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9th Circ. Is Wrong On Consumer Fraud Injunctive Relief Issue

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Plaintiffs in consumer fraud class actions regularly ask courts to enjoin defendants from continuing their allegedly unlawful advertising or labeling.[1]

Defendants in such cases, on the other hand, often argue that plaintiffs lack standing to seek such relief because they face no imminent risk of future injury — after all, plaintiffs necessarily know about any false advertising or deceptive labeling alleged in their own complaints and thus face no real risk of future deception.[2]

For years, defendants' arguments in this regard met with mixed results in the federal district courts. In 2012, however, several circuits began to hold that previously deceived consumers lacked standing for injunctive relief.[3]

In the last several years, a circuit split has developed, with the U.S. Court of Appeals for the Ninth Circuit concluding that previously deceived consumers may have standing for injunctive relief under certain circumstances, and the U.S. Court of Appeals for the Second and Third Circuits conclusively holding that they do not.

This split makes it possible that the U.S. Supreme Court will soon address the issue. If it takes this issue up, the court should side with the circuits that hold that previously deceived consumers lack standing.

The Circuit Split

Article III standing for injunctive relief requires more than past harm. Plaintiffs must show a risk of future injury that is certainly impending[4]. That risk of future injury must be concrete and particularized[5] and actual and imminent; allegations of possible future injury are not sufficient.[6]. Defendants in consumer fraud cases argue that previously deceived consumers cannot meet this requirement.

The Ninth Circuit's Davidson Decision and Its Potential Expansion in Coca-Cola

In 2018, the Ninth Circuit dealt defendants in such cases an apparent blow in Davidson v. Kimberly-Clark Corp.

There, the plaintiff alleged that the defendants falsely advertised their premoistened wipes as flushable.[7] The court held that the plaintiff had alleged standing by pleading that she wished to buy flushable wipes in the future and regularly visited stores where the defendants' products were sold but would have "no way of determining whether the representation 'flushable' is in fact true" in the future.[8]

Davidson identified two situations in which "misled consumers may properly allege a threat of imminent or actual harm sufficient to confer standing to seek injunctive relief."[9] First, a consumer could make "plausible allegations 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."[10]

Alternatively, a consumer could plausibly allege "that she might purchase the product in the future … as she may reasonably, but incorrectly, assume the product was improved."[11]

Although undoubtedly a loss for defendants, Davidson has also not shaken out to be the complete victory the plaintiffs bar may once have hoped.

District courts have held that Davidson is not "a blanket conclusion that plaintiffs seeking injunctive relief in mislabeling class actions always have standing"[12] and several district court decisions have distinguished Davidson on its facts.[13]

Indeed, the Ninth Circuit itself has distinguished Davidson, including holding that the plaintiffs lacked standing where they alleged only that they would consider buying the defendant's products again.[14] Nevertheless, because of the fact-specific nature of the inquiry, the question continues to be litigated in the Ninth Circuit.

A case currently pending before the Ninth Circuit, In re: Coca-Cola Products Marketing & Sales Practices Litigation, could further expand Davidson's holding.

The plaintiffs in that case allege that Coke's label misrepresents that the product is free of artificial flavors and chemical preservatives.[15] The district court held that the plaintiffs, despite their knowledge of this alleged false labeling, have standing to seek injunctive relief because they allege they are unable to rely on the label in the future and would consider purchasing Coke again were it properly labeled.[16]

At oral argument on Coke's appeal, Judge Marsha S. Berzon — who was also on the Davidson panel — characterized it as a "difficult case."[17]

The Developing Majority Rule

If the Ninth Circuit expands Davidson in Coca-Cola, it will only further cement its place as an outlier.

The Second and Third Circuits have both recently held that previously deceived consumers lack standing for injunctive relief.[18] And the U.S. Court of Appeals for the Seventh Circuit has agreed.[19]

In the 2018 case in the U.S. Court of Appeals for the Third Circuit, In re: Johnson & Johnson Talcum Powder Products Marketing, Sales Practices & Liability Litigation, for example, where the plaintiff alleged that Johnson & Johnson failed to warn consumers of an increased risk of cancer associated with its baby powder, the Third Circuit held that the plaintiff lacked standing to seek injunctive relief.[20]

