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Kimberly-Clark Unable to Flush Wet Wipes Case

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On December 10, 2018, the Supreme Court denied certiorari in *Kimberly-Clark Corp, v. Davidson*, No. 18-304 (2018), in which Kimberly-Clark sought to overturn a controversial Ninth Circuit decision allowing a plaintiff in a false advertising case to seek injunctive relief on behalf of an alleged consumer class notwithstanding that plaintiff's complaint acknowledged she was aware of Kimberly-Clark's purported false advertising before bringing suit, thus negating any likelihood she would suffer irreparable harm if injunctive relief were not granted.

In 2014, on behalf of a supposed consumer class, plaintiff sued Kimberly-Clark for false advertising under California false advertising and unfair competition statutes. In addition to damages and restitution, plaintiff also sought injunctive relief. Her complaint alleged that Kimberly-Clark's advertising of its pre-moistened toilet wipes as "flushable" was false and deceptive because that term misleads consumers into the false belief that the wipes disperse and disintegrate within minutes of flushing. Plaintiff claimed she paid a premium to buy Kimberly-Clark's product as compared to toilet paper or other wipes that do disintegrate quickly, yet unlike those other products, the Kimberly-Clark product did not.

The district court granted Kimberly-Clark's motion to dismiss on two grounds. First (and most pertinent to the cert. petition), the court held that plaintiff lacked Article III standing to pursue injunctive relief in federal court because when a plaintiff, knowing of the falsity of a defendant's false advertising, "will no longer purchase the product again, there is no risk of future harm and no basis for injunctive relief." Second, the court held that the complaint failed to state a claim for relief under Fed. R. Civ. P. 8 and 9(b) because plaintiff failed to allege facts plausibly showing that the "flushable" marketing was false or misleading.

On appeal, the Ninth Circuit reversed, holding that the fact plaintiff knew that a representation was once false doesn't preclude her from purchasing the product again on the mistaken assumption that the product had been improved, and thus being deceived again. The Ninth Circuit appeared to be concerned about a policy implication flowing from Kimberly-Clark's argument and the district court's holding, namely that because the named plaintiff in any consumer false advertising suit has, by definition, already discovered the supposed falsity of the defendant's advertising, under the district court's holding, injunctive relief virtually never would be permitted in state law consumer class action suits. The panel's stated belief that such a result would undercut important consumer protection laws appears to have materially impacted the panel's decision.

Kimberly-Clark petitioned unsuccessfully for rehearing, but in denying the petition, the Ninth Circuit panel amended its initial decision, acknowledging for the first time that its holding that plaintiff had Article III standing to seek injunctive relief was contrary to the holdings of all other federal appellate courts to have considered this issue. Nonetheless, the panel remained steadfast, 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 ," and that in all events, "there is no reason prospective injury [sufficient for an entitlement to injunctive relief] must always be premised on a *realistic threat* of a similar injury occurring" (emphasis added).

In its cert. petition, Kimberly-Clark noted the stark circuit split, and argued that the Ninth Circuit's ruling conflicted with the Supreme Court's holding precedent that under Article III, only a "real and immediate threat" of repeated injury suffices for a plaintiff to have standing to seek injunctive relief. In addition, Kimberly-Clark persuasively disposed of the Ninth Circuit's concern that the district court's denial of standing to seek injunctive relief might "undermine California's consumer protection statutes," arguing that state laws, or a federal court's inclination to avoid undercutting them, cannot expand federal constitutional limits on a plaintiff's ability to seek injunctive relief.

One might have supposed that a Supreme Court that has often been wary of class action litigation would have resolved this circuit split this term. Instead, the split will continue for the foreseeable future, and leave California class action defendants at risk of potentially draconian injunctions in consumer class action deceptive advertising suits that they would not face in other federal jurisdictions.

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