Finding the Earliest and Least Expensive Exit From Financial Services Class Actions

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Effectively responding to class litigation doesn't necessarily mean simply preparing an answer or perfunctory motion to dismiss, diving headlong into class discovery, investing in full-fledged combat on the merits of the claims, and planning for a fully contested class certification hearing. That is usually the most expensive option, but not always the best one. Even when it is the best option, important strategy choices on the front end can directly affect the outcome on the back end. For example, serious motions to dismiss can whittle down the claims at issue or the scope of the proposed class to more manageable levels, or maneuver the plaintiff into making allegations that avoid dismissal but create obstacles to certification. Resisting removal temptations under the Class Action Fairness Act, Pub L. No. 109-2, 119 Stat. 4 ("CAFA"), may set up an interlocutory appeal as of right on class certification under the applicable state court class action regime (as opposed to the discretionary review

afforded under Federal Rule of Civil Procedure 23(f)), keep a class settlement based upon coupon relief in play under a more lenient state court approval standard, and avoid the CAFA's expanded notice requirements (which in some cases invite regulator comment or scrutiny).

Your strategy in defending any class action, or any set of class actions, should be custom-made for that particular litigation, informed by a careful study of all available early strategy choices and potential end games. Locating the earliest and most cost effective exit in a given class action or set of class actions requires serious early examination of all the available options in each case, not reliance on a "one size fits all" approach.

I. GATHER THE FACTS AND ASSESS THE RISK UP FRONT.

Certainly, receipt of a summons carries with it time constraints on the duty to answer or otherwise respond to the case. But a company and its outside counsel should not let the opportunity for a serious motion to dismiss go by without serious investigation of the claims and transactions underlying them, and the substantive and procedural attacks that might be levied before an answer is filed. The company and its outside counsel should quickly assess the merits of the plaintiff's claim and analyze the facts of his or her individual transaction history *before* a first response is prepared and filed. If the claims made lack merit due to information the plaintiff's counsel seems not to know, it may well be that a voluntary dismissal can be obtained with a simple phone call to plaintiff's counsel, and if not, with a Rule 11 letter. If not, a convincing basis to propose a "nuisance value" individual settlement *before the commencement of discovery* may be revealed. On the other hand, such an analysis may reveal potential defenses that merit early dispositive briefing, or the identification of issues for targeted discovery from the plaintiff or third-parties to develop the defense. The more factual information the company can put in outside counsel's hands about the named plaintiff and his or her relevant transactions before the initial motion to dismiss or answer is filed, and the more the company empowers them to explore available options at the outset, the less likely you are to miss an opportunity for the earliest possible exit from the case.

II. IF THE CLASS ACTION IS FILED IN STATE COURT, THINK STRATEGICALLY ABOUT WHETHER TO REMOVE.

CAFA made removing class actions to federal court much easier, chiefly by eliminating the "complete diversity" requirement for removal of most class actions with an aggregate amount in controversy exceeding $5,000,000, and replacing it with a "minimal diversity" standard. But just because you can remove a class action doesn't mean you should. Federal court is not automatically the best venue for every class action, and businesses should not employ a knee-jerk preference for federal court. Whether to remove requires a case-by-case inquiry.

Removing cases under CAFA presents some significant drawbacks for the class action defendant. For example, the defendant must attempt to prove the amount in controversy exceeds $5,000,000 with detailed evidence that may have to primarily come from the company's own records. *See, e.g., Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 793, 797 (5th Cir. 2007). This requirement can

provide significant free discovery to the plaintiff, along with the identities of possible deponents, information as to various records to request in subsequent discovery, a road map to proving damages, and possible admissions that can be used against the company during class certification, summary judgment, or trial stages of the litigation, whether or not remand is granted. The more the company tries to hedge its statements as to the amount in controversy in an effort to avoid such admissions and consequences, the less likely it is that the company's burden of proving that the amount in controversy exceeds $5,000,000 will be found satisfied.

Even if the removing defendant carries that burden, the company will then be in a venue where any appeal from class certification is solely within the discretion of the appellate court. *See* FED. R. CIV. P. 23(f). The federal courts have made clear that such interlocutory appeals will be granted only sparingly, and only in the most compelling circumstances. *See, e.g., Asher v. Baxter Int'l Inc*., 505 F.3d 736, 741 (7th Cir. 2007) ("The final-decision rule of § 1291 is the norm, and Rule 23(f) is an exception that, like § 1292(b), must be used sparingly lest interlocutory review increase the time and expense required for litigation."); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1273–1274 (11th Cir. 2000) (same). In fact, on behalf of the U.S. Chamber of Commerce Institute for Legal Reform, the Skadden law firm recently conducted a study on 23(f) appeals, which was presented at DRI's 2014 Class Actions Seminar in Washington, D. C. The study analyzed 23(f) filings between October 31, 2006 and December 31, 2013, along with the ultimate dispositions of those petitions. The study showed that over the last seven years, less than 25% of 23(f) petitions have been granted, and of those that are, plaintiffs are enjoying increasing success in both reversing orders denying class certification and affirming orders granting class certification, despite the number of Supreme Court decisions over the last few years that should make class certification more difficult to obtain and sustain.

By contrast, some states allow appeals as of right from any grant or denial of class certification. *See, e.g.*, ALA CODE § 6-5-642; 12 OKLA. STAT. ANN. § 993(A)(6); TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(3); FLA. R. APP. P. 9.130(a)(3)(c)(vi) and (a)(6). In other states, petitions for mandamus or discretionary interlocutory appeals from class certification may be granted much more often than in the relevant federal court. An appeal as of right (or its functional equivalent) can be monumentally important because class certification and denial of a discretionary interlocutory appeal often force the defendant to settle rather than take a chance on the outcome of a classwide trial, particularly given the deleterious effects that an adverse classwide verdict and its attendant publicity can have on publicly traded stock. *See In re Rhone-Poulenc Rorer Inc*., 51 F.3d 1293, 1298–1302 (7th Cir. 1995). Worse yet, after class certification has already been granted and interlocutory review has been denied, a company wishing to settle is forced to negotiate with class counsel at a time when class counsel's leverage is at its most effective.

Moreover, even if a company is successful in removing a class action under CAFA, it will now find it somewhat more difficult and more expensive to settle the action on a class basis than would be the case in most state courts. CAFA makes even legitimate "coupon settlements" much less feasible. CAFA also requires that all relevant state and federal regulators of the company be provided with detailed notice of any proposed settlement and disclose the

identities of the class members affected by the settlement before it is approved. This requirement can not only make the terms of a settlement more expensive for the defendant in and of itself, but the necessity of abiding by this rule can easily generate both adverse publicity and additional collateral individual litigation, both at the hands of competing would-be class counsel and class members who object to or opt out of the action, and at the hands of regulators who choose to pursue their own separate investigations or lawsuits. The potential for intervention or objection by such regulators—some of whom may be elected officials—may have the potential to derail or greatly complicate the settlement process. The ability of class members to reject the settlement if a court later finds there has been a failure to provide proper notice to state and federal regulators is another significant concern, particularly to companies regulated by more than one state or federal agency. Under CAFA, the risk of making the wrong guess about which regulators need to be notified rests squarely on the defendant, forcing over-inclusive notice to the regulators as the safest recourse which, in turn, increases the risk of adverse consequences from review and scrutiny by more regulatory officials. Moreover, as part of this rigorous notice process, some courts may force settling defendants to effectively put their customer lists into what may well amount to the public domain.

These are only a few of the potential downsides that must be considered before deciding to remove a class action under CAFA; other potential pitfalls abound. Federal courts in a given circuit may be more prone to certify classes than the state forum in which the class action was originally filed, even when the state forum has developed a reputation as a "judicial hellhole" in the past. *See, e.g., In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004), *cert. denied*, 543 U.S. 870 (2004) (reversing denial of class certification regarding "race-distinct premium" claims); *Klay v. Humana*, 382 F.3d 1241 (11th Cir. 2004) (upholding 23(b)(3) certification of RICO claims of classes of physicians against various health maintenance organizations), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008). *Cf.* G. COOK, *The Alabama Class Action: Does It Exist Any Longer? Does It Matter?* 66 ALA. LAW. 289 (July 2005) (discussing the paucity of Alabama Supreme Court decisions upholding class certification and the abundance of Alabama Supreme Court decisions rejecting class certification that have been handed down since 1998).

The foregoing discussion is not intended to suggest that removing a class action is never the best choice. Quite often it will be. However, even in traditionally bad venues, the decision as to whether to attempt a CAFA removal—or any removal to federal court for that matter—should be made with careful consideration of all the pros and cons of each venue as to that particular case, including the impact on early dispositive motions, settlement possibilities, and interlocutory appeal of class certification.

III. INVEST TIME, EFFORT AND RESOURCES IN IDENTIFYING AND SERIOUSLY BRIEFING EARLY DISPOSITIVE MOTIONS.

Undoubtedly, the most expensive part of class litigation is class discovery, both in terms of time and money. Early dispositive motions have the potential to end the case before discovery. Their ability to do so is enhanced by the fact that most courts will stay discovery while a serious

motion to dismiss is pending.[1] Strategically and thoughtfully conducted early motion practice can be highly effective in defeating class actions before they can even get out of the gate. Even if they do not achieve complete victory, they will often reduce the scope of the case (either in terms of the claims made or of the geographic or temporal scope of the class proposed), producing substantial discovery and other savings and making the defense of the case more cost effective. These very large potential long term cost savings warrant significant short term investment in the fact-gathering, research and briefing necessary to make them possible.

Moreover, courts do not read complaints or answers until they have to. Strategically, then, a motion to dismiss will most likely be the first document a court actually reads in the case. Whether it is granted or not, then, a serious, well-briefed motion to dismiss can play a very helpful role in framing a court's overall opinion of the case, and in defining the core issues you want the court to focus on later in the litigation. It is an opportunity for a company to set the tone for the litigation—a chance for the company to begin telling the story *the way it wants to tell it*.

Courts are not going to dismiss a class action on the basis of a perfunctory motion to dismiss. But most judges are busy, and if a fair judge can be convinced by a serious, well briefed motion that there is no reason to clog his or her docket with a class action that can properly be disposed of at the outset, the judge may well embrace the opportunity to cut to the chase and dispose of all or part of the action, provided of course that your presentation convinces the judge that the dismissal will withstand appeal, and that discovery cannot and will not alter the analysis of the dispositive issues.

A successful dismissal effort in the early stages of a class action requires an investment not only in thorough legal research, analysis and briefing, but early, rapid and detailed examination of relevant internal client documents relating to the named plaintiff and his or her claims, as well as potentially useful public information about the plaintiff. The effort will usually involve more expense than in a typical

[1] *See, e.g., Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989) (the purpose of Rule 12 is to "streamline[ ] litigation by dispensing with needless discovery and factfinding"); *Dynamic Image Tech., Inc. v. U.S.*, 221 F.3d 34, 38 (1st Cir. 2000) ("Where, as here, a defendant challenges a court's jurisdiction, the court has broad discretion to defer pretrial discovery if the record indicates that discovery is unnecessary (or, at least, is unlikely to be useful) in regard to establishing the essential jurisdictional facts.") (bracketed text in original); *Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502, 505 (4th Cir. 1999) (affirming order staying discovery pending resolution of motion to dismiss, because such motions test the sufficiency of a complaint under a standard in which "all of the factual allegations in the complaint [are accepted] as true"); *Mann v. Brenner*, 375 Fed. App'x 232, 239 (3d Cir. 2010) (affirming order staying discovery during pendency of motion to dismiss); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) ("Facial challenges to the legal sufficiency of a claim or defense . . . should . . . be resolved before discovery begins. Such a dispute always presents a purely legal question; there are no issues of fact because the allegations contained in the pleadings are presumed to be true. Therefore, neither the parties nor the court have any need for discovery before the court rules on the motion."); *Landry v. Air Line Pilots Ass'n Int'l. AFL-CIO*, 901 F.2d 404, 435-36 (5th Cir. 1990) (affirming entry of protective order staying discovery pending resolution of motion to dismiss, because "no discovery was needed to resolve the motions to dismiss under F.R.Civ.P. 12(b)(6)[, as such] motions are decided on the face of the complaint."); *Thigpen v. U.S.*, 800 F.2d 393, 396-97 (4th Cir. 1986) ("Nor did the court err by granting the government's motion under Fed. R. Civ. P. 26(c) to stay discovery pending disposition of the 12(b)(1) motion . . . . Trial courts . . . are given wide discretion to control this discovery process"), *overruled on other grounds, Sheridan v. U.S.*, 487 U.S. 392 (1988).

individual case, but the potential payoff—avoidance of months or years of classwide discovery—is exponentially larger. Class-based discovery is highly disruptive of company's business, time consuming for both outside and in-house lawyers and business representatives, and can provide plaintiff's counsel with priceless information about other potential lawsuits, theories and clients to which he or she would have never been exposed otherwise. An early victory in a class action is therefore generally far more valuable to a company's bottom line than a later one, despite the higher-than-usual up-front cost that may be required to achieve it.

IV. DON'T OVERLOOK THE LESS OBVIOUS THRESHOLD CHALLENGES.

There is no "stock" motion to dismiss, or at least not one that warrants use in the class context. Instead, the potential for an early dispositive challenge is driven by the facts of the case (both as alleged and as they really are), the substantive law associated with the claims presented, and any limitations placed by a client and by procedural time constraints on the analysis and presentation of such challenges.

Federal Rule of Civil Procedure 12(b) or its typical state counterpart of course provides the vehicle for most early dispositive motions, including challenges to subject matter jurisdiction, standing, lack of venue, improper service or process, failure to join necessary parties, and a complaint's failure to state claims upon which relief can be granted. This paper will not try to address all of the different fact-specific grounds that may be present in any given case for an early dispositive motion to dismiss, but it will try to list some examples of the types of off-the-beaten path motions that have been successful in achieving an early end to financial services class actions. These examples serve to emphasize a very important point—the earliest exit from class litigation is not necessarily one you will find by simply looking at the elements of the claims asserted.

A. Challenges to a Plaintiff's Standing.

At least in the context of actions pending in federal court, a plaintiff must show that her claim presents the court with a sufficient case or controversy. U.S. CONST. art. III, § 2. To fulfill this requirement, a plaintiff generally must show that:

> (1) he has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000). Many states have adopted similar standing principles. *See*, *e.g.*, *Ex parte Aull*, — So. 3d —, 2014 WL 590300 (Ala. Feb. 14, 2014); *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 753 S.E.2d 846 (S.C. 2014); *ORO Mgmt., LLC v. R.C. Mineral & Rock, LLC*, 304 P.3d 925 (Wyo. 2013); *Hall v. Walter*, 969 P.2d 224 (Colo. 1998). Courts have rejected class actions at the pleading stage simply because the named plaintiff has not adequately pleaded the fact that he or she has been injured, and therefore has not established standing. *Birdsong v. Apple, Inc.* 590 F.3d 955, 960-61 (9th Cir. 2009) (holding plaintiffs had no standing because they did not themselves claim injury due to allegedly

excessive headphone volume). For example, many courts have held that plaintiffs alleging privacy violations or the unauthorized collection of personal information have failed to plead Article III standing because they have not shown concrete harm. *See, e.g.*, *In re Google, Inc., Privacy Policy Litig.*, No. C 12-01382, 2012 WL 6738343, at *4-6 (N.D. Cal. Dec. 28, 2012); *In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 327 (E.D.N.Y. 2005). Similarly, courts have widely held that borrowers lack standing to challenge—whether through a class action or individual action—the validity of mortgage and note assignments by and between lenders, because such assignments do not change the borrower's obligation but merely the identity of the entity to whom the borrower is obligated. *Peterson v. GMAC Mortg., LLC*, No. 11-11115, 2011 WL 5075613, at *2, 4 (D. Mass. Oct. 25, 2011) (dismissing debtors' complaint seeking to challenge validity of mortgage assignment from MERS to GMACM based on "robo-signer" allegations: "plaintiffs do not establish that they have a legally protected interest, as mortgagor, in the assignment of their Mortgage from the original mortgagee to a third party, as they are not a party to the assignment nor are they granted any rights under it. . . . Accordingly, plaintiffs have no legally protected interest in the Mortgage assignment from MERS to GMAC and therefore lack standing to challenge it.").[2]

[2] *See also Livonia Props. Holdings v. 12840-12976 Farmington Rd. Holdings*, 717 F. Supp. 2d 724, 747 (E.D. Mich. 2010), *aff'd*, 399 Fed. Appx. 97 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 1696 (2011) ("for over a century, state and federal courts around the country have applied similar reasoning to hold that a litigant who is not a party to an assignment lacks standing to challenge that assignment."); *In re Correia*, B.A.P. 452 B.R. 319, 324-25 (B.A.P. 1st Cir. 2011) (in affirming dismissal of mortgagors' adversary proceeding to set aside foreclosure based on challenges to the validity of mortgage assignment between lenders, concluding that because the mortgagors were not parties to the assignment, they lacked standing to challenge the assignment's validity: "There is no more to say."); *Lybrand v. Allen*, 23 F.2d 391, 394-95 (4th Cir. 1928) (holding that bankruptcy trustee could not challenge validity of assignment of debtor's mortgage and note from subsequent holder to debtor's brother); *Blackford v. Westchester Fire Ins. Co.*, 101 F. 90, 91 (8th Cir. 1900) ("As long as no creditor of the assignor questions the validity of the assignment, a debtor of the assignor cannot do so."); *Kain v. Bank of N.Y. Mellon*, No. 08-08404, 2012 WL 1098465, at *8 (Bankr. D.S.C. Mar. 30, 2012) ("this Court is swayed by recent authority finding that debtors, who are not parties to or third party beneficiaries of a P[ooling and] S[ervicing] A[greement], lack standing to challenge the validity of or noncompliance with terms of PSA."); *Silving v. Wells Fargo Bank*, No. CV 11-0676-PHX-DGC, 2012 WL 135989, at *3 (D. Az. Jan. 18, 2012); *Wenzel v. Sand Canyon Corp.*, No. 11-30211-JCB, 2012 WL 219371, at *11 (D. Mass. Jan. 5, 2012) ("Courts have repeatedly held that mortgagors have no standing to dispute a mortgage assignment to which they are not a party."); *Wolf v. Fed. Nat'l Mortg. Ass'n.*, 11-00025, 2011 WL 5881764, at *6 (W.D. Va. Nov. 23, 2011) ("Wolf does not have standing to challenge the validity of the assignment in this case: she was not a party to the assignment, and the assignment did not affect her underlying obligation to make timely payments."); *Valasco v. Sec. Nat'l Mrtg. Co.*, No. 10-00239, 2011 WL 4899935, at *4 (D. Hawai'i Oct. 14, 2011) ("as strangers to the Assignment and without any evidence or reason to believe that they are intended beneficiaries of that contract, [mortgagor] Plaintiffs may not dispute the validity of the Assignment."); *Kriegel v. Mortg. Electronic Registration Sys.*, No. PC2010-7099, 2011 WL 4947398 (R.I. Super. Ct. Oct. 13, 2011) (same); *Schieroni v. Deutsche Bank Nat'l Trust Co.*, No. H-10-663, 2011 WL 3652194, at *6 (S.D. Tex. Aug 18, 2011) ("Courts . . . have concluded that mortgage debtors lacked standing to challenge the chain of title under contracts by which the assignments were allegedly made. When, as here, the borrowers are not parties to the assignment contracts, courts decline to find that an attempted foreclosure is invalid or otherwise grant relief."); *Turner v. Lerner, Sampson & Rothfuss*, No. 1:11-CV-00056, 2011 WL 1357451, at *2 (N.D. Ohio Apr. 11, 2011) ("Plaintiffs are challenging the validity of the assignment of the mortgage notes now allegedly held by the foreclosing banks. However, it is generally accepted law that a litigant who is not a party to an assignment lacks standing to challenge assignment of

Recent Supreme Court decisions provide more ammunition than ever before to shoot down class actions in which injury allegations are weak or non-existent can be successfully challenged. In federal court, the by now familiar *Twombly* and *Iqbal* decisions provide clear ammunition to attack vague allegations of standing at the pleading stage, largely replacing the minimalist interpretations of the traditional "notice pleading" standard with a requirement that plaintiff plead specific facts plausibly showing an entitlement to relief. Facts showing that there is a causal connection between the wrong alleged and a resulting injury to the named plaintiff is part of what must be pled under this standard.[3]

Meanwhile, the Supreme Court's recent decision in *Comcast Corp. v. Behrend*, — U.S. —, 133 S. Ct. 1426 (U.S. 2013), makes it clear that the burden of establishing a causal connection between the alleged wrong and the damage claimed becomes a classwide burden at the class certification stage. However, the evidence which the named plaintiff wishes to rely upon to prove the causal connection between his own damage and the alleged wrong will often be so individualized as to create problems at the class certification stage, and this tension adds to the value of hitting the plaintiff with standing challenges not only in motions to dismiss, but in motions for summary judgment, deposition questions, and if the case gets there, in the opposition to class certification and any *Daubert* challenges to experts purporting to address classwide injury, damages or causation. Because of the continued significance of

a note. The Plaintiffs in this case are not parties to the assignments that are challenged—or seemingly connected in any way to the assigned note—and are unable to challenge the chain of title.") (quotations omitted); *Powers v. Aurora Loan Servs.*, No. 213-2010-CV-00181, 2011 WL 4428713 (N.H. Super. Ct. Feb. 14, 2011) (same). *Cf.* 6 AM. JUR. 2D *Assignments* § 2 ("[A]n assignment generally requires neither the knowledge nor the assent of the obligor . . . because an assignment cannot change the obligor's performance."); 6A C.J.S. *Assignments* § 132 (borrower may not assert grounds which may render the assignment voidable "because the only interest or right which an obligor of a claim has in the instrument of assignment is to insure him or herself that he or she will not have to pay the same claim twice."). *Accord Kapila v. Atl. Mortg.. & Inv. Corp.*, 184 F.3d 1335, 1337-38 (11th Cir. 1999) (holding that a bankruptcy trustee lacked standing to challenge mortgage assignment between lenders because the trustee stood in no better position than the debtor, who would lack standing to challenge the assignments); *Musselman v. U.S. Bank Nat'l Ass'n*., 6:11-cv-1247, 2012 WL 868772, at *3 (M.D. Fla. Mar. 14, 2012) (affirming entry of summary judgment against trustee who sought to challenge validity of mortgage assignment for lack of standing: the "Trustee in this case does not have standing to challenge compliance with the PSA because neither she nor [the mortgagor] was a party to the PSA, a third-party beneficiary, or an investor in the pooled mortgages at issue.").

