

Damages for breaches of privacy

A misrepresentation is 'fraudulent' if it is made with the knowledge or in the belief that it is false. As a general rule, the maker of a fraudulent misrepresentation is potentially liable to everyone who he intends or expects to rely on that misrepresentation for any pecuniary loss they might suffer as a result. Furthermore, a party who makes a fraudulent misrepresentation to another could be liable to a third party if the tortfeasor intends or expects that his misrepresentation would be repeated to and acted upon by the third party.

In the context of the safe harbor the relevant misrepresentation is the organization's public declaration that it will adhere to the safe harbor principles. Having made such a commitment, a conscious failure to abide by the principles could be grounds for a course of action for misrepresentation by those who relied on the misrepresentation.

Those who rely on a fraudulent misrepresentation have a right to recover damages. Allowable damages include actual out-of-pocket loss as well as the lost 'benefit of the bargain', in a commercial transaction. Whereas fraudulent misrepresentation requires either actual knowledge or at least the belief that the misrepresentation is false, liability can also attach for negligent misrepresentation. In a recent case, for example, the Superior Court of Connecticut held that a failure by an electric utility to disclose its reporting of customer payment information to national credit agencies sustained a cause of action for misrepresentation. In that case, the plaintiff was denied credit because the defendant reported payments not received within thirty days as 'late'. The plaintiff alleged that he had not been informed of this policy when he opened a residential service account with the defendant. The court specifically held that "a claim for negligent misrepresentation may be based on the defendant's failure to speak, when he has a duty to do so". This case also shows that "scienter" or fraudulent intent is not a necessary element in such a cause of action.

Insofar as a violation of the safe harbour principles entailed a misuse of personal information, it could also support a claim by the data subject for the common law tort of invasion of privacy. In a 1905 case, the Georgia Supreme Court found a right to privacy rooted in natural law and common law precepts in holding for a private citizen whose photograph had been used by a life insurance company without his consent or knowledge to illustrate a commercial advertisement. Articulating now-familiar themes in American privacy jurisprudence the court found that the usage of the photograph was 'malicious', 'false' and tended to 'bring plaintiff into ridicule before the world'.

Memorandum from the U.S. Chief Counsel for International Commerce