OPENING MOVES IN FRANCHISE LITIGATION

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November 2 - 4, 2016
Miami Beach, FL
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OPENING MOVES IN FRANCHISE LITIGATION

I. INTRODUCTION

Litigation is a high stakes game of strategy, like chess or baseball. Once the teams have taken the field, the opportunities to consider strategy in depth largely disappear. Opening moves, and the strategic decisions behind them, may be critical to the outcome on the diamond or in the courtroom. Is it wise to contest service or jurisdiction? Is an early merits motion likely to end the case or complicate it? Decisions in litigation, as in chess or baseball, are complex and have many moving, constantly evolving parts.

This paper will explore opening moves, for both plaintiff and defendant, franchisor and franchisee, in adversarial situations, their strategies and risks.

II. TAKING THE FIELD

The first move in franchise litigation is not immediately preparing the Complaint. Any lawyer who has listened to a client’s complaints knows that a case never looks as good as the first day it walks through his or her door. The encroachment that the franchisee says is destroying the business it has been successfully operating for years as the first franchisee in the state, may be seen by the franchisor as an unreasonable attempt by a franchisee to restrict the growth of the franchise system to the underserved areas in which the franchisor’s competitors are making significant inroads.

The first step for any litigator is to investigate the situation. Indeed, this is both an ethical obligation and a requirement of the Federal Rules. It is also fair to the client. A client must be disabused of the notion that its case is flawless, that the litigation can be completed in an efficient manner at a reasonable cost, or that a large monetary recovery is a certainty. A client who has unrealistic expectations may become adversarial to its own lawyer, making the lawyer’s job that much more difficult.

A. Contractual Constraints

One of the first decision points when preparing to file a franchise case is timing. It is important to determine at the outset when the client’s claim arose and what the applicable statute of limitations period is for each potential claim. This requires the threshold determination of which state law applies to the client’s claims, which is usually dictated in large part by a choice of law clause in the franchise agreement. Statutory limitation periods vary widely by state, so it is necessary to research the applicable limitations periods promptly.

In addition to statutory limitations periods for filing suit, check for contractual limitation periods. Franchise agreements sometimes require that parties file claims arising from the franchise agreement within a specified time period after the claim arises. These contractual limitations periods are frequently much shorter than the time span provided by the otherwise applicable statute of limitations period under state law. If a franchise agreement contains such a contractual limitations period, adhere to it and assume it will be enforceable.

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1 Fed. R. Civ. P. Rule 11, an attorney’s signature on a motion or pleading is his certification that “to the best of the person’s knowledge, information and belief there is good ground to support it.”
If the contractual limitations period has already run on a client’s claim, it may still be possible to proceed with filing the case and to challenge enforcement of the contractual limitations period. Courts apply a reasonableness standard to determine whether or not a contractual limitation is enforceable. For example, in *D & K Foods, Inc. v. Bruegger's Corp.*, a Maryland federal court held that the shortened limitations period agreed to in the franchise agreement was void and unenforceable because the shortened period of limitations in the franchise agreement “purported to waive the plaintiff’s right to the otherwise applicable statutory limitations period.”

In contrast to the court’s ruling in *D & K Foods* case, a California state court in *Khali Thabet v. Mobil Corp.* held that the shortened period agreed to in the contract was not unreasonable. The rationale behind the court’s decision in *Khali* was rooted in the fact that California law allows parties to agree to a provision shortening the statute of limitations period, provided that it is not unreasonable or gives an undue advantage to one of the parties.

### B. Who to Sue

The question of who to sue is another important threshold consideration. Franchisors typically use personal guarantees or similar contractual commitments to ensure that individuals can be named in litigation and held responsible for franchisee obligations. When filing suit on behalf of a franchisee against a franchisor, the client may feel aggrieved by particular people associated with the franchisor and be anxious to name those individuals as defendants. Typically those individuals will not be parties to the franchise agreement, but litigants may find a good faith basis for naming the individuals under state law theories for attaching direct liability or for piercing the corporate veil.

Direct liability generally requires that a plaintiff prove the individual personally participated in the wrongful conduct or specifically ordered the illicit conduct. Most state statutes allow three categories of individuals to be held liable: employees, control persons, and executives. These individuals will typically be jointly and severally liable only if they “materially aided in the wrongful transaction” or were shown to have a great deal of involvement or control in the violation.

Some jurisdictions may offer a lower threshold for attaching direct individual liability to corporate officers. For example, in *Shipman v. Case Handyman Servs., L.L.C.*, an Illinois federal court held the franchisor’s vice president was liable as a control person based merely on the fact that he was a corporate officer. The court in *Shipman* noted that the general rule had

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3 *Thabet v. Mobil Corp.*, No. B161837, 2003 WL 21711408, Bus. Franchise Guide (CCH) ¶ 12, 612 (Cal. Ct. App. Jul. 24, 2003); see also *Han v. Mobil Oil Corp.*, 73 F.3d 872, 877 (9th Cir. 1995) (12 month contractual limitations period was reasonable and thus enforceable); *Hays v. Mobil Oil Corp.*, 930 F.2d 96, 99 (1st Cir. 2001) (one-year period reasonable); *Doe v. Blue Cross & Blue Shield of Wisc.*, 112 F.3d 869, 874 (7th Cir. 1997) (39-month contractual limitation clause was reasonable).

4 *Id.*

5 *Mill Run Assocs. v. Locke Prop. Co., Inc.*, 282 F. Supp. 2d 278, 287 (E.D. Pa. 2003) (a corporate officer is only liable for torts that the officer committed or “specifically directed . . . to be done”).


always been that a corporate officer is liable unless the officer “had no knowledge or reasonable basis to have knowledge of the facts, acts, or transactions constituting the alleged violation.” Although there was no specific claim regarding what the vice-president should have known, the court held that the mere fact he was alleged to have violated the Illinois Franchise Disclosure Act was enough to withstand a motion to dismiss.\(^8\) A California appellate court upheld a judgment against a franchisor’s corporate secretary in *Neptune Soc’y Corp. v. Longanecker*, based on the fact that she was present when franchisor engaged in a wrongful transaction. The secretary failed to meet her burden to demonstrate that she had “no knowledge or reasonable grounds to believe” that the franchisor was selling an unregistered franchise.\(^9\) In *A.J. Temple Marble & Tile, Inc. v. Union Carbide Marble Care, Inc.*, the franchise executive who developed the business plan of a marble cleaning franchisor was found liable under a general New York business statute where the evidence showed he was directly responsible for misrepresentations and omissions in connection with franchise sales.\(^10\)

In contrast, piercing the corporate veil typically requires a plaintiff to prove that an individual maintained control over the corporation in such a way that the business entity served as an alternate version of the individual rather than an independently functioning corporate entity.\(^11\) If plaintiff can in good faith assert such facts to establish a particular individual’s liability, then plaintiff would have a good faith basis for naming the individual as a defendant.

### C. Pre-conditions to Suit

Although franchise agreements have pre-litigation clauses intended either to encourage early settlement and thereby reduce litigation costs or, in some instances, to raise additional barriers to being sued. These clauses usually require the parties to negotiate with one another, or compel parties to enter into a third-party neutral assisted mediation, before initiating litigation.

While a pre-litigation mediation requirement is typically considered a condition precedent to filing suit, negotiation and mediation are still inherently voluntary processes and it is up to the parties to exert a good faith effort to carry out the pre-litigation clause. Parties cannot be forced to negotiate in good faith or to reach an agreement.\(^12\) To be effective, there should be some information sharing through the negotiation or mediation process. When forced to sit at the table and negotiate, parties are often wary of revealing facts, legal theories, and strategies that may be key to success in later litigation. Thus, a meaningful exchange of information may not take place and the negotiation or mediation may be ineffective.

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8 *Id.* at 814.


10 Bus. Franchise Guide (CCH) ¶ 10849 (N.Y. 1996). See also *Kohr v. Gropp & Lehman Enters.*, No. 78-71707 Bus. Franchise Guide (CCH) ¶ 8123 (E.D. Mich. Aug. 17, 1981) (franchisor’s officers and shareholders jointly liable for franchisor’s violations of Michigan’s Franchise Investment Law for failing to register and provide prospectus); *Dollar Sys., Inc. v. Avcar Leasing Sys., Inc.*, 890 F.2d 165, 173 (9th Cir. 1989) (franchisor’s officers and directors who were materially involved in franchise sale that violated California Franchise Investment Law were individually liable).

11 *Iovate Health Scis., Inc. v. Allmax Nutrition, Inc.*, 549 F. Supp. 2d 127, 128 (D. Mass 2008) (stating that “a very closely-held corporation which was functionally the alter ego of the individual defendant provided a typical situation for piercing the corporate veil” (citing *Marks v. Polaroid Corp.*, 237 F.2d 428, 435 (1st Cir. 1956))).

12 In re *Atl. Pipe Corp.*, 304 F.3d 135, 144 (1st Cir. 2002) (the court noted that the likelihood of settlement is diminished when mediation is forced upon unwilling parties).
Courts will generally enforce a pre-litigation clause so long as the obligation is clear. For example, in *Tattoo Art, Inc. v. TAT International, LLC*, the parties’ contract required that they mediate before filing an action to enforce the agreement.\(^\text{13}\) Tattoo Art sued without first requesting formal mediation, although it had sought to negotiate with TAT International before and after filing suit.\(^\text{14}\) The court granted TAT International’s motion to dismiss on the grounds that Tattoo Art failed to fulfill the condition precedent of mediation.\(^\text{15}\)

Courts will not enforce a vague or undefined pre-condition to suit. For example, in *Cumberland & York Distributors v. Coors Brewing Co.*\(^\text{16}\), Cumberland sued Coors over a dispute regarding their distributorship agreement.\(^\text{17}\) The agreement provided that in the event of a dispute between Cumberland and Coors, the parties would engage in informal mediation with the president of Coors within sixty days from the start of the dispute.\(^\text{18}\) In addition, the agreement required that the mediation take place before either party could pursue any other remedy, and required the parties to commit to binding arbitration as the ultimate form of dispute resolution.\(^\text{19}\) The clause did not, however, contain any time limit for the duration of mediation.\(^\text{20}\) The court refused to enforce the pre-litigation mediation provision on the basis that the absence of a time limit for completing mediation could indefinitely delay final resolution of the dispute.\(^\text{21}\)

Even a complete, clear pre-litigation provision in a contract does not guarantee its enforcement. For example, in *HIM Portland, LLC v. DeVito Builders, Inc.*, the parties’ contract called for negotiation, then mediation, and finally arbitration for all disputes that were related to or arose out of the contract.\(^\text{22}\) Despite its clear language, the court declined to enforce the clause because the parties had elected not to follow all its requirements. Pursuant to the contract, the arbitration requirement would not be triggered until one of the parties requested mediation.\(^\text{23}\)

**D. Where to File**

Most franchise agreements contain forum selection clauses that specify where disputes may or must be litigated. These provisions generally designate the courts situated in the franchisor’s home state as the sole forum for litigation. Generally, forum selection clauses are

\(^{13}\) *Tattoo Art, Inc. v. TAT Intl, LLC.*, 711 F. Supp. 2d 645 (E.D. Va 2010).

\(^{14}\) *Id.* at 647.

\(^{15}\) *Id.* at 650.


\(^{17}\) *Id.* at *4.

\(^{18}\) *Id.*

\(^{19}\) *Id.*

\(^{20}\) *Id.* at *8*. More specifically, the court was noted that the lack of time limit meant that one party could put the other at a disadvantage by initiating mediation proceedings and force the dispute to go “stale” by doing nothing. *Id.*

\(^{21}\) *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41, 42 (1st Cir. 2003).

\(^{22}\) *Id.* at 44.
“prima facie valid” and “should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.”

However, the enforceability of forum selection clauses is not absolute. Federal law recognizes three exceptions to the enforceability of forum selection clauses: 1) the inclusion of the forum selection clause in the agreement was the result of fraud or overreaching; or 2) the party challenging enforcement will, for all practical purposes, be deprived of its day in court because of the inconvenience or unfairness of the selected forum; or 3) enforcement of the forum selection clause would contravene a strong public policy of the forum state. With regard to the first consideration, it may be difficult to invalidate a forum selection clause on the basis of fraud. As an example, in *Marano Enters v. Z-Teca Rests., L.P.*, Marano sought to have the forum selection clause declared void based on fraudulent inducement. The court ruled that a general allegation of fraudulent inducement to enter into the franchise agreement was insufficient to raise an issue that the forum selection clause itself was unenforceable on the basis of fraud.

Similarly, it is fairly difficult for franchisees to show they would lose their day in court if forced to litigate in the designated forum. In order to avoid enforcement of the forum selection clause, a franchisee would need to show that it could not afford to litigate its claims in the contractual forum, but could afford to litigate those same claims in its chosen forum. This concept was illustrated in *LeBlanc v. C.R. England, Inc.*, where LeBlanc argued that the forum selection clause was unreasonable because transfer to the contractually designated forum would be so gravely inconvenient that LeBlanc would for all practical purposes be deprived of her day in court. The court granted the transfer over LeBlanc’s objections, ruling that because LeBlanc failed to describe specifically why travel to the forum would be inconvenient and costly and instead relied solely on a generalized description of her economic and physical circumstances, she failed to meet her burden to establish that the forum selection clause was unreasonable.

Franchisees generally have had greater success challenging forum selection clauses on the grounds that they contravene a strong public policy of the franchisee’s home state. For example, in *Jones v. GNC Franchising, Inc.* the court concluded that a forum selection clause requiring out-of-state litigation violated California public policy, because California had a statute that rendered void “any clause in a franchise agreement limiting venue to a non-California forum for claims relating to a franchise in the state.” But a Texas forum selection clause in a

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24 *Id.* at 18.


26 *Id.* at 757.


28 *Id.* at 834, 835. See also *RM Yogurt Hawaii LLC v. Red Mango Franchising Co.*, No. 10-00157, Bus. Franchise Guide ¶ 14,405 (D. Haw. June 29, 2010) (financial burden that greatly affects the ability to have a meaningful day in court does not amount to effective deprivation).

29 *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000). See also *Am. Online, Inc. v. Superior Court of Alameda Cnty. (Mendoza)*, 90 Cal. App. 4th 1, 18-21 (2001) (Forum selection clause that required litigation in Virginia and application of Virginia law was unenforceable in California court, because plaintiffs’ rights would be diminished if
franchise area representative’s agreement did not violate California’s public policy in Estep v. Yuen Yung. The court found the distinction between a franchise agreement and a franchise area representative agreement to be significant for purposes of the California policy on forum selection clauses.

E. State or Federal Court

Another important consideration when preparing to litigate is whether to file in state or federal court. Although the relative appeal of state versus federal court will vary by state and issue, generally the federal court option will appeal to litigants who are comfortable with the uniformity of federal court rules and procedures, as well as to those litigants who are from out of state and may therefore want to avoid the more local arena. In addition, litigants will want to examine the relative speed of the court dockets, the depth and quality of the bench, the court system’s reputation on the magnitude of civil judgments, and the overall convenience of the particular forum.

Of course, federal court will be an option only if there is federal jurisdiction over the dispute. Federal jurisdiction can be premised either on diversity jurisdiction, or federal question jurisdiction. For diversity jurisdiction, the parties to the suit must “be citizens of different states and the amount in controversy must exceed the sum or value of $75,000, exclusive of interest and costs.” For federal question jurisdiction, the civil action must allege violations of the United States Constitution, federal law, or a treaty to which the United States is a party.

Before filing in federal court based on diversity jurisdiction, a litigant will need to determine the citizenship of the defendants. There must be complete diversity between all plaintiffs and all defendants. Generally, an entity’s principal place of business will dictate its citizenship. As illustrated in Miller-St. Nazianz, Inc. v. SAME S.P.A., merely having a mail drop in a particular state and declaring it as a principal place of business will not suffice as “citizenship” for purposes of diversity jurisdiction. According to the court, an “in care of address is not an admission of a nerve center in Wisconsin” where a majority of the business conduct took place in Italy.

35 Id.
It is important to know that when dealing with a limited liability company the residence of each member of the company is considered in the diversity of citizenship analysis. Thus, when a defendant entity is a limited liability company with, for example, twenty members, the citizenship of each member must be considered. Similarly, as illustrated in *C.D.A.N.A v. Culligan International Co.*, if a trade association acts as a representative of its members in litigation, the citizenship of each member will be considered in the diversity determination. This rule for determining diversity jurisdiction often presents an initial hurdle for litigants seeking to file in federal court, as plaintiffs may not have sufficient information to determine accurately the citizenship of a limited liability company or trade association.