[3] *Valley Forge Christian Coll. v. Americans United For Separation of Church & State, Inc*., 454 U.S. 464, 472 (1982) (to establish standing, a plaintiff's injury must be shown to be the "result of the putatively illegal conduct of the defendant" and not the actions of someone else); *accord In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235 (3d Cir. 2012) (affirming dismissal of putative class action due to the plaintiff's lack of standing because the plaintiff failed to sufficiently demonstrate a causal connection between the alleged injury and the defendant's wrongful conduct); *Chambers v. King Buick GMC, LLC*, No. 13-cv-2347, 2014 WL 4384316 (D. Md. Sept. 2, 2014) (dismissing putative class action to the extent plaintiff sought to assert claims against dealerships with whom the plaintiff had never personally dealt); *In re Trilegiant Corp., Inc*., No. 12-cv-396, 2014 WL 1315708 (D. Conn. Mar. 28, 2014) (dismissing putative class action because plaintiffs failed to allege that the defendants were the direct or indirect cause of their injuries); *Polanco v. Omnicell, Inc.*, 988 F. Supp. 2d 451 (D. N.J. 2013) (dismissing loss of confidential information class action because plaintiff failed to sufficiently demonstrate that her injury could be fairly traced to the defendant's conduct).

standing and injury throughout the case, an early motion to dismiss challenging plaintiff's lack of actual injury can pay long-term dividends even if it does not result in immediate dismissal. If the plaintiff responds to a motion to dismiss by claiming highly individualized forms of injury, or highly individualized evidence of a causal nexus between his or her injury and the wrong, this can result in serious problems showing injury, traceability and damages on a classwide basis at the class certification stage.

A good example is the case of *Resnick v. AvMed, Inc.*, 693 F.3d 1317 (11th Cir. 2012). There, a laptop containing a large amount of private information about thousands of customers was stolen. Plaintiff sued for damages on a class basis for the privacy breach. In the face of a challenge based upon failure to plausibly allege a traceable causal nexus between the data loss and plaintiff's subsequent identity theft troubles, plaintiff alleged that he had gone to extraordinary lengths to protect all of his personal information, never sharing any of it digitally or doing any online financial transactions. The court found this "barely" sufficient to survive a *Twombly*-based standing challenge at the pleading stage. But consider how that kind of highly-individualized causation plays out at the class certification stage—how in the world would plaintiff be able to prove the same degree of caution by the rest of the class, and if he could not, how could a causal connection between the data breach and any actual injury to absent class members be proven classwide? *Id*. at 1323, n. 1 ("As Plaintiffs have alleged only actual—not speculative—identity theft, we need not address the issue of whether speculative identity theft would be sufficient to confer standing.").[4]

The value of successfully attacking a named plaintiff's standing may go well beyond defeating the individual plaintiff's case at hand. Under federal law and the law of many states, the pendency of a class action tolls the running of the applicable statute of limitations on the claims of absent class members at issue until the case is dismissed or class certification is denied. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). A decision denying certification or dismissing the case ends such tolling and the running of the applicable statutes of limitation resumes automatically. *See, e.g.*, *Lewis v. City of Chicago, Illinois*, 702 F.3d 958, 961 (7th Cir. 2012). However, such tolling generally applies only to subsequent individual claims, not subsequent class action claims, because class members cannot "piggyback" substantively identical class actions on top of one another to extend the *American Pipe* tolling doctrine. *See, e.g.*, *Basch v. Ground Round, Inc*., 139 F.3d 6, 11 (1st Cir. 1998); *Griffin v. Singletary*, 17 F.3d 356, 359-60 (11th Cir. 1994); *Robbin v. Fluor Corp*., 835 F.2d 213, 214 (9th Cir. 1987); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985).

But there is an important prerequisite to *Amercian Pipe* tolling, at least under the law of many federal circuits and states. For the tolling doctrine to apply, the named plaintiff(s) in the first class action must have

[4] Issues very much akin to this are currently before the U.S. Supreme Court in *BP Exploration & Production Inc., et al. v. Lake Eugenie Land & Development, Inc.*, Docket No: 14-123. The question presented is whether the Fifth Circuit erred in holding—in conflict with the Second, Seventh, Eighth, and D.C. Circuits—that district courts can, consistent with Rule 23 and Article III, certify classes that include numerous members who have not necessarily suffered any injury actually caused by the defendant.

had standing. Courts in these jurisdictions have held that "if the original plaintiffs lacked standing to bring their claims in the first place, the filing of a class action complaint does not toll the statute of limitations for other members of the purported class." *In re Colonial Ltd. P'ship Litig.*, 854 F. Supp. 64, 82 (D. Conn. 1994); *see also Maine State Ret. Sys. v. Countrywide Fin. Corp.*, 722 F. Supp. 2d 1157, 1166–67 (C.D. Cal. 2010) ("the Court follows multiple other courts that have held in federal cases that the statute is tolled only as to claims where the named plaintiffs had standing"). The rationale is that "it would be beyond the constitutional power of a federal court to toll a period of limitations based on a claim that failed because the claimant had no power to bring it." *Palmer v. Stassinos*, 236 F.R.D. 460, 465 n.6 (N.D. Cal. 2006). Put differently, where "plaintiffs never had standing … federal jurisdiction never attached." *Walters v. Edgar*, 163 F.3d 430, 432 (7th Cir. 1998).

If a putative class action is commenced by a plaintiff without standing, quite a few courts have also held that the lack of subject matter jurisdiction renders the entire case a nullity, leaving the court powerless to allow substitution of plaintiffs in the original class action, to allow an amendment of the original class complaint, or to take any other action other than dismissing the case. A federal court *must always* dismiss a case upon determining that it lacks subject matter jurisdiction, regardless of the stage of the proceedings, and facts outside of the pleadings may be considered as part of that determination. *Arbaugh v. Y&H Corp*., 546 U.S. 500, 514 (2006). "[W]here the sole plaintiff in a case loses standing to proceed on his or her cause of action, the plaintiff also loses standing to amend the complaint to add plaintiff parties whose cause of action would survive." *Lawrence v. Household Bank (SB), N.A.*, 505 F. Supp. 2d 1279, 1285 (M.D. Ala. 2007); *accord Kowalski v. Tesmer,* 543 U.S. 125, 134 (2004) (plaintiffs' counsel generally lack "standing to bring in court the claims of future unascertained clients."). Thus, in many jurisdictions, a plaintiff who commences a case without personal standing cannot avoid dismissal by proposing someone else to replace him. *Jaffree v. Wallace*, 837 F.2d 1461, 1466 (11th Cir. 1988)("[w]here a plaintiff never had standing to assert a claim against the defendants, *it does not have standing to amend the complaint and control the litigation by substituting new plaintiffs*, a new class, and a new cause of action."); *see also S*; *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1023 (9th Cir. 2003); *Walters v. Edgar*, 163 F.3d 430, 432 (7th Cir. 1998); *Summit Office Park, Inc., v. U.S. Steel Corp.* 639 F.2d 1278, 1282-83 (5th Cir. 1981).[5]

Accordingly, in cases where the limitations period is short or was almost expired when the class action was filed, and in cases where the limitations period expires during the pendency of the suit, a successful challenge to the named plaintiff's standing has the potential to be effectively dispositive not just as to the named plaintiff's claims, but as to the claims of the entire alleged

[5] Some courts apply *American Pipe* tolling despite the dismissal of the original suit provided that the dismissal was based on reasons unique to the original plaintiff as opposed to some defect in the class itself. *See, e.g., Yang v. Odom*, 392 F.3d 97, 111 (3d Cir. 2004) ("[W]here class certification has been denied solely on the basis of the lead plaintiffs' deficiencies ... not because of the suitability of the claims for class treatment, American Pipe tolling applies to subsequent class actions."); *Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1149 (9th Cir. 2000) (en banc) (holding that the filing of a previous class action tolled the applicable statute for a later class action where the later action was not an attempt to relitigate the denial of certification or correct a procedural deficiency in the purported class).

class—at least in many jurisdictions.

B. The Lurking Standing Issue Peculiar to "No Actual Harm" Statutory Class Actions.

Many class actions involve an alleged violation of a statute or duty without any corresponding allegation that the plaintiff and the putative class members suffered any clear economic or other injury as a result. The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, *et seq.*, Fair Credit Reporting Act, 15 U.S.C. §§ 1681, *et seq.*, Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601, *et. seq.*, Fair and Accurate Credit Transactions Act, 15 U.S.C. §§ 1601, *et. seq.*, and many of the other federal alphabet-soup statutes are prime examples of consumer protection legislation that purport to authorize a private cause of action for an award of statutory damages in the absence of evidence of actual injury. No-injury class actions are in fact quite common, particularly in the financial services context, and pose great risks for defendants because they offer the potential for large recoveries even where the evidence of injury or causation is relatively weak. In such cases, attacking the plaintiff's standing early and often is one strategy that will often prove fruitful.

As noted earlier, at its core standing is an essential prerequisite of subject matter jurisdiction. *See, e.g., Anago v. Shaz*, 677 F.3d 1272, 1275 (11th Cir. 2012) (citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514, 126 S. Ct.1235, 1244 (2006)). Statutory damage class actions push the constitutional limits of standing, because they purport to hold a defendant liable regardless of whether any actual harm was caused. Just a couple of years ago, the Supreme Court granted *certiorari* to decide the intellectually difficult question of whether a mere statutory violation without any corresponding actual economic injury was sufficient to confer standing. In *Edwards v. First Am. Corp.*, 610 F.3d 514 (9th Cir. 2010), a case that was anticipated to have significant impact on the litigation of consumer claims seeking statutory damages, the Ninth Circuit had held that a mere technical violation of RESPA — without any resulting economic injury to the recipient of the document constituting the violation satisfied Article III's actual injury requirement, conferred standing upon the recipient, and created a justiciable controversy. Since constitutional provisions such as Article III's "concrete injury" requirement normally cannot be altered by a mere act of Congress, a number of courts have questioned whether Congress can effectively circumvent Article III's normal requirements for standing simply by saying that a technical violation of a statute creates a cause of action for statutory damages even without injury. After all, the Supreme Court itself has said that:

> "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." … It would exceed Article III's limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws. The party bringing suit must show that the action injures him in a concrete and personal way.

Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009). In the same vein, the First Circuit in *Conservation Law Foundation of New England, Inc. v. Reilly*, held that a

statutory violation does not confer Article III standing unless plaintiffs can show they suffered a "distinct and palpable injury" from the violation, explaining that "Congress may not expand by statute the standing limitations imposed upon it by Article III." 950 F.2d 38, 41 (1st Cir. 1991); *accord U.S. ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993) ("[S]ome injury-in-fact must be shown to satisfy constitutional requirements, for Congress cannot waive the constitutional minimum of injury-in-fact."); *U.S. v. Weiss*, 467 F.3d 1300, 1310–11 (11th Cir. 2006) ("While it is true that Congress may enact statutes creating legal rights … [a] federal court's jurisdiction … can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action.").

On the other hand, some other courts of appeal –such as the Ninth Circuit in *Edwards*—have concluded that Article III standing can be based solely on the violation of a statutory right without a further showing of injury. *See, e.g., Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 988–89 (6th Cir. 2009) (stating that Congress "has the authority to create a right of action whose only injury-in-fact involves the violation of [a] statutory right"); *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 763 (3d Cir. 2009) ("the fact that plaintiffs' injury is non-monetary is not dispositive"). These decisions have loosely created a standard suggesting that an "informational" injury will satisfy Article III's requirements, if a plaintiff is deprived of information required to be provided to her by statute.

Edwards was the case that was *supposed* to resolve this debate. So what did the Supreme Court do? It punted. After argument in *Edwards, certiorari* was dismissed on the last day of the Court's 2011-2012 term as having been improvidently granted. — U.S. —, 132 S. Ct. 2536 (2012). The issue was presented to the Supreme Court again during the 2012-2013 term in *Mutual First Fed. Credit Union v. Charvat*, but the Court denied *certiorari* review. — U.S. —, 134 S. Ct. 1515 (2014).[6] The issue was once again presented to the Court this term for *certiorari* review, in *Spokeo, Inc. v. Robins*, No. 13-1339, wherein the petitioner seeks review of the Ninth Circuit's reversal of a trial court's order dismissing a putative Fair Credit Reporting Act class action in which no actual injury was alleged. *See Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014). The petition was circulated for conference on September 29, 2014. Rather than deny review outright, the Court sought comment from the Solicitor General on October 6, 2014.

This is an issue won't seem to go away, and it seems likely that the Supreme Court will address it at some point. It is therefore an argument worth preserving in any statutory damage class action. In the interim there is still substantial uncertainty as to how constitutional standing requirements should be applied in consumer statutory damage-only class actions, especially those brought in federal court.

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[6] *Charvat* involved a putative class action for violations of the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693, *et seq.*, in that the defendant's ATM allegedly lacked a physical warning that transactional charges would be assessed users of the machine. Presented with a motion to dismiss challenging the plaintiff's standing for lack of an Article III injury, the District of Nebraska dismissed the action after concluding that "[u]nless Charvat alleges an injury in fact, he does not have standing to enforce the statute." *Charvat v. First Nat. Bank of Wahoo*, No. 12-cv-97, 2012 WL 2016184, at *5 (D. Neb. June 4, 2012). On appeal, the Eighth Circuit reversed, finding that Charvat had suffered a sufficient "informational" injury to satisfy the injury in fact requirement. *Charvat v. Mutual First Fed. Credit Union*, 725 F.3d 819 (8th Cir. 2013).

For example, while the Eighth Circuit concluded in *Charvat* that an "informational deprivation" injury will suffice for purposes of Article III in the context of the Electronic Funds Transfer Act, the same court concluded earlier this year that product mislabeling allegations—an informational injury for sure—do not satisfy the injury in fact requirement absent allegation of actual injury, at least in the context of a putative class allegation alleging violations of *state* deceptive trade and consumer protection acts. *Wallace v. Conagra Foods, Inc.*, 747 F.3d 1025 (8th Cir. 2014). Intellectual conflict over this issue thus exists not only between the circuits but sometimes within a given circuit.

Use this ongoing uncertainty to your advantage. Although plaintiffs have plenty of authority on their side as well, this issue still makes the plaintiff's bar quite nervous, and raising it can force the plaintiff's attorney to spend far more time than he or she planned defending his client's ability to "pass go." Generally, standing issues raised in a motion to dismiss will justify a stay of discovery pending decision as well—an expense that defendants generally want to postpone in most cases. (I know of at least two FDCPA class actions that were forced into modest individual settlements by *Edwards*-type motions, without the defendant giving up a single document in discovery).

C. Standing and Related Issues Arising Out Of The Named Plaintiff's Prior Or Pending Bankruptcy.

In every class action (and particularly in financial services class actions), a company should have its defense counsel search the federal bankruptcy dockets to see if the named plaintiff filed a bankruptcy petition, as the bankruptcy may impact his or her ability to bring the claims asserted individually, and therefore plaintiff's ability to represent the proposed class.

Under section 541(a) of the Bankruptcy Code, the commencement of a bankruptcy case creates an estate comprised of all legal or equitable interests of the debtor in property, wherever located and by whomever held. *See* 11 U.S.C. § 541(a)(1). This includes all "causes of action and rights of recovery on legal claims, whether in pending litigation or not." *Canterbury v. Federal-Mogul Ignition Co.*, 483 F. Supp. 2d 820, 824 (S.D. Iowa 2007) (citing *In re Ozark Rest. Equip. Co., Inc.*, 816 F.2d 1222, 1225 (8th Cir.1987)). In a chapter 7 case, claims that existed on the bankruptcy petition date become part of the bankruptcy estate, and the debtor loses standing to pursue them. *See Ozark Rest. Equip. Co.*, 816 F.2d at 1225; *Sherrell v. WIL-BFK Food Serv., Inc.*, No. 09–04072, 2009 WL 3378991 at *1-2 (W.D. Mo. 2009); *Miller v. Pacific Shore Funding*, 287 B.R. 47, 50-51 (D. Md. 2002) ("Therefore, the moment the [Chapter 7 debtors] filed their bankruptcy petition on January 16, 2001, all their interests in the instant cause of action became property of the bankruptcy estate:" as a result, they had "no standing to sue[, a]nd without standing, they can represent neither themselves nor any members of a putative class."), *aff'd.*, 92 Fed. App'x 933 (4th Cir. 2004).[7] In essence, the chapter 7 trustee becomes the real party in interest to those claims and may prosecute them for the benefit of the estate. *Ozark Rest. Equip.*

[7] However, some "courts have held that a debtor who lacks standing to pursue a claim for monetary damages may remain a plaintiff insofar as the debtor seeks equitable relief that would be of little or no value to the estate." *Sherrell*, 2009 WL 3378991, at *1 (citing *E.E.O.C. v. Merch. State Bank*, 554 F. Supp. 2d 959, 962 (D.S.D. 2008); *accord Barger v. City of Cartersville, Ga.*, 348 F.3d 1289, 1297 (11th Cir. 2003).

