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**CONSUMER CLASS ACTIONS AGAINST
FRANCHISE SYSTEMS**

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CONSUMER CLASS ACTIONS AGAINST FRANCHISE SYSTEMS*

I. INTRODUCTION

Franchise systems of any size are accustomed to litigation. However, the vast majority of that litigation is limited in scope and not publicized. For example, while unpleasant and potentially expensive, a lawsuit by a terminated franchisee, a contract dispute with an advertising company, or a tort claim by a franchisee's patron is not likely to imperil the franchise system in anyway. Consumer class actions are a different animal. By allowing similarly situated individuals to aggregate their claims, one class representative—often a person who has been solicited by an enterprising plaintiffs' attorney—can bring a claim seeking damages on behalf of potentially millions of individuals. Because of this fact, a certified class will often be an existential threat to the franchise system.

Many plaintiffs' attorneys are likely to view franchisors as good targets for consumer class actions. First, franchise systems often rely on "uniformity and consistency in operating procedures, product offerings, and advertising to create the brand recognition and reputation necessary to drive consumers to patronize franchise locations."¹ Because the franchisor sets these standards, plaintiffs are likely to try and hold franchisors accountable if they think something is wrong. Second, many franchise systems sell products that are not covered by arbitration clauses at a time when more and more businesses are adding arbitration clauses to their consumer contracts. Finally, many large franchisors are viewed as deep pockets, and due to the Franchise Disclosure Document being a public document, plaintiffs can verify that this is true before bringing suit.² Franchisees may find themselves pulled into the fray in certain situations, for example where the plaintiffs' attorney attempts to avoid federal jurisdiction and limits the class to only consumers who patronize a certain franchise location. Thus, both franchisors and franchisees should have a working understanding of how to defend against a consumer class action.

After providing an overview of the types of causes of action often brought in consumer class actions, this paper will provide an overview of the various procedural and strategic considerations that a franchisor and/or franchisee must make when defending a consumer class action. It is important to note, however, that every class action is different—what works in one case may not work in another. For this reason, this paper is not meant to dictate exactly what procedures and strategies should be used; it is simply meant to provide the pros and cons of any particular procedural device or strategy.

II. COMMON TYPES OF CONSUMER CLAIMS THAT FRANCHISE SYSTEMS MAY FACE

Below is an overview of some of the statutory and common law claims that a franchise system is likely to face in a consumer class action.

* The authors would like to thank Michael Duvall from Dentons for his assistance with the research and drafting of this paper.

¹ John Doroghazi & Armel Jacobs, *Basic Strategic Considerations in Defending Consumer Class Actions Against Franchisors*, 33 F.L.J. 167, 169 (2013).

² See 16 C.F.R. §436.5(u) (requiring disclosure of franchisor's financial statements).

A. Statutory

1. Unfair Trade Practice Claims

State consumer protection statutes are the most commonly asserted claims in consumer class actions. All fifty states, the District of Columbia, Puerto Rico, and Guam have enacted a statute, or sometimes a series of statutes, that are meant to prevent consumers from being subjected to unscrupulous and abusive practices in the marketplace.³ Though formulated differently, all generally prohibit “unfair” and “deceptive” acts or practices.⁴ These statutes differ from common law fraud claims because they generally do not require proof of intent or reliance.⁵ Indeed, some do not even require proof of causation—the mere fact that a violation occurred will entitle the plaintiff to statutory damages.⁶

Many consumer protection statutes list a number of specific practices that are automatically deemed deceptive or unfair.⁷ It is also common for other statutes in a jurisdiction to expressly state that violation of the statute also constitutes a violation of the jurisdiction’s consumer protection statute.⁸ Moreover, in some jurisdictions violating any state or federal statute (even one that does not incorporate the jurisdiction’s consumer protection statute) is a *per se* violation of the consumer protection statute.⁹ *Per se* violations aside, states have varying tests for determining whether an act or practice is unfair or deceptive, and it is beyond the scope of this paper to discuss these variations.¹⁰ While the remedies available vary by statute, they all provide for a private right of action and always include some combination of the following types of relief: actual damages, injunctive relief, attorney’s fees, punitive damages, and statutory damages.¹¹

When faced with a class asserting a violation of a consumer protection statute, counsel should determine whether the statute at issue has any procedures or quirks that can derail an unsuspecting plaintiff. For example, a number of consumer protection statutes limit or ban enforcement of their provisions through class actions, though, as explained below, whether a

³ CAROLYN CARTER & JONATHAN SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 1(8th Ed. 2013).

⁴ *Id.*

⁵ *Id.* at § 4.2.3.1.

⁶ For example, see D.C. Code. Ann. § 28-3905(k)(1)(A) (entitling a person to “treble damages, or \$1,500 per violation, whichever is greater . . .”).

⁷ See Carter, *supra* note 3 at § 3.2.2.1.

⁸ See, e.g., N.J. Rev. Stat. § 56:8-46 (stating a violation of New Jersey’s health club law is a violation of the New Jersey Consumer Fraud Act).

⁹ Carter, *supra* note 3 at §3.2.7.3.

¹⁰ *Id.* at §§ 4.1-4.9 (providing thorough overview of various standards applied by courts).

¹¹ See, e.g., Conn. Gen. Stat. 42-110g(a), (d) (allowing for the recovery of actual damages, punitive damages, attorney’s fees, and equitable relief); Kan. Stat. Ann. § 50-634(a)-(e) (allowing for the greater of actual damages or \$10,000, attorney’s fees, injunctive relief); N.Y. Gen. Bus. Law § 349 (the greater of actual damages or \$50, injunctive relief, attorney’s fees, and treble damages of no more than \$1,000). For a list of the remedies available under each statute, see Carter, *supra* note 3 at Appendix A.

federal court will enforce these bans is an unsettled question.¹² Some statutes have notice requirements that a defendant can use to its advantage. For example, the Texas Deceptive Trade Practices Act requires a plaintiff to provide the defendant with a notice at least 60 days before filing suit that details the plaintiff's basis for his claim and damages. If the plaintiff fails to do this before filing suit, the defendant can get the entire case automatically stayed until 60 days after the plaintiff provides the proper notice.¹³ Another example is that, under the Indiana Deceptive Consumer Sales Act, the failure to provide a pre-lawsuit notice prevents a plaintiff from bringing a claim for an "uncured deceptive" act, leaving the plaintiff with the ability only to assert the much harder to prove "incurable deceptive" act claim.¹⁴

2. TCPA

Consumer class actions asserting violations of the federal Telephone Consumer Protection Act ("TCPA") are very popular¹⁵ because the TCPA provides for statutory damages of \$500-\$1500 per violation of it.¹⁶ The TCPA prohibits unsolicited advertisements made by fax unless there is a preexisting business relationship between the sender and recipient and the fax contains a proper opt-out notice.¹⁷ The TCPA also prohibits telemarketing calls using a prerecorded or artificial voice or an automatic telephone dialing system unless the party receiving the calls has previously consented to receiving the calls.¹⁸ Courts have interpreted the prohibitions on telemarketing phone calls as applying to text messages.¹⁹ Under the TCPA, both the person who actually makes the call or sends the fax and any person on whose behalf the call is made or the fax is sent can be held liable. The Federal Communications Commission

¹² See, e.g., Ala. Code § 8-19-10(f) (prohibiting class actions under the Alabama Deceptive Trade Practices Act); Conn. Gen. Stat. § 42-110g(b) (limiting class actions under Connecticut Unfair Trade Practices Act to residents of Connecticut or those injured in Connecticut); Kan. Stat. Ann. § 50-634(b)-(d) (limiting class actions under Kansas Consumer Protection Act); Miss. Code Ann. § 75-24-15(4) (banning class actions under Mississippi's Consumer Protection Act); N.Y. C.P.L.R. § 901(b) (banning class actions in most cases seeking statutory penalties or minimum recoveries); Utah Code Ann. § 13-11-19(2)-(4) (limiting class actions under Utah Consumer Sales Practices Act); *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301 (Tenn. 2008) (explaining that Tennessee Consumer Protection Act does not authorize class actions). For a discussion of whether these bans are enforced in federal court, see *infra* II.A.1.

¹³ Tex. Bus. & Com. Code § 17.505; see, e.g., *Stewart v. Allstate Tex. Lloyds*, No. H-10-cv-04422, 2011 U.S. Dist. LEXIS 13235, at *5-6 (S.D. Tex. Feb. 10, 2011) (staying case that included claim under Texas Deceptive Trade Practices Act and a variety of common law claims).

¹⁴ See *Captain & Co. v. Stenberg*, 505 N.E.2d 88, 95 (Ind. Ct. App. 1987) (summarizing Ind. Code § 24-5-0.5-5(a)); *Lehman v. Shroyer*, 721 N.E.2d 365, 369 (Ind. Ct. App. 1999) (For an uncured act claim, notice "is an essential element of plaintiff's statutory action" and a "prerequisite with which a consumer must comply in order to bring an action.").

¹⁵ Zach Warren, *Telephone Consumer Protection Act Attracting More Litigation*, Inside Counsel Magazine (Nov. 18, 2013), <http://www.insidecounsel.com/2013/11/18/telephone-consumer-protection-act-attracting-more>.

¹⁶ 47 U.S.C. § 227(b)(3), (c)(5).

¹⁷ 47 U.S.C. §227(b)(1)(C); 47 C.F.R. § 64.1200(a)(4).

¹⁸ 47 U.S.C. § 227(b)(1)(A)-(B); 47 C.F.R. § 64.1200(a)(1)-(3). The TCPA also prohibits telemarketing calls made to a telephone number included on the do-not-call registry. 47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(c)-(d).

¹⁹ *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009).

“FCC”) has interpreted this second kind of liability to be governed by federal common law agency principles.²⁰

In the franchise context, TCPA cases against franchisors have generally hinged on whether the violator, which is usually a franchisee or third party hired by the franchisee, was the franchisor’s agent. Franchisors have been mostly successful in demonstrating that no agency relationship existed,²¹ although Papa John’s and Domino’s both settled TCPA class actions based on text message advertisements by franchisees after courts indicated that their franchisees may qualify as agents based on the specific circumstances before the court.²²

3. Industry Specific State Statutes (Health Clubs, Buying Clubs)

Along with the broad consumer protection statutes discussed above, many states have industry or practice specific consumer protection laws. While it is beyond the scope of this paper to list each of these laws in every state, common industry specific laws that may impact franchise systems include health club laws,²³ buying and membership club laws,²⁴ and contest and sweepstakes laws.²⁵ However, franchisors should carefully examine all state laws before operating in a jurisdiction because these laws can be extremely esoteric.²⁶ Similarly, franchisees should consult the relevant state laws before conducting any local promotion that the franchisor has not previously vetted. Although some industry specific statutes provide for a private right of action,²⁷ many simply provide that a violation is a per se violation of the state’s general consumer protection statute.²⁸

²⁰ See *Declaratory Ruling 13-54*, 28 F.C.C.R 6574, 2013 WL 1934349 (April 7, 2013). The FCC has suggested that it may be willing, after notice and comment rulemaking, to broaden vicarious liability under the do-not-call requirements to go beyond “common agency principles.” *Id.* at ¶ 32.

²¹ See *Friedman v. Massage Envy Franchising, LCC*, No. 3:12-cv-02962-L-RBB, 2013 WL 3026641, at *3 (S.D. Cal. June 13, 2013) (granting motion to dismiss against franchisor where agency was not adequately pleaded); *Thomas v. Taco Bell Corp.*, 879 F. Supp. 2d 1079 (C.D. Cal. 2012) (granting summary judgment to franchisor where plaintiff offered insufficient proof that franchisor controlled the marketing campaign of a local franchisee advertising council), *aff’d*, 2014 WL 2959160 (9th Cir. July 2, 2014); *Anderson v. Domino’s Pizza*, No. 11-cv-902, 2012 WL 1684620 (W.D. Wash. May 15, 2012) (granting summary judgment to Domino’s Pizza under state telemarketing statute where Domino’s franchisees made the calls and, while Domino’s required franchisees to use a certain phone system and to participate in national and local advertising campaigns, there was no evidence that Domino’s directed franchisees to engage in advertising campaigns in an illegal way).

²² See *Papa John’s Will Deliver \$16.5M to End TCPA Claims*, <http://www.law360.com/articles/442855/papa-john-s-will-deliver-16-5m-to-end-tcpa-claims>. For a discussion of the class certification decision in this case, see *infra* II.D.2. In *Spillman v. Domino’s Pizza, LLC*, No. 10-349-BAJ-SCR, 2011 WL 721498 (M.D. La. Feb. 22, 2011), another federal district court denied Domino’s motion to dismiss because plaintiff alleged that the franchisee by virtue of a franchise or agency relationship with Domino’s was required to send text message at issue. After Domino’s insurer agreed to contribute to a settlement, a settlement worth almost \$9.75 million was reached. See <https://pizzasettlement.com/Home.aspx>.

²³ For example, see N.J. Rev. Stat. § 56:8-39 to 56:8-46.

²⁴ For example, see Iowa Code Ann. § 552A.1 et seq. and Conn. Gen. Stat. § 42-310.

²⁵ For example, see Or. Rev. Stat. § 646A.362 and Cal. Bus. & Prof. Code § 25600.2.

²⁶ See Ill. Comp. Stat. §§ 502/2U, 505/2V, 505/2W (making certain representations about radon detection illegal).

²⁷ See, e.g., Conn. Gen. Stat. § 21a-222(a)-(b).

²⁸ See, e.g., N.J. Rev. Stat. § 56:8-46 (making a violation of New Jersey’s health club law a violation of the New Jersey Consumer Fraud Act).

4. RICO

Although most often associated with the Department of Justice's dismantling of the Italian mafia, the Racketeer Influenced and Corrupt Organizations Act ("RICO") also provides for civil liability, and civil RICO claims are often brought in consumer class actions. While RICO contains four different subsections under which a cause of action may be brought, each type of RICO claim generally requires the plaintiff to show that the defendant was involved with an enterprise in a pattern of racketeering activity that resulted in an injury to the plaintiff's business or property.²⁹ Because a civil RICO claim is "the litigation equivalent of a thermonuclear device" and the mere assertion of a RICO claim has an "almost inevitable stigmatizing effect" on a defendant,³⁰ courts do not like civil RICO claims. They are rarely successful: one study showed that plaintiffs have less than a 2% success rate in civil RICO claims.³¹ Despite these long odds, many plaintiffs find the prospect of winning treble damages and attorney's fees under RICO, as well as the ability to assert a nationwide class claim under a single law, too enticing to forego.³²

In consumer class actions against franchise systems, a civil RICO claim is not likely to succeed. Twice, the Seventh Circuit has held that a franchise or distributor system cannot satisfy the enterprise element of a RICO claim. Specifically, it has held both that (1) Chrysler and its network of dealers and (2) the franchisor of DirectBuy and its officer, directors, and franchisees are not a RICO enterprise.³³

B. Common-Law Claims (Fraud, Unjust Enrichment, Breach of Contract)

Consumer class actions often allege common law claims. While the types of common law claims asserted vary by case, they often include fraud, unjust enrichment, and/or breach of contract claims. With the exception of breach of contract, these claims are often very difficult to certify on a classwide basis. For example, fraud requires proof of reliance, which prevents the majority of fraud claims from proceeding as class actions.³⁴ Unjust enrichment can also be difficult to certify for any class spanning multiple states.³⁵ Contract claims, however, have a

²⁹ See GREGORY JOSEPH, CIVIL RICO: A DEFINITIVE GUIDE 164-67 (3d Ed. 2010) (discussing elements of claims under various sections of 18 U.S.C. § 1962(a)-(d)).

³⁰ See *Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649, 655 (S.D.N.Y. 1996).

³¹ See *Gross v. Waywell*, 628 F. Supp. 2d 475, 479 (S.D.N.Y. 2009) (citing Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 22 (2002)).

³² *Gross*, 628 F. Supp. 2d at 479 (describing RICO as "the siren song" that draws in "spellbound plaintiffs").

³³ *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225 (7th Cir. 1997) (Posner, J.); *Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 676 n. 3 (7th Cir. 2000); *Wooley v. Jackson Hewitt, Inc.*, 540 F. Supp. 2d 964 (N.D. Ill. 2008) (holding Jackson Hewitt, certain of its corporate affiliates, certain franchisees doing business as corporations, and the individual owner of more than 125 franchisees were not a RICO enterprise).

³⁴ *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 362 (4th Cir. 2004) ("Because proof of reliance is generally individualized to each plaintiff allegedly defrauded, fraud and negligent misrepresentation claims are not readily susceptible to class action treatment, precluding certification of such actions as a class action.") (internal citations omitted); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) ("[A] fraud class action cannot be certified when individual reliance will be an issue.")

³⁵ See, e.g., *Rodriguez v. It's Just Lunch, Int'l*, --- F.R.D. ---, 2014 WL 1921187, at *15 (S.D.N.Y. May 14, 2014).

higher likelihood of certification because the existence of a standard contract and a systematic practice by defendant that may have breached the contract create a number of common questions.