"The premise that former customers could again be deceived by the very sort of advertising practices over which they were already pursuing equitable relief," the Third Circuit held, was "unmoored from reality."[21] The plaintiff's argument, the Third Circuit wrote, was nothing more than a "'stop me before I buy again' claim."[22]

The U.S. Court of Appeals for the Second Circuit also recently rejected the potential grounds for standing set out in Davidson. In the 2020 case Berni v. Barilla SpA, the court held that past purchasers were not likely to encounter future harm for two reasons.[23]

First, they are "not bound to purchase a product again — meaning that once they become aware they have been deceived, that will often be the last time they will buy that item."[24] Second, "even if they do purchase it again, there is no reason to believe that all, or even most, of the class members will incur a harm anew."[25] Instead of being deceived again, consumers that buy again "will be doing so with exactly the level of information that they claim they were owed from the beginning."[26]

Berni also rejected arguments that prohibiting previously deceived purchasers from seeking injunctive relief would create a dilemma in which "[t]he only way a consumer could enjoin deceptive conduct would be if he were made aware of the situation by suffering injury," yet "once the consumer learned of the deception, he would voluntarily abstain from buying and therefore could no longer seek an injunction."[27]

The Second Circuit explained that it was not at liberty to create an equitable exception to constitutional standing requirements to achieve a policy objective.[28]

Standing for Previously Deceived Consumers Seeking Injunctive Relief Is Inconsistent with Article III

The Second and Third Circuit's rejections of the reasoning underlying Davidson increases the likelihood that the Supreme Court will step in to address the issue, particularly if the Ninth Circuit expands Davidson further in a case like Coca-Cola. If it does take the issue up, the court should side with the Second and Third Circuits.

First, as a matter of common sense, a consumer who knows the truth about a misrepresentation on a product's label or packaging will almost never face an actual or imminent threat of future injury.

Davidson was correct that past knowledge of falsity does not always equate to knowledge that a representation will remain false.[29] But, in most cases, it will be entirely implausible that a consumer alleging false advertising or labeling will be deceived by the very same alleged misconduct in the future.

Courts thus should not, as Davidson suggests, assume that a previously deceived plaintiff faces a plausible risk of future injury.

Davidson's suggestion that a previously deceived consumer might purchase the product again if he reasonably, but incorrectly, believes it has been improved is even less consistent with Article III's requirement of a concrete and particularized future injury.

As several post-Davidson cases have acknowledged, such some day expressions of intent are insufficient to establish a concrete risk of future injury.[30] As the Supreme Court's 2020 decision in Carney v. Adams reiterated, a few words of general intent are not sufficient to establish a concrete risk of injury.[31]

And, as the Second and Third Circuits have recognized, it is pure speculation to suggest that a consumer who knew she had once been fooled would be fooled again and again.[32] It is implausible that consumers ignore their past dealings in making future purchase decisions.[33]

Nor are there good grounds for an equitable exception to the requirements of standing for consumer fraud cases.

As the Second Circuit has recognized, federal courts should not create an equitable exception to the standing doctrine to achieve a policy objective.[34] Federal courts are constrained by Article III to hear only cases or controversies and are not empowered to create equitable exceptions to the "irreducible constitutional minimum of standing."[35]

As noted in the 2017 case Langan v. Johnson & Johnson Consumer Cos. in the U.S. District Court for the District of Connecticut, "[r]egardless of the salutary purpose of consumer protection statutes, they cannot alter the bedrock requirements for federal constitutional standing."[36]

Even if the standing doctrine could bend for policy reasons, the policy justifications cited by courts that have found standing for previously deceived consumers are not compelling.

Some courts, for example, have suggested that, by preventing consumers from suing for injunctive relief in federal court, a rule that previously deceived consumers lack standing for injunctive relief would denigrate state statutes that allow for such relief and create a Catch-22 in which the only plaintiffs with knowledge of false advertising lack the standing to seek relief.[37]

But the fact that there may be "no identifiable plaintiff who may pursue a particular claim has never been accepted as adequate reason to confer standing on a plaintiff who is otherwise unable to meet the standing doctrine's requirements."[38] And, even if it were, the supposed Catch-22 is illusory, because previously deceived consumers are not without potential relief.

Such consumers may still sue for damages under most states' consumer fraud laws. And most state attorneys general are authorized to seek injunctive relief under state consumer fraud laws.