Co., 816 F.2d at 1225; *see also Bauer v. Commerce Union Bank*, 859 F.2d 438, 441 (6th Cir. 1988) ("It is well settled that the right to pursue causes of action formerly belonging to the debtor—a form of property 'under the Bankruptcy Code'—vests in the trustee for the benefit of the estate."). *Accord* 11 U.S.C. § 704(a)(1). Pre-petition claims and causes of action remain property of the chapter 7 bankruptcy estate until they have been administered or abandoned by the trustee to the debtor. *Canterbury*, 483 F. Supp. 2d at 825. When a bankruptcy case is closed, only unadministered property listed in a debtor's bankruptcy schedules is abandoned to the debtor. 11 U.S.C. §§ 554(c) - (d). Thus, if the chapter 7 debtor failed to list his pre-petition class action claims in his bankruptcy schedules, the closing of the case will not result in abandonment of the claims to the debtor, and the chapter 7 trustee will remain the sole party with standing to prosecute the causes of action even after the bankruptcy case closes.

Although a chapter 13 debtor maintains control over all assets, *see* 11 U.S.C. § 1303, and has standing to bring suit in his own right, a chapter 13 bankruptcy filing may also impact a debtor's ability to bring claims that are property of the estate if the debtor failed to disclose the claims in his bankruptcy.[8] In such cases, the doctrine of judicial estoppel may apply to preclude the debtor from pursuing the claims.[9] *See, e.g.*, *Robinson*, 595 F.3d at 1273; *Stallings v. Hussmann Corp*., 447 F.3d 1041, 1047-1049 (8th Cir. 2006); *Clarke v. United Parcel Serv., Inc.*, 421 B.R. 436 (W.D. Tenn. 2010); *Williams v. Hainje*, No. 06-cv-121, 2009 WL 2923148 (N.D. Ind. 2009); *Lewis v. Crelia*, 229 S.W. 3d 19, 21-22 (Ark. 2006); *Southmark Corp. v. Trotter, Smith & Jacobs*, 442 S.E.2d 265, 266-67 (Ga. Ct. App. 1994). Although the elements of the judicial estoppel defense vary from jurisdiction to jurisdiction, typically, the elements are as follows: (1) the party must assume a position that is clearly inconsistent with a prior position taken by the party; (2) the party must successfully maintain the inconsistent position such that the court relies upon the position; (3) the party's inconsistent position must result in the party gaining an unfair advantage; and (4) the party must take the inconsistent position intending to manipulate the judicial process or obtain an unfair advantage. *Stallings*, 447 F.3d at 1047-1049.[10] The Eight Circuit has

[8] In a chapter 13 case, causes of action acquired after the commencement of the bankruptcy case may also comprise estate property, and a debtor may have an affirmative duty to disclose such claims. 11 U.S.C. § 1306; *see also Robinson v. Tyson Foods, Inc*., 595 F.3d 1269, 1274-75 (11th Cir. 2010).

[9] While the doctrine of judicial estoppel may also apply to preclude a chapter 7 debtor from pursuing undisclosed claims, the doctrine of judicial estoppel generally will not be extended to bar a chapter 7 trustee from pursuing claims on the basis of a debtor's failure to schedule the claims. *Canterbury*, 483 F. Supp. 2d at 827-830; *but see Guay v. Burack*, 677 F.3d 10 (1st Cir. 2012) (affirming application of judicial estoppel based on Chapter 7 debtor's failure to amend his bankruptcy schedules to disclose the existence of his claims as newly acquired assets prior to obtaining discharge from bankruptcy).

[10] *Accord New Hampshire v. Maine*, 532 U.S. 742, 750-751 (2001) (recognizing three factors as typically informing the decision on judicial estoppel: (1) whether the present position is clearly inconsistent with the earlier position; (2) whether the party succeeded in persuading a court to accept the earlier position, so that judicial acceptance of the inconsistent position in a later proceeding would create the perception that either the first or second court was mislead; and (3) whether the party advancing the inconsistent position would derive an unfair advantage); *Burnes v. Pemco Aeroplex, Inc*., 291 F.3d at 1285-86 (adopting a truncated judicial estoppel inquiry, finding that the following two factors are consistent with the three factors enumerated by the Supreme Court: (1) it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding, and (2) such inconsistencies must be shown to have been

observed that a debtor's failure to satisfy its statutory disclosure duty in bankruptcy is "inadvertent" only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment. *Stallings*, 447 F.3d at 1048. While courts will infer intent under such circumstances, the specific facts of the case may weigh against such an inference. *See id*. at 1048; *see also Lewis v. Crelia*, 229 S.W. 3d at 22. The argument for application of the doctrine of judicial estoppel typically is as follows: (1) the debtor's failure to disclose his claims in bankruptcy is inconsistent with his prosecution of those claims; (2) the bankruptcy relied on the inconsistent position in granting the debtor a discharge; and (3) the inconsistent position will result in the debtor receiving an unfair advantage in that he will receive the proceeds of estate property that otherwise would go to pay creditors in the bankruptcy case. As explained by the Middle District of Georgia,

> The doctrine of judicial estoppel has been applied consistently in the bankruptcy context notwithstanding its often harsh consequences. It does not matter if the non-disclosing party later attempts to correct the failure to disclose. Where, as here, a debtor fails to disclose an asset to the bankruptcy court and that omission is later challenged by an adversary, the debtor may not back-up, re-open the bankruptcy case, and amend his bankruptcy filings. To hold otherwise would suggest that a debtor should consider disclosing potential assets only if he is caught concealing them and would diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure of the debtors' assets.

In re Tyson Foods, 732 F. Supp. 2d 1363, 1373 (M.D. Ga. 2010).

D. Subject Matter Jurisdiction And Related Doctrines.

Subject matter jurisdiction defects are not always readily apparent. The obvious defects arise in a federal court action if the complaint fails to state a cause of action "arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, or where complete diversity of citizenship between the parties does not exist or the action involves claims seeking relief of less than $75,000. *Id.* at § 1332. In the class action context, of course, jurisdiction may also exist (or removal jurisdiction may arise) under CAFA, which establishes unique rules of minimal diversity and the amount required to be in controversy to establish subject matter jurisdiction.

But even where subject matter jurisdiction may be facially apparent, less obvious grounds to challenge it still may exist. Numerous doctrines (particularly abstention doctrines) have been adopted to curtail the use of a federal court's jurisdiction in cases where related litigation is ongoing or has been resolved in state court, as is often the case in class actions against financial services companies. For example, several of these doctrines have been recently successfully invoked to challenge federal courts' jurisdiction over numerous class actions involving mortgage

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calculated to make a mockery of the judicial system).

servicers' foreclosure practices. The *Princess Lida* doctrine is one of them: it precludes federal and state courts from simultaneously entertaining parallel proceedings where *in rem* or *quasi in rem jurisdiction* is being exercised in one of the proceedings. *Princess Lida v. Thompson*, 305 U.S. 456, 466 & nn. 17-18 (1939) (collecting cases); *Kline v. Burke Constr.*, 260 U.S. 226, 235 (1922) ("The rank and authority of the [federal and state] courts are equal, but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict."). Thus, the first court with an *in rem* or *quasi in rem* proceeding assumes "exclusive jurisdiction" over the matter. *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964); *U.S. v. Bank of N.Y.*, 296 U.S. 463, 477 (1936). Because the doctrine applies where a suit is brought "to enforce liens against specific property," *Kline*, 260 U.S. at 231,[11] and because foreclosure proceedings are considered in rem or quasi-in-rem proceedings in most states,[12] the *Princess Lida* doctrine can be invoked to defeat class actions seeking relief from, or liability based upon, mortgage servicers' foreclosure practices in prior or pending state court foreclosure proceedings. The end result of successfully employing this doctrine is that each individual foreclosure defendant must litigate his or her claim individually, in his or her own individual foreclosure proceeding, and not as part of a separate class action.

Two other doctrines which have been employed by mortgage companies and mortgage servicers to challenge the jurisdictional basis of federal class actions are the *Younger* and *Colorado River* doctrines. The *Younger* doctrine invites federal abstention of § 1983 and Due Process claims where the litigation would interfere with ongoing state actions which implicate important state interests and which themselves provide adequate opportunities to raise any Constitutional challenges. *Younger v. Harris* 401 U.S. 37 (1971); *accord Pennzoil Co. v. Texaco*, 481 U.S. 1, 11–14 (1987); *Juidice v. Vail*, 430 U.S. 327, 335–36 (1977); *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974). The *Colorado River* doctrine is broader, inviting a federal court to abstain from exercising subject matter jurisdiction over an action where "there is an ongoing parallel action in state court" involving substantially the same parties and issues, based on consideration of a number of factors. *Moore v. Demopolis Waterworks & Sewer Bd.*, 374 F.3d 994, 997 (11th Cir. 2004); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr.*, 460 U.S. 1, 17 & n.20 (1983). These doctrines have been successfully invoked, for example, to achieve the dismissal of putative class action asserting a § 1983 claim for deprivation of Due Process and a claim for abuse of process arising from a mortgage servicer's alleged use of "robo-signed" affidavits in state foreclosure proceedings. *Huber v.*

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[11] *See also Farmers Loan & Trust v. Lake St. Elevated R.*, 177 U.S. 51, 61 (1900) (mortgage foreclosure); *Randall v. Howard*, 67 U.S. 585, 590 (1862) (same); *Freeman v. Howe*, 65 U.S. 450, 456 (1860) (common law and statutory liens).

[12] *See, e.g., ABN AMRO Mortg. Grp, Inc. v. McGahan*, 931 N.E.2d 1190, 1196 (Ill. 2010) ("[W]e conclude that a mortgage foreclosure proceeding must be deemed a *quasi in rem* action."); *Cont'l Biomass Ind., Inc. v. Envtl. Mach. Co*., 876 A.2d 247, 250 (N.H. 2005) (foreclosure is a *quasi in rem* action); *Assoc. Home Equity Serv., Inc. v. Troup*, 778 A.2d 529, 540 (N.J. Super. Ct. App. Div. 2001) ("[A] foreclosure action is not strictly an *in rem* proceeding. It is a *quasi in rem* procedure, to determine not only the right to foreclose, but also the amount due on the mortgage."); *Mervyn's, Inc. v. Superior Court In and For Maricopa Cnty*., 697 P.2d 690, 693-94 (Ariz. 1985) ("where the ownership of property is the subject of the proceedings, such proceedings are *in rem* or *quasi in rem*"). *Accord Chapman v. Deutsche Bank Nat'l Trust Co*., 302 P.3d 1103, 1106-07 (Nev. 2013) (action to quiet title is a *quasi in rem* action).

GMAC Mtg., LLC, No. 11-cv-1250, 2011 WL 6020410 (M.D. Fla. Dec. 2, 2011).

Other doctrines may also serve as grounds for challenging the subject matter jurisdiction of a federal court to entertain putative class action allegations, depending on the nature of relief sought by the class and the facts underlying their claims. For example, a court's jurisdiction over a putative class action seeking declaratory or injunctive relief with respect to ongoing judicial collection or foreclosure proceedings may be challenged under the Anti-Injunction Act, 28 U.S.C. § 2283, or the *Brillhart* doctrine,[13] as well as under the Full Faith and Credit Act, 28 U.S.C. § 1738, and *Rooker-Feldman* doctrine to the extent such relief would interfere with judgments already entered in such proceedings.[14]

These examples suffice to make the point that subject matter jurisdiction, and the federal prudential limitations upon the exercise of such jurisdiction, a can be a viable means to an early exit from many financial services class actions, especially those predicated upon actions the defendant has taken or documents the defendant has filed as a plaintiff in prior court proceedings.

E. Challenges Based on the Fact That the Challenged Conduct Occurred in a Judicial Proceeding.

Unique grounds for dispositive challenge may also arise if the conduct challenged in a class action complaint occurred in the context of a judicial proceeding. As explained above, sometimes these challenges can take jurisdictional form. At other times, occasionally simultaneously pending on the alleged facts of the case, the challenges may be substantive in nature.

For example, consider again the recent widespread class litigation involving the alleged use of "robo-signed" affidavits in foreclosure proceedings. Often such ligation was couched in terms of claims under the FDCPA, or under state law unfair and deceptive trade practice statutes. The problem with using the FDCPA to attack

[13] *See, e.g., Phillips v. Charles Schreiner Bank*, 894 F.2d 127, 132 (5th Cir. 1990) (Anti-Injunction Act precluded the district court from enjoining state court foreclosure proceedings); *Potoczny v. Aurora Loan Serv., LLC*, No. 12-cv-1251, 2014 WL 3600475, at *5-6 (E.D. Pa. July 22, 2014) (same); *Nixon v. Individual Head of St. Joseph Mortg. Co., Inc.*, 612 F. Supp. 253, 255 (N.D. Ind. 1995) ("The Anti-Injunction Act, 28 U.S.C. § 2283, prohibits the granting of injunctions to stay state court proceedings, including mortgage foreclosure actions."), *aff'd*., 787 F.2d 595 (7th Cir. 1986). See also *Brillhart v. Excess Insurance Company of America*, 316 U.S. 491, 494–95 (1942) and *Wilton v. Seven Falls Company*, 515 U.S. 277 (1995) (explaining substantial discretion of federal courts to decline jurisdiction of federal declaratory judgment actions in favor of ongoing state proceedings).

[14] *See, e.g., Kamilewicz v. Bank of Boston Corp*., 92 F.3d 506, 512 (7th Cir. 1996) (*Rooker-Feldman* doctrine precluded federal court from reviewing alleged improprieties in nationwide class settlement reached in mortgage-related servicing class action and which was approved by an Alabama state court: "the state court approved the settlement, including the fees. The Supreme Court of Alabama or the United States Supreme Court could reverse the decision were either so inclined. The federal district court, on the other hand, cannot."); *Collins v. Erin Capital Mgmt., LLC*, 991 F. Supp. 2d 1195, 1204 (S.D. Fla. 2013) (dismissing putative class action in part because "the relief sought … [wa]s precisely the type of impermissible case brought by state-court losers complaining of injuries caused by state-court judgments rendered before th[e federal] case commenced and inviting the Court's review and rejection of the state-court judgments. [Plaintiff] … cannot seek the opposite of what the state court awarded without running afoul of the *Rooker–Feldman* doctrine."); *Smith v. Litton Loan Serv., LP*, No. 04-cv-02846, 2005 WL 289927. At *6-7 (E.D. Pa. Feb. 4, 2005) (dismissing action under *Rooker-Feldman* because the "Court can not and will not sit in judgment of the final determination [of foreclosure] made by the Montgomery County Court of Common Pleas.").

litigation conduct is that the FDCPA—at least outside of Sixth Circuit jurisprudence[15]—does not permit borrowers to litigate about litigation. *Cowan v. MTGLQ Invs., LP.*, No. 09-cv-472, 2011 WL 2462044, at *3 (M.D. Fla. June 17, 2011) ("foreclosing on a home is not debt collection pursuant to the FDCPA and thus, one cannot state a claim under the FDCPA … based on a foreclosure action").[16]

Whatever the underlying cause of action may be, other off-the-beaten path defenses are in play when the class action attacks litigation conduct. For example, parties are afforded broad immunity under the *Noerr-Pennington* doctrine[17] (and often by similar provisions of state law[18]) for governmental petitioning activities, including to statements made to the judicial branch during litigation proceedings and in preparation for such proceedings. *Bill Johnson's Rest. v. NLRB*, 461 U.S. 731, 741 (1983); *Cal. Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *Andrx Pharm. v. Elan Corp.*, 421 F.3d 1227, 1233 (11th Cir. 2005) ("Subsequent precedent has extended *Noerr-Pennington* immunity to defendants who exercise their right to petition [the] government by resorting to administrative and/or judicial proceedings."); *Theme Promotions v. News Am. Mktg., FSI*, 546 F.3d 991, 1007 (9th Cir. 2008) ("because *Noerr-Pennington* protects federal constitutional rights, it applies in all contexts"). Federal and most states' laws also afford forms of immunity for a party's litigation-related conduct. This is because the remedy for a party's false or misleading litigation-related conduct lies not in a separate civil action for damages, but "is for the criminal process, the [State] Bar or other offices of government." *Regal Marble, Inc. v. Drexel Invs., Inc.*, 568 So. 2d 1281, 1283 (Fla. Ct. App. 1990), *review*

[15] *See, e.g., Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 461 (6th Cir. 2013) ("[M]ortgage foreclosure is debt collection under the FDCPA.").

[16] *See also Warren v. Countrywide Home Loans*, 342 Fed. App'x 458, 461 (11th Cir. 2009) ("foreclosing on a home is not debt collection"); *DeMoss v. Peterson, Fram & Bergman*, No. 12-cv-2197, 2013 WL 1881058, at *2 (D. Minn. May 6, 2013) ("[T]his court has previously held that foreclosure activities do not constitute debt collection under the FDCPA."); *Lara v. Aurora Loan Servs. LLC*, No. 12-cv-0904, 2013 WL 1628955, at *7 (S.D. Cal. Apr. 16, 2013) ("[N]umerous district courts, including several in the Ninth Circuit, have also held that the activity of foreclosing on [a] property pursuant to a deed of trust is not collection of a debt within the meaning of the FDCPA." (internal quotation marks omitted) (alterations in original)); *Acosta v. Campbell*, No. 04-cv-761, 2006 WL 3804729, at *4 (M.D. Fla. Dec. 22, 2006), *aff'd.*, 309 Fed. App'x 315 (11th Cir. 2009) (dismissing FDCPA and FCCPA claims brought by borrower against his lender, and noting that "[n]early every court that has addressed the question has held that foreclosing on a mortgage is not debt collection activity") (quoting *Beadle v. Haughey*, No. 04-cv-272, 2005 WL 300060, at *3 (D.N.H. Feb. 9, 2005)).

[17] The *Noerr-Pennington* doctrine derives from the First Amendment, guaranteeing "the right of the people . . . to petition the Government for redress of grievances." *Eastern R.R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127, 136-38 (1961); *Mine Workers v. Pennington*, 381 U.S. 657, 669 (1965).

[18] Oklahoma, for example, recognizes a form of petitioning immunity similar to that afforded by the *Noerr-Pennington* docrine. "The right of the people to petition the government for redress of grievances is safeguarded by Art. 2, § 3 of the [Oklahoma] constitution," which guarantees the people "the right . . . to apply to those invested with the powers of government for redress of grievances by petition, address, or remonstrance." *Brock v. Thompson*, 948 P.2d 279, 289 & n. 37 (Okla. 1997). "The clear import of the right-to-petition clause is to protect from litigation those who . . . solicit governmental action, even though the result of such activities may indirectly cause injury to others." *Gaylord Entm't Co. v. Thompson*, 958 P.2d 128, 143 (Okla. 1998). The immunity is not limited to collective petitioning efforts: "[t]he availability of protection for petitioning activity involving *private interests* is implicit." *Id.* at 143, n.56 (emphasis in original) (citing *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741, 743 (1983)).

denied 583 So. 2d 1036 (Fla. 1991). Witness immunity would also serve as an obstacle to such claims since testimony—even false or malicious testimony—is afforded absolute immunity from civil causes of action, *Briscoe v. LaHue*, 460 U.S. 325, 333-35 (1983), and because affidavits are commonly deemed a form of testimony entitled to witness immunity protections.[19] These defenses are best asserted as part of a broader, carefully integrated theme: the proper remedy for alleged judicial misconduct—if there was one—is the remedy of civil contempt. And because the civil contempt remedy is typically one within the exclusive jurisdiction of the specific court in which the contempt was committed,[20] a classwide adjudication of contempt is not an option.