Of particular interest to franchise systems may be the developing area of common law claims relating to data breaches. The recent trend is that federal courts are dismissing these cases for lack of Article III standing when the plaintiff's only alleged injury is simply that a data breach occurred and information may have been revealed or that the plaintiff had to purchase credit monitoring. Instead, courts are requiring the plaintiff to show some proof that the data breach caused an actual injury, such as an identity theft.³⁶ However, a district court recently approved a class action settlement in a data breach case where there had been no showing of financial harm to the plaintiff.³⁷ Commenters have called this settlement a first of its kind, and franchise systems should watch developments in this area closely.³⁸

III. STRATEGIC CHOICES WHEN DEFENDING A CONSUMER CLASS ACTION

A. Choosing a Forum

1. State v. Federal?

Consumer class actions often travel in packs, and a defendant is many times sued in nearly identical actions in multiple jurisdictions (both state and federal). These multiple suits occur because plaintiffs' counsels are jockeying for position or attempting to avoid jockeying for position by trying to steer clear of asserting overlapping classes. For each consumer class action filed in a state court, the defendant needs to decide whether to attempt to remove it to federal court. Deciding between state and federal courts requires consideration of a number of different factors. First, state and federal courts sometimes have different standards (or different interpretations of the same standards) for class certification.³⁹ For a class action defendant, determining which jurisdiction has the more demanding class certification standard is especially important.⁴⁰ The denial of class certification means that the named plaintiff is often left with a *de minimis* claim; the certification of a class can expose the defendant to potentially business ending liability and will inevitably, except in the rarest of cases, result in the defendant agreeing

³⁶ For a thorough discussion of standing in data breach cases, see *Galaria v. Nationwide Mut. Ins. Co.*, --- F. Supp. 2d ---, 2014 WL 689703 (S.D. Ohio Feb. 10, 2014). Recently, a plaintiff was successful in demonstrating standing by claiming that he purchased a premium service from the defendant based on a misrepresentation about data security. *In re LinkedIn User Privacy Litig.*, 5:12-CV-03088-EJD, 2014 WL 1323713 (N.D. Cal. Mar. 28, 2014). SNR Denton US LLP (now Dentons US LLP) represented Nationwide Mutual Insurance Company in *Galaria*.

³⁷ See *Curry v. AvMed, Inc.*, No. 10-cv-24531-JLK (S.D. Fla. Feb. 28, 2014), Doc. No. 91.

³⁸ See Linn Foster Freedman & Kathryn M. Sylvia, *First data breach class action with no claim for financial harm settled: AvMed settles for \$3M*, http://www.nixonpeabody.com/files/167884_Privacy_Alert_07MAR2014.pdf. Indeed, as this paper was being finalized, the West Virginia Supreme Court revived a data breach class action despite the fact that there was no showing that plaintiffs' data had been misused. *Tabata v. Charleston Area Med. Ctr., Inc.*, 759 S.E.2d 459, 464 (W. Va. 2014) (finding that plaintiffs have a "concrete, particularized, and actual" legal interest in their medical information remaining confidential).

³⁹ See Jessica D. Miller & Jordan M. Schwartz, *Recent Appellate Federal and State Developments in Class Actions*, NFJE EIGHTH ANNUAL JUDICIAL SYMPOSIUM 87, 99-105 (July 2012), <http://www.dri.org/dri/course-materials/2012-NFJE-Symposium/schedule.html> (identifying variations in class action jurisprudence among federal and state courts).

⁴⁰ Doroghazi, *supra* note 1, at 173.

to a classwide settlement.⁴¹ There is a perception that state courts are more apt to certify classes than the federal courts, but some have questioned that assertion.⁴² Thus, franchise defendants must review both the federal and state case law and standards to decide which forum is more favorable.⁴³

As part of this review, franchise defendants should pay careful attention to whether the applicable state law limits or bans class actions. This factors in to the removal analysis because the Supreme Court's 2010 decision in *Shady Grove Orthopedic Associates v. Allstate Insurance Company*⁴⁴ has left it unsettled whether federal courts will enforce these class action restrictions. In *Shady Grove*, a plurality of the justices determined that New York's ban on class actions to recover certain statutory damage claims conflicted with Federal Rule of Civil Procedure 23 and that, in the circumstances of the case, applying Rule 23 did not violate the Rules Enabling Act.⁴⁵ However, lower courts have struggled to apply this case because five justices could not agree on a rationale.⁴⁶ Thus, if a case happens to be filed in a state that limits or bans class actions, staying in state court may be the safer choice.⁴⁷

Federal and state courts often have different procedures for discovery, assignment of cases, and jury pool makeup, as well as varying standards regarding the acceptance of coupon settlements,⁴⁸ and varying propensities to grant summary judgment.⁴⁹ While it is impossible to

⁴¹ A recent study found that less than one percent of cases with a certified class are tried to a verdict. See Administrative Office of the California Courts, *Class Certification in California: Second Interim Report from the Study of California Class Action Litigation 23* (2010), <http://www.courts.ca.gov/documents/classaction-certification.pdf>.

⁴² Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?*, 81 NOTRE DAME L. REV. 591, 635 (2006) (finding similar certification rates in state and federal court); *but see* Neil J. Marchand, *Class Action Activity in Michigan's State and Federal Courts* 16 (Jan. 2009) (unpublished, http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=neil_marchand) (finding that Michigan state courts had a higher class certification rate than federal courts in Michigan).

⁴³ Doroghazi, *supra* note 1, at 173-74.

⁴⁴ 130 S. Ct. 1431 (2010).

⁴⁵ *Id.* at 1443.

⁴⁶ Justice Scalia, writing for the plurality, stated that Rule 23 should govern in all cases where it "answers the question in dispute." *Id.* at 1437. Justice Stevens in his concurrence reasoned that a case-by-case analysis is preferable, noting that the relevant question is whether the state law at issue is substantive or procedural. *Id.* at 1448. Courts across the country have disagreed about which opinion controls. *Compare In re OnStar Contract Litig.*, No. 2:07-MDL-1867, 2010 U.S. Dist. LEXIS 87471, at *20-*21 (E.D. Mich. Aug. 25, 2010) (viewing Justice Scalia's opinion as controlling) *with In re Trilegiant Corp.*, --- F. Supp. 2d ---, 2014 WL 1315244, at *25-30 (D. Conn. Mar. 28, 2014) (applying Justice Stevens' opinion); *cf. In re Hydroxycut Mktg. & Sales Practices Litig.*, No. 09-MD-2087 BTM KSC, 2014 WL 295302 (S.D. Cal. Jan. 27, 2014) (finding that neither Justice Scalia nor Justice Stevens' opinion is controlling and finding that *Shady Grove* offered little guidance). Wiggin and Dana is counsel to a defendant in the *Trilegiant* case.

⁴⁷ Doroghazi, *supra* note 1, at 174.

⁴⁸ For example, Texas has a statute that precludes recovery of attorney's fees in coupon settlements. See *Kazman v. Frontier Oil Corp.*, 398 S.W.3d 377 (Tex. Ct. App. 2013). At least one Massachusetts court has followed the federal courts in applying a heightened level of scrutiny. *In re Massachusetts Smokeless Tobacco Litig.*, 23 Mass. L. Rptr. 719 (Sup. Ct. Suffolk County, Mass. Apr. 9, 2008). California, on the other hand, appears to treat coupon settlements like any other proposed class settlement. *Intervention, Inc. v. Avaniir Pharms.*, No. A114812, 2007 WL 772889 (Ct. App. Cal. Mar. 15, 2007).

discuss the intricacies of every factor that can differ between federal and state court, one of the most important factors to compare is the skill of the federal and state court benches.⁵⁰ Many state courts assign judges to particular motions, instead of cases. The result could be that an ill-equipped judge, due to a “lack of time, resources, skill, or owing to ideological bent,” is deciding class certification.⁵¹ Federal court, however, poses the opposite risk: the entire case can be assigned to an ill-equipped judge. Thus, determining which bench has the better overall roster, which should include consideration of ideological bent, is key.⁵² Another important factor to consider is how each court handles discovery. Class discovery is an expensive endeavor and defendants, all other things being equal, will often prefer a forum “where discovery is slow to begin or where it is likely that discovery will be stayed pending a decision on an early dispositive motion.”⁵³ Finally, if it appears likely that a case will include non-cash compensation as a component of the settlement, state courts are preferable because federal courts, as discussed below, have become increasingly hostile toward non-cash settlements. Any proposed class settlement in federal court also requires notice to state and federal regulators.⁵⁴ If the franchise defendants are “particularly sensitive” to regulator attention, state court may be the better choice.⁵⁵

In short, while every situation is different, it is usually preferable to be in federal court due to, among other things, the overall skill of the federal bench, the formality of the federal procedural rules, the Supreme Court’s recent jurisprudence favoring class action defendants,⁵⁶ the procedural mechanisms for consolidating lawsuits from many districts before a single judgment, the ability to get many lawsuits from different districts before one judge, and avoiding plaintiffs having a home court advantage.⁵⁷

a. CAFA’s Jurisdiction and Removal Requirements, Exceptions

In 2005, Congress—reacting to perceived abuses of the class action system in certain state courts—enacted the Class Action Fairness Act of 2005 (“CAFA”). Among other things, CAFA drastically altered the removal standards for putative class actions.⁵⁸ Under CAFA, a

⁴⁹ See Thomas Mayhew, *Choosing Federal or State Court in Consumer Class Actions*, Vol. 16, No. 3 ASSOCIATION OF BUSINESS TRIAL LAWYERS NORTHERN CALIFORNIA REPORT (2007) (discussing each of these topics in detail under California law); see also Doroghazi, *supra* note 1.

⁵⁰ Doroghazi, *supra* note 1, at 174.

⁵¹ *Id.*

⁵² *Id.* at 175. A recent article has suggested that judges are often swayed by the merits underlying the case when deciding class certification. Stacey M. Lantagne, *A Matter of National Importance: The Persistent Inefficiency of Deceptive Advertising Class Actions*, 8 J. BUS. & TECH. L. 117, 130 (2013).

⁵³ Doroghazi, *supra* note 1, at 175.

⁵⁴ 28 U.S.C. § 1715(b).

⁵⁵ Doroghazi, *supra* note 1, at 175.

⁵⁶ See *Comcast v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

⁵⁷ Doroghazi, *supra* note 1, at 175.

⁵⁸ See S. Rep. No. 109-14, at 3 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 5-6. Some courts have essentially ignored the Senate Judiciary Committee’s Report because it was issued after CAFA was enacted. See *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 177 (4th Cir. 2011).

defendant can remove a putative class action if the class' claims, in the aggregate, exceed \$5,000,000 and at least one class member is a citizen of a different state from any defendant.⁵⁹ CAFA allows defendants to remove class actions even if the defendant is a citizen of the state where the state court action was filed.⁶⁰ While class actions meeting CAFA's requirements still must be removed with 30 days of service, CAFA eliminated the rule that removal must occur within one year of initial filing, even if a case becomes removable for the first time after the one year deadline has passed.⁶¹ CAFA also created a mechanism for courts of appeal to review remand orders of class actions.⁶² CAFA, however, does not limit the application of common law abstention doctrines such as *Colorado River*, *Buford*, or *Younger* abstention.⁶³ It also does not override a valid forum selection clause limiting the permissible forum to state court only.⁶⁴

CAFA's diversity jurisdiction provisions contain two mandatory⁶⁵ exceptions: the local controversy exception and the home-state exception. The local controversy exception requires a district court to decline jurisdiction over a class action where all of the following are met: (1) "greater than two-thirds of the members of all the proposed plaintiff classes in the aggregate are citizens of the state in which the action was originally filed"; (2) "at least one defendant is a defendant (aa) from whom significant relief is sought . . . (bb) whose alleged conduct forms significant basis of the claims asserted . . . and (cc) who is a citizen of the State in which the action was originally filed"; (3) the "principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed"; and (4) in the last three years, no other class action has been filed asserting the same or similar claims against any of the defendants.⁶⁶ Federal courts are still determining exactly what "significant relief" and "significant basis" under the local-controversy exception means. However, in consumer class actions attacking a franchise system-wide marketing practice, if the franchisor is named as a defendant, it is sure to be a defendant from whom "significant relief" is sought and whose conduct forms a "significant basis" of the plaintiffs' claims.⁶⁷

⁵⁹ 28 U.S.C. § 1332(d)(2)(A), (6).

⁶⁰ Compare 28 U.S.C. § 1441(b)(2) with 28 U.S.C. § 1453(b).

⁶¹ See 28 U.S.C. § 1453(b) (negating 28 U.S.C. § 1446(c)(1)'s one year time limitation for class actions).

⁶² Compare 28 U.S.C. § 1453(c) with 28 U.S.C. § 1447(d).

⁶³ See THE CLASS ACTION FAIRNESS ACT, LAW AND STRATEGY, 176-85 (Gregory Cook Editor 2013).

⁶⁴ See *Mendoza v. Microsoft, Inc.*, ---F. Supp. 2d ---, 2014 WL 842929, at *13 (W.D. Tex. Mar. 5, 2014) ("[C]ourts have held that the CAFA, like other federal statutes subject to the civil venue statutes, does not preempt a valid forum-selection clause."); *Guenther v. Crosscheck Inc.*, No. C 09-01106 WHA, 2009 WL 1248107, at *5 (N.D. Cal. Apr. 30, 2009) ("Although CAFA may otherwise afford this Court jurisdiction, however, CAFA does not trump a valid, enforceable and mandatory forum-selection clause by which the parties agreed to litigate in state court . . .").

⁶⁵ CAFA also contains a discretionary exemption allowing the district court, after balancing six statutory factors, to decline jurisdiction where more than one-third, but less than two-thirds, of the proposed class are from the same state as the "primary defendants." *Id.* § 1332(d)(3). For a detailed discussion of this discretionary exception, see Cook, *supra* note 63, at 176-85.

⁶⁶ 28 U.S.C. § 1332(d)(4)(A)(i)-(ii).

⁶⁷ For an extensive discussion of the meaning of these terms, see Cook, *supra* note 63; Doroghazi, *supra* note 1.

CAFA's home-state exception requires a district court to decline jurisdiction if "two-thirds or more of the members of all proposed plaintiff classes in the aggregate" and "the primary defendants" are citizens of the state where the action was originally filed.⁶⁸ In a consumer class action against a franchise system, if the franchisor is named as a defendant, it is "virtually certain" to be considered a "primary defendant."⁶⁹

Thus, a franchisor will be able to remove any consumer class action meeting CAFA's amount in controversy requirement filed against it, except for cases filed in the state(s) where the franchisor is a citizen (*i.e.* where it is incorporated and where it has its principal place of business)⁷⁰ and more than two-thirds of the proposed class is made up of citizens from that state.⁷¹ Conversely, a consumer class action only naming a franchisee could be more difficult to remove for a few reasons. First, unless the franchisee has a large customer base alleging a significant harm, the franchisee may have a hard time meeting the \$5 million amount in controversy threshold. Second, unless the franchisee happens to be located in an area where its customers come from multiple states (such as an airport or near a state line), plaintiffs' counsel will argue that one of the exceptions obviously applies.

2. Consolidating Federal Actions

Once any removable state court cases are removed to federal court (or if the cases were filed there in the first place), the next decision is whether to move forward with the cases in their current districts or to attempt to have them all sent to one district.

This decision requires consideration of a number of factors. The most important one is deciding what judge and district is the best fit for the defendant(s). If, for example, a case is in a circuit with unfavorable precedent or assigned to a judge with a history of being pro-consumer or of granting class certification more than should be expected, then seeking transfer is advisable. However, when faced with multiple cases, the potential advantage of not seeking to consolidate the cases also must be considered. For example, if one of the cases is before a favorable judge, but in a district where the cases are not likely to be consolidated, there may be a benefit to proceeding with the cases separately even if that may significantly increase the defendant's effort, cost, and administrative difficulties due to litigating a number of class actions in different districts at the same time. Specifically, it is possible that the defendant can get an early victory on a motion to dismiss, motion for summary judgment, or motion for class certification in the friendly district and then use that decision in the other cases throughout the country as persuasive authority. This strategy, however, comes with considerable risk. The case in the more favorable forum needs to be on a faster track than the other cases for this

⁶⁸ 28 U.S.C. § 1332(d)(4)(B).

⁶⁹ See Doroghazi, *supra* note 1, at 172. For a detailed discussion of the case law on the meaning primary defendant, see Cook, *supra* note 63, at 171-75; see also *Moua v. Jani-King of Minn., Inc.*, No. 08-4942, 2009 U.S. Dist. LEXIS 6238, at *8-13, (D. Minn. Jan. 27, 2009) (holding franchisor was a primary defendant under the home-state controversy exception in class action brought by franchisees); *Kearns v. Ford Motor Co.*, No. CV 05-5644-GAF, 2005 WL 3967998, at *8 (C.D. Cal. Nov. 21, 2005) (both Ford and Ford dealers were primary defendants in consumer class action alleging about pre-owned certified car program).

⁷⁰ See 28 U.S.C. § 1332(c)(1); see also *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192 (2010).

