

“No Injury” Plaintiffs and Standing

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ABSTRACT

American courts have wrestled with the issue of standing in lawsuits where there is a question as to whether the plaintiff has an “injury in fact.” The issue has developed differently depending on the context. The issue arose in mass tort suits where persons exposed to a toxic substance did not have any present adverse physical condition. These cases were variously labeled “exposure-only,” “latent manifestation,” or, in the class action context, “future claimants” suits. In such suits, state substantive laws vary markedly as to whether there is a cause of action and right to recover damages for fear of future injury. Federal Employers Liability Act cases limit recovery for “fear of cancer” to those cases in which there is evidence of a present condition making cancer more likely.

*In order to avoid more onerous substantive law standards in tort cases, including class action requirements, plaintiffs in product liability cases gravitated from tort to contract causes of action. Theories based on the “benefit-of-the-bargain” and “economic harm” have sometimes succeeded in overcoming the “no injury” claim when there is proof of actual economic harm. The Fifth Circuit’s decision in *Cole v. General Motors*, distinguishing its prior decision in *Rivera v. Wyeth-Ayers Laboratories*, reflects a willingness to find economic harm to be an adequate claim of injury. Two recent cases, *In re Cheerios Marketing & Sales Practices Litigation* and *Lopez v. Southwest Airlines Co.*, indicate the unsettled parameters of that test and are discussed in the context of developing standing law.*

*Statutory penalty and rights cases present special circumstances for standing requirements depending on the intent of the statute. The Supreme Court has recently declined to decide, in *First American Financial Corp. v. Edwards*, whether a company could be sued for violating certain statutes even if the plaintiff suffered no direct harm from the violation. The full scope of statutory fixed penalty and damages suits where there would be no injury without the statute is still to be fleshed out.*

Invasion of privacy suits have mushroomed with the cyberspace revolution, leaving many still-unanswered questions as to what degree of actual harm is required to establish standing. Finally, a spate of false labeling and advertising claims suits have been filed under state consumer statutes, many relating to food, with differing results in the courts relating to the question of actual injury.

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INTRODUCTION

For several decades, American courts have wrestled with the propriety of lawsuits brought by plaintiffs who have difficulty proving any present injury. The issue was first given prominence in mass tort suits brought by persons exposed to a toxic substance but who did not have any present adverse physical condition as a result.¹ These cases were variously labeled “exposure-only,” “latent manifestation,” or, in the class action context, “future claimants” suits.² Besides mass torts like asbestos exposure, exposure-only cases have arisen particularly in product defect, environmental, and pharmaceutical litigation.³

As future-injury plaintiffs have increasingly turned to non-tort causes of action, often to avoid stricter standards being imposed for class treatment of tort-based claims, defendants have raised the pre-

¹ See, e.g., Note, *And Justiciability for All?: Future Injury Plaintiffs and the Separation of Powers*, 109 HARV. L. REV. 1066, 1066–68, 1073–76 (1996).

² See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612–13, 626–29 (1997) (rejecting a settlement class of “future claimants” who were exposed occupationally to asbestos and who had varying symptoms from different exposures); *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 426–27, 446 (1977) (finding that exposure of pipefitters, known as “the snowmen of Grand Central” because they were often covered with asbestos, would not support a present claim for emotional distress damages due to risk of future disease); *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 231–34 (5th Cir. 1984) (holding that the later-developing physical and mental problems of electrician exposed to toxic substance while cleaning electrical apparatus on freighter were not actionable).

³ See *infra* notes 17–41 and accompanying text.

sent injury argument in opposition to these causes of action as well, pejoratively labeling them “no injury” suits.⁴ These claims have often been brought for breach of warranty, deceptive products or services, unfair consumer practices under state consumer statutes, statutory fixed penalty or damages, and common law or statutory invasion of privacy and identity. “No injury” has been raised in these cases in support of such defenses as lack of standing, failure to state a cause of action under relevant state tort law, failure to state a claim for damages for actual injury, and unavailability of class treatment due to lack of commonality and inability to give notice to exposure-only plaintiffs.⁵ Lack of standing, however, is the defense most frequently raised when there is an assertion of “no injury.”⁶

I. THE STANDING DOCTRINE

Article III, Section 2 of the United States Constitution extends the judicial power to “Cases” or “Controversies.”⁷ A dispute is an Article III case or controversy only if the plaintiff can establish constitutional standing.⁸ Standing under Article III requires three elements: that an injury be “concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.”⁹ The first element is “injury in fact.” It is defined as “an invasion of a legally protected interest which is . . . concrete and particularized, and . . . actual or imminent, not conjectural or hypothetical.”¹⁰ In this definition, “particularized” requires that the plaintiff have personally suffered some harm.¹¹ “Actual or imminent” requires that the harm has happened or is sufficiently threatening, and not merely that it may occur at some future time.¹² Article III standing applies to cases in federal courts.¹³ States have similar standing

⁴ *O’Neil v. Simplicity, Inc.*, 553 F. Supp. 2d 1110, 1112–20 (D. Minn. 2008) (discussing how a class action on behalf of buyers of recalled cribs failed to state cognizable claims for breach of warranty, violation of various state statutes, and unjust enrichment where they did not allege actual manifestation of a defect that resulted in some injury).

⁵ See, e.g., *Amchem Prods., Inc.*, 521 U.S. at 619–29; *O’Neil*, 553 F. Supp. 2d at 1110.

⁶ See *infra* notes 8–16.

⁷ U.S. CONST. art. III, § 2.

⁸ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992) (detailing the case or controversy requirement).

⁹ *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010); see also *Warth v. Seldin*, 422 U.S. 490, 498–501 (1975).

¹⁰ *Lujan*, 504 U.S. at 560 (citations and internal quotation marks omitted).

¹¹ *Id.* at 560 n.1.

¹² *Id.* at 564.

¹³ See *id.* at 559–60.

rules for their courts, although they may differ in certain respects, and state standing requirements may arise from particular statutory provisions.¹⁴

The parameters of the standing doctrine were developed in cases involving governmental entities or application of statutory, administrative, or constitutional provisions.¹⁵ Prudential standing standards reflect the concern of the courts under federalism not to encroach upon the other two branches of government. This Article focuses primarily on standing requirements in suits between private parties seeking remedies under tort, contract, administrative, or statutory causes of action.

Courts are in the process of trying to apply coherent standing doctrines to deal with the often-evolving causes of action being asserted by plaintiffs. This Article tracks the approaches that courts have taken, particularly in class actions, in cases in which there is no apparent present injury and asks whether the tests that have been applied serve the policies they are intended to support. Courts in such “no injury” cases invoke the same mantra of standing terms as in the governmental standing cases—the injury in fact must be concrete, particularized, and imminent.¹⁶ The context of these cases, however, often dictates how those terms will be applied where damages, rather than injunctive relief against a governmental entity, are involved.

II. EXPOSURE-ONLY TOXIC TORT CASES

In mass tort cases involving exposure to toxic substances like asbestos, many courts have found the “injury in fact” requirement for standing satisfied only by an increased risk of a medical condition at a

¹⁴ See, e.g., *Save the Homosassa River Alliance, Inc. v. Citrus Cnty.*, 2 So. 3d 329, 336–40 (Fla. Dist. Ct. App. 2005) (discussing the state standing doctrine and its statutory limitations).

