbitration agreement, the sole question before the Supreme Court was “whether the arbitrator (even arguably) interpreted the parties’ contract, not whether he got its meaning right or wrong.” Id. The arbitrator had interpreted the contract twice and
decided that it permitted class arbitration. *Id.* at 2069. Citing *Stolt-Nielsen*, the Supreme Court noted that under § 10(a)(4)’s limited scope of review, a District Court can only set aside an arbitral award where the arbitrator exceeded his powers and “[i]t is not enough to show that the arbitrator committed an error – or even a serious error.” *Id.* at 2068. Because the parties had bargained for the arbitrator’s construction of their agreement, the Supreme Court held that an arbitral decision even arguably construing or applying the contract must stand. *Id.* The Supreme Court further held that Defendant, in arguing that the arbitrator did not have sufficient contractual basis for his decision, had misread the holding in *Stolt-Neilsen*. Defendant had argued that, under *Stolt-Nielsen*, the arbitrator exceeded his authority by interpreting an arbitration agreement to authorize class arbitration where there was no evidence, in the agreement or otherwise, that the parties had agreed to such a procedure. The Supreme Court explained that this case was different from *Stolt-Nielsen* because in *Stolt-Nielsen* the parties had stipulated that they had not reached an agreement regarding class arbitration, so the arbitrator did not construe the contract. *Id.* at 2070. By contrast, the parties here agreed that the arbitrator should decide whether their contract authorized class arbitration. The arbitrator also interpreted the contract and found that there had been an agreement for class arbitration. *Id.* To overturn the decision, the Supreme Court would have to find that the arbitrator had misinterpreted the parties’ intent. However, the FAA bars a District Court from making such determination as it permits vacating an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly. *Id.* The Supreme Court thus held that so long as the arbitrator interpreted the contract, his decision would hold “however good, bad, or ugly.” *Id.* at 2071. Accordingly, the Supreme Court concluded that the arbitrator did not exceed his powers by allowing class arbitration.

**Rajagopalan, et al. v. NoteWorld, LLC, 2013 U.S. App. LEXIS 10055 (9th Cir. May 20, 2013).** Plaintiff, a debtor, brought a class action alleging violations under the Racketeering Influenced and Corrupt Organizations Act (“RICO”) and Washington state law. Upon canceling his subscription for a debt settlement program with First Rate Debt Solutions (“First Rate”), Plaintiff sought a full refund from Defendant NoteWorld, LLC, the company responsible for payment processing. NoteWorld refunded an amount being held in reserve to pay settlements, but did not refund the amount that had been disbursed to the debt relief service provider (“DRSP”) or an additional amount of fees. NoteWorld informed Plaintiff that it was a completely separate entity from the DRSP, was independently owned and operated, and did not perform the duties that the DRSP had been contracted to do. Further, NoteWorld informed Plaintiff that it undertook its obligations as an independent third-party and did not act as an agent for the DRSP, nor did it take on any of the contractual obligations of the DRSP. Plaintiff’s contract with First Rate contained an arbitration clause. NoteWorld moved to stay the litigation and compel arbitration and alternatively to dismiss without prejudice. Although NoteWorld conceded that it was not a signatory to the contract containing the arbitration provision, it argued that because Plaintiff’s claims relied upon and arose under that contract, it could invoke the arbitration agreement both as a third-party beneficiary of the contract and under the theory of equitable estoppel. The District Court denied NoteWorld’s motion, and on appeal, the Ninth Circuit affirmed. The Ninth Circuit remarked that under Washington state law, both contracting parties must intend that a third-party beneficiary contract be created, and although NoteWorld’s name was mentioned in the contract, the indirect reference to a third-party did not make the third-party a beneficiary of the contract. *Id.* at *6-7. The Ninth Circuit observed that the creation of a third-party beneficiary contract requires that the parties intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract, and that NoteWorld submitted no evidence that Plaintiff intended to designate NoteWorld as a third-party beneficiary, that NoteWorld assumed any duties or obligations under the First Rate contract, or that any party assumed direct obligations to NoteWorld. *Id.* The Ninth Circuit opined that equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes. *Id.* at *7-8. Plaintiff did not contend that NoteWorld or any other party breached the terms of the contract; instead Plaintiff had statutory claims that were separate from the contract itself. Thus, because Plaintiff’s statutory claims did not arise out of or relate to the contract that contained the arbitration agreement, the Ninth Circuit held that NoteWorld could not compel Plaintiff to arbitrate his claims on the basis of equitable estoppel. Accordingly, the Ninth Circuit
opined that the District Court had correctly concluded that NoteWorld could not invoke the arbitration clause as a third-party beneficiary or through equitable estoppel.

**Reed Elsevier, Inc. v. Crockett, et al., 2013 U.S. App. LEXIS 22408 (6th Cir. Nov. 5, 2013).** A law firm, a subscriber of LexisNexis (a business division of Reed Elsevier), filed a class-wide arbitration demand with the AAA alleging that LexisNexis charged additional fees without any warning that Crockett was using a database outside the Plan. In response, LexisNexis sued the Crockett firm (“Crockett”) seeking a declaration that the Plan’s arbitration clause did not authorize class arbitration. The District Court agreed and granted LexisNexis summary judgment. On appeal, the Sixth Circuit affirmed the District Court’s order. Crockett argued that an arbitrator, rather than the District Court, should have decided whether the Plan’s arbitration clause authorized class-wide arbitration. The Sixth Circuit stated that an arbitrator had authority to answer the question whether an agreement provided for class-wide arbitration only if the parties had authorized the arbitrator to answer that question. Further, to decide whether the parties had authorized an arbitrator to determine class-wide arbitrability, the Sixth Circuit relied on gateway disputes and subsidiary questions. The Sixth Circuit stated that gateway disputes were for judicial determination unless the parties clearly and unmistakably provided otherwise. Gateway disputes include whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy. *Id.* at *5. On the other hand, the subsidiary questions include issues related to waiver, delay, or whether a condition precedent to arbitrability had been fulfilled. The Sixth Circuit noted that the plurality in *Green Tree Financial Corp. v. Bazzle*, 123 S. Ct. 2402 (2003), concluded that class-wide arbitrability is merely a subsidiary question because it concerns not whether the parties agreed to arbitrate a matter, but rather what kind of arbitration proceeding the parties agreed to in their contract. *Id.* at *6. The Supreme Court in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), flatly stated that it “has not yet decided whether the availability of class arbitration” is a gateway question. *Id.* at *7. Therefore, the Sixth Circuit relied on *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 559 U.S. 662 (2010), which characterized the differences between bilateral and class-wide arbitration as fundamental for several reasons. First, arbitration’s benefits were much less assured with respect to class-wide arbitration, giving reason to doubt the parties’ mutual consent to that procedure. Second, confidentiality becomes more difficult in class-wide arbitrations, thus potentially frustrating the parties’ assumptions when they agreed to arbitrate. Third, the commercial stakes of class action arbitration were in fact comparable to those of class action litigation. *Id.* at *8. Thus, the Sixth Circuit opined that arbitration was weakly suited to the higher stakes of class litigation. *Id.* at *9. Therefore, the Sixth Circuit held that the question whether an arbitration agreement permitted class-wide arbitration was a gateway matter, which was reserved for judicial determination unless the parties clearly and unmistakably provide otherwise. Further, the Sixth Circuit stated that in the absence of any reference to class-wide arbitration in the contract, the agreement could be read to speak only to issues related to bilateral arbitration. The Sixth Circuit reasoned that the principal reason to conclude that the arbitration clause did not authorize class-wide arbitration was that the clause nowhere mentioned it, and the clause limited its scope to claims arising from or in connection with this order, as opposed to other customers’ orders. Crockett argued that if the arbitration clause did not permit class-wide arbitration, then it was unconscionable and the clause was one-sided. The Sixth Circuit opined that the absence of a class action right did not render an arbitration agreement unenforceable. *Id.* at *14. Accordingly, the Sixth Circuit affirmed the District Court’s order.

**Editor’s Note:** The Sixth Circuit’s decision in *Reed Elsevier* answers an important issue left open by the Supreme Court’s rulings in *Stolt-Nielsen v. Animal Feeds International Corp.*, 559 U.S. 662 (2010), *AT&T Mobility LLC v. Concepcion, et al.*, 131 S. Ct. 1740 (2011), and *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013). The Sixth Circuit’s decision provides a roadmap for employers in terms of securing enforcement of a bilateral arbitration agreement through the auspices of a court as opposed to an arbitrator.

practices by charging marked-up or unnecessary fees in connection with Defendants’ home mortgage loan servicing businesses. Plaintiffs contended that Defendants allegedly adopted a uniform practice designed to maximize fees assessed on delinquent borrowers’ accounts, by unlawfully marking up default-related fees charged by third-parties and assessing them against borrowers’ accounts for an undisclosed profit. Through the alleged unlawful enterprise, Plaintiffs contended that Defendants marked up fees charged by vendors, often by 100% or more, and failed to disclose the mark-ups and hidden profits to borrowers. Defendants filed a motion to dismiss, which the Court granted in part. Defendants first argued that 12 U.S.C. § 1818(i) divests the Court of subject-matter jurisdiction because the conduct alleged and relief sought was subsumed, regulated, and governed entirely by a consent order into which Defendant entered with the U.S. Department of Treasury’s Office of the Comptroller of Currency (“OCC”), wherein Defendant consented to the issuance of a consent cease and desist order. At the very outset, the Court noted that § 1818(i)(1) provides that the appropriate Federal banking agency may apply to a federal district court for the enforcement of any effective and outstanding notice or order issued under this section, and such courts shall have jurisdiction and power to order and require compliance, but no court shall have jurisdiction to enter an injunction or otherwise issue or enforce any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order. Id. at *30. The Court noted that Rex v. Chase Home Finance LLC, 905 F. Supp. 2d 1111 (C.D. Cal. 2012), found that because the judicial mechanisms of § 1818 focused on the ability of either the federal banking agency or recipient of a cease and desist order to obtain review of the order, it was clear that the jurisdiction divesting clause was not intended to prohibit non-parties from exercising their separate remedies at law. Id. Instead, Rex opined that the primary purpose of § 1818 was to prevent federal district courts from usurping the OCC’s power to enforce its own consent orders against parties to the orders. The analysis in Rex was based primarily on the findings from In Re JPMorgan Chase Mortgage Modification Litigation, 880 F. Supp. 2d 220 (D. Mass. 2012). Relying on these cases, the Court found that § 1818(i) did not divest the Court of jurisdiction for four reasons. First, the deficiencies and unsafe or unsound practices identified by the OCC were primarily devoted to foreclosures, and the steps taken to remedy the deficiencies were not intended to address a fraudulent scheme. Id. at *41. Second, the complaint on its face did not seek to review, modify, suspend, terminate, or set aside any such notice or order. Third, the amendments made to the consent order indicated that the OCC did not intend for third-parties to waive their rights by requesting a review of mortgages. Finally, Defendants did not sufficiently articulate how the outcome of this action necessarily affected the OCC’s enforcement of the consent order. The Court concluded that § 1818(i) itself seeks to ensure that federal district courts do not interject themselves into the relationship between the OCC and parties when it comes to enforcement or review of a consent order. The Court remarked that the statute did not seek to prohibit third-parties from asserting claims, nor did the consent order itself purport to do so. Accordingly, the Court denied Defendants’ motion to dismiss based on the argument that § 1818(i) divested the Court of subject-matter jurisdiction. Similarly, the Court denied the motion to dismiss based on the doctrines of primary jurisdiction and equitable abstention; preemption by National Bank Act; lack of Article III standing, and unjust enrichment and fraud. The Court, however, granted Defendants’ motion to dismiss RICO claims with leave to amend.

In Re Diet Drugs Products Liability Litigation, 2013 U.S. App. LEXIS 10168 (3d Cir. May 21, 2013). Wyeth L.L.C. entered into a nationwide class action settlement agreement related to its marketing of two weight-loss agents which were linked to the development of heart disease. The settlement agreement provided compensation to qualifying diet drug users suffering from heart disease based on their age and the severity level of their medical condition. To qualify for these benefits, a claimant had to be diagnosed as FDA Positive. The settlement agreement had two payment matrices to calculate the compensation a claimant would receive. While Matrix A applied to claimants who ingested diet drugs for fewer than 61 days and did not have any of the alternative causation factors listed by the settlement agreement, Matrix B applied to resolve all other qualifying claims. Id. at *1-3. Claimants whose valvular heart conditions worsened to a higher severity level were permitted to file supplemental claims seeking additional benefits. Roberta Haberman, a class member, filed a supplemental claim after undergoing dual heart valve surgery in 2009. Haberman claimed that she was entitled to Matrix A benefits based on a 2002 echocardiogram showing that she had valvular heart disease and did not have any of the listed alternative causation factors.
The AHP Settlement Trust, which administered the settlement fund, rejected her request for Matrix A benefits, and determined that Matrix B applied to her claims because four echocardiograms performed between 2007 and 2009 showed that she had developed mitral annular calcification prior to her surgery. The District Court affirmed the Trust’s determination. \textit{Id.} at *3-4. On appeal, the Third Circuit affirmed. The issue to be determined was whether the settlement agreement imposed a time limitation on the medical evidence upon which the Trust could rely in determining whether a claimant had an alternative causation factor. The FDA Positive regurgitation that determined whether a claimant was entitled to Matrix benefits had to be diagnosed by an echocardiogram performed between beginning diet drug use and the end of the screening period on January 4, 2003. The parties disputed whether this same limitation applied to the diagnosis of alternative causation factors. The Third Circuit observed that because the screening period ended on January 4, 2003, application of this limitation would preclude the Trust from relying on the echocardiograms performed between 2007 and 2009 to determine whether Haberman’s claim should be resolved under Matrix A or Matrix B. The Third Circuit stated that the settlement agreement was not ambiguous in not placing a time limit on the medical evidence on which the Trust could base its determination of whether an alternative causation factor was present. \textit{Id.} at *6. Accordingly, the Third Circuit affirmed the District Court’s order denying Haberman’s challenge to the Trust’s determination that she was not entitled to Matrix A benefits.

(xii) Ascertainability Under Rule 23

\textit{Bright, et al. v. Asset Acceptance, LLC, 2013 U.S. Dist. LEXIS 108432 (D.N.J. Aug. 1, 2013).} Plaintiff, a consumer who had an unpaid cell phone bill, brought an action alleging that Defendant, a debt collector, violated the Fair Debt Collection Practices Act (“FDCPA”) by calling its consumers from a telephone number which falsely displayed the name “Warranty Services” on the caller identification devices. \textit{Id.} at *1. Plaintiff alleged that consumers were misled about the identity of the caller as a debt collection agency in direct violation of the FDCPA. Plaintiff further alleged that Defendant’s conduct was a deceptive means to collect a debt and that the use of any business, company, or organization names other than the true name of the debt collector’s business violated the FDCPA. Plaintiff moved for class certification proposing a class of “all New Jersey consumers who, between October 7, 2010 and August 23, 2011, Asset Acceptance, LLC called using the telephone number 443-550-7962.” \textit{Id.} at *19. The Court denied Plaintiff’s motion because it determined that the class was not ascertainable and that Plaintiff did not fulfill the predominance requirement. The Court stated that Plaintiff offered no objective way to ascertain the class members. The members of the proposed class were required to: (i) have received a call from Defendant from the 7962 number; (ii) have caller ID services; and (iii) to have the name “Warranty Services” appeared on the caller ID when received the call from the 7962 number. \textit{Id.} at *20. Neither Plaintiff nor Defendant knew which consumers had caller IDs during the relevant time period and such information was not contained with Defendant’s computer databases. \textit{Id.} at *21. Further, the Court determined that even if Plaintiff’s proposed class was ascertainable, Plaintiff’s claims failed on the predominance requirement of Rule 23. \textit{Id.} at *35. Specifically, it determined that the evidence showed that Defendant took appropriate steps to ensure that the correct name appeared with the 7962 number by conferring with its vendor. The Court opined that the evidence showed that any error with regard to the caller ID display name would be a result of each individual’s local phone provider failing to update its database. Thus, the Court found that individual discovery would be required to determine if each class member’s phone provider updated their database and that common questions to the class did not predominate. Additionally, the Court noted that Plaintiff provided no viable way to calculate actual damages, even though he sought actual damages as relief. The Court determined that the result would be individualized damage calculations and that questions common to the class would not predominate. Accordingly, the Court denied Plaintiff’s motion for class certification.

\textit{Campusano, et al. v. BAC Home Loans Servicing LP, 2013 U.S. Dist. LEXIS 76148 (C.D. Cal. April 29, 2013).} Plaintiffs, a group of mortgagors, brought a class action alleging that Defendants breached their loan agreements by failing to timely implement the terms of the agreements. Plaintiffs had entered into agreements with Defendants to modify the terms of the mortgage loans to avoid defaulting on their loans. For its breach of contract claims, Plaintiffs sought certification of all homeowners in the United States.
whose residential mortgage loans had been serviced by Defendant and whom, since January 1, 2008, received a loan modification agreement from Defendant and returned it executed (“Agreement”); timely made the first payment required by the Agreement; and for whom Defendant did not timely implement the loan modification set out in the terms of the Agreement. Additionally, for its state law claims relative to unfair and deceptive acts and practices (“UDAP”), Plaintiffs sought certification of four sub-classes, each made up of all class members of California, Massachusetts, Oregon, and Washington. The Court denied Plaintiffs’ motion for failure to establish the class was ascertainable. First, the Court stated that for a class to be ascertainable, its members must be identifiable by reference to objective criteria, and the class definition precise enough that it is administratively feasible for the Court to ascertain whether an individual is a member. Id. at *8. Plaintiffs stated that Defendants had produced a list that identified 100,518 currently active loan accounts of borrowers who returned executed permanent loan modifications and for whom Defendants did not implement the modification or implemented them on materially different terms. To show how the precise number might be identified, Plaintiffs relied on a spreadsheet containing information of 800 randomly selected borrowers who returned executed loan modification agreements. Using this data, Plaintiffs’ expert, Professor Alan White, asserted that the number of individuals that met each prong of the class definition could be ascertained. White identified 491 class members in the randomized sample. Thereafter, White submitted a supplemental report revising his estimates which identified a new way of accurately identifying when a loan modification agreement had been implemented. This supplemental report incorporated the actual effective dates of the loan modification agreements for 319 borrowers in the 800-borrower sample, information that was recently provided to Plaintiffs. Using this new data, White identified 299 borrowers who returned executed loan modification agreements and for whom Defendant did not timely implement the modified terms. The supplemental report also used recently produced data regarding payment history to determine that at least 222 of these 299 borrowers made at least one modified payment and 99 of those made the modified payment within one month of the first modified payment due date. Although Plaintiffs had not identified the precise number of individuals who fell within the class definition, the Court stated that to show ascertainability, Plaintiffs need only show that the endeavor was feasible. Id. at *12. Here, White’s supplemental declaration showed that analysis of Defendant’s electronic records could accomplish much of the work of identifying class members. Even if Defendant’s databases did not have indicators that aligned with each of the class criteria and some review of individual loan modification agreements was necessary, the Court noted that it did not render the class unascertainable. Accordingly, the Court observed that numerosity and ascertainability were established.

Next, regarding commonality, Plaintiff stated that whether Defendant breached loan modification Agreements by failing to implement them consistent with the effective dates expressed was a common question of law. The Court, however, noted that the mere construction of an “effective date” provision would lead to a host of individual questions regarding the underlying validity of the loan modification agreements. Id. at *17. Plaintiffs proposed another common question – whether the acceptance of a timely first payment under a loan modification agreement bound Defendants to that agreement, regardless of whether all the conditions precedent to the contract had been fulfilled or whether Defendant had signed the document. The Court held that this question would generate a wide diversity of answers, depending on the terms of each contract and the applicable state contract law. Finally, although Plaintiffs asserted that Defendant’s uniform systemic practices fulfilled the commonality requirement, the Court remarked that without any evidence linking the purported common conduct to the alleged harm suffered by the class, the common conduct would not resolve the claims of class in one stroke. Accordingly, the Court denied Plaintiffs’ motion for class certification.

Carrera, et al. v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013). Plaintiff brought a consumer fraud class action alleging that Defendant falsely advertised its product, One-A-Day WeightSmart. Plaintiff then moved to certify a Rule 23(b)(3) class of Florida consumers under the Florida Deceptive and Unfair Trade Practices Act. Defendant challenged class certification, arguing that the proposed class was not ascertainable because putative class members were unlikely to have documentary proof of purchase, as well as that Defendant did not sell WeightSmart directly to consumers. Id. at 304. Nonetheless, the District Court certified a state-wide class, accepting both of the Plaintiff’s proposals to ascertain class membership: (i) by retailer records of on-line sales and sales made with store loyalty or rewards class; and (ii) by class
Plaintiff, a consumer, brought a class action under the Telephone Consumers Protection Act (“TCPA”), alleging that it received three unsolicited faxes advertising services. Defendant filed a motion to strike Plaintiff’s class allegations and Plaintiff filed a motion to compel discovery. The Court granted Defendant’s motion and denied Plaintiff’s motion. Plaintiff sought every advertising facsimile delivered anywhere in the United States from December 23, 2006 to the present, with detailed descriptions of the content of each facsimile, the sending and receiving telephone numbers for each facsimile, and the make and serial number of the sending device. Id. at *2-3. Plaintiff also sought certification of a class of all individuals who on or after four years prior to the filing of this action, were sent telephone facsimile messages of material advertising the commercial availability of any property, goods, or services by or on behalf of Defendant with respect to whom Defendant cannot provide evidence of prior express permission or invitation for the sending of such faxes, with whom Defendant did not have an established business relationship and that did not display a proper opt-out notice. Id. at *9. Defendant contended that Plaintiff’s class allegations constituted an impermissible fail-safe class that required individualized merits-based determinations to ascertain class membership. The Court noted that this issue was a failure to define a sufficiently identifiable class, a failure to meet the commonality and typicality requirements of Rule 23(a), or a failure to meet the predominance requirement of Rule 23(b)(3). Id. at *10. Under any of these approaches, Plaintiff failed to define a class that could be certified. A fail-safe class is one that is defined so that whether a person qualifies as a member depends on whether the person has a valid claim. Id. The Court opined that such a class definition was improper because a class member either won or, by virtue of losing, was defined out of the class and was therefore not bound by the judgment. Id. Here, the proposed class included only those individuals to whom Defendant sent faxes without prior consent and with whom Defendant did not have an established business relationship. Id. at *11. Further, the Court stated that the
need to make a determination for each class member as to whether the facsimile transmission was unsolicited, both by the lack of express permission and the absence of a prior business relationship, made class treatment inappropriate and unmanageable. *Id.* The Court rejected Defendant’s argument that individualized determinations of whether the recipients consented would predominate over class claims. The Court observed that Defendant placed an order with a third-party for a fax broadcast and took no steps to verify consent, which precluded individualized defenses of consent. *Id.* at *13. However, there was no evidence that Defendant engaged in blast faxing on its own or through a third-party or worked off a nationwide leads list. The evidence indicated that there was no national policy of distributing advertising materials via facsimile transmission. The Court reasoned that determining class membership would require individualized determinations regarding the absence of prior consent and the absence of a prior business relationship, which are precluded by Rule 23. *Id.* at *14. The Court concluded that because the class allegations could not proceed, Plaintiff’s motion to compel was moot. Accordingly, the Court granted Defendant’s motion to strike Plaintiff’s class allegations.

(xiii) Class Actions Involving Unions

*Healy, et al. v. International Brotherhood Of Electrical Workers, 2013 U.S. Dist. LEXIS 119102 (N.D. Ill. Aug. 22, 2013).* Plaintiffs, a group of electricians, sued their union, Freeman Electrical, Inc., Global Experience Specialists, Inc. (“GES”), and the Metropolitan Pier and Exposition Authority (“MPEA”) asserting claims for breach of the union’s collective bargaining agreement (“CBA”) with Freeman and GES and breach of the union’s duty of fair representation. The CBA provided a process by which electricians were referred to contractors for hire. Under the CBA, the union was the sole source of referrals to contractors, and pursuant to the union’s written referral call procedures, a contractor placed a “short call,” for a position that lasted less than two weeks, and a “long call,” for a position that lasted more than two weeks. *Id.* at *3. The MPEA owned and operated Navy Pier and McCormick Place, and prior to 2011, the union’s referral hall allowed it to place a third type of call for electricians known as a “McCormick Place call” or a “show call.” *Id.* at *4. Subsequently, McCormick Place asked certain electricians to remain on-call beyond the length of their show calls, and these electricians became known as the “McCormick Place Pool” or “the pool.” *Id.* After, the Metropolitan Pier and Exposition Authority Act (“MPEA Act”) was amended in 2010, Freeman and GES won contracts to provide electrical services at McCormick Place, and the union then agreed to give them access to the McCormick Place Pool of electricians through a sub-contracting arrangement with the MPEA, pursuant to Freeman and GES entering into Interpretive Side Letters (“ISLs”). These letters provided that neither Freeman nor GES could provide electrical work with its own employees at any location owned, operated, or controlled by the MPEA. Plaintiffs, Freeman, and GES electricians on the long and short call lists contended that because of the ISLs, Freeman and GES hired only McCormick Place Pool members to perform work at McCormick Place. Further, Plaintiffs alleged that due to Defendants’ conduct, Freeman and GES laid-off all of their electricians who had been working at McCormick Place between August 12, 2011 and the end of September 2011. Plaintiffs moved for certification of a class under Rule 23(b)(2) consisting of all union members who were on the out-of-work lists at the union referral hall, and certification of a class under Rule 23(b)(3) consisting of all union members who were laid-off by Freeman and GES between August 12, 2011 and the end of September 2011. The Court granted the motion in part. First, the Court noted that under Rule 23(b)(2), class certification is available if the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. *Id.* at *8-9. Further, the Court stated that a request for such injunctive relief, however, is rendered moot when there is no reasonable expectation that the wrong will be repeated. *Id.* at *9. Defendants had rescinded the ISLs, stopped using the McCormick Place Pool, and terminated all electricians in that pool, and Freeman and GES currently used electricians obtained through the union’s referral hall. Thus, because the challenged practice was discontinued, the pool in question no longer existed, and there was no reasonable expectation that alleged illegal practices were likely to recur, the Court opined that there was no basis to certify the Rule 23(b)(2) class. Second, regarding the Rule 23(b)(3) class, the Court observed that the challenged practice of borrowing electricians from the McCormick Place Pool rather than obtaining them through the union referral hall, which resulted in termination of all proposed class members, was reasonably concrete and liability-determinative on its own.
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The Court noted that a particular ad hoc breaks. The Eighth Circuit remarked that no basis. Further, in 1990, the union had addressed a similar grievance, wherein the employer ad hoc Id. communicate openly and honestly with him about the investigation and the grievance process. The Eighth issue to arbitration was not arbitrary. Finally, Plaintiff asserted that the union acted in bad faith by failing to continuously operating lines, the Eighth Circuit opined that the union's decision not to take this particular practice, and the previous experience with this very issue of scheduled rest breaks for employees on the impracticality of designating specific times change to the CBA's rest period provision, but because of the impracticality of designating specific times down for a scheduled break. The Eighth Circuit also observed that the union had negotiated a possible not actually receiving their rest periods. The Court certified a class and later granted summary judgment to based on how much work he lost as a result of Defendants' conduct, which would differ from class member to class member. However, because of the class size and because some damages-related issues like the wage rate were in fact common, the Court opined that the calculation of individual damages would not predominate over the common issues concerning liability. Thus, the Court ruled that the predominance requirement was met. Finally, the Court stated that class action was an efficient use of judicial resources considering the class size, the similarity of their claims, and the absence of conflicting interest. Accordingly, the Court certified a Rule 23(b)(3) class.

Inechien, et al. v. Nichols Aluminum, LLC, 2013 U.S. App. LEXIS 17938 (8th Cir. Aug. 28, 2013). Plaintiff, an employee, brought a class action alleging that his employer breached its collective bargaining agreement (“CBA”) by failing to establish rest periods as required by the CBA, and that the union breached its duty of fair representation. The Court certified a class and later granted summary judgment to Defendants. On appeal, the Eighth Circuit affirmed. Plaintiff asserted that the union acted arbitrarily and breached its duty of fair representation when it failed to conduct an investigation into the merits of his grievance and failed to process his grievance properly. While union representatives stated they had interviewed employees on continuously operating lines, Plaintiff presented evidence from the employees themselves that no such interviews took place. The Eighth Circuit stated that a disputed issue of fact remained regarding whether the Union acted arbitrarily or in bad faith when, based on an investigation that may or may not have taken place, it failed to arbitrate the grievance that coil coating line employees were not actually receiving their rest periods. Second, regarding the allegation that the employer breached the CBA by failing to establish scheduled rest periods for workers on continuously operating lines, the Eighth Circuit observed that the union had several reasons to believe that arbitration of this issue would not prove successful. The union understood what the rest period practice had been for workers on the continuously operating lines, and although Plaintiff pointed to testimony from workers who stated that there were times when they were not able to take their breaks or to take leave of their responsibilities altogether during a break, suggesting a genuine dispute over a material issue of fact, none of these workers disputed the existence of the longstanding method for taking ad hoc breaks. The Eighth Circuit remarked that no evidence was provided that workers on the continuously operating lines had ever taken breaks on other than an ad hoc basis. Further, in 1990, the union had addressed a similar grievance, wherein the employer had responded that workers were allowed break time without disrupting production. The Eighth Circuit noted that this response specifically explained that the continuously operating line simply could not be shut down for a scheduled break. The Eighth Circuit also observed that the union had negotiated a possible change to the CBA's rest period provision, but because of the impracticality of designating specific times for scheduled rest periods on the continuously operating lines, the proposal was abandoned. Thus, when the union faced this issue in the past, it proposed changing the language of the rest period provision, rather than asserting a violation of the CBA as it was currently written. Considering the undisputed longstanding practice, and the previous experience with this very issue of scheduled rest breaks for employees on the continuously operating lines, the Eighth Circuit opined that the union's decision not to take this particular issue to arbitration was not arbitrary. Finally, Plaintiff asserted that the union acted in bad faith by failing to communicate openly and honestly with him about the investigation and the grievance process. The Eighth...
The Board filed a notice of removal stating that the Union had consented to the removal. The Union at *19. Although the texts of the rule required the formality of filing a paper that is signed and at *18. The Fourth Circuit also held that Plaintiffs had misread the arbitrator’s award in that the of the removal, the Fourth Circuit held that it did not require, in a case involving multiple Defendants, that all Defendants must consent to removal, each signing the notice of removal or filing a separate notice of removal. at *17. The Union here had filed papers early on, signed by its attorney, indicating that it had consented to the removal. Finding the practice of having one attorney represent to the District Court the position of other parties in the case with the intent that the District Court act on such representation as quite common, the Fourth Circuit concluded that the removal was effective. at *18. The Fourth Circuit also held that Plaintiffs had misread the arbitrator’s award in that the arbitrator did not declare them to be permanent employees or that they were entitled to any retroactive compensation and benefits. The arbitrator had stated explicitly that it would be inappropriate to order the

Mayo, et al. v. Board Of Education Of Prince George’s County, 2013 U.S. App. LEXIS 7321 (4th Cir. April 11, 2013). Plaintiffs, a group of temporary employees, brought a class action seeking a declaration that they were permanent employees entitled to pay and protection under a collective bargaining agreement (“CBA”) and an arbitrator’s award under that agreement. Plaintiffs alleged that even though the CBA excluded temporary employees from the bargaining unit, they were entitled to the benefits of an arbitration award entered as the result of arbitration between the School Board and the Union. The District Court dismissed the complaint for failure to state a claim. On appeal, the Fourth Circuit affirmed the District Court’s ruling. The Fourth Circuit found that the Union adequately consented to the notice of removal, that neither substantive claim asserted by Plaintiffs stated a plausible claim for which relief could be granted, and that the District Court did not err in striking Plaintiffs’ motion for reconsideration of the dismissal order. at *27. In a wage-related dispute between the School Board and the Union regarding the School Board’s practice of hiring substitute and temporary employees, the arbitrator, who found that the Board had violated the CBA, had directed and the parties had accordingly reached a settlement wherein the Board had agreed to pay the Union over $1 million as back pay amounts. at *5-8. Plaintiffs alleged that they had become permanent employees after 60 days of employment and that they were therefore entitled to damages. at *8. Plaintiffs also alleged that the Union had breached its duty of fair representation by fraudulently misleading them about the arbitration decision and award in their favor and instead accepting a pay-off from the Board to resolve Plaintiffs’ and temporary employees’ rights. at *9. Plaintiffs further alleged a breach of contract by the School Board, claiming that they were third-party beneficiaries under the CBA and were not paid the compensation and benefits of full-time employees that the CBA mandated. at *10. The Board filed a notice of removal stating that the Union had consented to the removal. The Union had, however, did not sign the notice of removal, nor did it timely file its own notice or a written consent to the School Board’s notice. While the Union filed a motion to dismiss, Plaintiff filed a motion to remand. The District Court denied Plaintiffs’ remand motion and granted the motion to dismiss. at *10. Plaintiffs argued that the Union’s consent to removal was inadequate to effect a removal. The Fourth Circuit, however, found that removal was effective. The Fourth Circuit noted that removal under 28 U.S.C. § 1446 requires unanimous consent of all Defendants, but neither the statute nor case law explains how Defendants should express consent. at *12-14. Noting that different circuits have adopted different approaches to the requirement, the Fourth Circuit joined the Sixth and Ninth Circuits and adopted the less formal approach. The Fourth Circuit held that a notice of removal signed by at least one attorney for one Defendant representing unambiguously that all Defendants consent to the removal was adequate for removal purposes. at *19. Although the texts of the rule required the formality of filing a paper that is signed and that presented the bona fides of the removal, the Fourth Circuit held that it did not require, in a case involving multiple Defendants, that all Defendants must consent to removal, each signing the notice of removal or filing a separate notice of removal. at *17. The Union here had filed papers early on, signed by its attorney, indicating that it had consented to the removal. Finding the practice of having one attorney represent to the District Court the position of other parties in the case with the intent that the District Court act on such representation as quite common, the Fourth Circuit concluded that the removal was effective. at *18. The Fourth Circuit also held that Plaintiffs had misread the arbitrator’s award in that the arbitrator did not declare them to be permanent employees or that they were entitled to any retroactive compensation and benefits. The arbitrator had stated explicitly that it would be inappropriate to order the
conversion to permanent status of those substitute and temporary employees who were ultimately found to have filled what should have been permanent classified positions. Id. at *21. The arbitrator had also concluded that no remedy was warranted for the period of the violation occurring prior to the filing of the grievance, and that for the period after the award, the Board must cease using substitute or temporary employees to do work that should have been done by bargaining unit personnel. Id. at *22. The arbitrator had further concluded that for the period between the Union’s filing of the grievance and the Board’s compliance with the award, the best course was to return to the parties to settlement discussions in the first instance subject to the foregoing proviso that retroactive conversion of the incumbents of such positions was not warranted. Id. at *23. The Fourth Circuit found no language in arbitrator’s award that could provide relief to Plaintiffs. The Fourth Circuit therefore held that Plaintiffs’ theory of breach was based on fundamental misreading of the arbitrator’s decision and therefore implausible. Id. Finally, the Fourth Circuit held that Plaintiffs were not third-party beneficiaries under the CBA between the Board and the Union, and therefore could not bring a breach of contract action against the School Board. The CBA explicitly excluded temporary employees from coverage. Although the CBA did allow the use of substitute or temporary employees to fill authorized positions, the Fourth Circuit noted that it did so to protect those positions for members of the bargaining unit. Id. *24. Thus, finding no support for Plaintiffs’ claim that they were third-party beneficiaries of the CBA, the Fourth Circuit held that the District Court did not abuse its discretion in dismissing Plaintiffs’ claim. The Fourth Circuit also held that the District Court did not abuse its discretion in striking Plaintiffs’ motion for reconsideration which was filed untimely. Plaintiffs had offered no new arguments that required the District Court to alter or amend its dismissing the complaint. Id. at *27. Accordingly, the Fourth Circuit affirmed the judgment of the District Court.

(xiv) Attorneys’ Fee Awards In Class Actions

Boyd, Jr., et al. v. Farrin, 2013 U.S. Dist. LEXIS 110418 (D.D.C. Aug. 2, 2013). Plaintiffs, a farm advocacy organization for African-Americans, and its president, brought a class action for breach of fiduciary duty, quantum meruit, and breach of contract, alleging that Defendants did not fulfill their promise to compensate them for their advocacy work during In Re Black Farmers Discrimination Litigation, No. 08-MC-511 (D.D.C.) (“Pigford II”). Plaintiff John Boyd recovered as a Plaintiff in Pigford v. Glickman, No. 97-1978 (D.D.C.) (“Pigford I”), a class action challenging racial discrimination in the allocation of federal farm assistance. Thereafter, Plaintiffs aggressively campaigned to secure compensation for the late filers who were denied relief under Pigford I, and Boyd’s efforts culminated in the passage of § 14012 of the 2008 Farm Bill, which earmarked $100 million for the late filers. To avail themselves of the earmarked funds, Boyd hired Defendants, who filed Pigford II. The parties in Pigford II settled the action after years of hard work. Plaintiffs also witnessed the passage of the Claims Resolution Act, which appropriated an additional $1.15 billion for the late filers. Id. at *1. Under the Pigford II settlement, the parties agreed to award attorneys’ fees of an amount between 4.1% and 7.4% of an adjusted sum of the settlement funds. When class counsel filed their motion for attorneys’ fees, the attorneys did not mention Boyd or seek any payment on his behalf. The Court in Pigford II denied Boyd’s motion for leave to respond to the attorneys’ fees motion, holding that he had no standing, that Boyd could not participate as a Pigford II Plaintiff because he had received a determination on the merits as a Plaintiff in Pigford I, and that named Plaintiff National Black Farmers Association (“NBFA”) could not be a member of Pigford II’s settlement class because it was not an individual. Defendants moved separately to dismiss Plaintiffs’ complaint for lack of subject-matter jurisdiction and for failure to state a claim. The Court explained that to have standing, a Plaintiff must have suffered an injury-in-fact, i.e., an invasion of a legally protected interest which is both concrete and particularized, and actual or imminent, not conjectural or hypothetical. Id. at *11. Further, an action cannot constitute an invasion of a legally protected interest if the action is of no legal significance. Id. The Court remarked that when attorneys’ fees are available under fee shifting statutes, non-lawyers cannot receive these attorneys’ fees, and Defendants could not have requested attorneys’ fees for Plaintiffs because such a request would have violated Defendants’ ethical obligation not to share fees with non-lawyers. Id. at *12-13. Because Plaintiffs could not collect from the settlement, either as Plaintiffs or via attorneys’ fees, the Court determined that they could not establish a legally protected interest that Defendants had been injured by not seeking to collect these monies for them. Therefore the Court stated that Plaintiffs had no standing to bring claims alleging that they had a right to compensation from the settlement. Regarding the breach of
fiduciary duty claim, the Court determined that while lawyers owe a fiduciary duty to their clients, here, the complaint did not show that Defendants represented Boyd personally, and it only alleged that Defendants represented NBFA and its members, not Boyd. Additionally, while one paragraph of the complaint stated that Defendants represented Plaintiffs in connection with *Pigford II*, Plaintiffs failed to identify any facts to show that Defendants represented Boyd. The Court also determined that Defendants could not have represented Boyd in connection with *Pigford II* because he was precluded from being a Plaintiff in *Pigford II*. Thus, because there was no evidence that Defendants were entrusted with a duty to further any independent interests of Boyd, the Court dismissed the fiduciary duty claim. Although Boyd supported his breach of contract claim with allegations of verbal promises made by Defendants, the Court noted that conclusory allegations of verbal promises to pay, absent a description of the pertinent obligations, could not nudge claims across the line from conceivable to plausible. *Id.* at *20. Finally, the Court opined that the *quantum meruit* claim failed to allege with specificity facts establishing that Defendants knew Boyd expected to be paid. The Court determined that absent factual details of the expectation that Boyd allegedly conveyed to Defendants, his complaint could not justify the conclusion that Defendants were reasonably notified that Boyd, in performing such services, expected to be paid. Accordingly the Court granted Defendants’ motions to dismiss.

*City Of Livonia Employees Retirement Systems, et al. v. Wyeth,* 2013 U.S. Dist. LEXIS 113658 (S.D.N.Y. Aug. 7, 2013). Plaintiffs, a class of stock holders, brought a class action under Securities and Exchange Act of 1934 alleging that Defendant defrauded class members by making materially false misstatements and omissions relating to the safety of a drug called Pristiq. Subsequently, the parties settled the action and the proposed settlement provided for creation of a cash settlement fund in the principal amount of $67.5 million, plus any interest that may accrue thereon. A stock owner, Julia Petri, objected that the requested attorneys’ fees of class counsel were excessive and that the proposed minimum distribution threshold for class members was discriminatory. The Court determined that Petri lacked standing to object, and opined that the requested fees and proposed threshold were reasonable. The Court observed that although Petri purchased shares of Wyeth stock during the class period, she failed to file a subsequent proof of claim to participate in the settlement, and thus lacked any interest in the requested attorneys’ fees or the proposed minimum distribution threshold on the fund, and therefore lacked standing to object. Class counsel proposed a $10 minimum distribution threshold, asserting that a *de minimis* threshold was necessary to ensure an efficient allocation of the settlement fund. The Court agreed that the proposed threshold was necessary to address the disproportionate administrative expense to the fund associated with issuing very small checks. Class counsel also requested a fee of 24.5% of the settlement fund, resulting in a multiplier of 4.2 based on a lodestar of $3,909,020.75. The Court observed that in calculating a reasonable attorneys’ fee in a class action, the Court may set some percentage of the recovery as a fee, and in doing so must consider the time and labor expended by counsel; the magnitude and complexities of the litigation; the risk of the litigation; the quality of representation; the requested fee in relation to the settlement amount; and public policy considerations. *Id.* at *11-12. The Court noted that class counsel expended considerable effort and resources researching, investigating, and prosecuting the claims, at significant risk to itself, and in a skillful and efficient manner, to achieve an outstanding recovery for the class members. Further, the Court remarked that the result was proof of the experience and tenacity of class counsel. Defendants had asserted potentially viable arguments against Plaintiffs’ claims, rendering the settlement a particularly noteworthy victory for the class. The Court however, stated that in a settlement of this size, the Court must caution against the unnecessary siphoning of funds from Plaintiffs. Thus, the Court stated that an award of 20% of the fund represented a sizeable and reasonable payment to Plaintiffs’ attorneys, while also falling in line with similar awards in the Southern District of New York. Additionally, the Court found that that a 3.45 multiplier based on a lodestar of $3,909,020.75 was a reasonable figure given the laudable result in this action. Accordingly, the Court awarded attorneys’ fee of 20% of the settlement fund, or $13.5 million, and expenses in the amount of $461,050.19 and interest calculated at the same rate as that earned on the settlement fund.

Fraley et al. v. Facebook, Inc., 2013 U.S. Dist. LEXIS 124023 (N.D. Cal. Aug. 26, 2013). Plaintiffs, a group of Facebook members, brought a class action contending that Defendant violated § 3344 of the California Civil Code and § 17200 of the California Unfair Competition Law, by utilizing the names, photographs, likenesses, and identities of members of Facebook to promote products and services through a “Sponsored Stories” program. Id. at *2. Subsequently, the parties settled the action, pursuant to which Defendant agreed to pay $20 million. After the Court granted final approval to the settlement, Plaintiffs moved for attorneys’ fees. The Court granted the motion. Plaintiffs contended that their fee request was well justified under the percentage-of-recovery approach, in which a fee award of 25% of a settlement fund is generally considered the benchmark. Id. at *3. Plaintiffs sought fees amounting to 37.5% of the settlement fund, arguing that the recovery included the economic value of the injunctive relief. Plaintiffs claimed that their requested $7.5 million in fees represented either 9.6%, 4.5%, or an even smaller percent of the common fund, depending on which expert valuation of the injunctive relief was employed. The Court stated that under state and federal law, it possessed the discretion to apply either a lodestar method or the percentage-of-the-fund method in calculating a fee award. The Court found that it was appropriate to utilize the percentage of recovery approach, including the 25% benchmark, and although the percentage recovery was sometimes calculated prior to any deduction for costs and settlement administration expenses, here it was more appropriate and reasonable to apply the benchmark percentage to that portion of the settlement that would actually be distributed to the class. Id. at *6. Plaintiffs urged the Court to assign a dollar value to the injunctive relief and to consider it part of the total settlement fund, for purposes of applying a percentage-based fee. Although Plaintiffs offered several methodologies for assigning a dollar value to the injunctive relief, the Court noted that there was nothing to suggest that any class member would obtain monetary compensation as a result of any of the injunctive relief provisions. Accordingly, the Court stated that adopting any particular dollar calculation offered by Plaintiffs was unwarranted, and the value of injunctive relief would not be deemed part of the settlement fund against which a benchmark percentage would be applied. Plaintiffs’ claimed lodestar was somewhat greater than 25% of the settlement fund, particularly given that costs, expenses, and incentive awards were being deducted from the fund prior to application of the percentage. The Court stated that counsel appeared to have avoided some of the excess hours that could result from overstaffing. The Court, however, noted that for the purpose of applying a cross check, Plaintiffs adequately demonstrated that they reasonably incurred...
approximately 8,000 hours in attorney time, which at reasonable hourly rates would result in a lodestar of not less than $4.5 million. The Court remarked that having urged a percentage-based recovery, Plaintiffs could not now reasonably contend that the lodestar cross-check suggested that recovery was too low unless a multiplier were applied. Thus, the Court found that as a cross-check, the lodestar approach confirmed that application of the percentage of recovery model reached an appropriate result. Accordingly, the Court granted attorneys’ fees of 25% of the balance of the settlement funds remaining after deduction of settlement administration expenses, litigation costs, and the incentive awards awarded.

**Hayes, et al. v. Harmony Gold Mining Co., 2013 U.S. App. LEXIS 1941 (2d Cir. Jan. 29, 2013).** A group of purchasers of Harmony Gold’s American Depositary Receipts ADRs, and sellers of Harmony Gold’s put options, brought a securities fraud class action alleging Defendants under-reported the expenses to implement a new accounting software system. The parties subsequently resolved the litigation. The District Court approved the settlement of $9 million, and awarded attorneys’ fees equivalent to one-third of the total recovery. On appeal, Plaintiff Hayes, acting pro se, challenged the settlement and asserted that the District Court’s approval was inappropriate on three grounds: (i) the District Court was not entitled to approve it over the objection of Plaintiff as the sole class representative; (ii) the District Court failed to engage in a quantitative analysis of the proposed settlement; and (iii) attorneys’ fees should not be permitted to exceed 10% of the common settlement fund, unless the settlement was structured on a “per share” or “claims made” basis. *Id.* at *3.* The Second Circuit rejected these challenges and affirmed the District Court’s ruling. As to Defendant’s first contention, the Second Circuit noted that the District Court did not state whether a lead Plaintiff’s objection could prevent a settlement approval. The Second Circuit held, however, that a class representative may not single-handedly veto a proposed settlement. *Id.* at *4.* Second, while the District Court must give comprehensive consideration to all relevant factors in reviewing a settlement, the Second Circuit stated that a settlement hearing should not become a trial. *Id.* Here, the District Court considered a detailed damages analysis by class counsel’s retained expert, including the potential unavailability of foreign witnesses, the difficulty of proving fraudulent intent, and the burdens of expert discovery that diminished the expected financial return of litigation; further, it did so before concluding that the proposed settlement, on terms recommended by an independent and experienced mediator, was procedurally and substantively fair. *Id.* at *4-5.* The Second Circuit opined that no more analysis was required. *Id.* at *5.* Third, Plaintiff did not present any authority to support his proposed 10% cap on attorneys’ fees in common fund cases, nor did he offer any support for his urged “per share” settlement approach. *Id.* at *6.* The Second Circuit reasoned that a percentage fee award from a common settlement fund aligned the interests of class counsel with that of the class. Accordingly, the Second Circuit affirmed the order of the District Court.

**In Re Beacon Associates Litigation, Case No. 09-CV-3907 (S.D.N.Y. May 9, 2013).** This action was one among the plethora of lawsuits arising out of the Bernard Madoff ponzi scheme. Plaintiffs’ claims were among the so-called “feeder fund” lawsuits; in this case, they focused on the activity of Defendant Ivy Asset Management (“Ivy”), through whom the other Defendants – Beacon Associates, Andover Associates, and J.P. Jeanneret Associates, together with various affiliates – invested client funds in the Madoff ponzi scheme. Various lawsuits were filed in the New York and Florida state courts, and all were transferred before the U.S. District Court for the Southern District of New York in the context of a motion to approve a global settlement of all actions in which Ivy was named as a Defendant, which included certain class actions that required the Court’s approval. *Id.* at 6. The Court received no opposition to the settlement or to the plan of allocation that were negotiated by and between Plaintiffs, the New York Attorney General (“NYAG”), and the U.S. Department of Labor. *Id.* at 8. However, there were objections raised to the negotiated fee award of $40,771,538 sought by Plaintiffs’ attorneys. *Id.* at 12, 31. The Court began by recognizing several propositions, including: (i) that class counsel is entitled to be paid a fee out of common fund created for the benefit of the class; (ii) that a Court overseeing a class action can only approve a fee request that is fair and reasonable; and (iii) that the trend in the Second Circuit has been toward use of a percentage of recovery as the preferred method of calculating the award for class counsel in common fund cases, reserving the traditional lodestar calculation as a method of testing the fairness of a proposed percentage. *Id.* at 13. With this context, the Court noted that both the actions were client-driven from the
beginning, unlike all too many class actions, which were lawyer-driven. The Court also noted that Plaintiffs’ counsel took the cases on contingency. The Court further observed that as a percentage of the settlement amount, the requested fees were significantly below the amount that was often allowed in the Second Circuit. However, the Court found that there was excessive and duplicative work undertaken with respect to document review. Id. at 36-40. Accordingly, the Court ordered that each firm’s share of the fee award be reduced by an amount equal to 25% of the dollar amount allocated to the document review. With that reduction, the Court approved the fees as requested as well as the requested expenses. Id. at 39-40.

**In Re Black Farmers Discrimination Litigation, 2013 U.S. Dist. LEXIS 96932 (D.D.C. July 11, 2013).** A group of African-American farmers alleged racial discrimination by the U.S. Department of Agriculture (“USDA”) in the provision of farm loans and subsidies and other federal agricultural benefits. In 1999, the Court entered the consent decree, establishing a non-judicial claims resolution process for the farmers. Over 58,000 farmers (“Plaintiffs”) filed their claim forms late and were unable to pursue relief. In 2008, § 14012 of the Food, Conservation, and Energy Act of 2008 (the “Farm Bill”) was enacted, which enabled a claimant to obtain a determination if he had not previously obtained one. The Farm Bill made no provision for a non-judicial claims resolution process. Numerous complaints were filed by Plaintiffs, all of which were consolidated into this case. Subsequently, the matter was stayed and the parties reached a settlement which provided for a comprehensive, non-judicial claims resolution process for Plaintiffs seeking recovery from a $100 million fund appropriated by the Farm Bill. Furthermore, a $1.25 billion fund was created by the government under the Claims Resolution Act (“CRA”) to carry out the terms of the settlement agreement. Class counsel filed a motion for an award of attorneys’ fees, seeking an award set at 7.4% of the common settlement fund, the maximum amount permitted under the settlement agreement. The Court granted the motion. Class counsel argued that they devoted an immense number of hours to the case and incurred many millions of dollars in unreimbursed out-of-pocket expenses. The government argued that counsel’s work in this case merited compensation at a rate of 4.1% of the common fund. The Court considered various factors in evaluating the fee request under the percentage-of-recovery method. First, with respect to the size of the fund, the Court observed that the CRA’s specific references to the settlement agreement made clear that the execution of an agreement between class counsel and Defendant’s counsel was a necessary catalyst leading to the appropriation of a great deal of additional funding for this litigation. Id. at * 23. The adept negotiation of the settlement agreement by class counsel dramatically benefitted the class by ensuring that a greater number of Plaintiffs would prevail on their claims than otherwise, that these claims would be resolved and payments issued in a timely manner, and that adequate funding would exist to provide meaningful compensation to each successful Plaintiff. Id. at * 26. According to the fee request, more than 80,000 attorney hours and 160,000 paralegal hours were expended in negotiating and preparing 20 drafts of a settlement agreement (work that the Court believed encouraged Congress to fully fund the settlement), working with a claims administrator and ombudsmen appointed by the Court to oversee smooth and fair implementation of the settlement, organizing and convening meetings around the country with claimants, assisting them in preparing claims forms, and facing “novel challenges” such as “devis[ing] a fair and efficacious manner of resolving a potentially very large number of claims with funds drawn from a limited pool.” Id. at *18-19. As Court explained, “[a]n exclusive focus on the lack of discovery, merits briefing, and trial gives short shrift to the unbelievable logistical challenges that confronted class counsel in designing and implementing the claims resolution process in this case . . .” Id. at *19. The Court therefore concluded that the award of 7.4% – totaling $90.8 million – sought by class counsel was neither unusual nor unreasonable.

**Editor’s Note:** The fee award of $90.8 million is one of the largest ever in a discrimination class action.

**In Re Citigroup Inc. Bond Litigation, 2013 U.S. Dist. LEXIS 178436 (S.D.N.Y. Dec. 19, 2013).** The Court approved a $730 million settlement in a Securities Act class action. Class counsel moved for an award of attorneys’ fees equal to 20% of the common fund, or $146 million, plus interest. The Court awarded fees to class counsel in the amount of 16% of common fund, or $116.8 million. Id. at *7-9. The Court observed that awarding attorneys’ fees using a percentage of the fund method was a common practice in the Second Circuit. Id. at *10. In support of its request for a 20% award, class counsel pointed
to a number of cases involving significant recoveries in which Courts awarded fees between 17% and 33% of the common fund. It also noted that all Plaintiffs, seven of which were institutional investors, approved of the fee application, and a 20% award was expressly permitted under the terms of the retainer agreements that class counsel negotiated with the institutional clients. Id. at *11-12. However, the Court noted that in larger settlements, such as this one, case law authorities recognized economies of scale by awarding fees in the lower range. It also pointed to a study which concluded that in settlements in the $550 to $800 million range, the average percentage fee award was 17.3%, with a median of 16.5%. Id. at *13-14. The Court also noted that an empirical study of class action settlements in 2006 and 2007 submitted by one of the objectors found that the percentage awarded in settlements between $500 million and $1 billion was 12.9%. Id. at *14. Although the Court recognized the limited utility of that study because of the small sample size, it took seriously the concerns that a 20% award was too high. It thus found that a 16% award was reasonable, subject to confirmation by a lodestar cross-check. Id. at *15. The lodestar is the product of a reasonable hourly rate and the reasonable number of hours required by the case. Multipliers are typically applied to the lodestar figure to represent the risk of litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys and other factors. In this case, class counsel submitted a lodestar figure of $87,229,248, representing 213,507 hours worked multiplied by a proposed reasonable hourly rate for each attorney working on the matter. Id. at *15-16. Using that figure, the fees requested represented a 1.67 multiplier. Applying the Court’s preferred 16% award resulted in a 1.34 multiplier. The Court noted that the 1.34 multiplier was well within the range of awards approved within the Second Circuit. Id. at *17-18. The Court found that the hours expended were reasonable, though noting that because the lodestar was being used only as a cross-check it was unnecessary for the Court to delve into each hour of work performed by counsel to ascertain whether the number was reasonable. Id. at *19-20. However, the Court concluded that the blended hourly rate for staff attorneys of $385 was too high. The Court observed that staff attorneys worked about 78% of the total hours performed by class counsel. Reducing the rate to $300 per hour resulted in a multiplier of 1.59, and a rate of $250 per hour resulted in a multiplier of 1.8. Id. at *21-24. Thus, the Court concluded that a suitable reduction in the hourly rate of staff attorneys further supported its conclusion that a 16% of the fund award was reasonable. Id. at *24. The Court then considered the factors of the magnitude and complexities of the litigation, the risks of the litigation, the quality of the representation, the requested fee in relation to settlement, and public policy considerations. It concluded that each of these factors supported a substantial award, and that 16% of the fund was reasonable. Id. at *24-31.


Plaintiffs, a group of direct and indirect purchasers of flights between the United States and Korea, brought an antitrust class action asserting price fixing by several airlines. The parties subsequently settled, and the Court granted settlement approval. Plaintiffs’ counsel then applied for an award of attorneys’ fees in the amount of $12.5 million. That amount equaled 25% of the cash portion of the settlement fund and 25% of the coupon portion of the settlement fund. The District Court found that the amount requested was fair, appropriate, and reasonable and awarded the requested fees. The Court noted that pursuant to the order granting preliminary approval of the settlement, notice was provided to the class informing class members that Plaintiffs’ counsel intended to apply for an award of attorneys’ fees in an amount not to exceed the amount requested in Plaintiffs’ application. Id. at 2. The Court found that the percentage of the fund method in common fund cases was the prevailing practice in the Ninth Circuit for awarding attorneys’ fees. The Court found that the settlement conferred substantial benefits on the class. In awarding Plaintiffs’ counsel 25% of the coupons provided by the settlement, the Court took into account the value of the coupons to be redeemed in light of the characteristics of the coupons and other factors. Those other factors included, among other things: (i) the freely tradable nature of the coupons, which can be sold for cash without the need to purchase any goods or services; (ii) the lengthy three-year term of the coupons; (iii) the six-month extension of their term for any cy pres distribution; (iv) the absence of blackout dates; (v) the fact that no fees will be charged by Defendants for the redemption of the coupons; (vi) the fact that an experienced coupon administrator had been appointed by the Court to make a market to facilitate the trading exchange of the coupons; (vii) the fact that class members include international travelers who travel often between the U.S. and Korea, and (vii) the fact that Plaintiffs’ counsel will be paid in the same coupons...
as the class for the portion of the settlement attributable to the coupons. *Id.* at 3. In approving the amount of the settlement, the Court took into account, among other things, the results achieved by the settlement, the substantial risks and complexity of the litigation, the contingent nature of the fee and the financial burden carried by Plaintiffs’ counsel, the length of time that the litigation had been pending, awards in similar cases, percentages in standard contingency fee agreements in similar individual cases, the non-monetary benefits obtained in the settlements, the reaction of the class, and the work and labor of Plaintiffs’ counsel, and the attorneys’ lodestar incurred in prosecuting the litigation. *Id.* The Court also found that the settlement was achieved following extensive arm’s-length negotiations between the parties and that the settlements were negotiated in good faith and in the absence of collusion. The Court considered the objections raised by objectors and found them to be without merit. *Id.* at 4-5.

In Re Southwest Airlines Voucher Litigation, 2013 U.S. Dist. LEXIS 143146 (N.D. Ill. Oct. 3, 2013). Plaintiffs, two individuals, brought a class action alleging that Defendant committed a breach of contract, was unjustly enriched, and violated various state consumer protection laws when it stopped honoring drink vouchers that it had given to airline travelers who purchased premium-priced “business select” tickets. *Id.* at *2-3. The vouchers were redeemable on any flight for an alcoholic drink that could otherwise cost $5. The parties eventually entered into settlement negotiations and reached an agreement to settle under which each class member was allowed to submit a proof of claim form and supporting documents to receive one replacement drink voucher for each unredeemed drink voucher. The settlement called for the replacement vouchers to expire one year after they were issued and barred Defendant from cancelling any vouchers issued in the future that did not contain expiration dates. The settlement also included payment of $15,000 as incentive awards to each of the two named Plaintiffs. Plaintiffs’ counsel petitioned for an award of $3 million in attorneys’ fees. The Court partly granted Plaintiffs’ petition by awarding fees in the amount of $1,332,206.25. First, the Court determined that the CAFA permits use of the lodestar method to determine attorneys’ fees. *Id.* at *11. The Court acknowledged that § 1712(a) of the CAFA precludes an attorneys’ fee award based on the value of the unredeemed replacement coupons, as it provides that if the settlement is for a recovery of coupons, the portion of any fee award attributable to the coupon award shall be based on the value to class members of the coupons that are redeemed. *Id.* at *13. The objectors to the settlement argued that any fee award in the action was attributable to the award of coupons within the meaning of § 1712(a). The Court, however, disagreed. It found that § 1712(b) authorizes a lodestar-based fee award in a case like this one. The Court noted that § 1712(b) contained three relevant provisions, including: (i) for a recovery of coupons to class members; (ii) allowance of a fee award to be based on something other than the value of the coupons; and (iii) authorization of the lodestar method. *Id.* at *14. The objectors asserted that any fee award here was attributable to the award of coupons within the meaning of § 1712(a), and thus the only appropriate basis for a fee award was the value of those coupons that actually end up getting redeemed by class members. *Id.* The Court ruled that the objector’s argument was based on an incorrect interpretation of § 1712(a). According to the Court, the statute provides in a straightforward way that if a portion of the coupon recovery was not used to determine the attorneys’ fee, the lodestar method shall be used. *Id.* at *18. The Court explained that the three sub-sections of § 1712 indicated that they were constructed as parallel methodologies that were available as alternatives when a class settlement involved recovery of coupons. *Id.* at *18-19. The Court concluded that the statute created the option of calculating an attorneys’ fee award in a mixed relief case via the lodestar method, as a purely contingent fee, or as a combination of the two. *Id.* at *20. The Court also added that this reading of § 1712 was consistent with Congress’ evident purpose of preventing excessive fee awards based on the largely illusory value of unredeemed coupons. *Id.* at *23. The Court therefore agreed with Plaintiffs’ contention that it might use the lodestar method to determine an appropriate fee. In applying the lodestar method, the Court determined that allowable attorneys’ fees totaled $1,332,206.25. The Court found that the evidence offered by Plaintiffs did not support the rates that Plaintiffs’ attorneys sought, and the legal and factual issues involved the case were not particularly complex. *Id.* at *33-35. Further, the settlement had returned to the class members almost exactly what they lost (namely, drink vouchers), and Plaintiffs’ counsel had not faced significant risk of defeat on the claims as the existence of a contract was a relatively straightforward proposition and evidence of the breach appeared to have been largely a matter of public record. *Id.* at *35-39. All these factors suggested to the Court a multiplier significantly less than the figure.
Plaintiffs proposed was appropriate, and thus the Court applied a multiplier of 1.5 to the lodestar figure of $888,137.50 that yielded attorneys’ fees totaling $1,332,206.25.

**In Re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, And Products Liability Litigation, 2013 U.S. Dist. LEXIS 123298 (C.D. Cal. July 24, 2013).** In this products liability class action brought after drivers across the United States began reporting that Toyota vehicles suddenly and unintentionally accelerated, the Court found that the parties’ settlement was fair and adequate, and tentatively found that the proposed award of fees, costs, and compensation fair, reasonable, and adequate. Under the settlement agreement, Toyota agreed to pay to Plaintiffs’ counsel separately from the settlement funds, an award of attorneys’ fees and expenses in the actions in the amount of $200 million in fees, plus up to an additional $27 million in expenses incurred prior to the fairness hearing in the actions. *Id.* at *290. Plaintiffs’ counsel contended that as the settlement agreement exceeded $1.6 billion, they requested the Court to approve attorneys’ fees in the amount of $200 million, representing around 12.3% of the settlement value. *Id.* at *298. The Court remarked that this was one of the largest automobile class action settlements in history. Plaintiffs' expert estimated the total economic losses caused by the alleged diminished value to be $590 million. The Court observed that class members who submitted eligible claims against the Cash in Lieu of Brake Override System (“BOS”) Fund could possibly recover 100% of the estimated value of the BOS, depending on the jurisdiction in which they resided and the value of the claims. *Id.* at *300. The Court also noted that the non-monetary benefits for the class were also valuable. Over 3.5 million class members who currently owned or leased a qualifying vehicle would be eligible to receive BOS, and in monetary terms, the benefit was valued at approximately $400 million. *Id.* at *301. Accordingly, the Court concluded that Plaintiffs’ counsel obtained those benefits for the class while facing tremendous risks, and their results were exceptional. Therefore, the Court ruled that this factor weighed in favor or approving the entire proposed fee award. *Id.* at *302. As to the risks and complications, the Court noted the risks included: (i) neither the NASA nor National Highway Traffic Safety Administration were able to identify a defect in the electronic throttle control system in vehicles; (ii) two interlocutory appeals were pending; and (iii) the uncertainty as to the admissibility of Plaintiffs’ expert reports, which all supported an approval of the proposed fee award. *Id.* at *303. As to the other factors such as the skill of counsel, the contingent nature of the fee, and awards in similar cases, those factors also weighed in favor of the fee award. The Court received 20 objections as to the fee award mostly contending that the fee award was excessive, with several objectors contending that the lodestar multiplier was too high. The Court remarked that it has considered all the circumstances of the case and performed a lodestar cross-check, and concluded that the proposed fee award, which represented only 12.3% of the total settlement value, was fair, reasonable, and adequate. *Id.* at *315. The Court, however, remarked that it could not complete its analysis before the final approval of the settlement agreement was granted. Similarly, the Court found that reimbursement costs request of $27 million – a discount from the $30,606,117 in the total costs incurred thus far – was also fair. *Id.* at *317. Because the Court had found certain difficulties in the plan of allocation, it kept the final approval in abeyance.

**In Re TFT-LCD (Flat Panel) Antitrust Litigation, 2013 U.S. Dist. LEXIS 6607 (N.D. Cal. Jan. 14, 2013).** Plaintiffs, a group of direct purchasers of televisions, monitors, and notebook computers that contained liquid-crystal display (“LCD”) panels, brought an antitrust class action alleging price fixing among global manufacturers of LCD panels. The parties subsequently reached a settlement. Pursuant to the settlement, Plaintiffs filed a motion for attorneys’ fees, reimbursement of expenses, and incentive awards. The Court granted the motion. The motion sought an award of attorneys’ fees of 30% of the $68 million settlement fund by the settlement payments from the AUO and Toshiba Defendants. Co-lead class counsel for Plaintiffs also sought $2,554,158.66 in additional expenses incurred in connection with the prosecution of this action that were not previously requested and awarded. Finally, the motion sought incentive awards of $5,000 each for the 11 court-appointed class representatives. Additionally, counsel for the four class representatives who testified at trial filed a request that those Plaintiffs receive an additional incentive award of $10,000, for a total incentive award of $15,000 each. At the hearing, counsel for the non-testifying class representatives requested that those class representatives also receive a total incentive award of $15,000 each. The Court opined that the amount of attorneys’ fees requested was fair and
reasonable under the percentage-of-the-fund method, which was confirmed by a lodestar cross-check, which revealed a negative multiplier of 0.86, based on 46,763.90 hours of work and a collective lodestar of $23,688,289.70. Id. at *43-44. The award of 30% was warranted for the excellent result obtained for the class; the quality and quantity of work performed by all the firms representing the class, including extensive motion practice, trial preparation, mediation, and trial, all involving complex and difficult issues of fact and law; the risks faced throughout the litigation; and a reasonable lodestar cross-check. Further, Plaintiffs received payment from one opt-out Plaintiff in the amount of $200,000 for access to their experts’ work product. The Court noted that it was possible that other opt-outs could agree to pay for use of the experts’ work product to use in their own cases, and class counsel confirmed that such payments would be added to the settlement fund, and that they would not request attorneys’ fees on those amounts. The Court further found that the 11 class representatives were entitled to the requested incentive awards, totaling $95,000 for the risks undertaken and the work performed for the benefit of the class, including consultation with Plaintiffs’ counsel, trial testimony, and attendance at trial by all of the class representatives at various times to ensure that at least one class representative was present at each day of trial. Id. at *46.

In Re TFT-LCD (Flat Panel) Antitrust Litigation, 2013 U.S. Dist. LEXIS 51271 (N.D. Cal. Mar. 29, 2013). Plaintiffs in this multi-district class action litigation alleged a long running conspiracy among Defendants and their co-conspirators to fix prices of liquid-crystal display (“LCD”) panels sold indirectly to Plaintiffs and other members of the indirect purchaser classes. Plaintiffs alleged that this conduct violated § 1 of the Sherman Act and also brought claims for restitution, disgorgement, and damages under the antitrust, consumer protection, and unfair competition laws of 23 states. The Court previously had granted the indirect purchaser Plaintiffs’ (“IPPs”) motion for class certification, certifying a nationwide class and 23 state-wide classes. Some parties settled and Plaintiffs filed a motion for final approval as well as motions for attorneys’ fees, expenses, and incentive awards, which the Court granted. The Court appointed a Special Master and assigned him the task of assisting the Court by issuing reports and recommendations on the subjects of the parties’ expenses and attorneys’ fees. The IPP class counsel sought an award of 28.5% of the settlement fund, which the Special Master had approved and recommended, but to which objectors filed objections. The Court found that the ultimate result achieved by IPP counsel, a settlement of approximately $1.08 billion, was exceptional. This represented approximately 50% of the potential recovery according to the IPP’s damages experts. Additionally, the Court noted that this case implicated provisions of the Foreign Trade Antitrust Improvements Act in relatively unprecedented ways. In grappling with the complicated issues, the Court noted that IPP counsel prosecuted this action for six years, advanced large amounts of money to fund the many expensive costs of litigation, and with no guarantee of payout at the end. Id. at *63-64. The Court observed that the primary objection was that 28.5% of the settlement fund for attorneys’ fees exceeded the 25% benchmark identified in Vizcaino v. Microsoft Corp., 290 F.3d 1043 (9th Cir. 2002). Id. at *66. The Court, reasoned that the complexity of this case and the excellent result obtained merited a 28.6% fee award. In addition to determining the amount of the total fee award, the Special Master was tasked with determining the allocation of the fee award among the 116 law firms that contributed to this litigation. The Special Master first employed the lodestar analysis for each firm reduced by 20% to eliminate inefficiencies. He capped individual billing rates at $1,000 per hour and applied a maximum of about $350 per hour for document review, with some leeway among other things. Fifteen law firms objected to the report, but the Court concluded that the Special Master’s overall methodology was correct in determining the allocation of the fee awards. The Court found that the use of lodestar method, including the use of multipliers, to determine the allocation of fees among the law firms involved was entirely proper in view of the circumstances of this case. Accordingly, the Court awarded attorneys’ fees of $309,725,250 to IPP class counsel which represented 28.6% of the settlement fund. Id. at *62, 68. The Court also awarded $8,736,131.43 for expenses incurred by IPP class counsel. Id. at *92-93.

In Re Vioxx Products Liability Litigation, 2013 U.S. Dist. LEXIS 61513 (E.D. La. April 30, 2013). Plaintiffs brought a class action under state consumer protection laws alleging that the drug Vioxx, manufactured by Merck, had an increased risk of cardiovascular problems. The Judicial Panel on Multidistrict Litigation (“MDL”) transferred thousands of Vioxx individual, class actions, and state and local
government enforcement actions to the U.S. District Court for the Eastern District of Louisiana to coordinate discovery and to consolidate pre-trial matters. Concurrently and independently, the U.S. Department of Justice initiated an investigation of Merck’s conduct with respect to Vioxx, which culminated in Merck pleading guilty to a criminal charge and agreeing to pay a substantial civil penalty. In connection with that process, representatives of the National Association of Medicaid Fraud Units (“NAMFCU”) and Merck negotiated a pattern settlement agreement which the 50 states could receive a portion of the civil penalty as reimbursement for amounts expended on Vioxx through the Medicaid program. Some states including the Commonwealth of Pennsylvania (“the Commonwealth”) rejected the NAMFCU offers and continued litigating in the MDL. Thereafter, through mediation, the Commonwealth and Merck reached a settlement. The Plaintiffs’ Steering Committee (“PSC”) then moved for a common benefit assessment from the fee paid to the Commonwealth’s outside counsel. The Court granted the motion in part. First, the Commonwealth argued that the Court lacked subject-matter jurisdiction over the motion. The Court remarked it had the authority to award common benefit assessment from the fee paid to the Commonwealth’s outside counsel. The Court granted the motion in part. First, the Commonwealth argued that the Court lacked subject-matter jurisdiction over the motion. The Court remarked it had the authority to award common benefit fees in this case as part of its inherent managerial authority over counsel appearing before it in association with the Vioxx MDL. Next, the Commonwealth also argued that the PSC’s request raised sovereign immunity concerns, because it actually constituted a claim for damages against the Commonwealth, and that the PSC was attempting to interfere with the allocation of state funds, which constituted an interference with a special sovereign interest of the Commonwealth. The Commonwealth further argued that PSC was attempting to interfere with the Commonwealth’s authority to dictate who was allowed to represent the Commonwealth, which was a highly circumscribed prerogative of the Commonwealth alone under state law. The Court observed that the PSC was seeking to recover from the Commonwealth’s private counsel a percentage of the fee that counsel received from his client, just as it had done with respect to the numerous personal injury claimants who pursued claims in this litigation. Id. at *17. The Court noted that the PSC’s request involved funds that the Commonwealth had already paid, rather than seeking to recover funds directly from the Commonwealth itself. Thus, the Court opined that sovereign immunity did not bar the PSC from obtaining a common benefit assessment from the Commonwealth’s private counsel. The Court also stated that to establish whether a common benefit fee was appropriate in this case, it had to determine whether the Commonwealth actually benefited from the PSC’s work. Because the Commonwealth and the PSC disagreed significantly on various factual issues, the Court remarked that further investigation of the facts would be required for proper resolution of the matter, and thus declined to make any holding in this regard. The Court referred this matter to Special Master to make a recommendation on the appropriate amount, if any, of a common benefit fee. Accordingly, the Court granted in part the PSC’s motion.

Maine State Retirement System, et al. v. Countrywide Financial Corp., Case No. 10-CV-302 (C.D. Cal. Dec. 5, 2013). In this consolidated class action brought by individuals and entities who purchased or otherwise acquired beneficial interests in certain mortgage backed securities (“MBS”), Plaintiffs alleged that Defendants made materially untrue or misleading statements or omissions regarding its loan origination practices in public offering documents. After discovery, the parties settled, and the Court approved the final settlement, and awarded attorneys’ fees and expenses. The parties agreed to settle all claims in exchange for Defendant making a payment of $500 million. The Court reviewed the proposed class action settlement and plan allocation, and found that both were, fair, reasonable, and adequate. Plaintiffs’ counsel had requested the Court approve a fee of 17% of the gross settlement fund, or $85 million, plus reimbursement for litigation expenses in the amount of $2,977,145. Plaintiffs’ counsel argued that the fee was appropriate based on the complexity of the litigation, the favorable result achieved, the normal fees for similar complex cases, and the risks involved. Although Defendants did not oppose the request for attorneys’ fees, the Court remarked that it had the authority and duty to pass upon the fairness of the attorneys’ fees request independently of whether there was objection. The Court noted that in assessing the reasonableness of attorneys’ fees, it had discretion in common fund cases to choose either the percentage-of-the-fund method or the lodestar method. Id. at *31. Under the percentage-of-recovery method, the prevailing attorneys are awarded a percentage of the common fund recovered for the class. Id. The Court noted that in applying this method, a benchmark of 25% of the fund is typically set as a reasonable fee award, and justify any increase or decrease from this amount based on circumstances in the record. The Court noted that the risk, expense, complexity, and likely duration of further litigation
factors favored award of attorneys’ fees. The Court remarked that it was difficult to understate the risks to recovery if the litigation had continued. The Court remarked that Countrywide going into bankruptcy remained a possibility, which only heightened the risks associated with continued litigation. The Court observed that even without bankruptcy, it remained unclear whether Countrywide’s assets were sufficient to cover its accumulated liabilities. The Court noted that prior to obtaining any recovery on the claims, the parties had acknowledged that the Ninth Circuit must resolve three discrete questions in Plaintiffs’ favor, which could have proved quite costly to Plaintiffs’ claims. Accordingly, the Court concluded that these risk factors favored an award of attorneys’ fees. In addition, the Court noted that the procedural history of the action demonstrated that Plaintiffs’ counsel had over the last six years persisted through numerous adverse rulings at both the state and federal levels and litigated issues of first impression in the Ninth Circuit and in California state courts to maintain the viability of their claims. During this time, the Court noted that Plaintiffs’ counsel expended considerable resources on discovery requests and motion practice. Because the fees in class actions are entirely contingent, the Court noted that Plaintiffs’ counsel faced a continual possibility of obtaining no pay out even after incurring significant expenses. Thus, in the light of contingent nature of any award, coupled with the financial burdens attendant to litigating the class action, the Court concluded that a 17% fee was reasonable.

Randle, et al. v. H&P Capital, Inc., 2013 U.S. App. LEXIS 4506 (4th Cir. Mar. 5, 2013). Plaintiff brought a class action alleging violations of the Fair Debt Collection Practices Act (“FDCPA”) against Defendants for leaving voice-mail messages that falsely implied that legal action had been taken, and by willfully engaging in other conduct that could reasonably be expected to abuse or harass. Prior to any ruling on class certification, the parties settled and Defendants agreed to pay $6,000 to Plaintiff plus attorneys’ fees incurred to prosecute her individual claims. The District Court awarded Plaintiff $76,876.59 in attorneys’ fees and costs, and Defendants appealed the award. Id. at *2-3. The Fourth Circuit dismissed the appeal in part and affirmed in part. Id. at *1. The Fourth Circuit noted that awarding attorneys’ fees is guided by 12 factors adopted in Barber v. Kimbrell’s, Inc., 577 F.2d 216, 226 (4th Cir. 1978), which include the time and labor required, the difficulty of the issues litigated, customary fees in similar situations, and the results obtained. These factors, however, usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate, i.e., the lodestar. Id. at *4. The FDCPA, however, does not mandate a fee award in the lodestar amount, and the District Court maintains the discretion to depart from it in appropriate circumstances. Id. at *5. Defendants argued that the District Court abused its discretion in awarding attorneys’ fees because the award failed to account for Plaintiff’s lack of success on her class claims and efforts to obtain non-monetary relief. The Fourth Circuit observed that the most critical factor in determining the reasonableness of an attorneys’ fee award is the degree of success obtained, and that a District Court may decrease the amount of fees that might otherwise be awarded in order to account for Plaintiff’s limited success. Id. at *6. The Fourth Circuit, however, stated that Plaintiff’s recovery was nominal, and that she was highly successful, settling all of her claims for $6,000, six times the maximum recovery amount permitted for individual actions under the FDCPA, and the District Court's fee award accounted for the work performed by Plaintiff’s attorneys in pursuing this successful outcome. Finally, the Fourth Circuit rejected as wholly without merit Defendants’ argument that the District Court abused its discretion in failing to significantly reduce the attorneys’ fees awarded in this case on the basis that Plaintiff did not prevail on her claims and her attorneys allegedly engaged in excessive billing. Accordingly, the Fourth Circuit dismissed the appeal in part and affirmed the District Court’s judgment in part. Id. at *6-8.

Silverman, et al. v. Motorola Solutions, Inc., 2013 U.S. App. LEXIS 16878 (7th Cir. Aug. 14, 2013). Plaintiffs, a group of investors, brought a class action alleging that Defendants made false statements regarding its 3G mobile phone. Plaintiffs contended that when this problem became public, their stocks declined. Plaintiffs asserted claims under the Securities and Exchange Act. After four years of litigation, Defendants agreed to pay $200 million to the class to settle the litigation. Two class members objected (the “Objectors”) to class counsel’s request for 27.5% of the settlement award in attorneys’ fees. The District Court overruled the objections and approved the settlement; it also awarded over $4.7 million to in litigation costs to Plaintiffs’ attorneys. On the Objectors’ appeal, the Seventh Circuit affirmed the District Court concluded that a 17% fee was reasonable.
Court’s ruling. At the outset, the Seventh Circuit dismissed one of the Objector’s appeals because he filed a late objection to the award of attorneys’ fees, and as he also did not file a claim to his share of the recovery; the Seventh Circuit held that he lacked any interest in the amount of fees as he would not recover anything on account of his failure to file a claim for a settlement share. The other Objector contended that the award was improper because it was fixed at the end of the litigation; he maintained that fee schedules should be set at the outset by auction in which the judge picks the low bidder. The Seventh Circuit observed that solvent litigants do not select their own lawyers by holding auctions, because auctions do not work well unless a standard unit of quality can be defined and its delivery verified. Although establishing a fee structure at the outset of a lawsuit was desirable, ex ante fee structures were not the only lawful means to compensate class counsel in common-fund cases. Id. at *3-4. The Seventh Circuit opined that attorneys’ fees in class actions should approximate the market rate. The Seventh Circuit stated that the costs of litigation did not depend on the outcome and much of the expense must be devoted to determining liability, which did not depend on the amount of damages; in securities litigation, damages often are calculated mechanically from movements in stock prices. The Seventh Circuit remarked that awarding counsel a decreasing percentage of the higher tiers of recovery enabled them to recover the principal costs of litigation from the first bands of the award, while allowing the clients to reap more of the benefit at the margin. Id. at *8. Therefore, the Seventh Circuit affirmed the District Court’s order.

Stetson, et al. v. West Publishing Corp., 2013 U.S. Dist. LEXIS 178408 (C.D. Cal. Sept. 20, 2013). Plaintiffs, a group of purchasers of legal bar exam review courses, brought a class action alleging violations of §§ 1 and 2 of the Sherman Act. After substantial litigation, the parties agreed to a settlement. Thereafter, the Court preliminarily approved the settlement agreement and conditionally certified the settlement class. Subsequently, Plaintiffs sought final approval of the settlement, and an award of attorneys’ fees and costs associated with prosecuting and settling the lawsuit. The Court granted the motion in part. The Court stated that all payments to settlement class members, class counsel, and the claims administrator should be disbursed pursuant to the procedures specified in the settlement agreement. The Court determined that Plaintiffs’ counsel, Harris & Ruble and the Law Offices of Perrin Disner, were qualified to represent the settlement class, and therefore the Court confirmed their appointment as class counsel. Class counsel claimed attorneys’ fees in the amount of $1.9 million and reimbursement of incurred costs in the amount of $49,934.89. Id. at *7. The Court, however, awarded the attorneys’ fees in the amount of $585,000 and reimbursement of $20,588.17 in costs given the value of the work to the class. Id. The Court found that it was appropriate to grant incentive awards in the amounts of $4,000 to each of the five class representatives in recognition of their contributions to the action and their services to the settlement class. Accordingly, the Court gave final approval of the class action settlement with reductions in fees and costs.

United States v. The City Of New York, 2013 U.S. Dist. LEXIS 125461 (E.D.N.Y. Aug. 30, 2013). The U.S. Department of Justice brought a class action against Defendant alleging that certain aspects of Defendant’s policies for selecting entry-level firefighters for the New York City Fire Department (“FDNY”) violated Title VII of the Civil Rights Act. Several individuals and the Vulcan Society (“interveners”) intervened in the action alleging similar claims on behalf of a putative class of black entry-level firefighter candidates. The Court had certified a class and granted summary judgment to Plaintiff, finding that Defendant’s exams had an unlawful disparate impact under Title VII. The Court had also granted the interveners’ motion for summary judgment regarding disparate liability, holding that Defendant’s exams constituted intentional discrimination as well as disparate impact discrimination. Id. at *7. The Court had further entered a remedial order enjoining Defendant from using the discriminatory exams and a final order providing for priority hiring, back pay, and retroactive seniority relief to eligible individual claimants who were determined to be victims of Defendant’s discrimination. Id. at *8-9. While Defendant appealed the scope of remedial order and final order, the interveners cross-appealed the entry of judgments dismissing their claims against the individual Defendants. The Second Circuit had then vacated the grant of summary judgment for disparate treatment liability, but upheld the injunctive relief order. Id. at *10. The interveners subsequently moved for interim fees and costs, arguing that because the relief they sought was largely upheld by the Second Circuit, their motion for fees was ready for decision without additional briefing. Id. at
11. The Court partly granted the interveners’ motion, finding that they were entitled to $3,556,609.20 interveners’ fees, although they had requested $7,710,542 in attorneys’ fees. The interveners argued that they were entitled to hourly rates prevailing in the Southern District of New York, rather than the Eastern District. Id. at *20. The Court found that the interveners failed to put forth any evidence that they actually contacted any attorneys in the Eastern District. The Court therefore held that the interveners could not overcome the presumption of in-forum rates without having made any contacts within the Eastern District. Id. The Court also made a 40% across-the-board reduction of the interveners’ requested hours. The Court found that the interveners were ultimately unsuccessful in their claims for class certification as to certain issues and their claims relating to the non-economic benefits. Id. at *35. The Court therefore found that the interveners were the prevailing party for approximately 75% of the hours they billed during the relevant period, and accordingly made a 25% across-the-board reduction to the requested hours. Id. at *36. The United States, as Plaintiff, had taken the lead on several efforts relating to the disparate impact claim, while the interveners championed many of their own efforts on injunctive relief. The Court therefore found that duplication of efforts with Plaintiff merited a further 10% reduction. Id. at *37. Finally, the Court indicated that there was some unnecessary staffing, which merited a further across-the-board reduction of 5%. Id. at *38-39. The Court found the 40% reduction to be appropriate given that the interveners successfully sought and prevailed upon wide-ranging relief that not only remedied discrimination in the FDNY, but also ensured that future generations of firefighters would have equal opportunity to become a firefighter, regardless of their race. Id. at *39. The Court also denied the interveners’ motion for expert and consultant fees, as they failed to provide sufficient information upon which the Court could conclude that the expert fees paid related to the aspects of the case where the interveners were the prevailing party, or that they resulted in materials used in the litigation. Id. at *45. However, because of nature of the action and Court’s reliance on the interveners’ experts in several of its orders, the Court declined to summarily deny the request for recoupment. The Court therefore ordered the interveners to submit further materials listing, for each expert, a short summary of the type of work performed for each corresponding bill. Id. at *46.

(xv)  Intervention Rights In Class Actions

* George, et al. v. Uponor, Inc., 2013 U.S. Dist. LEXIS 27579 (D. Minn. Feb. 28, 2013). Plaintiff, a homeowner, brought a class action alleging design and manufacturing defects in the F1960 brass fittings marketed and sold by Defendants. Plaintiff brought common law claims on behalf of a national class of homeowners, and also alleged a violation of New Mexico’s Unfair Trade Practices Act on behalf of a sub-class made of New Mexico homeowners. Curtis and Tina Smith (“Smiths”) filed a motion to intervene, arguing that Plaintiff’s putative nationwide class failed to adequately represent the affected California homeowners because Plaintiff had not asserted a claim under California’s Right of Repair Act (“RORA”). The Smiths argued they could potentially recover damages simply by owning defective parts, regardless of any subsequent damage those alleged defects may have caused because the RORA forgoes the economic loss doctrine. Id. at *6-7. The Court denied the Smiths’ motion to intervene. Id. at *2. Plaintiff argued that the Smiths did not have standing to intervene at that time because the class parameters were yet to be determined. The Court noted the rule in United States v. Metro St. Louis Sewer District, 569 F.3d 829, 833-34 (8th Cir. 2009), that an intervener has standing to intervene in an action is related to his or her injury. Id. at *9. However, the issue raised here was one of timing and procedural propriety because the class of Plaintiffs had yet to be certified. The Court noted that where the named Plaintiffs have viable claims, intervention before class certification is not appropriate as it is premature. Id. at *10. Further, the injection of additional legal or factual issues may unnecessarily complicate class certification and create unintended inefficiencies. Id. Rule 23(d)(1)(B)(iii) further indicates intervention is most appropriate after certification, as it provides that a Court may issue an order notifying existing class members of their right to intervene and ensure adequate representation of the class. Id. at *11. The Court observed that the Smiths’ motion was premature because class certification had yet to take place. Id. at *12. The Court further determined the Smiths did not adequately indicate how their ability to protect their interests would be impaired or impeded in the present action. Id. The Court noted that the RORA claims were functionally identical to those already asserted in three previously filed class actions. Id. The Smiths, as putative class members in each of these actions, had the ability to pursue their RORA claim separately but failed to do...
so. The Court observed that the Smiths had participated in discovery in *Sweidan v. Wirsbo Co.*, No. RIC 10014729 (Cal. Sup. Ct.), and thus acknowledged their status as putative class members in that action. *Id.* Although the Smiths indicated that this action could potentially delay or impede the progress of litigation in *Sweidan*, the Court opined that delays alone were not enough to justify intervention by right. *Id.* at *13. Accordingly, the Court denied the motion to intervene.

(xvi) **Collateral Estoppel, Res Judicata, And Settlement Bar Concepts Under Rule 23**

*Comer, et al. v. Murphy Oil USA, Inc.*, 718 F.3d 460 (5th Cir. 2013). Plaintiffs, a group of property owners, filed a putative class action against Defendants in 2005 (‘*Comer I*’) alleging that Defendants’ operation of energy, fossil fuels, and chemical industries caused the emission of greenhouse gasses that contributed to global warming, which increased the intensity and magnitude of Hurricane Katrina, which in turn destroyed Plaintiffs’ property. The District Court dismissed the action with prejudice, holding that Plaintiffs lacked standing, and that their claims were not justiciable under the political questions doctrine. On appeal, a three-judge panel of the Fifth Circuit reversed and remanded, in part, holding that Plaintiffs had standing to bring claims for nuisance, trespass, and negligence, and that these claims were justiciable under the political questions doctrine. Thereafter, Defendants filed a petition for *en banc* review. The Fifth Circuit granted Defendants’ *en banc* petition, which, pursuant to Fifth Circuit Rule 41.3, automatically vacated the three-judge panel’s opinion. Before the Fifth Circuit reheard the case *en banc*, the Fifth Circuit determined that it lacked the necessary quorum due to recusals of eight of the sixteen Fifth Circuit judges. Thus, the Fifth Circuit dismissed the appeal in its entirety, which reinstated the District Court’s original order. Plaintiffs then filed a petition for a *writ of mandamus* to the Supreme Court, seeking review of the Fifth Circuit’s dismissal of the appeal, but the Supreme Court denied their petition. Subsequently, the same Plaintiffs brought this action – *Comer II* – asserting nuisance, trespass, and negligence claims arising from Hurricane Katrina against many of the same Defendants. Defendants moved to dismiss the class action on various grounds, including that Plaintiffs’ claims were barred by the doctrine of *res judicata*. The District Court agreed with Defendants’ argument and dismissed Plaintiffs’ claims. Plaintiffs then appealed. On appeal, the Fifth Circuit noted that with respect to the elements of *res judicata*, the parties only disputed the third element of whether *Comer I* was a final judgment and on the merits. *Id.* at 467. As to whether the District Court’s decision in *Comer I* was a final judgment, the Fifth Circuit reasoned that the District Court properly entered final judgment, that judgment never was modified on appeal, and at no point was the District Court’s judgment disturbed. *Id.* at 468. The Fifth Circuit further opined that although the Fifth Circuit three-judge panel had reversed the District Court’s order, the reversal was vacated when Defendants’ *en banc* petition was granted. The Fifth Circuit rejected Plaintiffs’ argument for an equitable exception based on the notion that Plaintiffs did not receive meaningful appellate review in *Comer I*. The Fifth Circuit observed that such an exception was contrary to the well-known rule that principles of *res judicata* may not be abrogated out of equitable concerns. *Id.* Therefore, the Fifth Circuit held that the District Court’s judgment in *Comer I* constituted a final judgment for the purposes of *res judicata*. With respect to whether the District Court’s judgment in *Comer I* was on the merits, the Fifth Circuit observed that although a jurisdictional ruling is technically not an adjudication on the merits, it had long been the rule that principles of *res judicata* applied to jurisdictional determinations. *Id.* at 469. Thus, the Fifth Circuit held that the District Court’s judgment in *Comer I* was on the merits. Therefore, the Fifth Circuit found that despite the unusual chain of events at the Fifth Circuit in *Comer I*, the District Court’s decision in *Comer I* satisfied all the elements of *res judicata*. Accordingly, the Fifth Circuit affirmed the District Court’s decision.