⁷¹ It is worth noting that many courts will not accept domicile as per se proof of citizenship. See, e.g., *Wiggins v. Daymar Colleges Group, LLC*, No. 5:11-cv-36-R, 2012 WL 884907 (W.D. Ky. Mar. 14, 2012) (containing detailed discussion of this topic).

approach to be effective. Also, to work, this strategy requires that the defendant win on class certification or a dispositive motion in the friendly district. It also requires a defendant to win the same issue multiple times. This approach also will significantly increase defense costs due to duplication of efforts. Thus, in most circumstances, this approach is not advisable.⁷²

Next, not seeking transfer may allow the franchisor to negotiate with plaintiff's counsel of its choosing about a global settlement. This, too, however, is a risky approach. It increases the likelihood of objectors claiming that the settlement is collusive or the product of a reverse auction (*i.e.* where the defendant bids multiple plaintiffs against each other in an effort to get the weakest one to settle for the lowest amount).⁷³ In short, it is not advisable in most circumstances to, by choice, leave multiple class actions pending in different districts.

a. Methods—MDL, 1404(a) & First-Filed Rule

There are multiple procedural tools for getting the cases to one district: a motion to transfer under 28 U.S.C. § 1404(a) made in the district court; a motion to dismiss or transfer under the “first-filed” rule made in the district court; or a motion to transfer under 28 U.S.C. § 1407 made to the Judicial Panel on Multi-District Litigation.

A motion under § 1404(a) is most easily used when there are a small number of cases, or if there is only one case and the defendant wants it to proceed in a different district. Section 1404(a) provides: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” To obtain a § 1404(a) transfer, a franchise defendant must first show that the case could have been brought in the transferee district, *i.e.* any district where the franchise defendant is subject to personal jurisdiction⁷⁴ and venue would be proper.⁷⁵ Second, the court will then balance a variety of factors to determine whether matters of convenience and the interests of justice favor transferring the case to the proposed forum. However, if the claims in the case relate to any contract between the parties containing a forum selection clause, the Supreme Court has made clear that, absent extraordinary circumstances, that clause should be enforced.⁷⁶ Assuming there is no forum selection clause, courts describe the § 1404 factors in various ways, but the plaintiff's choice of forum, location of non-party and party witnesses, convenience of parties, locus of operative facts, and general judicial efficiency concerns are almost always considered.⁷⁷ If the proposed class is multi-state or national in scope, the

⁷² Doroghazi, *supra* note 1, at 176.

⁷³ MANUAL FOR COMPLEX LITIGATION, § 21.61 (4th ed. 2012) (referring to reverse auctions as one of the “recurring potential abuses in class action litigation that judges should be wary of as they review proposed settlements”); see also *Blair v. Equifax Check Servs.*, 181 F.3d 832, 839 (7th Cir. 1999) (suspecting that “[defendant] found a plaintiff (or lawyer) willing to sell out the class”).

⁷⁴ *Hoffman v. Blaski*, 363 U.S. 335, 343-44, (1960) (holding that the transferee court must have personal jurisdiction and proper venue over the action before § 1404(a) transfer is proper, even if the defendant waives personal jurisdiction and venue defenses).

⁷⁵ The applicable venue statute is 28 U.S.C. § 1391(b).

⁷⁶ *Atl. Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568 (2013).

⁷⁷ For examples of the different formulations of factors that the district court considers when deciding to transfer a case under § 1404, see *Res. Automation, Inc. v. Schrader-Bridgeport Int'l, Inc.*, 626 F.3d 973, 977-79 (7th Cir. 2010); *In re Apple, Inc.*, 602 F.3d 909, 912 (8th Cir. 2010) (noting that the Eighth Circuit has declined to offer an “exhaustive

plaintiff's choice of forum is given very little deference.⁷⁸ Instead, the § 1404(a) inquiry will turn on where the majority of witnesses are located, where the locus of operative facts is, and whether a transfer will enhance judicial efficiency. Absent unusual circumstances, if the franchisor is named as a defendant, the proposed transferee forum will be where the franchisor is headquartered because that is the forum where the locus of facts is likely to be and most witnesses will be found.⁷⁹

While often considered as part of a § 1404(a) motion,⁸⁰ the "first-filed" rule is another method for having all of the cases proceed before one court.⁸¹ It is a discretionary rule, based on the "strong presumption" that a court in a later-filed action should dismiss, stay, or transfer that action due to the pendency of a first-filed action in a different federal court.⁸² The rule's purpose is to promote judicial economy and efficiency and avoid inconsistent results.⁸³ Although it is not to be applied "mechanically," courts generally look at the chronology of the two actions, the similarity of the parties, and the similarity of the issues in deciding whether to apply the rule.⁸⁴ Generally, the more advanced the first case is, the more likely the subsequent courts are to apply the first-filed rule.⁸⁵ In the class context, the majority of courts do not require that the named plaintiffs be the same in both cases, only that the putative classes be similar or overlapping in some way.⁸⁶ Courts also do not require a perfect identity of the issues, only that

list of specific factors to consider" but directing district court to weigh "any 'case specific factors' relevant to convenience and fairness"); *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 106-07 (2d Cir. 2006).

⁷⁸ See, e.g., *In re Warrick*, 70 F.3d 736, 741 n. 7 (2d Cir. 1995); *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987).

⁷⁹ See *Wilson v. DirectBuy, Inc.*, 821 F. Supp. 2d 510 (D. Conn. 2011) (transferring three putative class actions to district where defendant franchisor is headquartered). John Doroghazi and Wiggin and Dana represented DirectBuy in the *Wilson* matter.

⁸⁰ See, e.g., *Cadenasso v. Metro. Life Ins. Co.*, 13-CV-05491-JST, 2014 WL 1510853, at *3-4 (N.D. Cal. Apr. 15, 2014).

⁸¹ For a good overview of the first-filed rule, see Michael Gallub, *Copycat Class Actions: The First-To-File Rule Provides Remedies*, <http://www.law.com/sites/michaelbgallub/2014/04/29/copycat-class-actions-the-first-to-file-rule-provides-remedies/>.

⁸² See, e.g., *Collegiate Licensing Co. v. Am. Cas. Co. of Reading, Pa.*, 713 F.3d 71, 78 (11th Cir. 2013); *EEOC v. Univ. of Penn.*, 850 F.2d 969 (3d Cir. 1988).

⁸³ *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 604 (5th Cir. 1999) ("Courts use this rule to maximize judicial economy and minimize embarrassing inconsistencies by prophylactically refusing to hear a case raising issues that might substantially duplicate those raised by a case pending in another court."); see also *Hilton v. Apple Inc.*, No. C-13-2167, 2013 WL 5487317 (N.D. Cal. Oct. 1, 2013).

⁸⁴ *Hilton*, 2013 WL 5487317, at *4; *Groom v. Bank of Am.*, No. 8:08-cv-2567-T-27EAJ, 2010 WL 627564, at *9 (M.D. Fla. Feb. 23, 2010); *Ward v. Follett Corp.*, 158 F. R.D. 645, 648 (N.D. Cal. 1994).

⁸⁵ *Hilton*, 2013 WL 5487317, at *5 (explaining how it would waste judicial resources to relitigate issue of standing in this case when court in earlier filed case has already ruled on it); *Bankers Ins. Co. v. DLJ Mortg. Capital, Inc.*, No. 8:10-cv-419-T-27EAJ, 2012 WL 515879, at *3 (M.D. Fla. Jan. 26, 2012) (applying first filed rule and noting that first case filed more than three months before current case).

⁸⁶ See *Adoma v. Univ. of Phoenix, Inc.*, 711 F. Supp. 2d 1142, 1147 (E.D. Cal. 2010) ("Here, the named defendants in *Sabol* and *Adoma* actions are identical. Moreover, the proposed classes for the collective actions are substantially similar in that both classes seek to represent at least some of the same individuals."); *Ross v. U.S. Bank Nat'l Ass'n*, 542 F. Supp. 2d 1014, 1020 (N.D. Cal. 2008) ("In a class action, the classes, and not the class representatives, are compared."); *contra Lac Anh Le v. Pricewaterhousecoopers LLP*, C-07-5476 MMC, 2008 WL 618938, at *1 (N.D. Cal. Mar. 4, 2008) (denying motion under first filed rule and noting that the two individual plaintiffs in the cases were not the same).

they are similar.⁸⁷ However, the less overlap among the claims and putative classes, the less likely a court is to apply the first-filed rule.⁸⁸

As the number of putative class actions increases, the best procedural mechanism for achieving consolidation is by a motion pursuant to 28 U.S.C. § 1407 for pre-trial coordination and transfer made to the Judicial Panel on Multidistrict Litigation (“MDL Panel.”). The MDL Panel is a panel of seven sitting federal judges, each from different federal judicial circuits, appointed by the Chief Justice of the United States.⁸⁹ Section 1407(a) provides that the MDL Panel may transfer civil actions pending in different districts “involving one or more common questions of fact” to “any district” for “coordinated or consolidated pretrial proceedings.” The MDL Panel determines whether transfer is appropriate by considering whether it will advance “the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.” When the cases at issue all include factual allegations about a specific practice or service provided by a franchise system, which will usually be the case in a consumer class action, the MDL Panel has held that transfer is warranted because common issues of fact are present.⁹⁰ The MDL Panel also has historically found that transferring multiple class actions to one forum for pre-trial purposes is warranted because doing so will “eliminate duplicative discovery, prevent inconsistent pretrial rulings, especially with respect to class certification and conserve the resources of the parties, their counsel and the judiciary.”⁹¹ The MDL Panel has granted transfer with as few as three to four pending cases, but having a larger number of cases will make it more likely that the MDL Panel will find that a transfer will aid judicial efficiency.⁹²

The MDL Panel, however, can be unpredictable, and, because of an increase in the number of MDL filings, the MDL Panel recently has been denying transfer motions at a higher

⁸⁷ See *Walker v. Progressive Cas. Ins. Co.*, No. C03-656R, 2003 WL 21056704, at *3 (W.D. Wash. May 9, 2003).

⁸⁸ *Quinn v. Walgreen Co.*, 958 F. Supp. 2d 533, 539 (S.D.N.Y. 2013) (denying motion to stay based on first filed rule the case “presents neither identical issues nor identical parties” as an earlier filed class action and noting that the proposed classes in each lawsuit were for different states).

⁸⁹ Overview of the Judicial Panel on Multidistrict Litigation, <http://www.jpml.uscourts.gov/panel-info/overview-panel>.

⁹⁰ For example, see *In re: Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 949 F. Supp. 2d 1369 (J.P.M.L. 2013) (transferring seven putative class actions where they shared factual questions regarding marketing practices and standards for Footlong sandwiches); *In re Monitornics Int'l, Inc., Tele. Consumer Protection Act Litig.*, 988 F. Supp. 2d 1364 (J.P.M.L. 2013) (finding common issues of fact existed about defendant’s policies and procedures for “calling consumers, directly or through agents, for the purpose of selling home security products or services, as well as its procedures for obtaining and recording the consumer’s consent for such calls.”). John Doroghazi and Wiggin and Dana represent the defendant in the Subway matter.

⁹¹ See, e.g., *In re: Subway*, 949 F. Supp. 2d at 1369 (transferring seven putative class actions involving deceptive marketing claims); *In re Shop-Vac Mktg. & Sales Practices Litig.*, MDL No. 2380, 2012 U.S. Dist. LEXIS 117365, at *2 (J.P.M.L. Aug. 16, 2012) (granting transfer of six putative class actions involving claims of deceptive marketing); *In re Conesco Life Ins. Co. Lifetrend Ins. Mktg. & Sales Practices Litig.*, 672 F. Supp. 2d 1372 (J.P.M.L. 2010) (granting transfer of three putative class actions).

⁹² See, e.g., *In re: HSBC Bank USA, N.A., Debit Card Overdraft Fee Litig.*, 949 F. Supp. 2d 1358 (J.P.M.L. 2013) (granting transfer of three putative class actions in two districts); but see *In re: Sempris Membership Program Mktg. & Sales Practices Litig.*, --- F. Supp. 2d ---, 2014 WL 709765 (J.P.M.L. 2014) (denying motion to transfer four putative class actions); *In re: Boeing Co. Employment Practices Litig. (No. II)*, 293 F. Supp. 2d 1382 (J.P.M.L. 2003) (denying transfer of three cases, stating number of cases was “minimal”).

rate.⁹³ Thus, it will likely deny a motion to transfer if it can find that other factors exist that would make transfer unnecessary, like evidence of informal coordination or cooperation between the courts⁹⁴ or transfers through 1404(a) motions.⁹⁵

While the MDL Panel usually transfers cases to a district with some connection to the cases, *i.e.* a defendant's home forum or a district where a case is currently pending,⁹⁶ the MDL Panel can send the case to any district in the country and any judge within the district it chooses.⁹⁷ Finally, the MDL Panel meets approximately once every three months and in most cases, federal courts will stay a case pending a decision by the MDL Panel.⁹⁸ Thus, a MDL motion, if nothing else, can provide a few months' reprieve from having to litigate on multiple fronts.⁹⁹

B. Pleading Practices

As with any complaint, a defendant served with a putative class action complaint must consider whether to first attack the complaint on its face or immediately defend the suit on the merits, with the benefit of discovery and evidence.

Some defense counsel have a rule of thumb to challenge a complaint "early and often" -- and not file an answer "until you have to" -- even if the likelihood of the challenge being sustained is low. Potential benefits from immediately attacking the complaint include narrowing the case by the dismissal of certain causes of action or claims, "educating" the judge early in the case about the law, and, of course, having the entire case dismissed without expending significant resources in discovery, depositions, dispositive motion practice, or trial.

⁹³Kathleen Sooy & Tracy Roman, *Multidistrict Litigation: Centralization is getting more Challenging*, <http://www.insidecounsel.com/2014/03/27/multidistrict-litigation-centralization-is-getting>.

⁹⁴ See *In re: Sempris*, 2014 WL 709765 (denying motion to transfer where claims were "fairly straightforward" consumer claims and there was common plaintiffs' counsel among the lawsuits); *In re: Capatriti Brand Olive Oil Mktg. & Sales Practices Litig.*, 963 F. Supp. 2d 1381 (J.P.M.L. 2013) (denying motion to transfer where voluntary cooperation was likely to occur); *In re: Goodman Mfg. Co., L.P., HVAC Prods. Liab. Litig.*, 987 F. Supp. 2d 1380 (J.P.M.L. 2013) (denying motion to transfer where there was evidence of informal cooperation among plaintiffs in various actions).

⁹⁵ See *In re: Truvia Natural Sweetener Mktg. & Sales Practices Litig.*, --- F. Supp. ---, 2014 WL 585552, at *2 (J.P.M.L. 2014) (denying motion to transfer because centralization was likely to be achieved through application of first filed rule and 1404(a) motions and noting that "centralization under Section 1407 should be the last solution after considered review of all other options").

⁹⁶ DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL § 6:1 (2013) (stating that the Panel is "likely to transfer a case to a district where at least one action is pending, or where a majority of the actions are pending").

⁹⁷ *Id.* (noting that there are no limitations on the Panel's choice of transferee district).

⁹⁸ See, *e.g.*, *Register v. Bayer Corp.*, No. CA 02-1013, 2002 WL 1585513, at *1 (E.D. La. 2002) ("[T]he interests of judicial economy will best be served by a temporary stay in these proceedings pending a ruling by the Judicial Panel on Multidistrict Litigation."); *U.S. Bank NA v. Royal Indem. Co.*, No. 3:02-CV-0853-P, 2002 WL 31114069, at *2 (N.D. Tex. 2002) (granting stay "to avoid the unnecessary waste of judicial resources if the MDL Motion is ultimately granted" and stating that "[i]f the MDL Motion is granted, all of the Court's time, energy and acquired knowledge regarding this action and its pretrial procedures will be wasted").

⁹⁹ Doroghazi, *supra* note 1, at 179.

In certain circumstances, however, targeted or even no motion practice on the pleadings may be appropriate, even in a putative class action. Potential disadvantages to attacking a complaint “early and often” include “educating” the plaintiff such that the complaint is amended, becomes better focused or, indeed, expanded to include stronger allegations, claims, and legal theories than the original complaint. In other words, a weaker complaint may be easier to defend against on the merits. Thus, and in light of liberal pleading rules and the ease with which a complaint may be amended, the decision whether to attack a complaint should be considered carefully rather than undertaken reflexively.¹⁰⁰

1. Motion to Dismiss

Under the federal rules, a motion to dismiss for failure to state a claim may be brought under Rule 12(b)(6) as to any or all of the asserted causes of action.¹⁰¹ A defendant also may bring a motion to dismiss for lack of subject matter jurisdiction (Rule 12(b)(1)), lack of personal jurisdiction (Rule 12(b)(2)), improper venue (Rule 12(b)(3)), or failure to join a necessary and indispensable party (Rule 12(b)(7)).¹⁰² A motion to dismiss must be made within 21 days of service of the summons and complaint, or, if service has been waived, within 60 days after the request for waiver was sent.¹⁰³

On a motion to dismiss for failure to state a claim, the allegations in the complaint are taken as true, and all inferences are drawn in the plaintiff’s favor.¹⁰⁴ Thus, a defendant bringing such a motion should do so only if there is a clear impediment to one or more of the causes of action asserted in the complaint, for example, the plaintiff will not be able to prove a particular element of the claim.¹⁰⁵

If a defendant has a viable argument concerning personal jurisdiction, however, such a challenge should be brought at the Rule 12(b) stage.¹⁰⁶ Personal jurisdiction often exists over a franchisor by virtue of state franchise statutes that require the franchisor to consent to the state’s jurisdiction as a condition for registering to do business in or sell franchisees sale in the state.¹⁰⁷ But if a franchisor is sued in a state in which it does not have direct operations or franchisees (perhaps as a result of forum shopping by a plaintiff), then it should consider moving

¹⁰⁰ See, e.g., Fed. R. Civ. P. 15(a) (“A party may amend its pleading once as a matter of course within . . . 21 days after service of a motion under Rule 12(b), (e), or (f) In all other cases, a party may amend its pleading only with . . . the court’s leave. The court should freely give leave when justice so requires.”).