F. Challenges Based On The Absence Of Necessary Parties.

Another important issue to analyze early in a putative class action case is whether all necessary parties have been joined or named as parties to afford the relief sought by the putative class. While jurisdictional and standing considerations focus on the would-be representative herself and the claims presented, the necessary party looks to who may be omitted from the case for purposes of the claimed relief. In the mortgage servicer context, for example,

[19] *See, e.g.*, *Todd v. Weltman, Weinberg & Reis Co*., 434 F.3d 432, 439-40 (6th Cir. 2006) ("[T]estimony presented in the form of an affidavit may be protected under absolute witness immunity. We find that the form of the witness testimony should not affect the status of the immunity attached thereto."); *Collins v. Wadden*, 613 F. Supp. 1306, 1314 (N.D. Ga. 1985) (witness immunity "is equally applicable to other forms of testimony such as depositions and affidavits"), *aff'd*., 784 F.2d 402 (11th Cir. 1986). *Accord Cox v. Great Seneca Fin. Corp*., No. 06-cv-1646, 2007 WL 772937, at *1 (E.D. Mo. Mar. 9, 2007) (dismissing FDCPA claims predicated on submission of allegedly "false, deceptive, and misleading" affidavit filed in collection action, because the affiant "enjoys the protection of absolute witness immunity for the subject affidavit."); *Etapa v. Asset Acceptance Corp*., 373 F. Supp. 2d 687, 690 (E.D. Ky. 2004) (in disposing of debtor's claims that creditor violated the FDCPA by submitting an affidavit in litigation that supposedly falsified the creditor's standing, concluding "[t]he doctrine of absolute witness immunity generally bars claims based upon allegedly false testimony."); *Beck v. Codilis & Stawiarski*, No. 99-cv-485, 2000 WL 34490402, at *6 (N.D. Fla. Dec. 27, 2000) ("The firm submitted false affidavits in state court [foreclosure proceedings] in support of the claim for fees. Although inexcusable, the submission of false affidavits is not actionable, based on the doctrine of absolute witness immunity.").

[20] *Florida Evergreen Foliage v. E.I. Du Pont De Nemours, Co*., 135 F. Supp. 2d 1271, 1283 (S.D. Fla. 2001) ("This Court finds that the acts allegedly committed by DuPont, although perhaps egregious and damaging to Plaintiffs, are definitely related to other judicial proceedings and that DuPont is therefore immune from civil liability for its actions ….[T]this does not mean that DuPont is immune from punishment: it may be held in contempt by the courts that it allegedly defrauded …"), *aff'd sub nom. Green Leaf Nursery v. E.I. DuPont De Nemours & Co*., 341 F.3d 1292 (11th Cir. 2003); *see also U.S. v. Claudio*, 499 Fed.App'x 865, 867 (11th Cir. 2012) ("To have jurisdiction to hold an entity in civil contempt, the district court must have had subject-matter jurisdiction over the underlying controversy."); *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 91 F.3d 914, 920 (7th Cir. 1996) ("Civil contempt proceedings are part of the action from which they stem, and their purpose, of course, is to secure compliance with a prior court order."); *In re A.S.*, 9 N.E.3d 129, 134 (Ind. 2014) ("A trial court cannot simply otherwise hale a citizen into court and sanction him or her. The inherent power of the judiciary to impose sanctions, while flexible and significant, begins and ends with the courtroom and the judicial process."); *Bryant v. Howard Cnty. Dep't of Social Serv. ex rel. Costley*, 874 A.2d 457, 467 (Md. 2005) ("[A] proceeding for constructive civil contempt [must] be filed in the action in which the contempt occurred."); *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. CO.*, 639 So. 2d 606, 608 (Fla. 1994) (remedy for fraud or misconduct in court does not given rise to a private damages action, but instead is "left to the discipline of the courts, the bar association, and the state.").

any action seeking declaratory relief to adjudicate title-related issues must name *all* persons claiming an interest in the subject property.[21] A putative class representative's failure to name all such persons presents problems far beyond Federal Rule of Civil Procedure 19 itself—it raises grave Due Process concerns as well.[22] Similarly, in class actions alleging breach of contract or rescission claims all parties to those contracts must be joined.[23] Regulators may also be necessary parties for this purpose, to the extent the claims presented seek to reform or modify material terms of a contract subject to form-filing or rate-filing. While in a traditional case this inquiry is largely limited to whether relief can be granted in light of the parties before the court, in the class context the absence of such parties may present a dispositive obstacle if the joinder of such persons will destroy the cohesiveness of the class by presenting predominately individualized inquiries concerning the circumstances surrounding each class members' claim, and potentially destroying the manageability of the case overall if the joinder of numerous third-parties is necessary to resolve each particular class member's claims.

G. Defenses That May Be Implicated When Insurance Is At Issue.

Recently, collateral protection insurance has been the focus of increasing

[21] *See, e.g.*, 7 CHARLES A. WRIGHT, *ET AL.* FEDERAL PRACTICE & PROCEDURE § 1621 (2011) ("whenever a party seeks to quiet title to a piece of land, he must join all known persons who are claiming title in order to settle the property's ownership without additional litigation"); *Atlantis Dev. Corp. v. U.S.*, 379 F.2d 818 (5th Cir. 1967) (in suit by government to assert its exclusive dominion and control over certain islands, the nonjoined party who also claimed ownership of the islands was deemed indispensable); *Bd. of Mgrs. of Charles House Condo. v. Infinity Corp.*, 825 F. Supp. 597, 607 (S.D.N.Y. 1993), *aff'd*, 21 F.3d 528 (2d Cir. 1994) ("In this action, in which plaintiff seeks to divest Schnurmacher of title to the Commercial Unit and terminate Infinity's Lease of the Commercial Unit, the banks which hold an interest in the Lease between Schnurmacher and Infinity are indispensable parties" because "[c]omplete relief could not be awarded plaintiff" where "title and rights to the property would be subject, to some extent, to the rights of the banks"); *Ariz. Lead Mines v. Sullivan Mining Co.*, 3 F.R.D. 135, 137 (D. Id. 1943) ("In a suit to quiet title ... anyone claiming to hold any interest in the property [in question] may be required to come in and set up the nature of his interest and its source.").

[22] *See, e.g.*, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ('"The fundamental requisite of due process of law is the opportunity to be heard.' This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.") (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983) (notice "is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice") (emphasis in original); *Elmco Props., Inc. v. Second Nat'l Fed. Savings Assoc.*, 94 F.3d 914, 921 (4th Cir. 1996) ("[A] party with an identified, present property interest whose address is known or reasonably ascertainable is entitled to mailed notice of proceedings affecting his property right."). *Accord U.S. v. Borromeo*, 945 F.2d 750, 752 (4th Cir. 1991) ("Due process protections ought to be diligently enforced, and by no means relaxed, where a party seeks the traditionally-disfavored remedy of forfeiture.").

[23] *See, e.g.*, *OneCommand, Inc. v. Beroth*, No. 12-cv-471, 2012 WL 3755614, at *2 (S.D. Ohio Aug. 29, 2012) ("the indispensable parties in a breach of contract actions are the parties to the contract."); *Barker-Homek v. Abu Dhabi Nat'l Energy Co.*, No. 10-cv-13448, 2011 WL 4506145, at *8 (E.D. Mich. Sept. 28, 2011) ("a contracting party is the paradigm of an indispensable party" in an action which alleges a breach of the contract). *Accord Silvers v. TTC Inds., Inc.*, 395 F. Supp. 1312, 1314 (E.D. Tenn. 1970) ("It is settled that [r]escission of a contract as to some of the parties, but not as to others, is not generally permitted. There is a general rule that where rights sued upon arise from a contract all parties to it must be joined."), *aff'd.*, 513 F.2d 632 (6th Cir. 1975).

attention by the plaintiff's class action bar. Many states extensively regulate collateral protection insurance. (*See, e.g.*, Review Requirements Checklist Collateral Protection Insurance (Physical Damage to Collateral) and Vendors' Single Interest, TEXAS DEPT' INS., available at http://www.tdi.texas.gov/commercial/pcckcpi.html (last visited Oct. 19, 2014). When a class action attacks insurance-related transactions, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, *et seq.*, may result in reverse-preemption of federal statutes of general applicability by state statutes and regulations specifically regulating the business of insurance. *See, eg, Coventry First, LLC v. McCarty*, 605 F.3d 865 (11th Cir. 2010).

When the amounts charged for insurance are attacked in a class complaint, whether directly or indirectly, the so-called "filed rate doctrine" may bar what is effectively a judicial challenge to rates approved by state insurance regulators. Simply stated, the doctrine holds that any "filed rate"—that is, one approved by the governing regulatory agency—is *per se* reasonable and unassailable in judicial proceedings brought by ratepayers. *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994); *accord Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156 (1922); *United Gas Pipe Line Co. v. Willmut Gas & Oil Co.*, 97 So. 2d 530, 535 (Miss. 1957) (petitioner "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.") (quoting M*ontana-Dakota Utils. Co. v. Northwestern Pub. Serv. Comm'n*, 341 U.S. 246, 251(1951)). Where it applies, "the filed-rate doctrine prevents more than judicial rate-setting; it precludes any judicial action which undermines agency rate-making authority." *Katz v. MCI Tel. Corp.*, 14 F. Supp. 2d 271, 274 (E.D.N.Y. 1998); *Kutner v. Sprint Commc'ns. Co.*, 971 F. Supp. 302 (W.D. Tenn. 1997) (filed-rate doctrine forbids courts from ordering relief that would contravene the filed rate). The two purposes of the filed-rate doctrine are that first, it protects against "price discrimination" between ratepayers (the "nondiscrimination strand"), and second, it preserves the exclusive role of regulatory agencies in approving rates that are "reasonable" by "keeping courts out of the rate making process" (the "on-justiciability strand"). *Marcus v. AT&T*, 138 F.3d 46, 58 (2d Cir. 1998).

> Application of the filed-rate doctrine in any particular case is not determined by the culpability of the defendant's conduct or the possibility of inequitable results. Nor does the doctrine's application depend on the nature of the cause of action the plaintiff seeks to bring. Rather, the doctrine is applied strictly to prevent a plaintiff from bringing a cause of action even in the fact of apparent inequities whenever either the nondiscrimination strand or the nonjusticiability strand underlying the doctrine is implicated by the cause of action the plaintiff seeks to pursue.

Id. at 58-59. Thus, numerous courts have held that the filed-rate doctrine prohibits plaintiffs from directly or indirectly claiming a lower rate than the one filed by a regulatory entity with the appropriate regulatory agency. *See, e.g., Florida Mun. Power Agency v. Florida Power & Light*

Co., 64 F.3d 614, 615 (11th Cir. 1995); *Hill v BellSouth Telecommunications, Inc.*, 364 F. 3d 1308, 1316 (11th. Cir. 2004); *Bryan v. BellSouth Commc'ns., Inc*., 377 F. 3d 424, 429 (4th Cir. 2004); *Arsberry v. Illinois*, 244 F. 3d 558, 562 (7th Cir. 2001). State courts have applied the filed rate doctrine to preclude claims that directly or inherently challenge approved insurance rates. *See, e.g., Anzinger v. Illinois State Med. Inter-Ins. Exch.*, 494 N.E.2d 655, 657-58 (Ill. Ct. App. 1986); *Commonwealth ex rel. Chandler v. Anthem Ins. Cos., Inc*. 8 S.W.3d 48, 51-52 (Ky. Ct. App. 1999); *City of New York v. Aetna Cas. & Surety Co*., 693 N.Y.S. 2d 139, 140 (N.Y. App. Div. 1999). Indeed, one such case noted that while the filed rate doctrine originated in federal courts, "it has been held to apply equally to rates filed with state agencies by every court to have considered the question." *Anthem Ins. Cos.*, 8 S.W.3d at 52; *see also MacKay v. Superior Court*, 188 Cal. App. 4th 1427 (Cal. Ct. App. 2010)(applying the filed rate doctrine to bar a consumer protection claim based on allegedly excessive insurance premiums).

H. Finer Points to Remember for the Rule 12(b)(6) "Failure To State A Claim Upon Which Relief Can Be Granted" Defense

1. Use of Extrinsic Evidence To Fashion A Rule 12(b)(6) Challenge.

An often overlooked strategy in evaluating the viability of a dispositive motion is the extent to which a defendant may introduce extrinsic evidence to support it. Generally, "consideration of a motion to dismiss under Rule 12(b)(6) is limited to consideration of the complaint itself,"[24] and "[m]atters outside the pleadings are not to be considered." *Hammond v. Baldwin*, 866 F.2d 172, 175 (6th Cir. 1989). However, that mantra is subject to a number of important exceptions that can make a 12(b)(6) motion much more potent.

First among them is the fact that documents attached to a motion to dismiss are considered *part of the pleadings* if they are referred to in, but not included with, the plaintiff's complaint and are central to the claims being brought. Introduction of such documents does not require the conversion of a motion to dismiss to one for summary judgment, and such documents are properly considered by a court in ruling on a motion to dismiss. *See*, *e.g.*, *Tellabs, Inc. v. Makor Issues & Rights*, 551 U.S. 308, 322 (2007); *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1159-60 (9h Cir. 2012); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000); *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997). The rationale for this exception to "four corners of the complaint" doctrine is a pragmatic one:

> If the rule were otherwise, a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff relied. Moreover, conversion to summary judgment when a district court considers outside materials is to afford the plaintiff an opportunity to respond in kind. When a complaint refers to a document and the document

[24] *Faulkner v. Beer*, 463 F.3d 130, 124 (2d Cir. 2006).

> is central to the plaintiff's claim, the plaintiff is obviously on notice of the document's contents, and this rationale for conversion to summary judgment dissipates.

GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1385 (10th Cir. 1997). This exception is most frequently invoked in the context of claims premised on contractual documents, the actual terms of which may contradict the plaintiff's allegations, or establish other defenses such as the tardiness of the plaintiff's claims under applicable statutes of limitation or rules of repose.

Another important exception to the "four corners of the complaint" rule relates to matters over which a court may take judicial notice. *Tellabs, Inc.*, 551 U.S. at 322. This exception permits a court, in considering a Rule 12 motion, to "take judicial notice of its own files and records, as well as facts which are a matter of public record," *Van Woudenberg ex rel. Foor v. Gibson*, 211 F.3d 560, 568 (10th Cir.2000), *abrogated on other grounds by McGregor v. Gibson*, 248 F.3d 946, 955 (10th Cir.2001). For example, this exception allows a defendant to rely on the contents of publicly available documents which may not be referred to in the complaint at all but which the defendant was required by law to file with regulators. *Oxford Asset Mgmt. Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002).

The strategic lesson here is that a company and its outside counsel should carefully evaluate whether an exception to the "four corners of the complaint" rule will allow the company to present a dispositive challenge not otherwise apparent from the face of the complaint by introducing evidentiary material without converting the motion to one for summary judgment, thereby likely delaying its resolution until the end of discovery under Rule 56(d).

An important corollary to the "four corners of the complaint" doctrine is the use that can be made of exhibits to a complaint, particularly when one or more of those exhibits contradict material allegations of the complaint. In such a case, "the exhibit trumps the allegations." *Williams v. CitiMortgage, Inc.*, 498 Fed. App'x 532, 536 (6th Cir. 2012) (quoting *N. Indiana Gun & Outdoor Shows, Inc. v. City of S. Bend*, 163 F.3d 449, 454 (7th Cir.1998)); *see also Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991) ("[I]n the event of conflict between the bare allegations of the complaint and any exhibit attached [thereto], the exhibit prevails."). *Accord* FED. R. CIV. P. 10(c). This can also serve as a basis for a dispositive challenge at the pleading stage that would not otherwise be facially apparent from the complaint itself.

2. Unique Challenges to FDCPA Complaints.

FDCPA class action complaints frequently allege in conclusory fashion that a mortgage servicer was acting as a debt collector, such that it was subject at all relevant times to the FDCPA's disclosure obligations. But such complaints frequently omit allegations that the plaintiff was in default at the time the defendant acquired mortgage servicing rights to his loan, let alone allegations that the putative class members were all similarly in default of their own mortgage obligations at that time. Obviously, such plaintiffs are trying to hedge their bets: they want to advance claims in which they may obtain some monetary recovery, but at the same time do not want to concede their default out of fear

that such judicial admissions could be used against them in collateral foreclosure or collection proceedings. The problem caused by this common tactic of FDCPA plaintiffs is that it makes the complaint vulnerable to a particular kind of challenge under *Iqbal* and *Twombly*, namely that the complaint does not plausibly allege facts demonstrating that the mortgage servicer qualifies as a "debt collector" under the "hyper-technical requirements of the [Fair Debt Collection Practices] Act." *Bailey v. Sec. Nat'l Serv. Corp.*, 154 F.3d 384, 387 (7th Cir. 1998).

The FDCPA regulates only the conduct of statutorily-defined "debt collectors," not a consumer's "creditors," *Aubert v. Am. Gen. Fin., Inc*., 137 F.3d 976, 978 (7th Cir. 1998), and not loan servicers acting on behalf of such creditors unless the customer was currently in default at the time the loan servicer obtained servicing rights to the loan. *Crawford v. Countrywide Home Loans, Inc*., No. 09-cv-247, 2011 WL 3875642, at *8 (N.D. Ind. Aug. 31, 2012) ("the FDCPA does not apply here because Countrywide is a creditor and not a 'debt collector' within the meaning of the statute, which specifically excludes mortgage servicing companies from its definition of 'debt collector.'").[25] In fact, numerous courts have dismissed FDCPA claims for this very sort of pleading defect. *See, e.g.*, *Brumberger v. Sallie Mae Serv. Corp*., 84 Fed. App'x 458, 459 (5th Cir. 2004) (affirming dismissal of FDCPA claims because plaintiff failed to "allege that he was in default at the time Sallie Mae began servicing his loans."); *Correa v. BAC Home Loans Serv. LP*, No. 11-cv-1197, 2012 WL 1176701, at *12 (M.D. Fla. 2012) (dismissing FDCPA claim due to plaintiff's failure to plead sufficient facts that the defendant was a "debt collector" aside from a "conclusory" allegation to that effect); *Conner v. Aurora Loan Serv., LLC*, No. 09-cv-5900, 2010 WL 2635229, at *2 (N.D. Ill. June 28, 2010).

V. POTENTIAL WAYS TO MOOT OR PRETERMIT CLASS CLAIMS BEFORE CLASS DISCOVERY.

A. Individual Settlements.

Early dispositive motions are not the only way to manufacture an early exit from

[25] The FDCPA regulates only the conduct of statutorily-defined "debt collectors," not a consumer's "creditors," *Aubert v. Am. Gen. Fin., Inc*., 137 F.3d 976, 978 (7th Cir. 1998), and not the servicers of such debts unless the customer was currently in default at the time the loan servicer obtained servicing rights to the loan. *See, e.g.*, *Bridge v. Ocwen Fed. Bank, FSB*, 681 F.3d 355, 359 (6th Cir. 2012) ("The distinction between a creditor and a debt collector lies precisely in the language of § 1692a(6)(F)(iii). For an entity that did not originate the debt in question but acquired it and attempts to collect on it, that entity is either a creditor or a debt collector depending on the default status of the debt at the time it was acquired. The same is true of a loan servicer, which can either stand in the shoes of a creditor or become a debt collector, depending on whether the debt was assigned for servicing before the default or alleged default occurred."); *Carter v. AMC, LLC*, 645 F.3d 840, 843 (7th Cir. 2011) ("At least four courts of appeal, including ours, have concluded that a servicing agent for a mortgage loan" is properly deemed a "creditor" under the FDCPA because it "'obtains' the debt even though the bank owns the note."); *Bailey v. Sec. Nat'l Serv. Corp.*, 154 F.3d 384, 378 (7th Cir.1998) ("The plain language of § 1692a(6)(F) tells us that an individual is not a 'debt collector' subject to the Act if the debt he seeks to collect was not in default at the time he purchased (or otherwise obtained) it") (parenthetical in original); *Perry v. Stewart Title Co*., 756 F.2d 1197, 1208 (5th Cir. 1985), *modified on other grounds by*, 761 F.2d 237 (5th Cir. 1985) ("The legislative history of section 1692a(6) indicates conclusively that a debt collector does not include the consumer's creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned.").

a class action. The old adage that "you get more flies with honey than with vinegar" works in class action land too. Rule 23(e) now explicitly provides that only settlement of the claims of a "certified class" requires court approval, leaving you free to settle individually with the would-be class representatives on any basis you can mutually agree upon. An early phone call to opposing counsel to explore this option can often produce a cost-effective resolution. Certainly an individual settlement buys you no protection against future lawsuits, but if you perceive the risk of that to be small, an early run at individual settlement may be worthwhile. Many lawyers who file statutory damage class actions under FACTA, FDCPA and ADA access statutes are particularly amenable to individual settlement.

