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2nd Circ. Slack-Fill Ruling Makes Injunctive Relief Harder

By Thomas Waskom, Neil Gilman and Michael Mueller
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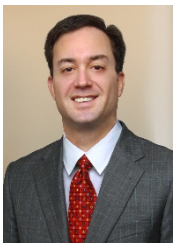


With its decision in Berni v. Barilla S.p.A.,[1] the U.S. Court of Appeals for the Second Circuit opened a circuit split with significant implications for consumer class actions seeking prospective injunctive relief. In Berni, the plaintiff had purchased a box of the defendant's pasta and then claimed it was underfilled — i.e., a slack-fill claim.[2]

The plaintiff filed a putative class action seeking damages and injunctive relief, and negotiated a settlement on behalf of a Rule 23(b)(2) class, for injunctive relief plus attorney fees.[3] The defendant agreed to add a fill line on boxes of pasta sold in the future.[4]

In response to an objection to the settlement, the Second Circuit found that because the plaintiff, a past purchaser, clearly knew about the alleged slack-fill issue by the time of the proposed settlement, he could not establish Article III standing for injunctive relief relating to future purchases.[5] That decision squarely conflicts with a U.S. Court of Appeals for the Ninth Circuit decision, and raises to the circuit level a long-running split among district courts about whether past purchasers have Article III standing in such cases.

In cases about alleged misrepresentations made on packaging — for instance, false claims about a product's ingredients, or how well it works — consumers usually seek price premium damages. The price premium is the difference between the amount the consumer actually paid and the hypothetical amount the consumer would have paid but for the misrepresentation. Calculating the amount of that price premium is a difficult exercise, usually requiring expert analysis and testimony.

Some plaintiffs also include a claim for injunctive relief, asking the court to order the defendant to change the offending statements on the label. The injunctive relief claim's strategic benefit to the plaintiff is that he or she can now seek certification not only under Rule 23(b)(3), which requires a showing of predominance and superiority, but also under Rule 23(b)(2), with its lower bar for certification of a class.

But past purchasers' injunctive relief claims for future label changes raise serious Article III standing concerns. To establish standing, a plaintiff must allege that she has suffered a concrete, particularized, actual injury that is fairly traceable to defendant's actions, and she must allege that it is likely, not merely speculative, that the injury will be redressed by a favorable decision.[6]

To establish standing to seek injunctive relief, the plaintiff must allege not only "past exposure to illegal conduct"[7] but also "a sufficient likelihood that [she] will again be wronged in a similar way."[8] District courts have split on whether past purchasers have Article III standing to seek prospective injunctive relief (as opposed to remedial injunctive relief).

Of the courts to find standing, some have rested their decision on pragmatic grounds, what Judge Jack

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Weinstein called a "Catch-22":

The only way a consumer could enjoin deceptive conduct would be if he were made aware of the situation by suffering injury. But once the consumer learned of the deception, he would voluntarily abstain from buying and therefore could no longer seek an injunction.[9]
Other courts have reasoned that the plaintiff might be injured in the future, if he alleges that he intends to buy the same product again, so long as he can gain some confidence in the representations on the label.[10] This could fairly be called the "fool me once, shame on you" theory of standing.

Before Berni, only one federal appellate court had considered whether past purchasers have Article III standing to seek future changes to product packaging. In Davidson v. Kimberly-Clark Corp.,[11] the Ninth Circuit considered whether a past purchaser of "flushable" wipes can sue in federal court for an injunction requiring the manufacturer of the wipes to stop claiming they are flushable, on the basis that the wipes clog pipes.

