Pawn To d4
Opening Moves in Franchise Litigation

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Lokker Law PLC

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Smith Moore Leatherwood LLP
A Strong Opening Move
A Strong Line Up

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I. Taking the Field
The Initial Meeting – Prospective Plaintiff

• Listen to the client’s story
• Discuss how client has been harmed and the desired remedy
• Identify key documents to be reviewed
• Discuss other potential plaintiffs and defendants
• Advise generally re: applicable dispute resolution process, cost, timetable, and relief available
Review the Documents

• Contracts
  • Contractual limitations period?
  • Dispute resolution clause or pre-litigation mediation?
  • Choice of law and/or forum?
  • Limitations on remedies?

• FDD

• Key correspondence

• Financials
Pre-Conditions to Suit

• Pre-litigation mediation requirement as condition precedent to filing suit
  • *Tattoo Art, Inc. v. TAT Int’l, LLC.*, 711 F. Supp. 2d 645 (E.D. Va 2010)
• Strategic decisions surrounding pre-litigation mediation
  • Discovery tool
  • Negotiating in good faith
Crafting the Draft Complaint

• Naming business entities and individual defendants
• Consider effect on diversity jurisdiction if applicable
• Consider standards for imposing liability on named individuals to avoid early win for defendants
• Piercing the corporate veil
Where to File

• Court or Arbitration
  • Strategic considerations of contesting required forum
  • Embracing arbitration

• Federal or state court
  • Strategic considerations
  • Federal Jurisdiction Requirements
    • Federal Question
    • Diversity of citizenship complexities
Where to File – Further Considerations

• Favorable Forum Considerations
  • Connections
  • Quality of Judges
  • Docket Speed
  • Reputation for Damage Awards
Where to File – Further Considerations

• Forum selection clauses
  • Whether to challenge
  • Federal law exceptions to enforceability:
    • Result of fraud or overreaching
  • Party would be deprived of day in court due to inconvenience or unfairness of selected forum
  • Enforcement would contravene strong public policy of forum state
Remedies - Damages

• Determine client goals
• Unwinding a relationship and refunds
• Damages
  • Compensatory
  • Punitive, Statutory
• Liquidated Damages
Remedies – Attorney’s Fees

• Attorney’s Fees
  • Contractual
  • Statutory
  • Pleading
  • Proof
    • Timing - when to present the evidence
    • What to present – witnesses and documents
Remedies – Equitable Relief

• Rescission
  • Available by statute
  • Available as remedy for fraud

• Specific Performance
  • Use to enforce post-termination obligations
  • Use to enforce in-term obligations
Remedies – Equitable Relief

• Permanent Injunctions
• Preliminary Injunctions
  • Preserving the status quo
  • Enjoining infringement
• TROs
  • Mechanics
  • Strategic considerations
Remedies – Injunctive Relief

  • No presumption of irreparable harm
• *eBay* effect on preliminary injunctions
  • Practical effect in court
  • Inconsistent rulings
Proof of Irreparable Harm

• Articulate Actual Harm
• Evidentiary Support
  • Harm to goodwill or reputation
  • Contractual representations
  • Loss of control over marks
  • Consumer confusion
  • Relationship of parties
II. Bottom of the First
Potential Challenges Available to a Defendant

• Removal and challenges to subject matter jurisdiction
• Challenges to personal jurisdiction
• Challenges to venue
• First-filed rule
• Failing to join a necessary/indispensable party
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 plaintiff and defendant

• May depend on original forum and preference for state vs. federal court
Removal and Challenges to Subject Matter Jurisdiction

- Defendant seeking to remove
- Plaintiff seeking remand
- Costs
Removal and Challenges to Subject Matter Jurisdiction

• Lack of subject matter jurisdiction can be raised *at any time*.