B. Rule 68 "Pickoffs".

Class actions for relatively small individual sums but large aggregate classwide amounts are fairly common, especially under statutes that assure a minimum recovery in statutory damages for those who enforce the statutory mandate by suing for violations. Particularly in these types of actions, a class action defendant should evaluate the possibility of attempting to "moot" the case by making a Rule 68 offer of judgment to the named plaintiff. This is sometimes called "picking off" the named plaintiff. In at least some circuits, this tactic has appeared to work. *See, e.g.*, *Demasco v. Clearwire Corp*., 662 F.3d 891 (7th Cir. 2011). In others, not so much. *See Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004). To some extent, this issue is grows out of a rule change made in 2003. Before 2003, Rule 23(e) was interpreted to require court approval for any settlement of a proposed class action, even an individual settlement with the named plaintiff. As just noted above, the 2003 amendments changed that, requiring court approval only for settlements of claims, issues, or defenses *of a certified class*. This opened the door much wider for settlement of the individual claims of the class representative and dismissal of the remainder of the suit on mootness grounds. The ALI Aggregate Litigation Project had urged that court approval be required for such individual settlements, but not notice to the class, to guard against abuse of the class-action device to extract "individual" settlements in which the dismissal of the proposed class action results in a considerably enhanced payment to the named plaintiff (and perhaps also to the lawyer). *See* ALI Principles of Aggregate Litigation § 3.02(a).

Rule 68 on its does not facially purport to be about making putative class actions moot, but about creating a mechanism to shift costs when an offer is not accepted and the plaintiff later wins but does not do better at trial. But Rule 68 requires that a defendant offer a judgment in the plaintiff's favor, and a judgment would end the named plaintiff's individual claim. A trend has thus emerged seeking to use Rule 68 offers as a means of mooting a putative class action.

The Supreme Court has addressed related issues. In *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), it held that proposed class representatives could appeal denial of certification even though defendant had offered to pay them the full amount of their individual claims. In part, the Court emphasized the named plaintiff's stake in class certification as a method of spreading the costs of litigation, including attorney fees.

On the other hand, in a proposed "opt-in" collective action under the Fair Labor Standards Act, the Supreme Court recently held that a Rule 68 offer could moot the case. *Genesis Healthcare Corp. v. Symczyk*, — U.S. —, 133 S. Ct. 1523

(2013). In this 5-4 decision, the precedential value of which is clouded by plaintiff's unusual stipulation that an unaccepted offer of judgment mooted the named plaintiff's claim, the majority observed that the continuing validity of *Roper* might be questioned in light of *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990), which held that an interest in attorney fees is "insufficient to create an Article III case or controversy." But the Court also distinguished class actions from FLSA collective actions given "the unique significance of certification decisions." *Genesis Healthcare Corp.*, 133 S. Ct. at 1532. The dissent argued that an unaccepted Rule 68 offer is "a legal nullity, with no operative effect," and argued that permitting such unaccepted offers would impermissibly frustrate the public policy purposes behind collective actions. *Id*., 1533, 1536 (Kagan, J., dissenting).

Whether an unaccepted offer of judgment moots the named plaintiff's claim absent the unusual stipulation in *Symczyck* is a question expressly left open by that opinion, and remains the subject of great disagreement among circuit courts of appeal. Some adhere to the view that "when a Rule 68 offer unequivocally offers a plaintiff all the relief she sought to obtain, the offer renders the plaintiff's action moot." *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365, 371 (4th Cir. 2012); *accord Samsung Elec. Co. v. Rambus, Inc.*, 523 F.3d 1374, 1379 (Fed. Cir. 2008) ("[t]he district court had no case or controversy to continue to consider" after defendant "offered the entire amount ... in dispute"); *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991) ("Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright, under Fed. R. Civ. P. 12(b)(1), because he has no remaining stake."). Some courts of this ilk have held that, in the face of an unaccepted offer of complete relief, district courts may enter individual judgment in favor of the named plaintiff, while others in this camp have granted motions to dismiss on mootness grounds where the named plaintiff refuses to accept an offer of full individual relief. *See, e.g., Thomas v. Law Firm of Simpson & Cybak*, 244 Fed. App'x 741, 744 (7th Cir. 2007); *Machesney v. Lar-Bev of Howell, Inc*., No. 10-cv-10085, 2014 WL 3420486, at *2-3 (E.D. Mich. July 14, 2014); *Greif v. Wilson, Elser, Moskowitz, Edelman & Dicker LLP*, 258 F. Supp. 2d 157 (E.D.N.Y. 2003). *See also Giannopolous v. Iberia Lineas Aeras de Espana, SA*, 2014 U.S. Dist. LEXIS 73003 (N.D. Ill. May 29, 2014) (plaintiff's counsel, whose client had accepted an offer of judgment thereby mooting the claim, could not use discovery process to locate a substitute plaintiff).

In *Weiss*, the Third Circuit took a different view, holding that a plaintiff could "trump" an unaccepted Rule 68 offer of individual relief with a subsequent motion for class certification, and that "[a]bsent undue delay in filing a motion for class certification, therefore, where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint." 385 F.3d at 348. Meanwhile, the Ninth Circuit has held that "an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot." *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 950 (9th Cir. 2013); *accord Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1247-50 (10th Cir. 2011); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 920-

21 (5th Cir. 2008). *See also O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 575 (6th Cir. 2009) (expressing disagreement "with the Seventh Circuit's view that a plaintiff loses outright when he refuses an offer of judgment that would satisfy his entire demand"); *McCauley v. Trans Union, L.L.C.*, 402 F.3d 340 (2nd Cir. 2005) (holding that a plaintiff 's rejection of an offer of judgment for the full amount desired does not, in and of itself, moot the case); *Stein v Buccaneers Limited Partnership,* __ F. 3d __ (11th Cir. Dec. 1, 2014)(unaccepted offer of individual judgment does not moot putative class action); *Geismann v. Allscripts Healthcare Solutions, Inc.*, 764 F. Supp. 2d 957, 960 (N.D. Ill. 2011) (where a motion for class certification has been filed, an offer of judgment to the named plaintiff alone may not render the class action moot because it is "not an offer of the *entire* relief sought by the suit.") (emphasis in original).

Whether attempting a Rule 68 "pickoff" makes sense thus depends in large part upon the jurisdiction you find yourself in. There are, however, other things you will need to vet before attempting this maneuver. The judgment (if any) that results from a Rule 68 offer of judgment is just that—a judgment—and it is considered a judgment on the merits. *Menchise v. Akerman Senterfitt*, 532 F.3d 1146, 1152-53 (11th Cir. 2008) ("An offer of judgment, as contemplated by Rule 68, requires that a judgment be entered in favor of the offeree.").[26]

With federal judgments, and judgments in states that follow the same preclusion philosophy, the potential use of nonmutual offensive collateral estoppel to prevent relitigation of issues necessarily determined in a prior judgment is always a concern. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979). While there may be very good arguments that no issues are actually litigated when a judgment results from a Rule 68 offer, there is actually a paucity of comforting precedent analyzing whether such judgments can have collateral estoppel effect. *See, eg, Sanchez v. Verified Person, Inc.*, No. 11-cv-2548, 2012 WL 1856477, at *6 (W.D. Tenn. May 21, 2012) (noting that the court's order of dismissal based on a Rule 68 offer of judgment "will not have any collateral estoppel effect," but may have "precedential value in future proceedings involving offers of judgment for the full amount of statutory damages" by putative class members); *Tallon v. Lloyd & McDaniel*, 497 F. Supp. 2d 847, 853 (W.D. Ky. 2007); *Int'l Star Registry of Ill. v. Bownman-Haight Ventures*, Inc., No. 01-cv-4687, 2003 WL 21640473, at *4 (N.D. Ill. 2003) ("a judgment based on an offer of judgment has no collateral estoppel effect unless it contains a clear provision to that effect"). *But compare Acceptance Indem. Ins. Co. v. Southeastern Forge, Inc.*, 209 F.R.D. 697 (M.D. Ga. 2002) (judgment entered on a Rule 68 offer only has *res judicata* and collateral estoppel effect to

[26] *Accord 4501 Northpoint LP v. Maricopa Cnty.*, 128 P.3d 215, 216 (Ariz. 2006) ("we hold that a taxpayer who accepts an offer of judgment in the taxpayer's favor under Rule 68 of the Arizona Rules of Civil Procedure has prevailed by an adjudication on the merits); *Hanley v. Mazda Motor Corp.*, 609 N.W.2d 203, 208 (Mich. Ct. App. 2000) (holding that Rule 68 judgment functions as an adjudication on the merits for purposes of claim preclusion, noting that "an offer of judgment more nearly emulates a judgment after trial rather than a form of settlement."); *Fleet v. Sanguine, Ltd.*, 854 P.2d 892, 898 & n.32 (Okla. 1993) ("[T]he offer of judgment removes from judicial consideration all fact issues whose resolution is necessary to the judgment's pronouncement. . . . The judgment that results is considered to be equivalent to a jury verdict."), *abrogated on other grounds by Purcell v. Santa Fe Minerals, Inc.*, 961 P.2d 188 (Okla. 1998); *Wimbledon Townhouse Condo. I Ass'n v. Kessler*, 425 So. 2d 29, 30 (Fla. Ct. App. 1983) (a Rule 68 judgment "end[s] the dispute on the merits").

those who are parties at the time the judgment is entered, and not on those who are no longer parties to the case at that time); *Ex parte Horn*, 718 So. 2d 694, 705-06 (Ala. 1998) (discussing, without resolving, one party's assertion that judgment entered on Rule 68 offer had collateral estoppel effect); *Mr. Hangar, Inc. v. Cut Rate Plastic Hangars, Inc.*, 63 F.R.D. 607, 610 (S.D.N.Y. 1974) (defendant's offer to pay plaintiff $25 in copyright infringement suit "constituted an acknowledgement of plaintiff's rights and an admission of the infringement."), *disapproved of on other grounds by Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981). Wright & Miller also observe that even if the judgment is not entitled to issue preclusive effect, it should nonetheless "be admissible as an admission in later litigation." 12 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3005, at 110 (1997).

The risks and implications of this often-overlooked issue should be thoroughly vetted before attempting to employ the Rule 68 pickoff maneuver.

C. Motions to Strike.

In some cases, the inherently individualized proof plainly necessary to prove the elements of the claims asserted, the widely varying state laws that would be applicable to the claims, or the lack of an objective way to identify members of the class will make the complaint amenable to an immediate motion to strike class allegations under Federal Rules of Civil Procedure 12(f) and 23(d)(1)(D),[27] or their equivalent state counterparts. A motion to strike class allegations is appropriate where the complaint contains allegations that sufficiently "undermine the theory that a . . . class will be appropriate at all." *The Lantz v. Am. Honda Motor Co., Inc.*, No. 06-cv-5932, 2007 WL 1424614, at *4 (N.D. Ill. May 14, 2007); *accord Palmer v. Combined Ins. Co. of Am.*, No. 02-cv-1764, 2003 WL 466065, at *2 (N.D. Ill. Feb. 24, 2003) ("[I]t is sometimes possible to determine from the pleadings alone that the[Rule 23] requirements cannot possibly be met, and in such cases, striking class allegations before commencing discovery is appropriate."); 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS: LAW & PRACTICE § 3:4 at 393-94 (10th ed. 2013) (motions to strike class actions are appropriate where it is "apparent on the face of the complaint" that "(a) the putative class is improperly defined and therefore unascertainable, or insufficiently numerous; (b) plaintiffs cannot fairly and adequately protect the interests of absent class members; or (c) the predominance of individual issues over questions common to the proposed class precludes certification of the class.").

The rationale behind allowing pre-discovery motions to strike class allegations is one based on procedural fairness. Where the allegations of a complaint demonstrate that the action is not suitable for class treatment, it is appropriate to strike the class allegations to prevent unnecessary and wasteful class discovery. *See, e.g., Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 991 (N.D. Cal. 2009) (striking class allegations from the pleadings "to avoid the expenditures of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial"); *Lumpkin v. E.I. Du Pont de Nemours & Co.*, 161 F.R.D. 480, 481-82 (M.D. Ga. 1995) (striking class allegations and stating that "awaiting further discovery will only cause

[27] Rule 23(d)(1)(D) provides that a court entertaining a putative class action may "issue orders that . . .require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceeding accordingly."

needless delay and expense"); *Bd. of Educ. of Twp. High Sch. v. Climatemp, Inc.*, Nos. 79-cv-3144 & 79-cv-4898, 1981 WL 2033, at *2 (N.D. Ill. Feb. 20, 1981) (finding that motion to strike was procedurally appropriate, reflecting "the court's inherent power to prune pleadings in order to expedite the administration of justice and to prevent abuse of its process").

The most frequently successful grounds for a motion to strike class allegations are presented by a vaguely defined or facially overbroad class, or one which facially incorporates or requires individualized issues of proof to determine its membership. When a proposed definition would facially require individual mini-trials or a complex discovery and administrative process just to determine each person's class membership, it is well established that class certification should be denied.[28] Accordingly, where the allegations of a complaint (or extrinsic documents incorporated therein) make it clear that the class members cannot be readily and objectively identified, defendants have succeeded in moving to strike class allegations at the pleading stage. *See, e.g., Jones v. National Sec. Fire & Cas. Co.*, No. 06-1407, 2006 WL 3228409 (W.D. La. 2006), *aff'd*, 501 F.3d 443 (5th Cir. 2007); *In re Vioxx Prod. Liab. Litig.*, No. MDL No. 1657, 2012 WL 2061883 (E.D. La. 2012); *Schilling v. Kenton Cnty., Ky.*, No. 10-cv-143, 2011 WL 293759 (E.D. Ky. Jan. 27, 2011); *Sanders*, 672 F. Supp. 2d at 991; *Hovsepian v. Apple, Inc.*, No. 08-cv-5788, 2009 WL 5069144 (N.D. Cal. Dec. 17, 2009); *Earnest v. Gen. Motors Corp.*, 923 F. Supp. 1469, 1473-74 (N.D. Ala. 1996). *Kubany by Kubany v. School Bd. of Pinellas Cnty.*, 149 F.R.D. 664, 665 (M.D. Fla. 1993).

A viable motion to strike may also arise from the inherently uncertifiable nature of the claims pled or class proposed. For example, courts have granted motions to strike the class allegations of complaints which propose fail-safe class definitions—that is, definitions which effectively require a finding that defendant is liable to you in order for you to be a class member. *See, e.g., Sauter v. CVS Pharmacy, Inc.*, No. 13-cv-846, 2014 WL 1814076 (S.D. Ohio May 7, 2014); *Barasich v. Shell Pipeline Co.*, LP, No. 05-cv-4180, 2008 WL 6468611 (E.D. La. June 19, 2008); *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657, 2008 WL 4681368 (E.D. La. Oct. 21, 2008), *aff'd. sub nom. Avmed Inc. v. BrownGreer PLC*, 300 Fed. App'x 261 (5th Cir. 2008).

Courts have also granted motions to strike class definitions which propose the certification of multistate classes asserting common law claims subject to varying legal standards, burdens of proof and defenses. This is because "[n]o class action is proper unless all litigants are governed by the same legal rules." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002). Recognizing that "'variations in state law may swamp any common issues and defeat

[28] *See, e.g., EQT Prod. Co. v. Adair*, — F.3d —, 2014 WL 4070457, at *7 (4th Cir. Aug. 19, 2014) ("If class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate.") (quoting *Marcus v. BMW of N.A., LLC*, 687 F.3d 583, 593 (3d Cir. 2012)); *Martin v. Pacific Parking Sys. Inc.*, — Fed. App'x —, 2014 WL 3686135, at *1 (9th Cir. July 25, 2014) (affirming denial of class certification due to lack of administratively feasible means of identify class members, and noting that "self-identification" by putative class members would be improper outside of the settlement context); *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir.2007) ("The existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of Federal Rule of Civil Procedure 23."); *Wooden v. Bd. of Regents of the Univ. Sys. of Ga*, 247 F.3d 1262, 1288 (11th Cir. 2001) (same).

predominance'" under Rule 23(b)(3),[29] and also defeat the requisite cohesiveness and homogeneity of a proposed class under Rule 23(b)(2),[30] these courts have granted motions to strike the class allegations of complaints which seek to certify the claims of class members subject to divergent state law principles. *See, e.g.*, *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943 (6th Cir. 2011) (affirming order granting motion to strike); *Lawson v. Life of the South Ins. Co.*, 286 F.R.D. 689 (M.D. Ga. 2012); *Stearns v. Select Comfort Retail Corp.*, No. 08-cv-2746, 2009 WL 1635931 (N.D. Cal. June 5, 2009); *Thornton v. State Farm Mut. Auto Ins. Co., Inc.*, No. 06-cv-00018, 2006 WL 3359482 (N.D. Ohio Nov. 17, 2006); *Becnel v. Mercedes-Benz USA*, LLC, No. 2:14-cv-00003 (E.D. La., June 3, 2014). *Cf. Henry v. Assocs. Home Equity Servs.*, 272 B.R. 266, 273-76 (C.D. Cal. 2002), *aff'd.*, 269 Fed. App'x 394 (9th Cir. 2003) (circuit split on bankruptcy rule preclude certification of nationwide bankruptcy debtor class). For similar reasons, courts have granted motions to strike class allegations which propose the certification of claims incorporating subjective elements that will require individualized proof. *See, e.g.*, *Baum v. Great Western Cities, Inc., of N.M.*, 703 F.2d 1197 (10th Cir. 1983) (fraud); *In re Yasmin and Yaz (Drospirenone) Mktg. Practices & Relevant Prods. Liab. Litig.*, 275 F.R.D. 270 (S.D. Ill. 2011) (personal injury); *Tietsworth v. Sears, Roebuck and Co.*, 720 F. Supp. 2d 1123 (N.D. Cal. 2010) (warranty and consumer protection claims); *Chilton Water Authority v. Shell Oil Co.*, No. 98cv-1452, 1999 WL 1628000 (M.D. Ala. May 21, 1999) (negligence and fraud).

Even when a motion to strike is perceived by the court as premature,[31] it may well aid in setting the stage and "poisoning the well" in advance of certification proceedings. It may also lead to a narrowing of the class definition or the voluntary dismissal of some of the proposed claims (and with it, the narrowing of the scope of discovery).

D. Voluntary Remediation.

Class actions for allegedly failing to comply with the access provisions of the Americans with Disabilities Act ("the ADA") are a recurring thorn in the side of banks these days. The key to these cases, absent a compelling legal ground for immediate dismissal, is generally achieving compliance ASAP and thereby controlling costs and fees. Most ADA cases involve one of more actual technical compliance deficiencies which give the Plaintiffs a valid, but petty, cause of action. The number of Plaintiffs is typically only an issue if multiple disabilities/access issues are involved (*e.g.*, blind plaintiff using ATM, wheelchair bound plaintiff addressing

[29] *Ward v. Dixie Nat'l Life Ins. Co.*, 257 Fed. App'x 620, 628-29 (4th Cir. 2007) (quoting *Castano v. Am. Tobacco Co.*, 84 F3d. 734, 741 (5th Cir. 1996)); *accord Andrews v. AT&T*, 95 F.3d 1014, 1023-24 (11th Cir. 1996), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

[30] *Grayson v. 7-Eleven, Inc.*, No. 09-cv-1353, 2011 WL 2414378, at *3 (S.D.Cal. June 10, 2011) ("Courts routinely deny class certification where the laws of multiple states must be applied because variations in the states' laws would preclude class claims from meeting Rule 23(b)(2)'s cohesiveness requirement."); *accord Fosmire v. Progressive Max Ins. Co.*, 277 F.R.D. 625, 635-36 (W.D. Wa. 2011); Tyler v. Alltel Corp., 265 F.R.D. 415, 429 (E.D. Ar. 2010); Alligood v. Taurus Int'l Mfg., Inc., No. CV 306-003, 2009 WL 8387645, at *12 (S.D. Ga. Mar. 4, 2009); *Zehel-Miller v. Astrazenaca Pharm., LP*, 223 F.R.D. 659, 664 (M.D. Fla. 2004); I*n re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 145-47 (E.D. La. 2002).

