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Basic Strategic Considerations in Defending Consumer Class Actions Against Franchisors

John Doroghazi and Armel Jacobs

Most consumer transactions are for small amounts of money.¹ Consumers who believe they have been deceived or defrauded during these transactions have little recourse because, as Judge Richard Posner once wrote, “only a lunatic or a fanatic sues for \$30.”² And even if a consumer is a lunatic or a fanatic, he will likely be on his own in court: there are certainly few lawyers interested in taking those cases on contingency, and even a crazy person will rarely be willing to pay by the hour to recover what, in most cases, is no more than a few hundred dollars.

The class action procedural rules provide consumers with a plausible means of obtaining relief. These rules allow similarly situated individuals to aggregate their claims so that the potential damages are large enough to interest competent plaintiffs’ lawyers in taking the case on contingency.³ The financial incentive is often strong enough to trump the disadvantages of class actions for plaintiffs, such as the additional responsibility of protecting the class’s interests, the potential for prolonged litigation and delay in receiving relief, discovery into whether the class representative and the class counsel can adequately represent the class, and increased litigation expenses if the case is unsuccessful.⁴



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1. A recent study by the Federal Reserve found that the average value of debit card transactions is around \$37. FED. RESERVE SYSTEM, THE 2010 FEDERAL RESERVE PAYMENTS STUDY: NONCASH PAYMENT TRENDS IN THE UNITED STATES: 2006–2009, at 16 (2010), www.frb.services.org/files/communications/pdf/press/2010_payments_study.pdf.

2. *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.).

3. See 1 HERBERT NEWBERG ET AL., *NEWBERG ON CLASS ACTIONS* § 1:7 (5th ed.) (noting that “[t]he class action device is often the sole means by which individuals may receive compensation”).

4. See John Dienelt & Margaret Middleton, *Settling Franchise Class Action*, 21 *FRANCHISE L.J.* 112 (2002).

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A class action can be the litigation equivalent of a weapon of mass destruction. In many instances, consumer classes potentially will include hundreds of thousands, or millions, of people. This places vast sums of money at issue, especially because many state consumer protection statutes allow for treble damages, punitive damages, statutory minimum damages, and/or injunctive relief.⁵ For example, if a class has one million potential members who each has an average claim of \$25 against the franchisor and the relevant consumer protection statute allows for treble damages and attorney fees, the franchisor's potential exposure is more than \$75 million, along with defense costs, diversion of management focus and energy from the business, and possible reputational injury. Therefore, if a class is certified, the litigation may become a "bet the system case."⁶ And even for class actions that are not "bet the system cases," they are still costly to defend in the age of electronic discovery. Unlike a typical franchisor-franchisee dispute where discovery is often limited to documents relating to a specific franchise, plaintiffs in a consumer class action are challenging a business practice. This generally entitles them to broad discovery about that business practice, which can result in a defendant having to produce millions of pages of documents at great expense while plaintiffs have to produce few, if any, documents in return.⁷ For these reasons, courts have recognized that class actions can lead to "in terrorem" settlements" because of the "substantial pressure" on defendants "to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."⁸

5. Several states expressly authorize awards for punitive damages. See CAL. CIV. CODE § 1780; CONN. GEN. STAT. § 42-110g; D.C. CODE § 28-3905(k)(1)(c). About half of states authorize treble or other multiple damages awards. See, e.g., DEL. CODE ANN. tit. 6, § 2531-2536; MASS. GEN. LAWS ANN. ch. 93A, §§ 1-11; MO. REV. STAT. § 407.025; OHIO REV. CODE ANN. §§ 1345.13. Similarly, about half of states allow private plaintiffs to obtain minimum damages awards. See, e.g., HAW. REV. STAT. § 480-24 (\$1,000 minimum); N.Y. GEN. BUS. LAW §§ 349-350 (\$50 minimum). For a state-by-state list of available private remedies in state consumer protection statutes, see CAROLYN CARTER ET AL., UNFAIR AND DECEPTIVE ACTS AND PRACTICES app. A (Nat'l Consumer Law Ctr. 8th ed. 2012).

6. See Dienelt & Middleton, *supra* note 4, at 152 (recognizing that class actions place large amounts of money and potential changes to the franchise system at risk).

7. See *Boeynaems v. LA Fitness Int'l, LLC*, 285 F.R.D. 331, 333 (E.D. Pa. 2012) (noting that asymmetrical discovery in putative class actions "dramatically increases the economic pressure on the defendant"). Although recently there has been increased discussion of cost shifting in e-discovery, the general trend remains toward broad, burdensome discovery obligations on class action defendants. See Damian Santomauro & Melissa DeHoney, *E-Discovery in the Class-Action Context: Making the Case for Cost-Shifting*, 211:13 N.J. L.J. (Apr. 1, 2013) (discussing how the "inherent litigation cost differential, which is largely unique to putative class actions, can lead to an undeniably unjust result: cases being settled based on cost pressure, rather than relative merits.").

8. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1200 (2013) (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011)); see also *FED. R. CIV. P. 23 Advisory Committee's 1998 Note on subd. (f)*; *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677-78 (7th Cir. 2009) (Posner, J.) ("When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than bet the company, even if the betting odds are good. For by aggregating a large number of claims, a class action can impose a huge contingent liability on a defendant.").

Plaintiffs are likely to view franchisors as good targets for consumer class actions for three reasons.⁹ First, class actions rise and fall on whether there is common proof. 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. It is the franchisor that sets these standards; when something goes wrong, plaintiffs will seek to hold the franchisor accountable, arguing that the franchise structure necessarily guarantees that common proof exists. Second, successful franchisors—those with hundreds or thousands of franchisees—may be viewed as deep pockets that can afford to pay a multimillion-dollar class settlement or judgment.¹⁰ Finally, many businesses manage the risk of class claims by including in their consumer contracts arbitration clauses that explicitly ban class arbitration.¹¹ However, in many franchise systems, e.g., the quick-service restaurant industry, the business model may not offer an opportunity to use a consumer contract with an arbitration clause. This leaves certain franchisors vulnerable to consumer class claims.

This article discusses three of the core strategic decisions that a franchisor must make when defending a consumer class action. First, the article discusses the pros and cons of removal to federal court if a class action is filed in state court and the special removal statute that governs class actions. It also explores the advantages and disadvantages of consolidating into one district multiple consumer class actions filed against a franchisor in different federal courts and the procedures for doing so. Second, the article discusses some of the most effective arguments against class certification, including

9. For some recent examples of consumer class actions against franchisors, see *In re Subway Footlong Sandwich Marketing & Sales Practices Litigation*, 2013 WL 2563889 (J.P.M.L. June 10, 2013); *Agne v. Papa John's International, Inc.*, 286 F.R.D. 559 (W.D. Wash. 2012); *Thomas v. Taco Bell Corporation*, 879 F. Supp. 2d 1079 (C.D. Cal. 2012); *In re Kentucky Grilled Chicken Coupon Mktg. & Sales Practices Litigation*, 280 F.R.D. 364 (N.D. Ill. 2011); *In re Jiffy Lube International, Inc., Text Spam Litigation*, 802 F. Supp. 2d 1367 (J.P.M.L. 2011); *Wilson v. DirectBuy, Inc.*, 821 F. Supp. 2d 510 (D. Conn. 2011); and *Marshall v. H&R Block Tax Services, Inc.*, 270 F.R.D. 400 (S.D. Ill. 2010). Wiggin and Dana is defendants' counsel in the *In re Subway* litigation and was the defendants' counsel in the *Wilson* litigation.

10. Plaintiffs have the added benefit of being able to review a franchisor's finances in the publicly available Franchise Disclosure Document required by the Federal Trade Commission. See 16 C.F.R. § 436.5(u) (requiring disclosure of franchisor's financial statements).

11. The Supreme Court has held that class arbitration is not authorized unless "there is a contractual basis for concluding that the party agreed to do so." See *Stolt-Nielson S.A. v. Animal-Feeds Int'l Corp.*, 130 S. Ct. 1758, 1175 (2010). Moreover, the Supreme Court has made it clear that it will aggressively enforce arbitration agreements. See *Concepcion*, 131 S. Ct. at 1752; see also Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005) (discussing the use of contractual waivers of class actions in a variety of contexts).

This concept is a familiar one in the world of franchising because many franchisors include arbitration clauses in their franchise agreements to eliminate the possibility of franchisee class actions either in court or in arbitration. See Edward Wood Dunham, *The Arbitration Clause as a Class Action Shield*, 16 FRANCHISE L.J. 141 (1997). For a recent example of a court compelling individual arbitration of a franchisee's claims against a franchisor and finding that the class arbitration waiver in the same agreement was enforceable, see *Green v. SuperShuttle International, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011).

how the characteristics of a franchise system may actually strengthen these arguments in some circumstances. Finally, it provides an overview of the mechanics of a class settlement in federal court and highlights two strategy decisions that a franchisor must make when settling any consumer class action.

