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Reading The 9th Circ.'s Tea Leaves On Injunctive Standing

By **Alexandra Laks and Lucia Roibal** (February 23, 2018, 11:02 AM EST)

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On Dec. 20, 2017, the Ninth Circuit refined injunctive standing requirements in the misbranding context in Victor v. R.C. Bigelow Inc. and Khasin v. R.C. Bigelow Inc. (collectively, “Bigelow”), finding that injunctive standing is limited and requires a current intent to purchase challenged products in the future.[1]

These decisions demonstrate the Ninth Circuit’s evolving standards on injunctive relief since its last decision on the issue in Davidson v. Kimberly-Clark Corp.[2] The Ninth Circuit in Davidson addressed a split in district court decisions as to whether a plaintiff seeking an injunction to prevent allegedly deceptive labeling can establish Article III standing once he or she understands the truth of an alleged misrepresentation.

The Ninth Circuit answered in the affirmative, finding that a plaintiff who is aware that a label is falsely advertised still suffers an actual threat of future harm necessary for Article III standing because, if the plaintiff seeks to purchase the product again, he or she will be unable to rely on the defendant’s representations, or might reasonably, but incorrectly, believe that the product has improved. The panel in Davidson was not persuaded that injunctive relief would never be available for a consumer who learns, after purchasing a product, that the label is false.

In Bigelow, however, the Ninth Circuit affirmed a district court’s decision that the plaintiffs did not have injunctive standing where they had no intent to purchase challenged products again in the future. In reaching this conclusion only two months after Davidson, the Ninth Circuit threads the needle to carefully avoid conflict with its prior decision, and, in turn, further defines the scope of injunctive standing. We discuss the panel’s holding in Bigelow, as well as key takeaways, below.

Case Background

Plaintiffs Victor and Khasin both alleged that defendant R.C. Bigelow Inc. mislabeled its tea products in part by including the phrase “healthful antioxidants” on its products’ labels.[3] According to plaintiffs, this alleged “misbranding” violated California’s Unfair Competition Law, the Consumer Legal Remedies Act, California’s False Advertising Law and California’s Sherman Law.

The district court granted summary judgment to Bigelow, finding that: (1) the plaintiffs had failed to present evidence in support of the claim that a reasonable consumer was likely to be misled by Bigelow's statements; (2) the plaintiffs failed to present any evidence in support of a claim for damages; and (3) the plaintiffs failed to demonstrate standing for injunctive relief. As to whether the plaintiffs had Article III standing to seek an injunction, the district court found that, because they plaintiffs had not plausibly alleged they intended to purchase Bigelow products again, they could not establish a "sufficient likelihood" that they would be injured in the future.

The district court also found that the plaintiffs could not establish that they were likely to suffer the same injury in the future because, now that they understood what "healthful antioxidants" meant, there was no danger that they would be misled by the statement in the future. The court dismissed the plaintiffs' claims and entered judgment.

The plaintiffs appealed the decision.

Oral Argument — Does Davidson Apply?

Because Davidson addressed the second grounds for the court's finding that the plaintiffs lacked standing, the question on appeal was whether the first ground — the plaintiffs' lack of intent to purchase Bigelow tea products again — was sufficient to demonstrate they would not suffer future injury. The plaintiffs argued that Davidson answered this question as well, claiming that the decision means plaintiffs have injunctive standing the moment they allege a labeling is misleading, regardless of whether they intend to purchase products again in the future or if the company changes its labels.

The panel — which included Judge Berzon, who had sat on the Davidson panel — expressed skepticism during the oral argument, noting that the plaintiffs in Davidson had expressly stated that they had an interest in buying the product in the future. The Bigelow plaintiffs, by contrast, testified in deposition that they would not buy the product again unless a court issued an injunction, nor would they purchase the tea with updated and accurate labels. The panel also repeatedly expressed concern that the plaintiffs' testimony was intended to manufacture standing rather than reflect their true position.

Panel Decision — Davidson Distinguishable; Injunctive Relief Unavailable If No Intent to Purchase

The panel's ultimate opinion (which is unpublished) was consistent with the panel's statements at oral argument. The panel rejected the plaintiffs' position that Davidson controlled, and instead held that the plaintiffs were not entitled to injunctive relief because they did not face a threat of future harm. "Because they will not consider buying even properly labeled tea until they receive an injunction," the panel reasoned, "[the plaintiffs] will not be harmed by wondering if the tea is still mislabeled or by buying the tea without knowing if it is still mislabeled."

This distinguished the plaintiffs' case from Davidson, in which the plaintiff wanted to purchase the product again, but did not know if the labeling was accurate. The panel accordingly held that the plaintiffs "did not face a real or immediate risk of being harmed again in the same manner and so lack Article III standing to seek injunctive relief."

Takeaway

Davidson and Bigelow demonstrate that injunctive standing is not an "all or nothing" standard. Instead,

whether a plaintiff has standing to pursue an injunction will depend largely on the facts, and particularly on a plaintiff's deposition testimony. As the panel noted in Bigelow, this raises concerns that the plaintiffs' attorneys may attempt to influence deposition testimony to ensure their clients testify to meet injunctive standing requirements.

Also, by highlighting testimony that does and does not satisfy these requirements — i.e., the "future intent to purchase and fear of mislabeling" that sufficed in Davidson versus the "intent to purchase only if an injunction is granted" that failed in Bigelow — the decisions help define the contours of injunctive standing in the misbranding context, and put to rest disagreement in the Ninth Circuit as to the fundamentals of these standards: Knowledge that an advertisement is false does not foreclose standing, but a present intent to purchase — coupled with fear that the product will continue to be mislabeled — is required.

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[1] See Victor v. Bigelow, No. 16-16639 (9th Cir. argued Nov. 15, 2017); Khasin v. Bigelow, No. 16-16641 (9th Cir. Argued Nov. 15, 2017).

[2] 873 F.3d 1103 (9th Cir. 2017).

[3] See Khasin v. R.C. Bigelow, Case No. 12-cv-02204-WHO (N.D. Cal. Aug. 29, 2016); Victor v. R.C. Bigelow, Case No. 13-cv-02976-WHO (N.D. Cal. Aug. 29, 2016).