



DEFEATING CLASS ACTIONS: WHEN TO TARGET PLAINTIFFS' STANDING CLAIMS AND DAMAGES MODELS

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Over the past decade, the number of consumer class-action filings has risen steadily. In particular, the plaintiffs' bar has devised new ways to assert false advertising and statutory-damages class actions against companies in a wide range of industries. Defending these kinds of class actions can be challenging, especially in relatively plaintiff-friendly jurisdictions. Fortunately, some courts have provided defendants with effective tools for defeating these types of class actions at the motion-to-dismiss and class-certification stages. This LEGAL BACKGROUNDER discusses two recent trends—attacking plaintiffs' standing and their damages models.

Attacks on Standing

Consumer class actions based on alleged violations of statutes that provide minimum damages amounts—known as statutory-damages class actions—have exploded in popularity in recent years. These statutes include the Fair and Accurate Credit Transactions Act (FACTA), which awards \$100 to \$1,000 per violation plus actual and punitive damages; the Telephone Consumer Protection Act (TCPA), which awards \$500 per violation, plus treble damages for a willful or knowing violation; the Fair Debt Collection Practices Act (FDCPA), which provides up to \$1,000 per person plus actual and punitive damages; and the Video Privacy Protection Act (VPPA), which provides not less than \$2,500 per violation. Given the potential for astronomical damages awards when applied to classes of thousands if not millions of individuals, it is not surprising that plaintiffs have increasingly been drawn to these kinds of cases.

But where class actions are based only on statutory violations, defendants have had considerable success in getting those actions dismissed for lack of Article III standing. The seminal case supporting this defense is *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).¹

In *Spokeo*, plaintiff Thomas Robins brought a class action against Spokeo, Inc., a consumer reporting agency, for violations of the Fair Credit Reporting Act (FCRA). Robins alleged that Spokeo created a profile for him that contained inaccurate information. The US District Court for the Central District of California dismissed the case for lack of Article III standing because Robins could not show any actual harm from Spokeo's publication of inaccurate information. *Id.* at 1544. The US Court of Appeals for the Ninth Circuit reinstated the case, holding that Robins had standing. The Supreme Court, in a 6-2 decision, vacated the Ninth Circuit decision and remanded the case for further review. The Supreme Court held that to have standing, a plaintiff must show, among other factors, that he has suffered an "injury in fact"—that is, an

¹ [Ed. Note: WLF filed an *amicus* brief in *Spokeo* in support of the Petitioner, available at <http://www.wlf.org/upload/litigation/briefs/13-1339tsacWashingtonLegalFoundation.pdf>.]

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injury that is both “concrete and particularized.” *Id.* at 1545. The Court explained that a concrete injury could be tangible or intangible. *Id.* at 1549. Further, it explained that Congress could elevate intangible harms to concrete injuries. However, a “bare procedural violation,” such as the Court’s hypothetical example of misstating someone’s zip code, would be a statutory violation that does not give rise to a concrete injury. *Id.* at 1550.

For defendants seeking to challenge plaintiffs’ standing, *Spokeo* makes clear that a statutory violation, by itself, is not automatically an injury in fact. Certain intangible harms are not concrete or particularized and thus do not support Article III standing.

Since the *Spokeo* decision, courts have reached inconsistent conclusions as to which statutory violations constitute concrete injuries. For example, courts have differed over whether a phone call in violation of the TCPA constitutes an injury in fact. In *Romero v. Dep’t Stores Nat’l Bank*, 199 F. Supp. 2d 1256, 1263 (S.D. Cal. 2016), a California district court held that one unanswered telephone call could *not* constitute a concrete injury sufficient for standing, explaining that “[n]o reasonable juror could find that one unanswered telephone call could cause lost time, aggravation, distress, or an injury sufficient to establish standing.” In contrast, in *Ung v. Universal Acceptance Corp.*, 198 F. Supp. 2d 1036, 1039 (D. Minn. 2016), a Minnesota district court held a TCPA violation gave rise to a concrete injury and asserted that even one unwanted phone call was sufficient for standing because “[w]hile the injury in such a situation might well be minimal, it is enough to clear Article III’s low bar for a concrete injury.”

