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SECOND CIRCUIT REVIEW

Expert Analysis

Court Applies Different Principles When Interpreting Injury in Fact

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Article III standing is a fundamental precondition to any federal lawsuit. The "first and foremost of standing's three elements," in the words of the Supreme Court, is injury in fact: an actual or imminent, and concrete and particularized, invasion of a legally protected interest. *Spokeo v. Robins*, 136 S. Ct. 1540, 1547-48 (2016). This element, however, is not always analyzed consistently: Two opinions handed down in May and June by the U.S. Court of Appeals for the Second Circuit, in *Whalen v. Michaels Stores*, and *John v. Whole Foods Market Group*, appear to apply different principles in interpreting injury in fact. Perhaps as a result of their different analyses, the opinions ordered different appellate dispositions.

'Whalen v. Michaels Stores'

In April 2014, Michaels Stores confirmed that a cybersecurity breach in its system had resulted in the theft of customers' information. *Whalen v. Michaels Stores*, 2017 WL 1556116, at *1 (2d. Cir. 2017).[1] But only "payment" information, such as credit card number—and not "personal" information, such as address—"was at risk in connection with this issue." Mary Jane Whalen had been a customer of Michaels during the period of cybersecurity vulnerability and her credit card was later charged, fraudulently, by a third party in Ecuador. Whalen filed a putative class action against Michaels based on violations of state law.

Whalen asserted several theories as to injury in fact, all of which were rejected by Judge Joanna Seybert below, who granted the defendant's motion to dismiss. *Whalen v. Michael Stores*, 153 F. Supp. 3d 577, 580-83 (E.D.N.Y. 2015). Three of these theories were in sharp focus on appeal: (1) the actual theft and use of Whalen's credit card information; (2) the risk of future identity fraud; and (3) her alleged loss of "time and money resolving the attempted fraudulent charges and monitoring her credit." *Whalen*, 2017 WL 1556116, at *2. Judges Guido Calabresi, Susan L. Carney, and Carol Bagley Amon, sitting by designation, affirmed dismissal of Whalen's claims in a summary order. The court ruled that Whalen had not adequately alleged injury in fact, because she (1) never actually had to pay for any fraudulent charges; (2) cancelled her card, thereby negating the risk of future fraud; and (3) "pleaded no specifics about any time or effort that she herself ha[d] spent monitoring her credit."

> The 'John' court applied a less rigorous threshold for establishing injury in fact and was more willing to draw inferences in plaintiff's favor. The more deferential principles that the John court included in its analysis are absent from 'Whalen's' analysis.

'John v. Whole Foods Market'

In June 2015, the New York City Department of Consumer Affairs issued a press release claiming that Whole Foods often

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mislabeled the weight, and thus inflated the price, of certain prepackaged foods. *John v. Whole Foods Market Group*, 858 F.3d 732, 734 (2d. Cir. 2017). The press release observed that 80 different types of prepackaged food were mislabeled and that 89 percent of such food's labels violated federal labeling standards. Sean John, a "routine" shopper at Whole Foods who "regularly" purchased prepackaged foods there, filed a putative class action against Whole Foods and attached the aforementioned press release to his complaint. Importantly, the complaint "d[id] not identify a specific food purchase as to which Whole Foods overcharged John."

District Judge Paul Engelmayer dismissed John's complaint for lack of injury in fact, finding there to be "no non-speculative basis on which to conclude that the *particular packages* of Whole Food[s] products John…bought were overweighted." *In re Whole Foods Market Group Overcharging Litigation.*, 167 F. Supp. 3d 524, 535 (S.D.N.Y. 2016) (emphasis in original). Judges Amalya L. Kearse, Dennis Jacobs, and Ray Lohier vacated Englemayer's order, ruling that, "drawing all reasonable inferences in his favor," John's more general allegation that he regularly purchased prepackaged food that was "systematically and routinely mislabeled and overpriced" was sufficient to meet the "low threshold required to plead injury in fact." 858 F.3d at 737 (internal quotation marks omitted).

Analysis

These two cases both reached the Second Circuit with the same posture: on appeal from a successful facial challenge to the lower court's subject matter jurisdiction at the pleading stage.[2] But the opinions reached different results and applied different analyses. The *John* court applied a less rigorous threshold for establishing injury in fact and was more willing to draw inferences in plaintiff's favor. The more deferential principles that the *John* court included in its analysis, as discussed below, are absent from *Whalen*'s analysis.

"Low Threshold." *John* emphasized that the Second Circuit has "repeatedly" embraced the principle that "[i]njury in fact is a 'low threshold'…" 858 F.3d at 736 (quoting *WC Capital Management v. UBS Securities*, 711 F.3d 322, 329 (2d. Cir. 2013)). In contrast, *Whalen* demanded "specificity" and "more specifics" from Whalen's pleadings, and faulted her for failing "to add anything more substantial" to her allegations. See 2017 WL 1556116, at *1, *2. The contrast is most stark with respect to Whalen's third theory of injury in fact: Whalen's failure to identify "*specifics*" with respect to credit monitoring was fatal, but John's failure to "identify a *specific* food purchase" was not. Whereas *Whalen* demanded "more substan[ce]" on this allegation, *John* cited the "low threshold" and credited a similar allegation.

Drawing "All Reasonable Inferences." *John* also emphasized that "courts should…draw from the pleadings all reasonable inferences in the plaintiff's favor" and "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." 858 F.3d at 737 (quoting *Carter v. HealthPort Technologies,* 822 F.3d 47, 58 (2d. Cir. 2016)). The John court in fact drew such inferences—distinguishing an earlier case that appeared to the lower court to forbid such inferences—and applied such a presumption in its analysis.

In contrast, *Whalen* did not draw any inferences in favor of the plaintiff. The *Whalen* court, for example, criticized plaintiff's allegation that "consumers must expend considerable time" on credit monitoring as containing "no specifics," choosing to ignore the inference that Whalen, as a consumer, spent such time. See 2017 WL 1556116, at *2. The court also was unpersuaded by the more concrete allegation that "[Whalen] and the class suffered additional damages based on the opportunity cost and value of time" associated with credit monitoring. Yet the Second Circuit has previously recognized that "time is money." *LeCroy Research Systems Corp. v. C.I.R.*, 751 F.2d 123, 125 (2d. Cir. 1984); see also *In re F.C.C.*, 217 F.3d 125, 136 (2d. Cir. 2000). And credit monitoring is, in fact, offered as a service with a price tag. Accordingly, *Whalen's* narrower view of what courts should infer or presume in favor of plaintiffs appears to be in direct tension with the analysis in *John*.

Conclusion

Ultimately, the *John* court vacated the lower court's dismissal because it was "plausible that John overpaid for at least one product"—that he was injured insofar as he paid a few extra dollars or cents. See *John*, 858 F.3d at 737-38. Had the *Whalen* court recognized injury in fact's low threshold and drawn all reasonable inferences in Whalen's favor, it may well have concluded that Whalen, too, was injured insofar as she incurred additional costs.

1. Notably, as a summary order, *Whalen* does not have precedential effect. See Local Rule 32.1.1(a). But litigants may still cite the opinion. Fed. R. App. P. 32.1(a); Local Rule 32.1.1(b)(1).

2. A "facial" challenge to a litigant's standing is "based solely on the allegations of the complaint or the complaint and exhibits attached to it …." *Carter v. HealthPort Technologies*, 822 F.3d 47, 56 (2d. Cir. 2016)).