*In Re Diet Drugs Products Liability Litigation, 2013 U.S. App. LEXIS 2014* (3d Cir. Jan. 28, 2013). Plaintiff, an individual, brought an action against Defendant alleging that she developed primary pulmonary hypertension (‘PPH’) from Defendant’s diet drugs. Defendant moved to enjoin Plaintiff’s action pursuant to a class action settlement agreement it entered with diet drug users who developed various health problems. *Id.* at *2*. Thousands of individuals had filed claims in various jurisdictions, alleging that they had been injured by the drugs. Defendant subsequently entered into a nationwide class action settlement agreement, and the Court certified the class, approved the settlement agreement, and entered an order stating that it would maintain exclusive jurisdiction over the action and each of its parties to enforce the settlement in accordance with its terms. *Id.* at *3*. The settlement agreement enjoined class members from
suing Defendant for all diet drug-related injuries, but it allowed class members to sue Defendant if they could demonstrate that they developed PPH through the use of the diet drugs. *Id.* at *4. To qualify for the exception, a class member had to demonstrate the exclusion of a medical condition referred to as “greater than mild restrictive lung disease,” i.e., a class member was required to produce pulmonary function tests (“PFTs”) showing that the class member’s total lung capacity was greater than 60% of predicted at rest. *Id.* Plaintiff produced a pulmonary consultation note prepared by Dr. Terry Fortin, a cardiologist certified by the American Board of Internal Medicine, stating that based on a PFT, Plaintiff’s total lung capacity was 56%. *Id.* at *5. Plaintiff contended that the settlement agreement did not enjoin her from filing a claim because a board certified cardiologist had determined that her PPH was not caused by restrictive lung disease, notwithstanding the fact that her sole PFT showed her total lung capacity to be less than 60% of predicted at rest. *Id.* at *13. Plaintiff pointed to Dr. Fortin’s statements that whether Plaintiff’s total lung capacity percent calculation was 56% or 60% was clinically irrelevant, and that, to a reasonable degree of medical certainty, Plaintiff’s diet drug use was the cause of her PPH. *Id.* The District Court agreed with Defendant, and enjoined Plaintiff’s action. On appeal, the Third Circuit affirmed. The Third Circuit noted that the settlement agreement unambiguously required a PFT reporting that a putative Plaintiff’s lung capacity was greater than 60% of predicted at rest, and that Dr. Fortin’s declaration did not satisfy that requirement. *Id.* at *14-16. Although Dr. Fortin stated in her declaration that the figures used to represent average lung capacity by demographic characteristics were only averages and might vary in actual practice, the Third Circuit noted that Plaintiff failed to produce any evidence establishing that her lung capacity was greater than 60%. *Id.* at *15. Alternatively, Plaintiff contended that the District Court should have reformed the settlement agreement because diagnostic procedures for PFTs had changed. *Id.* at *20. The Third Circuit, however, noted that Plaintiff had not raised the reformation argument with the District Court and it was asserted for the first time on appeal. *Id.* at *21. The Third Circuit therefore held that Plaintiff had waived the argument that the District Court should have reformed the PPH standards in the settlement agreement to reflect modern diagnostic equipment. *Id.* Accordingly, the Third Circuit affirmed the District Court’s ruling.

In Re Urethane Antitrust Litigation, Case No. MDL 1616 (D. Kan. Dec. 16, 2013). In this multi-district litigation, three Plaintiffs had opted-out of a class action antitrust case. In that case, the jury found that the Defendant Dow Chemical Co. (“Dow”) participated in a conspiracy in violation of federal antitrust law. Plaintiffs moved for partial summary judgment, seeking to preclude Dow from re-litigating the issue of the existence of a conspiracy involving Dow, and thus, establish that fact for purposes of these cases. The Court denied the motion. *Id.* at 1-2. Plaintiffs argued that collateral estoppel applied because the issue of the existence of the conspiracy involving Dow was presented to and decided by the jury in the first action; the first action was finally adjudicated on the merits; and Dow had a full and fair opportunity to litigate the issue in the first action. *Id.* at 4. What Plaintiffs were seeking was application of the doctrine of non-mutual offensive collateral estoppel, a doctrine first recognized by the U.S. Supreme Court in Parklane Hosiery Co. v. Shore, 439 US 322 (1979). In that case, the Supreme Court noted that while the possibility of defensive collateral estoppel gives a Plaintiff a strong incentive to join all potential Defendants in the first action, the offensive use of collateral estoppel creates the opposite incentive. Since a Plaintiff will be able to rely on a previous judgment against Defendant, but will not be bound by the judgment if Defendant wins, a Plaintiff has every incentive to adopt a wait and see attitude, in the hope that the first action by another Plaintiff will result in a favorable judgment. Thus, Parklane Hosiery noted that offensive use of collateral estoppel does not promote judicial economy in the same manner as its defensive use, and the total amount of litigation may be increased. Rather than prohibiting the use of non-mutual offensive collateral estoppel altogether, the Supreme Court left it to the broad discretion of judges to determine when it should be applied. However, the Supreme Court noted that the general rule should be that in cases in which a Plaintiff could easily have joined in the earlier action, and the application of offensive estoppel would be unfair to a Defendant, use of offensive collateral estoppel should be denied. *Id.* at 3-4. The Court here also recognized that in Premier Electrical Construction Co. v. National Electrical Contractors Association, Inc., 814 F.2d 358, 367 (7th Cir. 1987), the Seventh Circuit adopted a categorical rule prohibiting the application of non-mutual offensive collateral estoppel in favor of class members who have opted-out of a class action to which they seek to give preclusive effect. The Seventh Circuit reasoned that Rule 23 was amended in
1966 to do away with one-way intervention in class actions in favor of the present opt-out procedure. *Id.* at 4-5. The Court agreed with the reasoning Seventh Circuit, and on that basis denied Plaintiffs’ motion. *Id.* at 7. In doing so, the Court rejected the Plaintiffs’ argument that the rule in *Premier* should not be applied here because they were not “pure opt-outs,” since they alleged a longer conspiracy period than what was alleged in the class action. *Id.* The Court noted that Plaintiffs had not explained why they could not have attempted to obtain certification of a longer class period, with or without a sub-class. They also did not explain why they could not have remained in the class action for the shorter class period and limited their own lawsuit to the pre-class period. *Id.* at 8. The Court stated that even if the categorical rule of *Premier* were not applied, the Court would deny collateral estoppel in the exercise of its broad discretion under *Parklane Hosiery*. Plaintiffs could easily have remained in the first action. Further, the conspiracy finding of the jury in the first case was imprecise concerning its duration, the members, and the products to which related. Thus, it would be unfair to bind Dow to that finding in this case. *Id.* at 9-11. Accordingly, the Court denied Plaintiffs’ motion.

**State Of New Mexico ex rel. King v. Capital One Bank, 2013 U.S. Dist. LEXIS 159741 (D.N.M. Nov. 4, 2013).** The State of New Mexico, through its Attorney General, brought an enforcement action challenging Defendants’ sale of payment protection plans which canceled or suspended a credit card holder’s obligation in certain circumstances. Plaintiff alleged violation of the New Mexico Unfair Practices Act (“NMUPA”), and a federal disclosure regulation known as Regulation Z. A similar class action – *Spinelli v. Capital One Bank (USA) N.A.*, No. 08-CV-132 (M.D. Fla.) – which was settled, provided that class members and all those who claimed through them or who asserted claims on their behalf, including the government, were deemed to have completely released and forever discharged Defendants from each of the released claims. Class members were also forever barred and enjoined from commencing, instituting, or maintaining any released claims against the released parties in any other forum. Defendants asserted that Plaintiff’s request for a refund of monies paid by consumers for these payment protection products was barred under the theory of *res judicata*, and moved to dismiss the consumer relief claims. The Court granted the motion. The Court stated that the settlement in *Spinelli* was a judgment on the merits, and the settlement agreements were final judgments for the purposes of *res judicata*. The Court noted that an agency enforcing a statutory scheme is not in privity with the private complainant when the agency is acting to vindicate a broader public interest protected under the statute, and thus, the agency cannot be bound by a private settlement to the extent that the settlement would prevent the agency from protecting that public interest. *Id.* at *13. The Court, however, also opined that different considerations apply when the agency is acting solely for the private benefit of the complaining individual and is seeking a remedy which only benefits that individual. *Id.* at *13. The Court observed that Plaintiff was representing an exclusively private interest, and compensation for the individual consumers would inure solely to the benefit of the consumers. Further, the Court remarked that the fact that Regulation Z also implicated public interests did not mean that Plaintiff was advancing public interests with respect to the consumer relief claims. Thus, the Court found that Plaintiff was in privity with the consumers who were parties to the *Spinelli* action. The Court observed that *Spinelli* challenged Defendants’ allegedly unfair trade practices, and the dispute concerned only those consumers who actually used Defendants’ services. The dispute in *Spinelli* involved contracts between consumers and Defendants, and the Court opined that each of the contracts was one transaction for *res judicata* purposes. The Court reasoned that Plaintiff here could not say there was a different nucleus of operative facts simply because it was alleging claims under a new legal theory. Additionally, the relief sought by Plaintiff was reimbursement of the same fees that were awarded under the *Spinelli* settlement, which further led to the conclusion that Plaintiff’s case was the same cause of action as the one in *Spinelli*. Finally, the Court observed that where the parties are in privity, the party in the second lawsuit stands in the shoes of the party in the first lawsuit for *res judicata* purposes. *Id.* at *20. Thus, the Court determined that if the class members had a full and fair opportunity to litigate their claims in *Spinelli*, Plaintiff itself had that same opportunity because the parties were in privity. Accordingly, the Court dismissed Plaintiff’s consumer relief claim with prejudice.
**Notice Issues In Class Actions**

**Brooks, et al. v. GAF Materials Corp., 2013 U.S. Dist. LEXIS 69101 (D.S.C. May 15, 2013).** Plaintiffs, a group of customers, brought a class action asserting claims for negligence, negligent misrepresentation, breach of warranty, breach of implied warranties, fraud, violation of the South Carolina Unfair Trade Practices Act, and unjust enrichment arising from the sale of allegedly defective roofing shingles. The Court granted certification to a class comprised of all individuals or entities who owned South Carolina property with cracked, split, or torn shingles manufactured at Defendant’s Mobile, Alabama facility between 1999 and 2007. Plaintiffs then filed a motion as to the required notice to class members, requesting the Court to set a hearing to consider the proposed notice and then issue an order approving such notice. The Court denied the motion. Defendant alleged that Plaintiffs’ proposed plan only anticipated giving individual notice to 19 people rather than the 6,000 Plaintiffs originally represented to the Court, and giving notice to all others by publication. Plaintiffs had not explained why publication would be an appropriate method to serve notice. The Court found that publication was not appropriate where names and addresses could be ascertained, and that Plaintiffs had not discussed why they chose the eight newspapers that they did and how those papers were best positioned to notify potential class members. Plaintiffs also requested that Defendant be directed to send the notice to any builder or distributor who had purchased the shingles. The Court noted that builders or distributors were not potential class members unless they still owned the structures and such broad notice did not recognize the Court’s order and limitation that class members must have actual cracked, split, or torn shingles. Further, the Court stated that the typical rule was that Plaintiffs must initially bear the cost of notice to the class as part of the ordinary burden of financing their own suit. *Id.* at *6*. Here, Plaintiffs gave no reason why the cost of notice should be imposed on Defendant. Accordingly, the Court denied Plaintiffs’ motion.

**Corpac, et al. v. Rubin & Rothman, LLC, 2013 U.S. Dist. LEXIS 9803 (E.D.N.Y. Jan. 24, 2013).** Plaintiff brought a putative class action alleging that Defendant violated the Fair Debt Collection Practices Act by falsely representing or implying that an attorney had meaningfully reviewed Plaintiff’s account. The parties reached a settlement and filed a motion to certify the class and grant preliminary settlement approval. The total settlement was $87,900 of which $3,500 was to be allocated to the lead Plaintiff, $9,400 to a charitable organization as a *cy pres* payment, and $75,000 for attorneys’ fees. *Id.* at *3*. The other class members were entitled to the lesser of either $500,000 or 1% of the net worth of the debt collector. *Id.* at *4-5*. The Court denied settlement approval. The Court found that notice of the conditional settlement sent to the class members violated both due process and Rule 23(c)(2)(B). *Id.* at *5-6*. The notice in question was a one-time advertisement in a weekday edition of the New York Post. *Id.* at *6*. Furthermore, potential class members were likely located outside of the city because Defendant conducted business state-wide, however, the publication was only distributed through New York City. Relying on *Hecht v. United Collection Bureau Inc.*, 691 F.3d 18 (2nd Cir. 2012), where the Second Circuit held that a single publication did not satisfy either due process or Rule 23(c)(2)(B), the Court denied approval of the settlement agreement. *Id.* at *6-7*. Because the parties themselves withdrew their request for final approval of the settlement based on notice requirement of *Hecht*, the Court directed the attorney for Plaintiff to determine a proper and constitutionally valid method of notice by a renewed application. *Id.* at *11*. One class member had objected to the settlement agreement, arguing that there was a conflict of interest between Plaintiff’s counsel, William F. Horn (“Horn”) and Defendant’s counsel, Robert Arleo (“Arleo”). The objector asserted that the adverse counsel had served as co-counsel in at least 25 individual FDCPA cases, and in another case, Arleo had represented Horn. The Court noted that Horn and Arleo had an extraordinary business relationship, handling FDCPA cases together and the Court found it reasonable to conclude that Arleo possessed relevant confidential information about Horn’s counsel’s strengths, weaknesses, techniques, and procedures. *Id.* at *21*. Horn argued that he consummated the settlement when Joseph Latona served as Defendant’s counsel in March 2011, and Arleo, who was assigned as Defendant’s counsel on December 21, 2011, was not involved in the settlement. *Id.* at *19*. The Court stated that the close relationship between Horn and Arleo would be irrelevant if the class notice was effective and the settlement was approved. *Id.* at *15*. The Court, however, had not yet approved the settlement and Arleo had to initiate a new proposed notice. *Id.* at *15-16*. The Court thus noted that Arleo would have an opportunity to influence objection hearings, settlement procedures, renewed notice, and, if necessary, the trial. *Id.* at *20*. 

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*Seyfarth Shaw LLP*
The Court was concerned that sufficient notice could alter the class size and consequently, the final settlement. *Id.* at *21. Thus, to protect the current class members and to ensure transparency for all potential class members, the Court rejected the settlement and held that Arleo should withdraw from the action. *Id.* at *22. The Court then concluded that final approval would have to wait for a renewed application and method of notice for the potential class members.

**Custom LED, LLC, et al. v. eBay, Inc., 2013 U.S. Dist. LEXIS 122022 (N.D. Cal. Aug. 27, 2013).** Plaintiff, a corporation, filed a class action asserting claims against an integrated on-line marketing portal, for breach of contract, unfair competition in violation of California’s Unfair Competition Law, and violations of California’s False Advertising Law in connection with its “Featured Plus” listings. *Id.* at *2. Plaintiff stated that Defendants utilized various interconnected websites as entry points, so that a search for an item listed on one website could be initiated from any of the other sites. Subsequently, the parties reached a settlement pursuant to which Defendants agreed to pay $4,750,000. After subtracting attorneys’ fees and costs, the net settlement fund approximated $3,355,000. Plaintiff’s counsel estimated that the average net recovery would be $4.71 for the first period and $46 for the second period. The parties did not state the total fees paid in each period or provide an estimate of the number of individuals who fell within the class definition. The default method for distributing funds to class members with active eBay accounts would be to give them account credits. Class members who received credits could apply for a refund and any class member who did not want to receive a credit could choose to receive a check instead by providing notice to the claims administrator no later than the deadline for filing objections. The default method for distributing funds to class members with closed eBay accounts would be to send them checks to the name and address in eBay’s records or to any other name or address that the class members provide to the claims administrator. The claims administrator would provide notice to the putative class members in the following four ways, including: (i) by setting up a website; (ii) by e-mail to the e-mail address that eBay has for each class member; (iii) by first-class mail to the mailing address currently in eBay’s records with respect to class members whose e-mail notice is returned as undeliverable; and (iv) by a press release. The settlement agreement also provided that any putative class members who did not opt-out of the action would release all claims, known or unknown. The Court denied the parties’ joint motion for preliminary approval of the proposed class action settlement. The Court found that the scope of the release was overly broad. The Court also found that the proposed notice was deficient in four ways. First, the proposed notice did not adequately inform the putative class members of the scope of the release. *Id.* at *19. The scope of the release was much broader than what the notice disclosed. Second, the notice did not inform class members of the key difference between receiving payment via an account credit and receiving payment via check, which was that only the former was subject to reductions based on any amounts owed to Defendants. *Id.* Third, the notice did not contain a range of the potential recovery that the class members could expect to receive under the settlement. Thus, it was not possible for a member of the proposed class to determine even approximately what percentage of the fees paid to Defendants he would recover under the settlement. *Id.* at *20. Finally, the notice did not contain sufficient information as to how to receive payment, opt-out of the settlement, or object to the settlement. *Id.* The proposed notice merely instructed class members to follow the specific details listed in the notice website, a link to which was provided in the notice. The Court determined that the notice itself must contain this crucial information. *Id.* For these reasons, the Court denied the parties’ motion for approval of the settlement.

**Hughes, et al. v. Kore Of Indiana Enterprises, Inc., 2013 U.S. Dist. LEXIS 95849 (S.D. Ind. July 10, 2013).** Plaintiff, a customer, brought a class action alleging that Defendant failed to post a required notice on two ATMs that charged a fee for transactions in violations of the Electronic Fund Transfer Act (the “EFTA”). Earlier, the Court had granted Plaintiff’s motion for class certification. Subsequently, the Court recognized *sua sponte* that Plaintiff never provided notice to class members. Plaintiff, in his report, then proposed that notice be provided by a notice posted on the ATM at issue, published in the Indianapolis Star newspaper and on a website. The Court states that it would be improper to maintain certification of this class and thereby vacated its previous order certifying the class. Plaintiff contended that individual notice to the class members was unnecessary and that notice by publication, internet, and posted notice on the ATM would be adequate. Plaintiff asserted that a third-party, ATM Management, acted as the transaction
processor/servicer for the two relevant ATMs and that ATM Management provided third-party discovery that provided a truncated account number that disclosed only the last four digits or the personal account number (“PAN”) of the credit card or debit card account. Further, Plaintiff claimed that it was unknown whether ATM Management had the full account number or whether it could obtain the full account number because of privacy laws. In his certification memorandum, however, Plaintiff had declared that the class could be identified by bank identification number (“BINs”) and PANs, which he claimed were stored in the ATMs’ computer data. Plaintiff suggested that it was likely that the names and addresses of the individual class members would be difficult and costly to ascertain for purposes of direct notice. Plaintiff did not previously indicate that there would be any impediment to obtaining the class members’ BINs or PANs. Plaintiff claimed that even if the full account numbers could be obtained there could be numerous banks to contact, given that the over 2,800 stipulated transactions took place in the relevant geographic area. The Court remarked that if the class members were located throughout the United States, it was unlikely that Plaintiff’s primary methods of proposed notice would provide sufficient notice to the class members. Further, the Court disagreed that the requirement to provide individual notice to identifiable class members may be abandoned simply because doing so would require considerable financial resources and effort. Thus, because of Plaintiff’s new representations regarding the feasibility of identifying, locating, and notifying the class members, the Court held that this action had become unmanageable as a class action, which in turn favored decertification. Second, the Court observed that in his certification memorandum, Plaintiff argued that a class action was the superior method for adjudicating the controversy because given that each potential Plaintiff’s damages would range from a hundred dollars or so to a few thousand dollars, individual Plaintiffs would lack the resources to pursue their claims. The Court noted that Plaintiff’s argument ignored that the EFTA contains a fee shifting provision for successful litigants regardless of whether the matter is prosecuted individually or as a class action. Thus, considering the fee shifting provision and the available statutory awards, the Court opined that utilizing a class action to litigate the class members’ claims may actually be more detrimental than if the class members were to bring individual lawsuits. Here, the parties stipulated to $10,000 in recoverable statutory damages, and if each of the over 2,800 transactions resulted in 2,800 class members, the maximum amount each could recover would be approximately $3.57. The Court, however, noted that under § 1693m(a)(2)(B) in an individual action, a successful Plaintiff would be guaranteed an amount not less than $100, and thus maintaining this matter as a class action could be detrimental to the class members’ recovery. Id. at *19-20. Further, the Court remarked that without identifying each individual class member and establishing the true composition of the opt-out class, there was no way of determining how any awarded statutory damages would be apportioned. Accordingly, the Court found that maintaining this action as a class action was no longer the superior method for adjudicating the controversy, and decertified the class action.

In Re Processed Egg Products Antitrust Litigation, 2013 U.S. Dist. LEXIS 94062 (E.D. Pa. July 3, 2013). Plaintiffs, a group of direct and indirect purchasers, brought a class action under the Sherman Act alleging conspiracy among egg producers and trade groups to manipulate the supply of eggs and egg products, thereby affecting domestic prices. Subsequently, the Direct Purchaser Plaintiffs (“Plaintiffs”) and Sparboe Farms, Inc. (“Sparboe”) settled the action whereby Plaintiffs would release all claims against Sparboe, in exchange for information that Plaintiffs’ attorneys believed would aid Plaintiffs in the prosecution of their claims against the non-settling Defendants. Pursuant to the settlement agreement, Sparboe agreed to reimburse Plaintiffs up to $350,000 for the cost of class notice. Before class notice was issued in conjunction with the Sparboe settlement, Plaintiffs also settled with Defendants Moark, LLC, Norco Ranch, Inc., and Land O’ Lakes, Inc. (collectively, “Moark”), for $25 million. When the Court granted preliminary approval to the Moark settlement, it also approved Plaintiffs’ proposal to issue separate notices for the Sparboe and Moark settlements. Although at that time, neither Plaintiffs nor Sparboe addressed how or whether the Moark settlement affected Sparboe’s obligation to reimburse Plaintiffs for the cost of class notice concerning the Sparboe settlement, the parties subsequently disputed on the issue of reimbursement. The Court found that Sparboe was not obliged to reimburse Plaintiffs for the cost associated with the preparation and dissemination of the notice of Parties’ class settlement. Plaintiffs argued that the notices could not have been combined because the Court’s order had provided for separate notices. Specifically, the Sparboe settlement agreement stated that “[i]n the event Plaintiffs enter
into a cash settlement with [Moark] and receive preliminary approval of that settlement prior to the issuance of notice under this Agreement (such that the settlement notices can be combined), Plaintiffs shall apply those settlement funds intervener the cost of notice.” Id. at *4. The Court remarked that “can” is a word used to indicate possibility or probability, and based on such definitions, and the fact that the Sparboe and Moark notices were approved on the same day, the Court concluded that the notices “could” have been combined. Id. at *5. Therefore, the Court remarked that the Sparboe and Moark notices could have been combined, and that Sparboe had no obligation to reimburse Plaintiffs for the costs of class notice.

(xviii) Multi-Party Litigation Over Modification Of Employee Benefits

Connecticut Independent Utility Workers Local 12924, et al. v. Connecticut Natural Gas Corp., 2013 U.S. Dist. LEXIS 83862 (D. Conn. June 14, 2013). Plaintiffs, a group of employees and their union, filed a complaint against their employer (“CNG”), the Benefits Administration Committee, the retiree health plan, and the employee health plan, alleging violations of the Labor-Management Relations Act (“LMRA”) and the ERISA. Defendants filed a motion to dismiss all of Plaintiffs’ claims, which the Court granted in part and denied in part. In 1991, CNG and the union entered into a collective bargaining agreement (“CBA”), which set the maximum payments CNG would make toward retiree major medical insurance premiums. In 1994, CNG and the union renewed this agreement via a letter (the “Contract”), which provided that if any employee’s balance in his major medical maximum reached a balance of $250,000 and the premiums for medical insurance reached particular levels, then CNG would hold discussions with the union for the review of both the lifetime maximum and the premium sharing. After the Contract was signed, Defendants unilaterally changed the method of calculating the maximum premium payments and blended the dependent caps for retiree health benefit plans for retired and active employees, increasing the premiums. At the outset, the Court refused to consider the 1994 CBA in connection with the motion to dismiss, because Plaintiffs only referred to the Contract in their complaint, but agreed to consider correspondence related to Plaintiffs’ ERISA document requests. The Court denied Defendants’ motion in regards to standing, finding that the Contract was enforceable whether or not Plaintiffs were retired or current employees. The Court also denied Defendants’ statute of limitation argument, noting that there was nothing on the face of the complaint or in the documents properly before the Court that established when Defendants first unilaterally changed the method for calculating premiums. Id. at *13. Defendants also argued that Plaintiffs’ alleged breach of contract claim for violation of § 301 of the LMRA and violation of the retiree health plan pursuant to § 502 of ERISA should be dismissed because Plaintiffs failed to show that they had a vested right in the set premium caps. Id. at *14. Specifically, Defendants argued that the reservation of rights clause in the employee handbook, which gave CNG the right to change or end the plan for any reason, was determinative of whether or not Plaintiffs’ benefits vested under the plan. Because such a right was recognized under Second Circuit case law authorities and Plaintiffs pointed to no rulings supporting its position that the reservation of rights clause was subject to the provisions of the CBA or any specific language promising vested benefits, the Court granted Defendants’ motion to dismiss these claims. Id. at *19-21. The Court stated that the fact that the Contract contained no obvious time limitation on CNG’s obligation to enter into discussions with the union did not convert it into a promise for vested benefits. Id. at *21. Plaintiffs further alleged that Defendants breached their fiduciary duty in violation of the ERISA by changing the manner in which premium contributions were calculated. Id. at *23. The Court agreed with Defendants that modification of an ERISA welfare benefit plan was not a fiduciary act and dismissed Plaintiffs’ claim because Plaintiffs benefits were not vested. Relative to Plaintiffs’ allegation that Defendants breached their fiduciary duty in failing to notify them of a material modification to the plan, the Court found that there was no language in the plan documents that notified Plaintiffs of a change in the premium calculation, even if the new calculation was described in those documents. Because Plaintiffs claimed that they lost the opportunity to bargain for a more favorable plan as a result of Defendants’ failure to notify them of plan changes, the Court allowed Plaintiffs’ claim on this ground. Finally, Plaintiffs alleged that Defendants violated § 104(b)(4) of the ERISA by failing to fully respond to several information requests. Defendants argued that they were not required to provide calculation worksheets or outdated plan descriptions. Id. at *34. The Court determined that to the extent Plaintiffs’ claims referred to Defendants’ failure to produce calculation worksheets or outdated summary plan descriptions, they were not actionable. However, the Court stated that it was unable to determine whether Defendants fully
complied with Plaintiffs’ document requests from previous plan periods that were being used to administer
the plan in effect in 2012, and accordingly denied Defendants’ motion to dismiss for violation of § 104(b)(4).
Id. at *35.

and retirees of Defendant, on behalf of themselves and a purported class of retirees of Defendant, moved
for a preliminary injunction to prevent Defendant from terminating their current healthcare coverage during
the pendency of the lawsuit. The Court granted Plaintiffs’ motion. Id. at *1-2. The Court noted that in
determining whether to grant a motion for preliminary injunction, it must consider four factors, including:
(i) the movant’s likelihood of success on the merits; (ii) whether the movant will suffer irreparable harm
without the injunction; (iii) whether granting the injunction will cause substantial harm to others; and (iv) the
impact of the injunction on the public interest. The Court indicated that these are not prerequisites that
must be met, but rather are factors that must be considered and balanced. Id. at *11-12. Plaintiffs argued
that termination of their healthcare benefits violated the Labor-Management Relations Act and the ERISA.
To show a likelihood of success on the merits on these claims, Plaintiffs were obligated to demonstrate that
they had a vested benefit under the collective bargaining agreements. To prove this, Plaintiffs were
required to show that the Defendant and the union intended to include a right to lifetime benefits when they
negotiated the collective bargaining agreements at issue. Id. at *12. The Court concluded that the
collective bargaining agreement (“CBA”) unambiguously vested the healthcare benefits that the retirees
currently enjoyed. The CBA provided for continued hospitalization, surgical, and medical coverage to past
pensioners and their dependents without cost prior to March 1, 1996, and promised to cover employees
retiring after March 1, 1996, at a co-premium amount to be frozen at the co-premium in effect at the time of
retirement. Id. at *13-14. The Court rejected Defendant’s argument that the CBA contained a reservation
of rights providing Defendant with the right to cancel benefits after the termination of the CBA. The Court
found that the reservation of rights applied to employees and not to retirees. Id. at *14-15. The Court also
stated that even if the language of the CBA was found to be ambiguous, the extrinsic evidence supported
the finding of vested benefits. Defendant continued to provide healthcare benefits to retirees for five years
after the CBA ended, and the Court concluded that a rational for-profit corporation would have terminated
the benefits immediately to cut out unnecessary costs if it had not been legally obligated to continue them.
Id. at *16. Thus, the Court found that Plaintiffs had demonstrated a strong likelihood of success on the
merits. The Court also determined that Plaintiffs were likely to suffer immediate irreparable harm if the
benefits were terminated. Evidence was presented that the increased costs of alternative healthcare plans
would destroy retirees’ fixed, limited incomes. In order to qualify for Medicaid, there were eligibility
requirements that might force a class member to sell property. When balanced against the strong
likelihood of success on the merits, the Court concluded that these two factors supported granting a
preliminary injunction. Id. at *17-19. With respect to harm to others, Defendant had been providing
healthcare benefits to the retirees even after the plant closed. Requiring Defendant to continue to do so
would not create any harm that Defendant was not currently facing and that it did not agree to undertake.
Finally, the Court found that the public interest supported requiring the continued healthcare benefits.
Defendant’s argument that the United States should assume the cost of healthcare was not in the public
interest. Accordingly, the Court granted the Plaintiffs’ motion for preliminary injunction. Id. at *19-20.

In Re Patriot Coal Corp., 497 B.R. 36 (8th Cir. 2013). The Debtor, Patriot Coal Corp. (“Patriot”) and
number of its affiliate coal mining companies, filed voluntary petitions for relief under Chapter 11 of
Bankruptcy Code. Patriot and its subsidiaries, including Heritage Coal Co., LLC, (“Heritage”) and Eastern
Associated (“Eastern”) were wholly-owned subsidiaries of Peabody Energy Corp. (“Peabody”). The United
Mine Workers of America (“UMWA”) was a union that represented a number of workers employed by the
parties, and the Bituminous Coal Operators’ Association (“BCOA”) was the multi-employer bargaining
association formed by the mine operators, whose sole purpose was to bargain with the UMWA on behalf of
its coal industry employer members. In 2007, Patriot, Heritage, and Eastern spun-off from Peabody. The
UMWA and the BCOA negotiated and entered into to National Bituminous Coal Wage Agreement
(“NBCWA”). Neither Eastern nor Heritage were members of the BCOA, but both companies entered into
an agreement known as “me too,” essentially agreeing to abide by the NBCWA. Id. at 38. Heritage
incorporated Article XX, which defines and makes provision for health and other benefits for retirees, of the NBCWA into its “me too” agreement. Id. While Peabody was contemplating a strategic spin-off, it entered into an acknowledgement and assent agreement with the UMWA, which stated that Peabody would be primarily obligated to pay for benefits for approximately 3,100 of Heritage’s retirees, known as the assumed retirees or the attachment A retirees pursuant to Article XX. In 2007, before the spin-off, Peabody, Patriot, and Heritage entered into the NBCWA Individual Employer Plan Liabilities Agreement. After the spin-off, Patriot became a parent corporation; Heritage and Eastern, among others, became Patriot’s subsidiaries. With the decline in demand of coal, and for other reasons, Plaintiffs along with several other subsidiaries, filed a motion under 11 U.S.C. § 1113 and 1114. Section 1113 provides debtors with procedures necessary to gain Bankruptcy Court approval to reject a collective bargaining agreement, and § 1114 requires a debtor to timely pay retiree benefits unless the Bankruptcy Court determines that modification of those benefits is necessary. Id. at 40. The UMWA filed a notice of appeal and elected to have its appeal heard by the District Court. Meanwhile, Patriot and Heritage sought a judgment declaring that Peabody’s obligations with respect to the healthcare benefits owed to the Assumed Retirees would not be affected by modification of the benefits of retirees of Heritage or Eastern under § 1114. The Bankruptcy Court held that all liabilities remained with Heritage, and Peabody was simply obligated to fund those liabilities. The Bankruptcy Court stated that the terms of the liability assumption agreement were unambiguous and as such, it should be enforced by its plain meaning. The Bankruptcy Court held that Peabody could not be made to fund benefits that exceeded the benefits that Eastern was contractually obligated to fund. On Patriot and Heritage’s (“Plaintiffs”) appeal, the Eighth Circuit reversed. At the very outset, the Eighth Circuit observed that § 1114(e)(1)’s language indicated that a CBA can be rejected under § 1113 and the debtor would still be required to timely pay for, and refrain from modifying, retiree benefits provided for in that labor agreement unless authorization to modify is granted under § 1114. Id. at 40. The Eighth Circuit observed that while Heritage’s rejection of its CBA relieved it of its contractual obligation to pay benefits, it still had a statutory obligation to pay those benefits. Accordingly, the Eighth Circuit held that upon rejection of the “me too” agreement under § 1113, absent modification under § 1114, Heritage was still required to comply with the terms of the individual employer plan and provide its retirees those plan defined benefits. Id. at 42. The Eighth Circuit further noted that while Heritage sought the Bankruptcy Court’s approval to modify some of its retiree benefits obligations, it repeatedly stated that its motion did not seek to modify the assumed retirees’ benefits. The Eighth Circuit, however, disagreed with the Bankruptcy Court that only Heritage was liable for the benefits. The Eighth Circuit explained that Heritage was made liable to the UMWA through the “me too” agreement, pursuant to Article XX. Id. at 43. The Eighth Circuit noted that the liabilities assumption agreement, to the contrary, remained in effect, and Peabody conceded by acknowledging that its obligation remained under any future labor agreement. The Eighth Circuit noted that the assumption agreement plainly stated that Peabody agreed to assume to pay Heritage’s retirees benefits. As Heritage was still obligated by § 1114 to provide benefits under the terms of the individual employer plan, which was precisely what Peabody agreed to assume and pay, the Eighth Circuit concluded that Peabody’s obligation under the liabilities assumption agreement remained undisturbed upon grant of the §§ 1113 and 1114 motion. Id. Accordingly, the Eighth Circuit reversed the order.


Plaintiffs, a group of mine workers as well as an employee union, brought a class action alleging that they were entitled to lifetime benefits pursuant to the National Bituminous Coal Wage Agreement (“NBCWAs”) and other related agreements executed by the subsidiaries of Defendants – Arch Coal, Inc. (“Arch”),
As
Id.
at 8-9. Rather, Plaintiffs had argued that their rights were interfered with because the
at 8. The Court found that § 510 of ERISA was not
at 12. The Court therefore concluded that, because § 510 does not
2013 U.S. Dist. LEXIS 132337 (N.D. Tex. Sept. 16,
at 3-4. While Plaintiffs alleged that Defendants violated § 510 of ERISA because Defendants interfered
with the employees’ attainment of their pension rights by selling or spinning of their subsidiaries,
 Diğer party that it did not because the employees’ eligibility for benefits remained the same before
id. at 8. The Court found that § 510 of ERISA was not
applicable because it does not protect against transactions that impact the financial security of welfare
benefit plans. The Court noted that the primary purpose “of § 510 is to prevent unscrupulous employers
from discharging or harassing their employees in order to keep them from obtaining vested pension rights,”
and Plaintiffs here did not assert that the spin-off/sale of the subsidiaries interfered with their right to attain
benefits. Id. at 8-9. Rather, Plaintiffs had argued that their rights were interfered with because the
sale/spin-off of the subsidiaries jeopardized the fund’s capacity to pay their entitled benefits. Id. at 9. As
Plaintiffs conceded, employees were still entitled to the same welfare benefits after the transaction as
before, and employees continued to qualify and collect benefits. The Court therefore held that Plaintiffs’
claims were not within the ambit of § 510 of ERISA. The Court further held that even if it accept Plaintiffs’
analysis of § 510, which reads continued liability post-transaction or post-reorganization for both welfare
and pension benefit plans into the statute, it would render other sections of ERISA superfluous, especially
§ 4069, which “states that employers who attempt to evade liability for pension benefit plans through the
use of transactions or corporate reorganizations will remain liable for the benefits promised in those plans,”
and § 4212(c), which “provides that when, in multi-employer pension benefit plans, an individual attempts
to evade or avoid liability for their obligation to contribute by means of a transaction, they will remain liable
regardless of that transaction.” Id. at 12. The Court therefore concluded that, because § 510 does not
protect the financial integrity of pension funds, and because Plaintiffs’ interpretation of § 510 would make
other sections of ERISA superfluous, Plaintiffs did not state a claim under § 510 against Defendants. Id. at
12. Accordingly, the Court granted Defendants’ motions to dismiss.

Murphy, Jr., et al. v. Verizon Communications, Inc., 2013 U.S. Dist. LEXIS 132337 (N.D. Tex. Sept. 16,
2013). Plaintiffs, a group of participants in Verizon Communications Inc.’s ("Verizon") pension and health
and welfare benefits plans who were involuntarily transferred to Defendant Idearc, Inc.’s ("Idearc") pension
plans in November 2006, brought a class action alleging violations of ERISA. The action arose out of
Verizon’s spin-off of a business unit known as Verizon Information Services ("VIS") to a publicly-traded
company, Idearc, resulting in a transfer of certain Verizon retirees, formerly employed by VIS and covered
under Verizon’s pension plans, to new plans that had been created in the spin-off and administered by Idearc. Idearc filed for Chapter 11 bankruptcy in 2009 and emerged from bankruptcy as SuperMedia Inc. Plaintiffs, representing the transferred retirees, alleged that the involuntary transfer of retirees from Verizon’s allegedly more financially secure pension plans to Idearc’s allegedly less-secure plans breached ERISA’s fiduciary duties. Defendants moved for summary judgment. Verizon argued that the transfers fully complied with ERISA’s provision governing transfers of assets, its decision to transfer the benefit obligations for VIS employees to Idearc was not made in a fiduciary capacity, and that such a decision could not support Plaintiffs’ claim for breach of fiduciary duty. Plaintiffs on the other hand asserted that they did not challenge Verizon’s decision to transfer, but rather the manner in which Verizon accomplished the transfer. According to Plaintiffs, the transfer of retirees violated the pension plan’s terms and therefore violated the plan documents rule. Id. at *25. While Verizon’s pension plans permitted transfers of assets and liabilities, Plaintiffs core argument was that nothing in the plans permitted the transfer of individual persons, like the retirees, from coverage under one plan to coverage under another. The Court disagreed with Plaintiffs. The Court noted that the pre-November 2006 Verizon pension plans had implicitly granted Verizon the authority to transfer participants in its plans to a different plan created as a result of a transfer or liabilities. Id. at *26. Plaintiffs’ assertions that the retirees were “persons” and not “assets” or “liabilities,” and that no single asset in a defined benefit plant was traced to or belonged to a single individual, could not overcome the provision in the plans that implicitly authorized the transfer of persons from one plan to another. Id. at *27. Because the transfer was not a violation of plan provision, the Court found that Plaintiffs’ theory that Verizon violated the plan documents rule could not support its breach of fiduciary duty claim. Id. at *30. Plaintiffs also asserted that Verizon violated plan provisions because it allegedly required the unanimous consent of individuals to be transferred. Id. at *30-31. The Court rejected Plaintiffs’ contention. Because Plaintiffs’ referred plan provisions applied only to employees and not retirees, and because the spin-off transfer changed nothing regarding the substantive benefits to which Plaintiffs were entitled, the Court noted that Plaintiffs’ argument boiled down to an assertion that one of the “benefits” to which they were entitled was the right to have a particular corporate entity to administer their plans, and nothing in the plan’s provisions created such a benefit. Id. at *31-32. Plaintiffs next asserted that “involuntary” or “surreptitious” transfer of retirees was a breach of the fiduciary duty of loyalty. The Court, however, found that Plaintiffs had failed to show that Verizon fraudulently induced or otherwise materially misled the retirees into accepting a pension plan transfer for which they did not volunteer. Id. at *36. Plaintiffs also failed to identify any acts of misconduct that could show that Verizon performed fiduciary function in connection with the spin-off. Id. The Court therefore concluded that Verizon’s act did not constitute a fiduciary function, and accordingly granted Verizon’s motion for summary judgment on the Plaintiffs’ claim for breach of fiduciary duty. Accordingly, the Court granted Defendants’ motion for summary judgment.

**Sonoma County Association Of Retired Employees, et al. v. Sonoma County, 2013 U.S. App. LEXIS 3856 (9th Cir. Feb. 25, 2013).** Plaintiff, a retired County employees association, brought a class action alleging that Defendant breached its obligation to provide certain vested healthcare benefits in perpetuity. Plaintiff alleged that Defendant violated its long-standing agreement to pay for all or substantially all health benefits when it limited it to $500 a month in 2008. The District Court dismissed the action, finding that Defendant had never expressly promised to continue the subsidy in perpetuity. Upon Plaintiff’s appeal, the Ninth Circuit vacated and held that the District Court erred in dismissing Plaintiff’s complaint in light of the California Supreme Court’s decision in *Retire Employees Association of Orange County, Inc. v. County of Orange (REAOC II),* 266 P.3d 287 (Cal. 2011). *REAOC II* recognized that a County might form a contract with implied terms under specified circumstances. Id. at *1. Plaintiff alleged that Defendant had promised, in 1964, to pay all the costs of post-retirements healthcare benefits for its retirees and their dependents, and in 1985, had entered into a “tie agreement,” which promised that Defendant would treat retirees and their dependents the same as it treated the active management employees with respect to healthcare benefits and Defendant’s payment of costs. Id. at *2-3. Plaintiff alleged that promises and the employees’ performance of services in exchange created a legally binding contract and that Defendant intended the promise to continue during the lives of the retirees and their dependents. Id. at *3. Plaintiff submitted copies of 68 resolutions, memoranda of understanding (“MOUs”), and ordinances to support their claims.
Id. at *5. The Ninth Circuit noted that the MOUs supported Plaintiff’s allegation that Defendant promised healthcare benefits. Specifically, the documents stated that Defendant would make contributions intervener a health plan premium for retirees hired after 1990 who worked for the County for at least ten years, and have contributed to the County’s retirement system for the same length of time. Id. at *12. The Ninth Circuit further noted that Plaintiff’s complaint had also plausibly alleged that Defendant intended the healthcare benefits to vest for perpetuity. Id. at *13. Plaintiff asserted that former employees who drafted the documents would testify in support of their position regarding the background, purpose, and intent of the documents, and stated that at least one former Board member would testify as to Defendant’s intent that the benefits vest in perpetuity. Id. The Ninth Circuit therefore held that the complaint included factual content that was non-conclusory and substantial enough to allow the District Court to make a reasonable inference that Defendant implicitly bound itself to provide healthcare benefits to its retirees in perpetuity. Id. at *14-15. The Ninth Circuit, however, also noted that Plaintiff did not make allegations sufficient to establish that the resolutions, ordinances, and MOUs were the product of a bargained-for exchange of consideration. While the complaint alleged that the MOUs were “Board-ratified,” it did not allege or provide evidence that the Board ratified the MOUs by resolution or ordinance. Id. at *16. Noting that REAOC II focused on the statutory requirement that compensation of county employees must be addressed in an ordinance or resolution, the Ninth Circuit found that Plaintiff’s passing references to Board ratification was an insufficient basis for the District Court to infer that Defendant enacted a resolution or ordinance that ratified the relevant MOUs. Id. Nevertheless, the Ninth Circuit held that it could not agree with the District Court’s decision to deny Plaintiff the leave to amend. The Ninth Circuit noted that the District Court did not have the benefit of REAOC II, which clarified that a public entity in California could be bound by an implied term in a written contract. Id. at *24. Thus, according to the Ninth Circuit, in light of REAOC II, Plaintiff might be able to amend its complaint to state a claim that could survive a motion to dismiss and granting leave for such amendment would not be futile. Id. at *18. The Ninth Circuit therefore concluded that the District Court erred in dismissing Plaintiff’s complaint without leave to amend and accordingly remanded the action for further proceedings consistent with REAOC II.


Plaintiffs, a retired employee and workers union, brought a class action under the Labor Management Relations Act (“LMRA”) and the ERISA alleging breach of a collective bargaining agreement (“CBA”) for failure to provide lifetime retiree healthcare benefits. The CBA guaranteed eligible retirees and former union-represented Jackson plant employees lifetime company-paid retirement healthcare at the levels and terms in effect during the effective dates of those CBAs, and at the time of closing the Jackson plant. Id. at *2. The CBA in effect at the time the Jackson plant closed stated that the healthcare that retiring employees had at the time of retirement would continue thereafter, and that Defendant would pay the premium for retirees, their eligible family members, and surviving spouses. Id. Subsequently, Defendants discontinued group healthcare plans with an individual Health Reimbursement Account (“HRA”) and replaced it with group healthcare plans for each retiree, spouse, and other eligible family member. Id. at *2-3. Defendants stated that their contribution to the HRA would be reviewed annually, subject to change, and that Defendants retained the right to amend or terminate the HRA. Id. at *3. Plaintiffs moved for class certification, and the Court certified a class of all individuals who retired or terminated from the union-represented collective-bargaining unit at the Kelsey-Hayes plant in Jackson, Michigan under the 1995, 1999, and 2003 CBAs. The class also included the retirees’ and terminated employees’ surviving spouses, and other dependents eligible for company-paid retirement healthcare, including all pension-eligible retired employees; pension-ineligible employees terminated at age 65 or older not discharged for cause; the surviving spouses of the retired and terminated employees; and the eligible dependents of the retirees, terminated employees, and surviving spouses. Id. at *4. The Court stated that the numerosity requirement was met because there were approximately 400 proposed class members. Id. at *7. The Court found that the commonality requirement was met because each member of the proposed class was subject to a CBA guaranteeing lifetime, fully-funded benefits. Id. at *8. The Court held that the typicality element was satisfied because the named Plaintiffs and putative class members claimed under the same legal theory and course of conduct that Defendants wrongfully altered their collectively-bargained lifetime healthcare benefits.
benefits, and threatened to reduce, suspend, or eliminate the promised healthcare in the future. *Id.* at *9-10. Finally, the Court observed that adequacy of representation was satisfied because Plaintiffs Strait and Stevens evidenced in their declarations a commitment to pursue the common interest of the class members to enforce their collectively bargained for retiree healthcare benefits, and both were former union officials who participated in collective bargaining. *Id.* at *10. In addition to class certification under Rule 23(b)(1), the Court stated that certification pursuant to Rule 23(b)(2) was appropriate because Defendants acted on grounds that applied to the class as a whole, so final injunctive relief or corresponding declaratory relief was appropriate respecting the class as a whole. *Id.* at *14. Defendants argued that certification would be inappropriate if class certification proceeded because the CBAs prohibited the changes made to Plaintiffs’ healthcare benefits, and as some of the retirees could prefer the HRAs rather than restoration of CBA-promised healthcare coverage. *Id.* Although Defendants suggested that the Court proceed with certification in a liability/remedy “staged approach,” they provided no legal authority wherein retiree healthcare class actions had separated merits and remedy certification or included an opt-out remedy approach. *Id.* at *15. The Court remarked that the policy behind Rule 23 to promote efficiency, economy, and consistency would be frustrated with such an approach, and the proposed class members would be vulnerable to a self-interested employer who sought to save money by illegally withholding promised benefits. *Id.* Accordingly, the Court granted class certification.

*United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied & Service Workers International Union, et al. v. Cookson America, Inc.*, 2013 U.S. App. LEXIS 5324 (2d Cir. Mar. 18, 2013). Plaintiff, a union representing Defendants’ employees at its Hamburg, New York plant, brought an action seeking a declaratory judgment that the Facility Closure Agreement (“FCA”) obligated Defendants to pay the Retiree Medical Allowance (“RMAs”) to 36 potentially eligible retirees who had yet to reach the age of 65. The CBA provided that employees hired prior to March 15, 1994, who ultimately retire from the company and reach age 65, become eligible to receive a one-time medical benefit allowance. *Id.* at *4. Subsequently, Defendant announced that it would be closing its plant and the parties negotiated the FCA, which stated that Defendants would honor the CBA’s RMA provision, and that the existing CBA between the parties (“the 2004 CBA”), which also included the RMA provision, would remain in effect until the last bargaining unit member was terminated. *Id.* Thereafter, Defendant stated that it would no longer provide the RMA at age 65 to employees hired prior to March 15, 1994 and who ultimately retired from the company. The District Court granted Plaintiff’s motion for summary judgment because the CBA remained operative until the plant closed, and the FCA required Defendant to honor the CBA’s RMA provision until the plant closed. On appeal, the Second Circuit affirmed the District Court’s ruling. First, Defendants argued that when the facility was closed, employees who worked there did not retire within the definition required by the 2004 CBA, and thus were not entitled to the RMA. *Id.* at *7-8. The Second Circuit rejected Defendant’s argument, stating that their interpretation was superfluous because it prevented any employee who worked at the facility until its closure from claiming the RMA. *Id.* at *8. Second, Defendants argued that they could refuse to pay the RMA because, after a CBA expires, an employer may modify or terminate a retiree’s medical benefits guaranteed by the newly expired CBA. *Id.* The Second Circuit, however, opined that the FCA, and not the CBA, imposed the relevant requirement, and the FCA mandated a continuing obligation, which Defendant was required to fulfill. *Id.* at *8-9. Finally, Defendants argued that Plaintiff lacked standing to bring the claims because it no longer represented the relevant employees who had retired. *Id.* at *9. The Second Circuit noted that the union was a party to the FCA, and Defendants’ refusal to pay retiree benefits under that agreement would injure the union by depriving it of the benefit of the bargain, because the union had negotiated and incurred obligations in order to secure that benefit. *Id.* at *10. Further, a decision declaring that the FCA obligated Defendant to pay the RMA would redress that injury. *Id.* The Second Circuit also observed that Plaintiff had sued Defendants for violating the FCA, which was a contract between an employer and a labor organization representing employees in an industry affecting commerce. Further, Plaintiff satisfied the requirements of 29 U.S.C. § 185(a) because it sued as an entity to vindicate its own contractual interests. *Id.* at *11. Thus, the Second Circuit noted that Plaintiff had both the constitutional standing to sue to enforce the FCA, and statutory standing because its complaint fell within the zone of interests protected by the law. *Id.* Further, the Second Circuit opined that when employers undertake contractual obligations, accepted contract principles mandate that unions have
a legitimate interest in protecting the retirees’ rights, and may seek enforcement of applicable contract provisions. *Id.* at *13. The Second Circuit noted that there was no potential conflict of interest between the retirees and active employees because the plant had closed. *Id.* at *14. Accordingly, the Second Circuit affirmed the decision of the District Court.


Plaintiffs, a group of retirees and their union, brought an action under the Labor Management Relations Act (“LMRA”) and the ERISA challenging Defendant employer’s unilateral modification of their collectively bargained retirement health insurance benefits. *Id.* at *1-2. The Court granted summary judgment to Plaintiff, finding that Defendants’ alteration of Plaintiffs’ healthcare benefits breached the parties’ 1995, 1999 and 2003 collective bargaining agreements (“CBAs”). Plaintiffs worked at the now closed automobile parts manufacturing plant of Defendants and were members of labor organizations that were parties to the CBAs. Under the CBAs, Defendants were required to establish healthcare coverage for retirees and their dependents and surviving spouses and to contribute the full premium for such coverages. Before and after the plant closing in 2006, Defendants paid all retirees’ healthcare coverage costs. *Id.* at *5-6. In September 2011, Defendants announced a change in retiree healthcare program and advised that group healthcare plans would be replaced with an individual Health Reimbursement Account (“HRA”) funded by Defendants and to be used by retirees to purchase individual healthcare policies. On January 1, 2012, Defendants discontinued healthcare coverage for retirees age 65 and older and made a one-time contribution of $15,000 for each retiree and spouse for 2012 and provided for an additional $4,800 credit for 2013. Any future contributions were to be at the discretion of Defendants. Plaintiffs asserted that Defendants breached the 1995, 1999 and 2003 CBAs by unilaterally modifying their healthcare benefits. *Id.* at *6-8. Citing various cases addressing the vesting of retiree benefits, the Court held that the unambiguous language of the CBAs demonstrated Plaintiffs’ right to vested lifetime retirement health insurance coverage. *Id.* at *12-14. The Court found that the CBAs’ promised “continuance” of the healthcare coverages the employees had “at the time of retirement” and that such coverages “shall be continued thereafter” for retirees, their spouses, and eligible dependents and that any changes could be made “by mutual agreement between the company and the union” was unambiguous language demonstrating Plaintiffs’ right to vested lifetime retirement healthcare coverage. *Id.* at *14-15. The Court further noted that it had previously held in various cases that identical CBA terms unambiguously promised vested, lifetime retiree healthcare benefits. *Id.* at *15. The Court also pointed out that an arbitrator recently considering virtually identical CBA terms had found that the retirees had vested rights to medical plan coverages for their lifetime, and relying on the CBA’s contractual language had ruled that company breached the CBA by imposing the same HRAs challenged herein. *Id.* at *17. Accordingly, the Court granted summary judgment in Plaintiffs’ favor. The Court additionally held that collateral estoppel barred Defendants from re-litigating the meaning of the CBA terms or re-litigating whether the CBA language promised lifetime, fully vested retiree healthcare insurance coverage, as Defendants had the full and fair opportunity to litigate the issue in prior cases. *Id.* at *18-19. Defendants were also stopped from denying that the CBAs promised vested lifetime retirement health insurance based on their conduct. *Id.* at *19. The Court had earlier analyzed identical CBA terms and had rejected Defendants’ contrary interpretations. Aware of this, Defendants had again used the identical terms. The Court therefore held that Defendants were estopped from retroactively reinterpreting the CBA terms. *Id.* Accordingly, the Court granted Plaintiffs’ motion for summary judgment and ordered Defendants to reinstate Plaintiffs’ healthcare coverage.


Plaintiffs, a group of retirees, brought a class action alleging that although their collective bargaining agreements (“CBA”) promise lifetime, unalterable health benefits to be paid by their employer upon retirement, Defendants denied the benefits in violation of the Labor Management Relations Act (“LMRA”) and ERISA. Beginning at least in 1971 and in two, three, or five-year intervals, the International Brotherhood of Electrical Workers Local No. 1985 (“the Union”) and Hoover Co. entered into series of CBAs. In general, each CBA was similarly formatted and included: (i) a basic labor agreement (“BLA”); (ii) an Exhibit A-1
In 1992, a new Welfare Plan was negotiated that extended to qualified retiring employees the opportunity to receive company-paid healthcare after retirement. From 1992 through 2007, every Welfare Plan formally recognized such an opportunity. The company and union negotiations occurred in conjunction with several key organizational changes. In 1989, Hoover was purchased by Maytag, which later merged with Whirlpool in 2006. On January 31, 2007, Whirlpool sold the Hoover floor-care business to Techtronic Industries Co., Ltd., (“TTI”). As part of the sale agreement with TTI, Whirlpool retained the liabilities associated with retirement health benefits for Hoover employees who retired prior to January 31, 2007. In May 2011, Whirlpool delivered notices to retirees announcing its plans to reduce their health benefits effective January 1, 2013, which was later extended to January 1, 2014. Specifically, Whirlpool notified Medicare-eligible retirees with company-paid supplemental health benefits would no longer be provided and that any supplemental health coverage would have to be individually purchased. Whirlpool also informed retirees who were not Medicare-eligible that their health coverage would transition to the same plan as that provided to the majority. After the class was certified, Plaintiffs filed a motion of partial summary judgment, and Whirlpool filed a cross-motion for summary judgment. The Court granted Whirlpool's motion in part and denied Plaintiffs' motion. Plaintiffs claimed that the negotiated CBAs and the language therein created vested rights to certain health benefits, which were forever unalterable. The Court noted that if a welfare benefit had vested, the employer's unilateral reduction of that benefit breached the CBA, creating a right of action under the LMRA.\textit{id.} at *18. The Court noted that sub-class A consisted of retirees between 1980-1983, and they were governed by the 1980-1983 CBA. The Court observed that the language of the CBA supported Plaintiffs’ argument as to sub-class A that Hoover assumed responsibility for paying for the continued medical coverage provided in the 1977 Welfare Plan that had previously provided only at the retirees’ own expense.\textit{id.} at *25. Whirlpool, however, argued that the benefits ended in 1983, and that the preamble of the CBA did not contemplate continuation of such benefits beyond 1983. The Court disagreed, finding that the CBA did not limit the benefits at the end of the agreement.\textit{id.} at *27. The Court noted that the 1980-1983 retirees' continued receipt of company-paid health benefits beyond the expiration of the 1980-1983 CBA was evidence enough of their lifetime right to receive such benefits.\textit{id.} at *29. Accordingly, the Court denied Whirlpool's motion for summary judgment as to sub-class A. The Court next noted that sub-class B consisted of 1983-1992 retirees, who were not promised company-paid health benefits. Plaintiffs argued that those class members gained their rights through the 1980 contract settlement, which guaranteed sub-class A class members their lifetime benefits. The Court, however, found that the plain language of the CBA did not obligate Hoover or Maytag, and did not obligate Whirlpool, to provide health insurance benefits for the 1983-1992 retirees.\textit{id.} at *34. Accordingly, the Court granted summary judgment to Whirlpool on the claims of sub-class B. Next, sub-class C, comprised of 1993-2003 retirees, contended that their CBA formally established the opportunity to continue company-paid health benefits during retirement. The Court noted that the eligibility of the 1993-2003 retirees to receive company-paid health benefits was tied to their receipt of pension benefits. Relying on extrinsic evidence, the Court noted that there was no dispute that sub-class C retirees had continued to receive company-paid benefits. Whirlpool, however, argued that the healthcare benefits for the 1993-2003 retirees were alterable and terminable. The Court observed that in 1988, 1993, 1997, 1998, 1999, and 2002, the company published a Group Insurance Plan describing the health insurance programs offered to hourly employees.\textit{id.} at *56. The 1993-2003 retirees signed hourly medical insurance authorization forms, which permitted them to choose various medical coverages to continue during retirement, to list dependents, or to waive coverage altogether. Those forms contained text stating that the premium cost, share of premium cost, and the medical coverage were all subject to change. However, the company’s open and consistent position supported the inference that although the company had hoped to continue the retirement healthcare program indefinitely, it also had intended to preserve the right to modify or terminate the benefits.\textit{id.} at *57. The Court remarked that this evidence counseled in favor of Whirlpool’s interpretation of the Welfare Plan. Accordingly, the Court left resolution of this issue to trial. Finally, as to sub-class D consisting of 2003-2007 retirees, the Court noted that different rules applied to different groups within the sub-class, but the parties did not provide the Court with any means to make the appropriate distinctions or to assess the less than lucid terms. Accordingly, the Court refused to resolve the claims of 2003-2007 retirees on a motion for summary judgment.
Civil Rights Class Actions

A.R., By And Through Her Next Friend, Susan Root, et al. v. Dudek, 2013 U.S. Dist. LEXIS 17623 (S.D. Fla. Sept. 25, 2013). Plaintiffs, a group of children diagnosed as medically fragile and who qualified for services through Florida’s Medicaid program, brought a class action alleging that the Florida had a history of unnecessarily segregating medically fragile and complex children in institutions, and thus discriminating against these children on the basis of their disabilities. Plaintiffs alleged that Defendants denied them Medicaid services, including private-duty nursing services, due to the adoption of uniform policies, practices, and regulations to reduce private duty nursing services, and children were unnecessarily being institutionalized. Id. at *3. Plaintiffs further contended that Defendants failed and continued to fail to provide medically necessary services in home and community settings to Medicaid recipient children in Florida. Plaintiffs asserted violations of the Rehabilitation Act of 1973, the Medicaid Act, the Nursing Home Reform Amendments to the Medicaid Act, Early and Periodic Screening, Diagnostic, and Treatment Services, and 42 U.S.C. § 1983. Plaintiffs moved for certification of a class comprised of all current and future Medicaid recipients in Florida under the age of 21, who were institutionalized in nursing facilities, or medically complex or fragile and at risk of institutionalization in nursing facilities. The Court denied the motion. Plaintiffs asserted that the proposed class consisted of approximately 3,338 children with severe disabilities who were either currently living in nursing facilities or were at risk of being placed in nursing facilities due to the threatened denial or reduction of medical and nursing services. Id. at *8. Further, Plaintiffs contended that common to all of the claims were allegations that Defendants routinely denied or reduced community-based medically necessary services to Plaintiffs, and that, as a result, Plaintiffs and class members were unnecessarily institutionalized and were at risk of institutionalization in nursing facilities. The Court remarked that this case presented the issue of whether children were unnecessarily denied community-based services because of a policy or systemic practice on Defendants’ part or because, in isolated cases, Defendants made errors in executing legal policies and practices. Id. at *9. The Court reasoned that if a systemic problem existed, the case could be appropriately handled as a class action, and if the case involved a problem with the individualized application of the challenged policies in a handful of cases, class certification may not be appropriate. Id. at *10. The Court observed that at this juncture, the record was not sufficiently developed to discern what may be the case. Thus, the Court denied Plaintiffs’ motion without prejudice and stated that Plaintiffs would have the opportunity to conduct discovery as to whether their claim that class certification was appropriate and to renew their motion for class certification at the end of the discovery period if they so desired.

Aranas, et al. v. Napolitano, Case No. 12-CV-1137 (C.D. Cal. April 19, 2013). Plaintiffs brought a class action challenging the constitutionality of § of the Defense of Marriage Act (“DOMA”), which precluded named Plaintiff Jane DeLeon from receiving certain immigration benefits that are available to immigrants in heterosexual marriages. Plaintiffs alleged that Defendants denied DeLeon I-601 waiver of inadmissibility due to § of the DOMA. The I-601 waiver of inadmissibility requires a showing that removal from the United States would result in extreme hardship to the U.S. citizen spouse or parent. Id. at *2. Pursuant to § of the DOMA, DeLeon’s same-sex spouse did not qualify as a spouse for purposes of establishing the requisite hardship. DeLeon moved for class certification, and the Court granted the motion and certified a class of all members of lawful same-sex marriages who had been denied or would be denied lawful status or related benefits under the Immigration and Nationality Act by the Department of Homeland Security solely due to § of the DOMA. Defendant asserted that the proposed class definition included potential class members who lacked Article III standing because they would be harmed, if at all, at some future date. The Court noted that in a class action, standing is satisfied if at least one named Plaintiff meets the requirements. Id. at *3-4. Thus, the Court opined that the proposed class definition was not improper solely because some potential class members had not yet been harmed. Defendants also argued that a nationwide class action should be denied because it could interfere with the litigation of similar issues in other judicial districts. The Court noted that nothing in Rule 23 limits the geographical scope of a class action that is brought in conformity with the rule. Id. at *6. Thus, the Court opined that the proposed class definition was not improper solely because the proposed class encompassed the entire country. The Court observed that numerosity was easily established. Plaintiff cited empirical data, including 2010 Census
Bureau estimates of about 42,000 American households that included same-sex spouses, and provided evidence of the large number of same-sex couples seeking immigration benefits. Regarding commonality, the Court noted that the proposed class members had all been disfavored by DOMA’s denial of their state recognized same-sex marriages. Defendants argued that an I-601 waiver of inadmissibility, which DeLeon sought, was discretionary and DeLeon could not receive the waiver even if § was deemed unconstitutional. The Court noted that although Defendants’ argument concentrated on the ultimate immigration benefits that DeLeon and the proposed class members sought, this was not at issue. The Court remarked that other proposed class members could seek different types of immigration benefits, but DeLeon and all proposed class members were foreclosed from any consideration for immigration benefits by §. The Court observed that § 3 was allegedly unconstitutional, and an absolute initial threshold foreclosing consideration for the immigration benefits sought. Id. at *8. Accordingly, the Court found that commonality was met. Although Defendants argued that the facts concerning DeLeon’s immigration status were unique, it was undisputed that she was denied the I-601 waiver of inadmissibility solely due to §. The Court remarked that while DeLeon’s I-601 waiver of inadmissibility would ultimately depend on a discretionary weighing of facts and circumstances peculiar to her, that decision was not before it. Thus, the Court reasoned that Plaintiff was not likely to be preoccupied with litigating the defense to the detriment of the class as a whole, and stated that typicality had been satisfied. Regarding adequacy, the Court observed that Defendants’ argument focused solely on the ultimate immigration benefit sought, and ignored the substantial shared interest among DeLeon and the class members in a declaration of DOMA’s constitutionality. The Court remarked that whether DeLeon ultimately received a waiver of inadmissibility was beyond the scope of this action. Thus, the Court concluded that DeLeon was an adequate class representative. The Court opined that Rule 23(b)(2) applied, which permits class action certification where the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. Id. at *10-11. Finally, the Court noted that the proposed interim class counsel were from a non-profit organization specializing in complex federal litigation on behalf of immigrants and refugees, and the attorneys had extensive experience litigating class actions on behalf of immigrants and refugees. Thus, the Court found that proposed counsel was qualified to serve as interim class counsel. Accordingly, the Court granted the motion for class certification.

**DL, et al. v. District Of Columbia, 2013 U.S. App. LEXIS 7375 (D.C. Cir. April 12, 2013).** Plaintiffs brought a class action challenging Defendant’s systemic failure to identify, locate, and evaluate three to five year old children with disabilities, and offer them a free appropriate public education in violation of the Individuals with Disabilities Education Act (“IDEA”), Section 504 of the Rehabilitation Act, and other laws. Id. at *5. Plaintiffs sued on behalf of all children who were or might be eligible for special education and related services, who live in, or are wards of, the District of Columbia, and whom Defendant did not identify, locate, evaluate, or offer special education and related services to when the child was between the ages of three and five years old, or whom Defendant have not or would not identify, locate, evaluate or offer special education and related services to when the child was between the ages of three and five years old. Id. at *7-8. Plaintiffs requested certification of a class pursuant to Rule 23(b)(2), and a declaratory judgment that Defendant had violated federal and District of Columbia law, including the IDEA. Id. at *5-6. The District Court certified the class pursuant to Rule 23(b)(2). Defendant thereafter moved to decertify the class in light of the Supreme Court’s intervening decision in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011). Defendant argued that Plaintiffs’ claims were too broad to establish commonality under Rule 23(a) as required by Wal-Mart. Id. at *12. Plaintiffs opposed Defendant’s motion and moved to amend the initial class certification order to add sub-classes and to re-certify the existing Rule 23(b)(2) class as a hybrid class, with claims for comprehensive declaratory and injunctive relief under Rule 23(b)(2) and individual claims for compensatory damages and/or reimbursement under Rule 23(b)(3). Id. The District Court granted Plaintiffs’ motion for hybrid certification and denied Defendant’s motion to decertify the class, finding that Plaintiffs had “amply demonstrated there are questions of law and fact common to the class,” all members of which “suffered the same injury: denial of their statutory right to a free appropriate public education.” Id. at *13. The District Court had also concluded that the requested sub-classes were unnecessary. On Defendant’s appeal, the D.C. Circuit vacated the class certification order and remanded.
for reconsideration of whether a class, classes, or sub-classes might be certified. The D.C. Circuit found that the harms alleged to have been suffered by Plaintiffs involved different policies and practices at different stages of Defendant’s “Child Find” program and the free appropriate public education (“FAPE”) process, and the District Court had identified no single or uniform policy or practice that bridged all of their claims. Id. at *22. The D.C. Circuit reasoned that even if Defendant had violated the IDEA as to each class member, that was not enough to establish Rule 23(a) commonality in the absence of a uniform policy or practice that affected all class members. Id. Nonetheless, the D.C. Circuit did not suggest that a class could never be certified. Id. at *24. The D.C. Circuit acknowledged that Plaintiffs had recognized the problem with the currently certified class when they moved to add four sub-classes consisting of children whom Defendant failed to identify or locate for services; provide with a timely initial evaluation; provide with a timely eligibility determination; or provide with a smooth and effective transition. Id. at *24-25. Plaintiffs suggested that they could show as to each sub-class that the harm caused by Defendant’s failures stemmed from a policy or practice that would provide a basis for the requested injunctive and declaratory relief. Id. at *25. Because the District Court had never considered the proposed sub-classes, the D.C. Circuit determined that a remand would be appropriate so that District Court could determine whether sub-classes would meet the requirements of Rule 23(a) commonality after Wal-Mart. Id. at *25-26. Accordingly, the D.C. Circuit vacated the order certifying the class and remanded the case to the District Court for reconsideration.

Kenneth R., et al. v. The State Of New Hampshire, 2013 U.S. Dist. LEXIS 132648 (D.N.H. Sept. 17, 2013). Plaintiffs, a group of people with serious mental illness who were institutionalized, brought a putative class action alleging that Defendants, the Governor of New Hampshire, the Office of the New Hampshire Department of Health and Human Services, and the Administrator of the New Hampshire Bureau of Behavioral Health, violated the integration mandates of the Americans With Disabilities Act (“ADA”) and Rehabilitation Act (“RA”) by relying excessively on the provision of institutional care to treat mental illness rather than appropriate community-based care programs. Id. at *6-7. Plaintiffs also alleged that Defendants violated the Nursing Home Reform Act (“NHRA”) by failing to develop and implement an adequate Pre-admission Screening and Annual Resident Review (“PASARR”) program as mandated by the NHRA. Plaintiffs further asserted that Defendants’ pattern or practice of under-funding community services and its over-reliance on institutional treatment created a systemic deficiency in the array of available community services, which in turn contributed to the unnecessary institutionalization of people with serious mental illness, and to the placement of such people at serious risk of unnecessary institutionalization. Id. at *7-8. Plaintiffs moved for certification of a class consisting of all persons with serious mental illness who were unnecessarily institutionalized in the New Hampshire Hospital or Glencliff or were at serious risk of unnecessary institutionalization. Id. at *22. The Court granted Plaintiffs’ motion as to the ADA and RA claims, finding that Plaintiffs met all the requirement of Rule 23(a) and (b)(2). Plaintiffs satisfied the commonality requirement for ADA and RA class as the evidence, which included Defendants’ own reports and the opinions of Plaintiffs’ experts established that the proposed ADA and RA class was comprised of hundreds of persons. Substantial evidence suggested that Defendants’ policies and practices had created a systemic deficiency in the availability of community-based mental health services and the deficiency was the source of harm alleged by all class members. Id. at *32. Defendants’ own reports demonstrated that there was a dearth of available community-based services within New Hampshire’s mental health system and that the systemic condition was a result of the way Defendants managed the system, which it could have controlled. Id. The evidences also suggested a causal connection between the systemic condition and the harm experienced by all class members, i.e., a serious risk of unnecessary institutionalization, which included a serious risk of continued unnecessary institutionalization. Id. at *32-33. Plaintiffs thus showed that common questions susceptible to common answers included whether there was a systemic deficiency in the availability of community-based services and whether that deficiency followed from Defendants’ policies and practices. Id. at *34. Defendants argued that class certification was improper due to dissimilarities in class members’ needs and preferences for community-based services, and dissimilarities in their current preferences and future needs as between institutional care and community-based services. Id. at *37-38. Specifically, Defendants asserted that the limited funding “pie” could necessarily pit class members needing and wanting a particular community
service, or mix of services, against other members needing and wanting some other community service or mix of services. *Id.* at *38-39. The Court, however, found that Defendants were venturing into issues that were not particularly relevant to the class certification inquiry. *Id.* at *39. The Court further determined that even if Defendants were predicting an intra-class conflict, the creation of independently represented sub-classes would resolve such potential issues. *Id.* at *40. Defendants also contended that differences in future needs, and differences in treatment preferences between community services and institutional care, would defeat commonality. The Court rejected Defendants’ contention, finding that the existence of preference differences among class members would not change the fact that Defendants’ practices with regard to community services had affected all class members. *Id.* at *41. The Court thus concluded that Plaintiffs met the commonality requirement. The Court also held that Plaintiffs met the typicality and adequacy of representation requirements. All class members had an abiding interest in securing the availability of community-based services options sufficient to preclude unnecessary institutionalization, and it was adequately showed that, due to a shortage of the types of community-based services sought, each of the named Plaintiffs either experienced unnecessary institutionalization or were at serious risk of being unnecessarily institutionalized. *Id.* at *45-46. The Court thus found that the named Plaintiffs’ experiences and claims were typical of those of the members of the class, and that the named Plaintiffs were adequate representatives of the class. *Id.* at *46. Plaintiffs sought to maintain the action as an injunctive class action under Rule 23(b)(2). Because Plaintiffs submitted evidence to show a systemic deficiency in Defendants' community-based mental health services system, the Court found that they met their burden to show that Defendants acted or refused to act on grounds that apply generally to the class, and that final injunctive relief or corresponding declaratory relief was appropriate respecting the class as a whole. *Id.* at *47. The Court also ruled that injunctive relief prohibiting a discriminatory lack of community service option would benefit all class members. The Court, however, denied class certification as to Plaintiffs’ PASARR claim, since the evidence did not support an adequate inference that the number of persons negatively affected by the asserted deficiencies in PASARR was sufficiently large to warrant class treatment. *Id.* at *27. Accordingly, the Court granted Plaintiffs’ motion for class certification as to their ADA and RA claims, and denied class certification of their PASARR claim.

**Ligon, et al. v. City Of New York**, 2013 U.S. Dist. LEXIS 18565 (S.D.N.Y. Feb. 11, 2013). Plaintiffs, a group of African-American and Latino residents, brought a class action alleging that New York Police Department’s (“NYPD”) practice of making unlawful trespass stops outside residential buildings that were enrolled in the trespass affidavit program (“TAP”) were often made without reasonable suspicion, and thereby violated the Fourth Amendment. The TAP allowed police officers to patrol inside and around thousands of private residential apartment buildings throughout New York City. Plaintiffs moved for a preliminary injunction seeking an order requiring the NYPD to create and implement new policies that specifically address the problem of unconstitutional trespass stops. *Id.* at *4. Following the grant of the preliminary injunction, Defendants obtained an immediate stay pending appeal. *Id.* Plaintiffs subsequently moved for certification of a class solely for the purpose of preliminary injunctive relief consisting of all individuals who were at risk of being stopped outdoors without legal justification by the NYPD on suspicion of trespassing in buildings enrolled in the TAP. *Id.* at *5-6. Plaintiffs sought certification to ensure that any relief ordered in connection with the preliminary injunction motion would benefit all persons at risk of being subjected to the challenged practice. *Id.* at *6. The Court granted Plaintiffs’ motion. The Court held that Plaintiffs had showed a clear likelihood that Defendants had displayed deliberate indifference toward a widespread practice of unconstitutional trespass stops by the NYPD outside of the TAP buildings. *Id.* at *7. The evidence demonstrated that the NYPD frequently made trespass stops for no reason other than that the officer had seen someone enter and/or exit the building and the testimony of Plaintiffs and a non-party witness described similar encounters with the police when stopped in the vicinity of TAP buildings. *Id.* at *8. Defendants argued that Plaintiffs lacked standing because no Plaintiff could demonstrate more than one past improper stop. *Id.* at *19. The Court, however, held that the frequency of alleged injuries inflicted by the practice at issue had created a likelihood of future injury sufficient to address any standing concerns. *Id.* at *20. The Court held that Plaintiffs had adequately established the likelihood of an unconstitutional stop and frisk practice of the part of the NYPD for purposes of class certification because they had offered more than enough evidence at the hearing to support the conclusion the NYPD had a practice of making
unlawful trespass stops outside of the TAP buildings in the Bronx. *Id.* at *22. Further, Plaintiffs also satisfied all the legal prerequisites for class certification. Plaintiffs met the commonality requirement as Plaintiffs and the putative class members were allegedly subjected to the same unlawful conduct by NYPD officers under the auspices of a single NYPD program, i.e., unjustified stops, not supported by reasonable suspicion, and occurring outdoors in the vicinity of TAP buildings in the Bronx on suspicion of trespass. *Id.* at *23-24. Defendants met the typicality requirement because the experiences of the named Plaintiffs were identical to those of the proposed class. *Id.* at *26. Defendants argued that Plaintiffs' proposed class definition was too vague to enable a proper determination of class members particularly because it read that the class included “all individuals who have been or are at risk of being stopped outdoors without legal justification.” 

*Id.* at *28. The Court agreed with Defendants and amended the class definition to state that the class consisted of “all individual who have been or are at risk of being stopped outdoors within the vicinity of Bronx apartment buildings.” *Id.* at *29. The Court held that the amendments would make the definition clear enough to make the proposed class sufficiently ascertainable. *Id.* Thus, concluding that Plaintiffs satisfied the prerequisites of Rule 23, the Court granted class certification solely for the purpose of preliminary injunctive relief.

**Richardson, et al. v. Kane, 2013 U.S. Dist. LEXIS 51122 (M.D. Pa. April 9, 2013).** Plaintiff, an inmate in Pennsylvania, brought a class action on behalf of all current and future inmates, seeking damages and injunctive relief for claims of excessive use of force and conditions of confinement in violation of the Eighth Amendment. Plaintiff alleged that Defendants punished him for rejecting dangerous cell assignments by placing him in painfully tight metallic restraints for weeks at a time. Defendants filed a motion to dismiss, which the Court granted in part. Defendants first sought to dismiss Plaintiff’s request for class certification. The Court noted that Plaintiff’s request to certify a class consisting of all persons who were currently imprisoned or will be imprisoned was overbroad as it clearly encompassed persons who had not suffered any injury. *Id.* at *15. To the extent that Plaintiff sought to certify a class based on inmates housed pursuant to a policy of housing inmates with a hostile inmate, the Court found that the determination of class membership would require adjudication on a person-by-person basis. Accordingly, the Court refused to certify the class. In their motion to dismiss, Defendants asserted that they were entitled to qualified immunity. The Court noted that application of qualified immunity implicates two distinct inquiries. The first inquiry evaluates whether Defendant violated a constitutional right, and the second inquiry assesses whether the right in question was clearly established at the time Defendant acted. *Id.* at *34. As to the first inquiry, the Court noted that the Eighth Amendment protects prisoners from cruel and unusual punishment, including the unnecessary and wanton infliction of pain. *Id.* at *36. To prevail on an Eighth Amendment claim, the Court noted that an inmate must show: (i) a deprivation that is objectively sufficiently serious; and (ii) a sufficiently culpable state of mind of Defendant. *Id.* Although the initial use of restraints may properly be characterized as an excessive force claim, the Court concluded that the prolonged use of restraints at issue here was more properly analyzed under the deliberate indifference standard. *Id.* at *36-37. Defendants asserted that they could not be held deliberately indifferent as to the health and safety of Plaintiff because, among other things, it was important to the safety and security of the institution and all those who resided and worked within it that inmates comply whenever they were given direct orders from staff; or, alternatively, that there was no evidence that Plaintiff was injured by improperly applied restraints. Nonetheless, the Court concluded that there remained disputed issues of material facts as to whether Defendants were deliberately indifferent to an excessive risk to Plaintiff’s health and safety. Taking the evidence in the light most favorable to Plaintiff, the Court concluded that Plaintiff had set forth sufficient allegations that Defendants were deliberately indifferent to a substantial risk of serious harm to Plaintiff in violation of Eighth Amendment. As to the second prong of qualified immunity, Defendants claimed that placement of Plaintiff in ambulatory restraints for 28 days was an obvious violation of his Eighth Amendment rights. The Court noted that the prolonged restraint of Plaintiff compelled Defendants to provide frequent status reports, and prison regulations required constant monitoring of prisoners in restraints. The Court concluded that a reasonable official in Defendants’ position would have known that
placing Plaintiff in restraints for 28 days violated Eighth Amendment. The Court found that Defendants had fair notice that their alleged conduct, if proven true, violated a clearly established right under the Eighth Amendment. *Id.* at *46. Accordingly, the Court rejected Defendants’ defense of qualified immunity.

**Roadhouse, et al. v. Las Vegas Metropolitan Police Department, 2013 U.S. Dist. LEXIS 37870 (D. Nev. Mar. 19, 2013).** Plaintiff, an inmate, was arrested on misdemeanor charges of reckless driving and was admitted to the Clark County Detention Center (“CCDC”) operated by Defendant. He brought a class action alleging that his federal and state constitutional rights were violated because he was strip searched without particularized, reasonable suspicion in a group and in the view of other inmates. *Id.* at *3-4. Plaintiff moved for class certification proposing two separate classes, including: (i) all detainees of the CCDC who were strip searched in groups of two or more pursuant to Defendant’s blanket policy, practice, or custom (the “group search class”), and (ii) all pre-arraignment detainees of the CCDC who were strip searched upon admission to the general population of the facility without reasonable suspicion that they were concealing drugs, weapons, or other contraband pursuant to Defendant’s blanket policy, practice, or custom (the “suspicionless search class”). *Id.* at *4. The Court denied Plaintiff’s motion for class certification. First, the Court denied certification of both classes under Rule 23(b)(2) because not only was there a policy in place that precluded the need for an injunction, but also the damages sought were not incidental. *Id.* at *20-21. The Court also found the group search class was not suitable for class certification under Rule 23(b)(3) because the proposed class could not meet either the predominance or superiority requirement. *Id.* at *21. Defendant’s written policy clearly instructed police officers not to conduct strip searches in a group setting, and Defendant provided several affidavits that lieutenants assigned to booking at the CCDC at all relevant times believed subordinates followed and obeyed the policy. *Id.* at *22-23. Defendant also provided affidavits of at least eleven additional male correctional officers who stated that they always followed the policy. *Id.* at *24. Further, Plaintiff’s proposed class included females. Female officers who conducted strip searches of female inmates provided affidavits stating that they never violated the policy of providing a dividing partition if a group strip search was conducted. *Id.* The Court thus noted that each putative class member would need to establish his or her unique fact-specific evidence about his or her strip search. *Id.* at *32. The Court held that too many individual questions and potential answers predominated over the common questions and answers. *Id.* Given such complexities, the Court found that class action treatment was not the superior method of adjudication for the group search class. *Id.* at *31-33. The Court also declined to certify of the suspicionless search class. The Court had earlier held in an order on a motion to dismiss that suspicionless searches did not violate the Fourth Amendment. The Court also concluded there was no right for inmates to be free from such searches under the Nevada Constitution. For these reasons, the Court declined to certify the class. *Id.* at *33-34.

**Chen-Oster, et al. v. Goldman, Sachs & Co., 2013 U.S. Dist. LEXIS 148318 (S.D.N.Y. Oct. 15, 2013).** Plaintiffs, a group of female employees, commenced a class action in 2010 by accusing Defendant of gender bias and having a “corporate culture” that allegedly favors men over women for pay and promotions. *Id.* at *1. Plaintiffs contended that they had been discriminated against with respect to compensation, promotion, and performance evaluations. *Id.* at *2. During discovery, the parties reached an impasse regarding several categories of documents that Defendant refused to produce, arguing that they were not relevant to Plaintiffs’ claims. Specifically, Defendant refused to produce the following categories of documents: (i) all internal complaints made by putative class members during the discovery period that related to compensation, promotion, or performance evaluations; (ii) unredacted copies of all discoverable complaints; and (iii) internal complaints made by female employees who were not in the class. *Id.* at *3. Plaintiffs filed a motion to compel. The Court remarked that “more ‘liberal civil discovery rules’ [apply] in employment discrimination cases, giving Plaintiffs ‘broader access to employers’ records in an effort to document their claims.” *Id.* at *6. The Court noted that even “broader discovery” is warranted when a Plaintiff has asserted that a pattern or practice of discrimination exists at the organization-wide level as opposed to allegations levied against an individual supervisor. *Id.* at *8. With respect to the first open issue – all internal complaints made by putative class members during the discovery period that
relate to compensation, promotion, or performance evaluations – the Court held that Defendant must produce this information despite its assertion that they “have nothing to do with gender concerns.” *Id.* at *9. While complaints containing relevant “buzzwords” such as “sex discrimination,” “gender,” “glass ceiling,” or “women’s work” are clearly gender-related, the Court held that “buzzwords are not required at the discovery stage in a disparate treatment case" given the broader scope of discovery in pattern or practice cases. *Id.* at *13. The Court held that Defendant “must provide Plaintiffs any internal complaints regarding compensation, promotion, or performance reviews where a female who is a member of the putative class drew a comparison between herself or another putative class member and one or more of her male colleagues.” *Id.* at *15. With respect to the second issue – unredacted copies of all discoverable complaints – the Court also held that Defendant must provide this information to Plaintiffs as it was relevant to the case and so that Plaintiffs are able to “contact potential witnesses and develop anecdotal evidence of the alleged gender discrimination.” *Id.* at *19. While Defendant objected based on the fact that producing these unredacted complaints would violate the privacy interest of its current and former employees, and therefore undermine the integrity and effectiveness of its internal complaint process, the Court held that the parties’ protective order and confidentiality agreement addressed such concerns. *Id.* at *23-24. With respect to the final issue – internal complaints made by female employees who are not in the class – the Court held that Defendant was not required to produce such information since complaints by non-class members “will be overly burdensome” and that such a burden “outweighs the scant possibility of uncovering admissible evidence.” *Id.* at *27. However, the Court ordered Defendant to disclose complaints made by women who were not members of the putative class but work within the same business units as the putative class members (e.g., analysts or administrative assistants). *Id.* at *29. The Court held that since these employees “have worked closely with the putative class members” they may be able to “provide anecdotes and information regarding their interactions with common managers, experiences utilizing the same internal complaint process, or the general culture of these divisions.” *Id.*

**Critchfield Physical Therapy, P.C., et al. v. Techhealth, Inc., 2013 U.S. Dist. LEXIS 29672 (E.D. Mo. Mar. 4, 2013).** Plaintiff, a health service provider, brought a class action alleging that Defendant sent unsolicited fax advertisements in violation of the Telephone Consumer Protection Act (“TCPA”). Defendant argued that there was no violation of the TCPA because Plaintiff and other recipients consented to receipt of fax advertisements. In response to discovery requests, Defendant provided Plaintiff with a redacted spreadsheet containing certain information relating to the fax recipients. *Id.* at *3-4. Plaintiff moved for an order compelling the production of unredacted faxing lists used in Defendant’s faxing campaigns; identities, names, addresses and contact information for potential class members; telephone records or fax transmission logs including telephone numbers and service providers used in Defendant’s faxing campaigns; and documents relating to faxing software, hardware models, devices, and hard drives used in Defendant’s faxing campaigns. *Id.* at *4. The Court granted in part and denied in part Plaintiff’s motion. Plaintiff asserted that the spreadsheets in their native unredacted format were required to analyze their contents and to determine if any alterations were made, and also to prove numerosity. Further, Plaintiff maintained that telephone records were required to determine the number and dates of faxes sent during the class period. Plaintiff submitted a proposed protective order to address Defendant’s privacy concerns. Defendant, however, argued that its telephone records, faxing software, and mirror images of its hard drives had no relevance to class certification, and providing the mirror images would result in the production of confidential information, including patient information and Defendant’s confidential business information and trade secrets. Defendant also asserted that complying with Plaintiff’s requests was burdensome as Defendant would have to produce voluminous phone records dating back to 2007, many of which had nothing to do with Plaintiff’s lawsuit. The Court noted that in the context of fax advertising cases like this, case law authorities have held that at least some of the data like that sought by Plaintiff was not only relevant to the merits of Defendant’s established-business-relationship defense, but also it would demonstrate that each class member was like Plaintiff relevant to this defense. *Id.* at *9-10. At the same time, the Court noted that much of the discovery Plaintiff sought was unnecessary and overly burdensome at the class certification stage. The Court opined that although it would allow some of the discovery sought, it would await a further showing of the need for other aspects of the discovery requests, depending upon the arguments Defendant raised in opposition to Plaintiff’s motion for class certification. Accordingly,
the Court denied Plaintiff’s motion with respect to fax recipients’ full contact information and to compel production of a mirror image of Defendant’s hard drives. The Court, however, directed Defendant to produce an original version, in native form, of the spreadsheet it had previously produced, including the full names and fax numbers of those on the spreadsheet, subject to a protective order to be agreed upon by the parties, which would include a prohibition against Plaintiff contacting any prospective class members. Further, the Court also instructed Defendant to produce information regarding the fax sending devices/machines and the contact information of Defendant’s telephone service used to send the faxes in question. *Id.* at *10-11.


Plaintiffs, a group of borrowers, alleged that Defendant Bank of America (“BoA”) created impound accounts for residential mortgage loan customers without prior notice to or consent of the customer. Plaintiffs asked Defendant to identify all class members by providing the name, the current or last known mailing address, and the current or last known e-mail address of the class member, the residential property address secured by the loan, and the loan number. Defendant objected, stating that the information sought was protected from disclosure by statutes governing the privacy rights of consumers and was premature prior to a ruling on class certification. Parties did not contact the Court within 30 days regarding a discovery dispute pursuant to the Court’s local rules. Defendant provided a spreadsheet containing information for approximately 9,200 potential members of the putative class, and Parties agreed to a representative sample of 221 Servicing Records (“SSR”) that contained loan amounts, property values, payment histories, schedules of fees and charges, escrow/impound records, and summaries of calls with each borrower. The borrower names, addresses, and account numbers were redacted to protect consumer privacy. The parties also did not contact the Court regarding any discovery dispute concerning the production of the spreadsheet or the redacted SSR. Thereafter, Plaintiff moved for class certification and filed an *ex parte* motion to continue the class certification hearing so that they could have sufficient time for additional discovery. Plaintiffs did not mention that they were also seeking discovery of class member contact information in order to reply to Defendant’s opposition. The parties brought this dispute to the Court’s attention on March 18, 2013. Plaintiffs first received objections to its interrogatory in August 2012; received the spreadsheet data in October 2012; and received the data for the 221 SSR’s before January 11, 2013. Because all of these dates were more than 30 days before March 18, 2013, the Court found that Plaintiffs waited too long to bring this dispute to the Court’s attention, and thus waived their request to compel production of class member. Additionally, the Court noted the delay in submission of the discovery dispute and denied Plaintiffs’ request to compel production of class member contact information. The Court also remarked that Plaintiffs failed to show how the information sought was relevant to refuting Defendant’s defenses to class certification. Plaintiffs wanted the contact information of putative class members because they asserted the SSR data did not tell the entire story of those loan files, as they did not accurately memorialize certain telephone conversations or completely failed to memorialize conversations. Plaintiffs argued that the contact information would give them an opportunity to speak to these class members about those conversations, which would allow Plaintiffs to refute Defendant’s defenses to class certification based on the SSR data that individual issues about causation and injury predominate. The Court observed that Plaintiffs, however, failed to specify what use of the SSR they sought to refute and what information they would obtain by contacting the individual putative class members that would rebut BoA’s arguments. The Court noted that Defendant relied solely on the information contained in the SSR to make its arguments in opposition to class certification and did not use any redacted or other information not produced, and Plaintiffs had access to this same pool of information. Thus, in light of the privacy concerns surrounding the class member contact information and the lack of relevancy offered by Plaintiffs, the Court also denied their request to compel production on this ground.

**Dunbar, et al. v. Google, Inc., 2013 U.S. Dist. LEXIS 48630 (N.D. Cal. April 2, 2013).** Plaintiff, a customer of an e-mail account serviced by Google, Inc., brought a class action alleging that Defendant unlawfully and intentionally intercepted and used electronic communications to display advertisements in violation of the Electronic Communications Privacy Act. Plaintiff moved to compel discovery, asserting that Google did not produce documents relating to Gmail ad targeting and data flow referenced in one of the
documents Google did produce; documents found at a link referenced in another produced document; and any prior, final, or subsequent versions of four of the documents. The Court had issued an order in part requiring Google to produce those documents. Plaintiff then moved to enforce this order, but the Court denied the motion. Google stated that the documents at issue were two versions of explanations of its automated processing system in Gmail; the first version was a diagram providing an overview of the system (“Diagram”) including a link to a document with a more detailed explanation (“Description”), and the second version was the Description, which contained a link back to the Diagram. Google asserted that the Gmail ad targeting and data flow was the hyperlink in the Diagram and the link referenced in Plaintiff’s second request was the hyperlink from the Description back to the Diagram. Google claimed that it produced both the Diagram and the Description in 2011 and an updated version of the documents prior to the Court’s earlier order. Id. at *3-5. Plaintiff offered no evidence beyond his suppositions that there were other, absent documents, and Google stated that it had no other documents with that link attached or with that title. Thus, the Court opined that absent some showing by Plaintiff that there were other documents that Google had not produced, Google was in compliance with its earlier order. Further, Google had produced updated versions of both the Diagram and the Description, and maintained that any past versions of the documents were not saved as separate files because they were continuously updated, and so the new versions were saved over the old versions. Although Google suggested that it had identified custodians who could have an earlier version, it did not establish that it successfully located any earlier versions. Google also maintained that the attorney-client privilege protected any versions produced before it shared the documents with parties other than its in-house counsel. Google asserted that it had no obligation to retain these past versions of the Diagram and the Description because they were altered in the normal course of business. Id. at *5-7. The Court noted that Google failed to take steps to preserve documents that could have been discoverable even after the litigation commenced, and stated that because as soon as a potential claim was identified, a litigant was under a duty to preserve evidence which it knows or reasonably should know was relevant to the action, Google’s failure to retain older versions of the documents as they were being amended was problematic. Id. at *7. The Court, however, also observed that nothing in either Plaintiff’s papers or Google’s opposition suggested that the failure to preserve prior versions of the documents was the result of a culpable state of mind which supported a finding of spoliation. Accordingly, the Court opined that no further order to enforce or sanctions were warranted. Id. at *7-8.

