

Week 13 – Final Exam Review

- 5:30 Today's agenda
 - Mediations
 - Positional bargaining
 - Principled negotiation
- 6:00 Break
 - UTPA
 - FCRA
 - FDCPA
- 6:55 Break
- 7:00 Guest Speaker: James Sinclair



The New York Times



BUSINESS DAY

The Former Khmer Rouge Slave Who Blew the Whistle on Wells Fargo

By EMILY FLITTER MARCH 24, 2018





Duke Tran, at his home in Damascus, Ore., has waged a nearly four-year legal fight against his former employer Wells Fargo, arguing that he was fired for blowing the whistle on deceptive practices.

Amanda Lucier for The New York Times

After Duke Tran escaped from slavery, but before he became a millionaire, he was a Wells Fargo employee.

Portland-Area Man Wins Reported Seven-Figure Whistleblower Settlement from Wells Fargo

Formerly enslaved by the Khmer Rouge, Duke Tran lived the American dream until a big bank fired him.



By Nigel Jaquiss | Published March 25 at 12:35 PM • Updated March 25 at 12:35 PM

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UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: INTEL CORP. CPU MARKETING,
SALES PRACTICES AND PRODUCTS
LIABILITY LITIGATION

MDL No. 2828

TRANSFER ORDER

Before the Panel:^{*} Plaintiffs in two Northern District of California actions move under 28 U.S.C. § 1407 to centralize this litigation in the Northern District of California. This litigation consists of five actions pending in four districts, as listed on Schedule A.¹ Plaintiffs in twenty actions and potential tag-along actions support the motion. Plaintiffs in eight of these potential tag-along actions and one additional potential tag-along action support centralization in the District of Oregon, as does defendant Intel Corporation. Plaintiffs in three potential tag-along actions suggest centralization in the Eastern District of New York.

On the basis of the papers filed and the hearing held, we find that centralization under Section 1407 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation. All responding parties agree that the actions share factual issues arising out of allegations that Intel manufactured its computer processors to use “speculative execution” technology, which left the processors exposed to security vulnerabilities known as “Spectre” and “Meltdown,” and that the fix for this problem can considerably slow the processors’ speed. Centralization will eliminate duplicative discovery, prevent inconsistent pretrial rulings on class certification and other issues, and conserve the resources of the parties, their counsel, and the judiciary.

We find that centralization in the District of Oregon is appropriate. Defendant Intel and plaintiffs in at least nine related actions support centralization in that district. Intel has extensive operations there, including its employees who evaluated the security vulnerabilities and developed patches to mitigate them, as well as the team that led the development of the first Intel processor to

^{*} Judge Ellen Segal Huvelle and Judge Lewis A. Kaplan took no part in the disposition of this matter. Additionally, one or more Panel members who could be members of the putative classes in this litigation have renounced their participation in these classes and have participated in this decision.

¹ The Panel also has been notified of 30 potentially-related actions pending in seven districts. These and any other related actions are potential tag-along actions. See Panel Rules 1.1(h), 7.1, and 7.2.