Although the amount in controversy element is more straightforward, litigants should consider nuances related to claims for injunctive relief and actual basis for damages, as discussed in Section III.A.1, *infra*.

The availability of federal question jurisdiction is generally more limited than diversity jurisdiction. The most common basis for federal question jurisdiction in franchise cases is the Lanham Act, which provides the primary cause of action for trademark infringement and unfair competition claims against terminated franchisees. The recent passage of the federal Defend Trade Secrets Act of 2016, which provides for federal jurisdiction in civil trade secret theft cases, may give franchisors an additional basis for federal question jurisdiction in cases against terminated franchisees who continue to operate their formerly franchised businesses and misappropriate the franchisor’s trade secrets in the process. Notably, the Federal Trade Commission Act and the Franchise Rule promulgated pursuant to it do not provide a private right of action for litigants and it is therefore not a basis for federal question jurisdiction. Similarly, the federal Arbitration Act does not provide an independent basis for federal court jurisdiction.

**F. What Remedies to Seek**

When preparing to file suit, determine what your client really wants as the end result. For many litigants, the ultimate goal is a monetary judgment to compensate for lost profits or, in the case of a franchisor, for past due fees as well as lost future profits. Some dissatisfied franchisees may want to unwind the franchise relationship and get their money back. Both franchisors and franchisees may want to enjoin the other party from engaging in certain conduct. Clients will always want to recover their attorney’s fees, which is possible only if there is an attorney fee clause in the contract, or if there is a statutory remedy available. Discern the client’s desires and then, within the parameters of the available claims and governing law, craft the Complaint in the way best suited to achieve the desired results. Strategize with your client before filing suit about the available evidence of damages and the pleading and proof requirements for recovery. Be familiar with the court’s procedure for pleading and proving attorney’s fees, as those protocols may vary significantly from state to state.

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1. Damages

The most common remedy parties seek in franchise cases is damages. This remedy is designed to compensate plaintiff for its monetary loss caused by the other party’s wrongdoing. Most forms of financial loss are potentially recoverable as long as they were reasonably foreseeable at the time the agreement was signed. Plaintiff bears the burden of proof on damages, which cannot be speculative and must be causally related to the injury suffered. The injured party generally has a duty to mitigate its losses. 41

In some instances, the franchise agreement may contain a provision for “liquidated damages” pursuant to which the franchisee and franchisor have agreed in advance to the amount of damages that will be paid to the other party in the event of a particular breach. This method avoids the difficulties of having to prove the amount of actual loss at the time. The clause must be a genuine estimate of the losses that the parties are expected to suffer; otherwise a court may find the clause to be an unenforceable as a penalty. 42 A New Jersey state court enforced a liquidated damages clause that required a licensee upon breach to pay $200,000 to licensor in Ramada Franchise Systems, Inc. v. Jacobcart, Inc. 43 According to the court, the set amount was a “reasonable forecast of just compensation” for the harm caused by the breach when the harm was very difficult to measure. In contrast, an Ohio federal court in Leisure Systems, Inc. v. Roundup LLC ruled a liquidated damages provision requiring franchisee to pay all sums then currently due and owing, plus the monthly average royalty and service fee paid or due by franchisee for the prior three years multiplied by the number of months remaining on the agreement, was an unenforceable penalty. 44

2. Equitable Relief

When monetary compensation is not an adequate solution, parties may seek an equitable remedy such as an order for specific performance, an injunction, or a rescission order, which unwinds the relationship altogether.

In the case of specific performance, a party asks the court or arbitration panel to force the breaching party to perform an obligation under the contract. A franchisor may sue for specific performance in order to enforce a franchisee’s post-termination obligation to de-identify

41 See, e.g., Sun Blinds, Inc. v. S.A. Recasens, No. 03-2122, Bus. Franchise Guide (CCH) ¶ 12913 (1st Cir. Oct. 7, 2004) (noting that Sun Blinds bore the burden at trial of proving that Recansen’s actions were detrimental to their business relationship and caused damages).

42 See Exemplar Manufacturing Co. v. Lear Corp., 331 B.R. 704, 711 (Bankr. E.D. Mich. 2005) (“liquidated damages are enforceable if they are ‘reasonable’ when viewed in light of several factors; an ‘unreasonably large’ liquidated damages amount is ‘void as a penalty.’”); also Ramada Worldwide Inc. v. Homewood Hotel, Inc., No. 06 C 11, Bus. Franchise Guide (CCH) ¶13545 (N.D. Ill. Feb. 5, 2007) (noting that based on undisputed evidence of the parties agreed “informed, negotiated compromise” for the liquidated damages provision, the provision is entitled to the presumption of validity and that the defendants bear the burden of proving that the provision was unenforceable). See also Deborah S. Coldwell, et al., Liquidated Damages, 29 FLJ 211 (Spring 2010).

43 No. 3:01-cv-00306, Bus. Franchise Guide (CCH) ¶12,609 (N.D. Tex. Feb. 21, 2003). See also Country Inns & Suites by Carlson, Inc. v. Interstate Props., LLC, 329 F.’Appx 220, Bus. Franchise Guide (CCH) ¶ 13,948 (11th Cir. May 12, 2009) (liquidated damages provision in hotel franchise agreement requiring franchisee to pay three times the royalty and marketing fees payable to the franchisor for 12 months preceding termination was reasonable).

or continue operating a location and pay royalties. In contrast, a franchisee can use specific performance to force a franchisor to fulfill its obligations under the franchise agreement.45

A franchisee plaintiff may seek to rescind the franchise agreement. Some franchise statutes provide this as a remedy, as does common law fraud. This remedy is generally available only in the early stages of a franchise relationship because it calls for an unwinding of that relationship. If rescission is the chosen remedy, a franchisee will not be entitled to recover damages arising from the ongoing relationship.46

Frequently, parties seek preliminary injunctive relief to preserve the status quo while the parties’ rights and obligations are being determined.47 Franchisees may seek injunctive relief to preclude termination or non-renewal of a franchise agreement, and sometimes to prevent the franchisor from imposing unreasonable performance standards upon the franchisee.48 Franchisors often seek injunctive relief in conjunction with a Lanham Act claim to prevent irreparable injury to the franchisor’s trademarks.

When filing suit in federal court or a state court with analogous procedures, a party may consider filing for a Temporary Restraining Order (“TRO”) at the outset of the litigation. A TRO requires strong sworn support and a judge willing to grant it. Although it requires significant upfront effort, if granted it creates a surge of momentum for the moving party and forces an early hearing on the motion for preliminary injunction. The TRO itself is limited to a 14-day duration and operates in conjunction with a preliminary injunction motion.

Similarly, a motion for preliminary injunction requires early intense work by counsel and the hearing is often a mini-trial. Even if the motion is unsuccessful, or only partially successful, it educates the court on critical issues and may expose significant weaknesses in a party’s case. The preliminary injunction motion may effectively end the case, depending upon what is at stake. If a franchisor has successfully enjoined a franchisee’s continued operation of a terminated franchise, the case may settle soon thereafter.

The legal landscape surrounding preliminary injunctive relief in franchise cases has changed somewhat over the last ten years. Prior to eBay v. MercExchange,49 franchisor motions for preliminary injunction on a trademark claim were often successful based on an evidentiary “presumption of irreparable injury” arising from a terminated franchisee’s continued use of the franchisor’s trademarks. Since eBay, the outcomes on such motions are less predictable. The eBay court held, in the context of patents, that an applicant for an injunction to protect intellectual property (“IP”) must meet the same standard of proof as in non-IP cases, and

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45 See, e.g., Schwartz v. Rent A Wreck of Am., Inc., 468 F. App’x 238 (4th Cir. 2012) (franchisee sued franchisor for specific performance to enforce implied franchise rights to exclusive territory).


that “traditional equitable principles” did not permit for broad classifications such as the presumption of irreparable harm.50

eBay, while conclusive in the context of permanent injunctions, left open the question whether a presumption of irreparable harm would still apply in the preliminary injunction context. The lower courts split on application of the Supreme Court's eBay ruling to preliminary injunctions. For example, in Abbott Laboratories v. Andrx Pharmaceuticals, Inc. and Sanofi-Synthelabo v. Apotex Inc., the lower court granted Abbott Laboratories’ motion for preliminary injunction against Teva Pharmaceuticals USA, Inc. Citing eBay, the appellate court vacated the injunction, holding that plaintiff had failed to provide evidence of irreparable harm.51

In contrast to Abbott, the court in Sanofi-Synthelabo v. Apotex Inc. granted a preliminary injunction on the basis of a presumption of irreparable harm. The appellate court affirmed, noting that the lower court had not abused its discretion in applying the presumption of irreparable harm where plaintiff had established a likelihood of success on the merits.52 The court declined to address whether eBay had eliminated the presumption of irreparable harm.53

The Supreme Court's 2008 decision in Winter v. NRDC addressed the standard for preliminary injunctions.54 The Court emphasized that a “mere possibility” of irreparable harm is insufficient to warrant a preliminary injunction because that would be “inconsistent with the characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that plaintiff is entitled to relief.”55 Despite the fact that Winter addressed the presumption of irreparable harm in the preliminary injunction context, court decisions have continued to be inconsistent on the issue.

In Burger King Corp. v. Cabrera, the court concluded in a trademark case that a presumption of irreparable harm based on a finding of “likelihood for success on the merits” was “questionable” after eBay.56 The court reasoned “[w]hile the complete contours of eBay have yet to be developed, the Supreme Court has clearly expressed its disapproval for the use of categorical rules in connection with injunctive relief in intellectual property actions.”57

An Alabama federal court came to the opposite conclusion in Sylvan Learning Inc. v. Learning Solutions, Inc., finding that since Sylvan had demonstrated a substantial likelihood of

50 Id.

51 Abbott Labs. v. Andrx Pharms., Inc., 452 F.3d 1331 (Fed. Cir. 2006).

52 Sanofi-Synthelabo v. Apotex Inc., 470 F.3d 1368, 1381 (Fed. Cir. 2006).

53 Id. at n.9.


55 Id. at 22.


57 Id. See also 7-Eleven, Inc. v. Dhaliwal, 2012 WL 5880462, at *4 (E.D. Cal. Nov. 21, 2012).
success on the merits, the presumption of irreparable injury applied based, in part, on contractual language supporting that presumption.\textsuperscript{58}

After eBay and Winter, franchisors should be prepared to articulate actual harm and present evidence of it. Sufficient evidence of irreparable harm can be demonstrated by evidence of: (i) the potential harm to the franchisor’s goodwill or reputation; (ii) provisions in the franchise agreement; (iii) the franchisor’s loss of control over its trademarks; (iv) consumer confusion; and (v) the relationship of the parties.

III. BOTTOM OF THE FIRST

The defense should begin just as the plaintiff does, with investigation. Not only does investigation provide an attorney information needed to respond to the Complaint, the investigation also reveals topics for a serious discussion with the client. Does it make sense to attempt an early mediation, or informal discussion? What are potential pitfalls, and how should they be approached? The defendant will have the same concerns as the plaintiff in terms of time, cost, and potential outcome. Unless the defendant has a viable counterclaim, the best case scenario is judgment in its favor in which case it will paying nothing. Considerations such as these should inform the defendant’s opening strategy – whether to seek an informal conference, try early mediation, or respond to the Complaint.

Potential choices available to the defense, aside from answering the Complaint or moving to dismiss for failure to state a claim, which is addressed in Section IV, include:

- Removing to federal court and challenging subject matter jurisdiction;
- Challenging personal jurisdiction;
- Challenging venue;
- Invoking the first-to-file rule;
- Challenging a failure to join a necessary/indispensable party.

A. Removal and Challenges to Subject Matter Jurisdiction

Challenges to federal subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) can prove useful for both the plaintiff and defendant, depending on the original forum and the preference for state versus federal court. If the plaintiff decides to file in federal court, a successful defense challenge to subject matter jurisdiction could result in an early dismissal, though victory will be short-lived as the plaintiff will likely re-file the case in state court. On the other hand, a defendant wishing to remove the case to federal court under 28 U.S.C. § 1441\textsuperscript{59} can be thwarted by a plaintiff’s successful challenge to subject matter jurisdiction, resulting in a remand to state court as well as a possible order to pay the plaintiff’s litigation costs in moving for


\textsuperscript{59} “Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.” 28 U.S.C. § 1441(a).
remand. Unlike some of the other challenges discussed below, lack of subject matter jurisdiction can be raised at any time either by the parties or the court sua sponte. It is thus an important area to become familiar with because a seeming success at the district court level could be undone at the appellate level by a successful subject matter jurisdiction challenge.

In the franchise litigation arena, federal subject matter jurisdiction is likely premised on diversity jurisdiction under 28 U.S.C. § 1332, which requires that the opposing parties are citizens of different states and that the amount in controversy exceed $75,000, exclusive of interests and costs. A challenge to diversity jurisdiction therefore comes in two forms: challenge to amount-in-controversy and challenge to diversity of citizenship.

1. Amount in Controversy

In Soft Pretzel Franchise Systems Inc. v. Taralli, Inc., a franchisor filed suit seeking a preliminary injunction, pending the outcome of an ongoing arbitration proceeding, against a franchisee who allegedly breached the covenant not to compete contained in the franchise agreement by continuing to operate a similar business after the franchise agreement was properly terminated. The franchisee had also failed to honor the equipment buy-back provision contained in the agreement. In challenging the court’s subject matter jurisdiction, the franchisee contended that the court could not consider the monetary damages at issue in the ongoing arbitration proceeding between the parties because the damages were not the subject of the motion for preliminary injunction.

Relying on Third Circuit cases dealing with motions to compel arbitration, the court held that it would consider the damages sought in the underlying arbitration: “Here, Plaintiff requests preliminary injunctive relief pending the outcome of the arbitration proceeding. The preliminary injunction is the first step in a litigation which seeks as its goal the same permanent injunctive relief, in addition to damages.” The court also held that the amount in controversy exceeded $75,000, which included (1) lost future royalties calculated based on the franchise term remaining when the agreement was prematurely terminated due to breach; (2) the book value of the equipment that was the subject of the buy-back provision; and (3) the initial franchise fee, which the franchisor claimed represented the value of the franchisee’s continued use of the franchisor’s confidential and proprietary information in violation of the covenant not to compete. The court therefore denied the franchisee’s motion to dismiss for lack of subject matter jurisdiction.

On the other hand, in Scooter’s Chicken International, LLC v. Sunday Dinner, LLC, the court granted the franchisee-defendant’s motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1). In that case, the franchisor sued the franchisee for breach of contract and unfair trade practices, among other claims, because the franchisee began operating an identical business under a different name using the franchisor’s proprietary information and intellectual

60 “The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States . . . .” 28 U.S.C. § 1332(a).


62 Id. at *4.

property. Though the plaintiff-franchisor claimed damages for unpaid royalties and damages for
stolen proprietary information, the franchisor failed to offer any proof of those amounts. In
contrast, the franchisee-defendant offered records showing the amount of previously-paid
royalties, as well as evidence that the business was unprofitable and closed after approximately
seven months. Because the royalty calculation was based on a percentage of gross sales, the
franchisee showed the unpaid royalties amounted to around $17,000, far below the jurisdictional
threshold. The plaintiff-franchisor bore the burden of proving the jurisdictional amount in
controversy and offered nothing to counter the franchisee’s evidence. The court therefore held
that the jurisdictional amount was not met and granted the franchisee’s motion.64

The takeaway from these cases is that, in the event of a challenge to the jurisdictional
amount in controversy, the party seeking to invoke federal subject matter jurisdiction (the
plaintiff if the case is filed in federal court or the defendant if the case is removed to federal
court) should point to specific amounts of damages and give the court some basis for
calculating an amount of damages over $75,000 to have the best chance of avoiding a
dismissal for lack of subject matter jurisdiction. A franchisor-defendant seeking to challenge
successfully the jurisdictional amount should likewise point to specific evidence showing the
amount in controversy does not exceed $75,000.