Many courts have focused on whether a statutory right is substantive or procedural. Generally, violation of a substantive statutory right gives rise to a concrete injury, while violation of a bare procedural right does not. A judge in the Southern District of Florida in *Wood v. J Choo USA, Inc.*, 201 F. Supp. 3d 1332, 1340 (S.D. Fla. 2016) considered the plaintiff’s right to a properly truncated receipt pursuant to FACTA guidelines to be a “substantive legal right” and therefore found the violation created a concrete injury. Similarly, a Northern District of California judge in *Matera v. Google Inc.*, 2016 WL 5339806, at *13-14 (N.D. Cal. Sept. 23, 2016), held that violations of the Electronic Communications Privacy Act (ECPA) and the California Internet Privacy Act (CIPA) constituted injuries in fact because both statutes “create substantive rights to privacy in one’s communications” and such rights have been historically protected by courts. Thus, plaintiffs did not need to allege any additional harm to achieve standing. *Ibid.* By contrast, the Seventh Circuit in *Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724, 727 n.2 (7th Cir. 2016) gave no weight to the substantive versus procedural distinction, explaining that regardless of “whether the right is characterized as ‘substantive’ or ‘procedural,’ its violation must be accompanied by an injury-in-fact.”

Despite the split in judicial interpretations of standing requirements post-*Spokeo*, many defendants have successfully achieved dismissals of class actions on standing grounds.² Article III standing remains a powerful tool for class-action defendants because it can be wielded at the earliest stages of litigation, including on a motion to dismiss, as well as at later stages, because standing, as a constitutional requirement, cannot be waived.

² See, e.g., *Dutta v. State Farm Mut. Auto. Ins. Co.*, 2016 WL 6524390, at *3 (N.D. Cal. Nov. 3, 2016) (holding that where FCRA violation was in the delay of plaintiff’s consumer report, but the report was entirely accurate, plaintiff lacked concrete injury); *Case v. Hertz Corp.*, 2016 WL 6835086, at *4 (N.D. Cal. Nov. 21, 2016) (holding that inclusion of extraneous information on a consent form in violation of FCRA is not a concrete injury); *Nokchan v. Lyft Inc.*, 2016 WL 5815287, at *4 (N.D. Cal. Oct. 5, 2016) (holding the same); *Kirchner v. First Advantage Background Services Corp.*, 2016 WL 6766944, at *3 (E.D. Cal. Nov. 14, 2016) (holding that formatting of consent form in violation of FCRA is not a concrete injury); *Larroque v. First Advantage LNS Screening Sols., Inc.*, 2016 WL 4577257, at *5 (N.D. Cal. Sept. 2, 2016) (holding that furnishing consumer reports for employment purposes without first obtaining certification of the employer’s compliance in violation of FCRA is not a concrete injury).

Attacks on Damages

When the Supreme Court issued its decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013),³ many practitioners believed that it would be a boon for class-action defense attorneys by providing a tool for challenging a plaintiff's damages model at the class-certification stage. In *Comcast*, the Supreme Court reversed class certification under Federal Rule of Civil Procedure 23(b)(3) where the plaintiffs' damages model fell "far short of establishing that damages are capable of measurement on a classwide basis." *Id.* at 1433. The Supreme Court further held that any model supporting a damages theory must be consistent with the plaintiff's theory of liability. Finally, the Supreme Court noted that this requires district courts, for purposes of Rule 23, to conduct a "rigorous analysis" to determine whether that standard has been met.

After the Court decided *Comcast*, some believed that any showing of individualized issues with regard to damages calculations would defeat class certification. This has not been the case. For example, in *Leyva v. Medline Industries*, 716 F.3d 510, 514 (9th Cir. 2013), the court held that "the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." Several other Ninth Circuit decisions have followed *Leyva* in holding that *Comcast* does not require a complete absence of individualized damages calculations in order to certify a class.⁴

This does not mean, however, that *Comcast* lacks teeth in the Ninth Circuit. Indeed, district courts in the Ninth Circuit have continued to deny class certification under *Comcast* where plaintiffs failed to tie their damages model to their theory of liability. For example, in *Werdebaugh v. Blue Diamond Growers*, 2014 WL 7148923, at *13 (N.D. Cal. Dec. 15, 2014), plaintiffs pursued a class action on behalf of consumers who purchased almond milk labeled as "all natural" and/or containing "evaporated cane juice." The district court decertified the class because plaintiffs' damages model failed to isolate the "price premium" attributable to the alleged mislabeling from unrelated factors such as brand loyalty and advertising effects. The court also stated the model was flawed by not taking into account the labeling of competing products. *Ibid.*