FOOD • 1 day ago

Woman's \$400G lawsuit claims 'cover-up' of mouse guts allegedly found in soup

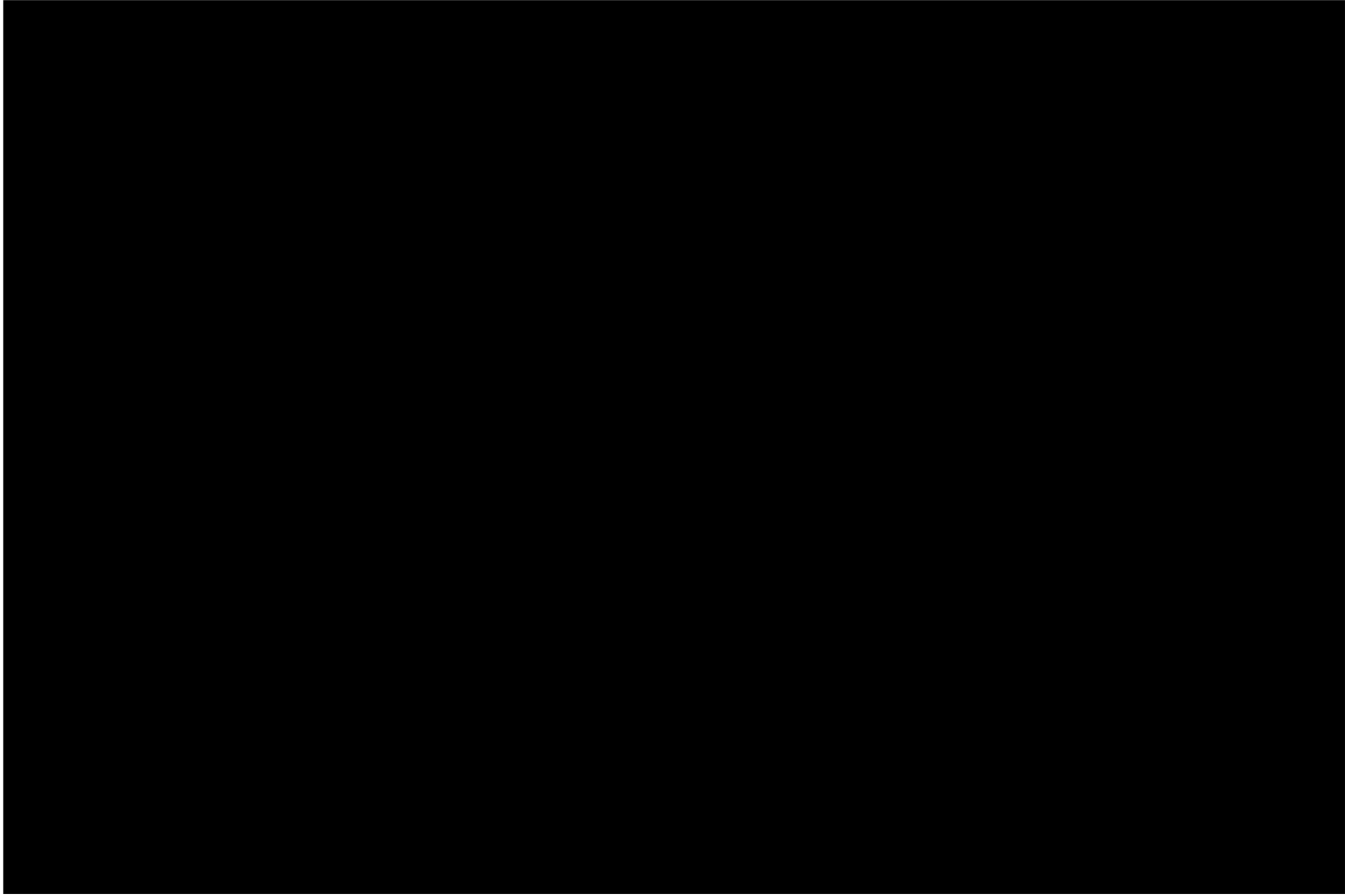
By Stephen Sorace | Fox News



An Oregon woman filed a lawsuit Monday, claiming she found mouse guts in a carton of Pacific Foods soup. (Photos submitted to court)

An Oregon woman sued a food company this week, claiming it swept aside her complaints of allegedly finding what appeared to be mouse remains in a carton of soup.

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Announcements

Spring Course Evaluations

April 12 – 5:30pm

Class – Bring Laptop

FBA Settlement CLE

April 19 – 12:00pm to 1:00pm

Portland District Courthouse



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2018 Final Exam Outline

Fact Pattern A – UTPA

1. Laundry list
2. Claim elements
3. Ascertainable loss
4. “Person” definition

Fact Pattern B – UTPA

5. Laundry list
6. “Services” definition
7. Fee shifting scheme
8. Ascertainable loss

Fact Pattern C – FCRA

9. Statute of limitations
10. Claim elements
11. Claim elements
12. Claim elements

Fact Pattern D – FCRA

13. Damages
14. Damages
15. Fee shifting scheme
16. Claim elements

Fact Pattern E – FDCPA

17. Claim elements
18. “Collector” definition
19. Damages
20. Lodestar

Fact Pattern F – FDCPA

21. Claim elements
22. Article III standing
23. “Debt” definition
24. Statute of limitations

2018 Final Exam Outline

Fact Pattern G – TCPA

- 25. Damages
- 26. Statute of limitations
- 27. *Spokeo*
- 28. Fee shifting scheme

Fact Pattern H – TCPA

- 29. Article III standing
- 30. Mootness
- 31. *Campbell-Ewald*
- 32. *ACA International*

Fact Pattern E – ORLTA

- 33. Tenant remedies
- 34. “minor defect” definition
- 35. Permissible entry
- 36. Fee shifting scheme

