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NO HARM, NO FOUL: RECKONING WITH THE INJURY REQUIREMENT

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Most of us can recall learning in law school that there can be no civil action without injury. Many actions may cry out for redress, but not all give rise to proper lawsuits. As with the familiar basketball adage, "no harm, no foul" was the watchword for gaining access to a courtroom. And harm meant something specific—demonstrable injury actually incurred.

The injury requirement anchors tort law, and much of civil law more generally. It is also a cornerstone condition of the right to appear in federal court. As the Supreme Court recently affirmed, Article III standing requires injury, meaning harm of a sort "concrete, particularized, and actual or imminent." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).

In recent years, the injury rule has come under assault, increasingly honored in the breach. Courts have permitted plaintiffs to employ various work-arounds to end-run the time-honored injury requirement. The result is a blurring of the line between actionable and non-actionable wrong, fuzziness in the application of torts and warranty law in environmental litigation and beyond, and a tug of war between those courts guarding the courthouse doors and others willing to open them wide.

Medical Monitoring. The trend of tort claims without injury begins with medical monitoring litigation. Plaintiffs in such cases contend that they have not yet been injured, but someday might, due to exposure to a given toxic agent, and ask for a regime of court-ordered medical testing. In effect, medical monitoring theories substitute exposure to some substance in place of injury. Many states recognize medical monitoring as a remedy; some go so far as to endorse an independent cause of action of medical monitoring. *See, e.g.*, *Donovan v. Philip Morris USA, Inc.*, 455 Mass. 215, 225–27 (2009) (Massachusetts); *Bower v. Westinghouse Elec. Corp.*, 206 W.Va. 133, 140–42 (1999) (West Virginia); *Redland Soccer Club, Inc. v. Dep't of the Army & Dep't of Def.*, 548 Pa. 178, 195–96 (1997) (Pennsylvania); *Burns v. Jaquays Mining Corp.*, 156 Ariz. 375, 380 (Ct. App. 1988) (Arizona).

Courts continue to wrestle with this concept. Typical of cases recently recognizing a cause of action for medical monitoring is *Donovan*, tobacco litigation in which plaintiffs produced "evidence of physiological changes caused by smoking" and submitted expert medical testimony that such physiological changes resulted in a "substantially greater risk of cancer." 455 Mass. at 225. The court emphasized that a successful medical monitoring claim must show that one's exposure to a hazardous substance resulted in "subcellular changes that substantially increased the risk of serious disease, illness or injury"; the court distinguished cases where plaintiffs did not have such proof of symptoms or subclinical effects arising from exposure to hazardous substances. *Id.* at 225–26.

By contrast, New York's highest court recently declined to recognize an independent cause of action for medical monitoring absent injury. In *Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439, 446 (2013), a class of smokers claiming to face increased risk of lung cancer asked the court to order medical monitoring to detect cancer in its early stages. The Court of Appeals held the line, concluding that it would not endorse such a "significant deviation" from its tort jurisprudence by recognizing an independent claim for medical monitoring without evidence of "present physical injury or damage to property." *Id.* at 452; *see also id.* at 446 (holding that the "threat of future harm is insufficient to impose liability against a defendant in a tort context"). At the same time, the court acknowledged that plaintiffs could seek medical monitoring as consequential damages in connection with other traditional tort claims. *Id.* at 452.

Maryland's highest court also recently addressed the issue in environmental tort litigation involving an

underground gasoline leak. In *Exxon Mobil Corp. v. Ford*, 433 Md. 426 (2013), the court reversed the jury's award of non-economic damages for emotional distress (including the fear of contracting cancer) and damages for the cost of future medical monitoring. The court found that while some plaintiffs had shown exposure to chemicals at levels above those considered safe, they failed to present expert testimony showing that "any individual faced a particularized and significantly increased risk as a result of the leak in relation to the public at large." *Id.* at 475. It also rejected claims for emotional distress based on fear of cancer, in part because plaintiffs failed to present evidence of actual injury. *Id.* at 470. Explaining that a plaintiff must sustain "an objectively demonstrable physical injury," the court ruled that plaintiffs had failed to show injury "manifesting emotional distress," meaning an injury to their mental state, physiological or psychological symptoms, or an actual physical harm, arising from exposure to the leak. *Id.*