In Re iPhone/iPad Application Consumer Privacy Litigation, 2013 U.S. Dist. LEXIS 74821 (N.D. Cal. Mar. 6, 2013). Plaintiffs, a group of Apple device owners, brought a class action alleging that Apple Inc. collected and stored geolocation information from class members even when the geolocation feature of the devices was turned off; and that Defendant failed to disclose to class members that its operating system allowed third-parties to collect and monitor personal information from Apple devices without their consent. Id. at *12. The Court had found that Apple had improperly limited production, and thus ordered Apple to produce documents responsive to Plaintiffs’ requests for production, but limited Plaintiffs’ requests for discovery regarding personal information to those categories that Plaintiffs identified in their complaint as being shared with third-parties. Plaintiffs asserted that Apple failed to comply with a previous order and sought three types of information from Apple, including unredacted versions of relevant documents in which Apple had redacted names and other information; documents responsive to two of Plaintiffs’ requests regarding Apple’s privacy policies and whether Apple obtained consent to share users’ location data; and further responses to seven requests for production that were the subject of the previous order. Id. at *14. The Court deferred ruling until it reviewed Apple’s searches. The declaration of Apple’s Senior Litigation Manager stated that Apple had not produced at least six responsive documents that were subsequently attached to its motion for summary judgment. Id. at *19. Having reviewed its discovery processes, Apple discovered some additional documents that could be responsive, and the Senior Litigation Manager promised to produce any additional non-privileged, responsive documents. The Court remarked that Apple provided sufficient evidence to suggest that it has not fully complied with its earlier order and in fact had not produced all responsive documents. The Court directed Apple to file a detailed account of the discovery process used, and to specifically identify the search terms used, the dates on which it performed the searches, any individual custodians or central sources subject to each set of terms
used in the searches, and the number of responsive documents. The Court also instructed Apple’s Senior Litigation Manager to file a declaration explaining from what sources Apple drew the responsive documents, particularly the parameters Apple used to determine that documents were not responsive. \textit{Id.} at *25. Considering that only 3,000 out of 10,000 potential documents were produced to Plaintiff, the Court directed Apple to show how it limited its production. Plaintiffs also sought all documents relating to Apple’s policies, security criteria, and privacy standards used to authorize apps to be distributed, downloaded, shared, or sold through the Apple iTunes App store; and all documents relating to whether Apple obtained consent from any user, including but not limited to Plaintiffs named in the complaint, to have their location data collected, and/or sent to Apple by and/or through their iDevices. The Court ordered that Apple produce any responsive documents to these requests. Finally, in its production of documents regarding its app review process, Apple redacted two categories of information, stating that the information was irrelevant and highly confidential even within the company. \textit{Id.} at *27. The Court remarked that Apple did not explain why the protective order was insufficient as to these materials. Because the Court was not persuaded that Apple was entitled to an exemption from the discovery obligation to produce the documents as they were kept in the usual course of business (especially given the protective order to which Apple itself stipulated), it held that Apple must produce unredacted versions of the documents to Plaintiffs’ counsel, with an attorneys-eyes-only designation if so warranted. \textit{Id.}

\textit{In Re Nexium Antitrust Litigation}, 2013 U.S. Dist. LEXIS 10455 (D. Mass. Jan. 24, 2013). In a multi-district class action alleging products liability claims against AstraZeneca arising from the drug Nexium (esomeprazole magnesium), the Court determined that a consolidated complaint on behalf of a putative direct purchaser class needed to be filed. \textit{Id.} at *6. However, a squabble developed among counsel as to which coalition of counsel would prosecute the consolidated complaint. \textit{Id.} Taking note that the squabble was motivated by obtaining a larger allocation of attorneys’ fees rather than by professional judgment, the Court appointed lawyers Sobol, Gerstein, and Sorensen and their respective law firms as co-lead counsel for the putative class of direct purchaser Plaintiffs. \textit{Id.} at *7. Because the interests of those Plaintiffs in non-\textit{Illinois Brick} repealer states were not fully protected here, the Court directed counsel to step forward to represent that class of Plaintiffs. \textit{Id.} Under the \textit{Illinois Brick} rule, consumers who bought a price-fixed product from a middle-man could not sue the manufacturer. \textit{Id.} Further, the Court also directed counsel to report about the existence of any related litigation in state courts. \textit{Id.}

\textit{In Re Prograf Antitrust Litigation}, 2013 U.S. Dist. LEXIS 63594 (D. Mass. May 3, 2013). Plaintiffs, a group of purchasers the prescription drug Prograf, brought a class action against Astellas Pharma US, Inc., alleging that Astellas filed a baseless citizen petition with the Food and Drug Administration with the sole intent of foreclosing market entry by generic competitors, which improperly extended its monopoly and kept Prograf prices at supra-competitive levels. Due to an on-going discovery dispute regarding documents that had been withheld or redacted by Astellas on the basis of the attorney-client privilege and work product doctrine, Plaintiffs moved for appointment of a special master to assess Astellas’ claims of privilege by reviewing a portion of the redacted and withheld documents. As directed by the Court, Astellas submitted a set of proposed rules delineating how to address the applicability of privilege to three relevant categories of documents, namely communications involving third-parties, communications in which an individual is speaking as a business executive rather than as a lawyer, and communications between non-lawyers. Thereafter, the Court adopted a set of rules to guide the assessment of privilege and work product, stating that Astellas should apply these rules to the documents currently withheld or redacted and produce additional materials to Plaintiffs in accordance therewith. The Court reserved the issue of an appointment of a special master until the parties reported the results of their efforts pursuant to the order.

\textit{New England Carpenters Health & Welfare Fund v. Abbott Laboratories}, 2013 U.S. Dist. LEXIS 35644 (N.D. Ill. Feb. 20, 2013). Plaintiff brought a class action under the Racketeer Influenced and Corrupt Organizations Act (“RICO”), and the Robinson-Patman Act alleging that Defendant paid undisclosed kickbacks, through prescription co-payment subsidy programs, to privately-insured individuals so that those health plan members would choose Defendant’s branded drugs instead of less-expensive therapeutic alternatives. Defendant filed a motion to dismiss, and in this motion requested a stay of discovery until the

Plaintiff, a consumer, brought a class action seeking to recover damages for purchases of Marlboro Lights ("Lights") cigarettes, and alleging that she was induced to believe that light cigarettes were less harmful than full-flavored cigarettes based upon the marketing and branding of Lights. Defendants moved to quash 14 deposition topics Plaintiff submitted or alternatively for a protective order. The Court granted the motion. Discovery had been divided into phases with the first and current phase limited to the issue of class certification. Defendant Philip Morris USA Inc. ("PM USA") contended that because the first phase of discovery had been limited to the issues relevant to class certification, the remaining 14 deposition topics were overly broad, in that they were unlimited in temporal scope, and, for the most part, addressed merits issues, rather than class certification issues. PM USA suggested that Plaintiff visit its website, where transcripts of depositions from previous litigation against PM USA were available. PM USA also provided a chart containing a list of 75 previous depositions, which were identified by the deponent, his or her titles with the company, and the general topic about which the deponent testified. The Court stated that an understanding of prior Lights litigation, particularly class certification in those actions, was instructive because both parties agreed that PM USA would offer similar, if not identical, arguments to defeat class certification in this action. PM USA asserted that there was prior testimony that related to compensation and studies about compensation that had either been pointed out or provided to Plaintiff in a chart of prior deposition testimony, including 30(b)(6) deposition testimony, that related to the issue of compensation. PM USA asserted that because there had also been expert reports on this issue, Plaintiff had a much less burdensome way of discovering this information, rather than PM USA trying to recreate 50 years of history into one witness on a 30(b)(6) topic. PM USA argued that while the fact that people smoked differently was a class certification issue, the functionality of the FTC machine was a merits issue. The Court noted that to the extent that PM USA conducted studies on consumer choice, PM USA appeared to concede that such information was relevant to the class certification issue. Accordingly, the Court stated that Plaintiff could reformulate her deposition topics to include consumer choice information, but not include topics that included the functionality of the FTC machine or PM USA's knowledge regarding the various ways that smokers increased their tar and nicotine intake while smoking Lights. The remaining five deposition topics sought the identities on individuals with knowledge of the deposition topics. PM USA objected because Plaintiff sought the identities of individuals that were no longer with PM USA, and reiterated that the chart contained the identities of 75 individuals with knowledge. The Court remarked that as the deposition topics had now been limited, PM USA's objections to the final five deposition topics had no merit. Finally, PM USA objected to Plaintiff's document requests that were made as a part of the Rule 30(b)(6) notice, stating that the requests were voluminous and included documents that had already furnished. Plaintiff requested copies of all discovery responses which PM USA made, including responding to interrogatories, requests for production, and responses to requests for admissions in each respective case, all documents which had produced in these Light cigarette cases, and all records concerning other Lights and other tobacco litigation in which Defendants or any of their predecessors-in-interest had been involved. The Court found that
 Plaintiff’s request for documents was overbroad, and concluded that to the extent that Plaintiff submitted an amended notice of Rule 30(b)(6) deposition, limited in scope as discussed in this order, the document request would be sufficiently pared down so as not to be oppressive. The Court observed that to require PM USA to respond to this notice would be to ignore the directive of Rule 26(b)(2)(C)(iii) to limit the extent of otherwise relevant discovery where the benefit to and need of the propounding party was outweighed by the burden, expense, and impracticable demand imposed on the other side. *Id.* at *25.

*Rosales, et al. v. FitFlop USA, LLC, 2013 U.S. Dist. LEXIS 33472 (S.D. Cal. Mar. 11, 2013).*  Plaintiff, a consumer, brought a class action alleging violations of California’s Unfair Competition Law and the California Consumers Legal Remedies Act, as well as for breach of express warranty. Plaintiff alleged that Defendant’s footwear did not provide the benefits it advertised and it could actually cause or exacerbate the type of problems it claimed to protect against. Plaintiff applied for an issuance of a letter of request for international judicial assistance pursuant to the Evidence Act of 1975 to permit deposition testimony and production of documents from certain foreign individuals. The Court granted in part and denied in part Plaintiff’s motion. In advertisements promoting Defendant’s products, Dr. David Cook and Darren James were identified as co-inventors of technology used in FitFlop footwear. The Court thus found that Plaintiff was entitled to take the depositions of Dr. Cook and James and to request that they produce any relevant documents. Since these individuals were located in England, Plaintiff believed the depositions would not be allowed to proceed without a letter of request. Accordingly, the Court granted Plaintiff’s application for issuance of a letter of request to depose and seek documents from Dr. Cook and James. Plaintiff also sought a letter of request to depose and request documents from Scott Thompson, Carina Price, Ann-Marie Buckley, Thierry Boue, and Sara Mielke. All but Price were former employees. Price was a researcher who was allegedly involved in studies conducted concerning FitFlop footwear. Plaintiff asserted that it had to depose these individuals to authenticate documents, understand the process used to craft and substantiate Defendant’s health benefit claims; explain the procedures implemented to ensure that the claimed health benefits were accurate; and provide details as to how such a large number of unverified health benefits were presented to the public. The Court observed that although these non-party witnesses had relevant personal knowledge about Defendant’s past operations and the development of FitFlop footwear, Plaintiff did not adequately justify why it was necessary to depose each individual. Plaintiff did not cite any particular information or documents prepared or received by these individuals that needed further explanation or clarification that Plaintiff had been unable to obtain from Defendant. Defendant also objected on the grounds that Plaintiff knew about these non-party witnesses for an extended period of time but waited until nine days before discovery was scheduled to close – even after the discovery cut-off had already been extended – to seek the Court’s assistance in deposing them. Further, Defendant argued that the requested depositions were unnecessary because Plaintiff had already deposed other individuals with the same or similar personal knowledge, so the testimony of these non-party witnesses was unimportant to a resolution of the case. For these reasons, the Court denied Plaintiff’s application for issuance of a letter of request to depose and seek documents from Thompson, Price, Buckley, Boue, and Mielke.

*Saf-T-Gard International, Inc., et al. vs. Vanguard Energy Services, LLC, Case No. 12-CV-3671 (N.D. Ill. Feb. 15, 2013).*  Plaintiff, a global supplier of industrial safety products and personal protective equipment, brought a class action under the Telephone Consumer Protection Act (“TCPA”) alleging transmission of unsolicited faxes. Plaintiff moved to compel Defendant Seminole to provide information regarding faxes it sent to potential class members. The Court denied the motion. Plaintiff’s complaint alleged that Vanguard Energy Services, LLC (“VES”) sent an unsolicited fax advertisement, and that Vanguard Energy, LLC (“Vanguard”), and Seminole Energy Services, LLC (“Seminole”) were liable because the fax was sent on their behalf, and because they managed and directed the affairs of VES. Earlier, the Court had certified a class consisting of all persons whom were sent unsolicited faxes by or on behalf of Defendants from May 14, 2008 to June 4, 2012, promoting their goods or services for sale and who were not provided an opt-out notice. Plaintiff argued that the class definition encompassed individuals who received faxes sent by Seminole and Vanguard, as well as faxes sent by VES. The Court opined that the class definition should be read in the context of the amended complaint, which only alleged that faxes were sent by VES. The class definition was properly understood to encompass those who received...
unsolicited faxes sent by VES, on behalf of VES, Vanguard and/or Seminole. There was no factual basis in the amended complaint to expand the class to people who received faxes directly from Seminole. Thus, the Court ruled that discovery must be limited to materials relevant to faxes sent to class members by VES, and accordingly, denied Plaintiff’s motion to compel.

**Simms, et al. v. National Football League, Case No. 11-CV-248 (N.D. Tex. July 10, 2013).** Plaintiffs, a group of ticket holders to the Super Bowl XLV game, brought a class action alleging breach of contract and fraudulent inducement resulting from being denied seating at the game. Earlier, the Magistrate Judge had granted Defendant’s motion for protective order to quash the deposition of Roger Goodell, Defendant’s Commissioner, and denied Plaintiffs’ motion to compel his deposition. In its order, the Magistrate Judge had observed that Goodell was an apex executive; Plaintiffs had not established that Goodell possessed first-hand and non-repetitive knowledge regarding the relevant issues, and Plaintiffs had not first attempted to depose lower-ranking employees before seeking Goodell’s deposition. Plaintiff again moved to compel the deposition of Goodell. The Magistrate Judge subsequently granted Plaintiffs’ motion in part. Plaintiffs asserted that although they had deposed the executives designated as employees with knowledge, they were unable to obtain information they sought. Moreover, Plaintiffs stated that the witnesses they had deposed claimed that they were unable to answer what Goodell intended by his statements. Further, Plaintiffs claimed that Goodell was actively and personally involved in the planning Super Bowl XLV because he declared that he helped develop the video replay board to enhance fan viewing experiences, hyped the video replay board to Super Bowl fans, attended a Super Bowl planning meeting at Defendant’s New York offices, and received e-mails regarding the goal of breaking Defendant’s attendance record and was asked to review attendance numbers. In addition, Plaintiffs also stated that Goodell admitted to pre-game awareness that there was a mistake in the fan seating, that he did not know how many fans would be affected, and that he wanted to meet with the affected fans. Plaintiffs alleged that Goodell claimed to have met with the affected fans, planned to review the issues, offered affected fans tickets for the next year or a money payment option, and personally signed the letters addressed to the affected fans. Finally, Plaintiffs claimed that Goodell had first-hand and unique knowledge of relevant facts, and he was the only executive known to Plaintiffs who had gone on record and admitted fault and mistakes on behalf of Defendant relating to the temporary seating. Defendant claimed that Plaintiffs had only deposed four out of the 10 individuals it offered as persons with knowledge, and their deposition testimony did not establish that Goodell had first-hand and non-repetitive knowledge of relevant information. Defendant claimed that Plaintiffs sought to harass Goodell by asking questions outside the purview of the relevant issues, and contended that due to his high-ranking role, Goodell did not have personal knowledge of the relevant facts or knowledge superior to that of the lower ranking employees who were involved in the operational aspects of the temporary seating areas. Plaintiffs, however, argued that Goodell’s own words and actions were at issue, and although they had not deposed all the witnesses identified by Defendant, they had deposed the witnesses employed by Defendant, and all those witnesses disclaimed any insight as to what Goodell meant by his statements. Plaintiffs stated that Goodell voluntarily injected himself into the dispute through his admissions, acceptance of responsibility, promises to investigate, participation in the decision to break the Super Bowl attendance record, and other public statements and conduct. Id. at 4. The Magistrate Judge noted that Goodell possessed first-hand knowledge of relevant information, including his own statements and actions involving the temporary seating and the video replay board, before, during, and after the Super Bowl, as well as his intentions in communicating about these issues with fans, including those persons directly affected by the temporary seating issues. Further, the Magistrate Judge remarked that Plaintiffs were not required to establish that the matters about which Goodell possessed first-hand knowledge were directly relevant to their claims, only that those matters bear on, or reasonably could lead to other matters that could bear on, any issue that was or might be in the case. The Magistrate Judge opined that Plaintiffs met their burden with respect to the limited issues referenced and that if the other executives of Defendant were unable to answer questions regarding Goodell’s statements, the remaining offered witnesses, who were not employed by Defendant, would be unlikely to answer those questions. The Magistrate Judge stated that Plaintiffs were not required to expend additional resources to depose the third-party witnesses offered by Defendant, and that Plaintiffs had established that they first attempted to
obtain the required information through less burdensome means of discovery. Accordingly, the Magistrate Judge permitted Plaintiffs to depose Goodell on limited topics.

(xxi) Class-Wide Proof In Class Actions

**Ackerman, et al. v. Coca-Cola Co., Case No. 09-CV-395 (E.D.N.Y. July 18, 2013).** Plaintiffs, a group of consumers, brought a class action alleging that Defendants engaged in the deceptive labeling and marketing of “vitamin water,” which Defendants promoted as a nutrient-enhanced water beverage in violation of the law of New York and California, among others. Pursuant to Rules 23(b)(2) and (3), Plaintiffs sought certification of a New York class and a California class comprising of all New York and California residents who purchased vitamin water during the class period. The Magistrate Judge recommended certification of the classes as injunction classes pursuant to Rule 23(b)(2), but otherwise denied Plaintiffs’ motion. In an attempt to satisfy Rule 23(b)(2) requirement, Plaintiffs argued that class certification was appropriate because individual damages were small and were not the motivating factor behind the litigation; rather, their primary motive was to change the labels on vitamin water. The Magistrate Judge noted that in **Wal-Mart Stores, Inc. v. Dukes**, 131 S. Ct. 2541 (2011), the Supreme Court held that certification under Rule 23(b)(2) is not appropriate when, despite the suitability of generalized injunctive or declaratory relief, each class member also would be entitled to an individualized award of monetary damages. Id. at *36. In this case, Plaintiffs’ prayer for relief sought both monetary and injunctive relief. Id. at *37. The Magistrate Judge explained that since the crux of Plaintiffs’ complaint was that they paid a premium for vitamin water, or purchased vitamin water instead of another beverage, it was clear that monetary relief was central to their claims. Id. Accordingly, the Magistrate Judge recommended that the New York and California classes be certified as Rule 23(b)(2) injunctive classes to litigate all aspects of Plaintiffs’ claims for declaratory and injunctive relief, but that certification be denied to the extent Plaintiffs sought monetary damages, including restitution and disgorgement. Id. at *39. With respect to Rule 23(b)(3), the Magistrate Judge found that all of the proof for the California and New York claims as to loss causation would require individualized determinations. Id. at *43, 45-46. The Magistrate Judge found these individual questions would overwhelm the common issues and make the litigation unmanageable. Accordingly, certification under Rule 23(b)(3) was inappropriate. Id. at *45, 49. Accordingly, the Magistrate Judge granted Plaintiffs’ motion to certify in part and denied it in part.

**Comcast Corp. v. Behrend, et al., 133 S. Ct. 1426 (2013).** Plaintiffs, a group of subscribers to Defendant Comcast’s cable television services, brought a putative class action alleging that Comcast engaged in anti-competitive clustering by making deals with cable competitors to swap assets and allocate regional cable markets among themselves in violation of federal antitrust laws. Subsequently, Plaintiffs moved to certify a putative class of two million current and former Comcast subscribers under Rule 23(b)(3). In support of class certification, Plaintiffs proposed four different theories of causal antitrust impact, but in certifying the class, the District Court accepted only one theory of antitrust impact as capable of class-wide proof – the “overbuilder” theory that Comcast’s conduct made it harder for competitors to build cable networks in areas already served by an incumbent. Id. at 1428. The District Court held that Plaintiffs’ damages model provided an adequate methodology to measure damages on a class-wide basis even though the model did not isolate damages resulting from the overbuilder theory because it included damages for all four theories of liability initially set forth by Plaintiffs. On appeal, the Third Circuit rejected Comcast’s argument that the class was improperly certified because Plaintiffs’ damages model failed to tie its damages calculation to the overbuilder theory and found that Comcast’s “attack[] on the merits of the methodology [had] no place in the class certification inquiry.” Id. at 1433 (quoting Behrend v. Comcast Corp., 655 F.3d 182, 207 (3d Cir. 2011)). Subsequently, Comcast petitioned for certiorari, which the Supreme Court granted. In its majority decision, the Supreme Court observed that the requirements of Rule 23 are far from a “mere pleading standard,” and that Plaintiffs affirmatively are required to demonstrate, by a preponderance of the evidence, that they satisfied each element of Rule 23 at the class certification stage. Id. at 1432. The Supreme Court reaffirmed its holding in **Wal-Mart Stores, Inc. v. Dukes**, 131 S. Ct. 2541, 2551 (2011), that a District Court is required to conduct a “rigorous analysis” to ensure that the requirements of Rule 23 have been satisfied, and that conducting such an analysis “will frequently entail ‘overlap with the merits of the Plaintiff's underlying claims.’” Id. Furthermore, the Supreme Court held that the District Court’s
requirement to conduct a rigorous analysis at the class certification stage applies with equal force to the requirements of both Rule 23(a) and Rule 23(b). In fact, the Supreme Court emphasized that Rule 23(b)(3)’s predominance requirement, describing it as an “adventurous innovation” requiring District Courts to exercise their “duty” to take a “close look” at whether common questions predominate over individual ones. Id. Applying these standards to the case, the Supreme Court held that Plaintiffs’ damages model fell far short of establishing that damages could be measured on a class-wide basis. The Supreme Court noted that a damages model in a class action must measure only the damages attributable to Plaintiffs’ particular theory of liability. Id. at 1433. The Supreme Court further noted that although damages calculations need not be exact at the class certification stage, a damages model that does not attempt to measure only those damages attributable to that theory cannot establish that damages are susceptible of measurement across the entire class for Rule 23(b)(3) purposes. Id. The Supreme Court rejected the Third Circuit’s interpretation of Rule 23(b)(3) as requiring a District Court to evaluate only whether a damages model is capable of quantifying damages class-wide at the class certification stage – without considering whether the model’s methodology and conclusions are in fact speculative or arbitrary – because such an interpretation would reduce Rule 23(b)(3)’s predominance requirement “to a nullity” Id. Thus, the Supreme Court held that class certification was improper because Plaintiffs’ damages model failed to isolate damages flowing from “reduced overbuilding competition,” but rather “assumed the validity of all four theories of antitrust impact initially advanced by the [Plaintiffs].” Id. at 1434. In addition, the Supreme Court found that because Plaintiffs’ damages model did not calculate damages that were “the result of the wrong,” common issues of liability and conclusions are in fact speculative or arbitrary – because such an interpretation would reduce Rule 23(b)(3)’s predominance requirement “to a nullity” Id. Further, the Supreme Court held that Plaintiffs’ failed to satisfy Rule 23(b)(3)’s predominance requirement. Accordingly, the Supreme Court reversed the Third Circuit’s decision affirming a class certification order under Rule 23(b)(3).

Editor’s Note: The Supreme Court’s ruling in Comcast Corp. is significant for employers as it provides a clear reaffirmation and extension of the decision in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), that District Courts considering class certification requests must conduct a “rigorous analysis” that may involve merits issues to ensure that plaintiffs seeking class certification have met their burden to “affirmatively demonstrate” compliance with Rule 23. Importantly, the Comcast Corp. ruling makes clear that the principles articulated in Wal-Mart apply even more rigorously to Rule 23(b)(3)’s predominance requirement not only regarding issues of liability, but also issues as to causation and damages. In that respect, a key takeaway from Comcast Corp. is that damages have to be provable on a class-wide basis at the class certification stage in order for plaintiffs to satisfy Rule 23(b)(3).

Cowden, et al. v. Parker & Associates Inc., 2013 U.S. Dist. LEXIS 72253 (E.D. Ky. May 22, 2013). Plaintiffs, a group of insurance agents, brought a class action alleging that Defendants did not pay commissions owed to them. The Defendants were an insurance agency, Parker & Associates, Inc. (“Parker”), and its owner. Parker sold insurance policies offered by various carriers through independent agents. Id. at *1. Plaintiffs moved for class certification, and the Court denied the motion for failure to establish predominance and superiority. Parker promised to pay the agents a one-time commission paid the first year for any successfully placed policy, and a renewal commission paid monthly beginning the 13th month of each policy. Id. at *6. The commissions were subject to chargebacks for various expenses. Id. at *10. The Court noted that all agents were placed in a hierarchy consisting of at least 12 levels that changed over time and were different for each insurance carrier. Id. at *6-7. When an agent successfully placed a plan, the agent and any agents above that agent in the hierarchy for that carrier were entitled to a portion of the commission due from the carrier. The evidence Plaintiffs submitted, however, did not explain how each commission would be divided among that group of agents. Thus, because Plaintiffs did not sufficiently explain what evidence was required to determine the amounts promised to each agent, the Court opined that the commission payments owed to each agent could not be determined through evidence applicable to the class as a whole. The Court noted that determining the total amount that Parker was obligated to pay each agent would require an individual analysis of the number of plans sold by each agent. Id. at *9. The Court also observed that the issue of whether Parker breached its obligation to pay agents’ commissions would require an individual analysis of each agent’s sales and expenses, the
commission payments made to the agent, and any legitimate chargebacks to the agent’s account. *Id.* at *14. Moreover, Plaintiffs offered no manageable way to calculate damages across the entire class and the Court remarked that the individual damages calculations that would be required would inevitably overwhelm any questions common to the entire class. Accordingly, the Court stated that Plaintiffs failed to demonstrate predominance. *Id.* at *16-19. Because Plaintiffs provided no information regarding the potential recovery of any class members, the Court concluded that it was unable to determine that the potential individual damage awards here were the types of award that would preclude individual class members from seeking relief through litigation. Determining liability and damages would require detailed, individualized inquiries into each agent’s account, and given the necessary number of individual inquiries, the Court remarked that a class action was not a superior form of adjudication. *Id.* at *19-20. Accordingly, the Court denied Plaintiffs’ motion for class certification.

**Eastman, et al. v. First Data Corp., 2013 U.S. Dist. LEXIS 107163 (D.N.J. July 31, 2013).** Plaintiffs, a group of customers who entered into lease agreements for point of sale systems (“POS”), brought a class action alleging that Defendants defrauded them by charging exorbitant and unconscionable fees under a lease agreement for credit and debit card equipment. Plaintiffs moved for class certification, which the Court denied for failure to establish commonality. Based on information attained during discovery, Plaintiffs’ expert witness, Dr. Steven Pomerantz, created a standard formula to determine the interest rate charged to each class member, and used a regression analysis to provide the retail cost of the POS system for the remaining merchants. The Court determined that this formula did not consider the additional goods and services provided to customers in addition to the POS terminals. It agreed with Defendants that the roughly 24,000 leases at issue were all different because they contained different combinations of good and services, and thus they did not have any stand-alone price which could be easily quantified. Defendants also claimed that reduced processing fees allegedly came with all leases, and that there was no way to quantify the full benefit of reduced processing fees for merchants whose leases had not yet ended. Plaintiffs asserted that these additional goods and services could only be proved through the admission of evidence outside the leases, which they claimed would be inadmissible under the parol evidence rule. The Court, however, opined that the parol evidence rule does not exclude evidence of additional services, and that under the rule, it must consider all of the relevant evidence that will assist in determining the intent and meaning of the contract, a process which includes a thorough examination of extrinsic evidence in the interpretation of contracts. *Id.* at *20-21. Thus, considering the evidence of these additional services submitted, the Court opined that these additional goods and services, in conjunction with the difficulty in determining a purchase price, prevented a class-wide proceeding from generating common answers. Plaintiffs further alleged that certain data in the leases were not disclosed, including the retail purchase price of the POS terminals, the interest rate for the leases, the total amount being financed, and the amount and method of the calculation of sales tax. The Court stated that there was no stand-alone purchase price that could be disclosed to customers, and thus no interest rate or amount being financed. Plaintiffs pointed to N.J.S.A. 56:8-2.5, which requires price tags to be affixed to goods for sale. The Court observed that the common evidence problem still remained, regardless of whether the Consumer Fraud Act applied to the leases or not. It clarified that if the Act did not apply, Plaintiffs would have to prove that Defendants’ sales representatives omitted the information orally. Because every single one of the leases was negotiated orally, the Court determined that testimony from every individual merchant and sales representative would be needed in order to determine whether Defendants disclosed certain information. Further, if the Consumer Fraud Act applied, Defendants argued that it would only require the lease price to be stated in the lease, which was done in all their leases. The Court agreed. Because Defendants did not sell stand-alone POS terminals without services, the Court found there was no real purchase price that could be disclosed to its customers, and consequently no other method of sales tax calculation. Finally, although Plaintiffs argued that the lease program was unconscionable because it hid the true market value of the equipment being financed, the Court opined that the unconscionability inquiry would require determining the value to each individual merchant, which could not be determined with common evidence. Accordingly, the Court denied Plaintiffs’ motion for class certification for lack of viable class-wide proof.
Plaintiffs, a group of consumers, brought a putative class action alleging that Defendant deceptively marketed a hair care serum without a flammability warning. When launched in the market in 2004, Defendant’s serum contained a flammability warning. Defendant removed the denatured alcohol as an ingredient in serum near the end of 2006 in order to comply with California’s Volatile Organic Compound regulation, and at the beginning of 2007, removed the flammability warning. Id. at *3-4. Plaintiffs contended that the serum was flammable even with denatured alcohol removed. The named Plaintiffs, a California resident and a Texas resident, initially filed the action in February 2011, alleging violations of California consumer protection and business competition laws as well as state warranty and false advertising laws. They sought to represent everyone who purchased Defendant’s serum in the U.S. from February 2007 to the present. The action was later consolidated with a similar proposed class action that had been filed in New York. After initially granting certification to California and New York classes in May 2012, the Court had ruled that Plaintiffs had not met the typicality requirement. Plaintiffs then named new proposed class representatives for the New York class and the California class and renewed their motion for class certification. The Court denied certification as to the California class, but granted certification for the New York class. The Court found that the issues related to the label instructions and warnings as to flammability were common to the class, two of the named Plaintiffs had claims typical of the class, the common questions predominated regarding whether the manufacturer had violated the false advertising prohibitions, and that the named Plaintiffs were adequate representatives. Id. at *10-34. The Court, however, agreed with Defendant that under Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013), the California class could not be certified because Plaintiffs had not shown that common questions predominated over individual issues as to damages. Defendant did not dispute that common issues predominated regarding proof of damages for the New York class because under New York law each injured consumer might recover $50 upon proof of injury as they were seeking only statutory damages. Id. at *35. Under California law, Defendant argued that inquiry was required into whether each individual class member would have purchased the product if properly labeled, and how much they would have been willing to pay. Id. Plaintiffs submitted that they would generate common proof of damages by determining, through expert testimony, the actual market value of the serum purchased by the class, which would also determine the actual market value for a flammable product not labeled as such. Each class member could then be awarded the difference between historical market price and true market price. The Court acknowledged that it was a legally justifiable theory of restitutionary relief that did not depend on individualized inquiries and that could be used under California consumer protection law as well as to compute relief for breach of the implied warranty of merchantability. Id. at *36-39. Plaintiffs, however, had not offered expert testimony to demonstrate a connection between their theories of liability – violations of California’s consumer fraud statutes and breach of the implied warranty of merchantability – and damages. Id. at *40-41. Under Comcast, a Rule 23(b)(3) class could be certified only if there is evidence demonstrating the existence of a class-wide method of awarding relief that is consistent with Plaintiffs’ theory of liability. Id. at *42. Because Plaintiff had not submitted expert testimony demonstrating a gap between the true market price of serum and its historical market price, the Court held that they did not meet their burden of demonstrating that common questions predominated over individual issues regarding class-wide relief. Id. at *43. According to the Court, if the false advertising had a measurable impact on the serum’s market price, then there is a class-wide method of awarding relief, but without a quantifiable impact on the market price, certification would be inappropriate because Plaintiffs did not offer any other method of awarding relief based on common proof. Id. at *43-44. Accordingly, the Court held that the California class was not appropriate for certification, but allowed Plaintiffs to renew their motion after presenting expert testimony demonstrating that common questions predominated regarding class-wide relief.

In Re BP P.L.C. Securities Litigation, 2013 U.S. Dist. LEXIS 173303 (S.D. Tex. Dec. 6, 2013). In this securities fraud class action brought by purchasers of BP American Depository Shares (“ADSs”) on the NYSE who were allegedly injured by a series of misrepresentations and omissions made by Defendants between 2007 and 2010, the Court denied Plaintiffs’ motion for class certification. Defendants argued that Plaintiffs failed to establish predominance because they did not show that damages were capable of a
class-wide measurement. The Court noted that predominance is a test that is readily met in cases alleging securities fraud largely due to the fraud-on-the-market presumption, which excuses securities fraud Plaintiffs from establishing individual reliance on an alleged misrepresentation in certain circumstances. Id. at *61. The Court explained that the fraud-on-the-market presumption theorizes that, when securities are sold on an open and efficient market, public and material information about the company is quickly incorporated into the price of the security, and each investor who trades in the security thereafter is defrauded to the extent that the information was false and artificially inflated the price of the security beyond its true value. Id. Defendants disputed the applicability of the fraud-on-the-market presumption with regards to alleged misrepresentations found in two U.S. Department of the Interior’s Minerals Management Service (“MMS”) regulatory filings – the Initial Exploration Plan (“IEP”) and the Gulf of Mexico Regional Oil Spill Response Plan (“OSRP”). Defendants claimed that Plaintiffs failed to establish two prerequisites necessary to invoke the presumption, including publicity and market efficiency. Defendants contended that the OSRP was not accessed by any member of the public until after the oil spill, and that the IEP was accessed by only a small handful of people (approximately 22) prior to the spill. According to Defendants, because the preponderance of the evidence did not support that the IEP and the OSRP were publicized or otherwise publicly known before the oil spill, the alleged misstatements contained within those documents could not have been incorporated into the ADS price, and each Plaintiff would be required to establish his or her own reliance on the documents. The Court observed that Plaintiffs offered no credible argument in opposition to Defendants’ publicity argument, and therefore found that Plaintiffs failed to establish predominance on the fraud-on-the-market presumption. Id. at *65. Plaintiffs contended that the class members’ damages would be calculated by use of an event study, a statistical analysis that examines the effect of an event on a dependable variable, such as a corporation’s stock price. Defendants cited to Comcast Corp. v. Behrend, 144 S. Ct. 1426 (2013), where the plaintiffs brought an antitrust claim against Defendant, theorizing that the practice harmed subscribers by eliminating competition and holding prices for cable services above competitive levels. In denying class certification, Comcast found that it is not sufficient for Plaintiffs to provide a class-wide damages model; rather, they must also show that the damages model is consistent with their liability theory. Relying on Comcast, Defendants argued that Plaintiffs’ proposed event study methodology violated the requirement of Comcast that damages must advance Plaintiffs’ theory of liability. The Court agreed with Defendants and remarked that without a more complete explication of how Plaintiffs proposed to use an event study to calculate class members' damages, and how that event study would incorporate – and, if necessary, respond to – the various theories of liability, it could not certify the litigation for class action treatment. Id. at *74. Accordingly, the Court denied Plaintiffs’ motion for class certification.

**In Re US Foodservice Inc., 2013 U.S. App. LEXIS 18141 (2d Cir. Aug. 30, 2013).** Plaintiff brought a class action alleging that Defendant, a food distributor, violated RICO by overbilling them. Plaintiffs included as Defendants the U.S. government, as well as hospitals, schools, restaurant chains, and small businesses across the U.S. The District Court had certified a nationwide class, finding that Plaintiffs’ claims were susceptible to generalized proof such that common issues predominated. Defendant appealed. The Second Circuit affirmed the District Court’s certification order under Rule 23(b)(3). Plaintiffs had alleged that Defendant, the country’s second largest food distributor, had engaged in a fraudulent scheme by which it artificially inflated the cost component of its cost-plus billing model. Under this model, the final cost to the customer was computed based on the “cost,” the price at which Defendant purchased the goods from its supplier, and the “plus,” the additional surcharge Defendant charged on top of the cost. Id. at *3. Defendant’s contracts with its cost-plus customers provided various methods for calculating cost and Plaintiffs’ claims centered on contracts that set cost based on the “invoice cost” which referred to the price on the invoice form the supplier to Defendant. Id. at *4. Plaintiff alleged that Defendant’s scheme, which was centered on six Value Added Service Providers (“VASPs”), were shell companies established and controlled by Defendant for the purpose of fraudulently inflating its costs to its customers. Id. at *5. According to Plaintiffs, VASPs permitted Defendant to overcharge its customers via the generation of fraudulent marked-up invoices that misrepresented Defendant’s cost for the goods provided to its customers. Specifically, Plaintiffs alleged that Defendant devised a scheme to defraud its customers in which it mailed to customers phony invoices generated by the VASPs to inflate prices above what the
customers were contractually obligated to pay, and that Defendant breached the terms of its cost-plus contracts by using the VASP invoices to calculate the cost component of the amounts billed to customers, thereby causing the customers to pay prices higher than they should have paid under the contracts. *Id. at *19.* Although the legitimacy of Defendant's use of the VASPs was contested, the District Court determined that certification was appropriate because Plaintiffs had demonstrated that the relevant issues were susceptible to generalized proof. Defendant argued that a misrepresentation necessary to prove mail or wire fraud could not be established through common evidence as the customer invoices could not be deemed to misrepresent costs without reference to the parties' underlying contractual arrangement. *Id. at *21-23.* The Second Circuit disagreed, noting that the District Court had specifically found that Defendant’s cost-plus contracts were substantially similar in all material respects. Plaintiffs had specifically alleged that the VASP-related invoices mailed to cost-plus customers included the same fraudulent misrepresentation, i.e., that the cost component of Defendant’s billing was based on the invoice cost from a legitimate supplier and not from a shell VASP controlled by Defendant and established for the purpose of inflating the cost component. *Id. at *21-22.* The Second Circuit thus found that the material misrepresentation was the same in each. The Second Circuit opined that Plaintiffs were successful in proving that Defendant inflated their invoices and misrepresented the amount due, and the proof of payment constituted circumstantial evidence that customers lacked knowledge of the scheme. *Id. at *26.* The record also contained generalized proof of Defendant’s concealment of its billing practices. The Second Circuit thus concluded that the District Court did not err in finding that there was no evidence that Plaintiffs were aware of the VASP system or its purpose. *Id. at *29.* While Defendant relied on survey evidence suggesting that customers purchasing on a cost-plus basis understand that foodservice distributors would have an internal profit or inside margin in the cost component of their private label sold on a cost-plus basis and that such distributors use middlemen vendors, the Second Circuit found that such evidence did not raise the concern of issues of individual knowledge predominating. *Id. at *30.* The Second Circuit explained that whether the VASPs were created for the purpose of misrepresenting cost and were kept secret to deceive customers about overbilling, or whether they provided legitimate service to Defendant for which it appropriately billed its customers, was a question subject to generalized proof. *Id. at *32.* The Second Circuit thus held that the class would “prevail or fail in unison” on such point that in either case, question of fact common to class members would predominate. *Id. at *32-33.* The Second Circuit further held that Defendant’s contention that RICO damages could not be shown on a class-wide basis was without merit. The Second Circuit noted that Defendant had entered into contracts that entitled its customers to “cost-plus” pricing, which allegedly deceived them into believing that they were being afforded such pricing when in fact they were overcharged. *Id. at *35.* The Second Circuit held that measure of damages would be the difference between the amount customers paid on fraudulently inflated cost-plus invoices and the amount they should have been billed. *Id. at *35-36.* Accordingly, the Second Circuit affirmed the District Court’s order certifying the class.

*Parko, et al. v. Shell Oil Co., 2013 U.S. Dist. LEXIS 125188 (S.D. Ill. Sept. 3, 2013).* Plaintiffs, a group of property owners in Roxana, Illinois, brought an action alleging that Defendants, current and former owners and operators of an oil refinery in Roxana, caused or allowed hazardous petroleum by-products to contaminate their property. Plaintiffs moved for certification of a class comprising of all the persons who owned real property in Roxana, Illinois that included any portion of any of the parcels on the Village map listed in the table. The Court granted the motion. Defendants argued that Plaintiffs lacked standing. The record showed that hazardous oil by-products from the refinery had clearly been released into the proposed class area, and Plaintiffs alleged that the dispersion injured them by damaging their properties' value, damaging the use and enjoyment of their properties, giving rise to economic loss, and giving rise to reasonable fears of contracting resultant disease. The Court opined that Plaintiffs stated concrete, particular, and actual injury. Further, the Court remarked that Defendants' argument that the named Plaintiffs were not aware of the injury until they were told about the contamination did not defeat standing because they were aware now, as they alleged continuing and present adverse effects of Defendants’ alleged misconduct. The Court also stated that the fact that Plaintiffs could have difficulty proving damages did not imply that they had not been harmed. Thus, the Court found that Plaintiffs alleged both injury and causation sufficient to satisfy the standing requirement. Defendants also argued that Plaintiffs’ class...
definition did not require that class members were impacted by alleged contamination and did not reference any geographical zone of pollution. The Court observed that the class definition was ascertainable as it consisted of property owners in Roxana, and in particular, 387 discrete parcels of land. Roxana was approximately 6.8 miles in size with a population of only 1,500 people, and thus the Roxana property owners were definite enough. Furthermore, the proposed class of property owners were in a discrete boundary in which over 1,000 people resided, which satisfied numerosity. Plaintiffs raised a common question of whether Defendants’ failure to contain petroleum by-product at the refinery resulted in contamination to Roxana property, the resolution of which the Court stated would provide a common basis for liability for each class member. The Court also observed that the named Plaintiffs claimed they incurred property damage because Defendants allowed hazardous petroleum by-products to flow from the nearby refinery, and all purported class members had an identical claim. Nothing indicated that named Plaintiffs’ claims diverged from the claims of unnamed Roxana property owners, and thus the Court stated that typicality and adequacy requirements were satisfied. Defendants argued that common questions did not predominate over individual questions because Plaintiffs referenced an irrelevant standard of liability; Plaintiffs could not show class-wide exposure or contamination; and proof of damages would be property-specific. The Court, however, stated that it was enough at that stage that Plaintiffs would rely on common evidence and a common methodology to show injury, and common proof of damages was simply not required for class certification. Id. at *24. Finally, the Court noted that class-wide resolution was the superior method for adjudication of Plaintiffs’ claims. Accordingly, the Court certified the class.

Simms, et al. v. National Football League, 2013 WL 3449538 (N.D. Tex. July 9, 2013). Plaintiffs, a group of Super Bowl XLV ticketholders, brought a class action alleging claims of breach of contract and fraudulent inducement. The Super Bowl XLV tickets were form contracts granting holders entry in the stadium and a spectator seat for the game. Plaintiffs contended that to accommodate additional fans at the Super Bowl game, 13,000 to 15,000 temporary seats were installed. The installation delays resulted in Plaintiffs gaining entry to the stadium after the game began, and some never got a seat. Four groups of ticketholders claimed to have been affected by the partial completion of the temporary seating, including: (i) those who were denied seats to the game (the “displaced class”); (ii) those who were delayed in gaining access to their seats (the “delayed class”); (iii) those who were relocated from their seat to a lesser quality in the stadium (the “relocated class”); and (iv) those who were seated but had an obstructed view of the field (the “obstructed view class”). Id. at *5. The NFL previously offered to settle with the displaced class. Plaintiffs sought class certification, which the Court denied. As to the displaced class, the Court noted that Plaintiffs failed to satisfy the Rule 23(b)(3) requirements. The Court explained that to succeed on a breach of contract claim under Texas law, a Plaintiff must show: (i) the existence of a valid contract; (ii) performance or tentative performance by Plaintiff; (iii) breach of contract by Defendant; and (iv) damage resulting to Plaintiff from the breach. Id. at *10. Because the NFL admitted that it breached the contract, the only question left for the Court to decide was that of damages. The Court remarked that given that patrons incurred vastly different expenses to attend the Super Bowl, there was no formula to adjudicate damages on a class-wide basis, and this result in mini-trials to determine damages. Id. Accordingly, the Court found that the predominance and superiority requirements were not satisfied. For the same reasons, the Court found that establishing damages as to the delayed class would involve predominance of individual issues. The Court explained that to recover damages, each class member would need to present evidence or testimony to establish the costs incurred to attend the Super Bowl, which would then need to be considered in light of that person’s particular experience, to calculate any loss or damage actually sustained as a result of losing the benefit of the bargain. Id. at *14. Here, the damages associated with the alleged breached were minimal, i.e., each member may have waited two hours to be admitted, they did still make it to their seats without missing any portion of the game or pre-game activities. The Court thus concluded that ascertaining such damages would require an inquiry that was unique to every class member. Id. As to the relocated class, the Court remarked that before it could evaluate a proposed class under Rule 23, it must consider whether the class membership was ascertainable under the proposed definition. The Court remarked that by limiting class membership to those who received replacement seats of lesser quality, Plaintiffs introduced a subjective element to the class definition. The Court, however, found that as a “fail-safe” class, this definition was sufficient on its face to move forward on
the Rule 23 inquiry, but it nevertheless retained the subjective element, which posed significant impediments to certification under Rule 23. *Id.* at *18. The Court remarked that the issues that persisted with the other two classes also remained with the relocated class, *i.e.*, damages would need to be calculated individually for each class member. In addition, each putative class member also would need to show that his replacement seat was of lesser quality. The District Court concluded these inquiries were individualistic in nature. As to the obstructed view class, the Court noted that the fraudulent inducement required Plaintiffs to show reliance on their part for statements made by Defendants, which also required an individual inquiry. Accordingly, the Court denied Plaintiffs’ motion for class certification.

**Multi-Party Litigation Under The WARN Act**

*Bulchak, et al. v. ADOC Holdings, Inc., Case No. 13-CV-11153 (Bankr. D. Del. Nov. 19, 2013).* Plaintiff, an employee, brought an action under the WARN Act on behalf of himself and others similarly-situated alleging that Defendants terminated them without advance notice as required by federal and state laws. Earlier, the Bankruptcy Court had conditionally certified the WARN class and preliminary approved a settlement agreement pursuant to which the class would be awarded an allowed unsecured claim in the amount of $430,000 against Defendants with the priority set forth in § 507(a)(4) of the Bankruptcy Code (the “WARN priority claim”) and the class should receive an allowed prepetition general unsecured claim in the amount of $1,570,000. The parties thereafter jointly moved for the approval of the proposed settlement agreement. The Bankruptcy Court granted the motion. In order to consider the final approval of the settlement agreement, the Bankruptcy Court held the fairness hearing, where it noted that the terms of the settlement agreement were fair, reasonable, and adequate, and met the nine factor test developed in *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975). *Id.* at *3. Additionally, the Bankruptcy Court found that the settlement and the settlement agreement satisfied the requirement of Rule 9019 of the Federal Rules of Bankruptcy Procedure and thus, they were fair, equitable, and in the best interests of the Defendants’ estates. Moreover, the Bankruptcy Court remarked that the settlement agreement was negotiated at arm’s-length and in good faith, and other sufficient cause existed for granting the relief requested in the joint motion. Accordingly, the Bankruptcy Court granted final approval of the class action settlement.

*Guippone, et al. v. BH S&B Holdings LLC, 2013 U.S. App. LEXIS 24560 (2d Cir. Dec. 10, 2013).* Plaintiff brought a WARN class action alleging that he was terminated without being given a 60-day notice in advance of his termination. Plaintiff worked at Steve & Barry’s, which filed for protection from its creditors pursuant to Chapter 11 of the U.S. Bankruptcy Code. Thereafter, Defendants, a group of investment firms, created a series of interrelated entities to purchase and manage Steve & Barry’s. One of the entities, BHY S&B HoldCo, LLC (“HoldCo”), served as the holding company and sole managing member of another entity, BH S&B Holdings LLC (“Holdings”). Holdings then bought Steve & Barry’s assets, and retained a number of employees including Plaintiff. When Holdings’ financial situation deteriorated rapidly, RAS Management Advisors was hired to manage the wind-down, who was authorized by HoldCo board to have Holdings file for protection from its creditors. Holdings filed for bankruptcy, and sent WARN notices and termination notices to employees. Defendants brought two separate motions to dismiss, one on behalf of the investment firms and one on behalf of HoldCo. The District Court granted the motion by finding that Plaintiff failed to plead adequate facts to support its claim that the investors were employers under the WARN. The District Court denied HoldCo’s motion, holding that Plaintiffs sufficiently alleged that HoldCo disregarded Holdings’ corporate form and exercised *de facto* control over the company sufficient to make HoldCo liable under the WARN. Subsequently, on a motion for summary judgment, the District Court held that Plaintiff failed to raise a triable question of fact that would allow a jury to find that HoldCo could be held liable pursuant to the WARN as a single employer with Holdings. On appeal, the Second Circuit affirmed in part and denied in part. The Second Circuit noted the U.S. Department of Labor (“DOL”) regulations to determine if related entities are single employers to determine whether WARN liability can be imposed on a parent company. The regulations provided that independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as part of the parent or contracting company depending upon the degree of independence from the parent company. Some of the factors to be considered in making this determination are common ownership, common directors and/or officers, *de facto* exercise of control, unity of personnel policies emanating from a
common source, and the dependency of operations. *Id.* at *11-12. The Second Circuit affirmed the District Court’s order granting the investment firms’ motion to dismiss. Regarding common ownership, only HoldCo was alleged to have ever had a direct ownership interest in Steve and Barry’s, while the six remaining investment firms did not share common ownership with Steve and Barry’s, because their interest in it was routed through HoldCo. Regarding common directors and/or officers, four of the seven members of HoldCo’s Board of Managers were alleged to have been representatives of specific investor Defendants, and HoldCo was alleged to have been the sole managing member of Steve and Barry’s. Further, regarding unity of personnel policies emanating from a common source factor, the District Court had observed that Steve and Barry’s had its own management structure, in which Defendants participated only indirectly, by helping to vet certain programs. Regarding the dependency of operations factor, Plaintiff did not allege that Defendants shared administrative or purchasing services, shared employees or office equipment, or commingled finances, and he failed to connect any entity other than HoldCo to Steve and Barry’s. Finally, regarding *de facto* control, Plaintiff alleged that HoldCo capitalized Steve and Barry’s; one of its board members assisted in searches for a CEO and CFO for Steve and Barry’s; and one of its board members had final sign-off authority on something known as the staff Holiday Incentive program at Steve and Barry’s. The District Court had opined that these allegations, if proven, were sufficient to support the conclusion that HoldCo disregarded Steve and Barry’s corporate form and exercised *de facto* control over the company. Thus, although the District Court had observed that the allegation that HoldCo directed Steve and Barry’s to enter bankruptcy and shut its facilities was sufficient to warrant denial of HoldCo’s motion to dismiss, it noted that the fact that HoldCo’s board was comprised of representatives from various other Defendants was not enough to subject them to liability under the WARN Act. Thus, the District Court had dismissed all Defendants other than Steve and Barry’s and HoldCo. Regarding the grant of summary judgment to HoldCo, the Second Circuit remarked that there was a question of fact as to whether HoldCo exercised *de facto* control over Holdings, since Holdings lacked its own board, and HoldCo’s board of directors chose Holdings’ management and negotiated Holdings’ financing. The evidence also raised a question of fact as to whether HoldCo made the decisions leading to the alleged illegal employment practice. Further, the Second Circuit observed that Holdings was so controlled by HoldCo that it lacked the ability to make any decisions independently, and that the resolution passed by HoldCo’s board authorizing Holdings to effectuate the reduction-in-force was, in fact, direction from HoldCo to Holdings to undertake the lay-offs. The Second Circuit opined that authorizing lay-offs was not just a prerogative of ownership; rather it was a function of being an employer, especially where, as here, HoldCo was the sole member and manager of Holdings, and the HoldCo board operated as Holdings’ board. Thus, because HoldCo directed the lay-offs with no regard to Holdings’ separate corporate form, the Second Circuit reversed the grant of summary judgment to HoldCo.

**In Re Flexible Flyer Liquidating Trust, 2013 U.S. App. LEXIS 2850 (5th Cir. Feb. 11, 2013).** Plaintiffs, a group of former employees, filed a class action alleging that Defendant was liable under the WARN Act for failing to give them the required 60-day lay-off notice. Defendant never made a profit, and constantly lost money. Defendant was funded entirely by Cerberus, its parent company. Defendant obtained an additional source of operating capital when it entered into a factoring arrangement with CIT Group Commercial Systems, LLC (“CIT”). Subsequently, CIT informed Defendant that it would no longer be advancing credit at all, and Cerberus also refused to fund Defendant anymore. Two days after CIT terminated all funding, Defendant filed for bankruptcy, and notified its employees that it would be terminating business operations, resulting in company-wide lay-offs. The Bankruptcy Court determined that Defendant was excused from providing advance notice because it had established that the shutdown was the result of an unforeseeable business circumstance. The Bankruptcy Court credited the testimony of Michael Earrey, Defendant’s Chief Financial Officer, finding that the abrupt unavailability of operating funds caused the lay-offs and that the sudden lack of funds was completely unanticipated. In dismissing Plaintiffs’ claims, the Bankruptcy Court concluded that the shutdown and the mass lay-offs were not planned, proposed, or foreseeable and that Defendant had provided WARN Act notice at the earliest practical date that such a notice could be provided. *Id.* at *1-6. On Plaintiffs’ appeal, the District Court found that the factual determinations made by the Bankruptcy Court were not clearly erroneous, and the legal conclusions were thorough and correct. *Id.* at *6. On further appeal, the Fifth Circuit affirmed the
District Court’s judgment. Id. Although the WARN Act requires covered employers planning a plant closing or mass lay-off to give affected employees 60 days’ notice of such action, there are exceptions that excuse employers who fail to provide the required notice. Id. at *7. When such an exception applies, employers are required to give only “as much notice as is practicable.” Id. at *7-8. Here, the Bankruptcy Court determined that the closing of Defendant’s business was not reasonably foreseeable, and although 60 days before the shutdown Defendant was undisputedly experiencing financial difficulties, there was no indication that a company shutdown was imminent. The evidence demonstrated that the focus of Defendant’s management was on saving the company, not planning for an upcoming shutdown. The Fifth Circuit found that the holdings of the Bankruptcy and District Courts were further supported by the showing that during the time period immediately preceding the closure, Defendant still had financing in place from CIT, as well as back-up funding from Cerberus, which had never refused Flexible Flyer’s previous requests for additional capital. Only when CIT and Cerberus both decided to cut off funding completely, and did so almost simultaneously without warning, did the shutdown became inevitable. The Fifth Circuit observed that although Defendant’s financial condition was perilous for much of its eight-year existence, encouraging events continued to renew probabilities that better days might be ahead. The Fifth Circuit held that the WARN Act allows good faith, well-grounded hope, and reasonable expectations, and that its regulations protect an employer’s exercise of business judgment and are intended to encourage employers to take all reasonable actions to preserve the company and the jobs. Id. at *12-13. Concluding that the case presented a convincing example of an event that met the unforeseeable business circumstance exception, the Fifth Circuit found that the Bankruptcy Court did not err in applying the exception. Id. at *13.

In Re TWL Corp., 2013 U.S. App. LEXIS 6433 (5th Cir. Mar. 29, 2013). Plaintiff, a former employee, brought a class action adversary proceeding within a bankruptcy suit filed by Defendants alleging violations of the Worker Adjustment and Retraining Notification Act (“WARN Act”) by failing to give its employees 60 days written notice of their termination. Defendants were in the business of providing workplace learning, training, and certification programs, and Plaintiff served as the vice president. In 2008, Defendants allegedly laid-off the majority of its workforce, including Plaintiff, and the next month filed a voluntary petition for bankruptcy under Chapter 11. Id. at *2. In addition to the adversary complaint, Plaintiff also filed a class proof of claim against Defendants on behalf of all former employees, and filed a motion for class certification. Meanwhile, Defendants’ reorganization efforts failed, and the Bankruptcy Court converted the bankruptcy case to Chapter 7 and appointed a trustee of the estate. Subsequently, the Bankruptcy Court denied Plaintiff’s motion for class certification, and granted the Trustee’s motion to dismiss the adversary proceeding. The Bankruptcy Court found that Plaintiff did not satisfy the numerosity and superiority requirements because even if all the 130 members of the putative class elected to pursue the WARN Act claims, that number would be manageable. Similarly, the Bankruptcy Court found that Plaintiffs failed to establish superiority, and thus concluded that it would be a waste of Defendants’ limited assets to move forward with the adversary proceeding when Plaintiff was the only individual who had asserted a timely claim under the WARN Act. The District Court affirmed the Bankruptcy Court’s order, and on Plaintiff’s further appeal, the Fifth Circuit reversed and remanded the case to the District Court.

Plaintiff argued that the Bankruptcy Court’s certification consideration did not adhere to Rule 23 factors, but was improperly influenced by a discretionary determination under Bankruptcy Rule 9014. Id. at *12. The Fifth Circuit noted that pursuant to Rule 703 of the Federal Bankruptcy Rules, class adversary proceedings are allowed in bankruptcy cases if Rule 23 requirements are satisfied. Id. at *10. Regarding numerosity, the Fifth Circuit stated that the proper inquiry is whether joinder is impractical. Id. at *15-16. However, it was not possible on the record to determine whether the Bankruptcy Court’s conclusion as to numerosity was improperly influenced by considerations under Rule 9014. Id. at *18-19. As to superiority, the Bankruptcy Court had stated that the Bankruptcy Code already concentrates any WARN Act claims in the Bankruptcy Court by requiring former employees to seek allowance of such claims in order to share in any distribution from Defendants’ assets. Similar to its finding on numerosity, the Fifth Circuit determined that it was unable to affirm the Bankruptcy Court’s order on the record before it, and remanded the case. Id. at *28-29. Likewise, the Fifth Circuit remarked that it was left without adequate findings of fact and conclusions of law by which it could ascertain whether the record supported the Bankruptcy Court’s
dismissal of Plaintiff’s adversary complaint. Accordingly, the Fifth Circuit vacated the orders of the Bankruptcy Court. Id. at *35-36.

**Woolery, et al. v. Matlin Patterson Global Advisers, LLC, 2013 U.S. Dist. LEXIS 57790 (D. Del. April 23, 2013).** Plaintiffs, a group of laid-off employees of Premium Protein Products (“Premium”), brought a class action alleging lay-offs in violation of the WARN Act. Defendants, former majority owners of Premium, took over the daily operations of Premium when its business began to decline. Defendants acted through Ronald Gould, who at Defendants’ behest, informed employees that Premium would be forced to shut down if it did not turn a profit. Eventually, at a meeting, Defendants’ executives announced their decision to close the facilities, and one of Defendants’ executives stated that the 60 days’ notice under the WARN Act would not be provided because the attempts to make the business profitable were unsuccessful and that the bankruptcy of Premium and PPP Holdings (collectively “the PPP Entities”) made such notice unnecessary. The Hastings and Lincoln facilities were then closed, and the employees were wrongly informed that the closures were merely temporary furloughs, when in reality they never returned to work. Defendants moved to dismiss for failure to state a claim under the WARN Act and the Nebraska Wage Payment and Collection Act (“NWPC”). The Court granted the motion in part and denied in part. The Court stated that to gain recovery against parent entities, Plaintiffs must show that the parent entities acted with the subsidiary as the single employer in making the wrongful termination decision. The Court noted a five factor balancing test to determine whether subsidiary and parent entities should be treated as a single employer, including whether the companies share common ownership, whether the companies share common directors and/or officers, the existence of de facto exercise of control by the parent over the subsidiary, the existence of a unity of personnel policies emanating from a common source, and the dependency of operations between the companies. Id. at *6. Further, the Court observed that a particularly striking showing of de facto control could warrant liability even in the absence of the other factors. Id. at *8. Plaintiffs alleged that Defendants controlled the daily decisions of the company and dealt directly with premium employees. Plaintiffs alleged that Defendant Matlin’s partner, Mark Chodock, personally made significant management changes within Premium, and demoted Steve Sands, the President of Premium and Chairman of the Board, to Secretary, and thereafter relieved him from his responsibilities as an Officer and a Director. Further, Plaintiffs alleged that Chodock personally fired Mike Gager, the manager of the Hastings facility, and then closely managed his replacement. The Court remarked that all of these could be considered circumstances that demonstrate a lack of an arm’s length relationship between the companies. Id. at *9. Plaintiffs also alleged that Defendants made the specific business decision to conduct the lay-offs without 60 days’ notice. Plaintiffs specifically alleged that Defendants made the decision to shut down the facilities, lay-off the employees without 60 days’ notice, and enter bankruptcy. The Court opined that Plaintiffs’ allegations made a strong showing of the de facto control factor. Id. at *17. The Court remarked that Plaintiffs’ allegations exceeded a parent company’s standard exercise of control pursuant to the ordinary incidents of stock ownership. Thus, the Court denied the motion to dismiss as to the WARN Act claim. Regarding the NWPC Act claim, the Court observed that Congress specifically empowered the U.S. Department of Labor (“DOL”) to prescribe such regulations as may be necessary to carry out the WARN Act. The Court, however, noted that claims under the NWPC Act are brought under state law, and the DOL’s regulations have no effect on such a state law claim. Id. at *18. Thus, because there was no indication that Nebraska ever intended NWPC Act liability to attach to parent companies, and the plain meaning of employer would not include Defendants, the Court granted Defendants’ motion to dismiss the NWPC Act claim.

**Young, et al. v. Fortis Plastics, LLC, 2013 U.S. Dist. LEXIS 137070 (N.D. Ind. Sept. 24, 2013).** Plaintiff, a former employee, brought a class action alleging that he and 90 other individuals were not provided with the 60-day notice required by the WARN. Plaintiff’s claim arose out of the closing of Defendant’s facility in October, 2011. Asserting claims on behalf of the affected employees, Plaintiff sought wages and benefits allowed under the WARN, and a declaratory judgment that Defendants wrongfully failed to pay wages and benefits, interest, and attorneys’ fees. The Court granted Plaintiff’s motion for class certification pursuant to Rule 23(b)(3), but denied it under 23(b)(2). The Court found that Plaintiff met each of the elements of Rule 23(a). Plaintiff satisfied numerosity as there were 91 people working at the facility when it closed.
Plaintiff satisfied commonality because all of the issues related to the WARN were common to the class, including issues as to who employed the class members, whether the closing of the facility consisted of a mass lay-off or plant closing, and whether notice was provided to the former employees. *Id.* at *18.

Plaintiff satisfied typicality as Plaintiff’s claims were typical of those of the proposed class in that each of the claims arose from the decision to close the facility and was based on the same legal theory of a violation of the WARN. *Id.* at *21. Plaintiff satisfied adequacy of representation as his claim was identical to those of the other members of the proposed class, and there was no evidence of any unique defense or circumstance that could cause a conflict between the named Plaintiff and other members of the class. *Id.* at *22. The Court thus held that Plaintiff met all the Rule 23(a) factors. Because many of the elements of Plaintiff’s claim were susceptible to resolution on a class-wide basis, the Court found that common questions predominated over individual issues pursuant to Rule 23(b)(3). These issues included whether Defendant as an employer of the proposed class that was subject to the WARN, whether the closing of the facility constituted a mass lay-off or plant closing, and whether Defendant provided notice, if required, under the WARN of the closing of the facility. *Id.* at *27. The Court found that each of the elements would affect the proposed class members equally without the need for individualized proof. *Id.* The Court opined that although damages would require some individualized inquiries, that was insufficient to defeat certification of the class. Information to determine back pay was readily determinable from Defendant’s records. Medical expenses incurred that would have otherwise been covered would require more individualized inquiry, but not enough to defeat class certification. *Id.* at *28. The Court therefore certified the class under Rule 23(b)(3). The request for certification of the declaratory relief claim pursuant to Rule 23(b)(2), however, was denied. The purpose for the declaratory relief was only to ensure the obtainment of money damages. Thus, the Court concluded that the sought for monetary award was not merely incidental, and thus, Rule 23(b)(2) certification was inappropriate. *Id.* at *24-25.

(xxxiii) Class Definition Issues

*Annunziato, et al. v. Collecto, Inc. d/b/a EOS CCA, 2013 U.S. Dist. LEXIS 148988 (E.D.N.Y. Oct. 15, 2013).* Plaintiff brought a class action alleging that Defendant was engaged in illegal practices of collecting debt owed by Plaintiff to the New York Institute of Technology (“NY Tech”) in violation of the Fair Debt Collection Practices Act (“FDCPA”). The Court modified Plaintiff’s proposed class definition and certified a class consisting of: (i) all individuals who have mailing addresses within New York State; (ii) who within one year before the filing of this action; (iii) were sent a collection letter in a form materially identical or substantially similar to the form letter sent by Defendant to Plaintiff; (iv) regarding a debt that was time-barred by the applicable statute of limitations; (v) containing a collection fee that they had not previously authorized by entering into an agreement with NY Tech; and (vi) which was not returned by the postal service as undelivered. Plaintiff moved for reconsideration of the Court’s order with respect to the class definition. *Id.* at *1-2. The Court granted the motion. The Court agreed that there was an inadvertent error in its prior order with respect to the class definition. The Court recognized that in its previous decision, Plaintiff brought two distinct claims concerning the form letter Defendant sent to Plaintiff. First, Plaintiff alleged that the form letter included an additional fees/collection costs, which he believed was arbitrarily created by NY Tech and Defendant in order to collect unearned fees and to intimidate him into paying the principal for fear that he would otherwise be liable for more fees/collection costs. Second, Plaintiff claimed that Defendant’s statement in the form letter that it had the right to take further steps to collect the alleged debt was false and deceptive in that the alleged debt was outside the applicable statute of limitations, and outside the period a debt could be reported on Plaintiff’s credit reports. *Id.* at *5-6. Therefore, the Court found it necessary to modify the class definition so as to correct any unintended conflation of Plaintiff’s two claims in the class definition that was included in its prior order. Accordingly, the Court granted Plaintiff’s motion for reconsideration and modified the class definition as follows: (i) all individuals who have mailing addresses within New York State; (ii) who within one year before the filing of this action; (iii) were sent a collection letter in a form materially identical or substantially similar to the form letter sent by Defendant to Plaintiff; (iv) regarding a debt that was time-barred by the applicable statute of limitations or containing a collection fee that they had not previously authorized by entering into an agreement with NY Tech; and (v) which was not returned by the postal service as undelivered. *Id.* at *6.
Astiana, et al. v. Kashi Co., 2013 U.S. Dist. LEXIS 168251 (S.D. Cal. Nov. 22, 2013). Plaintiffs brought a consumer class action on behalf of purchasers of certain Defendant’s food products alleging that the products contained deceptive and misleading labeling and advertisements. Earlier, the Court had certified a class of California purchasers of Defendant’s products marketed and labeled as containing “Nothing Artificial.” Id. at *7. The Court had also certified a class of California purchasers of Defendant’s products marketed and labeled as “All Natural” that contained the ingredients pyridoxine hydrochloride, calcium pantothenate, or hexane-processed soy. Id. After the Court had denied Defendant’s motion that calcium pantothenate and pyridoxine hydrochloride should be eliminated from the “All Natural” class definition, Defendant moved to modify the “All Natural” class definition with respect to hexane-processed soy ingredients. Id. The Court denied the motion. Defendant presented a 2006 letter from the U.S. Department of Agriculture (“USDA”) to Defendant’s primary supplier of soy-hexane processed ingredients, informing the supplier that certain soy protein isolates and soy protein concentrates manufactured with hexane were acceptable as ingredients in meat and poultry products. Therefore Defendant argued that the USDA had approved of Defendant using the term natural to describe its products containing hexane-processed soy ingredients sourced from the same manufacturer. The Court stated that Defendant was mistaken in asserting that the USDA letter settled the issue of whether hexane-processed soy ingredients were natural because the USDA letter repeatedly stated that it applied only to meat and poultry products. For the products at issue in this suit that contained poultry, Defendant had not adequately established that the labels clearly identified the non-natural ingredient directly beneath or beside all natural claims or on the principal display panel. A letter from the USDA was not a controlling authority because interpretations such as those in opinion letters lacked the force of law. Further, the Court stated that Defendant’s reliance on USDA regulations to exclude soy-hexane processed ingredients from the “All Natural” class ran afoul of its own website where Defendant asserted that it should create its own standard for the term natural because the USDA definition applied only to meat and poultry. Id. at *10. Moreover, in an attempt to cast the USDA opinion letter as dispositive, Defendant ignored its own definition of minimal processing, which involved processes that could be done in a family kitchen and the effect that definition might have had on consumers. Accordingly, the Court denied the motion.

Diacakis, et al. v. Comcast Corp., 2013 U.S. Dist. LEXIS 64523 (N.D. Cal. May 3, 2013). Plaintiff, individually and on behalf of similarly-situated customers who contracted with Defendant for its bundled cable, telephone, and internet services package, brought a putative class action alleging that Defendant misrepresented the terms of its bundled package when it failed to disclose to potential subscribers that they would be charged an additional fee for the rental of a cable modem in violation of various California state consumer protection statutes. Subsequently, Plaintiff moved to certify a class of “all individuals in the State of California who purchased a bundled internet, cable television and telephone service package from Defendant . . . and who were charged rental or lease fees for the mandatory telephony modem equipment in addition to the bundled rate from May 14, 2007 to the present.” Id. at *7. With respect to Rule 23’s requirement that the class be sufficient ascertainable, Defendant argued that Plaintiff’s proposed class was not ascertainable because the class definition was overbroad. The Court opined that Plaintiff’s class definition must include persons injured by Defendant’s alleged conduct, and that Plaintiff’s claims against Defendant required a showing of consumer deception. Id. at *11. However, the Court observed that Plaintiff’s proposed class definition included all consumers who purchased the bundled package, “irrespective of whether he or she was deceived by [Defendant’s] alleged failure to disclose the existence of additional modem charges.” Id. at *12. Therefore, the Court held that since the proposed class included persons who were not injured in the same manner as Plaintiff, the proposed class definition was overbroad and not ascertainable. Accordingly, the Court denied Plaintiff’s motion for class certification.

Feuerstack, et al. v. Stanley Weiner, 2013 U.S. Dist. LEXIS 106321 (D.N.J. July 30, 2013). Plaintiff brought a class action under the Fair Debt Collection Practices Act (“FDCPA”) alleging that Defendant sent improper written collection communications, specifically by failing to disclose the consumer’s right to obtain verification of the alleged debt; failing to disclose that Defendant was not admitted or licensed to practice law in the State of New Jersey; falsely representing the legal status of the alleged debt; and falsely representing that the filing of legal action would result in additional expenses to the consumer. Plaintiff’s
proposed class comprised of all New Jersey consumers who were sent collection letters and/or notices that contained at least one of the alleged violations arising from Defendant’s violation of the FDCPA. Plaintiff asserted that during discovery, it was determined that the class of individuals impacted by Defendant’s conduct extended beyond New Jersey. Plaintiff moved to amend the complaint pursuant to Rule 15 in order to redefine the scope of the putative class from New Jersey consumers to consumers nationwide. The Court denied the motion. Plaintiff argued that the proposed amendment related back to the filing of the original complaint under Rule 15(c)(1)(B), which permits relation back where the amendment asserts a claim or defense that arose of the same conduct, transaction, or occurrence set forth in the original pleading. The Court, however, observed that when an amendment seeks to change a party against whom a claim is asserted, as opposed to changing merely the allegations set forth in the pleading, the relation back rule is more stringent. The Court stated that three requirements must be satisfied in order for relation back pursuant to Rule 15(c)(1)(C) to be appropriate. Id. at *6. First, the claim or defense asserted in the amended pleading must arise out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. Id. Second, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in received such notice of the action that it will not be prejudiced in defending on the merits. Third, within the period provided by Rule 4(m), Defendant knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party’s identity. Id. Although Plaintiffs contended that the claims asserted on behalf of the nationwide class involved the same basic conduct alleged in the original complaint, the Court observed that Defendant was not on notice that he could be called upon to defend against claims on a nationwide basis when Plaintiff first filed a motion to amend the complaint which was beyond the 120 day period provided by Rule 4(m). The Court noted that in order to preserve the protection provided to Defendant by the statute of limitations, the relation-back rule requires Plaintiffs to show that the already commenced action sufficiently embraces the amended claims so that Defendants are not unfairly prejudiced by late-coming Plaintiffs and that Plaintiffs have not slept on their rights. Id. at *11. The Court found that the expansion of the proposed class would unduly prejudice Defendant and denied Plaintiff’s motion to amend.

McManus, et al. v. Sturm Foods Inc., 2013 U.S. Dist. LEXIS 120705 (S.D. Ill. Aug. 26, 2013). Plaintiffs, a group of consumers, brought a class action alleging that Defendants violated consumer protection statutes and unjust enrichment laws of eight states with regard to their Grove Square Coffee (“GSQ”) single serving coffee product. Plaintiffs contended that Defendants misrepresented and omitted the true nature of GSQ products by indicating that the product contained fresh ground coffee and a filter rather than “instant” or “soluble.” Id. at *2. Plaintiffs sought certification of a class consisting of all consumers during the class period who purchased GSQ products in Alabama, California, Illinois, New Jersey, New York, North Carolina, South Carolina, and Tennessee. The Court denied Plaintiffs’ motion for class certification. The Court remarked that before analyzing the class certification requirements, it must first ensure that the class was sufficiently defined. In other words, the class must be ascertainable, i.e., a Court can determine class membership with objective criteria; and the class is not overbroad, i.e., if it sweeps in a great number of members who for some reason could not have been harmed by Defendants’ allegedly unlawful conduct. Id. at *5. The Court noted that Plaintiffs moved to certification of eight sub-classes, each comprised of class members bringing claims under their respective state consumer protection and unjust enrichment laws. The Court found that under the state consumer protection laws requiring causation or actual reliance, Plaintiffs’ class definitions were overbroad as they included all individuals who purchased a GSQ product. The Court remarked that this definition necessarily included purchasers who knew, or who were indifferent, to the product’s insoluble coffee content. For those purchasers, the Court concluded that Plaintiffs could not prove causation, reliance, or actual injury from Defendants’ alleged misrepresentation. Id. at *7. Accordingly, the Court held that Plaintiffs’ claims under Alabama, New York, New Jersey, North Carolina, South Carolina, and Illinois law were overbroad and improper for class certification. The Court, however, noted that it would analyze the California and New Jersey statutory claims, as they permitted a class-wide presumption of reliance or causality for class certification purposes in limited circumstances. Plaintiffs sought relief under the California’s Legal Remedies Act (“CLRA”), Unfair Competition law (“UCL”), and False Advertising Law (“FAL”). The Court noted that under UCL, a private individual may bring suit only if he or she suffered injury-in-fact, and has lost money. Id. at *9. The FAL requires an actual
economic loss caused by Defendant’s conduct, and the CLRA requires each class member to have an actual injury caused by the unlawful practice. Id. Plaintiffs’ current class definition included individuals who were not exposed to Defendants’ alleged misrepresentation; therefore, the Court could not presume reliance. Id. at *12. The amended complaint and motion for class certification, however, alleged that Defendants’ use of the word “soluble” rather than “instant,” package design, and store placement were deceptive. Id. As to the New Jersey statutory claims, the Court noted that applicable law allowed a class-wide presumption in very limited circumstances. Because Plaintiffs’ class potentially included many individuals who bought GSQ products because of, or in spite of, knowing that it contained instant coffee, the class included a great number of individuals who could not prove causation or an ascertainable loss under New Jersey law. Id. at *18. Accordingly, the Court ruled that the New Jersey and California subclasses were overbroad. As to Illinois, the Court noted that the Illinois Consumer Fraud and Deceptive Practices Act requires Plaintiffs to show that he or she was actually deceived by the misrepresentation. Because the class definition was premised only on “purchase” of the allegedly misrepresented product, which also included those purchasers who never saw the allegedly deceptive advertising, the Court concluded that the Illinois sub-class definition also was overbroad. Id. at *21. Accordingly, the Court concluded that the class definitions for all of the eight sub-classes were overbroad. The Court also opined that it found no way to limit the class membership without an impermissible Plaintiff-by-Plaintiff subjective inquiry; therefore, the class was unascertainable and failed under the Rule 23 analysis. Therefore, the Court denied Plaintiffs’ motion for class certification.

Plaintiff, a consumer, brought a class action alleging violation of the Wisconsin Deceptive Trade Practices Act (“DTPA”) and Unfair Trade Practices Act (UTPA”), as well as for unjust enrichment. Plaintiff alleged that from the early 1970s until the summer of 2010, because Defendant described its cigarettes as “Light” and “Ultra Light,” consumers believed that those cigarettes were safer to smoke than regular cigarettes. Id. at *3. Plaintiff argued that Defendant designed a cigarette that could pass the Federal Trade Commission’s test for qualifying as light even though the cigarette had the potential to deliver the same amount of harmful substances as would a regular cigarette. Plaintiff moved for class certification of a class comprising of all Wisconsin residents who purchased light cigarettes manufactured by Defendant between June 16, 2003 and the present. The Court denied the motion. Plaintiff claimed that he and the class members all suffered a common injury as a result of Defendant’s deceptive marketing practices because those practices caused them to purchase cigarettes that were less valuable than the cigarettes Defendant claimed to be selling. Id. at *6. The Court expressed its doubts on whether between 2003 and the present, all Wisconsin purchasers of Defendant’s light cigarettes believed that such cigarettes were necessarily safer to smoke than regular cigarettes. Plaintiff did not identify any Wisconsin resident, other than himself, who, during the class period, believed that light cigarettes were necessarily safer to smoke than regular cigarettes. Further, the Court noted that prior to 2003 and throughout the class period, many public disclosures were made which called into doubt the notion that light cigarettes were safer to smoke than regular cigarettes. Beginning in 1999 and continuing through much of the class period, Defendant itself disseminated information indicating that light cigarettes might not be safer to smoke than regular cigarettes. Id. at *8. Accordingly, the Court opined that Plaintiff and the class members had not suffered a common injury, and only those class members who actually believed during the class period that light cigarettes were necessarily safer to smoke than regular cigarettes would have been injured by the deceptive marketing practices. Id. at *7. Further, the Court stated that not only was it problematic that the class definition contained a large number of persons who suffered no injury, but also it was impossible to distinguish between the class members who were injured by Defendant’s conduct and those who were not absent holding an individualized hearing for each class member to ascertain the knowledge possessed by that class member at the time of each of his purchases. Id. at *11. The Court remarked that the need to make individualized inquiries to identify class members actually injured by Defendant’s conduct prevented the case from being certified as a class action. Id. at *12. Accordingly, the Court denied Plaintiff’s motion for class certification.
Claim Preclusion Issues In Class Action Litigation

Bayshore Ford Truck Sales, Inc., et al. v. Ford Motor Co., 2013 U.S. App. LEXIS 17740 (3d Cir. Aug. 26, 2013). Plaintiffs, a group of franchised vehicle dealers, brought a class action alleging violation of the Federal Automobile Dealers Day in Court Act due to Defendant’s decision to cease manufacturing heavy trucks. Defendant’s relationship with its dealers was governed by the sales and service agreement. It provided that if the agreement was terminated, a dealer could elect to accept certain termination benefits, and upon termination or non-renewal by the dealer, Defendant would be released from any and all other liability to the dealer. After Defendant announced that it would no longer manufacture heavy trucks, 24 of the 25 Plaintiffs sent resignation letters demanding termination benefits under the agreement. These Plaintiffs also sent letters acknowledging receipt of termination benefits and releasing Defendant from any liability except for the termination benefits owed by Defendant. The remaining Plaintiff, W.W. Wallwork, Inc., settled with Defendant by relinquishing its heavy truck dealership and receiving a medium truck franchise in its place. He also released and discharged Defendant from all claims, actions, causes of actions, rights, or obligations. The District Court granted summary judgment to the class on its claim that Defendant breached the agreement. Defendant then moved for summary judgment as to the 25 Plaintiffs arguing that their claims were barred by the release provision in the agreement. The District Court granted the motion, holding that these Plaintiffs would be excluded from the class. Following entry of final judgment as to the remaining class members, Plaintiffs appealed. The Third Circuit affirmed the order of the District Court. First, Plaintiffs argued that the executed releases were controlling because those releases were agreements separate from the sales agreement. Plaintiffs pointed to the fact that each release letter was different because they contained individually negotiated benefits. The Third Circuit, however, found that even though the release letters Plaintiffs executed were individually negotiated to provide different termination benefits to each Plaintiff, the portions of those letters that released Defendant from liability were substantially the same as the release contemplated in the agreement. The Third Circuit stated that the release language in the letters merely memorialized the terms that Plaintiffs agreed to in the sales and service agreement. Further, the Third Circuit opined that the release stipulated in the Agreement was unambiguous because it unequivocally stated that when a dealer resigned its franchise, demanded termination benefits, or accepted those termination benefits, Defendant was fully released from any liability. Thus, the Third Circuit ruled that the District Court correctly held that the claims of the 24 Plaintiffs were barred by the release. The Third Circuit noted that the settlement agreement between Wallwork and Defendant, which was governed by North Dakota law, released Defendant from all claims in any way connected with the Wallwork’s operation of the dealership and their other operations in Fargo, North Dakota. The Third Circuit observed that the settlement language was unambiguous and that Wallwork had released all claims against Defendant. Plaintiffs also alleged that Defendant undermined the integrity of the class action process by obtaining releases from putative class members in violation of Rule 23. The Third Circuit, however, noted that Defendant’s solicitation of written releases was plainly contemplated by the parties because it was expressly stated in the agreement. Further, the Third Circuit reasoned that Defendant’s conduct did nothing to undermine the integrity of the litigation because the releases that Defendant obtained merely memorialized the substance of the Agreement. Accordingly, the Third Circuit affirmed the District Court’s order.

In Re Metropolitan Life Insurance Co. Sales Practices Litigation, 2013 U.S. App. LEXIS 19788 (3d Cir. Sept. 27, 2013). Plaintiff, a policy and annuity owner, brought a class action alleging that Defendant MetLife had engaged in unlawful sales practice relating to a disability policy. MetLife moved to dismiss, arguing that Plaintiff’s claims had been released in the prior MDL litigation, which ended in a class settlement. The District Court held that Plaintiff was bound by that settlement and release, and granted MetLife’s motion. On appeal, the Third Circuit affirmed the District Court’s order. Plaintiff argued that the release did not bar his claim because it did not have an identical factual predicate and that he should not be bound by the class action litigation based on inadequate class representation, as well as improper certification due to lack of typicality and commonality. Plaintiff also contended that he was not given sufficient notice because he was not properly sent the entire notice package. The Third Circuit observed that Plaintiff conceded that he received part of the notice package, which contained brochures that put him on notice that the policy was part of the class settlement and outlined the relief available in the action.
Thus, the Third Circuit held that Plaintiff received adequate notice. Regarding Plaintiff’s argument that his claim was not barred because it did not have the identical factual predicate, the Third Circuit stated that Plaintiff misstated the context of the District Court’s reference to this test. The Third Circuit opined that the District Court did not hold that a release could not relinquish claims that did not have the identical factual predicate, but determined that Plaintiff was not precluded under this exclusion from alleging claims based on key facts arising after 1997 that did not share a common nucleus with the MDL claims. Moreover, the Third Circuit noted that on appeal, Plaintiff did not rely on this exclusion, nor did he contend that his claim was not covered by the language of the release. Thus, the Third Circuit concluded that Plaintiff’s argument as to the permissible scope of the release failed. Similarly, Plaintiff put forth a collateral attack on the settlement, and urged that such an attack was permissible because the class certification and settlement were summary and conclusive in nature, so that it would be unfair to preclude a collateral challenge to it. The Third Circuit disagreed with Plaintiff because the record was clear that class members had a full and fair hearing. Concluding that the issue may not be re-litigated once a District Court has decided that due process protections were provided for a particular class member or group of class members, the Third Circuit affirmed the judgment of the District Court.

Walker, et al. v. R.J. Reynolds Tobacco Co., 2013 U.S. App. LEXIS 18582 (11th Cir. Sept. 6, 2013). In an action arising in the aftermath of Engle v. Liggett Group, Inc., 954 So.2d 39 (Fla. 2006), brought against major domestic manufacturers of cigarettes, the Eleventh Circuit held that Defendant’s right to due process was not violated and the class findings from state court were entitled to full faith and credit in federal court. The Engle class action was brought on behalf of all Florida citizens and residents who suffered or died as a result of medical conditions caused by their addiction to cigarettes. Realizing the enormity of the task at hand, the Florida state trial court had split the trial into three phases, and in the Phase I, had decided that the tobacco companies breached a duty of care, manufactured defective cigarettes, and concealed material information. In Phase II, the trial court had determined the liability of the tobacco companies to three individual class representatives, the compensatory damages for those individuals, and the class-wide punitive damages. Finally, in Phase III, it had evaluated the individual claims of the remaining class members. Id. at *6-10. When the case reached the Florida Supreme Court, it affirmed the trial court’s verdict from Phase I, and gave those findings res judicata effect in future proceedings. At the same time, the Florida Supreme Court had also decertified the class, holding that class treatment was not feasible because individualized issues such as legal causation, comparative fault, and damages predominated. Id. at *11. After the Florida Supreme Court’s ruling, thousands of individual cases were filed in state and federal courts, leading to years of conflicting rulings on the effect of the Florida Supreme Court’s holding. Defendant here appealed from money judgments granted in favor of the survivors of two smokers who filed a class action against Defendant in state court. Defendant argued that the application of res judicata in later suits filed by individual smokers violated its constitutional right to due process of law because the jury verdict was so ambiguous that it was impossible to tell whether the jury found that each tobacco company acted wrongfully with respect to any specific brand of cigarette or any individual Plaintiff. Id. at *4. The Eleventh Circuit affirmed the judgments against Defendant. The Eleventh Circuit found that Defendant “had a full and fair opportunity to be heard in the Florida class action and the application of res judicata under Florida law does not cause an arbitrary deprivation of property.” Id. at *5. The Florida Supreme Court had concluded that the jury had been presented with arguments that the tobacco companies acted wrongfully toward all Plaintiffs and that all cigarettes that contained nicotine were addictive. Id. at *25. Although the proof submitted to the jury included both general and brand-specific defects, the Florida Supreme Court had concluded that the jury was asked only to determine all common liability issues for the class and not brand specific defects. Id. Further, the Florida Supreme Court had explained that the approved findings from Phase 1 would have res judicata effect in the later individual cases. According to the Eleventh Circuit, the Florida Supreme Court did not approve all of the findings from Phase I, but stated that the findings from Phase I about fraud and intentional infliction of emotional distress could not have preclusive effect because “the non-specific findings in favor of the Plaintiffs” on those questions were “inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause.” Id. at *27. The preclusive effect suggested to the Eleventh Circuit that the Florida Supreme Court had determined that the jury findings about the other claims were specific enough to apply in favor of every
class Plaintiff. *Id.* The Eleventh Circuit reasoned that “the Florida Supreme Court of Florida made the necessary finding when it explained that the approved findings from Phase I ‘go to the Defendants’ underlying conduct, which is common to all class members and will not change from case to case’ and that ‘the approved Phase I finding are specific enough’ to establish certain elements of the Plaintiffs’ claims.” *Id.* at *31. Further, Defendant had a full and fair opportunity to litigate the issue of common liability in Phase I, and also had an opportunity to contest its liability in the later cases brought by individual members of the *Engle* class. *Id.* at *28-29. The Eleventh Circuit further noted that the modest sums received by Plaintiffs suggested that the juries fairly considered the questions of damages and fault. *Id.* at *29. The Eleventh Circuit therefore concluded that the procedures adopted by the Supreme Court of Florida to manage thousands of suits under Florida law did not violate the federal right of Defendant to due process of law. Accordingly, the Eleventh Circuit affirmed the judgments against Defendant.

(xxv) Settlement Approval Issues In Class Actions

*Calibuso, et al. v. Bank Of America, 2013 U.S. Dist. LEXIS 180848 (E.D.N.Y. Dec. 30, 2013).* Plaintiffs, on behalf of a group of female financial advisors currently and formerly employed by Defendant, filed class and collective action claims alleging that Defendant’s compensation and account distribution policies unlawfully discriminated against female financial advisors in violation of the Equal Pay Act and Title VII. Subsequently, the parties agreed to settle the matter. The Court then entered a preliminary approval order of the parties’ proposed settlement agreement certifying settlement classes under Rules 23(b)(2) and 23(b)(3). After notice was issued to the class, Plaintiffs moved for final approval of the class action settlement. Pursuant to the terms of the settlement agreement, Defendant agreed to establish a monetary settlement fund in the amount of $39 million. With respect to attorneys’ fees, the Court approved Plaintiffs’ fee request in the amount of $11,467,500, which was approximately 29% of the settlement fund. *Id.* at *17. The Court also approved Plaintiffs’ request for cost and expenses in the amount of $1,162,018. *Id.* With respect to service awards, the Court approved service awards of $35,000 for each named Plaintiff. Furthermore, the Court approved Plaintiffs’ request to allocate $775,000 of the settlement fund to be set aside for the purposes of resolving all individual, non-class claims. *Id.* As to the programmatic relief entered by the Court under the terms of the settlement agreement, Defendant is required to engage an independent consultant selected by Plaintiffs’ counsel to conduct an internal study of Financial Advisor teaming and make non-binding recommendations as to ways to facilitate improved teaming arrangements for female Financial Advisors. Furthermore, Defendant is obligated to post existing non-discrimination and anti-retaliation policies on an internal website accessible to all of its Financial Advisors. Defendant is also required annually to provide Financial Advisors with information about the process for making internal complaints of gender discrimination, and shall request that Financial Advisors acknowledge either in writing or electronically that they have read the complaint procedure. The Court further required Defendant to make available to all U.S. Wealth Management Financial Advisors and Financial Advisor Trainees the option of adding a non-binding mediation process with a third-party neutral to their teaming agreements. Therefore, with respect to the settlement agreement’s $39 million monetary fund and programmatic relief provisions, the Court found them to be fair, reasonable, and adequate. Accordingly, in light of its findings, the Court granted Plaintiffs’ motion for final approval of the parties’ settlement agreement.

*Clark, et al. v. Procter & Gamble Co., 2013 U.S. App. LEXIS 15930 (6th Cir. Aug. 2, 2013).* Plaintiffs, a group of consumers, brought a class action alleging that Pamper’s Dry Max diapers caused severe diaper rash. Plaintiffs’ action was filed after the U.S. Consumer Product Safety Commission began its investigation into the issue, which subsequently found no connection between the use of the diapers and diaper rash. Thereafter, the parties settled the action, pursuant to which Defendant reinstated a refund program that limited refunds to one box per household, and required consumers to provide an original receipt and UPC code clipped from a Pampers box. Defendant also agreed to make labelling changes to its Pampers box-label. Further, the named Plaintiffs released all of their Pampers-related claims and received $1,000 per affected child. Unnamed class members did not receive any award, were forced to release their equitable claims, and were permanently barred and enjoined from filing a class action in any future lawsuit against Defendant. Finally, the agreement provided $2.73 million to Plaintiffs’ counsel in attorneys’ fees. The District Court granted final approval of the settlement. On appeal, the Sixth Circuit
reversed the order. In evaluating the fairness of a settlement, the Sixth Circuit expressed concern over a settlement that gives preferential treatment to class counsel, for they are no more entitled to disregard their fiduciary responsibilities than the class representatives. *Id.* at *10. First, regarding the one-box refund program, the Sixth Circuit expressed concern over the likelihood of consumers retaining their original receipt and Pampers-box UPC code, in some instances for diapers purchased as long ago as August 2008. The Sixth Circuit observed that the class included consumers who bought Dry Max Pampers between August 2008 and September 28, 2011, and Defendant’s initial refund program ended in December 2010. Thus, before this settlement agreement was even reached, consumers who purchased Pampers during a 29-month period – of the 38 months encompassed by the class definition – had already had an opportunity to obtain their single-box refund, without the assistance of class counsel and without assigning away important rights. This, the Sixth Circuit remarked, raised doubts about the parties’ assertions of value. The Sixth Circuit stated that a class representative who proposes that high transaction costs be incurred at the class members’ expense to obtain a refund that already is offered is not adequately protecting the class members’ interests. *Id.* at *14. Thus, the Sixth Circuit opined that the relief provided by the settlement gave preferential treatment to class counsel while only perfunctory relief to unnamed class members. The Sixth Circuit also concluded that the named Plaintiffs were inadequate representatives because an award of $1,000 per child more than compensated the class representatives for any actual damages they might have incurred as a result of buying Dry Max diapers, and having been promised the award, they had no interest in vigorously prosecuting the interests of unnamed class members. Although class counsel argued that the payments were incentive awards, the Sixth Circuit observed that $1,000-per-child payments provided a disincentive for the class members to care about the adequacy of relief afforded to unnamed class members, and instead encouraged the class representatives to compromise the interest of the class for personal gain. Accordingly, the Sixth Circuit reversed the order of the District Court.