Fact Pattern F – ORLTA

- 37. Eviction lawsuits
- 38. Eviction lawsuits
- 39. Eviction lawsuits
- 40. Statute of limitations

Extra Credit

Make-up Points

Students can make up two missed attendance, participation, or assignment points by doing any of the following: (1) Sit in on an Oregon State Bar Consumer Law Section meeting, (2) Sit in on an Oregon Trial Lawyers Association Consumer Protection Section meeting, (3) Have coffee or lunch with an Oregon consumer law attorney, (4) Attend a meeting about consumer law legislation, (5) Write a short (no more than 1,000 word) blog post about a consumer law case, issue, or podcast, or (6) write a short (no more than 1,000 word) summary of a chapter of one of the books on the optional readings list.

Make-up points will not impact a student's final exam score. However, in the event more than one student earns the maximum 100 points possible for the class, the student with the most make-up points will break the tie for the highest grade.

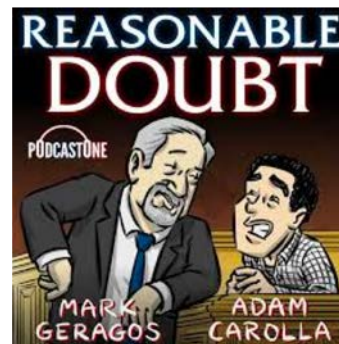
Extra Credit

Optional Readings

Damages 3 by David Ball

Case Framing by Mark Mandell

Rules of the Road by Rick Friedman



Damages Chart

CONSUMER LAW	STATUTORY AUTHORITY	EMOTIONAL HARM	ECONOMIC LOSS	STATUTORY DAMAGES	PUNITIVE DAMAGES
UTPA	ORS 646.638				
FCRA	15 U.S.C. § 1681n				
FDCPA	15 U.S.C. § 1692k				
TCPA	47 U.S.C. § 227(b)(3)				
ORTLA	ORS 90 et seq.			*	

Fee Shifting Chart

CONSUMER LAW	STATUTORY AUTHORITY	AMERICAN RULE	PREVAILING PLAINTIFF	PREVAILING PARTY
UTPA	ORS 646.638(3)			
FCRA	15 U.S.C. § 1681o(a)(2)			
FDCPA	15 U.S.C. § 1692k(a)(3)			
TCPA	47 U.S.C. § 227(b)(3)			
ORLTA	ORS 90.255			

Statute of Limitations Chart

CONSUMER LAW	STATUTORY AUTHORITY	ONE YEAR	TWO YEARS	THREE YEARS	FOUR YEARS
UTPA	ORS 646.638				
FCRA	15 U.S.C. § 1681n		*		
FDCPA	15 U.S.C. § 1692k				
TCPA	28 U.S.C. § 1658				
ORLTA	ORS 90 et seq.				

Unlawful Trade Practices Act

PRIVATE RIGHT OF ACTION	CLAIM ELEMENTS	DAMAGES	ATTORNEY FEES	STATUTE OF LIMITATIONS
ORS 646.638	(1) Willful violation (2) Causation (3) Ascertainable loss	Actual, statutory, and punitive damages	Prevailing plaintiff	One year

ORS 646.605(4)

(4) "Person" means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity except bodies or officers acting under statutory authority of this state or the United States.

ORS 646.605(6)

(6) (a) "Real estate, goods or services" means those that are or may be obtained primarily for personal, family or household purposes, or that are or may be obtained for any purposes as a result of a telephone solicitation, and includes loans and extensions of credit, and franchises, distributorships and other similar business opportunities, but does not include insurance.

ORS 646.608(1)(f)

- (f)** Represents that real estate or goods are original or new if the real estate or goods are deteriorated, altered, reconditioned, reclaimed, used or secondhand.

ORS 646.608(1)(s)

- (s)** Makes false or misleading representations of fact concerning the offering price of, or the person's cost for real estate, goods or services.

⚠ Caution
As of: March 10, 2018 9:51 PM Z

Paul v. Providence Health System-Oregon

Supreme Court of Oregon

September 21, 2011, Argued and Submitted; February 24, 2012, Filed
SC S059131

Reporter

351 Ore. 587 *, 273 P.3d 106 **, 2012 Ore. LEXIS 108 ***, 2012 WL 604183

LAURIE PAUL, Plaintiff, and RUSSELL GIBSON and WILLIAM WEILLER, DDS, individually and on behalf of all similarly-situated individuals, Petitioners on Review, v. PROVIDENCE HEALTH SYSTEM-OREGON, an Oregon corporation, Respondent on Review.