I. Pros and Cons of Removal to Federal Court

When one class action is filed, it is often followed shortly thereafter by copycat class lawsuits filed in other state and federal courts throughout the country.¹² These cases frequently challenge the same business practices as the first lawsuit but differ in some small way, such as varying the facts alleged, the definition of the proposed class, and/or the causes of actions asserted. The first decision for a franchisor sued in a state court putative class action is whether to remove the case to federal court. Once the case is removed, or if it was filed in federal court, and if there are multiple lawsuits pending in more than one federal district court, the franchisor must then decide whether to seek consolidation of all the cases before one federal judge.

A. Class Action Fairness Act of 2005

Before Congress passed the Class Action Fairness Act of 2005 (CAFA),¹³ removing a putative class action to federal court was difficult. A defendant had to show that the named plaintiff's individual claim exceeded the amount-in-controversy requirement for diversity jurisdiction.¹⁴ Some courts even held that the defendant and all potential class members had to satisfy the diversity requirements.¹⁵ That often left defendants, who were exposed to millions of dollars of potential liability, trapped in "judicial hellholes" like Madison County, Illinois; Jefferson County, Texas; and Palm Beach County, Florida.¹⁶

Congress, reacting to this and other perceived flaws of class actions, passed CAFA in 2005. Among other things, CAFA drastically altered the removal standards for putative class actions.¹⁷ Under CAFA, a defendant can

12. See, e.g., *In re: Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 2013 WL 2563889 (J.P.M.L. June 10, 2013) (centralizing seven cases filed in five different districts against franchisor regarding its marketing practices); *In re: Jiffy Lube Int'l, Inc., Text Spam Litig.*, 802 F. Supp. 2d 1367 (J.P.M.L. 2011) (centralizing seven cases filed in three different district courts against franchisor and franchisee regarding improper text message communications).

13. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.).

14. See generally *Kessler v. Nat'l Enters.*, 347 F.3d 1076, 1078 (8th Cir. 2003) (pre-CAFA case holding that claims of class members cannot be aggregated).

15. *Chapman Funeral Home, Inc. v. Nat'l Linen Serv.*, 178 F. Supp. 2d 1247 (M.D. Ala. 2002) (pre-CAFA case discussing circuit split on issue of whether jurisdiction over one class member allowed supplemental jurisdiction over all remaining class members).

16. See Robert Langer, *Class Action Fairness Act of 2005*, CONN. LAW. (Apr. 2005), reprinted in 41 ARK. L. 18 (2006).

17. 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 given the Senate Judiciary Committee's report on CAFA little weight because it was issued

remove a putative class action if the class's claims, in the aggregate, exceed \$5 million and at least one class member is a citizen of a different state from any defendant.¹⁸ Moreover, unlike traditional diversity jurisdiction, CAFA allows the removal of class actions by a defendant even if it is a citizen of the state where the state court action was filed.¹⁹ Although CAFA does not alter the usual thirty-day deadline for removal, for class actions it eliminated the rule that removal must, in all circumstances, occur within one year of initial filing.²⁰ Finally, unlike in normal diversity jurisdiction cases, CAFA created a mechanism for courts of appeal to review orders remanding class actions.²¹

CAFA, however, contains two mandatory exceptions to federal diversity jurisdiction: 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 each of these requirements is 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 "from whom significant relief is sought," "whose alleged conduct forms a significant basis of the claims asserted," and who is a citizen of the state where the action was originally filed; (3) the plaintiff class was injured in the state where 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.²² The 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.²³ CAFA also contains a provision allowing a district court, in its discretion after balancing six statutory factors, to decline jurisdiction where more than one-third, but less than two-thirds, of the proposed class is from the same state as the "primary defendants."²⁴

Although federal courts are still determining exactly what "significant relief" and "significant basis" mean under the local controversy exception, in consumer class actions against a franchisor attacking a franchise system-wide marketing practice, a franchisor is undoubtedly a defendant from whom significant relief is sought and whose conduct forms a significant basis of the plaintiffs' claims.²⁵ Similarly, a franchisor is virtually certain to satisfy the definition

after CAFA became law. See *West Virginia ex rel. McGraw v. CVS Pharm., Inc.*, 646 F.3d 169, 177 (4th Cir. 2011).

18. 28 U.S.C. § 1332(d)(2)(A), (6).

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

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

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

22. 28 U.S.C. § 1332(d)(4)(A)(i)–(ii).

23. 28 U.S.C. § 1332(d)(4)(B).

24. 28 U.S.C. § 1332(d)(3).

25. Courts have taken similar approaches to defining these terms, resulting in many tests that Newberg describes as "mildly divergent." 2 NEWBERG, *supra* note 3, § 6:20. In defining *significant relief*, the Tenth Circuit, for example, has found significant relief where "the local defendant's

of primary defendants²⁶ under the home state exception.²⁷ Thus, a franchisor can remove any consumer class action meeting CAFA's amount-in-controversy requirement filed against it, except for cases filed in the state(s) where a franchisor is a citizen, i.e., where it is incorporated and has its principal place of business,²⁸ and where the proposed class only includes consumers who are citizens of that state.²⁹

conduct [is] significant when compared to the alleged conduct of the other defendants and . . . 'the relief sought against that defendant is a significant portion of the entire relief sought by the class.'" Coffey v. Freeport McMoran Copper & Gold, 581 F.3d 1240, 1244 (10th Cir. 2009) (quoting Evans v. Walter Indus., Inc., 449 F.3d 1159, 1167 (11th Cir. 2006)). Other courts draw from a Senate Report on CAFA in defining the term, holding that the relief is insignificant if, relative to other defendants, only a "small change" in this defendant's behavior is sought. Coleman v. Estes Exp. Lines, Inc. 631 F.3d 1010, 1018 (9th Cir. 2011); see also Levine v. Entrust Group, Inc., No. C 12-03959 WHA, 2013 WL 1120695, at *2-3 (N.D. Cal. Mar. 18, 2013) (finding that franchisor was undoubtedly a defendant whose alleged conduct "forms a significant basis of plaintiffs' claims" and from which "significant relief" was sought in consumer fraud class action). Similarly, the term "significant basis" has had several interpretations. The majority of courts employ a comparative test that assesses the relative roles of co-defendants. For example, the Third Circuit test considers whether "the local defendant's alleged conduct is a significant part of the alleged conduct of all the Defendants." Kaufman v. Allstate N.J. Ins. Co., 561 F. 3d 144, 156 (3d Cir. 2009); see also Mattera v. Clear Channel Commc'ns, Inc., 239 F.R.D. 70, 80 (S.D.N.Y. 2006) (finding a significant basis where "a significant portion of the relief" sought by plaintiff "must be provided by [defendant]").

26. "Primary defendant" within the meaning of the home state exception has also had slightly varying interpretations among federal courts. See Brook v. UnitedHealth Grp. Inc., 06 CV 12954 (GBD), 2007 WL 2827808 (S.D.N.Y. Sept. 27, 2007) (collecting cases). Although some courts have held that a defendant is "primary" where it is "liable to the vast majority of class members," Kendrick v. Standard Fire Ins. Co., CIV.A.06 141 DLB, 2007 WL 1035018, at *5 (E.D. Ky. Mar. 31, 2007), other courts have focused on which of the defendants is "most able to bear liability if the plaintiffs prevail." In Matter of Ingram Barge Co., CIV.A. 05-4419, 2007 WL 148647, at *2 (E.D. La. Jan. 10, 2007).

27. See Moua v. Jani-King of Minn., Inc., No. 08-4942, 2009 U.S. Dist. LEXIS 6238, at *8-13 (D. Minn. Jan. 27, 2009) (determining that 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 its dealerships were considered primary defendants in class action alleging consumers were deceived about preowned certified car program).

28. A franchisor is a citizen of the state where it is incorporated and where it has its principal place of business. See 28 U.S.C. § 1332(c)(1); see also Hertz Corp. v. Friend, 130 S. Ct. 1181, 1192 (2010) (interpreting *principle place of business* to mean corporation's "nerve center" from where corporation is directed and controlled and recognizing that this is usually corporation's headquarters).

