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EXPERT ANALYSIS

THE *SPOKEO* RESULT: WHO'S PEDDLING UPHILL AND WHO'S JUST COASTING DOWN

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It has been only three short months since the U.S. Supreme Court handed down the decision in *Spokeo v. Robins*, and courts across the country already have become a battleground between plaintiffs and defendants as they try to establish their version of the Court's meaning.

Plaintiffs and defendants alike continue to assert divergent meanings regarding what *Spokeo* does in respect to Article III standing to sue based on a concrete injury-in-fact. As an initial image of how courts have interpreted the meaning of *Spokeo* — at least at the district court level — has begun to develop, an examination of the inexact mosaic of precedent becomes more and more necessary.

This article examines, in the brief interlude since *Spokeo*, how courts have applied *Spokeo* to the federal statutes, especially those commonly associated with claims brought against financial institutions — the Fair Credit Reporting Act, Fair Debt Collection Practices Act, Telephone Consumer Protection Act, and Truth in Lending Act.

Circular implications of *Spokeo*

Spokeo v. Robins, 136 S.Ct. 1540 (2016), depending on one's perspective, either eviscerates or invigorates actions centered on purely procedural statutory violations. The language of the opinion can be used by either side of the standing argument to justify their respective legal position.

The Supreme Court found in its holding that a plaintiff cannot "automatically [satisfy]" the particularized harm prong of Article III's standing analysis "whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." Absent any tangible damage resulting from a procedural statutory violation, the Court noted that a person must face at least "the risk of real harm" to satisfy the concreteness requirement. A "bare procedural violation" will not suffice.

However, the Court left it to lower courts to interpret the thrust of its holding when it concluded that Congress can "identify intangible harms that meet

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minimum Article III requirements," but did not define what types of intangible harms are sufficient.

The 'spokes' for standing: Injuries concrete/particularized and actual/imminent

The *Spokeo* facts are pretty basic. Plaintiff Thomas Robins alleged that Spokeo was a "consumer reporting agency" under the FCRA. Robins discovered that Spokeo's website had published allegedly false information about him, including incorrect reports that he was married, in his fifties, had children, held a job, was relatively affluent, and had a graduate degree.

Based on Spokeo's publication of this purportedly inaccurate information, Robins filed a putative class action alleging a willful violation of various provisions of the FCRA and sought the maximum statutory damages. Robins made vague allegations in his complaint that the inaccurate report affected his employment opportunities, as well as his credit and insurance.

The district court dismissed Robins' complaint, focusing on the lack of alleged harm and finding that Robins lacked standing because he had failed to properly plead an "injury in fact". On appeal, a 9th U.S. Circuit Court of Appeals panel reversed the trial court's ruling, finding that the FCRA does not require a showing of actual harm when a plaintiff sues for willful violations. (*Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014).)

The appellate panel opined that a violation of a statutory right created by the FCRA is a "concrete, *de facto* injur[y]" sufficient to confer standing. In so holding, the panel found that Robins had a personal interest in the handling of his credit information, and that misreporting Robins' credit information was a violation of that interest sufficient for him to claim injury-in-fact.

The issue accepted by the Supreme Court for review in *Spokeo* was whether a bare violation of the FCRA is sufficient for Article III standing, which requires that an injury be both (1) concrete and particularized; and (2) actual or imminent.

The Supreme Court, in its majority opinion, vacated the 9th Circuit's decision, holding that although the appellate court addressed the "particularized" prong, it had failed to consider the "concrete" requirement of Article III standing. But, the Court stopped short of determining whether Robins' alleged injuries-in-fact met the test for concrete injury, and it remanded the case to the 9th Circuit to reevaluate its analysis.