The requirements of Article III do not support standing for previously deceived consumers seeking injunctive relief in private litigation. Although the issue will no doubt continue to be litigated, particularly in the Ninth Circuit, the Supreme Court should step in to resolve the dispute and put an end to such "stop me before I buy again" claims.

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[1] See, e.g., Campbell v. Whole Foods Mkt. Grp., Inc ., 2021 WL 355405, at *15-16 (S.D.N.Y. Feb. 2, 2021).

[2] See Lujan v. Defenders of Wildlife , 504 U.S. 555, 564 (1992).

[3] See McNair v. Synapse Grp. Inc. , 672 F.3d 213, 225-26 (3d Cir. 2012); Nicosia v. Amazon.com, Inc. , 834 F.3d 220, 239 (2d Cir. 2016); see also Conrad v. Boiron, Inc ., 869 F.3d 536, 542 (7th Cir. 2017) (agreeing that previously deceived consumer lacked standing).

[4] Davidson v. Kimberly-Clark Corp. , 889 F.3d 956, 967 (9th Cir. 2018) (emphasis in original) (quoting Clapper v. Amnesty Int'l USA , 568 U.S. 398, 409 (2013)).

[5] Carney v. Adams , 141 S.Ct. 493, 498 (2020) (quoting Lujan, 504 U.S. at 560).

[6] Davidson, 889 F.3d at 968 (emphasis in original) (quoting Summers v. Earth Island Inst. , 555 U.S. 488, 493 (2009); Clapper, 568 U.S. at 409).

[7] Id. at 961-62.

[8] Id. at 962, 972.

[9] Id. at 961.

[10] Id. at 969-70.

[11] Id. at 970.

[12] Schneider v. Chipotle Mexican Grill, Inc. , 328 F.R.D. 520, 528 (N.D. Cal. 2018).

[13] See, e.g., Cordes v. Boulder Brands USA, Inc ., 2018 WL 6714323, at *4 (C.D. Cal. Oct. 17, 2018); Anthony v. Pharmavite , 2019 WL 109446, at *6 (N.D. Cal. Jan. 4, 2019).

[14] See Lanovaz v. Twinings N. Am., Inc. , 726 F. App'x 590, 591 (9th Cir. 2018); see also Min Sook Shin v. Umeken USA, Inc. , 773 F. App'x 373, 375 (9th Cir. 2019).

[15] In re Coca-Cola Prod. Mktg. & Sales Practices Litig ., 2020 WL 759388, at *1 (N.D. Cal. Feb. 14, 2020).

[16] Id. at *6-9.

[17] Oral Argument at 35:15, In re Coca-Cola Prod. Mktg. & Sales Practices Litig. (No. II), No. 20-15742 (9th Cir.), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000018815.

[18] See Berni v. Barilla S.p.A. , 964 F.3d 141, 149 (2d Cir. 2020); In re Johnson & Johnson Talcum Powder Prod. Mktg., Sales Practices & Liab. Litig., 903 F.3d 278, 293 (3d Cir. 2018); Thorne v. Pep Boys Manny Moe & Jack Inc., 980 F.3d 879, 896 (3d Cir. 2020).

[19] See Conrad, 869 F.3d at 542.

[20] 903 F.3d at 292.

[21] Id.

[22] Id. at 292-93.

[23] 964 F.3d at 147.

[24] Id.

[25] Id. at 148.

[26] Id.

[27] Id. (quoting Belfiore v. Procter & Gamble Co ., 311 F.R.D. 29, 67 (E.D.N.Y. 2015)).

[28] Id.

[29] 889 F.3d at 969.

[30] See, e.g., Lanovaz, 726 F. App'x at 591.

[31] 141 S.Ct. at 501 (2020).

[32] McNair, 672 F.3d at 225 n.15.

[33] Id.

[34] Berni, 964 F.3d at 148.

[35] Lujan, 504 U.S. at 560.

[36] Langan v. Johnson & Johnson Consumer Cos ., 2017 WL 985640, at *11 (D. Conn. Mar. 13, 2017), vacated on other grounds, 897 F.3d 88 (2d Cir. 2018).

[37] Davidson, 889 F.3d at 970; Belfiore v. Procter & Gamble Co., 94 F. Supp. 3d 440, 445 (E.D.N.Y. 2015).

[38] Langan, 2017 WL 985640, at *11.

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