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NO *SPOKEO* REDUX, NO FEDERAL CIRCUIT UNANIMITY FOR FCRA CLASS-ACTION STANDING

By Frank A. Hirsch Jr. and Kelsey Kingsbery

Frank A. Hirsch Jr. *,* co-head of ***Alston & Bird***'s financial services litigation team, is a partner in the firm's Raleigh, N.C., office, and ***Kelsey Kingsbery*** is an associate there. They defend industry participants against all types of federal statutory claims (*e.g.*, EFTA, FCRA, TILA, and FDCPA) and also defend regulatory enforcement actions against financial services providers. Reach them at *frank.hirsch@alston.com* and *kelsey.kingsbery@alston.com*.

The U.S. Supreme Court in 2016 issued its opinion in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), a much-anticipated ruling on Article III standing in the context of statutory violations. Yet the decision offered more confusion than certainty on the injury-in-fact requirement.

The issue in *Spokeo* was whether Robins had standing to sue credit reporting agency Spokeo Inc. under the Fair Credit Reporting Act for publishing factually inaccurate information on its website. A federal district court judge dismissed the case in *Robins v. Spokeo, Inc.*, 10-5306, 2011 WL 597867 (C.D. Cal. 01/27/11). Robins appealed and the 9th U.S. Circuit Court of Appeals reversed, holding that he did have standing. The appellate court reasoned that violations of a statutory right are usually sufficient to confer Article III standing. (*See Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014) ("*Spokeo I*"). The Supreme Court vacated and remanded.

The Court cautioned that a plaintiff does not automatically satisfy the injury-in-fact requirement "whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." A bare procedural violation, such as an error in a zip code, divorced from any concrete harm, was insufficient to establish Article III standing, the Court said. Rather, only actual harm or a risk of real harm could satisfy the concreteness requirement.

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It added one further holding: Intangible injuries may be "concrete" under certain circumstances. This leaves open several glaring questions:

- When can intangible injuries be concrete?
- How should a court determine if they are concrete?
- If a zip code error is not actual harm or a risk of real harm, then what else under FCRA is likewise a bare procedural violation?
- How can something intangible by "concrete"?

The Court's circular reasoning provided little guidance for determining whether the standing requirement has been satisfied in FCRA cases. Not surprisingly, courts applying *Spokeo* in FCRA cases have reached conflicting results when it comes to which intangible injuries are sufficient to confer standing.

The potential exposure to defendants for FCRA violations is enormous. But whether a plaintiff has Article III standing to sue under FCRA is becoming less clear. And just a few weeks ago, the Supreme Court declined the invitation to clarify the growing confusion surrounding this standing issue

Roots of the issue

The FCRA is an old consumer statute dating back to 1970. It was written before there was an Internet (before search engines like Spokeo), before the mass collection of computerized data, before the Homeland Security Agency, and before the Office of Foreign Assets Control terrorist watch list.

The FCRA established rules for accessing credit reports, for achieving maximum possible accuracy in maintaining credit report information, and for ensuring fair disclosures to consumers whose credit reports are pulled or who are denied credit based upon their credit report (adverse action notices). Unlike most consumer protection statutes, FCRA not only allows for class actions, punitive damages, and attorneys' fees, it sets no cap on damages a company faces for violations.

Similarly, FCRA's most recent amendment, the Fair and Accurate Credit Transactions Act, which was enacted in 2003, allows class action damages without any limit on exposure. FACTA protects consumers' personal information by prohibiting parties from printing anything more than the last five digits of a credit card number on printed receipts.

The protection of consumer privacy and the risks of identity theft are at the heart of FCRA/FACTA. But these protections must be balanced against a privately built and functioning system of tracking credit related information by CRAs using proprietary algorithms and scoring processes. The government simply cannot duplicate a public credit reporting system. Reporting to the CRAs by furnishers is voluntary and this data fuels the system.

Typical defendants in class action litigation under FCRA include:

- One of many credit reporting agencies (CRAs), the three largest of which include Equifax Inc., Experian information Solutions Inc., and TransUnion LLC.
- Information furnishers — lenders of all types, leasing companies, credit-card companies, and the like — which provide credit performance data to CRAs.
- Employers/landlords and other companies with limited rights to pull a person's credit report for "permissible purposes."
- Retail businesses of all types which generate paper credit card receipts or personally identifiable information.

