

Defending The 'No-Injury' Class Action

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Plaintiffs and their enterprising counsel often bring class actions targeting a company's nonmonetary policies or practices, asserting that such policies or practices violate consumer protection laws or other state or federal statutes. These class actions may be brought to recover "damages" or, in other instances, they only seek injunctive relief against an allegedly wrongful policy or practice. In virtually all of these cases, the class definition will broadly sweep all of the individuals who may have been exposed to the policy or practice into the putative class. However, in many instances, a significant proportion of absent class members did not suffer or sustain any actual harm, injury or damage as a result of the challenged conduct.



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Identifying A "No-Injury" Class Action

Does the class action target a company's policies, procedures, form documents, a statutory duty or administrative rule, or otherwise pertain to alleged wrongdoing that did not automatically cause a quantifiable monetary loss? Is the class action limited to the recovery of statutory or presumed damages? Do the class members' experiences and circumstances vary, such that some class members were not affected or impacted in any way by the alleged wrongdoing?

If so, then counsel for the company may be able to use one or more of the following strategies and principles to defeat the class action, each of which could be the subject of an in-depth article.

Class is Overbroad and Unascertainable

Courts generally require, as an implied class certification prerequisite, an ascertainable class, which is an objectively identifiable group of individuals who have the same claim. Where, however, a class is defined all-inclusively by reference to "all individuals" or "all customers" (to avoid interjecting factual determinations or the creation of a failsafe class), then the class definition may be overbroad. For example, an "all-customers" class is overbroad if it includes customers who were not impacted, harmed or damaged by the challenged policy, procedure or conduct. Courts frequently deny class certification if the class includes a significant number of members who, if they were to try to sue on their own, would not have any claim. Importantly, the Rules Enabling Act (and similar rules or legislation applicable in state courts) prohibits rules of procedure, such as Rule 23, from enlarging the substantive rights of absent class members.

Along these same lines, interjecting qualifications or limitations into a class definition may in turn create an ascertainability issue or result in a failsafe class. For example, limiting a class to only those customers “who were damaged as a result of the inclusion of a [boilerplate] contract term” may solve the problem of an overbroad “all-customers” class, but it interjects individualized factual determinations that render the members of the narrowed class objectively unascertainable.

Plaintiff and/or Class Members Do Not Have Standing to Sue

Standing is currently a hot-button issue, particularly in federal court under Article III. With respect to the named plaintiff, issues of standing may be implicated if the plaintiff is claiming only statutory damages,[1] or if the plaintiff is a dissatisfied one-time purchaser seeking an injunction proscribing future wrongdoing. Standing principles also may extend to absent class members who were not affected by, and who could not prove that they sustained any harm or damage as a result of, the challenged conduct. State courts may apply standing principles that are similar to those applied in federal court.

Actual Damage is a Required Element of a Claim

For many common-law claims, actual damage is a required element of the claim. Likewise, state statutes or procedural rules might impose an actual damages requirement (or exclude the recovery of statutory damages) in a class action. Thus, in a no-injury class action, the named plaintiff and/or absent class members may not be able to establish the substantive elements of the class claim.

Plaintiff Cannot Establish the Commonality or Predominance Prerequisites

Courts sometimes address intra-class differences through the class definition, and other times under the commonality and predominance prerequisites to class certification. Under commonality and predominance, defense counsel should focus on issues of causation, i.e., is there common and classwide proof that the alleged wrongdoing in fact caused harm or damage to the members of the class? If individuals included in the class were not harmed or damaged as a result of the alleged wrongdoing, then there is no classwide proof of causation.

In general, individualized issues of causation (sometimes referred to as “fact of damage”) are a more significant impediment to class certification than differences in the amount of damages, although significant intra-class differences in the formula for computing damages, or the necessity of highly individualized proof of the amount of damages sustained by a given class member, may still be relevant to whether a class can be certified. The amount of damages may also be relevant to class certification if the aggregate classwide damages are based on statistical modeling.[2]

Plaintiff Cannot Establish the “Typicality” Prerequisite

A class action almost always is strategically fronted by plaintiff who was impacted by the challenged policy or practice, even if others included in the putative class were not. Defense counsel may be able to defeat certification by showing that the named plaintiff’s own peculiar facts are not typical or representative of the facts pertaining to other absent class members. Likewise, intra-class conflicts may be created if the named plaintiff seeks to artificially limit the claims or damages that could be asserted if absent class members were to sue on their own.

An Overview of Tools to Bring Class Certification Issues Before the Court

Class actions are expensive to defend. The following procedures may be applicable to the defense of a class action:

- motion to dismiss, establishing that some or all of the named plaintiffs' claims fail as a matter of law (focus on claims with fee-shifting statutes);
- motion to dismiss or strike class action allegations, establishing that class certification is precluded as a matter of law;
- limited and/or bifurcated discovery (strategically focused on either class certification or liability issues), followed by targeted motion practice;
- imposition of a "trial plan" requirement, which may expose the lack of classwide evidentiary proof as to one or more elements of a cause of action;
- offer of judgment[3];
- motion for summary judgment; and
- motion to decertify class.

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[1] See *Spokeo Inc. v. Robins*, Case No. 13-1339.

[2] See *Tyson Foods Inc. v. Bouaphakeo*, Case No. 14-1146.

[3] See *Campbell-Ewald Co. v. Gomez*, Case No. 14-857.

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