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PERSPECTIVE

## Ruling offers insights on consumer injuries and standing

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Sometimes a court can rule in a party's favor on grounds even that party has disclaimed. That was the case in the 9th U.S. Circuit Court of Appeals' recent decision in *McGee v. S-L Snacks National*, 2020 DJ-DAR 12941 (Dec. 7, 2020), the latest in a line of 9th Circuit opinions clarifying Article III's standing requirements in consumer-products litigation. *McGee* is important not only for the guidance it offers litigants and courts in assessing the relationship between the substance of a plaintiff's claims and standing, but also because it illuminates courts' independent obligation to address subject-matter jurisdiction and the strategic questions litigants confront as a result.

The case arose from a seemingly innocuous source: Pop Secret brand popcorn. Plaintiff Jacquelyn McGee had purchased and eaten Pop Secret on a number of occasions. But after purportedly discovering that the snack contained trans fat, McGee sued Pop Secret's manufacturer, Diamond Foods. She contended that Diamond had engaged in unfair practices, breached the warranty of merchantability, and created a nuisance by including trans fat in its product.

The district court dismissed McGee's complaint for lack of Article III standing, and the 9th Circuit affirmed. As the Court of Appeals observed, Diamond had expressly "conceded that McGee had standing." Nevertheless, the court explained, it was required to address the issue because it implicated the district court's subject-matter jurisdiction. And the court held that McGee in fact lacked standing.

The 9th Circuit began by rejecting McGee's argument that she had suffered Article III injury-in-fact by being deprived of the "benefit of her bargain." The court explained that to plead such an injury, a plaintiff "must show that she did not receive a benefit for which she actually bargained." McGee, however, had not pleaded that Diamond made any representations about Pop Secret's safety, and Pop Secret's labeling expressly disclosed it contained trans fat.

Next, the 9th Circuit rejected McGee's "overpayment" theory of economic injury, which was premised on the assertion that "Pop Secret is not fit for human consumption and has a value of \$0." The court recognized that it had previously held that "a plaintiff can satisfy the injury in fact requirement by showing that she paid more for a product than she otherwise would have due to a defendant's false representations." But here, McGee did not actually chal-

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lenge any false representations. That, the court explained, distinguished *Hawkins v. Kroger* — the decision that led Diamond to concede standing. Although that case likewise involved trans fats, there the plaintiff had alleged the defendant falsely represented its product contained *no* trans fats. Here, by contrast, Pop Secret's label disclosed the presence of trans fats (the health consequences of which were generally known long before McGee made her purchases).

Finally, the court rejected McGee's contentions that she suffered physical injury as the result of her consumption of Pop Secret. While McGee alleged that eating the popcorn had inflamed her organs, degraded her cognitive abilities, and caused cholesterol and insulin issues, she "did not allege that she has undergone medical testing or examination to confirm that she suffers from these conditions or that they were caused by her consumption of Pop Secret." And, the court held, none of the general medical studies on which McGee relied demonstrated that consuming Pop Secret would have necessarily caused such issues. Similarly, the court concluded, these studies failed to support McGee's related argument that Pop Secret increased her risk for future physical injuries.

The 9th Circuit's decision is notable for at least two reasons. First, it demonstrates the importance of considering a

plaintiff's substantive claims in determining whether the plaintiff has established an Article III case or controversy. Here, had McGee alleged a fraud claim, the result likely would have been different — even if McGee's real-world injury from purchasing and consuming popcorn would have been exactly the same. Although the 9th Circuit analyzed this issue as implicating standing's injury-in-fact requirement, it could also be considered in terms of the causation

requirement. If McGee had been induced into purchasing Pop Secret by some sort of false advertising regarding trans fats, she could have alleged that Diamond's alleged violation — its advertising — actually *caused* her harm. If not for the false advertising, she would not have purchased Pop Secret or she would have paid less for it, and thus she would have been better off. But McGee's claims were instead premised on the assertion that because Pop Secret contained trans fat, it violated California law. Those supposed violations, however, had no causal connection to either McGee's purchase of Pop Secret or the price she paid for it. Whether or

not Diamond breached the warranty of merchantability, for example, McGee still would have purchased the same popcorn for the same price. Only if McGee could demonstrate that the content of that popcorn itself caused her injury would she have standing to press her transfat-content claims. And as the 9th Circuit concluded, she had not sufficiently alleged that type of harm.

Second, the decision also illustrates an interesting strategic issue. One might think the defendant here got lucky: Diamond conceded standing, but the court saved Diamond from itself. Yet the procedural history suggests the story might be more complex. Diamond conceded McGee's standing in a Rule 28(j) letter filed shortly before argument — when it had just learned the identity of the panel members. Diamond could have conceivably viewed the composition of the panel as favorable to the plaintiff on this question, and thus decided to preserve credibility, and shift the court's focus, by conceding standing and pressing their alternative arguments. Critically, the downsides of that concession were lower than they might normally be, given the court's obligation to address McGee's Article III standing regardless of what Diamond said. While this strategy would undoubtedly be a risky one, Diamond's ultimate victory here suggests there might be some circumstances in which it could pay off — or at the very least cause no harm. ■

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