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1. [Diaz v. Fist Advantage Corp., 2006 U.S. Dist. LEXIS 102566](#)

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## [Diaz v. Fist Advantage Corp.](#)

United States District Court for the Central District of California

July 17, 2006, Decided; July 17, 2006, Filed

SACV 05-481 JVS (RNBx)

### Reporter

2006 U.S. Dist. LEXIS 102566 \*

Diaz v. Fist Advantage Corp.

**Subsequent History:** As Amended August 7, 2006.

### Core Terms

actual damage, damages, cause of action, class action, violations, consumer, actual injury, motion to dismiss, requirements, contends, alleges, class claim, causal connection, first cause, investigative, benefitted, punitive

**Counsel:** [\*1] Attorneys for Plaintiffs: Jeffrey Wilens.

Attorneys for Defendants: John P. Zaimes, Tyree P. Jones.

**Judges:** James V. Selna.

**Opinion by:** James V. Selna

### Opinion

#### CIVIL MINUTES - GENERAL

**Proceedings: Defendant's motion to 1) dismiss; or 2) for partial summary judgment (FId 5-31-06)**

**Cause called and counsel make their appearances. The Court's tentative ruling is issued. Counsel make their arguments. The Court vacates the pretrial and trial dates in this matter. The Court sets a further scheduling conference for September 18, 2006 at 10:30 a.m. Counsel are directed to file a joint report of counsel seven (7) days prior to the scheduling conference.**

**The Court GRANTS IN PART and DENIES IN PART the Defendant's motion to Dismiss and rules in accordance with the tentative ruling as follows:**

Defendant First Advantage Corporation ("FADV") moves this Court for an order dismissing the first and third causes of action in the First Amended Complaint ("FAC") brought by Plaintiff Steven Joseph Diaz ("Diaz") on behalf of himself and others similarly situated. In the alternative, FADV seeks summary adjudication of those causes of action.

#### I. BACKGROUND

FADV is in the business of preparing background screening reports about prospective employers [\*2] for its customers/employers. (FAC, ¶¶ 16, 18.) Diaz alleges, and FADV does not dispute for the purposes of this motion, that FADV is an investigative reporting agency and subject to the requirements of the [Investigative Consumer Reporting Agencies Act \("ICRAA"\), California Civil Code section 1786, et seq.](#) (Id., ¶ 18.)

In the first cause of action, brought both individually and as a class action, Dia contends that FADV violated ICRAA by failing to include in its reports a notice that the report does not guarantee the accuracy of the information provided and that the information is gathered from public records, [Cal. Civ. Code § 1786.29\(a\)](#), and by failing to inform consumers seeking to obtain a report that they have a right to receive all disclosures, *id.*, [§ 1786.29\(b\)](#). (FAC, ¶ 19.) Diaz contends that he was the subject of a report to the Automobile Club of Southern California ("Auto Club"), where he applied for and received an offer of employment. (Id., ¶ 21.) Diaz further alleges that he requested a copy of his report from FADV, that the report did not have the requisite disclosure, and that he was not informed of his right to review documentation. (Id., ¶¶ 23-24.) Diaz further alleges that neither he nor any other putative class member suffered injury as a result [\*3] of these violations. (Id., ¶ 9.) As a result, Diaz and the class seek only statutory damages.<sup>1</sup>

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<sup>1</sup> No class has yet been certified for this action.

In the second cause of action brought only as an individual action,<sup>2</sup> Diaz claims that FADV violated ICRAA by providing an inaccurate report and failing to institute policies to ensure the accuracy of background reports. (*Id.*, ¶¶ 38-40.) According to Diaz, as a result of the inaccuracies, he suffered actual damages in the form of delayed employment, emotional and psychological distress, anguish, anxiety, and pain and suffering. (*Id.*, ¶ 41.)

In the third and final cause of action, Diaz claims, as an individual, as a private attorney general, and as a putative class representative, that FADV's violations of ICRAA constitute unlawful, fraudulent, and unfair business practices in violation of California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code § 17200, et seq.* (*Id.*, ¶¶ 46-48.)

FADV now seeks to dismiss or in the alternative seeks summary adjudication of the first cause of action as both an individual claim and as a class claim and the third cause of action as a class claim.

## II. LEGAL STANDARD

Under *Federal Rule of Civil Procedure 12(b)(6)*, a motion to dismiss will not be granted unless it appears that the plaintiff can prove no set of facts in support of his claim [\*4] that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). In resolving a *Rule 12(b)(6)* motion, the Court must construe the Complaint in the light most favorable to the plaintiff and must accept all well-pleaded factual allegations as true. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The Court must also accept as true all reasonable inferences to be drawn from the material allegations in the Complaint. *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998).

If, on a *Rule 12(b)(6)* motion, matters outside the pleadings are presented and not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of pursuant to *Rule 56. Fed. R. Civ. P. 12(b)*. Because this Court can rule on this motion without regard to the matter outside the pleadings provided by FADV, the motion will not be converted to a *Rule 56* motion.

