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DC Court of Appeals Abandons Article III Standing for Consumer Advocacy Groups

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"[P]ublic interest organizations bringing suit [for the purpose of promoting interests or rights of consumers are] free from any requirement to demonstrate their own Article III standing." With that statement in *Animal Legal Defense Fund v. Hormel Foods Corp*., 2021 WL 3921512 (D.C. Sept. 2, 2021), the D.C. Court of Appeals opened the courthouse doors to organizations using District of Columbia's consumer law to sue without alleging anyone experienced an actual injury. As a result, companies that sell goods or services in the District of Columbia should brace themselves for a surge of litigation by advocacy groups, some of which have extreme agendas that do not align with consumer interests.

The District of Columbia's Consumer Protection Procedures Act. Like most consumer protection laws, the Consumer Protection Procedures Act (CPPA) originally authorized a private right of action by "any consumer who suffers damage as a result of . . . a trade practice." In 2000, the D.C. Council amended this provision to permit lawsuits by "a person, whether acting for the interests of itself, its members, or the general public seeking relief from the use by any person of a trade practice." Then, in 2012, the D.C. Council specifically authorized nonprofit organizations and public interest organizations to bring CPPA actions. D.C. Code Ann. § 28-3905(k)(1). An individual or organization may seek relief from a violation of the CPPA, including after it purchases or receives a product "in order to test or evaluate qualities pertaining to use for personal, household, or family purposes." Organizations avoid class certification requirements and federal court jurisdiction by seeking only injunctive relief, attorney's fees, and costs, not monetary damages.

Advocacy groups have increasingly filed CPPA actions targeting the marketing of food, beverages, and other products. One recent lawsuit alleges that a soft drink maker cannot tout itself as environmentally responsible so long as it sells single-use plastic bottles. Another claims that a meat producer did not live up to its advertised efforts to safely supply food during the pandemic. Organizations have also alleged that products marketed as "pure," "natural," "clean," or just generally "safe" contain minute traces of a chemical or other substance that make their advertising false or deceptive.

Article III Standing, D.C. Courts, and the CPPA. Whether a plaintiff has standing to bring a CPPA private-attorney-general action is often contested in litigation. Article III standing reserves judicial power for cases in which a plaintiff has experienced a concrete harm caused by the defendant's conduct, ensuring that cases are resolved in the context of an actual dispute. An organization can establish Article III standing by showing that it had to divert significant resources from its programs to respond to the practice at issue. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). There must be a "direct conflict" between the defendant's conduct and the organization's mission. *D.C. Appleseed Ctr. for Law and Justice, Inc. v. D.C. Dep't of Ins., Sec., & Banking*, 54 A.3d 1188, 1206-09 (D.C. 2012). A statutory violation alone is insufficient to qualify as an injury in fact for Article III standing purposes. S*pokeo, Inc. v. Robins*, 578 U.S. 330 (2016). As the

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U.S. Supreme Court recently recognized, Article III does not grant unharmed plaintiffs "freewheeling power to hold defendants accountable for legal infractions." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021).

While D.C. courts are not bound by Article III, until *Hormel*, the D.C. Court of Appeals had specifically ruled in CPPA cases that "this court has followed consistently the constitutional standing requirement embodied in Article III." *Grayson v. AT&T Corp.*, 15 A.3d 219, 224 (D.C. 2011). It had repeatedly reaffirmed this principle, even after the 2012 amendments. Following these decisions, some trial court judges adhered to Article III requirements in representative actions brought by organizations, while others took a more relaxed approach.

The Court of Appeals' Decision. The D.C. Court of Appeals held in *Hormel* that the D.C. Council replaced Article III standing requirements with a statutory test that provides "maximum standing" to public interest organizations. That test requires an organization to "check three boxes": (1) it must be a public interest organization ("a nonprofit organization that is organized and operating, in whole or in part, for the purpose of promoting interests or rights of consumers"); (2) it must identify a "consumer or class of consumers" that could bring the suit in their own right; and (3) it must have a "sufficient nexus" to those consumers' interests to adequately represent them. *Hormel*, 2021 WL 3921512, at *6.

Applying this test, the court ruled that the Animal Legal Defense Fund (ALDF) had standing to bring an action seeking to stop Hormel's Natural Choice marketing campaign, which it claimed led consumers to believe that the animals slaughtered to make its deli meats are treated humanely when they are not, and to require the company to engage in "corrective advertising." *Id*. at *2. The Court rejected Hormel's argument that ALDF ("the legal voice for all animals") does not represent the interests of meat-eating consumers. Rather, the court found that promoting the interests of consumers only needs to be part of the nonprofit's purpose. *See id.* at *6. While the organization's end goal may be to have the public stop eating meat entirely, the court found that its interests in seeking truthful advertising and accurate information, as well as its concern with how animals are treated, sufficiently aligned with meat-eating consumers. *See id.* at *7.

Expect a Surge of Litigation. *Hormel* is likely to turn the District of Columbia's local courts into a playground for national advocacy groups to promote their policy agendas, rather than serve the interests of consumers. Unlike consumer class action litigation, these claims will not need to identify a single D.C. resident who alleges that he or she purchased the product because of misleading labeling or advertising. As advocacy groups and the plaintiffs' bar learn of the ruling, the number of these claims, which were already accelerating in recent years, is likely to surge.

D.C. courts can attempt to protect the interests of consumers and constrain misuse of the statute. Courts can add teeth to the CPPA's requirement of a "sufficient nexus" between an organization's mission and the consumer interests involved in the lawsuit. They can also dismiss claims when an organization's complaint fails to assert a plausible claim that reasonable consumers would be misled by the challenged representation, which must be one that would be material to a decision to purchase the product for a significant number of consumers. D.C. Code Ann. § 28-3904(e), (f), (f-1). If litigation runs rampant, as occurred with a similar provision that California voters abandoned years ago,[1] the D.C. Council may need to reverse course.

[1] California's Unfair Competition Law (UCL) once allowed any person to bring a "representative" action on behalf of itself, its members, or the public without the need to allege a loss of money or property or satisfy class action standards. That provision gave rise to a cottage industry of no-injury consumer lawsuits. California voters intervened, passing an initiative in 2004 known as Proposition 64, which incorporated basic injury-in-fact and class certification requirements into the UCL.

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