When the Honey Runs Out:

Strategies for Combating Consumer Class Action Suits

By Matthew R. Dornauer, Thomas P. Hanrahan and Laura L. Richardson

Recent years have witnessed a flood of class actions alleging false advertising and deceptive promotion of an unlimited range of consumer products. Few legal claims will more quickly get the attention of you and your management team — and for good reason. Defending a class action is uncertain and costly, leading scores of companies to conclude that an expensive settlement is the smarter option, however frivolous the case may seem. Is there a better solution than wading through the extensive discovery and lengthy sequence of motions that almost always end in such a settlement? We think there is.

CHEAT SHEET

- *The global reach of this issue.* Because of the cross-border nature of consumer shopping, the European Commission is currently exploring ways to ensure a coherent approach to collective redress in the European Union.
- *Minimize your risk.* Consider auditing your marketing messages to remove or revise claims that you cannot readily substantiate.
- *Guarantee money back.* Establish a business practice to address the concerns of dissatisfied consumers.
- *Capitalize on the pre-filing notice letter.* Instead of losing or ignoring the letter, respond to it by offering a refund, as requested.

The class action problem

Imagine this (entirely fictional, but inspired by real events) scenario: Your company sells a modestly priced consumer product. Let's say it's an electric toothbrush. Your marketing team has made many claims for this toothbrush — it whitens teeth better than the leading brand, it improves the customer's breath and it is made with a special germ-fighting material. The brush includes the required labeling by law. Your company has sold a ton of these over the past four years: big margins, very profitable. The marketing and sales folks are really pleased.

Someone — let's call him Bob — buys the toothbrush and, lo and behold, Bob thinks his teeth aren't noticeably whiter. Even worse for Bob, his dentist tells him his teeth are riddled with decay-causing germs. Bob thinks he wasted his money on this toothbrush. He doesn't call your company to complain, or lodge a complaint via your company's website or social media accounts. But, Bob knows a guy who knows a guy who, naturally, knows a lawyer looking to file a class action case. And Bob's bad experience has created the opportunity for such a case. Bob and, more importantly, Bob's new lawyer think you overpromised, and Bob believed you — or so says his lawyer — and you didn't deliver.

On Tuesday morning, a letter from Bob's lawyer lands on your desk. It claims your advertising about the electric toothbrush is false and misleading, that the brush has nothing remarkable to commend it to consumers, and that you have peddled a toothbrush that is considerably more expensive, but no better, than a cheaper generic brand. According to the letter, Bob and thousands of consumers bought your toothbrush at a very hefty premium only because of the materially false representations your company has made. Consequently, says Bob's lawyer, you owe Bob and thousands of other purchasers a refund. And if you don't agree to pay everyone, Bob will file a class action to force you to pay a full refund, or at least the price premium above the cost of a generic toothbrush, plus attorney's fees. You consider for a moment whether to respond to the letter, and quickly decide it's a waste of time. A few weeks later, Bob's lawyer files the promised class action complaint. The complaint alleges the usual array of claims under state consumer fraud and false advertising statutes, breach of express and implied warranty, and some common law misrepresentation and concealment claims.

What now? Retain counsel experienced in such cases? What an excellent idea. Examine your insurance coverage to see if it will cover this? Important to check, but don't be too optimistic that your policy will cover this kind of lawsuit. Put a litigation hold in place to preserve ESI and other material pertaining to the toothbrush? Absolutely. These are best practices for any case. But what else needs to be done? Is there a solution that might avoid a drawn-out class action battle?

The usual response to cases like this is to have your counsel draft a motion to dismiss on whatever grounds become apparent. Sometimes, that works, but fraud (and that's how Bob's lawyer will characterize most of the claims in his complaint) is ordinarily regarded as a fact question, as is Bob's claim of reliance and lack of efficacy. Maybe you can get a warranty claim thrown out with prejudice, but absent something uncommon — say, a preemption defense, or Bob's inability to plead some factual element with the specificity required under the *Twombly/Iqbal* pleading standard — complaints like this have a fairly high survival rate at the pleading stage.