**Day, et al. Persels & Associates, LLC, 2013 U.S. App. LEXIS 18741 (11th Cir. Sept. 10, 2013).** Plaintiff brought a class action on behalf of herself and a state-wide class of consumers alleging that Defendants failed to negotiate their debt with creditors. Plaintiff alleged that Defendants, a group of several law firms, lawyers, and affiliated debt-management businesses, enrolled consumers in debt-settlement programs that were designed to fail. Plaintiff asserted claims under Florida Deceptive and Unfair Trade Practices Act, the Credit Repair Organizations Act, and several causes of action under common law. *Id.* at *7. Plaintiff and Defendants had consented to have a Magistrate Judge conduct all proceedings and enter a final judgment. Eventually, the parties settled. Although certain class members objected to the settlement, the Magistrate Judge certified the class, approved the settlement, and entered a final judgment. The objecting class members appealed and argued that the Magistrate Judge lacked subject-matter jurisdiction to enter a final judgment because the absent class members never consented to proceed before a Magistrate. *Id.* at *17. The Eleventh Circuit disagreed and held that absent class members were not parties whose consent was required under 28 U.S.C. § 636(c) for a Magistrate Judge to enter a final judgment in a class action. *Id.* The Eleventh Circuit found support for its holding from the ordinary legal meaning of the term “party,” when Congress added the relevant language of § 636(c) suggesting that the term “parties” excludes absent class members. *Id.* at *18. The Eleventh Circuit determined that the exclusion of absent class members from the term “parties,” since “[f]rom a practical standpoint, the inclusion of absent class members as parties under section 636(c) ‘would virtually eliminate § 636(c) referrals to Magistrate Judges in all potential class actions, because it would de facto transform all such cases into ‘opt-in’ style actions and fundamentally change the capacity of the judgment . . . to bind both sides in the absence of express consents.’” *Id.* at *27. The objecting class argued that Plaintiff lacked authority to bind absent class members when she consented to the jurisdiction of the Magistrate Judge before the class had been certified and that section 636(c) violated Article III of the Constitution. The Eleventh Circuit disagreed, holding that the absent class members were not bound by the consent of Plaintiff. The Eleventh Circuit held that absent class members had sufficient tools to protect their interests. The Eleventh Circuit explained that absent class members retained at least three options to protect their rights to the adjudication of their claims, as: (i) absent class members could apply to intervene in the lawsuit; (ii) absent class members in many class actions could opt-out of a settlement and not be bound by the judgment; and (iii) absent class members could bring a
The entities would be allowed to license individual players’ publicity rights, or at *15. Because Plaintiffs

Id. at *9. The agreement provided no monetary relief to the absent Plaintiffs, but released any claims that an absent Plaintiff had against Defendants. The only evidence of the ability of Defendants to satisfy a judgment concerned a single Defendant, Persels & Associates, which incurred nearly $6 million of losses in 2010 and 2011 and had $14 million in outstanding debt from a previous settlement. The Eleventh Circuit found that the declaration established only that one of the seven Defendants would be unable to satisfy a significant judgment and did not prove that the other six Defendants would be unable to satisfy a judgment or even address the ability of those six Defendants to satisfy a judgment. Id. at *49. Accordingly, the Eleventh Circuit vacated the final judgment that approved the settlement agreement and remanded the action for further proceedings.


Plaintiffs, a group of retired NFL football players, brought a class action alleging that Defendant violated their common law and statutory rights of publicity by using images from their playing days in Defendant’s films productions. Plaintiffs alleged that while the league was allowed to use players’ names, images, and likenesses during their playing days, usage was not allowed after the players’ contracts expired. Plaintiffs brought claims for unjust enrichment, violations of the Lanham Act, and for violations of their rights of publicity due to the unauthorized uses of their likenesses. The parties eventually settled, and the Court had granted preliminary approval of the settlement by conditionally certifying a settlement class. The Court then granted final approval of the settlement. Under the settlement terms, Defendant must deposit $7,550,000 into a settlement escrow account, which had to be used to pay attorneys’ fees and expenses, service awards to Plaintiffs, both to be determined, and to establish and for initial operating expenses of a licensing agency for class members to receive payments directly commensurate with the value of their publicity rights. Id. at *36. The entities would be allowed to license individual players’ publicity rights, or the rights of groups of players, in conjunction with Defendant’s copyrights and trademarks, and 75% of the fees generated from such licenses would be paid directly to the players whose publicity rights were licensed. Id. at *24-25. All money remaining was to be transferred to the common good fund. The settlement also provided that Defendant could deduct up to $13.5 million from the common good fund contribution to pay for expenses related to opt-out claims. Id. at *11. The Court weighed the merits of Plaintiffs’ action against the terms of the settlement, Defendant’s financial condition, the complexity and expense of further litigation, and the amount of opposition to the settlement, and found that the settlement was fair, reasonable, and adequate. The Court pointed out that the chances that the action seeking to recoup sums for the alleged infringement of Plaintiffs’ publicity rights would succeed were slim at best because too many obstacles stood in the way of success. Id. at *9. The Court noted that the action involved a large, diffuse class of individuals with very different potential damages and very different present-day needs, and thus the settlement was the best solution for the difficulties of the class and their claims. The Court further held that the complex and extraordinary expensive factors also weighed in favor of the settlement. Plaintiffs’ claims were complex because they involved not just claims of injury, but also implicated constitutional principles. Discovery had not yet been fully accomplished, and class certification would require a detailed analysis of the claims of the class members. Moreover, the statute of limitations could bar the claim of the many members of Plaintiff class because no Plaintiffs would be entitled to compensation for any unauthorized use of their images before 2003, which meant that the claims likely were severely limited in value. Id. at *14. In addition, the action could require a choice-of-law analysis because it involved claims of a nationwide class asserting personal rights. Id. at *15. Because Plaintiffs played in various locations, for teams located throughout the United States, it was likely that they would have expected that the vindications of their publicity rights would be subject to the law where their teams was located or where they themselves lived. In sum, the Court concluded that the law of many different jurisdictions could apply to Plaintiffs’ claims, and thus the choice-of-law analysis was exceedingly complex,
which could make the manageability of a class action highly problematic. *Id.* at *18-20. The Court thus
found that the complexity of the action weighed heavily in favor of settlement. Additionally, the Court found
that benefits of the settlement were numerous and far-reaching. Accordingly, the Court concluded that
settlement was fair, reasonable, and adequate.

on behalf of themselves and similarly-situated current and former hearing-impaired USPS employees,
brought a class action alleging that Defendant failed to provide reasonable accommodations to current and
former hearing-impaired employees in violation of the Rehabilitation Act. After a decade of litigation, the
parties jointly moved for final approval of their stipulated settlement agreement. As a preliminary matter,
after holding that the settlement class satisfied Rule 23(a) and (b) requirements, the Court certified both a
damages settlement class under Rule 23(b)(3), and an injunctive relief class under Rule 23(b)(2). *Id.* at *8-
11. With respect to the reasonableness of the settlement, the Court observed that the parties’ agreement
provided for extensive injunctive relief. In particular, the non-monetary relief included training USPS
supervisors on the new accommodation requirements and technology called for by the agreement, as well
as the creation of various internal management structures to monitor the provision of reasonable
accommodations to deaf and hearing-impaired postal employees. *Id.* at *12-13. As to monetary relief
under the settlement agreement, the Court observed that the common fund of $4.55 million included a
baseline award of $10,000 to each class representative for services provided on behalf of the class, as well
as a baseline award of $250 to each eligible damages class member. *Id.* at *13. The Court further noted
that all remaining funds would be allocated to eligible class members based on the severity of the harm
they experienced as a result of their non-accommodation by Defendant. As to the parties’ estimation that
half of the approximately 6,000 eligible class members would submit a claim, resulting in an average award
of $927 per class member, the Court noted that this estimate “is less than damages awards in EEOC
actions, discrimination suits, and settlements based on similar allegations.” *Id.* As such, the Court ordered
that the distribution of the amount be reallocated by reducing the attorneys’ fees and expenses awarded to
class counsel by $526,000, to $1,024,217. With respect to attorneys’ fees, the Court noted that D.C.
Circuit precedent had established that “the percentage of recovery method is superior to the lodestar
method for determining attorneys’ fee awards in common fund cases” because it better protects against
potential abuses and unfairness in the distribution of settlement monies. *Id.* at *20. The Court found that
class counsel spent a disproportionate amount of time working on a case that did not present significant
legal complexities and other litigation inefficiencies. *Id.* at *24-25. Therefore, the Court determined that a
rate of recovery of 20% rather than the 30% called for by the parties’ agreement was “more reasonable and
fair.” *Id.* at *26. Finally, as to legal expenses, the Court cut class counsel’s proposed award for legal
expenses by half of a $150,000 “flat success rate” promised to a private mediator who helped the parties
reach the settlement agreement. *Id.* at *27. The Court opined, “[s]uch a fee might be appropriate . . . in a
highly complex case between two (or at least one) highly financed corporations, where there is a very large
common fund for the settlement. It is not, however, appropriate in a much less complex case against a
financially strapped organization like USPS, where there is a very modest common fund.” *Id.* In
conclusion, the Court granted final approval of the parties’ settlement agreement.

**In Re Crocs, Inc. Securities Litigation, 2013 U.S. Dist. LEXIS 122593 (D. Colo. Aug. 28, 2013).** In this
consolidated class action alleging that Defendants violated the Exchange Act and rules promulgated by the
Securities and Exchange Commission (“SEC”), the Court preliminarily approved the settlement between
the parties. Plaintiffs had alleged that Defendants made materially false and misleading public statements
about its inventory and the systems that Defendants used to manage its inventory, which led to Plaintiffs’
damages as the stock prices of Defendants decreased when the corrective disclosures were made. After
the Court had dismissed Plaintiffs’ complaint with prejudice for failure to state a claim, Plaintiffs appealed to
the Tenth Circuit. During the appeal, the parties negotiated a settlement, and the Tenth Circuit remanded
the case for approval of the settlement. The settlement provided that in exchange for the full release of the
class claims, Defendants would pay a settlement amount of $10 million into a settlement fund of which
$250,000 could be used by the lead Plaintiff for costs and expenses. The settlement agreement provided that
after deducting the attorneys’ fees, costs of notice, expenses, and costs for claims administration,
settlement fund would be allocated pro rata among the settlement class members based on the following factors: (i) the date class members purchased securities; (ii) the type of the security purchased; (iii) the first-in first-out ("FIFO") method of recognized loss; and (iv) the agreed upon claim formula. A group of Plaintiffs lead by National Roofing Industry Pension Plan ("National Roofing"), who sought appointment as lead Plaintiff, objected to the proposed settlement agreement. National Roofing raised three arguments: (i) the current lead Plaintiffs – Antonio Pedrera Sanchez and Fernando Perdrera Sanchez (the "Sanchez Group") – lacked standing to function as the lead Plaintiff in light of the Supreme Court’s ruling in Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869 (2010); (ii) the timing of the settlement agreement raised serious doubts about the fairness of the class members’ anticipated recovery; and (iii) the settlement agreement was not fair, reasonable, or adequate because an estimated net recovery of $6.4 million for the settlement class was less than 15% of the Sanchez Group’s alleged damages. Id. at *8. The Court first noted that the class was sufficiently large to satisfy the numerosity requirement. Because Plaintiffs alleged that Defendants recklessly or knowingly made material misrepresentations or omissions regarding the inventory, this issue of fact and law was common across the class. Opposing typicality, National Roofing argued that the lead Plaintiff lacked standing because Sanchez Group was not a member of the relevant class because it did not purchase securities on a U.S. Domestic exchange, but rather purchased CFDs on a foreign exchange. The Court rejected this argument, finding that National Roofing failed to show that the interests of the Sanchez Group were agnostic to the interests of the settlement class. Id. at *25. The Court found that although Sanchez Group purchased the CFDs, its interests were typical of the settlement class because they were subject to a common risk, i.e., that the Tenth Circuit would affirm the order of dismissing the claims. Id. National Roofing further argued that the Sanchez Group was atypical because it did not purchase the common stock during the relevant class period, and that it could cure its lack of standing by appointing two named Plaintiffs, Babbit and Lundberg, who purchased common stock during the class period. The Court found that nothing in the Private Securities Litigation Reform Act requires selection of a lead Plaintiff with a standing to sue, but Courts are merely required to appoint a person to serve as a lead Plaintiff. Id. at *28. Accordingly, the Court ruled that the Sanchez Group’s claims were typical to that of other class members. Similarly, the Court found that the adequacy of representation requirement was satisfied. The Court noted that the lead Plaintiff, as well as absent class members, sought compensation for Defendants’ alleged misrepresentations. As Plaintiffs brought this claim under federal law, the Court found that there were no issues concerning variations with state law. Accordingly, the Court concluded that predominance requirement was satisfied. Finally, the Court noted that Rule 23(e) provides that a proposed settlement may only be approved after finding that it was fair, reasonable, and adequate; and Rutter & Wilbanks Corporation v. Shell Oil Company, 314 F.3d 1180 (10th Cir. 2002), provides factors that a Court must analyze before approving a settlement. The Court, however, remarked that it was unclear to what extent on a motion for preliminary approval it must delve into those factors, but based on the limited information available to the Court at that stage, it noted that the information weighed in favor of preliminary approval. The Court explained that the parties reached the settlement after several months of mediation, and it did not appear as though it was the result of a collusive agreement between the parties. Id. at *41. Further, the Court noted that the settlement agreement seemed to have been negotiated against the likelihood of success on appeal. Even if Plaintiffs succeeded on appeal, they ran the risk of failing to establish the required elements of their § 10(b) claims. The Court similarly found that the settlement amount was adequate, and that Plaintiffs were represented by experienced counsel. Accordingly, the Court found that settlement was fair and reasonable, and preliminarily approved it.

In Re Oil Spill By The Oil Rig, Case No. 10-MD-2179 (E.D. La. Aug. 7, 2013). This multi-district litigation arose from the massive oil spill that followed the sinking of Deepwater Horizon, a mobile offshore drilling unit operated by BP Exploration and Production Inc. After settlement, the Court issued notice to BP asking to show cause why the Claims Administrator’s proposed third quarter 2013 budget should not be funded. BP was given the opportunity to question the Claims Administrator and the vendors regarding the administration of the Court Supervised Settlement Program ("CSSP") and the expenses incurred in running the program for which BP provided the funding. BP complained that the CSSP was operating with high costs and low productivity and that the Claims Administrator’s Office did not appear to employ an expense management plan. The Claims Administrator stated that BP had not followed the provisions of the
settlement agreement, specifically whereby a three person claims administration panel was convened to address and attempted to resolve unanimously any issues or disagreements that arose regarding the Claims Administrator’s oversight responsibilities, settlement administration, or any other issues involving the settlement program. The Claims Administrator stated that the CSSP had operated in an open and transparent manner both as to BP and class counsel who had always had the opportunity to raise concerns about the Claims Administrator’s operations. Further, the Claims Administrator pointed out that it had submitted its budget to BP and to class counsel on a quarterly basis and BP had made inquiries about specific vendor costs, but it had never challenged or disapproved of the Claims Administrator’s proposed budget. Robert Levine, chief financial officer of the Claims Center, sent BP the third quarter budget required for the Claims Administrator’s operation and advised that $128,654,584 was required to fund the third quarter budget. Maria Travis, the Director of Claims, stated that they continued to have significant concerns about CSSP’s poor productivity and excessive costs, and requested that the CSSP resubmit its third quarter 2013 budget with appropriate documentation, analysis, metrics, and explanatory notes to support each item in the budget. Thereafter, BP failed to approve the requested budget. The Court noted that while the settlement agreement provided that the administrative budget was subject to the reasonable approval of BP, in this instance, given the course of conduct between the Claims Administrator and BP in operating on a quarterly budgetary basis as a matter of routine, the Court found that the refusal to fund the third quarter 2013 budget was unreasonable. Accordingly, the Court ordered BP to fund the third quarter 2013 budget for settlement administration in its entirety.

In Re Payment Card Interchange Fee And Merchant Discount Antitrust Litigation, 2013 U.S. Dist. LEXIS 179340 (E.D.N.Y. Dec. 13, 2013). In what it described as the “largest-ever cash settlement in an antitrust class action,” the Court granted final approval of a settlement that called for a cash payment estimated at $7.25 billion. Id. at *1-7, 16, 54. Beginning in June 2005, more than 40 class action complaints were filed by merchants against Defendants Visa USA Inc. (“Visa”) and MasterCard International Incorporated (“MasterCard”), as well as issuing and acquiring banks. Id. at *4, 25. Plaintiffs alleged that Visa and MasterCard adopted and enforced rules and practices relating to payment cards that had the combined effect of unreasonably restraining trade and injuring merchants in violation of the Sherman Act. The rules and practices challenged included the setting of default interchange fees; a number of rules designed to restrict merchants from steering customers to lower-cost credit cards and/or forms of payment other than Visa or MasterCard; and a rule requiring merchants to accept all of the network’s credit cards or debit cards when offered for payment, regardless of which bank issued the card. Id. at *26. In addition to a cash payment estimated at $7.25 billion, the settlement included, among other things a rule modification permitting merchants to place a surcharge on Visa or MasterCard branded credit card transactions at both the brand and product levels; an obligation on the part of Visa and MasterCard to negotiate interchange fees in good faith with merchant buying groups; and authorization for merchants that operate multiple businesses under different trade names or banners to accept Visa and/or MasterCard at fewer than all of its businesses. Id. at *16-17. The case had been extensively litigated for more than eight years prior to settlement. Discovery included more than 400 depositions, the production and review of more than 80 million pages of documents, the exchange of 17 expert reports, and a full 32 days of expert deposition testimony. Id. at *11. There were also multiple days of mediation before a retired judge, a law professor, and two sitting federal judges. Id. at *13-15. The proposed settlement was challenged vigorously by a number of objectors, including some merchant Plaintiffs who participated directly in the settlement discussions and initially agreed to the terms of the settlement. As part of a settlement process, the Court appointed an expert witness to advise the Court on economic issues that may arise in connection with the proposed settlement. Id. at *19-20. Ultimately, the Court concluded that the objectors were seeking injunctive relief to which they would not be entitled even if they prevailed in the litigation, and also refused to take into consideration the very real prospect that they may not succeed at trial at all. Id. at *22-25. The Court examined the proposed settlement for both procedural and substantive fairness and concluded that it passed these tests. Id. at *30-55. Noting that there were no objections to the plan of allocation of the settlement funds, the Court approved the settlement and the plan of allocation. Id. at *87-89.

Plaintiffs, a group of customers, brought a class action alleging that Defendant committed a breach of contract, was unjustly enriched, and violated various state consumer protection laws when it stopped honoring drink vouchers that it had given to airline travelers who purchased premium-priced business select tickets. The coupons were redeemable on any flight for drinks that would otherwise cost five dollars, did not expire, and could be redeemed immediately or saved for a future flight. Subsequently, the parties settled the action pursuant to which each class member would receive one replacement drink voucher for each unredeemed drink voucher, which would expire one year after its date of issuance. The Court granted final approval to the settlement, including incentive awards. The proposed settlement class was comprised of all customers who purchased an eligible drink voucher through the purchase of a business select ticket or otherwise, during the time period before August 1, 2010, but who did not redeem the voucher. The Court noted that the proposed class totaled over two million individuals, and each class member suffered the same injury, i.e., the loss of the ability to use the drink vouchers. The claims of all of the class members depended on whether Defendant’s decision to stop honoring the drink vouchers amounted to a breach of contract, and there was no serious contention that the legal theory would vary based on the class members’ different states of residence or other individual factors. Class member Michael Tigar argued that because the drink vouchers were less valuable to some class members than others and had no value to some class members, there was insufficient cohesiveness among the class members. The Court rejected that objection, stating that because each class member who submitted a claim would be returned to essentially the position he or she was in prior to the decision not to honor the vouchers, the fact that some might have considered the voucher to be a worthless piece of paper had no real impact on the Rule 23(a) analysis. Further, because there was no other pending litigation, and any given Plaintiff’s individual stake in the outcome was so small that separate suits were impracticable, the Court noted that the requirements for certification under Rule 23(b)(3) were satisfied. In determining whether the settlement was fair and reasonable, the Court observed that there was some potential certainty regarding the terms of the contract on which Plaintiffs’ claims were based because Defendant contended that it never intended to allow holders of the vouchers to redeem them indefinitely. The Court determined that the fact that Plaintiffs got back almost exactly what they lost weighed in favor of approval of the proposed settlement. Further, the Court noted the complexity, length, and expense of future litigation, the absence of collusion, and the low level of objection favored approval. Although several objectors contended that a settlement was appropriate only if it provided a cash recovery, the Court remarked that this settlement differed from many coupon-based settlements because the underlying loss itself involved a voucher; hence, the settlement did not substitute a coupon for a pecuniary loss. Id. at *25-26. Although some objectors contended that the settlement was unreasonable because it required them to submit a claim in order to receive settlement benefits, the Court reasoned that a claim form was reasonable and appropriate because although Defendant tracked the number of vouchers issued, it did not track how many were redeemed. Accordingly, the Court observed that the settlement was fair, reasonable, and adequate, and granted final approval of the settlement.


Plaintiff, a consumer, brought an action under various New Jersey statutes, on behalf of consumers who canceled memberships with L.A. Fitness health clubs (the “Membership Agreement Class”), and those who entered into contracts for personal training sessions (the “Fitness Service Agreement Class”). Subsequently, Parties settled the action, and the Court granted preliminary approval to the settlement. Plaintiff moved for final approval, and the Court granted the motion. Defendant agreed to award various types of relief which the parties valued in the aggregate of $3.8 million. The Membership Agreement Class received a 45-Day Access Pass (the “45-Day Pass”) to L.A. Fitness facilities and would also, upon request, receive a payment for monetary damages in an amount equal to one-third of one month’s dues. Given Plaintiffs’ estimate that the 45-Day Pass was worth $52.48 and the cash award was worth $11.67, Membership Agreement Class members had claimed awards worth approximately $24,203.91. The Fitness Service Agreement Class could choose either two free 25-minute personal training sessions or a $100 credit intervener a new Monthly Dues Membership. Given Plaintiffs’ estimate that each of these forms of relief was worth $100, Fitness Service Agreement Class members had claimed awards worth
approximately $44,000. The settlement also provided for a cy pres award, according to which unclaimed funds would be awarded to Legal Services of New Jersey. The Court observed that the $100 credit interener a new membership was clearly a discount and thus, a coupon even under Plaintiffs’ own definition that it was a credit that required class members to spend money in order to realize the benefit. Further, the Court stated that the 45-Day Pass and personal training voucher, though they offered a complete product, were nonetheless exactly the type of in-kind compensation covered by the coupon settlement provisions of the CAFA. Although they were vouchers and not discounts, the Court noted that they shared some characteristics of coupons, including forced future business with Defendant. Thus, the Court stated that the 45-Day pass, the personal training voucher, and the $100 membership credit were all coupons under the CAFA. The Court observed that the settlement was fair, reasonable and adequate. Because the settlement provided substantial and immediate benefits for the class, as opposed to the expense and uncertainty of continued litigation, the complexity and duration of the litigation favored approval. Further, the stage of the proceedings also favored approval because the parties had exchanged initial disclosures and arrived at the settlement after negotiation before a retired federal judge, and the Court noted that all parties had an adequate appreciation of the merits of the case. The risks of establishing liability and damages favored approval of the settlement. The Court also stated that the ability of Defendant to withstand a greater judgment favored approval. First, only 617 class members had requested cash payouts, reflecting a cost to Defendant of about $7,000. Even if the remaining 20,852 consumers in the Membership Agreement Class requested their checks for $11.67 before the deadline, this only amounted to $250,000. The Court remarked that the small size of Defendant’s cash exposure was particularly troubling because the settlement’s cy pres award would not come from the alleged $3.8 million common fund, but only from that portion of the $250,000 which was requested but not cashed. Second, the Court stated that the $3.8 million figure was misleading because it was based solely on the value to class members. Although the parties’ suggested values of $52.48 for the 45-Day pass and $100 each for the personal training sessions and gym membership credit would be appropriate for consumers, the Court found that the costs to Defendant were much lower. Defendant already had health clubs operating in New Jersey, and given these sunk costs, the marginal cost of a few hundred extra visits by holders of the 45-Day Passes was close to zero. Further, the Court noted that the range of reasonableness of the settlement in light of the best recovery and all the attendant risks of litigation favored approval. Finally, the Court observed that the harm each claimant allegedly suffered for the Membership Agreement Class was $30 incurred for an extra month’s dues. In light of that figure, the Court opined that a transferable 45-Day Pass plus a small cash award was sufficient. For the Fitness Services Agreement Class, the Court stated that the likely damages were more difficult to calculate, except to the extent that the alleged violations of the New Jersey Retail Installment Sales Act could total $65, which made the $100 relief appropriate. Although the settlement would not come close to its alleged $3.8 million value, the Court observed that it nonetheless fell within the range of reasonableness and was fair enough. Class counsel estimated its relevant lodestar at $161,615.50, or 389 hours at an average rate of $415 per hour. The Court noted that counsel’s request for $200,000 reflected a multiplier of 1.2, below the multiplier range of 1.35 to 2.99 which the Third Circuit has found reasonable. Accordingly, the Court granted $200,000.00 in attorneys’ fees and expenses. Finally, the settlement provided for an award to Plaintiff of $11,065.28, which would resolve charges from her credit card company. She would also receive a $3,000 incentive award. The Court stated that this award was reasonable in light of the time that the lead Plaintiff invested in the matter. Accordingly, the Court granted final approval to the settlement.

McReynolds, et al. v. Merrill Lynch & Co., Case No. 05-CV-6583 (N.D. Ill. Dec. 6, 2013). Plaintiffs, on behalf of themselves and similarly-situated African-American brokers employed by Defendant, brought a nationwide class action alleging that Defendant implemented and utilized company-wide account distribution and teaming policies that had an unlawful disparate impact against African-American brokers in violation of Title VII. The Court initially denied Plaintiffs’ motion for class certification, which was later reversed by the Seventh Circuit. On remand, the Court certified a disparate impact class with respect to Defendant’s teaming and account distribution policies. Subsequently, the parties agreed to settle the matter. The Court subsequently entered a preliminary approval order of the parties’ proposed settlement agreement. After notice issued to the class, Plaintiffs then moved for final approval of the class action.
settlement. Under the terms of the proposed settlement agreement, Defendant agreed to establish a settlement fund and make a payment in the amount of $160 million. In support of their motion, Plaintiffs submitted an expert declaration of Professor John Coffee of Columbia University School of Law. In comparing the settlement numbers in the case to other major employment discrimination class action settlements, Professor Coffee opined that the settlement provided per capita benefits of approximately $111,000 to the 1,433 class members. Further, he opined that Plaintiffs’ fee request for 21.25% of the adjusted common fund – a figure of approximately $40 million in attorneys’ fees – was justified and in line with analogous fee awards. The Court agreed with Professor Coffee and held that the requested attorneys’ fees were reasonable when compared to fee awards in comparable cases. Id. at 6. With respect to the settlement agreement’s $160 million monetary fund and injunctive relief provisions, the Court found them to be fair, reasonable, and adequate. Moreover, the Court observed that only one settlement class member had opted-out of the monetary settlement. Thus, the Court noted that the response of the settlement class members to the settlement agreement further supported approval of the settlement. Id. at 4. The Court also approved service awards of $250,000 for each class representative and $75,000 to the six members of Plaintiffs’ litigation steering committee. Id. at 5. In light of its findings, the Court granted Plaintiffs’ motion for final approval of the parties’ settlement agreement.

Editor’s Note: The McReynolds settlement is not only the largest employment discrimination class action settlement of 2013, but also the $160 million settlement fund is one of the largest common funds ever achieved in settlement of an employment discrimination class action.

Newman, et al. v. Americredit Financial Services, Inc., Case No. 11-CV-3041 (S.D. Cal. April 15, 2013). Plaintiffs brought a class action alleging that they received phone calls to their mobile phones from Defendant, an administrator of automobile loan accounts, or Defendant’s agent, using autodialing equipment or a prerecorded voice message in violation of the Telephone Consumer Protection Act (“TCPA”). The calls were made to individuals regardless of whether they had a loan account with Defendant. The parties resolved the litigation. Plaintiffs moved for certification of a settlement class and preliminary approval of the settlement. The Court denied the motion. The settlement provided a lump sum payment of $6.5 million, from which $2,040,000 was for attorneys’ fees, up to $25,000 for costs, $10,000 as incentive payments to the class representatives, and pro rata payments to class members of no more than $500 per claim. The settlement also provided that if the number of submitted claims resulted in a pro rata distribution greater than $500 per claim, the excess over $500 per claim would be distributed as a cy pres distribution to the Consumers Union. However, if a large number of claims was submitted resulting in a pro rata distribution of less than $30 per claim, then Defendant’s settlement payment would be increased up to $8.5 million. The Court observed that the benefit of the settlement to the class members was difficult to evaluate because Plaintiffs’ motion did not disclose an estimate of the first notice and settlement administration costs, and the size of the class also was unclear. The Court remarked that with a clearer estimate of the notice and settlement administration costs, and the size of the class, Plaintiffs should be able to provide a more reliable estimate of the amount the class members could expect to recover if each class member filed a claim. Second, the Court noted that the class period spanned more than five years, yet class members who received one unlawful call to their mobile phone would be compensated the same as those who received numerous calls over the class period. Because Defendant maintained a database of mobile phone calls, the Court opined that it could be possible to distribute the settlement more equitably among the class members. Third, regarding the cy pres award, the Court stated that although class members’ recovery was limited to $500, the motion did not address the rationale for this decision, considering that Defendant agreed to pay at least $6.5 million and that the statute permitted an award greater than $500 per call. Id. at *4. Further, the Court remarked that a cy pres award had to be guided by the objectives of the underlying statutes and the interests of the class members, and must not benefit a group too remote from the class. Id. Fourth, the Court observed that the motion did not address the strengths and weaknesses of Plaintiffs’ claims and Defendant’s defenses. The Court reasoned that a substantive discussion of these issues was necessary for the Court to make the requisite findings under Rule 23(e)(1)(C), and to give proper notice to the class under Rule 23(c)(2). Id. Although named Plaintiffs Newman and Mack sought appointment as class representatives, only Newman filed a declaration, and it
addressed the representation issues in a perfunctory manner. The Court remarked that Plaintiffs’ evidence was insufficient to make the necessary findings. Additionally, although three law firms sought appointment as class counsel, the Court was not inclined to appoint all without an explanation why all of the firms were needed to adequately represent the settlement class. Finally, although the named Plaintiffs sought $5,000 each as incentive awards, they did not provide any evidence to support their award requests. The Court observed that incentive awards were intended to compensate class representatives for work done on behalf of the class, and to make up for financial or reputational risk undertaken in bringing the action. Id. at *5. The Court determined that the amount of the award must be related to the actual service or value the class representative provided to the class, and noted that Plaintiffs had not provided any evidence to support their award request. Id. Accordingly, the Court denied the motion.

Richardson, et al. v. L’Oreal USA, Inc., 2013 U.S. Dist. LEXIS 158599 (D.D.C. Nov. 6, 2013). Plaintiff brought a class action alleging that Defendant falsely marketed certain hair care products as "salon only" even though they were also available at mass-market retail stores. Id. at *2. The parties agreed to settle the case for injunctive relief only; Defendant would change its labeling and the class members would agree to release any class claims for monetary relief. Id. at *4. The Center for Class Action Fairness objected, making three substantive arguments, including: (i) Plaintiffs lacked standing to seek injunctive relief; (ii) individualized damages issues would predominate, particularly between retail and mass-market purchasers; and (iii) the class was not cohesive enough to justify Rule 23(b)(2) certification for settlement purposes. Id. at *10. The Court rejected the standing argument, and found that Plaintiffs "have standing here." Id. at *22. The Court, however, found that the class did not meet the predominance requirement of Rule 23(b)(3). Plaintiffs tried to argue against a predominance analysis since they were not seek damages, but the Court ruled that if they extinguished their damages claims, then absent class members deserved Rule 23(b)(3) notice and opt-out protections. The Court analyzed the ramifications of settling a class action under Rule 23(b)(2) that would also extinguish class-wide damages claims as "too hard to certify." Id. at *31-32. The Court noted that "[i]t is not hard to imagine adventurous or avaricious counsel taking advantage of this novel settlement structure to the detriment of absent class members. For example, imagine a putative consumer class action where damages determinations would be relatively complex or speculative on a nationwide basis, but perhaps not so on a state-to-state basis. Calculating that a piece of a state-wide class would not be very rewarding to pursue, the hypothetical plaintiffs build a record showing that a broad nationwide class seeking damages could never be certified. Then, Plaintiffs seek to file a suit for injunctive relief only and seek to settle with Defendant. Because releasing all damages claims in a [Rule 23(b)(2)] settlement class would almost certainly be improper, Defendant agrees that Plaintiffs need not release individual damages claims – the value of which is trivial, as in many consumer class actions. But Plaintiffs agree to release class-wide damages claims, under the auspices of an impossible-to-certify nationwide class. Plaintiffs get attorneys’ fees, Defendant gets a near-bulletproof release, and class members get . . . an injunction. In the end, stripping the procedural right to bring a damages class action from absent class members without their knowledge or consent – and effectively precluding their damages claims – is not proper." Id. at *45-47. The Court also held that the intra-class conflict between those who bought at salons and those who bought at mass retail stores meant the class was not cohesive enough for Rule 23(b)(2) certification. Id. at *49. For these reasons, the Court declined to approve the parties’ proposed class action settlement.

Rodriguez, et al. v. National City Bank, 2013 U.S. App. LEXIS 16615 (3d Cir. Aug. 12, 2013). Plaintiffs brought a class action alleging that Defendants’ pricing policy authorized a subjective surcharge of additional points, fees, and credit costs to an otherwise objective risk-based financing rate, which resulted in a widespread discriminatory disparate impact on minority applicants for home mortgage loans. Id. at *2-3. Plaintiffs’ theory, in substance, in the mortgage lending context, mimicked the theories rejected in Wal-Mart Stores, Inc. v. Dukes, et al, 131 S. Ct. 2541 (2011). The parties agreed to a class action settlement, and the District Court preliminarily approved the parties’ settlement. Id. at *5. While final approval of the settlement and certification of a settlement class was pending, the Supreme Court issued its opinion in Wal-Mart. Id. In light of Wal-Mart, the District Court denied Plaintiffs’ motion for final approval of settlement and certification of a settlement class. Id. at *7. The District Court found that the proposed
class of approximately 25,000 African-American and Hispanic persons failed to meet the commonality and typicality requirements as prescribed in Wal-Mart. Id. The District Court pointed out that Plaintiffs did not satisfy the commonality requirement because the dispositive legal issue of whether Defendants’ discretionary pricing policy constituted a common practice that affected class members in a discriminatory manner was not the same for each member of the class. Id. The District Court concluded that despite the regression analysis that Plaintiffs offered showing an overall disparate impact, the fact that each loan officer would likely offer different reasoning for how he or she applied their discretion to loan applications further supported the conclusion that the issues involved in the case would differ based on the loan officers from which the class members received a loan. Id. On appeal, the Third Circuit upheld the District Court’s decision and reasoned that “whether class action representatives are seeking certification for the purpose of settlement or with the intent to litigate, the members of the proposed class must meet the threshold requirements of Rule 23(a), and our policy preference for voluntary settlement cannot and does not alter that demand.” Id. at *17. As such, the Third Circuit affirmed that the role of a judge in approving a Rule 23 settlement class, while limited, “is more than a rubber stamp, and thus it will sometime result in the undoing of a settlement.” Id. at *27. In assessing the proposed settlement class, the Third Circuit held that, “Here, as in [Wal-Mart Stores, Inc. v.] Dukes, the exercise of broad discretion by an untold number of unique decision-makers in the making of thousands upon thousands of individual decisions undermines the attempt to claim, on the basis of statistics alone, that the decisions are bound together by a common discriminatory mode.” Id. at *38. Accordingly, fatal for the proposed settlement class was the fact that while Defendants’ pricing policy may have “opened the door to biases that individual loan officers could have harbored,” as Plaintiffs failed to establish (as was the case in Wal-Mart) that “there was a common and unlawful mode by which the officers exercised their discretion.” Id. at *34.

Seebrook, et al. v. The Children’s Place Retail Stores, Inc., 2013 U.S. Dist. LEXIS 171864 (N.D. Cal. Dec. 4, 2013). Plaintiffs, a group of retail store customers, brought a class action alleging that Defendant violated the California’s Song-Beverly Act by intentionally requesting and recording the customers’ addresses and phone numbers during credit card transactions at Defendant’s California retail locations. Subsequently, the parties settled the action, giving the class members an option either to receive a $10 gift certificate or a 35% off voucher at Defendant’s retail stores. Plaintiffs moved for attorneys’ fees, expenses, and incentive award payments. The Court granted the motion. At issue was whether the settlement qualified as a coupon settlement, thus triggering the provisions of § 1712 under the CAFA. The Court noted that In Re HP Inkjet Printer Litigation, 716 F.3d 1173 (9th Cir. 2013), held that if a settlement gives coupons and equitable relief, and the Court sets attorneys’ fees based on the value of the entire settlement, then the Court must use the value of the coupons redeemed when determining the value of the coupons part of the settlement. Id. at *3. Further, the Court observed that while a coupon is a discount on merchandise or services offered by Defendant, a voucher provides for free merchandise or services. Id. at *4. Here, the Court stated that the 35% off voucher was undoubtedly a coupon but the issue was whether the $10 merchandise certificate provided in the alternative was also a coupon. The Court observed that because much of the merchandise at Defendant’s stores was priced for purchase at $10 or less, class members did not need to spend money in order to realize the settlement benefit. Hence, the Court opined that the $10 certificate was not a coupon and did not trigger the provisions of § 1712. Id. at *7. Further, because class members suffered no actual out-of-pocket economic loss, the Court reviewed the request for attorneys’ fees under the lodestar method. Here, the parties had agreed that class counsel would receive $335,000 in attorneys’ fees and costs. Because counsel’s hours were supported with declarations and detailed time records setting forth the hours expended, categories of the hours expended, and the dates on which the time was expended, the Court opined that a $335,000 award for class counsel’s fees, costs and expenses of litigation was reasonable. Id. at *7-8. Further, the Court also granted Plaintiffs’ request of $2,750 incentive payments to compensate class representatives. Id. at *8.

Subsequently, the parties settled the class action for $2,125,000 and sought approval of the settlement. The Court denied preliminary approval to the settlement. First, the Court noted that the payments to the class members should be self-executing, and that class members need not file anything if they desired to receive payment. The Court remarked that the burden on determining how much each class member was entitled to rested solely on the class administrator, but the class members should still be allowed to opt-out if they so desired. Second, because of the required self-executing provision, the Court stated that the payment must be clearly identified as such and not as junk mail. The Court directed Plaintiffs to submit an exemplar of the payment mailing for approval, and instructed the parties that the check should be valid for at least one year from the date of issue. Third, because it would be economically unfeasible to send out settlement payments to owners who possessed a small amount of stock, the Court agreed to a provision that excluded payment to individuals with an estimated settlement recovery of less than $1.00. The Court observed that $75,000, the amount set apart for the notice and administration account was too high, and asked Plaintiffs to revisit this amount or submit documentation to show why this amount was necessary. The Court also reduced the award to the three remaining lead Plaintiffs, Zachary Lewy, Sampson Daruvalla, and William Spiegelberg to $6,000 collectively, or $2,000 each. While the Court noted that Plaintiffs’ attorney expended effort and had taken risks in this case, it remarked that the attorneys’ fee award of $708,262.50 was high, and thus asked Plaintiffs to submit documentation, including their billings, to justify this award. Finally, because the Court found that the litigation expenses of $150,000 were excessive, it directed Plaintiffs to submit their litigation expenses to the Court for approval, including those they expected to incur between preliminary approval and the final dismissal of the lawsuit. Accordingly, the Court denied preliminary approval to the settlement.

**Tobin, et al. v. Conopco Inc., Case No. 12-CV-05881 (N.D. Cal. April 15, 2013).** Plaintiff, a purchaser of Defendants’ All Natural Ben & Jerry’s Ice Cream, brought a class action alleging that the ice cream was falsely labeled as “All Natural” and that it contained alkaliized cocoa, corn syrup, partially hydrogenated soybean oil, or other ingredients that either did not exist in nature or had been chemically modified. This action was filed after the Court denied final approval to the settlement in a similar action entitled **Astiana v. Ben & Jerry’s Homemade, Inc., 10-CV-4387 (N.D. Cal.)** (the “Astiana litigation”). The parties subsequently settled this action and moved for preliminary approval of the settlement. Plaintiff in the **Astiana** case also filed a motion to intervene. The Court issued a tentative ruling denying both motions and listed questions that the Court wanted to address at the upcoming settlement hearing. First, regarding the motion for preliminary approval, the Court stated that the parties should address whether the Northern District of California was the proper venue in light of the fact that Court decided not to relate this case with the **Astiana** litigation, and whether Plaintiff could prove typicality in light of Defendant’s defense that Plaintiff lacked statutory standing to bring her claims under the New Jersey Consumer Fraud Act. Further, because the parties stated that they would include all claims that were submitted as part of the **Astiana** settlement, the Court asked the parties to determine whether additional publication notice would be the best notice practicable considering the low response to publication notice, and whether parties had any evidence regarding the efficacy of their proposed internet notice. Further, the Court disagreed with the parties that there was no *cy pres* component to the proposed settlement, as the Court did not see the nexus between the proposed charities and the nature of the claims. The Court stated that it could not delete, modify, or substitute certain provisions, and that the settlement would stand or fall in its entirety. *Id.* at 2. Thus, the Court required parties to address whether the settlement shared the requisite nexus with the nature of the claims. Furthermore, the Court required the parties to address why it should not view this settlement with greater skepticism given that it substantially reduced the funds available for settlement purposes from the settlement proposed in **Astiana**, the fees and administrative costs were to be deducted from that fund, Plaintiff intended to seek over 20% of the available funds, and the revised settlement offer came soon after the Court denied final approval in **Astiana**. Regarding the motion to intervene, the Court directed the parties to determine whether Astiana intended to maintain her request to intervene and be appointed interim lead counsel if the Court stood by its tentative ruling and denied the motion for preliminary approval. The Court also ordered the parties to address why it should not view this as an end run around the Court’s earlier decision that these cases were not related. Finally, the Court asked if it were to approve the
settlement, and Astiana chose to opt-out, would Defendants argue that the release provisions would be a bar to her claims.

Vassalle, et al. v. Midland Funding LLC, 2013 U.S. App. LEXIS 3914 (6th Cir. Feb. 26, 2013). Plaintiffs, a group of debtors, brought a class action alleging that Defendant’s debt collectors routinely signed form affidavits without personal knowledge of the facts. Plaintiffs asserted violation of Fair Debt Collection Practices Act, as well as common law claims of fraudulent misrepresentation, negligence, and unjust enrichment. Subsequently, the District Court approved a nationwide class settlement that resolved the litigation along with other two related lawsuits arising from similar factual predicates. Defendant agreed to pay $5.2 million into a common fund, from which class counsel would receive attorney fees of no more than $1.5 million, and the costs of settlement administration. Eligible class members who timely returned a claim form would then receive payments of $10 each; however, the response rate was such that each class member would receive $17.38. Additionally, the four named Plaintiffs were to receive $8,000 collectively. Defendant also agreed to exonerate the named Plaintiffs’ debts. Further, Defendant agreed to create and implement written procedures for the generation and use of affidavits in debt collection lawsuits to prevent the use of affidavits where the affiant lacked personal knowledge of the facts set forth in the affidavit. Eight objectors-appellants objected to the settlement. On their appeal, the Sixth Circuit reversed the order of the District Court. First, the Sixth Circuit stated that the disparity in the relief afforded to the named Plaintiffs, on the one hand, and the unnamed class members, on the other hand, made the settlement unfair. The named Plaintiffs received the primary benefit of the settlement. If the 1.44 million unnamed class members received this benefit, like named Plaintiff Brent, they would be absolved of debts. Instead, the settlement blocked the unnamed class members from employing Defendant’s use of false affidavits against Defendant in any other lawsuit, virtually assuring that Defendant would be able to collect on these debts. Further, the Sixth Circuit remarked that the $17.38 payment to class members could be described as de minimis, especially in comparison to the now-forgiven debt of $4,516.57 owed by one named Plaintiff. Moreover, the one-year injunction did not actually prohibit Defendant from creating false affidavits; rather, it only required Defendant to change its policies and provided oversight of this process. The Sixth Circuit also noted that the representation was not adequate under Rule 23(a) nor was the class action vehicle superior under Rule 23(b)(3). The class representatives had no interest in vigorously prosecuting the unnamed class members’ most important interest, i.e., the ability to use the false affidavits against Defendant to contest their debts. Further, the class representatives were interested in ensuring the settlement was approved so that their debts would be forgiven, while the unnamed class members were interested in ensuring the settlement was not approved so they retained the right to challenge Defendant’s false affidavits. The unnamed class members also had an interest in individually controlling the defense of Defendant’s judgments against them. The Sixth Circuit opined that these considerations demonstrated that the class action was not the superior method of resolving the controversy. Thus, the Sixth Circuit found that the District Court erred in finding that the class action settlement was fair and adequate.

Mootness Issues In Class Action Litigation

Canada, et al. v. Meracord, LLC, 2013 U.S. Dist. LEXIS 80479 (W.D. Wash. June 6, 2013). Plaintiffs, a group of debtors, brought a class action alleging violations of the Racketeering Influenced and Corrupt Organizations Act, the Washington Debt Adjusting Act, and the Washington Consumer Protection Act, and claims for aiding and abetting the commission of unfair and deceptive business conduct, breach of fiduciary duty, and unjust enrichment. Defendant served the named Plaintiff an offer of judgment for $13,058.46, plus reasonable attorneys’ fees, costs, and expenses. Thereafter, Defendants moved to dismiss the named Plaintiff’s claims, arguing that the offer of judgment was in full satisfaction of her claims and thus mooted her claims. The Court denied the motion. The Court observed that Pitts v. Terrible Herbst, Inc., 653 F.3d 1081, 1091-1092 (9th Cir. 2011), held that an unaccepted Rule 68 offer of judgment – for the full amount of the named Plaintiff’s individual claim and made before the named Plaintiff files a motion for class certification – does not moot a class action. Id. at *3-4. Defendants, however, argued that Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013), abrogated Pitts. Genesis assumed, without deciding, that Defendant’s offer of judgment mooted Plaintiff’s claim, and then held that Plaintiff had no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would
preserve her suit from mootness. \textit{Id.} at *4. The Court noted that although \textit{Genesis} discussed cases involving Rule 23 class certification issues, there was nothing to indicate that the specific holding extended beyond FLSA collective actions. The Court observed that \textit{Genesis} explicitly distinguished class certification case law on the issues of a significant personal stake, inherently transitory claims, and frustrating the purposes of class actions by allowing a Defendant to “pick off” named Plaintiffs. \textit{Id.} Accordingly, the Court declined to apply \textit{Genesis} and denied the motion to dismiss.

\textit{Diaz, et al. v. First American Home Buyers Protection Corp.}, 2013 U.S. App. LEXIS 20327 (9th Cir. Oct. 4, 2013). Plaintiff, an owner of a home warranty plan, brought a class action alleging that Defendant refused to make timely repairs, used substandard contractors, and wrongfully denied claims. Plaintiff asserted state law claims for unfair competition, misrepresentation, concealment, breach of contract, and breach of the implied covenant of good faith and fair dealing. Subsequently, the District Court dismissed Plaintiff’s claims for concealment and unfair competition. Defendant then made an offer of judgment to Plaintiff on her remaining individual claims, which Plaintiff rejected. Thereafter, Defendant moved to dismiss the lawsuit for lack of subject-matter jurisdiction, arguing that the action was moot in light of Plaintiff’s refusal to accept the offer of judgment for full satisfaction of the amount she could possibly recover at trial. The District Court granted Defendant’s motion. On appeal, the Ninth Circuit reversed. The Ninth Circuit held that an unaccepted Rule 68 offer of judgment for the full amount of the named Plaintiff’s individual claim – made before the named Plaintiff files a motion for class certification – does not moot a class action. \textit{Id.} at *9-10. The Ninth Circuit noted that the other circuits, however, are divided on the question. The Sixth Circuit in \textit{O’Brien v. Ed Donnelly Enters., Inc.}, 575 F.3d 567, 574-75 (6th Cir. 2009), agreed with the Seventh Circuit’s opinion in \textit{Rand v. Monsanto Co.}, 926 F.2d 596, 598 (7th Cir. 1991), that an offer of judgment that satisfies a Plaintiff’s entire demand moots the case, but disagreed with the Seventh Circuit’s view that a Plaintiff loses outright when he refuses an offer of judgment that would satisfy his entire demand. \textit{Id.} at *11. In \textit{McCauley v. Trans Union, L.L.C.}, 402 F.3d 340, 342 (2d Cir. 2005), the Second Circuit disagreed with the Sixth and Seventh Circuit that an unaccepted Rule 68 offer for complete relief moots a Plaintiff’s claim. \textit{Id.} Further, in \textit{Genesis Healthcare Corp. v. Symczyk}, 133 S. Ct. 1523 (2013), the dissenting opinion agreed with the Second Circuit that an unaccepted offer of judgment cannot moot a case. \textit{Id.} at *13. Further, the dissent had stated that a case becomes moot only when it is impossible to grant any effectual relief whatever to the prevailing party, and an unaccepted offer of judgment cannot moot a case. \textit{Id.} at *15. The dissent had also opined that Rule 68 precludes imposing a judgment for a Plaintiff based on an unaccepted settlement offer made pursuant to its terms, and that the text of Rule 68 contemplates that a District Court will enter judgment only when a Plaintiff accepts an offer. \textit{Id.} at *17. Persuaded by the dissenting opinion in \textit{Genesis Healthcare}, the Ninth Circuit held that an unaccepted Rule 68 offer that would have fully satisfied a Plaintiff’s claim did not render that claim moot. The Ninth Circuit reasoned that once Defendant’s offer lapsed, it was, by its own terms and under Rule 68, a legal nullity, with no operative effect. Thus, the Ninth Circuit vacated the dismissal of Plaintiff’s claims, and remanded for further proceedings.

\textit{Hrivnak, et al. v. NCO Portfolio Management Inc.}, 2013 U.S. App. LEXIS 11687 (6th Cir. June 11, 2013). Plaintiff, a debtor, brought an action asserting that Defendants violated the Fair Debt Collection Practices Act (“FDCPA”) and Ohio consumer protection law. Defendants made a Rule 68 offer of judgment to Plaintiff for $7,000, plus reasonable costs and attorneys’ fees. Plaintiff moved to strike the offer and alternatively for class certification. Defendants, however, argued that the offer mooted the case because it satisfied all of Plaintiff’s claims. The District Court rejected the mootness argument, and held that Plaintiff’s claims should be allowed to proceed. Defendants then moved for reconsideration of the District Court’s holding and to dismiss the case for lack of jurisdiction, raising their mootness arguments in both motions. The District Court affirmed its original holding, and certified this legal issue for immediate appellate resolution. On appeal, the Sixth Circuit affirmed. According to Defendants, the only relief available to Plaintiff under the FDCPA and Ohio law was a statutory damages award of no more than $1,000 plus attorneys’ fees and costs. Defendants claimed that Plaintiff was ineligible for any additional actual or punitive damages, and pointed to precedent from other circuits that the FDCPA bars private litigants from obtaining the injunctive and declaratory relief sought. Having purported to establish that their offer would
give Plaintiff everything he deserved, Defendants argued that Plaintiff’s resistance to the Rule 68 offer made the entire case moot. The Sixth Circuit observed that to moot a case or controversy between opposing parties, an offer of judgment must give Plaintiff everything he had asked for as an individual, and an offer limited to the relief Defendant believed was appropriate did not suffice. Id. at *6-7. Further, the Sixth Circuit stated that mootness occurred only when the offer was accepted or Defendant indeed offered to provide every form of individual relief Plaintiff sought in the complaint. Id. at *8. Here, Defendants did not offer to satisfy all of Plaintiff’s individual demands, and instead offered to satisfy just those demands they believed were legitimate under state law and the FDCPA. Although Plaintiff sought more than $25,000, reasonable attorneys’ fees, and injunctive and declaratory relief, Defendants offered him only $7,000 plus costs and attorneys’ fees. The Sixth Circuit found that the disparity between what Defendants offered and what Plaintiff sought would preclude a finding of mootness. Further, the Sixth Circuit observed that because Plaintiff’s other claims were not so insubstantial that they failed to present a federal controversy, Defendants’ Rule 68 offer did not deprive the District Court of subject-matter jurisdiction. The Sixth Circuit remarked that although the offer created a risk that Plaintiff would be liable for all costs later incurred if he failed to obtain final relief of more than $7,000 on the merits, as Rule 68 provides, this did not end the otherwise-vested subject-matter jurisdiction of the District Court. The Sixth Circuit stated that Defendant’s argument went to the merits of Plaintiff’s claims, and the merits of those claims were not so insubstantial as to deprive the District Court of jurisdiction. To rule on whether Plaintiff was entitled to a particular kind of relief was to decide the merits of the case, and the Sixth Circuit noted that neither Rule 68 nor any other rule required the District Court to do that in response to a motion to dismiss for lack of subject-matter jurisdiction. Accordingly, the Sixth Circuit affirmed the order of the District Court.

Physicians Healthsource, Inc., et al. v. Purdue Pharma LP, 2013 U.S. Dist. LEXIS 127117 (D. Conn. Sept. 6, 2013). Plaintiff brought a class action alleging that Defendants violated the Telephone Consumer Protection Act by sending unsolicited advertisements through faxes that did not contain the required opt-out notices. Plaintiff moved for class certification and the Court denied the motion without prejudice. The Court stated that class certification was appropriate only if it found, after a rigorous analysis, that the prerequisites of Rule 23(a) had been satisfied. Id. at *2-3. The Court observed that here, such rigorous analysis was not applicable because Plaintiff filed its motion for class certification prior to discovery. The Court noted that Plaintiff conceded that more discovery was needed before any determinations could be made on certification, but sought leave to submit a memorandum of law in support of its motion and other evidence after it obtained discovery. Further, the Court inferred that Plaintiff’s haste in filing the motion was prompted by the Seventh Circuit’s recent decision in Damasco v. Clearwire Corp., 662 F.3d 891 (7th Cir. 2011), holding that, without a motion for class certification on the docket, a putative class action could be deemed moot if the named Plaintiff received a Rule 68 offer of judgment that provided full relief. Id. at *3-4. The Court noted that the Second Circuit had never adopted such a rule, and several other circuits had expressly rejected it. Id. at *4. Moreover, even assuming that a putative class complaint could be rendered moot by an unaccepted offer of judgment directed at the named Plaintiff, and assuming further that the putative class could be saved by filing a place-holder motion for class certification at the earliest possible juncture, it did not follow that an initial, under-developed motion for class certification must linger on the docket while the Court awaited the filing of a later, fully-developed motion following discovery. Id. at *5. The Court reasoned that an order granting or denying class certification was inherently tentative and the Court was free to alter it in response to future developments in the litigation. Further, the Court remarked that to the extent that class allegations were preserved from mootness by the filing of a premature motion for certification, they were no less preserved by an order denying that motion without prejudice to renewal before final judgment. Id. at *5-6. Accordingly, the Court denied the motion.

Tanasi, et al. v. New Alliance Bank, 2013 U.S. Dist. LEXIS 177035 (W.D.N.Y. Dec. 17, 2013). In this class action, Defendants had previously argued that their pre-certification Rule 68 offer of judgment to the named Plaintiff rendered moot not only Plaintiff’s individual claims, but also all of the putative class’ claims. The Court ruled that the class claims remained viable. Defendants subsequently moved to certify the order denying Defendants’ motion for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Id. at *1. The Court granted the motion. Certification for appeal pursuant to § 1292(b) is permissible only if: (i) the order
involves a controlling question of law as to which there is a substantial ground for difference of opinion; and
(ii) an immediate appeal from the order may materially advance the ultimate determination of the litigation.

Id. at *2. The Court noted that whether a pre-certification offer of judgment under Rule 68 moots a putative
class action was a consequential and unresolved question in the Second Circuit. Moreover, if the question
were resolved in Defendants’ favor, the case would be concluded. Accordingly, the Court found that
certification was appropriate and certified the order for interlocutory appeal. Id. at *3.

consumer, brought a class action on behalf of himself and others similarly-situated alleging that Defendant,
as the operator of the ATM located in a gas station, failed to post notices on the ATM as required by the
Electronic Funds Transfer Act (“EFTA”) and charged him a $2.00 service fee. Defendant denied that it was
the operator of the ATM. Thereafter, Plaintiff amended his complaint to name the company that serviced
the ATM, Cash Technologies of America, Inc. (“CTA”), as Defendant. Plaintiff then settled with CTA and
after executing the settlement agreement, Plaintiff again amended his complaint to re-name Mamaso as
Defendant. The Court granted summary judgment to Mamaso, finding that Plaintiff had already received a
full recovery from CTA on his EFTA claim, and thus Plaintiff’s individual and class action claims against
Mamaso were moot. On appeal, the Fifth Circuit affirmed. The Fifth Circuit noted that as a general
principle, a purported class action becomes moot when the personal claims of all named Plaintiffs are
satisfied and no class has been certified. Id. at *3. The Fifth Circuit stated that although Plaintiff raised a
number of arguments on appeal as to why the CTA settlement did not satisfy his individual EFTA claim, he
did not present any of those arguments to the District Court; accordingly, Plaintiff had waived the issue.
Moreover, the Fifth Circuit noted that no class had been certified at the time of the CTA settlement. Plaintiff
argued that under the relation-back doctrine, his settlement with CTA did not render his class action claim
moot. In applying the doctrine, the Fifth Circuit distinguished between situations where Defendant
attempted to force mootness by offering to settle with the named Plaintiff for the full amount of his claim
before the time for moving for class certification had expired and those where the named Plaintiff
voluntarily accepted a full settlement offer before filing a motion for class certification. Id. at *4. Here,
because Plaintiff voluntarily settled with CTA, the Fifth Circuit opined that the relation-back doctrine did not
apply and that Plaintiff’s settlement with CTA therefore mooted his action.

(xxvii) **Experts In Class Certification Proceedings**

**Cason-Merenda, et al. v. Detroit Medical Center, 2013 U.S. Dist. LEXIS 57077 (E.D. Mich. April 22,
2013).** In December 2006, Plaintiffs, two registered nurses (“RNs”), filed a class action alleging that a
group of hospitals in the Detroit Metropolitan Area (“DMA”) violated § 1 of the Sherman Act. In count I
Plaintiffs alleged that the hospitals conspired to suppress nurse wages and that this conduct violated
§ 1 per se. In count II Plaintiffs alleged that the hospitals agreed to exchange compensation information
and that the effect of the exchange was to suppress nurse wages in the DMA in violation of § 1 under the
rule of reason. In March 2012, the Court granted Defendants’ motion for summary judgment on count I but
denied it as to count II. In reports provided by Plaintiffs’ expert, Dr. Orley Aschenfelter, he opined that he
could show with common proof that: (i) all or nearly all members of the class suffered harm (antitrust
impact); and (ii) the measure of each class member’s lost earnings. Id. at *11. Defendants sought to
Dr. Aschenfelter proposed to show the wages the class members would have earned had there been no
conspiracy (the “but-for” wages) by using a “benchmark” or “yardstick” methodology comparing the wages
paid to RNs to what the hospitals paid for registered nurses supplied by temporary agencies. Id. at *22.
Defendants’ principal challenge to this method was that Dr. Aschenfelter failed to make the substantial
adjustments necessary to ensure that the agency fee benchmark was “reasonably comparable” to the “but-
for” wages that the hospitals would have paid to their RNs. Id. at *25. The Court noted that Dr.
Aschenfelter did make adjustments to account for the differences and that challenges to the completeness
or accuracy of those adjustments were matters affecting the weight to be given to the testimony and not its
admissibility. Id. at *25-33. Defendants also challenged Dr. Aschenfelter’s benchmark analysis on the
grounds that it generated a single “but-for” wage figure encompassing all nurses that worked at a given
hospital in a given year and failed to distinguish between nurses with differing levels of experience, skill
and training. Id. In fact, Dr. Aschenfelter conceded that his method may result in understating the losses of experienced nurses as compared to the losses suffered by their less experienced counterparts. Id. at *33-37. However, the Court held that this was not a basis for excluding Dr. Aschenfelter’s testimony. So long as Dr. Aschenfelter was able to convince a jury that his benchmark methodology provided a truly conservative estimate of the RN losses, the Court reasoned that then his testimony was admissible on the issue of common antitrust impact. Moreover, the Court noted that the Sixth Circuit had previously upheld an aggregate measure of damages in an antitrust case that rested upon a uniform impact theory similar to that advanced by Dr. Aschenfelter. Id. at *34-37.

**Freeman, et al. v. Blue Ridge Paper Products, Inc., 2013 U.S. App. LEXIS 14157 (6th Cir. July 9, 2013).** Plaintiffs, a group of property owners, brought a class action seeking damages for nuisance under North Carolina law. Plaintiffs’ property sat along the Pigeon River approximately 26 miles from Defendant’s paper mill, which discharged chemicals into the river. Plaintiffs alleged that that the river was black or brown in color, that it emanated a foul odor and that it contained foam, as a result of which Plaintiffs alleged that they experienced fear, stress, annoyance and anxiety. The District Court granted Defendant’s motion for summary judgment, holding that Plaintiffs failed to introduce the requisite expert proof of causation, because none of Plaintiffs’ experts testified that Defendant caused the color, odor, or foam, or that any of the chemicals from Defendant’s effluent were even present in the river. On appeal, the Sixth Circuit affirmed. The Sixth Circuit observed that a fact-finder was required to determine the fate of numerous chemicals after they traversed 26 miles down a river. Id. at *15. The Sixth Circuit opined that the District Court properly observed that in addition to the complexity resulting from sheer distance, this case required the analysis of an effluent’s composition, examination of other sources’ discharges into the water, and the study of chemical reactions of various compounds present in water at various points. While admitting Defendant’s data consisted of thousands of tests from hundreds of samples showing that none of the 26 of river contained chemical levels above relevant standards for human health, ecological well-being, or aesthetics, Plaintiffs contended that the tests were unreliable because they only covered a five year period, instead of the entire seven year class period at issue. The Sixth Circuit, however, stated that this argument was unavailing because it had no bearing on whether Plaintiffs satisfied their burden of demonstrating causation by expert evidence; rather, Defendant’s test data supported the conclusion that the matter was complex and required expert evidence on the part of Plaintiffs. Alternatively, Plaintiffs argued that they had introduced sufficient expert testimony to demonstrate a nuisance. The District Court had found that Plaintiffs’ fear, stress, annoyance, and anxiety was not actionable because, notwithstanding the expert testimony, Plaintiffs’ fears were not rooted in scientifically verifiable health risks, as there was no evidence that any of Defendant’s chemicals were in the river. The Sixth Circuit observed that after holding that Plaintiffs did not offer the requisite expert proof, the District Court explicitly turned to an additional argument that derived from expert testimony on the potential genotoxic and carcinogenic health effects of the chemicals at issue. The District Court did not expressly introduce its new analysis as implicating fear, stress, annoyance, and anxiety, but it necessarily involved such claims by discussing Plaintiffs’ expert’s opinions as to Plaintiffs’ emotional well-being and potential fear of Defendant’s effluent. Because Plaintiffs offered no other authority suggesting that North Carolina would permit fear, stress, annoyance, and anxiety based nuisance claims without a showing of scientifically verifiable evidence, the Sixth Circuit affirmed the summary judgment.

**Giannopoulos, et al. v. Iberia Líneas Aéreas De España, S.A., 2013 U.S. Dist. LEXIS 135450 (N.D. Ill. Sept. 23, 2013).** Plaintiffs, a group of airline ticket purchasers, brought a class action alleging violation of European Union Regulation No. 261/2004, which requires airlines to compensate airline passengers for delayed and cancelled flights under certain circumstances. In support of their motion for class certification, Plaintiffs offered the expert report of Clint Rhoden. Defendant moved to strike Rhoden’s report, and the Court denied the motion. Defendant recorded information about its flights, including information about cancellations and delays in its databases. Plaintiffs retained Rhoden to combine or aggregate the information in these databases into a relational database that allowed him to run searches or queries across the three original databases and to compare the information they contained. Defendant argued that Rhoden’s report was unreliable and irrelevant because the information contained in the databases was
insufficient to determine whether particular passengers were eligible for EU 261 compensation. The Court remarked that although the evidence would eventually show that it was not possible to use the databases to identify putative class members, it was not the issue here on this motion to strike. The Court opined that its task on this motion was to ascertain if Rhoden followed a reliable method to aggregate the databases and run queries on those databases. Defendant did not dispute that Rhoden followed a reliable method to aggregate the databases and run queries on those databases. Further, the Court observed that the data Rhoden produced was both helpful and relevant to this case. Defendant admitted that the databases at issue contained the information it had regarding its flight cancellations, delays, and compensation paid. The Court noted that Rhoden made it possible to run queries across these combined databases to reveal which of Defendant’s flights were cancelled or delayed for 180 minutes or more, whether Iberia paid compensation to passengers on those flights, and how much compensation Iberia paid. Because Plaintiffs sought compensation for cancelled and delayed flights, the Court found that this information was helpful to the determination of the pertinent issues. Additionally, the Court observed that Rule 702(b) of the Federal Rules of Evidence requires that an expert’s testimony be based on sufficient facts or data. Id. at *12. Although Defendant argued that Rhoden must be knowledgeable about how the original data was collected, it did not dispute the accuracy of the data, which it collected itself. Rather, Defendant argued that the data it provided to Plaintiffs was not sufficient to serve as the basis for class certification. The Court remarked that whether this data was sufficient to serve as the basis to certify the class was a separate question, and not at issue in the challenge to the expert’s testimony. Accordingly, the Court denied Defendant’s motion to strike.

In Re Front Loading Washing Machine Class Action Litigation, 2013 U.S. Dist. LEXIS 96070 (D.N.J. July 10, 2013). Plaintiffs, a group of customers, brought a class action alleging that the front-loading automatic washing machines ("FLWs") Defendant sold were defective and caused mold and mildew as well as foul odors in the machines and on clothing. Plaintiffs asserted claims under the New Jersey Consumer Fraud Act, Magnuson-Moss Warranty Act, and breach of express and implied warranties under New Jersey law, and for unjust enrichment under New Jersey law. Plaintiffs moved to certify a nationwide class of those who purchased FLWs in the United States and, in the alternative, to certify classes to apply the substantive law of the state where Plaintiffs resided and/or purchased their FLWs. Plaintiffs submitted expert witnesses’ reports from Dr. R. Gary Wilson’s ("Wilson") and Dr. Chin Yang’s ("Yang"), in support of their motion for class certification. Defendant moved to exclude the opinions of Dr. Wilson and Dr. Yang, arguing that both lacked a reliable methodology, and that neither was qualified to serve as an expert witness. The Court denied Defendant’s motion. The Court found that both Dr. Wilson and Dr. Yang were qualified to give their expert opinion. Dr. Wilson’s opinion was based on the extensive experience he had gained during his more than 20 years as an engineer with Whirlpool, his education, his training, his technical expertise, as well as his review and analysis of the FLWs in this and related litigation. Dr. Yang, who was a Ph.D. microbiologist specializing in mycology, had analyzed the mold and fungi testing data collected by Defendant’s experts and concluded that the testing was not performed in conformity with the lab’s standard operating procedure, and that the testing did not include tests for bacteria, a major odor-causing component of biofilm. Id. at *13-15. The Court held that the fact that Dr. Wilson did not undertake his own testing did not disqualify him as an expert for the purposes for which he was offered, and that Dr. Yang could rely on the testing done by other experts and opine as to whether their methods of testing would mimic the growth of mold in the real world. Id. at *19. The Court therefore denied Defendant’s motion for excluding Plaintiffs’ expert opinions. The Court also denied Plaintiffs’ motion for excluding Defendant’s expert opinion, with the exception of one expert. Defendant offered the opinions of three expert witnesses, Dr. Charles J. Wysocki ("Wysocki"), Dr. Edward M. Caulfield ("Caulfield"), and Dr. Thomas Maronick ("Maronick"), in opposition to class certification. Dr. Wysocki offered his opinions about olfactory abilities and experience among all people generally, and essentially, supported Defendant’s argument that there could never be a class certified on the basis of odors, as there was too much variation among people’s abilities to smell. Id. at *20. The Court also found that Dr. Caulfield’s opinion could be helpful in determining whether class certification was appropriate. Dr. Caulfield’s opinion proposed to show that there was no uniform design defect in the machines, but rather, that “the improper use and maintenance of Plaintiffs’ washing machines
caused the buildup and odors.” Id. at *23. The Court found that Plaintiffs’ arguments were substantive disagreements with the timing choices in his testing process, which did not disqualify him as an expert. Id. at *24. The Court, however, excluded Dr. Maronick’s opinion on the basis that it was too unreliable. Defendant had offered Dr. Maronick to challenge Plaintiffs’ assertion of predominance in support of their class certification motion. Dr. Maronick conducted an internet-based consumer survey to determine the incidence of problems among the population of Defendant’s FLW owners and the overall satisfaction or dissatisfaction with the machines. Id. at *20. The Court noted that Dr. Maronick’s on-line survey asked only highly general questions, and Dr. Maronick could not say much of anything about who answered his internet survey and how many people Dr. Maronick surveyed. Id. at *21-22. The Court further refused to strike the three Plaintiff expert reports that referenced declarations previously deemed inadmissible because Plaintiffs conceded that references were inadvertently included. Id. at *25-26. Accordingly, the Court denied Defendant’s motion to exclude Plaintiffs’ experts Dr. Wilson and Dr. Yang and Plaintiffs’ motion to exclude Defendant’s experts Dr. Caulfield and Dr. Wysocki, and granted Plaintiffs’ motion to exclude Defendant’s expert Dr. Maronick.

In Re Titanium Dioxide Antitrust Litigation, 2013 U.S. Dist. LEXIS 62394 (D. Md. May 1, 2013). Plaintiffs, a group of purchasers of titanium dioxide, brought a class action alleging that Defendants engaged in an unlawful conspiracy to fix, raise, or maintain the prices of titanium dioxide in violation of § 1 of the Sherman Act. Titanium dioxide is a dry chemical powder that is the widely used pigment for providing whiteness, brightness, and opacity to many products, particularly paints and other coatings. Id. at *5-6. Plaintiffs offered three experts — Professor George L. Priest, Dr. Bruce W. Hamilton, and Dr. Russell L. Lamb — in support of their claims. Defendants filed a motion to exclude the expert testimony, which the Court granted in part and denied in part. Defendants argued that each expert’s testimony was improper under Rule 704 of the Federal Rules of Evidence because it was directed to the ultimate legal issue in the case. The Court noted that Rule 704 permits the admission of expert testimony that “embraces an ultimate issue to be decided by the trier of fact.” Id. at *15. Questions of fact that are committed for resolution by the jury are a proper subject of expert opinion testimony; however, testimony that states a legal standard or draws a legal conclusion is inadmissible. Id. at *13. The Court observed that the three experts intended to opine, based on their economic analyses, that Defendants’ behavior was consistent with collusion and inconsistent with competition. The Court found that this testimony was admissible under Rule 704(a), because it did not state a legal standard or draw a conclusion, nor did it use terms with distinct and specialized meanings in law. Id. at *14. Defendants also challenged two other aspects of the expert testimony regarding: (i) whether Defendants violated § 1 of the Sherman Act, and (ii) whether Defendants’ behavior during the class period was pre-textual. The Court found that this testimony was not admissible. The first set of opinions would, in essence, tell the jury what result to reach and was therefore inadmissible. Id. at *17. The Court concluded that if the second set of opinions was admitted, it would impinge upon the jury’s function to determine the truthfulness and credibility of Defendants. Accordingly, the Court excluded the two sets of expert testimony. Id. at *18-19. Defendants’ second ground for exclusion was that the experts’ opinions were based on principles or methods that were neither scientific nor reliable, and thus were inadmissible per the Supreme Court’s holding in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Defendants argued that the testimony of Priest, a Yale law professor, should be excluded because he offered only legal opinions under the guise of economic testimony. The Court found that while the subject of Priest’s testimony — that the Defendant’s conduct was more consistent with collusion than unilateral action — was permissible, Priest, as a law professor, was not the proper source to provide such economic testimony. Id. at *24-25. Accordingly, the Court excluded the testimony of Priest. At the same time, the Court rejected Defendants challenge to the testimony of Hamilton. That Hamilton only reviewed parts of the record selected by Plaintiffs’ counsel did not make his testimony unreliable. Defendants were free to challenge his methodology on cross-examination. Id. at *31-34. The Court also did not find that Hamilton’s partial reliance on the opinion of another expert (Lamb) for his testimony created any grounds for exclusion. Id. at *34-37. Further, the fact that the multi-factor test applied by Hamilton to support his opinion had not been subjected to peer review were not grounds for exclusion, as the factors had been cited with approval in other antitrust cases. Id. at *37-42. Finally, the fact that Hamilton did consider other alternatives for his conclusions did not make his testimony inadmissible either. Id. at *42-45. The Court
also rejected Defendant’s attempt to bar Lamb’s testimony. The Court found that the Defendant’s challenges to Lamb’s regression analyses and various opinions went to the probative value of his opinions and not to their reliability. *Id.* at *45-58.

Sanctions In Class Action Litigation

**Anchondo, et al. v. Dunn, 2013 U.S. App. LEXIS 3392 (10th Cir. Feb. 19, 2013).** Plaintiff, a debtor, brought an action seeking to recover fees and costs which had been awarded to her in a Fair Debt Collection Practices Act (“FDCPA”) action against Defendant Anderson, Crenshaw and Associates, L.L.C. (“ACA”) and Steve Dunn, ACA’s attorney in an FDCPA action. ACA was unable to pay those fees and costs, and was now bankrupt. ACA’s insurer refused to cover the loss because ACA failed to file a timely claim. The District Court held that Dunn and Thomas Backal, ACA’s president and chief operating officer, acted in bad faith to deprive Plaintiff of a potential recovery from the insurer, and ordered that they pay Plaintiff and her counsel the damages and fees owed by ACA plus the costs incurred in litigating the matter. On appeal, the Tenth Circuit affirmed the District Court’s order. Dunn offered different and conflicting excuses for failing to reveal the existence of insurance during discovery, and the Tenth Circuit noted that a finder of fact is ordinarily free to find such inconsistencies undermine a witness’ credibility. *Id.* at *3. The District Court relied on the fact that ACA had professional liability coverage for suits arising from its wrongful acts; that Dunn and Backal knew this; that during discovery Dunn did not turn over documents reflecting insurance applicable to the suit; and that they allowed the period for filing a timely claim to lapse. The Tenth Circuit noted that all these facts, apart from and in addition to the District Court’s disbelief of Dunn’s and Backal’s testimony, contributed to its inference of bad faith. Dunn challenged the District Court’s finding that his relationship with ACA exceeded that of a normal attorney-client relationship. The evidence demonstrated a peculiarly close relationship between Dunn and Backal. Dunn was a signatory on ACA’s bank accounts; accounts showed him to be a manager of ACA; Dunn was a managing officer of two corporations with Backal; and Dunn located his law office at ACA’s offices until ACA went out of business. The Tenth Circuit, however, refrained from determining whether the District Court’s finding of a particularly special and close relationship was wrong. Plaintiff requested attorneys’ fees and costs with respect to Dunn’s appeal under the FDCPA’s fee-shifting provision. The Tenth Circuit granted the request and remanded to the District Court to determine an appropriate amount. Accordingly, the Tenth Circuit affirmed the order of District Court holding Defendants jointly liable.

**Ayers, et al. v. Multiband Field Services, Inc., 2013 U.S. Dist. LEXIS 133077 (E.D. Mich. Sept. 18, 2013).** Plaintiff, a job applicant weighing over 250 pounds, brought a disparate treatment and disparate impact class action alleging that Defendant’s hiring policy violated the Michigan Elliot-Larsen Civil Rights Act. Defendant’s Field Service Technicians (“FSTs”) utilized heavy-duty, industrial ladders with a maximum load capacity of 300 pounds, and because they carried tools and equipment while they scaled ladders, all FSTs were required to weigh less than 250 pounds. Defendant contended that the disparate impact claim failed as a matter of law because Plaintiff did not allege a facially neutral policy or practice that produced the disparate impact. Thus, Defendant moved to dismiss the disparate impact claim, and the Court granted the motion. Plaintiff argued that disparate impact cases did not require a facially neutral policy. The Court noted that disparate impact claims focus on employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. *Id.* at *7-8. Further, the Court stated that Michigan case law authorities followed the U.S. Supreme Court, and when addressing disparate impact claims under the Elliot-Larsen Act, they begin with the observation of facially-neutral policies. *Id.* at *9. Accordingly, the Court remarked that Plaintiff’s claim – that because the language “facially neutral” does not appear in the Elliot-Larsen Act or in Title VII, and therefore was not a requirement – was inconsistent with binding jurisprudence. *Id.* at *10. The Court stated that when an employer’s policy is expressly discriminatory, a Plaintiff must establish that employer acted with the intent to discriminate, and when a policy does not expressly discriminate, or where it is facially-neutral, a Plaintiff may still demonstrate discrimination by establishing such a policy has a disparate impact. *Id.* at *11. Plaintiff also argued that if the policy or practice must be neutral, Defendant’s policy or practice was in fact neutral because of its reference to a third-party’s safety criteria for the maximum load of a ladder. The Court observed that when analyzing a
disparate impact claim under Title VII, a Plaintiff must identify and challenge a specific employment practice, and then show an adverse effect. Id. at *14. The Court stated that Defendant’s policy, which required FSTs to weigh less than 250 pounds, was not facially-neutral, and recasting it in alternative terms by referring to the maximum safety capacity of a necessary tool did not make it so, even if recasting the policy was permitted. The Court opined that Plaintiff’s argument – that he may ignore the specific policy and attempt to rewrite it in terms that rendered it facially-neutral based on the acceptance of a third-party’s safety standards – was without merit. Accordingly, the Court dismissed Plaintiff’s disparate impact claim. The Court noted that Title 28 U.S.C. § 1927 allows a Court to award sanctions against any attorney who multiplies the proceedings in any case unreasonably and vexatiously, and that § 1927 sanctions require a showing of something less than subjective bad faith, but something more than negligence or incompetence. Id. at *17. Thus, the Court stated that an attorney is sanctionable when he intentionally abuses the judicial process or knowingly disregards the risk that his actions will needlessly multiply proceedings. Further, the Court noted that “vexatiously multiplying proceedings,” included conduct where an attorney knows or reasonably should know that a claim pursued is frivolous. Id. at *18. The Court ruled that sanctions were warranted here because Plaintiff’s counsel should have known that the disparate impact claim was without merit. The Court remarked that a facially-neutral policy was required for such a claim, and Plaintiff’s counsel did not produce a single case to the contrary, and yet heedlessly pursued the argument. Because such conduct needlessly multiplied these proceedings, and Defendant incurred additional expenses in moving to dismiss the frivolous claim, the Court found that those expenses should be shouldered by Plaintiff’s counsel personally. Accordingly, the Court directed Defendant to file supplementary briefing indicating the reasonable expenses incurred.

_Felix, et al. v. Northstar Location Services, LLC, 2013 U.S. Dist. LEXIS 88145 (W.D.N.Y. June 24, 2013)._ Plaintiffs brought an action under the Fair Debt Collection Practices Act and the California Rosenthal Fair Debt Collection Practices Act alleging that Defendant’s telephonic voice messages failed to disclose that the communication was from a debt collector, the purpose or nature of the communication, or the identification of Defendant as the caller. Subsequently, pursuant to a settlement, Plaintiffs moved for preliminary class certification and settlement approval. Because the motion was not filed in good faith as the holdings of _Wal-Mart Stores, Inc. v. Dukes_, 131 S. Ct. 2541 (2011), and _Hecht v. United Collection Bureau, Inc._, 691 F.3d 218 (2d Cir. 2012), were not cited in Plaintiffs’ motion, the Court denied the motion and directed Plaintiffs’ counsel to show cause why their arguments for class certification were not sanctionable. The Court observed that in _Wal-Mart_, the key to the Rule 23(b)(2) class was the indivisible nature of the injunctive or declaratory remedy warranted, i.e., the notion that the conduct was such that it could be enjoined or declared unlawful only as to all of the class members or as to none of them. Id. at *3. The Court noted that the settlement class as defined in the motion included those consumers to whom any type of false, deceptive, or misleading claim was made, and because the stipulated injunction proposed by Plaintiffs would not provide relief to all of those consumers, it could not satisfy the _Wal-Mart_ standard. Therefore, the Court stated that it was not possible to conclude that the proposed stipulated injunction would benefit each member of the settlement class, as required by _Wal-Mart_ for certification under Rule 23(b)(2). Further, Plaintiffs’ counsel suggested that if the Court determined that a proposed class description was not sufficiently definite, it could grant class certification but modify the definition of the proposed class to provide the necessary precision or to correct other deficiencies. The Court noted that it lacked the authority to alter the parties’ settlement agreement by modifying their definition of the settlement class. Id. at *5. The Court observed that none of the factors Plaintiffs cited were discussed in the motion and thus, there was no reason to conclude that injunctive relief, even if it had been requested in the pleadings or available under the FDCPA, would be appropriate in this case. The Court stated that although the possibility of sanctions was raised by the Court _sua sponte_, the conduct of Plaintiffs’ counsel did not rise to the level of subjective bad faith. Thus, the Court opined that they should not be sanctioned.

_In Re AOL, Inc. Repurchase Offer Litigation_, 2013 U.S. Dist. LEXIS 171776 (S.D.N.Y. Dec. 5, 2013). Plaintiff, a stock holder, brought a class action alleging that AOL had conducted a sham auction of the patent portfolio to disguise the fact that it had months earlier agreed to sell the patents to Microsoft. Plaintiff also alleged that Defendants kept the deal secret so that they could buy stock under the
repurchase program at a discounted price. The main source for this theory was a blog post written by Mark Stephens. Further, Plaintiff alleged that before the sale of the portfolio, AOL’s CEO, Tim Armstrong had called Microsoft’s CEO, Steve Ballmer, to spur Microsoft’s long-held interest in acquiring the Patent Portfolio and to close the deal. Later, Plaintiff filed an amended complaint which continued to rely on the blog and to press the secret theory of deal between AOL and Microsoft. Plaintiff disclosed that the source for this allegation was a news report from Reuters. The Court found that the Reuter only mentioned that Armstrong said he made a call to Ballmer alerting him of the decision to sell the patents. Thus, the Reuters story fell far short of supporting an allegation that the conversation had occurred before the auction, or that the men had closed any deal during the conversation. Accordingly, the Court had granted Defendants’ motion to dismiss and issued an order requiring Plaintiff to address whether sanctions should not be imposed pursuant to Private Securities Litigation Reform Act (the “PSLRA”). Plaintiff’s counsel asserted that the use of the phrase “to close the deal” was only intended to convey that the call to Ballmer was made to bring the plan into fruition, i.e., a plan to monetize AOL’s patent portfolio. Id. at *8. Plaintiff’s counsel also argued that his pleading did not actually say that the auction was a sham, but instead he was only seeking to allege that AOL designed an auction process to favor Microsoft and its superior knowledge of the patent portfolio. The Court found that this interpretation of the phrase “close the deal” was belied by both the overall theory and particular language of the amended complaint, the thrust of which was that AOL and Microsoft reached a deal that AOL kept secret in order to repackage its stock at an artificially deflated price and later covered up with a sham auction. id. at *9. In fact, the amended complaint alleged that AOL had already committed to a plan to sell its patent portfolio to Microsoft, and was actively bringing to fruition the sale in secret, while benefitting from the artificially low price of AOL stock. The Court stated that the secret deal theory, including the allegation concerning the telephone call, was plainly at the heart of Plaintiff’s case, and the recent submissions by counsel demonstrated that this theory was utterly lacking in support. Moreover, the Court stated that counsel had not cited any evidence that this telephone call even occurred in the fall, let alone that it resulted in a secret determination that Microsoft would purchase the patents. Plaintiff’s counsel also attempted to downplay the allegations, insisting that the word “sham” was never used and that the amended complaint alleged only that the auction was designed to favor Microsoft and that Microsoft was merely the advantaged bidder and expected winner. Id. at *10-11. The Court stated that although it was true that the amended complaint stopped short of using the word “sham,” it did, however, repeatedly refer to the auction as a putative auction and alleged that it strained credulity to suggest that this was a full-fledged open auction. Id. Further, Plaintiff’s counsel argued that the unsupported allegations regarding the telephone call and the auction were de minimis and that a complaint was not fully sanctionable under the PSLRA unless it contained a substantial failure to comply with Rule 11(b). The Court, however, stated that the PSLRA provided that for substantial failure of any complaint to comply with any requirement of Rule 11(b), the award shall be the full amount of the reasonable attorneys’ fees and costs. Id. at *12. Accordingly, the Court found that counsel had violated Rule 11 by making factual allegations that were utterly lacking in support, and that sanctions must be imposed.

In Re Diamond Foods, Inc. Derivative Litigation, 2013 U.S. Dist. LEXIS 24665 (N.D. Cal. Feb. 22, 2013). Plaintiffs, the Board of Trustees of City of Hialeah Employees’ Retirement System and David Lucia, brought a shareholder derivative action against a number of Diamond Foods, Inc.’s current and former officers and directors. Initially, the Court was concerned that counsel would reach a settlement that would sacrifice legitimate claims at a discounted rate because they potentially lacked subject-matter jurisdiction. Id. at *6. Accordingly, the Court advised counsel not to engage in settlement discussions until the class was certified or represented by new counsel. Id. Subsequently, the Court held that it lacked subject-matter jurisdiction due to the failure to state a claim under § 14(a) of the Exchange Act, and the Court declined to exercise supplemental jurisdiction over the remaining state law claims because identical state suits had already been filed. Plaintiffs appealed that order. Meanwhile, identical state lawsuits filed against the same Defendants in California state court were consolidated into a single action in San Francisco County Superior Court. Id. at *7. After dismissal of the federal action, Plaintiffs filed derivative actions in the Delaware Court of Chancery, which consolidated their actions with a related securities fraud class action that also was pending before the Court. Id. Plaintiffs filed a motion asking the Court to issue an order to show cause why Defendants should not be held in contempt for engaging in settlement discussions with
counsel in the derivative actions filed in Delaware and California. The Court denied the motion. The Court remarked that if another derivative action had been allowed to go forward by another judge, then it would be the duty of counsel in that action to consider settling the corporation’s claim just as it would be his or her duty to consider preparing the case for a trial. Id. at *7-8. Here, the order postponing settlement negotiations was aimed at doing so until after the Court determined that the class representatives were in a position to negotiate on the merits without a discount for extraneous matters unique to the representative such as a lack of subject-matter jurisdiction. Id. at *8. The Court held that the order only barred negotiation before the instant parties to the instant case; and did not bar representative negotiations between parties supervised by another judge elsewhere. Id. The Court stated that the parties did not contrive to files suits elsewhere in order to evade its jurisdiction because the other derivative actions were already pending before Plaintiffs filed the federal derivative action. Id. at *8-9. Accordingly, the Court dismissed Plaintiffs’ motion.

In Re Pradaxa (Dabigatran Etxilate) Products Liability Litigation, 2013 U.S. Dist. LEXIS 173674 (S.D. Ill. Dec. 9, 2013) In this multi-district litigation alleging that Defendants’ blood thinning medication caused patients to suffer life-threatening, uncontrollable bleeding, the Court granted the motion of Plaintiffs’ steering committee (“PSC”) for sanctions against Defendants for various discovery abuses. The PSC’s motion for sanctions addressed alleged discovery violations that fell into one of four categories, including: (i) failure to preserve the custodial file of Professor Thorstein Lehr (a high-level scientist formerly employed by Defendant Boehringer Ingelheim International GMBH (“BII”) intricately involved in Pradaxa), as well as the failure to identify Professor Lehr as a custodian with potentially relevant evidence; (ii) failure to preserve evidence relating to untimely disclosure and production material in the possession of Defendants’ sales representatives and clinical science consultants; (iii) the production issues related to the G Drive (one of Defendants’ shared networks); and (iv) failure to preserve or untimely production of business-related text messages on certain employees’ cell phones. Id. at *3. The Court noted that Defendants’ duty to preserve material relevant to this litigation arose in early 2012 when it received a letter regarding the first post-launch Pradaxa product liability suit. Plaintiffs contended that Professor Lehr was responsible for quantitative analysis relating to the interaction between Dabigatran and specific patient populations. According to Plaintiffs, although he left Defendants’ employment, BII never disclosed Professor Lehr in any answers to the PSC’s interrogatories, and that PSC learned about Professor Lehr’s relevance to this litigation in September 2013, when Lehr was identified during deposition of one of Defendants’ employees. Plaintiffs contended that BII failed to respond to PSC’s requests to produce Professor Lehr’s custodial files. The Court found that the actions and omissions of Defendants were in bad faith. Defendants nevertheless argued that despite their failure to produce or preserve documents, that they produced now or their inability to produce other documents at all were the result of a good faith measured approach to the production of millions of documents over a fairly short period of time. The Court remarked that one of the problems to which it had been referring to was that Defendants kept coming up with materials in an untimely manner; materials were being turned over months later than promised, often on the eve of a deposition. Id. at *65. The Court remarked that Defendants had violated the Court’s case management orders, and had made misrepresentations to the Court. As to failure to preserve Professor Lehr’s case file, the Court directed Defendants to produce all files in seven days, and remarked that it would enter a full order based on Defendants’ response. Id. at *66-67. Regarding an inadequate litigation hold as to sales representatives, the Court ordered Defendants to produce the complete files within 14 days. Id. at *67. Regarding the failure to preserve text messages, the Court ordered Defendants to produce any text messages not otherwise covered by the order within 14 days. Id. at *68. Similarly, the Court directed Defendants to produce relevant portions of its G Drive within 30 days. Id. The Court also imposed financial sanctions on both Defendants, and found them liable to $931,500 for their conduct during the litigation. Id. at *71.

months later Ozard moved to voluntarily dismiss his claims with prejudice. The parties entered into a stipulation dismissing Ozard’s claims with prejudice, but noting that Defendant reserved its rights to seek attorneys’ fees, costs, and all other appropriate relief in connection with the dismissal. Defendant then petitioned the Court for an award of attorneys’ fees in the amount of $187,172, representing one-third of the fees incurred in defending the litigation. The Court denied the motion. Id. at *1-5. Defendant sought fees pursuant to the CLRA, which provides that the Court shall award costs and reasonable attorneys’ fees to a prevailing Defendant on a finding by the Court that Plaintiff’s prosecution of the action was not in good faith. Defendant argued that it was the prevailing party because Ozard dismissed his claims with prejudice. The Court disagreed, noting that prevailing party status under the CLRA is entirely different from such status under a cost statute. The cost statute focuses on the procedural outcome of the claims, while the CLRA’s fee shifting provision looks to whether each party has realized its litigation objectives. Because two other representative Plaintiffs remained in the case, Defendant still faced liability on every claim that existed when Ozard’s claims were dismissed. Accordingly, the Court found that Defendant was not a prevailing party within the meaning of the CLRA. Id. at *6-12. The Court also found that Ozard had not acted in bad faith. Defendant argued that Ozard prosecuted his claim with “willful blindness” to the truthfulness of his allegations because he did not read the complaint, and this constituted subjective bad faith. Id. at *14. The Court disagreed. It noted that the CLRA was designed to protect consumers against unfair and deceptive business practices and encouraged prosecutions of statutory violations. Weak or frivolous claims did not amount to bad faith within the meaning of the Act, and Defendant presented no evidence that Ozard’s withdrawal from the case was for an improper purpose. Id. at *15-16. The Court also noted that inherent in the CLRA’s attorneys’ fees provision analysis is the equitable principle of fairness. Defendant was seeking a large sum of money from a single named class representative even though Defendant was not prejudiced by Ozard’s withdrawal because it still had to defend against the same claims that were being prosecuted by the remaining Plaintiffs. Id. at *18-19. Defendant also argued that bad faith could be shown by Ozard’s lack of responsiveness and failure to participate in discovery until his deposition was taken. The Court rejected this argument, finding that Ozard was working 80-hour weeks running his four businesses and that this, rather than bad faith, explained his delayed responses. Id. at *19-21.