2. Diversity of Citizenship

Although pleading and proving diversity of citizenship is often more straightforward than
the amount-in-controversy requirement, there are still potential pitfalls for federal plaintiffs or
removing defendants. One mistake that sometimes plagues unwary federal litigants is the
failure to plead the citizenship of all members of a limited liability company.65 It appears all
federal courts of appeal to have considered the issue have uniformly held that the citizenship of
a limited liability company for diversity jurisdiction purposes is determined by the citizenship of
all of its members, though the Supreme Court has yet to directly address the
issue.66 Challenging the sufficiency of a Complaint on this ground may not prove fruitful,
however, because courts may be willing to allow a plaintiff to amend the Complaint to allege
diversity properly.67 By the same token, it is possible a court would allow a defendant to amend
its notice of removal to allege properly jurisdictional facts if the defendant failed to plead the
citizenship of a limited liability company’s members.68 Of course, the best policy is to be
cognizant of limited liability company parties and investigate their membership prior to removal.

64 Id. at *4.

65 See, e.g., Baymont Franchise Sys., Inc. v. Calu Hosp., LLC, 113 F. Supp. 3d 1000, 1001 (N.D. Ill. 2015); Barnhill

66 See, e.g., Harvey v. Grey Wolf Drilling Co., 542 F.3d 1077, 1080 (5th Cir. 2008); Wise v. Wachovia Sec., LLC, 450
F.3d 265, 267 (7th Cir. 2006); Rolling Greens MHP, L.P. v. Comcast SCH Holdings LLC, 374 F.3d 1020, 1022 (11th
Cir. 2004).

67 Cf. Baymont Franchise Sys., Inc., 113 F. Supp. 3d at 1001 (suggesting court would be amenable to a motion to
alter or amend the judgment under Fed. R. Civ. P. 59(e) if plaintiff was capable of establishing the jurisdictional facts
within the 59(e) timeframe).

68 See Barnhill, 2015 WL 93918, at *3 (ordering defendant to amend notice of removal to properly allege diversity of
citizenship); Dando, 2014 WL 6991467, at *2 (allowing defendant to amend notice of removal to add additional facts
about citizenship).
A successful subject matter jurisdictional challenge may not get rid of a case permanently. It can either be remanded to or refiled in state court, depending on the original posture of the case. But it is advisable to be aware of potential subject-matter-jurisdictional hurdles lest an appellate court undo a favorable result due to an unraised jurisdictional challenge.

B. Challenges to Personal Jurisdiction

Another potential challenge available to a defendant is a motion to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2). Unlike a challenge to subject matter jurisdiction, a challenge to personal jurisdiction can be waived if not asserted in a motion or other responsive pleading, such as an answer. Fed. R. Civ. P. 12(h).

Federal courts’ exercise of personal jurisdiction is most often linked to service of process on a defendant “who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.” Fed. R. Civ. P. 4(k)(1)(A). This means that the exercise of jurisdiction must comport with (1) a state’s long-arm statute, and (2) the Due Process Clause of the Fourteenth Amendment.69 “Specific jurisdiction “depends on an affiliation[n] between the forum and the underlying controversy (i.e., an activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation),” whereas “general jurisdiction “permits a court to assert jurisdiction over a defendant based on a forum connection unrelated to the underlying suit (e.g., domicile).”70 Below are some examples of successful and unsuccessful challenges to personal jurisdiction in the franchise litigation context.

1. Examples of Successful Challenges

In H.H. Franchising Systems, Inc. v. Brooker-Gardner,71 one of several defendants successfully moved to dismiss the franchisor-plaintiff’s claims against it for lack of personal jurisdiction. The franchisor-plaintiff argued that the moving defendants were subject to personal jurisdiction under the forum selection clause in the franchise agreement because, though they did not sign the agreement, (1) certain defendants assumed ownership of the franchise, and (2) certain defendants were “closely related” to those bound by the agreement.72 Although the court held that some of the non-signatory defendants were “closely related” to those bound by the forum selection clause in the franchise agreement and thus were bound themselves, the court held that one defendant, Ralph & Millie’s Place, was not bound by the forum selection clause. In reaching this conclusion, the court noted that Ralph & Millie’s Place, though owned by one of the franchisees, was not involved in the franchised business, and there were no documents showing Ralph & Millie’s Place assumed any ownership interest in the franchises. The court therefore granted Ralph & Millie’s Place’s motion to dismiss for lack of personal jurisdiction.73


70 Walden v. Fiore, 134 S. Ct. 1115, 1122 n.6, 188 L. Ed. 2d 12 n.6 (2014) (internal quotation marks and citations omitted).


72 Id. at *3.

73 Id. at *6.
In Orange Leaf Holdings, LLC v. Patel, the district court held that two defendants challenging a plaintiff-franchisor’s claims against them were not subject to personal jurisdiction. Plaintiff’s allegations based on “belief and understanding” that defendant Dan Pool (a non-signatory to the franchise agreement) was co-CEO of an umbrella company that ran the franchised business, was a business partner of the franchisee, and contacted the franchisor on “numerous occasions in Oklahoma” about negotiations pertaining to the franchised business were insufficient in the face of Pool’s affidavit to the contrary. Additionally, the court held that personal jurisdiction did not lie against defendant Dan Pool when the only allegations of his contacts with the forum state were two emails he sent that were received by two of the plaintiff’s Oklahoma franchise locations.

2. Examples of Unsuccessful Challenges

In H.H. Franchising Systems, Inc., discussed above, the court denied several defendants’ motions to dismiss the claims of the franchisor-plaintiff for lack of personal jurisdiction. The plaintiff’s sole argument was that all defendants—even the non-signatories—were bound by the forum selection clause in the franchise agreement. The court found this argument persuasive as to three of the non-signatory defendants. Although these three defendants did not sign the franchise agreement, the court held they were still bound by the forum selection clause because they were “closely related” to the bound parties. For example, one defendant signed a deposit check that went toward the purchase of the franchise, attended the initial franchise training and actively participated in other training, signed an “Addendum to Franchise Agreement” indicating he was an owner, and signed a confidentiality agreement.81 Another defendant was held bound by the forum selection clause because a franchisee essentially assigned her interest in the franchise to this defendant, despite technical non-compliance with the franchise agreement’s provisions on assignment.

In Orange Leaf Holdings, LLC, discussed above, the district court held that defendant Chintu Patel was subject to personal jurisdiction despite his jurisdictional challenge to claims brought against him by the plaintiff-franchisor. The court held Patel was subject to its jurisdiction because defendant Patel signed franchise agreements with the plaintiff, “directed his activities at Plaintiff in agreeing to the franchise contract and the claims in this action arise from that relationship,” and traveled to Oklahoma on several occasions to conduct business related to the franchise agreements.

75 Id. at *2.
76 Id. at *2-3.
77 2015 WL 4464774.
78 Id. at *4.
79 Id. at *5.
80 2015 WL 1529032.
81 Id. at *2.
In *CG & JS Enterprises, LLC v. H & R Block, Inc.*, the plaintiffs filed suit against H & R Block based on the failed purchase of an H & R Block franchise. The defendant-franchisor moved to dismiss for lack of personal jurisdiction, contending that it was not subject to jurisdiction in Louisiana because it was located in Missouri, conducted no business in Louisiana, and had no employees in Louisiana. Additionally, the defendant contended it never entered into a franchise agreement with the plaintiffs and had no role in reviewing them as potential franchisees. The court held that based on the record evidence before it, including email correspondence with persons who were employed by some H & R Block entity located in Missouri, it would allow the plaintiff to conduct further jurisdictional discovery and denied defendant’s motion to dismiss for lack of personal jurisdiction.

3. Examples of Challenges to Specific Types of Parties

i. Officers and Owners

In *Sanford v. Maid-Rite Corp.*, plaintiff-franchisees sued a franchisor and several of its officers, alleging violations of Minnesota Franchise Act. The court held that the mere listing of the officers on the Franchise Disclosure Document filed in the forum state was insufficient to confer personal jurisdiction over the individual defendants.

In *Noble Roman’s, Inc. v. French Baguette, LLC*, the plaintiff-franchisor brought claims for trademark infringement, unfair competition, and breach of contract, and defamation against the franchisee, the property owner where the franchise was located, and the franchise owner. The franchisee owner defendant challenged the court’s personal jurisdiction. The court held it had personal jurisdiction over the owner because the owner entered into a confidentiality agreement with an Indiana corporation, thereby purposefully availing himself of the privilege of conducting business in Indiana, and because of the owner’s allegedly defamatory statements against the franchisor.

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83 Id. at *2.
84 H & R Block, Inc. contended that a different entity, H & R Block Tax Services, LLC, was the proper defendant. Id. at *1.
85 Id. at *3.
87 Id. at *3 (“[T]here is no allegation that [the officer defendants] individually wrote, filed, or otherwise initiated contact with the forum. Therefore, the FDDs do not demonstrate that [the officer defendants] individually interacted with the forum.”).
88 684 F. Supp. 2d 1065 (S.D. Ind. 2010).
89 Id. at 1071-72.
ii. Master Franchisees

In *Jennings v. Bonus Building Care, Inc.*, the district court ruled that the plaintiff-franchisees had established personal jurisdiction over all fifty-five defendants, including master franchisees, based on plaintiffs’ claims under the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961–1968. The court reasoned that it had personal jurisdiction over all defendants because RICO provided for nationwide service of process.

As with challenges to subject matter jurisdiction, challenges to personal jurisdiction will not necessarily get rid of a case altogether; the case may simply be brought in another forum. Challenges to personal jurisdiction may also largely be obviated by forum selection clauses often contained in franchise agreements, assuming a court enforces the clause. But, a successful personal jurisdiction challenge can enable a defendant to avoid litigating in an inconvenient or otherwise undesirable forum.

C. Challenges to Venue

A motion to dismiss for improper venue under Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406 or a motion to transfer under 28 U.S.C. § 1404 are also potential options for the defense. Like a challenge to personal jurisdiction, a challenge to venue can be waived if not asserted in a motion or other responsive pleading. Fed. R. Civ. P. 12(h). Venue in federal court is generally governed by 28 U.S.C. § 1391:

1. a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;

2. a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

3. if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court’s personal jurisdiction with respect to such action.

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91 Id. at *1.

92 Id. at *3-4.

93 Although courts generally appear willing to enforce forum selection clauses, there have been cases where courts have declined to do so, particularly in California due to statutory restrictions. See *Frango Grille USA, Inc. v. Pepe’s Franchising Ltd.*, No. CV 14-2086 DSF PLAX, 2014 WL 7892164, at *3 (C.D. Cal. July 21, 2014).

94 “The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.” 28 U.S.C. § 1406.

95 Section 1404 governs motions to transfer from one federal district court to another: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.” 28 U.S.C. § 1404.
In the franchise context, forum selection clauses are often used and generally provide for suit to be filed in a particular court or state. The Supreme Court has recently addressed the appropriate procedure when a defendant seeks to enforce a forum selection clause and cause the case to be heard in another federal district court.\(^{96}\) In *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*,\(^{97}\) the Court clarified that

> Whether the parties entered into a contract containing a forum-selection clause has no bearing on whether a case falls into one of the categories of cases listed in § 1391(b). As a result, a case filed in a district that falls within § 1391 may not be dismissed under § 1406(a) or Rule 12(b)(3).\(^{98}\)

The Court further held that “[a]lthough a forum-selection clause does not render venue in a court ‘wrong’ or ‘improper’ within the meaning of § 1406(a) or Rule 12(b)(3), the clause may be enforced through a motion to transfer under § 1404(a).”\(^{99}\)

After determining the appropriate procedural mechanism for enforcing forum selection clauses, the Court turned to the proper analysis of a § 1404 motion to transfer based on a forum selection clause: “When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause.”\(^{100}\) The Court specified that the presence of a valid forum selection clause affects a district court’s § 1404(a) analysis in three ways: “[f]irst, the plaintiff’s choice of forum merits no weight”; “[s]econd, a court evaluating a defendant’s § 1404(a) motion to transfer based on a forum-selection clause should not consider arguments about the parties’ private interests”; and “[t]hird, when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue’s choice-of-law rules—a factor that in some circumstances may affect public-interest considerations.”\(^{101}\)

Post-*Atlantic Marine*, courts not surprisingly are inclined to find venue is proper in the location specified by a forum selection clause in the face of a motion to transfer.\(^{102}\) A venue

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\(^{96}\) This section addresses § 1404 motions because they are likely most applicable. Forum selection clauses that provide for venue exclusively in a state or foreign forum must be enforced through a motion to dismiss for forum non conveniens. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 580, 187 L. Ed. 2d 487 (2013).

\(^{97}\) 134 S. Ct. 568, 187 L. Ed. 2d 487 (2013).

\(^{98}\) *Id.* at 577.

\(^{99}\) *Id.* at 579. Of course, if venue is improper in the original forum (i.e., it does not fall into one of the § 1391(b) categories) as opposed to merely contrary to the forum selection clause, then a motion to dismiss under 12(b)(3) and/or § 1406 motion to dismiss for improper venue is an option.

\(^{100}\) *Id.* at 581.

\(^{101}\) *Id.* at 581-82.

challenge will thus be most useful if the plaintiff files in a forum other than that specified by the forum selection clause. However, following the Supreme Court’s decision in Atlantic Marine, the mere existence of a forum selection clause specifying a forum different than that chosen by the plaintiff is not a basis for dismissal, unless the specified forum is a state or foreign forum.

D. First-filed Rule

Another more particularized venue challenge may be available to a party who initially files suit and then is later sued by the opposing party or another related party in a competing case based on overlapping issues. Under the first-filed rule, the initial plaintiff may be able to have the second-filed case transferred to the court where the first case was filed. Although this strategy will not result in a dismissal of the litigation, it avoids the inconvenience and cost of litigating overlapping issues in two different forums, as well as the potential for inconsistent results. Examples of cases granting transfer based on the first-filed rule and declining transfer based on other considerations are discussed below.

1. Examples of Cases Granting Transfer

In Miller v. Careminders Home Care, Inc., the court granted the defendant-franchisor’s 28 U.S.C. § 1404(a) motion to transfer the case to the Northern District of Georgia where a prior-filed suit and arbitration were pending. The plaintiff opposed transfer, contending that the first-filed rule did not apply to her because she was not a franchisee (she invested money in the franchise business and was an officer and owner of the franchisee) and thus was not a party to the prior-filed litigation. The court disagreed, noting that “the applicability of the first-filed rule is not limited to mirror image cases where the parties and the issues perfectly align. Rather, the principles underlying the rule support its application where the subject matter of the later filed cases substantially overlaps with that of the earlier one.”

In Watson v. Jimmy John’s, LLC, the court granted a defendant-franchisor’s motion to transfer an employment class action based on the first-filed rule to a district court where a similar earlier-filed class action was pending. The court reasoned that, though the named plaintiffs in the class actions differed, the defendants were substantially similar and “first-to-file rule in a class action suit only requires that the Court compare the proposed classes, not the named plaintiffs.”

105 Id. at *1, *3.
106 Id. at *3 (internal quotation marks and citations omitted).
108 Id. at *3.
2. Examples of Cases Denying Transfer

In Just Born, Inc. v. Summit Foods Enterprises, Inc., the defendant-distributor moved to transfer the plaintiff-manufacturer’s lawsuit based on the first-filed rule. However, the court denied the motion, noting that even though the distributor’s state court action was filed first, it was removed to federal court after the manufacturer’s lawsuit was filed:

In applying the first-filed rule, the first-filed case is the federal civil action which is first in time, whether by removal or the actual filing of a civil action in federal court. Since the rule the Court follows today is limited to federal district courts, the plaintiff in a state civil action can avoid being the second-filed matter by simply filing a complaint in a federal district court, not a state trial court at the outset. As noted, Just Born filed this action on December 13, 2013. Summit’s state court action was not removed until one week later, on December 20, 2013. Accordingly, Summit’s motion under the first-filed rule must be denied.

In CertainTeed Corp. v. Nichiha USA, Inc., the court denied a motion to transfer based on the first-filed rule, holding that the two actions were not “materially on all fours:”

The Georgia Action is limited to the enforceability of the Non–Compete Agreement in Georgia, and a request to enjoin CertainTeed from preventing Demey’s employment with Nichiha. The Pennsylvania Action raises numerous issues, including violations of trade secret laws, civil conspiracy, and unfair practices, in addition to the enforceability of the Non–Compete Agreement in all states but Georgia. Therefore, the cases are not “truly duplicative,” and the first-filed rule does not apply. Moreover, the initial relief granted in the Georgia Action is limited to Georgia. The relief sought in the Pennsylvania Action extends beyond Georgia’s borders.

