Coca-Cola Plaintiffs' Decert. Highlights Class Claim Problems

By **Jason Russell, Hillary Hamilton and Candace Ross Phoenix** (November 5, 2021)

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Many litigators defending class actions challenging representations on a product's label or other marketing share a common frustrating experience: Class claims based on negligible and/or entirely subjective harm survive a motion to dismiss, settlement discussions go nowhere, and expensive discovery ensues.

Then, after a round of extensive briefing on certification, the class fails to be certified — or, worse, is eventually decertified — because the plaintiffs did not meet pleading and/or certification standards. Meanwhile, the unhappy defendant watches its legal costs mount, as weeks turn into months and often into years.

Heightened pleading standards, including mandatory evidentiary showings at the motion to dismiss stage, could end this familiar cycle.

A Recent Example

In August, the U.S. Court of Appeals for the Ninth Circuit issued a memorandum decision for In re: Coca-Cola Products Marketing and Sales Practices Litigation (No. II).

The Ninth Circuit thereby reversed the U.S. District Court for the Northern District of California's decision to certify a class where the plaintiffs did not adequately allege an injury in fact, and, accordingly, did not have Article III standing to pursue injunctive relief.[1]

The plaintiffs alleged that the Coca-Cola Co. misled consumers with its slogan, "No artificial flavors. No preservatives added," because Coke contains phosphoric acid, which they contended should have been disclosed on the label.[2] The Ninth Circuit considered their claims in light of the standard articulated by the U.S. Supreme Court in Spokeo Inc. v. Robins in 2016:

> To establish injury in fact [for Article III standing], a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."[3]

In addition, the panel discussed the 2018 Ninth Circuit decision in Davidson v. Kimberly-Clark Corp., noting that the plaintiff purchaser of "flushable" wipes in Davidson had sufficiently alleged "personal and individual" harm because she could not rely on the advertising statements on the wipes "because of her desire to purchase the product as advertised" and "at the motion to dismiss stage, her plausible allegations that she 'would purchase truly flushable wipes manufactured by Kimberly–Clark if it were possible' made the informational injury she suffered concrete."[4]

Applying these standards, the In re: Coca-Cola Products panel held that the plaintiffs had not adequately alleged a concrete, imminent injury, and did not have standing to pursue

injunctive relief.

The plaintiffs only had an "abstract interest in compliance with labeling requirements" because none of the plaintiffs alleged that they would purchase Coke "as advertised, that is, free from ... artificial flavors or preservatives."[5] At best, some plaintiffs stated that if Coke were properly labeled, they would "consider purchasing it" — which was not enough.[6]

The Ninth Circuit specifically addressed each of the named plaintiffs' alleged harms. First, two of the plaintiffs did not have sufficient standing because there was no evidence that either had stated any desire to purchase Coke in the future.[7]

Second, four other plaintiffs declared they would consider purchasing Coke depending on several factors, including Coca-Cola's disclosures regarding the presence of phosphoric acid, whether phosphoric acid was removed from the product — and what replaced it, if anything — and the price of the soda.[8] Noting "allegations of possible future injury are not sufficient," the panel found that the plaintiffs' claims that they would consider purchasing a properly labeled Coke were insufficient to show actual or imminent threat of future harm.[9]

Finally, the panel turned to two plaintiffs who "were not concerned with phosphoric acid, but rather with whether Coca-Cola was telling the truth on its product's labels," and who said that they would be interested in purchasing Coke if its labels were accurate, regardless of whether the beverage contained phosphoric acid.[10]

In rejecting this argument, the Ninth Circuit cited a 2021 Supreme Court case, TransUnion LLC v. Ramirez, which held "[a]n 'asserted informational injury that causes no adverse effects cannot satisfy Article III.'"[11]

The panel also noted that alleging a bare procedural violation does not satisfy the standing requirements.[12] Therefore, the plaintiffs' desire for truthful labels, without more, was insufficient to prove that they "suffered any particularized adverse effects."[13]

Heightened Pleading Standards Would Save Judicial and Party Resources

The fact that Coca-Cola was forced to wait until after a class was certified to obtain this ruling — and expended years of effort and litigation costs to do so — exemplifies how the current pleading and certification standards for labeling claims allow plaintiffs lacking sufficient harm to survive a motion to dismiss, and even achieve class certification. For the same reasons, the current standards make economical settlement of such claims at an early stage inordinately difficult.