## III. DISCUSSION

### A. Motion to Dismiss First Claim as a Class Action Claim

<sup>2</sup> FADV does not seek dismissal of the second cause of action.

Under ICRAA,

(a) An investigative consumer reporting agency or user of information that fails to comply with any requirement of this title with respect to an investigative consumer report<sup>3</sup> is liable to the consumer who is the subject of the report in an amount equal to the sum of all the following:

(1) Any actual damages sustained by the consumer as a result of the failure or, except in the case of class actions, ten thousand dollars (\$10,000), whichever [\*5] sum is greater.

*Cal. Civ. Code § 1786.50* ("*Section 1786.50*"). FADV asserts that the first cause of action must be dismissed as a class action claim because Diaz has failed to allege any actual damage to himself or the class members and therefore cannot satisfy the requirements under ICRAA to get damages. (Mot'n, pp. 6-9.) In opposition, Diaz makes two arguments: (1) that because the class is not yet certified, the class action exception does not apply (Opp'n, pp. 4-6), and (2) because Diaz will seek certification only on the liability issue, what type of damages are available at this point is irrelevant and thus there is no need to establish actual injury.

In the first instance, this Court can dismiss a class claim before the class has been certified. *Searles v. Southeastern Pennsylvania Transp. Auth.*, 990 F.2d 789, 790 n.1 (3d Cir. 1993); *Burgener v. California Adult Auth.*, 407 F. Supp. 555, 560 (N.D. Cal. 1976). Moreover, under ICRAA, the only damages available to a class are actual damages sustained as a result of the violation. *Cal. Civ. Code § 1786.50*. Diaz contends that he will only seek certification on the liability issue alone and then proceed with individual claims to obtain the statutory damages, and therefore, he does not need to establish actual injury resulting from the violation. The Court, however, views this as an attempted end run around ICRAA and avoidance of its class action requirements. [\*6] By its terms, ICRAA does not leave damages for another day.

Accordingly, this Court agrees with FADV that Diaz must allege actual damages resulting from the violation in order to sustain a cause of action under ICRAA as a class action. Because Diaz alleges in the FAC that "the violations of *section 1786.29(a)* and *(b)* did not cause plaintiff and the class members any actual damages,"

<sup>3</sup> For the purposes of this motion, FADV does not argue that the claim must be dismissed for failure to allege facts that establish a violation; rather, FADV focuses on redressability.

(FAC, ¶ 9), the Court finds that Diaz has failed to state a class claim for relief under ICRAA. The motion to dismiss the first cause of action as a class claim is therefore granted.

#### B. Motion to Dismiss First Claim as an Individual Claim

As mentioned above, any individual who violates any of the provisions of ICRAA is liable to the individual who is the subject of the report for "[a]ny actual damages sustained by the consumer as a result of the failure or, except in the case of class actions, ten thousand dollars (\$10,000), whichever sum is greater." [Cal. Civ. Code § 1786.50](#).

FADV contends that the proper reading of this statute requires Diaz to allege an actual injury and causal connection between the violation and the injury, regardless of whether Diaz seeks actual damages or statutory damages. (Mot'n, pp. 7-12.) FADV contends that the proper interpretation [\*7] of [Section 1786.50](#) is that the statutory amount is a damages award and not a penalty, and that to be awarded damages in California, a plaintiff must establish an injury. (Id., p. 10 (citing [Cal. Civ. Code § 3281](#); [AUI Ins. Co. v. Sup. Ct.](#), 51 Cal. 3d 807, 826, 274 Cal. Rptr. 820, 799 P.2d 1253 (1990); and [Zikratch v. Stillwell](#), 196 Cal. App. 2d 535, 544, 16 Cal. Rptr. 660 (1961)).) To support this argument, FADV notes that [Section 1786.50\(b\)](#) allows the court to award punitive damages. According to FADV, to award punitive damages on a \$10,000 statutory award for a mere technical violation would controvert well settled California law that requires actual injury to be awarded punitive damages. (Mot'n, p. 11 (citing [Cheung v. Daley](#), 35 Cal. App. 4th 1673, 1677, 42 Cal. Rptr. 2d 164 (1995) and [Kizer v. County of San Mateo](#) 53 Cal. 3d 139, 147-48, 279 Cal. Rptr. 318, 806 P.2d 1353 (1991)).) Finally, FADV contends that a reading of [Section 1786.50\(c\)](#), which bars recovery for a violation that benefits the consumer who is the subject of a report, requires the interpretation of [Section 1786.50\(a\)](#) that it proffers — in other words a plaintiff who benefits cannot recover under [Section 1786.50\(c\)](#); therefore a plaintiff must have suffered to recover under [Section 1786.50\(a\)](#).

Diaz, on the other hand, interprets [Section 1786.50\(a\)](#) to only require actual injury and a causal connection when actual damages are sought and not when the statutory award is sought. Rather, Diaz interprets the \$10,000 award to be a penalty and presents the legislative history of [Section 1786.50](#) to support that interpretation. Moreover, Diaz contends that to interpret ICRAA as

desired by FADV, the Court would have [\*8] to read the word "or" out of the statute.