There is, however, another far less frequently used tactic — one that can be employed successfully to win the dismissal of class action cases at the outset. This tactic denies Bob standing to sue by offering him a full refund, his attorney's fees and any other monetary relief he individually might win at trial. In effect, it places him in the position he would have been in had he never bought the toothbrush, and thus, Bob would have nothing to complain about.

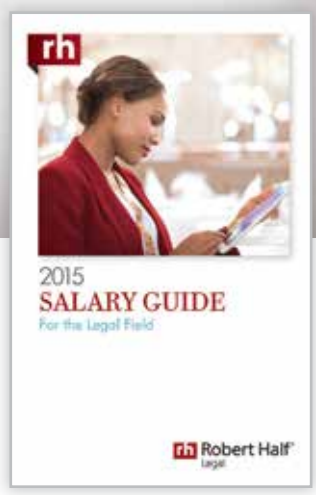
We describe below what one company did, and how a recent decision by the US Supreme Court bolsters the foundation for this approach. Fundamentally, the key is a simple offer to pay. Not an offer under Federal Rule of Civil Procedure 68 (or analogous state rules). Not even a settlement proposal as such — certainly not an offer to the putative class and not even

Matthew R. Dornauer, general counsel of Phusion Projects, is responsible for all of the company's legal matters and government affairs. Prior to joining Phusion Projects in 2013, he was an attorney in Sidley Austin, LLP's Chicago office, focusing his practice on a wide range of litigation, regulatory and transactional matters. *mdornauer@phusionprojects.com*

Thomas P. Hanrahan is senior counsel at Sidley Austin, LLP, based in Los Angeles. He focuses his practice on consumer protection, antitrust and product liability matters across a variety of industries. He has also served as a global co-chair of Sidley's Complex Commercial Litigation practice, and as head of the firm's Los Angeles Litigation Group. *thanrahan@sidley.com*

Laura L. Richardson is an associate with Sidley Austin, LLP, based in Los Angeles. She practices in the Litigation group, focusing on complex commercial litigation. Prior to joining Sidley, Richardson was a clerk for the Honorable Jon P. McCalla of the United States District Court for the Western District of Tennessee. *laura.richardson@sidley.com*

What's emerging regarding legal salary and other trends?



Cut to the chase with the *2015 Salary Guide*.
Download now at roberthalflegal.com/salary-center.

ACC ALLIANCE
Exclusive Savings for ACC Members

ACC members, take advantage of your Alliance discount.

1.800.870.8367

roberthalflegal.com

Robert Half® Legal

a "settlement" that the complaining consumer is free to reject. This is just a straightforward unilateral refund offer to a disgruntled customer. Good business marries good legal tactics.

A case study

A small, closely held company that manufactured a consumer product became embroiled in consumer class actions very similar to the hypothetical scenario above. The retail price for the product was fairly low (i.e., under $5). The company had several competitors who sold a similar product, and this particular kind of product happened to attract the attention of some government regulators.

The stage for the lawsuits was set when some of the regulators expressed concern that consumers might misuse the product, to the detriment of their health. The agencies disclosed their concerns publicly and called on all manufacturers of this kind of product to make certain changes. Although the company disagreed that the alleged concerns had any merit, it chose to redesign its product. One might doubt that this sequence of events had the makings of a consumer fraud and false advertising claim, but a couple of lawyers thought it did. They corralled a handful of people who had allegedly bought the company's product and filed class action cases in federal district courts in California, Florida and New York.

The complaints alleged, in broad terms, that the company had violated consumer fraud statutes by failing to disclose adequately the risks involved in using its product, and if the plaintiffs had known about that risk, they would not have bought the product at all. To posture this as a class action, plaintiffs alleged that everyone who bought the product was similarly deceived. None of the plaintiffs claimed they had suffered any physical injury, only that they were not aware of the risk associated with using the product.

On the merits, the company thought it had a sound position. No one could legitimately claim to have been deceived: The supposedly unknown "risk" in using the product was the very reason plaintiffs and other consumers bought the product in the first place. If a few people misused the product, it was not for lack of understanding what it was and how it could be misused. Moreover, as the company's counsel looked at the cases, there seemed to be ample and compelling reasons why no class could be certified.

