GIBSON DUNN

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TURNING BACK FROM THE ABYSS: D.C. COURT OF APPEALS PUTS AN END TO "NO INJURY" REPRESENTATIVE ACTIONS UNDER D.C. CONSUMER LAW

To Our Clients and Friends:

On January 20, 2011, the D.C. Court of Appeals -- the District of Columbia's high court -- issued an *en banc* decision that significantly limits the scope of so-called "representative actions" under the D.C. Consumer Protection Procedures Act (CPPA). The court held that plaintiffs asserting claims under the CPPA must satisfy the standing requirements embodied in Article III of the U.S. Constitution, including the element of injury-in-fact. The decision effectively puts an end to the "no injury" suits that had become increasingly common in the District's courts.

The Court of Appeals' decision came in the consolidated cases *Grayson v. AT&T Corporation*, No. 07-CV-1264, and *Breakman v. AOL LLC*, No. 08-CV-1089. In both cases, the plaintiffs sued under a CPPA provision that authorizes consumer actions to vindicate the interests of "the general public." D.C. Code § 28-3905(k).

The first action was brought by former Congressman Alan Grayson. He alleged that several telecommunications companies defrauded the D.C. government by failing to report as "unclaimed property" the unused value of prepaid calling cards purchased by Grayson and other consumers in the District. Grayson sought injunctive relief and monetary recovery of the cards' unused value. The second action involved a suit by plaintiff Paul Breakman alleging that the internet service provider AOL failed to disclose to its existing members that it was offering new members a cheaper option for monthly dial-up internet service. Breakman was not an AOL customer, but brought the claim solely in "a representative capacity on behalf of the interests of the general public" under the CPPA.

Grayson and Breakman both argued that amendments to the CPPA enacted in 2000 authorized plaintiffs to bring suits "on behalf of the general public," whether or not the plaintiff had any contact with the defendant, purchased the defendant's products, or suffered injury of any kind.

The Court of Appeals disagreed. Based on the structure and legislative history of the CPPA amendments, the court concluded that the D.C. Council did not intend to override the D.C. courts' longstanding practice of adhering to federal Article III standing requirements -- even though those principles do not directly bind the D.C. judiciary, an Article I creation. Instead, the court held that a plaintiff must suffer "actual or threatened injury" from the alleged unlawful practice to have standing to assert a CPPA claim.

Applying this test, the court made quick work of Breakman's claim. Noting that the plaintiff alleged no personal injury and brought his suit "solely in a 'representative capacity,'" the court concluded that he could not demonstrate "the requisite injury-in-fact for standing in our courts" and affirmed the trial court's dismissal for lack of subject matter jurisdiction.

Turning to Grayson's claim, the court held that the plaintiff had successfully asserted injury-in-fact by alleging specific "violation or invasion of his statutory legal rights created by the CPPA," including misrepresentation of a material fact and use of unconscionable terms of sale. The court found it "significant[]" that Grayson claimed to have personally "obtained and used prepaid calling cards in the District," and noted he alleged the requisite "'personal stake' (he personally obtained calling cards in consumer transactions in which the . . . information was not disclosed) to oblige the court to determine whether his legal theory about the applicability of the CPPA is correct"--that is, to reach the merits of his claim.

The court ultimately concluded, however, that Grayson failed to allege a violation of his statutory rights under the CPPA. The complaint did not identify "any material fact that defendants either stated or failed to disclose about the calling cards that he and others obtained in the District of Columbia," nor did it allege anything unconscionable about the defendants' terms of sale. On that basis, the court affirmed the trial court's dismissal of Grayson's suit for failure to state a claim.

Grayson restores stability to litigation under the D.C. CPPA. The District was at risk of becoming a magnet for "no injury" lawsuits filed by professional plaintiff's law firms and litigation advocacy groups. By adhering to traditional standing requirements, the D.C. Court of Appeals has ensured that only plaintiffs with a true stake in the outcome will be able to file suit.

It is likely that interested advocacy groups will seek to overrule *Grayson* legislatively. Gibson Dunn will monitor these legislative developments.

Gibson, Dunn & Crutcher's Class Actions Practice Group is available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn attorney with whom you work or any of the following members of the Class Actions Practice Group:

Gail E. Lees - Chair, Los Angeles (213-229-7163, glees@gibsondunn.com)
Andrew S. Tulumello - Vice-Chair, Washington, D.C. (202-955-8657, atulumello@gibsondunn.com)
G. Charles Nierlich - Vice-Chair, San Francisco (415-393-8239, gnierlich@gibsondunn.com)
Peter Sullivan - New York (212-351-5370, psullivan@gibsondunn.com)
Christopher Chorba - Los Angeles (213-229-7396, cchorba@gibsondunn.com)