[31] *See, e.g.*, *Nobles v. State Farm Mut. Auto. Ins. Co.*, No. 10-cv-04175, 2012 WL 4090347 (W.D. Mo. Sept. 17, 2012).

counter height or bathroom clearance issues).

The good news in ADA public access cases is that plaintiffs can only achieve injunctive relief and attorney fees. As such plaintiffs' counsel often attempt to drive these cases for fees, and seek to bring in their own experts to drive up costs. The U.S. Supreme Court in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598 (2001), provides us with a strong defensive weapon to that approach in that plaintiffs cannot recover fees based on the "catalyst" theory of causing a unilateral change to the premises by the defendant as a result filing suit—instead, they must actually obtain a judgment to receive fees. As such, a well-advised defendant will employ an immediate review of the facilities to determine if there are compliance issues, and work with the client to effectuate immediate correction of all feasible items (many can be accomplished at very low cost) before plaintiff can achieve any court-ordered results. This will largely, if not completely, moot plaintiff's injunctive claims. Absent a compelling legal defense, the goal should be to rapidly achieve compliance to eliminate the plaintiffs' remedies.

The opportunity for voluntary remediation should be considered in other kinds of class actions as well. In data breach class actions, for example, many prospective defendants immediately offer all affected customers free credit monitoring and identity theft protection, then argue that this moots the claims of class members who cannot prove a fraudulent transaction. Many mass tort defendants, such as BP in the wake of its oil spill, and GM in the wake of its ignition issues, have likewise offered a well-orchestrated and highly publicized voluntary alternative dispute resolution mechanism as a means of resolving claims efficiently without class litigation. Such private relief can substantially mitigate the public relations costs of the issues on which the class action is based. But the value of consider such relief can extend beyond this. A number of courts have held that the availability of voluntary private relief from the defendant is a relevant factor in the "predominance" and 'superiority" analysis for Rule 23(b)(3) class certification. *See, e.g., Berley v. Dreyfus & Co*., 43 F.R.D. 397, 398-99 (S.D.N.Y. 1967) (class certification in securities litigation denied because defendant's unilateral offer to refund purchase price of securities provided an avenue of relief superior to a class action, and allowing a class action to move forward "would needlessly replace a simple, amicable settlement procedure with complicated, protracted litigation."); *Pagan v. Abbott Labs., Inc*., 287 F.R.D. 139, 151 (E.D.N.Y. 2012)(finding of no superiority based in part on fact that a class action was not superior to defendant's voluntary recall and refund program); *Daigle v. Ford Motor Co*., No. 09-cv-3214, 2012 WL 3113854, at *5-6 (D. Minn. July 31, 2012) (finding that Ford's offer to install new torque converters in allegedly defective automobiles, or refund those who paid to service their vehicle prior to the recall, "weigh[ed] against a finding that a class action is a superior method of adjudication"); *Webb v. Carter's Inc*., 272 F.R.D. 489, 504-05 (C.D. Cal. 2011) (denying certification where defendants offered a voluntary refund program that permitted purchasers of defective clothing to obtain the "very relief that Plaintiffs seek"—namely, refunds); *In re Aqua Dots Prods. Liab. Litig*., 270 F.R.D. 377, 385 (N.D. Ill. 2010) (denying certification where defendants offered refund to purchasers of defective children's toys that would avoid "needless judicial intervention, lawyer's fees, or delay"); *In re ConAgra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 699-700 (N.D. Ga. 2008) (denying

certification where defendants offered refunds to purchasers of potentially salmonella-tainted peanut butter that likely would exceed judicial disgorgement sought in litigation); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614, 622 (W.D. Wash. 2003) (defendants' refund offer to purchasers of PPA-containing products justified denial of class certification); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 463 (D.N.J. 1998) (defendant's offer to reimburse repair costs for defective anti-lock brake systems was a ground for denial of class certification). *See also* 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE §1779 ("The court need not confine itself to other available 'judicial' methods of handling the controversy in deciding the superiority of the class action" since a non-judicial alternative may obviate the need for court involvement at all); Eric P. Voigt, *A Company's Voluntary Refund Program For Consumers Can Be A Fair And Efficient Alternative To A Class Action*, 31 REV. LITIG. 617 (2012). While not all courts agree with this approach,[32] even some of those agree that the decision of would-be class representatives to eschew privately offered relief in favor of class litigation can be considered in determining their adequacy under Rule 23(a). *See, e.g.*, *In re Aqua Dots Prods. Liab. Litig*., 654 F.3d 748, 752 (7th Cir. 2011) ("A representative who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on offer is not adequately protecting the class members' interests."). Creative public offers of private relief will not be feasible in every case, but the idea is almost always worth consciously evaluating as a potentially cost-effective antidote to a newly-filed or likely imminent class action.

[32] Among the courts rejecting the notion that voluntary private relief have a place in the Rule 23 predominance and superiority analysis are: *Amalgamated Workers Union of Virgin Islands v. Hess Oil Virgin Islands*, 478 F.2d 540 (3d Cir. 1973); *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig*., No. 08–md–1954, 2013 WL 1182733 (D. Me. Mar. 20, 2013); *Turner v. Murphy Oil USA, Inc*., 234 F.R.D. 597, 610 (E.D. La. 2006).

VI. DEALING WITH MULTIPLE CLASS ACTIONS (FIRST TO FILE RULE VERSUS MDL VERSUS SETTLEMENT).

The problem of competing class actions presents a variety of challenges and options for the defendant. There is no one-size-fits-all response, but knowing the tools available will give defense counsel and the defendant the best opportunity to tailor a successful strategy to deal with a multiplicity of class litigation involving overlapping or repetitive claims. There are several.

A. Race To Judgment.

One option, of course, is to simply defend each action separately. In this scenario, the first action to reach *classwide* judgment on the merits, whether by settlement or litigation, and whether in state or federal court, will generally be conclusive as to all class members despite any competing litigation that remains pending, by virtue of *res judicata* and claim preclusion principles and the Full Faith and Credit Clause of the United States Constitution. *See, e.g., Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367 (1996); *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373 (1985).

The preclusive effect of settlement creates an undeniable incentive among competing class counsel to be the first to reach settlement. Critics of this phenomenon argue that it undercuts the interests of class members by setting up opportunities for a defendant to pursue a so-

called "reverse auction," forcing class counsel to bid against each other to see who is willing to offer the cheapest overall class settlement. *See, e.g.* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 388. From the defense perspective, simultaneous negotiation with class counsel in multiple cases is inadvisable, and can lead to unnecessary difficulties in obtaining approval of the resulting settlement in the face of inadequate representation claims and other objections by the would-be class counsel with whom settlement is not reached. *See, e.g., Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002) (reversing settlement approval under circumstances suggestive of reverse auction); *Figueroa v. Sharper Image*, 517 F. Supp. 2d 1292, 1323 (S.D. Fla. 2007) (same). However, the fact remains that a defendant facing numerous class actions has strong express or implied bargaining leverage with whichever set of counsel the defendant chooses to first negotiate: be the first to cut a deal, class counsel, or risk being left out entirely.

This leverage is certainly not unchecked. All requirements of Rule 23 other than manageability must still be satisfied by whatever settlement is reached, *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997), and the settlement must still be found fair and reasonable to the class on independent review by the trial court after the class is provided with the best practicable notice and the opportunity to object. *Id.* at 625-26. The settlement must also survive any appeal, and would-be class counsel whose cases are being settled out from under them are highly likely to appeal. To avoid this, defendants sometimes try to bring all would-be class counsel into the settlement by agreement once a deal has tentatively been struck with one set of class counsel. Further, it is not unheard of for courts in first-filed class actions to enjoin class proceedings, or even settlement negotiations, in subsequently filed class actions, though the scope of their authority to do so is hardly settled. *See, e.g., In re Checking Account Overdraft Litig.*, No. 09-cv-02036, 2012 WL 1564007, at *8-11 (S.D. Fla. Apr. 30, 2012); *In re Managed Care Litig.*, 236 F. Supp. 2d 1336, 1343 (S.D. Fla. 2002). *But cf. Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1098 (9th Cir. 2008) (vacating order enjoining settlement activity in subsequently-filed class action); *Grider v. Keystone Health Plan Cent., Inc.*, 500 F.3d 322, 326-27 (3rd Cir. 2007) (same).

The "race to judgment" scenario has shortcomings. If class settlement is not the client's goal, the defendant's ability to control which case goes to judgment first can be quite limited. Often, the cases in the venues that are the worst from the defendant's perspective are the cases that are put on the fastest tracks by plaintiff-friendly judges. Moreover, the cost of defending multiple class actions at once can be prohibitive for some defendants. Worse yet, *defeating* class certification in one jurisdiction will generally not have preclusive effect in another jurisdiction, particularly as between state and federal court class actions. *Smith v. Bayer*, 131 S. Ct. 2368, 2381-82 (2011). Only settlement with or judgment against a certified class will have preclusive effect. However, if a classwide settlement can be reached, then as long as the court deems the overall settlement fair and reasonable, the classwide release in that settlement can extend the preclusive effect well beyond that of normal *res judicata* principles, so as to release claims not expressly asserted in the complaint and claims not even within the approving court's jurisdiction. *See, e.g., Matsushita*, *supra*; *Nottingham Partners, LTD v Trans Lux. Corp.*, 929 F. 2d 25 (1st

Cir. 1991).

B. First To File Rule.

Where the competing class actions are each within the same state or are each filed in or removable to federal court, traditional principles of comity between courts can often provide an opportunity to effectively limit the litigation to the first-filed case, or at least consolidate all of the litigation before the judge with the first-filed case. How attractive this option is will depend, of course, on the defendant's evaluation of the desirability of the venue and trial judge in the first-filed case.

First, there is a longstanding rule of comity whereby a federal court in which a substantially identical action is filed has discretion to stay, dismiss or transfer the second-filed action in deference to the first-filed action. This is known as the "first-to-file" or "first-filed" rule. *See, e.g.*, *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952). The rule provides that when actions involving nearly identical parties and issues have been filed in two different district courts, the court in which the first suit was filed should generally proceed to judgment." *Zide Sport Shop of Ohio, Inc. v. Ed Tobergte Assocs., Inc.*, 16 F. App'x 433, 437 (6th Cir. 2001); *accord Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 603 (5th Cir. 1999); *Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 950 (5th Cir. 1997); *Sutter Corp. v. P & P Indus., Inc.*, 125 F.3d 914, 920 (5th Cir. 1997). The potential use of the rule is less settled when one action is pending in state court and the other in federal court. *Compare Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 675 F.2d 1169, 1174 (11th Cir. 1982) *with Kaiser Found. Health Plan, Inc. v. Shelton*, No. 09-cv-309, 2009 WL 3018704, at *6 (D. Haw. Sept. 17, 2009). However, CAFA and the Securities Litigation Uniform Standards Act (SLUSA) now make it easier to get most class actions removed to federal court, mitigating this problem to a large degree.

The degree of identity of parties and claims is a significant factor in application of the first-to-file rule. *See, e.g., Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403, 407 (5th Cir. 1971). How much is a subject of some disagreement. *Compare Fat Possum Records, Ltd. v. Capricorn Records, Inc.*, 909 F. Supp. 442, 445 (N.D. Miss. 1995) ("a substantial overlap of the content of each suit is sufficient") *with Owens v. Blue Tee Corp.*, 177 F.R.D. 673, 679 (M.D. Ala. 1998) (finding the rule inapplicable where a prior filed suit involved certain identical claims, but where two of the three plaintiffs in the second suit were not parties to the first suit).

Most states have similar principles of comity among courts of equal jurisdiction which, as a matter of jurisdiction, discretion or statute, can give precedence to the court first seized of jurisdiction. *See, e.g., Ex parte Liberty Nat'l Life Ins. Co.*, 631 So. 2d 865 (Ala. 1993) (court first seized of jurisdiction over a controversy has exclusive jurisdiction, through and including entry and enforcement of judgment in the first filed action); *Tunica Pharmacy, Inc. v. Cumberland Mut. Fire Ins. Co.*, No. 08-cv-5827, 2010 WL 4116964 (N.J. Super. Ct. App. Div. June 23, 2010) (holding New Jersey insurance coverage class action against insurer was substantially similar to a pending action in Pennsylvania, and thus a comity dismissal was warranted); *Levert v. University of Illinois at Urbana/Champaign ex rel. Bd. of Trs.*, 857 So. 2d 611 (La. Ct. App. 2003) (comity warranted declining jurisdiction due to prior similar class action in another state).

C. Transfers of Venue.

Complementing the first-filed rule

and similar state court principles are the transfer of venue tools available both in the federal system and in most state systems. Section 1404(a) of Title 28 of the United States Code provides that "[f]or 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 …." Transfer of venue pursuant to 28 U.S.C. § 1404(a) is at the discretion of the court, considering "'[a]ll relevant factors to determine whether or not on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum.'" *Peteet v. Dow Chem. Co*., 868 F.2d 1428, 1436 (5th Cir. 1989) (quoting 15 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3847 at 370 (1986)). The factors normally considered under this discretionary venue transfer statute include a number of private and public interest factors, none of which is given dispositive weight. *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004). *Compare Van Dusen v. Barrack*, 376 U.S. 612 (1964); *Jones v. GNC Franchising, Inc.*, 211 .3d 495, 498-499 (9th Cir. 2000); *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1135 n.1 (11th Cir. 2005).

While the plaintiff's choice of forum is normally accorded some weight, numerous courts have said that it is accorded less weight when the suit is brought as a class action, partly because the interests and convenience of the class as a whole are at stake. *See, e.g., Koster v. Lumbermens Mut. Cas. Co*., 330 U.S. 518 (1947); *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir.1987); *In re Warrick*, 70 F.3d 736, 741 & n.7 (2d Cir. 1995). Moreover, courts have frequently found that the pendency of a prior similar action in the proposed transferee forum strongly militates in favor of a § 1404(a) transfer. *See, e.g., Cont'l Grain Co. v, The FBL*-585, 364 U.S. 19, 26 (1960); *Cianbro Corp. v. Curran-Lavoie, Inc.*, 814 F.2d 7, 11 (1st Cir. 1987); *Emerson Elec. Co. v. Black and Decker Mfg. Co.*, 606 F.2d 234, 242 (8th Cir. 1979); *C.M.B. Foods, Inc. v. Corral of Middle Ga.*, 396 F. Supp. 2d 1283, 1286 (M.D. Ala. 2006). A recent amendment to Title 28 allows a court to transfer even to a venue where the action could not have been filed originally if all parties consent. Otherwise, transfer is only available under § 1404(a) if the proposed transferee forum is one in which venue would have been proper. *See, e.g., Hoffman v. Blaski*, 363 U.S. 335 (1960).

Most states, by statute or rule of civil procedure, have transfer or dismissal options under principles similar to those of § 1404(a). *See, e.g.*, ALA. CODE §§ 6-3-21.1, 6-5-430, 6-5-440; GA. CODE. ANN. § 9-10-31.1(a); 735 ILL. COMP. STAT. 5/2-619(3); N.Y. CIVIL PRACTICE LAW § 327; N.C. GEN. STAT. § 1-75.12; TEX. CIV. PRAC. & REM. CODE § 71.051; VA. CODE § 8.01-265.

D. MDL Transfer.

Another option available to a defendant facing competing class actions with common or overlapping issues is to seek a transfer and pretrial consolidation of all cases into multi-district litigation proceedings pursuant to 28 U.S.C. § 1407. Unlike the first-filed rule of comity, substantial identity of parties is not required. The mere presence of one or more common issues is enough. Also, unlike a motion under the first-filed rule, a § 1404 motion for transfer is not ruled upon by any of the judges assigned to the pending class actions. Unlike a § 1404(a) transfer motion, whether the forum chosen for pretrial MDL consolidation is a venue in which each of the actions could have been filed originally filed is not an issue. And unlike the "race-to-judgment" strategy, the object of MDL

treatment is to bring all cases together for coordinated discovery and pretrial proceedings, including determination of class certification issues.

Section 1407 provides that "[w]hen 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." The decision on whether to order MDL treatment with respect to overlapping actions is made by the Judicial Panel on Multidistrict Litigation ("JPML"), based upon considerations of public and private convenience and efficiency. *Id.* Cases transferred and consolidated for MDL treatment are transferred and consolidated for pretrial purposes only, and must each be remanded to the original forum for any trial. *Id.*

MDL treatment has several advantages for the defendant. It has the *potential* to lessen the overall costs of defense of what would otherwise be a true multiplicity of litigation. It avoids inconsistent rulings on pretrial matters, discovery, dismissal and summary judgment motions, and class certification. It brings all relevant players to the same bargaining table for purposes of settlement, and thereby enhances the prospects for an effective global resolution of the controversy. Counsel for all plaintiffs are forced to coordinate their discovery efforts, so that the defendant does not have to deal with an endless series of different but overlapping discovery requests in each case, nor tender the same witnesses for deposition multiple times. This can substantially reduce the disruption of the defendant's business.

At the same time, MDL treatment also carries disadvantages. Where the same plaintiff's counsel are behind numerous similar actions against the same defendant, their purpose is often to manufacture a basis for seeking MDL treatment in order to build settlement pressure and delay or derail early dispositive motions. In this scenario, the defendant achieves little in the way of discovery savings over what would otherwise be achieved by things such as simple stipulations with opposing counsel that a given deposition will be taken in all relevant cases simultaneously. Moreover, the very creation of an MDL and the publicity that attends it in the class action bar may actually serve as "blood in the water," bringing new plaintiff's counsel and new litigation to the MDL feeding trough.

Even when the multiplicity of actions involves different plaintiff's counsel working independently, Plaintiffs' counsel forced by MDL transfers to pool their resources often become a much more formidable, collective adversary than the individual counsel would be if left to fend for themselves. Collectively, the combined mass of a large number of plaintiffs tends to enhance the leverage exerted even by claims with relatively questionable merit. Among the consequences of this are that discovery often proceeds at a much faster pace, with much more intelligence and design, and discovery battles often become more difficult for the defendant to win. Any given discovery request in an MDL is typically more likely to be relevant in some respect when several different cases are at issue than when there is only one. Consequently, the promise of overall cost savings that led the defendant to seek MDL treatment in the first place can often vanish in an ever-expanding quagmire of broadened discovery. MDL's tendency to generate substantial publicity and a large amount of "copycat" or "tagalong" litigation that might not otherwise have been filed combines with these factors to result in an increased likelihood that the end result of the litigation in an MDL setting will be a class action settlement.

Whether the JPML will grant MDL treatment depends in large part on the number of overlapping actions facing the defendant. In general, the fewer the number of overlapping cases, the more complex and central the common issues will have to be to justify consolidated treatment. MDL transfer is also more likely when cases are young than when they are nearing trial or settlement.

There is no way for a defendant to know for certain what judge will end up with the MDL if multidistrict transfer and consolidation is granted by the JPML. Where cases are pending and which are further along are certainly factors, as are the preferences of the parties, but factors such as relative court congestion, the experience of potential judges with MDLs generally and the subject matter at issue in particular, and the geographic proximity of the potential forum to key evidence and witnesses are all considered as well. Although the forum chosen does not have to be a forum where any of the actions was originally filed, over 90% of the time it is. Daniel A. Richards, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge*, 78 FORDHAM L. REV. 311, 331 (2009).

E. Anti-Suit Injunctions.

Under limited circumstances, it may be possible for a defendant to enjoin prosecution of a competing class action. To the extent a federal court is authorized to issue such an injunction, its authority derives from the All Writs Act ("AWA"), 28 U.S.C. § 1651, and exceptions to the Anti-Injunction Act ("AIA"), 28 U.S.C. § 2283.

