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Ninth Circuit Puts a Cap on Coca-Cola Class Certification Order

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A new decision in the Ninth Circuit significantly limits which consumers may have standing to seek an injunction against false advertising or labeling. For the past several years, the law in the Ninth Circuit was that a "previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase," because a consumer's "[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." *Davidson v. Kimberly-Clark Co.*, 889 F.3d 956, 969 (9th Cir. 2018). But in August 2021, the Ninth Circuit significantly limited this holding by clarifying that a consumer's "abstract interest in compliance with labeling requirements" or desire for a manufacturer to "truthfully label its products" does not suffice to establish Article III standing under *Davidson*. *Engurasoff v. Coca-Cola Refreshments USA, Inc.*, No. 25-15742, 2021 WL 3878654, at *2 (9th Cir. Aug. 31, 2021).

Engurasoff arises out of a long-running multidistrict litigation in which the plaintiffs alleged that Coke, Coca-Cola's signature cola, is mislabeled as having "no preservatives" and "no artificial flavors" because it contains phosphoric acid, which allegedly functions as both an "artificial flavor" and a "chemical preservative." In February 2020, the district court granted the plaintiffs' motion to certify an injunctive relief class under Rule 23(b)(2) and held that they had established standing to seek injunctive relief under *Davidson*. In reaching this conclusion, the district court reasoned that consumers could satisfy *Davidson* by alleging either (1) that "their inability to rely on the labels would cause them to refrain from purchasing a product that they otherwise would want" or (2) that they would "purchase the product in the future, despite the fact that it was once marred by false advertising or labeling, because they may reasonably, but incorrectly assume the product was improved." *In re Coca-Cola Mktg. & Sales Practices Litig.*, No, 14-2555, 2020 WL 759388, at *5 (N.D. Cal. Feb. 14, 2020) (citation and internal quotation marks omitted). The district court agreed with Coca-Cola that the plaintiffs did not satisfy the second test because there was no reasonable possibility that Coca-Cola would stop using phosphoric acid as an ingredient in Coke, whose formula —leaving aside the ill-fated rollout of New Coke—has remained largely unchanged for over a century. But the district court nonetheless found that the plaintiffs had satisfied the first test by alleging that they would purchase Coke in the future, even if it continued to contain phosphoric acid, so long as

the labeling either disclosed the presence of phosphoric acid or refrained from representing that Coke was free of preservatives and artificial flavors. *See id.* at *7-9.

On August 31, 2021, the Ninth Circuit vacated this ruling and held that the plaintiffs had not established standing to seek injunctive relief. In so holding, the Ninth Circuit found it dispositive that "[n]one of the plaintiffs in this case allege a desire to purchase Coke as advertised, that is, free from what they believe to be artificial flavors or preservatives." 2021 WL 3878654, at 2. Instead, some of the plaintiffs alleged that they would consider purchasing Coke in the future if it were "properly labeled." The Ninth Circuit concluded that this "abstract interest in compliance with labeling requirements" was "insufficient, standing alone, to establish Article III standing." *Id.* at *2. After articulating this rule, the Ninth Circuit concluded that the majority of the plaintiffs lacked Article III standing because they either expressed no interest in purchasing Coke in the future or merely stated that they would "consider" purchasing Coke in the future, which the Ninth Circuit found insufficient to establish an imminent future injury sufficient to give those plaintiffs standing. It then addressed the two plaintiffs who stated that "they would be interested in purchasing Coke again if its labels were accurate, regardless of whether it contained chemical preservatives or artificial flavors." *Id.* Although these plaintiffs stated that they would likely purchase Coke in the future if its labeling were truthful, the Ninth Circuit concluded that their "desire for Coca-Cola to truthfully label its products, without more, is insufficient to demonstrate that they have suffered any particularized adverse effects." *Id.*

Engurasoff's central holding—that a plaintiff's "abstract interest in compliance with labeling requirements" or desire for a manufacturer to "truthfully label its products" does not amount to an injury-in-fact cognizable under Article III—has significant ramifications for false advertising cases in federal court. A plaintiff can no longer satisfy *Davidson* by stating that they would "consider" purchasing a product in the future or that they would likely purchase the product in the future if the allegedly "untruthful" statements were removed from the labeling. Instead, a plaintiff must allege that they would be likely to purchase the product "as advertised"—which, in many cases, will necessitate a change to the product itself rather than a change to the challenged advertising. And the Ninth Circuit's holding that an "abstract interest in compliance with labeling requirements" does not amount to a cognizable injury-in-fact may provide additional ammunition to manufacturers faced with cases premised on alleged violations of federal labeling regulations, particularly when the plaintiff is unable to allege a cognizable injury other than a violation of the applicable regulation. It remains unclear how broadly or narrowly courts will apply *Engurasoff*, but it may provide defendants with a powerful tool to defeat false advertising cases on Article III standing grounds.

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