¹⁵ See *Flast v. Cohen*, 392 U.S. 83, 101 (1968) (finding in a taxpayer suit that, “in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution”); see also *Lujan*, 504 U.S. at 562 (determining that where “a plaintiff’s asserted injury arises from the government’s allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed” to establish standing); *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) (“[B]roadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.”); *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153–54 (1970) (“[T]he interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”).

¹⁶ See, e.g., *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1, 3–8 (Miss. 2007).

later time.¹⁷ This rationale has also been extended to delayed manifestation in pharmaceutical and medical device litigation where the plaintiff's condition due to exposure can be viewed as a "ticking time bomb" for possible future injury.¹⁸ Likewise, courts have found that a credible threat of future harm can establish injury in fact in environmental cases.¹⁹ Although such cases are often resolved on the issue of standing, the "no injury" issue can be raised instead in the context of addressing whether there is a cause of action under state law (such as "fear of cancer" or anxiety or mental anguish due to exposure), whether damages can be awarded for such claims, or whether "medical monitoring" is available under state law.

A. State Laws Concerning Fear of Future Injury

State laws vary as to whether there is a separate cause of action for fear of future injury resulting from exposure.²⁰ Some states require proof of a reasonable probability that the plaintiff will contract a medical condition.²¹ Others require an accompanying physical injury of a sufficiently serious nature related to the exposure.²² In circum-

¹⁷ See *Carlough v. Amchem Prods., Inc.*, 834 F. Supp. 1437, 1451–52 (E.D. Pa. 1993) (citing cases holding that "exposure to a toxin constitutes injury in fact under Article III"); *Ashton v. Pierce*, 541 F. Supp. 635, 638 (D.D.C. 1982), *aff'd*, 716 F.2d 56 (D.C. Cir. 1983), *amended by* 723 F.2d 70 (D.C. Cir. 1983); *see also In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1433 (2d Cir. 1993).

¹⁸ See *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 461 (E.D. La. 2006); *In re Copley Pharm., Inc.*, 161 F.R.D. 456, 462–63 (D. Wyo. 1995); *In re DES Cases*, 789 F. Supp. 552, 564–65 (E.D.N.Y. 1992), *appeal dismissed*, 7 F.3d 20 (2d Cir. 1993).

¹⁹ *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947, 949–50 (9th Cir. 2002) (agreeing "with those circuits that have recognized that a credible threat of harm is sufficient to constitute actual injury for standing purposes, whether or not a statutory violation has occurred" in suit by downstream farmers to prevent release of water they alleged would cause salinity adversely affecting their irrigated crops); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1234–35 (D.C. Cir. 1996) (determining that "the incremental risk is enough of a threat of injury to entitle plaintiffs to be heard" in a challenge to a Forest Service decision selecting a logging plan that created a slightly greater likelihood of a wildfire).

²⁰ See Christopher P. Guzelian, *Liability & Fear*, 65 OHIO ST. L.J. 713, 719 (2004).

²¹ See *Boyd v. Orkin Exterminating Co.*, 381 S.E.2d 295, 296, 298 (Ga. Ct. App. 1989) (holding that children with elevated levels of pesticide in their blood could not recover for "increased risk of cancer" because they had to prove to a "reasonable medical certainty" that such consequences would occur" (quoting Phillip E. Hassman, Annotation, *Admissibility of Expert Medical Testimony as to Future Consequences of Injury as Affected by Expression in Terms of Probability or Possibility*, 75 A.L.R.3d 9 (1977))).

²² See *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 32 (Ariz. Ct. App. 1987) (rejecting the claims of residents on land adjacent to an asbestos-producing mill for risk of cancer and emotional distress based on transitory, nonrecurring physical conditions, such as headaches, indigestion, weeping, muscle spasms, depression, and insomnia, on the grounds that these did not constitute "substantial bodily harm").

stances in which the individuals exposed may not have a present cause of action for damages, they may choose to seek only “medical monitoring” rather than damages; that is, periodic medical examinations at a defendant’s expense.²³ State substantive laws vary as to recognition of a cause of action for medical monitoring.²⁴ Among states that do recognize it, some view it as a separate cause of action, although others characterize it as only a remedy, which must be supplemental to another cause of action.²⁵ One court has found injury in fact satisfied if a plaintiff exposed to toxic substances is unable to receive medical screening due to the failure of the government agency responsible for implementing the appropriate medical monitoring program to do so.²⁶

Courts have understandably been hesitant to expand the requirement of injury in fact beyond actual present harm to the likelihood of future harm, recognizing that medical science cannot provide such predictions with much accuracy.²⁷ Many jurisdictions will thus not allow the possibility of future harm to satisfy standing, or to serve as either an element of a tort cause of action or a separate cause of action for risk of future harm or mental anguish.²⁸ The challenge is to devise tests that can restrict recovery in delayed-manifestation or ex-

²³ See *Scott v. Am. Tobacco Co.*, 949 So. 2d 1266, 1291 (La. Ct. App. 2007) (ordering tobacco manufacturers in class action on behalf of smokers in the state to fund a cessation program to provide monitoring and clinical assistance to stop smoking). Class action status, however, has not always been approved. See *In re Telectronics Pacing Sys., Inc.*, 221 F.3d 870, 882 (6th Cir. 2000) (invalidating a Rule 23(b)(1) “limited fund” settlement class of persons with pacemakers where medical monitoring was joined with a right to damages if medical problems arise); *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 483–85 (E.D. Pa. 1997) (denying a Rule 23(b)(2) “injunctive” class for medical monitoring because it included a fund for treatment). *But see* *Craft v. Vanderbilt Univ.*, 174 F.R.D. 396, 406 (M.D. Tenn. 1996) (noting authority supporting proposition that medical monitoring can be a form of injunctive relief).

²⁴ See, e.g., *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1, 3 (Miss. 2007) (describing how Mississippi does not recognize a claim for medical monitoring unless there is proof of physical or emotional injury).

²⁵ *Pisciotta v. Old Nat’l Bancorp.*, 499 F.3d 629, 639 (7th Cir. 2007) (“[S]ome courts have allowed medical monitoring damages to be recovered or have created a special cause of action for medical monitoring.” (citing *Badillo v. Am. Brands, Inc.*, 16 P.3d 435, 438–39 & nn.1–2 (Nev. 2001) (containing citations to seventeen different states that allow medical monitoring claims in some form))); see also John J. Weinholtz, *Defending “No Injury . . . Yet”: Medical Monitoring Claims in Class Action Settings*, BRIEF, Spring 2001, at 17.

²⁶ See *Pritikin v. Dep’t of Energy*, 254 F.3d 791, 796–97 (9th Cir. 2001).

²⁷ See, e.g., *Paz*, 949 So. 2d at 3–6 (stressing that an injury must be foreseeable); see also *Parker v. Brush Wellman, Inc.*, 377 F. Supp. 2d 1290, 1296–99 (N.D. Ga. 2005) (expressing doubt that non-detectable, “sub-clinical” conditions can constitute an injury); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 686 (Mich. 2005) (determining that the extensive factual determinations surrounding possible future harm is a question for the legislature, not the courts).

²⁸ See, e.g., *Paz*, 949 So. 2d at 3–7 (discussing how medical monitoring is rejected in Missis-

posure-only cases to those situations in which future harm is more than just a hypothetical.