But there was one basic problem that these strong arguments could not avoid: They would not end the case early, and with cases in multiple jurisdictions, the company would have to win every time. The classic arguments against class certification depended here, as they almost always do, on proving facts. Like so many good arguments that depend on facts, you can't unleash them until you get to class certification, summary judgment or even trial. And by then, you have invested a lot of management's attention, time and, of course, company money that could be better used elsewhere.

So as the company considered how it might balance its immediate business need to promote and sell its product against the prospect of waging a litigation war of unknown duration and cost, it pursued the classic initial defense maneuver: filing motions to dismiss in the various cases.

Those motions triggered a messy and, consequently, expensive procedural history. Plaintiffs voluntary dismissed the first case filed in California, and promptly re-filed it in the neighboring federal district. There, the court dismissed the action as blatant forum shopping. A good outcome, but the repetitive series of procedural motions was costly, and the cases were not going away. Abandoning California entirely, the same lawyers found new plaintiffs in Florida and filed there. To end the drain on the company's resources, a better solution was needed.

The company and its counsel came up with that better solution. They decided to take the plaintiffs at their word that they were disappointed customers. Here is where customer

An ounce of prevention

There are no sure-fire ways to avoid becoming a target of class action litigation, but there are steps that can make you a less attractive target.

1. **Take a skeptic's look at your marketing claims. Are they true? Exaggerated? Puffery? Defensible if pressed for the supporting evidence? Appropriate for the intended audience?**
2. **Where possible, vary the marketing message over time, place and audience. Differences undermine claims of class cohesion.**
3. **"Your mileage may vary." Few products work the same way for every person in every circumstance. Tell consumers that.**
4. **Can you incorporate a non-judicial dispute resolution agreement into the product sale process? For example, add it to the product's label and/or website. Recent Supreme Court decisions are especially supportive of such agreements.**
5. **"The customers are always right" … even when they're not. An open and clear "money back if not completely satisfied" message is inexpensive, practical insurance against class action claims.**

Offices in
Beijing
Brussels
Century City
Chicago
Del Mar Heights
London
Los Angeles
New York
Orange County
Palo Alto
San Diego
San Francisco
Seoul
Shanghai
Washington, DC

Many people believe that law firms are pretty much the same. We don't. We believe that what separates us from the pack is not what we do, but how we do it. Aggressive not conservative, team players not one-man-bands, problem solvers not just legal practitioners. Our clients clearly understand and value this difference.

How can we help you? Contact our Chairman, Guy Halgren, at 619.338.6605.

SheppardMullin

sheppardmullin.com

The company and its counsel came up with that better solution. They decided to take the plaintiffs at their word that they were disappointed customers.

satisfaction integrated seamlessly with a legal path to dismiss all claims with prejudice. Approaching the plaintiffs as disappointed customers, the company said it would refund the plaintiffs' purchase price.

In doing so, it capitalized on a then-recent federal appellate decision that had endorsed the notion that a plaintiff who has been offered everything he might recover as financial damages in a lawsuit has no real claim against the defendant and, therefore, lacks standing in federal court.

This tactic had very limited precedent, in no small part because several federal circuits had expressed hostility to allowing a defendant to "pick off" the named plaintiff in a class action case, thereby leaving the other members of the alleged class unrepresented. Although the path was uncertain, here is what the company did:

First, it accepted the allegation in the complaint about the retail price paid for the product, as well as the number of products the plaintiffs purchased. Next — and before plaintiffs had initiated any discovery or filed a motion to certify a class — it sent a letter to plaintiffs' counsel advising that the company would refund to plaintiffs the amounts they had paid for the product, plus an amount deemed adequate to cover any punitive damages claimed (i.e., given the low purchase price and a desire to avoid argument, 10 times the purchase price), plus reasonable attorney's fees and costs plaintiffs may have incurred. This was not presented as a Rule 68 offer,[1] and it did not have any expiration date. It was, however, more than a mere refund. It was intended to remove all potential upside for the plaintiffs should they succeed on their own claims in the litigation.

Did plaintiffs leap at this chance to get everything they could get by litigating? No, the refund offer was rebuffed. That decision, however, was the predicate for the company to ask the court in Florida to dismiss the lawsuit, because plaintiffs could not gain anything beyond what was already made freely available to them and, consequently, they lacked standing to pursue the case.