Similarly, in *Lanovaz v. Twinings N. Am., Inc.*, 2014 WL 1652338, at *4 (N.D. Cal. Apr. 24, 2014), plaintiffs filed a class action against Twinings for the alleged mislabeling of its teas as a "Natural Source of Antioxidants." The court denied certification for damages, but granted certification for injunctive and declaratory relief, holding that plaintiffs' damages model failed under *Comcast* because its price premium did not isolate the theory of liability from other factors. *Id.* at *7.

Further, in *Algarin v. Maybelline, LLC*, 300 F.R.D. 444 (S.D. Cal. 2014), plaintiffs filed a class action for Maybelline's alleged false advertising of its Superstay 24HR product line of makeup. The court denied class certification in part because of plaintiffs' insufficient damages model. The court explained that the model's assumption that "the 24 hour/no transfer claim command[ed] a premium of \$1.00-\$3.00" was "pure speculation on the part of Plaintiffs." *Id.* at 460. The court stated that it could "fathom a number of reasons why the Class Products may be priced as they are," which undermined plaintiffs' claim that the damages model was tied to the liability theory. The court offered examples of innocent rationales that could explain the price premium, stating "perhaps [the premium] is due to a higher quality of ingredients, perhaps it is because of the selection of colors offered, or perhaps it reflects the costs Maybelline expended in the research and development of the products." *Ibid.* Thus, the court held plaintiffs' damages model was "inconsistent

³ [Ed. Note: WLF filed an *amicus* brief in *Behrend* in support of the Petitioners, available at <http://www.wlf.org/upload/litigation/briefs/11-864tsacWashingtonLegalFoundationpdf1.pdf>.]

⁴ *Doyle v. Chrysler Grp., LLC*, 2016 WL 6156062, at *1 (9th Cir. Oct. 24, 2016); *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016); *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 987-88 (9th Cir. 2015); *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014).

with the law,” because it did not “establish that any difference in price is attributed solely to the alleged misrepresentation.” *Ibid.*

District courts have also denied class certification under *Comcast* where plaintiffs provided an underdeveloped damages model. In *Brazil v. Dole Packaged Foods, LLC*, 660 F. App’x 531, 533 (9th Cir. 2016), for example, plaintiffs filed a class action against Dole for alleged misrepresentations that its fruit was “all natural.” Plaintiffs’ damages model assumed that the fruit at issue was worthless and therefore damages were a full refund for the price of the fruit. *Id.* at 534. The Ninth Circuit affirmed the district court’s holding that damages should be the price premium, *i.e.*, the difference between the price of the fruit and actual value of the fruit. Because plaintiffs did not show how they would calculate the price premium classwide, the Ninth Circuit held that the motion to decertify was properly granted. *Id.* at 534-35.

Likewise, in *Rice v. Sunbeam Prod., Inc.*, 2014 WL 794331, at *6 (C.D. Cal. Feb. 24, 2014), the court denied class certification without prejudice because plaintiffs did not meet the *Comcast* standard of showing damages can be calculated on a classwide basis. Specifically, plaintiffs failed to supply expert evidence of the true market value of defendants’ allegedly defective Crock-Pot. The court explained that while plaintiffs need not prove their damages model correctly calculated true market value at the class-certification stage, they “must supply at least some expert evidence about the true market value.” *Ibid.*

As these cases demonstrate, *Comcast*’s required rigorous analysis of damages theories provide an effective tool for class action defendants in defeating class certification. Plaintiffs who fail to properly evaluate damages in line with liability have exposed themselves to decertification.

Conclusion

Challenges to standing and damages models are just two of a variety of tools that defendants have used to defeat class certification. Going forward, the plaintiffs’ bar is sure to continue filing consumer class actions against companies. It is thus important for companies to be aware of the tools they can wield at the earliest stages of litigation to prevent costly and protracted proceedings.