Finally, the Court held that bad faith cannot be inferred from the fact that Ozard disposed of his receipts after he withdrew from the case. Id. at *21-22. Accordingly, the Court denied Defendant’s motion for attorneys’ fees

Shevlin, et al. v. The Phoenix Life Insurance Co., 2013 U.S. Dist. LEXIS 65513 (D.N.J. May 8, 2013). Plaintiffs, a group of investors, brought a class action challenging the demutualization of the Phoenix Life Insurance Co. and Defendants’ alleged failure to satisfy Plaintiffs’ reasonable dividend expectations. Earlier, the parties had negotiated a discovery confidentiality order ("DCO") in anticipation that confidential information might be disclosed during the course of the litigation. The DCO gave any party or third-party the right to designate certain materials as confidential. Id. at *2-3. Plaintiffs’ counsel, who deposed Philip Polkinghorn, was aware of the terms of the DCO and had reviewed it prior to the deposition. Prior to the deposition, Plaintiffs’ counsel also knew that Khai LeQuang, a partner with the law firm of Orrick, Herrington & Sutcliffe, LLP would be present. Additionally, Plaintiffs’ counsel knew that LeQuang was contemplating litigation with Defendants. Prior to the deposition, Defendants had produced documents to Plaintiffs, several of which were previously designated as confidential by Defendants. Plaintiffs’ counsel used those documents during the deposition in LeQuang’s presence. When the confidential documents were used, LeQuang received a copy of and read the DCO. Because Plaintiffs’ counsel did not identify LeQuang or state that he was involved in a separate litigation against Defendants at any point prior to or during the deposition, Defendant moved for sanctions for breach of the DCO. Id. at *4. The Court granted the motion. The Court noted that Plaintiffs’ counsel allowed LeQuang to sit in on the deposition with the knowledge that he was opposing counsel in another matter being contemplated against Defendants and without revealing this to defense counsel. Further, Plaintiffs’ counsel had prepared for the deposition, had used documents which were marked confidential by Defendants, and had elicited testimony regarding those documents. Although these documents were not shown to LeQuang, the Court opined that his presence during questioning was enough to constitute disclosure of confidential information to him. Id. at *7. Accordingly, the Court opined that the failure of Plaintiffs’ counsel to obtain an executed copy of the
non-disclosure agreement from LeQuang constituted a breach of the parties’ DCO. On this basis, the Court granted Defendants’ motion for sanctions.

_Winger, et al. v. Best Buy Co., Inc., Case No. 10-CV-923 (D. Ariz. Jan. 10, 2013)._ Plaintiff, a group of consumers, brought an action under the Racketeer Influence and Corrupt Organizations Act (“RICO”) alleging that Defendants defrauded consumers by falsely representing 2-way speakers as 3-way speakers. Earlier, the Court had found that Plaintiff lacked standing to bring a RICO claim, terminated the action, and granted Defendants’ request for expenses and attorneys’ fees incurred in their first and second sets of discovery requests, and corresponding with Plaintiff’s counsel to seek supplementation of false and misleading discovery responses. The Court granted this relief under Rule 37(c)(1) because of Plaintiff’s failure to disclose John Ivey as a potential witness, or at least someone with discoverable information. Subsequently, the Court ordered Plaintiff’s counsel, Hagens Berman Sobol Shapiro LLP (“HBSS”), to pay Defendants $56,271.07 in attorneys’ fees and costs. HBSS thereafter filed a motion seeking relief from the Court’s sanctions order under Rule 59(e). The Court denied the motion. HBSS contended that the sanctions order was based on factual errors because HBSS had consulted with Ivey as an expert to assist in trial preparation; that it did not know until Plaintiff’s deposition that Ivey had installed and removed Plaintiff’s speakers; and that Plaintiff misspoke when she stated that Ivey helped install and remove her speakers. The Court, however, observed that it was HBSS’ duty to perform a reasonable investigation of Plaintiff’s allegations before filing this suit, and its failure to do so could not excuse its subsequent misrepresentations and failures to disclose. _Id._ at 3. The Court remarked that any alleged factual errors were due to HBSS’ failure to fully investigate the case and did not warrant altering the sanctions order. In finding that sanctions were warranted under Rule 37(c)(1), the Court determined that HBSS was not substantially justified in failing to disclose Ivey as a person with discoverable information. _Id._ at 4. Further, HBSS offered no substantial justification for why it failed to correct and supplement Plaintiff’s discovery disclosures and responses as requested by Defendants. The Court also remarked that HBSS was required to supplement Plaintiff’s discovery disclosures and responses in a timely manner. Regarding sanctions against an individual attorney, Rule 37(c)(1)(A) allows the Court to order payment of the reasonable expenses, including attorneys’ fees, caused by the failure to disclose or supplement discovery information and witnesses and does not specify whether such an order may be made against counsel or the party, and Rule 37(c)(1)(C) allows the Court to impose other appropriate sanctions. _Id._ at 6. Thus, the Court stated that it could assess attorneys’ fees against individual counsel under Rule 37(c)(1). The Court did not accept HBSS’ contention that it performed a reasonable inquiry, yet failed to discover that Ivey was a person with discoverable information relating to Plaintiff’s allegations until Plaintiff’s deposition and therefore found that HBSS violated Rule 26(g) upon signing Plaintiff’s initial disclosure statement, as well as Plaintiff’s responses to Defendants’ first set of interrogatories and document requests. _Id._ at 7. Because HBSS, without substantial justification, signed a disclosure statement and discovery responses that were incomplete and incorrect at the time they were made or were compiled without making a reasonable inquiry, the Court found that sanctions against HBSS were proper under Rule 26(g). _Id._ at 8. The Court also rejected HBSS’ contention that alteration of sanctions order was necessary to prevent manifest injustice because it would be unjust that Defendants have had to defend against a case manufactured by HBSS based on ever changing allegations in which HBSS repeatedly provided untruthful and inadequate information during discovery. _Id._ at 9. The Court thus concluded that the sanctions imposed against HBSS should stand, whether under Rule 37(c)(1) or Rule 26(g), and accordingly denied the motion to alter or amend its earlier judgment.

_Law Offices Of Leonard I. Desser, P.C., et al. v. Shamrock Communications, Inc., 2013 U.S. Dist. LEXIS 81302 (D. Md. June 10, 2013)._ Plaintiff, a law firm, brought an action alleging that Defendant sent junk faxes that failed to comply with the Telephone Consumer Protection Act (“TCPA”). The Court in an earlier order had expressed concern about the communications by Defendant or Defendant’s counsel with potential class members for the specific purpose of opposing class certification, and pointed out that it was unknown if those communications sufficiently informed those contacted about the pendency of this lawsuit or that they were potentially members of the proposed class. Defendant filed a report relating to contacts...
with putative class members. First, Defendant’s counsel asserted he had no contact with the advertisers who provided the affidavits in support of Defendant’s motion to strike. The Court, however, noted that the affidavits at issue were apparently drafted by Defendant’s counsel or someone in his office, as they had identical case captions, and were mostly identical in substance. Further, the affidavits had the same internal law office file number shown by Defendant’s counsel on all of its other filings with the Court. Thus, the Court remarked that although Defendant’s counsel may not have been the one to pick up the telephone and call the affiants, he was apparently part of the effort to contact them. The Court stated that the report was inadequate in describing the communications between Defendant and potential class members. The Court observed that the report was silent on a myriad of key issues, including whether Defendant provided each person contacted with a copy of the complaint; explained all of the allegations of misconduct under the TCPA; explained to the customers that their provision of affidavits was completely voluntary and would not affect their business relationship with Defendant; told them that they could consult a lawyer of their choice; provided them with name and contact information for Plaintiff’s counsel; or explained to them that providing Defendant with an affidavit could affect their ability to participate in the lawsuit or to receive monetary compensation from Defendant. Considering these omissions, the Court found that Defendant’s business manager presented Defendant’s view of the litigation to those contacted without balancing it against Plaintiff’s view of the case or informing them of other considerations, such as voluntariness and potential effect on their participation in the litigation. Thus, the Court stated that until the question of class certification was resolved, any communication about this lawsuit by either side with those who could be potential class members must reflect a careful balance of competing viewpoints and possible effects on those contacted. Further, the Court ordered that the parties should seek leave to contact putative class members for the purpose of supporting or opposing class certification. Finally, because the Court could not ascertain whether the affidavits obtained by Defendant in support of its motion to strike class allegations were obtained after neutral and balanced communications with potential class members, it struck the affidavits without prejudice.

(XXX) Issues With The Judicial Panel On Multi-District Litigation In Class Actions

In Re Ford Fusion And C-Max Fuel Economy Litigation, 2013 U.S. Dist. LEXIS 81645 (J.P.M.L. June 7, 2013). In multiple class actions concerning the marketing, sale, and advertising of the mileage estimates of Ford Fusion Hybrid and C-Max Hybrid vehicles, Plaintiffs sought centralization of lawsuits in the U.S. District Court for the Central District of California. Plaintiffs’ motion encompassed seven actions pending in four districts. The Panel noted that these actions involved common questions of fact, and that centralization would be convenient to the parties and witnesses and promote the just and efficient conduct of this litigation. The Panel opined that centralization would eliminate duplicative discovery; prevent inconsistent pre-trial rulings, including with respect to class certification; and conserve the resources of the parties, their counsel, and the judiciary. Defendant suggested that the actions be centralized in the Southern District of New York. Plaintiffs argued that various actions and potential tag-along actions suggested centralization either in California, Florida, or Illinois. The Panel noted that because this litigation was in its relatively early stages, any number of the suggested districts could serve ably as the transferee district for this litigation involving automobiles marketed throughout the nation. On balance, the Judicial Panel chose to centralize the litigation in the Southern District of New York where two actions were already pending.

In Re National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation, No. MDL 2492 (J.P.M.L. Dec. 18, 2013). Before the U.S. Judicial Panel on Multidistrict Litigation, Plaintiffs in Arrington, et al. v. National Collegiate Athletic Association, Case No. 11-CV-06356 (N.D. Ill.), moved to centralize related litigation in the Northern District of Illinois. While the National Collegiate Athletic Association (“NCAA”) did not oppose the motion, other Plaintiffs in potential tag-along class actions opposed centralization or sought to have the litigation centralized in a different court. The Panel granted the Arrington Plaintiffs’ motion and ordered the litigation centralized in the Northern District of Illinois. Id. at 1-2. The actions all sought medical monitoring for putative classes of former student athletes at NCAA member schools who alleged they suffered concussions. The opponents of centralization argued, among other things, that (i) the putative classes and claims alleged in the actions did not sufficiently overlap; and
In Re Plavix Products Liability Litigation, 2013 U.S. Dist. LEXIS 19618 (J.P.M.L. Feb. 12, 2013). In this multi-district action alleging unjust enrichment and breach of the implied warranty of merchantability based on Defendants’ illegal and deceptive promotion of Plavix, a prescription blood thinner, Defendants filed a motion for centralization of 21 actions in the U.S. District Courts in either New York or New Jersey. Earlier, the Judicial Panel of Multi District Litigation rejected Defendants’ motion for centralization in In Re Plavix Products Liability Litigation (“Plavix I”), MDL No. 2030, which involved 12 actions pending in three districts. Three of those 12 actions were encompassed in the present motion for centralization. Id. at *2. The Judicial Panel granted the motion. The Judicial Panel noted that litigation had expanded dramatically since its denial in Plavix I. Id. at *3. In Plavix I, 10 actions pending in New Jersey were significantly more advanced than the other two actions pending in the Eastern and Southern Districts of New York. Id. By contrast, 21 constituent actions were now pending in nine districts. Id. at *4. Further, 13 potential tag-along actions were pending, increasing the number of districts to 14. Id. Second, a dramatic increase in related state court cases suggested that related federal actions would increase as well. Id. The Judicial Panel remarked that creation of a Plavix Multi District Litigation (“MDL”) would result in efficiencies under 28 U.S.C. § 1407, and facilitate coordination among all courts with Plavix cases, because there would be only one federal judge handling most or all federal Plavix litigation. Id. at *5.

Third, the number of law firms in litigation increased significantly form Plavix I. Id. Issues concerning the development, manufacture, regulatory approval, labeling, and marketing of the drug were common to all actions. Id. at *6. Further, centralization would prevent duplicative discovery, inconsistent pre-trial rulings, and conserve resources for the parties, their counsel, and the judiciary. Id. The Judicial Panel opined that the U.S. District Court for the District of New Jersey was an appropriate transferee district for pre-trial proceedings with respect to the actions. Id. Defendant Sanofi was headquartered in New Jersey, and Defendant Bristol-Myers was headquartered in New York. Id. Accordingly, many of Defendants’ witnesses and documents could be found in or near New Jersey. Id. Further, Judge Wolfson, who had been overseeing the Plavix cases in the District of New Jersey for several years, had developed familiarity with the factual and legal issues that litigation presented. Id. Twelve other actions filed in the Northern District of California and Northern District of Mississippi, where motions to remand were pending, were removed from state court on multiple grounds, including because they were the CAFA mass actions. Id. at *9. The CAFA provides that any action removed pursuant to § 1332(d)(11)(C)(i) shall not subsequently be transferred to another court pursuant to § 1407, unless a majority of Plaintiffs in the action request transfer pursuant to § 1407. Id. The Judicial Panel concluded that it was unclear whether the actions were properly removed, because it was not briefed on the CAFA issues. Id. Thus, it was difficult for the Judicial Panel to ascertain whether an action removed on multiple grounds, including the CAFA’s mass action provision, fell within the transfer bar of § 1332(d)(11)(C)(i). Accordingly, the Judicial Panel declined to transfer those actions pending rulings by the two putative transferor courts. Id. at *10. Further, the Judicial

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Panel stated that in the event that remand was denied, these actions could be subject to transfer to the MDL pursuant to the conditional transfer order process set forth in Panel Rule 7.1. *Id.*

(xxxi) **Standing Issues In Class Actions**

*Cook & Tommy Shaw Foundation, et al. v. Billington, 2013 U.S. App. LEXIS 24749 (D.C. Cir. Oct. 15, 2013).* Plaintiffs, the Cook and Shaw Foundation (“Foundation”) and several of its members, brought a Title VII action asserting that the Library of Congress’ denial of recognition as an employee organization to the Foundation constituted retaliation. The Foundation, a non-profit organization composed of current and former employees of the Library, helped Library employees pursue allegations of racial discrimination against the Library. The Library had explained that the Foundation’s purpose of helping employees bring and maintain lawsuits against the Library was inconsistent with the Library’s policy that recognized employee organizations be concerned only with welfare, financial assistance, recreational, cultural, or professional activities. Although the District Court had opined that Plaintiffs had standing, it dismissed the complaint for failure to state a claim of retaliation under Title VII. On appeal, the D.C. Circuit affirmed. Plaintiffs alleged that the denial of recognition to the Foundation deprived them of certain benefits, such as holding meetings using Library facilities, and posting materials on the Library’s bulletin boards. *Id.* at *6.

The D.C. Circuit opined that the benefits of recognition were not trivial, and denial of those benefits constituted an injury-in-fact. Further, Plaintiffs also alleged that a ruling in their favor would redress their injury by allowing them to attain those benefits. Thus, the D.C. Circuit opined that Plaintiffs established Article III standing. Additionally, the Library also asserted the prudential standing zone of interests requirement as a bar to this suit. The D.C. Circuit noted that this issue generally arises when a Plaintiff brings a claim under the Administrative Procedure Act as a party allegedly aggrieved by some agency action that violated a substantive statute. *Id.* at *8. The D.C. Circuit observed that *Thompson v. North American Stainless, LP*, 131 S. Ct. 863, 870 (2011), held that the language “person claiming to be aggrieved” in Title VII is similar to the APA’s “aggrieved” language and thus incorporates the “zone of interests” requirement that the Supreme Court has found to apply in the APA context. *Id.* at *8-9.

Further, the D.C. Circuit stated that a Plaintiff with Article III standing satisfies the zone of interests requirement unless his interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. *Id.* at *9. The individual Plaintiffs claimed that they were injured by the alleged non-recognition of the Foundation, and the D.C. Circuit noted that Title VII gives injured employees a right to sue, and that as employees, the individual Plaintiffs’ interests obviously cannot be deemed marginally related to or inconsistent with the purposes of Title VII. Accordingly, the D.C. Circuit opined that the individual Plaintiffs satisfied the zone of interests requirement. The D.C. Circuit also observed that retaliation by an employer is unlawful only if that retaliation occurred because of actions by employees or applicants for employment. *Id.* at *11.

The D.C. Circuit stated that to prove their retaliation claim, Plaintiffs must show that an employee engaged in statutorily protected activity; that the employee suffered a materially adverse action by the employer; and that a causal link connects the two. *Id.* at *11-12. The D.C. Circuit, however, noted that the complaint did not allege that a particular employee engaged in one of the statutorily protected activities and then suffered a materially adverse action because he or she had engaged in that statutorily protected activity. Thus, because the complaint failed to allege that the denial of recognition constituted retaliation for statutorily protected activity by employees or applicants for employment, the D.C. Circuit opined that the complaint failed to state a claim under Title VII.

*Friedman et al. v. Mercedes Benz USA, LLC*, No. 12-CV-7204 (C.D. Cal. Jan. 31, 2013). Plaintiffs brought a consumer class action alleging false advertising against Defendant Mercedes-Benz USA, LLC (“MBUSA”) and individual claims against the dealer from which Plaintiffs leased their vehicles, Keyes European LLC (“Keyes”). Plaintiffs alleged that MBUSA advertised and marketed features it would be offering in its 2012 CLS550 in conjunction with certain packages but that early production vehicles were not equipped with some of those features. Plaintiffs alleged that MBUSA informed its authorized dealers that only 2012 CLS550 vehicles manufactured after July 2011 would be equipped with those features, but this information was not disclosed to the public or potential purchasers. Named Plaintiffs Brian Friedman and Daniel Brown together leased a vehicle because they were interested in the PARKTRONIC system, an
active parking guideline feature in the 2012 CLS550, but the 2012 Mercedes CLS550 that they leased did not come equipped with this feature even though it was advertised as standard equipment in that model. Plaintiffs asserted claims for violations of three statutes against MBUSA, including: the California Consumer Legal Remedies Act (“CLRA”), § 17200 of the California Business and Professions Code (“UCL”), and § 17500 of the California Business and Professions Code (“FAL”). MBUSA sought to dismiss Plaintiffs’ claims for lack of standing because Brown did not suffer an injury-in-fact, nor could he because his name was not on the lease, as the lease was signed only by Friedman, and Brown merely drove the vehicle. Id. at *23. The Court granted MBUSA’s motion to dismiss for lack of standing. The Court noted that the irreducible constitutional minimum of standing requires a showing of injury-in-fact that is concrete and particularized and actual or imminent, a causal connection between the injury and the conduct, and the ability of the Court to provide redress for the injury. Plaintiffs contended that Brown paid the $3,000 down payment on the vehicle and made at least some of the monthly lease payments; therefore, he suffered an injury. The Court, however, observed that not having obtained the vehicle or obligated himself to make the monthly lease payments, he could not have suffered a legal injury-in-fact because he had no legally protectable interest in the vehicle. Id. at *24. Accordingly, the Court concluded that Brown did not have standing to pursue his claims individually or on behalf of the class, and granted MBUSA’s motion to dismiss Brown from the complaint. MBUSA argued that Friedman lacked standing because he did not allege facts showing that he plausibly and reasonably relied upon alleged misrepresentations by MBUSA, and lost money or property as a result. MBUSA also argued that Friedman did not allege that he saw the purportedly false advertisement. The Court noted that in order to establish standing under the CLRA, the UCL, or the FAL, Plaintiff must establish that he suffered an injury as a result of Defendant’s alleged conduct. Id. at *25. In order to do so, California law requires a Plaintiff to plead and prove that he or she relied on a material misrepresentation. Id. at *25-26. The Court observed that the only advertisement alleged to have been seen by either named Plaintiff was that seen by Brown on the MBUSA website; it was undisputed that Friedman did not see this advertisement. The only other MBUSA communication discussed in the complaint was an internal Mercedes e-mail that informed the dealers that the initial vehicles did not have all the features advertised as part of standard equipment. The Court remarked that it was not clear if this communication was ever actually seen and, in any event, Plaintiffs learned of it after the vehicle was leased. The Court indicated that while it harbored serious doubts as to whether Plaintiffs can allege facts that Friedman relied upon the advertisements, the Court granted MBUSA’s motion to dismiss Friedman from the complaint with leave to amend.

In Re Motor Fuel Temperature Sales Practices Litigation, 2013 U.S. Dist. LEXIS 101083 (D. Kan. July 19, 2013). In these class actions, which were part of larger multi-district litigation, Plaintiffs sued numerous motor fuel retailers and refiners. The crux of Plaintiffs’ complaint was that a gallon of motor fuel at a higher temperature had less mass and less energy in comparison with a gallon of the same motor fuel at a cooler temperature. Plaintiffs claimed violations of the California Consumer Legal Remedy Act (“CLRA”), breach of implied covenant of good faith and fair dealing, and unjust enrichment. Three California cases – Rushing v. Alon USA, Inc., Lerner v. Costco Wholesale Corp., and Wyatt v. B.P. Am. Corp. – were before the Court on Defendants’ joint notice of motion for summary judgment on Plaintiffs’ California state law claims. Chevron first argued that Plaintiffs lacked Article III standing. Chevron contended that Plaintiffs paid taxes on net gallons passed through to consumers based on gross gallons. Chevron characterized Plaintiffs’ tax theory as though Plaintiffs were seeking a tax refund from the government. Therefore, Chevron contended that Plaintiffs lacked standing to bring a claim based on over-collection of fuel taxes because Chevron did not collect and consumers did not pay motor fuel excise tax. The Court, however, noted that Plaintiffs did not seek a tax refund, but instead they sought damages and injunctive relief based on a practice that overcharged consumers and called the overcharge a “tax.” Id. at *76. Under this theory, the Court found that Plaintiffs had Article III standing. Chevron next argued that Plaintiffs lacked standing under the CLRA because they received the benefit of their bargain, i.e., Plaintiffs were not injured because they received 231-cubic-inch gallons of motor fuel the specified prices per gallon. Plaintiffs, however, argued that they suffered economic injury because they unwittingly purchased fuel that was effectively diluted because of its warm temperature. As a result, Plaintiffs contended that they paid for more gallons motor fuel than they otherwise would have if the fuel was sold in temperature-adjusted
gallons, and over-reimbursed Chevron for taxes on phantom gallons. The Court agreed, and ruled that Plaintiffs had a standing to bring claims under the CLRA. Plaintiffs also claimed that Chevron’s method of selling motor fuel by the gallon without disclosing or adjusting for temperature violated the California Unfair Competition Law (“UCL”). The Court noted that in partnership with the National Institute of Standards and Technology (“NIST”), the National Conference on Weights and Measures (“NCWM”) has developed specifications, tolerances, and other technical requirements for weighing and measuring devices, including retail motor fuel devices. The NIST publishes these standards in Handbook 44, and under California law, the standards and requirements in Handbook 44 apply to commercial weighing and measuring devices in California. The Court noted that in Handbook 44, § 3.30 refer to liquid measuring devices that measure “units,” for example “gallons,” and refers to unit or gallon to describe specifications, tolerances, and user requirements for retail motor fuel devices. Id. at *85-86. The Court remarked that Chevron’s argument was further bolstered by the fact that § 3.30 expressly distinguishes the specifications for retail motor fuel devices, which do not mention temperature adjustment, from the specifications for wholesale motor fuel devices, which do mention temperature. Id. at *87. Accordingly, the Court concluded that Plaintiffs offered no reason to construe the terms unit or gallon in § 3.30 to mean only standard or temperature adjusted gallon. In addition, the Court noted that the legislature had approved the use of correct weight or measure or weighing, measuring, or counting instruments, i.e., those that meet all of the tolerance and specification requirements of Handbook 44. Accordingly, the Court concluded that California law permitted Chevron’s sale of motor fuel by gross gallon without adjusting for temperature. Plaintiffs further contended that Chevron’s failure to disclose the effect of temperature on motor fuel violated the UCL. The Court noted that California law insulates from UCL liability motor fuel retailers that sold units of motor fuel using correct weight or measure or weighing, measuring or counting instruments. Therefore, the Court concluded that California shielded Chevron from claims that it should have disclosed the fact that the temperature of units that their correct instruments dispense might vary. Id. at *96. Plaintiffs also claimed that Chevron violated the UCL by paying taxes on net gallons and passing on the taxes to consumers based on gross gallons. The Court found that these claims were barred by a statutory and regulatory safe harbor, because the statutes specifically authorize the challenged conduct. Id. at *101. The Court ruled that as with the UCL claims, the CLRA claims may be barred under the safe harbor doctrine, as the CLRA is a generic consumer protection statute, and by contrast California regulatory framework created specific requirements for retail gasoline dispensing that may not be trumped by general prohibitions of the CLRA. Id. at *102. Similarly, the Court sustained motion for summary judgment on state law claims as to Chevron.

Taragan, et al. v. Nissan North America, Inc., 2013 U.S. Dist. LEXIS 87148 (N.D. Cal. June 20, 2013). Plaintiffs, a group of owners and lessees of vehicles equipped with an electronic “Intelligent Key” system, brought a class action alleging violations of the Magnuson-Moss Warranty Act, the Song-Beverly Consumer Warranty Act, the California Unfair Competition Law (“UCL”), the California Consumer Legal Remedies Act (“CLRA”), and fraudulent concealment. The Intelligent Key system allowed a vehicle operator to start a vehicle’s engine through the wireless transmission of an electronic code in lieu of a physical key. Plaintiffs alleged that this system posed a safety hazard because it was possible for the vehicle to roll away after the engine was turned off if the automatic transmission was not placed in park. Defendants moved to dismiss. The Court granted the motion. First, the Court observed that in asserting a warranty claim under the Song-Beverley Act, Plaintiffs must allege that their product actually exhibited the alleged defect. Id. at *13. Here, because Plaintiffs did not actually experience a rollaway incident, the Court found that Plaintiffs’ claim of defect, as pled, was theoretical. Although the complaint alleged that Plaintiffs and the class had been placed in danger, the Court remarked that these allegations were insufficient to establish the requisite injury necessary to state a viable claim for breach of implied warranty. Thus, the Court found that Plaintiffs failed to state a claim under the Song-Beverly Act. Second, because the substantive elements are the same under the Song-Beverly Act and Magnuson-Moss Act, the Court stated that Plaintiffs’ companion claim under the Magnuson-Moss Act should be dismissed. Third, regarding their fraudulent concealment claim, Plaintiffs alleged that Defendants knowingly concealed and failed to disclose that their vehicles were subject to the alleged rollaway danger due to the Intelligent Key system. Plaintiffs’ allegation that Defendants were in a superior position to know the facts about the quality and nature of the Subject Vehicles was conclusory to establish Defendants’ duty to disclose, because the
Court noted that to satisfy Rule 9(b) of the California Civil Code, Plaintiffs must allege specific facts that their claim should have alerted Defendants that the Intelligent Key system design was, in fact, defective. \textit{Id.} at *22. The Court observed that there were no facts showing that Defendants actively concealed anything from Plaintiffs, and the pleadings failed to allege with the requisite specificity how Defendants sought to suppress information in the public domain or obscure consumers' ability to discover information regarding the alleged rollaway danger. Accordingly, the Court found that Plaintiffs' allegations were insufficient to demonstrate a duty to disclose. Fourth, because Plaintiffs' claim under the UCL were dependent upon their claims under the Song-Beverly Act, the Magnuson-Moss Act, and the CLRA, and because those claims were dismissed for failure to state a claim, the Court dismissed Plaintiffs' claim under the UCL. The Court noted that Plaintiffs offered no factual allegations demonstrating that the alleged conduct threatened to violate the letter, policy, or spirit of the antitrust laws, or that it harmed competition. Plaintiffs also failed to show that the use of the Intelligent Key system was immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. The Court observed that the purported rollaway risk was completely avoidable by placing the automatic transmission in park and/or applying the parking brake – all of which a driver should do as a matter of common sense and prudence and in compliance with California law. Thus, the Court stated that Plaintiffs failed to state a claim under UCL. Further, because Plaintiffs failed to adequately allege facts establishing a duty to disclose, the Court found that the failure to do so did not support a claim under the fraudulent prong of the UCL. Accordingly, the Court granted Defendants' motion to dismiss.


Plaintiff, a customer, brought a class action under New York General Business Law ("GBL") and New York General Obligations Law ("GOL") alleging that Defendant's automatic renewal policy of XM on-line account was a deceptive trade practice, that Defendant gave inadequate notice of its automatic renewal practice, and that Defendant was unjustly enriched by collecting subscription charges from customers whose services were automatically renewed. Plaintiff sought injunctive relief mandating Defendant to comply with GOL's notice provisions. Plaintiff had purchased a one-year subscription at the end of a three-month trial period. Thereafter, Plaintiff purchased a three-year subscription by telephone, and activated an on-line account which allowed him to listen to satellite radio over the internet. While activating this account on-line, Plaintiff checked a box which indicated that he had read and accepted the terms and conditions of service, which included that the term of the Agreement was indefinite and services would continue until cancelled. Plaintiff's subscription was thus renewed and he received an invoice for an additional three year subscription. Plaintiff cancelled the subscription after he received a past due notice and paid a pro-rated bill for the cost of services for the period between automatic renewal and cancellation. Plaintiff moved for class certification of all residents of the State of New York who subscribed to XM Satellite radio service and had their service plan automatically renewed at any time since June 11, 2005. The Magistrate Judge recommended that Plaintiff's motion for class certification be denied. On Plaintiff's Rule 72 objections, the Court agreed with the Magistrate Judge and denied the motion for certification. The Court noted that a class cannot be certified if a named Plaintiff lacks Article III standing, and the named Plaintiff must show that they have been personally injured. \textit{Id.} at *9. Here, the Court noted that Plaintiff could not satisfy the injury-in-fact requirement for injunctive relief because Plaintiff was not an XM customer at the time he commenced the lawsuit and Plaintiff did not face future harm from XM's renewal policies. Moreover, Plaintiff demonstrated that he was now aware of XM's renewal policies and was thus unlikely to suffer from being billed without his knowledge. Further, the Court stated that Plaintiff's claims under the GBL were not amenable to class certification because Plaintiff was unable to show injury to proposed class members on a class-wide basis, since individual issues predominated. Plaintiff would have to show which of the proposed class members were actually injured when their subscription was automatically renewed. Because Plaintiff was unable to prove through common evidence which customer wanted their subscriptions to be automatically renewed, the Court found that predominance was not satisfied. Further, the Court noted that damage calculations would be required for individual consideration. Additionally, Plaintiff's unjust enrichment claim was also not amenable to class treatment because individual inquiries were required to determine whether or not subscribers were actually injured, given that subscribers who wanted or assented to renewal were not injured. For these reasons, the Court found that Plaintiff's unjust
enrichment claim was also not amenable to class treatment and thus denied the motion for class certification.

Employee Testing Issues In Class Actions

**Vasich, et al. v. City Of Chicago**, 2013 U.S. Dist. LEXIS 1740 (N.D. Ill. Jan. 7, 2013). Plaintiffs brought an action alleging that the Physical Abilities Test (“PAT”) administered to firefighter and EMT candidates by the City of Chicago discriminated against female applicants in violation of Title VII. Plaintiffs alleged both disparate impact and disparate treatment of female firefighter applicants. Plaintiffs sought to certify a class of women applicants who took and failed the PAT at any time after September 11, 2007. The City filed a motion for partial summary judgment, which the Court granted in part. The City first sought to limit the class period to events occurring on or after June 27, 2009, which was roughly 300 days before the named Plaintiff Vasich filed an EEOC charge making allegations of class-wide discrimination. In support of its argument, the City pointed to the absence of any mention of the PAT in most of the pre-Vasich charges, the exclusive use of first person pronouns in all of the charges (e.g., “I was discriminated against”), and the failure of any charge to refer to any other individuals, let alone a class. *Id.* at *10. Plaintiffs identified the start of the class period as September 11, 2007, a date they claimed to have derived from an EEOC charge filed by Plaintiff Evans. Plaintiffs alleged that this charge and the ensuing EEOC investigation placed the City on notice that the alleged discrimination was much broader than any individual’s experience not being hired or promoted. The Court observed that any charge of discrimination based on race, sex, religion, or national origin necessarily implicates the claimant’s membership in a protected class. *Id.* at *13. In this case, the earliest charges of discrimination the Court observed did not suffice to give the City notice of class-wide claims based on the PAT. Each charge spoke only of discrimination against the charging woman herself, using the pronouns “I” and “my,” exclusively; not one of them referred to any other applicants or to discrimination against women in general. *Id.* at *15. Plaintiffs argued that allegations of class-wide discrimination were suggested by the EEOC’s investigation. The Court stated that the charges themselves gave no suggestion of class-wide claims. The Court therefore concluded that because it was not until Plaintiff Vasich’s 2010 charge that any woman complained about a class-wide discrimination based on the use of the PAT, her charge must define the class period. Accordingly, the Court granted the City’s motion as to the class period. The City also sought to strike Plaintiffs’ request for a mandatory injunction requiring the City to develop a new, nondiscriminatory physical evaluation. The City argued that Plaintiffs lacked standing to obtain mandatory injunction because there was no threat of a concrete injury to Plaintiffs, let alone a class. *Id.* at *32. The Court remarked that if the City had established beyond dispute that it had discontinued the use of the PAT altogether, it would have found that Plaintiffs lacked standing. Instead, the Court was merely in the process of selecting a vendor to develop a replacement test. The Court remarked that it could not assume that a future test would not adversely impact women. The Court observed that merely because the City violated law in the past, it did not mean that the City would violate the law in the future. *Id.* at *32. Therefore, the Court ruled that it would flag the issue for the time being, and remarked that although Plaintiffs survived the challenge to standing, Plaintiffs bore the burden to show that any past discrimination they proved may also persist in the future, and that this fact could not be assumed. Similarly, the Court denied the City’s motion to dismiss the disparate impact and treatment claims.

Application Of Tolling Principles In Class Actions

**Hall, et al. v. Variable Annuity Life Insurance Co.**, 2013 U.S. App. LEXIS 16976 (5th Cir. Aug. 15, 2013). Plaintiffs, a group of life insurance purchasers, brought a class action alleging that Defendants committed securities fraud by misrepresenting the prospective tax benefits of its annuities. Plaintiffs had purchased a VALIC deferred variable annuity and were members of the class in previously filed action in Drnek v. Variable Annuity Life Insurance Co. After the Court in Drnek vacated its prior order of class certification, Plaintiffs filed this action. Defendants moved to dismiss Plaintiffs’ complaint. The District Court
Court granted Defendants’ motion because Plaintiffs filed this class action more than five years after the certification order was vacated in Drnek. On appeal, the Fifth Circuit affirmed the District Court’s order. Plaintiffs contended that the order vacating class certification in Drnek did not cause the tolling of the statute of repose to cease. The Fifth Circuit stated that American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), created a special rule (“American Pipe tolling”) to “freeze the clock” for putative class members once a class action lawsuit was filed. Later decisions of the Supreme Court had distilled a bright line rule that the filing of a class action tolled the running of a statute of limitations for all asserted members of the class. Id. at *7. The Fifth Circuit noted that under American Pipe, the statute of limitations for the putative class members resumed running when class certification was denied or when a certified class was decertified, and once the District Court denied certification or decertified a class, the putative class members had no reason to assume that their rights were being protected. Id. at *8. Plaintiffs argued that the vacated certification order in Drnek was not because the class failed to meet the Rule 23 requirements, but to prevent the class members from being handicapped by the witness exclusion caused by class counsel. In addition, Plaintiffs argued that the original motion for certification in Drnek was effectively reinstated and remained pending, entitling the putative class members to American Pipe tolling. The Fifth Circuit stated that although Plaintiffs were correct that the vacatur of a certification order had the effect of nullifying that order, it was not necessarily true that a vacatur completely reinstated the parties’ pre-existing procedural and temporal statuses. Id. at *10. Moreover, this case illustrated the unfairness of finding that a vacatur of class certification implicitly reactivated a pending motion for class certification. Although Plaintiffs insisted that the vacatur of certification was different from decertification because vacatur did not involve a consideration of Rule 23’s requirements, the Fifth Circuit opined that Plaintiffs ignored the fact that the basis of the vacatur in Drnek was fundamentally a Rule 23 class certification issue. The Fifth Circuit observed that in Drnek, the certification order was vacated because Plaintiffs could not prove a class-wide measure of damages, a classic issue of common question predominance under Rule 23(b)(3). The Fifth Circuit observed that in Taylor v. United Parcel Services, Inc., 554 F.3d 510, 520 (5th Cir. 2008), it considered how long the statute of limitations remained tolled for an employment discrimination Plaintiff who had been a member of a certified class of similarly-situated Plaintiffs. Id. at *12. The Fifth Circuit, after considering American Pipe, found that if the District Court denied class certification under Rule 23, tolling of the statute of limitations ends and the principles enunciated in Taylor weighed in favor of finding that American Pipe tolling ceased when a certification order was vacated. Id. at *14. Accordingly, the Fifth Circuit affirmed the District Court’s order.

In Re Vertrue Inc. Marketing And Sales Practices Litigation, 2013 U.S. App. LEXIS 7693 (6th Cir. April 16, 2013). This multi-district litigation encompassed 13 putative class actions. Plaintiffs alleged that Defendants lured them into membership programs by making misrepresentations in violation of the Electronic Funds Transfer Act (“EFTA”), the Racketeer Influenced and Corrupt Organizations Act (“RICO”), and state consumer protection statutes. Id. at *3-4. Previously, in a similar action entitled Sanford v. MemberWorks, Inc., 2008 U.S. Dist. LEXIS 79189 (S.D. Cal. Sept. 30, 2008), the District Court had dismissed Plaintiffs’ federal claim for the wrongful mailing of unordered merchandise and concluded that the named Plaintiffs lacked standing to assert their claim for violation of the EFTA. The District Court also declined to exercise supplemental jurisdiction over the remaining state law claims. Id. at *6. Id. Therefore, because all of the Plaintiffs’ claims were dismissed, the action was dismissed in its entirety without ruling on the motion for class certification. Id. Accordingly, the putative class members of the Sanford action brought these actions. Defendant Vertrue, Inc., operating as MemberWorks, Inc., filed a motion to dismiss based upon the statute of limitations. The District Court dismissed some but not all of Plaintiffs’ claims. The District Court allowed the remaining claims to proceed, concluding that they were properly tolled, and granted Vertrue’s motion to certify that part of the District Court’s order ruling that certain claims were properly tolled. Id. at *4-7. On appeal, the Sixth Circuit affirmed. Although the parties agreed on the appropriate limitations period for each claim, they disagreed on whether Plaintiffs were entitled to the benefit of tolling. First, with respect to the federal claims, the Sixth Circuit observed that in American Pipe & Constructions Co. v. Utah, 414 U.S. 538, 554 (1974), the Supreme Court had held that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. Id. at
*8. The Sixth Circuit had previously held – in Andrews v. Orr, 851 F.2d 146 (6th Cir. 1988) – that American Pipe tolling protects class members until a motion for class certification is denied. Thereafter, equitable tolling applies. Id. at *11. The Sixth Circuit also previously held that American Pipe tolling applies only for individual claims, not for subsequent class claims. Id. at *9-12. Vertrue argued that since this was a class action, tolling did not apply. The Sixth Circuit disagreed, noting that its prior decision involved a case in which class certification in the earlier filed case was denied. Here no decision on class certification had been rendered, and thus the concern of repetitive class action lawsuits was not present. The Sixth Circuit affirmed the District Court’s application of tolling to the federal claims. Id. at *11-12. The Sixth Circuit also agreed with the District Court that the state law claims were tolled by operation of 28 U.S.C. § 1367(d). That statute provides that the period of limitations for any related state law claim asserted shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless state law provides for a longer tolling period. Id. at *16. The Sixth Circuit observed that the suspension approach to § 1367(d), i.e., that the state statute of limitation is superseded while the federal court is considering the claim and for 30 days after the claim is dismissed, properly gives effect to both § 1367(d) and the state statute of limitations. Id. at *18-19. Accordingly, the Sixth Circuit stated that all of Plaintiffs’ state law claims except those requiring fraudulent concealment tolling were filed timely. Finally, Vertrue argued that Plaintiffs in this case were not parties in the Sanford action and, thus, did not have claims which could be tolled pursuant to § 1367(d). The Sixth Circuit, however, opined that because there was no indication that Congress intended to exclude putative class members from the tolling available through operation of § 1367(d), Plaintiffs here properly articulated state law claims for purposes of § 1367(d). Id. at *20.

Odle, et al. v. Wal-Mart Stores, Inc., 2013 WL 66035 (N.D. Tex. Jan. 7, 2013). Plaintiff Stephanie Odle and six other named Plaintiffs brought a class action alleging that they were subjected to gender discrimination as a result of specific policies and practices in Wal-Mart’s regions located in Texas. Previously, the named Plaintiffs were class members in a nationwide class action decertified in 2011 by the U.S. Supreme Court in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011). After the Supreme Court reversed the class certification order, named Plaintiff Odle filed this class action. Defendant subsequently sought to dismiss the complaint or to strike the class claims. Plaintiffs’ main argument against dismissing the class claims based on the statute of limitations was that two recent Supreme Court cases – Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co., 130 S. Ct. 1431 (2010), and Smith v. Bayer Corp., 131 S. Ct. 2368 (2011) – support tolling the statute of limitations for Plaintiffs’ class claims and allow application of tolling in a successor class action under American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974). American Pipe tolls the running of the statute of limitations on absent class members’ federal causes of action during the pendency of the class action, at least until certification is denied. The Court found that the class action claims did not benefit from American Pipe tolling and thus were barred. Plaintiffs then filed a motion to certify the issue of tolling for interlocutory review. The Court granted the motion. Among the three factors to be satisfied for certification of an interlocutory appeal under 28 U.S.C. § 1292(b), the factor of whether there was substantial ground for difference of opinion was disputed by the parties. Plaintiffs argued that the tolling issue fell within the ambit of cases where a substantial ground for difference of opinion has been recognized. They also argued there was substantial ground for difference of opinion on the extent of American Pipe tolling in light of Shady Grove and Smith, Id. at *2. The Court noted that in determining whether there is substantial ground for difference of opinion, there are varied approaches. There is a substantial ground for difference of opinion if the courts are in dispute on the question and the Court of Appeals of the circuit has not spoken on the point or if novel and difficult questions of first impression are presented. The level of uncertainty required to find a substantial ground for difference of opinion should be adjusted to meet the importance of the question in the context of the specific case. Id. at *3. Here, the Court found that while case law precedents do not agree on what affect recent Supreme Court precedent has on successor class actions, or more specifically American Pipe tolling with successor class actions, some case law precedents have found that these cases have changed the law. Id. Although the Court believed that its previous decision granting Defendant’s motion to dismiss was correct, it found that there was substantial ground for difference of opinion. Accordingly, the Court granted Plaintiffs’ motion to certify for interlocutory review.
Seyfarth Shaw LLP was the third in a succession of American Pipe Wal-Mart Andrews at *44. The Court provided extensive Andrews American Pipe Andrews Id. applies only to the initiation of a new individual action, not a After merited refinement, and – absent controlling precedent in doctrine.” American Pipe case. However, Plaintiffs “rebooted” their claims and focused them in a different way, with new region-specific allegations related to “Region 43” – a region centered in Middle and Western Tennessee, and including portions of Alabama, Arkansas, Georgia, and Mississippi. Id. at *7-9. Plaintiffs alleged: (i) denial of equal pay for hourly retail store positions; (ii) denial of equal pay for salaried management positions up to, and including, co-manager; and (iii) denial of equal opportunities for promotion to management track positions up to, and including, store manager. Wal-Mart filed a partial motion to dismiss Plaintiffs’ complaint or, in the alternative, to strike the class claims, arguing that the class claims were not viable for a host of reasons. As a threshold argument, Wal-Mart asserted that the putative class members’ claims were time-barred because – based on American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974) – the applicable statute of limitations was not tolled. American Pipe provides that the commencement of a class action suspends the applicable statute of limitations as to members of the class who would have been parties had the suit been permitted to continue as a class action. Id. at *12-15 (citing American Pipe, 414 U.S. at 554). The threshold question addressed by the Court was whether American Pipe tolling permitted Plaintiffs in Phipps to pursue class-wide relief on behalf of a regional sub-class, after the U.S. Supreme Court in Wal-Mart held that certification of the broader class was not appropriate. Id. If they were not, the claims of any putative class members who otherwise failed to file timely EEOC charges would be time-barred. Id. at *12. The Court determined that the class claims were time-barred based on the Sixth Circuit controlling decision of Andrews v. Orr, 851 F.2d 146, 149 (6th Cir. 1988), which addressed whether American Pipe tolling applies to a follow-on class action. Andrews was the third in a succession of class action racial discrimination lawsuits, the first of which was resolved through a consent decree, and the second denied certification. In addressing whether a named Plaintiff could file a third round of individual and/or follow-on class action claims, the Sixth Circuit held in Andrews that Plaintiffs individually benefitted from American Pipe tolling only through the date of denial of the first class certification motion, and that the tolling principle in American Pipe applies only to the initiation of a new individual action, not a new class action. Id. at *27-32. Thus, the Sixth Circuit found in Andrews that the time limitation requiring a timely administrative charge for requesting class-wide relief (as compared to individual relief) was not tolled during the pendency of a second motion to certify. Id. Relying on Andrews, the Court indicated that it was “constrained” to find that the class claims were time-barred. Id. at *44. The Court provided extensive analysis regarding American Pipe and its progeny, and provided a roadmap for possible Sixth Circuit review of the issues, noting that, “in light of recent jurisprudential trends, the Court believes that Andrews merits reconsideration – or at least refinement – to permit follow-on sub-class actions to benefit from American Pipe tolling under appropriate circumstances, such as those presented here.” Id. at *10. The Court then laid out the reasons that Andrews merited refinement, and – absent controlling precedent in Andrews – why tolling would be appropriate in this circumstance: American Pipe and its progeny do not preclude the application of American Pipe tolling to subsequent class actions because the case law does not seem to “have contemplated the possibility of a follow-on sub-class action, let alone how the American Pipe rule might apply. Indeed [the Supreme Court in American Pipe] and the concurring opinions seem to have recognized that future procedural contexts would test the limits of the American Pipe doctrine.” Id. at *44-46.

(3xiv) Exhaustion Principles In Class Actions

Dukes, et al. v. Wal-Mart Stores, Inc., 2013 U.S. Dist. LEXIS 5411 (N.D. Cal. Jan. 14, 2013). After remand from a decision in the litigation by the U.S. Supreme Court, Defendant filed a motion to dismiss or strike the class allegations in Plaintiffs’ fourth amended complaint, arguing that putative class members had not filed timely administrative charges with the EEOC and could not “piggy-back” or “coat-tail” on the charge filed by former named Plaintiff Stephanie Odle. Id. at *3. The Court denied Defendant’s motion, stating that the putative class members could piggy-back on Odle’s charge. Defendant then requested leave to seek reconsideration of this order on the basis that Odle had filed a separate class action in 2011.
in Texas seeking to represent a class of Wal-Mart employees different than the class at issue here, which constituted a change in fact and law that warranted reconsideration of the Court’s piggy-backing ruling. The Court denied Defendant’s motion. The Court opined that the development in the Texas litigation was not a new material fact or change in law. Id. at *5. The judge in the Texas case had held that Odle’s 2011 class action was not timely, which would only be material if the Court accepted Defendant’s premise — squarely rejected in the Court’s earlier order — that the fourth amended complaint was a “new” class action attempting to rely on Odle’s 1999 administrative charge. Id. The Court observed that Defendant did not purport to identify new facts or law justifying reconsideration of that premise, but rehashed the same arguments which were rejected earlier when the Court concluded that it was the same case that was initiated in 2001, and that the Court’s 2002 ruling that putative class members could rely on Odle’s charge continued to apply to the sub-set identified in the fourth amended complaint. Id. Accordingly, the Court denied Defendant’s request for leave to file a motion for reconsideration.

Williamson, et al. v. Fermi National Accelerator Laboratory, 2013 U.S. Dist. LEXIS 159342 (N.D. Ill. Nov. 7, 2013). Plaintiff, an Administrative Support Assistant, was required by her employer to fill out a medical questionnaire, provide a DNA sample, and submit to a physical examination. Id. at *3. In this medical questionnaire, Plaintiff noted that she suffered from depression, PTSD, and is genetically predisposed to heart disease, hypertension, hearing problems, and cancer. Id. Ten days later Defendant required Plaintiff to take a physical examination and shortly thereafter she was “fired without warning” for “deficient performance” despite having received no warnings or prior criticisms of her job performance. Id. After her termination, Plaintiff filed a charge with the EEOC alleging that Fermilab discriminated against her (and her alone) in violation of both the Americans With Disabilities Act (“ADA”) and the Genetic Information Nondisclosure Act of 2008 (“GINA”). Id. At the conclusion of its investigation, the EEOC issued a determination which stated in relevant part that, “…I have also determined that Respondent discriminated against a class of individuals, including Charging Party, by acquiring their genetic information, in violation of GINA.” Id. at *4. Plaintiff then filed class action alleging Fermilab violated GINA by requiring all new employees, including herself, to submit to a physical exam and complete a medical questionnaire that included questions concerning family medical history. Plaintiff also claimed that her termination violated the ADA as it was based on her disclosure that she suffered from PTSD. Id. Defendant filed a motion to dismiss Plaintiff’s class-wide GINA claims “for failure to exhaust administrative remedies with the EEOC because [she] did not explicitly make allegations of class-wide discrimination or discrimination allegedly suffered by others in her Charge to the EEOC.” Id. at *7. While noting that “as a general rule, a plaintiff cannot bring a discrimination claim in a lawsuit that was not included in her EEOC charge” the Court held that the EEOC’s determination letter put Defendant on notice that Plaintiff, and/or a broader class of individuals, might pursue legal action against the employer, thus satisfying the exhaustion of administrative remedies requirement. Id. at *10. In reaching this decision, the Court reasoned that the purpose of the exhaustion of administrative remedies requirement is to provide notice to Defendant and to promote conciliation. Id at *11. The Court determined that it was sufficient that the EEOC’s post-investigation determination letter “finding discrimination against a class of individuals and inviting Defendant to participate in conciliation” meets both goals of the exhaustion of administrative remedies requirement. Id. As such, the Court declined to dismiss Plaintiff’s class-wide claims. Additionally, the Court rejected Defendant’s request to limit the class period to 300 days before the EEOC’s determination letter since at this point the record was not clear as to when precisely Defendant obtained notice of potential class-wide concerns – which is from when the class period should be measured. Id. at *13.

Appointment Of Class Counsel And Lead Plaintiffs

Handy Jr., et al. v. Robinson, 2013 U.S. Dist. LEXIS 32303 (D. Colo. Feb. 15, 2013). Plaintiff, a former prisoner at Arapahoe County Detention Facility (“ACDF”), brought a class action alleging that the conditions of confinement at ACDF were constitutionally inadequate. Plaintiff alleged that Defendant implemented a triple bunking policy that resulted in cramped cells where each inmate was allocated less than 20 square feet of space, an open door medical policy that allowed ACDF staff and inmates to hear and see the examinations of inmates by medical care providers, and a policy that set bonds at a disproportionate level relative to other Colorado counties. Id. at *1-2. Plaintiff also alleged that the kosher
meals served at ACDF were not actually kosher, and that the showers at ACDF were unsanitary. Id. at *2-3. Plaintiff sought injunctive and declaratory relief. Plaintiff moved for class action certification consisting of all individuals who were and would be detained at ACDF, and for appointment of class counsel. Id. at *6. The Court denied Plaintiff’s motion. First, the Court noted that a pro se litigant cannot fairly and adequately protect the interests of the entire class, and that Plaintiff, pursuant to Rule 23(g), requested the Court to appoint class counsel. Id. at *7-8. Second, the Court noted that Plaintiff’s motion did not provide any meaningful discussion of Rule 23 requirements, but rather recited the requirements and, in a conclusory fashion, stated that they were met. Id. at *8. Accordingly, the Court denied Plaintiff’s motion for class certification and to appoint class counsel.

In Re Howrey LLP, Case No. 11-DM-31376 (Bankr. N.D. Cal. Jan. 18, 2013). Plaintiff, Howrey Claims, LLC, filed a class action against Defendants, former partners of Howrey LLP, seeking to hold the former partners liable as alter egos of Howrey LLP based on the former partners’ alleged diversion of funds. Plaintiff sought to represent all class members who incurred liability as alter egos of Howrey. Blum Collins LLP (“Blum”), counsel for Gail Adams (“Adams”), and Outten & Golden LLP (“Outten”), counsel for Stephanie Langley, each filed various memoranda and declarations setting forth legal and factual bases for appointment as class representative and for appointment as class counsel. Id. at 2. The Court found that both Langley and Adams, joined by fellow claimant Rami Dalal (“Dalal”), would fairly and adequately protect the class members’ interests, and accordingly selected Adams and Dalal as class representatives. Id. The Court noted that its decision for class representative was primarily because Adams and Dalal selected Blum as class counsel. Id. The Court opined that both Blum and Outten adequately identified and investigated potential claims, and both had experience in handling class actions, complex litigation, and the types of claims asserted in the case at bar. Id. Further, both had adequate knowledge of the applicable law and possessed the resources necessary to represent the class. Id. Although the Court noted that Langley served on the Official Creditors’ Committee in Debtor’s Chapter 11 case, the Court held that this did not present a conflict of interest. Id. at 2-3. The Court also noted that Adams and Dalal were two of nearly 100 class members represented by Blum. Id. at 3. The Court opined that this factor favored Blum and merited its choice of Adams and Dalal as class representatives and Blum as class counsel. Id. The Court showed deference to the numerous claimants who chose to be represented by Blum, and held that they should not be represented by counsel they had not chosen. Id. The Court rejected Blum’s argument that his claimants would opt-out of the WARN claims class if Langley was selected a class representative and Outten as class counsel. Id. Accordingly, the Court certified the WARN class, designated Adams and Dalal as class representatives, and designated Blum as class counsel.

In Re Sanofi-Aventis Securities Litigation, 2013 U.S. Dist. LEXIS 38783 (S.D.N.Y. Mar. 20, 2013). Plaintiffs, a group of investors, brought an action alleging that Defendants Sanofi-Aventis and two of its former executives violated the Securities Exchange Act of 1934 by giving misleading statements regarding development of the drug rimonabant. The FDA had asked Sanofi to reassess certain data concerning the link between rimonabant and suicide. Defendant gave an optimistic and misleading report that the FDA development of the drug rimonabant. The FDA had asked Sanofi to reassess certain data concerning the link between rimonabant and suicide. Defendant gave an optimistic and misleading report that the FDA declined to mention suicide or the independent assessment of the data. Thereafter, pursuant to a public hearing, the FDA committee unanimously voted not to recommend approval of the drug and Sanofi sent out a press release to that effect. Hawaii Annuity Trust for Operating Engineers’ (“Hawaii”), a Taft-Hartley multi-employer trust fund, purchased shares of Sanofi common stock in several off-exchange transactions. Plaintiffs sought class certification, and an order appointing Hawaii and NE Carpenters as class representatives, and appointing their law firms as class counsel. The Court granted Plaintiffs’ motion for class certification in part, certifying a class of all purchasers of Sanofi
ADRs during the period of February 24, 2006 through June 13, 2007. The Court also appointed Hawaii as the class representative, and Robbins Geller Rudman & Dowd LLP as class counsel. The Court found that there were 241.4 million ADRs available for trading during the class period, and that 474.8 million ADRs traded during this period. Since the same two misleading statements allegedly caused injury to all holders of ADRs by artificially inflating their price, the commonality requirement was met. The Court stated that because Plaintiffs had the same knowledge that the rest of the market, they were typical of the class. The Court observed that Hawaii was adequate to serve as the class representative because its interests were not antagonistic to the rest of the class, and it had retained attorneys who had ample experience representing Plaintiffs in securities fraud class actions. The Court found that the predominance and superiority requirements of Rule 23(b) were satisfied because Plaintiffs demonstrated that the alleged material misstatements were publicly known, that the security traded on an efficient market, and that Plaintiffs purchased shares between the time the misleading statement was made and the time the truth was revealed. The alleged misstatements were made on earnings calls and widely reported to the market; Sanofi ADRs traded on the NYSE; and Hawaii purchased its shares after the first misstatement and did not sell them before the class period ended. The Court then analyzed the work Plaintiffs’ counsel had done in identifying or investigating potential claims in the action; counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action; counsel’s knowledge of the applicable law; and the resources that counsel would commit to representing the class. The Court noted counsel’s ability to litigate this action and pledge to protect the interests of all potential Plaintiffs, and accordingly appointed Robbins Geller Rudman & Dowd as class counsel.

Johnson, et al. v. Bankers Life And Casualty Co., 2013 U.S. Dist. LEXIS 139986 (W.D. Wis. Sept. 30, 2013). Plaintiff and her husband purchased an individual retirement annuity from Defendant, which replaced an existing annuity purchased from another company, because it contained an annuity income preservation amendment rider, which Defendant represented would keep both the annuity and income from the annuity from affecting their Medicaid eligibility and spend down provisions/requirements. When this proved to be untrue following her husband’s death, Plaintiff brought this putative class action lawsuit against Defendant for breach of fiduciary duty, negligent and intentional misrepresentation, civil theft, and violation of Wisconsin Organized Crime Control Act. Plaintiff subsequently moved to file a second amended complaint adding the former employee/agent of Defendant, Nancy Weinreis, as a Plaintiff and proposed class representative. The Court granted Plaintiff’s motion. Defendant opposed the second amended complaint on the grounds that it was futile and would cause undue delay and prejudice. The Court observed that the amendment came immediately following the deadline for amendments. The Court noted that Weinreis appeared to be a wholly inadequate class representative, as she had a conflict of interest with the class as a former employee/agent of Defendant. The Court found that part of the adequacy determination turns on whether Defendant had put forward an arguable defense peculiar to the proposed class representative that might bring into question the adequacy of the named Plaintiff’s representation. Id. at *8. The Court opined that there was no doubt that Weinreis’ former position as an agent of Defendant raised a peculiar defense, which would appear to render her inadequate under Rule 23(a). The Court, however, remarked that while adding Weinreis as a putative class representative would be futile, it was not prepared to conclude that Weinreis’ individual claim was futile. Therefore, the Court granted Plaintiff leave to proceed on her second amended complaint to add Weinreis as a named Plaintiff.

Kaplan, et al. v. S.A.C. Capital Advisors, Case No. 12-CV-9350 (S.D.N.Y. Oct. 22, 2013). Two groups of investors brought a securities class action against S.A.C. Capital Advisors, L.P. and its affiliates (collectively, the “SAC Defendants”) alleging that they were engaged in illegal insider trading in violation of the Securities Exchange Act of 1934 as amended by the Private Securities Litigation Reform Act of 1995 (“PSLRA”). Plaintiff, the City of Birmingham Retirement and Relief System and putative class member KBC Asset Management NV (“KBC,” and collectively, the “Institutional Investor Group”) moved for the appointment as lead Plaintiff. The Court granted the motion. The SAC Defendants argued that KBC ran afoul of the PSLRA’s “five-in three” rule because it failed to advise the Court that it had served as a lead Plaintiff in five securities class actions during the prior three years. The Court stated that the PSLRA was focused on restricting private individuals from acting as professional Plaintiffs, and institutional investors...
like KBC need not be subject to the “five-in-three” rule. \textit{Id.} at 2. The SAC Defendants contended that at least three of the seven KBC funds at issue did not have timely claims and that KBC had only a minor financial stake in this litigation. The Court noted that the Institutional Investor Group disputed the SAC Defendants’ legal analysis in calculating the repose period, and therefore it should not examine the issue here because it applied only to three of the seven KBC funds and was not related to KBC’s adequacy as lead Plaintiff. In addition, the Court stated that the relative size of KBC’s financial interest in this case would not act as a bar because there were no other competing applications to serve as lead Plaintiff. Therefore, based on record, the Court found good cause to appoint the Institutional Investor Group as lead Plaintiff.

\textit{Martin, et al. v. Blessing}, 134 S. Ct. 402 (2013). Plaintiffs asserted an antitrust challenge to the 2008 merger of Sirius Satellite Radio, Inc. and XM Satellite Holdings, Inc. \textit{Id.} at 402. Several class actions were consolidated and the District Court appointed three law firms to serve as interim class counsel. \textit{Id.} In addition to the four enumerated Rule 23(g) factors, the District Court – Judge Baer of the U.S. District Court for the Southern District of New York – ordered that the three law firms appointed as class counsel “ensure that the lawyers staffed on the case fairly reflect the class composition in terms of relevant race and gender metrics.” \textit{Id.} at 2. Following certification, the parties settled the litigation. Nicholas Martin, a class member, objected to the terms of the settlement, as well as the District Court’s reliance on race and gender in assessing the adequacy of class counsel. \textit{Id.} at 403. The District Court overruled the objections. On appeal, the Second Circuit refused to set aside the settlement, concluding that Martin had no standing because he failed to allege an injury-in-fact. \textit{Id.} The U.S. Supreme Court denied \textit{certiorari}. In a separate opinion, Justice Alito acknowledged that Rule 23(g) allows a District Court to consider “any matter” pertinent to class counsel’s ability to fairly and adequately represent the interest of a class. Justice Alito opined that it is nonetheless “doubtful” that the District Court’s practice of requiring the race and gender of class counsel to mirror the class composition could survive a constitutional challenge. \textit{Id.} According to Justice Alito, “[i]t seems quite farfetched to argue that class counsel cannot fairly and adequately represent a class unless the race and gender of counsel mirror the demographics of the class.” \textit{Id.} at 405. To demonstrate the “strange results” that the District Court’s requirement might foster, Justice Alito used an example of a class action that consisted of persons who had undergone a particular type of treatment for prostate cancer and then questioned whether “it would be proper for a district judge to favor law firms with a high percentage of male attorneys?” \textit{Id.} at 404. Additionally, Justice Alito questioned how this rule could be applied in practice, since in some cases it is impossible to obtain the relevant information without requesting it from all of the class members, such as in a securities case where the class consists of everyone who purchased stock of a particular company. \textit{Id.} Although Justice Alito did not disagree with the Supreme Court’s decision to deny \textit{certiorari}, for “unlike the courts of appeals, we are not a court of error correction,” he pointed out that “the denial of \textit{certiorari} does not constitute an expression of any opinion on the merits” and, in his view, he was “hard pressed to see any ground on which Judge Baer’s practice can be defended.” \textit{Id.} at 405. Justice Alito further warned that “if the challenged appointment practice continues and is not addressed by the Courts of Appeals, future review may be warranted.” \textit{Id.}

**Editor’s Note:** The separate opinion of a Supreme Court Justice in a denial of \textit{certiorari} is rare. Justice Alito’s opinion likely represents the death knell of selection of class counsel based on diversity issues.

\textit{(xxxvi)} 

\textit{Workplace RICO Class Actions} 

\textit{In Re National Western Life Insurance Deferred Annuities Litigation}, 2013 U.S. Dist. LEXIS 20314 (S.D. Cal. Feb. 14, 2013). In this consolidated class action, the Court denied Defendant’s motion to decertify a nationwide class alleging civil RICO violations. Plaintiffs brought this suit on behalf of all individuals 64 years and older who purchased deferred annuity investment products from Defendant National Western Life Insurance Company. Plaintiffs claimed that Defendant allegedly provided Plaintiffs with sales materials that falsely and deceptively represented that Plaintiffs would receive a premium bonus, which would be added to their investment values, and that they would not be charged certain fees. The two issues before the Court included: (i) whether Plaintiffs could meet Rule 23(a)’s commonality requirement; and (ii) whether Plaintiffs could establish reliance on a class-wide basis. With respect to Rule
23(a)’s requirement, the Court noted that the critical issue in the case was whether the class members relied on any of the alleged misrepresentations by Defendant to their detriment. The Court emphasized that all that is required to satisfy Rule 23(a)’s commonality requirement is a single common question as to whether Defendant’s sales materials contained false representations. Because such a question was not disputed, Rule 23(a)’s requirements were met, even though there may have been individual questions of actual reliance. The Court went on to find that Plaintiffs could establish reliance (and thus causation) on a class-wide basis because: (i) the nature of the alleged misrepresentations, which appeared prominently in the marketing materials provided to Plaintiffs by Defendants; (ii) the fact that Plaintiffs were required to sign an acknowledgement that they read and understood the materials containing the alleged misrepresentations; and (iii) because Plaintiffs alleged that they would not have purchased the annuities in question but for those misrepresentations, and that other investment options had performed better than the annuities. Put another way, the evidence of standardized written misrepresentations coupled with evidence that the products offered were worth less than similar products sufficed to create a common-sense link between the alleged misrepresentation and the alleged harm. Accordingly, the Court granted the motion for class certification.

Zavala, et al. v. Wal-Mart Stores, Inc., 2013 U.S. Dist. LEXIS 13128 (D.N.J. Jan. 31, 2013). Plaintiffs, a group of former employees, brought a putative class and collective action alleging violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), the FLSA, and the common law of false imprisonment. This action, similar to Zavala v. Wal-Mart Stores, Inc., No. 03-CV-5309 (D.N.J.) (“Zavala I”), alleged that Defendant entered into a criminal enterprise to exploit their labor. In Zavala I, the Third Circuit had affirmed dismissal of the RICO claims, the decertification of the collective action, and the grant of summary judgment on the false imprisonment claims. Thereafter, individuals who had been part of the collective action in Zavala I filed this new suit. Defendant moved to dismiss the RICO, false imprisonment claims, and FLSA collective action claim. The Court granted the motion. First, the Court noted that Plaintiffs’ RICO and RICO conspiracy claims were time-barred. RICO’s four year statute of limitations begins to accrue when an individual knows or should have known of their injury. Id. at *5. Here, Plaintiffs stopped working for Defendant in 2003, and opted-in to the Zavala I putative FLSA collective action on or before June 30, 2006. Thus, Plaintiffs knew or should have known about their RICO claims when they opted-in to Zavala I more than four years before they filed this suit. Regarding the FLSA claim, because the Third Circuit had determined that an almost identical FLSA collective action was not certifiable because Plaintiffs did not satisfy the similarly-situated standard for collective actions, the Court dismissed the FLSA collective action claim. The Court, however, stated that Plaintiffs’ individual FLSA claims could move forward. Finally, regarding the false imprisonment claim, although Plaintiffs did not contest Defendant’s assertion that their claim was time-barred, Plaintiffs asserted that the doctrine of issue preclusion immunized their false imprisonment claims from dismissal. Zavala I had denied Defendant’s motion to dismiss essentially identical false imprisonment claims. The Court opined that even if that ruling had issue preclusive effect, it did not prevent Defendant from asserting a statute of limitations defense here. Id. at *7. The parties disagreed as to whether the applicable limitations period was determined by the law of the state where the alleged false imprisonment occurred, but considering that the most generous potentially applicable statute of limitation was six years, and that Plaintiffs had stopped working at least seven years before they filed the complaint, the Court also dismissed the false imprisonment claims. Id. at *6-8.

Public Employee Class Actions

Men Of Color Helping All Society, Inc., et al. v. City Of Buffalo, 2013 U.S. App. LEXIS 13563 (2d Cir. July 1, 2013). Plaintiffs, a group of current or former firefighters, brought a class action challenging the Buffalo Fire Department’s implementation of its previous drug testing policy. The District Court granted Defendants’ motion for summary judgment. On appeal, the Second Circuit affirmed the judgment. Plaintiffs asserted that the Buffalo Fire Department violated their procedural and substantive due process rights under the Fourteenth Amendment. The Buffalo Fire Department conceded that Plaintiffs had a cognizable property interest in their continued public employment, but asserted that the firefighters received adequate procedural protections. Plaintiffs, however, asserted that the Buffalo Fire Department’s violation of the procedures in the drug testing policy – including the procedures for mandatory retesting and
for review by a Medical Review Officer (“MRO”) – meant that the firefighters had no meaningful opportunity to challenge their positive drug test results. The Second Circuit noted that Plaintiffs were not prevented from disputing the fairness or accuracy of their test results and consequent terminations during the pre-termination hearing, or the grievance process in state court. Consequently, the Buffalo Fire Department’s provision of notice, a pre-termination opportunity to be heard, and the availability of the post-termination grievance procedure and Article 78 petition in state court satisfied the requirements of due process. Thus, the Second Circuit opined that Defendants were properly granted summary judgment as to Plaintiffs’ procedural due process claims. Further, the Second Circuit remarked that no reasonable jury could find that the Buffalo Fire Department’s actions were so egregious or outrageous that they could be said to shock the contemporary conscience. Accordingly, the Second Circuit found that Plaintiffs failed to establish that the Buffalo Fire Department’s implementation of the drug testing policy violated their substantive due process rights. Although Plaintiffs conceded that the Buffalo Fire Department could require firefighters to undergo drug testing, they argued that as applied, the drug testing policy violated a constitutional right to informational privacy through the sharing of their private medical information. Considering the compelling safety concerns of the Buffalo Fire Department and the wide latitude afforded governments in the management of their employees, the Second Circuit observed that the required medical releases, which permitted the sharing of diagnoses and treatment plans with the Buffalo Fire Department, were reasonable. Further, the Second Circuit noted that Plaintiffs were on notice of the drug testing policy, which required that they sign any and all releases and/or waivers so as to allow the City to ensure employee participation in the counseling/rehabilitation program, and also worked in an industry the character of which should have alerted them to the likelihood of inquiries into their fitness and judgment. Thus, the Second Circuit found that no reasonable jury could find that the drug testing policy violated the privacy rights of Plaintiffs, and Defendants were properly granted summary judgment as to Plaintiffs’ privacy claim.

**McNulty, et al. v. Federal Housing Finance Agency, 2013 U.S. Dist. LEXIS 86085 (M.D. Pa. June 19, 2013).** Plaintiff brought a class action seeking repayment of transfer taxes that Defendants allegedly failed to pay, and to enjoin Defendants from future failures to pay transfer taxes. Plaintiff alleged that Defendants Federal National Mortgage Association, (“Fannie Mae”), and the Federal Home Loan Mortgage Corp., (“Freddie Mac”), purchased mortgages on the secondary market, pooled them, and then re-sold them as mortgage backed securities to investors on the open market. Plaintiff alleged that upon completing the conveyance of title, Fannie Mae and Freddie Mac had an obligation under Pennsylvania law, including state, county, municipal, and school district requirements, to pay transfer taxes to the Recorder in the County where the transfer took place. Plaintiff alleged that she was the authorized collection agent for Lackawanna County of the transfer taxes as were other Recorders of Deeds throughout the State of Pennsylvania. Further, 53 P.S. § 6924.301.1(f)(1) authorizes political sub-divisions and cities to levy and collect their own real estate transfer taxes, for which Plaintiff was again the authorized collection agent. Plaintiff claimed that the failure of Fannie Mae and Freddie Mac to pay the required transfer taxes deprived local governments of significant tax revenue to which they were legally entitled. Defendants moved to dismiss Plaintiff’s amended complaint for failure to state a claim upon which relief could be granted. The Court granted the motion. Freddie Mac and Fannie Mae are corporations charted by Congress to establish secondary market facilities for residential mortgages, to provide stability in the secondary market for residential mortgages, and to promote access to mortgage credit throughout the nation. Under 12 U.S.C. § 1723a(c)(2) and 12 U.S.C. § 1452(c), Congress exempted Fannie Mae and Freddie Mac from “all” state and local taxes except for taxes on real property. Id. at *10. Defendants asserted that based on the language of their charters, they were statutorily exempt from paying the transfer taxes. The Court agreed that the “all taxation” language of the statutes meant “all” taxation and that Defendants were exempt from paying taxes on transfers of real estate such as those sought in this case. Id. at *16-17. The Court stated that Defendants were entities entitled to an exemption from taxation, which was provided by Congress at their inception. Plaintiff argued that because Fannie Mae and Freddie Mac had changed since their inception, neither was an agency or instrumentality of the federal government and could not constitutionally enjoy immunity from taxation. The Court, however, found that interpreting the language of the charters to allow Defendants exemptions from the transfer taxes would not be unconstitutional. Plaintiff also argued
that Defendants must also pay the realty transfer tax based on the plain language of the real property or carve out exceptions within the charters’ exemptions. The exemption at issue contained an exception to the extent that any real property of Defendants shall be subject to state, territorial, county, municipal, or local taxation to the same extent as other real property is taxed. Id. at *22. The Court noted that when Congress provides exceptions in a statute, it does not follow that Courts have authority to create others, and that the proper inference is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth in it. Id. Further, the Court stated that the tax at issue was on the privilege to transfer real property, not on the property itself, and the statutes’ exception to the exemption applied to taxes imposed directly on the real property itself and not on the transfer of the real property. Thus, the Court held that the transfer tax did not fall within the carve-out exception. Accordingly, the Court granted Defendants’ motion to dismiss.

(xxviii) Injunctions In Class Actions


Plaintiffs, a group of former NFL professional football players, brought a class action under § 43(a) of the Lanham Act alleging that Defendant violated their common law and statutory rights of publicity by using former players’ images in Defendant’s Films without compensating the players. After substantial litigation, the parties settled. In preliminarily approving the settlement, the Court conditionally certified a settlement class and provided procedures both for objecting to the settlement and for opting-out of the settlement class. The Court also ordered that all class members and their legally authorized representatives were preliminarily enjoined from filing any lawsuits arising out of the claims at issue. Later, several putative class members and their attorneys had filed two new lawsuits – Culp v. NFL Productions, LLC, Case No. 13-CV-4999 (D.N.J. Aug. 20, 2013), and Tatum v. National Football League, Case No. 13-CV-1272 (W.D. Pa. Aug. 30, 2013) – alleging similar claims. Lead settlement counsel moved to enforce the injunction granted in the preliminary approval order. The Court granted the motion. First, counsel for Plaintiffs in Culp and Tatum contended that the opt-outs were effective when mailed and this proved that the filing of the two new lawsuits was appropriate and within the opt-out Plaintiffs’ rights. The Court stated that the class here was only conditionally certified and thus any opt-out depends on whether the Court actually certified the class, which necessarily included the determination that each opt-out was timely and properly made. In addition, the Court stated that it specifically enjoined any putative class member from initiating further litigation in this matter, which was self-evident to the lawyers involved that this injunction restrained them and their clients from filing any lawsuit until the final approval hearing. Counsel did not explain what would happen to these new cases if the Court did not approve the settlement and did not certify a class, which would alone remove their contention that the injunction did not apply to individuals who had requested exclusion from the uncertified class. The Court observed that no putative class member was excused from the class unless and until the Court certified the class and excused those individuals who wished to be excluded. Thus, putative class members ceased to be members of the class when the certification decision excluded them and the statute of limitations was tolled until then. Accordingly, the Court granted the motion.

(xxix) Class Actions In Bankruptcy


Plaintiff brought an action under California’s Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act (“CLRA”) alleging that the packaging and marketing of Uncrustables and Crisco Shortening Products mislead consumers into believing that they were healthy, when in reality they contained amounts of trans fat from partially hydrogenated vegetable oil (“PHVO”). Earlier, the Court had granted Defendant’s motion to dismiss Plaintiff’s individual claims, holding that when Plaintiff reopened her bankruptcy proceedings she conceded that her interest in this action was a pre-petition interest. As a result, the bankruptcy trustee was the real party in interest, and as such, he chose to settle Plaintiff’s individual claims with Defendant for $22,500. Plaintiff moved for attorneys’ fees and costs. The Court granted the motion. The Court stated that transferring the injunctive relief remedy to the bankruptcy estate did not necessarily mean that a claim for attorneys’ fees was also transferred. Further, because Plaintiff
herself was never entitled to collect an award of attorneys’ fees, the Court remarked that the fee award could not be used to satisfy the claims of the creditor, and thus, her right to attorneys’ fees was not a property that was transferred into the bankruptcy estate. Accordingly, the Court found that Plaintiff’s counsel could assert a right to fees on their own behalf under California law. Id. at *10. Plaintiff asserted that the lawsuit prompted Defendant to remove the trans-fat from Uncrustables; remove the wholesome and homemade goodness claims from Uncrustables’ packaging and website; and remove the saturated fat comparison chart from Crisco’s packaging. The Court noted that Plaintiff sufficiently established the precise factual/legal condition that she sought to change, i.e., removing certain health claims regarding, or the allegedly harmful PHVO from its Uncrustables and Crisco Shortening products. The Court stated that although Plaintiff’s suit did not induce Defendant to change its advertising claims, it prompted Defendant to remove a component of Uncrustables that made the claims allegedly false or misleading. The Court found evidence that Uncrustables were a widely distributed consumer product, that trans-fat had been strongly linked to certain diseases in various studies, and that Defendant removed PHVO from Uncrustables in response to this suit. This sufficiently established that the removal of PHVO from Uncrustables conferred a significant benefit to a large class of individuals. The Court further noted that the necessity and financial burden requirement examined whether private enforcement was necessary and whether the financial burden of private enforcement warranted subsidizing the successful party’s attorneys. Id. at *38. Considering California’s specific recognition of the significance of private enforcement in the area of consumer protection and the absence of any showing of parallel government action, the Court stated that Plaintiff’s action was necessary, and the financial burden made the award appropriate. Accordingly, the Court concluded that Plaintiff was entitled to attorneys’ fees.

**Brannan, et al. v. Wells Fargo Home Mortgage, Inc., 2013 Bankr. LEXIS 64 (Bankr. S.D. Ala. Jan. 8, 2013).** Plaintiffs, a group of debtors, brought a class action alleging that Defendant’s signing and filing practices were pervasively improper or fraudulent. Plaintiffs alleged that Defendant filed or caused the filing of false affidavits in support of motions for relief from the automatic bankruptcy stay. Plaintiff moved for certification of two classes pursuant to Rule 7023 of the Federal Rules of Bankruptcy Procedure. Id. at *6. The classes consisted of all individuals who filed a bankruptcy claim where Defendant filed, or caused to be filed, an affidavit in support of a motion for relief from the stay, motion for adequate protection, or similar motion for a defined period and who made any payment to Defendant for attorneys’ fees and/or filing fees, and those who had any charges posted to their mortgage account for attorneys’ fees and/or filing fees associated with such motions. Id. at *6-7. The Court granted Plaintiffs’ motion for class certification. The Court found that Defendant’s alleged misconduct could be a basis for other remedial causes of action, such as fraud. Id. at *15. Plaintiffs alleged that Defendant used law firms to prepare and present relief from stay motions that were accompanied by affidavits that were relied on to establish Defendant’s case-in-chief. Id. at *16. The Court noted that the affidavits, if prepared as alleged, at a minimum were recklessly prepared under counsel’s direction and submitted by counsel to the Court to obtain relief. Id. The evidence showed that there was a relatively small number of preparers, notaries, supervisors, and attorneys who prepared all of the affidavits in question, and the Court noted that the practice was common place. Id. at *18. Defendant argued that a class action lawsuit would violate its due process rights. The Court rejected Defendant’s argument, finding that there was no due process violation because it would not award purely punitive sanctions against Defendant, provided that the classes were certified and the preferred remedy was to make the debtors whole and prevent future improper conduct. Id. at *20-21. The Court opined that a class action was the only plausible way to provide relief for the hundreds of debtors injured by Defendant’s practices. Id. at *24. The Court also held that certification was warranted because Plaintiffs satisfied the Rule 7023 requirements. The Court determined that the numerosity requirement was satisfied because Plaintiffs offered 631 affidavits into evidence. Id. at *25. The Court determined that the commonality requirement was satisfied because the motion and affidavits raised common questions of fact for each claim, as each Plaintiff suffered damages resulting from Defendant’s allegedly fraudulent conduct. Id. at *26. Defendant argued that there was no evidence of a company-wide policy that injured each Plaintiff, but the Court rejected this argument, finding that Defendant required affiants to handle numerous affidavits in short amounts of time without procedures in place that insured complete accuracy and truthfulness in the legal documents. Id. at *29. The Court concluded that
Plaintiffs satisfied the typicality requirement because there was a universal defect in all of the affidavits, and substandard quality, which made each Plaintiff typical of other class members. *Id.* at *30. The Court determined that the fourth element was met because the class representatives were class members and did not pose a conflict of interest. *Id.* at *31. The Court also noted that there were no claims that would require any individualized inquiry. *Id.* at *34. The Court noted that the best way to remedy the alleged injury would be to enjoin Defendant from collecting the fees and costs associated with the improperly prepared motions and affidavits. *Id.* at *33. Accordingly, the Court granted Plaintiffs’ motion for class certification.

**FACTA And FDCPA Class Actions**

*Battle, et al. v. Law Offices Of Charles W. McKinnon, P.L., 2013 U.S. Dist. LEXIS 29263 (S.D. Fla. Mar. 5, 2013).* Plaintiff, a debtor, brought a class action alleging that a letter sent by Defendant violated the Fair Debt Collection Practices Act (“FDCPA”) by misstating the applicable legal standard with regard to Plaintiff’s need to dispute the debt’s validity in writing and because it was deceptive to the least sophisticated consumer with regard to his or her legal rights. Subsequently, the parties entered into a settlement and moved for class certification and preliminary approval. *Id.* at *2. The Court certified the settlement class and preliminarily approved the settlement. Plaintiff sought recovery for all individuals with addresses within the United States whom received a letter from Defendant that did not comply with the FDCPA. The Court stated that Plaintiff’s class definition was concise, specific, and readily identified individuals who comprised the putative class. *Id.* at *4-5. In regards to class certification, the Court found that numerosity requirement was established because Defendant conceded that there were at least 50 persons who received letters in identical or substantially similar form as the Plaintiff received from May 15, 2011 and May 14, 2012. *Id.* at *6. Second, the class was limited to those persons who received identical or substantially similar letters from Defendant. Further, whether Plaintiff or other class members were actually misled by Defendant’s letters had no bearing on Defendants’ potential liability under the FDCPA. *Id.* at *8. Thus, the Court observed that these issues could likely be resolved without individualized factual or legal inquiries, and that Plaintiff satisfied the commonality requirement. *Id.* Third, the Court noted that typicality was established because Plaintiff received the same letter as other putative class members, and Plaintiff sought relief based upon the same legal theory as putative class members. *Id.* at *9. Fourth, the Court determined that no inherent conflict of interest existed because the alleged conduct toward the named Plaintiff was identical to other putative class members. *Id.* at *10. Additionally, Plaintiff’s counsel had litigated similar class actions involving consumer rights. Thus, the Court concluded that adequacy requirement was also met. The Court found that Plaintiff established predominance because Defendant allegedly engaged in a course of conduct that violated the FDCPA and the putative class members’ statutory rights. *Id.* at *11. Given that the putative class members received the same letters from Defendant, the Court concluded that it could make a general determination regarding whether Defendant violated the FDCPA without any individual inquires. Finally, considering the large number of potential claims, and the comparatively small statutory damages to which each individual putative class member would be entitled, the Court concluded that a class action was superior to other forms of litigation. *Id.* at *12. Accordingly, the Court certified the settlement class. The Court observed that based on Defendants’ representations of net worth, a settlement agreement for $16,018.56 constituted an amount equal to the maximum available statutory damages recoverable by a class under the FDCPA, and thus was fair and reasonable. Further, the settlement provided a payment of $2,000 to the class representative for damages and her role in litigation, $13,000.00 as class counsel’s fees and costs, and that Defendants would pay the costs of class administration directly to the class administrator while class counsel would be responsible for directing the class administrator. The Court found that the stipulations were fair and reasonable. Further, the Court stated that a pro-rata share of the settlement fund would be distributed to each class member who did not timely opt-out of the class.

*LaRocque ex rel. Spang v. TRS Recovery Services, Inc., 2013 U.S. Dist. LEXIS 314 (D. Me. Jan. 2, 2013).* Plaintiff brought a class action based on a variety of federal and state law claims arising from Defendants’ check collection procedures. After the Court certified three sub-classes, Defendants moved to expand one class from a class of Maine residents to a nationwide class. The Court denied the motion.
Defendants argued that Maine-limited scope of the class would circumvent the statutory cap on damages set forth in the Fair Debt Collection Practices Act (“FDCPA”). *Id.* at *2-3. The FDCPA, 15 U.S.C. § 1692k(a)(2)(B), limits statutory damages in class actions to $1,000 per named Plaintiff and “such amount as the Court may allow for all other class members ... not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector ...” *Id.* at *2. Plaintiff’s lawyers had also filed putative statewide class action lawsuits in four other districts. Defendants argued that allowing class counsel free rein to file as many class actions as they choose in order to continually reset the cap would have the effect of writing the cap out of the statute. Therefore, in declining to certify a nationwide class, the Court reasoned that if Plaintiff was able to establish Defendants’ liability, the Court would invoke its discretion at the time of determining statutory damages. *Id.* at *6. Then, Defendants could point to the size of the class and the pendency of lawsuits in other jurisdictions because nothing in the statute requires that a Court set statutory damages at the maximum allowed. *Id.* Accordingly, the Court denied Defendants’ motion to expand the class.

**Manno, et al. v. Healthcare Revenue Recovery Group, LLC, 2013 U.S. Dist. LEXIS 52620 (S.D. Fla. Mar. 26, 2013).** Plaintiff brought a putative class action alleging violations of the Telephone Consumer Protection Act (“TCPA”) and the Fair Debt Collections Practices Act (“FDCPA”). Plaintiff had received medical treatment in the emergency room at Memorial Hospital Pembroke (“Memorial”), and had filled out some paperwork during the admissions process in which he provided a cellular telephone number to the hospital. The Medical services that Plaintiff obtained from Defendant Inphynet South Broward, Inc. (“Inphynet”) were processed through a billing company and were referred to Defendant Healthcare Revenue Recovery Group, LLC (“HRRG”) for collection if the bill was not paid. In an effort to collect Plaintiff’s debt to the hospital, HRRG called Plaintiff using the telephone number he provided during the admissions process. Plaintiff claimed that he did not expressly consent to use of the telephone number for debt collection purposes. *Id.* at *2. Plaintiff moved for class certification proposing a FDCPA class and a TCPA class of all Florida residents whom HRRG called regarding a debt due to Inphynet arising from care received at Memorial in which HRRG failed to disclose that it was a debt collector. *Id.* at *3-5. The Court granted Plaintiff’s motion. The Court determined that numerosity was satisfied because thousands of Florida residents met the class definition. *Id.* at *18. The Court found that the key question of whether HRRG violated the FDCPA by leaving a voice message for putative class members, during the class period, without disclosing that the communication was from a debt collector was enough to establish commonality. *Id.* at *21. Further, the issue of whether Plaintiff or other class members were actually misled, or were subjectively unaware that HRRG was a debt collector, was not an individualized issue defeating commonality, and the issue of whether the provision of a phone number on admissions paperwork equated to express consent was a question common to all class members because all class members filled out paperwork at the time of treatment. *Id.* at *22-25. Typicality was satisfied because Plaintiff’s claims were the same as those of the putative class members. *Id.* at *32-33. Regarding predominance, the Court held that determining whether Defendants were liable was subject to generalized proof and would not be overshadowed by individualized determinations. *Id.* at *37. The Court stated that the issue of whether class members received phone messages that lacked information required by the FDCPA or whether providing a phone number during the admissions process amounted to consent under the TCPA were common to the class members and predominated over any individual issues. *Id.* at *36-39. Regarding superiority, although both the FDCPA and the TCPA have built-in incentives for aggrieved Plaintiffs to litigate individually – such as the opportunity to collect statutory damages and attorneys’ fees – such claims were not inappropriate for class treatment and Congress did not indicate that consumers could not bring class actions under these statutes. *Id.* at *40-41. The Court thus concluded that large number of claims, along with relatively small statutory damages, the desirability of adjudicating the claims consistently, and the probability that individual members would not have a great interest in controlling the prosecution of the claims, indicated that a class action would be the superior method for adjudicating Plaintiff’s claims under the FDCPA and TCPA. *Id.* at *41-42. Accordingly, the Court rejected Defendants’ standing challenges and found class certification appropriate.
McDonald, et al. v. Asset Acceptance LLC, 2013 U.S. Dist. LEXIS 110829 (E.D. Mich. Aug. 7, 2013). Plaintiffs, a group of consumers, brought a class action alleging that Defendant violated the Fair Debt Collection Practices Act ("FDCPA") through its practice of retroactively imposing post charge-off interest on consumer debts it purchased from various financial institutions. Defendant purchased Plaintiffs’ charged-off debts from the Chase and World Financial Network National Bank ("WFNB"). Defendant then added interest to the principal from the date of charge-off to the date of the state court action, and brought its collection action in the state court. Plaintiffs argued that the original creditor had waived the right to collect interest once it decided to charge-off the debts. Defendant, as assignee, stood in the shoes of the original creditor, and could not collect interest during the period when the original debtor, not Defendant, owned the debt. The parties both moved for summary judgment. The Court granted Plaintiffs’ motion and denied Defendant’s motion. Defendant asserted that Plaintiffs’ individual claims were barred by the statute of limitations. Id. at *14. The Court stated that Defendant’s state court actions qualified as discrete violations of the FDCPA wherein Defendant was alleged to have misrepresented the amount of the debt owed by Plaintiffs in legal documents and Defendant also failed to provide any argument as to why the state court proceedings did not qualify as discrete violations. Accordingly, the Court found that Plaintiffs’ claims were not time-barred. Defendant also argued that the original creditors did not waive the right to impose interest because the credit card agreements between Plaintiffs and their respective creditors contained choice-of-law provisions. The Court observed that Defendant testified that they stopped adding interest to accounts once they are charged-off as part of its normal business practice. Moreover, Plaintiffs also provided evidence of agreements between Defendant and other financial institutions, all of which expressly excluded post charge-off interest from the definition of unpaid balance in the agreement. Therefore, the Court noted that it was clear from the evidence that Chase and WFNMB intended to waive the right to collect interest on Plaintiffs’ accounts. Further, the Court stated that Michigan law applied because Defendant was a Michigan corporation, and under this law, an assignee steps into the shoes of the assignor and only acquired such rights as the assignor possessed at the time of assignment and therefore Defendant could not retract a waiver made by its predecessor in interest. Id. at *30. Defendant further argued that because the waiver was not in writing, it was unenforceable under the Michigan statute of frauds. The Court found that the credit card account purchase agreements between Defendant and the original creditors specifically stated that the original creditors did not impose interest on the accounts subsequent to charge-off. Regarding the bona fide error defense, Defendant argued that it was not aware that the original creditors waived the right to collect interest and that it did not intent to violate the FDCPA. The Court opined that Defendant purchased the accounts with full knowledge that the legally enforceable unpaid balance did not include post charge-off interest and offered no analysis of the elements of the defense that it had the burden of demonstrating. The Court stated that other than the assertion that the procedures were reasonable, Defendant provided no explanation detailing how it was reasonable for it to impose interest on an account it did not yet own. Finally, Defendant asserted that none of the Plaintiffs knew that the original creditors waived interest; thus, there was no materially misleading statement regarding the debts. The Court noted that Defendant made false and misleading statements in its attempts to collect Plaintiffs’ debts when it unlawfully added interest to the accounts and undoubtedly, misrepresenting the total amount of the debt in a state court pleading was material, not merely a technicality. Id. at *35. Accordingly, the Court granted summary judgment to Plaintiffs and denied summary judgment to Defendant.

Thomasson, et al. v. GC Services Limited Partnership, 2013 U.S. App. LEXIS 18290 (9th Cir. Sept. 3, 2013). The District Court certified the class in an action alleging that Defendant violated the Fair Debt Collection Practices Act by failing to warn Plaintiffs that their calls could be monitored, which caused them to reveal financial information. Id. at *1-3. The Ninth Circuit granted the Defendant’s Rule 23(f) petition to appeal, reversed the District Court’s order, and remanded with instructions to decertify the class. Id. at *1, 5. The Ninth Circuit stated that establishing the claim at issue would require an individualized inquiry into hundreds of phone calls to determine whether and when any warning was given in each call. With a putative class of over 400 class members, Plaintiffs could not establish that Defendant acted uniformly as to each member of the class by relying on 18 anecdotal reports of individual telephone calls because that did not constitute significant proof of a uniform policy. Id. at *1, 3-4. Since the claim would necessarily require an individualized inquiry into each telephone call with Defendant, it did not generate a common
contention, let alone one that predominated. Id. at *4. Accordingly, the Ninth Circuit reversed the District Court’s order and remanded the case for further proceedings.

TCPA Class Actions

**A & L Industries, Inc. d/b/a Powder Coating, et al. v. P. Cipollini, Inc., 2013 U.S. Dist. LEXIS 142463 (D.N.J. Oct. 2, 2013).** Plaintiff brought a class action alleging that Defendant, through Business-to-Business Solutions (“B2B”), sent it and a class of other recipients junk faxes in violation of the TCPA. Plaintiff moved to certify a class consisting of all individuals and entities that received the identical fax in September 2006. The Court granted the motion. First, the Court noted that Plaintiff had submitted evidence that during the class period, B2B sent the allegedly illegal fax to more than 4,500 unique fax numbers. Thus, the Court found that the numerosity requirement was satisfied. Second, the Court found that commonality requirement was met because each of the class members’ claims hinged on the common contention that Defendant engaged B2B to send the exact same illegal facsimile to each potential class member. Third, regarding typicality, the Court found that the claims of all class members including Plaintiff arose from the same event, practice, or course of conduct. As to the predominance requirements, the Court found that Plaintiff presented evidence that B2B sent the September 2006 fax to numbers gleaned from a list purchased from a third-party provider and that Defendant did not know to whom B2B was sending the fax. The Court thus ruled that this evidence tended to negate individualized issues warranting adjudication by representation. Finally, regarding superiority, Defendant relied on Local Baking Products v. Kosher Bagel Munch, Inc., 23 A.3d 469 (N.J. App. Div. 2011), which held that TCPA suits were categorically inappropriate for class certification. Id. at *12-13. The Court noted that Local Baking analyzed superiority in the context of New Jersey’s class action rule and applied state court precedent in analyzing that rule. While New Jersey’s class action rule was essentially similar to the federal analogue, the Court was required to follow federal precedent interpreting the federal rule. Further, the Court stated that another problem with Local Baking was that it assumed, because the $500 statutory damages award considerably exceeded a TCPA Plaintiff’s real or sustained damages, such Plaintiff was sufficiently incentivized to act in his or her own self-interest without the necessity of class action relief. The Court found that the difference between actual and statutory damages, however, was of no moment when the statutory recovery was, in absolute terms, still minimal. The Court thus concluded that the TCPA claims were better off resolved in a single class action than in numerous individual lawsuits. Moreover, certifying a class furthered the policy behind Rule 23 by aggregating class members’ relatively paltry potential individual recoveries, thus overcoming the problem that small recoveries do not incentivize TCPA Plaintiffs to sue individually. For these reasons, the Court granted the motion for class certification.