That motion was granted. The court dismissed the entire case with prejudice. While the dismissal was on appeal, the company negotiated settlements with each of the individual plaintiffs, thereby terminating the litigation without settling on a class-wide basis or facing the potentially ruinous costs of lengthy class litigation.

Since then, further developments in the law suggest greater receptivity to the underlying standing concepts the company relied upon. Those developments provide a framework for a company to limit its exposure in class action cases.

Lessons from recent developments in case law

The approach taken by the company, and the potential greater use of this approach, rests on a series of Supreme Court cases and critical rulings by the Seventh Circuit Court of Appeals. The general mootness doctrine was fairly well understood, but in a case decided in 1975 and two others in 1980, the Supreme Court had carved out narrow exceptions to this doctrine in the class action context.[2] In broad terms, the Court held that mootness of the named plaintiff's claim would not moot the rest of the case where a motion to certify a class had been filed.

That left open the question whether a class action could survive where the named plaintiff's claim becomes moot before a motion to certify is filed. In 2011, in *Damasco v. Clearwire Corp.*, the Seventh Circuit said the case does not survive. In reaching that conclusion, the Court rejected the more accommodating standard in other circuits that allowed a plaintiff reasonable time to file a certification motion, even after receiving an offer that mooted the plaintiff's individual claim. Rejecting this as jurisdictionally unsound, the Seventh Circuit said the simpler and more defensible solution to the "picking off" concern was for the plaintiff to file a class certification motion with the complaint. Otherwise, an offer fully satisfying plaintiff's claim would moot the plaintiff's claim and the entire action.

In another ruling that same year (*In re Aqua Dots Products Liability Litigation*), the same circuit held that no class should be certified where the defendant company had offered and honored "money-back" requests for refunds on recalled products. The Court reasoned that this company-sponsored approach was superior to a class action, because this approach more fairly and adequately protected the interests of the class. Taking these cases together, the Seventh Circuit held that a refund program may undermine the proof required under Rule 23[3] and may moot the plaintiff's claim at the outset of the case.

The Supreme Court's 2013 decision in *Genesis Healthcare Corp v. Symczyk*, 133 S. Ct. 1523 (2013), materially enhanced this reasoning. In that case, the Court considered whether a Rule 68 offer that fully satisfied the plaintiff's claim in an FLSA case mooted the entire action. The defendant had served plaintiff with an offer of judgment under Rule 68 that fully satisfied plaintiff's claim. Plaintiff ignored the offer, and the district court dismissed the entire case as moot, rejecting the criticism of "attempting to 'pick off' the named plaintiff before the collective-action process could unfold."

UBIC

UBIC Tames Big Data Through **FUTURE DISCOVERY**

Virtual Data Scientist

Developed to accompany our advanced predictive coding tools, providing greater insight into the data pool subject to review.

Behavior Informatics

Deconstruct Big Data through UBIC's "***Behavior Informatics***" a fusion of information sciences and behavioral sciences, revealing underlying human thought processes and past decisions.

UBIC's Approach to Big Data Through FUTURE DISCOVERY

E-discovery today is mostly concerned with "***Fact Discovery***"– simply searching for facts contained within the vast scope of Big Data. UBIC's "***Future Discovery***" mines Big Data to reveal crucial patterns in human behavior.

UBIC's "***Virtual Data Scientist***" utilizes "***Behavior Informatics***" to analyze and reveal hidden patterns of human thought and interaction, providing reviewers with the ability to read between the lines of the data.

With UBIC's "***Future Discovery***" – Big Data has never looked so small.

SILICON VALLEY | LOS ANGELES | WASHINGTON DC | NEW YORK
TOKYO | OSAKA | NAGOYA | HONG KONG | SEOUL | TAIPEI | LONDON

877-321- UBIC • usinfo@ubicna.com • ubicna.com

Responding to notice letters

Consider a response that can create the basis for a motion to dismiss the inevitable lawsuit for lack of standing.