Two months before that 9th Circuit issued it ruling on remand in *Spokeo, Inc. v. Robins*, No. 17-806 (U.S., *petition for certiorari denied* 1/22/18) (*Spokeo II*), the U.S. District Court, District of Northern California determined that TransUnion had willfully injured a class of approximately 8,000 consumers whose names erroneously were included on the Treasury's OFAC list. (*Ramirez v. TransUnion, LLC*, No. 12-cv-632, 2017 WL 5153280 (N.D. Cal. 11/07/17).

The district court rejected TransUnion's plea to set aside an earlier jury award to class plaintiffs of $8.1 million in statutory damages (about $1,000 per class member) plus $52 million in punitive damages —

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more than six times the verdict amount. (*Ramirez v. TransUnion, LLC*, No. 12-632, 2017 WL 2403812 (N.D. Cal. 06/02/17).)

The class representative claimed harm in the form of a delay in his attempted car purchase and getting the run-around from TransUnion when he requested that his name be removed from the OFAC list. TransUnion demonstrated that 80 percent of the "class" had never had their credit reports disclosed to anyone showing their OFAC listing.

Nevertheless, the court held plaintiffs had established harm, because many in the class had attempted to call TransUnion to have their names removed. Notably, TransUnion did not have a process in place to cross-check all OFAC listed names with its other identifier data.

So, if FCRA standing is satisfied by the class representative, CRAs face significant exposure (at least in the 9th Circuit), even if the majority of the class members awarded money have not demonstrated any concrete injury or risk of real harm.

Circuits split on FCRA standing

Last August, on remand, the 9th Circuit in *Spokeo II* again found that Robins had standing (*Robins v. Spokeo, Inc.*, 867 F.3d (9th Cir. 2017).) The appellate panel determined that the inaccuracies in Robins' report regarding age, marital status, educational background, and employment history were the type that may be important to employers. Thus, the 9th Circuit found, the inaccuracies posed a risk of real harm to Robins' employment prospects. The panel rejected Spokeo's argument that Robins lacked standing because he failed to assert any concrete injury resulting from the inaccuracies, such as the loss of a specific job opportunity.

This ruling was not surprising given the 9th Circuit's decision in *Syed v. M-I, LLC,* 853 F.3d 492 (9th Cir. 2017), another FCRA case, earlier that year. An appellate panel held in *Syed* that the employer's failure to comply with FCRA's requirement that the mandated consumer report disclosure be presented in a stand-alone document was sufficient to confer standing. The appellate panel held that when a liability waiver is included in the document that contains the disclosure and authorization information, FCRA is violated.

The *Syed* court went on to explain that the plaintiff had sufficiently alleged standing because the inclusion of the liability waiver was not a "bare procedural violation," but had deprived Syed of his right to information. The panel reasoned that FCRA "creates a right to privacy by enabling applicants to withhold permission to obtain the report from the prospective employer, and a concrete injury when applicants are deprived of their ability to meaningfully authorize the credit check."

The 3d Circuit employed a similar rationale to find Article III standing under FCRA, at least in the data breach context. In *Horizon Healthcare Service Data Breach Litigation*, 846 F. 3d 625 (3d Cir. 2017), an appellate panel found that the unauthorized dissemination of plaintiffs' private information was the very injury FCRA was intended to protect and thus the disclosure alone satisfied the Article III concreteness requirement. The panel rejected the district court's finding that because plaintiffs could not articulate any particularized harm resulting from the disclosure, such as identity theft, identity fraud, medical fraud, or phishing, plaintiffs had failed to establish Article III standing.

The 4th Circuit, however, has gone in a different direction in the FCRA context. Last year, in *Dreher v. Experian Information Solutions*, 856 F.3d 337 (4th Cir. 2017), an appellate panel ruled that if a plaintiff fails to allege a concrete injury stemming from inaccurate information listed on a credit report, he or she is unable to establish constitutional standing.

The plaintiff had alleged that Experian violated FCRA because it listed one of his credit-card accounts under the name of a defunct credit-card company, instead of the servicer who had actually reported the account to Experian, thereby depriving Dreher of information he was entitled to under FCRA. The court determined that the fairness and accuracy of the credit report was not impacted by the fact that the account was identified by the former credit-card company rather than the current servicer.

