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Resolving the Dispute over Injunctive Relief Classes

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In the years since the Supreme Court's decision in *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), which made it harder for plaintiffs to certify damages classes under Federal Rule of Civil Procedure 23(b)(3), plaintiffs in putative federal class actions have increasingly sought to certify injunctive relief classes under Rule 23(b)(2). To have standing to pursue injunctive relief under Article III, however, a plaintiff must personally face a "real and immediate threat" that he or she will be harmed again. A commonsense reading of this rule, therefore, would preclude consumers from seeking injunctive relief in false-advertising cases because plaintiffs who detail in their complaint how they were allegedly deceived cannot credibly claim that they face the threat of being deceived in the same way again. For example, a plaintiff who purchases a food labeled "All Natural" but later sues alleging that it contains artificial ingredients will not be misled about the food's contents again.

However, a minority of pro-plaintiff courts—in jurisdictions ranging from California to Kansas to the District of Columbia—have gotten around this constitutional requirement by creating a "public policy" exception to Article III in consumer false-advertising class actions. While the exception has no basis in established constitutional law, these courts justify this exception by arguing, primarily, that rejecting consumer injunctive relief classes for lack of standing would effectively "thwart the objective" of state consumer protection laws and would essentially preclude federal courts from enjoining false advertising. See, e.g., *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181 (D.D.C. 2013); *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-MD-1840, 2012 WL 1415508 (D. Kan. Apr. 24, 2012); *Henderson v. Gruma Corp.*, No. CV 10-04173 AHM, 2011 WL 1362188 (C.D. Cal. Apr. 11, 2011).

Regardless of whether or not that is true (it is not), as a matter of law it is entirely beside the point because, as one district court recently put it, "Article III's mandate can't be displaced by a policy preference." *Lucas v. Jos. A. Bank Clothiers, Inc.*, No. 14-cv-1631-LAB, 2015 WL 2213169 (S.D. Cal. May 11, 2015) ("[T]he assumption that if plaintiffs have no standing to sue, no one would have standing, is not a reason to find standing.") Furthermore, the minority courts are wrong that a "public policy" exception is necessary to protect consumers. First, consumer plaintiffs can simply sue in state court, where there is no Article III standing requirement. Second, competitors clearly have standing to enjoin false advertising because they are placed at a competitive disadvantage if their competitors are lying to consumers. Third, there are numerous bodies and agencies that police false advertising, including the Federal Trade Commission, at the federal level, and attorneys general offices at the state level.

As a result, the "public policy" exception does little more than deputize class action plaintiffs' lawyers to police product labels on behalf of consumers who face no risk of future injury and to

increase the costs defendants must incur in defending consumer products class actions. All this leaves plaintiffs' lawyers as the only clear winners from the "public policy" exception.

While most federal district courts have smartly rejected the exception, only one court of appeals (the Third Circuit) has directly ruled on the issue. In *McNair v. Synapse Group Inc.*, 672 F.3d 213 (3d Cir. 2012), the Third Circuit sided with the majority of courts, holding that the plaintiffs lacked standing to pursue injunctive relief in an action alleging that the defendant falsely advertised magazine subscriptions. The court reasoned that "the law accords people the dignity of assuming that they will act rationally, in light of the information they possess," and that the plaintiffs would not be injured if they chose to accept the defendant's magazine offers in the future, presumably with full awareness of the defendant's allegedly unlawful practices.

The other courts of appeals should quickly follow the Third Circuit's lead and resolve the uncertainty facing class action defendants by definitively rejecting the judicially created "public policy" exception to Article III. Fortunately, the Ninth Circuit will get the chance to do so this year, in the currently pending appeal of *Jones v. ConAgra Foods, Inc.*, No. C-12-01633-RB, 2014 WL 270726 (N.D. Cal. June 13, 2014), which squarely presents the injunctive relief issue in a consumer class action involving food products. In Jones, the district court rejected the "public policy" exception and found that the plaintiffs lacked standing to pursue injunctive relief on behalf of consumers who had purchased various allegedly mislabeled foods, such as tomato sauce, cooking spray, and hot chocolate. Quoting another recent consumer class action opinion, the district court stated, "[T]he power of federal courts is limited, and that power does not expand to accommodate the policy objectives underlying state law."

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