The court recounted the deep split between district courts in the Ninth Circuit, and "resolve[d] this district court split in favor of plaintiffs seeking injunctive relief."[12] The appellate court reasoned that "a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase," because the consumer might suffer an "'actual and imminent, not conjectural or hypothetical' threat of harm."[13]

The Ninth Circuit based that decision both on the possibility that a plaintiff might want to rely on future representations from the same defendant,[14] regarding the same product, and on the more practical concerns voiced by Judge Weinstein.[15]

The Second Circuit's decision in Berni reaches the opposite conclusion, albeit in a different procedural posture. In reviewing the approval of the Rule 23(b)(2) class settlement, the court considered whether "'a single injunction or declaratory judgment would provide relief to each member of the class.'"[16]

The court reframed this question in the inverse: "[A] class may not be certified under Rule 23(b)(2) if any class member's injury is not remediable by the injunctive or declaratory relief sought."[17] With that framework in place, the court asked, "[A]re each of the pasta purchasers likely to be harmed by Barilla in the imminent future absent injunctive relief?"[18]

To the Second Circuit, the answer is "no," for several reasons. First, past purchasers are not necessarily going to purchase a product again, whatever the named plaintiff might allege.[19] Second, if the past purchasers do buy the pasta again, "next time they buy one of the newer pastas, they will be doing so with exactly the level of information they claim they were owed from the beginning."[20]

The Second Circuit met head-on the Catch-22 problem raised by several courts, including the Ninth Circuit. According to the Second Circuit, it may be true that strict enforcement of Article III's requirement of imminent future harm will preclude past purchasers from seeking forward-looking packaging changes, but "an equitable exception to Rule 23(b)(2) simply does not exist, and courts cannot create one to achieve a policy objective, no matter how commendable that objective."[21]

Nor, after Berni, can plaintiffs in the Second Circuit fall back on the allegation that they would buy the product again in the future if they could rely on the packaging's representation. Or rather, individual

plaintiffs can, but proposed class representatives cannot, because they will not be able also to allege that the same is true of every member of the putative 23(b)(2) class.

It is unlikely that many individual plaintiffs and their counsel will take up the mantle of seeking injunctive relief in the form of label changes, absent the leverage and potential fees that come with the threat of class certification.

While the split has now risen to the circuit level, the U.S. Supreme Court may wait for other circuits to take sides before resolving the dispute. Even still, Berni will have significant repercussions in the Second Circuit and beyond for some time to come.

Notes

1. Berni v. Barilla S.p.A., Case No. 19-1921 (decided July 8, 2020).

2. Slip op. at 5-6.

3. Id. at 6.

4. Id. at 6-7.

5. Id. at 17.

6. See Friends of the Earth Inc. v. Laidlaw Envtl. Servs. (TOC), 528 U.S. 167, 180-81 (2000).

7. O'Shea v. Littleton, 414 U.S. 488, 494 (1974).

8. City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983).

9. Belfiore v. Procter & Gamble Co., 311 F.R.D. 29, 67 (E.D.N.Y. 2015).

10. See, e.g., Akinmeji v. Jos. A. Bank Clothiers Inc., 399 F. Supp. 3d 466, 478 (D. Md. 2019) ("Because she has alleged that she would like to purchase additional products from [the defendant] in the future, [the plaintiff's] inability to rely on the validity of [the defendant's] allegedly deceptive sales promotions may be deemed a sufficiently imminent or actual threat of harm to support standing"); Curran v. Bayer Healthcare LLC, 2019 U.S. Dist. LEXIS 15362, *14 (N.D. Ill. Jan. 31, 2019) ("He does not allege that he would not buy defendant's product again or that it is worthless; to the contrary, he alleges that he 'would purchase the product again in the future if he could be assured that the product was accurately labeled'").

11. Davidson v. Kimberly-Clark Corp., 889 F.3d 956 (9th Cir. 2018).

12. Id. at 969.

13. Id. (quoting Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009)).

14. Id. at 969-70.

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15. Id. at 970.

16. Slip op. at 11 (quoting Wal-Mart Stores Inc. v. Dukes, 564 U.S. 338, 360 (2011)).

17. Id.

18. Id. at 13.

19. Id. at 13-14.

20. Id. at 14.

21. Id. at 16.

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