WINSTON & STRAWN LLP

BLOG

# Ninth Circuit Right on Standing for Previously Deceived Consumers—but Uncertainty Remains

SEPTEMBER 21, 2021

## Key takeaway

The Ninth Circuit recently held that previously deceived consumers lacked Article III standing to enjoin Coca-Cola from labeling its Coke products as free of artificial flavors and chemical preservatives where they alleged nothing more than an interest in proper labeling. The unpublished decision demonstrates that defendants can prevail on this issue when facing a potential injunction against their advertising or labeling, but leaves uncertainty and potential ammunition for consumer-fraud plaintiffs.

---

In June, we warned that *In re Coca-Cola Products* could deepen the divide between the Ninth Circuit and other courts on a recurring issue in consumer class actions—whether plaintiffs have standing to seek injunctions barring allegedly false advertising or labeling. This is an important issue for defendants—even in cases with relatively low potential for monetary exposure, such injunctions threaten expensive and disruptive labeling and advertising changes. Several weeks ago, the Ninth Circuit held (in an unpublished memorandum decision) that plaintiffs alleging mislabeling of Coke had "not demonstrated a threat of future harm sufficient to support their claim for injunctive relief."[1] The Ninth Circuit got it right, but *Coca-Cola* still leaves some uncertainty about standing for injunctive relief in this circuit.

Several other circuits have correctly held that, because the plaintiffs necessarily know about deceptive advertising or labeling alleged in their own complaints and thus cannot be deceived again, plaintiffs in such cases lack the "imminent risk" of future injury necessary for standing to seek injunctive relief.[2] The Ninth Circuit is the outlier. In 2018, it held in *Davidson* that "misled consumers may properly allege a threat of imminent or actual harm" in two situations: where a plaintiff plausibly alleges that she (1) "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," or (2) "might purchase the product in the future … as she may reasonably, but incorrectly, assume the product was improved."[3] Although undoubtedly a blow to defendants, several courts—including the Ninth Circuit itself in other unpublished decisions—later distinguished *Davidson* and held that previously deceived consumers lacked standing for injunctive relief under certain circumstances.[4]

*Coca-Cola* put the question squarely before the Ninth Circuit again. At issue were allegations that Coke's label misrepresents that the product is free of artificial flavors and chemical preservatives.[5] The plaintiffs claimed that "they would consider purchasing" Coke again if it were "properly labeled."[6] The Ninth Circuit didn't bite, holding that "such an abstract interest in compliance with labeling requirements is insufficient" and that "the imminent injury requirement is not met by alleging that the plaintiffs would *consider* purchasing Coke" again.[7]

Although the court got it right, the opinion nevertheless provides some fodder for consumer-fraud plaintiffs and lacks precedential value for defendants. As with many decisions in this context, *Coca-Cola* involved a heavily fact-based analysis, distinguishing the *Davidson* plaintiff's "personal and individual" harm from the abstract "informational" injury alleged by the Coke purchasers, who never alleged "a desire to purchase Coke *as advertised*."[8] The court characterized the *Davidson* scenarios as "non-exclusive" illustrations of threatened harm sufficient to satisfy Article III, leaving open the possibility that it will accept different theories in the future.[9] Moreover, the panel's decision to not formally publish the opinion impacts its reach.

Companies therefore continue to face risks associated with claims for injunctive relief in consumer-fraud cases in the Ninth Circuit. Winston attorneys have litigated this issue in multiple cases, and are available to assist defendants facing similar allegations in future cases.

---

[1] *In re Coca-Cola Prods. Mktg. & Sales Pracs. Litig. (No. II)*, 2021 WL 3878654, at *1 (9th Cir. Aug. 31, 2021).

[2] *See, e.g.*, *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).

[3] *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 961, 969-70 (9th Cir. 2018).

[4] *See, e.g.*, *Min Sook Shin v. Umeken USA, Inc.*, 773 F. App'x 373, 375 (9th Cir. 2019); *Lanovaz v. Twinings N. Am., Inc.*, 726 F. App'x 590, 591 (9th Cir. 2018); *Hanna v. Walmart Inc.*, 2020 WL 7345680 (C.D. Cal. Nov. 4, 2020); *Anthony v. Pharmavite*, 2019 WL 109446, at *6 (N.D. Cal. Jan. 4, 2019); *Cordes v. Boulder Brands USA, Inc.*, 2018 WL 6714323, at *4 (C.D. Cal. Oct. 17, 2018).

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

[6] *Coca-Cola*, 2021 WL 3878654, at *2.

[7] *Id.* (emphasis in original).

[8] *Id.* at *1-2 (emphasis in original).

[9] *Id.* at *1.

3 Min Read

## Authors

Jeff Wilkerson

Patrick Hogan

## Related Topics

False & Deceptive Advertising | Consumer Products

## Related Capabilities

Class Actions & Group Litigation | Advertising Litigation | Litigation/Trials

## Related Regions

North America

## Related Professionals

Jeff Wilkerson

Patrick Hogan

*This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.*