**Bank, et al. v. Independence Energy Group LLC, Case No. 12-CV-1369 (E.D.N.Y. Mar. 12, 2013).** Plaintiff brought a class action under the Telephone Consumer Protection Act (“TCPA”), on behalf of all persons who received one or more telephone calls using an artificial or pre-recorded voice to advertise Defendants’ commercial goods or services within the last four years. Plaintiff alleged that Defendants placed one telephone call using an artificial or pre-recorded voice to his residential telephone line that delivered a message advertising Defendants’ electricity-related services. Plaintiff also alleged that during the class period, Defendants made similar telephone calls to at least 10,000 residential telephone lines. Neither Plaintiff nor the other class members gave Defendants prior express invitation or permission to make pre-recorded telephone calls to them. Plaintiff sought statutory and double damages and an order enjoining Defendants from further violating the TCPA. Defendant moved to dismiss for failure to state a claim, and the Court suo sponte dismissed Plaintiff’s complaint for lack of subject-matter jurisdiction. The Court observed that the specific language of the TCPA creates a private right of action only if otherwise permitted by the laws or rules of a State, and that New York state law prohibits class actions predicated on statutory damages. Accordingly, the Court opined that Plaintiff’s class action seeking statutory damages pursuant to the TCPA could not proceed, and that it could not exercise subject-matter jurisdiction over the TCPA class action. Thus, the Court dismissed Plaintiffs claims.

**Bank, et al. v. Independence Energy Group LLC, 2013 U.S. App. LEXIS 24014 (2d Cir. Dec. 3, 2013).** Plaintiff brought a class action under the Telephone Consumer Protection Act (“TCPA”), on behalf of all...
persons who received one or more telephone calls using an artificial or pre-recorded voice to advertise Defendants’ commercial goods or services within the last four years. Plaintiff alleged that Defendants placed one telephone call using an artificial or pre-recorded voice to his residential telephone line that delivered a message advertising Defendants’ electricity-related services. Plaintiff also alleged that during the class period, Defendants made similar telephone calls to at least 10,000 residential telephone lines. Neither Plaintiff nor the other class members gave Defendants prior express invitation or permission to make pre-recorded telephone calls to them. The District Court dismissed Plaintiff’s complaint for lack of subject-matter jurisdiction, based on application of § 901(b) of the New York Civil Practice Law and Rules (“CPLR”), which prohibits class action suits for statutory damages. On appeal, the Second Circuit vacated the District Court’s order. The Second Circuit stated that § 227(b)(3) of the TCPA provides that private parties may, “if otherwise permitted” by the laws or rules of court of a State, bring an action in an appropriate court of that State. Id. at *2-3. The Second Circuit, however, noted that in Mims v. Arrow Financial Services, LLC, 132 S. Ct. 140 (2012), the Supreme Court uprooted the TCPA jurisprudence by concluding that, despite § 227(b)(3)’s state-centric language, there was no convincing reason to read into the TCPA’s permissive grant of jurisdiction to state courts any barrier to the U.S. District Courts’ exercise of the general federal-question jurisdiction they have possessed since 1875. Id. at *3. The Second Circuit had considered in Giovanniello v. ALM Media, LLC, 726 F.3d 107, 111 (2d Cir. 2013), whether, in light of Mims’ fundamental shift in the way that the Supreme Court viewed § 227(b)(3)’s “if otherwise permitted” language, the governing statute of limitations in a TCPA claim was the applicable state limitations period, or the federal catch-all limitations period set forth in 28 U.S.C. § 1658(a). Id. The Second Circuit concluded that Mims could not be construed as requiring the application of state law limitations periods to TCPA claims in federal court, and remarked that its prior interpretation of § 227(b)(3) as having substantive content, and as a delegation of authority to state courts to set the terms of TCPA claims, no longer held true. Id. at *4. Instead, Mims suggested that in enacting the TCPA, Congress merely enabled states to decide whether and how to spend their resources on TCPA enforcement, and, in fact, Mims emphasized that Congress had a strong federal interest in uniform standards for TCPA claims in federal court. Thus, the Second Circuit concluded that Mims could not be construed to apply state law limitations periods to TCPA claims in federal court. Further, the Second Circuit stated that nothing about the law at issue here – a state civil procedure statute prohibiting class action claims for statutory damages – counseled a different result from that reached in Giovanniello. To the contrary, the Second Circuit had recognized in Giovanniello that the rationale set forth in Bonime v. Avaya, Inc., 547 F.3d 497 (2d Cir. 2008) – which held that CLPR § 901(b), not Rule 23, governed TCPA class action suits – had now been rejected. Id. at *5. Specifically, Bonime’s rationale was overturned in Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co., 559 U.S. 393 (2010). Further, Mims also undermined that rationale, which relied on jurisdictional interpretations of § 227(b)(3). Accordingly, the Second Circuit opined that Rule 23, not state law, governed when a federal TCPA suit may proceed as a class action.

Blow, et al. v. Bijora, Inc., Case No. 11-CV-3468 (N.D. Ill. Nov. 18, 2013). Plaintiffs brought a class action under the TCPA alleging that Defendant used an automated dialer to send mass marketing text messages to cellular telephones with Illinois area codes. Although the Court granted Plaintiffs’ motion for class certification, there were a number of problems, including the fact that the named Plaintiff, Nicole Strickler, was a member of the law firm handling the class action. Because Strickler’s financial interest in the case was not co-extensive with the class, and a law firm representing one of their own attorneys as named Plaintiff in a class action implied a manufactured litigation, the complaint was amended to add Nicole Blow and Jennifer Glasson as class representatives. Subsequently, on Plaintiffs’ request, Glasson’s claims were dismissed without prejudice. Thereafter, Plaintiffs explained that they received discovery from a third-party that showed that Glasson was not a proper class representative because she did not receive the specific text messages at issue. Plaintiffs moved for certification of a class different from the one certified earlier. The proposed class comprised of all persons with Illinois area codes who, on or after a date four years prior to the filing of the action and on or before a date 20 days following the filing of this action, received texts sent using an automated telephone dialing system, or persons who received automatic or pre-recorded text messages that did not contain the identity of the business placing the call or the telephone number that placed the call and sent using an automated telephone dialing system. The
Magistrate Judge recommended granting the motion. First, Defendant conceded that within the prescribed time period, sent texts to more than 1,000 individuals with cell phones with the designated Illinois area codes. *Id.* at *5*. Second, the Magistrate Judge noted that while certifying the earlier class, the Court had determined that the allegations that Defendant used an automated dialer to send mass marketing messages to consumers’ cellular telephones involved common factual questions about Defendant’s marketing efforts and common legal issues under the TCPA. Accordingly, the Magistrate Judge opined that commonality was established. *Id.* The Magistrate Judge stated that because the named Plaintiff’s claim and the claims of the putative class arose from the same mass of text messages, the typicality requirement was also satisfied. *Id.* Finally, the Magistrate Judge noted that regarding the Rule 23(b)(3) predominance requirement, the Court had determined that individual questions such as consent did not overwhelm individual questions here, and that all claims depended on proving whether Defendant sent those messages and that such conduct violated the TCPA. *Id.* at *6*. The Magistrate Judge also ruled that class action was the superior means of adjudication because resolution of issues on a class-wide basis was preferable to dealing with hundreds of suits involving small potential recoveries. Accordingly, the Magistrate Judge recommended re-certifying Plaintiffs’ proposed class with the new class definition.

**Chen, et al. v. Allstate Insurance Co., 2013 U.S. Dist. LEXIS 81409 (N.D. Cal. June 10, 2013).** Plaintiffs brought an action under the TCPA alleging that Defendant contacted them and other proposed class members on their cell phones without their consent. Subsequently, Defendant made an offer of judgment, and offered named Plaintiffs Richard Chen $15,000 and Florencio Pacleb $10,000, plus reasonable attorneys’ fees and costs. Chen filed a notice of acceptance of the offer of judgment, and was dismissed from the case. Pacleb did not accept and Defendant asserted that the offer to Pacleb was still open. Defendant then moved to dismiss for lack of subject-matter jurisdiction, and also argued that the demand for treble damages should be dismissed or stricken. The Court granted in part and denied in part Defendant’s motion. The Court observed that in class actions once a class is certified, the claims of the unnamed class members are not mooted by the named Plaintiff’s acceptance of an offer of judgment. *Id.* at *9-10*. The Court noted that in *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1086-87 (9th Cir. 2011), the Ninth Circuit held that a rejected offer of judgment for the full amount of a putative class representative’s individual claim does not moot a class action where the offer precedes the filing of a motion for class certification. *Id.* at *11*. Further, the Ninth Circuit had noted that if the class had been certified, mooting the putative class representative’s claim would not moot the class action, because upon certification the class acquires a legal status apart from the interest asserted by the class representative. *Id.* at *12*. The Ninth Circuit stated that if class certification was denied, mooting the class representative’s claim would not necessarily moot the class action, because the putative class representative retained an interest in obtaining a final decision on the class certification issue. *Id.* Even if the class certification issue had not yet been addressed, the Ninth Circuit opined that mooting the putative class representative’s claims would not necessarily moot the class action. *Id.* Although Defendant argued that *Pitts* was no longer good law in light of *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), the Court disagreed. The Court noted that while *Pitts* was limited to a class action, the ruling in *Genesis* was limited to the collective action context. As the action here was filed as a proposed Rule 23 class action, the Court opined that *Pitts* remained controlling. Defendant argued that because Pacleb could obtain complete relief without further litigation, his claims were moot, and because the offer of judgment was made prior to any motion for class certification, there was no longer any controversy between the parties and the complaint should be dismissed for lack of subject-matter jurisdiction. The Court opined that even if Pacleb’s claims were moot, the entire case cannot be dismissed for lack of subject-matter jurisdiction, and Pacleb would still be able to move for class certification.

**Craftwood II, Inc. d/b/a Bay Hardware, et al. v. Tomy International, Inc., 2013 U.S. Dist. LEXIS 99350 (C.D. Cal. July 15, 2013).** Plaintiff, a corporation, brought a class action under the TCPA alleging that Defendant sent unsolicited junk faxes without permission from the recipient, and that the faxes did not include a required notice that recipients had the right to stop future junk faxes. Defendant’s counsel sent Plaintiff a settlement offer of $1,500 for each faxed advertisement and agreed to pay Plaintiff’s costs, any pre-judgment interest on statutory damages, and to accept entry of an injunction prohibiting Defendant
from sending any unsolicited faxed ads that violated the TCPA. Plaintiff’s counsel rejected Defendant’s offer, stating that the lawsuit sought class-wide relief, and that Plaintiff would consider a class-wide resolution only after conducting enough discovery. Defendant moved for summary judgment, arguing that because it provided all the individual relief to which Plaintiff could be entitled, its offer mooted Plaintiff’s claims. The Court treated the motion for summary judgment as a motion to dismiss for lack of jurisdiction, and denied it. Id. at *1-4. The Court noted that the Ninth Circuit in Pitts v. Terrible Herbst, Inc., 653 F.3d 1090 (9th Cir. 2011), held that a Defendant’s strategy of attempting to “buy off” the small individual claims of the named Plaintiffs would not result in mootng a class action. Among other things, such a strategy is inconsistent with the purpose of Rule 23. Id. at *8-10. Defendant argued that Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013), overruled or seriously undermined the decision in Pitts. The Court, however, stated that Genesis was distinguishable because it considered a claim filed as a collective action under the FLSA, and a ruling in the context of a collective action does not directly apply to a class action. In addition, the Court observed that Genesis did not actually reach the issue of whether a Rule 68 offer of judgment mooted the individual claim. The Supreme Court assumed that to be the case. Id. at *10-11. Here, Plaintiff had taken steps to preserve its continuing interest in the lawsuit. Plaintiff did not concede that the offer it rejected actually mooted its case. Moreover, the offer did not provide relief for the class claims, and it only offered payment for the not-yet-determined number of faxes that actually violated the TCPA. Thus, the Court held that Pitts remained controlling law, and accordingly, denied Defendant’s motion. Id. at *10-16.

**Fields, et al. v. Mobile Messengers America, Inc., 2013 U.S. Dist. LEXIS 163950 (N.D. Cal. Nov. 18, 2013).** Plaintiffs, a group of consumers, brought an action under the TCPA alleging that Defendant placed unauthorized, misleading, or deceptive charges on consumers’ telephone bills. Plaintiffs claimed that Defendants sent unsolicited texts providing horoscopes and celebrity gossip to consumers, and regardless of whether a consumer responded to the initial text, Defendants enrolled the consumer in one of several subscription plans without his or her consent, and charged $9.99 per month for the subscription plan on their phone. Plaintiffs further alleged that Defendants were able to enroll Plaintiffs in subscription plans without their consent by means of a software platform. Plaintiffs moved for certification of three classes. First, Plaintiffs sought to certify a nationwide text-receipt class, alleging a claim under the TCPA, which prohibits placing calls to a mobile phone using an automatic telephone dialing system without the recipient’s prior express consent. Second, Plaintiffs sought to certify a nationwide enrollment class, alleging claims under California law for money had and received, conversion, unjust enrichment, and negligence. Third, Plaintiffs sought to certify a California enrollment sub-class, asserting claims under the California Business & Professions Code. The Court denied the motion. Defendants relied on the testimony of the architect of Wise Media’s subscription platform, Ryan McDonnell, as evidence of mass consent. McDonnell stated that the platform confirmed the validity of consumer subscription requests with secure PIN numbers and that he tested the platform frequently. According to Plaintiffs’ own expert, Arthur Olsen, over 1.5 million subscriptions were confirmed by consumers by Wise Media’s platform. Defendants also submitted records of incidents where putative class members consented to Defendants’ texts by responding with a PIN and offered a report that categorized why consumers complained to their carriers about their subscription plans. Plaintiffs, however, argued that the supposed confirmations logged by Wise Media’s platform were fraudulent because Wise Media employees could access the platform. Olsen stated that after analyzing a division of confirmations recorded by Wise Media’s platform, he noticed suspicious patterns suggesting programmed confirmations, rather than actual confirmations by consumers. Defendants asserted that the suspicious patterns represented less than 10% of the total recorded confirmations on Wise Media’s platform. Finally, McDonnell opined that wide-scale fraud in Wise Media’s platform was not possible because the platform recorded a consumer’s confirmation with the consumer’s phone number, PIN, and IP address. After examining the evidence and other submitted documentation, the Court found that Plaintiffs had failed to meet their burden to prove that the issue of consent could be addressed with class-wide proof. Id. at *13-14. Defendant’s platform had recorded over 1.5 million instances of consent by subscribers. Id. at *14. Thus Plaintiffs’ argument alleging mass fraud did not satisfy their evidentiary burden under Rule 23(b) because it merely speculated, without any actual evidence, that mass fraud might have occurred. Accordingly, the Court denied their motion to certify a
nationwide text-receipt class. Similarly, the Court noted that Plaintiffs failed to show predominance of common issues of law with regard to the proposed nationwide enrollment class and failed to show numerosity with regard to the proposed California enrollment sub-class.


Plaintiff brought a class action alleging that Defendants sent thousands of unsolicited fax advertisements for goods and/or services without proper opt-out notices, in violation of the TCPA. The only private cause of action explicitly provided for in TCPA is a state court right of action, which is available only if otherwise permitted by the laws or rules of court of a State, and New Jersey law or rules provides that a TCPA claim cannot be maintained in state court as a class action. Id. at *1-2. Accordingly, Defendants moved to dismiss, arguing that New Jersey state law operates to bar a TCPA claim from being maintained as a class action. The Court denied the motion. First, the Court noted that **Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co., 130 S. Ct. 1437 (2010)**, which involved state law claims for unpaid statutory interest, held that, if a suit met Rule 23’s criteria, it could be maintained as a federal class action notwithstanding state law. Further, the Court observed that **Landsman & Funk PC v. Skinder-Strauss Associates, 640 F.3d 72 (3d Cir. 2011)**, held that, although the TCPA is a federal statute, it does not support federal question jurisdiction under 28 U.S.C. § 1331; thus, a TCPA action, despite its grounding in federal law, could be maintained in federal court only pursuant to diversity jurisdiction. Id. at *10. Further, **Mims v. Arrow Financial Services, 132 S. Ct. 740 (2011)**, held that nothing in the text, structure, purpose, or legislative history of the TCPA calls for displacement of the federal question jurisdiction that District Courts ordinarily have under 28 U.S.C. § 1331. Id. at *13. The Court opined that there is no statement in the TCPA sufficiently explicit to demonstrate that Congress intended to supersede the well-established principle that the Federal Rules of Civil Procedure reign supreme in a federal court action based on federal law, and that TCPA only states that a state court cause of action must comport with state law. Id. at *15. The Court noted that the underlying principle of **Mims** is that TCPA does not limit the availability of remedies in federal court, and **Shady Grove** holds that, even where a federal court Plaintiff asserts a state law cause of action, Rule 23 may permit class-wide relief where state law would deny it. Id. Thus, the Court opined that in a federal court TCPA case, class action eligibility is governed by federal law and not state law. Further, the Court observed that the court in **Landsman & Funk, P.C. v. Skinder-Strauss Associates, 2012 U.S. Dist. LEXIS 183249 (D.N.J. Dec. 19, 2012)**, reversed its earlier decision and concluded that Plaintiff was not precluded from bringing this class action complaint. Id. at *17. The court in **Landsman** also stated that the state law limitations have no application in this federal question case in federal court. Accordingly, the Court observed that Rule 23, not state law, governs the availability of class action treatment of Plaintiff’s claims under TCPA. Second, the Court noted that Plaintiff asserted a state law claim under the NJ Fax Act which prohibits transmission of certain unsolicited advertisements, provides for a private right of action with statutory damages of $500 per violation, and instructs courts to proceed in a summary manner to adjudicate such claims. Id. at *18-19. The Court remarked that the NJ Fax Act class claim possibly presented a stronger case for dismissal than the federal TCPA claim, and the statutory injunction to proceed in a summary manner suggested that a class action was not within the State legislature’s contemplation. The Court, however, also observed that Plaintiff in **Shady Grove** also asserted a cause of action created by a state statute, and that New York had by statute foreclosed a class action. The Supreme Court found that the standards of Rule 23, were in direct conflict with those of the New York statute, and held that this valid federal rule, being in conflict with a state one, was deemed to control by virtue of the Rules Enabling Act. Id. at *20-21. Accordingly, the Court opined that for the NJ Fax Act claim, as for the TCPA claims, Rule 23 controls the permissibility of class action treatment, and denied Defendants’ motion to dismiss.


Plaintiff brought a class action alleging that Defendant violated the TCPA by sending unsolicited fax advertisements to Plaintiff and numerous other recipients. Defendant, an attorney, hired Top of Mind Solutions (“Top of Mind”), a third-party advertiser, to distribute a one-page fax to his contacts. Defendant’s faxes did not inform the recipient how to stop receiving the faxes. As a result, if the faxes were found to be advertisements, sending them violated the TCPA. The District Court granted the Plaintiff’s motion for class
certification, and finding the faxes to be unsolicited, also granted its motion for summary judgment. It ordered Defendant to pay $500 in statutory damages for each of the 8,430 faxes sent for a total of $4,215,00. The Court allocated the amount as follows: $7,500 to the representative Plaintiff; $1,430,055.90 for attorneys’ fees and expenses; and the remainder, after payment to the class members, to the Legal Assistance Foundation of Metropolitan Chicago as a cy pres award. Id. at *1-3. On appeal, the Seventh Circuit affirmed the District Court’s decision on the merits, but vacated its remedial order. Id. at *17. As to class certification, the Seventh Circuit held that individual issues about who received how many faxes did not predominate. The company that sent the faxes kept adequate records concerning who was sent how many faxes and there was no need for individual adjudication on this issue. Id. at *4-7. The Seventh Circuit agreed with the District Court that the only issue on the merits was whether the faxes were advertisements. The Seventh Circuit concluded that promotion or marketing was the reason the faxes were transmitted and the fact that only 25% of each fax was devoted to an advertisement for goods did not make the advertising incidental within the meaning of applicable FCC Regulations. Id. at *7-12. The Seventh Circuit, however, noted several problems with the District Court’s remedial order. First, it noted that the District Court ordered the Defendant to pay $4,215,00, but it did not say to whom. None of the individual class members were entitled to that much, and it was the individual class members who received the faxes who were entitled to damages, not the class as a whole. Id. at *12-13. The Seventh Circuit also took issue with the District Court’s order requiring that the residue be turned over to a charity without first soliciting the views of the parties. Id. Although the Foundation was a worthy organization, many case law authorities have expressed skepticism about using the residue of class actions to make contributions to judges’ favorite charities. The Seventh Circuit stated that money not claimed by class members should be used for the class’ benefit to the extent possible. Id. at *13-17. Accordingly, the Seventh Circuit affirmed the District Court’s decision on the merits but vacated the remedial order. It remanded the case with instructions to enter a judgment requiring the Defendant to remit to the registry or to a third-party administrator. Id. at *17-18.

Mussat, et al. v. Global Healthcare Resource, LLC, 2013 U.S. Dist. LEXIS 35107 (N.D. Ill. Mar. 13, 2013). Plaintiff, a cosmetic surgeon, brought a class action alleging violations of Telephone Consumer Protection Act (“TCPA”), the Illinois Consumer Fraud Act, and Illinois common law of conversion. Plaintiff alleged that she received a fax from Global Healthcare Resource (“GHR”) on behalf of its subsidiary Physician Billing Services (“PBS”). Plaintiff submitted fax logs provided by GHR’s former counsel for February 4, 2011, and February 7, 2011, which showed that 47 faxes were sent during a 72-minute period on each of those days. Plaintiff contended that some of the fax numbers shown on the logs belonged to doctors’ offices who were not existing clients of PBS, and that the phone logs did not show that PBS ever called the offices prior to sending the faxes. Plaintiff moved for class certification. The Court granted certification of a class comprised of all individuals with a fax machine who on February 4, 2011, or February 7, 2011, received at least one fax by or on behalf of GHR promoting PBS with respect to whom Defendant did not have prior express permission or invitation for the sending of such fax or faxes according to Defendant’s records and with whom Defendant did not have an established business relationship. Id. at *1. GHR contended that the fax log was inadmissible because it had not been properly authenticated. Plaintiff stated that GHR supplied the fax log during discovery and indicated that it listed GHR’s fax transmissions. The Court observed that because the very act of production is implicit authentication, the fax log had been authenticated and could be considered in deciding the class certification motion. Id. at *9. Based on GHR’s fax logs, Plaintiff asserted there were at least 87 class members. The Court remarked that even if it eventually proved true that GHR sent no unsolicited faxes, or no unsolicited faxes other than those received by Plaintiff herself, Plaintiff presented sufficient evidence to meet the numerosity requirement. The Court also opined that Plaintiff’s claims were typical of the class, for all the class members’ claims were based on the theory that Defendants sent them unsolicited faxes without any prior communications. The Court noted that the adequacy requirement was met because Plaintiff had participated actively in the case by submitting to a deposition, class counsel had significant experience bringing class action claims, including claims under the TCPA, and there was no indication that Plaintiff’s interests were antagonistic to those of other class members. Plaintiff also contended that questions of law and fact common to the class predominated over individualized questions, and that the common issue was
whether GHR sent a particular fax to the class members without their consent. The Court reasoned that other common questions were the manner in which GHR assembled its fax list and whether GHR’s practice was to contact fax recipients before sending them a marketing fax. Although GHR indicated that some of the numbers on the fax logs corresponded to its existing clients, it did not present evidence that every number belonged to an entity with which it had a business relationship. The Court opined that although there were individual questions as to the content of the faxes, the individual entities received, and whether the faxes were solicited, common issues predominated. Finally, the Court observed that a class action was the superior method for the adjudication of the class members’ claims, and accordingly granted Plaintiff’s motion.

**O’Brien, et al. v. General Electric Corp., Case No. 12-CV-1909 (S.D. Cal. Aug. 2, 2013).** Plaintiff, a credit card holder, brought a class action under the Telephone Consumer Protection Act ("TCPA") alleging that Defendant made repeated telephone calls to her without prior consent and that the calls continue after she asked for them to stop. When Plaintiff was approved for her credit account, she was provided an initial disclosure statement, which contained an arbitration clause. Later, Plaintiff received her credit card along with an agreement which also contained an arbitration clause. Subsequently, a change in terms of the credit card agreement was sent to Plaintiff that included an arbitration clause and a waiver of the right to pursue class actions in arbitration. The arbitration clause in this amendment contained essentially the same language as the earlier agreement. When Plaintiff missed her credit card payments, Defendant contacted her by telephone and through written correspondence regarding the missed payments. Plaintiff alleged that she contacted an attorney to stop the calls and verbally instructed Defendant’s agents to stop the calls to no avail. Defendant moved to dismiss the class allegations and also moved to stay and compel contractual arbitration on an individual basis. The Court denied the motion to dismiss, but granted the motion to compel arbitration. In moving to dismiss the class allegations, Defendant argued that the proposed class definition was not adequately defined because it was improperly merits-based. Plaintiff asserted that the issue was premature and a motion to dismiss was an inappropriate vehicle for challenging the class allegations. Further, Plaintiff contended that if Defendant sought to strike the class allegations, the motion should be denied because such decisions should be based on the complete record supporting a motion to certify the class, not on a complaint simply providing notice of the action. The Court held that it was inappropriate to resolve the class claims at the pleading stage, and that Defendant’s motion was premature and more properly presented in opposition to Plaintiff’s motion for class certification. Thus, the Court denied Defendant’s motion to dismiss Plaintiff’s class allegations. Regarding the motion to compel arbitration, Plaintiff contended that the arbitration provision was not applicable to her because her claims did not arise from or relate to the credit card account, noting that case law authorities have long held tort-based causes of action, including invasion of privacy and nuisance, do not arise under contract and therefore cannot be subject to contractual arbitration provisions. Further, Plaintiff asserted that the claims presented here were independent from the contract containing the arbitration clause. *Id.* at *10. The Court remarked that Plaintiff’s contention was unpersuasive that her claims were not related to the broad arbitration clause contained in her credit card agreement that was entered into when Plaintiff received her credit card, and revised subsequently. The Court observed that the provision’s language was clearly not limited in scope because the arbitration provision broadly provided that any past, present, or future legal dispute of any kind, including statutory and common law claims and claims for equitable relief, that related in any way to Plaintiff’s account or her relationship with Defendant would be resolved by binding arbitration. Finally, regarding Plaintiff’s claim that she would be divested of her ability to vindicate her statutory rights if required to participate in arbitration, the Court opined that as the arbitration provision clearly provided safeguards against such divestiture, this contention was unpersuasive. Thus, because the Court found that the arbitration provision contained in the credit card agreement was enforceable and applicable to Plaintiff’s individual claims, it granted Defendant’s motion to compel arbitration.

**Olney, et al. v. Resumedirector.com, 2013 U.S. Dist. LEXIS 141339 (E.D. Cal. Sept. 30, 2013).** Plaintiff brought an action on behalf of himself and others similarly-situated alleging that Defendant, Job.Com, used an automatic telephone dialing system ("ATDS") to call Plaintiff’s cellular telephone in an effort to sell or solicit its services without Plaintiff’s prior express consent in violation of the Telephone Consumer
Protection Act ("TCPA"). Defendant filed a third-party complaint against three providers/operators of websites ("Third-Party Defendants ") that purported to connect job seekers with recruiters and employers by posting job seeker’s resumes on various job websites. Defendant alleged that the Third-Party Defendants, acting as Plaintiff’s agent, provided it with Plaintiff’s telephone number during the process of registering Plaintiff on Defendant’s website, which contained an “opt-out” option of receiving telephone communications form Defendant, and the Third-Party Defendants failed to opt-out Plaintiff. Id. at *2-3. The Third-Party Defendants moved to dismiss Plaintiff’s action based on Plaintiff’s lack of statutory standing, and to strike the class allegations. The Court denied the Third-Party Defendants’ motions. The Third-Party Defendants argued that Plaintiff did not have standing to pursue his TCPA claim because Plaintiff voluntarily provided his cell phone number to the provider’s website, explicitly authorized the provider to register him on Defendant’s website and other websites, and the provider became Plaintiff’s agent and was able to consent to Defendant’s call to Plaintiff. Id. at *11-12. The Third-Party Defendants presented extensive extrinsic evidence in support of their argument, including the declaration of their Co-Chief Executive Officer, who described how Plaintiff created an account for himself and consented to posting his resume on numerous job boards, and how Plaintiff offered his phone number during the process. The Third-Party Defendants also presented evidence obtained during discovery, including copies of the statement for the telephone that received the phone calls at issue. The Court refused to consider any of the evidences as extrinsic evidence is not considered in the context of motion to dismiss without converting the motion to a motion for summary judgment, and none of evidence offered fell into the exceptions that allowed such conversion. Id. at *17. The Third-Party Defendants asserted that Plaintiff would be unable to identify any discovery that could help his case, and identified numerous case law authorities for the proposition that provision of one’s cell phone number constituted consent under the TCPA. Id. at *20. The Court, however, found that several of those cases concerned confirmatory text messages, and were not directly analogous because Plaintiff here had never directly communicated with Defendant in a manner that would expressly indicate consent. The Court further found that the issue of whether consent was given was not a straightforward inquiry because even if Plaintiff had consented to calls from the Third-Party Defendants, the issue still remained as to whether that was sufficient to consent to calls from other job hunting websites to whom the Third-Party Defendants provided Plaintiff’s telephone number. Id. at *24. Because Plaintiff had not yet had an opportunity to discover all the material that was pertinent to the motion at the current stage of litigation, the Court found no reason to adjudicate a summary judgment motion. The Court therefore denied the Third-Party Defendants’ motion to dismiss Plaintiff’s action. The Court further denied the Third-Party Defendants’ motion to strike Plaintiff’s class allegations as Plaintiff satisfied all the requirement of Rule 23. Plaintiff’s proposed class of all persons within U.S. who received any telephone calls from Defendant or its agent to their cellular telephone made through the use of ATDS within the defined period consisted of thousands of class members. Id. at *32-35. Plaintiff satisfied the numerosity requirement. Plaintiff also satisfied the commonality requirement by identifying a common question that could result in a common answer, i.e., whether Defendant’s employment of an “opt-out” method of gaining consent violate the TCPA. Id. at *39-40. Plaintiff further satisfied the typicality requirement as his claim was co-extensive with those of the other potential class members because he suffered the same exact injury, i.e., receiving calls from Defendant on his cellular telephone. Id. at *42. The Third-Party Defendants did not dispute Plaintiff’s ability to satisfy the adequacy of representation requirement. Further, the Court reasoned that the present record did not warrant a finding that individualized questions predominated over the common question articulated. The Court noted that the individual issues raised by the Third-Party Defendants – such as “does the failure to uncheck Defendant’s consent box indicate consent, or does it indicate that the person did not see the box, or that the box was automatically checked, or did not understand that they could un-check” – might not be legally relevant if use of an opt-out method as employed by Defendant was found unlawful. Id. at *45-46. Accordingly, the Court denied the Third-Party Defendants’ motion to strike the class allegations.

Physicians Healthsource Inc., et al. v. Cephalon, Inc., Case No. 12-CV-3753 (E.D. Pa. Jan. 28, 2013). Plaintiff, a healthcare provider, brought a class action alleging that Defendant sent two unsolicited advertisements via a facsimile machine in violation of the Telephone Consumer Protection Act ("TCPA"). Defendants filed a motion to dismiss for lack of standing, and alternatively argued that if Plaintiffs were
found to have standing, the scope of discovery should be limited to only the two faxes in dispute. \textit{id.} at *1-2. The Court denied Defendants’ motion. Defendants argued that Plaintiff had no viable claim for relief under the TCPA because it was not the recipient of the alleged fax advertisements. Defendants contended that Dr. Martinez, an employee of Plaintiff, was the recipient for purposes of the TCPA because the faxes at issue were addressed, directed, and transmitted to Martinez at a number he held out as his own. Defendants argued that because Plaintiff did not receive the faxes, it suffered no injury, and thus lacked standing to bring a claim under the TCPA. In absence of any Third Circuit precedent addressing the issue of standing relating to claims brought under § 227(b) of the TCPA, the Court relied on the legislative history of the TCPA and observed that the Congress emphasized that unlike regular mail, when an unsolicited advertisement was sent via fax, the recipient assumed both the cost associated with the use of the facsimile machine and the cost of the paper used to print out facsimile messages. \textit{id.} at *4. Further, Congress explained that receiving an unsolicited fax advertisement occupied the recipient’s facsimile machine so that it was unavailable for legitimate business messages while processing and printing the junk fax. \textit{id.} at *5. In this instance, Plaintiff owned the fax machine and paid the telephone bills for the fax machines. Defendants sent the fax advertisements to Plaintiff’s fax machine and a telephone line owned and paid for by Plaintiff. Further, Defendants’ fax messages occupied Plaintiff’s fax machine, presumably making it unavailable to process other fax messages for legitimate business purposes. Thus, the Court opined that if these factual allegations were true, Defendants’ faxes caused the very type of harm that Congress sought to remedy when it enacted the TCPA. Thus, the Court concluded that Plaintiff suffered an injury-in-fact, there was a causal connection between the injury and the conduct complained of, and it was likely the injury would be redressed in a favorable decision. Accordingly, the Court denied Defendant’s motion to dismiss Plaintiff’s claim for lack of standing. \textit{id.} at *6. The Court also refused to limit discovery to the two faxes sent to Plaintiff. \textit{id.} at *6, n. 1.

\textit{Smith, et al. v. Citibank, N.A., Case No. 13-CV-748 (C.D. Cal. June 18, 2013)}. Plaintiff, a debtor, brought a class action alleging that Citibank violated the TCPA by improperly calling his cell phone using an auto dialer. When Plaintiff fell behind on his student loan, Citibank called him on his cellphone in an attempt to collect payment on the loan. Plaintiff informed the representative that he revoked all consent to receive calls on his cellphone. Plaintiff alleged that Citibank called him more than 20 times from the auto dialer over the course of the next several weeks, thereby causing severe emotional distress. Plaintiff electronically signed and submitted a loan application (“Application”) to Citibank, prior to which he was required to review a promissory note (“Note”) and agree to the terms and conditions governing the electronic submission of the Application. The Application contained an express reminder to review the terms of the Note prior to signing the Application and the Note contained an arbitration agreement. Citibank moved to compel arbitration, and the Court granted the motion. The Court observed that under Nevada law, an agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract. \textit{id.} at *5. Here, Plaintiff agreed to the agreement by signing and submitting the Application, and he did not allege any facts to show that the arbitration agreement was invalid or unenforceable under Nevada law. This, combined with the strong public policy favoring arbitration, led the Court to find that the arbitration agreement was valid and enforceable. The Court also analyzed whether Plaintiff’s claims fell within the scope of the arbitration agreement. The Court observed that in considering whether a claim falls within the scope of an arbitration agreement, it should focus on the factual allegations in the complaint rather than the legal causes of action asserted. \textit{id.} at *6. The Court stated that if the allegations underlying the claims touched matters covered by the parties' agreements, then those claims must be arbitrated, whatever the legal labels attached to them. \textit{id.} Here, the arbitration agreement provided that claims subject to arbitration included claims relating to any and all aspects of Plaintiff’s account such as the origination, establishment, terms, treatment, operation, handling, billing, servicing, limitations on, or termination of Plaintiff’s account. Plaintiff’s claims arose out of his failure to make required payments on his loan and Citibank’s efforts to collect the amount owed under the terms of the Note. These claims related to the terms, treatment, operation, handling, billing, servicing, termination, and acceleration of his account. Given the broad language of the agreement, the Court found that Plaintiff’s claims fell within its scope. Additionally Citibank
moved to stay this action pending arbitration. Because the Court found that Plaintiff’s claims were arbitrable under the terms of the arbitration agreement, it stayed the proceeding. Accordingly, the Court granted Citibank’s motion to compel.

(xlii) The *Cy Pres* Doctrine In Class Actions

*Dennis, et al. v. Kellogg Co.*, 2013 U.S. Dist. LEXIS 64577 (S.D. Cal. May 3, 2013). Plaintiffs brought a consumer class action alleging that Defendant made false and unsubstantiated representations in its advertising and labeling of its Frosted Mini-Wheats products. Subsequently, the parties settled the action, with the settlement agreement providing for a $2.75 million cash fund for distribution to class members on a claims-made basis; $5.5 million of food products to charities to feed the indigent pursuant to the *cy pres* doctrine; a prohibition on Defendant from using the challenged representations in advertising for three years; and approximately $2 million in attorneys’ fees and costs. *Id.* at *1*. The District Court gave final approval to the settlement. The Ninth Circuit, however, reversed the District Court’s final settlement approval order, vacated the judgment and award of attorneys’ fees, and remanded for further proceedings, finding that the *cy pres* award under the terms of the original settlement failed to target the Plaintiff class, as the organizations identified had little to do with “the purposes of the underlying lawsuit or the class of plaintiffs involved.” *Id.* at *2*. The Ninth Circuit explained that given the asserted claims concerning fair competition and consumer fraud “appropriate *cy pres* recipients are not charities that feed the needy, but organizations dedicated to protecting consumers from, or redressing injuries caused by, false advertising.” *Id.* at *1-2*. Thereafter, the parties renegotiated the settlement and moved for preliminary approval of the revised settlement. The revised settlement provided for a $4 million cash fund for distribution to class members on a claims-made basis, any remaining balance of which would be distributed equally, pursuant to the *cy pres* doctrine, among the Consumers Union, Consumer Watchdog, and the Center for Science in the Public Interest, and prohibited Defendant from using the challenged representations in advertising for three years. The Court granted preliminary approval to the revised settlement. *Id.* at *2*. First, the Court certified for settlement purposes a class consisting of all persons or entities in the United States who purchased Frosted Mini-Wheats branded cereal from January 28, 2008, up to and including October 1, 2009. *Id.* at *2-4*. Second, the Court noted that the proposed settlement, which was the product of arms-length negotiations by experienced counsel, provided considerable cash recovery and injunctive relief. The Court was also satisfied with the proposed *cy pres* recipients, as each a well-established and well-regarded consumer protection organization, which sufficed under the Ninth Circuit’s prescriptions. However, the Court expressed concern over how identification of proper *cy pres* recipients resulted in a severe drop in the value of the class’ claims, from $10.5 million to about $2 million or approximately 75%, while requested attorneys’ fees of approximately $2 million remained constant. The Court directed parties to address these concerns in their final approval briefing and at the final approval hearing and, accordingly, granted preliminary approval to the revised settlement. *Id.* at *5*.

*Hughes, et al. v. Kore Of Indiana Enterprise, Inc.*, 2013 U.S. App. LEXIS 18873 (7th Cir. Sept. 10, 2013). Plaintiff, a customer, brought an action alleging that Defendant failed to post a required notice on two ATMs that charged a fee for transactions in violations of the Electronic Fund Transfer Act (the “Act”). Although the District Court had granted Plaintiff’s motion for class certification, it subsequently decertified the class. On appeal, the Seventh Circuit reversed and remanded. The Seventh Circuit noted that a Plaintiff in an individual suit who proves a violation of the Act is entitled to his actual damages, if any, or to statutory damages of at least $100 but not more than $1,000, whereas if a class action is filed and is successful, the class is entitled to such amount of damages as the District Court may allow, but only up to the lesser of $500,000 or 1% of Defendant’s net worth. *Id.* at *3*. No minimum amount of damages to which a class member is entitled is specified. *Id.* The District Court decertified the class on two independent grounds. First, the District Court had stated that the class members would do better bringing individual suits, since if an individual suit were successful, Plaintiff would be entitled to at least $100 in damages. The Seventh Circuit observed that although some class members could have made many transactions on the ATMs, the $100 to $1,000 range for statutory damages was per suit rather than per transaction, and thus individual lawsuits which would be seeking damages of only $100 would not be realistic. The Seventh Circuit stated that the smaller the stakes to each victim of unlawful conduct, the
greater the economies justifying class action treatment and the likelier that the class members would receive some money rather than nothing, given the difficulty of interesting a lawyer in handling a suit for such modest statutory damages as provided for in the Act. Further, the Seventh Circuit remarked that the amount of damages that each class member could expect to recover was too small even to warrant the submitting of a proof of claim in the class action proceeding, and thus, the best solution was a *cy pres* decree. The Seventh Circuit stated that payment of $10,000 to a charity whose mission coincided with the interest of the class would amplify the effect of the modest damages in protecting consumers, and a foundation that received $10,000 could use the money to do something to minimize violations of the Act that class members each given $3.57 could not do. Thus, the Seventh Circuit remarked that it should be possible to find a charity concerned with consumer protection issues of the general character presented by the case. Second, the District Court had decertified the class because that the requirement of notice to class members could not be satisfied, and because the two ATMs were in college bars, obtaining the identity of all the users could require subpoenaing hundreds of banks. The notice proposed by class counsel consisted of sticker notices on two ATMs and publication of a notice in the principal Indianapolis newspaper and on a website. Although notice by publication involved a risk that a class members would fail to receive the notice, the Seventh Circuit observed that there was no indication that any class member had a damages claim large enough to induce him to opt-out and bring an individual suit for damages, and that the notice posted conspicuously in both bars in which the ATMs were located was the best way to reach the bars’ regulars who were most likely to have made repeated use of the ATMs and thus to have a potential interest in opting-out. The Seventh Circuit stated that a class action had a deterrent and a compensatory objective. Here, the compensatory function of the class action had no significance, but the Seventh Circuit opined that a judgment would remind Defendant to take greater care in the future to comply with federal law. With the maximum statutory damages of $100 to $1,000 per individual Plaintiff, and an ATM user fee of $3, the Seventh Circuit opined that the *cy pres* remedy was the most appropriate. The Seventh Circuit also noted that the award of damages to the class members would have no greater deterrent effect than the *cy pres* remedy, would do less for consumer protection than if the money was given to a consumer protection charity, and would impose a significant administrative expense that handing the $10,000 over to a single institution would avoid. The Seventh Circuit observed that a time-saving alternative could be a class action with the stated purpose, at the outset of the suit, of a collective award to a specific charity. Accordingly, the Seventh Circuit reversed the District Court’s order.

*In Re EasySaver Rewards Litigation, 2013 U.S. Dist. LEXIS 15738 (S.D. Cal. Feb. 4, 2013).* Plaintiffs brought a nationwide class action alleging that Defendants’ practice of enrolling customers in a rewards program was unlawful and constituted fraud, violation of California’s Unfair Competition Law, the California Consumers Legal Remedies Act, the Federal Electronic Funds Transfer Act, breach of contract, breach of implied covenant of good faith and fair dealing, invasion of privacy, and negligence. Plaintiffs were on-line consumers who completed purchases on Defendant Provide Commerce’s retail websites and who were subsequently enrolled in a rewards program run by Defendant Regent Group, Inc. d/b/a Encore Marketing International. Plaintiffs alleged that Provide Commerce transmitted the consumers’ personal payment information to Regent Group without the consumers’ consent and that the consumers were involuntarily enrolled in the rewards program and charged without their consent. After several years of litigation and substantial discovery, the parties reached settlement which awarded each claimant a pro-rata share of a $12.5 million cash fund for restitution of non-reimbursed membership fees, as well as a $20 on-line credit at Provide Commerce’s websites. *Id.* at *10.* The settlement class consisted of all individuals who placed an order with Provide Commerce’s website during a defined period and were subsequently enrolled by Regent Group in one or more of the identified membership programs. *Id.* at *8.* The total settlement approximated $38 million if the entire class used the credits and made claims for reimbursement. *Id.* at *11-12.* The settlement also provided incentive awards to the named class representatives and attorneys’ fees up to a total of $8.65 million, plus actual costs up to $200,000. *Id.* at *12.* After a hearing regarding the settlement and the fees, costs, and incentive awards, the Court granted Plaintiffs’ motion for final approval of settlement. The Court concluded that the $20 credit in addition to the cash reimbursement fund provided fair, reasonable, and adequate relief to class members based on the nature of Plaintiffs’ claims and status of the case. The Court held that the restrictions imposed on the $20 credits did not alter the
value of the credit to the class members, and therefore overruled one named class member’s objection to the $20 credits. The Court also overruled a class member’s objection to the cy pres distributions in the proposed settlement agreement. The settlement designated three academic institutions as cy pres recipients – San Diego State University, University of California-San Diego, and University of San Diego Law School – in order to fund programs regarding internet privacy and security. Pointing out that three of the class counsel in the action graduated from University of San Diego Law School (“USD”), the objecting class member asserted impropriety based upon connections with the proposed cy pres beneficiaries. Id. at *25. The Court, however, found no allegations of significant relationships with USD beyond it being the alma mater of three attorneys out of the many associated with the case. Id. at *26. There was no suggestion that class counsel had any further relationship with the school than simply graduating from there. Id. The Court found no significant appearance of impropriety that necessitated replacing the recipients negotiated and agreed upon by the parties. The objecting class member further contended that the recipients of the cy pres award were limited to San Diego and the distribution was therefore impermissible as it failed to account for the nationwide scope of the class. Id. at *28. The Court found that the overall impact from the proposed cy pres distributions were not limited to San Diego. Id. at *32. The Court noted that by giving the money to academic institutions – which serve a diverse student population of students from many states, issue widely-distributed publications, and engage in the overall national academic discourse – the funds were directly contributed to the national academic dialogue involving internet privacy and security. Id. at *31. Because the class members were all internet consumers, the Court stated that regardless of their physical location, programs furthering the goals of internet security and privacy would benefit users of the internet everywhere, including the silent class members. Id. at *31-34. Finally, the Court overruled the objection that the proposed settlement inequitably enriched class counsel and the named representatives at the expense of the absent class members. The Court found no basis for a finding that requested fees was unreasonable or out of proportion to the settlement achieved. Id. at *36. The Court also found no evidence suggesting that the parties reached the settlement as a result of collusion or self-interest. Id. at *38. The Court accordingly granted final settlement approval.

**In Re New Motor Vehicles Canadian Export Antitrust Litigation, Case No. 03-MD-1532 (D. Me. Sept. 24, 2013)***. Plaintiffs, a group of car buyers and lessees, brought a class action alleging that Defendants, a group of motor vehicle manufacturers, distributors, and dealer associations, conspired in violation of antitrust and consumer protection laws to restrict the movement of lower priced vehicles into the U.S. market so as to prevent downward pressure on U.S. new vehicle prices. The claims against Defendants Toyota and the Canadian Automobile Dealers’ Association (“CADA”) survived, and subsequently the parties settled the litigation by agreeing to establish a settlement fund. After distribution of the Toyota and CADA settlement funds to the class, Plaintiffs reported that $21,164.89 remained in the net combined settlement fund. Plaintiffs moved for cy pres distributions of the remaining funds and the District Court approved the cy pres distribution. The District Court noted that the First Circuit had approved the use of cy pres distribution of residual funds when a further distribution to class members would not be economically viable because the additional payment amounts would be too small. Here, the Court noted that after deducting the $8,000 cost for mailing the additional checks, a per capita distribution of the residual would result in checks of approximately $1.87 per claimant. A weighted pro rata distribution of the residual would result in most class members receiving less than $0.20, and hundreds receiving nothing because their distribution amounts would be less than $0.01. The Court stated that under either scenario, the recovery per claimant was too small to distribute further, and therefore a cy pres distribution was appropriate. The Court adopted a reasonable approximation test for selecting and approving an appropriate cy pres beneficiary, under which the interests of the cy pres beneficiary should reasonably approximate the interests of the class members. The Court stated that the Consumers Union, a 501(c)(3) nonprofit organization, is the publisher of Consumer Reports, a widely circulated consumer interest magazine well-known for providing information to automobile buyers. Consumers Union conducts policy research and advocacy on a host of consumer issues, including research and advocacy for the benefit of automobile purchasers. Accordingly, the Court concluded that it would distribute the residual monies to Consumers Union, earmarking the cy pres award to fund research and advocacy efforts aimed at helping automobile buyers.
remedies were a growing feature of class action cy pres remedy because distributing the $6.5 million
Plaintiff brought a class action alleging that Defendant, a third-party debt collector, cy pres
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certiorari Accordingly, the Supreme Court denied the writ of cy pres
Justice Roberts stated that cy pres distributions are not in proper in connection with a class settlement, but are subject to
settlement class. The Court denied the motion without prejudice. The Court stated that cy pres distributions are not in proper in connection with a class settlement, but are subject to approval of the particular application of the funds. Cy pres distributions are commonly utilized for unclaimed funds. Id. at *6. The Court remarked that in contrast to cases in which the cy pres doctrine had been utilized to make good use of unclaimed settlement funds, in this case, the parties sought an order preliminarily approving a cy pres payment to Bay Area Legal Services in lieu of making payments to the individual class members. Further, the Court noted that FDCPA limited a debt collector’s liability in class actions to the lesser of $500,000 or 1% of the net worth of the debt collector. Id. at *7. Therefore, the Court stated that it required further evidence such as an affidavit to satisfy that the proposed settlement was actually 1% of Defendant’s net worth before preliminarily approving the settlement. Accordingly, the Court denied the motion for preliminary approval of the settlement without prejudice.

Marek, et al. v. Lane, 2013 U.S. LEXIS 7772 (U.S. Nov. 4, 2013). Plaintiffs, a group of Facebook members, brought a class action alleging that the Facebook’s new program, Beacon, violated the members’ privacy rights by gathering and publicly disseminating information about their on-line activities without permission. Id. at *2. Thereafter, the parties entered into a settlement agreement, wherein Facebook agreed to pay $9.5 million into a common fund. Id. at *3. Plaintiffs’ counsel were awarded nearly a quarter of the fund in fees and costs, while the named Plaintiffs received modest incentive payments, and the unnamed class members received no damages from the remaining $6.5 million. Id. The parties, however, earmarked that sum for a cy pres remedy because distributing the $6.5 million among the large number of class members would result in too small an award per person. Id. The cy pres remedy agreed to by the parties entailed the establishment of a new charitable foundation that would help fund organizations dedicated to educating the public about on-line privacy and a Facebook representative would be one of the three members of the new foundation’s board. The parties also agreed to expand the settlement class barred from future litigation to include not just those individuals injured by Beacon during the period in which it was an opt-out program, but also those injured after Facebook had changed the program’s default setting to opt-in. Id. at *3-4. One of four unnamed class members, Megan Marek, objected to the settlement, challenging the disconcerting features of the new Foundation, including facts that a senior Facebook employee would serve on its board, that the board would enjoy nearly unfettered discretion in selecting fund recipients, and that the Foundation necessarily lacked a proven track record of promoting the objectives behind the lawsuit. Id. at *4-5. The District Court rejected these objections, and approved the settlement. Upon appeal, a divided panel of the Ninth Circuit affirmed the District Court. Thereafter, a petition for rehearing en banc was denied, over the dissent of six judges. The Supreme Court then denied the writ of certiorari, but Chief Justice Roberts issued an opinion. Justice Roberts noted that Marek’s challenge was focused on the particular features of the specific cy pres settlement at issue. Id. at *5. Therefore, Justice Roberts opined that granting review of this case might not have afforded the Supreme Court an opportunity to address more fundamental concerns surrounding the use of such remedies in class action litigation, including when such relief should be considered; how to assess its fairness as a general matter; whether new entities could be established as part of such relief; if not, how existing entities should be selected; and what the respective roles of the judge and parties were in shaping a cy pres remedy. Id. Justice Roberts stated that cy pres remedies were a growing feature of class action settlements and in a suitable case, the Supreme Court might need to clarify the limits on the use of such remedies. Id. Accordingly, the Supreme Court denied the writ of certiorari.

McCall, et al. v. Facebook, Inc., 2013 U.S. App. LEXIS 39395 (9th Cir. Feb. 26, 2013). Plaintiffs brought a class action alleging that Defendant Facebook’s new program called “Beacon” violated Facebook members’ privacy rights by gathering and publicly disseminating information about their on-line activities
without permission, in violation of various state and federal law statutes. After extensive litigation, the parties entered into a settlement which provided for permanent termination of the Beacon program, a payment of $9.5 million in exchange for release of all Plaintiffs’ class claims, and $3 million as attorneys’ fees, administrative costs, and incentive payments to the class representatives. The remaining settlement funds would be utilized to form a charity organization, the Digital Trust Fund (DTF”), which would fund and sponsor programs educating users regarding critical issues relating to protection of identity and personal information on-line. The District Court approved the settlement, and upon the objectors’ appeal, the Ninth Circuit affirmed the settlement as fair and reasonable. The Ninth Circuit denied the objectors’ petitions for rehearing and the petitions for rehearing en banc. The dissent, however, observed that it had often rejected settlements where the selected charity lacked a substantial record of service in remedying the types of wrongs alleged, or where the selected charity was not sufficiently limited in its choice of projects to ensure that class members would truly be benefitted by its works. Id. at *3-4. These safeguards, the dissent remarked, were not applied by the majority. The dissent also noted that DTF had no record of service, being a customized creation of the settlement, and the settlement agreement and DTF’s articles of incorporation expressed how funds would be used. The Ninth Circuit remarked that although the DTF promised to fund and sponsor programs addressing critical issues relating to internet privacy, neither the programs nor the issues were defined with any specificity necessary to be reasonably certain that class members would actually benefit from these activities. Further, the dissent observed that although the cy pres money was to be spent in a manner that advanced the objectives of the underlying statutes, the DTF’s receipt of these settlement funds did not advance the objectives of the statutes upon which Plaintiffs relied in their suit. Id. at *6. All the statutes under which Plaintiffs brought their claims shared a common purpose of preventing the unauthorized access or disclosure of private information. The dissent noted that although the DTF’s sole stated purpose was to educate users, regulators, and enterprises on how to protect internet privacy through user control, Plaintiffs’ claims had nothing to do with users’ lack of education or control; instead, they related to misconduct by internet companies that wrongfully exposed private information in ways that even educated users cannot anticipate, prevent, or direct. The dissent opined that an appropriate cy pres recipient must be dedicated to protecting consumers from the precise wrongful conduct about which Plaintiffs complained. However, an organization focusing on protecting privacy solely through user control could not prevent unauthorized access or disclosure of private information where the alleged wrongdoer already had unfettered access to a user’s records. Thus, the dissent opined that although the DTF could teach users how to create strong passwords and generally be more cautious on-line, it would not teach users how to protect themselves from Facebook’s deliberate misconduct.

Tennille, et al. v. The Western Union Co., 2013 U.S. Dist. LEXIS 176224 (D. Colo. June 25, 2013). In two purported class action lawsuits, later consolidated, alleging claims for violation of various consumer protection laws, unjust enrichment, conversion, and declaratory relief, the Court granted the final judgment approving the terms of the settlement. Plaintiffs alleged that Defendant waited too long to inform consumers if their money transfers were not redeemed by the recipients and that it used the unredeemed funds to generate income until the funds were escheated to state governments. The parties executed a settlement agreement, which the Court preliminarily approved on January 3, 2013. The Court subsequently entered an order certifying the settlement class and granting final approval to the settlement. Under the approved settlement, a class settlement fund and an account was established for the benefit of class members. Id. at *5. Defendant was required to deposit into the class settlement fund the class members’ unredeemed money transfer funds less administrative fees and charges as specified in the class members’ contracts and/or permitted by state statutes. Id. at *6. The estimated amount to be deposited in the fund was $135 million and it could not include any funds deemed abandoned or unclaimed under the abandoned or unclaimed property laws of any state. Id. Only class members who submitted valid claims were entitled to receive a settlement payment and Plaintiffs executed releases that released Defendant from any claims arising out of the class action. Any remaining monies, after payment of all valid claims, administration fees, class representative awards, and attorneys’ fees and expenses were to be put into a cy pres fund, which would be paid directly to the states, territories, districts, and U.S. jurisdictions each in proportion to the amount that would have escheated to that state, territory, district, or U.S. jurisdiction in the absence of settlement. Id. at *12-13. The state, territory, district, or U.S. jurisdiction (“Releasing
Jurisdictions”) were required to release the released parties, class counsel, and the claims administrator from any and all escheatment liabilities and claims arising from the action before receiving any monies from the cy pres fund in consideration for receipt of the proportionate amount that would have escheated to that state, territory, district, or U.S. jurisdiction in the absence of any payments from the class settlement fund. Id. at *13. The Court required the release to be filed in the required form prior to the Releasing Jurisdictions receiving the monies from the cy pres fund. Id. If any of the Releasing Jurisdictions did not sign the release within the stipulated period or assert a claim against Defendant relating to the funds in the class settlement fund or cy pres fund, such funds were to be deposited into a separate fund, established by the claims administrator, and upon an adequate showing by Defendant, the Court could direct payment from the separate fund, up to the proportionate amount that would have been paid to the Release Jurisdiction and use it to satisfy any claims or judgments, or any costs or fees associated with any claim or judgment against Defendant or the released parties. Id. at *13-14. The funds deposited into the cy pres fund were not subject to escheatment, as the class members’ rights to those funds were forever released upon the Court’s judgment. Given these provisions, the Court approved the terms of the settlement, including the cy pres aspects of the settlement.

(xliii) Absentation In Class Actions

Ackerman, et al. v. ExxonMobil Corp., 2013 U.S. App. LEXIS 16336 (4th Cir. Aug. 7, 2013). Plaintiffs, hundreds of residents of Fallston, Maryland, filed a class action (the “Koch” action) against Defendants in Maryland state court. Plaintiffs alleged several state law causes of action for the contamination of their properties by gasoline and gasoline additive methyl tertiary-butyl (“MTBE”) from an Exxon station that was operated by Defendant John R. Hicks. Defendant ExxonMobil removed the case invoking federal officer jurisdiction, and it was transferred to the MDL Panel and assigned to the U.S. District Court for the Southern District of New York. Subsequently, the Second Circuit determined in an unrelated case that the history of MTBE production and marketing did not support federal officer removal, and the Koch litigation was remanded to the Harford County Circuit Court. The state court judge granted the Koch Plaintiffs’ request for class certification, but later sua sponte decertified the class. The judge then asked the Koch Plaintiffs to file a new action for the former class members so that he could consolidate it with the existing one and thereby adjudicate the claims of the named Plaintiffs in Koch as well as the former class members. As a result, more than 750 former class members filed a new action in the state court (the “Ackerman” action) alleging the same facts and state law claims as Koch. Defendants removed Ackerman from state court under authority of the Energy Policy Act, which authorizes the removal of MTBE-related claims and actions filed after August 8, 2005. Meanwhile, the Koch Plaintiffs amended their state court complaint to add all the individual Plaintiffs named in Ackerman, but this action was not removed by Defendants. The Ackerman Plaintiffs filed a motion to remand, arguing that the removal was time-barred and that Defendants waived their right to remove by litigating for several years in the state court. Alternatively, the Ackerman Plaintiffs requested the District Court to abstain under the doctrine promulgated in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), which permits federal courts, under exceptional circumstances, to refrain from exercising jurisdiction in deference to pending, parallel state proceedings. Id. at *4-5. The District Court denied the motion to remand, but granted the motion to abstain. On appeal, the Fourth Circuit affirmed. In the Fourth Circuit, Defendants argued that the Plaintiffs in Koch should not have been permitted to amend their complaint because 29 U.S.C. § 1446(d) deprives the state court of further jurisdiction unless the case is remanded. Id. at *10-11. Thus, they contended that the Koch case was not a parallel action within the meaning of the Colorado River abstention doctrine. Defendants conceded that if Koch was found to be parallel, abstention was properly granted. Id. at *9-10. The Fourth Circuit held that the prohibition of further state court action requirement by § 1446(d) was limited to the removed action – in this case, to Ackerman and not Koch. Therefore, the amendment was not prohibited, Koch was parallel and the District Court did not err by abstaining. Id. at *20-21.

(xliv) Objectors In Class Actions

Hydroxycut-branded products, brought an action alleging that although Defendant advertised its products as being safe and effective for weight loss, certain ingredients in the products were unsafe and associated with cases of severe hepatotoxicity and other serious health ailments. Subsequently, the parties agreed to a settlement. During the course of settlement approval proceedings, Sasha McBean and Tim Blanchard, two class members who objected to the settlement, and their attorney, Darrell Palmer, moved to quash deposition subpoenas served on them by class counsel. The Court denied in part and granted in part the motion. The Court granted the motion to quash with respect to the subpoena directed to Palmer because the Court found that it would be not productive or appropriate for class counsel to conduct discovery on him. The Court, however, took a different view with respect to the objectors themselves. The objectors had inserted themselves in the litigation by filing objections. The Court observed that under Rule 26(b), discovery of non-privileged material is permissible if it is relevant to the claim or defense of any party and appears reasonably calculated to lead to the discovery of admissible evidence. Id. at *67. The Court stated that some of the information sought from objectors by class counsel was relevant to the settlement issues before the Court. Because Palmer had represented objectors in numerous cases, McBean and Blanchard had filed objections in other cases, there was a question whether McBean resided at the address used on the claim form. As the claim form provided no factual information regarding class membership, the Court found that class counsel’s concern regarding the standing of McBean and Blanchard was justified. The Court ruled that it would allow an evidentiary hearing on the issue to establish whether the objectors were bona fide class members and had standing, and also limited discovery on the issue of intent and motive of the objectors. Although the Court was not of the opinion that motive directly related to the merits of the objections, it remarked that motive and intent could have bearing on the issue of the objectors’ credibility with respect to the issue of standing.

Hershey, et al. v. Exxon Mobil Oil Corp., 2013 U.S. App. LEXIS 24888 (10th Cir. Dec. 16, 2013). A group of objectors (the “objectors”) and the Gregg Trust appealed from the District Court’s approval of a class action settlement between Plaintiff and Defendant. Despite the terms of the settlement agreement and the District Court’s order, the objectors filed the appeal without posting a bond to secure the cost of appeal, including attorneys’ fees and the interest likely to be lost on the judgment while the appeal was pending. Plaintiff moved to dismiss the appeal for failing to post the bond. Id. at 3-4. The Tenth Circuit granted the motion. The objectors argued that requiring the posting of a bond to secure these costs violated Rule 7 of the Federal Rules of Appellate Procedure. The Tenth Circuit agreed that Rule 7 did not authorize requiring the posting of a bond to cover such costs, but noted that Rule 7 was not the exclusive authority governing appeal bonds. The settlement agreement expressly required the posting of a bond to cover such costs. Since the objectors were class members, they were bound by this provision of the settlement agreement. Moreover, as the District Court observed, the objectors failed to timely object to this bond provision of the settlement agreement. Accordingly, the Tenth granted Plaintiff’s motion and dismissed the objectors’ appeal. Id. at 5-6. The Gregg Trust opted-out of the class, and therefore was not bound by the settlement agreement. However, the Trust’s co-trustees and counsel were members of the class and did not opt-out. The District Court ruled that the Trust could not pursue its claims against Defendant using the same trustees and counsel because it had enjoined class members from suing the Defendant on the same claims. The Tenth Circuit rejected the Trust’s argument that the District Court’s order prevented the Trust from selecting its own trustees and counsel. The Tenth Circuit held that the District Court had the authority to enjoin class members from pursuing a non-class member’s claims. The Tenth Circuit also noted that the District Court had the power to, and did, bar non-class members from acting in concert with class members to pursue such claims. Id. at *10-17. Accordingly, the Tenth Circuit upheld the District Court’s order with respect to the Gregg Trust’s trustees and counsel. Id. at 17.

In Re TFT-LCD (Flat Panel) Antitrust Litigation, 2013 U.S. Dist. LEXIS 69299 (N.D. Cal. May 14, 2013). In this multi-district class action litigation, Plaintiffs alleged a global price-fixing conspiracy in the market for thin-film transistor liquid-crystal display panels, and sought equitable relief under the Clayton Act, based on alleged violations the Sherman Act, as well as restitution, disgorgement, and damages under antitrust, consumer protection, and unfair competition laws of 23 states. Earlier, the Court had issued a second amended order granting final approval of a combined class, parens patriae, and governmental entity
settlemets with Defendants AUO, LG Display, and Toshiba; ordering final judgment of dismissal with prejudice; and an award of attorneys’ fees, expenses, and incentive awards. Objector Keena Dale filed a motion to alter or amend the judgment or alternatively for reconsideration, clarification, or rehearing of the second amended order and/or alternatively a motion to enjoin disbursement of any fees to co-lead class counsel for the indirect-purchaser Plaintiffs, Joseph Alioto and the Alioto Law Firm, pending further Court consideration. Thereafter, objectors Kevin Luke and Geri Maxwell filed a motion for relief from judgment, in which they joined Dale’s motion and advanced additional arguments. Further, Alioto filed a motion to strike the Dale motion to amend, alleging that Dale and his counsel were engaging in extortion and blackmail. The Court denied all the motions. The motions revolved around a loan agreement between LFG National Capital LLC and Joseph Alioto and the Alioto Law Firm. A copy of this loan agreement was attached to a letter LFG filed seeking payment to LFG of a part of any fee awarded to Alioto. In turn, Alioto challenged LFG’s appearance and disputed the amounts owed under the loan, but did not dispute the existence of the loan agreement itself. The objectors’ motions argued that the loans constituted illegal fee splitting between a lawyer and non-lawyer and should preclude any fee award to Alioto. Dale sought reconsideration of the order under Rule 59(e), and Luke and Maxwell requested relief from the judgment under Rule 60(b)(3). The Court denied the motions to alter or amend the judgment based on Rule 59(e) because the movants failed to present their arguments within a reasonable time after the issue they raised was brought to their attention. LFG filed its materials in early February, and the judgment was not issued until almost eight weeks later. Second, the objectors charged misconduct by Alioto, who was not a party to the litigation or the associated judgment. Because Rule 60(b)(3) permits relief only when the fraud alleged was committed by an adverse party, the Court denied the Rule 60(b)(3) motion. Id. at *44. Third, the Court observed that in the Northern District of California any party seeking to file a motion for reconsideration may only do so after obtaining leave from the Court. Id. at *45. Because Dale, Luke, and Maxwell failed to obtain leave to do so, the Court denied the motions for reconsideration. Fourth, the Court denied both motions to enjoin disbursement as unsupported. Finally, because the Court denied Dale’s motion, the Court deemed Alioto’s motion to strike Dale’s motion as moot.

(xlv) Privacy Class Actions

Faulkner, et al. v. ADT Security Services Inc., 2013 U.S. App. LEXIS 1108 (9th Cir. Jan. 17, 2013). Plaintiff, a California resident, brought a putative class action alleging that Defendants recorded his telephone conversation with Defendants’ representative without his consent in violation of § 632 of California’s invasion of privacy law. On Defendants’ motion to dismiss, the District Court held that Plaintiff’s conversation was not a confidential communication because he had no objectively reasonable expectation that his telephone conversation with Defendants would not be overheard or recorded. Id. at *4. Further, the District Court looked at the surrounding circumstances to determine whether the parties had an objectively reasonable expectation that the conversation was not being recorded or overheard, and concluded that Plaintiff had not alleged what circumstances would support an expectation of privacy in such a call. On appeal, the Ninth Circuit remanded the action to give Plaintiff an opportunity to amend his complaint to successfully plead a cause of action. The Ninth Circuit observed that to prevail against the Rule 12(b)(6) motion, Plaintiff would have to allege facts that would lead to the plausible inference that his conversation was confidential, a communication that he had an objectively reasonable expectation was not being recorded. Id. at *8. Plaintiff alleged that he called Defendants to dispute a charge, and that his conversation was confidential because it was carried on in circumstances as may reasonably indicate that any party to the communication desired it to be confined thereto. The Ninth Circuit opined that the latter allegation was no more than a threadbare recital of the language of § 632 of the California Penal Code, which should not be just accepted as true and thus did not suffice to prevail over a motion to dismiss. Id. at *8-9. Plaintiff’s allegation that he called to dispute a charge was not sufficient to lead to the plausible inference that he had an objectively reasonable expectation of confidentiality. Id. at *9. The Ninth Circuit stated that too little was asserted in the complaint about the relationship between the parties and the circumstances of the call to lead to the plausible conclusion that there was an objectively reasonable expectation of confidentiality. Id. Accordingly, the Ninth Circuit remanded the matter to the District Court for it to consider allowing the Plaintiff to amend his complaint in a manner that would satisfy federal pleading standards.
Plaintiffs, a group of individuals who downloaded and installed a tracking software created and operated by Defendant onto their computers, brought an action alleging privacy breaches. Plaintiffs alleged violations of the Stored Communications Act, the Electronic Communications Privacy Act, and the Computer Fraud and Abuse Act, as well as unjust enrichment. Plaintiffs moved to certify a class of all individuals who, since 2005, downloaded and installed Defendant’s tracking software onto their computers via one of its third-party bundling partners. Plaintiffs also proposed a sub-class defined as all class members not presented with a functional hyperlink to an end-user license agreement before installing Defendant’s software onto their computers. The Court granted certification except on the claim for unjust enrichment. The Court held that class certification would be appropriate for each of the other three claims relying on “federal statutes that provide protection against the unauthorized interception of information from Plaintiffs’ computers.” Id. at *12. Plaintiffs had installed Defendant’s software after downloading a free product offered by Defendant’s “bundlers,” who provided free digital products to consumers on the internet. Id. Defendant used the bundlers to distribute a program called OSSProxy, which constantly collected data about the activity on the computer and sent it back to Defendant’s servers. Id. at *13. The OSSProxy software allegedly collected a variety of information about a consumer’s computer, including the names of every file on the computer, information entered into a Web browser, including passwords and other confidential information, and the contents of PDF files. Id. The users were given the choice to “Accept” or “Decline” the Privacy Statement and User License Agreement (“ULA”), which contained terms governing which information OSSProxy would collect from the consumer’s computer and how that information would be used. Id. at *6. Plaintiffs asserted that the data collected went beyond the scope of the consumer’s consent to monitoring in the ULA by designing its software to merely “fuzzify” or “obscure” confidential information collected, rather than “making commercially viable efforts to automatically filter” that information. Id. at *7. The Court estimated that the software was installed on millions of computers between 2008 and 2011. Id. at *14. The Court observed that Plaintiffs satisfied commonality by raising a variety of common questions that could be resolved on a class-wide basis. Id. at *15. The Court found that each class members engaged in a substantively identical process to download OSSProxy and therefore, the scope of consent was common across the class and sub-class. Id. at *15-17. The Court thus held that Plaintiffs demonstrated ample issues common to the entire class. The Court also determined that each of the named Plaintiff’s claims were typical to class and sub-class. Both the named Plaintiffs had downloaded the OSSProxy software onto their computers after downloading a free digital product from one of Defendant’s bundling partners, and both used a substantively identical process to download OSSProxy. Id. at *19. The Court further determined that Plaintiffs met the adequacy requirement as both had vigorously participated in that action, and class counsel were qualified to represent the class. Id. at *22-23. Because the issues of whether Plaintiffs consented to OSSProxy’s data collection, the scope of that consent, and whether Defendant exceeded that consent could all be determined on a class-wide basis, the Court concluded that common questions predominated over any questions affecting only individual members, and the class action was superior to other available methods for fairly and efficiently adjudicating the controversy. Id. at *26-27. The Court also noted that the statute of limitations did not provide any reason to deny class certification and the issue whether each individual plaintiff suffered damage or loss from Defendant had no applicability to the federal statutory claims, as it provided for statutory damages. Id. at *29-30. Accordingly, the Court granted Plaintiffs’ motion for class certification.

In Re Hannaford Brothers Co. Customer Data Security Breach Litigation, 2013 U.S. Dist. LEXIS 39055 (D. Me. Mar. 20, 2013). Plaintiffs, a group of grocery store customers, brought a class action alleging that a third-party criminally breached Defendant’s information technology systems and gained access to the customers’ confidential financial and personal information because of negligence and breach of implied contract on Defendant’s part. Earlier, the District Court had dismissed the complaint in its entirety, but on appeal, the First Circuit held that Plaintiffs could proceed on their negligence and breach of implied contract claims. On remand, Plaintiffs moved for certification of a nationwide class comprised of all individuals or entities who made purchases at stores owned or operated by Defendant or for which Defendant provided electronic payment processing services, using debit or credit cards, and who made reasonable out of pocket expenditures in mitigation of the consequences to them of an electronic breach of
Defendant’s data security consisting of payment of fees to obtain prompt replacement of cancelled cards and purchase of security products. The District Court denied the motion for failure to establish predominance. Regarding Plaintiffs’ negligence and implied contract claims, the Court noted that the common questions of liability were whether Defendant breached a duty to securely maintain its customers’ credit and debit card information and whether that breach caused the intrusion, affected Plaintiffs’ electronic data, and reasonably led them to take protective measures that cost money. Further, the District Court stated that what differed was the actual impact on particular cardholders and the actual mitigating steps they took and the costs they incurred. Defendant argued that causation was at issue and that there could be a huge variation among customers, namely whether and how many fraudulent charges they suffered, the steps they took as a result, and what alternative resources were available to them. Plaintiffs, however, maintained that the only issue where there could be individualized proof was the amount of damage that each customer suffered. Further, Plaintiffs asserted that the trial would be straightforward; the issues of standard of care, breach, and what happened as a result of the intrusion were all the same; and that they would prove by statistical proof the total damages caused to the class. Plaintiffs stated that they had card issuers’ records that isolated the category of customers who shopped at Defendant’s stores, and that these records showed cards replaced and fees charged, instances of rush delivery charges, and instances of the purchase of insurance or credit monitoring services. Additionally, Plaintiffs asserted that they could find experts who would be able to testify by statistical probability what proportion of the fees incurred were attributable to Defendant’s intrusion, as distinguished from other causes like card loss or theft. With this evidence Plaintiffs intended to ask the jury for a lump sum damage award that reflected the total fees that Defendant caused. The Court, however, observed that although Plaintiffs contended that they would find an expert, they did not present that expert or that expert’s opinion. The Court remarked that it could not take judicial notice that there would be such an expert. Further, the Court stated that Plaintiffs’ lack of an expert opinion on their ability to prove total damages to the jury was fatal, and that without an expert, total damages could not be proved, and the alternative was a trial involving individual issues for each class member as to what happened to his or her data and account, what he or she did about it, and why. Thus, because of the absence of expert opinion testimony, the Court held that Plaintiffs failed to show predominance. Accordingly, the Court denied the motion for class certification.

**In Re LinkedIn User Privacy Litigation, 2013 U.S. Dist. LEXIS 31131 (N.D. Cal. Mar. 6, 2013).**

Plaintiffs, a group of premium members of LinkedIn, brought a class action alleging that in 2012 hackers infiltrated Defendant’s computer system and posted approximately 6.5 million stolen LinkedIn users’ passwords and e-mail addresses on the internet. Plaintiffs alleged breach of contract, negligence, and violation of California’s Unfair Competition Law (“UCL”). The Court granted Defendant’s motion to dismiss Plaintiff’s first amended consolidated complaint (“FAC”). Plaintiffs argued that they suffered an injury-in-fact under an economic harm theory, contending that they did not receive the full benefit of the bargain for their premium memberships. *Id.* at *9. Further, Plaintiffs asserted that they suffered economic harm because Defendant did not provide the level of security promised in exchange for membership fees. *Id.* at *10. The Court found that the FAC failed to state an injury-in-fact because the security settings for premium members were identical to that of non-premium members. *Id.* Thus, purchasing a premium account did not provide a particular level of security, but rather provided the advanced networking tools and capabilities to facilitate enhanced usage of LinkedIn’s services. *Id.* Second, Plaintiffs contended that they suffered an injury-in-fact under their claim for misrepresentation, alleging that the privacy policy misrepresented premium users’ level of security. *Id.* The Court rejected this argument because the FAC did not state that Plaintiffs had read the privacy policy, which was necessary to establish a causal relationship for a misrepresentation claim. *Id.* at *11. Third, Plaintiffs contended that they suffered an injury-in-fact when Defendant allegedly their breached contracts by not providing the level of security promised in the security agreement. *Id.* at *11-12. The Court stated that the alleged breach of contract could not have caused the injury, but rather, the injury had to occur at some point before the breach, at the time when the parties entered in the agreement. *Id.* at *12. Thus, the Court noted that Plaintiffs’ alleged injury could not result from claims related to the breach of contract. *Id.* Finally, the Court noted that Plaintiffs must allege more than “overpaying for a ‘defective’ product” to establish injury-in-fact when it stems from insufficient performance. *Id.* at *13. Here, Plaintiffs alleged that the security services provided
were defective, rather than alleging that they were never provided. Thus, the Court opined that Plaintiffs did not satisfy the requirements for Article III standing based solely on the benefit of the bargain theory of economic harm. \textit{Id.} at *14. Accordingly, the Court granted Defendant’s motion to dismiss.

\textbf{Quesada, et al. v. Banc Of America Investment Services, Case No. 11-CV-1703 (N.D. Cal. Feb. 19, 2013).} Plaintiff, a customer, brought a class action alleging that Defendant’s employees recorded confidential telephone conversations without the customers’ knowledge or consent in violation of California’s Invasion of Privacy Act. Members of the Defendant bank’s Separation Team made the calls at issue from call centers in Waltham, Massachusetts, Lincoln, Rhode Island, and Charlotte, North Carolina. Plaintiff sought certification of a class of all individuals in California whose telephone calls were recorded by Defendant without their consent from December 2009 through Spring 2010. \textit{Id.} at 2. The Court denied the motion. Plaintiff provided declarations from Siobhan Fitzgerald, a Separation Team member who worked at the Waltham, Massachusetts call center, who testified that Separation Team members were not trained or instructed to disclose to customers that they were on a recorded line. Fitzgerald had sent an e-mail to David Sorensen, the Site Manager of the Waltham, Massachusetts call center, to inform him that recording telephone calls without the customer’s consent was illegal in California and that Separation Team members were not disclosing to customers that they were recording their calls. \textit{Id.} at 4. Thereafter, Sorensen e-mailed Separation Team members, instructing them to state that they were calling on a recorded line anytime that they make an outbound call. \textit{Id.} Fitzgerald alleged that this was the first time Separation Team members were instructed to disclose to customers that their telephone calls were being recorded and that by this time, all 80,000 California clients had already been called. Defendant disputed that its employees did not notify customer that their calls were being recorded, and argued that its written policy always required that employees notify customers if a call was being recorded. Defendant provided the declaration of Sorensen, who stated that he was aware that recording telephone calls without consent was illegal in California, and that some Separation Team members may not have disclosed that their call was being recorded, notwithstanding the actual policy requiring notification. Plaintiff argued that there were two common questions in this case, including whether Defendant obtained consent to obtain telephone calls, and whether the phone calls contained confidential information. The Court, however, observed that Fitzgerald’s testimony, even if believed, was not sufficient to demonstrate the consent issue as to all class members. \textit{Id.} at 9. Fitzgerald worked in one call center and did not purport to know whether Separation Team members in any other call center disclosed that calls were being recorded. According to Sorensen, Separation Team members were trained to disclose that the caller was on a recorded line and the exhibits of training materials that Defendant provided supported Sorensen’s testimony. Further, the evidence demonstrated that Separation Team members were required to disclose that calls were being recorded pursuant to Defendant’s written policy, monitored for compliance with this written policy, and compensated based upon compliance with this written policy. \textit{Id.} The Court remarked that although Fitzgerald could testify to her own practice, this was not evidence capable of establishing the consent issue as to all 80,000 clients, or establishing the consent issue as to the customers who received calls from the Waltham, Massachusetts call center where Fitzgerald worked. \textit{Id.} at 11. Plaintiff also did not propose a realistic means for class-wide resolution of the common question, nor did he demonstrate that there was a common question to satisfy the commonality requirement. Further, Plaintiff did not show uniformity among putative class members to try this or any other issue as a class action. Accordingly, the Court denied Plaintiff’s motion for class certification.

\textbf{(xlvi) Choice-Of-Law Issues In Class Actions}

\textbf{Astiana, et al. v. Kashi Co., 2013 U.S. Dist. LEXIS 108445 (S.D. Cal. July 30, 2013).} Plaintiffs brought a consumer class action on behalf of people who purchased a number of Defendant’s food products, alleging that the products contained deceptive and misleading labelling and advertisements. Specifically, Plaintiffs alleged that the phrases “Nothing artificial” and “All Natural” on certain product labels were misleading because the products contained, or were processed with, synthetic substances. \textit{Id.} at *5. Plaintiffs alleged violation of the unlawful, unfair, and fraudulent prongs of California’s Unfair Competition Law (“UCL”), California’s False Advertising Law (“FAL”), California’s Consumer Legal Remedies Act (“CLRA”), and breach of express warranty and quasi-contract. Plaintiffs moved to certify two nationwide classes, or
alternately multi-state or state-wide classes, for customers who purchased certain products containing the allegedly misleading phrases. Id. at *5-6. The Court denied Plaintiffs’ motion to certify nationwide or multi-state classes asserting claims under California law. Id. at *44. The Court agreed with Defendant that under California’s choice-of-law rules, Plaintiffs bore the initial burden to show that California had “significant contact or significant aggregation of contacts” to the claims of each class member. Id. The Court clarified that California law may only be used on a class-wide basis if the interests of other states were not found to outweigh California’s interest in having its law applied. Id. The Court relied on Mazza v. Honda American Honda Motor Co., 666 F.3d 581 (9th Cir. 2012), wherein the Ninth Circuit reviewed the application of California consumer protection laws – specifically the UCL, FAL, CLRA and unjust enrichment – to a nationwide class and determined that there were material differences between California consumer protection laws and those of the other states. Id. at *45-46. The Ninth Circuit determined that the application of California law to other jurisdictions would significantly impair their ability to calibrate liability to foster commerce, and opined that “each class member’s consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place.” Id. at *46. Defendant identified the same material differences in the laws that dissuaded the Ninth Circuit in Mazza from applying California law to other states. Id. Because Plaintiffs’ action involved the application of similar consumer protection laws, the Court agreed with Defendant and declined to apply California consumer protection law to a nationwide class. Id. at *46-47. The Court, however, granted Plaintiffs’ motion to certify a class representing California purchasers of products containing the allegedly misleading language, opining that the proposed class satisfied all the Rule 23 requirements. Id. at *30-31. However, the Court agreed with Defendant that Plaintiffs failed to sufficiently show that “natural” had a uniform definition among class members, such that a sufficient number of class members would have relied the language or that Defendant’s “representation of natural in light of the presence of the challenged ingredients would be considered to be a material falsehood by class members.” Id. at *40. Nonetheless, the Court determined that Plaintiffs made a sufficient showing of materiality to justify certification of a class as to certain ingredients, which were listed in federal regulations as a “synthetic organic chemical manufacturing industry chemical.” Id. at *42-43. The Court determined that common issues existed and predominated with respect to the products containing those ingredients, and therefore, certified a class covering Defendant’s products containing listed ingredients but labeled “All Natural,” and denied the remainder of Plaintiffs’ motion to certify an “All Natural” class. Id. at *43. Ultimately, the Court certified a “Nothing Artificial” class and an “All Natural” class, and declined to certify any nationwide classes.

Cochran, et al. v. Volvo Group North America, LLC, 2013 U.S. Dist. LEXIS 57158 (M.D.N.C. April 22, 2013). Plaintiffs, a group of customers, brought a class action alleging that Defendant breached express and implied warranties of merchantability as to certain Volvo trucks. Plaintiffs sought certification of a nationwide class of truck owners and lessees on particular issues. The Court denied the motion for class certification. Plaintiffs contended that all the potential class members had substantially the same express warranty, by which Volvo warranted its truck components to be free from defects in material and workmanship under normal use and service up to the periods as specified. Plaintiffs identified two categories of questions common to the class, including whether the trucks suffered from common defects, and if so, whether Defendant failed to fix these defects. Id. at *4. Plaintiffs asserted that these were questions of fact, and contended that these issues were central to the resolution of their express warranty claims and related to their implied warranty claims. The Court noted that breach of warranty was a state law claim, and Plaintiffs had not set forth which state’s law they believed would apply, nor had they set forth the elements of a claim for breach of express warranty that they contended would apply to the claims of the putative class. Thus, the Court remarked that it was impossible to tell if the answers to the proposed questions would resolve an issue central to the validity of the express warranty claim. The Court observed that the potential conflicts of law presented by nationwide class actions had serious constitutional implications, and that differences in state law also raised manageability concerns. Id. at *7-8. The Court noted that applicable case law authorities have held that class actions are not proper unless all litigants were governed by the same legal rules and that products liability suits may not proceed as nationwide classes due to differences in the state laws that would apply. Id. at *8. The Court determined that Plaintiffs could not establish that common questions would predominate when the various laws had not been
identified and compared. *Id.* at *9. The Court stated that under the North Carolina choice-of-law rules, which would apply to this case, warranty claims are governed by the state with the most significant relationship to the contract, and that North Carolina law examines the states of manufacture, distribution, purchase, resale, and damage in making this determination. *Id.* at *9-10. The engines at issue were designed in Sweden, engineered and assembled in Maryland, put into truck chassis in Virginia, and sold to fleet customers and independent dealers throughout the country; the trucks were sold by Defendant out of North Carolina, though most trucks never entered North Carolina. The Court remarked that Plaintiffs had made no effort to identify how North Carolina’s choice-of-law rules would apply in this case, nor had they explained what jury instructions on these issues might look like or explained the source of law for those instructions. The Court remarked that Plaintiffs ignored the issue of choice-of-law in its entirety. The Court opined that without such an analysis, it could not be determined whether the issues were common, whether they predominated, whether the class would be manageable, and whether a class action was the superior method of adjudication. The Court found that Plaintiffs’ efforts to avoid these problems did not suffice. *Id.* at *12-13. Accordingly, the Court denied the motion for certification.

**Jarrett, et al. v. Panasonic Corp. Of North America, 2013 U.S. Dist. LEXIS 97983 (E.D. Ark. June 21, 2013).** Plaintiff, a consumer, brought an action alleging that Defendants designed, manufactured, distributed, or sold defective Sanyo plasma televisions and asserted claims of breach of implied warranty and merchantability, and violation of the Arkansas Deceptive Trade Practices Act (“ADTPA”). Defendants moved for judgment on the pleadings under Rule 12(c), which the Court granted in part. The Court remarked that when a putative class consists of persons from numerous states pursuing common law claims, as was the case with Plaintiff’s nationwide class, it must conduct a choice-of-law analysis before considering the requirements of Rule 23. Plaintiff argued that she sought to impose the law of a single state, i.e., Arkansas, to the nationwide class and that application of a single state’s law to a nationwide class of consumers was constitutionally permissible in those circumstances. The Court agreed that the laws of the various states in which putative class members resided differed materially with respect to all of Plaintiff’s claims, but remarked that it must nevertheless decide whether Arkansas law would apply to the claims of all the putative class members, including those who resided in states other than Arkansas. The District Court noted that in *Tyler v. Alltel Corporation*, 265 F.R.D. 415, 421 (E.D. Ark. 2010), Plaintiff asserted claims under the ADTPA and for unjust enrichment and argued that Arkansas law should apply to a nationwide class of persons who were charged an early termination disconnect fee. After determining that both the consumer protection statutes and the law of unjust enrichment of the various states differed, the Court in *Tyler* applied the choice-of-law provision in the contract, Arkansas’ general contract choice-of-law principles, and Arkansas’ choice-of-law tort principles, and concluded that regardless of which choice-of-law principle governed, Arkansas law could not be applied to the claims of class members who resided outside of Arkansas. *Id.* at *28. Therefore, *Tyler* concluded that the law of each state where the consumer transaction occurred, or where the consumer lived, should govern the transaction. *Id.* at *29. In so concluding, the Court rejected the same argument that Plaintiff in this action made that Defendants maintained headquarters in Arkansas and the fraudulent conduct emanated from Defendants’ headquarters and that any failure to disclose or any fraudulent conduct occurred at the point of sale. *Id.* Based on the reasoning in *Tyler*, the Court found that certifying the nationwide class proposed by Plaintiff would require the application of the laws of up to 50 states, which would render this action unmanageable. Therefore, the Court found that Plaintiff failed to satisfy Rule 23(a)(2)’s commonality requirement. In addition, the Court remarked that even if Arkansas law were to apply to Plaintiff’s claims, there were individual issues of fact that made class certification for both her nationwide class and her Arkansas subclass inappropriate with all of her claims. In this respect, the Court noted that breach of implied warranty of merchantability claim requires each class member to prove that the alleged unmerchantable condition was a proximate cause of her damages. *Id.* at *32. Similarly, an ADTPA claim requires each class member to prove reliance on the allegedly fraudulent conduct and that such fraudulent conduct caused damage. *Id.* Therefore, the Court concluded that Plaintiff failed to establish the predominance requirement. Because Plaintiff failed to establish the requirements of Rule 23(a)(2) and (b)(3), the Court granted Defendants’ motion for judgment on the pleadings on Plaintiff’s class allegations.
Insurance-Related Class Actions

Chehalem Physical Therapy, Inc., et al. v. Coventry Health Care, Inc., Case No. 09-CV-320 (D. Ore. April 16, 2013). Plaintiffs, a group of healthcare providers, brought a putative class action alleging that Defendant breached its preferred provider organization (“PPO”) agreements by reimbursing the incorrect amount for medical services. Specifically, Plaintiffs alleged that Defendant’s computer system took improper “PPO discounts” whenever a provider submitted a bill for workers’ compensation medical service that was less than the maximum amount payable under the applicable state’s workers’ compensation fee schedule. Id. at *6-7. Pursuant to Rule 23(b)(2), Plaintiffs sought to certify and to act as class representative for an injunctive class of healthcare providers who had a First Health PPO Provider Agreement with a workers’ compensation National Rate Code (“NRC”) associated with Target Rate Codes (“TRCs”) PT3 and RB9. Id. at *7. The Court granted Plaintiffs’ motion for certification of an injunctive class with a slight modification in the definition of the class. Id. at *22. Defendant’s procedure included assigning an NRC to the services of the providers, and bundling the various NRCs negotiated by a provider into a TRC. Id. Defendant determined whether the combination of NRCs negotiated in an agreement matched an existing TRC and, if so, that existing TRC was assigned to the Appendix A in which the rates were set out. Id. at *8. Defendant argued that variations in providers’ contract methodologies, state regulatory schemes, and payment regulations for different categories of providers would preclude a finding of commonality and typicality between members of the proposed class. Id. at *10. Plaintiffs acknowledged that the workers compensation fee schedules, rules, and guidelines might differ from state to state, and the percentage discount applied to various contracts between providers and Defendant might also differ. Id. at *12. Plaintiffs, however, argued that the uniting factor among providers with contracts with TRCs RB9 and PT3 was Defendant’s on-going miscalculation of the “lesser of” the reimbursement amount. Id. The Court agreed with Plaintiffs that it had met its burden to show commonality at this stage of the lawsuit as the putative members of the proposed injunctive class were challenging a widespread procedure that was “generally applicable to the class as a whole.” Id. at *18. The Court, however, found that the RB9 and PT3 designations would lack the necessary precision to define the class in any states other than Oregon and Washington. Id. at *13. The Court explained that while the “RB” designation was the same in all states, the number “9” indicated the ninth version of the contract with the Medicare component for the state of Washington. Id. The same was applicable to “PT3” designations as they applied only to physical therapists in the state of Oregon. Id. at *14. Nevertheless, the Court found that the problem with Plaintiffs’ class definition was not fatal to certifying an injunctive class. Id. The Court found that with some minor changes, the proposed class definition would more appropriately define a group of providers with common characteristics that would allow members of that group to identify themselves as having a right to recover based on the description. Id. at *19. The Court therefore modified the injunctive class definition to include “all healthcare providers who have a First Health PPO Provider Agreement with a reimbursement procedure proving for the payment of the lesser of (a) the billed charge, or (b) a discount based on a percentage of the maximum payable amount under the applicable state’s workers’ compensation fee schedule (after application of any applicable state rules or guidelines) (hereafter referred to as the “fee schedule maximum”), and who have had a deduction from the billed charge when that charge was less than the fee schedule maximum. Excluded from the class were healthcare providers in the state of Louisiana.” Id. at *19-20. The Court found that the modified definition would fit the parameters for an injunctive class as the class members would have contracts specifying similar reimbursement guidelines, and each class member would have had a discount taken from a billed charge when the billed charge was less than the state fee schedule maximum. Id. at *20. Accordingly, the Court modified the class definition and granted Plaintiffs’ motion for certification of an injunctive relief class.