Prior History: [***] CC 060101059; CA A137930. On review from the Court of Appeals. *

Paul v. Providence Health System-Oregon, 237 Ore. App. 584, 240 P.3d 1110, 2010 Ore. App. LEXIS 1190 (2010)

Disposition: The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

Core Terms

plaintiffs', monitoring, damages, emotional distress, identity theft, patient, theft, confidential, personal information, emotional distress damages, economic damages, expenses, cases, statutes, stolen, negligence claim, services, future harm, increased risk, economic loss, distress, records, disks, tapes, third party, medical records, parties, special relationship, defendant's conduct, healthcare provider

Case Summary

Procedural Posture

Plaintiff patients sought review of an order from the Oregon Court of Appeals, which upheld the dismissal of their action against defendant nonprofit health corporation for negligence and violation of the Oregon Unlawful Trade Practices Act

* Appeal from Multnomah County Circuit Court.

Marilyn E. Litzberger, Judge.

237 Ore. App. 584, 240 P.3d 1110 (2010).

(UTPA), Or. Rev. Stat. § 646.638(1) (2005).

Overview

The patients brought a suit against the corporation, claiming economic and noneconomic damages for financial injury and emotional distress that they allegedly suffered when, through the corporation's alleged negligence, computer disks and tapes containing personal information were stolen from the car of one of the corporation's employees. The court of appeals upheld the determination of the trial court that the patients failed to state claims for negligence or for violation of UTPA. On review, the court found that the patients failed to allege actual, present injury caused by the corporation's conduct. The cost of credit monitoring that resulted, not from any "present economic harm" to the patients, but from the risk of possible future harm, was insufficient to state a negligence claim. The patients did not allege actual identity theft or financial harm, other than credit monitoring and similar mitigation costs. They did not offer a cogent basis for overruling Oregon's well-established negligence requirements, which required the allegation of present injury. There was no indication that the UTPA was intended to protect against such speculative losses as the risk of identity theft.

Outcome

The judgment of the court of appeals was affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

[HN1](#) Appeals, Standards of Review

Michael Fuller

351 Ore. 587, *587; 273 P.3d 106, **106; 2012 Ore. LEXIS 108, ***1

Page 2 of 10

When reviewing a trial court order granting a motion to dismiss, an appellate court accepts as true all well-pleaded facts in the complaint.

law of negligence imposes on persons at large.

Torts > Negligence > Elements

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

[HN6](#) Negligence, Elements

[HN3](#) Types of Losses, Economic Losses

To recover damages for purely economic harm, liability must be predicated on some duty of the negligent actor to the injured party beyond the common law duty to exercise reasonable care to prevent foreseeable harm.

Torts > Negligence > Elements

[HN7](#) Negligence, Elements

Torts > ... > Pain & Suffering > Emotional Distress > General Overview

The threat of future harm, by itself, is insufficient as an allegation of damage in the context of a negligence claim.

[HN3](#) Pain & Suffering, Emotional Distress

A plaintiff may recover damages for emotional distress, in the absence of physical injury, where the defendant's conduct infringed on some legally protected interest apart from causing the claimed distress, even when that conduct was only negligent.

Torts > Negligence > Elements

[HN8](#) Negligence, Elements

Torts > Negligence > Elements

[HN4](#) Negligence, Elements

Not all negligently inflicted harms give rise to a negligence claim. Rather, to recover in negligence, a plaintiff must suffer harm to an interest of a kind that the law protects against negligent invasion.

The fact that a defendant's negligence poses a threat of future physical harm is not sufficient, standing alone, to constitute an actionable injury.

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

Torts > Negligence > Elements

[HN9](#) Types of Losses, Economic Losses

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

[HN3](#) Types of Losses, Economic Losses

Under the economic loss doctrine, one ordinarily is not liable for negligently causing a stranger's purely economic loss without injuring his person or property. Damages for purely economic losses, however, are available when a defendant has a duty to guard against the economic loss that occurred. A duty to protect against economic loss can arise from a defendant's particular status or relationships, or from legislation, beyond the generalized standards that the common

Proof of damage is an essential part of a plaintiff's negligence case. Nominal damages, to vindicate a technical right, cannot be recovered in a negligence action, where no actual loss has occurred.

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

Torts > Negligence > Elements

Michael Fuller

In Paul v Providence, why couldn't plaintiffs recover economic loss damages?