B. The FELA Approach to “Fear of Cancer”

The considerable differences in state laws do not bode well for a uniform approach to recovery for future injury. The practice under the Federal Employers Liability Act (“FELA”),²⁹ however, reflects an approach that has been developed in a series of cases that have gradually and carefully expanded the circumstances where future injury can satisfy “injury in fact” requirements. In a 1997 decision, *Metro-North Commuter Railroad Co. v. Buckley*,³⁰ the Supreme Court applied the zone-of-danger test to a FELA claim for fear of cancer brought by a pipefitter who had suffered intensive exposure to asbestos, but who had a clean bill of health at the time of suit.³¹ The Court rejected his claim, saying exposure alone is insufficient to show “physical impact” under the test.³² “[A] simple (though extensive) contact with a carcinogenic substance,” the Court said, “does not . . . offer much help in separating valid from invalid emotional distress claims.”³³ The Court distinguished, however, exposure-only plaintiffs from plaintiffs who suffer from a disease—as to whom the common law “already permit[s] recovery for emotional distress.”³⁴

Five years after *Metro-North Commuter Railroad Co.*, in *Norfolk & Western Railway Co. v. Ayers*,³⁵ six former railway workers sued under FELA for exposure to asbestos resulting in their contracting asbestosis.³⁶ “Asbestosis is a noncancerous scarring of the lungs by asbestos fibers,” and although it can range “in severity from mild to debilitating,” the “symptoms include shortness of breath, coughing, and fatigue.”³⁷ The defendant presented the question “[w]hether a plaintiff who has asbestosis but not cancer can recover damages for fear of cancer under the [FELA] without proof of physical manifestations of the claimed emotional distress.”³⁸ The Court answered:

sippi and other states); see also *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 432–35 (1997) (discussing how courts have limited future injury claims in various contexts).

²⁹ Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51–60 (2006).

³⁰ *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997).

³¹ *Id.* at 424, 427.

³² *Id.* at 430.

³³ *Id.* at 434.

³⁴ *Id.* at 436–37.

³⁵ *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135 (2003).

³⁶ *Id.* at 140.

³⁷ *Id.* at 142 n.2.

³⁸ *Id.* at 157.

Our answer is yes, with an important reservation. We affirm only the qualification of an asbestosis sufferer to seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering damages. It is incumbent upon such a complainant, however, to prove that his alleged fear is genuine and serious.³⁹

The defendant argued that “fear of cancer is too unrelated . . . to be an element of [an asbestosis sufferer’s] pain and suffering,”⁴⁰ but the Court cited scientific evidence that heavy exposure to asbestosis increases the risk of lung cancer.⁴¹ The Court’s “genuine and serious” test for fear of cancer thus required physical manifestation of a condition that can be linked factually to the development of cancer.⁴² It noted that the plaintiffs did not seek “discrete damages for their *increased risk* of future cancer,” but rather “for their *current* injury, which, they allege, encompasses a *present fear* that the toxic exposure causative of asbestosis may later result in cancer.”⁴³

The “genuine and serious” test for fear of cancer in FELA cases has been scrutinized in cases since *Ayers*. The Supreme Court revisited the issue again in a 2009 decision, *CSX Transportation, Inc. v. Hensley*.⁴⁴ In this case, the plaintiff sued his railroad employer for damages resulting from exposure to asbestos.⁴⁵ The employer appealed a five million dollar jury verdict, claiming reversible error in the trial court’s failure to give its requested instruction, which specifically referenced the “genuine and serious” test.⁴⁶ The Court reversed, finding that the instruction should have been given and reflecting on the delicate balancing that occurred in *Ayers* between the plaintiff’s fear of future illness and the need to protect defendants from massive tort cases based on unforeseeable injury.⁴⁷ Without the defendant employer’s requested instruction, the Court found that a jury “could award emotional-distress damages based on slight evidence of a plain-

³⁹ *Id.*

⁴⁰ *Id.* at 152, 154 (quoting oral arguments) (internal quotation marks omitted).

⁴¹ *Id.* at 154–55.

⁴² *See id.* at 153–54, 157.

⁴³ *Id.* at 153.

⁴⁴ *CSX Transp., Inc. v. Hensley*, 556 U.S. 838 (2009).

⁴⁵ *Id.* at 839.

⁴⁶ *Id.* at 840 (“Plaintiff is also alleging that he suffers from a compensable fear of cancer. In order to recover, Plaintiff must demonstrate . . . that the . . . fear is genuine and serious.”).

⁴⁷ *Id.* at 842 (“When this Court in *Ayers* held that certain FELA plaintiffs can recover based on their fear of developing cancer, it struck a delicate balance between plaintiffs and defendants—and it did so against the backdrop of systematic difficulties posed by the ‘elephantine mass of asbestos cases.’” (quoting *Ayers*, 538 U.S. at 166)).

tiff's fear of contracting cancer," even though "more is required" and plaintiffs must "satisfy a high standard in order to obtain [such damages]."48

Although a jury instruction is required to prevent a jury from accepting only slight evidence of fear of cancer, some cases may not even reach the jury instruction stage, having been dismissed on a motion for summary judgment. For example, in *In re Asbestos Products Liability Litigation (No. IV)*,⁴⁹ the defendant-employer moved to exclude evidence regarding fear of cancer and for partial summary judgment on this claim.⁵⁰ The court granted the motion, finding that the plaintiff had not been diagnosed with asbestos-related cancer and had acknowledged that he had not experienced breathing-related symptoms since 1998.⁵¹

The FELA "fear of cancer" doctrine falls short of providing recovery based solely on exposure, requiring evidence of a *present* condition making cancer more likely. This result is more plaintiff-friendly than the law in many states, but the "genuine and serious" test seeks to prohibit recovery for fear based merely on speculation of a future causal impact. Whether that language in a jury instruction will accomplish that goal might be questioned, and the gatekeeping role of the court in excluding evidence or granting partial summary judgment in appropriate situations is certainly necessary.

III. BENEFIT-OF-THE-BARGAIN AND ECONOMIC LOSS CASES

The delayed-manifestation doctrines were developed primarily in personal injury tort litigation.⁵² As courts increasingly refused to certify class actions in tort suits due to problems such as standing and individualized issues like reliance, plaintiff lawyers shifted to contract or statutory causes of action applicable to a variety of consumer and business situations.⁵³ Suits for breach of warranty and "benefit-of-the-bargain" have been increasingly brought in relation to defective prod-

48 *Id.* at 841–42.

49 *In re Asbestos Prods. Liab. Litig. (No. IV)*, No. 09-cv-92610, 2013 WL 1628165 (E.D. Pa. Mar. 28, 2013).

50 *Id.* at *1.

51 *Id.* at *3–4; see also Michael D. Hultquist, *Fear of Cancer as a Compensable Cause of Action*, BRIEF, Spring 2001, at 8–12 (discussing future injury cases in which summary judgment was granted).

52 See *supra* Part II.

53 See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 737 (5th Cir. 1996); see also *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1074 (6th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1296–97 (7th Cir. 1995).

ucts and services.⁵⁴ Applying the label “no injury,” defense attorneys have challenged such suits and their class action status on standing grounds, as well as by asserting failure to state a claim.⁵⁵

A. *Parameters of Product Liability Suits for Economic Loss*

As product liability suits moved from tort to contract, courts have shaped the parameters of permissible economic loss claims. Two Fifth Circuit decisions reflect the developing doctrines in relation to “no injury” cases.