29. Satisfying this requirement may be difficult because many courts will not accept domicile as per se proof of citizenship. See, e.g., Wiggins v. Daymar Colls. Group, LLC, No. 5:11-cv-36-R, 2012 WL 884907 (W.D. Ky. Mar. 14, 2012) (containing detailed discussion of this topic). In states where a franchisor is not a citizen, plaintiffs also can try to avoid CAFA jurisdiction by naming only a local franchisee as a defendant. This approach, however, is not likely to be used often because it requires narrowly defining the class to customers of a particular franchisee, which limits the potential damages, and most franchisees are not likely to be an attractive target because they may not have the resources (or insurance coverage) necessary to satisfy any kind of class judgment. For an example of a plaintiff successfully defeating CAFA jurisdiction using this tactic, see *Randall v. Evamor*, No. 4:09-cv-1756 ERW, 2010 WL 1727977 (E.D. Mo. Apr. 29, 2010). Wiggin and Dana was the defendant's counsel in that case.

B. Removal to Federal Court: Factors to Consider

Because removal is now a viable option in most circumstances, the first decision that a franchisor sued in a state court must make is whether to remove the case to federal court. This decision requires analyzing a number of factors.

First, state and federal courts have, in some circumstances, different standards, or different interpretations of the same standards, for class certification.³⁰ Determining which forum has the better law on class certification is especially important because class actions are usually won or lost at certification: either the named plaintiff is left with a claim worth no more than a few hundred dollars, or the defendant is faced with the possibility of a class judgment and virtually always enters into a class-wide settlement.³¹ Although there is a perception that state courts certify classes more often than federal courts, there is some evidence that this may not be true.³² Instead of relying on knee-jerk perceptions, franchisors should review the applicable class certification case law and standards that will apply in the federal and state courts to decide which is more favorable.

A few states have strict limits or outright bans on the ability to bring class actions under their consumer protection statutes.³³ However, the U.S. Supreme Court's 2010 decision in *Shady Grove Orthopedic Associates v. Allstate Insurance Company*³⁴ has muddied the waters on 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

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

31. A recent study found that less than 1 percent of cases with a certified class went to a verdict. See ADMIN. OFFICE OF THE CAL. COURTS, CLASS CERTIFICATION IN CALIFORNIA: SECOND INTERIM REPORT FROM THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION 23 (2010), www.courts.ca.gov/documents/classaction-certification.pdf.

32. 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), 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); ADMIN. OFFICE OF THE CAL. COURTS, *supra* note 31, at A2 (noting that from 2000 to 2005, 44 percent of motions for certification were granted).

33. Some examples include: ALA. CODE § 8-19-10(f) (2013) (prohibiting class actions under the Alabama Deceptive Trade Practices Act); CONN. GEN. STAT. § 42-110g(b) (2013) (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) (2013) (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) (2013) (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).

34. 130 S. Ct. 1431 (2010).

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.³⁵ However, because five Justices did not agree on a rationale, lower courts have struggled to determine whether a particular state law banning class actions is procedural and therefore trumped by Rule 23 or if it is substantive and must be enforced.³⁶ Thus, if a franchisor happens to have a case filed against it in a state that limits or bans class actions, staying in state court may be the safer choice.

Aside from differences in class certification law, federal and state courts often have different procedures regarding the management of discovery and assignment of cases, varying standards regarding the acceptance of coupon settlements,³⁷ different jury pool makeup, and varying propensities to grant summary judgment.³⁸ It is beyond the scope of this article to review how each potential variation affects forum choice, but some themes stand out.

Franchisors should compare the federal and state court benches to determine where they are most likely to get the best judicial assignment. Many state courts do not assign a single judge to a case. Instead, judges are assigned to particular motions.³⁹ This creates a risk of having a class certification motion decided by a judge who is ill-equipped to do so because of lack of time, resources, skill, or ideological bent. In federal court, where a single judge is assigned to the case, there is the flip-side risk of having the entire case assigned to a judge who may not be a favorable draw for those same reasons.

35. *Id.* at 1443.

36. 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 Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, No. 1:08-WP-65000, 2010 U.S. Dist. LEXIS 69254, at *6–8 (N.D. Ohio July 12, 2010) (applying Justice Stevens’s case-by-case rationale); *Bearden v. Honeywell Int’l, Inc.*, No. 3:09-cv-1035, 2010 U.S. Dist. LEXIS 83996, at *29 (M.D. Tenn. Aug. 16, 2010) (finding Justice Stevens’s concurrence controlled).

37. For example, Texas has a statute that precludes recovery of attorney fees in coupon settlements. See *Kazman v. Frontier Oil Corp.*, 398 S.W.3d 377 (Tex. App. 2013). At least one Massachusetts court has followed the federal courts in applying a heightened level of scrutiny to coupon settlements. *In re Mass. 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. Avanir Pharms.*, No. A114812, 2007 WL 772889 (Cal. Ct. App. Mar. 15, 2007).

38. See Thomas Mayhew, *Choosing Federal or State Court in Consumer Class Actions*, 16:3 ASS’N BUS. TRIAL LAWS. N. CAL. REP. (2007) (discussing each of these topics in detail under California law).

39. Several state trial courts rotate judges throughout different districts to guard against favoritism and bias. This is a local practice in Connecticut as well as several other states. See CONN. GEN. STAT. § 51-164t and implementation discussed at www.jud.ct.gov/external/media/faq.htm; see also, e.g., N.C. CONST. art. IV, § 11; VT. SUPERIOR COURT, SUPERIOR JUDGE ROTATION SCHEDULE, available at www.vermontjudiciary.org/JC/JudicialAssignments.aspx (last visited Sept. 3, 2013).

Thus, determining which bench has the better overall roster is key. This is especially important because, as a practical matter, judges are often swayed by the merits underlying the case when deciding class certification.⁴⁰

Next, because of the cost of discovery in class actions, defendants generally prefer courts where discovery is slow to begin or where it is likely that discovery will be stayed pending a decision on an early dispositive motion. Thus, all things being equal, a defendant should opt for the forum where the least amount of discovery will occur over the longest period of time.

Finally, if it appears that the case may settle early and will include a non-cash compensation to class members, a franchisor may prefer a state court to a federal court because CAFA is very hostile to certain kinds of non-cash settlements and requires settling defendants to notify state and federal regulators of any proposed settlement.⁴¹ A franchisor that is particularly sensitive to attention from state and federal regulators may want to remain in state court for this reason.

On the whole, however, the overall skill of the federal bench, the formality of the federal rules, the recent Supreme Court jurisprudence limiting class actions,⁴² the ability to get many lawsuits from different districts before one judge, and the avoidance of “home cooking” are all reasons why in most circumstances federal court is the preferred venue for class actions.

C. *To Consolidate or Not to Consolidate: That Is the Question*

As mentioned before, there are often multiple, would-be class actions pending in different federal and state courts. Once all of the state 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. In fact, a defendant can, in some circumstances, seek transfer even if there is only one case.

1. Factors to Consider

Deciding whether to pursue transfer requires consideration of a number of factors.

First and foremost is deciding what judge/district is best. If, for example, a case is assigned to a judge with a history of consistently certifying cases or if the circuit has unfavorable precedent, then seeking transfer is the way to go. Conversely, if the judge assigned has a defendant-friendly reputation, the circuit has good class action precedent, and/or the potential transferee district has many pro-consumer judges, then seeking transfer is unwise. When there is only one class action pending, this is essentially the only consideration.

40. Stacey M. Lantagne, *A Matter of National Importance: The Persistent Inefficiency of Deceptive Advertising Class Actions*, 8 J. BUS. & TECH. L. 117, 130 (2013).

41. 28 U.S.C. § 1715(b).

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

If there are multiple class actions filed in different districts, however, this determination becomes more difficult. First, the franchisor must now weigh the potential advantage of not seeking to consolidate the cases. One such scenario would be that one of the cases is in a friendly district. In that case, the franchisor must weigh the benefits of being able to proceed with one of the cases before a friendly court against the significant increase in effort, cost, and administrative difficulties that litigating the other cases in different districts at the same time will cause. In that scenario, transfer only makes sense if the franchisor believes that it can get an early victory on a motion to dismiss, motion for summary judgment, or motion for class certification and then use that decision in the other cases throughout the country as persuasive authority. This is a risky strategy; if the case in the favorable forum does not get on (and stay on) a faster track than the other cases, much of the value of this approach is lost. There is also the risk of losing the early dispositive motion in the favorable forum, which will create negative precedent for plaintiffs to use in all of the other cases. This strategy also requires a franchisor to win on the same issue multiple times instead of just having to win once if all of the actions are before a single judge. This approach also will significantly increase defense costs due to duplication of efforts. Thus, in most circumstances, this approach is not advisable.

Second, the franchisor may decide that seeking transfer is not advantageous because some plaintiffs' counsel appear more open to settlement than others. Although this approach has the clear advantage of possibly allowing a class settlement to be reached sooner and on potentially more favorable terms, it also increases the risk of objections 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).⁴³

In short, it is not advisable in most circumstances to, by choice, leave multiple class actions pending in different districts.

