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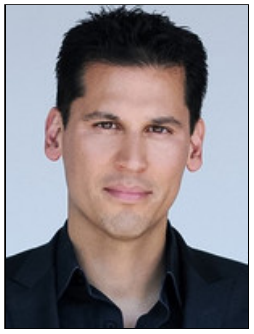
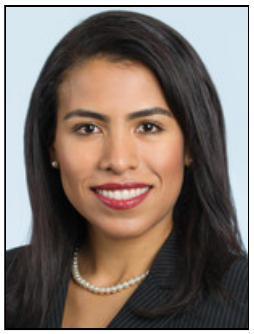
Challenging No-Injury Class Actions In State Court


Joshua Briones


E. Crystal Lopez

Law360, New York (August 30, 2016, 12:49 PM ET) -- A problem facing many businesses in the U.S. is being subject to a "no-injury" class action filed by enterprising plaintiffs counsel who cite technical violations of statutory requirements — such as the Fair Credit Reporting Act, the Telephone Consumer Protection Act, the Fair and Accurate Credit Transactions Act or the Truth in Consumer Contract and Warranty and Notice Act. Then there are nonstatutory based claims — such as those alleging some kind of unfair competition based on an alleged technical misuse of a word in labeling or marketing materials like "all natural" or "organic.

These suits seek to impose crippling civil penalties and/or damages on companies even when no class member was actually injured by the complained-of conduct. This sets up a system ripe for abuse as evidenced by lawyers trolling for clients who want to sue deep pocketed companies in virtually every industry.

In the wake of the U.S. Supreme Court's decision in Spokeo v. Robins, some corporate defendants are concerned that successfully challenging plaintiffs' Article III standing will merely cause plaintiffs to refile the action in state court, a forum which corporate defendants traditionally view as less favorable. Some commentators have feared the Class Action Fairness Act of 2005 could be rendered meaningless in "no-injury" class actions that can no longer proceed in federal court, because it could mean that defendants effectively lose the ability to defend a "no-injury" class action in federal court.

However, plaintiffs that cannot articulate a concrete harm in federal court are not likely to establish standing anywhere, even in the state courts with more liberal standing requirements.

The Federal Injury-In-Fact Requirement

A victory in federal court will preclude suits in state courts adopting the federal injury-in-fact requirement or a more stringent standard.

Representative States: Alabama, Connecticut, Nebraska, New York, Montana, Vermont

Numerous state courts apply the same standing doctrine as federal courts. Alabama, Connecticut and Vermont, for example, have adopted the federal standing test as the means of determining whether standing exists in Alabama state courts.[1] Nebraska, too, requires a litigant to demonstrate an injury in fact that is actual or imminent."[2] Montana courts have explained that the state standing requirement derives from the state constitution, which limits the judicial power to "cases at law and in equity" and which has been interpreted to embody the same limitations as the Article III "case and controversy" provisions of the U.S. Constitution.[3]

Other states, such as New York, have a more stringent test for standing which requires plaintiffs to establish standing by demonstrating "an injury in fact that falls within the relevant zone of interests sought to be protected by law."[4]

In all of these states, plaintiffs counsel would be foolish to refile the action in state court after the case has been dismissed for lack of standing in federal court. If they do, defendants can readily defeat the state action by citing the dismissal in federal court.

Procedural Violations

Plaintiffs alleging mere procedural violations will not necessarily fare better in state courts despite more liberal standing requirements.

Representative States: California, New Jersey, Wisconsin, Michigan

Of course, some states have less exacting standing requirements. For example, in 2010, Michigan adopted a liberal prudential standard for determining whether a plaintiff has standing to sue.[5] Other states have also employed liberal standing principles. New Jersey, for example, only requires the plaintiff to have a sufficient stake and real adverseness with respect to the subject matter of the litigation and a substantial likelihood of some harm visited upon the plaintiff in the event of an unfavorable decision.[6] Similarly, Wisconsin boasts that its "law of standing ... is construed liberally, and even an injury to a trifling interest may suffice."[7]

Even so, in these states with more liberal standing requirements, the same common-sense arguments that corporate defendants would have made in federal court could persuade state court judges in these states to dismiss frivolous statutory based class actions. State legislatures enact statutes to redress actual harm. In these "no-injury" class actions, however, enterprising plaintiffs attorneys are simply taking advantage of a mere technical violation of a statute — not to redress any harm to society, but to line their own pockets. In such cases, defendants who find themselves in state court should challenge plaintiffs' statutory standing and highlight the economic motivations underlying the claim.

Conclusion

Over the past several years, there has been a rash across the country in "consumer protection" class actions. Not health and safety or privacy challenges; those obviously should be first order of priority both from the standpoint of risk to the company and from the standpoint of reputation and "doing the right thing."

For example, labeling class action claims have been increasing dramatically in the past several years and have hit a number of industries including food, heath, cosmetics, pet care and others. The challenges run the gamut from trade dress to challenges about specific product content or potential scientific benefits. The TCPA, which was intended to protect the public from unwanted contact while in the privacy of their homes has become the most abused federal statute in history.

The good news is that cases like Spokeo are finally giving defendants the winning arguments needed to successfully challenge "no-injury" class actions. In most cases, the benefits of filing a motion to dismiss for lack of Article III standing outweigh the "risk" of ending up in state court. In the best case scenario, the federal dismissal will preclude plaintiffs from filing in state court. Even in the worst case scenario, defendants will have the opportunity to appeal to the state judge's common sense and attack plaintiffs who seek rewards for nonexistent injuries.

—By Joshua Briones and E. Crystal Lopez, Mintz Levin Cohn Ferris Glovsky and Popeo PC

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[1] Ex Parte Ala. Educ. Television Comm'n, 151 So. 3d 283 (Ala. 2014); Conn. Ass'n of Health Care Facilities v. Worrell, 508 A.2d 743, 746 (Conn. 1986); Parker v. Town of Milton, 726 A.2d 477, 480 (Vt. 1998) (adopting the federal Lujan test for standing).

[2] Thompson v. Heineman, 289 Neb. 798, 814 (2015).

[3] Stewart v. Bd. of County Comm'rs, 573 P.2d 184, 186 (Mont. 1977).

[4] Caprer v. Nussbaum, 825 N.Y.S.2d 55, 62-63 (App. Div. 2006).

[5] Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686, 699 (Mich. 2010).

[6] Jen Electric Inc. v. County of Essex, 197 N.J. 627, 645 (2009).

[7] McConkey v. Van Hollen, 783 N.W.2d 855, 860 (Wis. 2010) (internal quotations and citation omitted).