All of the below

plaintiffs did not allege injury to person or property

plaintiffs did not allege actual, present injury

plaintiffs cannot recover damages for the risks of future economic harm

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Fair Credit Reporting Act

PRIVATE RIGHT OF ACTION	CLAIM ELEMENTS	DAMAGES	ATTORNEY FEES	STATUTE OF LIMITATIONS
15 U.S.C. § 1681n, o	(1) Failure of a furnisher or CRA to properly reinvestigate (2) After a consumer (3) Sends notice of a dispute to a CRA	Actual or statutory damages, punitive damages	Prevailing plaintiff	Two years*

FCRA Statute of Limitations

15 U.S. Code § 1681p - Jurisdiction of courts; limitation of actions

US Code

Notes

Authorities (CFR)

[prev](#) | [next](#)

An action to enforce any liability created under this subchapter may be brought in any appropriate United [States](#) district court, without regard to the amount in controversy, or in any other court of competent jurisdiction, not later than the earlier of—

- (1)** 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or
- (2)** 5 years after the date on which the violation that is the basis for such liability occurs.

Fair Credit Reporting Act

Claim Elements

- Within **5 business days** after receiving a dispute, a CRA must **provide** all **relevant** information regarding the dispute (an “ACDV form”) to the furnisher. 15 U.S.C. § 1681i(a)(2).
- If a CRA determines a dispute is **frivolous**, it must notify the consumer within **5 business days**. 15 U.S.C. § 1681i(a)(3).
- Within **30 days** after receiving a dispute, CRAs and furnishers must **investigate**, **review** all relevant information, and **delete** any incorrect credit information. 15 U.S.C. § 1681s-2(b); i(a). *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147 (9th Cir. 2009).
- A CRA must provide reinvestigation **results** to a consumer within **5 business days**. 15 U.S.C. § 1681i(a)(6).

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Fair Debt Collection Practices Act

PRIVATE RIGHT OF ACTION	CLAIM ELEMENTS	DAMAGES	ATTORNEY FEES	STATUTE OF LIMITATIONS
15 U.S.C. § 1692k	(1) consumer (2) consumer debt (3) debt collector (4) violation	Actual and statutory damages	Prevailing plaintiff	One year

FDCPA Elements

A “consumer”

“The term ‘consumer’ means any *natural person* obligated or allegedly obligated to pay any debt.”

§ 1692a(3)



A “consumer debt”

“The term ‘debt’ means any obligation or alleged obligation of a consumer to pay money arising out of a transaction ... for *personal, family or household purposes*.”

§ 1692a(5)



A “debt collector”

“The term ‘debt collector’ means any person who uses any instrumentality of interstate commerce or the mails in any business the *principal purpose* of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be *owed or due another*.”

§ 1692a(6)



A “violation”

Any abusive practice, false representation, or unfair practice.

§ 1692d, e, f



Lodestar Method

- The **lodestar method** calculates “reasonable fees” under a fee shifting statute
- Courts multiply reasonable **hours** incurred by a reasonable hourly **rate**
- Anything more than a 10% “**haircut**” requires judges to **show their work**

Collection Communications

- No collection calls before **9am or after 8pm**
- No collection calls or letters to consumers represented **by an attorney**
- No collection calls or letters **at work** if prohibited by a consumer's employer
- No collection calls or letters to **third parties** except to verify location information
- No collection calls or letters after a consumer asks to be left alone **in writing**

15 U.S.C. § 1692c



False or Misleading Communications

“A debt collector may not use any **false, deceptive, or misleading** representation or means in connection with the collection of any debt.”

15 U.S.C. § 1692e



Caution
As of: February 17, 2018 11:10 PM Z

Spokeo, Inc. v. Robins

Supreme Court of the United States
November 2, 2015, Argued; May 16, 2016, Decided
No. 13-1339

Reporter

136 S. Ct. 1540 *; 194 L. Ed. 2d 635 **; 2016 U.S. LEXIS 3046 ***; 84 U.S.L.W. 4263; 100 Empl. Prac. Dec. (CCH) P45,556; 26 Fla. L. Weekly Fed. S 128

SPOKEO, INC., Petitioner v. THOMAS ROBINS

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: As Revised May 24, 2016.

