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The Latest On Article III Standing In False Ad Class Actions

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The typically rudimentary concept of standing has a more complex existence in the class action world. The basic principle that a plaintiff has Article III standing if: (1) he or she suffered an "injury in fact"; (2) there is a causal connection between the injury and the defendant's actions; and (3) the injury can be redressed by a favorable decision for the plaintiff, remains intact.[1] However, other facets of standing must also be evaluated early on in litigation of a class action claim, including (1) does a plaintiff have standing for products not purchased and (2) does a plaintiff have standing to assert a claim for injunctive relief?

A fierce debate concerning whether a plaintiff has standing to bring claims concerning products that he or she did not purchase wages on, and defendants should weigh the costs and benefits of attacking such broad claims. Conversely, however, earlier this year, the United States Court of Appeals for the Ninth Circuit provided a clear rule regarding a plaintiff's standing to assert a claim for injunctive relief — a plaintiff has standing to assert a claim for injunctive relief if he or she makes the proper allegations in the complaint.[2] To no one's surprise, the plaintiff-friendly Ninth Circuit decision has already been used to defeat defendants' motions to dismiss.[3]

Does a Class Representative Have Standing to Assert Claims Based on Products Not Purchased?

In recent years, standing issues have come to a head where a class representative brings consumer claims concerning a line of products even though the representative did not purchase all of the products at issue. Some courts have held that the plaintiff simply has no standing to assert claims concerning not-purchased products because they could not have caused injury. Other courts have leaned toward finding standing where the purchased item and not-purchased items are "substantially similar." And the remaining courts have held that the issue is not a standing question appropriate for disposition at the pleading stage, and instead is a Rule 23 issue to be analyzed at class certification.[4]

In Contreras v. Johnson & Johnson Consumer Co., the court found that the class representatives did not have standing to bring suit for sunscreen products they did not purchase and whether all four products share things in common for purposes of demonstrating commonality, typicality or predominance is effectively irrelevant to the question of whether the plaintiff has suffered an injury in fact with regard to all four products.[5] Conversely, in Astiana v. Dreyer's Grand Ice Cream Inc., the court noted that "the critical inquiry seems to be whether there is sufficient similarity between the products purchased and not purchased," and found that the plaintiffs alleged sufficient similarity where the same kind of food products (ice cream) as well as the same labels for all the products ("All Natural Flavors") were at issue.[6] And in Velasquez-Reyes v. Samsung Electronics America Inc., the court determined that the plaintiff's "ability to adequately represent the putative class is a question better left for the certification process" because the purchased and not-purchased items were subject to the same violations and Samsung's advertisements did not distinguish among the products.[7]

In light of the split in approaches, until the Ninth Circuit provides definitive guidance on the issue, defendants should be prepared to take aggressive approaches early on in litigation, including considering changing venues depending on precedent. However, where defendants anticipate a classwide settlement, it may be wise to allow the broad allegations to remain, allowing potential for settlement of a single matter to resolve all claims had against the defendant.

Does a Plaintiff Have Standing to Assert a Claim for Injunctive Relief?

While the scope of products remains an open issue, the Ninth Circuit finally weighed in on whether a plaintiff has standing to assert a claim for injunctive relief. In Lanovaz v. Twinings North America Inc.,[8] the plaintiff, Nancy Lanovaz, asserted that the labels on Twinings' products did not satisfy U.S. Food and Drug Administration regulations, and therefore were unlawful and misleading to consumers. The plaintiff sought injunctive relief under California's Unfair Competition Law, False Advertising Law, and Consumers Legal Remedies Act. Twinings moved for summary judgment as to the injunctive relief claim, in part, because the plaintiff testified that she would not purchase a Twinings tea product again.

The trial court granted summary judgment because the undisputed evidence showed that the plaintiff had no intention to buy the product again. The Ninth Circuit affirmed, confirming that the plaintiff must have evidence of intention to purchase a product in the future to survive summary judgment when pursuing injunctive relief in UCL, FAL and CLRA actions.[9] Merely stating that the plaintiff would "consider buying" the offending product in the future will not suffice.[10] "[A] profession of an intent … is simply not enough to satisfy Article III. A 'some day' intention — without any description of concrete plans, or indeed even any specification of when the some day will be — does not support a finding of the 'actual or imminent' injury that Article III requires."[11] Absent evidence of a plaintiff's intent to purchase the product again in the future, dismissal of a claim for injunctive relief is appropriate.

Courts have already applied the Lanovaz reasoning, finding that where plaintiffs allege that they could potentially incur future harm, standing to seek injunctive relief exists.[12]

Conclusion — Choose Wisely

While a fundamental principle applicable to nearly every case, standing in the class action context has gained new attention. The split within the Ninth Circuit concerning standing for unpurchased products creates opportunities for defendants to pursue offensive strategies and highlights the importance of evaluating trends in jurisdictions where claims are filed and considering changes of venue, when available and appropriate.

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[1] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[2] Lanovaz v. Twinings North America Inc., No 16-16628, 2018 U.S. App. LEXIS 15248 (9th Cir. June 6, 2018).

[3] Josten v. Rite Aid Corp., No. 18-cv-0152-AJB-JLB, 2018 U.S. Dist. LEXIS 198124 (S.D. Cal. Nov. 20, 2018); Stafford v. Rite Aid Corp., No. 3:17-cv-1340-AJB-JLB, 2018 U.S. Dist. LEXIS 169580 (S.D. Cal. Sept. 28, 2018).

[4] See, e.g., Contreras v. Johnson & Johnson Consumer Cos., No. CV 12-7099-GW(SHx), 2012 U.S. Dist. LEXIS 186949, * 5-6 (C.D. Cal. Nov. 29, 2012) (where plaintiff did not purchase three of the four sunscreen products at issue, she lacked Article III standing and therefore could maintain an action only with respect to the single product she purchased); Astiana v. Dreyer's Grand Ice Cream Inc., No. C-11-2910 EMC, 2012 U.S. Dist. LEXIS 101371, *13 (N.D. Cal. July 20, 2012) (plaintiffs had standing where they alleged sufficient similarity between the products they did purchase and those that they did not, and concerns over products' material differences "are better addressed at the class certification stage rather than at the [pleading] stage"); Velasquez-Reyes v. Samsung Elecs. Am. Inc., No. CV 16-1953-DMG (KKx), 2017 U.S. Dist. LEXIS 148784, *24 (C.D. Cal. Sept. 13, 2017) (finding that the plaintiff's ability to adequately represent the putative class is a question better left for the certification process).

[5] Contreras, 2012 U.S. Dist. LEXIS 186949 at *5-6.

[6] Astiana, 2012 U.S. Dist. LEXIS 101371, at *1.

[7] Velasquez-Reyes at *24.

[8] No 16-16628, 2018 U.S. App. LEXIS 15248 (9th Cir. June 6, 2018).

[9] Lanovaz, 2018 U.S. App. LEXIS 15248.

[10] Id., *2-3.

[11] Id.

[12] Josten v. Rite Aid Corp., No. 18-cv-0152-AJB-JLB, 2018 U.S. Dist. LEXIS 198124 (S.D. Cal. Nov. 20, 2018); Stafford v. Rite Aid Corp., No. 3:17-cv-1340-AJB-JLB, 2018 U.S. Dist. LEXIS 169580 (S.D. Cal. Sept. 28, 2018).