2. Procedures for Consolidation

There are two 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 or a motion to transfer under 28 U.S.C. § 1407 made to the Judicial Panel on Multi-District Litigation (MDL Panel).

If the franchisor is seeking to transfer only one or two cases, it should file a motion under § 1404(a), which 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."

43. 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").

To obtain a § 1404(a) transfer, the franchisor must first show that the case could have been brought in the transferee district, i.e., any district where the franchisor is subject to personal jurisdiction⁴⁴ and venue would be proper.⁴⁵ Second, the court will then balance a number of factors to determine whether matters of convenience and the interests of justice favor the case proceeding in the proposed transferee district. Courts articulate these factors in various ways, but they almost always include 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.⁴⁶ For a plaintiff seeking to represent a multistate or national class, the plaintiff's choice of forum is given very little deference;⁴⁷ and the § 1404(a) inquiry will instead turn on where the majority of witnesses are located, where the locus of operative facts is, and whether a transfer will enhance judicial efficiency.⁴⁸ Absent unusual circumstances, the forum where the franchisor is headquartered is likely to be the only forum that a franchisor can claim is a proper transferee forum in a § 1404(a) motion because that is the forum where the locus of facts is likely to be and where most witnesses will be found.⁴⁹

If the franchisor is faced with more than three class actions, then a motion pursuant to 28 U.S.C. § 1407 for pretrial coordination and transfer made to the MDL Panel is the best procedural mechanism. The MDL Panel is a special panel of seven sitting federal judges appointed by the Chief Justice of the United States. No two judges may be from the same federal judicial circuit.⁵⁰

44. *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 a § 1404(a) transfer is proper even if defendant agrees to waive personal jurisdiction and venue defenses).

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

46. Courts in the Second Circuit consider nine factors in this analysis: (1) the plaintiff's choice of forum; (2) the convenience of witnesses; (3) the location of relevant documents and relative ease of access to sources of proof; (4) the convenience of parties; (5) the locus of operative facts; (6) the availability of process to compel the attendance of unwilling witnesses; (7) the relative means of the parties; (8) the forum's familiarity with the governing law; and (9) trial efficiency and the interest of justice, based on the totality of the circumstances. *See D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 106–07 (2d Cir. 2006). Although expressed in slightly different ways, other courts consider essentially the same factors. *See Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000); *Cont'l Cas. Co. v. Staffing Concepts, Inc.*, 06 C 5473, 2009 WL 3055374 (N.D. Ill. Sept. 18, 2009).

47. *In re Warrick*, 70 F.3d 736, 741 n.7 (2d Cir. 1995); *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) (following same rule); *Berenson v. Nat'l Fin. Servs., LLC*, 319 F. Supp. 2d 1, 3 (D.D.C. 2004). Courts make this exception because “in a class action there will be numerous potential plaintiffs, each possibly able to make a showing that a particular forum is best suited for the adjudication of the class's claim.” *Goggins v. Alliance Capital Mgmt., L.P.*, 279 F. Supp. 2d 228, 232 (S.D.N.Y. 2003); *Georgouses v. NaTec Res., Inc.*, 963 F. Supp. 728, 730 (N.D. Ill. 1997) (holding in a class action that “plaintiff's home forum is irrelevant”).

48. *See, e.g., Jones v. Walgreen Co.*, 463 F. Supp. 2d 267, 274 (D. Conn. 2006) (focusing on the remaining factors after finding class action plaintiff's choice of forum was “entitled to less weight”).

49. *Wilson v. DirectBuy, Inc.*, 821 F. Supp. 2d 510 (D. Conn. 2011) (transferring three putative class actions to district where defendant franchisor is headquartered).

50. U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, OVERVIEW OF PANEL, www.jpml.uscourts.gov/panel-info/overview-panel (last visited Sept. 3, 2012).

According to 28 U.S.C. § 1407(a),

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for 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 defendant to its customers, which is almost always the case in consumer class actions, the MDL Panel has found that common issues of fact are present such that transfer is warranted.⁵¹

The MDL Panel has also consistently found that transferring multiple class actions to one forum for pretrial purposes is warranted because doing so will “avoid duplicative discovery, eliminate the risk of inconsistent pretrial rulings on class certification and other pretrial matters, and conserve the resources of the parties, their counsel, and the judiciary.”⁵² The MDL Panel, however, is a little unpredictable and may deny a motion to transfer if it finds that other factors making transfer unnecessary are present, such as evidence of informal coordination or cooperation between the courts.⁵³

51. See, e.g., *In re Bank of N.Y. Mellon Corp. Foreign Exch. Transactions Litig.*, MDL No. 2335, 2012 U.S. Dist. LEXIS 53533, at *6 (J.P.M.L. Apr. 16, 2012) (common issues of fact existed when the factual issues in each action “aris[e] from allegations concerning BNY Mellon’s provision of foreign exchange (FX) services to its clients” and “[s]pecifically, BNY Mellon’s ‘standing instruction’ service . . .”); *In re Enfamil Lipil Mktg. & Sales Practices Litig.*, 764 F. Supp. 2d 1356, 1357 (J.P.M.L. 2011) (“All actions involve common factual questions arising from the marketing and advertising of the infant formula Enfamil LIPIL. . . . Plaintiffs particularly focus upon Mead’s representations concerning the presence and/or efficacy of two nutrients . . . that are known to promote brain and eye development in infants . . . and which are contained in Enfamil LIPIL.”); *In re Conesco Life Ins. Co. Cost of Ins. Litig.*, 323 F. Supp. 2d 1381, 1383 (J.P.M.L. 2004) (“All actions name the same, common defendant, Conesco, and share questions of fact arising out of Conesco’s decision to change its method of calculating monthly deductions on certain of its life insurance policies.”); *In re Farmers Ins. Co.*, 295 F. Supp. 2d 1375, 1377 (J.P.M.L. 2003). Where actions share factual questions, the MDL Panel has long held that the presence of some disparate legal theories is no reason to deny transfer. See *In re Merscorp Inc. Real Estate Settlement Procedures Act (RESPA) Litig.*, 560 F. Supp. 2d 1371 (J.P.M.L. 2008).

52. See, e.g., *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); *In re Park W. Galleries, Inc.*, 645 F. Supp. 2d 1358 (J.P.M.L. 2009) (granting transfer of three putative class actions involving claims of fraudulent sales of art during shipboard auctions); *In re Vertrue Mktg. & Sales Practices Litig.*, 626 F. Supp. 2d 1318 (J.P.M.L. 2009) (granting transfer of three putative class actions involving claims of deceptive marketing of free trial offers); *In re Chrysler LLC 2.7 Liter V-6 Engine Oil Sludge Prods. Liab. Litig.*, 598 F. Supp. 2d 1372, 1373 (J.P.M.L. 2009) (granting transfer of five putative statewide class claims with “nearly identical” factual allegations because doing so would allow one judge to “streamline proceedings and make consistent rulings on discovery disputes, dispositive motions, and issues relating to experts.”); *In re Bank of Am. ATM Fee Litig.*, 398 F. Supp. 2d 1367, 1368 (J.P.M.L. 2005) (centralizing three class actions for similar reasons).

53. See *In re Waggin’ Train Chicken Jerky Pet Treat Prods. Liab. Litig.*, MDL No. 2392, 2012 WL 4470412 (Sept. 28, 2012) (“In these circumstances, informal cooperation among counsel

The MDL Panel is a bit unpredictable in other ways, too. For example, an MDL transfer is more likely as the number of cases goes up, but the MDL Panel has granted transfer with as few as three or four pending cases.⁵⁴ Although 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,⁵⁵ that is not always the case, and the MDL Panel can send the case to any district in the country.⁵⁶ Another added benefit of moving for MDL treatment is that the MDL Panel meets approximately once every three months,⁵⁷ and in most cases federal courts will stay a case pending a decision by the MDL Panel.⁵⁸ Thus, a benefit of an MDL motion is that it can provide a few months' reprieve from having to litigate on multiple fronts.

Finally, it is worth noting that the MDL Panel has its own set of unique procedural rules that are very different from the normal Federal Rules of Civil Procedure. Counsel should read the rules closely before filing anything before the MDL Panel.⁵⁹

and coordination among the involved courts are, in our judgment, preferable to formal centralization.”); *In re Oplus Techs., Ltd., Patent Litig.*, MDL No. 2400, 2012 WL 4753430 (Oct. 3, 2012).

54. *See In re Conesco Life Ins. Co.*, 672 F. Supp. 2d 1372 (granting transfer of three putative class actions); *In re Park W. Galleries, Inc.*, 645 F. Supp. 2d 1358 (granting transfer of three putative class actions involving claims of fraudulent sales of art during shipboard auctions); *In re* 626 F. Supp. 2d 1318 (granting transfer of three putative class actions involving claims of deceptive marketing of free trial offers). *But see 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”); *In re Chiropractic Antitrust Litig.*, 483 F. Supp. 811, 813 (J.P.M.L. 1980) (finding that the transfer of four cases would “not necessarily serve the convenience of the parties and witnesses or promote the just and efficient conduct of the litigation”).

55. DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL § 6:1 (2013) (hereinafter JPML MANUAL) (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”).

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

57. For a list of upcoming hearing dates, see U.S. JUDICIAL PANEL ON MULTIDISTRICT LEGISLATION, HEARING INFORMATION, www.jpml.uscourts.gov/hearing-information (last visited Sept. 3, 2013).

58. *See 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,” noting 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”); *Namocivz v. Cooper Tire & Rubber Co.*, 225 F. Supp. 2d 582, 585 (D. Md. 2001) (granting stay to ensure that “in the event consolidation is ordered, there is consistent treatment of the numerous lawsuits and that judicial resources are not wasted”); *Aetna U.S. Healthcare, Inc. v. Hoechst Aktiengesellschaft*, 48 F. Supp. 2d 37, 43 (D.D.C. 1999) (granting stay pending decision of the MDL Panel due to the “potential for common and overlapping issues[—] . . . a stay would further judicial economy and eliminate the potential for conflicting pretrial rulings were the case ultimately transferred”); *Good v. Prudential Ins. Co. of Am.*, 5 F. Supp. 2d 804, 809 (N.D. Cal. 1998) (observing that “[c]ourts frequently grant stays pending a decision by the MDL Panel”).

59. *See generally* J.P.M.L. Rules.

II. Basic Strategies for Defeating Class Certification

A. Federal Rule of Civil Procedure Requirements

Federal Rule of Civil Procedure 23 governs class actions. For a court to certify a case as a class action, a plaintiff must meet the four requirements of Federal Rule of Civil Procedure 23(a) (numerosity, commonality, typicality, and adequacy of representation) and one of the three requirements of Rule 23(b).

Rule 23(a) provides:

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.

Numerosity requires the plaintiff to show that the class is “so numerous that joinder of all members is impracticable.”⁶⁰ As long as the plaintiff puts forward the necessary evidence, numerosity is never really at issue in a consumer case as a class of larger than forty members will satisfy this requirement.⁶¹

Commonality⁶² requires proof that the class’s claims “depend upon a common contention . . . that it is capable of class-wide resolution,” but the Supreme Court has cautioned that this inquiry focuses not on whether there are common questions but on whether a class-wide proceeding will “generate common answers” to those questions.⁶³

Typicality,⁶⁴ which often merges in practice with commonality,⁶⁵ is met if the named plaintiffs’ “are reasonably co-extensive with those of absent class members; they need not be substantially identical.”⁶⁶ Thus, if a named plaintiff’s “claim arises from the same event, practice or course of conduct that gives rise to the claims of the class members, factual differences will not render that claim atypical if it is based on the same legal theory as the claims of the class.”⁶⁷

Adequacy of representation⁶⁸ requires a showing that the named plaintiffs and their counsel “will vigorously prosecute the interests of the class through qualified counsel.”⁶⁹

60. FED. R. CIV. P. 23(a)(1).

61. *Vega v. T-Mobile U.S.A., Inc.*, 564 F.3d 1256, 1267–68 (11th Cir. 2009) (noting that having more than forty class members satisfies the numerosity requirement, but finding that district court abused its discretion in finding the requirement met because plaintiff had made no showing about size of statewide class).

62. FED. R. CIV. P. 23(a)(2).

63. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

64. FED. R. CIV. P. 23(a)(3).

65. *Dukes*, 131 S. Ct. at 2551 n.5.

66. *Meyer v. Portfolio Recovery Assocs.*, 707 F.3d 1036, 1042 (9th Cir. 2012).

67. *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 598 (3d Cir. 2012).

68. FED. R. CIV. P. 23(a)(4).

69. *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 757 (6th Cir. 2013).

For a court to certify a class, plaintiff must also satisfy one of the three requirements of Federal Rule of Civil Procedure 23(b).⁷⁰ Rule 23(b)(1) is used mostly in ERISA litigation and is not often employed in consumer class actions.⁷¹ Rule 23(b)(2) applies primarily when plaintiffs are seeking injunctive relief, such as in civil rights litigation, and generally does not apply when plaintiffs are seeking monetary damages.⁷² Rule 23(b)(3) requires the court to find that “questions of law or fact common to class members pre-

70. Rule 23(b) reads as follows:

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
 - (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.

71. NEWBERG, *supra* note 3, § 4:7.

72. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011). In recent years, however, plaintiffs have sought Rule 23(b)(2) certification more frequently in consumer class actions. In Rule 23(b)(2) classes, class members can only seek incidental monetary damages. See *id.* (expressly stating that plaintiffs may not seek Rule 23(b)(2) certification where “the monetary relief is not incidental to the injunctive or declaratory relief”). Because most consumer cases involve Rule 23(b)(3) class claims, a review of this case law is beyond the scope of this article. For an overview of this issue, see TERENCE M. RIDLEY, DEFENDING CONSUMER PROTECTION ACT CLASS ACTIONS UNDER RULE 23(b)(2) (2010), www.thefederation.org/documents/10.Defending%20Consumer%20Protection-Ridley.pdf. For recent cases involving Rule 23(b)(2) consumer class actions, see *Reis v. Arizona Beverages*, 287 F.R.D. 523 (N.D. Cal. 2012) (certifying Rule 23(b)(2) injunctive relief class); *In re Motor Fuel Temperature Sales Practices Litigation*, 279 F.R.D. 598 (D. Kan. 2012) (certifying hybrid class of motor fuel consumers, consisting of a Rule 23(b)(2) class to determine liability and injunctive relief, and a Rule 23(b)(3) damages class subdivided by “issues” under Rule 23(c)(4)); *Rowe v. Bankers Life & Casualty Company*, No. 09-cv-491, 2012 WL 1068754 (N.D. Ill. Mar. 29, 2012) (rejecting certification under both Rule 23(b)(2) and Rule 23(b)(3) where class of insureds failed to show that requested injunctive relief would be final and that common issues predominated); *Gonzales v. Comcast Corporation*, 2012 WL 10621 (E.D. Cal. Jan. 3, 2012) (declining to certify hybrid class of Comcast customers alleging fraudulent billing practices); *Delarosa v. Boiron, Inc.*, 275 F.R.D. 582 (C.D. Cal. 2011) (certifying Rule 23(b)(2) and Rule 23(b)(3) classes of homeopathic cold remedy purchasers alleging the product failed to abate cold, describing the Rule 23(b)(2) group as a “subclass”); and *Wooley v. Jackson Hewitt, Inc.*, No. 07-c-2201, 2011 WL 1559330 (N.D. Ill. Apr. 25, 2011) (denying certification of hybrid damages and injunction consumer class of tax preparation services company).

dominate 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.”⁷³ In short, this requires the plaintiff to demonstrate that “those issues in the proposed action that are subject to generalized proof outweigh those issues that are subject to individualized proof.”⁷⁴

The plaintiff must “affirmatively demonstrate”⁷⁵ compliance with Rule 23(a) and (b) by a preponderance of the evidence.⁷⁶ The court must engage in a “rigorous analysis” when considering class certification even if that analysis “will entail some overlap with the merits of the plaintiff’s underlying claim.”⁷⁷

B. Potential Arguments

Although it would be impossible to catalog all the potential arguments available to defeat class certification, some of the common arguments used in crafting a class certification defense to any nationwide consumer class action are discussed below. In most cases, class certification motions and decisions come after the parties have engaged in discovery. However, there is a growing acceptance of defendants seeking to dismiss or strike class claims as part of a motion under Federal Rule of Civil Procedure 12.⁷⁸ This approach is not advisable in all cases but should always be considered—both because it may help defendants avoid having to engage in onerous class discovery and because it sends a strong message to plaintiffs about defendants’ willingness to fight.

1. Ascertainability

Although not expressly required by Rule 23, for a class action to proceed, there must indeed “be a class,”⁷⁹ and the class must be “definite enough that the class can be ascertained.”⁸⁰ Although a class need not be “so ascertainable that every potential member can be identified at the commencement of the

73. FED. R. CIV. P. 23(b)(3).

74. *Heerwagen v. Clear Channel Commc’ns*, 435 F.3d 219, 226 (2d Cir. 2006).

75. *Dukes*, 131 S. Ct. at 2551.

76. *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 228 (5th Cir. 2009); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008); *Teamster Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 202 (2d Cir. 2008).

77. *Dukes*, 131 S. Ct. at 2551; *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) (explaining that court must make “definitive assessment” that each requirement of Rule 23 is satisfied).

