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Post-'Spokeo' Standing for Consumer Class Actions a Struggle

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Federal courts have varied widely in their interpretation of standing for plaintiffs in consumer protection class actions since last year's U.S. Supreme Court decision in *Spokeo v. Robins*, ___ U.S. ___, 136 S.Ct. 1540 (May 16, 2016).

The 'Spokeo' Ruling

In *Spokeo*, the U.S. Supreme Court addressed standing under the "case and controversy" requirement of Article III of the U.S. Constitution and the Fair Credit Reporting Act, 15 U.S.C. Sections 1681, et seq. Plaintiff Thomas Robins, on behalf of a putative class, alleged that the defendant, an online "people search" engine and aggregator of personal information, had violated the FCRA by including inaccurate information in his online profile.

The court's decision attempted to clarify the Article III constitutional requirement that a civil plaintiff allege an "injury-in-fact" that is both "concrete and particularized" in order to establish federal jurisdiction over a case. The court's decision focused particularly on the appropriate application of the "concreteness" prong of this test.

Initially, the court noted that a cognizable injury must be concrete but need not be "tangible." Here, the court referenced constitutional claims, such as free speech cases, over which federal courts have traditionally asserted standing despite the absence of tangible injuries. The court also found that the "risk of a real harm" can satisfy the requirement of concreteness even without allegations of immediate harm, i.e., in cases of slander per se.

Examining the FCRA, Judge Samuel Alito's 6-2 majority opinion further held that Congress "is well positioned to identify intangible harms that meet minimum Article III requirements." The court held, nevertheless, that a mere statutory violation is insufficient to create federal jurisdiction in the absence of any concrete harm.

The Supreme Court then remanded the case to the U.S. Court of Appeals for the Ninth Circuit to make a determination of whether the plaintiff in *Spokeo* had adequately alleged a concrete injury. In December, the Ninth Circuit heard arguments in the remanded case. Counsel for the parties, despite the Supreme Court's guidance, continued the debate over whether the statutory violation alleged by Robins was sufficient to show a concrete injury entitling him to standing in federal court.

The Aftermath of 'Spokeo'

If the *Spokeo* holding recounted above seems to you less than a model of clarity, your response is akin to that of counsel and courts who have struggled to apply the Supreme Court's reasoning in the wake of the decision.

The obliqueness of the decision suggests the court merely kicked the can down the road to allow lower courts and litigants additional opportunities to develop appropriate theories for standing in consumer class actions.

Unsurprisingly, the results of court decisions applying *Spokeo* to date have been nearly as mixed as the varied reactions to the decision. Around the country, defendants to consumer class actions subsequently have succeeded arguing that *Spokeo* raises the bar for plaintiffs. For example, In *Myers v. Nicolet Restaurant of De Pere*, ___ F.3d ___, No. 16-2075 (7th Cir. Dec. 13, 2016), the Seventh Circuit threw out a claim that failure to truncate payment card expiration dates on payment receipts provided standing to assert a violation of the Fair and Accurate Credit Transactions Act, 15 U.S.C. Section 1681(c)(g)(1). The court found that the exposure merely of an expiration date did not increase the risk of identity theft or cause other actual harm of the type that Congress intended FACTA to address, see also *Hancock v. Urban Outfitters*, 830 F.3d 511 (D.C. Cir. 2016) (requests for disclosure of zip codes did not create standing under District of Columbia consumer protection laws); *Braitberg v. Charter Communications*, 836 F.3d 925, 926 (8th Cir. 2016), (without allegation of data breach, the defendant's retention of the customers' personally identifiable information did not provide standing to assert violation of the federal Cable Communications Policy Act).

By contrast, rulings by local federal courts interpreting *Spokeo* have been relatively favorable to plaintiffs. Those decisions have been guided by the Third Circuit's opinion in *In re Nickelodeon Consumer Privacy Litigation*, 827 F.3d 262 (3d Cir. 2016), which interpreted *Spokeo* to mean that "what a plaintiff cannot do is treat a bare procedural violation that may result in no harm as an Article III injury-in-fact." The court stated, "in some cases an injury-in-fact may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." The Third Circuit therefore - permitted privacy claims to proceed on behalf of a plaintiff class of children whose internet browsing habits had been collected by the defendants.

