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PERSPECTIVE

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Class action litigation in the 9th Circuit

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This year was an eventful one in the area of class action litigation, particularly in the 9th U.S. Circuit Court of Appeals. In 2017, the Court of Appeals declined to recognize a requirement under Rule 23 of a feasible method of determining class membership, and also issued a decision that could leave companies of liability insurance coverage for class actions alleging certain statutory violations. The court this year also revisited its prior decision in *Spokeo* following the U.S. Supreme Court's remand, holding that the plaintiff in that case adequately alleged a concrete injury. Finally, the Court of Appeals grappled with the difficult question of a litigant's standing to seek an injunction, ultimately ruling that a consumer's belief that an advertisement is false does not foreclose prospective relief.

This article highlights these important decisions by the 9th Circuit and offers some thoughts on what they might signal about the development of class action litigation in this circuit and nationwide.

9th Circuit Rejects Administrative Feasibility Requirement for Class Certification

In *Briseno v. ConAgra Foods*, issued in early January, the 9th Circuit declined to impose an "administrative feasibility" requirement for class certification under Rule 23 of the Federal Rules of Civil Procedure. *Briseno* involved false advertising claims brought by a putative class of purchasers of Wesson Oils. ConAgra argued that because people rarely maintain receipts or other records of these



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The home of the 9th U.S. Circuit Court of Appeals in San Francisco.

types of purchases, there would be no administratively feasible method of determining whether a particular individual was within the class.

The 9th Circuit, however, declined to require an administratively feasible means of determining class membership as a prerequisite for class certification. The court reasoned that Rule 23(a) imposes certain enumerated requirements that must be satisfied before a class will be certified, and "administrative feasibility" is not one of them. In reaching this decision, the court disagreed that an administrative feasibility requirement is necessary to ensure efficiency or to protect class action defendants from fraudulently filed claims.

Despite *Briseno's* holding that administrative feasibility is not a specifically enumerated prerequisite for class certification under Rule 23(a), the decision need not be read as a loss for defendants. The 9th Circuit expressly recognized that similar considerations should be considered as part of other components of the certification inquiry, including the "pre-dominance" and "superiority" requirements under Rule 23(b)

(3). Thus, *Briseno* may ultimately require only that defense counsel make the same arguments in slightly different ways.

Alleged Disclosure of False Consumer Information Sufficiently 'Concrete' Under Supreme Court's *Spokeo* Decision

On Aug. 15, the 9th Circuit wrote the next chapter in the *Robins v. Spokeo, Inc.* litigation saga, which concerns standing under Article III in connection with alleged violations of a statutory right. In the suit, Robins alleged that Spokeo — a website that collects and displays information about consumers — published an inaccurate report about him after failing to follow reasonable procedures to assure maximum accuracy. In May 2016, the Supreme Court vacated a prior 9th Circuit decision on the ground that in determining whether Robins had Article III standing, the Court of Appeals had improperly failed to determine whether Robins alleged a "concrete" injury.

On remand, the 9th Circuit determined that Robins' alleged inju-

ry was sufficiently "concrete" under the Supreme Court's decision. The Court of Appeals first noted that, as clarified by the Supreme Court, the mere fact that Robins alleged a particularized violation of a statute does not automatically mean that he suffered a concrete injury. Nonetheless, that Congress sought to allow individuals to recover for a particular type of intangible harm is relevant in determining whether that harm is concrete. With these considerations in mind, the 9th Circuit elucidated a two-part test for determining whether the alleged violation of a statute satisfies Article III: (1) whether the statutory provisions at issue were established to protect the plaintiff's concrete interests, as opposed to purely procedural rights; and if so, (2) whether the specific statutory violations alleged in a particular case actually harm, or present a material risk of harm to, such interests.

