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Expert Chapters

Q&A Chapters

Defining and Measuring Damages in "No-Injury" Class Actions


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I. Introduction

Class actions in the U.S. are certified as per the criteria listed in Rule 23 of the Federal Rules of Civil Procedure. The criteria listed in Rule 23(a) are often summarised as: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy.[1] While an economist might be asked to opine on one or more of those criteria, the focus of an economist's role often is on analysing the additional question of "predominance" for classes brought under Rule 23(b)(3).

Although putative class members need not have the same amount of damage to satisfy predominance, economists and financial experts routinely test whether damages are of the same type and are at least directionally consistent. A growing area of class actions, however, involves allegations for which some material proportion of class members have suffered no obvious harm or economic losses. Examples include matters alleging product defects, consumer fraud, antitrust, and statutory violations of state and federal laws with small or no concrete consequences for individual plaintiffs.

These so-called "no-injury" class actions are the subject of substantial debate not only in the law, but also among experts charged with examining the proximate cause of economic losses and the reliable measurement of damages, if any. One or more of the following conditions are typically referenced in describing these cases: (1) the plaintiffs suffered no actual or imminent concrete harm to support an injury-in-fact; (2) the harm is a technical statutory violation; (3) the economic loss is negligible; and (4) the remedy is unrelated to compensating plaintiffs for economic or other harm.[2] Following from these conditions, many no-injury class actions are challenged before and during the class certification stage of the proceedings. Courts determine if the plaintiffs have Article III standing before analysing the class certification requirements.[3]

Expert analysis can be relevant to establishing whether injury-in-fact exists in addition to whether the named plaintiffs adequately represent the putative class. Regarding other class certification requirements, expert analysis often focuses on factors or relationships that establish or refute the existence and measurement of recoverable damages for all or nearly all putative class members. Three types of no-injury class actions are considered below to illustrate the roles of standing, defining harms, and measuring class-wide damages that are typical of the no-injury class action debates.

II. TCPA: Satisfying Standing

Article III standing requires the plaintiffs to establish three elements: injury-in-fact; a causal connection between the injury and the challenged conduct; and that it is likely that the injury will be redressed by a favourable decision. The question of whether Article III jurisdiction is conferred in cases arising under the Telephone Consumer Protection Act of 1991 (TCPA) has arisen in recent cases in two distinct contexts: (1) whether the receipt of a handful of texts can be considered a "concrete injury"; and (2) whether a "professional plaintiff" who arguably sought out the offending communications suffered harm under the Article III standards.

A. Article III Decisions in Text Messaging Cases

The TCPA specifically addresses automated telephone calls but does not discuss texts as this technology was not yet in common use. Congress has not amended the law in the interim to specifically address its applicability to text messages. In 1992, Congress amended the law to allow the Federal Communications Commission (FCC) to exempt free-to-receive telephone communications. Subsequently the FCC under its rulemaking authority applied the TCPA's regulations to text messaging.[4]

Consumer rights advocates argue that the receipt of a single unsolicited text is an actionable invasion of privacy. Defendants argue that the receipt of a handful of silent texts on a messaging app does not rise to the same level of harassment as the "robocalls" the statute was intended to address. The question of whether the receipt of a handful of text messages can confer Article III jurisdiction has recently been addressed in conflicting decisions by the Ninth and Eleventh Circuits.

In *Van Patten*, the plaintiff received two text messages advertising a fitness club years after having cancelled his membership.[5] The Ninth Circuit examined whether the receipt of these two messages constituted a "concrete injury" as required for Article III standing. The court held that under *Spokeo*,[6] the text messages were annoying enough to infringe upon the privacy of the recipient. The court looked to the intention of Congress as reflected in the language of the TCPA and held that plaintiffs need not allege additional harm other than receiving unsolicited texts in order to state an actionable claim under the TCPA.

In contrast, the Eleventh Circuit later held in *Salcedo* that the receipt of a single unsolicited text message did not rise to the level of a concrete injury and therefore the plaintiff had no Article III standing to sue.[7] The Eleventh Circuit specifically rejected the reasoning of the Ninth Circuit in *Van Patten* as "cursory". The *Salcedo* court noted that Congress had been silent with respect to text messages and that it had empowered the FCC to exempt calls that were not charged to the called party from the TCPA.