The parties on remand filed simultaneous supplemental briefs on July 26, 2016. Robins bases his argument on the Supreme Court's decision, the plain text of the FCRA, and the legislative history to conclude that the Top Court meant to raise procedural violations of the FCRA to concrete interests. Spokeo, on the other side, relies on the common law regarding defamation and Congressional intent that the FCRA was not meant to enforce trivial inaccuracies to assert that plaintiff lacks Article III standing.

Oral argument is scheduled for Dec. 13, 2016.

The break-out of post-*Spokeo* rulings

Since the middle of May 2016, Courts have been very busy in applying the rationale of the articulated standing test to various fact patterns in ongoing disputes. This relatively short period of time has seen the development of quite a collection of opinions on the injury-in-fact requirement as applied to consumer financial services claims.

We discuss the most relevant cases in the context of the statutory claims being attempted below. Afterwards, we will make some observations.

- ***Fair Credit Reporting Act.*** Looking to the legislative intent of the FCRA, the U.S. District Court, Eastern District of Virginia sided with plaintiff and found standing under the FCRA based on adverse action and impermissible use of credit claims. (*Thomas v. FTS USA, LLC*, No. 3:13-CV-825, 2016 WL 3653878 (E.D. Va. 06/30/16).)

That court found itself particularly persuaded by the fact that Congress, in enacting the FCRA, had recognized certain intangible harms, such as the right to receive information before an adverse action is taken against you, and the inclusion of actual damages as an alternative to statutory damages,

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which the court found to protect against hard to prove actual damages for the FCRA claims.

Other courts, including those in the 4th and 9th Circuits, have aligned with *Thomas*, such as *Larson v. Trans Union, LLC*, No. 12-CV-05726, 2016 WL 4367253 (N.D. Cal. 08/11/16), which held that failure to provide statutorily required information is an "informational" injury and is concrete. *Burke v. Fed. Nat'l Mortgage Ass'n*, No. 3:16CV153, 2016 WL 4249496 (E.D. Va. 08/09/16), held that a third party's act of obtaining consumer's credit report without authorization violates consumer privacy and is a concrete harm.

But that has not been the only conclusion. Courts within the 6th Circuit, for example, have found plaintiffs to lack standing where they fail to allege that they suffered any consequential damage as a result of a purported FCRA breach. (*Smith v. Ohio State Univ.*, No. 2:15-CV-3030, 2016 WL 3182675 (S.D. Ohio 06/08/16) (no concrete harm from disclosures that did not comply FCRA when conducting employment-related background check).)

● ***Fair Debt Collections Practice Act.*** Defendants' attempts to use *Spokeo* to overcome actions proceeding under the FDCPA have met stiff resistance as courts in multiple circuits have rejected the notion that *Spokeo* does away with a plaintiff's standing to pursue bare procedural violations.

Most notably, the 11th Circuit in *Church v. Accretive Health, Inc.* found plaintiff had alleged sufficient facts to confer Article III standing by alleging "injury to her statutorily-created right" that Congress had created — in that instance, the right to statutorily required disclosures. (*Church v. Accretive Health, Inc.*, No. 15-15708, 2016 WL 3611543 (11th Cir. 07/06/16). Under 11th Circuit precedent, failure to abide by that right, in and of itself, is concrete injury.

Other courts, including those in the 3d, 5th, 7th, and 10th Circuits, have caught wind of the 11th Circuit's approach and followed suit. (*Quinn v. Specialized Loan Servicing*, LLC, No. 16 C 2021, 2016 WL 4264967 (N.D. Ill. 08/11/16) (failure to provide plaintiff with information required under FDCPA is a sufficiently concrete harm); *Sayles v. Adv. Recovery Sys.*, No. 3:14-CV-911, 2016 WL 4522822 (S.D. Miss. 08/26/16) (failure to report a debt as disputed on credit report is a concrete harm); *Daubert v. NRA Grp., LLC*, No. 3:15-CV-00718, 2016 WL 4245560, (M.D. Pa. 08/11/16) (envelope that displayed personal information of plaintiff sufficiently concrete injury); *Irvine v. I.C. Sys., Inc.*, No. 14-CV-01329, 2016 WL 4196812 (D. Colo. 07/29/16) (provision of false information to plaintiff about their credit report is a concrete harm).)