¹⁰¹ Fed. R. Civ. P. 12(b)(6).

¹⁰² Fed. R. Civ. P. 12.

¹⁰³ Fed. R. Civ. P. 12(a).

¹⁰⁴ See, e.g., JAMES WM. MOORE, ET AL., MOORE’S FED. PRAC. - CIVIL § 12.34 & n.8 (collecting cases).

¹⁰⁵ See, e.g., *ArcAngelo, Inc. v. DirectBuy, Inc.*, 2013 U.S. Dist. LEXIS 164941 (N.D. Ind. Nov. 20, 2013) (dismissing breach of duty of good faith claim brought against franchisor by putative class). Wiggin and Dana is counsel to DirectBuy in this matter.

¹⁰⁶ See, e.g., Moore, *supra* note 104, at § 12.31 & n.7 (collecting cases); Fed. R. Civ. P. 12(h)(1).

¹⁰⁷ See, e.g., Cal. Corp. Code § 31155; Haw. Rev. Stat. § 482E-5(c); Ill. Rev Stat. ch. 121½, par. 716; Ind. Code, tit. 23, art 2, ch. 2.5, § 24; MSA § 19.854(23); MCL § 445.1522; Minn. Stat. § 80C.20; NY Gen. Bus. Law. § 686; ND Cent. Code § 51-19-15.1; RI Gen. Laws § 19-28-6.F; SD Codified Laws Ann. 37-5A-36; Va. Code Ann. 13.1-566; Wash. Rev. Code § 19.100.140.

for dismissal on this ground. Similarly, if the franchisee is sued in a state other than the one in which it operates, it should strongly consider filing a motion to dismiss arguing a lack of personal jurisdiction.

By contrast, a challenge to a federal court's subject matter jurisdiction never is waived, even at or after trial.¹⁰⁸ Of course, it is highly advisable to raise such a challenge at the pleadings stage if grounds to do so exist so that the case does not proceed further. As noted above, in class actions, federal subject matter jurisdiction not only exists under traditional "federal question" and "diversity" grounds but also under the jurisdictional provisions of CAFA.¹⁰⁹ Since federal subject matter jurisdiction may exist under CAFA if there is "minimal" diversity between one named plaintiff and one named defendant,¹¹⁰ a franchisor with hundreds or thousands of direct operations or franchisees nationwide likely will be subject to federal subject matter jurisdiction in a putative consumer class action lawsuit.

2. Motion for Judgment on the Pleadings

Under the federal rules, a motion for judgment on the pleadings also is available under Rule 12(c). This motion is governed by the same standards as a motion to dismiss under Rule 12(b), *i.e.*, the averments are taken as true and all inferences are resolved in the plaintiff's favor.¹¹¹ But a motion for judgment on the pleadings differs from a motion to dismiss with respect to timing: a motion for judgment on the pleadings may be brought after the pleadings have closed, *i.e.*, after an answer is filed.¹¹²

A strategic advantage to filing a motion for judgment on the pleadings rather than (or after) a motion to dismiss is that, in the meantime, the defendant can conduct discovery and frame both sides' theories of the case. Also, since a motion for judgment on the pleadings may be brought at any time during the case so long as trial is not delayed, a successful motion may not be cured by leave to amend if that motion is granted on a substantive ground.¹¹³ While a motion for judgment on the pleadings, like a motion to dismiss, must be based on the pleadings themselves (not any extrinsic evidence), a defendant may incorporate documents that are referenced in the complaint.¹¹⁴ Thus, in a class action based on allegedly identical or similar contract terms or uninformed (mis)representations, a motion for judgment on the pleadings, like a motion to dismiss, may attach and incorporate the contract or written disclosure.

3. Motion to Compel Arbitration

Many consumer contracts contain arbitration agreements permitting -- or requiring -- parties to arbitrate, rather than litigate, their disputes. In putative consumer class actions, motions to compel arbitration are prevalent and of utmost importance, especially because a

¹⁰⁸ See Fed. R. Civ. P. 12(h)(3).

¹⁰⁹ See 28 U.S.C. § 1332(d).

¹¹⁰ See *id.* at § 1332(d)(2).

¹¹¹ See Moore, *supra* note 104, at § 12.38 & nn.8-9 (collecting cases).

¹¹² Fed. R. Civ. P. 12(c).

¹¹³ See, e.g., *Bushnell Corp. v. ITT Corp.*, 973 F. Supp. 1276, 1282 (D. Kan. 1997).

¹¹⁴ See Moore, *supra* note 104, at § 12.38 & n.3.1 (collecting cases).

series of recent decisions by the United States Supreme Court repeatedly endorsing arbitration as a favored means for dispute resolution.

In *Stolt-Nielsen S.A. v. AnimalFeeds, N.A.*, the Supreme Court held that the availability of class arbitration may not be implied in an arbitration agreement merely because the agreement is “silent” on the issue of class arbitration.¹¹⁵ Thus, a consumer obligated to arbitrate rather than litigate cannot pursue class proceedings in the arbitration forum (absent an agreement by the defendant to do so).

Next, in *AT&T Mobility LLC v. Concepcion*, the Court held that state-law doctrines may not specifically restrict the enforcement of arbitration agreements, *i.e.*, any such doctrines must be applicable to contracts generally.¹¹⁶ Thus, in *Concepcion*, the Supreme Court invalidated California’s “*Discover Bank*” rule, which had been based on the notions that small claims -- which most consumer class actions purport to involve -- required class actions to effectively vindicate those claims and that arbitration agreements prohibiting class proceedings prevented that “vindication.”¹¹⁷ The *Concepcion* Court squarely held that under the Federal Arbitration Act (“FAA”)¹¹⁸ -- which broadly applies to any contract involving or affecting interstate commerce -- a class waiver (which specifically prohibits class proceedings) in an arbitration agreement does not render the agreement unenforceable merely because, as a result, a plaintiff must proceed with arbitration individually rather than on behalf of a putative class.¹¹⁹

And in *American Express Co. v. Italian Colors Restaurant*, the Court held that courts may not invalidate a contractual waiver of class arbitration on the ground that the high cost to the plaintiff to pursue its claim individually would prevent the “effective vindication” of a statutory right.¹²⁰ That is, even if a plaintiff’s potential recovery may not exceed its costs in pursuing a claim, an arbitration agreement governed by the FAA must be enforced according to its terms.

Thus, under these three Supreme Court decisions, an arbitration agreement that does not permit class proceedings is not unenforceable under state-law principles merely because a plaintiff must proceed individually. Moreover, the Supreme Court repeatedly has underscored a pro-arbitration stance in recent Terms.¹²¹ States, even including very recently California, have followed this mandate.¹²²

In consumer class actions, enforcement of an arbitration agreement that does not permit class proceedings can be an important -- and practically dispositive -- tool to use at the outset of

¹¹⁵ 559 U.S. 662, 684 (2010).

¹¹⁶ 131 S. Ct. 1740, 1747 (2011).

¹¹⁷ *Id.* at 1750.

¹¹⁸ 9 U.S.C. §§ 1-16.

¹¹⁹ 131 S. Ct. 1740, 1750 (2011).

¹²⁰ 133 S. Ct. 2304, 2312 (2013).

¹²¹ See, e.g., *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500 (2012); *Marmet Health Care Ctr. v. Brown*, 132 S. Ct. 1201 (2012); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012).

¹²² See, e.g., *Iskanian v. CLS Transp. L.A., LLC*, --- Cal. ---, 2014 Cal. LEXIS 4318 (Cal. June 23, 2014) (holding that a state’s refusal to enforce a class action waiver on grounds of public policy or unconscionability is preempted by the FAA and that *Gentry v. Superior Court*, 42 Cal. 4th 443 (Cal. 2007) has been abrogated by *Concepcion*).

a case. If a consumer is obligated to arbitrate his or her claims on an individual basis rather than litigate them on a putative class-wide basis, then the franchisor or franchisee's potential exposure to the class -- and the defense costs associated with the class action -- may be greatly reduced.

Accordingly, a franchise defendant sued in a putative class action immediately should investigate whether the named plaintiff is subject to an arbitration agreement. Moreover, a franchise defendant should consider moving to compel arbitration under the terms of an agreement even if (1) the defendant is not a party to the agreement, or (2) the agreement is not the basis for the putative class action suit. Courts often permit non-parties to an arbitration agreement to enforce it as a "non-signatory," e.g., if the defendant is sued as an alleged alter ego of the signatory to the agreement.¹²³ Also, many arbitration agreements have a broad scope, e.g., covering "all disputes" or "any matter in dispute," which can encompass claims beyond those relating to the contract containing the arbitration agreement.¹²⁴ Thus, even if a consumer is not suing to enforce a specific term of a contract or is not making a claim involving contract at all, an arbitration provision may encompass the plaintiff's claims and provide a basis for a franchise defendant to bring a successful motion to compel arbitration.

4. Motion to Strike Class Allegations

In addition to moving to dismiss, it is sometimes advisable to move to strike some or all of the class allegations. A court may eliminate class allegations based on the pleadings alone "[i]f, as a matter of law, a class cannot be certified" and "it would be a waste of the parties' resources and judicial resources to conduct discovery on class certification."¹²⁵ Defendants have taken different approaches about whether to move to strike class allegations under Federal Rule of Civil Procedure 12(b)(6) or 12(f), but courts have generally treated either motion as hinging on whether "it is obvious from the pleadings that no class action can be maintained."¹²⁶ Motions to strike can attack any aspect of the class allegations, including adequacy of representation, typicality, commonality, ascertainability, predominance, or the permissibility of a class claim under a specific state law.¹²⁷

¹²³ See, e.g., *In re: Apple iPhone 3G & 3GS "MMS" Mktg. & Sales Pracs. Litig.*, 864 F. Supp. 2d 451, 463 (E.D. La. 2012); *Hansen v. KPMG, LLP*, 2005 U.S. Dist. LEXIS 38137, at *11 (C.D. Cal. Mar. 28, 2005); *Metaclad Corp. v. Ventana Envr. Org. P'ship*, 109 Cal. App. 4th 1705, 1713-14 (Cal. App. 2003).

¹²⁴ See, e.g., *Levin v. Alms & Assocs.*, 634 F.3d 260, 269 (4th Cir. 2011); *Desert Outdoor Adver. v. Sup. Ct.*, 196 Cal. App. 4th 866, 877 (Cal. Ct. App. 2011).

¹²⁵ *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 655 (D. Nev. 2009) (quoting *In re Walls*, 262 B.R. 519, 523 (Bankr. E.D. Cal. 2001)); see also *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011) (affirming district court's granting of motion to strike class claims where, in nationwide class action, choice of law issues required application of each state's consumer protection laws and laws of states differed).

¹²⁶ See, e.g., *In re: Yasmin & Yaz (Drospirenone) Mktg., Sales Practices, & Relevant Prods. Liab. Litig.*, 275 F.R.D. 270, 274 (S.D. Ill. 2011); *DeBose v. Fedex Corp.*, No. 08-cv-7042 (AKH), 2009 U.S. Dist. LEXIS, at *5 (S.D.N.Y. June 2, 2009) (granting motion to strike class allegations where plaintiff could not succeed on them as a matter of law); *Shabaz v. Polo Ralph Lauren Corp.*, 586 F. Supp. 2d 1205, 1211 (C.D. Cal. 2008) (reviewing motion to strike class claims using Rule 12(b)(6) standard).

¹²⁷ See, e.g., *Pilgrim*, 660 F.3d 943 (variations in state law); *In re Trilegiant*, 2014 WL 1315244, at *25-30 (right to class action limited under state law); *Labou v. Cellco P'ship*, 2:13-CV-00844-MCE, 2014 WL 824225 (E.D. Cal. Mar. 3, 2014) (typicality and adequacy of representation); *Trazo v. Nestle USA, Inc.*, 5:12-CV-2272 PSG, 2013 WL 4083218 (N.D. Cal. Aug. 9, 2013) (typicality, ascertainability, and commonality); *Bohn v. Boiron, Inc.*, 11 C 08704, 2013 WL 3975126, at *6 (N.D. Ill. Aug. 1, 2013) (numerosity and lack of adequate representation).

A motion to strike can provide multiple strategic advantages. If it is successful and the plaintiff cannot plead around the court's decision in an amended complaint, the case is effectively over before defendant has to engage in any discovery, saving the franchise defendant hundreds of thousands of dollars in discovery costs. Similarly, even if not fully successful, it may limit the scope of the proposed class. This may allow for a more limited discovery and decrease the overall value of the case for the plaintiff, which, in turn, may help defendant obtain a more favorable settlement. Finally, even if it will not be successful, it may provide the court with a good preview of the defendants' arguments and frame the issues going forward for the court. That being said, an ill-considered motion to strike can backfire and cause the court to essentially pre-determine that class certification will ultimately be appropriate.

5. Motions for Summary Judgment

If a putative class action is not resolved on the pleadings, then a defendant may move for summary judgment at the appropriate stage of the litigation. In a class action, however, there are special considerations affecting the determination of the appropriate time to move for summary judgment.

a. Pre-Certification

A class action defendant may move for summary judgment before a ruling on class certification, however, doing so likely will waive the defendant's protections under the rule against "one-way intervention." Under that rule, a class action defendant has the right to have the certification decision precede a determination on the merits, e.g., a ruling on a motion for summary judgment.¹²⁸ This protection ensures that putative absent class members will not "know the result" of the case before having to decide whether to remain in or opt-out of the class action.

A defendant may waive the protections of this rule, however, and a common way to do so is by seeking a merits determination before the certification decision. The tactical advantages of proceeding in this way may include obtaining an early resolution of the case without incurring significant defense costs. Therefore, bringing an early motion for summary judgment should be considered if a defendant has a strong argument likely to prevail on summary judgment -- and even more so if the case presents a relatively easy one for class certification. One disadvantage of moving for summary judgment before class certification is that a favorable ruling will have preclusive effect only as to the named plaintiff, not the putative class members.¹²⁹

b. Post-Certification

By contrast, moving for summary judgment after a class is certified (if one is certified), has the strategic advantages of involving a fully developed record and carrying preclusive effect against the certified class members, thereby preventing duplicative lawsuits involving the same

¹²⁸ See, e.g., Fed. R. Civ. P. 23(c)(2); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974); *Schwarzschild v. Tse*, 69 F.3d 293, 296 (9th Cir. 1995); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 762 (3d Cir. 1974) (en banc).

¹²⁹ See *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985); see generally Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 175 (2003).

claims and issues.¹³⁰ Of course, defense costs in the months or years leading up to a post-certification motion for summary judgment can be significant.

6. Answer

Rather than filing a motion, a defendant may simply answer a complaint. Or, if a Rule 12(b) motion is granted in part as to certain causes of action, a defendant may answer those averments concerning the surviving causes of action.

As noted above, there may be tactical benefits to answering a complaint early, *i.e.*, before motion practice. Doing so “locks in” the plaintiff to his or her allegations, claims, and legal theories. In federal court, a complaint may only be amended by stipulation or leave of court after 21 days have elapsed following the filing of an answer.¹³¹

Notably, several federal courts have applied the heightened pleading standards of *Twombly*¹³² and *Iqbal*¹³³ to answers, as well as complaints.¹³⁴ Thus, a defendant should consider providing factual detail to its affirmative defenses, rather than a rote recitation of the legal defenses themselves.

Also, in putative class actions, a defendant may assert in its answer affirmative defenses applicable to both the named plaintiff and to absent class members. For example, if only some of the putative class members have arbitration provisions in their contracts, the answer may so specify with respect to those class members. That partially applicable defense, in turn, may be used to strike certain class allegations from the complaint or to narrow the class at the certification stage.

C. Discovery Practices

Discovery plays an outsized role in consumer class actions because plaintiffs often attack an entire business practice or business model, which means enormous amounts of the franchise defendant’s documents will be potentially relevant. Conversely, each named plaintiff is only likely to have relevant documents about his interaction with the franchise system. This makes the burdens of discovery fall abnormally on defendants and causes discovery to be extraordinarily expensive for them.¹³⁵ Keenly aware that the cost and burden of discovery is a pressure point, plaintiffs will often use onerous discovery requests as a method of extorting a settlement out of defendants.¹³⁶ Plaintiffs also seek voluminous discovery so that once there is a

¹³⁰ See, e.g., *Phillips Petroleum*, 472 U.S. at 808; see Nagareda, *supra* note 129, at 175.

