Legal Opinion Letter

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"NO INJURY" CLASS ACTION PLAINTIFFS FOUND TO LACK LEGAL STANDING

by
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The phenomenon of "no injury" class actions is rising in popularity as consumers without actual injuries or damages continue to band together to seek a large pay day. Courts, however, are quickly recognizing the abstract and speculative nature of these "no injury" class actions, dismissing them on the grounds of lack of Article III standing.

A recent example is *In re McNeil Consumer Healthcare*, where Judge Mary McLaughlin of the Eastern District of Pennsylvania recently dismissed a putative "no injury" class action for lack of constitutional standing. 2011 U.S. Dist. LEXIS 76800 (July 15, 2011 E.D. Penn). The litigation stemmed from allegations that McNeil Consumer Healthcare, a division of Johnson & Johnson, along with third party contractors, engaged in a conspiracy to conceal quality control problems and manufacturing defects of adult and child medications. *Id.* at *1. The alleged conspiracy surfaced when the FDA cited McNeil's Fort Washington facility for various manufacturing deficiencies. *Id.*

The twenty seven named plaintiffs, along with the rest of the class, alleged — in a complaint the court described as "difficult to distill into a coherent summary" — that they purchased unspecified "Subject Products" manufactured by McNeil that were defective. *Id.* Ultimately, these products were recalled. *Id*. According to plaintiffs, the recall was inadequate because plaintiffs purchased the products at an inflated price and were not properly compensated for their out-of-pocket expenses. *Id.* at *1, *7. Consequently, they sought purely economic damages. *Id.* at *7.

Johnson & Johnson, McNeil, and the third party contractors filed motions to dismiss, asserting as a threshold issue that plaintiffs lacked Article III standing. *Id.* at *8. Specifically, they argued that plaintiffs failed to establish an "injury-in-fact." *Id.* As they explained, "[a]lthough the plaintiffs allege in a conclusory fashion that they have not been fully reimbursed for their out-of-pocket expenses for the products in question, they do not allege what specific harm that [sic] they have suffered." *Id.* Judge McLaughlin agreed and dismissed the class for lack of standing. *Id.* at *9-10.

When a plaintiff seeks to invoke federal jurisdiction it is their burden to establish standing, a jurisdictional prerequisite under Article III, § 2. *Id.* at *8 (internal citations omitted). The plaintiff must offer proof of (1) an injury-in-fact; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision. *Id.* (internal citations omitted). This constitutional standing requirement is equally applicable to class

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actions where the class representative must establish an injury-in-fact, not simply that other unidentified members of the class suffered injuries. *Id.* at *9 (internal citations omitted).

The court found that plaintiffs' complaint failed to establish an injury-in-fact as to Johnson & Johnson, McNeil, and the third party contractors. *Id.* at *9-10. In analyzing the injury-in-fact element, the court reasoned that the complaint was "deficient insofar as the plaintiffs d[id] not allege which particular products they purchased." *Id.* at *9. Instead, plaintiffs generally alleged that they purchased "Subject Products including some Recalled Subject Products." *Id.* This vague umbrella term — "Subject Products"— included, at a minimum, twenty-one different products and seventy-four types of these products. *Id.* Additionally, plaintiffs did not allege how the "Subject Products" they purchased were defective. *Id.* at *10. There was an allegation only that the "Subject Products" suffered from "serious problems." *Id.* As the court explained, "[e]ven assuming that the 'serious problems' identified [] encompass the allegations of specific product recalls and FDA citations, the plaintiffs fail to allege any personal harm arising therefrom." *Id.* Instead, plaintiffs relied on injuries suffered by third party non-class members as alleged on internet blogs. *Id.* at *12-13. Accordingly, the court concluded that even with a generous reading of the plaintiffs' complaint, they have not established an injury-in-fact as they failed to allege "that they, rather than non-plaintiff members of the class, have suffered injury as a result of said problems." *Id.* at *10.

For support, the court cited two analogous cases, both raised by the defense in their motions. The first, *Rivera v. Wyeth-Averst Laboratories*, involved the dismissal of a putative class action brought against Wyeth wherein the plaintiffs sought solely economic damages for harm sustained from a defective drug causing liver failure. 283 F.3d 315 (5th Cir. 2002). In finding that the plaintiffs failed to establish injury-in-fact, the U.S. Court of Appeals for the Fifth Circuit explained that the plaintiffs did not allege that the drugs were defective or caused them specific injuries. In a second case, *Whitson v. Bumbo*, the plaintiff brought a putative class action stemming from defective baby seats. No. C 07-05597 MHP, 2009 WL 1515597 (N.D. Cal. Apr. 16, 2009). Plaintiffs sought purely economic damages under a theory of overpayment. The court ultimately ruled that plaintiffs lacked standing because they failed to allege that their own products revealed a defect or that they suffered injury therefrom. The injuries of non-parties were insufficient to establish injury-in-fact.

In addition to the lack of an "injury-in-fact," the court found that plaintiffs failed to establish causation as to the third party contractors. *Id.* at *15. When the complaint was stripped down to the actual conduct of the third party contractors, all that remained were allegations of removing defective medicine from the store shelves in a phantom recall. *Id.* at *16. It was unclear how plaintiffs were harmed by such conduct. *Id.* Indeed, as the court noted, "each purportedly defective [medicine] that was removed from store shelves became unavailable for purchase by a consumer. It does not logically follow that the plaintiffs could have been injured by these actions." *Id.* The necessary causal relationship was simply too tenuous to ever be established, therefore the third party contractors were granted a dismissal with prejudice.

Judge McLaughlin's opinion should be applauded for its insightful and logical approach to handling "no injury" class action lawsuits. Courts facing similar "no injury" claims in the future should look to this opinion for guidance and respond in a like fashion by addressing the threshold issue of standing, whether raised or not. In tackling this issue, courts will find a uniform result — plaintiffs bringing "no injury" lawsuits cannot survive in federal court as their injuries are forever based on pure conjecture. Courts should continue to take a strong stand against "no injury" actions using the doctrine of standing as a tool of dismissal.