CARLTON FIELDS

Ninth Circuit Says Plaintiff Might Get Fooled Again

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Last week the Ninth Circuit reopened a key avenue in consumer false advertising class actions – injunctive relief. A growing number of trial courts had dismissed those claims, reasoning that plaintiffs who know of the alleged fraud aren't at risk of being fooled again. No more. In *Davidson v. Kimberly-Clark Corporation*, the Ninth Circuit held that a plaintiff who alleges that so-called "flushable wipes" are not actually flushable has standing to sue the seller of these wipes for injunctive relief, despite the fact that the allegations in the complaint make it clear that she no longer believes the product's labels. The plaintiff asserted claims under California's Unlawful Competition Law (UCL) and False Advertising Law (FAL). While the Ninth Circuit rejected all of the reasons the trial court used to dismiss the complaint, its most striking finding deals with the plaintiff's standing to seek injunctive relief. Injunctive relief can be costly to a defendant — not because it has to pay money to the plaintiff, but because it has to change its advertising and marketing, with literally millions upon millions of products caught in the stream of commerce and subject to either recall and repackaging or destruction. Early elimination of the injunctive claim takes that leverage away from plaintiffs so defendants often moved to dismiss the injunctive claims on standing grounds. Numerous district courts have found that similar plaintiffs lack standing to seek injunctive relief because, as one district court put it, "plaintiffs who are already aware of the deceptive nature of an advertisement are not likely to be misled into buying the relevant product in the future and, therefore, are not capable of

being harmed again in the same way." The Ninth Circuit rejected this basic argument, finding that there was "an actual and imminent, not conjectural or hypothetical threat of future harm" to the plaintiff, and holding 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." It was sufficient, the court found, that the plaintiff alleged that she still wants to buy such products if they are actually flushable, but that, if she were to see this representation on the defendants' products in the future, she "could not rely on that representation with any confidence." According to the court, this was enough of a threatened injury to establish standing. The court also opined that, if it found that this plaintiff lacked standing, no plaintiff asserting similar false advertising claims could get injunctive relief in federal court, despite the fact that the UCL specifically provides for such relief, thus gutting that statute. Injunctive relief is also important in these class actions as an individual plaintiff can win the injunction even without class certification; while the large damage awards only come into play if the class is actually certified by the court. This new ruling thus eliminates one method of limiting the risk of these consumer class actions in the Ninth Circuit and plaintiffs are sure to cite this new ruling in false advertising cases in federal courts across the country. Whether other circuits will follow the Ninth Circuit's lead remains to be seen.

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