¹³¹ See Fed. R. Civ. P. 15(a)(2).

¹³² *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

¹³³ *Iqbal v. Ashcroft*, 129 S. Ct. 1937 (2009).

¹³⁴ See, e.g., *Sun Microsystems, Inc. v. Versata Enters.*, 630 F. Supp. 2d 395, 408 n.8 (D. Del. 2009) (surveying cases).

¹³⁵ *Thorogood v. Sears, Roebuck, & Co.*, 642 F.3d 842, 848-51 (7th Cir. 2010) (Posner, J.); *Boeynaems v. LA Fitness Int'l, LLC*, 285 F.R.D. 331, 334 (E.D. Pa. 2012).

¹³⁶ See *Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 719 (2d Cir. 2013) (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)) (noting that a plaintiff, even with a largely groundless claim, has an incentive to “take up the time of a number of other people, with the right to do so representing an *in terrorem*

settlement, they can point to the amount of discovery conducted as justification for why the settlement is fair and why they deserve a significant fee award. Against this backdrop, below are some various strategic and practical issues to keep in mind when dealing with discovery in a consumer class action.

1. Importance of Preservation

By now, all litigators should be aware of their obligations regarding document preservation under *Zubulake* and its progeny.¹³⁷ The importance of properly preserving documents in a consumer class action cannot be overstated. The case law contains numerous examples of class action defendants being sanctioned or otherwise prejudicing themselves by failing to preserve documents.¹³⁸ While the preservation obligations are not any different than in a normal case, the scope of what needs to be preserved is. For example, in a normal franchise termination dispute, the relevant documents are usually the files related to the specific franchisee and the e-mails of a select group of custodians about that franchise. In contrast, consumer class actions often attack a specific business practice or an entire business model. In some instances, the relevant documents may be most of the franchisor or franchisee's documents.

The best approach is for the franchise defendant to issue a broad litigation hold and set aside a back-up tape containing the relevant documents from as close to the date of learning of the lawsuit as possible. If the scope of the preservation is overly burdensome, counsel should consider approaching plaintiffs' counsel to discuss whether an agreement on a narrower preservation scope is possible. Alternatively, the franchise defendant can seek court intervention and ask for an order allowing it to limit its document preservation to a more reasonable document universe.

2. Bi-furcation

Ordinarily, discovery during a class action will take place on all issues at once. Defendants, however, often request that the court bifurcate class and merits discovery so that only class discovery occurs before a certification decision. The rationale is that limiting discovery will advance judicial economy by having the class certification earlier in the case and by limiting the parties' (*i.e.* defendant's) pre-certification discovery expenses.¹³⁹ In addition, bifurcating discovery can provide defendants with a better negotiating posture for settlement, especially if the most troublesome documents would not be included in the first discovery

increment of the settlement value, rather than a reasonably founded hope that the discovery process will reveal relevant evidence"); *Thorogood*, 642 F.3d at 848-51.

¹³⁷ See, e.g., *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003). For a good overview of litigation hold requirements, see Craig Tractenberg, et al., *Continuing Your Business During Class Action Litigation*, presented at the 2014 IFA Legal Symposium.

¹³⁸ For examples, see *In re: Ethicon, Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, MDL 2327, 2014 WL 439785 (S.D. W. Va. Feb. 4, 2014) (awarding monetary sanctions to plaintiff and allowing each district judge in MDL proceeding to determine, at trial, whether plaintiff could introduce evidence of the failure to preserve documents); *Nursing Home Pension Fund v. Oracle Corp.*, 254 F.R.D. 559 (N.D. Cal. 2008) (entering adverse inference sanctions in securities fraud litigation for failing to preserve documents).

¹³⁹ See MANUAL FOR COMPLEX LITIGATION § 21.14 ("Discovery into the merits delays the certification decision and may ultimately be unnecessary. Courts often bifurcate discovery between certification issues and those related to the merits of the allegations.").

phase.¹⁴⁰ There are, however, instances when conducting merits discovery first is advantageous, such as when the defendant has a good liability argument, but a weaker class argument or where class discovery would be particularly onerous in comparison to merits discovery.¹⁴¹ Convincing a court to bifurcate discovery is often difficult. Courts have made it clear that looking into whether the class certification requirements are met will require some overlap with the merits inquiry.¹⁴² Thus, unless defendants can show a clear advantage to one type of discovery proceeding first and that the line between class and merits discovery is easily determined, most courts are unlikely to bifurcate discovery.¹⁴³

3. Cost-Sharing

As mentioned above, class action discovery is often (1) expensive and time consuming for the defendant, and (2) used by the plaintiff as a weapon to extort a better settlement.¹⁴⁴ One way to level the playing field is to seek cost-sharing. Courts generally apply a seven-factor test for determining when the costs of discovery compliance should be shifted. These factors include examining (1) how much the requested information is designed to discover germane information; (2) the availability of the information from other sources; (3-4) the cost of production compared with the amount in controversy and the resources of the parties; (5) the parties' abilities and incentives to control costs; (6) the importance of the issues being decided in the case; and (7) the relative benefit to each party in obtaining the information at issue.¹⁴⁵ In the class context, the leading case is *Boeynaems v. LA Fitness International, LLC*, where a district court ordered that the plaintiffs must share the cost of some pre-certification discovery.¹⁴⁶ In reaching this conclusion, the district court noted that the defendant had already produced a large number of documents at significant cost, and that the additional documents the plaintiffs sought would cost over \$500,000 to produce. In that circumstance, the district court decided that it would allow the additional discovery that the plaintiffs were seeking, but the plaintiffs had to pay for it.¹⁴⁷ Cost-sharing, however, is still the exception, and counsel should not expect or count on the court ordering it. A franchisee defendant may have more success with this kind of

¹⁴⁰ *Boeynaems*, 285 F.R.D. at 334 (“Defendant wants to limit its production of information as much as possible under the applicable rules, in part to save costs, but also, candidly, to provide Plaintiffs with as little material as possible from which to find evidence for use at trial (or in settlement negotiations).”).

¹⁴¹ *Physicians Healthsource, Inc. v. Janssen Pharm., Inc.*, CIV.A. 12-2132 FLW, 2014 WL 413534 (D.N.J. Feb. 4, 2014) (bifurcating discovery and order merits discovery conducted first in TCPA class action where court found that there was a potentially dispositive narrow merits issue that did overlap with class issues and ordering merits discovery completed in four months).

¹⁴² *Wal-Mart Stores*, 131 S. Ct. at 2551-52 (noting that class certification “will entail some overlap with the merits of the plaintiffs underlying claim”); *In re: Initial Public Offering Secs. Litig.*, 471 F.3d 24 (2d Cir. 2006).

¹⁴³ See NEWBERG ON CLASS ACTIONS § 7.8 (“Discovery on the merits should not normally be stayed pending so-called class discovery, because class discovery is frequently not distinguishable from merits discovery and classwide discovery is often necessary as circumstantial evidence even when the class is denied. Such a discovery bifurcation will often be counterproductive in delaying the process of the suit for the orderly and efficient adjudication.”).

¹⁴⁴ *Thorogood*, 642 F.3d at 848-51.

¹⁴⁵ See, e.g., *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003).

¹⁴⁶ *Boeynaems*, 285 F.R.D. 331.

¹⁴⁷ *Id.* at 340-42; *Schweinfurth v. Motorola, Inc.*, No. 1:05CV0024, 2008 WL 444908, at *2 (N.D. Ohio Sept. 30, 2008) (finding that requested discovery may be relevant, but because compliance would be expensive and evidence may not be admissible at trial, ordering plaintiffs to pay 50% of the document production costs).

argument than a franchisor because the plaintiff cannot as easily argue that the franchisee has significant resources or that complying with onerous discovery will not imperil the franchisee's ability to operate.

4. Document Collection & Review

Once discovery requests are received, documents must be collected and reviewed. Counsel should participate in the collection of documents to ensure it is done correctly.¹⁴⁸ Failing to do so can result in sanctions, including the court ordering the defendant to hire a third party, at the defendant's expense, to conduct a proper collection, and monetary sanctions directed both at the defendant and its counsel.¹⁴⁹

Although every lawyer approaches document collection slightly differently depending on the case, the client, and her preferred style, a document collection in a class action that will withstand court scrutiny should proceed in a manner similar to the following:

- Counsel determines, through its knowledge of the franchisor, conversations with the pertinent employees, and the assistance of in-house counsel, which custodians are likely to have relevant documents.
- Counsel interviews each custodian briefly about where he or she keeps her documents and if there are any other relevant custodians.
- Counsel creates a list from these meetings to determine what e-mail files and system files it must collect.
- Once collected, any search terms, presumably pre-cleared with opposing counsel, are used to cull the documents to a more manageable universe.
- Counsel should keep a written record of the collection process.

Once the relevant documents are collected, counsel must decide how to conduct the document review. In class cases, it is usually advisable to retain a team of contract reviewers, whom counsel can train and oversee. In addition, clients are likely to demand that counsel use contract attorneys because of their lower cost.

A cutting edge method of document review that some courts have recently approved is predictive coding.¹⁵⁰ Predictive coding involves using software that is "trained" by counsel to review vast swaths of data. The software generally works by having counsel review an initial set of documents. The software then analyzes this initial set of documents and uses it to review a

¹⁴⁸ For example, see *N.V.E., Inc. v. Palmeroni*, Civ. No. 06-5455 ES, 2011 WL 4407428 (D.N.J. Sept. 21, 2011) (finding counsel's failure to assist client in preserving or collecting documents to violate duties and sanctioning conduct by allowing plaintiff adverse inference regarding missing documents and awarding attorney's fees). For a thorough discussion of counsel's obligations, see *Pension Committee of Univ. of Montreal Pension Plan v. Banc of Am. Secs.*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010).

¹⁴⁹ See, e.g., *Procaps S.A. v. Patheon Inc.*, No. 12-24356-CIV, 2014 WL 800468 (S.D. Fla. Feb. 28, 2014).

¹⁵⁰ *Fed. Hous. Fin. Agency v. HSBC N. Am. Holdings Inc.*, 11 CIV. 6189 DLC, 2014 WL 584300, at *3 (S.D.N.Y. Feb. 14, 2014); *Moore v. Publicis Groupe*, 287 F.R.D. 182, 193 (S.D.N.Y. 2012) *adopted sub nom.*, 2012 1446534 (S.D. N.Y. Apr. 26, 2012).

much larger set of documents. Counsel then reviews a portion of the documents reviewed by the software and corrects any miscoded documents. This process is then repeated until the software has an acceptably low error rate.¹⁵¹ The end result is a human only having to review a small percentage of all of the documents reviewed. Some studies have shown that predictive coding returns a higher percentage of relevant documents than a human review at a lower overall cost.¹⁵² Because this technology is still relatively new, it is advisable to have the plaintiff and the court agree to its use before employing it. Otherwise, there is a risk that the review will need to be redone because the plaintiff will challenge it and the court will agree with the plaintiff.

5. Depositions

a. Named Plaintiffs

In a consumer class action, the deposition of the named plaintiff(s) often is important to attacking the adequacy and typicality requirements at class certification. For example, a deposition may reveal a conflict of interest between the named plaintiff and the putative class members it seeks to represent or between the named plaintiff and class counsel. Thus, defense counsel should explore whether the named plaintiff has been promised a benefit that may conflict with its duties to the absent franchisees. Counsel also should investigate whether the named plaintiff understands that it will be required to testify at trial, if the case proceeds that far, and that if the defendant prevails, it may seek costs as the prevailing party from the named plaintiff.¹⁵³

Additionally, deposing counsel should inquire as to how the named plaintiff became involved in the suit in the first instance, e.g., if it was recruited or solicited by class counsel. Various rules of ethics and professional responsibility proscribe certain methods of soliciting clients, and violations of those rules can bear on the adequacy of class counsel requirement.¹⁵⁴

Defense counsel also should inquire as to the named plaintiff's understanding of the case itself. While a named plaintiff is not charged with a duty to understand all aspects of a legal theory or claim, he or she does have an obligation to understand the basic facts and allegations in the lawsuit brought under his or her name.¹⁵⁵ As such, inquiry into these matters at deposition also is advisable.

Before deposing a named plaintiff, defense counsel also should investigate publicly available information. For example, has the named plaintiff been involved in other litigation? Does he or she have other negative history? Is there a bankruptcy pending that may

¹⁵¹ For a thorough discussion of how predictive coding works, see Note, *Man Versus Machine Review: the Showdown between Hordes of Discovery Lawyers and Computers*, 15 VAND. J. ENT. & TECH. L. 343, 354-56 (2013).

¹⁵² *Id.* at 367-68; See Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, XVII RICH. J.L. & TECH. 1, 37 (2011), (reporting that manual reviewers identified between 25% and 80% of relevant documents, while technology-assisted review returned between 67% and 86%).

¹⁵³ See, e.g., Fed. R. Civ. P. 54(d)(1).

¹⁵⁴ See, e.g., *Yumul v. Smart Balance, Inc.*, 2010 U.S. Dist. LEXIS 116960, at *20 (C.D. Cal. Oct. 8, 2010); *Bodner v. Oreck Direct, LLC*, 2007 U.S. Dist. LEXIS 30408, at *3, 7 (N.D. Cal. Apr. 25, 2007).

¹⁵⁵ See, e.g., *Sanchez v. Wal-Mart Stores, Inc.*, 2009 WL 1514435, at *3 (E.D. Cal., May 28, 2009); *Burkhalter Travel Agency v. MacFarms Int'l, Inc.*, 141 F.R.D. 144, 154 (N.D. Cal. 1991).

encompass the putative class litigation itself? Additionally, the ever-increasing prevalence of social media (e.g., Facebook, Twitter etc.) can yield a treasure trove of information, including connecting named plaintiffs to their counsel and other plaintiffs, providing further fodder for inquiries into potential conflicts of interest. Defense counsel may consider hiring a private investigator to mine for these types of information.

Also before deposing the named plaintiff, defense counsel should request all relevant documents from the named plaintiff, as well as from third parties by subpoena. Counsel should consider *not* serving written discovery -- namely, interrogatories -- on the named plaintiff before deposing her. This is because lawyers, not clients, draft responses to interrogatories and are able to carefully craft and revise them, typically over a 30-day response period.¹⁵⁶ In a deposition, by contrast, the plaintiff must answer questions without the benefit of counsel's tailoring and revisions of the answers, so a skilled defense counsel likely can secure key admissions via oral deposition.

b. Defendant's Representatives

The plaintiff in a class action suit likely will seek to depose one or more corporate representatives to give binding testimony on behalf of the franchisor or franchisee, under the federal rules or state counterparts concerning knowledgeable representatives.¹⁵⁷

A franchise defendant should evaluate carefully the representative(s) who will testify on the topics designated by the named plaintiff, and that process should begin early in the case. For example, a high-level executive may lack specific knowledge that is central to the case, including different practices throughout the franchise system and how actual decisions were made "on the ground." On the other hand, employees at more "local" levels may lack familiarity with practices in other states or nationwide and thus be unqualified to bind the defendant on the key issues in the litigation.

Regardless of the representative or representatives designated to testify on behalf of the defendant, defense counsel must invest significant time and effort into the preparation of those witnesses. Counsel should marshal all documents authored or sent to the witness, as well as all documents central to the case, and evaluate likely areas of inquiry by plaintiffs' counsel. Preparation should ensure that the deponent is familiar with those likely areas of inquiry, though caution must be given to ensure that the deponent stays within his or her realm of knowledge or experience when speaking on behalf of the company. The same is true of deponents noticed in their individual capacity and whom the defendant will represent in deposition as current or former representatives of the franchisor or franchisee.

D. Opposing Class Certification

Generally, a plaintiff's motion for class certification follows motion practice at the pleadings stage and discovery directed to class-certification issues. Some courts have specific timing requirements for filing a motion for certification, e.g., the U.S. District Court for the Central District of California requires a motion for class certification filed within 90 days of the complaint,

¹⁵⁶ See, e.g., Fed. R. Civ. P. 33(b)(2).

¹⁵⁷ See, e.g., Fed. R. Civ. P. 30(b)(6); Cal. Code Civ. P. § 2025.230.

unless otherwise ordered by the court.¹⁵⁸ Rule 23 provides that the certification question must be determined “at an early practicable time.”¹⁵⁹

In a class action, defense counsel should consider the franchise defendant’s potential defenses to certification long before the motion is filed, as discovery strategy in particular will be shaped by arguments made months or even years later.

1. Certification Standards

In federal court, Fed. R. Civ. P. 23 governs certification of class actions. The rule has two subsections addressing the standards for certification, Rule 23(a) and (b). Many states have similar, and often identical, standards.¹⁶⁰

a. Rule 23(a)

Rule 23(a) sets forth the following requirements for certification:

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

b. Rule 23(b)

In addition to meeting the requirements of Rule 23(a), Rule 23(b) requires that a class action fall into one of three categories, recited below. Most class actions seek damages and fall under Rule 23(b)(3), triggering the predominance, superiority, and manageability requirements.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

- (1) prosecuting separate actions by or against individual class members would create a risk of:
 - (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

¹⁵⁸ C.D. Cal. Local Rule 23.