Courts have also refused to follow the first-filed rule when certain circumstances are present, such as “forum shopping, anticipatory conduct, or when other special circumstances justify giving priority to the second action.”

E. Failing to Join a Necessary/Indispensable Party

Another potential tool available to a franchisee or franchisor defendant is a motion to join a necessary or indispensable party or, if joinder is not feasible, to dismiss for failure to join a necessary or indispensable party pursuant to Fed. R Civ. P. 19. Rule 19(a) provides that certain parties must be joined if feasible:

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110 Id. at *2 (internal quotation marks and citations omitted).
112 Id. at *3.
Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person’s absence, the court cannot afford complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person’s absence may:

   (i) as a practical matter impair or impede the person’s ability to protect the interest; or

   (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

The infeasibility of joining such a party is not automatic grounds for dismissal, however. Rule 19(b) provides, “If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.” Factors for the court to consider in determining whether to dismiss the action include:

(1) the extent to which a judgment rendered in the person’s absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

   (A) protective provisions in the judgment;

   (B) shaping the relief; or

   (C) other measures;

(3) whether a judgment rendered in the person’s absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.\(^\text{114}\)

In HRCC, Ltd. v. Hard Rock Cafe International (USA), Inc.,\(^\text{115}\) a Florida federal court held that the franchisor was not a necessary party under Rule 19, even though the franchise agreement was at the center of many of the franchisee’s claims. The franchisor in that case could not be joined because diversity jurisdiction would be destroyed.\(^\text{116}\) Nonetheless, the court

\(^{114}\) Fed. R. Civ. P. 19(b).


\(^{116}\) id. at *1.
determined that the case should not be dismissed because the franchisor was not a necessary or indispensable party:

It is important to acknowledge that Plaintiff HRCC does not seek to recover from HRL the monies paid pursuant to the franchise agreement or other damages. Rather, Plaintiff HRCC seeks to recover those funds from Defendants Hard Rock Café International (USA), Inc., a Florida corporation, and from Messrs. Tom Perez, Hamish Dodds, and Michael Beacham. It is beyond dispute that Hard Rock USA is a legal entity separate from HRL, which is a legal entity formed under the laws of the Island of Jersey. As previously discussed, HRL has already obtained a default judgement for the unpaid royalties, and that judgment is not contested in the instant case. A verdict against Hard Rock USA does not affect the ability of HRL to pursue collection of the previously obtained default judgment. HRL is not a party to the instant action; therefore, a judgment against one or more of the Defendants does not operate as collateral estoppel or res judicata. In fact, Plaintiff HRCC contends it is suing Defendants for their individual acts or omissions and that alter ego language found in the Amended Complaint is superfluous. As such, a judgment entered against a Defendant does not serve to define the conduct of HRL or the validity of the franchise agreement as between HRL and Plaintiff HRCC. Therefore, Rule 19(a)(1)(B)(ii) is not implicated in this analysis.117

In sum, jurisdictional challenges and challenges to venue may be strategically useful to prevent litigating in certain forums, but depending on the circumstances and type of challenge, they may not result in an outright dismissal of the case (or at least not permanently). Fed. R. Civ. P. 12(b)(6), discussed below, may often be a more useful tool for dismissal.

IV. THE GAME PLAN UNFOLDS

In baseball, the teams have to play 9 innings,118 but litigation offers opportunities for a walk-off home run early in the game or at least a chance to go into the second inning 3 runs up.

A. Motion to Dismiss (Rule 12(b)(6))

A wildly successful Motion to Dismiss for failure to state a claim can end the game with dispatch. It can test jurisdictional issues; challenge sufficiency of the factual pleadings; narrow the scope of causes of action; disclose critical (or even fatal) facts; focus the issues; and, most importantly, could result in a quick addition to the W column. Within the last decade, after the Supreme Court’s decisions in Bell Atlantic Corp. v. Twombly119 and Ashcroft v. Iqbal,120 motions to dismiss may have become a more potent weapon. Post-Twombly and Iqbal, at least in

117 Id. at *4 (internal citations omitted).

118 Except in the minor leagues, where teams have the option of scheduling two 7-inning games as a double header. And, of course, inclement weather can force an early end to a major league game (which can nevertheless constitute a complete game if at least 5 innings have been completed and the score isn’t tied).


federal court, a plaintiff has to “earn the right to engage in discovery.” A new commissioner had moved to town.

In *Twombly*, the Supreme Court posed a question that was familiar to antitrust lawyers, but likely surprised attorneys when in *Ashcroft v. Iqbal* it was applied in other disciplines: did the Complaint allege a “plausible” cause of action? Although Federal Rule of Civil Procedure 8(a) requires only a “short and plain statement of the claim showing that the pleader is entitled to relief,” the Court reasoned that the antitrust claim in *Twombly* had to be plausible:

> While a complaint . . . does not need detailed factual allegations, . . . a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level.

*Ashcroft v. Iqbal* extended the plausibility test beyond the antitrust arena and described a two-step process of analysis. A court should “begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” Legal conclusions can provide the framework of a complaint, but they must be supported by factual assumptions. Thus, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Next, “[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”

1. **The Federal Appellate Courts**

Appellate courts appear to have defined a consistent approach to analyzing a Motion to Dismiss — referred to elegantly in the First Circuit as a “two-step pavane.” A court should ignore rote recitals of elements, legal conclusions and conclusory statements that are not entitled to a presumption of truth; it should then accept factual allegations as true, assess

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121 550 U.S. at 556.

122 Similarly, Rule 8(d) provides that “[e]ach allegation must be simple, concise, and direct” and that “[n]o technical form is required.”


124 *Twombly*, 550 U.S. at 555, citations and internal quotations omitted.

125 *Iqbal*, 556 U.S. at 679.

126 *Id.* at 678.

127 *Id.* at 679.

128 *Grajales v. Puerto Rico Ports Auth.*, 682 F.3d 40, 45 (1st Cir. 2012).
compliance with Rule 8 (or Rule 9 if allegations based on fraud are present), and apply the plausibility barometer.129

Signs of unity in defining plausibility are less evident. The parameters of plausibility described by the Supreme Court in Twombly and Iqbal are more than possibility, but less than probability.130 Thus, as with the definition of the strike zone,131 at first blush “plausibility” appears to offer a modicum of predictability. But it will be unsurprising to no one that visions of “plausibility” depend on the eye of the judicial beholder, just as strike zones vary from umpire to umpire.132 The appellate courts are wrestling with plausibility standards. Typical issues include:

(a) Is there a heightened pleading standard? How weighty must a factual underpinning be?

(b) Can/should a court stray beyond the pleadings in a plausibility assessment?

(c) Are the parties’ divergent views of plausibility relevant?

(d) Does the complexity of the claim, and/or the potential cost of litigation have any bearing on the analysis?

The Tenth Circuit sees its approach to Twombly and Iqbal as a moderate one: “[W]e have concluded that the Twombly/Iqbal standard is a middle ground between heightened fact pleading, which is expressly rejected, and allowing complaints that are no more than labels and conclusions or a formulaic recitation of the elements of a cause of action, which the [Supreme] Court stated will not do.”133

The Ninth Circuit has adopted a more aggressive approach to the plausibility inquiry, demonstrating a willingness not only to consider but to weigh the parties’ competing views of plausibility. As the Court explained in Starr v. Baca:134

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129 See, e.g., Ocasio-Hernandez v. Fortuno-Burset, 640 F.3d 1, 12 (1st Cir. 2011); Grajales, supra; Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (3d Cir. 2009); Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 255-56 (4th Cir. 2009); McCauley v. City of Chicago, 671 F.3d 611, 616 (7th Cir. 2011); Brooks v. Ross, 578 F.3d 574, 581 (7th Cir. 2009); Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1289 (11th Cir. 2010); Starr v. Baca, 652 F.3d 1202, 1213-14 (9th Cir. 2011).


131 “The Strike Zone is that area over home plate the upper limit of which is a horizontal line at the midpoint between the top of the shoulders and the top of the uniform pants, and the lower level is a line at the top of the knees. The Strike Zone shall be determined from the batter’s stance as the batter is prepared to swing at a pitched ball” (incorporating 1996 change).

132 Don’t stand in a convention of MLB umpires and give voice to this observation unless your life, health and disability insurance is paid up.

133 Khalik v. United Air Lines, 671 F.3d 1188, 1191 (10th Cir. 2012).

134 652 F.3d 1202, 1216 (9th Cir. 2011).
If there are two alternate explanations, one advanced by the defendant and the other advanced by the plaintiff, both of which are plausible, plaintiff’s complaint survives a motion to dismiss under Rule 12(b)(6). Plaintiff’s complaint may be dismissed only when defendant’s plausible alternative explanation is so convincing that plaintiff’s explanation is implausible.

Under Starr, if plausibilities were in equipoise, the pleading survives a motion to dismiss.

Eight Ninth Circuit judges, dissenting from the *en banc* court’s denial of a petition for rehearing in *Starr v. County of Los Angeles*, 135 decried the appellate path of *Twombly* and *Iqbal* in their Circuit. The majority, the dissenters complained, applied an “Iqbal Lite” (“Same insufficient complaints, fewer dismissals!”) standard. 136

The Ninth Circuit put *Starr* on steroids in *Eclectic Properties, LLC v. Marcus Millichap Co.*, 137 in which the concept of weighing dueling plausibilities was enthusiastically confirmed. 138 But the court went further, declaring that “[s]omething more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs’ allegations plausible.” 139 Rule 8(a) requires only a plain short statement, but in the Ninth Circuit, the plaintiff must also plead facts that render its version of plausibility more likely than the defendant’s opposing view.

The Seventh Circuit has flirted with two approaches to plausibility: (i) the more complex the case the “fuller” the factual allegations required; 140 and (ii) plausibility may be assessed by weighing the competing explanations of the moving and the resisting party. 141 Judge Posner has promoted both positions. In *Limestone Development v. Village of Lemont, Illinois*, 142 Judge Posner opined that to withstand a post-*Twombly* motion to dismiss, the RICO complaint had to reflect facts that indicate a “substantial” case. Sounding like the economist he is, Judge Posner voiced the rationale that the gravitas of the cause of action must be weighed before subjecting a defendant to the tremendous expense of discovery:

[*Twombly*] teaches that a defendant should not be forced to undergo costly discovery unless the complaint contains enough detail, factual or argumentative, to indicate that the plaintiff has a substantial case.

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135 659 F.3d 850 (9th Cir. 2011).
136 *Id.* at 852.
137 751 F.3d 990 (2014).
138 *Id.* at 996.
139 *Id.* at 996-997
140 *Limestone Development v. Village of Lemont*, 520 F.3d 797 (7th Cir. 2008).
141 *Brooks v. Ross*, 578 F.3d 574 (7th Cir. 2009).
142 520 F.3d at 802-803. The *Limestone* case was decided post-*Twombly* but pre-*Iqbal*.
In a complex antitrust or RICO case a fuller set of factual allegations . . . may be necessary to show that the plaintiff’s claim is not “largely groundless.” (citation omitted).\(^{143}\)

Post-Iqbal, the Seventh Circuit applied the Twombly standards to a Complaint alleging misdeeds in lending practices in Swanson v. Citibank, N.A.\(^{144}\) Writing for the majority, Judge Wood frankly acknowledged the appellate court dilemma: “The question with which courts are still struggling is how much higher the Supreme Court meant to set the bar.”\(^{145}\) Judge Wood recognized the high costs of discovery and the possible use of gatekeeping Rule 12(b)(6) motions as a means of making it “more difficult to earn the right to engage in discovery.”\(^{146}\) Judge Posner dissented in Swanson, rejecting the majority’s suggestion that the standard of plausibility varies with complexity of the case, focusing instead on the “obvious alternative explanation” argument. Applying “judicial experience and common sense,” as the Supreme Court counseled in Iqbal, Judge Posner concluded that the defendant’s alternative explanation precluded discriminatory lending practices as a plausible inference.\(^{147}\) The defendant’s explanation was more plausible, Judge Posner argued, and the plaintiff thus failed to clear the Twombly/Iqbal bar.

The Seventh Circuit applied both analyses to the equal protection claims asserted against the Chicago police department in McCauley v. City of Chicago.\(^{148}\) The Court characterized the discriminatory lending claims in Swanson as less complex that those in McCauley, then upheld dismissal of the case because the plausible inferences of unlawful and lawful conduct to be drawn from the allegations were in equipoise.\(^{149}\) Because the claim was complex, the court concluded that more detail was needed to withstand a motion to dismiss.\(^{150}\)

Judge Hamilton penned a spirited dissent in McCauley. Among the five problems that Judge Hamilton perceived as raised by Iqbal is the Supreme Court’s “obvious alternative explanation” reasoning, which “[s]eems to invite judges to weigh competing explanations for alleged conduct and dismiss cases merely because they believe one explanation over another.”\(^{151}\) The problem, according to Judge Hamilton, is that Iqbal’s “more or less likely” language may be erroneously read to mean that a plaintiff loses on the pleadings if a defendant offers a more plausible explanation.\(^{152}\) “A plausible claim can seem less plausible or probable

\(^{143}\) Id.

\(^{144}\) 614 F.3d 400 (7th Cir. 2010).

\(^{145}\) Id. at 403.

\(^{146}\) Id. at 405.

\(^{147}\) 614 F.3d at 411.

\(^{148}\) 671 F.3d 611 (7th Cir. 2011).

\(^{149}\) 578 F.3d at 619.

\(^{150}\) Id. at 616-17.

\(^{151}\) McCauley, 671 F.3d at 625.

\(^{152}\) Id.
than the obvious alternative and still survive dismissal.”¹⁵³ The misreading – or misapplication – of *Iqbal*, Judge Hamilton warns, will result in “outcomes . . . based on how different judges view the plausibility” of the plaintiff’s theory of the case.¹⁵⁴

The Third and Eleventh Circuits have seemingly adopted a plausibility test similar to that of the Seventh Circuit,¹⁵⁵ but the Third Circuit has stopped short of requiring that a plaintiff plead a *prima facie* case.¹⁵⁶

The First and Second Circuits have rejected the notion of weighing competing plausibility rationales. In *Ocasio-Hernandez v. Fortuno Burset*,¹⁵⁷ the First Circuit reversed the district court’s dismissal of a §1983 claim. The court had concluded that the Complaint lacked plausibility based on an obvious alternative explanation for the defendants’ actions. Citing *Twombly*, the First Circuit reasoned that the district court could not ignore properly pled factual allegations, “even if it strikes a savvy judge that actual proof of those facts is improbable.”¹⁵⁸ The court went further holding, “[n]or may a court attempt to forecast a plaintiff’s likelihood of success on the merits.”¹⁵⁹ The Second Circuit ruled similarly in *Anderson News, LLC v. American Media, Inc.*:¹⁶⁰ “The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion.” The Petition for Certiorari in *Anderson* focused squarely on the dueling plausibility issue, but received no traction in the Supreme Court.

Three cases in the Sixth Circuit evidence either judicial schizophrenia or movement toward the First and Second Circuits’ more liberal views of plausibility. The first case, an *en banc* decision in *In re Travel Agent Commission Antitrust Litigation*,¹⁶¹ opted for the more-or-less probable view of plausibility, citing *Twombly*’s concern for hefty litigation costs. Judge Merritt, dissenting, described the debate as follows: “Here my colleagues have seriously misapplied the new standard by requiring not simple ‘plausibility,’ but by requiring the plaintiff to

¹⁵³ Id.

¹⁵⁴ Id.

¹⁵⁵ See, e.g., *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 228 (3d Cir. 2011), cert denied, 132 S. Ct. 1861 (antitrust complaint dismissed, parallel conduct “could just as well” be independent action); *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1342 (11th Cir. 2010) (antitrust complaint dismissed, allegations failed to show that inference of wrongful conduct was “more plausible” than legal, profit-maximizing conduct); *Am. Dental Ass’n v. Cigna Corp.*, 605 F.3d 1283, 1295 (11th Cir. 2010) (RICO case; obvious alternative explanation).

¹⁵⁶ *Fowler v. UPMC Shadyside*, 578 F.3d 203, 213 (3d Cir. 2009).

¹⁵⁷ 640 F.3d 1 (1st Cir. 2011).

¹⁵⁸ Id. at 12.

