

## Why 9th Circ. Revisited Its Decision On 'Flushable' Wipes

By **Lucia Roibal** (May 23, 2018, 3:28 PM EDT)

On May 9, 2018, the Ninth Circuit issued an opinion amending its 2017 decision in *Davidson v. Kimberly-Clark Corp.*[1] In the previous ruling, the Ninth Circuit had resolved a circuit-wide split on injunctive standing requirements in the misbranding context, holding that the fact that a plaintiff now knows the “truth” of an allegedly false advertisement does not foreclose injunctive standing.[2]

In its amended opinion, the panel clarifies its decision and refines the requirements for injunctive standing in the misbranding context in three ways: (1) it confirms that Article III injunctive standing requires plaintiffs to allege an intent to repurchase the product at issue; (2) it changes its previous stance that consumer protection laws would be gutted without injunctive relief; and (3) it holds that the plaintiff sufficiently alleged a “concrete and particularized” injury as well as redressability.



Lucia Roibal

### Case Background and the 2017 Opinion

Plaintiff Jennifer Davidson alleged that the labeling on Kimberly-Clark and affiliate’s premoistened wipes, stating that they were “flushable,” was false and misleading. The plaintiff sued Kimberly-Clark for violations of California consumer protection laws, and sought restitution and damages based on the price premium resulting from the “flushable” label, as well as an injunction requiring Kimberly-Clark to discontinue using the “flushable” label.

Kimberly-Clark moved to dismiss the plaintiff’s first amended complaint. The district court granted the motion, finding in part that the plaintiff lacked standing to seek injunctive relief because she was unlikely to purchase defendants’ flushable wipes in the future. The plaintiff appealed, and the Ninth Circuit reversed.

In particular, the panel’s opinion addressed the split in district court decisions as to whether understanding the truth of an alleged misrepresentation precludes injunctive standing. In *Davidson I*, the Ninth Circuit answered in the negative. The panel held that even if a consumer is aware that a label is falsely advertised, she or he may still suffer a threat of future harm necessary for Article III standing because, without an injunction, she or he may be unable to rely on the label in the future or might incorrectly believe the product has improved.

Davidson I thus clarified what does not preclude standing. But it left open the question of what exactly is required.

## **Davidson II Key Holdings**

While the key holdings in Davidson II remain largely the same, the panel's decision answers the question left open in Davidson I of what a plaintiff must allege for Article III injunctive standing. The panel's decision also changes course from Davidson I by finding that a plaintiff's inability to pursue injunctive relief would not gut consumer protection laws because the claims could be remanded to state court. Finally, the panel expands its Article III standing analysis and holds that the plaintiff demonstrated a "concrete and particularized" injury as well as redressability.

### **Plaintiff Must Allege an Intention to Repurchase the Product at Issue**

Although the majority of the court's October 2017 opinion remains unchanged, the key differences on injunctive standing requirements lie in the footnotes. In particular, the panel's amended opinion addresses other circuit decisions to assuage concerns that its decision conflicts with other circuits holding a previously deceived consumer does not have standing to seek injunctive relief.

As the court notes, the facts in Davidson were distinguishable from cases in the Second, Third and Seventh Circuits because the plaintiffs in those cases had not sufficiently alleged intent to repurchase the product at issue. One plaintiff, for instance, had alleged they might, one day, purchase the product.[3] And in Nicosia, the court held that the plaintiff was not entitled to injunctive relief because Amazon had discontinued selling the product at issue.[4] Further, the plaintiff did not allege that he intended to use Amazon in the future to buy any products.[5]

The plaintiff in Davidson, on the other hand, alleged that she would purchase truly flushable wipes. Consistent with the Ninth Circuit's 2017 decision in *Victor v. Bigelow*, No. 16-16639, and *Khasin v. Bigelow*, No. 16-16641, the court's revisions in Davidson II confirm that intent to purchase is a necessary element of injunctive standing.

### **The Inability to Get Injunctive Relief Does Not Gut Consumer Protection Laws**

In its previous decision, the Ninth Circuit expressed concern that California's consumer protection laws would be effectively gutted if injunctive relief were unavailable to a consumer who learned post-purchase that a product's label was false. In its amended opinion, the Ninth Circuit notes to the contrary that "risks to plaintiffs in cases such as this are occasionally overstated" because the proper course for a district court confronted with an Article III standing problem in a removed case is to remand for adjudication in state court.

Thus the issue of the "perpetual loop" of plaintiffs filing in California state court, defendants removing the case to federal court and the federal court dismissing injunctive relief claims "should not occur."

### **Other Standing Requirements Are Met Based on the Inability to Rely on Advertisements**

The Ninth Circuit's amended opinion also adds an analysis on redressability and whether the plaintiff's injury was "concrete and particularized," neither of which was addressed in Davidson I. The Ninth Circuit answered in the affirmative: the alleged injury was concrete based on her allegations that she would purchase truly flushable wipes.

Finally, a favorable ruling would likely provide redress for her alleged injury because the injunction the plaintiff sought would prohibit Kimberly-Clark from using “flushable” until the product was truly flushable.

### **Takeaways**

The amended opinion makes clear that its decision in Davidson is cabined to the facts and does not foreclose the argument that a plaintiff lacks injunctive standing because he or she now knows the truth about an allegedly false advertisement.

Instead, a plaintiff only has standing in this situation if she or he sufficiently alleges intent to repurchase the product in the future. And a threat of future harm is not enough: A court must confirm the plaintiff has met each of Article III’s requirements.

---

*Lucia X. Roibal is an associate at Morrison & Foerster LLP.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] Davidson v. Kimberly-Clark Corp., No. 15-16173, 2018 WL 2169784 (9th Cir., May 9, 2018).

[2] See Davidson v. Kimberly-Clark Corp., 873 F.3d 1103 (9th Cir. 2017).

[3] See McNair v. Synapse Grp. Inc., 672 F.2d 213 (3d Cir. 2012).

[4] Nicosia v. Amazon.com Inc., 834 F.3d 220 (2d Cir. 2016).

[5] Id. at 239.