"In construing a statute, it is axiomatic that the Court first looks to the language of the statute itself" [People v. Knowles](#), 35 Cal. 2d 175, 182, 217 P.2d 1 (1950). Only when the language is ambiguous do "we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." [Nolan v. City of Anaheim](#), 33 Cal. 4th 335, 340, 14 Cal. Rptr. 3d 857, 92 P.3d 350 (2004) (internal citations omitted).

With respect to whether a causal connection is required, the pertinent portion of [Section 1786.50](#) reads "(1) Any actual damages sustained by the consumer as a result of the failure or, except in the case of class actions, ten thousand dollars (\$10,000), whichever sum is greater." The Court does not find the language of [Section 1786.50](#) ambiguous and interprets it to mean that an individual may be awarded either actual damages resulting from a violation or \$10,000. The statute is clear that the "as a result" language modifies only the actual damages portion and not the ten thousand dollar portion. Accordingly, the Court finds that a causal connection is not required to be awarded the statutory damages.

Similarly, the Court does not believe that [\*9] actual damages must be shown to be awarded the statutory amount. The statute reads that when an investigative consumer reporting agency violates any provision of ICRAA, that agency owes the subject of that report either actual damages or the statutory amount. Simply put, the statute does not say that an actual injury is an element of the cause of action unless the individual suing desires actual damages. In that instance of course, actual injury and damage must be shown. Moreover, the Court does believe that a reading of the rest of [Section 1786.50](#) requires a different result as argued by FADV.<sup>4</sup> Furthermore, the Court does not agree that because [Section 1786.50\(c\)](#) prohibits recovery to the benefitted plaintiff, a plaintiff must have suffered to recover under [Section 1786.50\(a\)](#). Rather, it is possible that a plaintiff will not have suffered or

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<sup>4</sup> The Court acknowledges that punitive damages are generally recoverable only when there is actual (even if unquantifiable) damage. However, the Court need not resolve Diaz's potential punitive recovery in determining that he has a viable cause of action.

benefitted, and yet still be the subject of a violative report. In other words, as the Court interprets the relationship between the two subsections in the following manner: If [subsection \(c\)](#) prohibits recovery to a benefitted plaintiff, then it must be intended that a plaintiff who does not benefit (i.e., who either suffers or is neutrally affected) may be awarded damages. The legislature clearly could have [\*10] written the statute in a way to exclude all but injured plaintiffs from recovering, but chose very different language.

Accordingly, because an actual injury and causal connection need not be alleged for an individual to maintain a cause of action, FADV's motion to dismiss the first cause of action brought on behalf of Diaz himself is denied.

#### C. Motion to Dismiss Third Claim as a Class Claim

Finally, FADV seeks to dismiss the third cause of action in as much as it is brought as a representative action. FADV contends that under the UCL, to bring a class action, the class representative must allege that he suffered injury in fact. (Mot'n, pp. 12-14.) Because Diaz alleges that he suffered no actual injury as a result of the violation, FADV argues he does not have standing to bring suit. (*Id.*, p. 13.) FADV further argues that injunctive relief is not available because FADV now complies with ICRAA and that restitution is not available because Diaz was not the one who paid out any money to get the report. Diaz, on the other hand, argues that the UCL claim is brought regarding several violations of ICRAA, including [Sections 1786.20](#) and [1786.28](#), as well as the violations of [Section 1786.29](#) claimed in the class action causes of action.

Both private [\*11] parties and public prosecutors have standing to sue under [Section 17200](#). *Cal. Bus. & Prof. Code § 17204*. In 2004, California voters limited private party standing to any person "who has suffered injury in fact and has lost money or property as a result of such unfair competition." Prop. 64 § 3. Moreover, to bring a representative action, "any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of [Section 17204](#)." Prop. 64 § 2; *Paulus v. Bob Lynch Ford., Inc.*, 139 Cal. App. 4th 659, 43 Cal. Rptr. 3d 148, 163 (May 17, 2006).

FADV does not question Diaz's standing to sue on his own behalf or as a private attorney general because he alleges in his second cause of actions that he suffered actual damages that resulted from violations of [Sections 1786.20](#) and [1786.28](#). These sections, however, do not

form the predicate of his class action claim. Rather, violations of [Section 1786.29](#) form the basis of the class action suit, for which Diaz pleads neither he nor any putative class member suffered actual damages. For this reason, the Court agrees that Diaz does not have standing to bring a class action suit under the UCL on the basis of the violations for which there was no injury alleged. Accordingly, the motion to dismiss the third cause of action as a class action is granted.<sup>5</sup>

#### IV. CONCLUSION

For the foregoing reasons, [\*12] the motion to dismiss is granted in part and denied in part. In light of the Court's ruling, the Court orders that no further class discovery shall take place.

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<sup>5</sup> Having dismissed the cause of action on the standing basis, the Court declines to address whether injunctive relief or restitution are warranted here.