However, this does not make all purported violations of the FDCPA sufficiently concrete. Where defendant puts incorrect information in a letter, but plaintiff never receives the letter, there is no standing. (*Tourgeman v. Collins Fin. Servs., Inc.,* No. 08-CV-1392 CAB (NLS), 2016 WL 3919633, at *2 (S.D. Cal. 06/16/16).)

● ***Telephone Consumer Protection Act.*** It took "nearly daily" auto-dialed calls for the U.S. District Court, Eastern District of California to find that a plaintiff had alleged a concrete injury under the TCPA. (*Hewlett v. Consol. World Travel, Inc.*, No. CV 2:16-713, 2016 WL 4466536 (E.D. Cal. 08/23/16).)

Other courts that have found standing under the TCPA for a variety of reasons include those in the 4th, 6th, 7th, and 8th Circuits. (*Aranda v. Caribbean Cruise Line, Inc.*, No. 12 C 4069, 2016 WL 4439935 (N.D. Ill. 08/23/16) (unauthorized, autodialed calls to consumer is a sufficiently concrete injury); *Ung v. Universal Acceptance Corp.*, No. CV 15-127, 2016 WL 4132244 (D. Minn. 008/03/16) (same); *Krakauer v. Dish Network L.L.C.*, No. 1:14-CV-333, 2016 WL 4272367 (M.D.N.C. 08/05/16) (same); *Caudill v. Wells Fargo Home Mortgage, Inc.*, No. CV 5: 16-066, 2016 WL 3820195 (E.D. Ky. 07/11/16) (same).)

Completely separating itself from the other two California federal district courts, the Southern District of California declined to find standing when plaintiff had received over 290 phone calls in the course of six months. (*Romero v. Dep't Stores Nat'l Bank*, No. 15-CV-193, 2016 WL 4184099 (S.D. Cal. 08/05/16). Specifically, the court read *Spokeo* to mean that "if the defendant's actions would not have caused a concrete, or *de facto*, injury in the absence of a statute, the existence of the statute does not automatically give a plaintiff standing."

Likewise, where plaintiff alleges nothing more than a procedural violation of the TCPA and no attendant injury, the U.S. District Court, Eastern District of Louisiana has found plaintiff lacks standing. (*Sartin v. EKF Diagnostics, Inc.*, No. CV 16-1816, 2016 WL 3598297, at *1 (E.D. La. 07/05/16) (defendant sent plaintiff unsolicited fax advertisements).)

● ***Truth in Lending Act.*** In the context of a TILA violation, the U.S. District Court, Eastern District of California found that just because a defendant violated a procedural requirement requiring disclosure of government information, it does not establish a concrete harm when that information was provided by some other means. (*Jamison v. Bank of America, N.A.*, No. 2:16-CV-00422, 2016 WL 3653456 (E.D. Cal. 07/07/16).) Pleading ignorance to the information would be impossible in light of the alternative means of disclosure.

In contrast, an inaccurate payoff statement, in violation of TILA, was sufficiently concrete because of the chance that the inaccurate statement survives its correction — *i.e.*, it will "find[] its way into a bank's files." (*McLaughlin v. Wells Fargo Bank, NA*, No. C 15-02904, 2016 WL 3418337 (N.D. Cal. 06/22/16).)

The way ahead

Defendants should not be deterred by recent authority that tilts toward plaintiffs and should continue attacking bare procedural violations for what they are.

Exceptions continue to arise, even in jurisdictions with adverse authority. But, in the immediate aftermath of *Spokeo*, plaintiffs should take solace that their avenue of attack has been strengthened, not blocked.

There remains opportunity to pursue claims against financial institutions for foot-fault violations of federal statutes.