¹⁵⁹ Id. at 13; see also *Fowler v. UPMC Shadyside*, 578 F.3d 203, 213 (3d Cir. 2009) (court should not determine whether a *prima facie* case has been factually alleged); *Walters v. McMahon*, 684 F.3d 435, 439 (4th Cir. 2013) (plausibility does not require court to forecast evidence; plausible is not probable); *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1183 (10th Cir. 2009) (claim survives despite doubt as to merits).

¹⁶⁰ 680 F.3d 162, 185 (2d Cir. 2012), cert denied 2013 WL 57139 (Jan 7, 2013) (No. 12–446).

¹⁶¹ 583 F.3d 896 (6th Cir. 2009).
present at the pleading stage a strong probability of winning the case. . . .” The Sixth Circuit addressed the plausibility issue again in *Watson Carpet & Floor Covering, Inc. v. Mohawk Industries.* In that antitrust case, the court cited both the “more likely to be explained” rationale and the “savvy judge” language from *Twombly,* but this time came down more solidly on the side of the latter, stating: “Ferreting out the most likely reason for the defendants’ actions is not appropriate at the pleadings stage.” In a more recent encounter with the dismissal standards in an antitrust case, *Erie County, Ohio v. Morton Salt, Inc.*, the Sixth Circuit panel relied on *Watson Carpet* and remarked that “at the pleading stage, the plaintiff is not required to allege facts showing that an unlawful agreement is more likely than lawful parallel conduct.”

The Fourth Circuit’s position is enigmatic. In *Beasley v. Arcapita, Inc.*, Judge Gregory, in dissent, observed that on a Rule 12(b)(6) motion, “even if we may foresee the claim’s later failure at the summary judgment stage, we must refrain from examining its underlying merits.” The majority, however, had dismissed the case based on plaintiff’s failure to allege a plausible basis on which he might have standing to assert discrimination claims against the defendant. Because the case was dismissed, strictly speaking, on standing grounds, whether the majority agreed with Judge Gregory’s statement of the limits of a plausibility inquiry is unclear. Later, in *Walters v. McMahen,* the Fourth Circuit faced the plausibility issue again. Affirming the district court’s dismissal, the court explained that “a plaintiff need not ‘forecast’ evidence sufficient to prove the elements of the claim . . . [but] must allege sufficient facts to establish those elements.” Neither *Beasley* nor *Walters* directly addresses the issue of whether competing assertions of plausibility should be weighed, but the tone of these two cases suggests that the Fourth Circuit may be inclined toward the First and Second Circuit views.

A clear split of opinion among the Circuits may prompt the Supreme Court to grant certiorari and clarify *Twombly* and *Iqbal.* But whether there are well-defined opposing appellate court positions on the plausibility issue is unclear.

2. Application in the Federal District Courts

The tension between the *Twombly/Iqbal* standards and Rule 8(a)’s requirement for “a short and plain statement” fuels much of the ongoing judicial debate in the federal district courts. As one court complained, “*Iqbal* and *Twombly* contain few guidelines to help the lower courts

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162 *Id.* at 912.
163 648 F.3d 452 (6th Cir. 2011).
164 *Id.* at 458 (also remarking that plausibility is not probability).
165 702 F.3d 860 (6th Cir. 2012).
166 *Id.* at 868.
167 436 F. App’x 264, 267 (4th Cir. 2011).
168 *Id.* at 266.
169 684 F.3d 435 (4th Cir. 2012).
170 *Id.* at 439.
discern the difference between a ‘plausible’ and an implausible claim and a ‘conclusion’ from a ‘detailed fact.’”171

The Court of Federal Claims admirably summarized the range of “plausibility” offered in post-*Twombly* jurisprudence in *Dobyns v. U.S.*, 172 describing a spectrum of approaches:

- Minimalist courts, which continue to favor Rule 8(a) standards and view *Twombly/Iqbal* as having minimal impact on pleading;
- Moderate courts, which view *Twombly/Iqbal* as requiring “more fact pleading than previously thought necessary,”173 and
- Maximalist courts, which view *Twombly/Iqbal* as a sea change, establishing a fundamentally different, significantly heightened pleading standard.

Perhaps overlying the minimalist-moderate-maximalist approaches, some courts have suggested that only as a cause of action becomes increasingly complex do *Twombly* and *Iqbal* demand increasingly detailed and specific factual allegations, an approach suggested by the Seventh Circuit in *McCauley v. City of Chicago*: “The required level of specificity rises with the complexity of the claim.”174

But do these analyses provide a workable framework? An Ohio state court, rejecting application of *Twombly/Iqbal* standards to pleadings, certainly didn’t think so:

> The interstitial, definitional progress from the “fantastic” (e.g., “little green men”) through “speculative,” “conceivable,” “possible,” “plausible,” “reasonably founded,” “consistent with liability,” “suggestive of liability,” to “probability,” can be the legal equivalent of explaining the progression from a quark to the Higgs boson.175

Quark or Higgs boson? Strike or ball? The Supreme Court has not clarified the plausibility inquiry, and appellate court guidance is mixed, leaving it to the judgment of the district courts. Predictably in such an unsettled legal landscape, district courts applying *Twombly/Iqbal* and Rule 8(a) have used widely varying approaches.

Procedurally, some courts have focused assiduously on the pleading, refusing to consider contrary explanations and evidence. For example, in *Davidson v. ConocoPhillips Co.*, 176 the court assessed only the allegations of the complaint and refused even to review the

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173 Dobyns, 91 Fed.Cl. at 425. See also Khalik v. United Airlines, 671 F.3d 1188 (10th Cir. 2012).

174 Although the District Court in *Midas Int’l Corp. v. Chesley*,174 quoted *McCauley* with apparent approval, it did not appear to apply the complexity observation in that post-termination dispute between a franchisor and its former franchisee.


franchise agreement between the parties. The plaintiff-dealer there asserted breach of contract in connection with a rental reimbursement program on which the plaintiff allegedly relied in incurring significant expense to improve its service station. In its motion to dismiss, the defendant argued that the franchise agreement completely rebutted the dealer’s claims. The court refused to consider the terms of the agreement, however, because it was the defendant, not the plaintiff, who relied on the contract. A similar approach is evident in Brown v. Moe’s Southwest Grill, LLC, in which Moe’s franchisees asserted disclosure failures by the franchisor. A Georgia federal court set a low bar for compliance with Twombly and Iqbal: “[T]he burden at this stage of the litigation is only such that the court must be able to reasonably infer a plausible claim and liability from the alleged facts” and concluded that the plaintiffs had met that standard. Significantly, even though the defendant franchisor had produced a signed UFOC receipt that, if credited, would have barred at least one claim, the court refused to consider it. The bankruptcy court in In re Brooke Corp. similarly refused to consider the defendants’ factual arguments, referring to them as “more properly considered . . . defenses.”

Such a strict limitation to the four corners of the pleading may not represent the majority view, however. Although not always explaining their rationale, courts have often strayed beyond the pleading per se. The most conservative view is that the permissible extra-pleading permitted reference is to documents “integral to or explicitly relied upon in the complaint,” Ocean City Express Co. v. Atlas Van Lines. Or, as the court put it in Hopkins Pontiac GMC, Inc. v. Ally Financial, Inc., “A document attached to a motion to dismiss may be considered by the court without converting the motion into one for summary judgment only if the attached document is central to the plaintiff’s claim and undisputed.” The court in Hopkins, however, readily determined that it could take judicial notice of a party’s corporate structure on a motion to dismiss. Similarly standing for the proposition that public record documents may be considered,

177 Applicable pre- and post-Twombly precedent authorizes a court assessing a Rule 12(b)(6) motion to review documents “whose contents are alleged in a complaint and whose authenticity no party questions.” Id. Cases cited by the Court in Davidson include Branch v. Tunnell, 14 F.3d 449 (9th Cir. 1994).


180 Id. at *2.

181 Id. The Court in Comeaux v. Trahan, No. 12–0767, 2012 WL 5400044 (W.D. La. Nov. 5, 2012), agonized over the question. Both parties cited portions of a document referred to as a “Franchise Agreement,” but since neither attached it to the pleadings, could the Court consider its effect on the pending motion to dismiss? It was finally the parties’ agreement that convinced the Judge that she could do so.


183 Id. at 521.


the court in *Hile v. Jimmy Johns Highway* 55,\(^{187}\) untangled the public record of the plaintiff’s EEOC filing in the context of a motion to dismiss, counterintuitively commenting that “public records are not beyond the pleadings.”\(^{188}\)

Implementing the plausibility inquiry has proven far more difficult. Some district courts have danced gingerly around the facts in many franchise cases, refusing to stray too far into interpretation, arguably representing the minimalist approach. One such case is *Moran v. Mr. Transmission of Chattanooga, Inc.*\(^{189}\) The case involved a franchisor’s action against a franchisee who retired, abandoned the franchise, and turned over the assets of the business to his son, after which the son continued to operate the same business in the same location. The court examined the franchise agreement, found an ambiguity as to future royalties, but otherwise refused to consider the weight or veracity of the facts asserted in the complaint. Similarly, in *Echo, Inc. v. Timberland Machines & Irrigation, Inc.*,\(^{190}\) the district court refused to consider the defendant’s interpretation of the scenario described in the Complaint, commenting, “at this stage of the litigation we are examining only the legal sufficiency of [plaintiff’s] complaint, not evidence offered to show liability that can be assessed for weight or quality.”\(^{191}\) The court in *Premier Outdoors El Dorady, LLC v. Yamaha Motor Corp. USA*,\(^{192}\) took an even more blatantly minimalist approach. Citing both *Twombly* and a “no set of facts” standard, the dealer’s claims survived a motion to dismiss because they had “facial plausibility . . . that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”\(^{193}\)

The district court in *DavCo Acquisition Holding, Inc. v. Wendy’s Int’l, Inc.*\(^{194}\) showed less reluctance to roam into arguably factual matters in the course of a plausibility assessment. The case arose from Wendy’s decision to designate Coke as the sole approved fountain syrup provider. The franchisees’ efforts to encourage Wendy’s to consider Pepsi as an alternate supplier were, according to the plaintiffs, summarily rejected without explanation. The franchisees claimed that Wendy’s refusal to consider an alternate source, despite a contract provision allowing franchisees to propose one, was based solely on Coke’s direct contributions to Wendy’s advertising fund. The court examined the franchise agreements and applied its own

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\(^{188}\) *Id.* at 847.

\(^{189}\) 725 F. Supp. 2d 712 (E.D. Tenn. 2010).


\(^{193}\) *Id.* at 2.

rationale to the facts, concluding that the Complaint failed to plead a plausible cause of action.195

A similar approach is evident in *Kumon North America, Inc. v. Timban*.196 In that case, the a franchisee whose agreement had been terminated asserted, *inter alia*, a malicious interference claim against the franchisor arising out of the franchisor’s failure to approve prospective buyers of the location and termination of the franchise agreement. The court summarized the *Twombly/Iqbal* standard as: “A complaint cannot survive where a court can only infer that a claim is merely possible rather than plausible.”197 The franchisee’s factual allegations were weighed against the language of the franchise agreement, in light of which the court dismissed the claim. The franchisor’s conduct was consistent with the agreement, and the franchisee thus could not satisfy its pleading obligations.

Some creative (or desperate?) defendants have asked courts to assess a plaintiff’s compliance with pleading standards separately for each factual allegation in the pleading. In *AKB Wireless v. Wireless Toyz Franchise, LLC*,198 for instance, the franchisee urged the court to assess the plausibility of each of the franchisor’s factual allegations of breach of contract. The court refused, noting that “Nothing in *Twombly* . . . contemplates [such a] dismemberment approach to assessing the sufficiency of a complaint. . . . [A] district court must consider a complaint in its entirety without isolating each allegation for individualized review.”199 Surprisingly, the district court later had to remind the franchisee that it had already nixed the “dismemberment” approach.200

Where a court’s Local Rules require the filing of factual statements collateral to formal pleadings, courts have taken those statements into account when assessing compliance with *Twombly* and *Iqbal* plausibility standards.201 The franchisees’ RICO claims survived dismissal in *HT of Highlands Ranch, Inc. v. Hollywood Tanning Systems, Inc.*,202 despite “skeletal allegations” because the RICO Case Statement “flesh[ed] out” the facts. In *Jay Automotive Group, Inc. v. American Suzuki Motor Corp.*,203 the auto dealer-franchisee sued Suzuki asserting RICO violations arising out of Suzuki’s alleged failure to deliver desired models to the dealer; delivery of undesirable models; broken promises of brand promotion and sales growth; and other sins. The court’s Local Rules required responses to RICO-specific interrogatories

195 *Id.* at *7 (the Court reasoned that Coke was in a position to make concessions and to contribute to the advertising fund, and that Wendy’s was in a unique position to negotiate on behalf of all franchisees).


197 *Id.* at *5.


199 *Id.* at *8, citing *In Re Pressure Sensitive Labelstock Antitrust Lit.*, 556 F. Supp. 2d 363 (M.D. Penn. 2008).


201 Some courts, for example, require RICO-specific case statements and/or responses to interrogatories. A review of cases in which such is the case suggests these disclosures are nearly always taken into account on a motion to dismiss. See, e.g., *Jay Auto. Grp., Inc. v. American Suzuki Corp.*, discussed above, and *Darrick Enters. v. Mitsubishi Motors Corp.*, 2007 WL 2893366 (D.N.J. Sept. 28, 2007).


that must accompany the complaint. In determining whether plaintiff met the Twombly/Iqbal requirements, the district court examined both the Complaint and the RICO interrogatory responses, and the Complaint survived dismissal.

By and large, courts have been predictably lenient in assessing compliance by pro se plaintiffs. However, in at least two franchise-related cases, the claims of pro se plaintiffs were dismissed for failure to satisfy Twombly/Iqbal standards. And when Judges do exercise leniency, they do not always do so magnanimously. The pro se plaintiff in Taylor v. Holiday Inns, found herself on the receiving end of a strident warning. The court ordered her to again revise her prolix and confusing Complaint, expressing great frustration that she had not done so despite prior admonition. Judicial patience is not inexhaustible.

The Twombly/Iqbal plausibility inquiry has been applied in various pleading contexts. In Long John Silver’s, Inc., the plausibility inquiry was applied to determine whether an amendment would be futile. Counterclaims have often been the focus of a Twombly/Iqbal plausibility analysis, and a few cases suggest that the standards apply to affirmative defenses as well. Cases applying Twombly/Iqbal to affirmative defenses are rare as yet, but in Target Training Int’l, Ltd. v. Extended Disc North America, Inc., the standards were applied to both counterclaims and affirmative defenses.

### 3. Pleading Fraud

Franchise cases frequently involve allegations of fraud, stirring an additional pleading standard into the mix. Federal Rule 9(b) requires that “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” Do the Rule 9 fraud pleading standards trump Twombly/Iqbal, or are they grafted to the Twombly/Iqbal plausibility requirement?

Case precedent suggests that Twombly and Iqbal appear to have had very little effect on fraud-based pleading standards, as the district courts instead appear to focus on the heightened

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204 Id. at *9.


209 Twombly/Iqbal standards were applied to counterclaims in several of the cases cited above and, in addition in other franchise cases, e.g., Wingate Inns, Int’l, Inc. v. Swindall, 2012 WL 5252247 (D.N.J. Oct. 23, 2012) and Dunkin’ Donuts Franchising, LLC, 2013 WL 1688341 (E.D. Mo. April 18, 2013).

pleading requirements mandated by Rule 9.211 *Siemer v. Quizno’s Franchise Co., LLC,*212 a case in point, involved RICO and Sherman Act claims. The district court cited *Twombly* as applicable to the Sherman Act claim, but explained that the heightened standard of Rule 9 governed the RICO allegations. Assessing the plaintiff’s RICO and fraudulent inducement pleading against Rule 9, and the Sherman Act claim in light of *Twombly*, the district court granted the motion to dismiss. Separate claims and separate modes of assessment, but the claims met the same fate.