Thus, despite the inaccuracy, the plaintiff did not suffer the type of harm that FCRA is designed to prevent. In short, the Court held that plaintiffs cannot sue for an informational injury unless the denial of information also "creates a 'real' harm with an adverse effect." Dreher had not suffered any real harm, the panel reasoned, because he still was able to receive a fair and accurate credit report.

Other circuits likely would require 'tangible' harm

The remaining circuits have yet to address standing requirements in the context of inaccurate information in consumer reports. However, based on prior standing rulings in connection with FACTA violations and violations of other privacy statutes, it seems likely most, if not all, will follow the 4th Circuit in *Dreher*.

A 7th Circuit appellate panel, for example, in *Meyers v. Nicolet Restaurant*, 843 F. 3d 724 (7th Cir. 2016), held that the plaintiff lacked standing despite Nicolet's FACTA violation. Nicolet allegedly had printed the expiration date of Meyers' credit card on his receipt in violation of FCRA.

The panel found this was insufficient to establish standing because the violation did not cause Meyers any harm or appreciable risk of harm, as he discovered the violation immediately and nobody else ever saw the non-compliant receipt. The court explained that whether the right that is allegedly violated "is characterized as 'substantive' or 'procedural,' the violation must be accompanied by an injury-in-fact. A violation of a statute that causes no harm does not trigger a federal case."

A 2d Circuit appellate panel has agreed with the 7th Circuit in this regard in *Katz v. Donna Karan Company, L.L.C.*, 872 F.3d 114 (2d Cir. 2017). The 2d Circuit panel found that printing the first six digits of Katz's credit card number in violation of FACTA was insufficient to confer Article III standing. The Court found that because the first six digits are simply the issuer identification number, printing them did not raise a material risk of harm.

The U.S. District Court, Middle District of Florida held in *Riley v. United Parcel Service of America, Inc.*, No. 17-254 (M.D. Fl. 10/27/17), that the plaintiff lacked standing under FCRA. UPS allegedly failed to provide Riley with the results of the background check it used to determine whether to hire him in violation of FCRA. The court found that Riley had not suffered any harm from this violation though because he was able to obtain the background results elsewhere. There was no information injury, and therefore no Article III standing, because the plaintiff ultimately obtained all of the information to which he was entitled under FCRA.

The U.S. District Court, Southern District of Ohio likewise found an absence of Article III standing in the stand-alone disclosure requirement context. The factual scenario at issue in *Smith v. The Ohio State University*, 191 F. Supp. 3d 750 (S.D. Ohio 2016) was nearly identical to that in the *Syed* case, but the district court reached the opposite conclusion.

As in *Syed*, the disclosure included extraneous information in violation of FCRA. But unlike the 9th Circuit, the court found that the plaintiff suffered no concrete consequential damage as a result of the FCRA breach and therefore lacked standing under Article III. Notably, Smith did not allege that the violation caused any confusion when he was reviewing and signing the documents.

Interestingly, despite the 3d Circuit's ruling in *Horizon*, at least one district court in that circuit has agreed with the finding in *Smith*. The U.S. District Court, District of New Jersey, in *In re Michaels Stores, Inc., Fair Credit Reporting Act (FCRA) Litigation*, Nos. 14-7563, 15-2547 & 15-5504, MDL No. 2615 (D.N.J. 01/24/17), concurred that a violation of FCRA's stand-alone document requirement was insufficient to confer standing. There, the plaintiffs alleged that defendant's background check disclosure and authorization was in the middle of a document surrounded by extraneous information. But the Court found this FCRA violation, without more, was insufficient to establish Article III standing.

The same court has similarly found that printing the first six and last four digits of credit card numbers on customer receipts in violation of FACTA without more is insufficient to confer standing. (*See Kamal v. J. Crew Group, Inc., et al.*, No. 15-0190 (D.N.J. 12/29/15).) The mere procedural violation was insufficient, without evidence that anyone had accessed or attempted to access Kamal's credit-card information.

The district court rejected Kamal's argument that he became more susceptible to fraud due the violation. Kamal has appealed the decision to the 3d Circuit, arguing that the district court's ruling is at odds with *Horizon*. (*See Kamal v. J. Crew Group, Inc., et al.*, No. 17-2453 (3d Cir., *oral argument held* 02/08/18).)