• May be raised either by the parties or the court *sua sponte*. 
Challenge to Diversity Jurisdiction

• Amount in controversy
Challenge to Diversity Jurisdiction

• Diversity of citizenship
Challenges to Personal Jurisdiction

• Motion to dismiss under Fed. R. Civ. P. 12(b)(2)
• Fact-driven
• Discovery
Challenges to Personal Jurisdiction

• Specific types of parties
  • Officers and Owners
  • Master Franchisees
Challenges to Venue

Challenges to Venue

• After *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
Challenges to Venue

• But 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.
First-filed Rule

• Filing “first”
• Mirror image cases
• Exceptions and special circumstances
Failing to Join a Necessary/Indispensable Party

- 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
- What it means to be necessary
- Factors to consider in deciding whether to proceed or dismiss
The Game Plan Unfolds

### Boston Red Sox

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*a- lined out for Brentz in 7th*

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*b- grounded out for Fields in 5th. c- singled for Howell in 8th.*
# How Potent Are Rule 12 Weapons?

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Rule 12(c)  
Motion to Make More Definite and Certain

A party may move for a more definite statement of a pleading ... which is so vague or ambiguous that the party cannot reasonably prepare a response
Rule 12(e)

• A one-time only Motion

• “Disfavored”

• Appropriate only where a pleading is “so vague and ambiguous that the responding party cannot response, even in good faith, without prejudice to itself?”

Rule 12(e)

• A one time only Motion

• Disfavored

• Challenges jumbled, verbose, confusing pleadings


Rule 12(e)

• A one-time only Motion

• Disfavored

• Challenges vaguely defined parties


Rule 12(e)

• A one-time only Motion
• Disfavored
• Challenges vaguely defined parties
• Challenges jumbled, verbose, confusing pleadings
• Potential precursor to Rule 12(b)(6) or 12(c)
## How Potent Are Rule 12 Weapons?

<table>
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Rule 12(b)(6) Motion to Dismiss

[A] party may assert the following defenses by motion: . . . (6) failure to state a claim upon which relief can be granted
Rule 12(b)(6)

• A higher pleading standard after *Twombly* and *Iqbal*

Rule 12(b)(6)

• A higher federal pleading standard after *Twombly* and *Iqbal*
• State adoption varies

States in which adoption or rejection seems to be clear:

Adopted in: Colorado, Massachusetts, Nebraska, Wisconsin

Rejected in: Arizona, Delaware, Iowa, Minnesota, Oklahoma, Tennessee, Washington
Rule 12(b)(6)

- A higher federal pleading standard after *Twombly* and *Iqbal*
- Factual allegations must
  - “Raise a right to relief above a speculative level” *Twombly*
  - “[P]lausibly give rise to an entitlement to relief” *Iqbal*
- Recital of elements and conclusory facts are not enough
Rule 12(b)(6)

- Ignore recital of elements
- Ignore legal conclusion
- Ignore conclusory statements

THEN accept factual allegations as true and assess plausibility
Rule 12(b)(6)
Assessing Plausibility

• Prime importance: The factual underpinning
• But (unresolved issues):
  • Can a court look beyond the pleadings?
  • Are the parties’ opposing views of plausibility relevant?
  • Does complexity enter into the equation?
Rule 12(b)(6)

Pleading standard applies to:
- Complaints
- Counterclaims
- Affirmative defenses


Motion to Amend

*Long John Silver’s, Inc. v. DIWA III, 650 F. Supp. 2d 612 (E.D. Ky. 2009)*
Rule 12(b)(6)
The Strategic Decision

Does success depend on documents beyond the pleading?

Courts refuse to review Franchise Agreement or FDD and motion fails


Rule 12(b)(6)
The Strategic Decision

Will the court weigh opposing views of the facts?

(Motion denied; Court refuses to consider opposer’s interpretations)

(Motion granted; Court considers franchise agreement and weighs facts)

(Motion granted; Court weighs factual allegations against franchise agreement)
Rule 12(b)(6)
The Strategic Decision

Anecdotally, claims vulnerable to dismissal include:
Those that involve fraud or require proof of fraud

*Damabeh v. 7-Eleven*, 2012 WL 4009503 (N.D. Cal. Sept. 12, 2012)

Rule 12(b)(6)  
The Strategic Decision

Anecdotally, claims vulnerable to dismissal include:

RICO claims

But beware the RICO Case Statement


Rule 12(b)(6)
The Strategic Decision

Anecdotally, claims vulnerable to dismissal include:

Those that contradict clear provisions of franchise agreements or FDDs


Rule 12(c)
Judgment on the Pleadings
It’s all in the timing

• Same standard as Rule 12(b)(6)
• Properly filed AFTER pleadings by the parties

The Unexpected
## Defensive Vulnerabilities

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