First, *Cole v. General Motors Corporation*⁵⁶ was a class action on behalf of owners of DeVille automobiles for “economic loss” resulting from a defect in air bags that could deploy unexpectedly without a crash.⁵⁷ The court found that although the owners did not assert physical injuries, they alleged that they suffered economic injury at the moment of purchase because of their cars’ reduced value; it noted that “their injury is that there is a difference between what they contracted for and what they actually received.”⁵⁸

Cole distinguished the Fifth Circuit’s earlier decision in *Rivera v. Wyeth-Ayerst Laboratories*,⁵⁹ in which purchasers of prescription drugs sought recovery of economic damages after learning the drug had been withdrawn from the market because it caused liver damage in other patients.⁶⁰ *Rivera* found that the plaintiffs had never suffered physical injury and that an allegation of physical injuries to nonparties was not sufficient.⁶¹ “It is not enough,” the court said, “that Wyeth may have violated a legal duty owed to some other patients; the plaintiffs must show that Wyeth violated a legal duty owed to them.”⁶²

Rivera can be distinguished from *Cole* on its assertion that plaintiffs only pled injury to third persons, and the *Cole* court would be justified in resting on that distinction. The fact remains, however, that the plaintiff in *Rivera* was asserting economic loss to herself as well, which the *Rivera* Court seemed unwilling to accept.⁶³ The court reasoned that there was no loss of the benefit of the bargain:

⁵⁴ See, e.g., *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 720–21 (5th Cir. 2007).

⁵⁵ See, e.g., *id.* at 721–22.

⁵⁶ *Cole v. Gen. Motors Corp.*, 484 F.3d 717 (5th Cir. 2007).

⁵⁷ *Id.* at 718–19, 722.

⁵⁸ *Id.* at 722.

⁵⁹ *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315 (5th Cir. 2002).

⁶⁰ *Id.* at 316–17; see also *Cole*, 484 F.3d at 722–23 (distinguishing *Rivera*).

⁶¹ See *Rivera*, 283 F.3d at 320–21.

⁶² *Id.* at 320.

⁶³ See *id.* at 319–20.

By plaintiffs' own admission, Rivera paid for an effective pain killer, and she received just that—the benefit of her bargain Had Wyeth provided additional warnings or made [the drug] safer, the plaintiffs would be in the same position they occupy now. Accordingly, they cannot have a legally protected contract interest.”⁶⁴

Plaintiffs might have replied that Rivera paid for a drug that was safe but received one that could cause liver damage; thus, she did not receive what she bargained for. Wyeth might in turn have responded that the effectiveness of the drug as a pain killer was not affected by the fact that some other purchasers suffered liver damage, and Rivera suffered no loss. This, of course, is the crux of the question: whether a product that adversely affects others, but not the plaintiff, fails to provide the benefit of the bargain. Did Rivera contract for only a pain killer, or for a pain killer that would not have a propensity to cause liver damage? Is there any additional value, over and above what the purchaser receives, in a product that is in fact as safe as the purchaser expects it to be? In other words, is a product that has a propensity to harm, of which the purchaser was not aware, worth less to even those purchasers not affected by such propensity?

In distinguishing *Rivera*, *Cole* did not spell out all the twists and turns of this conundrum, although the *Cole* court viewed as critical that there be some positive and identifiable harm in order to establish a claim for economic loss.⁶⁵ For recovery of damages, the court said, there must be “actual economic harm (e.g., overpayment, loss in value, or loss of usefulness) emanating from the loss of [the plaintiff’s] benefit of the bargain.”⁶⁶ Overpayment would be the most likely basis for Rivera’s claim that she did not receive the benefit of the bargain. Can a value be put on how much a purchaser would be willing to pay for a safe product? Or is that value so de minimis in terms of the main intent of the purchaser—in Rivera’s case, to have an effective pain killer—that it cannot provide the basis for a valid claim? Of course, in a class action, that value could be quite small individually and yet

⁶⁴ *Id.* at 320.

⁶⁵ See *Cole*, 484 F.3d at 722–23; see also *In re Deepwater Horizon*, 739 F.3d 790, 795 (5th Cir. 2014) (rejecting a challenge to a settlement under which claims were paid to some class members who had not sustained economic loss caused by an oil spill). Citing *Cole*, the court in *In re Deepwater Horizon* held it was sufficient for Article III standing to allege loss caused by defendant’s conduct even though it might turn out that some class members had not been injured by that conduct. 739 F.3d at 803–04.

⁶⁶ *Cole*, 484 F.3d at 723.

amount to a sizable recovery in the interests of both compensation and deterrence.

B. Two Examples of “No Injury” Situations Claiming Economic Loss

Although *Cole* and *Rivera* covered the limitations of economic loss based on a contract claim, two recent district court cases provide additional examples for considering what factors should go into determining whether there is actual injury to a purchaser who receives a product or service that is defective, but who does not suffer any present injury from that defect.

*In re Cheerios Marketing & Sales Practices Litigation*⁶⁷ was a class action on behalf of purchasers of Cheerios alleging that the company made misrepresentations concerning the ability of Cheerios to reduce cholesterol, in violation of state consumer protection statutes and in breach of express and implied warranties.⁶⁸ The Food and Drug Administration had sent a warning letter to Cheerios’s manufacturer after finding federal violations in Cheerios’s advertisements claiming health benefits.⁶⁹ The plaintiff sought a full refund of the purchase price of Cheerios for all class members.⁷⁰ The district court dismissed, inter alia, for lack of standing, finding there was no concrete injury.⁷¹ The court found the claim for return of the purchase price “tenuous,” especially because the plaintiffs ate the full contents of what they had purchased, and many still ate Cheerios at the time of the suit.⁷² The court also found that class members would not be entitled to benefit-of-the-bargain damages because they had not objectively quantified their loss by specifically alleging that what they received was of lesser value than what was promised.⁷³

The *Cheerios* case reflects a failure to consider the full range of possible losses experienced by the purchasers of defective products or services who have not been directly affected by the defect. The plaintiffs in *Cheerios* may have eaten the food they had purchased, but by buying Cheerios on the advertised expectation that they would thereby lower their cholesterol, they had a loss of opportunity costs.

⁶⁷ *In re Cheerios Mktg. & Sales Practices Litig.*, No. 09-cv-2413, 2012 WL 3952069 (D.N.J. Sept. 10, 2012).

⁶⁸ *Id.* at *1–2.

⁶⁹ *Id.* at *2.

⁷⁰ *Id.* at *11.

⁷¹ *Id.* at *13.

⁷² *Id.* at *11.

⁷³ *Id.* at *12.

If the health benefits were a factor in their purchases (as most of the plaintiffs testified that they were⁷⁴), then they might have bought another cereal that would better achieve that goal. By eating a cereal with lesser cholesterol-reducing qualities than they might otherwise have bought, they could also be said to have lost the opportunity to make maximum use of their cereal meals. The fact that some purchasers continued to buy Cheerios after learning of the misrepresentations weakens that argument, but those who did not continue buying Cheerios cannot be said to have waived the loss of their opportunity costs.

A problem with the opportunity costs argument is how to value the loss. It is difficult to assess why consumers purchase different products and what their alternatives may be if they want certain features. There would surely be, however, some value to the lost opportunity costs that appropriate plaintiffs (and more importantly the class), could specifically plead and establish with evidence.