In *Hartman v. Medicredit*, ___ F.Supp.2d ___, No. 15-1596 (W.D.Pa. Dec. 20, 2016), the plaintiff alleged on behalf of a putative class that the defendant's mailing of collection letters that included personally identifiable information on the outside of the envelopes had violated the Fair Debt Collection Practices Act, 15 U.S.C. Section 1692, et seq. Applying *Nickelodeon*, the court refused to dismiss the claim for lack of standing, finding that debtors have a substantive right to be free from harmful debt-collection practices, and so a violation of the FDCPA constitutes a concrete injury, see also *Blaha v. First Nat'l Collection Bureau, Inc.*, ___ F.Supp.2d ___, No. 16-2791 (D.N.J. Nov. 10, 2016).

The Future of Standing

The further development of the "concrete harm" analysis set forth in *Spokeo* will be determinative of the viability going forward of consumer protection lawsuits, including individual claims and class action lawsuits. Certainly, lawyers on both sides of such cases will continue to contest the proper application of that case, until and unless the Supreme Court takes the opportunity in the future to clarify its ruling.

The application of *Spokeo* may determine whether federal plaintiffs need only allege a bare violation of a consumer protection statute, or must allege some actual financial loss to proceed in federal court. This issue is particularly relevant in consumer protection class actions, where the award of even modest statutory damages to a putative class, together with attorney's fees, creates strong incentives for defendants to settle cases that survive dismissal and certification proceedings. Meanwhile,

defense counsel are pressing the same analysis in nonstatutory cases, including data breach class actions, where plaintiffs allege that they face some risk of future injury, such as identity theft, but do not allege present financial harm, as in *Galaria v. Nationwide Mutual Insurance*, ___ F.3d ___, No. 15-3386 (6th Cir. Sept. 12, 2016), (reversing dismissal of data breach class action and finding *Spokeo* standing based on the plaintiff's nonspeculative allegations of continuing risk of fraud).

An attorney representing Robins in his continuing lawsuit against Spokeo has opined that the Supreme Court's decision will lead lower courts to dismiss weaker privacy claims, but will have little impact on the viability of stronger cases.

To that point, perhaps the most cogent interpretation of *Spokeo* to date is from the U.S. Court of Appeals for the Second Circuit. That court interpreted the Supreme Court's decision as instructing "that an alleged procedural violation can by itself manifest concrete injury where Congress conferred the procedural right to protect a plaintiff's concrete interests," but "a plaintiff may fail to demonstrate concrete injury where violation of the procedure at issue presents no material risk of harm to that underlying interest," as in *Strubel v. Comenity Bank*, 842 F.3d 181 (2d Cir. 2016).

This interpretation would have federal courts continue to open their doors to substantive claims that advance the policy interests underlying consumer protection statutes, while limiting the success of suits rooted in purely technical violations, which may be filed largely in pursuit of potential awards of fees to the plaintiffs' counsel.

Importantly, the *Spokeo* "concreteness" analysis speaks only to a plaintiff's standing to bring a claim in federal court. Accordingly, claims that may not survive a *Spokeo* analysis in federal court nonetheless still can be brought in state court, subject to jurisdictional limitations set by state laws, as in *Dittman v. The University of Pittsburgh Medical Center*, ___ A.2d ___, No. 971-WDA-2015 (Pa. Super. Jan. 12) (affirming dismissal of negligence claims in data breach class action based upon Pennsylvania's economic loss doctrine). See also *Medellin v. Ikea U.S.A. West*, ___ F.Supp.2d. ___, No. 15-55174 (9th Cir. Jan. 13).

Under this reasoning, the plaintiffs can use *Spokeo* to defeat defendant's removal efforts, or even to avoid adverse federal rulings by seeking remand to state court for lack of subject-matter jurisdiction. In *Medellin*, the defendant removed a California consumer protection law claim to federal court. After the district court decertified the class, the plaintiff appealed and, creatively, conceded that there had been no allegation of cognizable harm under *Spokeo* but only of bare procedural violations. The Ninth Circuit vacated the decertification ruling, holding the district court instead should have dismissed the case for lack of Article III standing, as held in *Mocek v. Allsaints USA*, ___ F.Supp.2d. ___, No. 16-C-8484 (N.D.Ill. Dec. 7, 2016) (remanding to state court and awarding attorney fees to the plaintiff after the defendant removed case from state court and then argued the federal court lacked Article III jurisdiction). •

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