The AWA provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 2283. The AIA provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. In limited circumstances, these statutes together enable a federal court to take the extraordinary step of enjoining activity being undertaken in a state court, an injunction to which the state court must accede under the Supremacy Clause of the U.S. Constitution. Recognizing the extraordinary force of a federal injunction, the courts have likewise recognized that such should be used sparingly; the AIA's "core message is one of respect for state courts." *Smith v. Bayer Corp.*, — U.S. —, 131 S. Ct. 2368, 2375 (2011). As such, in order to be sustainable on appeal, any injunction of a state proceeding must fit within one of the AIA's three exceptions: specific authorization by Act of Congress, injunctions "in aid of" the federal court's jurisdiction, or injunctions to "protect or effectuate" the federal court's judgments. A federal court cannot evade the AIA by enjoining a party rather than the state proceeding itself; courts have recognized that "[o]rdering the parties not to proceed is tantamount to enjoining the proceedings." *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 805 (9th Cir. 2002).

The "in aid of jurisdiction" exception to the AIA typically only applies when a *res* is at stake and thus only to actions *in rem*. *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229 (1922); *U.S. v. $270,000 in U.S. Currency, Plus Interest*, 1 F.3d 1146, 1148 (11th Cir. 1993). However, the courts have also recognized an additional scenario in which an "in aid of jurisdiction" injunction is permissible: when a federal court has "retained jurisdiction over complex, *in*

personam lawsuits," resolution of which is threatened by competing state court litigation. *See, e.g., In re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233, 1251–52 (11th Cir. 2006). The most common use of this "complex multi-state litigation exception" is where a "complex and carefully crafted settlement" in federal court "would be undermined by a state court adjudication." *In re Bayshore*, 471 F.3d at 1252; *see also In re Diet Drugs Prods. Liab. Litig.*, 282 F.3d 220, 239 (3rd Cir. 2002); *In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328, 337-38 (2d Cir. 1985).

The "in aid of jurisdiction" has been used in other contexts in class action litigation, as well – if rather sparingly. In *Winkler v. Eli Lilly & Co.*, for example, the Seventh Circuit, while vacating an AIA injunction as being overly broad, held that the AWA and AIA "permit a district court . . . to issue an injunction to safeguard a pre-trial ruling like [a] discovery order. . . ." 101 F. 3d 1196, 1203 (7th Cir. 1996); *see also Newby v. Enron Corp.*, 338 F.3d 467, 476 (5th Cir. 2003) (district court's stay of discovery in related state court action appropriate under All Writs Act); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 261 F. 3d 355, 368 (3rd Cir. 2001) (affirming injunction preventing opt-outs from using evidence, or engaging in motion practice, pertaining to settled class action claims in individual lawsuits; "the All-Writs Act and the Anti-Injunction Act do extend to discovery."); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 93 F. Supp. 2d 876, 880 (M.D. Tenn. 2000) (where plaintiffs had brought substantially similar suit in Texas state court, district court enjoined that court under All Writs Act from ruling on plaintiffs' motion to compel discovery). On the other hand, "the mere existence of a parallel lawsuit that seeks to adjudicate the same *in personam* cause of action does not itself provide sufficient grounds for an injunction against a state action in favor of a pending federal action." *In re Baldwin-United*, 770 F.2d at 336. Protection of a trial date in the federal court, for example, has been found to be insufficient to support an injunction against a competing state case. *Ret. Sys. of Ala. v. J.P. Morgan Chase & Co.*, 386 F.3d 419, 430-31 (2d Cir. 2004).

The AWA also permits injunctions against state proceedings where necessary to "protect and effectuate" the federal court's judgments. Known as the "relitigation exception," its applicability turns on principles of claim and issue preclusion, *Smith*, 131 S. Ct. at 2375, which are to be strictly and narrowly applied. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148 (1988). Because the state court's erroneous refusal to give preclusive effect to a federal judgment can be reviewed by state appellate courts and ultimately the Supreme Court, a federal court should ordinarily not dictate to a state court the preclusive consequences of the federal court's judgment. "[E]very benefit of the doubt goes toward the state court." *Smith*, 131 S.Ct. at 2376.

The Supreme Court's *Smith* decision, its latest pronouncement on the relitigation exception, casts doubt on whether that exception has any vitality outside the context of a final federal judgment on the merits. *Smith* involved competing federal and state product liability class actions against Bayer, the manufacturer of a prescription pharmaceutical. 131 S.Ct. at 2368. The federal case was filed approximately one month before the state action; both cases proceeded through discovery and toward class certification. *Id.* at 2373. The trial court denied class certification in the federal action, on predominance and commonality grounds, and Bayer then sought an injunction from the federal court, seeking to have the state

court prevented from entertaining plaintiffs' motion to certify a statewide class. *Id.* at 2374. The district court granted the injunction, a ruling upheld by the Eighth Circuit. *Id.* The Supreme Court unanimously reversed. *Id.* at 2374-75.

The Supreme Court held that because the analysis for class certification under Rule P. 23 was a different question from the state court's analysis of its own class action rule, there was no identity of issues between the two actions regarding class certification. *Id.* at 2377. The Court also held that an unnamed member of a putative and uncertified class could not be deemed a party for preclusion purposes, and thus that there was no identity of parties. *Id.* at 2377-78. The Court noted awareness of the problem of "serial relitigation of class certification," *id.* at 2381, but observed that the passage of CAFA enables defendants to remove most significant class actions to federal court, where either MDL consolidation under 28 U.S.C. § 1407, or "principles of comity" among federal courts, should minimize conflicting certification decisions. *Id.* at 2382.

How the lower courts go about applying the *Smith* "principles of comity" language in the class certification context remains to be seen. Some courts have been disinclined to view previous certification denials as deserving mandatory deference. *See, e.g., Smentek v. Dart*, 683 F.3d 373, 376 (7th Cir. 2012) (rejecting notion of "mandatory comity" where district court did not follow other courts' class certification denials in earlier cases involving same alleged class); *Thorogood v. Sears, Roebuck & Co.*, 678 F.3d 546, 551-52 (7th Cir. 2012) (vacating anti-suit injunction based on class certification denial); *Heibel v. U.S. Bank Nat'l Ass'n*, No. 11-cv-00593, 2012 WL 4463771, at *4 (S.D. Ohio Sept. 27, 2012) ("neither comity nor *stare decisis* make the [earlier] court's decision binding on this court, nor does the decision relieve this court of its obligation to conduct an independent analysis"). Other courts have relied heavily on previous certification denials. *See, e.g., Edwards v. Zenimax Media, Inc.*, No. 12-cv-00411, 2012 WL 4378219, at *4 (D. Colo. Sept. 25, 2012) (denying certification; finding opinion denying certification in earlier competing class case (highly persuasive and relevant"); *Baker v. Microsoft*, 851 F. Supp. 2d 1274, 1278-79 (W.D. Wash. 2012) (following earlier certification denial in overlapping class action, and holding that previous denial was entitled to rebuttable presumption that certification should not be granted).

Certain of the Court's language in *dicta* ("whether and how prior litigation has preclusive effect is usually the bailiwick of the *second* court," 131 S. Ct. at 2375) suggests that the relitigation exception might now have truly minimal scope. Nevertheless, the Court's invocation of comity principles, and its stated awareness of the potential abuse of seriatim class certification motions, can certainly be relied on by a defendant in defending a second such motion after having once defeated certification.

One weapon decidedly not in a defendant's arsenal in dealing with competing class actions is an anti-suit injunction by a state court against a federal court that does not involve *in rem* jurisdiction over a *res*. The law is settled that a state court has no authority to enjoin prosecution of federal court *in personam* proceedings, even if the state proceeding has been reduced to final judgment. *See Gen. Atomic Co. v. Felter*, 434 U.S. 12, 12 (1977) (per curiam); *Donovan v. City of Dallas*, 377 U.S. 408, 412-13 (1964).

VII. COST-EFFECTIVE SETTLEMENT.

Class actions settle for a variety of reasons, sometimes for reasons unassociated with the merits of the particular case. This is because class action settlements—unlike individual ones—can provide unique advantages to a company by globally resolving what might otherwise be a multiplicity of litigation in different venues presenting a significant threat of cumulative defense costs and exposure. Class settlements, in other words, frequently offer the potential to resolve business practice concerns in a "single shot," on terms negotiable to some degree by the company. While class settlements require court approval and generally notice to the class, they can be a cost-effective alternative to class litigation or a multiplicity of individual litigation, with the decided advantage of offering a fuller peace through a bargained-for classwide release. How, where and when you settle can greatly affect the overall cost of a class action settlement, not only in terms of the ultimate cost of the settlement relief itself, but in terms of the procedural costs of getting it approved and implemented.

A. Determining *when* to explore settlement and in what forum.

Determining when to negotiate settlement negotiations is a strategic and case-specific art. Negotiations can begin as early as a company's receipt of a class action complaint. More often, negotiations commence after the unfavorable resolution of early dispositive motions, during class-related discovery proceedings, or shortly before or after an unfavorable class certification decision. Some timing considerations are not necessarily unique to class litigation, but the greater stakes of class litigation magnify the different consequences of good timing versus bad.

There are strategic timing considerations that are unique to class litigation. The most obvious example is where a company is considering settlement of a class action brought in or removed to federal court. Prior to a class being certified, a plaintiff may dismiss his or her case without court approval. FED. R. CIV. P. 23(e). Thus, parties concerned with the limitations and requirements that CAFA imposes on settlements, such as the required notice to federal and state regulators and the restrictions on coupon settlements, might consider initiating their negotiations well before class certification-related proceedings occur. By doing so, they preserve the option of avoiding CAFA's requirements with a deal that calls for the plaintiff to voluntarily dismiss the federal action and re-file the class claims in a state forum where CAFA does not apply. This strategy was actually bolstered by the United States Supreme Court's recent decision in *Smith v. Bayer Corporation*, where the Court refused to grant preclusive effect to a district court's denial of class certification in part because states are free to craft their own rules for class certification, which may differ from the federal rules as long as those state rules comport with Due Process. —U.S.—, 131 S. Ct. 2368, 2377-78 (2011).

If the conduct challenged in a class action complaint is likely to induce (or has already induced) the filing of more class action or individual complaints, and an early risk evaluation suggests that the allegations may have some merit, early and successful negotiations with counsel in the first-filed case may be particularly well-advised. *See, e.g., In re: Ocwen Loan Serv., LLC, Fair Debt Collection Practices Act (FDCPA) Litig.*, 988 F. Supp. 2d 1367 (J.P.M.L. 2013) (denying motion by counsel in later-filed actions for transfer and consolidation of

class and individual actions due to the pendency of a proposed nationwide class settlement before the court in the first-filed action); *accord* Order Staying The Case, *Walden v. Ocwen Loan Serv., LLC*, No. 4:13cv361-RH/CAS (N.D. Fla. entered Oct. 15, 2013) (staying one of the later-filed class actions in the same FDCPA litigation based on the first-filed rule); Order Continuing Stay of Proceedings, *Struthers v. Ocwen Loan Serv., LLC*, No. 4:13-cv-00189-SMR-CFB (S.D. Iowa entered Jan. 6, 2014) (continuing stay based on first-filed rule as well as by the effect of the interim anti-suit injunction entered by court in the first-filed action pending that court's consideration of whether to give final approval to proposed nationwide class settlement).

At the same time, however, a company should be prepared to defend against arguments that plaintiff's counsel initiated negotiations *too early* in the litigation process, because of the judicial standard that calls for a court to assess whether the parties obtained "an adequate appreciation of the merits of the case" before negotiating the settlement. *In re Prudential Ins. Co of Am. Sales Practices Litig.*, 148 F.3d 283, 319 (3d Cir. 1998). Although there is "no precise yardstick to measure the amount of litigation that the parties should conduct before settling," *In re Rio Hair Naturalizer Prods. Liab. Litig.*, No. MDL 1055, 1996 WL 780512, at *13 (E.D. Mich. Dec. 20, 1996), parties must be prepared to demonstrate to that the settlement is not "the product of uneducated guesswork," *In re Corrugated Container*, 643 F.2d at 211. Therefore, a company who elects to initiate settlement negotiations during the infancy of litigation should recognize that confirmatory or informal discovery techniques may still need to be employed during and throughout the course of the parties' negotiations to demonstrate how the parties they informed themselves concerning the merits of the claims and defenses. *See, e.g., Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998) (formal discovery is not necessary "where the parties have sufficient information to make an informed decision about the settlement"); *Schwartz v. TXU Corp.*, Nos. 02-2243, *et al.*, 2005 WL 3148350, at *19 (N.D. Tex. Nov. 8, 2005) (collecting cases); *Levell v. Monsanto Research Corp.*, 191 F.R.D. 543, 556-57 (S.D. Ohio 2000) (approving settlement in which counsel relied primarily on informal discovery).

B. Negotiating the Structure of the Settlement Class.

Generally, a court's views of the fairness of the type and amount of relief to the members of a class—and how that relief can be awarded—will vary depending on the claims asserted and the particular circumstances of the underlying action. Moreover, the form and nature of the relief that will be found fair and reasonable is also at least in part a function of the form of class certified—*i.e.*, an injunctive class under Rule23(b)(2) or a "damages" class under Rule 23(b)(3). A company has clear incentives to seek use of the Rule 23(b)(2) device in the settlement context if possible, because "there is no absolute right of opt-out in a rule 23(b)(2) class, even where monetary relief is sought and made available." *In re Monumental Life Ins. Co.*, 365 F.3d 408, 417 (5th Cir. 2004)). In other words, companies have an incentive to resolve class actions on a mandatory, non-opt-out basis to achieve global certainty and finality through settlement. However, the Rule 23(b)(2) device is not always available. It is appropriate only where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or

corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2). In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court greatly restricted the use of the Rule 23(b)(2) device in settlements offering monetary relief. — U.S. —, 131 S. Ct. 2541 (2011). In the Court's view, "individualized monetary claims belong in Rule 23(b)(3)." *Id.* at 2558. As the Court explained, "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Id.* at 2558. Although monetary relief *is* permitted under Rule 23(b)(2), *id.* at 2560, its calculation must not "require[] individual damages determination[s]." *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 448 (6th Cir. 2002); *accord Allison v. Citgo Petroleum Corp*., 151 F.3d 402, 418 (5th Cir.1998) (denying certification of class under Rule 23(b)(2), "[g]iven the degree to which recovery of compensatory and punitive damages requires individualized proof and determinations, they clearly do not qualify as incidental damages"). These structural requirements obviously are not suited for all class action settlements.

Even where the Rule 23(b)(2) device is not available, a company and its counsel can still structure a class settlement to provide some level of certainty and finality. A major concern most defendants have with the 23(b)(3) device is that class members have opt-out rights, leaving the possibility that a significant number—if not potentially a majority—of the class could opt-out of the settlement, leaving the defendant with only relief against the remainder of the class members and the unbounded risk associated with litigation initiated by the opt-outs. One strategy for minimizing this risk is to include either a "blow provision" or "claw back provision" in the settlement. A blow provision "sets a ceiling on the percentage of class members who can opt-out of the settlement agreement before the defendant(s) may rescind the settlement." Owen C. Pell & Danielle Audette, *Issues to Consider in Drafting a Class Action Settlement Agreement*, Managing Complex Litigation 2008: Legal Strategies and Best Practices in "High-Stakes" Cases, 786 PLI/Lit 193 (Nov. 2008). Typically, the settlement will provide that if the opt-out threshold percentage is exceeded, the defendant may, but is not required to, unilaterally terminate the settlement. A claw back provision, on the other hand, "does not terminate the settlement agreement if more than a specified number of class members (or percentage of the class) opt-out of the class[, but instead] preserves the settlement as to class members who do not opt-out [while] adjust[ing] the settlement payment downward based on number or percentage of opt-outs." *Id.* Blow or claw back provisions are commonly approved and treated as enforceable as a matter of contractual agreement, provided a court finds the settlement in which they are contained to be fair, adequate and reasonable on an overall basis. *In re Domestic Air Transp. Antitrust Litig*., 148 F.R.D. 297, 305 (N.D. Ga. 1993) (a court "may only approve or disapprove the settlement as presented[, and] may not rewrite the settlement as requested by numerous objectors."). *Cf. In re Healthsouth Corp. Sec. Litig*., 334 Fed. App'x 248, 2009 WL 1684422, at *4-5 (11th Cir. Jun. 17, 2009) (refusing to extend opt-out deadline because of the prejudice that would result to the defendant in light of the "blow"

provision contained in the class action settlement); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 164 F.R.D. 362, 370 (S.D.N.Y. 1996), *aff'd.*, 107 F.3d 3 (2d Cir. 1996) (same).

C. Negotiating the Definition and Scope of the Settlement Class.

A negotiated settlement class can differ from the proposed litigation class. This is true even where a litigation class has already been certified by a court, since class certification is interlocutory in nature, and a court already "retains the authority to amend or redefine the class if events in the course of litigation require it." *Robin v. Doctors Officenters Corp*., 686 F. Supp. 199, 203 (N.D. Ill. 1988); *see also* FED. R. CIV. P. 23(c)(1)(C) ("An order that grants or denies class certification maybe altered or amended before final judgment"); *Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir. 1983) ("The district judge must define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts"). Therefore, companies can propose a different class definition—or request the alteration or modification of a prior certified class—during the settlement negotiation process. They are not, in other words, bound entirely by the plaintiff's theory or understanding of the case. Generally, a defendant will want to bargain for the broadest settlement class feasible within the context of the case, to ensure maximum peace for the settlement dollar.

D. Negotiating the Scope of the Release.

Perhaps nothing means more to a company in the class settlement context than the terms of release it will be given. A settling defendant should typically negotiate a classwide release that is not limited to the claims actually asserted in the lawsuit, but instead covers any and all claims based on the acts, events, representations or omissions at issue. *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 254 (2d Cir. 2001), *aff'd in part and vacated in part*, 539 U.S. 111 (2003) ("class action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability").

Once approved, a classwide release will have its own preclusive effect separate and apart from the *res judicata* effect normally accorded a judgment or dismissal on the merits. *Nottingham Partners v. Translux Corp.*, 925 F.2d 29, 31-32 (1st Cir. 1991). The parties may release claims not presented in the action, even claims which could not have been presented, so long as they arise from the same factual predicate as the claims asserted. *Matsushita Elec. Inds. Co., Ltd. v. Epstein*, 516 U.S. 367, 376-77 (1996).[33] The parties may also release

[33] *See, e.g., In re Am. Exp. Fin. Advisors Sec. Litig*., 672 F.3d 113, 135 (2d Cir. 2011) ("[t]he law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct."); *Hesse v. Sprint Corp*., 598 F.3d 581, 590 (9th Cir. 2010) ("A settlement agreement may preclude a party from bringing a related claim in the future even though the claim was not presented and might not have been presentable in the class action, but only where the released claim is based on the identical factual predicate as that underlying the claims in the settled class action.") (quotation omitted); *Thomas v. Blue Cross and Blue Shield Ass'n*, 333 Fed. App'x 414, 420 (11th Cir. 2009) ("Given a broad enough settlement agreement … and provided that [a class member] had notice of it and an opportunity to opt out, it is perfectly acceptable for the [class] action to preclude his claims, even if they could not have been part of that action itself."); *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 349 (6th Cir. 2009) ("The question is not whether the definition of the claim in the complaint and the definition of the claim in the release overlap perfectly; it is whether the released claims share a factual predicate with the claims pled in the complaint.); *Adams v. Southern Farm Bureau*

persons or entities not named as defendants in the action, again so long as the release is "based on the same underlying factual predicate as the claims asserted against the parties to the action being settled." *Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 396 F.3d 96, 109 (2d Cir. 2005) (citations omitted). In state proceedings, the parties may even release federal claims which could not have been brought in the state case. *Nottingham Ptrs.*, 925 F.2d at 34. Therefore, a company and its counsel should demand a release that ensures global certainty and finality to the litigation, including against related entities not named in the underlying class action, and all potential claims arising from the disputed events and transactions.