The second district court case addressing the factors of actual injury in a defective product or service case was a class action against Southwest Airlines for breach of express warranty on behalf of all passengers who took flights over a nine-month period during which the airline was in violation of certain Federal Aviation Administration Airworthiness Directives.⁷⁵ The plaintiffs sought “[b]enefit-of-the-bargain, out-of-pocket, and overpayment damages,” including return of the full airfares they had paid.⁷⁶ All of the flights ended safely without incident, and Southwest maintained that most of the deficiencies were minor and not safety related.⁷⁷ Once the deficiencies were remedied, the passengers were not exposed to any ongoing dangerous conditions that might manifest harm in the future.⁷⁸

Southwest moved to dismiss for, *inter alia*, lack of standing and failure to satisfy class action requirements.⁷⁹ The passengers arguably received the full benefit of the flights for which they paid. They received a flight that was in fact safe, and virtually all were probably

⁷⁴ *Id.* at *4–5.

⁷⁵ Consol. Amended Class Action Complaint at 5, *Lopez v. Sw. Airlines Co.*, No. 3:08-CV-1975-O (N.D. Tex. Aug. 6, 2012).

⁷⁶ *Id.* at 56.

⁷⁷ See Press Release, Sw. Airlines, Sw. Airlines Provides Testimony to U.S. House of Representatives Comm. on Transp. & Infrastructure (Apr. 3, 2008), available at <http://www.swamedia.com/releases/Southwest-Airlines-Provides-Testimony-to-U-S-House-of-Representatives-Committee-on-Transportation-and-Infrastructure>.

⁷⁸ See *id.*

⁷⁹ On July 10, 2013, the court granted the defendant’s motion for lack of standing. *Lopez v. Sw. Airlines Co.*, No. 3:08-CV-1975-O, slip op. at 2 (N.D. Tex. Aug. 6, 2012).

unaware of the violations and therefore did not suffer any mental anguish on the flight. Any allegations by some passengers that they suffered mental anguish later when they learned about the violations seem improbable. It might be argued that, as in the *Cheerios* case, the passengers flying Southwest lost opportunity costs to switch to another airline, but the variety of choices is much smaller as to airlines than alternative cereals, and a passenger’s choice of an airline could be influenced by many other factors.

As discussed concerning the *Rivera* case, there is a question as to whether any value can realistically be placed on the benefit of the bargain that a “no injury” consumer expected.⁸⁰ That would require, for example, valuing a flight without any existing FAA violations, or a pain killer without a propensity to cause liver damage, contrasted with what the consumer actually received. A claim for a full refund of what was paid ignores the fact that significant value might have been received—for example, a Southwest flight without incident—and a set-off might be appropriate. The case for finding injury might be made stronger where the defendant explicitly advertised and touted the very quality that was in fact deficient—like particular health benefits of the cereal, or an efficient and safe airline, or a pain killer drug that would not cause other complications. The context may be important in any particular case in determining whether the allegations of harm or loss are great enough to constitute injury in fact. These cases indicate that a survey of the full range of possible injury or loss should be undertaken by a court ruling on a claim of lack of standing because of “no injury.”

IV. STATUTORY PENALTY/DAMAGES AND RIGHTS CASES

Statutes, both federal and state, may prohibit certain conduct and provide a fixed penalty or damage recovery for it.⁸¹ Some statutes may not have an express fixed penalty or damages, but simply create a cause of action for certain conduct or violations.⁸² Congress may expand the range or scope of injuries that are cognizable for purposes of Article III standing by enacting statutes which create legal rights.⁸³ As the Supreme Court has explained, “Congress may enact statutes creat-

⁸⁰ See *supra* Part III.A.

⁸¹ See, e.g., 15 U.S.C. § 1692k (2012).

⁸² See, e.g., 18 U.S.C. § 1030(g) (2012).

⁸³ *Warth v. Seldin*, 422 U.S. 490, 500–01 (1975).

ing legal rights, the invasion of which creates [constitutional] standing, even though no injury would exist without the statute.”⁸⁴

There are many federal statutes that create both rights and their own standards regarding standing. For example, the Fair Debt Collection Practices Act (“FDCPA”)⁸⁵ provides for liability for individuals attempting to collect an unlawful debt, permitting the recovery of statutory damages up to \$1000 in the absence of actual damages.⁸⁶ Based on this section of the statute, courts have held that actual damages are not required for standing under the FDCPA.⁸⁷

As to certain other federal statutes, there has been much controversy over whether “injury in fact” is required. The issue came to the forefront in *Edwards v. First American Corp.*,⁸⁸ a suit based on a provision of the Real Estate Settlement Procedures Act (“RESPA”),⁸⁹ which forbids mortgage industry entities from making illicit kickbacks.⁹⁰ The plaintiff alleged that her title insurer provided millions of dollars in kickbacks to her title agency to steer business its way.⁹¹ She did not (and was unable to) allege, however, that she was charged more for her title insurance because of the kickbacks.⁹² The plaintiff sought statutory penalties for herself (approximately \$1500) and for all the members of the class she sought to represent.⁹³ The district court held that RESPA created certain rights and that a violation of these rights conferred standing, a holding the Ninth Circuit affirmed.⁹⁴ The appeal to the Supreme Court attracted a host of amicus briefs⁹⁵ and was expected to resolve the issue of whether a company could be

⁸⁴ Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973).

⁸⁵ Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692–1692p (2012).

⁸⁶ *Id.* § 1692k.

⁸⁷ See, e.g., *Keele v. Wexler*, 149 F.3d 589, 593–94 (7th Cir. 1998) (“[T]he plaintiff who admittedly owes a legitimate debt has standing to sue [even if she did not suffer actual damages] if the Act is violated by an unprincipled debt collector.”). Similarly, “proof of actual deception or damages is unnecessary to a recovery of statutory damages” under the Truth in Lending Act § 130, 15 U.S.C. § 1640 (2012). *Gambardella v. G. Fox & Co.*, 716 F.2d 104, 108 n.4 (2d Cir. 1983).

⁸⁸ *Edwards v. First Am. Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. dismissed as improvidently granted sub nom.* *First Am. Fin. Corp. v. Edwards*, 132 S. Ct. 2536 (2012).

⁸⁹ Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601–2617 (2012).

⁹⁰ See *id.*

⁹¹ *Edwards*, 610 F.3d at 515.

⁹² See *id.* at 516.

⁹³ Brief of Appellant at 15–16, *Edwards*, 610 F.3d 514 (No. 08-56538).

⁹⁴ *Edwards*, 610 F.3d at 515–17.

⁹⁵ See *First American Financial v. Edwards*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/first-american-financial-corp-v-edwards> (last visited Mar. 26, 2014) (listing various amicus briefs).

sued for violating a statute even if the plaintiff suffered no direct harm from the violation.⁹⁶ The Supreme Court, however, dismissed the appeal as improvidently granted,⁹⁷ and the question remains unresolved.