As to the first prong, the 9th Circuit held that the alleged dissemination of false information in consumer reports is a concrete harm that the Fair Credit Reporting Act was designed to prevent. The court emphasized the real-world economic impact that could result from a negative consumer report and observed that the rights created by FCRA "resemble other reputational and privacy interests that have long been protected in the law," such as libel. Turning to the second prong, while the court acknowledged that some technical violations of FCRA, such as attributing an incorrect zip code, likely would not suffice, the alleged inaccuracies in Robins' consumer report — for example, incorrectly stating his age, employment status and wealth — sufficiently presented a material risk of actual harm for Article III standing.

Time will tell whether the 9th Circuit's ruling will meaningfully affect the decisions of lower courts, which have been interpreting and applying the Supreme Court's *Spokeo* decision for the past year and half.

Insurance Policy Exclusion for Invasion of Privacy Claims Extended to TCPA Lawsuit

In *Los Angeles Lakers v. Federal Insurance Co.*, decided Aug. 23, the 9th Circuit held that an insurer was not required to provide coverage for a lawsuit asserting violations of the Telephone Consumer Protection Act, ruling that such claims fell within the policy's exclusion of coverage for claims based on "invasion of privacy."

The underlying suit against the Lakers arose out of text messages sent by the team to fans attending a basketball game. The plaintiff alleged that the Lakers violated the TCPA because he and other recipients of the automated text messages had not given prior consent. The Lakers tendered the case to Federal, their insurance provider, but Federal denied coverage, arguing that the claim fell within the policy's exclusion of claims "based upon, arising from, or in consequence of ... [an] invasion of privacy."

The 9th Circuit agreed with Federal. After analyzing the TCPA's text and relevant legislative history, the court concluded that the

underlying purpose of the TCPA is to protect against invasions of privacy. Accordingly, the 9th Circuit concluded that claims for alleged violations of the TCPA are "based upon" or "aris[e] from" an invasion of privacy and therefore fell within the policy exclusion.

Though the court's ruling concerned only the TCPA, the 9th Circuit's reasoning could potentially apply to claims brought under comparable statutes such as FCRA or the Fair and Accurate Credit Transactions Act. The number of class actions that have been filed under these statutes — as well as the aggregated potential damages liability involved in such actions — has exploded in recent years. In particular, these actions can involve tens or hundreds of thousands of class members seeking statutory damages awards that do not require proof of actual harm. Thus, companies should carefully analyze their insurance policies in light of the *Lakers* holding to ensure they will be covered in the event of a lawsuit, especially a class action lawsuit, under the TCPA or other similar statutes.

Consumers May Seek Injunctions Against Advertisements They Believe Are False

In October, the 9th Circuit held that a plaintiff may have standing to seek injunctive relief in a false advertising case even though the

plaintiff subjectively believes the advertising is false.

In *Davidson v. Kimberly-Clark*, the plaintiff brought claims under California's Unfair Competition Law, Consumer Legal Remedies Act, and False Advertising Law alleging that she suffered economic harm from her purchase of Kimberly-Clark pre-moistened wipes that were misleadingly labeled and marketed as "flushable." Because Davidson was already aware, based on her allegations, that the wipes were not flushable, Kimberly-Clark argued — and the district court agreed — that there was no imminent risk of Davidson being misled in the future.

The 9th Circuit differed. Relying on Davidson's allegations that she still wanted to purchase flushable wipes, that she continued to visit stores where Kimberly-Clark's products are sold, and that she would purchase wipes from Kimberly-Clark in the future if they were truly flushable, the Court of Appeals held that Davidson had adequately alleged the threat of future harm so as to be entitled to injunctive relief. The court reasoned 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." Thus, the threat of future harm may exist from the fact that the consumer cannot rely on statements on defendant's packaging in the future — a harm that is properly remedied through an injunction.

The *Davidson* decision will make it more difficult for defendants in the 9th Circuit to eliminate claims for injunctive relief at the pleadings stage. It is also noteworthy that, in dicta, the Court of Appeals appeared to consider that eliminating standing for injunctive relief, which would otherwise be available in state court, might further incentivize defendants to remove false advertising cases to federal court. It remains to be seen whether this concern will play a role in future decisions involving false advertising and unfair competition claims.

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