78. *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); *Muehlbauer v. Gen. Motors Corp.*, 431 F. Supp. 2d 847, 870 (N.D. Ill. 2006) (explaining that the court should examine whether class allegations are “facially deficient” and dismiss them if “no amount of discovery can save them”); *In re Walls*, 262 B.R. 519, 523 (Bankr. E.D. Cal. 2001) (“If, as a matter of law, a class cannot be certified. . . , it would be a waste of the parties’ resources and judicial resources to conduct discovery on class certification.”).

79. See 7A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1760 (3d ed. 1998).

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

action,” it must still be “administratively feasible for the court to determine whether a particular individual is a member.”⁸¹

In *Oshana v. Coca-Cola*, 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.⁸² Plaintiffs proposed a class consisting of all purchasers of fountain Coke during the class period.⁸³ The court dismissed the class claims on grounds of ascertainability, finding 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].”⁸⁴ The court noted 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.⁸⁵ The court denied certification because the putative class could contain millions of members unable to demonstrate that any deception had occurred. Depending upon the class alleged, this is the kind of argument that can end a class action before it even gets started.⁸⁶

A recent example of class certification failing for lack of ascertainability is *Carrera v. Bayer Corporation*, where the Third Circuit found that the class was not ascertainable and thus reversed a decision certifying a class of purchasers alleging that a vitamin manufacturer made improper claims about its products’ effects.⁸⁷ There, plaintiffs attempted to use customer affidavits to prove ascertainability because most customers lacked receipts and defendant did not have a list of purchasers.⁸⁸ After holding that the rigorous analysis standard applies to ascertainability determinations and that ascertainability is meant to protect a defendant’s due process rights,⁸⁹ the Third Circuit concluded that the use of customer affidavits was not enough to establish class membership without some other proof of class membership, such as a cus-

81. WRIGHT & MILLER, *supra* note 79, § 1760.

82. *Oshana*, 472 F.3d at 509.

83. *Id.* at 514.

84. *Id.*

85. *Id.*

86. See also *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, 2012 WL 865041, at *16 (S.D. Ill. Mar. 13, 2012) (granting motion to strike class claims where “determining class membership can only be accomplished through arduous individual inquiries pertaining to each unnamed class member”); *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011) (denying certification, stating that “courts of appeals have found class certification to be inappropriate where ascertaining class membership would require unmanageable individualized inquiry”); *Weiner v. Snapple Beverage Co.*, No. 07-cv-8742, 2010 WL 3119452, at *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”); *In re McDonald’s French Fries Litig.*, 275 F.R.D. 669, 673 (N.D. Ill. 2009) (finding the proposed class overbroad and unmanageable due to the “evidentiary headache” implicit in identifying class members through separate evidentiary inquiries).

87. No. 12-2621, slip op. (3d Cir. Aug. 21, 2013). See also *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349 (3d Cir. 2013); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583 (3d Cir. 2012).

88. *Id.* at 4–6.

89. *Id.* at 8–11.

tomers list or receipts.⁹⁰ Because of the obvious parallels between the putative class members in *Bayer* and the customers of many franchise systems, e.g., the quick-service restaurant industry, *Bayer* is likely to be an especially useful precedent in defending against class claims under Rule 23(b)(3).

2. Individualized Issues Versus Common Issues

Proof that class members each were subjected to different representations is often used to show that individualized issues predominate over common ones.⁹¹ For example, defendants have often been successful in opposing class certification by showing that there were material variations in the written advertisements seen by the class or that each class member was subjected to varying oral representations.⁹² Franchisors may be able to use the existence of a franchise system to bolster these arguments.⁹³

For example, in *Marshall v. H&R Block Tax Services, Inc.*,⁹⁴ a district court denied plaintiffs' motion to certify a class of consumers from eleven states who alleged that they had been deceived into purchasing an extended war-

90. *Id.* at 4–5, 12–19.

91. The Supreme Court's recent decision in *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), has left open the possibility that variations in damages may also be enough to defeat class certification. However, it remains unclear how broadly lower courts will read this decision. See Ellen Meriwether, *Comcast Corp. v. Behrend: Game Changing or Business as Usual*, 27 ANTITRUST 57 (2013).

92. See, e.g., *In re St. Jude Med., Inc.*, 522 F.3d 836, 838 (8th Cir. 2008) (noting that “[b]ecause proof often varies among individuals concerning what representations were received and the degree to which individual persons relied on the representations, fraud cases are often unsuitable for class treatment”); *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 398 (6th Cir. 1998) (claims requiring proof of what statements were made to a particular person, how the person interpreted those statements, and whether the person justifiably relied on those statements to his detriment are not susceptible to class-wide treatment); see also *Martin v. Dahlberg, Inc.*, 156 F.R.D. 207 (N.D. Cal. 1994) (variations in representations made by franchisees' sales staff prevented certification of class asserting consumer fraud and RICO claims); *Egwatu v. S. Lubes, Inc.*, 976 So. 2d 50 (Fla. Dist. Ct. App. 2008) (holding that variations in written and oral representations to potential class members prevented class certification).

93. The existence of a franchise system, however, does not always help the franchisor in defeating class certification. In *Agne v. Papa John's International, Inc.*, the named plaintiff alleged that Papa John's and certain of its franchisees had violated the Federal Telephone Consumer Protection Act by sending promotional text messages to consumers without their express consent. 286 F.R.D. 559 (W.D. Wash. 2012). 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, that sent the offending text messages. In reaching this conclusion, the court noted that there was evidence that Papa John's had some role in encouraging the use of the third party by franchisees and that this led to the existence of single, common question as it related to Papa John's: Did the actions of Papa John's make it vicariously liable for the third party and its franchisees sending text messages that consumers had not agreed to receive? *Id.* at 568. *But see* *Thomas v. Taco Bell Corp.*, 879 F. Supp. 2d 1079 (C.D. Cal. 2012) (granting summary judgment to franchisor because plaintiff was unable to show that it was vicariously liable for improper text messages sent by franchisee advertising association and various franchisees).

94. 270 F.R.D. 400 (S.D. Ill. 2010). For a more detailed discussion of this case, *Thompson v. Jiffy Lube International, Inc.*, 250 F.R.D. 607 (D. Kan. 2008), and *Martinelli v. Petland, Inc.*, 274 F.R.D. 658 (D. Ariz. 2011), see John Doroghazi, *Class Certification of Consumer Protection Claims Against Franchisors*, 16:1 DISTRIBUTION: ABA NEWSLETTER DISTRIBUTION & FRANCHISING COMMITTEE (2011).

ranty from H&R Block to protect against further tax liability from preparer error. Although the district court identified a number of reasons for denying certification, the court noted two reasons that were a direct result of H&R Block being a franchise system. First, it observed that there were both franchisees and company-owned stores and that the franchisees had not always been required to sell the warranty during the class period. Second, it noted 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.⁹⁵ The court highlighted these as variations that created individualized issues.

In *Thompson v. Jiffy Lube International, Inc.*,⁹⁶ the existence of a franchise system was one of the primary reasons the district court denied the plaintiff's motion to certify a nationwide class of consumers who were allegedly sold unnecessary services by automotive technicians who purportedly made misleading recommendations about the maintenance that class members' cars needed. The plaintiff asserted that the franchisor was liable for the actions of its franchisees and technicians because they were its agents. However, among other reasons, the district court found that a class was not certifiable because plaintiff did not satisfy Rule 23's typicality requirement.⁹⁷ The court explained that the franchise system had both company-owned stores and franchise locations but that plaintiff had visited a franchise location.⁹⁸ For the court, this meant that plaintiff was subject to certain defenses "arising from the agency relationship" that class members who visited the company-owned stores were not.⁹⁹ The district court also noted that the class was not certifiable because "some of her claims occurred before franchisees began using a computer program that purportedly was used to make improper service recommendations, and the franchise that she visited in fact used a different program."¹⁰⁰

3. Lack of Predominance of Common Issues

Showing that consumers have varying reasons for making the purchases that they did is another way to show a lack of predominance of common issues.¹⁰¹

95. *Marshall*, 270 F.R.D. at 410–11.

96. 250 F.R.D. 607 (D. Kan. 2008).

97. FED. R. CIV. P. 23(a)(3).

98. *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.

99. *Id.* at 623.

100. *Id.*; see also Doroghazi, *supra* note 94.

