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9th Circ. Axes Class Certification For Coca-Cola Consumers

By Hailey Konnath

Law360 (August 31, 2021, 10:44 PM EDT) -- The Ninth Circuit on Tuesday decertified a class of consumers claiming Coca-Cola falsely labels its drinks as having no artificial flavors when they contain phosphoric acid, ruling that the consumers lack standing to pursue injunctive relief in the dispute.

The three-judge panel reversed a class certification order from a California federal judge, agreeing with Coca-Cola that the consumers haven't shown that they're at risk of suffering any future harm in the years-long labeling multidistrict litigation.

"None of the plaintiffs in this case allege a desire to purchase Coke as advertised, that is, free from what they believe to be artificial flavors or preservatives, nor do they allege in any other fashion a concrete, imminent injury," the Ninth Circuit said. "Instead, as plaintiffs explained in their brief, they have 'each stated that if Coke were properly labeled, they would consider purchasing it.'"

Such an "abstract interest in compliance with labeling requirements" is insufficient to establish standing, the panel said.

The consumers allege that they were misled by labels claiming Coke had "no artificial flavors" and "no preservatives added," "since 1886," because those labels don't disclose that the drink contains phosphoric acid, which qualifies as a preservative and artificial flavor.

Several of the named plaintiffs have stated that they "would consider purchasing" Coke, depending on its disclosures along with other factors, according to the Ninth Circuit. But those declarations are insufficient to show an actual or imminent threat of future harm, it said.

Two of the named plaintiffs also said they weren't concerned with phosphoric acid, but instead were worried about whether Coca-Cola was truthful on its products' labels, the panel said. Both said they would be interested in purchasing Coke again if its labels were accurate, regardless of what was contained in the product, the panel noted.

But that desire for Coca-Cola to truthfully label its products isn't enough to demonstrate any particularized adverse effects, the Ninth Circuit said.

The litigation was consolidated before U.S. District Judge Jeffrey S. White in 2014. In 2017, the consumers asked the judge to certify classes of Coke buyers from California, Illinois, New York, New Jersey, Massachusetts and Florida.

Judge White partially certified the six state classes in February 2020, finding that because at least one named plaintiff from each of the six states said they would buy "properly" labeled Coca-Cola, each class has standing to seek an injunction forcing the company to change its labeling.

Coca-Cola then appealed, with Steven A. Zalesin of Patterson Belknap Webb & Tyler LLP arguing in February that the consumers lack standing and can't be certified. The consumers aren't at risk of future deception, and their purported injuries are "speculative and not imminent," he said at the time.

"This is Coke that has been around for 135 years, and it has always had phosphoric acid in it," Zalesin said. "They can't possibly be deceived or injured again in the future."

Meanwhile, Joshua D. Glatter of Fleischman Bonner & Rocco LLP argued on behalf of the consumers that Ninth Circuit precedent set in *Jennifer Davidson v. Kimberly-Clark Corp.* and other cases makes clear that consumers have standing to bring false labeling claims even if they may not be duped by the representations if they purchase the product in future.

Coca-Cola representatives and counsel for the consumers didn't immediately return requests for comment late Tuesday.

U.S. Circuit Judges Marsha S. Berzon, Bridget Bade and Morgan Brenda Christen sat on the panel for the Ninth Circuit.

The class is represented by Joshua D. Glatter of Fleischman Bonner & Rocco LLP.

Coca-Cola is represented by Steven A. Zalesin of Patterson Belknap Webb & Tyler LLP.

The case is *George Engurasoff et al. v. Coca-Cola Refreshments USA Inc. et al.*, case number 20-15742, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Dorothy Atkins, Mike Curley, Jeannie O'Sullivan and Emily Field. Editing by Ellen Johnson.