¹⁵⁹ Fed. R. Civ. P. 23(c)(1)(A).

¹⁶⁰ See, e.g., Cal. Code Civ. P. § 382.

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) 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; or

(3) the court finds that the 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. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

2. **Common Arguments**

In opposing class certification, certain arguments apply regardless of the fact that the case is a franchising class action. The following sections review common arguments against class actions regardless of case type, followed by a discussion of franchise-system specific arguments and issues.

a. **Ascertainability**

Although Rule 23 does not expressly require it, there must indeed “be a class”¹⁶¹ and the class must be “definite enough that the class can be ascertained.”¹⁶² While a class need not be “so ascertainable that every potential member can be identified at the commencement of the action,” it must still be “administratively feasible for the court to determine whether a particular individual is a member.”¹⁶³ This doctrine comes from the Seventh Circuit’s decision in *Oshana v.*

¹⁶¹ See 7A CHARLES A. WRIGHT, AND ARTHUR R. MILLER, FED. PRAC. & PROC. § 1760 (3d ed. 1998) (hereinafter “Wright & Miller”).

¹⁶² *E.g. Oshana v. Coca-Cola Co.*, 472 F.3d 506, 512 (7th Cir. 2006).

¹⁶³ Wright & Miller, *supra* note 161, at § 1760; See also *In re: POM Wonderful LLC*, ML 10-02199 DDP RZX, 2014 WL 1225184, at *6 (C.D. Cal. Mar. 25, 2014) (“In situations where purported class members purchase an inexpensive product for a variety of reasons, and are unlikely to retain receipts or other transaction records, class actions may present such daunting administrative challenges that class treatment is not feasible.”); *Sethavanish v. ZonePerfect Nutrition Co.*, 12-2907-SC, 2014 WL 580696 (N.D. Cal. Feb. 13, 2014) (“Plaintiff has yet to present any method for determining class membership, let alone an administratively feasible method. It is unclear how Plaintiff intends to determine who purchased ZonePerfect bars during the proposed class period, or how many ZonePerfect bars each of these putative class members purchased.”); *Weiner v. Snapple Beverage Co.*, No. 07-cv-8742, 2010 WL 3119452,

Coca-Cola, where soda purchasers sued Coca-Cola for advertising that the fountain soda contained the same ingredients as the bottled drink, when in fact the fountain soda contained saccharine.¹⁶⁴ Plaintiffs proposed a class consisting of all purchasers of fountain Coke during the class period.¹⁶⁵ The court dismissed the class claims on grounds of ascertainability, holding that the class “could include millions who were not deceived and thus have no grievance under the [Illinois Consumer Fraud and Deceptive Business Practices Act].”¹⁶⁶ The court highlighted that the proposed class could include those who bought the drink “because it contained saccharin,” as well as those who bought it “even though” it had the artificial sweetener.¹⁶⁷ Therefore, the putative class could include millions of members who were not deceived and therefore not harmed. The court denied certification because the putative class could contain millions of members unable to demonstrate that any deception had occurred.

A recent case has taken ascertainability one step further. In *Carrera v. Bayer Corporation*, the Third Circuit reversed a district court’s decision certifying a class of purchasers alleging that a vitamin manufacturer made misleading claims about its vitamins’ effects because the class was not ascertainable.¹⁶⁸ It was undisputed that the vast majority of the class lacked proof of their purchases and that the defendant did not have any list of purchasers.¹⁶⁹ To get around this problem, plaintiffs wanted to use customer affidavits to establish class membership. The Third Circuit found that the use of customer affidavits, without more, was not enough to make the class ascertainable.¹⁷⁰ It reached this conclusion because it found that the rigorous analysis standard governing the rest of Rule 23 also applies to ascertainability and that ascertainability is meant to protect a defendant’s due process rights.¹⁷¹ Not all courts, however, have followed *Carrera*’s reasoning because it has effectively “eviscerate[d] low purchase price consumer class actions in the Third Circuit.”¹⁷² Because many franchise systems sell low-cost products where customer lists and receipts are not likely to exist (*i.e.* quick-service restaurants), the franchisor will likely be able to construct a viable ascertainability argument to attack any Rule 23(b)(3) class alleged.

*13 (S.D.N.Y. Aug. 5, 2010) (denying certification where plaintiffs “failed to show how the potentially millions of putative class members could be ascertained using objective criteria that are administratively feasible”).

¹⁶⁴ *Oshana*, 472 F.3d at 509.

¹⁶⁵ *Id.* at 514.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ 727 F.3d 300 (3d Cir. 2013).

¹⁶⁹ *Id.* at 308.

¹⁷⁰ *Id.* at 308-10.

¹⁷¹ *Id.* at 306-07.

¹⁷² See *Forcellati v. Hylands Inc.*, No. CV-12-1983-GHK (MRK_x), 2014 WL1410264, at *5 (C.D. Cal. Apr. 9, 2014) (“Given that facilitating small claims is ‘the policy at the very core of the class action mechanism ... we decline to follow *Carrera*.”); *McCrary v. Elations Co., LLC*, No. EDCV 13-00242 JGB OP, 2014 WL 1779243, at *8 (C.D. Cal. Jan. 13, 2014) (refusing to follow *Carrera* and holding that class made up of purchasers of consumer product was ascertainable); *In re Paulsboro Derailment Cases*, No. CIV. 13-784 RBK/KMW, 2014 WL 1371712 (D.N.J. Apr. 8, 2014) (distinguishing *Carrera* because class membership could be shown by a combination of the plaintiff’s residence and other broad discovery).

b. Commonality and Predominance

Until relatively recently, courts often treated Rule 23(b)(2)'s commonality requirement as a low threshold, even requiring only the existence of a single common issue of law or fact.¹⁷³ The U.S. Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*¹⁷⁴ changed this paradigm.

In *Dukes*, which involved an alleged pattern of gender discrimination against female employees, the Court held that the mere recitation of common questions is insufficient to satisfy Rule 23(b)(2); rather, there must be common *proof* that can generate common *answers* to those questions.¹⁷⁵ That is, there must be some "glue" holding together the claims of the named plaintiff and absent class members such that those claims can be resolved in "one stroke."¹⁷⁶

The *Dukes* Court's articulation of the commonality requirement is more exacting than under some previous case law. It is consistent, however, with other cases, e.g., *Broussard v. Meineke Discount Muffler Shops*¹⁷⁷ in which the Fourth Circuit reversed a certification order (and overturned a \$390 million jury award) because the franchise agreements on which the class had sued contained "materially different contract language" regarding the alleged breach.¹⁷⁸

Rule 23(b)(3)'s predominance requirement historically has been more exacting, requiring that common questions of fact predominate over individualized ones.¹⁷⁹ For example, in consumer privacy class actions, whether a plaintiff or any absent class member had an objectively reasonable expectation that a conversation would remain private may be an individualized question that predominates over common ones.¹⁸⁰ And in franchising class actions, issues such as whether and how a franchisee complied with a franchisor's incentive program have constituted predominating, individualized issues.¹⁸¹

¹⁷³ See, e.g., *Williams v. Mohawk Indus.*, 568 F.3d 1350, 1355 (11th Cir. 2009); *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999); *Bird Hotel Corp. v. Super 8 Motels*, 246 F.R.D. 603 (D.S.D. 2007); *Corley v. Entergy Corp.*, 220 F.R.D. 478, 482 (E.D. Tex. 2004).

¹⁷⁴ 131 S. Ct. 2541 (2011).

¹⁷⁵ 131 S. Ct. at 2551.

¹⁷⁶ *Id.*

¹⁷⁷ 155 F.3d 331 (4th Cir. 1998).

¹⁷⁸ *Id.* at 340.

¹⁷⁹ See, e.g., *Hamilton v. First Am. Title Ins. Co.*, 423 Fed. App'x 425 (5th Cir. 2011); *Randleman v. Fid. Nat'l Title Ins. Co.*, 646 F.3d 347, 355 (6th Cir. 2011); *In re: Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321-22 (3d Cir. 2009); *In re: New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008). Michael Duvall and Sonnenschein, Nath & Rosenthal LLP (now Dentons US LLP) represented First American Title Insurance Company in *Hamilton* and *Randleman*.

¹⁸⁰ See, e.g., *Hataishi v. First Am. Home Buyers Protection Corp.*, 223 Cal. App. 4th 1454, 1467 (Cal. Ct. App. 2d 2014). Joel Siegel and Dentons US LLP represented First American Home Buyers Protection Corporation in *Hataishi*.

¹⁸¹ See, e.g., *Danvers Motor Co. v. Ford Motor Co.*, 543 F.3d 141, 148 (3d Cir. 2008) (reversing certification of a class of automobile franchisees because issues of whether the dealers were certified under the franchisor's dealer performance and customer satisfaction program, as well as issues concerning expenses and reimbursements under the program, were individualized and predominated over common ones).

c. Manageability and Superiority

Rule 23(b)(3) class actions also must be “superior to other available methods” for resolving the controversy, and a factor relevant to that consideration is “the likely difficulties in managing [the] class action.”¹⁸² The manageability requirement often raises similar factual issues as does the predominance requirement.¹⁸³

The superiority requirement considers alternative fora for resolving the dispute; thus, the existence of arbitration agreements covering the named plaintiff and/or absent class members is a relevant consideration for this requirement.¹⁸⁴

d. Standing, Typicality, and Adequacy

A named plaintiff must be a member of the class that it seeks to represent.¹⁸⁵ If it is not, then the named plaintiff lacks standing and cannot represent the class.¹⁸⁶

In addition to mandating a more exacting commonality requirement, the Supreme Court’s decision in *Dukes* confirmed that merits issues “enmeshed” with class certification questions may be evaluated at the certification stage.¹⁸⁷ As a result, questions such as whether the named plaintiff itself may recover under the legal claim and theory that it advances on behalf of the putative class may be addressed in connection with certification. A defendant should be cautious, however, in asserting standing arguments at the class certification stage, as a plaintiff may argue later in the case that a finding of standing is tantamount to law of the case on an element of the plaintiff’s claim and binding at trial.

Rule 23(a)’s typicality requirement (that a named plaintiff’s claims must be typical of those of the class) often raises the same issues as do the commonality and predominance prongs and thus merge into those inquiries.¹⁸⁸ In consumer class actions, though, differences in the experiences of the named plaintiff and absent class members may defeat a finding of typicality. For example, purchasers of automobiles who sue regarding false advertisement or fraud relating to financing may assert similar claims but have purchased and financed their vehicles for different reasons and under different terms.¹⁸⁹ Indeed, consumers suing based on alleged false advertisements may have seen different advertisements or read (or not read)

¹⁸² Fed. R. Civ. P. 23(b)(3).

¹⁸³ *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 n. 13 (1982); *Broussard*, 155 F.3d at 337.

¹⁸⁴ *See, e.g., Pablo v. ServiceMaster Global Holdings*, 2011 WL 3476473, at *2-3 (N.D. Cal. Aug. 9, 2011).

¹⁸⁵ *See, e.g., First Am. Title Ins. Co. v. Sup. Ct.*, 146 Cal. Ap. 4th 1564, 1573 (Cal. Ct. App. 2007).

¹⁸⁶ *See id.*

¹⁸⁷ 131 S. Ct. at 2551.

¹⁸⁸ *See, e.g., Dukes*, 131 S. Ct. at 2551 n. 5; *Amchem Prods. v. Windsor*, 521 U.S. 591, 626 n. 20 (1997); *Falcon*, 457 U.S. at 157 n. 13; *Broussard*, 155 F.3d at 337.

¹⁸⁹ *See, e.g., Stout v. J.D. Byrider*, 228 F.3d 709, 717 (6th Cir. 2000).

different terms and conditions, rendering absent class members' claims different than the named plaintiff's.¹⁹⁰

The adequacy requirement evaluates both the named plaintiff's and class counsel's suitability to represent the class.¹⁹¹ If the named plaintiff's or counsel's interests pose a material conflict with those of class members, then the adequacy requirement is not met.¹⁹²

For example, in franchising class actions, if a former franchisee seeks to represent a class including current franchisees, a conflict of interest may exist in that the former franchisee has little or no interest in the continued success of the franchisor, whereas the current franchisees obviously do.¹⁹³ Additionally, if the named plaintiff would benefit from one particular form of relief (e.g., damages) while members of the putative class would benefit from a different form of relief (e.g., an injunction), then an impermissible conflict of interest may exist and preclude certification.¹⁹⁴

Plaintiffs' counsel's experience and reputation are part of the adequacy calculus as well, but rarely are firms found inadequate in this regard. However, if class counsel have engaged in unethical behavior in the course of representing the class (e.g., improperly soliciting the named plaintiff to participate in the suit), then the adequacy requirement may not be satisfied.

e. Numerosity

In most class actions, the numerosity requirement does not present a significant barrier to certification, as classes as small as forty members have met the requirement that joinder is impracticable.¹⁹⁵ Though as noted above, class actions brought in federal court under CAFA must have 100 or more class members.¹⁹⁶ And while the threshold number to meet the numerosity requirement may be low, a named plaintiff still must *prove* the number through competent evidence. In one pre-CAFA franchising class action, a federal court denied certification for failure to meet the numerosity requirement when the putative subclass and class only included 38 or 123 dealerships, respectively, all of which were in New Jersey and only two of which had challenged one of the defendant's practices.¹⁹⁷ In some cases, a plaintiff's inability to ascertain the putative class may render the numerosity requirement unsatisfied as well.¹⁹⁸

¹⁹⁰ See, e.g., *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 227 (2d Cir. 2008); *Solomon v. Bell Atl. Corp.*, 9 A.D.3d 49, 53-54 (N.J. Super. Ct. App. Div. 2004).

¹⁹¹ Fed. R. Civ. P. 23(a)(4).

¹⁹² See, e.g., *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

¹⁹³ See, e.g., *McNerney v. Carvel*, 2001 U.S. Conn. Super. LEXIS 619, at *16 (Conn. Super. Feb. 23, 2001); *Iandolo v. Benetton Servs.*, 1988 U.S. Dist. LEXIS 9637, at *7 (N.D. Ill. Sept. 1, 1988).

¹⁹⁴ See, e.g., *Windsor*, 521 U.S. at 625; *Broussard*, 155 F.3d at 338; see also *Juarez v. Jani-King of Cal., Inc.*, 273 F.R.D. 571 (N.D. Cal. 2011).

¹⁹⁵ See, e.g., Newberg, *supra* note 143, at § 3:12 & n.9 (collecting cases).

¹⁹⁶ 28 U.S.C. § 1332(d)(5)(B).

¹⁹⁷ *Liberty Lincoln-Mercury, Inc. v. Ford Mktg. Corp.*, 149 F.R.D. 65, 74 (D.N.J. 1993).

¹⁹⁸ See, e.g., *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583 (3d Cir. 2012).

3. Franchise System Specific Arguments and Issues

The existence of a franchise system can provide a way of demonstrating to the court that there are variations in the experience of class members, which is the key to defeating class certification in most consumer class actions. For example, in *Marshall v. H&R Block Tax Services, Inc.*,¹⁹⁹ a district court denied a plaintiff's motion to certify a class of consumers from eleven states who alleged that they had been deceived into purchasing an extended warranty from H&R Block to protect against further tax liability from preparer error. While the court had a number of reasons for denying certification, one of the reasons was that because there were both franchisee- and company-owned stores and that the franchisees had not always been required to sell the warranty during the class period, this created an individualized issue that made certification improper.²⁰⁰

Similarly, in *Thompson v. Jiffy Lube International, Inc.*,²⁰¹ a district court denied the plaintiff's motion to certify a nationwide class of consumers who were allegedly sold unnecessary services by automotive technicians who made misleading recommendations about the maintenance that class members' cars needed. The plaintiff sought to hold the franchisor liable for the actions of the franchisees and its employees under an agency theory.²⁰² The court found that Rule 23(a)(3) was not satisfied because the franchise system had both company-owned stores and franchise locations, but that plaintiff had visited a franchise location, which meant that some class members would be subject to certain defenses "arising from the agency relationship" while others would not.²⁰³ The district court also noted that the class was not certifiable because "some of [the] claims occurred before franchisees began using a computer program that purportedly was used to make improper service recommendations, and the franchise that [plaintiff] visited in fact used a different program."²⁰⁴

Highlighting potential differences within the franchise system may be especially useful if the particular franchise system gives the franchisee some ability to run local advertising campaigns. These campaigns are likely to vary at least somewhat from the national campaigns and may provide a way of showing that each class member saw or heard a different representation or otherwise had varying experiences.

That being said, the mere existence of a franchise system, without more, will not always create individualized issues of fact that will defeat class certification. In *Agne v. Papa John's*

¹⁹⁹ 270 F.R.D. 400 (S.D. Ill. 2010). For a more detailed discussion of this case and *Thompson v. Jiffy Lube International, Inc.*, 250 F.R.D. 607 (D. Kan. 2008), see John Doroghazi, *Class Certification of Consumer Protection Claims Against Franchisors*, DISTRIBUTION—ABA NEWSLETTER OF THE DISTRIBUTION AND FRANCHISING COMMITTEE, Vol. 16, No. 1 (2011).

