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We don't know where we stand – three recent takes on injunctive relief standing in the Ninth Circuit

by Jay Bogan

Takeaway: "Most courts to have considered the issue agree . . . that consumer plaintiffs cannot pursue injunctive relief if they are already aware of the alleged deceptive practice." *Ulrich v. Probalance, Inc.*, No. 16 C 10488, 2017 WL 3581183, at *7 (N.D. Ill. Aug. 18, 2017). That sounds like common sense, given pronouncements by the U.S. Supreme Court that, for injunctive relief standing, the threat of injury must be "actual and imminent, not conjectural or hypothetical"; that the "threatened injury must be certainly impending to constitute injury in fact"; and that "allegations of possible future injury are not sufficient." But the Ninth Circuit recently took a markedly different route in *Davidson v. Kimberly-Clark Corp.*, 873 F.3d 1103 (9th Cir. 2017), where the panel elected to follow a pro-plaintiff line of district court authority. This post contrasts *Davidson*'s pro-plaintiff standing ruling with two unpublished Ninth Circuit decisions – issued before and after *Davidson* – holding that similarly-situated plaintiffs lacked standing to press injunctive relief claims.

Last April, a Ninth Circuit panel decided *Long v. Ingenio, Inc.*, 690 Fed. Appx. 497 (9th Cir. 2017), a case we discussed in a prior post. [***The Ninth Circuit affirms district court's dismissal of putative class action where named plaintiff lacked standing to assert claims for injunctive and declaratory relief***]. In *Long*, a business (Long Photo) claimed to have been defrauded into purchasing worthless "pay per call" advertising from an advertising and publishing company (Yellowpages) and sought to represent a putative class. But Long Photo never paid for the advertising, an essential requirement for seeking restitution. It also pressed claims for injunctive and declaratory relief.

The district court granted summary judgment in favor of Yellowpages and the Ninth Circuit affirmed. Regarding Long Photo's claim for injunctive relief, the Ninth Circuit ruled that it did not have standing to pursue a claim for injunctive relief because the parties no longer were in a contractual relationship, Long Photo was no longer threatened by the alleged misconduct, and there was no real or immediate threat of irreparable injury. 690 Fed. Appx. at 498 (citing *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1021-22 (9th Cir. 2004)). The Court of Appeals also ruled that the claim for declaratory relief was moot, because Yellowpages had represented it would not pursue a claim for monetary relief and had made a binding waiver of any compulsory counterclaim against Long Photo for the unpaid charges. *Id.* (citations omitted).

Six months later, in October, the panel in *Davidson v. Kimberly-Clark Corp.*, 873 F.3d 1103 (9th Cir. 2017), went in an entirely different direction. In that case, the plaintiff (Jennifer Davidson) paid extra for wipes

labeled as “flushable” because she believed that flushable wipes would be better for the environment, and more sanitary, than non-flushable wipes. She alleged that the Kimberly–Clark wipes she purchased were not, in fact, flushable. She sought not only to recover the premium paid for the allegedly flushable wipes, but also an order requiring Kimberly–Clark to stop marketing its wipes as “flushable.”

The district court granted summary judgment on all of Davidson’s claims but the Ninth Circuit reversed. On the issue of standing to seek injunctive relief, Davidson argued she alleged a cognizable injury because “she will be unable to rely on the label ‘flushable’ when deciding in the future whether to purchase Kimberly–Clark’s wipes.” *Id*. at 1112. The panel agreed with this argument: “We hold that Davidson properly alleged that she faces a threat of imminent or actual harm by not being able to rely on Kimberly–Clark’s labels in the future, and that this harm is sufficient to confer standing to seek injunctive relief.” *Id*. at 1113.

In reaching this conclusion, the panel identified what it considered to be a split on this issue at the district court level. On one side of this split – the “no standing side” – district courts generally conclude that “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.” *Id*. at 1114 (quoting *Pinon v. Tristar Prods., Inc.*, No. 1:16-cv-00331-DAD-SAB, 2016 WL 4548766, at *4 (E.D. Cal. Sept. 1, 2016)). On the other side are district courts who reason “that the plaintiff faces an actual and imminent threat of future injury because the plaintiff may be unable to rely on the defendant’s representations in the future, or because the plaintiff may again purchase the mislabeled product.” *Id*. (citing, among other cases, *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 527 (N.D. Cal. 2012)).

In siding with the courts finding standing, the *Davidson* panel reasoned: “Knowledge that the advertisement or label was false in the past does not equate to knowledge that it will remain false in the future.” 873 F.3d at 1114. Thus, a consumer can show standing by alleging “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.” *Id.* The panel also noted the possibility a consumer could allege “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.” *Id*.

In December, another unpublished decision, *Payne v. Office of the Commissioner of Baseball*, 705 Fed. Appx. 654 (9th Cir. 2017), found the named plaintiffs lacked standing to seek injunctive relief. There, two plaintiffs (Stephanie Smith and Gail Payne), seeking to represent a putative class, sued Major League Baseball for injunctive relief, on the ground that inadequate safety measures are taken at baseball games to protect fans from the dangers posed by foul balls entering the stands.

The district court dismissed for lack of standing and, this time, the Ninth Circuit affirmed. The panel in *Payne* took the more traditional route, ruling that Ms. Smith could not demonstrate a “certainly impending” or “substantial risk” of future injury from a foul ball, because she did not plan to attend any future ball game unless seated in a location protected by a net. As for Ms. Payne, her chance of being hit

by a foul ball in her chosen sections was only 0.0027% per game, which alleged injury was not "certainly impending." The panel also rejected the plaintiffs' argument that the inadequate safety measures interfered with their use and enjoyment of their baseball tickets, ruling that "[a] person does not suffer 'an invasion of a legally protected interest' solely because the owner of a facility open to the public has failed to implement a particular safety measure." *Id*. at 655. The *Payne* panel did not cite the *Davidson* decision issued two months earlier.

Can these seemingly disparate decisions be reconciled? Or do they reflect a genuine conflict? Kimberly-Clark views *Davidson* as the anomaly and, on November 3, 2017, petitioned for rehearing *en banc*. The panel later directed the plaintiff to file a response, indicating at least some interest in hearing more on the issue. And an amicus brief in support of the petition for rehearing has been submitted by the U.S. Chamber of Commerce, the National Association of Manufacturers, and the Grocery Manufacturers Association. We may have yet another decision from the Ninth Circuit soon about standing to seek injunctive relief, or possibly a cert petition asking the Supreme Court whether *Davidson* can be reconciled with the high court's recent standing rulings.