Nuisance. The amorphous tort of private nuisance likewise has proven elastic when it comes to injury. It was once settled that nuisance law required bona fide injury of a sort worthy of judicial remedy, and did not redress what courts and treatises familiarly called "trifling annoyances." *Banford v. Aldrich Chem. Co.*, 126 Ohio St. 3d 210, 213 (2010) ("[A] plaintiff may not recover for trifling annoyance and unsubstantiated or unrealized fears. There must be an appreciable, substantial, tangible harm resulting in actual, material physical discomfort."); 58 AM. JUR. 2d *Nuisances* § 72 ("[T]he law of nuisance does not concern itself with trifles or seek to remedy all the petty annoyances of everyday life in a civilized community."). Yet annoyance has become the lone injury anchor for recent environmental litigation in which claimants temporarily evacuated from their homes due to a factory explosion claim inconvenience and seek redress in nuisance. At least one state supreme court appears to hold that annoyance claimants may proceed on their nuisance theory so long as their alleged disturbance is tied to physical discomfort. *Banford*, at 216-17.

Defect as Injury. Other litigants seeking to test the injury requirement strive to equate defect with injury. A product line has a flaw, so the reasoning goes, and that flaw is itself the injury needed to bring suit. Under this reasoning, because a crib's drop-side may fail (but hasn't yet), a vehicle's braking system is unsound (but hasn't yet failed), and electrical system components may cause a house fire (but haven't yet), Article III standing exists and a common law cause of action is available.

Multiple courts stand firm in the face of such theories by requiring injury—actual failure producing actual harm. *See Briehl v. General Motors Corp.*, 172 F.3d 623, 620 (8th Cir. 1999) (affirming dismissal of express and implied warranty claims where plaintiffs alleged that their vehicles' brake mechanisms were defective but no plaintiff alleged that her vehicle's brakes had failed); *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 503 (8th Cir. 2009) (affirming dismissal of express and implied warranty, Magnuson-Moss Warranty Act, and unjust enrichment claims where purported defect in drop-side crib did not manifest in plaintiff's own product); *Harrison v. Leviton Mfg. Co.*, No. 05-cv-0491, 2006 WL 2990524, at **7–8 (N.D. Okla. Oct. 19, 2006) (dismissing tort and warranty claims where homeowner alleged that defective electrical system could deteriorate and lead to fire, but not that his system actually had deteriorated). Under this line of authorities, defect is not sufficient, nor is economic harm in the form of the purchase of a defective product or the cost to replace it. *See, e.g.*, *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002); *Gonzalez v. Kinro, Inc.*, 473 F. App'x 768, 769 (9th Cir. 2012).

Other courts find standing in such circumstances, even absent manifestation of the defect posited. *See In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 750 (7th Cir. 2011) (plaintiffs suffered injury where they paid more for allegedly defective toy than they would have paid for nondefective toy, though none suffered physical injury in its use); *Cole v. General Motors Corp.*, 484 F.3d 717, 723 (5th Cir. 2007) (denying motion to dismiss warranty claims where plaintiffs alleged that "they have suffered economic loss satisfying the injury-in-fact requirement because [their vehicles] were defective at the moment of purchase").

This defect theory of injury inevitably will get a workout in the recent and much-publicized wave of hacking events. In the days before modern-day hacking, courts would dismiss tort claims based on defects in security systems where the only alleged harm was product disappointment and resulting economic loss. *Fireman's Fund Am. Ins. Cos. v. Burns Elec. Sec. Servs., Inc.*, 48 Ill. App. 3d 298, 300-01 (1980) (affirming dismissal of strict liability case where a burglarized jewelry store had only suffered economic loss, stating: "When a buyer loses the benefit of his bargain because the goods are defective, that is, when he suffers economic loss, he has his contract to look to for remedies. Tort law need not, and should not, enter the picture."). Now, the hack of a retail store's credit card system, or of some company's computer system, can be expected to produce consumer class litigation brought on behalf of all affected credit card customers or computer owners. The theory of injury will be not injury itself, but the plaintiffs' *vulnerability* to harm following the hacking.

Courts vary in their assessments on whether this injury theory is sufficient to establish standing. In *In re Barnes & Noble Pin Pad Litig.*, for instance, so-called skimmers attempted to steal customer credit and debit card information by hacking pin pad systems in 63 Barnes & Noble stores. No. 12-cv-8617, 201 WL 4759588, at *1, *3 (N.D. Ill. Sept. 3, 2013). The court held that none of the ten separate theories of injury asserted by plaintiff customers at the time skimming occurred were sufficient to confer standing because plaintiffs did not allege that their information actually had been stolen or, in the case of the one plaintiff who did so allege, that she suffered any lasting harm from the theft. *Id.* at *2, *6. The court explained that "[m]erely alleging an increased risk of identity theft or fraud is insufficient to establish standing." *Id.* at *3. Instead, plaintiffs would have needed to show a "'certainly impending'" injury (*id.*); allegations of "'possible future injury'" were not enough. *Id.* at *2 (quoting *Clapper*, 133 S. Ct. at 1147).