- Express your confidence in the fairness and accuracy of marketing messages or product design, but balance that with expressing a desire to provide customer satisfaction in all cases.
- If you have a department or group in the company that handles consumer complaints, respond that you have referred the claim to them.
- Advise that the company will refund the full amount paid for the product, and ask where the refund should be sent.
- Give an estimate of how long it will take to process the refund. Keep that estimate under 30 days, the notice period provided in most statutes.
- Most of the time, it will be reasonable to ignore the inevitable demand for changes in advertising or product design. Anything you can say will very likely be unacceptable. The only time to say anything is if the product or marketing has changed in a material way that renders moot the demand for change. Of course, product labeling sometimes changes in the normal course of marketing cycles. Such changes merit review but, generally, should not be deterred by worry that they may be seen as an admission of culpability, so long as the changes are themselves defensible.

The Supreme Court affirmed the dismissal. Importantly, the Court stated the following: "[T]he mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied." While acknowledging that a Rule 23 action is different from an action under the Fair Labor Standards Act, the Court noted that the essential factor in its 1975 and 1980 decisions in the Rule 23 context was that "a putative class action acquires an independent legal status *once it is certified under Rule 23*." Notably, the Court did not adopt the notion, endorsed as a convenient solution in *Damasco*, that a class might acquire sufficient independent status by the mere filing of a motion to certify the class.

In the wake of *Genesis*, we have seen a growing acceptance of the idea that an offer of full satisfaction of a plaintiff's claim moots the action. District courts have found *Genesis* instructive in Rule 23 cases.[4] Such cases conclude that the mere filing of a class action complaint cannot avoid a finding of mootness where the plaintiff has received an offer fully satisfying her claim before moving for class certification, because the class has no independent legal status before that point.

Practical application of *Genesis*

What questions remain after *Genesis*? On a literal level, the Supreme Court has not yet squarely adopted the reasoning in *Damasco* and rejected the more plaintiff-friendly analysis in other circuits. The direction of the Court's thinking seems clear. As recent cases suggest, *Genesis* signals a greater acceptance by trial courts of a mootness argument in class action cases.

The key remaining question is whether the filing of a pro forma motion to certify a class — as proposed in *Damasco* — cuts off application of the mootness doctrine. Here, other recent decisions that articulate the burden on plaintiffs in the class certification process suggest that the answer will be "no."

In the wake of *Genesis*, we have seen a growing acceptance of the idea that an offer of full satisfaction of a plaintiff's claim moots the action.

Two years before *Genesis,* the Court ruled in *Wal-Mart Stores v. Dukes* that Rule 23 is not "a mere pleading standard," and that district courts must conduct a "rigorous analysis" before certifying a class. And, just a month before *Genesis*, the Court had ruled in *Comcast v. Behrend* that this rigorous examination must be had even if it implicates the merits of the case.

Considering these standards, the pro forma motion to certify a class should enjoy no more jurisdictional significance than a class complaint itself. This conclusion would seem further compelled by the provision in Rule 23 that confines the trial court's oversight of the class to the point after a class has been certified.

Given all this, how might our hypothetical toothbrush manufacturer employ these developments to extricate itself from the claim that Bob and his lawyers have filed?

The first lesson is the most obvious: Make yourself a smaller target by auditing your marketing messages to remove or revise claims that you cannot readily substantiate. "If it sounds too good to be true, it probably is," is a good rule of thumb. Our toothbrush manufacturer might revisit the claim about killing germs and whitening teeth if it lacks evidence to support those claims. While your marketing team may want to claim that your product can do everything under the sun, ask yourself whether these claims are plausible, or whether they will invite exactly the kind of litigation that you want to avoid. Making changes to your marketing strategy on the front

Open and shut.

When it comes to safeguarding your interests, you can trust the lawyers at Barnes & Thornburg. We combine deep legal experience, practical know-how and keen insight to deliver workable solutions to your toughest challenges. Helping you unlock your business' true potential.

BARNES & THORNBURG LLP

Uncommon Value

ATLANTA CHICAGO DELAWARE INDIANA LOS ANGELES MICHIGAN MINNEAPOLIS OHIO WASHINGTON, D.C.

btlaw.com

Consumer class actions in Canada

Consumer class action claims have also bloomed in Canada in recent years. In a trio of recent cases, the Supreme Court of Canada clarified several issues in ways that are different from US law and that seem to assure robust class action filings.