Munoz, et al. v. PHH Corp., 2013 U.S. Dist. LEXIS 69306 (E.D. Cal. May 15, 2013). Plaintiffs, a group of homeowners who obtained residential mortgage loans through Defendant PHH Corp. (“PHH”) and its affiliated reinsurer, Defendant Atrium Insurance Corp., brought a class action alleging that Defendants violated §§ 8(a) and (b) of the Real Estate Settlement Procedures Act (“RESPA”) by entering into captive reinsurance arrangements for the purpose of receiving kickbacks, referral payments, and unearned fee splits. Each of the named Plaintiffs had a residential mortgage loan with PHH that was insured by one of four private mortgage insurers (the “Primary Insurers”). Atrium, a wholly-owned subsidiary of PHH, was a
captive reinsurer, who reinsured the Primary Insurers’ obligations on PHH’s loans to Plaintiffs. All of Atrium’s reinsurance agreements with the Primary Insurers were excess-of-loss agreements, which called for Atrium to provide reinsurance on annual pool of loans. Plaintiffs alleged that the insurance premiums ceded to Atrium were, in fact, kickbacks from the Primary Insurers to PHH in exchange for PHH’s referral of borrowers to Primary Insurers for private mortgage insurance. Central to Plaintiffs’ kickback allegation was that Atrium never assumed real reinsurance risk, because, among other things, the agreements contained liability-limiting provisions that limited Atrium’s potential exposure beyond the bands of loss. Plaintiffs sought to certify a class of persons who obtained residential mortgage loans from PHH, and whose loans were included within PHH’s captive mortgage reinsurance arrangements. The Court partly granted Plaintiffs’ motion. At the very outset, the Court noted that § 8 of the RESPA prohibits giving or accepting any fee or kickback for a real estate settlement services involving a federally related mortgage loan. id. at *12-13. Plaintiffs argued that the primary consideration in determining Defendants’ liability under § 8 was whether Atrium assumed sufficient risk from the Primary Insurers. Defendants argued that the risk transfer analysis was not subject to common proof because risk assessment would entail a separate inquiry for each reinsurance agreement with a particular primary insurance provider, as well as for each book year among the four primary insurance providers. The Court disagreed, finding that the core content of the class certification theory was that Atrium’s agreements with Primary Insurers contained liability-limiting provisions. The Court noted that despite Defendants’ argument, at the core, they never contended that individual class members’ loans would need to be reviewed to ascertain the risk transfer. In addition, for class certification purposes, the Court found that the most important consideration of Atrium’s reinsurance agreements was that they were not entered into with individual borrowers, but with each Primary Insurer. Accordingly, the Court found that the commonality requirement was satisfied. The Court found that the typicality requirement was satisfied as well. The Court noted that § 8 of the RESPA imposed a one year statute of limitations on claims. Therefore, the Court found that Plaintiffs’ claims were not typical of class members from January 1, 2004, to June 1, 2007, because the complaint was filed on June 2, 2008. id. at *65-66. The Court also found that the predominance and superiority requirements were satisfied. Accordingly, the Court certified a class of all individuals who obtained residential mortgage loans from PHH and its affiliates on or after June 2, 2007, and purchased private mortgage insurance and whose loans were included within PHH’s captive mortgage reinsurance arrangements.

Wiedenbeck, et al. v. Cinergy Health, 2013 U.S. Dist. LEXIS 134672 (W.D. Wis. Sept. 20, 2013). Plaintiffs, a group of insured individuals, brought an action alleging that Defendant Cinergy Health, Inc.’s marketing of limited benefit health insurance policies was intentionally misleading. Plaintiffs also alleged that Defendants, American Medical and Life Insurance Company (“AMLI”) and National Congress of Employers, Inc., were fully aware of Cinergy’s marketing and approved it. Further, Plaintiffs alleged that all Defendants were involved in a scheme, pattern, and undertaking to deny, delay, and underpay claims. Plaintiffs asserted fraud based on the alleged intentional misrepresentations, and bad faith breach of the fiduciary relationship between an insurer and an insured. Because of Defendants’ misrepresentations and denials of coverage, Plaintiffs incurred substantial personal expenses including premium payments for the purchased policy, hospital billing, and other economic and non-economic damage. Plaintiffs moved for certification of a class based on the fraud cause of action, comprised of all Wisconsin residents who purchased an AMLI insurance policy marketed by Cinergy. id. at *9. The class period was January 1, 2007 to the present. The Court denied the motion for failure to establish commonality and typicality. The Court noted that there were at least two television commercials or infomercials at issue during the relevant time period, and although the proposed class included those purchasing policies dating back to January 1, 2007, neither advertisement was aired until late 2008. Further, the Court remarked at the possibility of some putative class members not seeing the advertisements containing the alleged misrepresentation. id. at *31. Defendants also submitted evidence that there were at least 10 call scripts used by Cinergy between 2008 and 2011. Even if all of the scripts contained the same uniform misrepresentation, the nature of a telephone conversation was that the representative was responding to specific, individual questions posed or information received from the customer. Thus, the Court stated that the content of actual consumer calls necessarily would vary. Further, faced with disclaimer language in the television advertisements and language clarifying the nature of the policy and the scope of the coverage in the single
script provided by Plaintiffs, the Court observed that the ultimate claim was that Defendants failed to adequately disabuse Plaintiffs of their belief that they were purchasing a major coverage plan with no pre-existing conditions exclusion. The Court stated that given that individual responses to specific questions by each customer about the scope of coverage, and whether Defendants adequately and accurately responded to those questions, was not subject to common proof. Whether class members read the plan’s description of actual coverage, and whether that language itself clarified any misapprehensions, also undermined Plaintiffs’ assertion of a uniform misrepresentation. Moreover, the Court stated that some consumers could have reviewed Defendant’s websites describing the plan at issue, both of which not only explained the limited nature of the policy at issue, but contrasted it with a major medical plan. Thus, the Court found that there was no uniform misrepresentation to the proposed class or any evidence of a common understanding, and noted that the Seventh Circuit had repeatedly rejected class certification where a fraud claim turned on an individual’s understanding to demonstrate causation or reliance. \textit{id.} at *35-36. Additionally, the Court observed that an intentional misrepresentation claim under Wisconsin law requires a Plaintiff to demonstrate that he or she actually relied on the false representation, which is separate from any inquiry as to whether the reliance was justified or reasonable. Plaintiffs provided no basis for proving reliance or causation on a class-wide basis. Accordingly, the Court denied Plaintiffs’ motion for class certification.

(xlviii) \textbf{Disparate Impact Issues In Class Actions}

\textit{Adkins, et al. v. Stanley}, 2013 U.S. Dist. LEXIS 104369 (S.D.N.Y. July 25, 2013). Plaintiffs, a group of African-American homeowners, and Michigan Legal Services, a nonprofit organization, brought a class action alleging that Defendant discriminated against African-Americans when New Century Mortgage Company issued predatory loans because of Defendant’s conduct. Plaintiffs alleged violations of the Fair Housing Act, (“FHA”), the Equal Credit Opportunity Act, (“ECOA”), and Michigan’s Elliot-Larsen Civil Rights Act, (“ELCRA”). Defendant filed a motion to dismiss, and the Court granted the motion in part. The Court observed that Defendant’s policies and practices caused New Century to target Plaintiffs for toxic loans, which placed Plaintiffs at greater risk of default, delinquency, and foreclosure, which in turn caused a concrete injury to Plaintiffs. Further, regardless of whether Plaintiffs qualified for better loan terms, they were subject to higher mortgage payments and fees over a longer period of time than they would have been had they not been targeted for these toxic loans. For these reasons, the Court found that Plaintiffs adequately pled an injury-in-fact. Plaintiffs’ complaint acknowledged that New Century stopped originating loans and filed for bankruptcy in 2007. Plaintiffs did not allege that Defendant’s policies had a similar effect on other loan originators, and even if Plaintiffs’ allegations demonstrated that they would reenter the housing market, the Court noted that their allegations did not demonstrate that Defendant’s policies posed a threat of future injury. Thus, the Court held that Plaintiffs lacked standing to pursue injunctive relief. Second, the Court found that only Plaintiffs’ FHA claims were timely, and accordingly, dismissed Plaintiffs’ ECOA and ELCRA claims. The Court then analyzed the merits of Plaintiffs’ FHA allegations. The Court stated that a \textit{prima facie} case under the FHA on a disparate impact theory requires only that Plaintiffs allege that an outwardly neutral practice actually or predictably has a discriminatory effect; that is, it has a significantly adverse or disproportionate impact on minorities, or perpetuates segregation. \textit{id.} at *24. Here, Plaintiffs identified the policy which had a disproportionate impact on minorities. That policy consisted of Defendant routinely purchasing both stated income loans and loans with unreasonably high debt-to-income ratios, requiring that New Century’s loans include adjustable rates and pre-payment penalties as well as purchasing loans with other high-risk features, providing necessary funding to New Century, and purchasing loans that deviated from basic underwriting standards. Plaintiffs alleged that these policies resulted in New Century aggressively targeting African-American borrowers and communities for the combined-risk loans. The Court stated that as an entity engaged in residential real estate-related transactions, Defendant was a loan purchaser and mortgage securitizer that fell within the scope of the FHA, and as such was prohibited both from discriminating in real-estate related transactions as well as discriminating in the terms or conditions of such a transaction. Additionally, the Court found that Defendant’s policies themselves resulted in Plaintiffs suffering a disparate impact, and that Defendant’s policies set the terms and conditions on which it would purchase loans from New Century. Thus, because the terms and conditions governing Defendant’s loan purchases directly resulted in a disparate impact.
when they caused New Century to issue toxic loans to Plaintiffs, the Court denied Defendant’s motion to dismiss Plaintiff’s FHA claims.

(xlix) **ADA Class Actions**

**Garner, et al. v. Vist Bank, 2013 U.S. Dist. LEXIS 179480 (E.D. Pa. Dec. 20, 2013).** Plaintiffs, a blind individual and a group representing blind people, brought a class action seeking declaratory and injunctive relief contending that an ATM machine operated by Defendant did not have a functional voice-guidance feature. Plaintiffs alleged that the ATM had no features to provide blind and visually-impaired users with the same level of privacy of input and output that was provided for sighted individuals. An investigation revealed that other ATM machines in Defendant’s ATM network were in violation of Chapter 707 of the applicable ADA Standards (“2010 Standards”). Defendant filed a motion to dismiss, which the Court denied. Defendant argued that Plaintiffs failed to adequately plead that Defendant discriminated against Garner on the basis of his disability because Plaintiffs’ claim was based on Garner visiting one ATM that was temporarily malfunctioning on one occasion. While the Court agreed with Defendant’s assertion that the ADA provided for an exception to liability for isolated or temporary interruptions in service or access due to maintenance repairs, it remarked that Defendant’s argument overlooked the reality that the ATM was not equipped with functional voice-guidance features. *Id.* at *8. Accordingly, the Court concluded that at the motion to dismiss stage, it would accept Plaintiffs’ allegations as true and found that Plaintiff had adequately pled a claim upon which relief could be granted under the ADA. Defendant also contended that Garner did not meet the standing requirements under Title III of the ADA. Defendant specifically argued that Garner was a tester Plaintiff who did not have standing to seek injunctive relief because he could not sufficiently allege an injury-in-fact. The Court noted that there were two methods that Garner could use to meet his burden of showing a sufficient imminent injury-in-fact, including: (i) the intent to return method; and (ii) the deterrent effect doctrine. *Id.* at *12. In the intent to return method, a Plaintiff could show that he faced an injury-in-fact that upon his return to the place where the alleged discrimination took place, the same alleged discrimination would occur again. *Id.*. Plaintiffs alleged that Defendant engaged in discriminatory conduct by not having functioning voice-guidance features on the ATM, and the Court observed that it was reasonable to infer that the discriminatory conduct would continue because Plaintiffs alleged that Defendant did not have a plan or policy to cause its ATMs to become compliant with the 2010 Standards. *Id.* at *13. Accordingly, the Court concluded that Plaintiff Garner faced an imminent injury-in-fact that gave him standing to seek an injunction to correct the discriminatory behavior. The Court further noted that under the deterrent effect doctrine, a Plaintiff is considered to have suffered an actual injury when he or she is deterred from patronizing a public accommodation because of accessibility barriers. *Id.* at *16. The Court observed that the deterrent effect method of establishing standing was based on the notion that a disabled Plaintiff suffered an injury under the ADA not only when he faced a barrier while visiting a Defendant’s place of public accommodation, but also when he is denied the opportunity to avail himself of the goods and services at Defendant’s entity. *Id.* at *17. Here, the Court noted that as Plaintiff Garner alleged that he discovered that the ATM was not accessible to the blind when he attempted to use it, but was unable to because it lacked functional voice-guidance features. *Id.* at *18. Accordingly, the Court concluded that Plaintiffs had standing. Defendant further argued that the other Plaintiff group – “Blind Ambitions” – did not have a standing because finding an ADA violation required the participation of individual members of Blind Ambitions. *Id.* at *20. The Court noted that the lawsuit dealt with blind individuals having access to public ATMs, which fell directly in line with the Blind Ambitions’ stated purpose, and that it sought a declaratory relief to bring ATMs in compliance with the 2010 Standards. *Id.* at *23. The Court thus ruled that Blind Ambitions had the standing to pursue the claim, and denied Defendant’s motion to dismiss.

**Vondersaar, et al. v. Starbucks Corp., 2013 U.S. Dist. LEXIS 122064 (C.D. Cal. Aug. 26, 2013).** Plaintiffs brought a class action on behalf of a putative class of wheelchair and electric scooter users under the ADA and the California’s Unruh Civil Rights Act alleging that the pick-up counters at Defendant’s stores were too high for them to reach. After the Court dismissed the complaint, Plaintiffs filed a first amended complaint (“FAC”) alleging that Defendant agreed to install ADA-compliant counters in all new construction, but chose not to lower pre-existing non-compliant counters. Plaintiffs identified 18 southern California
locations at which they personally encountered non-compliant counters and 50 other southern California stores that contained high counters, although they had not themselves visited those stores. Defendant moved to dismiss the FAC, which the Court granted in part. Defendant argued that Plaintiffs lacked standing to assert claims regarding stores they had not visited because they could not alleged a threat of future injury at those stores. *9. The Court stated that ADA standing was not necessarily site specific, and a purported class representative’s standing was not limited to locations actually visited. The Court agreed in part with Defendant’s argument that Plaintiffs had failed to adequately allege a standard, common, non-compliant ADA policy. The Court remarked that Plaintiffs’ factual allegations were not broad enough to encompass all of Defendant’s stores because Plaintiff had not alleged any facts regarding stores constructed after 2005, and all claims regarding such stores must be dismissed. Regarding the state law claims, the Court opined that a Plaintiff only had standing under the Unruh Act if he was the victim of a discriminatory act. *9. The Court noted that class actions under the Unruh Act were common, and having determined that Plaintiffs had standing to pursue class claims regarding stores constructed before 2005, this issue appeared to be moot. Accordingly, the Court granted in part and denied in substantial part Defendant’s motion to dismiss.

(I) Government Enforcement Litigation

**Department Of Fair Employment And Housing, et al. v. Law School Admission Council, Inc., 2013 U.S. Dist. LEXIS 57431 (N.D. Cal. April 22, 2013).** The DFEH filed suit against the Law School Admission Council, Inc. (“LSAC”), seeking damages and injunctive relief over alleged failures of the LSAC to provide disability-related accommodations to test-takers of the Law School Admission Test (“LSAT”). The DFEH brought its action both on behalf of 17 named individuals and as a “group or class” complaint on behalf of “all disabled individuals in the State of California who requested a reasonable accommodation for the LSAT from January 19, 2009 to the present.” *1. The DFEH alleged several forms of discrimination, including policies or procedures alleged to require test-takers to undergo psycho-educational and neuropsychological evaluations in order to be eligible for an accommodation, and a practice of placing notations on the test score if a test-taker was provided an accommodation, which is disclosed to all schools receiving the test score. *1-3. The DFEH brought the current motion claiming that its suit, similar to government enforcement actions brought by the EEOC, was not a “class action” and thus is not subject to the requirements of Rule 23. The Court held that the DFEH’s suit against the LSAC was indeed a “government enforcement action” seeking relief on behalf of a group of aggrieved individuals and did not qualify as a class action within the meaning of Rule 23. *27. In so ruling, the Court first analyzed the U.S. Supreme Court’s ruling in *General Telephone Co., of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980), which held that the EEOC could maintain a civil action for the enforcement of a statute under its jurisdiction and may seek relief for a group of individuals without first obtaining class certification under Rule 23. *10-11. The Court noted that the principle that emerged from *General Telephone* and post-*General Telephone* cases is that – where a government agency is authorized to act in the public’s interest to obtain broad relief, and the statute confers this power on the agency without referencing class certification – Rule 23 may not apply. *18. Turning to the DFEH, the Court noted that it must examine the nature of the DFEH’s enforcement actions to decide whether or not they are subject to Rule 23’s requirements. *20. The Court closely followed the Supreme Court’s analysis in *General Telephone*, starting with the DFEH’s authority. The Court noted that the California Fair Employment and Housing Act (“FEHA”) authorizes the DFEH to file administrative charges and to bring civil actions for group or class relief. *21. Additionally, the California Supreme Court has recognized the DFEH as a public prosecutor enforcing a public right. *24. The Court also analyzed the relationship and potential conflict between Rule 23 and the FEHA. *24-30. The Court noted that applying Rule 23 to the FEHA would substantially limit the number and types of suits the DFEH could bring on behalf of a class. *24. For instance, Rule 23 would foreclose actions by the DFEH against employers with a small number of employees because the DFEH would be unable to meet Rule 23’s numerosity requirement. *28. Similarly, the DFEH’s actions would be limited to claims “typified by those of the original charging party,” even though the FEHA authorizes class claims that are “like or reasonably related to” the original charge. *28-29. Finally, under the FEHA, the DFEH is authorized to proceed with an action even if some class members may appear to be disadvantaged, so long as the suit is advancing the public...
interest. *Id.* at 29. Applying Rule 23’s adequate representation requirement to the DFEH, however, would operate to foreclose an enforcement action where a conflict of interest between the DFEH and the members of the putative class existed. *Id.* at *29. The Court also evaluated the policy behind distinguishing the DFEH’s action from a Rule 23 class action. *Id.* at *30-31. The Court reasoned that unlike a private class action, where the typicality requirement ensures absent class members are not denied due process of law when they are bound without their explicit consent, in the DFEH case, absent victims are not bound by the outcome of a DFEH suit and may bring a suit against the employer on their own. *Id.* The Court also rejected the LSAC’s objections. The LSAC argued the Court’s ruling would create an untenable conflict between FEHA and Rule 23. *Id.* at *31-32. The Court dismissed this argument, noting that its decision does not hold that California law trumps Rule 23. *Id.* at *32. Instead, its decision establishes that certain governmental enforcement actions are simply “not” class actions. *Id.* The LSAC also argued the Court’s rule would allow “a state statute to prescribe the procedure for pursuing purported class claims in federal court.” *Id.* at *37-38. The Court rejected this argument, finding that the LSAC missed the import of *General Telephone.* The Court reiterated its ruling that when a government agency pursues class-wide relief through a civil enforcement action, it is not prosecuting a “class action” subject to Rule 23. *Id.* at *38.

**State Of Arizona v. ASARCO LLC, 733 F.3d 882 (9th Cir. 2013).** Defendant, a large copper mining company, employed Angela Aguilar at a mill facility in Sauharita, Arizona beginning December of 2005. During the eleven months she worked at the mill, Aguilar alleged she suffered repeated instances of sexual harassment by multiple successive supervisors and fellow co-workers, despite her complaints to ASARCO’s human resources department and at least one mill manager. Subsequently, Arizona sued Defendant, and Aguilar intervened in the lawsuit. After an eight-day trial, a jury found ASARCO liable on Aguilar’s sexual harassment claims, but not on her constructive discharge or retaliation claims. The jury did not find any compensable damages for Aguilar, instead awarding her one dollar in nominal damages for the sexual harassment claim and $868,750 in punitive damages. When ASARCO moved for judgment as a matter of law, the District Court ordered that the punitive damages award be reduced to Title VII’s statutory maximum of $300,000, but held the damages were not constitutionally excessive. On appeal, the Ninth Circuit evaluated the propriety of the punitive award through the lens of the U.S. Supreme Court’s three “guideposts” for determining unconstitutional excessiveness, including: (i) the degree of reprehensibility of Defendant’s conduct; (ii) the ratio of the punitive award to the actual harm inflicted on Plaintiff (*i.e.*, the dollar value of compensatory and nominal damages awarded); and (iii) the existence of any civil or criminal penalties that could be imposed for comparable misconduct. *Id.* at *885. As to the reprehensibility of ASARCO’s conduct, the Ninth Circuit held the minimal magnitude of harm actually inflicted on Aguilar had little bearing on whether ASARCO acted reprehensibly or with reckless disregard for Aguilar’s health and safety. The Ninth Circuit declined to consider the degree of harm inflicted, and instead considered only the type of harm inflicted, holding that intentional discrimination is “high on the reprehensibility scale.” *Id.* at 886. Similarly, the Ninth Circuit considered ASARCO’s disregard for risk to Aguilar sufficiently reprehensible to warrant high punitives, notwithstanding the fact that the specter of harm never actually materialized. *Id.* at 888. As to the ratio of the punitive award to the actual harm inflicted, the Ninth Circuit acknowledged that the 300,000 to 1 ratio far exceeded the next highest ratio – a 125,000 to 1 award – that it could locate in its own survey of discrimination case law. *Id.* at 891. Importantly, the Supreme Court has previously held “[punitive] damages must bear a reasonable relationship to compensatory damages,” and “few awards exceeding a single-digit ratio between punitive and compensatory damages … will satisfy due process.” *Id.* In light of these admonitions, the Ninth Circuit concluded a reduction of the punitive award was in order. As to possible penalties for comparable misconduct, the Ninth Circuit held Title VII’s damages cap to be a “legislative judgment” appropriate for benchmarking the reasonableness of a punitive award, and weighing in favor of damages “at least on the order of the statutory cap.” *Id.* at 893. The Ninth Circuit then held “a 300,000 to 1 ratio raise[d] [its] judicial eyebrows,” but a 125,000 to 1 ratio – the highest prior ratio it could find – did not. The Ninth Circuit cited numerous case law authorities striking down lesser punitive award ratios despite findings of actual harm, but nonetheless imposed the 125,000 to 1 ratio upon ASARCO. *Id.* The Ninth Circuit, therefore, vacated...
the District Court’s $300,000 punitive award, and remanded the case with the instruction that a new trial be ordered should Plaintiff reject a remittitur to $125,000. *Id.*

(ii) **Alien Tort Statute Class Actions**

**Balintulo, et al. v. Daimler AG, 2013 U.S. App. LEXIS 17474 (2d Cir. Aug. 21, 2013).** Plaintiffs brought consolidated putative class actions on behalf of those harmed by the decades-long South African apartheid alleging that the South African subsidiary companies of Defendants aided and abetted violations of customary international law committed by the South African government. Specifically, Plaintiffs claimed that Defendants sold cars and computers to the South African government, thus facilitating apartheid regime’s race-based deprivations and injustices, including rape, torture, and extrajudicial killings. *Id.* at *10. Plaintiffs brought the actions under the Alien Tort Statute (“ATS”), which confers federal jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the U.S.” *Id.* at *12. Defendants petitioned for mandamus relief after the District Court denied their motion to dismiss. Defendants argued that ATS did not allow for liability against corporations for acts committed outside the U.S. Defendants also argued that allowing the suit to continue threatened U.S. foreign policy interests. The Second Circuit denied mandamus relief, finding that the extraordinary remedy was not necessary because all of Plaintiffs’ claims were barred by the recent opinion of the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), which held that federal courts might not, under the ATS, recognize common law causes of action for conduct occurring in the territory of another sovereign. *Id.* at *17. The Second Circuit noted that *Kiobel* foreclosed all of the claims because Plaintiffs failed to allege that any relevant conduct occurred in U.S. The Second Circuit rejected Plaintiffs’ arguments that the ATS reached extraterritorial conduct because Defendants were American nationals and Defendants’ conduct affirmed significant American interests. All the relevant conduct here had taken place outside the U.S., and the Supreme Court, in *Kiobel*, had “expressly held that claims under the ATS cannot be brought for violations of law of nations occurring within the territory of a sovereign other than the United States.” *Id.* at *41. The Second Circuit held that a common law cause of action brought under the ATS could not have extraterritorial reach, and stated that District Courts are bound by the Supreme Court’s rule and they are without authority to “reinterpret” the binding precedent in light of irrelevant factual distinctions, such as the citizenship of Defendants. *Id.* Plaintiffs argued that Defendants took affirmative steps to circumvent the sanctions regime and that discovery would be necessary to determine the full scope of such U.S.-based conduct. The Second Circuit, however, noted that none of the claims tied the relevant human rights violations to actions taken within the U.S. Plaintiffs had alleged only vicarious liability of Defendants based on the actions taken within South Africa by their South African subsidiaries. Because Defendants’ putative agents did not commit any relevant conduct within the U.S. giving rise to a violation of customary international law, the Second Circuit concluded that Defendants could not be vicariously liable under the ATS. *Id.* at *51. The Second Circuit further found that issuance of the writ was unnecessary because Defendants had an adequate means of relief through a motion for judgment on the pleadings in light of *Kiobel.* *Id.* at *52. The Second Circuit also refused to consider whether Defendants had asserted a valid basis for “collateral order” jurisdiction because the *Kiobel* decision had plainly foreclosed Plaintiffs’ claims as a matter of law. *Id.* at *53. Accordingly, the Second Circuit denied the petition for mandamus relief.

**Doe, et al. v. Nestle USA, Inc., 2013 U.S. App. LEXIS 25204 (9th Cir. Dec. 19, 2013).** Plaintiffs, a group of Malian children who were forced to labor on cocoa fields, brought a class action asserting causes of action under the Alien Tort Statute (“ATS”), Torture Victim Protection Act, and related state law claims. Defendants moved to dismiss Plaintiffs’ first amended complaint pursuant to Rule 12(b)(6) for failure to state claims upon which relief could be granted. The District Court explained that the key question was whether domestic law or international law provided the proper legal standard for determining aiding and abetting liability under the ATS. Plaintiffs asserted that the proper source of aiding and abetting liability is domestic law. Defendants asserted that international law was the proper source. The District Court held that international law provides the appropriate definition of aiding and abetting law and granted Defendant’s motion to dismiss. The District Court reasoned that the ATS provides a domestic civil cause of action, which incorporated universally recognized norms of international law regardless of whether they were
criminal or civil. The District Court also held that provision of money by corporations to farmers was not specifically directed to assist farmers’ engagement in child labor, thereby precluding Defendants’ aiding and abetting liability. Finally, the District Court held that the Plaintiffs failed to allege that Defendants had requisite mens rea as part of asserting Defendants engaged in aiding and abetting liability under the ATS. Plaintiffs appealed. The Ninth Circuit vacated the District Court’s dismissal and held that Defendants could face liability under the ATS. The Ninth Circuit held that the District Court erred in requiring Plaintiffs to allege specific intent in order to satisfy the mens rea standard. The Ninth Circuit opined that the District Court should have granted Plaintiffs leave to amend their complaint in light of recent authority regarding the extraterritorial reach of the ATS and the standard for aiding and abetting. Thus, the Ninth Circuit remanded the case for further proceedings.

(iii) Workplace Antitrust Class Actions

**Cason-Merenda, et al. v. Detroit Medical Center, 2013 U.S. Dist. LEXIS 131006 (E.D. Mich. Sept. 6, 2013).** Plaintiffs alleged that eight Detroit area hospitals had engaged in a conspiracy to suppress nurse wages in the Detroit Metropolitan Area (“DMA”). Plaintiffs alleged in count I that Defendants entered into an agreement to suppress RN wages which violated § 1 of the Sherman Act per se. In count II, Plaintiffs alleged that Defendants exchanged RN wage information and that the effect of the exchange unlawfully suppressed RN wages in the DMA in violation of § 1 of the Sherman Act under the rule of reason. In previous decisions the Court granted Defendants’ motion for summary judgment as to count I but denied it as to count II. It also denied Defendant’s motion to exclude the testimony of Plaintiffs’ expert, Dr. Orley Ashenfelter, under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Defendants' challenge to Plaintiffs' motion for class certification focused almost exclusively on the predominance requirement of Rule 23(b)(3), *i.e.*, that questions of law or fact common to the class members predominate over any questions affecting only individual members. *Id.* at *22-23. According to the Court, Defendants’ principal argument in this respect was that Plaintiffs could not demonstrate, with proof common to the class, that each of the class members suffered an injury-in-fact as a result of the alleged antitrust violation. *Id.* at *31-32. Plaintiffs’ theory of damages in the case, both fact of injury and amount, relied exclusively upon the expert testimony of Dr. Ashenfelter. *Id.* at *24. Dr. Ashenfelter proposed to show the wages that class members would have earned had there been no conspiracy to unlawfully exchange wage data (the “but-for” wages) by using a “benchmark” methodology comparing the wages paid to RNs to what the hospitals paid for registered nurses supplied by temporary agencies. *Id.* at *45-46. Among their challenges, Defendants argued that Dr. Ashenfelter’s opinion improperly adopted a “one-size-fits-all” approach that disregarded the wide range of wages actually paid to the members of the RN class and disregarded the myriad factors, such as experience, specialized skills and department, that contribute to the wage disparities. *Id.* at *47. Dr. Ashenfelter himself conceded that his methodology measured only the “generic” nursing services provided by agency nurses and that it may result in understating the losses of experienced nurses. *Id.* at *47-48. The Court, however, rejected Defendants’ argument, agreeing with Plaintiffs that Dr. Ashenfelter’s opinion created a jury question concerning whether his benchmark approach provided a conservative estimate of the wages that all or nearly all class members would have earned but-for the alleged unlawful wage exchange. The Court also rejected Defendants’ argument that Dr. Ashenfelter’s benchmark analysis could not, on a class-wide basis, demonstrate the amount of damages suffered by all or nearly all class members. The Court characterized Defendants’ argument in this respect as merely a rehash of its “one-size-fits-all” argument that it had rejected in connection with Defendants’ challenge to Plaintiffs attempted showing of injury-in-fact. *Id.* at *67. For these reasons, the Court granted Plaintiffs’ motion for class certification.

**In Re High-Tech Employee Antitrust Litigation, 2013 U.S. Dist. LEXIS 153752 (N.D. Cal. Oct. 24, 2013).** On behalf of themselves and a class of employees, Plaintiffs alleged that seven high profile, high-tech employers reached agreements among themselves not to solicit each other’s employees and that the effect of these agreements was to suppress their wages. Plaintiffs moved for class certification and the Court granted their motion. In their motion Plaintiffs sought to certify a nationwide class of salaried technical, creative, and research and development employees who worked for any Defendant while that Defendant participated in at least one anti-solicitation agreement with another Defendant. *Id.* at *23.
 Plaintiffs estimated that the class exceeded 50,000 employees. \textit{Id.} at *25. The requirements of Rule 23(a) were not contested, and the Court found that Plaintiffs' satisfied them. \textit{Id.} at *31-39. The battleground of the parties focused on predominance under Rule 23(b)(3). The question was whether Plaintiffs could show with proof common to the class: (i) that all or nearly all members of the class suffered injury as a result of the alleged antitrust violation (“antitrust impact”); and (ii) the amount of damages suffered by class members. \textit{Id.} at *39-40. After reviewing recent Supreme Court and Ninth Circuit class action jurisprudence, the Court reached a number of conclusions that guided its analysis, including: (i) predominance requires the Court to determine whether common evidence and common methodology could be used to prove the elements of the underlying cause of action; (ii) the analysis may overlap with the merits, but the inquiry cannot require Plaintiffs to prove elements of their substantive case at the class certification stage; (iii) the Court must not only determine the admissibility of relevant expert testimony, but also its persuasiveness, which may require the Court to resolve methodological disputes; (iv) predominance requires a qualitative assessment and is not a mere inquiry into whether more individual than common questions exist; and (v) Plaintiffs are not required to show that each element of their claims is susceptible class-wide proof, only that common questions will predominate with respect to their case as a whole. \textit{Id.} at *53-54. The Court concluded that Plaintiffs' satisfied their burden regarding antitrust impact. In the Court's view the record supported the Plaintiffs' contention that the absence of employee solicitation could suppress the wages not only of the employees who would have been solicited, but also all other employees in the purported class. According to the Court, the evidence showed that each Defendant used formal administrative compensation structures that divided jobs into pay bands, zones, grades, and ranges by which they evaluated and paid employees in groups in relationship to other groups. \textit{Id.} at *86-87. It also found that in reaching compensation decisions it was important to each Defendant to maintain internal equity, i.e., “the idea that employees doing the same work would generally be paid similarly – in both hiring and promotions.” \textit{Id.} at *93. Thus, if a Defendant is forced to raise an employee's salary either in anticipation, or as the result, of solicitation by another employer, a Defendant would increase the pay of other employees to maintain internal equity. \textit{Id.} at *86-101. The Court found that these conclusions were supported by substantial documentary evidence and the testimony of Plaintiffs' experts. The Defendants argued that managers exercised broad discretion when setting and adjusting salaries and that in making compensation decisions, they valued performance over internal equity. As a result, they contended that compensation decisions were highly individualized and would require a case-by-case determination. The Court rejected these arguments, finding that they were supported principally by declarations drafted for purposes of the litigation and were inconsistent with contemporaneously created documents. The Court also found the criticisms lodged by Defendants' experts against the testimony of Plaintiffs' experts unpersuasive because, among other things, they were “conclusory and contrary to the overwhelming evidence in the record.” \textit{Id.} at *150-51. Finally, with respect to damages the Court concluded that the formulaic model for calculating damages created by Plaintiffs' expert satisfied the requirements of Rule 23(b)(3). \textit{Id.} at *167-177.

(iii) Stays In Class Action Litigation

\textit{Altamura, et al. v. L'Oreal, USA, Inc.}, 2013 U.S. Dist. LEXIS 122992 (C.D. Cal. Aug. 26, 2013). Plaintiffs, a group of consumers, brought a class action alleging breach of implied warranty of merchantability, breach of warranty of fitness, violation of the California Business and Professions Code and California Consumer Legal Remedies Act, and false advertising pursuant to New York General Business Law (“GBL”). Earlier, the Court had certified a class composed of New York purchasers, and denied certification of a class of California purchasers. Pursuant to Rule 23(f), Defendant petitioned for interlocutory appeal of this order, and moved before the Court to stay the action pending resolution of its Rule 23(f) appeal. The Court granted the motion. While determining whether a stay was appropriate, the Court considered Defendant's likelihood of success on the merits of the appeal, harm to Defendant in the absence of a stay, harm to Plaintiffs if the action was stayed, and the public interest. The Court stated that in order to show that Defendant were likely to succeed with their appeal they only had to demonstrate that its appeal involved serious legal questions. Here, Defendant had appealed the Court’s application of \textit{Comcast v. Behrend}, 133 S. Ct. 1426 (2013), to the statutory damages provision of § 349(h) of the GBL, which the Court opined was a serious legal question. \textit{Id.} at *5. Because this was an unsettled area of law,
the Court opined that Defendant’s appeal had a sufficient likelihood of success to justify a stay. Second, Defendant argued that sending out class-wide notification to the members of the New York class would unnecessarily damage its reputation if the New York class was decertified on appeal. Defendant also argued that the current two-tracked format of this action would force it to simultaneously litigate certification for the California class and merits discovery for the New York class. The Court found that Defendant’s concerns justified staying this case, except that Plaintiffs should be permitted to renew their motion to certify the California class. The Court reasoned that although Defendant could be harmed if this case unnecessarily proceeded to class notification and merits discovery, the harms identified were not implicated by Plaintiffs’ renewed motion to certify the California class, particularly because the New York class would be stayed in its entirety, class notice would not be distributed, and Defendant would not be forced into piecemeal litigation while its appeal was pending. Third, because Plaintiffs agreed that a stay of merits discovery and class notification was appropriate pending Defendant’s appeal and their own renewed motion for certification of the California class, the Court observed that this factor favored a limited stay. Finally, the public interest also supported a limited stay because by staying this action, the Court would avoid costly and potentially unnecessary litigation if the New York class was eventually decertified. The Court noted that proceeding with Plaintiffs’ renewed motion to certify the California class would keep this case moving forward, and thus serve the interests of justice. Accordingly, the Court granted the motion to stay the case but ordered that the stay would not apply to Plaintiffs’ renewed motion for certification of the California class and any discovery directly related to the renewed motion for class certification.

Busk, et al. v. Integrity Staffing Solutions, Inc., 2013 U.S. Dist. LEXIS 126738 (D. Nev. Sept. 5, 2013). Plaintiffs, a group of warehouse workers, brought a wage & hour class action seeking unpaid wages under the FLSA and state labor laws. Plaintiffs alleged that Defendant required them to pass through a security clearance at the end of each shift, for which they were not compensated. The District Court had dismissed Plaintiffs’ claims, finding that the time spent clearing security was not compensable under FLSA. Thereafter, Plaintiffs appealed the District Court’s order to the Ninth Circuit. The Ninth Circuit reversed in part, holding that the time spent proceeding through mandatory security screenings – to prevent employee theft – was compensable under the FLSA. Id. at *2. Subsequently, Plaintiffs sought to certify classes in Arizona, Pennsylvania, South Carolina, and a nationwide collective class action under the FLSA. Id. Defendant asserted that the Ninth Circuit’s decision had created an inter-circuit split and a decision was needed to resolve the unsettled nature of the FLSA on this issue therefore it petitioned the Supreme Court for writ of certiorari. Id. at *3. Defendant moved to stay all proceedings for 180 days, and the Court granted that motion. Plaintiffs argued that they would be prejudiced by a 180-day stay of all proceedings because they would not be able to take pre-discovery phase litigation steps and thus be prepared to commence discovery immediately following the Supreme Court’s decision on Defendant’s writ. Id. The Court noted that Plaintiffs were seeking to pursue a class action that would include nationwide discovery costs and legal fees and ultimately be very costly and burdensome for Defendant. Moreover, the Supreme Court’s decision on Defendant’s writ could drastically alter the parties’ litigation focus and, in fact the case itself; therefore, forcing the parties to proceed prior to a decision on Defendant’s writ, would risk wasting a substantial amount of resources on a case that might never go forward in its current form. Id. at *4. Additionally, the Court stated that waiting six months to determine whether Defendant’s petition would be granted would greatly simplify this case because the parties would be certain as to what law would apply. Therefore, regardless of how the Supreme Court decides, once the parties had their answer they would know how to move forward and eventually reach a resolution in this case. Id. Accordingly, the Court opined that it was in the interest of both parties, as well as the Court, to stay this case pending a decision by the Supreme Court on whether to grant the petition, or for 180 days from the date Defendant filed its motion, whichever was sooner.

In Re Online Travel Co. Hotel Booking Antitrust Litigation, Case No. 12-CV-3515 (N.D. Tex. April 24, 2013). In this consolidated class action, Plaintiffs alleged price fixing against Defendants, a group of online travel companies and hotel companies. Defendants filed a motion to compel arbitration, arguing that Plaintiffs had agreed to binding arbitration clauses while making on-line bookings. Plaintiffs filed a motion requesting that the Court stay briefing on Defendants’ motion to compel arbitration pending the Supreme
Court’s decision in *American Express Company v. Italian Colors Restaurant*, No. 12-133 (the “Amex case”). The Court denied Plaintiffs’ motion. The Court pointed out that despite knowing about the impending motion to compel arbitration months in advance of its filing, it was only now that Plaintiffs were formally requesting a stay in light of a Supreme Court case that had been pending since last year. Plaintiffs argued that no individual Plaintiff or class member could prosecute an antitrust action against Defendants given the high expert witness and other non-recoverable costs that would be involved and accordingly, Plaintiffs would effectively be prevented from vindicating their statutory rights under the antitrust laws. In granting *certiorari* in *Amex*, the Supreme Court was reviewing the Second Circuit’s underlying decision, where it found that an arbitration clause would entirely preclude certain merchants’ antitrust claims against Defendant and was thus unenforceable. *Id.* at *4.* The Court ruled that the granting of *certiorari* in the *Amex* case did not warrant a stay in this case. The Court observed that the *Amex* decision could affect current binding law regarding arbitration; however, because the cases in this MDL proceeding had been pending for several months, the Court as part of its case management procedures refused to halt proceedings just because it appeared that the *Amex* case could address a relevant or even dispositive issue. The Court concluded that Plaintiffs had waited too long in filing their motion and therefore denied their request for stay.

*Laumann, et al. v. National Hockey League*, 2013 U.S. Dist. LEXIS 31978 (S.D.N.Y. Mar. 6, 2013). Plaintiffs, a group of subscribers of television and internet packages for baseball and hockey programming, brought two putative class actions, which were subsequently consolidated into one against the National Hockey League (“NHL”), Major League Baseball (“MLB”), various clubs within the Leagues, regional sports networks (“RSNs”), Comcast, DirecTV, and multichannel video programming distributors (“MVPDs”). Plaintiffs alleged violations of the Sherman Act based on Defendants’ agreement to eliminate competition in the distribution of baseball and hockey games over the internet and television by dividing the live-game video presentation market into exclusive territories, protected by anti-competitive blackouts, and colluding to sell out-of-market packages exclusively through the League, which exploited its monopoly by charging supra-competitive prices. Defendants Comcast and DIRECTV moved on behalf of themselves and their affiliated RSNs (together “TV Defendants”) to stay the television subscriber’s claims pending a ruling in *American Express Co. v. Italian Colors Restaurant* (*AMEX*), which was argued in the U.S. Supreme Court on February 27, 2013. *Id.* at *6-7.* *AMEX* addressed the enforceability of an arbitration clause barring class arbitration as applied to federal antitrust claims. Defendant MLB, its various affiliates, and teams within the league (together, “MLB Defendants”) moved to stay *Garber v. MLB* (one of the class actions) in its entirety, pending the decision in *AMEX*. The Court denied both motions. *Id.* at 5. Pursuant to their contracts for television service, Plaintiffs entered into arbitration agreements with the TV Defendants that contained explicit class action waivers. In *AMEX*, the Second Circuit had declined to compel arbitration when a class action waiver contained in an arbitration agreement would effectively deprive Plaintiffs of federal antitrust law protection. *Id.* at *6.* None of the MLB Defendants had arbitration agreements with Plaintiffs. Although Plaintiffs did not allege that MVPDs had conspired with each other, their involvement in the case was not limited to claims by their own subscribers. *Id.* at *10.* Plaintiffs implicated the TV Defendants in the blackout agreements in internet packages. Moreover, the affiliated RSNs were broadcasted by multiple non-affiliate MVPDs – a Comcast RSN had no legal entitlement to require named Plaintiff Silver, a DIRECTV subscriber, to arbitrate his antitrust claims against the Comcast RSNs and vice versa. The Court noted that the TV Defendants could be correct that a reversal in *AMEX* could drastically reduce their liability by eliminating certain classes of claims; however, they offered no evidence that their role in the pre-trial proceedings would be significantly impacted by the outcome in *AMEX*. *Id.* at *11.* The Court noted that the MLB’s motion rested on multiple optimistic speculations, *i.e.*, that the Supreme Court would reverse *AMEX*, that Plaintiffs would pursue their claims against the TV Defendants in arbitration despite the Second Circuit’s finding that arbitration was prohibitive of just such claims, and that the Court would stay the entire antitrust case. *Id.* at *12-13.* The Court stated that Plaintiffs would have no judicial recourse against certain alleged conspirators in an anti-competitive agreement because arbitration agreements had no bearing on the viability of claims against the conspiracy’s core members. *Id.* at 13. The Court concluded that the TV Defendants failed to show that a stay pending a decision in *AMEX* would avoid significant prejudice to their rights to arbitrate claims with their subscribers. *Id.* at *14.* The Court
reasoned that a stay would delay litigation and result in greater inefficiencies than permitting the litigation to proceed on schedule. \textit{Id.}


Plaintiffs, on behalf of themselves and similarly-situated female store managers employed by Defendant, filed a nationwide class action alleging that Defendant paid female store managers less than males in violation of Title VII and the Equal Pay Act. Plaintiffs premised their claims on the allegation that they were discriminated against in pay as a result of subjective decisions made at the local store levels. After substantial discovery had been taken, but before Plaintiffs had moved for class certification, the Supreme Court issued its decision in \textit{Wal-Mart Stores, Inc. v. Dukes}, 131 S. Ct. 2541 (2011). Thereafter, Defendant filed a motion to dismiss and/or strike Plaintiffs’ class claims on the grounds that those claims were foreclosed by the Supreme Court’s decision in \textit{Wal-Mart}. In addition to opposing Defendant’s motion, Plaintiffs filed a motion for leave to file a first amended complaint in an attempt to avoid the potential consequences of \textit{Wal-Mart}. The District Court granted Defendant’s motion to dismiss and denied Plaintiffs’ motion for leave to file an amended complaint. Reference the Plaintiffs’ prior admission that the allegations of class-wide discrimination in their original complaint were “virtually identical” to those asserted in \textit{Wal-Mart}, the District Court concluded that Plaintiffs’ allegations failed to satisfy Rule 23(a)(2)’s commonality requirement because they were based on subjective decisions made at the store levels by hundreds of decision-makers. Furthermore, the District Court denied leave to amend on grounds of prejudice and futility, noting that while Plaintiffs purported to deny in the amendment that class members’ pay was set through a discretionary, subjective process, the discretionary pay of managers, within uniformly established parameters, remained the only source of discrimination alleged. Plaintiffs subsequently appealed the District Court’s order. On appeal, a divided three-judge Fourth Circuit panel reversed and remanded over a lengthy dissent. While the Fourth Circuit affirmed the District Court’s dismissal of Plaintiffs’ original complaint because those claims made conclusory allegations that Defendant exercised centralized control of store manager compensation at the corporate level, without identifying decision-makers or alleging that the subjectivity and stereotyping were exercised in a common manner with common direction, the Fourth Circuit found that the District Court’s denial of leave to amend the complaint on grounds that it was foreclosed by \textit{Wal-Mart} was erroneous and based on a misapprehension of the applicable law. In a vigorous dissent, the majority opinion was described as having subverted the Supreme Court’s decision in \textit{Wal-Mart}. Upon remand, Defendant filed a motion for a stay. Defendant asserted that it intended to file a petition for \textit{certiorari} with the U.S. Supreme Court to challenge the Fourth Circuit’s decision, and that the given the extensive costs and discovery the parties faced after the remand, a stay of the litigation pending the disposition of the petition was appropriate. The Court agreed, and granted the motion. \textit{Id.} at *1. The Court ordered that the case would be stayed until the Supreme Court’s ruling on Defendant’s petition for \textit{certiorari}.


Plaintiff brought a class action alleging that the portable hard drive he purchased did not work as advertised on the packaging. Plaintiff asserted claims for unfair business practices and untrue and misleading advertising under the California Business and Professions Code (“UCL”), and for violation of the California Consumers Legal Remedies Act. Plaintiff sought class certification. The Court stayed the case pending the appeal in \textit{O’Shea v. Epson America, Inc.}, Case No. 9-CV-8063, 2011 U.S. Dist. LEXIS 105504 (C.D. Cal. 2011). At issue was whether unnamed class members in a putative UCL class action had to satisfy Article III standing requirements. There was no controlling Ninth Circuit authority on that question and although \textit{O’Shea} held that absent class members must satisfy the requirements of Article III, \textit{Bruno v. Quen Research Institute, LLC}, 280 F.R.D. 524 (C.D. Cal. 2011), held that a Court was not required to analyze unnamed class members’ standing. \textit{Id.} at *2. In \textit{Mazza v. American Honda Motor Co., Inc.}, 666 F.3d 581, 594 (9th Cir. 2012), the Ninth Circuit held that in a putative UCL class action that no class may be certified that contained members lacking Article III standing. \textit{Id.} The Court, however, noted that although \textit{Mazza} explained that standing requires an actual injury traceable to the challenged conduct, it seemed to find class standing based on injury alone. \textit{Id.} Further, the Court observed that \textit{Mazza} analyzed whether a presumption of reliance was justified, and it was unclear whether this was simply the traceability prong of
the standing requirement, or some free-standing requirement that should be assessed in the Rule 23(b)(3) predominance analysis. *Id.* at *3. The Court noted that the Ninth Circuit had granted a Rule 23(f) petition in *O’Shea* to review the denial of class certification. The Court stated that appeal would address the question on which *O’Shea* and *Bruno* were split, and which, even after *Mazza*, was the source of much confusion here and in other putative UCL class actions. Because Article III standing requires an injury that is caused by the alleged misconduct, the Court opined that it would be impossible to show causation on a class-wide basis. The Court remarked that even if Plaintiff could show that the alleged injury was the same, he would have a difficulty showing that this injury, for all purchasers, was caused by alleged misrepresentations on the packaging. Accordingly, the Court stayed the action until determination of the appeal in *O’Shea*.

(liv) FCRA Class Actions

*Radcliffe, et al. v. Experian Information Solutions, Inc.*, 2013 U.S. App. LEXIS 7932 (9th Cir. April 22, 2013). Plaintiffs, a group of consumers who have been through bankruptcy, brought a class action under the Fair Credit Report Act (“FCRA”) alleging that Defendants issued improper consumer credit reports. Defendants allegedly provided reports showing that Plaintiffs were delinquent in making payments on debts that were discharged in bankruptcy proceedings, and failed to adequately investigate the errors following their discovery. The parties subsequently reached a settlement. The monetary settlement created a common fund of $45 million, and awarded up to $5,000 to each of the named Plaintiffs serving as class representatives in support of the settlement as incentives. *Id.* at *7. The class members who had sustained actual damages were to receive awards of between $150 and $750, depending on the nature of their injuries. The remaining class members were to be paid $26 each. *Id.* at *7-8. After a series of fairness hearings, the District Court issued an order granting final approval of the settlement. The settlement drew objections. On appeal, the objectors contended that the settlement agreement, which provided for incentive awards to named Plaintiffs in support of the settlement, created a conflict of interest between the class representatives and the class, and as a result, class counsel engaged in conflicted representation by continuing to represent the settling class representatives and the class at large after the two groups developed divergent interests. *Id.* at *9. The Ninth Circuit vacated the settlement. The Ninth Circuit found that the class representatives and class counsel did not adequately represent absent class members. According to the Ninth Circuit, the settlement created a divergence of interests between the named representatives and the class because incentive awards were conditioned on the class representatives’ “support for the settlement.” *Id.* at *4. The Ninth Circuit explained that the awards “changed the motivations for the class representatives. Instead of being solely concerned about the adequacy of the settlement for the absent class members, the class representatives now had a $5,000 incentive to support the settlement regardless of its fairness and a promise of no reward if they opposed the settlement”. *Id.* at *16. The Ninth Circuit stated that the significant disparity between the incentive awards and the payments to the rest of the class members further exacerbated the conflict of interest caused by the conditional incentive awards. *Id.* The Ninth Circuit questioned “whether class representatives could be expected to fairly evaluate whether awards ranging from $26 to $750 is a fair settlement value when they would receive $5,000 incentive awards” because conditional incentive awards could alter the calculus for the class representatives, pushing them to be “more concerned with maximizing their own gain than with judging the adequacy of the settlement.” *Id.* at *17. The Ninth Circuit thus held that because the class representatives would have divergent interests from those of absent class members as a result of the conditional incentive payments, they would be unable to fairly and adequately protect the interests of the class. *Id.* The Ninth Circuit further held that the conditional incentive awards rendered class counsel inadequate. The Ninth Circuit reasoned that class counsel had a fiduciary duty to the class as a whole, including reporting potential conflict issues to the District Court, which counsel failed to do. *Id.* at *23. The Ninth Circuit found that “as soon as the conditional incentive awards provision divested the interests of the class representatives from those of the absent class members, class counsel was simultaneously representing clients with conflicting interests,” and that class counsel’s conflicted representation provided another independent ground for overturning approval of the settlement. *Id.* at *24-25. However, because the conditional incentive awards did not create a conflict from day one, but rather
developed late in the course of representation, the Ninth Circuit remanded the issue to the District Court to determine when the conflict arose, and how the conflict should affect attorneys’ fees. Id. at *25.

Ramirez, et al. v. Trans Union, LLC, 2013 U.S. Dist. LEXIS 100095 (N.D. Cal. July 17, 2013). Plaintiff brought a putative class action under the Federal Credit Reporting Act and the California Consumer Credit Reporting Agencies Act alleging failure to ensure maximum possible accuracy of its credit reports and to provide consumers proper disclosures. Defendant served Plaintiff with a Rule 68 offer, which Plaintiff did not accept. Thereafter, Defendant filed a motion to dismiss for lack of subject-matter jurisdiction. The Court denied the motion, holding that the Rule 68 offer did not moot Plaintiff’s Rule 23 class action claims. Id. at *2. Subsequently, in Genesis HealthCare Corp. v. Symczyk, 133 S. Ct. 1523 (2013), the U.S. Supreme Court assumed without deciding that Defendant’s unaccepted Rule 68 offer mooted Plaintiff’s individual claims in an FLSA collective action suit, and that the lawsuit before it was properly dismissed for lack of subject-matter jurisdiction. In light of this decision, Defendant moved for reconsideration of the Court’s order. The Court denied the motion. Id. at *2-3. First, the Court noted that Pitts v. Terrible Herbst, Inc., 653 F.3d 1081, 1091 (9th Cir. 2011), held that an unaccepted Rule 68 offer of judgment for the full amount of the named Plaintiff’s individual claim, and made before the named Plaintiff filed a motion for class certification, did not moot a class action. Id. at *5. Defendant argued that Pitts was not factually analogous and therefore should not control. The Court stated that this was an improper argument because it did not fall within the narrow scope of the basis for reconsideration, i.e., the impact of Genesis on Pitts. The Court also observed that Local Rule 7-9(c) bars attempts to repeat any oral or written argument made in support of or in opposition to the interlocutory order which the party seeks to have reconsidered, and that although Defendant’s previous briefing did not address Pitts at length, it recognized its authority, pursuant to which the Court made its decision denying Defendant’s motion. Id. at *5-6. Nevertheless, the Court found Defendant’s attempt to distinguish Pitts unavailing. The Court found that, as in Pitts, the claims asserted by Plaintiff and the class would evade review if Defendant was allowed to pick off each subsequent lead Plaintiff. Id. at *7. Thus, the Court opined that Defendant’s motion was controlled by Pitts. Second, the Court disagreed that Genesis overruled Pitts, and noted that Genesis was an FLSA collective action, whereas Pitts was a Rule 23 class action. The Court opined that the delineation between Rule 23 class actions and FLSA collective actions barred a finding that Genesis was irreconcilable with Pitts. Further, the Court remarked that Pitts remained the law in the Ninth Circuit regarding the potential mooting power of Rule 68 offers on Rule 23 putative class actions and even if Genesis sent strong signals that Pitts could not survive review or even chipped away at the reasoning in Pitts, it was not enough to decline to follow Pitts. Id. at *10. Alternatively, Defendant sought to certify for appeal the subject-matter jurisdiction question pursuant to 28 U.S.C. § 1293(b), contending that whether the mootness analysis in Genesis overruled Pitts was a controlling question of law. Because Defendant failed to show that there was a substantial ground for difference of opinion as to whether Genesis overruled Pitts, the Court denied the request for certification. Id. at *13-14.

Reardon, et al. v. ClosetMaid Corp., 2013 U.S. Dist. LEXIS 169821 (W.D. Pa. Dec. 2, 2013). In this FCRA class action, Plaintiffs, a group of former job applicants, alleged that ClosetMaid had a standard practice of disqualifying job applicants for employment on the basis of their consumer reports in violation of the FCRA. Plaintiffs specifically alleged, among other things, that ClosetMaid did not send them a stand-alone FCRA disclosure. Instead, most Plaintiffs received a combined FCRA disclosure/authorization that contained a liability waiver. The Court agreed with Plaintiffs that the company’s failure to utilize a stand-alone FCRA disclosure could, and in this case did, violate the FCRA. Plaintiffs alleged that ClosetMaid relied upon information in their consumer reports without providing them with the appropriate disclosures required by the FCRA. The “Disclosure Class” consisted of about 1,800 individuals. The Court observed that at one time ClosetMaid had used both a “Notice of Intent to Obtain Consumer Credit Report” (the “Notice Form”) and an “Authorization to Obtain a Consumer Credit Report and Release of Information for Employment Purposes” (the “Authorization Form”). The Authorization Form contained a liability release that purportedly “released” ClosetMaid from complying with the FCRA’s disclosure and authorization obligations. The Court also observed that ClosetMaid did not always provide job applicants with the Notice Form and ultimately discontinued using the Notice Form altogether. ClosetMaid argued that the
Authorization Form served as both an FCRA disclosure and authorization for those individuals who only received the Authorization Form. However, the Court held that ClosetMaid’s “disclosure” in that combined form was not a stand-alone document as required under § 1681b(b)(2)(A)(i) of the FCRA. Although the FCRA allows for the authorization to be on the same document as the disclosure, the addendum of a liability release was extraneous information; thus, the Court held the form to be non-compliant. According to the Court, “ClosetMaid had no obligation to obtain a waiver of rights from the consumer; in fact, doing so in a disclosure form directly conflicted with the FCRA’s clear prohibition on an employer’s inclusion of any additional provisions, excluding the authorization itself, in the disclosure form.”  *Id.* at *5. Because the FCRA is clear in this regard, Plaintiffs alleged and the Court agreed that ClosetMaid’s actions were objectively unreasonable and therefore willful.

**Smith, et al. v. Res-Care, Inc., 2013 U.S. Dist. LEXIS 122334 (S.D. W. Va. Aug. 28, 2013).** Plaintiff, a job applicant, brought a class action under the Fair Credit Reporting Act (“FCRA”), seeking damages based on Defendant’s use of a consumer report in making the decision not to hire Plaintiff. When Plaintiff applied for employment, he authorized Defendant to investigate state, federal, and local law enforcement records to confirm statements made in his application. Plaintiff alleged that the authorization did not authorize Defendant to procure his consumer report for employment purposes. The consumer report allegedly contained criminal background information, which inaccurately maligned Plaintiff by reporting that he had written bad checks, pursuant to which Defendant declined to hire Plaintiff. Defendant moved to dismiss, arguing that because it made a Rule 68 offer of judgment to Plaintiff that fully satisfied the relief sought, Plaintiff’s claims were moot, and the Court thereby lacked subject-matter jurisdiction over the case. Defendant also argued that because no motion had yet been made for class certification, Plaintiff had no interest in representing the putative class. The Court denied the motion. Defendant made an offer of judgment to Plaintiff for $25,000, and represented that this amount was inclusive of all costs of this action and all actual attorneys’ fees. Plaintiff did not respond to the offer. The Court stated that Defendant’s offer of judgment did not fully satisfy Plaintiff’s request for relief. The Court noted that if a Plaintiff seeks uncapped and unspecified damages, an unaccepted offer of judgment cannot be said to provide full relief.  *Id.* at *14. Plaintiff’s request for relief included a request for punitive relief of an unspecified amount, and the Court found it significant that the FCRA did not cap the amount of punitive damages he could receive. Defendant, however, argued that any award of punitive damages Plaintiff received must adhere to constitutional limits as prescribed in applicable case law. The Court observed that in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages would satisfy due process.  *Id.* at *15. Because the maximum amount of actual damages under the FCRA is $1,000, Defendant argued that the maximum amount of punitive damages Plaintiff would receive using a single-digit ratio was $9,000. Defendant also contended that the allegations in this case did not support such a large award, and asserted that the $25,000 offer of judgment exceeded the amount of statutory damages, realistic punitive damages, fees, and costs to which Plaintiff was entitled. The Court found that although it was unlikely that Plaintiff would recover an amount of punitive damages in excess of $9,000, such an award was possible, and Plaintiff did not need to demonstrate the likeliness of the amount of any punitive award at that point. The Court noted that because the case was still in the early stages of discovery, a determination at this time would be inappropriate. Thus, because the Defendant’s offer of judgment did not provide full relief, the Court concluded that Plaintiff’s claims had not been mooted.

**Appeals In Class Action Litigation**

**Camesi, et al. v. University Of Pittsburgh Medical Center, 2013 U.S. App. LEXIS 18345 (3d Cir. Sept. 4, 2013).** This was a consolidated appeal of cases alleging violations of the Fair Labor Standards Act. In both cases, the District Court granted conditional certification of the collective actions, but then later granted the Defendants’ motions for decertification. The named Plaintiffs in each case voluntarily dismissed their individual claims with prejudice for the purpose of taking an appeal. The Third Circuit held that Plaintiffs lacked final orders appealable under 28 U.S.C. § 1291 and dismissed their appeals for lack of jurisdiction.  *Id.* at *1-2. The Court noted that generally a dismissal with prejudice constitutes an appealable final order. Prior interlocutory orders, such as class certification decisions, merge with the final judgment, and to the extent they affect the final judgment, may be reviewed on appeal.  *Id.* at *8. In both
cases, Plaintiffs did not suffer an adverse judgment on the merits. The subject of the appeal was not their voluntary dismissals but the interlocutory decertification orders. Id. at *13-15. Thus, the voluntary dismissal was viewed as an attempt to avoid the rule against interlocutory appeals of certification determinations. Therefore, the Third Circuit dismissed the appeals for lack of jurisdiction. Id. at *9, 15. The Third Circuit also agreed with Defendants that by voluntarily dismissing their claims, Plaintiffs made the cases moot. The Third Circuit expressly declined to consider whether the fact that individuals had opted-in to the case created a justiciable interest in the litigation based on Plaintiffs’ representative capacities. Instead, when Plaintiffs voluntarily dismissed their claims, they extinguished any residual representational interest they may have had. Id. at *15-19.

Eastman, et al. v. First Data Corp., 2013 U.S. App. LEXIS 24106 (3d Cir. Dec. 4, 2013). Plaintiffs, a group of customers, brought a class action alleging that Defendants defrauded them by charging an exorbitant and unconscionable fee under a purported lease agreement for credit and debit card equipment. After the District Court had denied Plaintiffs’ motion for class certification, Plaintiffs moved for permission to appeal. The Third Circuit denied the motion. The Third Circuit stated that Rule 23(f) states that the District Court may permit an appeal from an order granting or denying class certification as long as the petition for permission to appeal is filed within 14 days after the order is entered. Id. at *2-3. Because Rule 23(f) is a rule of civil procedure, Rule 6(a) governs the calculation of time to file the petition, which provides that when computing time in terms of days, Saturday, Sundays and legal holidays are included. Accordingly, the deadline for filing the Rule 23(f) petition was 14 calendar days. The Third Circuit, however, noted that the petition was filed three days late. Id. at *3. Although Rule 6(d) adds three days to the period when a party could act within a specified time after service and service was made under Rule 5(b)(2), the Third Circuit opined that this provision did not apply to the filing of a Rule 23(f) petition for permission to appeal. Plaintiffs contended that late filing should be permitted based on excusable neglect because they mistakenly added three days for service as provided by Rule 6(d). The Third Circuit stated that counsel’s mistake or ignorance of the rules did not constitute excusable neglect and was not a reason to accept an untimely petition. Id. at *5. Plaintiffs further asserted that the Third Circuit should allow the petition to be filed out of time. The Third Circuit remarked that the time limit set forth in Rule 23(f) was strict and mandatory and Rule 26(b)(1) clearly stated that it could not extend the time for filing a petition for permission to appeal. Id. Accordingly, the Third Circuit dismissed Plaintiffs’ petition seeking permission to appeal the District Court’s order denying class certification.

Gulino, et al. v. The Board Of Education Of The City School District Of The City Of New York, 907 F. Supp. 2d 492 (S.D.N.Y. 2013). Plaintiffs, a group of teachers in the New York City public school system, brought a class action alleging that the Board of Education of the City School District of the City of New York (“the Board”) discriminated against them in violation of Title VII of the Civil Rights Act of 1964. Id. at 525. The Court found that the Board violated Title VII by requiring teachers to pass the Liberal Arts and Sciences Test (the “LAST”) in order to obtain a permanent teaching license. Id. Defendant filed a motion requesting certification of an order for interlocutory appeal to the Second Circuit pursuant to 28 U.S.C. § 1292(b). Id. Defendant also sought certification of the question of whether an employer’s compliance with a facially neutral state licensing requirement for teachers that allegedly had a disparate impact on members of a protected class may subject it to liability under Title VII. Id. at 526. The Court observed that the issue met the statutory standard and certified the order for interlocutory appellate review. Id. Section 1292(b) authorizes an issue for immediate interlocutory appeal if the issue presents a controlling question of law, there is a substantial ground for difference of opinion on the issue, and an immediate appeal may materially advance the ultimate termination of the litigation. Id. The Court determined that the question was controlling, in that, if the Board was not subject to Title VII liability for its role in administering state law, then the case would be terminated. Id. Second, the Court noted that the Second Circuit stated that Title VII did not require employers to observe a state hiring provision that purports to require or permit any discriminatory employment practice; however, the ruling did not address whether employers must comply with facially neutral state statutes, such as the licensing requirements at issue in this case. Id. The Court opined that this issue could affect Defendant’s ability to ensure compliance with its licensing provisions. Id. The Court observed that other circuits had indicated that Title
VII liability did not extend to state licensing authorities, and the Court opined that this line of cases could extend to employers like the Board, which only hired professionals who obtained a state license to practice. *Id.* Finally, the Court determined that an immediate appeal would likely advance the termination of the litigation because the case had been pending for over 17 years, and was poised to enter a protracted remedial phase, which would likely involve discovery to determine back pay for an unascertained number of class members, and would prompt continued doubt regarding the validity of New York state teacher certification requirements. *Id.* at 527. Accordingly, the Court granted Defendant’s motion.

**In Re Cheryl Phipps, et al., 2013 U.S. App. LEXIS 24814 (6th Cir. Sep. 11, 2013).** Plaintiffs brought an action alleging that Defendant, Wal-Mart Stores, Inc., had systematically discriminated against female employees nationwide with respect to pay and promotion in violation of Title VII. Plaintiffs moved for leave to appeal a District Court’s interlocutory order dismissing their alleged class claims as time-barred. The Sixth Circuit granted the motion. The Sixth Circuit stated that it could permit an appeal to be taken from an order certified for interlocutory appeal by the District Court if: (i) the order involved a controlling question of law; (ii) a substantial difference of opinion existed regarding the correctness of the decision; and (iii) an immediate appeal could materially advance the ultimate conclusion of the litigation. *Id.* at *2. The Sixth Circuit observed that the threshold issue here was whether tolling under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), permitted the named Plaintiffs in this case to pursue a class action on behalf of a regional sub-class after decertification of the broader nationwide class in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). *Id.* The Sixth Circuit noted that the parties had not identified any circuit split on this issue, nor was the issue one of first impression. The Sixth Circuit stated that although the precedent seemingly established a bright-line rule excluding follow-on sub-class actions by former putative class members, subsequent case law had established exceptions to the rule that might extend to the present sub-class. *Id.* at *3. Due to the uncertainty in the law, the Sixth Circuit granted Plaintiffs permission to appeal.

**Love, et al. v. Wal-Mart Stores, Inc., Case No. 12-CV-61959 (S.D. Fla. Dec. 3, 2013).** Plaintiffs, a group of female employees, brought a class action under Title VII alleging that Defendant engaged in gender discrimination in three regions located in the southeastern United States. Plaintiffs were members of the original class in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and asserted class claims for a regional sub-class that was part of the nationwide class certified, and then decertified, in *Wal-Mart*. Defendant moved to dismiss the class claims, arguing that they were time-barred under *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994), which held that although the limitations period is tolled for individual claims while a class action is pending, the pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original class. *Id.* at *1. The Court granted Defendant’s motion, and rejected Plaintiffs’ arguments that *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), and *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 599 U.S. 393 (2010), implicitly overruled *Griffin*. *Id.* at *2. While *Bayer* addressed the application of the Anti-Injunction Act’s re-litigation exception, *Shady Grove* analyzed whether a New York law prohibiting certain claims from proceeding as class actions in state court similarly prohibited those claims from proceeding as class actions in federal court. *Id.* Plaintiffs then moved to certify the order dismissing their class claims for interlocutory review and to stay proceedings pending appeal. The Court granted the motion. The Court noted that it may exercise its discretion to certify an interlocutory order to the Court of Appeals only if the ruling involves a controlling question of law; there is substantial ground for difference of opinion as to the ruling; and an immediate appeal will likely materially advance the case intervenor its end. *Id.* at *2. The Court found that the controlling question of law requirement was met because the key issue presented was whether the Supreme Court’s opinions in *Bayer* and *Shady Grove* abrogated the Eleventh Circuit’s opinion in *Griffin*. Second, the Court noted that the Seventh Circuit, in *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011), opined that *Griffin*’s no piggy-backing rule cannot be reconciled with *Shady Grove*, which held that Rule 23 applies to all federal civil suits. *Id.* at *3. Although Defendant argued that *Griffin*’s no piggy-backing rule is required by the Rules Enabling Act, which forbids the use of the Federal Rules of Civil Procedure to alter any substantive rights, the Court observed that *Shady Grove* was wholly inconsistent with *Griffin*. *Id.* at *4. Thus, the Court opined that Defendant’s argument
highlighted that there was a substantial ground for difference of opinion on the impact of recent Supreme Court precedence on *Griffin*. Third, the Court noted that although this action was ready to proceed with discovery, from a judicial and litigation economy standpoint, there was no sense in requiring the parties to proceed on Plaintiffs’ individual claims only until the Eleventh Circuit had an opportunity to decide if the motion to dismiss was properly granted. The Court remarked that any ruling would have great impact on the breadth of allowable discovery and trial. Further, the Court observed that an interlocutory decision also had the potential to materially advance future cases and to conserve judicial resources involved with successive class action lawsuits filed in the future.


Plaintiffs, a group of former members of the nationwide class of female Wal-Mart employees alleging pay and/or promotion discrimination that was decertified in *Dukes v. Wal-Mart Stores, Inc.*, 131 S. Ct. 2541 (2011), moved to certify a class of employees in Region 43, a geographic region encompassing Wal-Mart stores in several states, including Tennessee. Wal-Mart moved to strike the class allegations, arguing that the putative class members’ claims were barred by the applicable statute of limitations and that the tolling doctrine set forth in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), did not apply to the class claims. Wal-Mart also relied on *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988), which held that there was unanimous agreement that the pendency of a previously filed class action did not toll the statute of limitations period for additional class actions by putative members of the original class. *Id.* at *3. Although the District Court granted the motion—holding that the putative Region 43 class members did not benefit from *American Pipe* tolling relative to the *Dukes v. Wal-Mart Stores* action—it expressed reservations about the propriety of applying *Andrews* to follow-on sub-class actions without providing for case-specific exceptions, including those recognized in various other federal case authorities. Plaintiffs then moved to certify the issue of tolling for follow-on sub-class actions for interlocutory review. While Plaintiffs’ motion was pending, the Sixth Circuit in *In Re Vertrue Marketing & Sales Practices Litigation*, 2013 U.S. App. LEXIS 10490 (6th Cir. April 16, 2013), found an exception to *Andrews* and upheld the application of *American Pipe* tolling in a follow-on class action. The District Court granted Plaintiffs’ motion. In *In Re Vertrue*, the individual Plaintiffs’ claims were denied on substantive grounds, and the District Court did not determine whether the proposed nationwide class met the Rule 23 certification requirements. *Id.* at *7. Former putative class members then filed another class action, seeking to certify the nationwide class that had not been addressed on the merits. The Sixth Circuit upheld the District Court’s finding that this second putative class action benefitted from *American Pipe* tolling, and construed *Andrews* as a case in which class certification had already been denied, whereas in *In Re Vertrue* there had been no definitive ruling on class certification. *Id.* at *8. *In Re Vertrue* held that repetitive and indefinite class action lawsuits addressing the same claims were simply not present and thus that the commencement of the original *Sanford* class action tolled the statute of limitations under *American Pipe*. *Id.* The District Court opined that *In Re Vertrue* construed *Andrews* as standing for a relatively narrow principle that it would be unjust, inefficient, and frustrate the purposes of a statute of limitations to permit former putative class Plaintiffs to re-litigate the same class certification claims perpetually with the benefit of *American Pipe* tolling. Accordingly, the District Court stated that a follow-on putative sub-class action did not necessarily present the same concern, at least where the District Court determines that the previous refusal to certify a larger class did not resolve whether members of a potentially viable putative sub-class shared sufficient commonality for Rule 23 purposes. The District Court held that the decision in *In Re Vertrue* essentially validated the District Court’s previous reservations about the scope of *Andrews*, and construed *Andrews* in a manner potentially reconcilable with permitting the extension of *American Pipe* tolling to a sub-class action here. The Court also stated that the peculiar procedural posture of this case could warrant a further type of exception to the holding in *Andrews*, particularly in light of fundamental fairness and policy concerns that apparently were not raised or were not at issue in *Andrews*. The District Court also noted that there was substantial ground for difference of opinion as to whether it could extend *American Pipe* tolling to the absent class members here, and the case presented substantial policy issues that flowed from the Supreme Court’s *Wal-Mart* decision, which could impact the viability of many putative class members’ claims here, as well as in other putative class action lawsuits going forward. *Id.* at *12. Because the legal issue presented was important, complex, and merited clarification by the Sixth Circuit, and because it was
ripe for resolution on appeal, and discovery concerning the individual Plaintiffs’ claims would not inform it, the District Court granted certification for interlocutory review.

**Foreign Worker Class Action Litigation**

*Baricuatro, et al. v. Industrial Personnel And Management Services, Inc., 2013 U.S. Dist. LEXIS 163821 (E.D. La. Nov. 18, 2013).* Plaintiffs, a group of Filipino workers, brought a class action against Defendants, three Louisiana companies who recruited and/or obtained visas for Plaintiffs, alleging that Defendants subjected them to forced labor in violation of the Trafficking Victims Protection Act (“TVPA”). Plaintiffs also alleged violation of the Racketeer Influenced and Corrupt Organization Act (“RICO”), the FLSA, and the Thirteenth Amendment in addition to alleging torts of fraud, negligent misrepresentation, false imprisonment, negligent infliction of emotional distress, and breach of contracts. After the Court conditionally certified the FLSA collective action, Plaintiffs moved for certification of two classes under Rule 23(b)(3) based on claims of breach of contract and the implied covenant of good faith and fair dealing. The proposed classes included all individuals who signed employment contracts with the named Defendants under E-2 and/or B-1 OCS visas, and all individuals who signed employment contracts under H2-B visas since October 1, 2005. *Id.* at *1-3. Plaintiffs also sought certification of a third class under Rule 23(b)(2), comprised of all individuals who were employed and recruited under a visa from the Philippines, seeking declaratory and injunctive relief only for alleged violations of the RICO and the TVPA. *Id.* at *3-4. The Court denied Plaintiffs’ motions. The Court found that Plaintiffs failed to meet the numerosity requirement for the proposed classes. There were only 48 persons who met the class definitions, they were easily identified, and Plaintiffs gave no explanation of why joinder was impracticable. *Id.* at *11-12. Regarding commonality, Plaintiffs argued that a common question was whether the agreements signed by the class members incorporated the requirements of the FLSA. The Court found that the answer to that question could dispose of the litigation in one stroke and that was sufficient to establish commonality. *Id.* at *17-18. The Court also found that typicality was satisfied, stating that the numerous differences argued by Defendants were better considered in analyzing predominance and superiority. *Id.* at *20-21. The Court, however, found that Plaintiffs were not adequate class representatives because Plaintiffs presented no evidence that they had sufficient knowledge to take an active role in controlling and prosecuting the litigation in a way that would benefit all class members. *Id.* at 24. The Court also concluded that there were too many individual questions that needed to be litigated to satisfy predominance and superiority. In addition to questions regarding whether Plaintiffs were parties to valid contracts, determining whether there was a failure to perform would necessarily entail consideration of the individual circumstances of each class member’s employment, including wages and benefits paid, travel time to various worksites, and the duration of shifts and the equipment required for particular work assignments. *Id.* at *27. The Court therefore held that Plaintiffs failed the tests for predominance and superiority. The Court applied the same holding for the claims for breach of the duty of good faith and fair dealing as they relied upon the same disparate circumstances as the breach of contract claims. *Id.* at *28. The Court therefore denied Plaintiffs’ motion for certification as to the proposed Rule 23(b)(3) classes. The Court further denied certification of the proposed Rule 23(b)(2) class seeking declaratory and injunctive relief for alleged violations of RICO and the TVPA. Two of the three named Plaintiffs withdrew and the third named Plaintiff was not only an inadequate class representative for the reason previously stated, but also he failed to meet the class definition. *Id.* at *52-55. In addition, the Court noted concern as to whether injunctive and declarative relief was even permissible under either the TVPA or the RICO, and even if available, Plaintiffs failed to explain how the statues related to their specific claims. *Id.* at *61-62. The Court also agreed with Defendants that Plaintiffs produced evidence of only particularized and isolated threats that fell short of a uniform policy causing a class-wide injury required under Rule 23(b)(2). *Id.* at *63. Accordingly, the Court denied Plaintiffs’ motion for class certification.

*Li, et al. v. Kerry, 2013 U.S. App. LEXIS 5460 (9th Cir. Mar. 20, 2013).* Plaintiffs, a group of Chinese speaking permanent residents in the United States, brought a class action under the Immigration and Nationality Act (“INA”) alleging that Defendants misallocated immigrant visas to eligible applicants in the employment-based third preference category during the 2008 and 2009 fiscal years. Plaintiffs requested visa numbers so that they could obtain visas or adjustment of status. The District Court dismissed the
The Court explained that the fact that Plaintiffs live outside the country might make such

actions difficult. Id. The Ninth Circuit affirmed the District Court’s decision. On Plaintiffs’ appeal, the Ninth Circuit agreed with the District Court that Plaintiffs failed to state a plausible claim against the U.S. Citizenship and Immigration Services (“USCIS”). Plaintiffs had alleged that the USCIS violated the INA by approving applications for adjustment of status out of priority date order. Id. at *10. The Ninth Circuit held that Plaintiffs’ claim could not prevail because the Department of State (“DOS”) and not the USCIS issues immigrant visa numbers. Id. The Ninth Circuit noted that the INA is silent about the order in which the USCIS should approve applications for adjustments of status after the DOS allocates immigrant visa numbers. Id. at *11. The Ninth Circuit rejected Plaintiffs’ contention that the USCIS had an affirmative duty to participate in the maintenance or creation of waiting lists as it had been raised for the first time on appeal. Id. at *12. The Ninth Circuit further rejected Plaintiffs argument that the USCIS acted arbitrarily and capriciously by failing to establish a complete and accurate system for monitoring the priority dates of individuals who were applying for immigrant visas. Id. at *13-14. Plaintiffs provided no authority suggesting that the USCIS had a specific duty to maintain such an elaborate system for monitoring priority dates or the number of pending applications. Id. at *14. The Ninth Circuit therefore held that Plaintiffs failed to state a claim against the USCIS. The Ninth Circuit further held that Plaintiffs’ claims seeking to recapture visa numbers from previous fiscal years were moot. Id. at *16. The Ninth Circuit noted that there is no statute or regulation authorizing the DOS to take a visa number from one year and allocate it to another year, and that employment-based visa numbers available in a particular fiscal year expire at the end of the year, rendering moot any claim for a visa number from a prior year. Id. at *17-18. The Ninth Circuit therefore affirmed the District Court’s dismissal of Plaintiffs’ claims seeking to recapture visa numbers. Finally, the Ninth Circuit affirmed the District Court’s dismissal of Plaintiffs’ claims seeking prospective relief from the DOS under the Administrative Procedure Act (“APA”). Plaintiffs sought to compel Defendants to make copies of the waiting lists for visas publicly available, and to waive the fees for Plaintiffs to renew their employment authorizations while waiting for immigrant visa numbers. Id. at *23. The Ninth Circuit found that there was no legal authority suggesting that Defendants were legally required to take such actions. Id. The Ninth Circuit therefore held that Plaintiffs failed to state a claim under the APA. Accordingly, the Ninth Circuit affirmed the District Court’s ruling.

Mejia, et al. v. Verizon Management Pension Plan, 2013 U.S. Dist. LEXIS 45054 (N.D. Ill. Mar. 29, 2013). Plaintiffs, a group of foreign citizens who worked for Defendant outside the U.S., brought a class action alleging improper tax withholding from their pension funds. Because Plaintiffs never worked or resided in U.S., they claimed that their employment income and benefits were “foreign source” benefits not subject to U.S. taxes. Id. at *2. Plaintiffs alleged breach of fiduciary duty, and aiding and abetting a breach of fiduciary duty, and sought benefits against the plans and an injunction against future wrongful withholdings. Defendants moved to dismiss. The Court granted Defendants’ motion, finding Plaintiffs’ complaint had pleading deficiencies. The Court had dismissed with prejudice the claims in the original complaint that sought to recoup benefits from the plans, and now found that Plaintiffs have not sufficiently repled the only remaining claim for non-monetary relief. Id. at *5. Specifically, the Court found that Plaintiffs failed to allege irreparable harm. Id. at *6. Even assuming Plaintiffs’ allegations that Defendant would continue to withhold money wrongfully, the Court found that the harm was not irreparable because Plaintiff could pursue a refund from the IRS. Id. at *7. The Court rejected Plaintiffs’ contention that uncertainty regarding the benefits that were due was an irreparable harm. Id. at *8. While Plaintiffs claimed that monitoring benefits imposes a lifelong duty, the Court found such duty to be no different than the diligence and prudence exercised by anyone who monitors his benefits to make sure they receive their proper share. Id. The Court explained that the fact that Plaintiffs live outside the country might make such monitoring inconvenient, but not irreparably harmful. Id. Further, because the remedy of a refund action is available up until the statute of limitations runs, the Court found Plaintiffs’ allegation – that the statute of limitations is continually running, cutting off their ability to recover the amounts wrongfully withheld – insufficient to support irreparable harm. Id. at *9. Plaintiffs had also requested injunctive relief of giving notice to plan participants that they might be due a tax refund and informing them how one could seek the
The employees subsequently filed two state court class actions in Colorado, which resulted in a $1.2 million class-wide settlement against LMB, with 39 employees opting-out of the settlement. Id. at §8. In the instant action, Plaintiffs, the 587 individuals whose claims against Nextel were resolved pursuant to the DRSA, sought to certify a proposed liability class against Nextel only, as well as a sub-class made up of the 39 employees who opted-out of the Colorado settlement against LMB. Id. at §9-10. Denying Plaintiffs' request to certify the opt-out sub-class, the Court found that Plaintiffs who opted-out of a class settlement preserved only their own individual claims against LMB. Id. at §13. The Court noted that the cornerstone of Rule 23(b) is that class members were not unconditionally bound by a class settlement agreement that they disagree with as they might exclude themselves, or "opt-out" of the class action or the settlement. Id. The Court reasoned that an opt-out could not resurrect a putative class action under the guise of individual claims. Id. at §14. Members of the proposed sub-class were the same individuals who brought claims against LMB as part of the class certified for settlement purposes, and the only qualitative difference was that the proposed sub-class consisted of those who opted-out of Colorado settlement. The Court found that the proposed sub-class members already had their chance to litigate their sub-set of issues against LMB, as they were represented by the law firm Leeds, Morelli & Brown, P.C. ("LMB").

Plaintiffs thereby lacked the basis for the sub-class request, and the Court denied Plaintiffs' motion to certify the opt-out sub-class. Id. at *12. The Court explained that an opt-out could not substitute for a certification that the members sustained injury, and the 39 employees were already represented by LMB in the Colorado settlement. Id. at *13. Plaintiffs later requested certification of a sub-class of those who opted-out of the Colorado settlement against LMB. Id. at *14. The Court, however, concluded that these allegations also were insufficient. Id. at *16. Plaintiffs thus failed to allege how they were harmed by a lack of notice, and failed to show that they could obtain notice based relief. Id. Finally, the Court found that Plaintiffs failed to show that they sustained any injury from a letter sent by Defendant asking beneficiaries to attest a company ID number was their Social Security number. Id. at *17. Plaintiffs claimed that the letter's threat to suspend benefits caused unidentified class members to delay or forego filing claims for refunds or even researching if such funds were due from the IRS for fear that they committed perjury or that Defendants would suspend their benefits. Id. at *18. The Court determined that these allegations also were insufficient. Id. at *20. Further, Plaintiffs offered no support for their contention that they were injured merely by being pressured by their fiduciaries into making a false statement under oath. Id. The Court thus concluded that all of these allegations lacked a factual basis, and were insufficient to support a cause of action. Id. at *21. Accordingly, the Court dismissed the complaint in its entirety with prejudice.
LMB on a class basis. *Id.* at *18. The Court therefore denied Plaintiffs’ motion for certification as to the proposed sub-class against LMB. The Court, however, granted certification of a liability issue class against Nextel, finding that Plaintiffs satisfied all four Rule 23(a) requirements. Plaintiffs asserted and Nextel did not dispute that the number of individuals subject to the DRSA were 587, thus establishing numerosity. All putative class members were similarly-situated with respect to Nextel in the context of the DRSA and there was no dispute that the putative class members were all similarly represented by LMB during the DRSA period. *Id.* at *26-27. Further, Nextel’s alleged liability was based on the single act of Defendants’ entering into the DRSA and the issue of whether the DRSA compromised LMB’s representation of its clients did not depend on evaluating each underlying claim or considering each LMB client’s place of residence. *Id.* at *28. The Court thus ruled that Plaintiffs established commonality. Plaintiffs also established typicality as each named Plaintiff was part of the same group of 587 individuals who were subjected to the DRSA, and who had stated claims and offered evidence of injury as a result of Defendants’ “unitary course of” “unlawful conduct” in connection with the DRSA. *Id.* at *31. Plaintiffs further established adequacy of representation, as the Court rejected Defendant’s dispute over adequacy based on Plaintiffs’ lack of sufficient knowledge of the litigation. *Id.* at *33-34. The Court concluded that certification under Rule 23(b)(3) would be appropriate because the class satisfied the predominance requirement “as the questions of law or fact common to all members predominated over any questions affecting only individual members,” as well as the superiority requirement. *Id.* at *38. Accordingly, the Court granted Plaintiffs’ motion for class certification of common issues of liability against Nextel and denied their motion to certify the proposed sub-class against LMB.

**Merck Sharp & Dohme Corp. v. Conway, 2013 U.S. Dist. LEXIS 73672 (E.D. Ky. May 24, 2013).** The Kentucky Attorney General filed a lawsuit against Plaintiff in the Franklin County Circuit Court alleging that Plaintiff willfully engaged in acts that were unfair, false, misleading, and/or deceptive in marketing and distribution of the prescription medication Vioxx in violation of the Kentucky Consumer Protection Act (“KCPA”). Plaintiff removed the action (“Merck I”), which was later transferred to the Judicial Panel on Multidistrict Litigation; in turn, it remanded the case on the basis that it was improperly removed. Nearly one year later, the Attorney General retained the law firm Garmer & Prather, PLLC, as outside counsel to assist him in the Vioxx litigation and signed a contingent fee agreement with the firm. Plaintiff then filed this action seeking a declaratory judgment and injunctive relief alleging that the Attorney General had delegated its coercive powers to private lawyers who had a clear, direct, and substantial financial stake in the outcome of *Merck I*. Plaintiff contended that a punitive enforcement action must be prosecuted in the public interest or not at all; therefore, its right to due process under the Fourteenth Amendment had been infringed. Both parties sought summary judgment, and the Court granted the Attorney General’s motion. At the very outset, the Court remarked that an attorney does not necessarily violate a Defendant’s due process rights by hiring outside counsel on a contingent fee; and that most case law authorities that have considered that issue have determined that such arrangements are permissible if certain criteria are met. *Id.* at *15. The Court noted that the contract directed outside counsel to coordinate the provision of the legal services with the Attorney General or his designated assistant, and contained express provisions concerning review of all substantive pleadings, motions, briefs, and other materials that may be filed with the Court. The contract provided that the Attorney General must approve in advance all aspects of this litigation, and contemplated the involvement of the Attorney General’s office in the proceedings, and thus ensured that a government attorney with supervisory authority would be personally involved in overseeing the litigation. *Id.* at *27. In addition, the Court found that the contracts in *Merck I* contained sufficient safeguards against the violation of Plaintiff’s due process rights. Accordingly, the Court concluded that the contingency fee agreement with the outside counsel expressly retained the Attorney General’s complete control over the course of the conduct of the case. The Court further observed that despite the contractual language, the requirement of neutrality would be violated if the Attorney General allowed outside counsel to overstep their grant of authority under the contract. Plaintiff relied essentially on the testimony of Assistant Attorney General Elizabeth Natter, stating that the Attorney General’s office could not control critical decision-making when it knew virtually nothing about the lawsuit it was supposed to be directing. The Court, however, accepted the Attorney General’s argument that knowledge and control were distinct.

Reliable Money Order, Inc., et al. v. McKnight Sales Co., 2013 U.S. App. LEXIS 501 (7th Cir. Jan. 9, 2013). In this appeal challenging the certification of a class on the basis that misconduct by Plaintiffs’ attorneys for the class disqualified the firm as adequate class counsel pursuant to Rule 23(g)(1)(B), the Seventh Circuit affirmed the District Court’s certification of the class. Plaintiffs’ claims related to unsolicited advertisements that were sent via facsimile by Business-to-Business ("B2B") and its owner Caroline Abraham. B2B attracted the attention of a law firm named Anderson & Wanca during its investigation of four other putative class action lawsuits (the “Four Cases”) brought under the Junk Fax Prevention Act of 2005 (the “Act”). Ms. Abraham admitted to finding fax records from B2B. Plaintiffs’ counsel thus had their proof of an identifiable class and certification followed. Despite having all information necessary to certify the classes in the Four Cases, Anderson & Wanca continued pushing Ms. Abraham to disclose all B2B fax transmission data. The attorney at Anderson & Wanca, Ryan Kelly, told Ms. Abraham that he would keep the information confidential, and in fact e-mailed her a copy of the protective order filed in one of the Four Cases, explaining that it would prevent Kelly from disclosing any of the backup disks to third-parties. Ultimately, Plaintiff's counsel subpoenaed Joel Abraham to testify and also ordered him to produce the back-up disks and hard drive. Mr. Abraham appeared at the deposition with his attorney Eric Ruben and produced the backup disks and hard drives. The B2B files provided many potential new clients for Anderson & Wanca, revealing the names of other potential Defendants who contracted with B2B to send unsolicited fax advertising and listing the recipients of that advertising. Anderson & Wanca began sending out solicitation letters to the recipients of B2B’s fax-blasting. The letter was stamped “advertising material” at the bottom but was not registered as required by state law. Id. at *7. Anderson & Wanca went on to file over 100 putative class actions under the Act, all rooted in data recovered from B2B disks and hard drive. Anderson & Wanca also sent out a $5,000 check made payable to Eric Ruben. Upon learning of Anderson & Wanca’s promises of confidentiality to Ms. Abraham, Defendants in lawsuits arising from the B2B data began challenging the propriety of class certification on grounds that misconduct by Anderson & Wanca attorneys disqualified the firm as adequate class counsel. Defendants contended that Anderson & Wanca breached a promise of confidentiality by using B2B data identifying targets of additional lawsuits; sent out misleading solicitation letters; and the $5,000 check to Ruben constituted improper witness compensation intended to influence testimony. The District Court found that ethical violations alone did not automatically render class counsel inadequate. Defendant filed a motion for interlocutory appeal and Plaintiffs filed a motion to dismiss. On appeal, the Seventh Circuit remarked that not all ethical breaches justify the grave option of denying class certification, and that even “serious” or “major” ethical violations – not prejudicial to the class – do not always require denial of class certification. Id. at *25. The Seventh Circuit remarked that although it was bothered by Kelly’s dealings with Ms. Abraham, and Anderson & Wanca’s solicitation letter, it did not believe that those lapses in professionalism undermined the District Court’s ability to decide the case. As to Anderson & Wanca’s interaction with Ms. Abraham, the Seventh Circuit concluded that Kelly did nothing wrong in obtaining the B2B records. The Seventh Circuit remarked that its finding did not mean that Anderson & Wanca did not breach their promise of confidentiality, but its finding only reflected the actions such as the one that occurred here, which did not prejudice an attorney’s client or undermine the integrity of the judicial proceedings, did not mandate disqualification of counsel. Id. at *29. As to the solicitation letter, the Seventh Circuit concluded that the letter neither prejudiced the class nor undermined the outcome of the case. Hence, it was insufficient to deny certification. Id. at *31. Accordingly, the Seventh Circuit affirmed the order of the certification of the class.