The district court’s opinion in *Damabeh v. 7-Eleven, Inc.*213 reflects the same bifurcated analysis. After 7-Eleven terminated his franchise for failing to repair the premises and maintain sufficient equity in the location, the franchisee-plaintiff sued 7-Eleven for breach of the franchise agreement and fraud. The district court weighed the plaintiff’s assertion of breach against the *Twombly/Iqbal* standards, concluding that essential facts were missing.214 The fraud claim was also rejected, but the court focused entirely on Rule 9 in doing so.215

In *Cornerstone Investment Partners, LLC v. Steak N Shake Ents., Inc.*,216 the court cited the principle that “fraud must be pled with particularity,” but referred to Rule 8(a), not Rule 9. In practical effect, though, the court seems to have equated Rule 9’s “particularity” requirement to *Twombly/Iqbal* standards. Sounding very *Twombly*-like, the court there observed that “vague statements . . . regarding the alleged material information [the franchisor] failed to disclose” and claiming generally that the franchisor “made misleading statements and material omissions without support” did not suffice. The court dismissed the franchisees’ allegations of fraud and misrepresentation.

4. Defensive Shifts

Of course, opponents aren’t likely to sit on their hands. The manager whose pitcher gets tagged for three runs in the first inning will likely make a call to the bullpen; a pleader facing a Motion to Dismiss might make a similar defensive move. Litigants have occasionally sought discovery to forestall a court’s decision on dismissal, with varying results. Asking for leave to amend the pleading is the most common defensive move and usually permitted (sometimes multiple times).

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211 Rule 9 provides that “all averments of fraud or mistake shall be stated with particularity.” This is often summarized as a “who, what, when, how” pleading requirement.


214 Id. at *3.


The plaintiff in *Solomon Realty Co. v. Tim Donut U.S. Ltd.*\(^{217}\) successfully persuaded the district court to allow limited discovery before rendering a decision on a motion to dismiss, but the opposite result occurred in *Long John Silver’s, Inc. v. DIWA III, Inc.*\(^{218}\) In *Solomon Realty*, the plaintiff-franchisee served discovery on the defendant-franchisor seeking information specifically directed to defendant’s Rule 12(b)(6) motion. The defendant moved to stay discovery pending a decision on its motion, but the court denied that request and required the defendant to comply with the plaintiff’s “very limited request for a maximum of three specific documents to assist it in responding to the motion to dismiss.”\(^{219}\) The contrary case, *Long John Silver’s*, was decided in the context of a motion to amend. The franchisor sought to amend its claims against franchisee and certain owners and guarantors, an attempt that was resisted on the grounds that the amendment would be futile. The franchisee’s corporate structure, ownership structure and guarantor relationships were complicated, and the franchisor requested limited discovery to clarify those relationships, in reaction to the franchisee’s motion to dismiss. The court refused to allow discovery and refused to allow the amendment.\(^{220}\)

5. State Courts

The National League has never warmed to the American League’s designated hitter rule, and not all the states have warmed to the *Twombly/Iqbal* pleading standards. Where standards of dismissal differ, state and federal, a litigant’s choice between state or federal court takes on added significance.\(^{221}\) But divining which states have adopted *Twombly/Iqbal*’s plausibility tests and which have not is not always easy.

i. States in which the supreme judicial authority has squarely faced the issue and adopted *Twombly/Iqbal*:

Colorado: “[W]e have always considered it preferable to interpret our own rules of civil procedure harmoniously with our understanding of similarly worded federal rules of practice . . . We see no reason to abandon that philosophy or approach today.” *Warne v. Hall.*\(^{222}\) The opinion goes on to relate, in somewhat self-congratulatory terms, the virtue of Colorado’s policy of keeping state and federal rules harmonious.

Mashantucket Pequot Tribal Court: Citing to Massachusetts authority, the Tribal Court sua sponte raised the issue and adopted *Twombly/Iqbal* standards in *Wang v. Mashantucket Pequot Gaming Enterprise.*\(^{223}\)


\(^{218}\) 650 F. Supp. 2d 612 (E.D. Ky. 2009).

\(^{219}\) *Solomon Realty*, 2009 WL 2485992, at *3.


\(^{221}\) As in interleague play – when in an American League home ballpark, the National League team uses a DH; when in a National League park, the American League pitcher is a batter. And don’t you love to see surprisingly good hitting pitchers?

\(^{222}\) 373 P.3d 588, 2016 CO 50, ¶12 (CO 2016).

\(^{223}\) 2015 WL 6080789 (Sept. 17, 2015).
Massachusetts: The Massachusetts Supreme Judicial Court adopted *Twombly/Iqbal* plausibility standards in *Iannacchino v. Ford Motor Co.* Since then, the reported cases applying *Twombly/Iqbal* have quickly piled up. Without the benefit of a comprehensive StatCast, this author concluded on an anecdotal basis, that case law applying *Twombly/Iqbal* is more extensive in Massachusetts than in any other state. Among the cases applying the new standards is at least one franchise case, *Ryan v. Holie Donut, Inc.*, an employment action by the employee of a Dunkin' Donut franchisee against the franchisee, based on alleged wrongful termination.

Nebraska: Observing that the Nebraska Rules of Pleading are modeled after the Federal Rules of Civil Procedure, and that in the past Nebraska has applied pleading standards equivalent to those in the federal courts, the Nebraska Supreme Court nevertheless paused to consider whether Nebraska should follow the *Twombly/Iqbal* path in *Doe v. Board of Regents*. The Nebraska Supreme Court shared *Twombly*'s concern about the “no set of facts” standard, but expressed concern that courts have interpreted *Twombly* and *Iqbal* as a heightened pleading standard. At the same time, the Nebraska Court noted that in *Twombly*, the U.S. Supreme Court specifically explained that it was not requiring a heightened standard of fact pleading. “We believe,” the Nebraska Supreme Court concluded, “that the Court's decision in *Twombly* provides a balanced approach for determining whether a complaint should survive a motion to dismiss and proceed to discovery.”

Wisconsin: Unconvincingly asserting that the *Twombly* and *Iqbal* standards are consistent with its 1983 decision in *Strid v. Converse*, the Wisconsin Supreme Court in *Data Key Partners v. Permira Advisers, LLC* applied the standard, declaring that: “*Twombly* makes clear the sufficiency of a complaint depends on substantive law that underlies the claim made because it is the substantive law that drives what facts must be alleged. Plaintiffs must allege facts that plausibly suggest they are entitled to relief.”

**ii. States in which the supreme judicial authority has squarely faced the issue and declined to adopt *Twombly/Iqbal*:**

Arizona: In *Cullen v. Auto-Owners Ins. Co.*, the Supreme Court stated: “We granted review to dispel any confusion as to whether Arizona has abandoned the notice pleading standard . . . in favor of the recently articulated standard in [*Twombly*]. We hold that Rule 8, as previously interpreted by this Court, governs the sufficiency of claims for relief.”

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225 MLB’s instant stat report service.


227 280 Neb. 492, 788 N.W.2d 264 (2010).

228 *Id.* at 278.


230 356 Wis.2d 665, 680, 849 N.W.2d 693, 701 (2014).

Delaware: One might question whether the Supreme Court of Delaware has “squarely” faced the issue. The question is directly addressed in *Winshall v. Viacom Int'l*, but the discussion appears in a lengthy footnote (footnote 12). There, the Court chastised the lower court for applying *Twombly/Iqbal*, which the Court described as “more rigorous than Delaware’s counterpart pleading standard.” The Court characterized the prevailing standard in Delaware as a “conceivability standard, more akin to possibility,” something short of the federal plausibility standard, which the Court characterized as falling “somewhere beyond mere possibility but short of probability.” Not slamming the door entirely on inching closer to *Twombly/Iqbal*, the Court commented that “at some future point in time, the plausibility standard may be shown as the better rule for Delaware,” but until then the “reasonable conceivability standard” carries the day.

Iowa: Thoughtfully considering the rationale expressed in *Twombly* supporting the adoption of plausibility requirements, the Iowa Supreme Court declared in *Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*: “[T]here is an insufficient basis to make such an important change in our rules. The appropriate forum for revising the Iowa rules is the rulemaking process . . . Accordingly, we decline to depart from our well-established standard for reviewing a motion to dismiss.”

Minnesota: The Supreme Court of Minnesota made its position abundantly clear in *Walsh v. U.S. Bank, N.A.*: “We granted review in this case to decide . . . whether the plausibility standard announced in *Bell Atlantic Corp. v. Twombly* [citation omitted] and *Ashcroft v. Iqbal* [citation omitted] applies to civil pleadings in Minnesota state court. We conclude that it does not.” The Minnesota Court’s rationale focused on the perceived additional burden the standards put on pleaders. Although the Court has looked to federal precedent addressing similar procedural rules as “instructive,” the added burden on the plaintiff was a bridge too far for the Court. “[The plausibility standard] raises the bar for claimants and thereby conflicts with [Minnesota] Rule 8.01’s preference for non-technical, broad-brush pleadings.”

Northern Mariana Islands: Citing to Tennessee authority, the Supreme Court of the Commonwealth of the Northern Mariana Islands in *Syed v. Mobil Oil Mariana Islands, Inc.* reversed a lower court’s order dismissing the Complaint. The lower court applied the *Twombly/Iqbal* pleading standard, thus “impermissibly deviat[ing] from this Court’s controlling precedent.”

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232 76 A.3d 808 (Del. 2013).

233 The Delaware Supreme Court sounded equally piqued in *Cambium Ltd. v. Trilantic Capital Partners III, L.P.*, 2012 WL 172844 (Del. Jan. 20, 2012), observing that the Court of Chancery opinion on appeal referred to the “plausibility” of a pleading nine times, concluding that the lower court thus must have applied the federal plausibility standard, and reversed on that basis.

234 812 N.W.2d 600, 608 (Iowa 2012).

235 851 N.W.2d 598, 600 (2014).

236 *Id.* at 603.

237 *Id.* at 605.

Oklahoma: It might be a stretch to say that the Oklahoma Supreme Court has squarely faced the issue. However, in *Edelen v. Board of Commissioners*, 239 in response to a party’s invitation to adopt *Twombly/Iqbal* standards, the court declined to do so, reiterating its “any cognizable theory” pleading standard.

Tennessee: Noting that *Twombly* and *Iqbal* had been cited in its lower courts at least 8 times, and applied once, the Tennessee Supreme Court in *Webb v. Nashville Area Habitat for Humanity, Inc.* 240 emphatically put the issue to rest: “We decline to adopt the new plausibility standard and adhere, for the following reasons, to the notice pleading standard and the principles . . . that have long governed Tennessee pleading practice.” In a well-reasoned and thorough analysis, the Court cited five reasons for its decision: (i) the change has resulted in a “loss of clarity, stability, and predictability in federal pleadings practice;” 241 (ii) the standard “incorporates an evaluation and determination of likelihood of success on the merits” 242 (iii) tests to guide the plausibility analysis are “problematic;” 243 (iv) the standard may result in “disproportionate dismissal of certain types of potentially meritorious claims that require discovery to be proven;” 244 and (v) the policy considerations underpinning *Twombly* and *Iqbal* in the federal courts are not evident in Tennessee. 245

Washington: An en banc Supreme Court in Washington rejected the *Twombly/Iqbal* pleading standards in *McCurry v. Chevy Chase Bank, FSB*, 246 commenting that “this court lacks the type of facts and figures (specific to Washington trial courts) that were presented to, and persuaded, the United States Supreme Court to alter its interpretation” of Rule 12(b)(6).

iii. States in which the supreme judicial authority appears to have adopted some, but not all aspects of *Twombly/Iqbal*:

Hawaii: In *Kealoha v. Machado*, 247 the Supreme Court of Hawaii defined the applicable standard on a motion the testing sufficiency of pleadings as “[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief.” In so doing, however, the Court cited with approval an earlier opinion by the Intermediate Court of Appeals in *Pavsek v. Sandvold*, 248 for the proposition that “the court is not required to accept

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240 346 S.W.3d 422, 430 (2011).
241 *Id.* at 431.
242 *Id.*
243 *Id.* at 432.
244 *Id.* at 434.
245 *Id.* at 435.
247 131 Hawai‘i 62, 74 (2013).
conclusory allegations on the legal effect of the events alleged,” a concept emerging from *Twombly*. Indeed, the appellate court in *Pavsek* cited *Twombly* as a source of the pronouncement. In a more recent opinion, the Intermediate Court of Appeals cited and appeared to apply a requirement that the pleading should “raise a right to relief above the speculative level,” again citing *Twombly*. *Bank of America, N.A. v. Herman.* Whether the Hawaii Supreme Court would agree is unclear based on *Kealoha*.

**Maine:** *Bean v. Cummings* involved a civil perjury complaint, and specifically whether a heightened pleading requirement, similar to that enunciated by the Supreme Court in *Twombly*, was appropriate. Citing *Twombly* and observing that Maine “values constructions and comments on the federal rule as aids in construing [] parallel provisions” of the Maine Rules, the Maine Supreme Court “agree[d] with the trial court’s application of a heightened pleading requirement in civil perjury cases.” The Court’s ruling was specific to perjury cases, however, and application of any heightened pleading standards in other civil matters is an open question.

**South Dakota:** In *Sisney v. Best*, the South Dakota Supreme Court adopted part of the pleading standards enunciated in *Twombly*: “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusion, and a formulaic recitation of the elements of a cause of action will not do” (internal citations omitted). However, the Court later explained in *Gruhlke v. Sioux Empire Federal Credit Union, Inc.*: “Despite our adoption of the new rule in *Best*, South Dakota still adheres to the rules of notice pleading, and therefore, a complaint need only contain [a] short and plain statement of the claim showing that the pleader is entitled to relief.” Of course, the Supreme Court in *Iqbal* insisted that its pronouncements in that case and in *Twombly* did not abrogate Rule 8’s “short plain statement” standard. To what extent Rule 8 survives in the federal courts in light of *Twombly* and *Iqbal* is unclear, as it appears to be in South Dakota. However, nothing in *Best* or *Gruhlke* suggest that plausibility pleading standards are imminent in South Dakota.
iv. States without clear direction from the supreme judicial authority, but in which appellate courts have applied *Twombly/Iqbal* standards:

California: Without whispering the word “plausibility,” two appellate courts in California have cited *Twombly* and required pleadings sufficient to raise the pleader’s right to relief above the speculative level.\(^{256}\)

Connecticut: The Connecticut Supreme Court’s approach to *Twombly/Iqbal* mirrors that of Louisiana (discussed below). *Twombly* pleading standards were applied to a state antitrust claim in *Bridgeport Harbour Place I, LLC v. Ganim*,\(^{257}\) on the basis of the Connecticut antitrust statute, which provides that in construing the statute “the courts of this state shall be guided by interpretations given by the federal courts to federal statutes.”

Louisiana: *Twombly* pleading standards were applied to a state antitrust claim in *Tuban Petroleum, LLC v. SIARC, Inc.*,\(^{258}\) the court noting that the Louisiana and federal antitrust statutes are “virtually identical.” At the same time, however, the court defined Louisiana’s pleading standard in “no set of facts” terms, suggesting that the Court’s holding is specific to antitrust cases (as was the Supreme Court’s *Twombly* opinion).

Missouri: Although the Supreme Court of Missouri has not directly addressed the issue, the state judiciary viewed the U.S. Supreme Court’s rejection of the *Conley v. Gibson*\(^{259}\) “no set of facts” pleading standard as finally catching up with Missouri. In a footnote in *Jennings v. Board of Curators*,\(^{260}\) a Missouri appellate court observed that “even the federal system has pulled back from some of Conley’s liberality,” citing *Twombly*. The court explained: “Our supreme court has firmly stated that ‘Missouri is not a notice pleading state.’ [citation omitted]. That [the pleading at issue] may give [the defendant] ‘fair notice of what the plaintiff’s claim is and the grounds upon which it rests’ is not good enough.” “Our rules ‘demand more than mere conclusions that the pleader alleges without supporting facts.’”\(^{261}\)

Texas: In *Kopplow Development, Inc. v. City of San Antonio*,\(^{262}\) the Texas Supreme Court implicitly appeared to reject *Twombly/Iqbal*, observing that, “Texas is a notice pleading jurisdiction, and a petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim. The purpose of this rule is to give the opposing party information sufficient to enable him to prepare a defense” (internal citations omitted). However, the *Kopplow* opinion never cited or directly addressed *Twombly* or *Iqbal*. Notwithstanding *Kopplow*, in 2014 and 2015 a raft of decisions from Texas appellate courts in various divisions cited and applied


\(^{257}\) 32 A.3d 296, 301 (Conn. 2011).

\(^{258}\) 11 So.3d 519, 523 (La. App. 2009).


\(^{260}\) 386 S.W.3d 796 (Mo. App. 2012).