The Ninth Circuit’s *Edwards* decision looked to the purpose of the individual statute in asking whether the “no injury” standard that was applied so as to deny standing would be consistent with the statute.⁹⁸ Reviewing the legislative history of RESPA, the court found a committee report that noted that “these practices could result in harm beyond an increase in the cost of settlement services,” because the “‘advice of the person making the referral may lose its impartiality and may not be based on his professional evaluation of the quality of service provided.’”⁹⁹ Based on its reading of the text and history, the court found that the statutory penalty of three times the amount of the charge paid for the settlement service was intended to include “instances in which no direct referral fee has been paid.”¹⁰⁰

In the briefing on the short-lived petition for a writ of certiorari, the defendant read the RESPA statute quite differently. The defendant pointed out that the statute made a violation a crime, allowed for injunctive actions by various federal and state officials, and did not create an individual right to recovery without proof of harm.¹⁰¹ Prior Supreme Court decisions, the defendant argued, did not hold that standing can be determined solely by asking whether Congress meant to authorize a suit.¹⁰² “It is settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.”¹⁰³ First American Financial further argued that someone complaining of an illegal kick-back could have pleaded injury “if she received service at a higher

⁹⁶ See Petition for Writ of Certiorari at i, *First Am. Fin. Corp. v. Edwards*, 132 S. Ct. 2536 (2012) (No. 10-708).

⁹⁷ See *First Am. Fin. Corp.*, 132 S. Ct. at 2537.

⁹⁸ *Edwards*, 610 F.3d at 517–18.

⁹⁹ *Id.* at 517 (quoting H.R. REP. NO. 97-532, at 52 (1982)).

¹⁰⁰ *Id.* at 518. Other circuits had upheld standing requirements with respect to other statutes with damages provisions. See, e.g., *Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 118–20 (2d Cir. 2009) (holding that plaintiff was required to demonstrate an injury in fact to satisfy standing when alleging a violation of the Employee Retirement Income Security Act); *Heard v. Bonneville Billing & Collections*, Nos. 99-4092, 99-4100, 2000 WL 825721, at *5 (10th Cir. June 26, 2000) (finding that plaintiff lacked standing in a claim alleging a violation of the FDCPA because she failed to state a personal stake in the outcome of the matter).

¹⁰¹ Brief for Petitioners at 5, 12, *First Am. Fin. Corp.*, 132 S. Ct. 2536 (No. 10-708).

¹⁰² *Id.* at 13 (arguing that the Ninth Circuit had misread *Warth v. Seldin*, 422 U.S. 490 (1975)).

¹⁰³ *Id.* at 20 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)).

price or of lower quality than available elsewhere, but Edwards [did] not allege that those things happened to her.”¹⁰⁴

Despite the briefing by the parties and a large number of amici curiae, the dismissal of the appeal in *Edwards* by the Supreme Court as improvidently granted leaves the contours of when a federal statute is deemed to confer standing unresolved. Because of the conflicting views on this issue, it seems likely that it will be addressed further by circuit courts regarding various federal statutes and eventually percolate up to the Supreme Court again.

V. INVASION OF PRIVACY CASES

Invasion of privacy suits arising out of the cyberworld have mushroomed in recent years.¹⁰⁵ These claims are based on such activities as data collection and storage, hacking of computer files, and theft of electronic information.¹⁰⁶ Challenges to standing are foremost among the defenses raised.¹⁰⁷ A great deal has been written on this subject, and the field is too extensive for comprehensive treatment in this Article. A quick overview, though, will highlight a few of the issues relating to the “no injury” for standing discussion.

Since 2001, there have been a number of class action suits alleging that internet website providers violated the privacy of users through “Flash cookies” that track their progress on the site.¹⁰⁸ Flash cookies collect information about consumers, such as what sites they visited, what they searched for, and whether they clicked on an ad.¹⁰⁹ This collection of information could result in profiles being created about each consumer for use by marketers.¹¹⁰ Suits in federal courts have often been based on the Computer Fraud and Abuse Act

¹⁰⁴ *Id.* at 1.

¹⁰⁵ See generally Derek Care, Peter C. Neger & James G. Snell, *Need for Clarification of Requirements for Establishing Article III Standing in Privacy Lawsuits Where There Is No Injury*, 81 U.S.L.W. 1437 (2013).

¹⁰⁶ See, e.g., *LaCourt v. Specific Media Inc.*, No. SACV 10-1256-GW(JCGx), 2011 WL 1661532, at *1–2 (C.D. Cal. Apr. 28, 2011); *Claridge v. RockYou, Inc.*, 785 F. Supp. 2d 855, 857–61 (N.D. Cal. 2011); *In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 502–03 (S.D.N.Y. 2001); *In re Intuit Privacy Litig.*, 138 F. Supp. 2d 1272, 1274 (C.D. Cal. 2001).

¹⁰⁷ See, e.g., *LaCourt*, 2011 WL 1661532, at *3–8.

¹⁰⁸ See, e.g., *In re DoubleClick*, 154 F. Supp. 2d at 502–03; *In re Intuit*, 138 F. Supp. 2d at 1274; see also Alycia Broz & Robert Kruppen, *Flash Cookies Litigation: The Next Wave or a “Flash” in the Pan?*, WHAT’S IN STORE (Am. Bar Ass’n Section of Antitrust Law, Chicago, Ill.), Winter 2013, at 27, available at <http://www.vorys.com/publications-729.html>.

¹⁰⁹ See *In re DoubleClick*, 154 F. Supp. 2d at 502–03.

¹¹⁰ See *In re Pharmatrak, Inc.*, 329 F.3d 9, 14 (1st Cir. 2003).

(“CFAA”),¹¹¹ which created a cause of action against a defendant that “knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer.”¹¹² State statutory and common law causes of action have also generally been included.¹¹³

An early case, *LaCourt v. Specific Media, Inc.*,¹¹⁴ set the pattern for a number of other federal courts in dismissing for lack of standing.¹¹⁵ The defendant contended that the plaintiffs had not pled that any class member was affected by defendant’s use of cookies, had been harmed, or had suffered a permanent loss in his computer.¹¹⁶ The court found that although it “would recognize the viability in the abstract” of the harm theories advanced by the plaintiffs—including “opportunity costs,” “value-for-value exchanges,” “consumer choice,” and “other concepts”—the plaintiffs had failed to “give some particularized example of their application in this case.”¹¹⁷ The court concluded:

The parties in their papers engage in a quasi-philosophical debate about the possible value of consumers’ “personal information” on the Internet. Ultimately, the Court probably would decline to say that it is categorically impossible for Plaintiffs to allege some property interest that was compromised by Defendant’s alleged practices. The problem is, at this point they have not done so.¹¹⁸

Flash cookie cases have continued in other courts, utilizing more precise allegations by plaintiffs, but encountering mixed results.¹¹⁹

Privacy issues have also been raised in “data breach” cases, which defendants have also categorized as “no injury” cases. In *Claridge v. RockYou, Inc.*,¹²⁰ the court denied the defendant’s motion to dismiss

¹¹¹ Computer Fraud and Abuse Act (CFAA) of 1986, 18 U.S.C. § 1030 (2012).

¹¹² *Id.* § 1030(a)(5)(A).

¹¹³ *See, e.g.*, *Bose v. Interclick, Inc.*, No. 10 Civ. 9183(DAB), 2011 WL 4343517, at *1, *9 (S.D.N.Y. Aug. 17, 2011) (asserting claims under the CFAA, New York General Business Law § 349, and common law trespass to chattels).

¹¹⁴ *LaCourt v. Specific Media Inc.*, No. SACV 10-1256-GW(JCGx), 2011 WL 1661532 (C.D. Cal. Apr. 28, 2011).

¹¹⁵ *See id.* at *1–2.

¹¹⁶ *Id.* at *5.

¹¹⁷ *Id.* at *4.