Rugdayzer, et al. v. Google, Inc., 2013 U.S. Dist. LEXIS 163116 (E.D.N.Y. Nov. 15, 2013). Plaintiffs, a group of gmail.com users, brought an action alleging that Buzz, a social networking tool, violated federal and state privacy laws by making users’ contact lists public without consent. For those gmail users who had previously created public Google profiles for themselves, Buzz automatically made public a list of people with whom the user had frequently e-mailed or chatted. Plaintiffs asserted violations of the Stored Communications Act (“SCA”). Based on its user agreement, Defendant moved to dismiss for improper
venue, or in the alternative to transfer the case to the U.S. District Court for the Northern District of California for a more convenient venue. The Court granted the motion to the extent it requested dismissal and denied it as moot to the extent it requested transfer. The agreement’s forum-selection clause stated that the parties agreed to submit to the exclusive jurisdiction of the courts located within the County of Santa Clara, California to resolve any legal matter arising from the terms. Thus, Defendant argued that this action should be dismissed under Rule 12(b)(3) for contravening the forum-selection clause. Plaintiffs contended that the clause was not a forum-selection clause, which was valid in California, but a venue-selection clause, and that it was therefore invalid because venue could only be determined by California’s venue laws. The Court, however, noted that California case law authorities do not distinguish between forum-selection clauses, which concern the place of jurisdiction, and venue-selection clauses, which concern the specific location within that jurisdiction where a case may be heard. Id. at *8. The Court stated that the clause here functioned as both a venue-selection clause and a forum-selection clause because it limited litigation to Santa Clara County, a venue, within the state of California, a forum. The Court also remarked that the only relevant limitation on venue-selection clauses is that they may not specify a county outside of those provided for in the state’s venue laws, and that California’s venue laws provide that a corporation may be sued in the county of the corporation’s principal place of business. Id. at *8-9. Because Defendant’s headquarters are in Santa Clara County, the Court found that the clause complied with California’s venue laws and so was a valid venue-selection clause under California law. Further, Defendant required all users, after seeing a screen listing the terms or a link to the terms, to agree to the terms of use before creating an e-mail account. The Court determined that agreements such as this which required a user’s assent as a prerequisite for using the services were considered reasonably communicated. Additionally, the Court stated that the forum selection clause was mandatory because it required rather than simply permitted suits to be brought in the selected forum and venue. The claims asserted here were also within the scope of the clause, which specified a particular forum and venue for the resolution of any legal matter arising from the term. Given the enforceability of the clause, the Court ruled that dismissal of the action was appropriate. Thus, because the action was dismissed based on the forum-selection clause, the Court denied the motion for transfer as moot.

Bifurcation Issues In Class Actions

David, et al. v. Signal International, LLC, 2013 U.S. Dist. LEXIS 117058 (E.D. La. Aug. 19, 2013). Plaintiffs, a group of over 500 Indian men, brought a class action alleging violation of rights to be free from forced labor, involuntary servitude, and peonage under the Thirteenth Amendment and 18 U.S.C. § 1854. Plaintiffs also claimed violations of the Trafficking Victims Protection Act of 2003 and the Racketeer Influenced and Corrupt Organizations Act. After the Court denied Plaintiffs’ motion for class certification, Defendants moved for severance of the 12 named Plaintiffs’ claims under Rule 20, arguing that Plaintiffs were misjoined under Rule 21. The Court denied the motion. Plaintiffs then moved to bifurcate trial and discovery, and the Court granted the motion in part. The EEOC also joined the case, and asserted four bases for its claims for relief under Title VII, including: (i) that Defendants created and perpetuated a hostile work environment; (ii) subjected certain employees to terms and conditions of employment that were less favorable than enjoyed by other employees; (iii) retaliated against specific employees who complained about Defendant’s employment practices; and (iv) engaged in a pattern or practice of subjecting its Indian employees to a hostile environment and disparate terms and conditions of employment based on their race and national origin. Id. at *9-10. The Court agreed that bifurcation was appropriate for discovery and trial with respect to the EEOC’s pattern or practice claim for disparate treatment, as bifurcation would help in the swift and efficient resolution of these claims. Id. at *10. The Court, however, declined to bifurcate the EEOC’s pattern or practice hostile work environment claim because of the subjective nature of the proof required. Id. at *11. The Court stated that post-trial briefing concerning the appropriateness and type of injunctive and equitable relief would be allowed, and the remaining claims asserted by the EEOC and all claims asserted by Plaintiffs would be tried in Phase II, including punitive damages. The Court reasoned that handling punitive damages in Phase II would allow the jury to make the fact-specific determinations necessary for each Plaintiff, and accordingly, granted in part and denied in part, the motion for bifurcation. Id. at *13.
Joinder And Severance Issues In Class Actions


Plaintiffs brought an action on behalf of a putative class, consisting of over 500 workers of Indian nationality whom Defendant allegedly trafficked into the United States through the federal government’s H-2B guest-worker visa program in violation of their rights, including their right to be free from forced labor and involuntary servitude under the 13th Amendment, the Trafficking Victims Protection Act of 2003, and the Racketeer Influenced and Corrupt Organizations Act. After the Court denied Plaintiffs’ motion for class certification, Defendant moved to sever the claims of the 12 named Plaintiffs under Rule 20, arguing that Plaintiffs were misjoined under Rule 21. The Court observed that Defendant was correct in stating that after class certification was denied, the Court was required to evaluate the case to determine if the named Plaintiffs’ claims were properly joined under Rule 20, and that the decision to allow permissive joinder under Rule 20 or to order severance of misjoined Plaintiffs under Rules 21 and 42(b) was left to its discretion. Id. at *9. However, the Court rejected Defendant’s argument that a finding that Plaintiffs’ claims were unsuitable for Rule 23 class certification was not tantamount to a finding that only severance of all claims would afford the parties a fair and just adjudication of the claims. Id. at *10-11. The Court opined that a “Rule 20 inquiry is distinct from that under Rule 23, and a ruling against the [P]laintiffs on the latter in no way suggests (much less mandates) a like outcome with respect to the former.” Id. at *11. Furthermore, the Court observed that Rule 20 created a two-prong test where joinder of Plaintiffs would be allowed when: (i) their claims arise out of the same transaction, occurrence, or series of transactions or occurrences; and (ii) there is at least one common question of law or fact linking all claims. Id. Here, the Court held that Plaintiffs satisfied the first prong because their claims all arose out of the same allegedly discriminatory practices and policies, and all Plaintiffs claimed to have suffered damage because of similar alleged misrepresentations and fraudulent schemes orchestrated by Defendant. Id. at *12. In addition, the Court held that Plaintiffs satisfied the second prong because their claims shared several common questions of law and fact. Id. Therefore, the Court held that Plaintiffs’ claims had satisfied Rule 20’s two-prong test such that permissive joinder was appropriate. Moreover, the Court opined that severance under Rule 21 or Rule 42(b) was likely to have the opposite effect from what Defendant claimed to seek, “causing the individual [P]laintiffs’ cases against [Defendant] to become hopelessly mired in inefficiency, redundancy, and delay.” Id. Accordingly, the Court denied Defendant’s motion to sever.


Plaintiffs brought an action on behalf of a putative class, consisting of over 500 workers of Indian nationality whom Defendant allegedly trafficked into the United States through the federal government’s H-2B guest-worker visa program in violation of their rights, including their right to be free from forced labor and involuntary servitude under the 13th Amendment, the Trafficking Victims Protection Act of 2003, and the Racketeer Influenced and Corrupt Organizations Act. After the Court denied Plaintiffs’ motion for class certification, Defendant moved to sever the 12 named Plaintiffs’ claims under Rule 20, arguing that Plaintiffs were misjoined under Rule 21. In denying Defendants’ motion to sever, the Court determined that it would progress under one case number with the 12 named Plaintiffs, and that, pursuant to the Court’s case management plan, the initial trial would have five named Plaintiffs – three chosen by Plaintiffs and two chosen by Defendants. Subsequently, Plaintiffs moved for reconsideration of the Court’s case management plan, which allowed Defendants to choose two of the five named Plaintiffs for the initial trial. Plaintiffs argued that reconsideration was necessary to prevent manifest injustice. In response, Defendants contended that Plaintiffs’ motion was untimely and that allowing Defendant to pick two Plaintiffs in the first trial would not result in manifest injustice. Id. at *8. The Court noted that it would not address the timeliness of the motion because Plaintiffs had not demonstrated that reconsideration of the Court’s case management plan was appropriate under either Rule 59(e) or Rule 60(b). Id. at *12-13. Furthermore, the Court noted that case management decisions rest squarely within the discretion of the Court. Id. at *13. The Court observed that the only case Plaintiffs cited on this issue – In Re Chevron U.S.A., Inc., 109 F.3d 1016 (5th Cir. 1997) – stated that while “it did not necessarily approve of the district court’s case management plan, it was nevertheless loathe to disturb the district court's discretionary determination as to an appropriate case management plan and the appropriate procedure for and use of an initial trial involving only the claims of a sampling of plaintiffs from a larger group.” Id. Furthermore, the Court noted that
neither Plaintiffs nor Defendant intended for the first trial to have a binding effect on the later trials or for the results of the first trial to be extrapolated in any way. *Id.* at *14. Therefore, the Court held that Plaintiffs’ attempt to re-litigate this issue by way of a motion to reconsider was inappropriate and that they had not established that the Court’s case management plan would result in manifest injustice. Accordingly, the Court denied Plaintiffs’ motion.

**(lxi)** **Special Masters In Class Actions**

*In Re Payment Card Interchange Fee And Merchant Discount Antitrust Litigation*, Case No. 05-MD-1720 (E.D.N.Y. July 2, 2013). Plaintiffs, a group of merchants who accepted Visa and MasterCard payment cards, brought a class action alleging that Defendants violated and continued to violate the antitrust laws by unlawfully inflating the fees merchants pay on Visa and MasterCard transactions. Plaintiffs alleged that Defendants violated § 1 of the Sherman Act by conspiring to fix the interchange rate, by adopting and enforcing anticompetitive restraints of trade, and by engaging in illegal tying and bundling. Additionally, Plaintiffs alleged monopolization of the market for payment card transactions in violation § 2 of the Sherman Act. Subsequently, the parties settled the action, and the Court granted preliminary settlement approval. The settlement consisted of two funds. Any person, business, or other entity that accepted Visa or MasterCard credit or debit cards in the U.S. at any time between January 1, 2004 and November 28, 2012, could be eligible to receive a payment from the $6.05 billion fund. The second fund of $1.2 billion was equivalent to a portion of interchange fees attributable to certain merchants that accepted Visa or MasterCard credit cards for an eight-month period to start by July 29, 2013. The Court appointed Dr. Alan O. Sykes to advise it on economic issues related to the proposed settlement, and to provide an impartial, independent assessment of the economic issues that would be the subject of dispute. The Court directed the parties and objectors to provide Dr. Sykes a copy of each of the expert reports that a party or objector had submitted in this case, and upon his request, any other documents that the party or objector had filed or served in the case. The parties and objectors did not need to provide any materials that had not already been filed or served without first receiving written authorization from the Court, and upon the provision of any material to Dr. Sykes, the providing party or objector was required to file a notice identifying the material provided. Further, the Court instructed the parties and objectors to provide Dr. Sykes with the name and contact information for a primary and alternate contact person for each group whom he could contact if he sought additional information in the record, had any questions, or needed to contact any experts in this case. The Court also directed Dr. Sykes to review the papers filed in support of and in opposition to the proposed settlement and to assist the Court with respect to all disputed issues on which he felt qualified to render assistance, including the economic value to merchants of the proposed rules changes and the breadth of the proposed release.

*Luppino, et al. v. Mercedes Benz USA, LLC*, 2013 U.S. Dist. LEXIS 130228 (D.N.J. Sept. 11, 2013). Plaintiffs brought a class action asserting consumer fraud and breach of warranty claims, alleging that they purchased or leased Mercedes-Benz vehicles with wheels that were defective and failed under normal driving conditions. In spite of the Court’s significant involvement on pre-trial motions, and its orders directing the parties to meet and confer on discovery issues, some of the discovery disputes remained the subject of continuing requests for relief. On reviewing the papers submitted by the parties at a status conference, the Court stated that a special master should be appointed. The Court noted that under Rule 53(a)(1)(C), a Court may appoint a special master to address pre-trial and post-trial matters that cannot be effectively and timely addressed the Court. *Id.* at *9. Further, the Court observed that the Third Circuit had appointed special masters to oversee and facilitate complicated and contentious discovery, and the Court previously had appointed special masters to resolve disputes between the parties regarding document designations. Regarding discovery that Plaintiffs contended was necessary to their class certification motion, the Court noted that although the Magistrate Judge issued at least two orders, and conducted at least three conferences and/or hearings on such discovery, the discovery remained outstanding and continued to be disputed. Even with the Court’s involvement, the rigidity of the parties’ dispute prevented the exchange of discovery that was clearly ordered by the Court. Further, the Court observed that the parties were using motions to seal to challenge the propriety of the underlying document designations. Parties had submitted over 266 pages of documents with respect to which they challenged the confidential
designations. According to the parties’ representations, over 70,000 pages of documents had already
been produced in discovery, and the Court had no indication of how many documents had been designated
as confidential. Id. at *12. Thus, the Court remarked that the potential scope of designation disputes was
immense, particularly in light of the fact that the parties had yet to produce privilege logs. The Court stated
that without frequent and intense monitoring, this action would further languish due to the parties’ constant
disputes. For these reasons, the Court determined the scope of the limited discovery that it would permit
and be overseen by the special master. The Court stated that the special master should review the motions to
seal, the documents referenced therein, and the designations made by the parties, and then provide a
report to the Court with findings regarding the propriety of the designations and recommendations.

(lxii) Sealing Issues In Class Actions

Plaintiffs, a group of former employees, brought a class action against high-tech companies alleging
antitrust claims. Plaintiffs alleged a conspiracy among Defendants to suppress employee compensation
and restrict employee mobility. The parties filed numerous motions to seal documents related to Plaintiffs’
motion for class certification. Id. at *8. The Court both granted and denied parts of the motion. First, the
Court denied Plaintiffs’ request to seal portions of Edward T. Colligan’s declaration, as well as two attached
exhibits in relation to Plaintiffs’ motion for class certification. Id. at *10. The Court noted that only a small
portion of the communications referred to Palm’s intellectual property portfolio and competitive position,
and Palm had failed to explain how public disclosure presented a risk of placing Palm at a competitive
disadvantage. Id. at *11. Second, the Court granted the motion to seal portions of Plaintiffs’ motion for
class certification and exhibits in support that Defendants designated as “Confidential.” Id. The Court
found that the motion and exhibits identified included confidential information regarding Defendants’
compensation and recruiting strategies, policies, and procedures, including quantitative data, and that
disclosure of that information could cause Defendants’ competitive harm. Id. at *16. The Court found
that Defendants’ requests were sufficiently specific and that Defendants had articulated a plausible
need for maintaining their confidentiality given the potential harm that could result from public
disclosure. Id. The Court, however, denied the motion to seal other identified exhibits and portions of
the motions where Defendants failed to show that they contained confidential information or that
disclosure could cause Defendants’ competitive harm. Id. at *17. Third, the Court found that good
cause existed to seal certain pages and lines of Defendants’ opposition to Plaintiffs’ motion for class
certification. Id. at *22. The Court noted that some excerpts contained Plaintiffs’ confidential
compensation information such as salaries, stock options, and confidential information regarding job
applications from non-Defendants, including the identities of associated non-parties. Id. The Court,
however, denied the motion to seal documents that did not include information that was confidential in
nature. Id. at *22-23. Fourth, the Court granted Defendants’ request to maintain the confidentiality of
certain Defendant-related company materials. The identified documents contained confidential and
commercially sensitive information about employee compensation, including Defendants’
compensation, information that reflected Defendants’ internal decision-making regarding their
business strategies related to compensation, and internal assessments of their and other employers’
competitive position in the labor market. Id. at *24. The Court found that Defendants’ requests to seal
were sufficiently specific and that Defendants articulated a plausible need for maintaining
confidentiality. Id. at *26-27. The Court also found that Defendants had made a particularized
showing with respect to sealing identified portions of Defendants’ motion to strike Plaintiffs’ expert
report of Dr. Edward E. Leamer, and the exhibits attached to the Declaration of Susan Welch filed in
support of Defendants’ motion to strike. Finally, the Court granted Plaintiffs’ request to file under seal
certain portions of Plaintiffs’ reply in support of its motion for class certification in opposition to
Defendants’ motion to strike because it referred to data that Defendants had designated as “Confidential.” Id. at *31. The Court noted that each motion and exhibit to a motion where it denied a request to seal, the parties should re-file the motion and exhibit consistent with its order and its standing order within seven days. Id. at *39.

In Re NCAA Student-Athlete Name & Likeness Licensing Litigation, 2013 U.S. Dist. LEXIS 85375 (N.D. Cal. June 17, 2013). Plaintiffs, a group of former college student-athletes, brought an action asserting that the National Collegiate Athletic Association (“NCAA”), Collegiate Licensing Company (“CLC”), and Electronic Arts Inc. (“EA”) conspired against them in violation of antitrust and right of publicity laws. Plaintiffs contended that Defendants unlawfully used Plaintiffs’ likenesses in games produced and distributed by EA, and that Defendants conspired to restrain trade in violation of the Sherman Act, and that this anti-competitive conspiracy foreclosed them from receiving compensation in connection with the commercial exploitation of their images, likenesses, and names. Plaintiffs moved to seal materials submitted in support of their reply brief for class certification. The Court granted in part and denied in part the motion. First, the Court allowed redaction of information referring to royalty rates and payment terms of licensing agreements and information containing trade secrets regarding the development of the avatars in its video games. Id. at *11. Because disclosure of detailed analysis of the consumer market for EA’s video games would harm its competitive standing, the Court granted redaction. The Court also granted sealing of information about the NCAA photography licenses because its disclosure could harm the NCAA in future negotiations regarding the rights to photograph college sporting events. Id. Further because disclosure would harm its future ability to negotiate such agreements, the Court granted redaction of an offer for a royalty split in negotiating a licensing agreement with CLC, and proposed terms for the licensing rights to bowl games, including royalty rates and payment terms. The Court stated that portions of the expert report also should be redacted because it referred to confidential revenue splits between NFL players. Id. at *12. Because some exhibits to the expert report were based upon confidential EA revenue data, the disclosure of which would harm the NCAA and EA’s competitive standing, the Court further granted their redaction. The Court likewise granted redaction of the potential damages figures because they were based on confidential financial information. Second, the Court denied redaction of information about the look of EA video games, because they were not trade secrets, and neither did the citations to certain exhibits disclose the content of those exhibits. The Court also denied sealing of an e-mail between the NCAA’s executives regarding working with presidents of member institutions because it did not reveal any trade secret, confidential research, or commercial information. Id. at *13. Further, the NCAA stated that public disclosure of comments on proposed by-law revisions contained in an exhibit to the declaration of Sathya S. Gosselin would harm its ability to enforce its by-laws on member institutions. Because this document was eight years old, and the NCAA failed to articulate what specific harm an outdated document would have on its current or future operations, the Court held that the exhibit must be filed in the public record. Regarding a flow chart from 2004 posing questions about the licensing of student-athlete names, images, and likenesses, and an exhibit containing guiding principles articulated for the NCAA’s amateurism by-laws, the Court noted that neither revealed any trade secret, confidential research, or commercial information, and accordingly denied its redaction. Further, the Court denied redaction of the attributes of EA’s video game avatars, which were listed in its video games and available on-line on its own website. Id. An exhibit of the Gosselin Declaration pertained to an eight-year-old e-mail chain discussing whether the use of student athlete images on the cover of a DVD violated the NCAA’s by-laws. The Court found that this was not the sort of competitively sensitive business information that would hinder the NCAA’s ability to negotiate future contracts. The exhibit also contained the amount of revenue generated from the DVD sales which was commercially sensitive; thus, the Court granted redaction to that aspect of it.

Breach Of Contract Class Actions

Britt Green Trucking, Inc., et al. v. FedEx National, LTL, Inc., 2013 U.S. Dist. LEXIS 163073 (M.D. Fla. Nov. 15, 2013). Plaintiffs, a group of independent contractors (“ICs”), brought a class action alleging that Defendant terminated their Equipment Lease and Operating Contracts (“ELOCs”) without the required written notice of termination. Plaintiffs alleged breach of contract for failure to abide by the 30-day notice requirement, violation of the implied duty of good faith and fair dealing, and violation of the Florida...
Deceptive and Unfair Trade Practices Act. Plaintiffs moved for certification of a nationwide class comprising of all persons and entities operating as ICs with ELOCs who contracted to carry freight for FedEx National LTL, Inc. and whose ELOCs were terminated without 30 days’ written notice. The Court denied the motion for failure to establish predominance. Plaintiffs sought certification under Rule 23(b)(3), and claimed that the predominant issue was whether Defendant breached the ELOCs by failing to provide written notice of termination as required under the ELOCs. The Court noted that under Florida law, the elements of breach of contract are a valid contract, a material breach, and damages. \textit{Id.} at *22-23. The Court observed that the ELOCs were valid contracts between the ICs and Defendant which described the manner in which Defendant would lease transportation equipment from the ICs, and the manner in which the ICs would provide transportation services. The Court stated that to determine whether Defendant breached the ELOCs with its ICs by failing to provide written notice of termination, the fact-finder would first be required to identify and segregate the ICs whose ELOCs were terminated by Defendant versus those ICs whose ELOCs ended for other reasons. If the particular ELOC was found to have been terminated, the fact-finder would then have to determine whether Defendant provided the requisite written notice of termination to the particular IC. The Court noted the affidavits submitted by Defendant which indicated that while its 2006 ELOCs contained a 30-day written notice requirement, in 2007 Defendant entered into revised contracts with ICs that contained a three day written notice requirement. Thus, the fact-finder would have to inquire as to whether each IC’s particular ELOC, terminated by Defendant, was bound by the 30-day written notice requirement or the three day written notice requirement. Accordingly, the Court observed that the determination of whether Plaintiffs had satisfied the second element of breach of contract would require individual inquiries into the conduct of each particular IC and the communications engaged in by Defendant and the particular IC. The Court also stated that even if Plaintiffs’ expert had prepared an economic model that could calculate damages on a class-wide basis, the individualized inquiry that would be required to establish whether Defendant materially breached the ELOC still predominated over common questions of law or fact. The Court found that the need for individualized damages calculations, when combined with the numerous liability and limitations issues requiring Plaintiff-by-Plaintiff scrutiny, counseled strongly against class certification pursuant to Rule 23(b)(3). Finally, the Court noted that to determine whether Defendant breached the ELOCs with its ICs by failing to provide written notice of termination as required under the ELOCs, the fact-finder would have to conduct individual inquiries to determine whether any viable contractual defenses existed for each IC. Thus, the Court stated that the common questions would not predominate, and denied the motion for class certification.

\textbf{Nationwide Insurance Independent Contractors Association v. Nationwide Mutual Insurance Co., 2013 U.S. App. LEXIS 9059 (3d Cir. May 3, 2013).} Plaintiffs, a group of insurance agents, a voluntary agent membership association, and David Gardner, an insurance agent who had operated under an agent agreement with Defendant, brought a class action seeking declaratory relief against Defendant. Under the agent agreement, agents had the option of accumulating deferred compensation incentive credits (“DCIC”) or enrolling in an alternative compensation program with higher levels of compensation and benefits. Additionally, the agent agreement had an exclusive representation provision that permitted Gardner to place insurance policies with companies other than Defendant with its consent. Subsequently, Defendant introduced the “On Your Side Promise program,” which increased its supervisory controls over its agents’ activities. Gardner, however, declined to sign this agreement. Defendant also implemented the 2010 Agent Choice Addendum (“2010 Addendum”), where agents who signed the addendum waived their right to accrue additional DCIC, although they retained the DCIC they had already accrued. Gardner did not sign the 2010 Addendum either. Plaintiffs alleged that Defendant also asserted exclusive ownership over policyholder information, thus depriving Gardner of the financial value of his business. Plaintiffs sought declaratory relief that the discrimination against agents who refused to relinquish their DCIC, by signing the 2010 Addendum, was a breach of the agent agreement; the practice of denying Gardner and other agents who declined to sign the On Your Side Promise agreement access to Defendant subsidiaries (“Network”) was a breach of the agent agreement; and the assertion of exclusive ownership over policyholder information was a breach of the agent agreement. Defendant moved to dismiss and the District Court granted the motion, holding that Plaintiffs lacked standing. On appeal, the Third Circuit affirmed. First, the Third Circuit observed that because Gardner refused to sign the two agreements, he was not a party to


Seyfarth Shaw LLP
either of these contracts. Further, Gardner cited no authority which would permit a non-party or non-beneficiary to challenge the existence or implementation of a contract, and Plaintiffs presented no facts to show that Gardner suffered an injury-in-fact resulting from the existence or implementation of these contracts or from denial of access to the Network. *Id.* at *8. Second, Plaintiffs alleged that Defendant’s practice of asserting exclusive ownership over policyholder information damaged Gardner because if he would need to secure financing or show credit worthiness, he would rely on policyholder information. However, Gardner did not allege that he would be leaving Defendant or that he had sought and been denied financing; rather, his claim was premised on mere speculation that he would wish to obtain financing and believed he would be unable to do so at some undetermined point in the future. The Third Circuit remarked that an injury premised on such multiple contingencies was not sufficiently concrete, and thus held that Gardner lacked standing as to this claim as well. *Id.* at *9. Although Gardner alleged that the 2010 Addendum and On Your Side Promise were breaches of the implied covenant of good faith and fair dealing of his agent agreement, the Third Circuit noted that Plaintiffs did not account for the requirement under Pennsylvania law that a duty of good faith and fair dealing in a breach of contract claim must always be grounded in a specific provision of a contract. *Id.* at *11. Further, the Third Circuit observed that Plaintiffs presented no facts demonstrating a breach of Gardner’s agent agreement. Gardner’s agent agreement specifically required him to obtain Defendant’s written consent before placing policies with either carriers. The Third Circuit opined that the good faith duty cannot be used to override an express contractual term. *Id.* at *12. Accordingly, the Third Circuit stated that to the extent Plaintiffs challenged the denial of bonuses, access to the Network, and Defendant’s claim of ownership over policyholder information as violations of Gardner’s agent agreement, Plaintiffs failed to state a claim.


Plaintiffs, a group of former employees, brought a class action alleging failure to provide job separation benefits in violation of the ERISA. Plaintiffs were long-time employees of Westinghouse Electric Corp. and participants in Westinghouse’s pension plan (the “Westinghouse Plan”). Subsequently, Northrop Grumman Corp. purchased certain assets from Westinghouse pursuant to an asset purchase agreement (the “APA”), which provided that certain employees, including Plaintiffs, would become Northrop Grumman employees. Northrop Grumman established a successor pension plan to the Westinghouse Plan for the benefit of these employees and Plaintiffs became participants in the Northrop Grumman Plan. After their lay-off, Plaintiffs sought certain permanent job separation benefits (“PJS Benefits”), which they contended they were entitled to under the Northrop Grumman Plan, but Defendants refused to award these benefits. Before Northrop Grumman’s purchase, an amendment to the Westinghouse Plan first narrowed and then eliminated the PJS Benefits from the Westinghouse Plan. The District Court granted summary judgment in favor of Defendant. On appeal, the Third Circuit affirmed. The Third Circuit had previously held that the Westinghouse Plan explicitly denied PJS Benefits to former Westinghouse employees who were hired by a successor employer. *Id.* at *7. The Third Circuit noted that the Westinghouse Plan explicitly stated that a permanent job separation occurred if there was a termination with an employer, affiliated entity, or excluded unit, and in no event would a permanent job separation occur if an employee was offered continued employment by a successor employer which was neither an employer, affiliated entity, nor an excluded unit. Because Northrop Grumman was not an employer, affiliated entity, or excluded unit under the Westinghouse Plan, the Third Circuit stated that Plaintiffs did not have a permanent job separation from Westinghouse as defined by the Westinghouse Plan. Further, the Third Circuit noted that once Plaintiffs were offered employment by Northrop Grumman, they were forever disqualified from receiving PJS Benefits under the successor employer provision of the Westinghouse Plan, and that as a result Plaintiffs suffered no loss of a benefit. The Third Circuit further observed that Plaintiffs also had no contractual basis to obtain such benefits from the Northrop Grumman Plan. The terms of the APA which governed Northrop Grumman’s obligation to provide the PJS Benefits required only that Northrop Grumman provide benefits comparable to the Westinghouse benefits in effect on the date of the APA. The Third Circuit noted that from its inception, the Northrop Grumman Plan provided PJS Benefits for qualifying Northrop Grumman employees who sustained a permanent job separation. Although the Northrop Grumman Plan eliminated PJS Benefits for employees laid-off after August 31, 1998, that provision was present from the Northrop Grumman Plan’s inception, and it therefore did not function as an amendment that later reduced an
existing benefit. Thus, the Third Circuit stated that Northrop Grumman’s decision not to award PJS Benefits to Plaintiffs under the Northrop Grumman Plan was not a cut-back in violation of § 204(g) of the ERISA. *Id.* at *11. Because Plaintiffs were laid-off after August 31, 1998, they did not qualify to receive PJS Benefits from Northrop Grumman. Accordingly, the Third Circuit found that Plaintiffs failed to demonstrate a violation of the ERISA and affirmed the District Court’s grant of summary judgment in favor of Defendants.

(lxiv) Amendments In Class Action Litigation


Plaintiff brought an action alleging a class claim for gender discrimination in violation of Title VII and an individual claim for unlawful retaliation in violation of the FMLA. Plaintiff then filed an amended complaint to add four additional named Plaintiffs and a class claim for violations of the Equal Pay Act (“EPA”), and pregnancy discrimination in violation of Title VII, as well as two individual FMLA claims. Plaintiffs then moved for conditional collective action certification of their EPA claims, and for leave to file a second amended complaint (“SAC”). The Court granted Plaintiffs leave to file their SAC, and granted Plaintiffs’ motion for conditional certification of their EPA claim. Approximately 26 additional Plaintiffs opted-in. The Court then instructed Plaintiffs that if any of the opt-in Plaintiffs intended to assert individual claims, the complaint would need to be amended immediately, before class discovery. The Court also ordered class discovery to be completed. Parties engaged in extensive discovery, including expert reports and approximately 28 depositions. Days before moving for class certification, Plaintiffs requested permission for leave to file a third amended complaint to conform their complaint to their motion for class certification. Plaintiffs then filed a motion for leave to amend their complaint for a third time to narrow existing Title VII class claims and add individual Title VII and class FMLA claims. The Court referred this motion to the Magistrate Judge, who recommended that the motion for amendment be denied. At the very outset, the Magistrate Judge noted that Plaintiffs’ proposed amendment would: (i) redefine the Title VII class to include a caregiver class and add class FMLA claims; (ii) convert Plaintiff Sheila Gruber McLean from an opt-in to a named Plaintiff and a class representative; and (iii) redefine the Title VII class to exclude McLean’s promotion claim and Plaintiff Katherine Wilkinson’s pregnancy and pay claims, and assert Wilkinson’s claims individually. Plaintiffs argued that they had a good cause to seek an amendment because they diligently sought leave to amend within one month after the close of the class discovery. According to Plaintiffs, they were unable to plead the FMLA class claim until critical facts emerged through class discovery. As to the FMLA and caregiver claims, the Magistrate Judge found that with reasonable diligence, information obtained from Plaintiffs themselves should have been gathered by Plaintiffs’ counsel when those individuals opted-in to the case well in advance of class discovery depositions. *Id.* at *29. The Magistrate Judge remarked that he was not persuaded that these discoveries formed the basis of the proposed amendment, and held that Plaintiffs failed to establish good cause. As to the issue of converting McLean from an opt-in to a named Plaintiff, the Magistrate Judge noted that Plaintiffs offered no explanation as to why they waited until after the completion of class discovery to try to convert her to a named Plaintiff, when she opted-in almost a year before. *Id.* at *37. As a result, the Magistrate Judge denied Plaintiffs’ request to convert McLean to a named Plaintiff. Plaintiffs also sought to assert individual Title VII claims on behalf of McLean and Wilkinson. The Magistrate Judge stated that the Court had unequivocally told Plaintiffs’ counsel that if they intended to amend to assert individual Title VII claims on behalf of opt-in Plaintiffs, they needed to do it immediately, which was in November 2012. The Magistrate Judge noted that in December 2012, Plaintiffs’ counsel stated that they would not seek to add individual claims, but the motion was filed after the completion of discovery in July 2013. Because Plaintiffs did not offer any explanations as to what prompted them to seek an amendment eight months later, the Magistrate Judge denied Plaintiffs’ request. *Id.* at *43. Finally, the Magistrate Judge found that Defendants would be significantly prejudiced by the proposed amendments. The Magistrate Judge explained that Plaintiffs’ failure to offer a clear and consistent definition of the proposed caregiver class at this late stage would result in Defendants being forced to defend newly proposed class-based theories. Accordingly, the Magistrate Judge recommended that the Plaintiffs’ motion to file a third amended complaint be denied.
Issues With Class Conflicts In Class Actions

In Re NCAA Student-Athlete Name & Likeness Licensing Litigation, 2013 U.S. Dist. LEXIS 160739 (N.D. Cal. Nov. 8, 2013). Plaintiffs, a group of 24 former college student-athletes, brought a class action asserting that the National Collegiate Athletic Association (“NCAA”), Collegiate Licensing Company (“CLC”), and Electronic Arts Inc. (“EA”) unlawfully used their likenesses in games produced and distributed by EA. Twenty-one Plaintiffs alleged Defendants restrained trade in violation of the Sherman Act and that this anti-competitive conduct foreclosed them from receiving compensation in connection with the commercial exploitation of their images, likenesses, and names. Plaintiffs moved for certification of an injunctive relief class as to their antitrust claims for all current and former student-athletes who competed on an NCAA Division I college or university men’s basketball team or on an NCAA football bowl subdivision men’s football team and whose images, likenesses, and/or names had been included in game footage or in videogames licensed or sold by Defendants after the conclusion of the athlete’s participation in intercollegiate athletics. Plaintiffs also moved for certification of a damages sub-class. The only difference between the two classes was that the sub-class excluded current student-athletes and former student-athletes whose names, likenesses, and images were featured in videogames or game broadcasts before July 21, 2005. The Court granted certification to the injunctive relief class, and denied certification to the damages sub-class. Regarding adequacy, the NCAA argued that there were conflicts of interest among class members that precluded certification. The NCAA contended that in an unrestrained market for publicity rights, some putative class members would command a higher price for their name, image, and likeness rights than others, and that if Plaintiffs were to prevail here, those high-value class members would be entitled to a larger share of damages than others because they would have suffered greater economic losses from the NCAA’s ban on student-athlete compensation. The Plaintiff’s proposed damages model, however, did not account for those differences. Instead, it proposed that damages be allocated equally among the members of every football and basketball team. The Court noted that even if some class members suffered greater economic losses than others, those losses were immaterial because Plaintiffs sought compensation only for losses suffered in the group licensing market, and not an individual licensing market. Further, the Court observed that damage calculations alone cannot defeat certification and the potential existence of individualized damage assessments does not detract from suitability for class certification. Id. at *27-28. Additionally, the Court reasoned that Plaintiffs' proposed damages model would only affect the damages sub-class members. Id. at *29. Thus, the Court concluded that the alleged conflict among class members asserted by the NCAA did not prevent class certification. Id.

Punitive Damages In Class Actions

Powell, et al. v. Tosh, 2013 U.S. Dist. LEXIS 63567 (W.D. Ky. May 3, 2013). Plaintiffs, a group of residents and property owners, brought a class action alleging that recurring intolerable noxious odors emanating from the Defendants’ swine waste facilities constituted a nuisance and decreased the value of their residence and real property. Plaintiffs asserted claims for nuisance, trespass, negligence, products liability, punitive damages, and civil conspiracy. The Court granted Defendants summary judgment on Plaintiffs’ negligence and negligence per se claims, finding that Plaintiffs had failed to prove that they suffered injuries to support those claims. The Court also granted Defendants summary judgment on Plaintiffs’ gross negligence and punitive damages claims, finding that the undisputed facts did not support a finding that Defendants failed to exercise even slight care. Plaintiffs moved the Court to reconsider its conclusions. First, Plaintiffs argued that the Court erred by failing to recognize that punitive damages were available for their nuisance claims. The Court noted that Kentucky law provides that punitive damages are recoverable if a claimant recovers damages for private nuisance. Id. at *10-11. The Court agreed with Plaintiffs that its prior decision was in error and that punitive damages were recoverable on Plaintiffs’ permanent nuisance claims. The Court, however, pointed out that a claimant must show that a Defendant acted with oppression, fraud, or malice. Id. at *11. The Court explained that “malice” for purposes of punitive damages was equated with “gross negligence,” which was defined as “the absence of slight care” or “reckless indifference or disregard for the rights of others.” Id. The Court stated that it had previously noted that the undisputed facts did not support a finding that Defendants failed to exercise even slight care. The Court clarified that the issue as to whether Plaintiffs submitted enough evidence to establish that
Defendants’ acts breached the statutory threshold of oppressive, fraudulent, or recklessly indifferent conduct need not be decided definitively at that juncture. Rather, the question whether Plaintiffs had put forth sufficient evidence to instruct the jury on punitive damages could be raised and decided at trial after the close of Plaintiffs’ proof. Accordingly, the Court granted Plaintiffs’ motion to reconsider relative to their claim for punitive damages.

State Law Procedural Requirements In Class Actions

**Williams, et al. v. Chesapeake Louisiana Inc.**, 2013 U.S. Dist. LEXIS 34778 (W.D. La. Mar. 11, 2013). Plaintiff, the owner of royalty interests in natural gas production in Louisiana, brought a class action alleging under-payment of royalties by Defendants. Plaintiff alleged that Chesapeake Louisiana engaged in a scheme to sell the gas produced from the leased premises at a price below market value to profit from substantially reduced royalty payments. Pursuant to Louisiana Mineral Code Article 137 (“Article 137”), as a prerequisite to filing suit, Plaintiff must provide written notice to Defendants of the alleged non-payment and under-payment of royalties. Plaintiff moved for class certification, while Defendant moved for denial of class certification, arguing that the pre-suit notice required by Article 137 could not be given on a class-wide basis as a matter of law. The Court granted Defendant’s motion to deny certification and denied Plaintiff’s motion for certification.

Id. at *1-2. First, the Court rejected Plaintiff’s argument that the notice requirement did not apply because the putative class did not seek dissolution of the lease or damages, but merely unpaid royalties due. The Court stated that Louisiana Statute § 31:137 requires notice to the lessee as a prerequisite to suit. Id. at *5-6. The issue before the Court was how to resolve the conflict between this Louisiana statute and Rule 23 of the Federal Rules of Civil Procedure. The Court noted that *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 130 S. Ct. 1437, 1448-49 (2010), stated that if the scope of the federal rule is sufficiently broad to control the issue before the Court, thereby leaving no room for the operation of seemingly conflicting state law, then the federal rule is applied unless it exceeds the limits set by the Rules Enabling Act. *Id.* at *7. The Court reasoned that the scope of Rule 23 was so broad that it left no room for the notice provisions of the Louisiana Mineral Code to operate. The Court also observed that Rule 23 provides that a class action may be brought if its requirements are met, but the Louisiana law added hurdles to bringing such a claim, as notice was a necessary prerequisite to royalty litigation brought by lessors against lessees under the Mineral Code, and notice may not be given on a class-wide basis. *Id.* at *13. The Court opined that the question to be determined was whether the Louisiana rule which precludes the filing of class action claims for the underpayment of mineral royalties was a rule of procedural or substantive law. The Court reasoned that the rule was so interwoven with the substantive law governing the payment of mineral royalties in Louisiana that it is a substantive rule. *Id.* The Court remarked that the notice requirement gave shape to the substantive rights and remedies of the parties in royalty litigation. The Court opined that Rule 23 altered Louisiana substantive law, and thus to apply it in this case fell outside the power granted by the Rules Enabling Act. The Court ruled that state substantive law had to be applied, and noted that under Louisiana law, class notice for under-payment of royalties did not meet the notice requirements of the Louisiana Mineral Code. *Id.* at *16. Accordingly, the Court held that a class could not be certified on this basis.

Mandamus Issues In Class Actions

**In Re Con-Way Freight, Inc.**, 2013 U.S. App. LEXIS 13221 (9th Cir. June 27, 2013). Plaintiff, a former driver, brought a class action alleging that Defendant’s piece-rate compensation formula did not comply with California's minimum wage statutes because it did not separately compensate its drivers for non-driving duties, even if the total compensation from the driver’s piece-rate activities averaged far more than minimum wage for all hours worked. Earlier, the District Court had denied Defendant’s motion for summary judgment. Defendant petitioned the Ninth Circuit for a writ of mandamus directing the District Court to reverse its summary judgment order, arguing that the District Court’s decision was an issue of first impression, insofar as preemption of California’s minimum wage as applied to piece-rates had never been addressed by an appellate court. Alternatively, Defendant argued that the District Court’s decision constituted clear and reversible error with respect to holding that California minimum wage law prohibits a piece-rate from covering both driving and non-driving duties, as that decision lacks any statutory or
regulatory basis. The Ninth Circuit denied the petition. The Ninth Circuit found that Defendant did not show that the action warranted the intervention of the Ninth Circuit by means of the extraordinary remedy of mandamus, and the Ninth Circuit opined that the petition for writ of mandamus was frivolous and wholly without merit. Thus, the Ninth Circuit denied the petition, and directed Defendant to show cause why sanctions should not be imposed for asserting a frivolous pleading. Id. at *2.

Disqualification Of Counsel In Class Actions

Flatworld Interactives LLC, et al. v. Apple Inc., 2013 U.S. Dist. LEXIS 111496 (N.D. Cal. Aug. 7, 2013). Plaintiff, Flatworld Interactives, brought a class action for patent infringement of touch and gesture-based technology used in Apple products. Based on discovery materials, Apple believed that John McAleese, a then-partner at one of Apple’s outside law firms, Morgan, Lewis & Bockius LLP (“Morgan Lewis”), and the husband of one of FlatWorld’s co-founders and directors, was improperly communicating and sharing confidential information related to Apple with FlatWorld and Hagens, Berman, Sobol, Shapiro LLP (“Hagens Berman”). Apple moved to disqualify Hagens Berman from representing FlatWorld, alleging that Hagens Berman was tainted by McAleese’s conduct. The Court conducted an in camera review and confirmed the existence of e-mail strings that Jennifer McAleese forwarded her husband even after Hagens Berman was retained. Further Jennifer McAleese admitted that John McAleese responded to her twice via e-mail after she forwarded other Hagens Berman communications to him. The Court stated that neither the absence of an agreement with respect to the fee to be charged nor a formal retainer agreement is required for there to be an attorney-client relationship. Rather, all that is needed is that the attorney knowingly obtains material confidential information and renders legal advice or services as a result. Id. at *20. The Court thus stated that retaining a law firm that would sue Apple for patent infringement, and by assisting in efforts to find a firm that would buy the patent to sue Apple itself, McAleese acted contrary to Apple’s interests. The Court, however, noted that Hagens Berman gained no advantage from McAleese and Hagens Berman did not hide McAleese’s name or the documents he reviewed on the privilege log, and instead promptly worked through the privilege issues raised by Apple and ultimately produced the documents in question. The Court clarified that to succeed on its disqualification motion, Apple must have made a threshold showing that McAleese had confidential information about Apple. The Court found that Apple did not establish that McAleese had any confidential information about it aside from the fact that Apple was concerned about FlatWorld’s privilege log. It also opined that McAleese never obtained confidential information or received confidential information about Apple. Therefore, because Apple provided no evidence that McAleese passed on any confidential information about it or actually had any confidential information to give, the Court held that Hagens Berman should not be disqualified. Thus, the Court denied Apple’s motion.

Helmer, et al. v. Goodyear Tire & Rubber Co., 2013 U.S. Dist. LEXIS 11779 (D. Colo. Jan. 29, 2013). Plaintiffs, a group of radiant heating system owners, brought a class action alleging that Entran I, a rubber hose manufactured by Defendant, had manufacturing and design defects that caused it to become brittle and crack, causing significant repair costs. Plaintiffs previously bought a suit regarding Entran II alleging the similar defects. Perkins Coie LLP, represented Defendant on two product liability cases concerning Entran II from 2003 to 2005, and represented Defendant in other product liability actions. Id. at *2. David Black, who represented Plaintiffs in Entran II, joined Perkins Coie as partner in 2009, and because Perkins Coie continued to represent Defendant in other matters, Black agreed not to perform any work adverse to Defendant in Entran II or otherwise. Id. at *3. Thereafter, Charles LaDuca, an attorney, asked Black to represent Plaintiffs in Entran III, which Black eventually agreed to do after Perkins Coie terminated his relationship with Defendant. Id. Defendant then filed a motion to disqualify counsel, and the Magistrate Judge recommended the Court grant the motion. Id. *5-6. One Rule 72 objections, the Court adopted that recommendation. First, the Magistrate Judge found that Perkins Coie’s representation in Entran II litigation continued until 2010. Id. at *7. While the firm’s representation of Defendant continued until 2010, its representation of Defendant in Entran II litigation ended in 2005. Id. Thus, the Court agreed with Defendant that this factual misunderstanding was clearly erroneous. Second, Plaintiffs argued that the motion to disqualify was governed by Rule 1.9(a) of the Colorado Rules of Professional Conduct. Id. The Court disagreed, stating that a motion to disqualify counsel in a federal case must be decided by federal
law and not state law because the claim was filed in federal court. *Id.* at *8.* Further, the Court noted that United States v. Stiger, 413 F.3d 1185 (10th Cir. 2005), applied Rule 1.9 of the ABA Model Rules of Professional Conduct rather than Rule 1.9 of the Oklahoma Rules of Professional Conduct for a disqualification motion, even though the two regulations were identical. *Stiger* held that the Model Rule reflected the national standard to be used in ruling on disqualification motions. *Id.* at *8.* Further, the Court confirmed the Magistrate Judge’s legal standard that a law firm should not change sides and represent a new client against a former client in a matter that was fundamentally similar to that in which the firm defended the former client. *Id.* at *12.* Third, the Court noted that the issue was not whether the two products themselves were identical, but whether the factual contexts of both cases were similar or related. *Id.* at *14.* The products’ function and alleged defects in Entran II and III were substantially the same, and the law firm which represented Defendant and its Entran II product now sought to represent Plaintiffs in their claim regarding Entran III. *Id.* at *15.* Accordingly, the Court found that the Magistrate Judge did not err in his findings and applications of the facts. *Id.* Finally, regarding laches, the Magistrate Judge noted that the motion to disqualify was not unduly delayed because it was filed two months after the complaint, and 45 days after Defendant’s answer. *Id.* at *18.* The Court determined that both Plaintiffs and their counsel were aware of a potential conflict of interest, and that they knew or should have known that it could lead to Perkins Coie being disqualified. *Id.* at *19.* Thus, the Court stated that the facts did not support the finding that Plaintiffs were unfairly prejudiced by the timing of the motion. *Id.* Accordingly, the Court approved and adopted the recommendation of the Magistrate Judge and granted Defendant’s motion to disqualify counsel.

**In Re Rail Freight Fuel Surcharge Antitrust Litigation, 2013 U.S. Dist. LEXIS 125054 (D.D.C. Sept. 3, 2013).** Plaintiffs, a group of shippers who purchased railroad freight shipping services, brought a class action alleging that Defendants, the four largest rail freight carriers in U.S., violated the Sherman Act by conspiring and fixing the levels of rail freight fuel surcharges. Plaintiffs had sought and obtained certification of a class consisting of approximately 30,000 shippers, which included Oxbow Carbon & Minerals LLC and five of its affiliated companies (“Oxbow”). *Id.* at *14.* The D.C. Circuit had later vacated the class certification order based on the U.S. Supreme Court’s decision in Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013), and remanded the action for reconsideration. Meantime, Oxbow moved to disqualify Latham & Watkins LLP (“Latham”) as counsel for Defendant Union Pacific Railroad Company (“UP”), asserting that Latham’s representation of UP was tainted by a conflict of interest. *Id.* The Court denied Oxbow’s motion. The Court found that the numerous declarations submitted by the parties, including declarations of eminent expert in legal ethics, and the relevant authorities suggested that Latham’s representations of UP did not present a disqualifying conflict of interest. *Id.* While the instant action was a consolidation of eighteen cases involving common allegation that UP, along with the three other Defendant railroads, engaged in price-fixing, Oxbow had filed a separate lawsuit against UP and one other named Defendant alleging the same fuel surcharge conspiracy (“Related Case”). *Id.* at *19.* Latham had represented UP in at least 32 separate matters, including litigation and environmental matters since 1997, and from 2004, it had represented Oxbow on a variety of corporate transactions and had advised Oxbow on more than 23 separate matters. *Id.* at *17.* None of the matters involved Oxbow’s relationship with UP or Oxbow’s domestic rail freight needs. Latham had also executed an Engagement Letter with Oxbow for performing legal work in connection with the permitting of new and expanded facilities at the Port of Long Beach in California and to cover representation on other on-going and future matters. *Id.* at *20.* Seeking Latham’s disqualification, Oxbow contended that Latham’s representation of UP was directly adverse to Oxbow in the Related Case as Latham’s defense would provide UP with defenses and arguments relevant to defending the Related Case. Oxbow also contended that Latham’s representation of UP was directly adverse to Oxbow as an unnamed putative class member of this consolidated action. The Court found that the instant action and the Related Case were not the same matter simply because they involved the same or similar claims. *Id.* at *33.* The Court noted that “same matter” operates narrowly in D.C. Rule 1.7(b)(1), which “deals with a situation in which the lawyer is representing one client in a matter, such as a litigation . . . in which another client, which the lawyer represents only in unrelated matters, takes a position adverse to the first client.” *Id.* The Court further noted that “the mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an
unrelated matter does not, without more, create a conflict of interest."  *Id.* The Court acknowledged that Latham’s defense of UP might involve the development of arguments or the taking of positions that ultimately establish negative precedent for Oxbow in the Related Case, but nevertheless found that the instant action and the Related Case constituted distinct matters.  *Id.*  at *38. The Court applied the general rule that unnamed class members were not firm clients for conflicts purposes and held that Latham’s representation of UP did not disqualify it.  *Id.* The Court found that Oxbow, an unnamed class member with a substantial interest in one or more claims, was similar to the tens of thousands of other class members of this action, and what set Oxbow apart was that it had been unusually interested in pursuing its claims outside this class action.  *Id.*  at *49. According to the Court, such activities could not serve as the basis for deeming Oxbow equal to a named party within the action for conflicts purposes.  *Id.* Moreover, Oxbow did not contend that it had shared any confidential information relevant to the instant action or the Related Case with Latham that could be used against Oxbow.  *Id.*  at *44. The Court concluded that Latham’s representation of UP presented no reason to doubt Latham’s loyalty to either UP or Oxbow in the matters in which Latham represented them.  *Id.* Accordingly, the Court denied Oxbow’s motion to disqualify Latham.

**Kane, et al. v. Chobani, Inc., 2013 U.S. Dist. LEXIS 109900 (N.D. Cal. Aug. 2, 2013).** Plaintiffs filed a class action alleging that Defendant misbranded its products under the federal Food, Drug and Cosmetics Act (“FDA”). Plaintiffs alleged that Defendant’s labels on its yogurt products were misleading because they claimed it was made with only natural products and wrongly identified the sweetener as evaporated cane juice. Defendant entered into an *ad hoc* consulting and confidentiality agreement with EAS, a consulting group specializing in FDA regulatory matters.  *Id.*  at *6-7. Subsequently, Plaintiffs’ counsel contacted EAS to provide expert services. Defendant discovered the relationship between EAS and Plaintiffs’ counsel and instructed EAS not to have any further communication with Plaintiffs’ counsel related to any matter at issue in the lawsuit.  *Id.*  at *13-14. EAS terminated its consulting services with Plaintiffs’ counsel and reassured Defendant about EAS’ protection of confidential information.  *Id.*  at *14. Defendant filed a motion to bar EAS from discussing issues in the case with Plaintiffs’ counsel, and the Court granted the motion. Defendant also filed a motion to disqualify Plaintiffs’ counsel, which the Court denied. The Court found that Defendant’s counsel had repeated and detailed strategy sessions with EAS about the allegations in the instant case, which were covered by a confidentiality provision in a written agreement, and which all parties involved considered to be confidential. The Defendant’s counsel conveyed to EAS his mental impressions, conclusions, opinions, and legal theories regarding Plaintiffs’ claims and Defendant’s anticipated defenses in the case. The Court therefore ruled that EAS and Plaintiffs’ counsel were barred from having further discussions with each other about issues in this litigation.  *Id.*  at *21. The Court then analyzed whether EAS had already disclosed the confidential information to Plaintiffs’ counsel, such that Plaintiffs’ counsel must also be disqualified. The Court stated that as the moving party, Defendant bore the burden of proof to show that confidential information was disclosed.  *Id.*  at *37. Defendant asserted that it was undisputed that the EAS expert discussed the exact same claims and defenses with Plaintiffs’ counsel that she discussed with Defendant’s counsel. The Court noted that Defendant neither sought a declaration from or deposition of the expert. Thus, the record regarding what the expert disclosed to Plaintiffs’ counsel consisted solely of counsel’s declarations, and the record did not support the conclusion that Defendant’s confidential information was provided to Plaintiffs’ counsel. The Court stated that the drastic measure of disqualification of Plaintiffs’ counsel was inappropriate because there was not a genuine likelihood that allowing the attorney to remain on the case will affect the outcome of the proceedings before the Court.  *Id.*  at *49. The Court, however, observed that this determination did not condone the conduct of Plaintiffs’ counsel.  *Id.*  at *51. Plaintiffs’ counsel was aware that EAS had a conflict with Defendant that would prevent EAS from appearing adverse to Defendant. Although EAS declined to elaborate on the nature of this conflict, Plaintiffs’ counsel could easily have inquired directly from Defendant as to whether this relationship would present a conflict. The failure of Plaintiffs’ counsel to make a simple phone call to opposing counsel risked breaching Defendant’s confidences, and could have required disqualification of Plaintiffs’ counsel.  *Id.*  at *52. The Court therefore concluded that Plaintiffs’ counsel was at fault for not immediately and forthrightly disclosing its intent to hire EAS, once the possibility of a conflict of interest
from such employment became apparent; however, such a failure did not warrant disqualification of Plaintiffs’ counsel. Accordingly, the Court denied Defendant’s motion to disqualify Plaintiffs’ counsel.

Statute Of Limitations Issues In Class Actions

Porter, et al. v. Pipefitters Association Local Union 597, 2013 U.S. Dist. LEXIS 130879 (N.D. Ill. Sept. 12, 2013). Plaintiffs were African-American pipefitters who were current or former members of Pipefitters Association Local Union 597, U.A. (“Local 597”). Defendant Mechanical Contractors Association (“MCA”) was a professional association representing Chicago-area contractors. Plaintiffs brought a class action against Local 597 and MCA alleging, among other things, race discrimination, retaliation, and conspiracy in violation of 42 U.S.C. 1981. Among other things, Plaintiffs alleged Local 597 and MCA were parties to a hiring agreement that had a discriminatory effect on African-American pipefitters. Defendants moved to dismiss certain portions of the complaint, including the conspiracy claim based upon the statute of limitations. The Court granted Defendants’ motion. Plaintiff’s conspiracy claim was brought under 42 U.S.C. § 1985. Defendants argued that the § 1985 claim was governed by Illinois’ two-year statute of limitations. Plaintiffs argued that the federal four-year “catch-all” statute of limitations contained in 28 U.S.C. § 1658 applied because the underlying tort was Plaintiffs § 1981 claims. Id. at *9-11. Section 1658 applies to any claim arising under an act of Congress that was enacted after December 1, 1990. The Court noted that § 1981 was amended by the Civil Rights Act of 1991 to bring within the statute claims of discrimination arising after the alleged contract at issue was formed. Id. at *11-13. According to the Court, if a § 1981 claim involves the making or enforcement of contracts, it is a pre-1990 § 1981 claim and the state statute of limitations applied. If, however, the claim involves conduct that occurs after the employment contract is formed, it is subject to the four-year statute of limitations of § 1658. In this case Plaintiffs failed adequately to alleged which contracts Defendants allegedly interfered with. Thus, it could not be determined whether future or existing contracts were involved. The Court, therefore, concluded that Plaintiffs’ allegations did not give Defendants fair notice and dismissed their conspiracy claim without prejudice. Id. at *14-15.

Medical Monitoring Class Actions

Caronia, et al. v. Philip Morris United States, Inc., 715 F.3d 417 (2d Cir. 2013). Plaintiffs, a group of people over the age of 50 who smoked Marlboro cigarettes or ceased smoking them within one year prior to filing this case, brought a class action alleging claims for negligence, strict liability, breach of warranty, and medical monitoring. None of Plaintiffs were diagnosed with lung cancer at the time, or were under investigation by a physician for suspected lung cancer. Plaintiffs contended that lung cancer was the leading cause of cancer deaths in the United States, more than 80% of those deaths resulted from cigarette smoke, and that Plaintiffs were at significantly increased risk for developing lung cancer as a consequence of their use of Marlboro cigarettes. Plaintiffs alleged that Defendant knew that it was feasible to lower the carcinogenic content of its cigarettes, and it purposely designed all of its Marlboro cigarettes to deliver excessive amounts of carcinogens when smoked. Instead of seeking compensatory or punitive damages, Plaintiffs sought to have Defendant provide funding for a Court-supervised program of medical monitoring for class members who were at increased risk of lung cancer from smoking Marlboro cigarettes. Defendant moved to dismiss the medical monitoring claim and for summary judgment as to Plaintiffs’ other claims. The District Court granted Defendant’s motion and denied Plaintiffs’ motion for class certification as moot. Id. at *418-27. The Second Circuit affirmed the District Court’s summary judgment order as to Plaintiffs’ negligence, strict liability, and breach of warranty claims. It certified several questions to the New York Court of Appeals concerning Plaintiffs’ equitable claim for medical monitoring. The Second Circuit noted that the question of whether a Plaintiff may maintain an independent cause of action for medical monitoring under New York law had not been addressed by the New York Court of Appeals. Although the issues had been addressed by New York’s intermediate appellate courts, in the federal district courts in New York, and in the highest courts of several other states, the treatments have varied. Id. at *434. Therefore, the Second Circuit stated that in cases such as the present case, where state law controlled and the governing principles were uncertain or ambiguous, it had to look into the interpretations of state courts. The Second Circuit noted that none of the New York State courts had directly addressed the question of
whether the State recognized an independent cause of action for medical monitoring, and the answer to this question, which had the capacity to resolve the litigation, was unclear. Accordingly, the Second Circuit certified the question as to whether a current and former longtime heavy smoker who had not been diagnosed with a smoking-related disease can pursue an independent equitable cause of action for medical monitoring claim for such a disease, and if so, what were the elements of that cause of action, and what was the applicable statute of limitations. *Id.* at *434-50.

**Coleman, et al. v. Union Carbide Corp., 2013 U.S. Dist. LEXIS 140613 (S.D. W. Va. Sept. 30, 2013).** In this medical monitoring class action brought by current and former residents and workers, the Court denied Plaintiffs’ motion for class certification. Plaintiffs contended that Defendants’ Alloy Plant – a heavy metals production facility that occupied a 120-acre site in Alloy, West Virginia – employed either minimal or no emission mitigation measures. Plaintiffs sought certification of two medical monitoring classes, including class-I, consisting of all persons who resided in, were employed by a business, or attended a school in the contamination area between March 31, 2009, and the date of class certification, and class-II, consisting of the same class of people but who resided in the contamination area prior to March 31, 2009. *Id.* at *13. Plaintiffs also sought a permanent injunction prohibiting Defendants from further contaminant releases in excess of permitted limits. Plaintiffs offered expert evidence in support of their motion, and Defendants contended that the experts could not pass the required analysis under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). The Court found numerous problems and inconsistencies in the data relied upon by Plaintiff’s experts, and thereby excluded the expert testimony. *Id.* at *96-104. The Court remarked that based on its ruling to exclude the expert opinions, the proposed classes had, at a minimum, become unascertainable. The Court noted that Plaintiffs proposed essentially three objective criteria by which to define the classes, including: (i) whether the person resided in, worked in, or attended school in the radius of impact; (ii) whether the person did so for a continuous period of certain temporal lengths; and (iii) whether the person had been diagnosed with an illness or disease attributable to substances released from the Alloy Plant. The Court concluded that absent the excluded expert opinions, class-wide proof of those three objective criterion were unavailable and the class was not susceptible to objective identification. *Id.* at *117. The Court remarked that there were host of other impediments to certification even assuming Plaintiffs’ expert opinions remained intact. The Court explained that one of the objective criteria upon which Plaintiffs ascertained their classes was whether the putative class member had been diagnosed with an illness or disease attributable to substances released from the Alloy Plant. That diagnosis, and hence class membership, would come only after each putative class member is examined and the individualized, and potentially subjective, determination made respecting whether they were presently suffering from one of the many illnesses or diseases that might be caused by one or more of the substances released from the Alloy Plant. *Id.* at *117. These and other such anomalies, the Court remarked, made the class unascertainable. Accordingly, the Court denied Plaintiffs’ motion for class certification of a medical monitoring class.

**Genereux, et al. v. Hardric Labs., Inc., 2013 U.S. Dist. LEXIS 88509 (D. Mass. June 23, 2013).** In this consolidated class action, Plaintiffs, a group of current and former employees and their families, alleged that Defendant, their employer, negligently exposed them to elevated levels of beryllium at Defendant’s facility resulting in increased risk of suffering beryllium-related diseases. Plaintiffs sought a program of medical monitoring. Defendant filed a motion for summary judgment, which the Court granted. The Massachusetts Supreme Judicial Court in *Donovan v. Philip Morris USA, Inc.,* 455 Mass. 215 (Mass. 2009), first recognized a cause of action for medical monitoring. *Donovan* held that a Plaintiff seeking medical monitoring must prove that Plaintiff was exposed to a hazardous substance that produced “subcellular changes” that substantially increased the risk of serious disease, illness, or injury. *Id.* at *3-7. Relying on the testimony of their medical expert, Dr. Newman, Plaintiffs alleged that they were at significant increased risk of developing subcellular changes and therefore were entitled to medical monitoring. Defendant contended that Plaintiffs failed to prove that they suffered subcellular change, which was one of the necessary elements to be proved under *Donovan*, and that Plaintiffs’ own expert could not state with reasonable medical certainty that any Plaintiff had suffered subcellular change. The Court opined that subcellular change was a necessary element of Plaintiffs’ case under *Donovan*. The subcellular change...
element served two primary purposes. First, it tied the modern doctrine of medical monitoring to traditional
 tort law, for the physiological changes with the attendant substantial increase in the risk of cancer, and the
 medical necessity of monitoring with its attendant cost could adequately establish the elements of injury
 and damages. *Id.* at *29. Second, it served as a check on the ability of Plaintiffs seeking medical
 monitoring to prevail merely on the basis of increased risk of harm. *Id.* at *30. The Court found that
 Plaintiffs had not offered any evidence of subcellular change. The Court pointed out that Dr. Newman
testified that he could not determine whether any Plaintiffs had suffered subcellular change. Dr. Newman’s
position was that individuals exposed to elevated beryllium levels were at an increased risk of subcellular
change, and that within a population of persons exposed to beryllium, some number would suffer
subcellular change. However, this increased risk did not cause him to conclude that any one or more of
Plaintiffs suffered subcellular change. The Court determined that standing alone, increased risk of
subcellular change was insufficient to prove Plaintiffs’ claims for medical monitoring. *Id.* at *34.
Accordingly, it granted Defendant’s motion for summary judgment.

Oct. 17, 2013). Plaintiffs, a group of homeowners, brought a class action against the manufacturer and the
certified installer of a home insulation spray – (spray polyurethane foam (“SPF”) – alleging that SPF is toxic
and created health hazards for people residing in homes where it was used. According to Plaintiffs,
exposure to SPF had caused them to develop a risk of contracting a serious latent disease for which the
monitoring procedures were different from those normally recommended in the absence of exposure.
Earlier, the Court had dismissed Plaintiffs’ medical monitoring claim, finding that Plaintiffs had not identified
a serious latent disease that would require medical monitoring. Thereafter, Plaintiffs filed an amended
complaint alleging that: (i) SPF can release toxins that can cause respiratory ailments and breathing
problems as well as skin, eye, and throat irritation; (ii) class members were at a significantly increased risk
of contracting serious latent diseases, including lung damage, and throat, eye, and nose irritations;
(iii) medical monitoring, including diagnostic exams and pharmaceutical interventions would prevent or
mitigate the adverse consequences of SPF exposure; and (iv) the monitoring procedures were different
from those normally recommended in the absence of exposure. *Id.* at *6-7. Defendants again moved to
dismiss the medical monitoring claim, arguing that Plaintiffs had not sufficiently pled the requisite elements.
The Court granted the motion. The Court stated that the following elements were necessary to state a
claim for medical monitoring: (i) exposure greater than normal background levels; (ii) to a proven
hazardous substance; (iii) the exposure is caused by Defendants’ negligence; (iv) as a proximate result of
the exposure, Plaintiffs have a significantly increased risk of contracting a serious latent disease; (v) a
monitoring program procedure exists that makes the early detection of the disease possible; (vi) the
prescribed monitoring regime is different from that normally recommended in the absence of exposure; and
(vii) the prescribed monitoring regime is reasonably necessary according to contemporary scientific
principles. *Id.* at *5. The Court found that Plaintiffs had failed adequately to allege a serious latent
disease. Plaintiffs’ allegation that the serious latent disease to be monitored was lung damage failed to
give Defendants fair notice of what the claim was and the grounds upon which it rested. The Court opined
that lung damage could encompass a host of different diseases, some of which might be patent or
discernable through routine medical checkups. In addition, the Defendants must know which lung
diseases were relevant when conducting discovery or retaining experts. *Id.* at *8-9. The Court also noted
that Plaintiffs’ proposed monitoring regime of diagnostic tests and pharmaceutical interventions failed to
identify the specific medical monitoring procedures that made early detection of a specific disease possible.
*Id.* at *9-10. Finally, the Court concluded that Plaintiffs’ allegation that monitoring procedures exist that
make the early detection of any latent disease possible that were different from those normally
recommended in the absence of the exposure was insufficient because it was nothing more than a
formulaic recitation of the element of the claim. *Id.* at *10. Accordingly, the Court granted Defendants’
motion to dismiss.

(1xxii) Opt-Outs In Class Actions

*In Re Bank Of America Corp. Securities, Derivative, And ERISA Litigation*, 2013 U.S. Dist. LEXIS 81053 (S.D.N.Y. June 5, 2013). Plaintiffs, a group of investors, brought an action alleging that Defendants,
including Bank of America Corp. (“BofA”), were liable for a series of misstatements and omissions related to BofA’s acquisition of Merrill Lynch & Co., Inc. About 11 months after the Court set the date for putative class members to request exclusion from the consolidated securities class action, named Plaintiff KERS & Co. moved for a ruling that it timely opted-out of the class. The Court denied the motion. In February 2012, the Court certified a class and directed that notice be sent to prospective class members that any opt-out requests must be sent in no later than May 7, 2012. KERS e-mailed lead counsel Harry Susman a copy of its executed request for exclusion from the class, and stated that it would send him the original via U.S. mail that same day. Harry Susman, in turn, forwarded that e-mail to Jill McCrary, his secretary. McCrary’s affidavit stated that on May 7, 2012, she received a copy of the exclusion request signed by KERS, which she included in a set of exclusion requests that she mailed on May 7, 2012 to Garden City Group (“GCG”), the claims administrator. The Court noted that GCG had no record of receiving an opt-out request from KERS. The Court stated that the only evidence of any instruction concerning the KERS opt-out request was a directive from an attorney to his assistant to keep in their file. The Court found that such an instruction was different from and inconsistent with an instruction to submit the request to the claims administrator, and that the intent to opt-out and the expectation that an attorney would file required forms are insufficient. Id. at *16-17. The Court remarked that while the submission of its postal receipt was relevant evidence that Susman forwarded an exclusion request on behalf of someone to GCG, its probative value to KERS was limited by the numerous contradictions in the record, and the absence of other evidence that the KERS request was timely submitted. Accordingly, the Court stated that KERS did not satisfy its burden of establishing that it communicated an intent to opt-out of the class. Alternatively, KERS requested the Court to find that there had been excusable neglect on the part of KERS within the meaning of Rule 6(b)(1)(B). The Court remarked that KERS and Susman were repeatedly informed that GCG had no record of KERS’ opt-out request, and notice was provided in pleadings filed on May 29, 2012, and November 30, 2012. KERS was not among the opt-out Plaintiffs listed in a notice to class members sent on or about December 24, 2012, and BofA’s counsel expressly alerted Susman’s attorneys to KERS’ failure to opt-out in a letter dated June 11, 2012. KERS waited approximately 10 months after first receiving notice of this potential problem before filing its motion. Moreover, although KERS contended that no prejudice would occur if its neglect was excused, BofA stated that based on KERS’ claim to have held 304,968 BofA shares during the class period and anticipated per-share damages from the class action settlement, BofA could be exposed to more than $1.4 million in damages if KERS succeeded on its request to opt-out. The Court found that pursuing an individual action or arbitration does not constitute notice of an election to opt-out of a class action. Id. at *24. The Court stated that the reason for missing the neglected deadline was the most important factor in considering excusable neglect, and that the equities would rarely favor a party who failed to follow the clear dictates of a Court’s order. Id. at *25-26. Accordingly, the Court found that KERS did not establish excusable neglect for its failure to timely seek exclusion from the class.

(lxxiii) Certification Of Defendant Classes

Stay The Course West Virginia v. Tennant, et al., 2013 U.S. Dist. LEXIS 6998 (S.D. W. Va. Jan. 17, 2013). Plaintiffs, a political action committee, brought an action challenging certain provisions of West Virginia’s election laws that placed a $1,000 independent contribution limit. Plaintiffs named as Defendants the West Virginia Secretary of State Natalie E. Tennant and Mercer County Prosecuting Attorney Scott Ash. Plaintiffs also sued Defendant Ash as the representative of a class of West Virginia’s 55 prosecuting attorneys, and requested certification of a Defendant class under Rule 23. Plaintiffs alleged that West Virginia’s prosecuting attorneys were responsible for enforcing the criminal penalty provisions of the challenged election statutes, and therefore certification of the prosecutors as a class would make any relief awarded by the Court applicable to and binding on these officials. The Court denied the motion for class certification. First, Plaintiffs contended that the class of prosecuting attorneys was sufficiently numerous that joinder would impede efficient resolution of this dispute. However, in light of the relatively small size of Plaintiffs’ proposed class, the Court’s consideration of other factors made it clear that individual joinder of West Virginia’s prosecuting attorneys was not impracticable. Id. at *6. The identities of West Virginia’s prosecuting attorneys were known to Plaintiffs, as were the addresses of their respective offices, and individual service did not present any apparent difficulty. Further, Plaintiffs’ proposed class of prosecuting attorneys included all prosecuting attorneys throughout the state who had prosecuted any criminal cases during the relevant period of time, and the Court found that the identities of the defendants were known to the Plaintiffs and the estate of the late President John F. Kennedy. The Court found that the class satisfied numerosity requirements. Second, Plaintiffs’ counsel argued that the class satisfied the requirements of commonality, but the Court disagreed. The Court noted that Plaintiffs failed to demonstrate that the claimed common core of interest was comprised of factual connections that were common to the members of the class. The Court found that there was no basis for concluding that the commonality of the Plaintiffs’ claims was typical. Third, the Court found that Plaintiffs failed to demonstrate that the class satisfied the requirements of typicality. The Court noted that the individual claims of each member of the class were not substantially similar and that the causes of action were not based on a common theory. The Court found that the class did not satisfy the requirements of typicality. Fourth, the Court found that the class did not satisfy the requirements of adequacy of representation. The Court noted that the individual claims of each member of the class were not substantially similar and that the causes of action were not based on a common theory. The Court found that the class did not satisfy the requirements of adequacy of representation. Fifth, the Court found that the class did not satisfy the requirements of manageability. The Court noted that the individual claims of each member of the class were not substantially similar and that the causes of action were not based on a common theory. The Court found that the class did not satisfy the requirements of manageability.
attorneys was not subject to expansion and its members resided within a limited geographic area. Plaintiffs also argued that individual joinder would needlessly complicate the resolution of this litigation by resulting in 55 practically identical responses to pleadings and requiring the presence of 55 similarly-situated individuals at scheduled hearings. Considering the fact that Plaintiffs’ own proposed representative refused to participate in this action, the Court observed that this suggestion was doubtful at best. Thus, the Court held that Plaintiffs’ proposed class was not sufficiently numerous to warrant certification. Second, the Court observed that Plaintiffs could not assure vigorous representation or demonstrate an absence of conflict on the part of their selected representative. Defendant Scott Ash, the Mercer County prosecuting attorney, named as the class representative had traditionally been selected as the representative in similar actions. The Court noted that Defendant Ash had no intention of vigorously prosecuting the interests of the class of West Virginia prosecuting attorneys. Plaintiffs’ motion for expedited consideration of class certification attached as an exhibit an e-mail from Defendant Ash to Plaintiffs’ counsel that informed them that he had decided not to answer or otherwise contest the suit. Further, Defendant Ash did not file an answer or a response to any of the pleadings, nor did he appear at the preliminary injunction hearing. The Court observed that certification of a class with a representative who refuses to defend this action would undermine the right of other West Virginia prosecuting attorneys to defend and enforce the laws of the State. Id. at *9. The Court also stated that Defendant Ash’s interests could conflict with those of other West Virginia prosecutors because he had indicated his decision not to contest this suit was based in part on his sympathy for Plaintiffs’ position. The Court thus held that Defendant Ash’s disagreement with the challenged law coupled with his refusal to defend this action rendered him incapable of serving as a class representative in a manner that would protect the interests of the otherwise unnamed prosecuting attorneys. Accordingly, the Court denied Plaintiffs’ motion for certification of a Defendant class.

Consumer Fraud Class Actions

Harnish, et al. v. Widener University School Of Law, 2013 U.S. Dist. LEXIS 38514 (D.N.J. Mar. 20, 2013). Plaintiffs, a group of law graduates, brought a class action alleging that Defendant posted to its website, and disseminated to third-party law school evaluators, misleading and incomplete graduate employment rates in violation of the New Jersey Consumer Fraud Act (“NJCFA”) and the Delaware Consumer Fraud Act (“DCFA”). Defendant moved for dismissal. The District Court denied Defendant’s motion, finding that Plaintiffs had made plausible allegations consistent with Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009). Plaintiffs alleged that over the years, Defendant’s website page stated that graduates had a 93% employment/advanced degree rate within nine months of graduation. Plaintiffs claimed that the employment statistics were misleading because Defendant did not disclose that its placement rate included full and part-time legal, law-related, and non-legal positions. Id. at *5. Plaintiffs also claimed that over the years the statements of the employment rate between 90 to 95% misled prospective law students into believing that rate referred to “legal employment.” Id. at *17. The Court found that Plaintiffs sufficiently pled an unlawful affirmative act under the NJCFA. Id. at *25. Under somewhat similar facts about a different law school, a New York Appellate Division had concluded that no reasonable person could be misled to believe a statement referring to an employment rate referred to legal employment only. Id. at *18. The Court disagreed with that conclusion. Id. at *19. The Court found that it was not implausible that a prospective law student making the choice of whether or which law school to attend would believe that the employment rate referred to law-related employment only. Id. at *20. Accordingly, the Court held that Plaintiffs had sufficiently pled an unlawful affirmative act under the NJCFA. Id. The Court also held that Plaintiffs sufficiently pled a knowing omission under the NJCFA. Id. at *27. Plaintiffs alleged that Defendant made material omissions concerning its reputation with potential employers, the value of its degree, and the rate at which recent graduates could obtain gainful employment in their chosen field. This caused students to pay inflated tuition based on omissions, including specifically that approximately 90% to 95% of graduates secured gainful employment. Id. The Court found the omissions plausible for purposes of Twombly. The Court noted that what made the posted and disseminated employment rate misleading was the failure to include notice that the employment rate referred to all types of employment, that it was not specifically referring to law-related employment, and that the rate might have been inflated by selectively disregarding employment data. Id. According to the Court, without the additional facts, Plaintiffs might have been misled to believe the employment rate referred to
their post-graduate employment prospects in the legal sector and not to employment generally. *Id.* Finally, the Court found that Plaintiffs sufficiently alleged an ascertainable loss. Plaintiffs had sought a remedy for the difference between the inflated tuition paid by them based on the material representations. *Id.* at *28. Plaintiffs had asserted that they would not have paid the amount in tuition had they been aware of Defendant’s true job placement rate and salary statistics. *Id.* The Court found the pleadings sufficient to meet the NJCFA’s broad standard for ascertainable loss. *Id.* The Court thus held that Plaintiffs pled a cognizable claim under the NJCFA. *Id.* at *30. Because the NJCFA and the DCFA are virtually identical in their pleading requirements, the Court further held that Plaintiffs also plausibly pled deception, misrepresentation, or the omission of any material fact under the DCFA as under the NJCFA. *Id.* at *31-32. Accordingly, the Court denied Defendant’s motion to dismiss.

*Macdonald, Jr., et al. v. Thomas M. Cooley Law School, 2013 U.S. App. LEXIS 15444 (6th Cir. July 30, 2013).* Plaintiffs, a group of graduates of the Thomas M. Cooley Law School (“Cooley”), brought a class action alleging violation of Michigan’s Consumer Protection Act (“Act”), common law fraud, and negligent misrepresentation under Michigan state law. Plaintiffs alleged that although they relied on the percentage of graduates employed statistic, and the average starting salary of all graduates statistic given in Cooley’s Employment Report and Salary Survey, these statistics did not correspond with their actual employment prospects upon graduation. Following graduation, most Plaintiffs had difficulty finding any legal employment. Cooley moved to dismiss and the District Court granted the motion. On appeal, the Sixth Circuit affirmed the order of the District Court. First, the Sixth Circuit observed that if a consumer buys a good, property, or service for a business purpose that is, not primarily for a personal, family, or household purpose, then the Act does not apply. *Id.* at *13-14. Here, Plaintiffs bought their legal education for a business purpose to use a law degree to prospectively better themselves and their personal circumstances through the attainment of full-time employment in the legal sector. Because Plaintiffs did not attend law school for personal purposes, the Sixth Circuit opined that the Act did not cover their purchasing of a legal education.

Second, regarding Plaintiffs’ claim for fraudulent misrepresentation, the Sixth Circuit stated that fraudulent misrepresentation requires a false representation by Defendant, and that Plaintiff could not prove that Cooley committed fraudulent misrepresentation based on the percentage of graduates employed because Plaintiffs could prove that this statistic was false. The statistic only stated that the percentage of graduates “employed.” *Id.* at *22. The Sixth Circuit stated that although Plaintiffs could have thought that “employed” meant employed in a permanent position for which a law degree was required or preferred, a Plaintiff’s subjective misunderstanding of information that is not objectively false or misleading cannot mean that a Defendant has committed the tort of fraudulent misrepresentation. *Id.* Thus, the Sixth Circuit stated that Plaintiffs failed to state a claim of fraudulent misrepresentation based on the percentage of graduates employed statistic. The Sixth Circuit also found that Plaintiffs could not establish a claim for fraudulent misrepresentation based on the “average starting salary for all graduates” statistic because their reliance on it was unreasonable. *Id.* at *26. The statement “average starting salary for all graduates” expressly contradicted other statements in the very same report showing that the report itself was based not on data for the entire class, but on data from those who completed the surveys. *Id.* The Sixth Circuit remarked that Plaintiffs’ reliance on the statement that the “average starting salary for all graduates” was $54,796 was unreasonable in light of both the statement that the “number of graduates with employment status known” was less than the total number of graduates and the very title of the report. *Id.* at *27. Thus, because their reliance was unreasonable, the Sixth Circuit stated that their claim for fraudulent misrepresentation failed as a matter of law. Regarding Plaintiffs’ allegation of silent fraud or fraudulent concealment, the Sixth Circuit observed that a Plaintiff must allege more than non-disclosure; a Plaintiff must establish that Defendant had a legal duty to make a disclosure. *Id.* at *28. Plaintiffs did not allege that they asked Cooley about the claims in its Employment Reports, or specifically requested additional information beyond what was publicly available, so as to create a duty for Cooley to disclose the truth. Thus, the Sixth Circuit stated that absent such an inquiry, Cooley had no duty to make any further disclosure concerning its Employment Reports. Accordingly, the Sixth Circuit affirmed the order of the District Court granting Cooley’s motion to dismiss.
Recusal Issues In Class Actions

In Re Aetna UCR Litigation, 2013 U.S. Dist. LEXIS 54864 (D.N.J. April 15, 2013). Plaintiffs, a group of subscribers who purchased healthcare services, providers of the healthcare services, and the associations which represented the providers, brought a class action alleging inadequate reimbursement to subscribers or their providers for out-of-network covered services or supplies through the use of the Ingenix Databases, as well as other reimbursement methodologies and out-of-network reimbursement policies. Plaintiffs and the Aetna Defendants agreed to a settlement and moved for preliminary approval of the settlement and preliminary certification of two settlement classes, including a subscriber settlement class and a provider settlement class (“the settlement classes”). The settlement classes excluded any Judge who presides or has presided over the actions, together with his or her immediate family members and any other individual residing in the Judge’s household. The presiding Judge of the Court noted that absent the express inclusion, he and his wife could be considered absent members of the putative class, and disclosed to the parties that his wife had maintained health insurance through an Aetna ERISA plan offered by her employer, which provided him with secondary coverage (because at all relevant times he subscribed to his own health benefits plan with the Government Employees Health Association, through his employment with the United States District Court). Accordingly, the Judge renounced, on the record, any interest, right, and/or claim he or his wife, who had expressly authorized him to speak on her behalf, might have in the subject matter of the lawsuit. Further, the Judge also noted that he and his wife were excluded from the settlement class. Thereafter, the non-settling Plaintiffs moved for recusal of the Judge. The Court granted the motion. The non-setting Plaintiffs argued that because of the Judge’s actual or imputed knowledge of a disqualifying interest existing for 20 months, an objective observer might harbor doubts about his impartiality, thereby requiring recusal under 28 U.S.C. § 455(a). The non-Settling Plaintiffs also argued that apart from the possibility of bias, the pre-divestiture financial interest that existed by virtue of the Judge’s membership in the putative class presented an independent and equally compelling basis for recusal under § 455(b)(4). The Judge noted that he and his spouse were putative class members until the divestiture, and that during the period in which Aetna determined ONET benefits using Ingenix data, he and his wife received health benefits through an Aetna ERISA plan, and thus they had a financial interest in this action, triggering recusal under § 455(b)(4). Id. at *14. The Judge noted that the Fifth Circuit in Tramonte v. Chrysler Corp., 136 F.3d, 1030 (5th Cir. 1998), reasoned that because § 455(b)(4) requires recusal for even paltry financial interests, the increased uncertainty of recovery in the pre-certification stage of a class action affects the size but not the existence of a disqualifying financial interest. Id. at *15. The Judge observed that because of the existence of financial interest where he and/or his spouse were putative class members, this disqualified him from presiding over a case, pursuant to § 455(b)(4), and thus recusal was necessary. Id. at *16. The Court noted that § 455(f) authorizes a judge to cure the disqualifying interest and thereby eliminate the recusal obligation. Id. The Court observed that curative divestment should be possible when recusal is mandatory under § 455(a) or (b) if a reasonable person would not have known the circumstances warranting recusal prior to his divestment of the offending interest. Id. at *19. The Court, however, stated that he should have made the connection between his wife’s Aetna health plan and the controversy in litigation much sooner, and if he had investigated whether he or his wife had made ONET claims giving them an interest in the claims at issue in this action, a prompt opt-out from the class and divestiture of that financial interest could have been effected under § 455(f). The Judge remarked that an immediate divestment of the offending interest upon assignment of the action would have been required for him to continue to serve as the Judge. Id. at *20. Accordingly, the Court granted the motion for recusal.

Ligon, et al. v. City Of New York, 2013 U.S. App. LEXIS 22939 (2d Cir. Nov. 13, 2013). Plaintiffs, a group of New York residents, brought an action challenging the constitutionality of the New York City Police Department’s (“NYPD”) stop and frisk policy that allowed police officers to patrol 1,000 private apartment buildings across the City of New York. The District Court had held that the City violated the Fourth and Fourteenth Amendments by acting with deliberate indifference in the NYPD’s practice of unconstitutional stops and frisks, and by adopting a policy of indirect racial profiling that targeted racially defined groups for stops and frisks, and also ordered significant remedies. On appeal, the Second Circuit stayed the District Court’s order and reassigned the case to a different Judge chosen randomly in order to avoid the appearance of partiality. In an unusual procedural circumstance, the Judge moved through counsel for
leave under Rule 21(b)(4) for appellate review of the order for judicial disqualification pursuant to 28 U.S.C. § 455. The Judge’s counsel requested the Second Circuit to vacate its order of reassignment to terminate a dispute that was distracting attention from the underlying merits. The Second Circuit denied the motion. The Second Circuit stated that the cases were reassigned not because of any judicial misconduct or ethical lapse on the part of the Judge, but solely pursuant to § 455(a), which provides that any Justice, Judge, or Magistrate Judge of the United States shall disqualify herself in any proceeding in which her impartiality might reasonably be questioned. Id. at *5. Further, the Second Circuit stated that Rule 21 governs writs of mandamus and prohibition, and other extraordinary writs, and provides that the Judge may request permission to address the petition for mandamus but may not do so unless invited or ordered to do so by the Court of Appeals. Here, Rule 21 did not apply to these proceedings because the Second Circuit did not issue an extraordinary writ to the Judge, nor was there a petition for a writ directed to it. Moreover, it was procedurally improper for a Judge to enter an appearance in an appeal of her own decisions, whether as a party, intervener, or amicus. Further, the Second Circuit stated that reassignment was not a legal injury to the Judge, for reassignment allowed the Second Circuit to ensure that cases were decided by judges without even an appearance of partiality. To the extent that the Judge sought to defend herself, the Second Circuit stated that it had made no findings that Judge had committed judicial misconduct, or had abdicated any of her ethical responsibilities. Finally, regarding the request of the Judge’s counsel to vacate the order of reassignment, the Second Circuit stated that it could not subscribe to the view that a decision made pursuant to a statute passed by Congress should be vacated because a non-party claiming to be affected by that order believed that the issue had become controversial or distracting. In addition, the Second Circuit remarked that reassignment was an ordinary tool used by the judicial system to maintain and promote the appearance of impartiality. The Second Circuit recognized that it was frustrating to work extensively on a case that was later reassigned based on an appearance of partiality, and it was a displeasing occurrence for any Judge, but these matters would be ably handled, without any arguable appearance of partiality, by another of her capable colleagues. Accordingly, the Second Circuit denied the motion.

Editor’s Note: Among all class action rulings in 2013, the decision is Ligon may well be the most unusual. A federal judge’s direct involvement in an appeal is unprecedented.

(lxxvi) Settlement Administration Issues In Class Actions

In Re Deepwater Horizon, Case No. 13-30315 (5th Cir. Dec. 2, 2013). Plaintiffs, a group of business entities, individuals, and the government, brought a large number of claims and class actions against British Petroleum Exploration & Production, Inc. (“BP”) based on injuries resulting from the 2010 explosion aboard the Deepwater Horizon, an offshore drilling rig, and the consequent discharge of oil into the Gulf of Mexico. The explosion killed 11 people and sent millions of barrels of oil discharge into the Gulf of Mexico. The accident resulted in thousands of lawsuits against BP, as well as Transocean Ltd., owner of the Deepwater Horizon drilling rig that burned and sank, and Halliburton Co., which provided cement services for the well. BP reached a settlement with most of the private Plaintiffs. BP had initially established its own claims process, and later funded the claims process administered by the Gulf Coast Claims Facility (“GCCF”) to begin paying out claims immediately instead of at the conclusion of litigation. Over approximately 18 months, BP paid out more than $6.3 billion to individuals and businesses with spill-related losses. In March 2012, the District Court had granted the parties’ request to implement a process to transfer claims from the GCCF to a Court-supervised program that the parties agreed to in principle, and appointed a Claims Administrator. After conducting the fairness hearing, the District Court had issued a final order certifying the class and approved the parties’ class settlement on December 21, 2012. One type of claim covered by settlement was businesses’ claims for economic loss (“BEL”). Under the class definition, BEL claimants must have conducted commercial activities in the Gulf Coast region during the relevant period, and in order to qualify as a class member, BEL claimants also must have suffered loss of income, earnings, or profits as a result of the Deepwater Horizon accident. The payments for claims were based on a numerical formula, primarily depending on distance from the spill, using sample periods before and after the event. In September 2013, BR raised concerns about the varied accounting methods BEL claimants used in the ordinary course of their record-keeping and the ways in which erroneously-stated
expenses could cause erroneous calculations. Subsequently, the claims administrator issued a policy announcement interpreting the settlement which, in effect, provided a formula for calculating payments to businesses without requiring proof that losses were caused by the spill. BP alleged that the administrator’s misinterpretation of the settlement resulted in awards of hundreds of millions of dollars to BEL claimants with inflated losses or no losses at all. Id. at 5. On January 30, 2013, the District Court had affirmed the administrator’s policy announcement. Upon BP’s appeal, the Fifth Circuit reversed the District Court’s order affirming the administrator’s interpretation of the settlement. The Fifth Circuit found that the District Court held that causation was not an issue for consideration on remand. The Fifth Circuit therefore remanded the action for further consideration. BP then filed an emergency motion against the District Court’s holding that causation was not an issue for consideration on remand. The Fifth Circuit found that the District Court erred by not considering the argument on causation. According to the Fifth Circuit, the District Court’s refusal to consider causation, upon presentation of that issue by BP, contravened its direction in the concurring opinion in In re Deepwater Horizon, 732 F.3d 326, 346 (5th Cir. Oct. 2, 2013). Id. The Fifth Circuit held that it opinion and concurrence, read together, invited the parties to present arguments with respect to causation, Rule 23, the Rules Enabling Act, and Article III standing on remand. The Fifth Circuit therefore remanded the causation issue again to the District Court for expeditious consideration. Id. at 6. The Fifth Circuit also ordered an injunction against any further payments to the BEL claimants whose injuries were not traceable to the spill until the District Court could dispose of the causation issue. Id.

In Re Nigeria Charter Flights Litigation, 2013 U.S. Dist. LEXIS 14196 (E.D.N.Y. Feb. 1, 2013). In this multi-district litigation, Plaintiffs, a group of individuals who purchased travel tickets between the United States and Nigeria, were denied passage when Defendant cancelled their flights without notice. Plaintiffs brought an action alleging damages for breach of contract, breach of treaty obligations, fraud, and negligence. Subsequently, the parties entered into a settlement which granted each Plaintiff a maximum of $1,700. Unclaimed portions of the fund were required to be returned to World Airways. The District Court approved the settlement agreement. Defendant subsequently contended that 211 of the 751 claims filed were non-qualifying. Id. at *3. Defendant also suggested that a neutral mediator should be appointed to resolve the 211 claims. Id. The District Court ruled that Defendant must promptly make payment for the 540 claims it acknowledged as qualifying, and that Defendant’s alleged deadline to file a timely claim was incorrect. Id. at *8. Defendant contended that 45 claims were untimely because they bore a postmark after the deadline established for submission of claims. The District Court, however, noted that the settlement agreement provided that class members could file claims up to 90 days after the final judicial approval date. Id. at *4. The final judicial approval date is the date when the District Court’s approval of a settlement agreement becomes final. The approval becomes final when the time to file an appeal expires, or when all appeals, including a petition for a writ of certiorari to the U.S. Supreme Court, have been exhausted. Id. Earlier, class counsel had filed a motion to approve the settlement agreement, attorneys’ fees, and disbursements. Plaintiffs in Mba v. World Airways, Case No. 04-CV-473, objected to the settlement and O. Benjamin Okeke, counsel for the Mba Plaintiffs, opposed class counsel’s application for fees and filed his own motion seeking fees and disbursements for $104,786.99. Id. at *5. Osita Okocha, counsel for Plaintiffs in Adeusi v. World Airways, Case No. 04-CV-2757, also filed a partial opposition to class counsel’s fee application, similarly seeking fees from the settlement fund. Id. On appeal, the Second Circuit affirmed the District Court’s order approving the settlement, but vacated and remanded the order awarding fees to class counsel only. Id. The District Court subsequently opined that August 26, 2008, the deadline established by Defendant for submission of claims was incorrect. The final judicial approval date, if measured from expiration of the 90 day period to file a petition for a writ of certiorari from the Second Circuit’s remand order, was July 5, 2010. Id. at *6. Thus, pursuant to the to the settlement agreement, the earliest deadline for submission of claims was 90 days later, or October 3, 2010. Id. The deadline was later if measured from 90 days after withdrawal of the second appeal to the Second Circuit on September 17, 2012. Id. Defendant contended that the remaining 166 of the 211 non-qualifying claims were submitted by individuals who did not meet the requirements for membership in the affected class. Id. The Court stated that it would conduct a hearing to appoint counsel to review those claims deemed non-
qualifying, and to discuss a framework for resolution of disputed claims. *Id.* at *7. In conclusion, the Court stated that Defendant must review the postmark dates of the 45 claims it contended were untimely and must arrange for prompt payment of all claims postmarked on or before October 3, 2010 or such later date that it agreed was applicable. *Id.* at *8. If Defendant contended that claims were untimely because they bore a postmark after October 3, 2010 then it had to file a report identifying such claims and the postmark date. *Id.*
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