²⁰⁰ *Marshall*, 270 F.R.D. at 410-11. In denying class certification, the court also noted another individualized issue created by the franchise system, which was that because franchise stores paid a royalty and the company owned stores did not, this created a discrepancy in how damages were to be calculated.

²⁰¹ 250 F.R.D. 607 (D. Kan. 2008).

²⁰² Fed. R. Civ. P. 23(a)(3).

²⁰³ *Jiffy Lube*, 250 F.R.D. at 623. The district court also held that plaintiff's claims were not typical because the court would need to apply different state law for each class members. *Id.* at 625-26.

²⁰⁴ *Id.* For another case discussing the impact of a franchise system in defending a consumer class action, see *Martinelli v. Petland, Inc.*, 274 F.R.D. 658 (D. Ariz. 2011), which is discussed at length in Doroghazi, *supra* note 199.

International, Inc., the named plaintiff alleged that Papa John's and certain of its franchisees had violated the TCPA by sending promotional text messages to consumers without their express consent.²⁰⁵ The district court certified plaintiff's proposed class, despite Papa John's objection that it was a third party hired by franchisees, and not it, who sent the offending text messages. The court noted Papa John's had some role in encouraging the use of a particular third party by franchisees, which in turn created a single common question as it related to Papa John's: did Papa John's actions make it vicariously liable for the third party and its franchisees sending text messages that consumers had not agreed to receive.²⁰⁶

E. Trial Strategy

Traditionally, few class actions are tried, as many are resolved at the pleadings, certification, or dispositive motion stages, and conventional wisdom is that corporate defendants are inclined to settle rather than risk a class-wide judgment.

Class actions are indeed tried, though, and defendants with strong positions on the merits may consider taking a case to judgment rather than settling. Whether a case is tried before a jury or a judge, and regardless the substantive nature of the case, certain fundamental considerations exist for the trial of a class action just like any other case. As an initial matter, franchisors and franchisees may not have aligned interest at trial and may have competing strategies. For example, depending on the facts of the case, the trial strategy of the franchisor and franchisee may be to point the finger at the other as being the source of the allegedly wrongful conduct.

1. Develop Theme(s) and Story

Even in a class action, core themes must emerge early and throughout trial. These themes should be previewed in the opening statement, permeate the trial through witness testimony, and be underscored in closing argument.

2. Identify and Prepare Best Witnesses

As noted above, identifying and preparing deponents is a key part of the discovery process. Likewise, potential witnesses must be evaluated well in advance of trial, including with regard to their substantive knowledge of case issues, ability to withstand cross-examination, and likeability to a jury or judge. Defense counsel should meet with witnesses several times leading up to trial to review key documents, direct examination, and likely areas of cross-examination.

3. Narrow Key Exhibits and Testimony

Another key aspect of trial preparation is to not only identify key documents but also narrow the number of documents that will be entered as part of the defense case (as well as witnesses' corresponding testimony about them). Even in a bench trial, the fact-finder's attention should be directed quickly and efficiently to the critical facts of the case. Even for primary witnesses, rarely should direct examination exceed one to two hours.

²⁰⁵ 286 F.R.D. 559 (W.D. Wash. 2012); see also *Rodriguez*, 2014 WL 1921187, at *4-6 (in action against franchisor and certain franchisees, certifying class claim that plaintiffs were misled into purchasing dating services because the evidence showed that the franchisor had trained franchisees to use script and franchisees never deviated).

²⁰⁶ *Papa John's*, 286 F.R.D. at 568.

4. Cross-examination

Counsel also must prepare to cross-examine adverse witnesses. The scope of cross-examination should be even narrower than direct examination; each question should “draw blood.” Preparation must include selection of the documents with which adverse witnesses are familiar and any testimony (written or oral) previously given by those witnesses. Again, by the time of trial, a cross-examination should be keenly focused, often only 30 to 60 minutes in duration.

5. Burdens of Proof

A defendant always should remember that the named plaintiff bears the burden to prove its and the class members’ claims.²⁰⁷ The defendant should hold the plaintiff to this -- both formally through a requisite trial plan and jury instructions (including one on class-wide proof) -- as well as through the course of the trial itself. A key aspect of a class action trial is that the named plaintiff must prove not only its claim but that of class members, using common proof.²⁰⁸ A defendant can prevail at trial simply because the plaintiff cannot carry that burden.

IV. RELATED ISSUES

A. Indemnification

Franchise agreements typically contain indemnification provisions for both the franchisor and the franchisee. In certain industries (e.g., automobile dealerships), indemnification is dictated by statute.²⁰⁹

When a class action is filed against a franchisor on account of conduct of franchisees, the franchisor may consider seeking indemnification from the franchisee, which, in turn, should have insurance coverage for such costs. The converse is also true: if a franchisee was simply engaging in conduct recommended or mandated by the franchisor, then the franchisee should consider seeking indemnification from the franchisor. Seeking contribution could create a number of issues within the class action. Aside from creating potential business strife, it may also make it difficult for the franchisor and franchisee to work together in defending against the class action lawsuit.

B. Remediation

While facing a class action, both franchisors and franchisees should also consider remedial measures that will limit the potential size of the action going forward. An obvious example is that if the class action alleges a breach of a uniform contract provision, then the franchisor may consider amending that term. If the class action concerns a program applicable

²⁰⁷ See, e.g., *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Dukes*, 131 S. Ct. at 2552 n.6.; *Espenscheid v. DirectSat USA LLC*, 705 F.3d 770, 776 (7th Cir. 2013); *Luiken v. Domino’s Pizza LLC*, 705 F.3d 370, 372 (8th Cir. 2013).

²⁰⁸ See, e.g., *Dukes*, 131 S. Ct. at 2561; *Babineau v. Fed. Express Corp.*, 576 F.3d 1183, 1186, 1193 (11th Cir. 2009); *Blades v. Monsanto Co.*, 400 F.3d 562, 574-75 (8th Cir. 2005). Sonnenschein, Nath & Rosenthal LLP (now Dentons US LLP) represented Monsanto Co. in *Blades*.

²⁰⁹ See, e.g., Ala. Code § 8-20-6; Cal. Veh. Code § 3064; Tex. Rev. Civ. Stat. Ann. art. 4413(36), § 756(b); Wis. Stat. § 218.01(3)(a)22.

to all or much of the franchise system, then the contours of that program should be reviewed and potentially revised. If the class action concerns a national advertising program, its content may be reviewed.

Careful consideration should be taken, however, to ensure that any changes to a contract, program, or advertising campaign are not accompanied by comment on the prior contract, program, or campaign. Commentary -- including internal (e.g., company emails) regarding their purported legality, shortcomings, or need for revision may be used in the pending case as admissions of wrongdoing in the first instance.

Relatedly, it is advisable for both franchisors and franchisees to adhere to a compliance program that addresses issues of trade and competition. Such a program should address topics including: misrepresentations to customers; disparaging competitors or their products; false advertising; coercion and intimidation against customers or suppliers; harassment of competitors; inducements of breach of contract; competitors' trade secrets or customer lists; and mislabeling.²¹⁰ The program also should address antitrust issues including: customer pricing and discounts; customer and territory divisions; supplier pricing; and refusals to deal.²¹¹

C. Class Notice

If a class involving monetary damages is certified under Rule 23(b)(3), notice of the pendency of the class action must be sent to absent class members.²¹² Under the federal rules, that notice must "clearly and concisely state in plain, easily understood language:

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting exclusion; and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).²¹³

The method of notice must be the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."²¹⁴ These requirements of the form and process of notice are grounded in

²¹⁰ See GARNER, FRANCHISE AND DISTRIBUTION LAW AND PRACTICE § 2:7.

²¹¹ See *id.*

²¹² See, e.g., Fed. R. Civ. P. 23(c)(2).

²¹³ Fed. R. Civ. P. 23(c)(2)(B).

²¹⁴ Fed. R. Civ. P. 23(c)(2)(B).

Due Process principles.²¹⁵ Additionally, if a federal class action is settled, notice of that settlement must be sent to all absent class members who will be bound by it.²¹⁶ Many states have similar rules regarding notice of a class action.²¹⁷

Often, notice of a consumer class action is sent to consumers by first-class mail and supplemented by website publication. Courts, however, have grown increasingly more comfortable with e-mailed notice, which costs a fraction of the cost of mailed notice. The general rule is that the costs of notice (e.g., the mailings; retaining a notice administrator) fall on the plaintiff.²¹⁸ However, the costs of notice can be shifted to the defendant, for example, if the defendant could accomplish such notice through a regularly scheduled mailing and thus substantially reduce the costs of notice or there already has been a liability determination made against the defendant.²¹⁹ These exceptions are very limited in application, though, and typically, the general rule that the plaintiff bears the costs of notice is followed.

While the costs and burden of class notice fall on the plaintiff, a class action defendant should ensure that notice form and process meets the applicable requirements, as consistent with Due Process, including reaching identifiable absent class members and advising them of the class action in clear terms. If the notice is deficient, then the class action judgment may lack the preclusive effect to which a class action defendant normally is entitled.²²⁰ Thus, in the event a class is certified, a class action defendant should take an active role in reviewing both the plaintiff's proposed notice plan and form and, if necessary, lodge any objections to it with the court.

V. SETTLEMENT

Unless a franchise defendant wins on a dispositive motion or defeats class certification, it is a near certainty that the case will result in a settlement: either an individual settlement with the named plaintiff or a class settlement.²²¹ Individual settlements warrant little discussion, other than that they do not need court approval and that they have no preclusive effect on the

²¹⁵ *Phillips Petroleum*, 472 U.S. at 812; *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-77 (1974).

²¹⁶ Fed. R. Civ. P. 23 (e)(1).

²¹⁷ See, e.g., Cal. Rules of Ct., R. 3.766.

²¹⁸ See *Eisen*, 417 U.S. at 178.

²¹⁹ *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 359 (1978).

²²⁰ See, e.g., *Phillips Petroleum*, 472 U.S. at 813; *Villacres v. ABM Indus.*, 189 Cal. App. 4th 562, 581-82 (2d Dist. 2010).

²²¹ See, e.g., Emery Lee & Thomas E. Willing, *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions* 11 (2008), [http://www.fjc.gov/public/pdf.nsf/lookup/cafa1108.pdf/\\$file/cafa1108.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa1108.pdf/$file/cafa1108.pdf) (noting that in every case where class certification was granted, either unconditionally or for settlement purposes resulted in a class settlement); *Id.* at 6 (noting that 55% of putative class actions result in a voluntary dismissal without class certification or class settlement); Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. OF EMPIRICAL LEGAL STUDIES 811, 819 (2012) (noting that in cases producing class settlements, 68 percent were in cases where no class had been certified previously); *California*, *supra* note 41, at D1 (88% of cases in California with certified class result in settlement).

class.²²² Below is a description of the types of relief often seen in class settlements, as well as a discussion of issues related to settlement approval and strategy.

A. Types and Costs

Class settlements are not one-size-fits-all: they can have different features depending on the case. However, class settlements often provide for one or more of the following types of relief.

1. Payments to Consumers

The typical class settlement is one that provides for a payment of money to class members. The most common cash settlement is one where the defendant simply agrees to pay a fixed amount of money, which is then used to fund the settlement. This is called a “common fund.” Depending on the terms of the settlement, the attorney’s fees and notice costs may be paid from the common fund or they may be paid separately. In addition, how class members receive a payment from the common fund varies by settlement. In some, automatic distributions are made to all class members from the fund. While this approach initially seems fairer because all class members receive something, in practice, this approach has a number of conceptual and practical problems. First, it presupposes that the parties have good addresses for mailing the payments. Second, it actually disfavors the class members who believe they were harmed by diluting the payments to them. Instead, many class settlements employ a “claims” process, where a class member must submit a form by mail or online asking for a payment. A claims process can keep administrative costs down and ensure that those who believe they are harmed receive compensation. So long as the claims process is not sufficiently onerous, it will not hinder approval.²²³ Finally, a Texas appellate court has held that if funds are automatically distributed to class members in a class action settlement, the settlement runs afoul of Texas’s escheat laws unless the settlement provides that any unclaimed checks are held by the claims administrator for a number of years before being escheated to the state.²²⁴

Another possible approach is for the defendant to agree to make a payment of a fixed amount to every class member who has a claim, with no cap on its potential liability. Defendants should avoid this approach unless they are very sure that there will be few claims made. In addition, many plaintiffs are not likely to agree to this approach because it makes valuing the settlement harder, and therefore, makes their seeking attorney’s fees more difficult.

2. Coupons

A coupon settlement is often tempting in a consumer class action.²²⁵ In those settlements, class members receive coupons or other non-monetary benefits while plaintiffs’

²²² Fed. R. Civ. P. 23(e); see, e.g., *Rodgers v. U.S. Steel Corp.*, 70 F.R.D. 639, 642 (W.D. Pa. 1976) (explaining that individual settlement with class members has not effect upon the rights of others).

²²³ See, e.g., *In re: Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products Liab. Litig.*, 8:10ML 02151 JVS, 2013 WL 3224585 (C.D. Cal. June 17, 2013), *appeal dismissed* (Oct. 25, 2013), *appeal dismissed* (Oct. 25, 2013), *appeal dismissed* (Nov. 6, 2013).

²²⁴ *State v. Highland Homes, Ltd.*, 417 S.W.3d 478 (Tex. App. 2012), *review granted* (Aug. 23, 2013).

²²⁵ Fitzpatrick, *supra* note 221, at 824.

attorneys receive their fee award in cash.²²⁶ Defendants like these settlements because they are a way to make lemonade out of lemons: a coupon settlement could require class members to make purchases or receive products from the defendant, which could increase sales or re-establish brand loyalty.²²⁷ Proponents of coupon settlements argue that by using coupons, a defendant can provide more value to consumers through a coupon than it would be willing to provide through cash.²²⁸

In reality, coupon settlements have generally provided consumers with little to no compensation while the plaintiffs' lawyers receive generous fees.²²⁹ Abusive coupon settlements was one of the reasons Congress enacted CAFA,²³⁰ which subjects coupon settlements in federal court to "heightened judicial scrutiny"²³¹ and contains requirements about the calculation of attorney's fees in coupon cases that are meant to make coupon settlements unpalatable to most plaintiffs' lawyers.²³² For this reason, a pure coupon settlement is a very risky proposition and not advisable. Courts, however, are open to settlements where class members can choose between a coupon and cash because they negate the main criticisms of coupon settlements that class members are required to do business with the defendant and that the coupons provide nothing of value.²³³

3. Cy Pres

Cy pres is a cash payment that is not directed to class members, but is instead directed to some kind of non-profit organization.²³⁴ This kind of payment is used as a way to get rid of residual funds if there are not enough claims made against a common fund or if it would be impractical to send a payment to each class member because the size of the payment is so small.²³⁵ Courts do not find the use of cy pres per se objectionable, but they have increased

²²⁶ Steven Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343, 1344 (2005).

²²⁷ National Association of Consumer Advocates, *Class Action Guidelines* p. 19 (2006), <http://www.naca.net/about-naca/class-action-guidelines>.

²²⁸ *Id.*

²²⁹ Hantler, *supra* note 226, at 1344-49.

²³⁰ Pub. L. 109-2, 119 Stat. 4, at §2(a)(3)(A) (stating that Congress passed CAFA in part to combat instances in which "counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value").

²³¹ See 28 U.S.C. § 1712(e); *Synfuel Technologies, Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir.2006); *Galloway v. Kansas City Landsmen, LLC*, No. 4:11-cv-1020-CV-W-DGK, 2013 WL 3336636, at *2 (W.D. Mo. July 2, 2013); *In re EasySaver Rewards Litig.*, 921 F. Supp. 2d 1040, 1047 (S.D. Cal. Feb. 4, 2013). Sonnenschein, Nath & Rosenthal LLP (now Dentons US LLP) represented DHL Express (USA), Inc. in *Synfuel Technologies*.

²³² See 28 U.S.C. § 1712.

²³³ See *In re EasySaver*, 921 F. Supp. 2d at 1047-48; NACA Guidelines, *supra* note 227, at 19.

²³⁴ See *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) ("We have recognized that federal courts frequently use the cy pres doctrine in the settlement of class actions where the proof of individual claims would be burdensome or distribution of damages costly.").

²³⁵ See *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 32 (1st Cir. 2012) *cert. denied*, 133 S. Ct. 338, 184 L. Ed. 2d 239 (2012); *Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 675 (7th Cir. 2013) ("Since distribution of

their scrutiny of cy pres provisions in recent years.²³⁶ When including a cy pres provision, it is advisable that the cy pres recipient is a non-profit organization having a mission related to the claims in the case and that is not associated with the defendant.²³⁷

4. Injunctive Relief

A class settlement can also include an agreement that the defendant will refrain from engaging in certain business practices for a set period of time. Many plaintiffs will insist on some kind of practice changes and it is a way for the parties to increase the perceived value of the settlement without the defendant having to pay any more cash.

