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ALERT
LITIGATION

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Ohio Supreme Court eradicates no-injury class actions

On Aug. 27, 2015, the Ohio Supreme Court established in *Felix v. Ganley Chevrolet, Inc.*, Slip Opinion No. 2015-Ohio-3430 that all members of a plaintiff class alleging violations of the Ohio Consumer Sales Practices Act (OCSPA) must have suffered injury as a result of the conduct challenged in a suit under the act. In so ruling, the court made clear that:

1. Ohio's class action rules and consumer protection statutes do not permit "windfall awards" to parties who were not actually injured by a business's allegedly improper commercial practices.
2. "No-injury" consumer class actions will not be allowed in Ohio.

This decision is particularly important to companies (and their management and boards) that provide consumer services and hold consumer information – including manufacturers, distributors, and/or retailers of consumer goods and/or providers of consumer services (banking, insurance, credit, utilities, etc.). At least in Ohio, class actions now cannot be based on allegations akin to "We bought a product, other people had a problem with it, and we want our money back, even though it worked fine for us."

Background

In *Felix*, the class representative had a dispute with his dealership over a financing rate and objected to the arbitration provision in the purchase agreement. The trial court, which previously found the arbitration provisions unenforceable, certified a class that included individuals who allegedly suffered a loss, but also individuals who entered automobile purchase agreements without complaint. Faced with the lack of actual damages, the trial court arbitrarily awarded $200 in "discretionary damages" to thousands of satisfied customers who happened to purchase cars from 25 dealerships during a particular period. This class certification order and partial ruling on the merits was affirmed by a divided panel of the Eighth Judicial District Court of Appeals.

In reversing and remanding the underlying decision, the Ohio Supreme Court noted the United States Supreme Court's insistence that courts give careful consideration to the class-certification process as Fed.R.Civ.P. 23 is not "a mere pleading standard." *Felix* at ¶26 citing to *Wal-OCSPA-specific issuesMart Stores, Inc. v. Dukes*, 564 U.S., 131 S.Ct. 2541, 2551. Per the Ohio Supreme Court, "there can be no dispute that a trial court's rigorous analysis of the evidence often requires looking into enmeshed legal and factual issues that are part of the merits of the plaintiff's underlying claims," but "the trial court may probe the underlying merits of the cause of action only for the purpose of determining that the plaintiff has satisfied Civ.R. 23." *Id*. (internal citations omitted).

Turning to consumer class action issues, the Ohio Supreme Court made clear that "Plaintiffs bringing OCSPA class-action suits must allege and prove that actual damages were proximately caused by the defendant's conduct" and that "[p]roof of actual damages is required before a court may properly certify a class action." *Id.* at ¶31 (internal citations omitted). That said, the court held that the "inquiry into whether there is damage-in-fact is distinct from the inquiry into actual damages: "[f]act of damage pertains to the existence of injury, as a predicate to liability; actual damages involves the quantum of injury, and relate to the appropriate measure of individual relief."" *Id.* at ¶34 citing to *Martino v. McDonald's Sys., Inc.*, 86 F.R.D. 145, 147 (N.D.Ill.1980).

Tying its analysis back to class certification issues, the court established that "[i]f the class plaintiff fails to establish that all of the class members were damaged (notwithstanding questions regarding the individual damages calculations for each class members), there is no showing of predominance under Civ.R. 23(b)(3)" as a "key purpose of the predominance requirement is to test whether the proposed class is sufficiently cohesive to warrant adjudication by representation." *Id.* at ¶35 (internal citations omitted). Further, noting that ""the most basic requirement to bringing a lawsuit is that the plaintiff suffer some injury…[a]part from a showing of wrongful conduct and causation, proof of actual harm to the plaintiff has been an indispensable part of civil actions"" the court conclusively held that "all members of a class in class action litigation alleging violations of the OCSPA must have suffered injury as a result of the conduct challenged in the suit." *Id.* at ¶36 citing to Schwartz & Silverman, *Common Sense Construction of Consumer Protection Acts*, 54 U.Kan.L.Rev. 1, 50 (2005).

With respect to the case at hand, the court found that certification failed as there was no showing that all class members suffered an injury in fact. *Id.* at ¶37. In particularly strong wording the court determined that the "trial court's holding that it could award $200 to each member of the class as a matter of the trial court's discretion is based on a fiction. There is no authority in the statutory scheme or in our precedent to support a damages award to a class member in class action litigation arising from the OCSPA absent a showing that the class member was injured and sustained damages as a result of the

defendant's conduct." *Id.* at ¶38.

In response to the technical question of whether its ruling was "foreclosed for want of a final, appealable order," the court ruled that the "certification of the putative class is before us, and as the dissenting judge in the court of appeals recognized, "the CSPA's damages limitation impacts not only the damages that may ultimately be recovered by a properly certified class but whether a putative class may be properly certified as a Civ. R. 23(B)(3) CSPA class in the first instance"; accordingly, because "the class certified in this case includes plaintiffs whose damages are, at best, inchoate, the class as certified is inconsistent with former R.C. 1345.09(B), 137 Ohio Laws, Part II, at 3227, and Civ.R. 23." *Id.* at ¶¶40-41 (internal citations omitted).

A sign of things to come

The eradication of "no-injury" class actions in Ohio may be a sign of things to come nationally when the United States Supreme Court considers a similar question in *Spokeo, Inc. v. Robins, No. 13-1339* (U.S. Apr. 27, 2015). The critical question in *Spokeo* is whether Congress can confer standing on a plaintiff who suffers no concrete harm, but who instead alleges only a statutory violation. Resolution of this issue will determine the scope of consumer and workplace-related direct and class-actions for generations, including actions stemming from data breaches and cyber-attacks.

The Ohio Supreme Court's decision in *Felix* marks a swing back towards actual injuries being required to establish claims; especially in class actions. And *Felix* certainly stands in stark contrast to the Seventh Circuit Court of Appeals decision in *Remijas v. Neiman Marcus Group, LLC*, No. 14-3122 (7th Cir. July 20, 2015), which, against the tide of cases holding to the contrary, allowed a class of plaintiffs whose data had been compromised to pursue claims even though no actual injury had been established because, in that court's view, plaintiffs "should not have to wait until hackers commit identity theft or credit-card fraud in order to give the class standing, because there is an 'objectively reasonable likelihood' that such an injury will occur." While *Felix* certainly applies to OCSPA claims – which has been used to assert class action claims related to, among other thing, auto purchase and repair, advertising, collections/credit reporting/financial services, data breaches, and predatory lending/finance scams/mortgage fraud – the Ohio Supreme Court's analysis of Civ. R. 23 class action requirement and its determination that failing to demonstrate that all purported class members have suffered an injury in fact precludes class certification will definitely affect class actions of every flavor.

For more information, please contact:

Richik Sarkar
216.430.2009
rsarkar@mcdonaldhopkins.com

McDonald Hopkins LLC
A business advisory and advocacy law firm®

Carl J. Grassi, President
600 Superior Avenue, East, Suite 2100, Cleveland, Ohio 44114

Chicago	**Cleveland**	**Columbus**		
312.280.0111	216.348.5400	614.458.0025		
Fax: 312.280.8232	Fax: 216.348.5474	Fax: 614.458.0028		
	Detroit	**Miami**	**West Palm Beach**	
	248.646.5070	305.704.3990	561.472.2121	
	Fax: 248.646.5075	Fax: 305.704.3999	Fax: 561.472.2122	