First, in *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57, [2013] 3 S.C.R. 477 the Court explained that plaintiff must show only "some basis in fact for each of the certification requirement." This standard "does not require that the court resolve conflicting facts and evidence at the certification stage ... [and it is] not necessary that common issues predominate over non-common issues." "[E]ven a significant level of difference among the class members does not preclude a finding of liability."[1]

Second, in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company,* 2013 SCC 58, [2013] 3 S.C.R. 545, the Court affirmed that the "some basis in fact" standard is "not a balance of probabilities." Expert evidence pertaining to class certification requires only "a credible and plausible methodology capable of proving harm on a class-wide basis." And proof of an "identifiable class" is subject to the same "some basis in fact" standard.[2]

Third, in *AIC Limited v. Fischer,* 2013 SCC 69, [2013] 3 S.C.R. 949, the Court articulated a multi-factor test to determine whether a class proceeding is "the preferable procedure for the resolution of the common issues." The core question is whether the class procedure provides better "access to justice" than some alternative.[3]

Notably, refund and restitution programs have not necessarily provided protection against class actions. *Fischer* found a regulatory-ordered refund was not preferable to a class proceeding. Recent programs by Hyundai and Kia to provide refunds to purchasers because of overstated fuel economy claims did not deter class action claims in Canada, and both companies agreed to settle the class claims for substantial amounts.

In conclusion, Canada is more accommodating to class actions, and complex consumer claims may frustrate the simple efficacy and appeal of a refund program.

Notes

1 *www.canlii.org/en/ca/scc/doc/2013/2013scc57/2013scc57.html.*
2 *www.canlii.org/en/ca/scc/doc/2013/2013scc58/2013scc58.html.*
3 *www.canlii.org/en/ca/scc/doc/2013/2013scc69/2013scc69.html.*

end may save you the headache of litigating on the back end. And, of course, confirming or developing adequate substantiation *before* claims are made is vital to credibility. Even though the complaining consumer bears the burden of proof on substantiation, if you defer studies until after a consumer complains, the resulting findings will be inherently suspect.

Another sound idea is to adopt business practices that will allow you to portray the "standing" defense not as an after-the-fact litigation ploy, but rather as an established business practice employed to address the concerns of dissatisfied consumers. If you do not have a "money-back" policy, consider adopting one. If you do have such a program, make sure it is mentioned in labeling and especially on the product's website. There is no good answer to the question Judge Easterbrook posed in *Aqua Dots*: If the customer can get a refund just by asking, why should anyone endure the cost and headache of a class action?

So, let's suppose that our hypothetical toothbrush company had such a policy. Even if Bob had not asked, the letter from the lawyer would have been the trigger for informing Bob that a refund was his for the taking, and it would be sent right away, pursuant to the company's long-standing customer satisfaction policy.

This response would moot Bob's claim before it is even brought and provides a powerful response to the inevitable argument that this is a "picking off" tactic. If the relief sought through a class action is nothing more than a refund that was part of the sale terms when Bob bought the product, then Bob is already entitled to a full refund through the money-back policy. You are not "picking off" anyone; you are simply giving the customer what you agreed to give him as part of the initial sale. Bob will have no personal stake in the litigation, even at its onset,

Tangled up in new laws?

Don't lose momentum. Contact Littler today.

Littler

Employment & Labor Law Solutions Worldwide™

littler.com

The use of warranty and indemnity insurance in Europe has been significantly increased in 2012 (8 percent) and slightly increased in 2013 (9 percent), which could be partly driven by certain bidders who strategically used such insurance in auction processes to make their bids more attractive.

because the "relief" the plaintiff seeks already was offered.

Third, capitalize on the pre-filing notice letter, if you receive one. Many state consumer statutes require the consumer to give the company written notice before a lawsuit for damages can be filed. The ostensible purposes of this is to allow the company to resolve the dispute without litigation. Consumer lawyers generally regard these notices as pro forma obstacles to a claim for damages. Manufacturers usually ignore them. Suppose our hypothetical company took a different tack: Instead of losing or ignoring the letter, it responded by offering a refund, as the letter asked. Even without a pre-existing refund program, you have now created, at least for Bob, a pre-complaint opportunity for him to get his money back. Even if you have to offer to compensate his lawyer, that amount is very likely to be a small fraction of the cost of lawyer fees in litigating — and ultimately settling — a class action.

