

The Ghost in the Darkness – Advanced Techniques for Defending Against Class Action Litigation



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Litigating Advertising Disputes
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Why California?

- Perceived as more liberal bench
- Legal culture is permissive toward plaintiffs
 - Skeptical toward preemption
 - Understand consumer laws to be very broad
- Lots of plaintiffs' lawyers
- Lots of public interest groups
- Legal and media center
- A single state class is big
- Not such a bad place to visit



Why *Not* California?

- Sophisticated bench
 - Many more big firm lawyers
 - State court bench is above average
 - Open to creative arguments
 - Aware of disproportionate discovery
- Political culture is skeptical toward plaintiffs
 - Prop 64 victory for business commur
 - State officials trimming their sails
- Some sophisticated journalists
- If you can win here
- Not such a bad place to visit



Who Is Behind The Litigation?



SEEGERWEISS LLP

BARON BUDD, P.C.

Pratt & Associates

Stember Feinstein

Braun Law



Janet Lindner
Spielberg

BARRETT LAW GROUP, P.A.

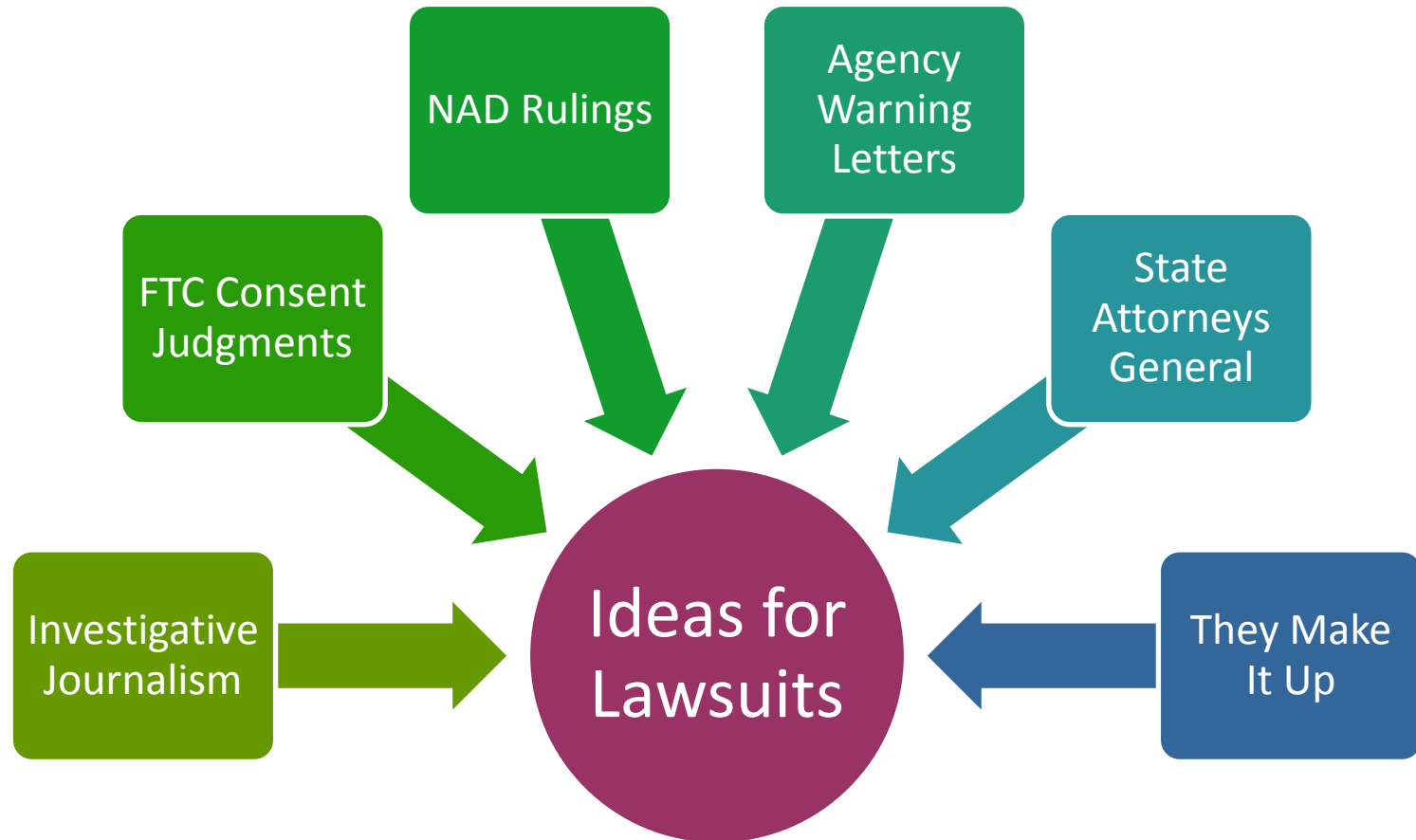
Carella, Byrne, Cecchi, Olstein, Brody
& Agnello, P.C.

MEISELMAN, DENLEA, PACKMAN,
CARTON & EBERZ P.C.
Attorneys at Law



REESE RICHMAN LLP

Where Do Plaintiffs (Lawyers) Get Inspiration?



What Do They Want?

- Money (Duh!)
 - Different business models
 - Quick shakedown
 - Stepwise escalation
 - Trench warfare
- Changed Practices
 - Sometimes more genuine than you think
 - Sometimes a fig leaf
- Respect
 - Judges (resume for lead counsel appointment)
 - Public interest groups (more cases, cooperation, legitimacy)
 - Other plaintiffs' lawyers

Efficient Settlement: Step One

- Analyze the Claim in Detail
 - Are we right on the law?
 - How will we prove it?
 - Who has the burden of proof?
 - What are the challenges to class cert?
- Analyze the Options
 - Change our label/ad claims?
 - Do part of what plaintiff wants?
- Analyze Costs of Litigation
 - Detailed budgets based on experience
 - Decision tree to map out possible path

Efficient Settlement: Step Two

- Analyze the Plaintiff/Plaintiff's Counsel
 - Motivations?
 - Track record?
 - Funding?
 - Possible team?
 - Possible coordination with prosecutors, public interest groups
- Out of Court vs. In-Court
- Publicity
- Litigate for the Right Reasons

Top Ten for Litigation Avoidance

10. Match marketing to R&D to support claims
9. Change labels frequently
 - Ascertainability, class size become issues
8. The dog brands can be trouble
7. Attend to regulatory compliance
 - It can be very complicated
 - It requires more resources (money and time) than most companies realize
6. Regulatory compliance is only a floor
 - There are 50 states plus other federal agencies

Top Ten for Litigation Avoidance

5. Consider other sources of guidance
 - FTC, NAD, court rulings, settlements, trade associations
4. Review old labels periodically
 - The law changes, particularly other sources of guidance
3. If you buy a brand, review the label
2. Think like a plaintiff's lawyer
 - Label review must be thorough and creative
1. Question the marketing department
 - What is this claim worth in \$\$?