In addition, in some situations the parties will agree to an injunctive-relief-only settlement under Federal Rule of Civil Procedure 23(b)(2). In that circumstance, however, the release in the settlement should not include money damage claims. If it does, that leaves the settlement vulnerable to criticism and disapproval.²³⁸

5. Settlement Administration

All class settlements require notice to the class and most require the distribution of settlement funds to class members. Because the vast majority of franchise defendants are unequipped to handle this undertaking (and because plaintiffs and the court will want a neutral third-party to oversee this process), the standard practice is for the parties to engage a third-party settlement administrator. The defendant always pays for the settlement administrator—either directly or by having part of the common fund used to pay administration costs. The administrator's role is to execute the notice and fund distribution plan agreed to by the parties and approved by the court. The settlement administrator can handle almost any aspect of a notification and distribution plan, including the drafting of notices, sending e-mail and mail notices, delivering CAFA notices to regulators, creating a settlement website and toll free number for class member questions, handling the submission of claim forms and opt-out requests, and distributing settlement payments. Many settlement administrators also have notice experts that will help create the notice plan, draft the notice language, and provide the parties with an expert opinion opining that the notice satisfies Rule 23 and Constitutional due process standards. There are multiple companies that provide these services. It is advisable to receive quotes from at least three settlement administrators before choosing one to ensure that your client is receiving the best possible price.

damages to the class members would provide no meaningful relief, the best solution may be what is called (with some imprecision) a 'cy pres' decree.").

²³⁶ See, e.g., *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 481 (5th Cir. 2011) ("Whatever the superficial appeal of cy pres in the class action context may have been, the reality of the practice has undermined it. It is time for courts to rethink the justifications of the practice."); *In re Pet Food Products Liab. Litig.*, 629 F.3d 333, 359 (3d Cir. 2010) (Weis, J., concurring in part and dissenting in part) ("Moreover, I am not persuaded that application of the cy pres doctrine is appropriate in the class action setting. I would hold that any funds remaining at the conclusion of the claims process should be distributed to class members where possible or should be escheated to the government.").

²³⁷ See *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679 (8th Cir. 2002) (directing the district court to tailor its cy pres distribution more closely to the subject of the litigation).

²³⁸ See *Richardson v. L'Oreal USA, Inc.*, No. 13-508 (JDB), 2013 WL 5941486 (D.D.C. Nov. 6, 2013) (refusing to approve class action settlement that provided for injunctive relief only, but the release prevented class members from bringing any damage claims on a classwide basis).

6. Attorney's Fees and Class Representative Incentive Payments

Plaintiffs' lawyers generally will not negotiate the attorney's fee awards until after the compensation for the class is negotiated and agreed to.²³⁹ Once the parties do start negotiating attorney's fees, there are many different ways to address them, such as having the fees come out of a common fund or having the defendant pay the fees in addition to the amount provided for by the common fund.²⁴⁰ It is important to remember that the parties cannot simply agree to an attorney's fee amount; the court must approve the attorney's fees as part of its Rule 23(e) approval of the settlement.²⁴¹ Therefore, the settlement agreement usually says that the defendant will not object to an order requiring a payment of attorney's fees up to a certain amount (when the fees are paid separately from the fund) or to the plaintiffs seeking a certain percentage or amount of the common fund in attorney's fees.²⁴² It is also advisable to provide for a term in the settlement agreement saying that plaintiffs do not have the right to void the settlement if they are not awarded the amount of fees requested. While defendants in reality do not care about the division of funds between the class and plaintiffs' counsel,²⁴³ defendants' counsel must not let this apathy lead to a settlement where the attorney's fees that plaintiff will seek are unreasonable compared to the compensation to the class. That kind of situation is likely to lead to objectors and potential disapproval by the court.

Plaintiffs often seek "incentive" payments for class representatives. In consumer class actions, these usually total anywhere from \$500 to \$7,500 and are meant to compensate the named plaintiffs for the extra time and effort that they have put towards the case.²⁴⁴ Like attorney's fee payments, they require court approval.²⁴⁵ Incentive award payments have recently come under greater scrutiny, with two federal appellate courts reversing class settlement approvals because, among other reasons, the large incentive payments in the cases called into question the named plaintiff's ability to represent the class.²⁴⁶ Indeed, the Sixth Circuit said that

²³⁹ See, e.g., *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 334-35 (3d Cir. 1998) (discussing the issues of whether "settling parties improperly entered into negotiations on counsel fees before concluding settlement negotiations"). Sonnenschein, Nath & Rosenthal LLP (now Dentons US LLP) represented Prudential Insurance Company of America in *In re Prudential*.

²⁴⁰ See *Staton v. Boeing Co.*, 327 F.3d 938, 972 (9th Cir. 2003) ("[T]he parties may negotiate and agree to the value of a common fund (which will ordinarily include an amount representing an estimated hypothetical award of statutory fees) and provide that, subsequently, class counsel will apply to the court for an award from the fund, using common fund fee principles.").

²⁴¹ See, e.g., *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 597 (N.D. Ill. 2011) ("In determining whether this sought-after amount is reasonable, the Court 'must balance the competing goals of fairly compensating attorneys for their services rendered on behalf of the class and of protecting the interests of the class members in the fund.'").

²⁴² It is beyond the scope of this article to discuss the various rules for the law on how courts calculate whether the amount of fees requested is reasonable, but for a good overview see NEWBERG, *supra* note 143, at §§ 11:41, 14.1-14.13.

²⁴³ See *Eubank v. Pella Corp.*, No. 13-2091, 2014 WL 2444388 (7th Cir. June 2, 2014) (Posner, J.).

²⁴⁴ See *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) ("Such [incentive] awards are discretionary and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.").

²⁴⁵ *Staton*, 327 F.3d at 975-78.

²⁴⁶ *In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir. 2013); *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1161 (9th Cir. 2013).

“to the extent incentive awards are common, they are like dandelions on an unmowed lawn—present more by inattention than design.”²⁴⁷ Thus, defendants’ counsel during settlement negotiations should ensure that incentive payments are kept as low as possible to avoid increased scrutiny over a part of the settlement that has little effect on the defendants’ bottom line.

B. Approval Process

1. General Procedure and Standards

If the parties agree to a class-wide settlement, it must be approved by the court because Federal Rule of Civil Procedure 23(e) prohibits the voluntary dismissal, settlement, or compromise without court approval, and the court may approve the proposed settlement “only after a hearing and on finding that it is fair, reasonable, and adequate.”²⁴⁸ After reaching a settlement, the first step is for the plaintiff to file an unopposed motion for preliminary approval with the court. At that time, the court will grant the motion if the settlement meets the low-threshold requirements of being a product of arm’s length negotiations, is within the range of possible settlements that could be approved, and proposes an acceptable notice plan.²⁴⁹ As part of the preliminary approval, the court will order that the parties provide class members with notice of the settlement, their ability to object or opt-out, and set a date for a final approval hearing.

Rule 23(e)(1) says that the court “must direct notice in a reasonable manner to all class members who would be bound by the proposal.” However, if the class settlement will include payments of money to class members and there is no class currently certified, the notice must also meet the requirements of Federal Rule of Civil Procedure Rule 23(c)(2)(B), which says that “for classes certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” The specific requirements for notice are discussed above.

Following notice and the opportunity for class members to object or opt-out, the court will hold a fairness hearing where the court asks questions of counsel, may ask for the parties to submit additional evidence, and give objectors the opportunity to speak. Following that hearing, the court will issue an order finally approving or disapproving of the settlement. For a settlement to pass muster, the court must find that there was procedural and substantive fairness, measured by:²⁵⁰

- Whether the settlement resulted from arm’s length negotiations;

²⁴⁷ *In re Dry Max*, 724 F.3d at 722.

²⁴⁸ Fed. R. Civ. P. 23(e).

²⁴⁹ *Cohen v. J.P. Morgan Chase & Co.*, 262 F.R.D. 153,157 (E.D.N.Y. 2009); *Bourlas v. Davis Law Assocs.*, 237 F.R.D. 345, 354 (E.D.N.Y. 2006).

²⁵⁰ *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974); *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012); see also MANUAL FOR COMPLEX LITIGATION, Fourth, § 13.14.

- The skill of Plaintiff’s counsel;
- The stage of proceedings and amount of discovery conducted;
- Plaintiffs’ risks in establishing liability and damages;
- Defendant’s financial condition;
- The class’s reaction to the proposed settlement;
- Future expense and likely duration of litigation; and
- The recommendation of a neutral party, or mediator, if any.²⁵¹

2. CAFA

Within 10 days of filing a proposed settlement with the court, CAFA requires each defendant²⁵² to notify the Attorney General of the United States²⁵³ and the “appropriate State Official”²⁵⁴ of each state where a class member resides of the proposed settlement.²⁵⁵ As a practical matter, serving the U.S. Attorney General and state attorney general in each state where a class member resides will satisfy CAFA.²⁵⁶ CAFA contains a list of the documents that must accompany the notice²⁵⁷ and requires that final approval of a settlement cannot occur until

²⁵¹ Use of a well-respected mediator, magistrate judge, or retired judge to facilitate settlement is advisable. See *D’Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (noting that the involvement of well-respected mediator helped “ensure that the proceedings were free of collusion and undue pressure”); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (A “presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm’s-length negotiations between experienced, capable counsel after meaningful discovery.”) (quoting MANUAL FOR COMPLEX LITIG. (Third), § 30.42 (1995)); see also *In re PaineWebber Ltd., P’ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997), *aff’d*, 117 F.3d 721 (2d Cir. 1997).

²⁵² See Moore, *supra* note 104, at § 23.162A (explaining that defendants cannot send one consolidated notice).

²⁵³ The proper federal official for banks is actually different, a distinction that is not relevant for franchisors. See 28 U.S.C. § 1715(a)(1)(A)-(B).

²⁵⁴ “[A]ppropriate State Official means the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person. If there is no primary regulator, supervisor, or licensing authority, or the matters alleged in the class action are not subject to regulation or supervision by that person, then the appropriate State official shall be the State attorney general.” *Id.* § 1715(a)(2).

²⁵⁵ *Id.* § 1715(a)-(b).

²⁵⁶ See *id.* § 1715(e)(2).

²⁵⁷ The notice must contain the following information: 1) A copy of the complaint, materials attached to the complaint, and amended complaints. But if the materials are electronically available, it is sufficient to explain how to access them electronically; 2) notice of any scheduled judicial hearings; 3) any proposed or final notices to the class; 4) any proposed or final class settlements; 5) any settlement or other agreement contemporaneously made by class counsel and defense counsel; 6) any final judgment or notice of dismissal; 7) if feasible, the names of each class member and the estimated proportional share of the claims to the state’s class members to the entire settlement; if this is not feasible, a reasonable estimate of the class members per state and those class members share compared to the entire settlement; and 8) any opinions by the court addressing 3-6. *Id.* § 1715(b)(1)-(8).

90 days after the federal and state officials are served with the CAFA notice.²⁵⁸ The penalty for failing to provide CAFA notice is that class members can choose to not be bound by a class settlement.²⁵⁹ This provision's purpose is to give state and federal regulators an opportunity to review class settlements and object if they regard the settlement as unfair.²⁶⁰ An objection by a state or federal regulator to a proposed class settlement carries considerable weight with courts and may torpedo a proposed settlement.²⁶¹

C. Issues Arising in Settlement

1. Objectors

Class members have standing to object to the settlement,²⁶² and it is highly likely that at least a few individual class members will object. These kinds of individual objectors are generally not a concern.²⁶³ Of more concern are professional objectors, who are a group of lawyers that partner with a class member and file objections for no purpose other than to "extract" money from class counsel or the parties in exchange for dropping the objection.²⁶⁴ There are a number of strategies for limiting the effectiveness of professional objectors. While obvious, the parties must take steps to ensure that there are no obvious flaws in the settlement, such as the appearance of collusion in the negotiation process, a defective notice program, or having some kind of asymmetry in the settlement (like the plaintiffs' lawyers, named plaintiffs, or a cy pres recipient receiving a large amount of money in comparison to the class.)²⁶⁵

There are other methods of preventing professional objections. One method is including a quick-pay provision in the settlement agreement, which is a provision saying that class counsel will be paid as soon as a settlement is approved, subject to refund later if the settlement is later overturned on appeal.²⁶⁶ If a quick-pay provision is included, it is advisable to have a confidential side letter with class counsel requiring them to keep the attorney's fees in their

²⁵⁸ *Id.* § 1715(d).

²⁵⁹ *Id.* § 1715(e).

²⁶⁰ See NEWBERG, *supra* note 143, at § 6:13; Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. PA. L. REV. 1971 (2008).

²⁶¹ See *Wilson v. DirectBuy, Inc.*, No. 3:09-cv-590 (JCH), 2011 WL 2050537 (D. Conn. May 16, 2011); *Figuroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292 (S.D. Fla. 2007). John Doroghazi and Wiggin and Dana represented DirectBuy in the *Wilson* case.

²⁶² See, e.g., *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir.1989) (citations omitted) ("The plain language of Rule 23(e) clearly contemplates allowing only class members to object to settlement proposals.").

²⁶³ Except if the objector happens to be the Chief Judge of the Ninth Circuit. See Alison Frankel, *Lawyers' Nightmare: When 9th Circuit Chief Judge Kozinski is class objector*, <http://blogs.reuters.com/alison-frankel/2013/11/20/lawyers-nightmare-when-9th-circuit-chief-judge-kozinski-is-class-objector/>.

²⁶⁴ Bruce Greenberg, *Keeping the Flies Out of the Ointment: Restricting Objectors to Class Action Settlements*, 84 ST. JOHN'S L. REV. 949, 950 (2010).

²⁶⁵ The Center for Class Action Fairness is a non-profit group that routinely objects to settlements having these kinds of features. <http://centerforclassactionfairness.blogspot.com/>; see also *In re: Dry Max*, 724 F.3d at 722; *Radcliffe*, 715 F.3d at 1161; *In re: Baby Prods. Litig.*, 708 F.3d 163 (3d Cir. 2013).

²⁶⁶ John Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What to Do About Them*, 39 FLA. ST. UNIV. L. REV., 865, 903 (2012).

escrow account until all objections are resolved. Other methods of dealing with objectors include (1) asking the court to require objectors to include information about previous objections to class action settlements that they or their counsel have filed with their objection; (2) deposing any professional objectors; (3) opposing any request for attorney's fees by the objector; and (4) asking the court to require an objector who plans on appealing the final approval order to first post an appellate bond.

2. Competing Interests of Franchisors and Franchisees

During settlement, and indeed throughout the case, the interests of the franchisor and franchisees may not always align. For example, one unique problem for franchisors is whether to seek contribution from related entities in the franchise system to contribute towards the settlement fund.²⁶⁷ On the one hand, the retail locations in a franchise system are owned and operated by franchisees, who could have also made representations to the class members that are the subject of the class action. That being said, seeking contribution is likely to cause strife within the franchise system for a number of reasons. Franchisees may resent being forced to contribute to a settlement where they were following a franchisor's general marketing practices. This could impair the long-term working relationship between the franchisor and franchisees.²⁶⁸ In fact, franchisees could conceivably claim, depending on the terms of the franchise agreement, the franchisor is breaching the franchise agreement by seeking contribution. That dispute could, in turn, lead to a franchisee class action about the attempt to force a contribution (unless of course there is an arbitration clause banning class actions in the franchise agreement).²⁶⁹ Thus, a franchisor should carefully consider the ramifications of seeking contribution from franchisees.

A similar problem exists for franchisors who want to make use of coupons in a class settlement because, most of the time, the coupons themselves will be redeemed at a franchise location.²⁷⁰ Thus, absent reimbursement by the franchisor, the franchisee will bear the costs of the coupon, raising the same kind of issues as seeking contribution does. Conversely, if the franchisor does agree to reimburse the franchisees for the value of the coupons spent at that location, objectors may take the position that if the franchisor is willing to pay its franchisees money, it should be willing to include those funds as cash in a class settlement for the benefit of class members. Thus, a hybrid coupon settlement will be difficult for a franchisor to pursue.²⁷¹

Finally, franchisees and franchisors may have competing interests if the plaintiff seeks injunctive relief. For example, a plaintiff may want a franchise system to stop selling a specific product as part of the settlement. If the franchisor does not believe that it will significantly impact gross sales in the system, or that it would impact gross sales less than another product, it is likely to agree to such a provision. On the other hand, if the product is one that has a high profit margin, franchisees may view limitations on the sale of that product very differently. Again, this

²⁶⁷ Doroghazi, *supra* note 1, at 192.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

creates another situation where the franchisor has to walk the tightrope of advancing its own interests in a way that will not have serious, negative impacts on the franchise system.

VI. CONCLUSION

As the above discussion makes clear, class actions are often high-stakes cases. When litigating these cases, each action that the franchisor and their counsel takes should be targeted towards one of three goals: 1) defeating class certification; 2) having the claims dismissed on the merits; or 3) setting up the least expensive, but still approvable, settlement possible. The topics covered in this article, while not exhaustive on any one topic, should provide franchisors with an overview of the various tools at their disposal to successfully defend against a consumer class action.

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