

Stretching — And Straining — The Concept Of 'Injury'

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A long-held tenet of federal law is that in order for a civil suit to proceed, the plaintiff has to have suffered some type of injury that the law recognizes. But that principle has been coming under attack from “no injury” suits. And with mixed messages coming from the courts, plaintiffs are more than willing to keep pushing the envelope on this issue.

In recent years, we have seen a proliferation of these no-injury class actions, which essentially seek damages even though the plaintiffs have not suffered any traditional, legally recognizable injury. For example, plaintiffs have filed numerous class action suits under the Telephone Consumer Protection Act, which protects consumers from unwanted telemarketing. Under that statute, if a company has called a consumer who doesn't want to be contacted, that may be enough to give rise to liability for the company. Thus, a TCPA class action will often involve consumers who did not suffer any injury in the traditional sense — including those who didn't even answer the telemarketer's call.



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Another approach that is eroding the traditional injury principle relies on a “defect as injury” theory. In these cases, plaintiffs who buy a product with an alleged defect — but never experience the alleged defect — still sue. Their argument, basically, is that the defect makes the product worth less than what they paid for it. In one high-profile example, companies have been sued for selling allegedly moldy washing machines, even though a sizable portion of class members never experienced any such problem with the machines they bought. Nevertheless, both the Sixth Circuit and Seventh Circuit have said that these cases can go forward.

As such cases proceed, plaintiffs attorneys continue to break new ground. Data breaches, such as those recently reported by Target and The Home Depot, are likely to be the subject of more class actions going forward. Already, it's not unusual to see that when a breach occurs, there is a class action filed within a day or two — often followed by dozens more. In these cases, class members typically claim that although they haven't seen fraudulent charges on their credit or debit cards, the breach has created the fear of future misuse of their cards or personal information, and that this provides sufficient injury to sue.

Certainly, there has been some pushback on the issue. In 2013, when the U.S. Supreme Court weighed in on the injury issue in *Clapper v. Amnesty Int'l USA*, it looked like this trend might begin to ebb. In that case (which was not a class action), the court said that injury has to be immediate and impending — not just something that might possibly happen someday. In the same term, the Supreme Court ruled in *Comcast Corp. v. Behrend* that a class can not be certified unless damages can be measured on a classwide basis.

Building on the *Clapper* and *Comcast* decisions, some courts have dismissed no-injury class actions or denied class certification on the grounds that plaintiffs have not been injured and therefore lack standing. Other courts, however, have allowed such cases to proceed. The absence of a bright-line rule has created a confusing landscape that encourages the continued proliferation of no-injury class actions.

Opportunities Missed — And Coming Up

In 2014, the Supreme Court turned down the chance settle the question and put a nail in the coffin of no-injury class actions. It declined to review several high-profile Court of Appeals rulings allowing such cases to proceed past threshold motions or affirming class certification. One such case — *First National Bank of Wahoo v. Charvat* — involved a federal statute requiring that ATMs have two notices explaining fees charged for transactions. The defendant banks' ATMs had only one. The class plaintiff — an employee at a plaintiffs' law firm who was fully aware of the transaction fees — voluntarily incurred the fees when he used the ATMs and then brought a class action. Nevertheless, the Eighth Circuit found that the plaintiff had suffered an "informational injury" because he did not receive the statutorily prescribed notice. The Supreme Court declined to review the decision.

The current term offers the Supreme Court another opportunity to provide clarity. The court has been asked to hear *Spokeo Inc. v. Robins*, a class action in which the plaintiff alleges violation of the Fair Credit Reporting Act by data aggregator Spokeo. The Ninth Circuit ruled that the plaintiff had sufficiently alleged an injury-in-fact, rejecting Spokeo's argument that the plaintiff must show tangible harm and not just fear that a prospective employer may rely on allegedly inaccurate data provided by Spokeo.

Here, a Supreme Court decision reversing the appellate court's ruling with clearly articulated reasoning could curtail the "no-injury" class action trend. However, if the court takes the case and affirms or issues a narrow decision, we are likely to see more conflicting decisions coming out of trial and appellate courts on whether these no-injury cases can proceed beyond the pleading stage and are appropriate for class certification. And those conflicting decisions will be a signal to the plaintiffs' bar to continue to file such suits and to keep trying to broaden the no-injury concept.

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