Life Ins. Co., 493 F.3d 1276, 1288–89 (11th Cir. 2007) (no impropriety in including in a settlement a description of claims broader than those that have been specifically pleaded, including known and unknown claims); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 106 (2d Cir. 2005) ("Plaintiffs' authority to release claims is limited by the 'identical factual predicate' and 'adequacy of representation' doctrines. Together, these legal constructs allow plaintiffs to release claims that share the same integral facts as settled claims, provided that the released claims are adequately represented prior to settlement."); *Newby v. Enron Corp.*, 394 F.3d 296, 305 n.15 (5th Cir. 2004) (noting that a class settlement may release "defendants from class members subsequently asserting claims relying on a legal theory different from that relied on in the class action complaint but relying on the same set of facts."); *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800, 805 (8th Cir. 2004) ("There is no impropriety in including in a settlement a description of claims that is somewhat broader than those that have been specifically pleaded. In fact, most settling defendants insist on this."); *City P'ship Co. v. Atlantic Acquisition Ltd. P'ship*, 100 F.3d 1041, 1044 (1st Cir. 1996) ("It is well-settled that in order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action."); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 201 (5th Cir. 1981) ("The weight of authority establishes that … a court may release not only those claims alleged in the complaint and before the court, but also claims which could have been alleged by reason of or in connection with any matter or fact set forth or referred to in the complaint. And it has been held that even when the court does not have power to adjudicate a claim, it may still approve release of that claim as a condition of settlement of an action before it.").

E. Negotiating The Form And Amount Of Relief.

There is no universal rule of thumb for determining what constitutes the "ideal" amount of relief to offer in any given class action settlement. Instead, a court will compare the relief offered with "the likely rewards the class would have received following a successful trial of the case." *Knight v. Alabama*, 469 F. Supp. 2d 1016, 1034 (N.D. Ala. 2006). Those amounts clearly do not need to equal one another—instead, a court will assess whether the value of the relief offered "falls within th[e] range of reasonableness, [and] not whether it is the most favorable possible result of litigation." *Lazy Oil Co. v. Wotco Corp.*, 95 F. Supp. 2d 290, 338 (W.D. Pa. 1997), *aff'd*, 166 F.3d 581 (3d Cir. 1999).[34] "Reasonableness" in

[34] *See also Williams v. Vukovich*, 720 F.2d 909, 922 (6th Cir. 1983) ("A court may not withhold approval simply because the benefits accrued from the [settlement] are not what a successful plaintiff would have received in a fully litigated case.") (citations omitted); *In re Chicken Antitrust Litig.*, 669 F.2d at 238 ("a just result is often no more than an arbitrary point between competing notions of reasonableness"); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 534 (D.N.J. 1997), *aff'd.*, 148 F.3d 283 (3d Cir. 1998) ("the issue is whether the settlement is adequate and reasonable, not whether one could conceive of a better result," because, "after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution") (citations omitted); *In re Agent Orange Product Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984) ("Dollar amounts are judged

this context often depends on a variety of factors specific to the case, including the likelihood of recovery at trial and the costs and difficulties associated in doing so, but at least one recent and comprehensive empirical study has found that, on average, courts have approved class action settlements as being fair, adequate and reasonable where the settlement provided a recovery representing between only 9% and 12% of the damages sought by the classes. *See* Janet C. Alexander, *Rethinking Damages in Securities Class Actions*, 48 Stan. L. Rev. 1487, 1500 & n. 50 (Jul. 1996); *accord In re Domestic Air Transport Antitrust Litig.*, 148 F.R.D. 297, 325 (N.D. Ga. 1993) (approving settlement providing between 12.7% to 15.3% of "best possible recovery").[35] *Cf. Grinnell Corp.*, 495 F.2d at 455 n.2 ("there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery").

Also, the forms of relief that can be offered to a class are not limited to money, a declaration, or an injunction. A settlement may offer the class with benefits of a non-monetary form, such as free service or product offerings. *Hill v. Art Rice Realty Co.*, 66 F.R.D. 449, 453 (N.D. Ala. 1974), *aff'd.*, 511 F.2d 1400 (5th Cir. 1975) ("It does not follow as a matter of course that money must be paid to make every settlement a reasonable one."). This is because the proper inquiry in assessing the fairness, adequacy and reasonableness of a settlement ultimately is not whether "compensation in kind is worth less than cash," but instead "whether the value of relief in the aggregate is a reasonable approximation of the value of plaintiffs' claims." *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001); *see also* 2 NEWBERG ON CLASS ACTIONS (FOURTH) § 11.46, at 1106-1108 ("Cash as well as noncash consideration is appropriate, as long as the total consideration is sufficient.") (collecting cases). Moreover, an otherwise fair and adequate settlement is not rendered defective merely because the relief it offers is "promotional" in nature. *In re Cuisinart Food Processor Antitrust Litig.*, MDL 447, 1983 WL 153 (D. Conn. Oct. 24, 1983); *Henry v. Sears Roebuck & Co.*, No. 98-4110, 1999 WL 33496080 (N.D. Ill. Jul. 23, 1999).

The use of "coupon" relief, where class members are given discounts or rebates off the future purchase of additional products or services, is now largely confined to state court class actions settlements. Although coupon relief is not prohibited in federal court,[36] CAFA imposes restrictions on the use of coupons in class actions pending in a federal forum. For example,

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not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case") (citations omitted).

[35] *Accord In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 323-24 (E.D.N.Y. 1993) (approving settlement affording recovery between 6% - 10% of the class' best possible recovery); *Chatelain v. Prudential Bache Sec., Inc.*, 805 F. Supp. 209, 211, 215 (S.D.N.Y. 1992) (approximately 8% of the class' best possible recovery); *Bagel Inn, Inc. v. All Star Dairies*, Civ. Act. No. 80-2645, 1981 WL 2185, at * 3 (D.N.J. Dec. 21, 1981) (8%); *Behrens v. Wometco Enter., Inc.*, 118 F.R.D. 534, 542-43 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990) (5.7%); *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 833 (E.D.N.C. 1994) (approximately 5%); *Weinberger v. Kendrick*, 698 F.2d 61, 65 (2d Cir. 1982) (between .28% - 1.1%).

[36] *See, e.g., David v. Am. Suzuki Motor Corp.*, No. 08–22278, 2010 WL 1628362, at *7 n.12 (S.D. Fla. Apr. 15, 2010) ("While coupon settlements may be disfavored, there is no bright-line rule holding that post-CAFA coupon settlements can never be approved as fair, adequate, and reasonable.").

heightened judicial scrutiny is applied to settlements offering coupon relief, *see* 28 U.S.C. § 1712(e), and attorneys' fee awards must reflect the rate of recovery of the coupons themselves (or alternatively should be based on upon the amount of time reasonably expended byclass counsel in the case). *Id.* at § 1712(b); *accord Figueroa v. Sharper Image Corp*., 517 F. Supp. 2d 1292 (S.D. Fla. 2007) (applying CAFA's heightened judicial scrutiny requirement, denying approval to coupon settlement). If a company intends to initiate settlement negotiations early in a class action pending in federal court, and wants to provide coupons as part of the relief, the company should consider, as suggested *supra*, a state court settlement approach. As suggested above, this may mean not removing a class action initially filed in state court, or for class actions filed in federal court, negotiating a settlement that calls for the dismissal of the federal action and the re-filing of the claims in a state forum where CAFA does not apply.

When negotiating the relief to be offered to the settlement class, a company and its counsel should also carefully resolve how any unclaimed or undistributed funds—or funds attributable to persons who cannot be identified to begin with—should be handled. While a company would obviously prefer for unclaimed funds to revert back to it, reversion clauses—particularly when coupled with "clear sailing" provisions with respect to class counsel fee awards—are often viewed with suspicion by courts.[37] The most frequently employed option is to distribute such funds to third-parties as a *cy pres* award.[38] However, broad and unbounded use of the *cy pres* remedy has itself become the subject of growing criticism, and Justice Roberts foreshadowed that there will come a day when the Supreme Court will address fundamental concerns surrounding the use of such remedies in class action litigation, including when, if ever, such relief should be considered; how to assess its fairness as a general matter;whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on." *Marek v. Lane*, — U.S. —, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., concurring in result).

As an example, use of a *cy pres* mechanism has been question where a settlement affords class members with *pro rata* distributions of a finite fund in a way that fails to fully compensate them for their injuries, yet provides that any unclaimed funds will be distributed to third-parties.[39]

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[37] *See, e.g., In re Checking Account Overdraft Litig*., 830 F. Supp. 2d 1330, 1356 (S.D. Fla. 2011) ("What would be legally unjustified here is for unclaimed funds to revert to BofA."); *Sylvester v. CIGNA Corp.*, 369 F. Supp. 2d 34, 41 (D. Me. 2005) (denying approval of proposed class settlement, and reasoning that "the presence of both a reverter clause and a clear sailing clause should be viewed with … suspicion and not be presumed fair to the class."); *Stewart v. USA Tank Sales & Erection Co., Inc.*, No. 12-cv-5136, 2014 WL 836212, at *6 (W.D. Mo. Mar. 4, 2014) ("some courts view reversionary provisions in claims made settlements as a red flag of potential collusion, particularly where—as here—the settlement contains a 'clear sailing' agreement on attorneys' fees."). *But see McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 812-13 (E.D. Wis. 2009) ("the reversion of unclaimed funds to the defendant is not objectionable when class members receive full recovery for their damages and the parties agree to the reversion") (citing *Mangone v. First USA Bank*, 206 F.R.D. 222, 230 (S.D. Ill. 2001)).

[38] *See, e.g., Nelson,* 2012 WL 2947212, at *4; *Perkins v. Am. Nat'l Ins. Co.*, No. 05-100, 2012 WL 2839788 (M.D. Ga. July 10, 2012).

[39] *Klier v. ELF Atochem N.A., Inc.*, 658 F.3d 468, 475-80 (5th Cir. 2011); *accord id.* at 482 (Jones, C.J.,

Cy pres distributions have also been questioned "if there is no reasonable certainty that any class member would benefit from it,"[40] and it has been suggested that the remedy should instead be set up in a way that "account[s] for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members." *Lane v. Facebook*, 696 F.3d 811, 819–20 (9th Cir. 2012). The Southern District of New York suggested that "the best application of unused settlement funds [may be] to donate them to an organization whose purpose is closely related to the purpose of the lawsuit." *Reyes v. Buddha-Bar NYC*, 08-cv-2494, 2010 WL 2545859, at *1 (S.D.N.Y. June 18, 2010). And while most courts currently hold that a proposed class settlement need not detail in advance the identities of intended *cy pres* recipients,[41] it is highly recommended that the settlement do so to foreclose an unnecessary avenue of objection for concerned class members.

F. Determining Whether Prerequisites Should Be Imposed For Relief Distribution.

Claim forms as a prerequisite to a share of settlement relief can be an effective way of reducing the overall cost of a settlement. *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233 (11th Cir. 2011) (affirming final approval of nationwide class action settlement imposing claim form requirement on class members). It is clear that imposing some "claim form" or "proof of claim" requirement on class members is not inherently improper.[42] Nor does a claim form requirement necessarily trigger CAFA's "coupon settlement" restrictions on attorneys' fees, 28 U.S.C. § 1712, because claim forms do not, in and of themselves, convert non-coupon relief to "coupons" within the common understanding of that term. *See, e.g.*, Carolyn Shapiro, *Recent Developments Affecting the Ethical Obligations of Attorneys in Class Actions*, Class Action Litigation 2006: Prosecution

concurring) ("In the ordinary case, to the extent that something must be done with unclaimed funds, the superior approach is to return leftover settlement funds to the defendant.").

[40] *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012).

[41] *See, e.g., In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 26 (1st Cir. 2012) (affirming district court's identification of, and distributions to, cy pres recipients of unclaimed funds following class settlement administration process: the settlement had provided that "[a]ll unclaimed funds remaining in the Net Consumer Settlement Pool shall be distributed in the discretion of the Settlement Court as it deems appropriate."), *cert. denied sub nom. Sensing v. Porter*, — U.S. —, 133 S. Ct. 338 (2012); *Perkins v. Am. Nat'l Ins. Co.*, No. 05-cv-100, 2012 WL 2839788 (M.D. Ga. July 10, 2012) (approving identification of and amount of distributions to cy pres recipients of unclaimed funds following completion of class action administration process).

[42] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.66, at 331 ("Class members must usually file claim forms providing details about their claims and other information needed to administer the settlement."); *see also Thompson v. Metropolitan Life Ins. Co.*, 216 F.R.D. 55, 67 (S.D.N.Y. 2003) (finding "no reason to conclude that the claim procedure is unfair because of the certain steps absent class members must take to obtain settlement benefits"); *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000), *aff'd. sub nom., D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001) (approving settlement requiring submission of claim form by class members); *In re NASDAQ Mkt-Makers Antritrust Litig.*, No. 94-3996, 2000 WL 37992 (S.D.N.Y. Jan. 18, 2000); *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166 (E.D. Pa. 2000); *Parks v. Portnoff Law Assocs.*, 243 F. Supp. 2d 244 (E.D. Pa. 2003) (approving class settlement requiring submission of claim forms by class members); *In re Storage Tech. Corp. Sec. Litig.*, No. 92-750, 1994 WL 1718450 (D. Colo. May 16, 1994); *Adams v. Robertson*, 676 So. 2d 1265 (Ala. 1995).

and Defense Strategies, 744 PLI/Lit 685 (Jul. 2006) ("Coupon settlements are settlements in which class members receive coupons or credits towards future purchases of goods or services from the defendant."); Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 Law & Contemp. Probs. 97, 102 (Autumn 1997) (same).

This is not to say that claim forms can always be used. Claim forms are appropriate where some proof of identity or entitlement is arguably needed, but they are hard to justify when the names and addresses of all class members are already known and their relative entitlement is not in question.[43] When a claim form process is to be included in a settlement, it is recommended that the submission deadline be set following the fairness hearing (although use of this strategy may be restricted by the provisions of CAFA in federal actions where the settlement offers relief in whole or in part in a coupon form, *see generally* 28 U.S.C. § 1712). In this way, any paucity of claimants as of the fairness hearing date will be less of an obstacle to settlement approval.

G. Developing an effective, cost-efficient and practical notice program.

Notice and an opportunity to object must be provided to class members about the settlement, and counsel must arrange for its distribution to the class. FED. R. CIV. P. 23(e)(1) ("The court must direct notice in a reasonable manner to all class members who would be bound by the proposal."). In a settlement, notice is always funded directly or indirectly by the defendant.

In general terms, notice "must be reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action, . . . afford them an opportunity to present their objections, [and . . .] afford a reasonable time for those interested to make their appearance." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Pearson v. Ecological Science Corp.*, 522 F.2d 171, 176-77 (5th Cir. 1975) (The purpose of Rule 23(e) "is to

[43] *See, e.g.*, *Milliron v. T-Mobile USA, Inc.*, No. 08-cv-4149, 2009 WL 3345762, at *6 (D.N.J. Sept. 10, 2009) ("[T]he Court finds it perfectly appropriate to require Class members to submit certain information proving that they are entitled to collect the relief awarded in this case."); *In re WorldCom, Inc. Sec. Litig.*, No. 02-cv-3288, 2004 WL 2591402, at *12 (S.D.N.Y. Nov. 12, 2004) (approving use of claim form which sought only "information … necessary in order for a fair distribution of the settlement proceeds."); *In re Wireless Telephone Fed. Cost Recovery Fees Litig.*, No. 03–MD–015, 2004 WL 3671053, at *14 (W.D. Mo. Apr. 20, 2004) ("The objectors also complain that the claim form for former subscribers is 'burdensome.' The one-page form merely requires a claimant to provide enough information to enable Defendants to search their records to confirm that the claimant falls within the definition of the relevant subclass. This requirement is reasonable."); *Mangone v. First USA Bank*, 206 F.R.D. 222, 235 (S.D. Ill. 2001) ("Notarization of claim forms is routinely required in class action settlements to assure that the fund is shared among proper and deserving claimants, and here only an affirmation was required from Class Members."). *But compare De Leon v. Bank of Am., N.A. (USA)*, No. 09-cv-1251, 2012 WL 2568142, *19 (M.D. Fla. 2012), r*eport and recommendation adopted by* 2012 WL 2543586 (M.D. Fla. 2012) (noting "the likelihood that the required proof is not readily available to putative class members" as a reason to reject proposed settlement); *Harris v. Vector Mktg. Corp.*, No. 08-cv-5198, 2011 WL 4831157 (N.D. Cal. 2011) (stating that settlement fund is "virtually illusory" given high unlikelihood that class members will actually return sample knife kit to make claim from fund). *Accord* BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES at 30 (3d ed. 2010) (judges should "[a]void imposing unnecessary hurdles on potential claimants," and should ensure that "[n]ecessary claim forms [are] as simple and clear as possible," free of "confusing questions and onerous proof requirements.").

assure that any person whose rights would be affected by a dismissal or compromise has the opportunity to contest the proposed action") (citations omitted). Typically, this has been interpreted to require that notice be sent by mail to all reasonably identifiable class members whose addresses are known or reasonably obtainable, and by some form of publication notice to those who cannot be reasonably identified. *Schaefer v. Tannian*, 164 F.R.D. 630, 637 (E.D. Mich. 1996) (describing the dissemination requirements of a class notice program); *see also Shutts*, 472 U.S. at 812; *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-75 (1974); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 528 n.52 (D.N.J. 1997), *aff'd.*, 148 F.3d 283 (3d Cir. 1998) ("Supplementing individual notice with publication notice [to class members who cannot be reasonably identified] represents an appropriate balance between protecting class members and making class actions workable"). However, there is a growing body of authority approving the use of e-mail to disseminate notice, at least where e-mail served as a principal means of communication between the defendant and the class members. *See, e.g.*, Brian Walters, *"Best Notice Practicable" in the Twenty-First Century*, 2003 UCLA J. L. & TECH. 4 (2003); Jordan S. Ginsberg, Comment, *Class Action Notice: The Internet's Time Has Come*, 2003 U. CHI. LEGAL. F. 739 (2003); Jennifer Mingus, Note, *E-Mail: A Constitutional (and Economical) Method of Transmitting Class Action Notice*, 47 CLEV. ST. L. REV. 87 (1999). The use of e-mail to disseminate notice offers not only significant cost advantages, but also electronic service can provide information to the parties that traditional mail cannot, such as "read-receipt" confirmation and "click through" data by each of the class members.

The widespread use of the internet now allows settling defendants to easily and cost-effectively create settlement websites, where the complete version of a settlement (along with other information) can be made available to the class members. Companies should strongly consider establishing settlement websites, and include references and internet addresses for these websites in the notices disseminated to class members. Not only are such websites a cost-effective and efficient means by which to keep mailed notice short and make additional materials available to the class members, the use of such websites helps insulate the parties from the traditional attacks of professional objectors based on the perceived inadequacy of disclosure in the notice process. *See, e.g.*, *Waters*, 2012 WL 2923542, at *8 (describing the extensive information offered class members on settlement website within context of assessing reasonableness of the notice program); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1342-44 (same, and referencing the information available on the settlement website as a ground upon which to overrule objectors' challenges to the adequacy of the notice program).

CONCLUSION

The foregoing is not intended to be an exhaustive list. The point is that when you are faced with a new class action, investing up front in an earnest effort to find an early exit, on or off the beaten path, can pay serious dividends. When successful, this strategy is far cheaper than simply accepting the burdens and expense of class discovery and class certification proceedings. Even if not totally successful, the cost of the effort may be offset by a narrowing of the claims or a stronger position at the certification stage. And if another early exit cannot be found, early evaluation of the costs and benefits of individual and class settlement options can either avoid or justify the expense of full battle.