In contrast to cases which have addressed the receipt of faxes without consent, the *Salcedo* court noted that the receipt of a text did not seize the receiving device for any length of time. The injury in fax cases is typically identified as the cost of paper and ink and the fact that the fax machine is tied up while it is receiving the unwanted communication. None of these facts are in play when a person receives an unwanted text. With respect to the invasion of privacy claim, the court stated that sending a text did not constitute an interruption that could be considered an "intrusion upon seclusion". The court stated that texts were a "brief inconsequential annoyance" akin to having a flyer waived in your face. The court did not identify the number of texts a recipient must receive in order to justify standing under Article III.

Similarly, in *St. Louis Heart Center*, the Eight Circuit upheld a district court decision that the receipt of an advertising fax with a technically deficient opt-out disclosure did not cause an actionable Article III harm and remanded the case to state court.[8]

The law in this area will likely continue to be in conflict until it is addressed by the U.S. Supreme Court, since the standards for invasion of privacy appear to be subjective and no "bright line" test currently exists.

B. Professional Plaintiffs and Article III

TCPA cases have a unique place in the class action landscape, because the nature of the injury – receiving texts and telephone calls without prior express consent – lends itself to the development of "professional plaintiffs" whose livelihoods are derived in whole or in part from serving as named plaintiffs in such suits. While some of these professional plaintiffs may by happenstance receive such communications from multiple defendants, others admittedly seek out the communications in order to file suit.

The Article III question that courts have been asked to address in this situation is: can the plaintiff actually have suffered an injury if they actively sought out the offending communications? Many courts have ruled that there is nothing inherently wrong with being a professional plaintiff, but persons who intentionally take actions designed to trigger such an offending communication do not suffer a compensable harm.

The guiding case is *Stoops*.[9] Deposition testimony of the plaintiff revealed that she purchased 35 cellphones and cellphone numbers with pre-paid minutes for the express purpose of receiving wrong-number debt-collection calls. Her business plan was to then send demand letters to the businesses that called or texted her number in error and file TCPA lawsuits as necessary to receive compensation. She also purchased additional minutes when she received calls in order to raise the value of her TCPA claims.

The *Stoops* court held that the plaintiff failed to establish she suffered an injury-in-fact under Article III. The court found that Congress' intent in enacting the TCPA was to protect consumers from the nuisance, invasion of privacy, cost, and inconvenience that auto-dialled and pre-recorded calls generate. Here the plaintiff's privacy interests were not violated, because the sole purpose of her cellphones was to attract calls so she could file TCPA lawsuits. The defendants thus failed to violate her economic interests, because her purpose in purchasing minutes under the calling plan was to receive calls that would enable her to file TCPA lawsuits.

The court also found that the plaintiff failed to establish "prudential standing" by failing to demonstrate that her interests were within the zone of interests intended to be protected by the TCPA. The court ruled that her interest in running a TCPA litigation filing business was not within the zone of interests to be protected by the TCPA and stated "[i]ndeed, it is unfathomable that Congress considered a consumer who files TCPA actions as a business when it enacted the TCPA as a result of its 'outrage over the proliferation of prerecorded telemarketing calls to private residences, which consumers regarded as an intrusive invasion of privacy and a nuisance'". The court also noted that court dockets are overflowing, and that enforcing standing requirements will provide courts with the time they need to address claims of parties who have actually suffered damages.

See also *Nghiem*, in which the court declined certification on the ground that the plaintiff was not an adequate representative and that his claims were not typical, because the plaintiff was a consumer attorney that handled consumer and debtor disputes.[10] The court noted that the plaintiff appeared to have signed up for mobile alerts from the defendant for the purpose of initiating a lawsuit and had no interest in purchasing the defendant's products; and questioned whether he could have suffered an invasion of privacy under those circumstances.

III. Labelling and Product Liability: Aligning Liability and Damages Theories

In other matters, the analytical scrutiny for no-injury class actions shifts from standing to predominance. *Comcast* determined that Rule 23(b)(3) required courts to examine whether the damages model isolated "only those damages attributable to" the theory of the unlawful conduct alleged.[11] One result of *Comcast* is that class actions involving alleged product defects or misrepresentation of safety or health claims have shifted to contract theories of liability and their related damage models. This shift for labelling and product liability cases removes concerns about Article III standing, but has implications for defining the economic losses associated with the theories of liability and the reliability of measuring damages due to the challenged conduct.