101. See, e.g., *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006); see also *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 665 (9th Cir. 2004) (affirming denial of class certification in RICO action alleging that defendants misrepresented nature of electronic gambling machines because individual differences in each class member, such as reason for gambling, relative skill, and knowledge of how slot machines operated, precluded generalized proof to establish causation); *In re Livent, Inc. Noteholders Sec. Litig.*, 211 F.R.D. 219, 223–24 (S.D.N.Y. 2002) (holding that varying sophistication of note purchasers meant that individual questions of reliance predominated); *Cohn v. Mass. Mut. Life Ins. Co.*, 189 F.R.D. 209, 214–16 (D. Conn. 1999) (presence of multiple variables, such as the purchaser's sophistication, relationship with the

A good example of this in a franchise setting is *Martinelli v. Petland, Inc.*,¹⁰² where the existence of a franchise system again provided one of the bases for a district court's denial of class certification. There, plaintiffs alleged that they had been misled into purchasing sick puppies from a franchise location of defendant by representations that the puppies were bred under "safe and humane conditions by a reputable breeder," even though the puppies were actually bred at a "puppy mill"—that is, breeding facilities that disregard the health of dogs in order to maximize profits.¹⁰³

Plaintiffs' claims required proof of reliance, and plaintiffs tried to show common proof of reliance under a third-party reliance theory, i.e., by showing that a third party relied on defendants' misrepresentations.¹⁰⁴ Plaintiffs argued that franchisees relied on uniform misrepresentations that the franchisor made to them about the quality of breeders it used and the health of the puppies its suppliers provided. The district court, however, held that plaintiffs would need to show third-party reliance "franchisee by franchisee" because the franchisor had presented evidence that franchisees make their purchasing decisions on "a host of factors other than what Petland allegedly represents."¹⁰⁵ These factors included, among others, the selection, price, and availability of certain puppies; the franchisees' relationship with and proximity to suppliers; the warranty that various suppliers are willing to provide; and the recommendations that other franchisees make about a supplier.¹⁰⁶

4. Variations in State Law

In consumer class actions seeking to represent consumers from multiple states, showing variations among the states' laws and convincing the court that it must apply each state's law is another powerful argument to use in defeating class certification.¹⁰⁷ It is important to note, however, that such an analysis needs to be done rigorously and must explain why the variations matter in the facts of that particular case because some courts have held

agents, and the questions they asked prevented use of common causation evidence); *Rodriguez v. McKinney*, 156 F.R.D. 112, 116 (E.D. Pa. 1994) (holding that class action was not appropriate for plaintiffs' RICO claim alleging that school misrepresented students' ability to benefit from it because the reason for each student's choice differed).

102. 274 F.R.D. 658 (D. Ariz. 2011); see also *Doroghazi*, *supra* note 94.

103. *Martinelli*, 274 F.R.D. at 660.

104. For a discussion of third party reliance, see *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

105. *Martinelli*, 274 F.R.D. at 664.

106. See *Doroghazi*, *supra* note 94.

107. See, e.g., *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012) (denying class of Honda purchasers where "variances in state law overwhelm common issues and preclude predominance for a single nationwide class"); *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943 (6th Cir. 2011); *Gianino v. Alacer Corp.*, 846 F. Supp. 2d 1096 (C.D. Cal. 2012) (refusing to certify class where court would have to apply the consumer protection laws of fifty states); *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, 276 F.R.D. 336, 342 (W.D. Mo. 2011) (refusing to certify nationwide unjust enrichment and consumer protection classes because of the variations in the laws of each state).

that the failure to do so renders an argument based on variation in law irrelevant to defeating class certification.¹⁰⁸

III. Strategic Considerations in Settling Class Actions¹⁰⁹

Unless a motion for class certification is denied or a case terminates by dispositive motion, it is a near certainty that the end result will be a settlement: either an individual settlement with the named plaintiff or a class settlement.¹¹⁰ Because class settlements require notice to the class and court approval,¹¹¹ deciding whether to settle on a class basis and what kind of consideration to offer to the class are crucial decisions for a franchisor.

A. Legal Requirements for Settlement

Federal Rule of Civil Procedure 23(e) prohibits the voluntary dismissal, settlement, or compromise of a class action 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.”¹¹² After reaching a settlement, the first step is for the parties to file a motion for preliminary approval with the court. At that time, the court will grant the motion if the parties meet the low-threshold requirement of showing that the proposed settlement is the product of arm’s-length negotiations and is within the range of possible settlements that could be approved.¹¹³ The court will then direct that the parties provide class members with notice of the settlement 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, in cases where the class settlement will include payments of money to class

108. See *Bruno v. Eckhart Corp.*, 280 F.R.D. 540, 545 (C.D. Cal. 2012).

109. Although some of the considerations discussed below apply to state court settlements, it is beyond the scope of this article to catalog all of the potential differences that may exist between state and federal court standards for approving class settlements.

110. See, e.g., EMERY G. LEE & THOMAS E. WILLGING, FED. JUDICIAL CTR., 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), [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, a class settlement resulted); *id.* at 6 (noting that 55 percent 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. EMPIRICAL LEGAL STUD. 811, 819 (2012) (noting that in cases producing class settlements, 68 percent were in cases where no class had been certified previously); ADMIN. OFFICE OF THE CAL. COURTS, *supra* note 31, at D1 (88 percent of cases in California with a certified class result in settlement).

111. PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 3.02 cmt. (a) (2010) (noting that federal courts and all states that allow class actions require notice to the class and approval of the court before a case may be settled on a class-wide basis).

112. FED. R. CIV. P. 23(e).

113. *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).

members and there is no class currently certified, the notice will also have to satisfy Federal Rule of Civil Procedure Rule 23(c)(2)(B), which requires 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.” Rule 23(c)(2)(B)’s heightened notice standard often applies. Traditionally, this requires notification by postal mail if the parties have records identifying the class members.¹¹⁴ In recent years, e-mail notice has become much more widely accepted and is often preferred by parties because it costs a fraction of what mail notice costs.¹¹⁵ When direct notice is not possible, the court will instead order publication notice, which usually involves publishing a notification in a widely circulated periodical or newspaper.¹¹⁶ Usually, a website is established where class members can view the notice and other relevant documents, contact the settlement administrator, and file claims. To be acceptable, the notice must be written “clearly and concisely” and “in plain, easily understood language” and provide general information on a number of topics, including the claims in the action, who is a member of the class, the relief provided and how to get it, how to exclude oneself from the class, how to object, the date and time of the fairness hearing, the scope of the release, and the settlement’s preclusive effect.¹¹⁷

Within ten days of filing a proposed settlement with the court, CAFA also obligates each defendant¹¹⁸ to make notification of the proposed settlement to the Attorney General of the United States¹¹⁹ and the “appropriate State Official”¹²⁰ of each state where a class member resides.¹²¹ As a practical matter, serving the state attorney general in each state will satisfy CAFA.¹²² CAFA contains a list of the documents that must be included in this notice¹²³

114. MANUAL FOR COMPLEX LITIGATION, *supra* note 43, § 21.311.

115. *Id.*

116. *Id.*

117. See FED. R. CIV. P. 23(c)(2)(B); 5 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 23.162[3] (Matthew Bender 3d ed.); MANUAL FOR COMPLEX LITIGATION, *supra* note 43, § 21.635. The Federal Judicial Center has sample class notice forms on its website. These should be used as templates for any notice. See FEDERAL JUDICIAL CENTER, www.fjc.gov/ (last visited Sept. 4, 2013).

118. See MOORE, *supra* note 117, § 23.162A (explaining that defendants cannot send one consolidated notice).

119. 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).

120. “[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).

121. *Id.* § 1715(a)–(b).

122. See *id.* § 1715(e)(2).

123. The notice must contain the following information: (1) a copy of the complaint, materials attached to the complaint, and amended complaints (if the materials are electronically

and requires that final approval of a settlement cannot occur until ninety days after the federal and state officials are served with the CAFA notice.¹²⁴ The penalty for failing to provide CAFA notice is that class members can choose to not be bound by a class settlement if the CAFA notice is not sent.¹²⁵ The purpose of this provision is to give state and federal regulators an opportunity to review class settlements and object if they regard the settlement as unfair.¹²⁶ An objection by a state or federal regulator to a proposed class settlement carries considerable weight with courts and may torpedo a proposed settlement.¹²⁷

Following a fairness 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 the following:¹²⁸

- Whether the settlement resulted from arm's-length negotiations
- The skill of plaintiffs' 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
- The recommendation of a neutral party, or mediator, if any¹²⁹

available, it is sufficient to explain how to access them electronically); (2) "notice of any scheduled judicial hearing[s]"; (3) any proposed or final notices to the class; (4) "any proposed or final class . . . settlement[s]"; (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 of each state's class members compared 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 items 3–6. *Id.* § 1715(b)(1)–(8).

124. *Id.* § 1715(d).

125. *Id.* § 1715(e).

126. See NEWBERG, *supra* note 3, § 6:13; Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. PA. L. REV. 1971 (2008).

127. 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). Wiggin and Dana was counsel for DirectBuy in the *Wilson* case.