On remand at, Motion granted by, in part, Motion denied by, in part *Robins v. Spokeo, Inc.*, 2016 U.S. App. LEXIS 22052 (9th Cir. Cal., June 20, 2016)

Decision reached on appeal by, On remand at, Remanded by *Robins v. Spokeo, Inc.*, 2017 U.S. App. LEXIS 15211 (9th Cir., Aug. 15, 2017)

Prior History: [***] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Robins v. Spokeo, Inc., 742 F.3d 409, 2014 U.S. App. LEXIS 2136 (9th Cir. Cal., Feb. 4, 2014)

Disposition: Vacated and remanded.

Core Terms

concrete, consumer, injury in fact, requirements, rights, particularized, vindicate, courts, private right, individualized, private plaintiff, public right, consumer report, statutory right, injury-in-fact, injuries, limitations, cases, consumer reporting agency, internal quotation marks, standing doctrine, legal right, Common-law, incorrect, confer, procedural violation, reasonable procedure, credit reporting, standing to sue, judicial power

Case Summary

Overview

HOLDINGS: [1]-The injury-in-fact requirement for standing under Article III of the Constitution required a plaintiff to allege an injury that was both concrete and particularized; [2]-In the action under the *Fair Credit Reporting Act of 1970*, the appellate court's standing analysis was incomplete because it failed to fully appreciate the distinction between concreteness and particularization, and it did not address whether the particular procedural violations alleged in the case entailed a degree of risk sufficient to meet the concreteness requirement.

Outcome

Judgment vacated. Case remanded. 6-2 Decision; 1 Concurrence; 1 Dissent.

LexisNexis® Headnotes

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN1 Standing, Injury in Fact

The injury-in-fact requirement for standing requires a plaintiff to allege an injury that is both concrete and particularized.

Constitutional Law > The Judiciary > Case or Controversy

Constitutional Law > Congressional Duties & Powers

Constitutional Law > The Presidency

Michael Fuller

136 S. Ct. 1540, *1540; 194 L. Ed. 2d 635, **635; 2016 U.S. LEXIS 3046, ***1

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Constitutional Law > The Judiciary

HN2 The Judiciary, Case or Controversy

The Constitution confers limited authority on each branch of the Federal Government. It vests Congress with enumerated legislative Powers, *U.S. Const. art. I, § 1*; it confers upon the President the executive Power, *U.S. Const. art. II, § 1, cl. 1*; and it endows the federal courts with the judicial Power of the United States, *U.S. Const. art. III, § 1*. In order to remain faithful to this tripartite structure, the power of the Federal Judiciary may not be permitted to intrude upon the powers given to the other branches. Although the Constitution does not fully explain what is meant by "the judicial Power of the United States," *U.S. Const. art. III, § 1*, it does specify that this power extends only to "Cases" and "Controversies," *U.S. Const. art. III, § 2*. And no principle is more fundamental to the judiciary's proper role in the United States' system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.

Civil

Procedure > ... > Justiciability > Standing > Burdens of Proof

Constitutional Law > ... > Case or Controversy > Standing > Elements

Constitutional Law > The Judiciary > Case or Controversy > Standing

Civil

Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN3 Standing, Burdens of Proof

Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. The doctrine developed in the U.S. Supreme Court's case law to ensure that federal courts do not exceed their authority as it has been traditionally understood. The doctrine limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong. In this way, the law of Article III of the Constitution standing serves to prevent the judicial process from being used to usurp the powers of the political branches, and confines the federal courts to a properly judicial role. Cases have established that the irreducible constitutional minimum of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.

The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements. Where a case is at the pleading stage, the plaintiff must clearly allege facts demonstrating each element.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN4 Standing, Injury in Fact

That a suit may be a class action adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN5 Standing, Injury in Fact

Injury in fact is the first and foremost of standing's three elements. Injury in fact is a constitutional requirement, and it is settled that Congress cannot erase Article III of the Constitution's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing. To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN6 Standing, Injury in Fact

In the context of standing, for an injury to be "particularized,"

Michael Fuller

Article III of the US Constitution limits the power of the federal judiciary to:

Actual cases or
controversies

federal
questions

controversies
over \$75,000

intra-state
disputes

Injury in fact means:

All of the below

an invasion of a legally
protected interest

that is concrete

and particularized

Telephone Consumer Protection Act

PRIVATE RIGHT OF ACTION	CLAIM ELEMENTS	DAMAGES	ATTORNEY FEES	STATUTE OF LIMITATIONS
47 U.S.C. § 227(c)(5)	(1) Automatic telephone dialing system, and robo-call or text without consent, or (2) Pre-recorded voice message without consent	Actual or statutory damages	American rule	Four years