Will this approach to diverting potential class litigation work in every case? Maybe not. It is best suited to lower-priced consumer goods, where the cost of refund is low and the likely incidence of refund demands is also low. On the other hand, a "money-back, no questions asked" policy may pose severe business challenges if the product is expensive, the complaint has received wide publicity and differences among class members could be hard to define.

Further, there is the persistent worry about being seen as an easy target if the company simply pays every claim. While that can be a real concern in some circumstances, generally, it gives consumers and lawyers more credit than they deserve for seeking out "free" money. In the case study we described above, no new lawyers ever filed a claim and no new consumers ever approached the company. There may be a number of reasons for that, but one lesson is that an individual refund approach will not necessarily excite a flood of claims.

The method we describe here has worked for some defendants in some cases. As recent developments percolate through the courts, some uncertainty in the law will likely remain for a while. However, the trend is clear, and the approach proposed here carries low cost and low risk, especially in comparison to the costs of litigation and the possibility that the class will be certified if the case proceeds. In short, if you seek a different outcome, try a different path. **ACC**

NOTES

1 Rule 68 of the Federal Rues of Civil Procedure allows a defendant to offer a judgment on specified terms. An offer not accepted within 14 days is deemed withdrawn. If the outcome at trial is more favorable to the defendant than the unaccepted offer, the plaintiff must pay defendant's costs (not necessarily attorney's fees) incurred after the offer was made.

2 *Sosna v. Iowa*, 419 U.S. 393 (1975); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980); *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980).

3 Rule 23 governs class actions in federal courts, and there are identical or similar rules in state courts. Among other requirements (e.g., that common questions predominate over individual questions of liability, injury, and proof of damages), the Rule also asks whether a class action is a superior means to relief for the putative class. The *Aqua Dots* court reasoned that there was no benefit to incurring the costs of a class action if a consumer could get a refund without it.

4 See, e.g., *Porter v. Collecto, Inc.*, (S.D. Fla. 2014); *Masters v. Wells Fargo Bank S. Cent., N.A.*, (W.D. Tex., 2013); *Keim v. ADF MidAtlantic*, LLC, (S.D. Fla., 2013).

ACC EXTRAS ON... Class actions

QuickCounsel
Class Actions in Europe (June 2011). *www.acc.com/quickcoun/ca_jun11*

Program Materials
What Do You Mean, You Don't Know? Evaluating Your Litigation Exposure (Oct. 2013). *www.acc.com/pm/litigation_oct13*

Sweepstakes, Raffles, Contests and Lotteries: What Every In-house Lawyer Needs to Know (Oct. 2012). *www.acc.com/pm/lotteries_oct12*

Top Ten
Wake Up and Smell the Options Top Ten Alternatives To Litigation (March 2012). *www.acc.com/topten/litigation_mar12*

Practice Resource
For more information on class actions, read ACC Alliance Practical Law's article regarding the evolving legal landscape of class action. *bit.ly/longliveclassactions*

ACC HAS MORE MATERIAL ON THIS SUBJECT ON OUR WEBSITE. VISIT *WWW.ACC.COM*, WHERE YOU CAN BROWSE OUR RESOURCES BY PRACTICE AREA OR SEARCH BY KEYWORD.

PHELPS DUNBAR LLP

Putting the Third Coast First®

The Third Coast is where the action is.

It's an economic phenomenon. Between the freight moving on the Mississippi, the oil production in the Gulf, and companies "reshoring" their manufacturing back from abroad, the Third Coast is big and getting bigger. With the largest port in the U.S., 28% of the nation's oil and gas employment, and 14% population growth in the last ten years, business opportunities are everywhere. And as a law firm long embedded in the business culture of the area, we're the ones who can help you seize those opportunities.

Michael D. Hunt, Managing Partner
Baton Rouge
225 346 0285 direct
michael.hunt@phelps.com