\(^{261}\) Id. at 799.

\(^{262}\) 399 S.W.3d 532, 536 (Tex. 2013).
the *Twombly* and *Iqbal* standards. One appellate court, citing both *Kopplow* and the competing federal *Twombly/Iqbal* standards opted for “Texas’ established fair notice pleading standard.” Thus, appellate courts in Texas both have applied and have rejected *Twombly* and *Iqbal*.

**Virginia:** Precedent is thin in Virginia, although the Virginia Court of Appeals applied the *Twombly/Iqbal* plausibility standard in *Historic Green Springs, Inc. v. Virginia Dept. of Env. Control*. The court simply concluded that the allegations in the complaint at issue “nudg[ed] . . . the claims across the line from conceivable to plausible,” citing *Twombly*.

**v. States without clear direction from the supreme judicial authority, but in which appellate courts have declined to apply *Twombly/Iqbal*:**

**Georgia:** The Georgia Court of Appeals approached the *Twombly/Iqbal* issue obliquely in *Bush v. Bank of New York Mellon*, describing the applicable pleading standard in Georgia to be “no set of facts.” In footnote 13 to the opinion, the court acknowledged the difference between the Georgia standard, based on *Conley v Gibson*, and the federal standard.

**Indiana:** The Supreme Court of Indiana characterized *Twombly* as “a recent watershed opinion” in *State v. American Family Voices*. Noting that neither party in that case raised the issue of whether the *Twombly* standards should apply, the Indiana Court in a footnote commented “we mention this issue because of the avalanche of cases addressing [the new standard].” In *Droscha v. Shepherd*, the Indiana Court of Appeals interpreted the Indiana Supreme Court comments in *American Family Voices* as a disinclination to join the *Twombly* ranks and applied a “no set of facts” standard. Matching the Indiana Supreme Court in footnoted comments, the appellate court simply noted that both parties “listed” the standard but did not argue its application.

**Kansas:** A Kansas appellate court was invited to apply *Twombly/Iqbal* pleading standards in *Smith v. State*, but declined to do so, citing *Conley* and reiterating the “fair notice” standard enunciated by the Kansas Supreme Court in 2003.

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266 70 S.E.2d 370, 374 (Ga. App. 2011).

267 898 N.E.2d 293 (Ind. 2008).

268 It’s appropriate to comment, in a footnote, about how many state courts that have either rejected or not decided whether plausibility standards should apply in state court, have addressed the issue in a footnote.

269 931 N.E.2d 882 (2010).


**Nevada:** The Nevada Supreme Court dangled the carrot of a potential declaration on *Twombly/Iqbal* in *Bevan v. Eighth Judicial Circuit*,272 but declined to grant a writ that would have positioned the issue up for decision.273 The Nevada Court of Appeals, another of the footnote jurisdictions,274 stated that “this court has not adopted this standard.” Interestingly, a Nevada appellate court in *Landers v. Quality Communications, Inc.*,275 addressed the same collateral estoppel issue as the North Carolina appellate court faced in *Fox v. Johnson*,276 but with a different outcome. Despite the differing standards, a federal court dismissal in the Nevada case collaterally estopped the state employment claim, whereas in North Carolina the differing standards meant that collateral estoppel did not apply.

**New Mexico:** The Supreme Court of New Mexico has not opined on the subject, but in *Madrid v. Village of Chama*,277 the New Mexico Court of Appeals stuck by its “no set of facts” standard, commenting that New Mexico is a notice pleading state, merely requiring the pleader to allege facts sufficient to put the adverse party on notice of its claims.

**North Carolina:** Whether *Twombly* and *Iqbal* standards apply in North Carolina was addressed briefly and dismissively in *Holleman v. Aiken*278: “This Court does not have the authority to adopt a new standard of review for motions to dismiss.” The appellate court’s discussion of the issue in *Fox v. Johnson*279 arose in a far more interesting context, the issue being whether an order of dismissal by a federal court pursuant to Rule 12(b)(6), post-*Twombly*, collaterally estopped an action in North Carolina state court. The court carefully explained that the federal court “explicitly applied the so-called ‘plausibility’ pleading standard as enunciated by the United States Supreme Court in [*Twombly]*.”280 Having used the “so-called” predicate to describe the federal standard, it will comes as no surprise that the court decided that a dismissal under the federal standard did not collaterally estop the state court proceeding.

**Ohio:** The appellate courts in Ohio have at least twice declined to adopt *Twombly* and *Iqbal* standards, once with some very interesting comments. In *Tuleta v. Medical Mutual of Ohio*,281 the appellate court declared loyalty to the “no set of facts” standard. The more interesting comments are in *Sacksteder v. Senney*.282 Again the court rejected *Twombly/Iqbal*,

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272 367 P.3d 750 (2010).
273 Think of it as sending a batter to warm up then pulling him after a pitching change.
274 The “footnote jurisdictions” are those several jurisdictions that have rejected *Twombly/Iqbal* in a footnote, perhaps so it doesn’t seem so strident.
275 2014 WL 3784254 (July 30, 2014).
276 777 S.E.2d 314 (N.C. App. 2015).
279 777 S.E.2d 314 (N.C. App. 2015).
280 *Id.* at 324.
describing the breadth of disunity among federal courts in the standards’ application in amusingly creative terms, the “legal equivalent of explaining the progression from a quark to the Higgs boson.”

**Texas**: Texas appellate courts are demonstrating schizophrenia on the issue. See subsection (iv) above.

**vi. States on the fence (pitchers waiting in the bullpen):**

**Alabama**: In *American Suzuki Motor Corp. v. Burns*, the Alabama Supreme Court cited *Iqbal’s* plausibility requirement and, in a footnote, observed that Alabama courts look to federal court interpretation of Federal Rules that are similar to Alabama’s rules. But one would be overly hasty in reading the opinion as the adoption of the *Twombly/Iqbal* plausibility standard; the Court appears to rely on the “no set of facts” standard of dismissal. An appellate court in Alabama has interpreted the position of the Supreme Court as reaffirming the “no set of facts” standard and rejecting *Twombly/Iqbal*.

**Montana**: Putting Montana in this category may be unfair, as the tenor of the two cases in which *Twombly* and *Iqbal* are mentioned suggests satisfaction with the state’s extant liberal pleading standards. In *McKinnon v. Western Sugar Co-op Corp.* without mentioning *Twombly or Iqbal*, the majority reiterated Montana’s “any set of facts” standard, commenting that “Our cases reflect the principle that liberal rules of pleading allow for compliance with the spirit and intent of the law rather than a rigid adherence to formula or specific words.” That prompted a dissent by Justice Rice, who championed *Twombly’s* pronouncements against conclusory allegations. In *Brilz v. Metropolitan General Ins. Co.*, the Montana Supreme Court acknowledged that in their dissent in *Twombly*, Justices Stevens and Ginsburg observed that the new standard appeared to conflict with Montana law. In *Brilz*, the *Twombly* issue arose in the context of the potential preclusive effect of a federal judgment in a subsequent state court action. In the process of finding that the prior federal judgment did, in fact, preclude the subsequent state court action, the court referred to “the liberality of [Montana’s] rules regarding pleadings,” thus signaling that the divergence between Montana and federal pleading standards noticed by Justices Ginsburg and Stevens, continues. Still, strictly speaking, the Montana Supreme Court has not clearly rejected *Twombly/Iqbal*.

**Rhode Island**: The Supreme Court of Rhode Island has dodged the *Twombly/Iqbal* issue twice. In *Chhun v. Mortgage Electronic Registration Systems, Inc.*, it did so neutrally, simply acknowledging the divergence but “leav[ing] the *Twombly* and *Iqbal* conundrum for another

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283 *Id.* at *10.

284 81 So.3d 320 (Ala. 2011).


286 225 P.3d 1221 (2010).

287 *Id.* at 1224.


289 84 A.3d 419, 423 (2014).
In 2015, the Court again left the issue of state adoption of Twombly/Iqbal undecided in DiLibero v. Mortgage Electronic Registration Systems, Inc., this time reversing a lower court dismissal due to the judge’s reliance on the federal standards.

Utah: The Supreme Court of Utah has specifically noted its “no opinion” on the Twombly/Iqbal standards. Joining the “footnote states,” in America West Bank Members, LC v. State, the Court applied the “no set of facts” standard and among the almost 100 footnotes to the decision, footnote 22 reads: “[W]e express no opinion regarding [the Twombly/Iqbal] approach.”

West Virginia: The Supreme Court of Appeals in West Virginia has twice acknowledged in footnotes, but declined to decide, whether Twombly/Iqbal standards apply in the state courts. In one of those cases, Highmark West Virginia, Inc. v. Jamie, the Court did so and pointedly noted that post-Twombly it had applied the “no set of facts” standard. Dissenting to the per curiam opinion in Roth v. Defeliceare, Inc., Justice Benjamin gently chastised the Court for “sticking its judicial head in the sand” and avoiding the Twombly/Iqbal issue. He posed the question directly: “Should West Virginia consider a heightened pleadings requirement,” at the same time expressing his own doubt. Notwithstanding gentle prodding, however, it appears that the issue remains undecided in West Virginia.

Vermont: The Vermont Supreme Court’s opinions seem to reflect an ongoing internal debate. Without directly addressing the Twombly/Iqbal pleading standards, the Court in Colby v. Umbrella, Inc. doubled down on the “no set of facts standard,” extolling the benefits of a forgiving pleading standard: “[T]he beauty of our rules of civil procedure is that they strike a fair balance, at the early stages of the litigation, between encouraging valid, but as yet underdeveloped, causes of action and discouraging baseless or legally insufficient ones. The complaint is a bare bones statement that merely provides the defendant with notice of the claims against it.” Justice Burgess took issue with the “no set of facts” standard, reciting the U.S. Supreme Court’s retirement of the Conley standard, and the reasons for the decision in

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290 The Court managed to decide the appellate issue, declaring that under either standard dismissal was appropriate.


294 Id., n 4. The second case, in which the court similarly footnoted its disinclination to decide the issue was Hoover v. Moran, 662 S.E.2d 711, n. 3. The court also recited but neither adopted nor rejected the Twombly/Iqbal standard, again in a footnote, in Robinson v. Pack, 679 S.E.2d 660 (2009), a case that heavily implicated the non-procedural issues addressed in the Supreme Court’s Iqbal decision.

295 700 S.E.2d 183 (W. Va. 2010).

296 Id. at 197.


298 The “no set of facts” pleading standard in the federal courts is typically cited to Conley v. Gibson, 355 U.S. 41 (1957)
Twombly. Later the same year, the Vermont Supreme Court again applied the “no set of facts” standard in Bock v. Gold,299 prompting a dissent by Justices Skoglund and Burgess.

B. Motion for a More Definite Statement (Rule 12(e))

1. The Rule

If a party is unsure about the facts or relies on sources who cannot firmly support facts, the attorney may be tempted to apply a little ambiguity to mask these weaknesses. Consider, for instance the consumer in a common franchise case, who sues the franchisee’s employee, the franchisee, the master franchisee, and the franchisor, defining all of them in the Complaint, collectively, as “Defendants.” Of course, the factual allegations that follow are ascribed to the “Defendants.” Similarly, we are all familiar with “shotgun” pleadings, in which pages and pages of facts are followed by conclusory assertions that the “above” facts support at least 10 different causes of action. It is in these situations that Rule 12(e) may prove useful.

Rule 12(e) permits a Motion for a More Definite Statement “of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response.”300 When considering a Rule 12(e) Motion by a party, courts characterize the motion as “disfavored”301 and warranted, as the Rule provides, only where “the pleading is so vague or ambiguous that the opposing party cannot respond, even with a simple denial, in good faith, without prejudice to [itself].”302 Rule 12(e) is a weapon that can be used to attack both a dearth of pleading and a prolixity of pleading, as the court described in Clark.303

Addressing a dearth of factual allegations:

Examples where the standard has been met are where the allegations of a complaint are not sufficiently specific to enable a defendant to determine the propriety of interposing in his answer a waivable defense . . . or where, in the absence of certain information peculiarly in the knowledge of the plaintiff, the defendant cannot, in good faith, answer the complaint with a general denial. [citations omitted]

And addressing prolix pleading:

Motions for a more definite statement are also an appropriate vehicle to pare down “shotgun” pleadings. By requiring more definiteness, issue may be joined on particular claims, discrete defenses can be interposed in discrete fashion, and the litigation may be made more manageable, through more controlled discovery, to the benefit of the litigants and the district court alike. [citations omitted]

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300 A parallel rule in state courts may offer a similar approach. See, e.g., Bush v. Bank of N.Y. Mellon, 720 S.E.2d 370, 374 (Ga. Ct. App. 2011), in which the court sua sponte invoked the parallel Georgia rule when faced with a pleading that defied understanding.


303 213 F.R.D. at 233.
The court noted, however, that because Rule 12(e) can be implemented to require pleading beyond that mandated by the Rules 8(a) and 12(b)(6), it may “be prone to abuse by defendants” and “its exercise should be cast in the mold of strictest necessity.”

Courts haven’t always needed to be prodded by parties to invoke Rule 12(e). Some have invoked the Rule, sua sponte, when they perceive their obligation to decide a Motion to Dismiss to be impossible to accomplish, or to require extraordinary efforts to untangle confusing factual allegations. In Letap Hospitality, LLC v. Days Inn Worldwide, Inc., the court was tasked with ruling on the franchisor’s Motion to Dismiss a complaint that included a litany of common law and statutory claims based on various purported actions or inactions of the franchisor, the effects of Hurricane Katrina, and various other occurrences. Amusingly, the court imposed a much less onerous standard for its sua sponte application of the Rule than is usually put on litigants. Complaining that it was “largely unable to assess the viability of [plaintiff’s] claims,” the court explained that it could require a more definite statement by the pleader when it faces “the cumbersome task of sifting through myriad claims, many of which may be disclosed by various defenses.” In fact the court had “an obligation to order re-pleading under [the Rule] sua sponte when a complaint fails to link the asserted facts with its cause of actions” because it “incorporates every antecedent allegation by reference into each subsequent claim.”

A Rule 12(e) Motion isn’t a walk-off home run, but it just might put a runner in scoring position. When successful, it can force a pleader to distinguish between direct actors and those whom the pleader may be seeking to suggest are responsible through a theory of agency; clarify confused pleadings and jumbled causes of action; expose the limits of a pleader’s knowledge; or provide fodder for a defense or counterclaim. It can also put a motion to dismiss on deck.

In Clark v. McDonald’s, supra, a putative class action, Rule 12(e) was successfully used to focus the claims. The plaintiff and an unincorporated association initiated an ADA action against the franchisor. Mr. Clark, the lead plaintiff, asserted that he had identified 150 McDonald’s restaurants in which architectural barriers effectively restricted or prevented his (and other disabled patrons’) access. The association purported to represent its disabled members. The franchisor filed a motion to dismiss contemporaneously with a motion for more definite statement. The court explained that the “shotgun” complaint did not differentiate between restaurants allegedly in violation of the ADA and those that were not: “McDonald’s [was] simply left to guess as to which of its remaining 2945 restaurants are alleged to violate the ADA, and how so. Without [such] information . . . McDonald’s can neither admit, nor in good faith deny, the allegations of ADA violations.” The court chastised the plaintiff remarking: “It is not too much for Plaintiffs to specify . . . the restaurants of which they have actual notice of ADA violations.”

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304 The Clark case predated Twombly, but the court’s observation regarding potential abuse is nevertheless instructive. Adequately pleading a case, consistent with Twombly/Iqbal standards is not necessarily inconsistent with inadequacies that may render it difficult or impossible for a responder to answer.

305 Clark v. McDonald’s, 213 F.R.D. at 233 (citation omitted).


307 Id. at *4-5.

308 Discuss above.

309 Clark v. McDonald’s, 213 F.R.D. at 234.
violations.” The court did not entirely agree with the franchisor, however. McDonald’s request that the plaintiffs also specify dates of visits and particular violations identified during same was denied.