Offers of Judgment

- State and federal rules permit **offers of judgment** before trial
- Offer of judgment rules encourage early **settlement of cases**
- An **unaccepted** offer can shift fees and costs in favor of a defendant

What was the main holding of the Campbell-Ewald opinion?

an offer of judgment must
provide complete relief

an unaccepted offer does
not moot a plaintiff's case

a contractor can be held
liable under the TCPA

In sum, [HN8](#)^[↑] [LEdHN/8](#)^[↑] [8] an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case, so the District Court retained jurisdiction to adjudicate Gomez's complaint. That ruling suffices to decide this case. We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount. That question is appropriately reserved for a case in which it is not hypothetical.



Michael Fuller <michael@underdoglawyer.com>

RE: TCPA List : Just Released - ACA just decided by DC Circuit

1 message

Fri, Mar 16, 2018 at 8:45 AM

To: michael@underdoglawyer.com

TCPA

[Post New Message](#)

Re: Just Released - ACA just decided by DC Circuit

[Reply to Group](#)

[Reply to Sender](#)



Mar 16, 2018 11:46 AM
[Yitzhak Zeiman](#)

Are you all reading this as I am? That the D.C. Circuit is setting aside the FCC's earlier treatment of predictive dialers as an ATDS? That would be catastrophic (and would lead to countless Motions to Stay that would very likely be granted);

As a threshold matter, the Commission maintains that the court lacks jurisdiction to entertain petitioners' challenge concerning the functions a device must be able to perform. The agency reasons that the issue was resolved in prior agency orders—specifically, declaratory rulings in 2003 and 2008 concluding that the statutory definition of an ATDS includes “predictive dialers,” dialing equipment that can make use of algorithms to “assist[] telemarketers in predicting when a sales agent will be available to take calls.” 2015 Declaratory Ruling, 30 FCC Rcd. at 7972 ¶ 10 n.39; see also *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (2008 Declaratory Ruling), 23 FCC Rcd. 559 (2008); 2003 Order, 18 FCC Rcd. 14,014. According to the Commission, because there was no timely appeal from those previous orders, it is too late now to raise a challenge by seeking review of a more recent declaratory ruling that essentially ratifies the previous ones. We disagree.

The Commission's most recent effort falls short of reasoned decisionmaking in “offer[ing] no meaningful guidance” to affected parties in material respects on whether their equipment is subject to the statute's autodialer restrictions. Postal Regulatory Comm'n, 785 F.3d at 754. A basic question raised by the statutory definition is whether a device must itself have the ability to generate random or sequential telephone numbers to be dialed. Or is it enough if the device can call from a database of telephone numbers generated elsewhere? The Commission's ruling appears to be of two minds on the issue. In certain respects, the order conveys that equipment needs to have the ability to generate random or sequential numbers that it can then dial. The order twice states that, to “meet[] the TCPA's definition of ‘autodialer,’ the equipment in question must have the capacity to “dial random or sequential numbers.” 2015 Declaratory Ruling, 30 FCC Rcd. at 7972 ¶ 10; see also *id.* at 7974 ¶ 15. And it is clear from context that the order treats the ability to “dial random or sequential numbers” as the ability to generate and then dial “random or sequential numbers.”

To see why, it is helpful to understand that the ruling distinguishes between use of equipment to “dial random or sequential numbers” and use of equipment to “call[] a set list of consumers.” *Id.* at 7972 ¶ 10. Anytime phone numbers are dialed from a set list, the database of numbers must be called in some order—either in a random or some other sequence. As a result, the ruling's reference to “dialing random or sequential numbers” cannot simply mean dialing from a set list of numbers in random or other sequential order: if that were so, there would be no difference between “dialing random or sequential numbers” and “dialing a set list of numbers,” even though the ruling draws a divide between the two. See *id.* at 7973 ¶¶ 13, 14. It follows that the ruling's reference to “dialing random or sequential numbers” means generating those numbers and then dialing them. The Commission's prior declaratory rulings reinforce that understanding. In its 2003 ruling addressing predictive dialers, the Commission observed that, “

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 19, 2016 Decided March 16, 2018

No. 15-1211

ACA INTERNATIONAL, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED
STATES OF AMERICA,
RESPONDENTS

CAVALRY PORTFOLIO SERVICES, LLC, ET AL.,
INTERVENORS

Consolidated with 15-1218, 15-1244, 15-1290, 15-1304,
15-1306, 15-1311, 15-1313, 15-1314, 15-1440, 15-1441