¹¹⁸ *Id.*

¹¹⁹ *See, e.g.*, *Bose v. Interclick, Inc.*, No. 10 Civ. 9183(DAB), 2011 WL 4343517, at *1, *7, *11 (S.D.N.Y. Aug. 17, 2011).

¹²⁰ *Claridge v. RockYou, Inc.*, 785 F. Supp. 2d 855 (N.D. Cal. 2011).

for lack of standing, where the allegations were that a hacker had exploited a security vulnerability, accessed a database, and copied e-mail and social-networking login credentials of some thirty-two million registered users.¹²¹ Suits arising out of hacking, theft, and misuse of data continue to proliferate, with standing as a principal issue.¹²²

VI. FALSE LABELING SUITS UNDER STATE LAW

A spate of suits for false labeling based on state statutes have been filed in recent years. The filings have been particularly heavy in courts in California, because California statutes have been seen as favorable to consumer plaintiffs, and California courts, state and federal, have been more amenable to class certification.¹²³ Defendants generally view such false labeling suits as “no injury” and allege lack of standing, as well as deficiencies as to elements of the substantive cause of action and class certification.¹²⁴ A number of the California statutes have their own standing provisions, which courts have interpreted liberally so that standing objections are often rejected.¹²⁵

A prime example of this type of liberal interpretation can be found in the California Supreme Court’s decision in *Kwikset Corp. v. Superior Court of Orange County*.¹²⁶ In this case, the plaintiff filed a representative action against Kwikset, alleging that it falsely marketed and sold locksets and other products, such as nuts and bolts, that contained foreign-made parts or involved foreign manufacture (Mexico

¹²¹ *Id.* at 857–61.

¹²² See *Reilly v. Ceridian Corp.*, 664 F.3d 38, 40–43 (3d Cir. 2011) (finding, in suit by law firm employees for damages due to increased risk of identity theft by an unknown hacker, that “no evidence suggests that the data had been—or will ever be—misused,” and that plaintiff’s “allegations of hypothetical, future injury are insufficient to establish standing”); see also *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142 (9th Cir. 2010) (holding that an employee’s allegation that theft of laptop subjected him to increased risk of future identity theft was sufficient to establish injury-in-fact for standing); *Worix v. Medassets, Inc.*, 857 F. Supp. 2d 699, 703, 706 (N.D. Ill. 2012) (determining that allegations of failure to implement adequate safeguards to protect personal information when computer hard drive was stolen were insufficient to plead injury and actual damages under Illinois law and Illinois Consumer Fraud Act). For a discussion regarding the application of various statutes to claims for failure to protect against hackers of credit card information, see generally *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 834 F. Supp. 2d 566 (S.D. Tex. 2011), *rev’d in part sub nom.* *Lone Star Nat’l Bank, N.A. v. Heartland Payment Sys., Inc.*, 729 F.3d 421 (5th Cir. 2013).

¹²³ See William R. Shafton, *California’s Uncommon Common Law Class Action Litigation*, 41 *LOY. L.A. L. REV.* 783, 830–31 (2008).

¹²⁴ See, e.g., *Kwikset Corp. v. Superior Court of Orange Cnty.*, 246 P.3d 877, 882–83 (Cal. 2011).

¹²⁵ See *id.*

¹²⁶ *Kwikset Corp. v. Superior Court of Orange Cnty.*, 246 P.3d 877, 882–83 (Cal. 2011).

and Taiwan) as “Made in U.S.A.”¹²⁷ The complaint asserted violations of the California False Advertising Law¹²⁸ and the California Unfair Competition Law (“UCL”),¹²⁹ alleging unlawful, unfair, and fraudulent business practices.¹³⁰

The UCL prohibits, and provides civil remedies for, unfair competition, which it defines as “any unlawful, unfair or fraudulent business act or practice.”¹³¹ Its purpose “is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.”¹³² To serve that purpose, the California Legislature framed the UCL’s substantive provisions in “broad, sweeping language.”¹³³ A standing rule was added in 2004 by Proposition 64, which limits private standing to any “person who has suffered injury in fact and has lost money or property as a result of the unfair competition.”¹³⁴

The California Supreme Court, in an opinion by Justice Werdegar (with four justices concurring and Justice Chin dissenting), reversed the court of appeal’s decision that plaintiffs had not adequately alleged “loss of money or property” as required by the UCL standing provision.¹³⁵ The court found that Proposition 64 intended to incorporate the federal “injury in fact” standing requirement,¹³⁶ noting, however, that “[t]here are sound reasons to be cautious in borrowing federal standing concepts, born of perceived constitutional necessity, and extending them to state court actions where no similar concerns apply.”¹³⁷

The majority proceeded to find that an injury in fact was adequately alleged and that Proposition 64’s “loss of money or property”

¹²⁷ *Id.* at 877, 892 (“Kwikset packaged its products with labels like ‘All American Made & Proud Of It’ and ‘Made in U.S.A.’ because it determined such marketing might sway reasonable people in their purchasing decisions.”).

¹²⁸ CAL. BUS. & PROF. CODE §§ 17500–17509 (West 2008).

¹²⁹ CAL. BUS. & PROF. CODE §§ 17200–17210 (West 2008).

¹³⁰ *Kwikset*, 246 P.3d at 881–82.

¹³¹ BUS. & PROF. § 17200.

¹³² *Kasky v. Nike, Inc.*, 45 P.3d 243, 249 (Cal. 2002).

¹³³ *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tele. Co.*, 973 P.2d 527, 540 (Cal. 1999).

¹³⁴ BUS. & PROF. § 17204; *see also Kwikset*, 246 P.3d at 884 (“The intent of this change was to confine standing to those actually injured by a defendant’s business practices and to curtail the prior practice of filing suits on behalf of ‘clients who have not used the defendant’s product or service, viewed the defendant’s advertising, or had any other business dealing with the defendant.’” (quoting *Californians for Disability Rights v. Mervyn’s, LLC*, 138 P.3d 207, 210 (Cal. 2006))).

¹³⁵ *Kwikset*, 246 P.3d at 877.

¹³⁶ *Id.* at 885.

¹³⁷ *Id.* at 885 n.5.

requirement, although narrower than injury in fact, was not more stringent.¹³⁸ The court determined that “lost money or property—economic injury—is itself a classic form of injury in fact.”¹³⁹ Further, the court viewed the federal injury in fact test as less demanding than have many federal courts: “[F]ederal courts have reiterated that injury in fact is not a substantial or insurmountable hurdle; as then Judge Alito put it: Injury-in-fact is not Mount Everest. Rather, it suffices for federal standing purposes to allege[] some specific, identifiable trifle of injury.”¹⁴⁰

How could falsely labeling a product as “Made in U.S.A.,” though, cause economic harm to the purchaser if he received the market value of the product? “Simply stated: labels matter,”¹⁴¹ the court said:

The marketing industry is based on the premise that labels matter, that consumers will choose one product over another similar product based on its label and various tangible and intangible qualities they may come to associate with a particular source. . . . To some consumers, processes and places of origin matter. . . . In particular, to some consumers, the “Made in U.S.A.” label matters. A range of motivations may fuel this preference, from the desire to support domestic jobs, to beliefs about quality, to concerns about overseas environmental or labor conditions¹⁴²

How can such subjective preferences be translated into actual economic loss where the consumer received and used the product? The court answered:

For each consumer who relies on the truth and accuracy of a label and is deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she *paid more for* than he or she otherwise might have been willing to pay if the product had been labeled accurately. This economic harm—the loss of real dollars from a consumer’s pocket—is the same whether or not a court might objectively view the products as functionally equivalent. A counterfeit Rolex might be proven to tell the time as accurately as a genuine Rolex and in other ways be functionally equivalent, but we do not

¹³⁸ *Id.* at 886.