Rule 12(e) also helped sort out jumbled, unfocused or confusing claims in Kids R Kids, Int'l, Inc. v. Progressive Child Care Systems, Inc. and Taylor v. Holiday Inns, Inc. A pro se plaintiff initiated the Taylor case alleging discrimination based on an alleged oral contract to permit worship services at a Holiday Inn hotel. The defendant franchisee described the Complaint as “33 pages of ramblings that include unrelated case law, statute provisions, and indistinguishable allegations.” Although the court acknowledged that pleadings of pro se parties are construed liberally, it commented that the plaintiff had been warned on multiple occasions that the generous standard did not mean that every pro se plaintiff is entitled to proceed to trial. The defendants’ Rule 12(e) motion was granted, the court describing the Complaint as “incomprehensible.” Kids R Kids, supra, was not a pro se action but suffered from a lack of detail. The claims included slander and libel, and the factual pleadings gave the defendant fair notice of the grounds for the claim. However, “without a more definite statement concerning the specific slanderous and libelous acts as well as the specific acts which constitute tortious interference, Defendants cannot frame a responsive pleading.”

Attempts to use Rule 12(e) to clarify the collective “defendant” or “plaintiff” issue have met with mixed success. The franchisee and franchisor defendants in Scribner v. McMillan moved for a more definite statement in response to a Complaint charging the collective “defendants” with wide-ranging employment discrimination. The court denied the motion, commenting that Rule 12(e) motions are disfavored and that the Rule is “not a tool to correct a claimed lack of detail.” The court’s view in Scribner was not shared by the court in R & K Lombard Pharmacy Corp. v. Medicine Shoppe Int'l, where the defendants’ Rule 12(e) motion to tailor factual allegations to individual plaintiffs was granted. The case involved 19 counts of antitrust violations by 25 franchisees against their franchisor and Cardinal Health, supported by roughly 20 pages of factual allegations, all asserted by the “plaintiffs” collectively. The general allegations, the court explained, were “not tailored to the individual plaintiffs. Thus, it cannot be

310 Id.
313 Id. at *3.
314 Id. at *5. The Court understandably complained that “unnecessary prolixity in a pleading places an unjustified burden on the district court judge and the party who must respond to it because they are forced to ferret out the relevant material from a mass of verbiage. . . ‘the law does not require nor does justice demand that a judge must grope through two thousand pages of irrational prolix and redundant pleadings, containing matters foreign to the issue involved . . . to determine the grounds for the petitioner’s complaint.’” Id.
315 Kids R Kids, 2006 WL 463177 at *6. See also Robinson v. Wingate Inns Int'l, 2014 WL 4952363 (D.N.J. Sept. 24, 2014) (Court sua sponte orders Rule 12 (e) relief to clarify what obligations franchisor was alleged to have breached).
317 Id. at 4.
determined whether these allegations apply to all or only some of the plaintiffs.”

319 The franchisor could not “reasonably be expected to frame a responsive pleading to the complaint in its current form.”

Rule 12(e) can act as the baserunner in a hit-and-run play, a precursor to a Rule 12(b)(6) motion to dismiss or a Rule 12(c) motion for judgment on the pleadings. Take Darrick Enterprises v. Mitsubishi Motors,321 for instance. In that case the court, sua sponte invoked Rule 12(e) to “help more precisely illuminate” the plaintiff’s causes of action, which included state and federal RICO claims, New Jersey Franchise Practice Act claims, federal Auto Dealers Act claims, breach of contract claims, and for declaratory judgment.322 “Specificity is imperative,” the court commented, because “it is difficult to determine from the Plaintiffs’ copious Complaint whether they have adequately pled” the asserted causes of action, and which plaintiff asserted which causes of action.323 After the plaintiffs complied, the court addressed the defendants’ Motion to Dismiss in detail, dismissing a raft of claims and moving other claims forward.324

Implicitly acknowledging the logical progression from Rule 12(e) to a motion to dismiss, the court in Letap Hospitality v. Days Inn Worldwide, Inc., supra, in the context of defendant’s motion to dismiss invoked Rule 12(e) and held some rulings in abeyance, awaiting the plaintiff’s supplemental pleading. In that action, the franchisee filed a “litany of grievances” against the franchisor, but it was “difficult to discern the legal claims.”325 The court dismissed four claims, and held an equal number in abeyance pending submission of a more definite statement. Two claims survived.326

2. Cautions

Rule 12(e) is a useful early tool, but caution in its use is warranted. It is one of the Rule 12 motions that can be brought only once, unless it was “unavailable” at the time of a prior rule 12(e) motion. In addition, the opposition may suggest and/or the court may prefer to “encourage” the respondent to amend its pleading or advise the defendant to obtain the desired information in discovery.327

319 Id. at 2.

320 Id. Hetrick v. Ideal Image Development Corp., 2007 WL 2729679 (M.D. FLA, Sept. 18, 2007) also falls in the success category, the Court there requiring a more definite statement due to plaintiff’s unclear standing to initiate the action. See also, Darrick Enters. v. Mitsubishi Motors, 2007 WL 6813810, at *5 (D.N.J. Jan. 19, 2007), in which the Court sua sponte invoked the Rule to require the plaintiffs to match plaintiffs to claims.


322 Id. at *6.

323 The court also required the plaintiffs to file a RICO case statement.


325 Letap, 2008 WL 3538587, at *3. The franchisee alleged 10 different causes of action.

326 More creatively, but unsuccessfully, Rule 12(b)(6) and Rule 12(e) were deployed simultaneously in AAMCO Transmission, Inc. v. Trovato, 2011 WL 4549135 (S.D. Cal. Sept. 28, 2011).

C. Motion for Judgment on the Pleadings (Rule 12(c))

Rule 12(c) could be titled Rule 12(b)(6) Part Deux. Almost the only practical difference between the two is timing. A Rule 12(c) motion for judgment on the pleadings only becomes possible after issues are joined, or in baseball parlance between the second and the ninth inning. The Rule allows such a Motion to be filed “[a]fter the pleadings are closed – but early enough not to delay trial.” A party is likely to have suffered through some costly and burdensome litigation prior to a Rule 12(c) Motion.

Just how little the Rule 12(c) motion differs from the Rule 12(b)(6) motion is evident in Precision Franchising, LLC v. Gatej. The defendant franchisee filed motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim. However, the motions were filed after she had answered the Complaint. Because of the timing, the court explained, the motions “shall be treated as Motions for Judgment on the Pleadings.” The motion for judgment for failure to state a claim was subject to Twombly and Iqbal, with one significant difference – both the plaintiff’s and the defendant’s pleadings are considered: “To ensure that each litigant receives a full and fair hearing, courts will not grant a Rule 12(c) motion unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.” Thus, Twombly and Iqbal standards in a Rule 12(c) motion are the same as in a Rule 12(b)(6) motion to dismiss, with similar potential uses and risks. It’s just a matter of when you want to test the line-up.

Timing, and its implications, are the only areas of controversy that Rule 12(c) appears to generate. Similar to a manager’s debate with the umpire over a defensive interference call, the technical niceties of Rule 12(c), Rule 12(b)(6) and Rule 56 have caused the spillage of judicial ink. A prime example is ERA Franchise Systems, LLC v. Hoppens Realty, in which the franchisor sued a holdover franchisee, prompting the franchisee to assert a bevy of counterclaims. The franchisor filed a Rule 12(c) motion, but did so “before the pleadings were closed, making a Rule 12(c) motion premature.” ERA also “mis-stepped” by presenting supporting documents not mentioned in the counterclaim and challenging the franchisee’s factual allegations. This lack of attention to the proper scope of Rule 12(c) clearly annoyed the court, which admonished ERA:

ERA obviously wants quick disposition of what appear to be weak claims, but the proper method for ERA to present its own version of the facts is in a motion for summary judgment, not a motion to dismiss on the pleadings Accordingly, I have


329 Id. at *1.

330 Id. at *2. It’s worth noting that this differs from a Rule 56 motion for summary judgment, in that depositions, pleadings, affidavits and a wide expanse of other items may be considered in a Rule 56 motion.


333 Id. at *1.
disregarded the evidence submitted by ERA that was not referred to in the counterclaim and I have disregarded its arguments based on that evidence.334

A delayed Rule 12(b)(6) motion can create a similarly fine-pointed issue. The defendant in Patel v. Contemporary Classics of Beverly Hills,335 filed a Rule 12(b)(6) motion to dismiss after the close of the pleadings. The plaintiff-franchisee challenged the motion as untimely under the Rule. Conceding that, as a technical matter, the franchisee was correct, the court had a ready retort:

[Many district courts that so regularly face this quandary have concluded that the appropriate response is to treat such an untimely motion to dismiss as a motion for judgment on the pleadings under Rule 12(c).]336

The Second Circuit affirmed the district court’s order of dismissal.

D. Strategy and Risks

A major league manager has a 25 man roster at his disposal, but not all players are used in every game. In his final season the Red Sox did not play Big Papi (David Ortiz) in “away” interleague games,337 so as not to tax his legs. Managers facing a left hand starter may stack his line-up with right-handed batters. In short, not all weapons are equally deployed.

Like a 25 man baseball roster, the Federal Rules (and for that matter, state court rules) offer litigants many weapons that can be deployed aggressively early in the case. Whether to use them depends on the merits, of course, but strategic considerations may be more persuasive. What does the case look like if the movant prevails? If the motion fails? If a Rule 12 Motion eliminates some, but not all of the case, how will the remaining claims be affected? Will the removal of a cause of action or defense or a party adversely affect jurisdiction? How will a successful motion affect discovery? Will rights to a jury trial be affected? What about damages or remedies available? What effect will early motions have on progress of the case? How important is a quick resolution? What claims are more susceptible to dismissal? Is it useful to educate the court on the facts early in the game?

Consider, for example, Darrick Enterprises v. Mitsubishi Motors Corp.338 After the plaintiffs provided the more definite pleading (and RICO case statement) that the court required, some claims survived and others fell by the wayside in the motion to dismiss. In addition, and perhaps as a trial logistics matter more important, specific surviving claims were identified to specific plaintiffs. The same claims did not survive for each of the plaintiffs, creating challenges for both plaintiffs’ and defendants’ counsel: how to organize and rationally pursue discovery in such a disjointed case; how best to deploy attorney assets; how to prioritize the claims; how to

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334 Id. Despite the tongue-lashing (pen whipping?), the court dismissed two of the franchisee’s counterclaims.

335 259 F.3d 123 (2nd Cir. 2001).

336 Id. at 126 (citations omitted).

337 Except as a pinch batter, and then he was never left in to play his first base position. And, except for early August 2016, at Dodger stadium, when Papi made two impressive defensive plays. When interleague games are played in home stadia of National League teams, National League rules apply.

prove damages for each claim; how to handle disparate tasks efficiently; whether the disjuncture of claims has resulted in practical conflicts among the parties or their claims; how complication will affect costs. The combination of Rule 12(e) and Rule 12(b)(6) may have narrowed the causes of action (some claims being eliminated), but the case became far more complex (and one can assume that complexity begets increased cost). The value of that outcome – for franchisor or franchisee – is arguable.

Whether a claim is more or less susceptible to early dismissal should be a prime consideration, particularly in view of the expense of motions in federal court. Anecdotally,\textsuperscript{339} cases applying Rule 12(b)(6) and Rule 12(c) seem to suggest that courts are more willing to dismiss some claims than others. Among those that may fall more readily on a motion to dismiss are claims that, by their nature, require detailed factual pleading (e.g., fraud, RICO, antitrust). Of course, such motions are also effective for gatekeeping issues (jurisdiction, venue, standing, abstention). Arguably simpler causes of action (e.g., breach of contract, negligence, equitable claims) appear to be more likely to survive a Rule 12 motion.

Again, however, the likelihood of success isn’t the only consideration. The finer strategic impacts of successful (or partially successful) Rule 12 motions are peculiar to each affected case. But one effect is certain – delay. Early motions take time, and delays will ripple across the litigation timetable. For some litigants the effects of delay can be devastating. The most obvious consequence of delay is cost; a party short of funds may be starved out and forced to accede to a poor resolution. Delay can destroy the efficacy of equitable relief or other non-monetary remedies. Unless a party can meet the high standards of \textit{eBay v. MercExchange, LLC}.\textsuperscript{340} and earn preliminary injunctive relief, an untenable situation will continue or deteriorate as the case drags on. For a franchisee attempting to forestall a termination, or a franchisor seeking de-identification or enforcement of a non-compete, time undoes the remedy.

In \textit{Cycle City, Ltd. v. Harley-Davidson Motor Co., Inc.},\textsuperscript{341} the dealer challenged the manufacturer’s failure to renew the dealership. The dealer did not suffer the catastrophic end of the business relationship with Harley-Davidson during litigation; Harley continued to sell its products to the dealer during the lawsuit, but did so according to the dealer at “significantly and unreasonably” increased prices. The dealer’s license to manufacture Harley trademarked goods, however, may have ended with the onset of litigation. Clearly, the dealer was resisting the termination. Deploying early weapons resulted in the following events:

- March 26, 2014 – Dealer files Complaint
- June 4, 2014 – Harley files Motion to Dismiss
- June 19, 2014 – Dealer opposes Motion
- July 2, 2014 – Harley replies

\textsuperscript{339} Without any objective metrics.

\textsuperscript{340} 547 U.S. 388 (2006).

\textsuperscript{341} 2015 WL 3407825 (D. Haw., May 26, 2015).
The Cycle City litigation was essentially stalled for 14 months! As that time passed, one can assume that business, the economy, life and outside forces changed, and that litigation strategies changed as well.

V. THE POST-GAME ANALYSIS

Strategic decisions in litigation, as in baseball, are not simple, nor are their outcomes predictable. The other evening, Bruce Bochy pulled Madison Bumgarner, who had delivered more than 100 pitches, for a closer; the lead that Bumgarner had built promptly disappeared. At other times, this same strategic decision secures the victory. So in litigation; the tough analysis is whether a strong opening move is just that, or whether it might doom the client’s position.
John Jett

John Jett is a partner in Kilpatrick Townsend & Stockton LLP’s Atlanta office. He focuses his practice on trade secret litigation and has worked extensively with franchisors in the retail and technology markets. While representing plaintiffs, he has recovered millions of dollars on behalf of deserving businesses and businesspeople. In defending commercial litigation, he has defeated numerous major claims, often through dismissals or summary judgments. He has served as first chair at trial, arbitration, and appeal, in addition to serving as a mediator and as a court-appointed special master.

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Ms. Lokker is the principal of Lokker Law PLC in Reston, Virginia. She is a frequent speaker and author on litigation and franchise-related topics. Ms. Lokker has been an active member of the American Bar Association (ABA). She served for ten years as an editor of the ABA’s Franchise Law Journal and is a former vice chair of the ABA Antitrust Section’s Distribution and Franchising Committee. Ms. Lokker was named a “Legal Eagle” by Franchise Times in 2007, 2008, 2009, and 2010 in recognition of her expertise and dedication to the practice of franchise law.

Ms. Lokker has extensive experience as a civil trial attorney representing corporations and individuals in franchise and general commercial litigation in federal and state courts and in arbitration proceedings. She regularly advises clients on franchise relationship issues and on the prevention and resolution of business disputes. She also concentrates on counseling start-up entities.

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Tami McKnew is a shareholder in the law firm of Smith Moore Leatherwood LLP, and served as Managing Director of its predecessor Leatherwood Walker Todd & Mann, P.C. from January 1995 through December 2000. She received her B.A. degree in 1971 from the University of California at Santa Barbara, her M.A. degree in 1973 from the University of California at Los Angeles, and her J.D. degree in 1978 from Northeastern University. Tami joined Leatherwood in 1978 and concentrates her practice in the areas of franchising, intellectual property, antitrust and complex litigation. She has been a member of the ABA Section on Antitrust since 1979 and a member of the ABA Forum on Franchising since 1980. With Andrew Loewinger, she co-chaired the 38th Annual Forum on Franchising in New Orleans in 2015. She is the co-editor of Covenants Against Competition in Franchise Agreements (Third Edition) and co-author of Annual Franchise and Distribution Law Developments, 2008, in addition to numerous other presentations at the Forum. Previous articles by her on internet trademark use appeared in Landslide, The Journal of Internet Law and Business Law Today. Her current Board memberships include Attorney Liability Protection Society RRG (ALPS); the South Carolina Chapter of the Nature Conservancy; the United Way of Greenville County; The Priester
Foundation; and the Institute for Child Success. She has one daughter, Bronwyn Kelson, who prosecutes bad guys in Sumter, SC, a lawyer son-in-law who strives to do good as a South Carolina Senator, and a granddaughter Adelaide who is the most wonderful, amazing child in existence (except for your grandchild). Tami loves to cook, read, and she skis badly but gamely.