A. Design Defect and Misrepresentation: Redefining Tort as Contract Claims

Class actions involving tort claims often have not been certified when plaintiffs (a) claimed only hypothetical or future harms, or (b) blended individuals who had observed injuries with those who only had potential injuries. To address the difficulties with these damage approaches, plaintiffs have increasingly employed contract causes of action that, at least as a threshold matter, substitute economic losses for personal and property injury claims. Many current class actions rely on theories based on immediate economic harm from a product defect misrepresented or concealed by defendants at the time of purchase.

The use of contract theory is not new in product liability litigation. A recent decision by the Third Circuit, however, emphasises the distinction between incidents of product failure and a latent, common defect in the context of predominance even in class actions with state consumer protection claims. In *Gonzales*,[12] the Third Circuit affirmed a district court decision in which proof of a common defect regarding roofing shingles was central to misrepresentation-based legal claims brought by the homeowner plaintiffs. "Rule 23 requires, if nothing else, that a putative class must describe the product's defect on a classwide basis. If proponents of the class do not allege a defect common to the class, the defectiveness of a given product is, by necessity, not susceptible to proof by classwide evidence."[13] The Third Circuit clarified that a defect, even if latent, must be common to the class; otherwise, the claimed injury is speculative or requires an individual inquiry to detect, and fails the predominance test.

B. Defining Economic Losses

Many product liability cases that allege a common defect include claims under state consumer protection laws for economic injuries

related to a product's usefulness, market value, repair costs, or other costs of risk avoidance. More generally, class actions alleging economic losses will seek damages that place the plaintiffs in the same economic position they expected absent the defendant's conduct. In application, the "benefit-of-the-bargain" approach raises a number of issues for the measurement of class-wide damages. The measure of damages that properly compensates plaintiffs becomes an issue, especially when some of the measures might indicate speculative or no damages.

1. Benefit-of-the-Bargain Measures

Although a full refund, uniform replacement cost, or average repairs cost basis for damages might support a class-wide approach, these measures can overcompensate plaintiffs who would continue to buy the relevant products absent the challenged conduct. By using a full refund or replacement measure in the proposed damages methodology, plaintiffs ignore that safety is only one aspect of a product's market value as reflected by the price paid. Under a benefit-of-the-bargain approach, plaintiffs should only be compensated for a difference in market value due to the change in the defendant's representations and the safety information available to buyers but for the challenged conduct. The full refund model might apply when products have no value once information about hidden risks or effectiveness is known (such as a marketed health supplement that is actually a sugar pill and worthless), but this is rarely the case in actual markets. When buyers also value other attributes of a product, a full refund of price paid will overcompensate for the economic losses, if any. Courts have recognised the distinction between worth less and worthless.[14]

An important issue for expert analysis is properly measuring the benefit of the bargain, especially when defendants often have conducted prior recalls of the relevant defective part or product and made repairs. *In re Gen. Motors LLC Ignition Switch Litig.* is instructive on the significance of the contracts perspective for class certification of product liability and labelling matters and the proper measure of damages required by these cases.[15] That case included one track of plaintiffs with no physical injuries but seeking recovery on behalf of a putative class of GM car owners and lessors. The plaintiffs claimed under federal and state laws that they and others incurred economic losses by a drop in the value of their vehicles due to alleged ignition switch defects and brand devaluation. Regarding the defect injuries, the court described the plaintiffs' theory as a "benefit-of-the-bargain defect theory". After investigating the measures of damages appropriate for each of three bellwether states (California, Missouri, and Texas), the court found that the proper measure of damages is the *lesser of* diminution in market value or repair costs.[16] The court also emphasised the importance of evidence for the diminution of market values based on supply and demand interactions, and that repairs made post-sale affected whether diminution in the market value existed at all.

2. Finding a Marginal Value of the Conduct

In cases where the evidence indicates that buyers received substantial benefits from the products and would be likely to purchase the same product absent the challenged conduct, a pricing premium is the proper measure of economic loss. Defendants often challenge pricing premium measures, because whether the market value of products would change in the absence of the challenged conduct depends on factors including, but not limited to, exposure to the alleged hidden risks or misrepresentations, risk preferences of buyers, value in use, and the costs of substitutes.

Damage models can be based on market information to estimate the pricing premium due to the alleged misrepresentations or omitted warnings. Regression models are often used to isolate the effects of certain market factors and product features on product prices. Reliable results isolating the marginal effect of a particular marketing representation can be confounded, however, by the available market information, level of aggregation of the pricing information, or variation within and across the purchasing environments. Courts have found that plaintiffs have failed to satisfy *Comcast* using these models.[17]

An alternative approach to isolate the marginal value of the conduct relies on survey methods and market simulations. Conjoint methods are a particular type of survey to elicit consumers' valuations of product attributes (which can include representations) and can measure incremental willingness to pay (WTP).[18] Conjoint methods can be combined with a market simulation to incorporate supply-side considerations for damages estimates.