¹³⁹ *Id.*

¹⁴⁰ *Id.* (citations and internal quotation marks omitted).

¹⁴¹ *Id.* at 889.

¹⁴² *Id.* at 889–90 (citations omitted).

doubt the consumer (as well as the company that was deprived of a sale) has been economically harmed by the substitution in a manner sufficient to create standing to sue.¹⁴³

Prior to the case reaching the California Supreme Court, the court of appeals had refused to accept any of these arguments, asserting that “consumers who receive a fully functioning product have received the benefit of their bargain, even if the product label contains misrepresentations that may have been relied upon by a particular class of consumers.”¹⁴⁴ Similarly, Justice Chin’s dissent to the California Supreme Court’s opinion objected to having a plaintiff’s subjective motivations in making a purchase play a role in determining standing.¹⁴⁵ The *Kwikset* majority had no difficulty with considering a consumer’s motivations in purchasing to establish standing:

Plaintiffs selected Kwikset’s locksets to purchase in part because they were “Made in U.S.A.”; they would not have purchased them otherwise; and, it may be inferred, they value what they actually received less than either the money they parted with or working locksets that actually were made in the United States. They bargained for locksets that were made in the United States; they got ones that were not.¹⁴⁶

Finally, the court took up what it described as the “market” argument made by the dissent. The court explained this argument as follows: The consumer “has lost no money or property if the marketplace would continue to value the product as highly as the amount the consumer paid for it, whether or not he or she would do so,” and “overpayments induced by fraud are only cognizable and a basis for standing if they can be measured according to some independent, objective market.”¹⁴⁷ The logic is that if, for example, the consumer has received a product that the market—not sharing his subjective preferences—would value at what he paid for it, how is he harmed? In response, the court was fact-specific: there was no evidence of resale in this specific case, and, in any case, the market argument assumed a functioning aftermarket that would allow the consumer to resell to those for whom the misrepresentation is immaterial.¹⁴⁸ The market argument also assumes that the consumer “has no qualms—religious,

¹⁴³ *Id.* at 890.

¹⁴⁴ *Id.* at 892.

¹⁴⁵ *Id.* at 897–99 (Chin, J., dissenting).

¹⁴⁶ *Id.* at 892 (majority opinion).

¹⁴⁷ *Id.* at 892–93 & n.18.

¹⁴⁸ *Id.* at 893.

ethical, or otherwise”—in reselling the mislabeled product and that resale will not involve transaction costs.¹⁴⁹

The absence or ineffectiveness of a resale market seems likely under the facts of the *Kwikset* case, but there could be situations—like an automobile that the buyer claims was misrepresented in some way quite personal to him—in which the market argument could weigh against finding standing. The issues discussed in *Kwikset* could have particular relevance in cases like the *Cheerios* and *Southwest Airlines* cases previously discussed.¹⁵⁰

Many of the false-labeling cases involve food,¹⁵¹ and the outcomes in the California courts have been diverse and inconsistent. Courts have frequently found standing, sometimes simply assumed without discussion—with a class action issue often being the real center of dispute. There have been settlements in some cases challenging, for example, claims of “all natural” ingredients. In two such cases, Naked Juice Company settled a consumer class action for \$9 million as to claims that its drinks contained unnatural and synthetic ingredients, and Barbara’s Bakery Inc. settled for \$4 million, agreeing to reformulate many of its products that contained genetically modified organisms.¹⁵² Further, courts are divided on whether a class representative has standing to assert claims on behalf of class members for products that the representative did not purchase.¹⁵³

¹⁴⁹ *Id.*

¹⁵⁰ See *supra* text accompanying notes 67–79.

¹⁵¹ See Julie A. Steinberg, *Primary Jurisdiction Argument Often Raised in Food Label Suits; Courts’ Reactions Differ*, 41 *Prod. Safety & Liab. Rep. (BNA)*, at 1420 (Nov. 25, 2013) (referencing food suits regarding energy drinks, yogurt, and mints).

¹⁵² Julie A. Steinberg, *Parties Broker \$9 Million Settlement in Labeling Suits Against Naked Juice Co.*, 41 *Prod. Safety & Liab. Rep. (BNA)*, at 839 (July 15, 2013); see also *Proposed Class Suit Targets Nature’s Path Cereal*, 41 *Prod. Safety & Liab. Rep. (BNA)*, 646 (May 27, 2013) (discussing suit alleging deceptive labeling of organic food, brought under the California Sherman Law, which is identical to the Federal Food, Drug, and Cosmetic Act); Julie A. Steinberg, *Preemption Squeezes Lemonade Label Claims; Nut, Cheese Label Claims Survive Dismissal*, 41 *Prod. Safety & Liab. Rep. (BNA)*, at 812 (July 8, 2013).

¹⁵³ In *Lanovaz v. Twinings North America, Inc.*, No. C-12-02646-RMW, 2013 WL 2285221, at *1 (N.D. Cal. May 23, 2013), the representative was allowed to bring class claims for deceptive labeling of teas that she had not purchased but that were made from the same plant as the teas she had bought. In a closely watched case, *Major v. Ocean Spray Cranberries Inc.*, No. 5:12-CV-03067 EJD, 2013 WL 2558125, at *4 (N.D. Cal. June 10, 2013), class certification was refused for lack of typicality, where the class representative’s false labeling claims encompassed products that he did not buy. See also *Clancy v. Bromley Tea Co.*, No. 12-cv-03003-JST, 2013 WL 4081632, at *3–6 (N.D. Cal. Aug. 9, 2013) (noting conflicting decisions in district regarding whether a plaintiff may represent class members who purchased products the plaintiff did not buy, but stating that this question should be determined at class certification, not at the dismissal stage).

CONCLUSION

American courts have wrestled with the issue of standing in lawsuits where there is a question as to whether the plaintiff has an "injury in fact." The issue has been developed in rather different ways depending on the context. In exposure-only toxic tort cases, state substantive laws vary markedly as to whether there is a cause of action and right to recover damages for fear of future injury. Practice in Federal Employers Liability Act cases has attempted to cabin recovery for "fear of cancer" to those cases in which there is evidence of a present condition making cancer more likely. As plaintiffs in product liability cases have gravitated from tort to contract causes of action, "benefit-of-the-bargain" and "economic harm" allegations have succeeded when there is proof of actual economic harm. Two recent cases indicate the unsettled parameters of that test. Standing requirements may be avoided in statutory damage and rights cases depending on the intent of the statute, and the Supreme Court has recently chosen not to decide whether a company could be sued for violating certain statutes even if the plaintiff suffered no direct harm from the violation. The full scope of statutory fixed penalty and damage suits where there would be no injury without the statute is still to be fleshed out. Invasion of privacy suits have mushroomed with the cyberspace revolution, leaving many still-unanswered questions as to what degree of actual harm is required to establish standing. Finally, a spate of false labeling and advertising claim suits have been filed under state consumer statutes, many relating to food, with differing results in the courts relating to the question of actual injury.