IN RECENT YEARS, California has become a haven for consumer class action lawsuits. This surge in class action complaints led the American Tort Reform Foundation to dub the Golden State as America’s number one “judicial hellhole.” Many factors account for this spike in consumer class actions. One key reason has been several high-profile pro-plaintiff decisions that the Ninth Circuit and the California Supreme Court have issued in the past five years.

The pendulum, however, may finally have begun swinging the other way. Judges in California, especially federal judges, have taken a more skeptical view of many consumer class action lawsuits. They have narrowly interpreted the pro-plaintiff decisions and have shown a willingness to apply common sense in dismissing many of the more dubious class action lawsuits at the pleading stage.

Over the past several years, the plaintiffs’ bar has challenged a wide swath of business practices, ranging from the sending of unauthorized text message advertisements to covert tracking of Internet web-surfing information, but most consumer class action lawsuits in California are still based on advertising. In a typical class action suit, plaintiffs’ lawyers allege that companies have deceived consumers through false and misleading advertisements or packaging on the product.

For example, Ferrero, the company that makes Nutella spread, was hit with a class action lawsuit alleging that it had misleadingly marketed its chocolate spread as “healthful.” According to the complaint, Ferrero engaged in an ad campaign of “images and videos of wholesome families and happy, healthy children enjoying Nutella for breakfast before going to school.” Despite the relatively scant evidence of wrongdoing, the company recently entered into a $3 million settlement. Companies as diverse as Dell and Diamond Foods have recently settled multimillion dollar false advertising lawsuits filed in California.

This recent wave of consumer class action lawsuits can be attributed to several interrelated factors. First, California’s consumer protection laws—the Unfair Competition

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Law, the Consumer Legal Remedies Act, and the False Advertising Law—are generally considered to be more advantageous to plaintiffs than similar laws of many other states. For example, California, unlike many of the other states, does not have a scienter requirement for false advertising claims. Moreover, many California courts have construed these statutes broadly in favor of plaintiffs, even though the plain language of California’s statutes is not markedly different from the laws of other states. Some California courts, for instance, have held that there is no need to show reliance or damages by unnamed members of the proposed class.6

More recently, the California Supreme Court eroded the statutory standing requirement for false advertising claims. In Kwisket Corporation v. Superior Court, the plaintiff bought a lockset that was labeled with the words “Made in the U.S.A.” but a small fraction of the parts was made elsewhere.7 Although there was no allegation that the lockset was defective, the plaintiff brought a putative class action lawsuit against the maker of the lockset. The maker argued that the plaintiff had suffered no real harm because the lockset performed as advertised and as one would reasonably expect from a lockset. Nonetheless, the California Supreme Court held that labeling does matter and that the plaintiff had suffered a sufficient injury to pursue the lawsuit.

The Ninth Circuit has also played a role in making California a haven for plaintiffs’ lawyers. Its Williams v. Gerber decision, in particular, has been a boon to the plaintiffs’ bar because it contains language that can be construed as making it difficult for a defendant to prevail on a Rule 12(b) motion. Specifi cally, some have read the opinion as precluding a dismissal on the pleadings even if a product’s packaging accurately discloses all ingredients. The Ninth Circuit reversed the dismissal of a lawsuit challenging the packaging of Gerber’s Fruit Juice Snacks. Although the ingredient list accurately disclosed all the ingredients, the court held that the packaging was potentially deceptive because it depicted a picture of a fruit that was not contained in the product. The Ninth Circuit thus held that there was a factual issue that would need to be decided at a later stage.9

Moreover, the Class Action Fairness Act (CAFA) may have had the unintended effect of encouraging a different form of forumshopping—not by state but by federal circuit. Concerned by plaintiffs’ lawyers who were forum-shopping for state courts that are notorious for certifying classes even in dubious cases, Congress passed CAFA in 2005, making it easier for defendants to remove cases to federal courts.10 Under CAFA, there is no longer a requirement for “complete diversity” (none of the plaintiffs can be from the same state as any of the defendants). Rather, “minimal diversity” (at least one plaintiff is from a state different from one defendant) is sufficient to confer federal jurisdiction as long as the proposed class has more than 100 members and the amount in controversy exceeds $5 million.11

The effect of the CAFA has served to neutralize many proplaintiff forums. For example, in Texas state court judges are often more likely to favor class action plaintiffs than federal judges, many of whom have a more probusiness bent. On the other hand, the plaintiff’s bar views California’s federal bench as more consumer-friendly, especially because California federal judges must decide cases under the penumbra of some of the Ninth Circuit’s more proplaintiff opinions. Indeed, one plaintiffs’ lawyer who is handling over 30 food labeling cases in the Northern District of California told a legal newspaper, “The law is more favorable here in than in any other jurisdictions that we’ve looked at.”12

Finally, the U.S. Supreme Court’s decision in AT&T Mobility v. Concepcion has made false advertising claims more enticing to plaintiffs’ lawyers.13 In Concepcion, the plaintiffs brought a putative class action suit against AT&T, alleging that it had falsely advertised its phones as “free” when in fact it had charged a sales tax on the full price of the phones.14 Relying on an arbitration provision in the AT&T service agreement that barred class actions, AT&T moved to compel the case to arbitration. The district court and the Ninth Circuit held that the arbitration provision was unconscionable and thus unenforceable, but the U.S. Supreme Court reversed and upheld the validity of such arbitration provisions.15 The Concepcion decision significantly reduced the power of class action lawsuits because companies can now insert arbitration provisions that bar class actions into their contracts with consumers. For most consumer goods involving claims of false advertisements, however, no written contracts (and thus no arbitration provisions) are implicated. Accordingly, many plaintiffs’ lawyers have focused their attention on products that are sold without formal contracts.

