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9th Circ. Addresses Lower Court Split On False Ad Cases

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Last week, the Ninth Circuit answered a question that has long split the district courts in that circuit: whether a plaintiff in federal court who was previously deceived by allegedly false or misleading advertising possesses Article III standing to seek an injunction targeting that advertising, even when she has become aware of the truth about the product and so cannot be misled by the advertising again in the future. In an opinion with important implications for false advertising cases in the Ninth Circuit, the court answered that question in the affirmative, "resolv[ing] this district court split in favor of plaintiffs seeking injunctive relief."[1]

The underlying case concerns several brands of premoistened wipes that are sold by Kimberly-Clark Corp. and labeled as "flushable." The plaintiff, Jennifer Davidson, alleged that the labeling of these wipes as "flushable" was false and misleading because the wipes are not actually suitable for flushing down the toilet. On behalf of a putative class of California consumers, Davidson asserted causes of action under California's false advertising and consumer protection laws and sought various remedies, including an order enjoining Kimberly-Clark from representing the wipes to be "flushable." The district court granted Kimberly-Clark's motion to dismiss Davidson's request for injunctive relief for lack of standing, and the plaintiff appealed.

In an opinion issued on Oct. 20, 2017, the Ninth Circuit reiterated the familiar proposition that, to have standing to seek injunctive relief, a plaintiff in federal court must establish an actual and imminent threat of future injury. The court then observed that the district courts had "split dramatically" on whether a false advertising plaintiff can make that showing. Some courts, including the district court presiding over Davidson's case, had concluded that a plaintiff who was deceived before but is now aware of the deceptive advertising cannot be fooled by that representation into buying the product again. These courts have thus rejected standing, reasoning that there is no plausible risk of future injury stemming from the challenged advertising.

The Ninth Circuit, however, agreed with the district courts that had concluded such a plaintiff could face a threat of future injury sufficient to support standing. Reasoning that "[k]nowledge that the advertisement or label was false in the past does not equate to knowledge that it will remain false in the future," the court articulated two ways in which a plaintiff could plausibly allege a threat of future injury. First, a plaintiff could allege that she will be "unable to rely on the product's advertising or labeling in the future, and so will not purchase the product although she would like to"; alternatively,

she could allege that "she might purchase the product in the future, despite the fact it was once marred by false advertising or labeling, as she may reasonably, but incorrectly, assume the product was improved."[2] Applying this standard, the court concluded Davidson had adequately alleged that she wished to buy Kimberly-Clark's flushable wipes in the future but could not rely on the "flushable" representation with any confidence, thus establishing a threat of future injury sufficient to confer standing.

The Ninth Circuit stated that its holding would avoid "anomalies" that would result from a contrary rule. For example, the court suggested that "California's consumer protection laws would be effectively gutted" if a consumer who purchased a product and then learned it was falsely advertised was precluded from seeking injunctive relief. In addition, the court's permissive view of standing would mitigate the risk of a "perpetual loop" of consumers filing false advertising claims in state court, defendants removing the cases to federal court, and the federal court dismissing any claims for injunctive relief on standing grounds.

The Davidson opinion may be an attractive candidate for further review. While the court's opinion focused on injury in fact, it acknowledged that redressability is also one of the "irreducible constitutional minim[a] of standing."[3] But the court did not attempt to explain how the injunctive relief Davidson is seeking would redress the injury she alleges — and it does not appear that it would. The Ninth Circuit found that Davidson is threatened with injury in that she wants to purchase Kimberly-Clark's flushable wipes again but has no way of knowing whether the "flushable" representation she sees on the pack is true. But Davidson is not seeking an injunction to make Kimberly-Clark sell a different form of wipe bearing the "flushable" claim that meets her standard for flushability. Rather, she is seeking to enjoin Kimberly-Clark from labeling its existing wipes as "flushable" — and, on her own terms, she has no interest in buying those wipes. The Ninth Circuit did not acknowledge or address this apparent disconnect between Davidson's claimed injury and the relief she is seeking. The Ninth Circuit's conclusion that Davidson's threatened injury was "actual and imminent," and not "conjectural or hypothetical," may similarly invite scrutiny.

Also troubling is the Ninth Circuit's suggestion that a contrary result would have "effectively gutted" California's consumer protection laws. Given the emphasis on this point, one might reasonably question the court's conspicuous disclaimer that, nonetheless, "our conclusion is not based on this consideration." The U.S. Supreme Court has explicitly cautioned the lower courts not to read public policy exceptions into constitutional standing requirements.[4] Indeed, many district courts considering the same standing issue addressed in Davidson have concluded that "[p]otential 'evisceration' of the intent underlying a statutory scheme may be unfortunate, but it is not a valid reason to confer standing in federal court when the paramount constitutional obligation is otherwise left unsatisfied."[5]

In the meantime, however, the Davidson opinion will have an immediate and practical effect on false advertising cases in the Ninth Circuit. The court's opinion not only holds that a plaintiff challenging advertising she knows to be false or misleading may have standing to seek injunctive relief, but also lays out a road map for alleging facts sufficient to support such standing. As such, the Ninth Circuit has likely ensured that successful challenges at the motion to dismiss stage to a plaintiff's standing to enjoin false advertising will become increasingly rare. Rather, defendants' focus should shift to developing facts in discovery that could support a challenge to standing at later stages of the case, including at class certification or summary judgment. A plaintiff who disclaims at deposition any interest in buying the relevant product again, for example, should be vulnerable to a standing challenge even under the Ninth Circuit's new guidance.

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[1] See Davidson v. Kimberly-Clark Corp., No. 15-16173, 2017 WL 4700093, at *9 (9th Cir. Oct. 20, 2017).

[2] See id. at *9.

[3] See id. at *7.

[4] See, e.g., Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1154 (2013) (cautioning that an "assumption that if [a plaintiff] has no standing to sue, no one would have standing, is not a reason to find standing") (quotations and citations omitted).

[5] Anderson v. The Hain Celestial Grp., Inc., 87 F. Supp. 3d 1226, 1234 (N.D. Cal. 2015).