

## Litigation Alert

October 26, 2017

### Key Points

- The 9th Circuit held that consumers may have Article III standing to seek an injunction under California false advertising law even though the consumer subsequently learned that the advertising in question was false or misleading.
- Knowledge that an advertisement or label was false in the past does not equate to knowledge that it will remain false in the future.
- A consumer's inability to rely in the future on a representation concerning a product when making purchasing decisions is an ongoing injury that may justify an order barring the false advertising.



### 9th Circuit Resolves Split on False Advertising Injunctions

On October 20, 2017, the U.S. Court of Appeals for the 9th Circuit resolved a district court split and affirmatively held that consumers may have Article III standing to seek an injunction under California false advertising law, even though the consumer subsequently learned that the advertising was false or misleading. *Davidson v. Kimberly-Clark Corp.*, No. 15-16173 (9th Cir. Oct. 20, 2017). Previously, many district courts in the circuit had held that plaintiffs who were already aware of the deceptive nature of an advertisement were 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 *Kimberly-Clark* court rejected this reasoning, explaining that a consumer's inability to rely in the future upon a representation made on a package, even if the consumer knew or continued to believe that the same representation was false in the past, is an ongoing injury that may justify an order barring the false advertising. *Id.* at 21. The court reasoned that, "if injunctive relief were unavailable to a consumer who later learns after purchasing a product that the product's label is false, California's consumer protection laws would be effectively gutted." *Id.* at 22. The 9th Circuit's opinion makes it more difficult to eliminate such claims via motion to dismiss. As a result, it is even more imperative that defendants facing allegations of false advertising seek advice from qualified counsel who can develop a sufficient factual record to demonstrate that the plaintiff lacks sufficient Article III standing and to devise a cohesive strategy to eliminate baseless claims.

### Background

Plaintiff Jennifer Davidson filed a putative class action against the Kimberly-Clark Corporation, alleging that Kimberly-Clark falsely advertised that its bathroom wipes were "flushable" when, in fact, they failed to properly break up when flushed. Accordingly, Davidson brought four California state law causes of action against the defendant in federal district court, including for common law fraud and for violations of the

Consumer Legal Remedies Act, California Civil Code § 1750, *et seq.*; False Advertising Law, California Business & Professions Code § 17500, *et seq.*; and Unfair Competition Law, California Business & Professions Code § 17200, *et seq.* Under these claims, Davidson sought to recover the premium that she paid for the allegedly flushable wipes and to obtain an order requiring the defendant to stop marketing the wipes as “flushable.”

The district court granted Kimberly-Clark’s motion to dismiss and held, *inter alia*, that Davidson lacked standing to seek injunctive relief because she was unlikely to purchase Kimberly-Clark’s flushable wipes in the future.

### **The 9th Circuit’s Opinion**

The 9th Circuit reversed the district court, holding that Davidson had Article III standing because her complaint alleged that she “continues to desire to purchase wipes that are suitable for disposal in a household toilet and would purchase truly flushable wipes manufactured by Kimberly-Clark if it were possible to determine prior to purchase if the wipes were suitable to be flushed.” In other words, the court held that, despite Davidson’s current knowledge that Kimberly-Clark’s wipes are not flushable, her inability to rely on Kimberly-Clark’s future representations that its wipes are flushable constitutes a “threatened injury that is certainly impending” and thereby establishes Article III standing. *Davidson*, No. 15-16173 at 23-24. In so holding, the court affirmatively resolved the 9th Circuit district court split in favor of plaintiffs seeking injunctive relief. *Id.* at 21.

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