Whether combined with a market simulation or not, these methods also have reliability limitations that have concerned the courts, especially in the context of complex product supply chains. For example, in *In re Fluidmaster, Inc.* consumers filed a consolidated class action complaint in multidistrict litigation against the upstream manufacturer of allegedly defective water supply lines connecting to plumbing fixtures.[19] The court rejected the proposed conjoint survey to support the damages claim because "[a]sking an unrepresentative group of purchasers to artificially assign values among an arrangement of potentially unimportant attributes that fails to approximate real-world purchasing decisions does not seem designed to produce a reliable WTP estimate that can be used to calculate class-wide damages".[20]

IV. Antitrust: Excluding Uninjured Plaintiffs

In the antitrust realm as well, courts have begun to address the implications of certifying a proposed class that contains uninjured plaintiffs. With its decision in 2015 in *Nexium*, the First Circuit concluded that certification of a class "is permissible even if the class includes a de minimis number of uninjured parties".[21] In certifying the class, the First Circuit laid out three principles necessary for class certification: (1) the theory of liability must conform to the injury caused to plaintiffs; (2) the definition of the class must be "definite"; and (3) the amount of the damages award must be limited to injured parties.[22] The First Circuit wrestled with this third principle, ultimately concluding that uninjured plaintiffs could be identified through sworn testimony in the form of an affidavit or declaration.[23] In affirming that a "mechanism would exist for establishing injury", the First Circuit ruled that "it is difficult to understand why the presence of uninjured class members […] should defeat class certification".[24]

The First Circuit rejected this sanguine view of uninjured plaintiffs in its more recent decision in *Asacol*.[25] In that matter, the plaintiffs alleged that the defendant, Warner Chilcott, impermissibly delayed the entry of a generic competitor to Asacol, an anti-inflammatory drug used to treat colitis, by withdrawing Asacol from the market *in lieu* of a similar drug for which patent protection was longer than for Asacol.[26] Neither the plaintiffs nor Chilcott disputed that around 10 per cent of the proposed class would not have switched to the generic version of Asacol, had it been able to launch, despite the fact that the generic would have been a lower-priced alternative.[27] Such individuals who would not have switched to a generic alternative presumably would not have suffered economic injury, since their economic position would remain unchanged regardless of whether a generic alternative had been made available.

The district court had ruled that these uninjured proposed class members could be removed from the case through the assistance of a claims administrator, and pointed to the prior *Nexium* ruling as its justification.[28] The First Circuit rejected the district court's view that the claims administration process would provide either a feasible or an equitable method for identifying uninjured plaintiffs. In reaching this conclusion, the First Circuit observed that "this is not a case in which a very small absolute number of class members might be picked off in a manageable, individualized process at or before

trial".[29] The First Circuit further observed that the "[p]laintiffs' proposed claims process provides defendants no meaningful opportunity to contest whether an individual would have, in fact, purchased a generic drug had one been available".[30]

Central to the dispute over the inclusion of uninjured plaintiffs in the proposed class was the issue of whether Warner Chilcott would be disadvantaged. The plaintiffs argued that since the aggregate damages number would "net out all purchases" made by individuals who would not have switched to the generic alternative, "the fact that some of that money might then be paid to uninjured people should be of no concern to Warner".[31] The First Circuit observed that a "defendant must be offered the opportunity to challenge each class member's proof that the defendant is liable to that class member".[32] The First Circuit further challenged the plaintiffs' "no harm, no foul" position, concluding that if a court were to accept the plaintiffs' reasoning, "there would be no logical reason to prevent a named plaintiff from bringing suit on behalf of a large class of [uninjured] people […] so long as the aggregate damages on behalf of 'the class' were reduced proportionately".[33]

Other courts have since looked to *Asacol* in denying class certification in light of a large number of uninjured plaintiffs. As an example, the District Court for the District of New Jersey, in another delayed-generic-entry case, observed that its case was similar to *Asacol* in that the proposed class contained individuals who would not have switched to a generic alternative, and that the plaintiffs "have not provided an appropriate common method of proving injury-in-fact given the presence" of such individuals.[34] The court observed that identifying which proposed class members were uninjured "would require extensive individualized inquiry" and on that basis denied class certification.[35]

