Knowledge of False Label Does Not Flush Standing for Injunction

Geoff A. Gannaway – February 6, 2018

A previously deceived consumer has Article III standing to seek an injunction against future false advertising, according to the U.S. Court of Appeals for the Ninth Circuit, resolving a split among district courts applying consumer protection laws. Although the plaintiff believed that the wipes the defendant had marketed as "flushable" were not actually suitable for disposal down a toilet, the court of appeals held that the plaintiff nevertheless had standing to seek an injunction.

In *Davidson v. Kimberly-Clark*, the plaintiff filed a class action lawsuit in state court, alleging violations of multiple California consumer protection statutes and seeking monetary and injunctive relief. The defendant removed the case to federal court pursuant to the Class Action Fairness Act (CAFA) and moved to dismiss. The U.S. District Court for the Northern District of California dismissed the plaintiff's claims for injunctive relief, reasoning that the plaintiff did not intend to purchase the same wipes in the future and therefore had no risk of future harm and no basis to enjoin the defendant from continuing to market the wipes as "flushable."

On appeal, the plaintiff argued that she still hoped to obtain flushable wipes and would purchase wipes from the defendant in the future if she could verify that they were "truly flushable." Without injunctive relief, the plaintiff explained, she would not be able to rely on future advertisements representing that the wipes were "flushable."

The Ninth Circuit noted that courts had "split dramatically" on whether a previously deceived consumer has standing to enjoin future false advertising of the same product. Courts denying standing typically reasoned that a plaintiff who becomes aware of deceptive advertising is unlikely to be misled into buying the same product again. Conversely, courts permitting plaintiffs to seek injunctive relief generally concluded that a plaintiff faces a threat of imminent or actual harm because he or she either cannot rely on a defendant's representations in the future or may again purchase the product based on the same misleading representations.

Ultimately, the Ninth Circuit adopted the latter rationale, explaining that "knowledge that the advertisement or label was false in the past does not equate to knowledge that it will remain false in the future." The appellate court observed that a plaintiff could be harmed in one of two ways: Some plaintiffs who would like to purchase a product might decline to do so because they are unable to rely on the defendant's representations, while other plaintiffs might, upon seeing a future representation, purchase the same undesirable product on the reasonable assumption that the manufacturer has improved it. The court found that the plaintiff had adequately alleged a threat of future harm because she desires to purchase truly flushable wipes, regularly visits stores selling the defendant's product, and has no way to determine if the "flushable"

representation is true. The Ninth Circuit concluded that denying standing to these types of plaintiffs would "effectively gut" California's consumer protection laws.

ABA Section of Litigation leaders agree that the Ninth Circuit's opinion honors the California legislature's intent to protect consumer rights. "If this case had come out the other way, defendants would be permitted to continue making knowingly false representations because they could remove every class action under CAFA and then get the injunctive relief thrown out," explains Kathryn Honecker, Scottsdale, AZ, cochair of the Section of Litigation's Consumer Litigation Committee.

While the opinion represents a victory for this plaintiff, not all consumers will have standing to pursue injunctive relief. "There is still room for defendants to challenge a plaintiff's standing," says Michelle M. Burke, Morristown, NJ, cochair of the Section's Young Advocates Committee. "If a plaintiff does not allege that he wants to purchase more of the defendant's product, or if he admits under oath that he does not intend to buy it, a defendant can argue that dismissal is appropriate because the consumer will not be harmed by future advertisements," notes Burke.

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