A High Burden for Dismissal

If false advertising cases can survive a motion to dismiss, settlement leverage increases dramatically. Furthermore, if a class is certified, a substantial class settlement becomes more likely regardless of the merits of the case. While a class action can be a useful and necessary device to remedy certain wrongs, a large number of the recent false advertising suits arguably lack merit. They are essentially lawyer-manufactured lawsuits in which there has been no real harm to the consumers, and the supposedly misleading statement is in reality marketing fluff that no reasonable consumer would believe.

The Nutella case is a prime example. Notwithstanding the television ads, it seems highly unlikely that most consumers believed that a hazelnut and chocolate spread is some-
how healthful. Fortunately for plaintiffs’ lawyers, it is generally difficult to prevail on a motion to dismiss under California’s consumer protection laws. On the grounds that a factual issue may exist, too many judges have declined to dismiss even highly questionable class action lawsuits at the pleading stage. Further, it is comparatively cost-efficient for plaintiffs’ lawyers to pursue a false advertising case, at least compared with other class action cases. For example, false advertising lawsuits are not likely to involve expensive expert analysis as those in mass tort cases.

Despite this tilted playing field, companies are not defenseless against these false advertising lawsuits. Defense counsel can and should vigorously contest these lawsuits at every stage, from motion to dismiss to class certification to summary judgment. But that does not mean that companies have to slog through years of attrition to defeat certification or prevail on summary judgment.

Indeed, many judges, especially at the federal level, have become more receptive to dismissing class action lawsuits at the pleading stage, often through preemption. These Ninth Circuit decisions are particularly notable because a plaintiff’s lawyer invokes the mantra that there supposedly is a factual dispute or that dismissals should supposedly be rare under California’s consumer protections laws. The recent case of Williamson v. Apple, Inc., is instructive. The plaintiff alleged that the iPhone’s glass casing cracked when dropped, despite Apple’s statements that it used “the same type of glass used in the windshields of helicopters and high-speed trains” and that it was “20 times stiffer and 30 times harder than plastic.”

The plaintiff’s counsel insisted that the court should not decide this issue at the pleading stage and should let it proceed further. The court dismissed this case, noting that “it is a reasonable consumer.…It seems a suspension of logic to say that [Apple’s] marketing campaign….somewhere erases these images from the collective experience such that the reasonable consumer could expect that glass could not break if dropped.” Other courts have similarly applied common sense in dismissing false advertising cases.

Another federal court in California recently went further in indicating that industry norms and practices should be taken into account even at the pleading stage. The putative class action complaint alleged that the product Sugar in the Raw misled consumers into believing that the product contained unprocessed and unrefined sugar. In dismissing the complaint, the court held that “a significant portion of the general consuming public, acting reasonably in the circumstances, could be misled.” The court must view the challenged advertisement or packaging from the perspective of a “reasonable consumer,” not the unwary consumer” or “a least sophisticated consumer.”

These Ninth Circuit decisions are particularly notable because they were decided after Williams v. Gerber. The Ninth Circuit in Williams refused to dismiss the case at the pleading stage, even though the product’s ingredient list had accurately disclosed all of the ingredients, but many federal courts in California have recognized that the holding in Williams is actually much narrower. The Ninth Circuit said that the case could not be dismissed at the pleading stage because there were alleged affirmative misrepresentations in the front of the packaging. Thus, Williams reaffirms the unremarkable proposition that a defendant cannot make a false statement in the front of the packaging and “then rely on the ingredient list to correct those misinterpretations [to] provide a shield for liability for the deception.”

Many federal district court judges have taken note that they need not let a questionable case proceed merely because a plaintiff’s lawyer invokes the mantra that there supposedly is a factual dispute or that dismissals should supposedly be rare under California’s consumer protections laws. The recent case of Williamson v. Apple, Inc., is instructive. The plaintiff alleged that the iPhone’s glass casing cracked when dropped, despite Apple’s statements that it used “the same type of glass used in the windshields of helicopters and high-speed trains” and that it was “20 times stiffer and 30 times harder than plastic.”

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“widely marketed” as “raw cane sugar,” not unprocessed and unrefined sugar.36

As one court put it in dismissing a class action complaint, allowing a questionable action complaint, allowing a questionable case to survive a Rule 12(b) motion “would require this Court to ignore all concepts of personal responsibility and common sense.”37 That court had it exactly right. Federal judges should and must serve as guardians against junk class action lawsuits.

1 See http://www.judicialhellholes.org/2012-13/california
3 In re Ferrero Litig., No. 3:11-CV-00205 at 27 (S.D. Cal. 2010).
7 21 U.S.C. §343-1(a) (“no State or political subdivision of a State may directly or indirectly establish...any requirement for...labeling of food...that is not identical to the requirement[s]” set forth in the NLEA).
8 Chacanaca, 752 F. Supp. 2d at 1111.
10 Id. at 1744.
11 Id. at 1749-54.