In our experience, the relatively low standard to survive a motion to dismiss — and the resulting substantial costs of defense for even low-value or subjective-injury claims — mean that class counsel are often loathe to accept settlements on the merits before certification. These same low bars lead some class counsel to maintain an overly optimistic assessment of the merits of the class claims when the settlement occurs post-certification, but before trial.

One way to align class counsel's real-world incentives and encourage consumer class action settlements — and avoid expending judicial and party resources in protracted litigation — would be by enacting legislation akin to the Private Securities Litigation Reform Act, which imposes heightened pleading standards in securities fraud actions, and stays discovery pending resolution of the defendant's motion to dismiss.[14]

Similar pleading requirements in consumer class action litigation would be particularly effective in streamlining actions where the purportedly false statement does not alter the efficacy of the product — e.g., representations regarding whether the product was tested on animals, made in America or organic. In these instances, the product performs as advertised, but the harm is largely subjective and informational, and arises from a plaintiff's own individualized beliefs.

Plaintiffs alleging classwide damages arising from allegedly false statements should be required to demonstrate with some specificity — perhaps even supported by evidence — the concrete, imminent injury at issue.

For example, a heightened pleading standard and evidentiary showing would have weeded out the Coca-Cola plaintiffs who were concerned only about truth in labeling, not phosphoric acid, as well as the plaintiffs who, even after discovery, were unable to demonstrate they intended to buy the product again.[15]

As another example, where a plaintiff complains that a cosmetic product advertised as "oil free" left her skin "feeling greasy" because the product contained oil-like compounds, that plaintiff should have to introduce evidence that even despite her dissatisfaction, she would buy that product again as advertised in order to survive a motion to dismiss her injunctive relief claims.[16]

Another means of streamlining these labeling actions alleging purely subjective harm would be to require the plaintiff to specifically plead how they will prove damages on a classwide basis. For example, the dissatisfied cosmetics customer described above would have to overcome the inherently individualized nature of her product experience at a much earlier stage in the litigation, rather than forcing the parties to wait until class certification briefing.

In sum, requiring a plaintiff to plead with specificity and submit evidence at the motion to dismiss stage attesting to their actual, provable harm could end the case more quickly — either though dismissal or settlement. This, in turn, would create incentives for all counsel to be realistic as to the true merits of the class claims, and better ensure that judicial and party resources are aligned with the merits of claims to avoid unnecessary litigation.

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[1] In re Coca-Cola Prod. Mktg. & Sales Pracs. Litig. (No. II), No. 20-15742, 2021 WL 3878654, at *1-3 (9th Cir. Aug. 31, 2021).

[2] Id. at *1 (emphasis omitted).

[3] Id. at *1-2 (alteration in original) (quoting Spokeo Inc. v. Robins, 578 U.S. 330, 339 (2016)).

[4] Id. (quoting Davidson v. Kimberly-Clark Corp., 889 F.3d 956, 970-71 (9th Cir. 2018)).

[5] Id. at *2.

[6] Id.

[7] Id.

[8] Id.

[9] Id. (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013)).

[10] Id.

[11] Id.; see also TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2213–14 (2021) (holding formatting issues in defendant's mailing did not give rise to standing for majority of class in FCRA claim based on consumers' potential "risk of not learning about the OFAC alert in their credit files" because "the risk of future harm on its own does not support Article III standing for the plaintiffs' damages claim" and "plaintiffs have identified no 'downstream consequences' from failing to receive the required information," such as "that the alleged information deficit hindered their ability to correct erroneous information before it was later sent to third parties," and "[a]n 'asserted informational injury that causes no adverse effects cannot satisfy Article III.'" (citations omitted)).

[12] In re Coca-Cola, 2021 WL 3878654, at *2 (quoting Spokeo, 578 U.S. at 342).

[13] Id.

[14] See 15 U.S.C. § 78u-4(b)(1)-(4).

[15] In re Coca-Cola, 2021 WL 3878654, at *2.

[16] Id.