The U.S. Supreme Court has also acknowledged the "importance" of properly addressing "whether uninjured class members may recover" a damages award.[36] In *Tyson Foods*, although the Supreme Court affirmed the Eighth Circuit's ruling certifying the proposed class, Justice Kennedy, writing for the majority, noted that Tyson Foods could "raise a challenge to the proposed method of allocation [of damages] when the case returns to the District Court for the disbursal of the award".[37] Kennedy's statement was in response to the argument advanced by Tyson Foods that the plaintiffs had "not demonstrated any mechanism for ensuring that uninjured class members do not recover damages here".[38]

In a concurring opinion, Chief Justice Roberts, while agreeing with the majority's decision to affirm class certification, wrote to "express [his] concern that the District Court may not be able to fashion a method for awarding damages to only those class members who suffered an actual injury".[39] Roberts further opined that Article III of the Constitution "does not give federal courts the power to order relief to any uninjured plaintiffs" and that "if there is no way to ensure that the jury's damages award goes only to uninjured class members, that award cannot stand".[40]

Both Kennedy and Roberts held open the possibility that the Supreme Court might, in the future, consider the question of whether compensation can be awarded to uninjured class members, but that the instant case did not provide that opportunity.[41] This suggests that a proposed class action, squarely presenting the issue of knowingly awarding damages to uninjured plaintiffs, may eventually wend its way to the U.S. Supreme Court.

Authors' Note

The views and opinions expressed in this article are those of the authors and do not necessarily reflect the opinions, position, or policy of Berkeley Research Group, LLC or its other employees and affiliates.

Endnotes

1. Fed. R. Civ. P. 23(a).
2. *See, e.g.,* Shepherd, Joanna, *An Empirical Survey of No-Injury Class Actions*, Emory Legal Studies Research Paper No. 16-402 (February 1, 2016). Available at: https://ssrn.com/abstract=2726905.
3. Article III, Section 2 of the U.S. Constitution.
4. 30 FCC Rcd. 7964 No. 3, 7961, 7978-79, 8016-22 (2015); 18 FCC Rcd. 14014, 14115 (2003).
5. *Van Patten v. Vertical Fitness Grp.*, LLC, 847 F.3d 1037 (9th Cir. 2017).
6. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).
7. *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019).
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10. *Nghiem v. Dick's Sporting Goods, Inc.*, 222 F. Supp. 3d 805 (C.D. Cal. 2016).
11. *Comcast Corp. v. Behrend*, 569 U.S. 27, 35, 133 S. Ct. 1426, 1433, 185 L. Ed. 2d 515 (2013).
12. *Gonzales et al. v. Owens Corning* 885 F.3d 186, (3d Cir. 2018), as amended (Apr. 4, 2018).
13. *Id.* at 198.
14. *See, e.g., In re Tobacco Cases II,* 240 Cal. App.4th 779, 192 Cal.Rptr.3d 881, 895 (2015).
15. *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MC-2543 (JMF), 2019 WL 3564698 (S.D.N.Y. Aug. 6, 2019).
16. *Id.* at *9.
17. *See, e.g., Werdebaugh v. Blue Diamond Growers,* No. 12-CV-02724-LHK, 2014 WL 7148923 (N.D. Cal. Dec. 15, 2014).
18. *See, e.g.,* McFadden, Daniel, "The Choice Theory Approach to Market Research", *Marketing Science* 5(4) (Fall 1986).
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20. *Id.* at *31.
21. *In re Nexium Antitrust Litigation*, 777 F.3d 9 (1st Cir. 2015).
22. *Id.* at 18–19.
23. *Id.* at 20.
24. *Id.* at 21.
25. In re Asacol Antitrust Litig., 907 F.3d 42 (1st Cir. 2018).
26. *Id.* at 44.
27. *Id.* at 47.
28. *Id.*
29. *Id.* at 53.
30. *Id.*
31. *Id.* at 55.
32. *Id.*
33. *Id.* at 56.
34. *In re Thalomid & Revlimid Antitrust Litig.*, No. CV 14-6997, 2018 WL 6573118 (D.N.J. Oct. 30, 2018) at *13.
35. *Id.* at *14.
36. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016) at 1050.
37. *Id.* at 1050.
38. *Id.* 1049.
39. *Id.* at 1050 (C.J. Roberts, concurring).
40. *Id.* at 1053.
41. *Id.* at 1050 and 1053.

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