128. Dienelt & Middleton, *supra* note 4, at 153; *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); *In re Ky. Grilled Chicken Coupon Mktg. & Sales*, 280 F.R.D. 364, 375 (N.D. Ill. 2011); *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012); see also MANUAL FOR COMPLEX LITIGATION, *supra* note 43, § 13.14.

129. 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"); *Visa U.S.A.*, 396 F.3d 96; (noting that 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 LITIGATION § 30.42 (3d ed. 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).

B. *Individual or Class Settlements?*

Unlike class settlements, settling individually with the named plaintiff before class certification does not require either notice to the putative class or judicial approval.¹³⁰ This is especially useful if the franchisor has been subject to regulatory investigation or is concerned that a class settlement notice would cause a state regulator to begin scrutinizing the franchisor's business. It also avoids the publicity of a class settlement and will undoubtedly be cheaper, at least in the short run, than a class settlement. And, unique to franchising, it allows a franchisor to provide what may be a more palatable disclosure in the Franchise Disclosure Document. For many prospective franchisees, reading that a putative class action was settled individually for a small sum may be less off-putting than reading that a franchisor settled a class action for what, in most cases, will be a relatively significant sum.¹³¹

However, unlike class settlements where all class members are bound, an individual settlement only binds the named plaintiff and does nothing to stop another named plaintiff from bringing an identical lawsuit.¹³² In fact, ethical rules prevent a settlement agreement from prohibiting the plaintiff's lawyers from filing another case asserting the same claims on behalf of a new plaintiff.¹³³ In most situations, this lack of preclusive effect makes individual settlements a bad strategic decision because, rather than buying peace, they will just put off the inevitable decision to litigate class certification¹³⁴ or settle with the class. Moreover, an individual settlement may incentivize plaintiffs to file more lawsuits. If plaintiffs' attorneys perceive that there is a quick payday in filing putative class actions against a franchisor, they have every reason to file those kinds of suits until the franchisor gives them a reason to stop. Moreover, in a class-wide settlement, a franchisor can obtain a release for both it and related entities such as franchisees that applies to all members of the class.¹³⁵ In an individual settlement, only the individual's claims are released.

C. *Coupons or Cash?*

Traditionally, defendants agree to provide a fixed fund of money or to pay each class member a certain dollar amount to settle a class action. Assuming

130. FED. R. CIV. P. 23(e) Advisory Committee's 2003 notes.

131. 16 C.F.R. § 436.5 (requiring disclosure of litigation in franchise disclosure document).

132. Lantagne, *supra* note 40, at 134–37.

133. MODEL RULES OF PROF'L CONDUCT R. 5.6(b) ("A lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.")

134. One commentator noted that even litigating the class issue and winning will not buy peace because of the lack of preclusive effect of the class decision on other courts. See Lantagne, *supra* note 40, at 134–37.

135. For discussions about the permissible scope of a class action release, see *TBK Partners v. Western Union*, 675 F.2d 456 (2d Cir. 1981). See also *Thomas v. Blue Cross & Blue Shield Ass'n*, 333 F. App'x 414 (11th Cir. 2009); *Moulton v. U.S. Steel Corp.*, 581 F.3d 344 (6th Cir. 2009); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 106, 107 n.13 (2d Cir. 2005); *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800, 805 (8th Cir. 2004); *Williams v. Gen. Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 271–74 (7th Cir. 1998).

that the cash provided is sufficient, these settlements are highly likely to be approved by the court and are unlikely to attract the attention of attorneys general.

In consumer class actions, however, the parties are often tempted to pursue a coupon settlement,¹³⁶ which provides for coupons or other non-monetary benefits while plaintiffs' attorneys receive fee awards in cash.¹³⁷ Defendants like these settlements because they perceive them as a way to make the best out of a bad situation: a coupon settlement requires class members to make purchases or receive products from the defendant. This could be a way to increase sales or reestablish brand loyalty.¹³⁸ Conceptually, a coupon settlement should benefit class members because it would make defendants willing to provide more value to consumers in the form of a coupon than they would otherwise pay in cash.¹³⁹

In practice, coupon settlements have become notorious for providing consumers with little to no compensation while plaintiffs' lawyers receive generous fees.¹⁴⁰ Congress cited abusive coupon settlements as one of the reasons for enacting CAFA.¹⁴¹ CAFA now requires that proposed coupon settlements in federal court be subjected to "heightened judicial scrutiny."¹⁴² Moreover, CAFA contains a number of requirements about the calculation of attorney fees in coupon cases that are meant to make coupon settlements unpalatable to most plaintiffs' lawyers.¹⁴³ Because of this increased hostility to coupon settlements, a pure coupon settlement is a very risky proposition and not advisable.

However, courts are open to settlements where class members can choose between a coupon and cash.¹⁴⁴ These settlements avoid the main criticism of coupon settlements, i.e., that class members are required to do business with the defendant to obtain anything of value from the settlement and that they provide nothing of value.¹⁴⁵ At first blush, a hybrid cash/coupon settlement may make sense for franchisors in many situations. Large franchise systems are likely to have millions of customers throughout the country, and, except in the most egregious cases, most class members are likely satisfied custom-

136. Fitzpatrick, *supra* note 110, at 824.

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

138. NAT'L ASS'N OF CONSUMER ADVOCATES, CLASS ACTION GUIDELINES 19 (2006), www.naca.net/about-naca/class-action-guidelines.

139. *Id.*

140. Hantler & Norton, *supra* note 137.

141. Pub. L. No. 109-2, 119 Stat. 4, § 2(a)(3)A (2005) (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").

142. See 28 U.S.C. § 1712(e); *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir.2006); *Galloway v. Kan. 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.*, 2013 WL 435032, at *5 (S.D. Cal. Feb. 4, 2013).

143. See 28 U.S.C. § 1712.

144. See *In re EasySaver Rewards Litig.*, 2013 WL 435032.

145. NAT'L ASS'N OF CONSUMER ADVOCATES, *supra* note 138, at 19.

ers who suffered very small injuries or none at all. Compensating class members with any meaningful amount of money may be cost prohibitive. In that situation, providing a modest (at least in class settlement terms) cash fund along with a more valuable coupon for goods or services is likely to appeal not only to the franchisor (as a way to limit costs) but also to class members because satisfied customers can receive more of what they want while other class members can seek cash relief.

One unique problem for franchisors is whether to try and force other related entities in the franchise system to contribute toward the settlement fund. Unlike most big-box retail chains, which own all of the retail locations and make all of their own advertising decisions, the retail locations in a franchise system are owned and operated by franchisees, which could have also made representations to the class members. Thus, there are multiple parties that conceivably could have had a hand in creating or perpetuating the marketing practices that prompted the class action. Although it may be in the franchisor's short-term financial interest to seek contributions from franchisees (or any other entity that may have had a role), doing so is likely to have negative legal or business ramifications. For example, trying to force franchisees to contribute could, depending on the terms of the franchise agreement, lead to claims that the franchisor is breaching the franchise agreement. And if the franchise agreement does not contain an arbitration clause, that dispute could, in turn, lead to a franchisee class action concerning the attempt to force a contribution. Similarly, even if a franchisor has an ability to force franchisees to contribute, doing so could cause lingering ill will toward the franchisor that could interfere with the parties' working relationship, something worth far more than whatever contribution can be extracted from franchisees and other entities.

A similar problem exists for franchisors that want to make use of coupons in a class settlement because, most of the time, the coupons themselves are going to be redeemed at a franchise location. Thus, absent reimbursement by the franchisor, the franchisee will bear the costs of the coupon. Unless the franchisees willingly agree to bear this cost, the franchisor may be setting itself up for lawsuits from franchisees charging that making the franchisees bear the cost of the coupons violates the franchise agreement. Conversely, if the franchisor agrees to reimburse the franchisees for the value of the coupons spent at that location, it leaves the class settlement open to objections 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, these administrative difficulties make even a hybrid coupon settlement difficult for a franchisor to pursue.

IV. Conclusion

By their very nature, class actions are high-stakes endeavors. A verdict in a consumer fraud class action will deliver a crippling blow to all but the most

well-heeled franchisor.¹⁴⁶ Because of these stakes, franchisors and their attorneys must be prepared to take on class actions aggressively and effectively with two goals always in mind: setting the case up for dismissal or, if that is not possible, finding a way to reach a palatable and approvable class settlement. Although this article is in no way exhaustive in covering all of the strategic and tactical considerations that may arise in the course of a class action, it does provide an overview of the methods that franchisors can use to try to position a class action for successful resolution.

146. Fitzpatrick, *supra* note 110, at 830 (noting that approximately 10 percent of all money that changed hands in the U.S. tort system during a two-year period was the result of class actions).