At least one district court in the remaining circuits has aligned itself with the *Spokeo/Horizon* ruling. The U.S. District Court, Western District of Missouri, in *Alame v. Mergers Marketing*, No. 17-6066, 2017 WL 4167454 (W.D. Mo. 09/19/17), found that Alame had adequately alleged Article III standing based on inaccurate information about his residential history in a consumer report produced to a third party. Although Alame did not allege that the inaccurate information about his residential history led to the loss of any job or other opportunity, the court nonetheless found Alame had alleged a material risk of harm because the consumer report gave the inaccurate impression that Alame frequently moved from location to location.

The future's unclear for FCRA class actions

The Supreme Court had the opportunity to settle these discrepancies when *Spokeo II* was appealed. Spokeo urged the Supreme Court to resolve the "confusion among the scores of lower court decisions" that have been handed down over the past eighteen months. Spokeo argued that the deep conflict across the country on the threshold issue of standing — which arises in every federal case — should not be allowed to continue.

But The Court denied the cert petition without comment. So, at least for now, questions will remain regarding the standing requirements under FCRA — and the exercise of federal jurisdiction in FCRA cases will continue to vary from court to court.

There are a few takeaways to consider in this situation:

- The "*Spokeo* war" will continue for some time. The 9th Circuit will continue to be the hot spot for FCRA class actions given the low bar that *Spokeo II* and *Syed* have set. The 4th, 6th, and 7th Circuits, by contrast, will likely see less activity as a result of the *Dreher*, *Katz*, and *Meyers* decisions.
- Standing to bring class actions under FACTA may be a higher hurdle than FCRA; but, this depends on the willingness (or not) of courts to determine that the "risk of real harm" is not satisfied by the inclusion of impermissible data on receipts or communications without a linkage to an identity theft episode or exposure. Courts in the 2d and 7th Circuits, following *Katz and Meyer*, respectively, hold that technical FACTA errors by themselves are insufficient. The may also hold true in the 3d Circuit, pending the result of the appeal in *Kamal*.
- Whether the FCRA circuit split will widen over time is unknown. But it probably will, given the circular reasoning of the *Spokeo* holding. We have already seen opposite conclusions by courts on essentially the same fact patterns involving employer disclosures and consent form cases. There is no reason to believe this divergence will not occur with other nearly identical fact patterns.
- While *Spokeo* advises that a mere zip code error is insufficient, no other court has yet to declare what else (if anything) under FCRA (as opposed to FACTA) is similarly innocuous and therefore insufficient to confer standing.
- Circuit courts have echoed language from *Spokeo I* declining to provide guidance on when intangible harms satisfy standing. The 2d Circuit in *Katz* declared: "We do not have to resolve whether other procedural violations of FACTA should or will meet a similar outcome, a question for the lower courts to determine in the first instance on a case and fact-specific basis."
- Don't look for the Supreme Court to revisit the FCRA standing issue anytime soon. SCOTUS dodged the undecided issue in *Spokeo I* in 2016, and in 2018 denied cert in *Spokeo II* when presented with a circuit split as well as multiple *amicus* briefs by prominent business associations. Indeed, FCRA cases before the Supremes are rare — with only *State Farm* (willfulness standard) and *Spokeo* decided in the last 20 years.
- A legislative fix to FCRA — perhaps placing a cap on class action damages similar to RESPA, TILA and other consumer protection statutes — might be possible. This is especially true if any defendant faces a potential company-killer verdict or class-certification determination (such as the infamous case of *Ratner v. Chemical Bank New York Trust Company*, 329 F. Supp. 270 (S.D.N.Y. 1971)). This was the situation with TILA in 1974 when, after a spate of class claims over technical violations that threatened the financial services industry, Congress amended TILA to place a cap on class damages.

While it's clear that the Supreme Court won't be clarifying the FCRA standing issue anytime soon, we still don't know how the circuit split will shake out. The 3d Circuit heard argument in the *Kamal* appeal just a short time ago.

Will the 3d Circuit invoke *Horizon* to affirm standing? Or will it limit *Horizon* to its facts, and follow the 6th and 7th Circuits? It's only a matter of time before the other circuits are asked to address similar questions.

