

Allstate's "Drivewise" Suit Against Kia's "Drive Wise" Mark Finally Runs Out Of Gas

Allstate Ins. Co. v. Kia Motors Am., Inc., No. 18-55164, 2019 WL 4233634 (9th Cir. Sept. 6, 2019)

Nick Wheeler & Reid Huefner | September 12, 2019

The Ninth Circuit recently held that the district court did not err when it ruled that Allstate's "Drivewise" mark—which Allstate conceded was merely suggestive and for which Allstate failed to establish the level of its marketplace recognition—was only entitled to a narrow scope of protection and could not be used to prevent Kia from using its "Drive Wise" mark. The Circuit further held that the advisory jury's conclusion to the contrary did not affect the Circuit's review of the court's decision.

Allstate Insurance Company ("Allstate") filed a trademark infringement suit against Kia Motors America, Inc. ("Kia") asserting a likelihood of confusion between Kia's "Drive Wise" mark and Allstate's "Drivewise" mark. Allstate uses its "Drivewise" mark for its "Drivewise Program," a discount plan through Allstate's auto insurance program. Kia's uses its "Drive Wise" mark for "Advanced Driver Assistance Systems" features in its vehicles.

An advisory jury at the district court level was first empaneled and reached a verdict in favor of a finding of a likelihood of confusion. A month later, the district court disagreed with this verdict and ultimately found there was no likelihood of confusion.¹ The district court's analysis relied on the Ninth Circuit's *Sleekcraft* eight factor likelihood of confusion test² and particularly concluded that Allstate's "Drivewise" mark was conceptually weak and not closely related to Kia's products.

The district court found Allstate's mark to be suggestive and, thus, "inherently weak," though able to be strengthened by factors such as "extensive advertising, length of exclusive use, public recognition, and uniqueness." The district court noted that Allstate provided no evidence that its "Drivewise" mark "enjoy[ed] market place recognition" and all the money Allstate claimed to have spent on developing and advertising its mark, around \$400 million and \$50 million respectively, was not persuasive without proper supporting documentation. Allstate's mark was further weakened by third parties using "Drivewise" in different fields and the disparity between the small number of users in the "Drivewise" program and Allstate's alleged program scope and large investment into the mark.

Regarding the proximity of goods, Allstate's and Kia's goods were found not to be closely related. Allstate offered a service while Kia offered an actual product. The "Drivewise" discount plan was free while Kia's system costed several thousands of dollars. The District Court noted, the stark difference in price greatly reduced the likelihood of confusion.

The Ninth Circuit, reviewing the *Sleekcraft* factors, noted that Allstate provide no marketplace recognition evidence (e.g., consumer surveys or advertising investments) and found the "Drivewise" mark to be conceptually weak and only entitled to narrow protection. The Circuit also agreed with the district court's finding that differences in

hardware and software, features, and price meant the products were not closely related. In affirming the lower court's rejection of the advisory jury opinion, the Ninth Circuit found that "the advisory jury's conclusion does not affect our review of the court's decision."³