By contrast, in *Pisciotta v. Old National Bancorp*, the Seventh Circuit found standing for plaintiffs suing the owner of a secure website after a computer hacker gained access to plaintiffs' confidential and personal information stored on the site, even though plaintiffs did not allege that the hacker actually used their information. 499 F.3d 629, 631-32 (7th Cir. 2007). Yet the claims were ultimately dismissed for failure to state injury sufficient to support relief.

The Supreme Court Weighs In - and Takes a Pass. The Supreme Court has recently had occasion to offer its own views on injury. Twice it has done so, twice it has passed.

In *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013), which found proponents of California's ban on same-sex marriage to have standing to appeal a district court order invalidating the ban, the Court reaffirmed that a party must "seek a remedy for a personal and tangible harm." The *Hollingsworth* Court found this no mere technicality: "The Article III requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury serves vital interests going to the role of the Judiciary in our system of separated powers." *Id.* at 2667.

In *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), a case involving surveillance of the communications of non-U.S. citizens under the Foreign Intelligence Surveillance Act (FISA), the Court addressed whether future injuries can establish Article III standing. Plaintiffs, human rights lawyers, and others opposed to FISA-approved surveillance, argued they had standing because "there [was] an objectively reasonable likelihood that their communications with their foreign contacts" would be intercepted under FISA. *Id.* at 1146. The Court majority held the line. Noting that Article III requires that an injury be actual or imminent, the Court concluded that for future injury to be imminent it must be "certainly impending" and not merely possible. *Id.* at 1147. Ultimately, the Court found plaintiffs' theory of potential future injury too speculative to be "certainly impending" for standing purposes. *Id.* at 1150.

Only months after deciding *Clapper*, in a move that surprised many court-watchers, the Supreme Court declined to review class certification decisions in

two product liability class actions involving alleged washing machine defects that caused mold growth and noxious odors for some but not all purchasers. The Sixth Circuit had affirmed class certification of all purchasers of Duet washing machines in Ohio, despite Whirlpool's contention that because the incidence of mold is rare, most class member purchasers suffered no injury. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409, 420 (6th Cir. 2012). The Seventh Circuit followed suit in *Butler v. Sears, Roebuck & Co.*, despite Sears's argument that class certification was not appropriate because most class members had not experienced mold. 702 F.3d 359, 362 (7th Cir. 2012).

The Supreme Court initially agreed to review both cases. Ultimately the Court reversed course, vacating and remanding for further consideration in light of its decision in *Comcast v. Behrend*, 133 S. Ct. 1426 (2013). *Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013); *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013). On remand, both the Sixth and Seventh Circuits reaffirmed, holding that *Comcast* did not change the outcome of the class certification determination because all members of the respective classes allegedly suffered injury in the form of purchase of a defective washing machine. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 857 (6th Cir. 2013); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 798, 801 (7th Cir. 2013). As the Sixth Circuit explained, "[b]ecause *all* Duet owners were injured at the point of sale upon paying a premium price for the Duets as designed, even those owners who have not experienced a mold problem are properly included within the certified class." *In re Whirlpool*, 722 F.3d at 857.

On February 24, 2014, the Supreme Court declined to review the two affirmances, thus foregoing an opportunity to clarify the current state of injury doctrine.

Holding Firm on Injury. The injury requirement serves important social, legal, and political functions. For one, injury separates courtroom resolution from the work of expert regulatory agencies, which are free to make social policy decisions and regulate products untethered to the personal circumstances of any given claimant. Courts lax on injury often wind up taking on *de facto* the role of such regulatory bodies, blurring the line between the branches of government.

Requiring injury also helps ensure that courts act like courts, resolving genuine cases and controversies and matters ripe for resolution, by "defin[ing] the class of persons who actually possess a cause of action" and "provid[ing] a basis for the factfinder to determine whether a litigant actually possesses a claim." *Caronia*, 22 N.Y.3d at 446. Insisting on injury also safeguards against "frivolous and unfounded" lawsuits, conserving the courts' resources for disputes that are ripe and ready for adjudication. *Id.* Moreover, allowing the uninjured to recover may lead to inequitable division of resources, with fewer funds available to the injured. *See Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 442-44 (1997); *Caronia*, 22 N.Y.3d at 451.

Let's also not forget what we learned in law school. We were taught the importance of the injury requirement for a reason. It remains an important lesson.

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