On Petitions for Review of an Order of
the Federal Communications Commission

Shay Dvoretzky argued the cause for petitioners ACA International, et al. With him on the joint briefs were *Helgi C. Walker*, *Monica S. Desai*, *Amy L. Brown*, *Jonathan Jacob Nadler*, *Christopher J. Wright*, *Jennifer P. Bagg*, *Elizabeth Austin Bommer*, *Robert A. Long*, *Yaron Dori*, *Brian Melendez*, *Tonia Ouellette Klausner*, *Keith E. Eggleton*, *Kate Comerford*

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We uphold the Commission's approach to revocation of consent, under which a party may revoke her consent through any reasonable means clearly expressing a desire to receive no further messages from the caller. We also sustain the scope of the agency's exemption for time-sensitive healthcare calls.

We set aside, however, the Commission's effort to clarify the types of calling equipment that fall within the TCPA's restrictions. The Commission's understanding would appear to subject ordinary calls from any conventional smartphone to the Act's coverage, an unreasonably expansive interpretation of the statute. We also vacate the agency's approach to calls made to a phone number previously assigned to a person who had given consent but since reassigned to another (nonconsenting) person. The Commission concluded that calls in that situation violate the TCPA, apart from a one-call safe harbor, regardless of whether the caller has any awareness of the reassignment. We determine that the agency's one-call safe harbor, at least as defended in the order, is arbitrary and capricious.

We therefore grant the petitions for review in part and deny them in part.

I.

The federal government's efforts to combat unwanted robocalls have spanned nearly three decades, involving two federal agencies and a number of congressional enactments. In the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, 15 U.S.C. § 6101 *et seq.*, Congress empowered the Federal Trade Commission to regulate the telemarketing industry. The FTC's measures include a general bar against calling any telephone number on the "do-

Habitability – cont'd

Remedies

- * Terminate the lease
- * Money Damages
- * Substitute Services – for essential services
- * Repair and Deduct
- * Injunctive relief
- * Defense in Eviction, see *infra*

Habitability – Money Damages

- * Suit for \$\$ damages
 - * Includes reduced rental value, personally injury, damage to items, other incurred expenses.
 - * “[W]e think that the extension of damages to cover emotional distress due to the uninhabitable condition is inconsistent with adjoining provisions of the statute.” *Brewer v. Erwin*, 287 Or 435, (1979).
- * Exceptions – (affirmative defense)
 1. LL neither knew nor reasonably should have known of the defect **AND**
 - a) Either, T knew or reasonably should have known of the defect and failed to give notice before the damage was suffered, **or**
 - b) The defect was caused after the tenancy began by the deliberate or negligent act or omission of someone *other than the landlord or a person acting on behalf of the landlord*.
 2. Defect caused by deliberate or negligent act or omission of the tenant or tenant’s guest.

Habitability – cont'd

Remedies

- * Terminate the lease
- * Money Damages
- * Substitute Services – for essential services
- * Repair and Deduct
- * Injunctive relief
- * Defense in Eviction, see *infra*

Tenant Self-Help Remedy for Minor Repairs

- * If Tenant Complains in Writing about “Minor” Repairs and Landlord does not respond within 7 days, Tenants may do own Repairs and Deduct the Cost of Repairs from Rent
- * “Minor” Means Defects Less than \$300 to Repair
- * “Minor” does not mean Mold, Radon, Asbestos, Lead Based Paint
- * T must provide statement from party doing repair as to what done and amount billed
- * Tenant may not use this Option if:
 - * The Problem was Caused by Tenant
 - * Tenant Knew about the Problem for at Least 6 Months Prior to Notice to Landlord
 - * Landlord Fixes the Problem (Either before or after the Notice)
 - * Tenant has used this Remedy in the Past for the Same Problem

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Evictions

- * Standardized summons/complaints and answers
- * Must be served within 1 judicial day of filing
- * First appearance within 7 days of filing
- * First appearance
 - * Failure to appear by either party results in judgment
 - * Both parties appear
 - * Stipulated agreement
 - * Dismissal
 - * Trial

Evictions Trial

- * Within 15 days of first appearance
- * Plaintiff/LL: only may pursue possession
- * Tenant may
 - * Defend; and
 - * Counterclaim if and only if the right to do so is otherwise provided by statute.
 - * NOTE: All ORLTA claims are authorized by statute
- * Winner entitled to reasonable attorney fees