Spokeo, 16 Months Later

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We were deep into defending a Fair Credit Reporting Act matter last year when the United States Supreme Court gave us a gift horse named *Spokeo, Inc v. Robins*. This was exciting, to say the least. Thanks to the holding in *Spokeo*, our plaintiff would not have standing to proceed where he alleged a mere technical violation of the statute, but no actual injury. A status conference took place soon after, and we did not miss our chance to tell the judge that we intended to file a motion to dismiss on the basis of *Spokeo*. Opposing counsel winced. The judge responded, "What's *Spokeo?*" About 16 months later, with the true impact of *Spokeo* in a state of thorough confusion, we find ourselves asking the same question.

To date, federal district courts have applied *Spokeo* inconsistently in consumer litigation, with some courts essentially finding that any statutory violation leads to an actual injury and other courts examining the factual scenario pled for cognizable actual damages. Now that there are a manageable number of opinions issued by federal courts of appeals, we chose to focus our analysis on those decisions.

I. *Spokeo*, 16 Months Later

Article III of the United States Constitution limits the jurisdiction of federal courts to "actual cases or controversies" which means that the plaintiff must have suffered an injury in fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In federal consumer litigation, the defense bar long maintained that the technical violations of consumer protection statutes do not result in the type of injury Article III requires. The plaintiff's bar insisted that any violation of a federal statute causes damages that federal courts are obligated to redress. Both sides of the bar hoped the Supreme Court would decide this issue in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016), but the decision failed to provide the requisite clarity.

The plaintiff in *Spokeo* was a consumer about whom the defendant website operator allegedly published inaccurate information. The plaintiff contended that the defendant violated the FCRA by willfully failing to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports. The trial court dismissed the complaint, holding that the plaintiff had not properly pled injury-in-fact as required by Article III. The Ninth Circuit reversed, finding that a plaintiff satisfies the injury-in-fact element so long as he merely alleges a violation of his statutory rights.

The Supreme Court reversed the Ninth Circuit, however, observing that "a plaintiff does not automatically satisfy the injury-in-fact requirement whenever a statute grants a right and purports to authorize a suit to vindicate it. Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* at 1543. Put differently, a plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* at 1549. For example, where "a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information," yet that consumer information is "entirely accurate," there is no harm as a matter of law. *Id.* at 1550.

A number of district courts ran with this line of reasoning and held that, post-*Spokeo*, a plaintiff does not have Article III standing where he alleges only that the defendant committed a technical violation of a statute, which by definition is not "de facto," "real" or "concrete." Other district courts

disagreed, and homed in on language from *Spokeo* that intangible injuries can also be concrete, so long as "the risk of real harm can satisfy the requirement of concreteness." *Id.* at 1549. These district courts effectively held that *Spokeo* did not make any new law or change the state of standing doctrine, under which a mere technical violation of a consumer statute is often sufficient to establish standing because it is not difficult to allege "the risk of real harm," even without any actual harm. This issue begged the attention of the courts of appeal, which have now begun to weigh in on the impact of *Spokeo* when a plaintiff alleges a technical violation of one of various consumer statutes.

II. Post-*Spokeo* Courts of Appeals

Our review of these decisions from the courts of appeals has revealed certain trends. For example, to date there is consensus among the courts of appeals that have addressed the issue that a technical violation of the Fair and Accurate Credit Transactions Act ("FACTA") does not cause an actual injury upon a consumer whose credit card expiration date was printed on a receipt or from whom a zip code was requested in connection with a credit card purchase. *See Crupar-Weinmann v. Paris Baguette America, Inc.,* 861 F.3d 76 (2nd Cir. 2017); *Meyers v Nicolet Restaurant of De Pere,* LLC, 843 F.3d 724 (7th Cir. 2016); *Hancock v Urban Outfitters, Inc.,* 830 F.3d 511 (D.C. Cir. 2016). These courts have found it "hard to imagine" how the alleged violation of FACTA "could have increased the risk that plaintiff's identity would be compromised." *See Crupar-Weinmann,* 861 F.3d at 82; Meyers, 843 F.3d at 727.

On the other hand, the courts of appeals are thus far in agreement that a technical violation of the Telephone Consumer Protection Act automatically gives a consumer standing to sue when he or she receives an unwanted voice mail or text message. *See Susinno v. Work Out World Inc.,* 862 F.3d 346 (3rd Cir. 2017); *Van Patten v. Vertical Fitness Group, LLC,* 847 F.3d 1037 (9th Cir. 2017). These courts say that "Congress squarely identified this injury," and "elevated a harm that, while 'previously inadequate in law,' was of the same character of previously existing 'legally cognizable injuries,'" related to invasion of privacy. *See Susinno,* 862 F.3d at 351-352, quoting *Spokeo,* 136 S.Ct. at 1549. Thus, an unsolicited phone call or text message is *per se* injurious.

Cases under the Fair Credit Reporting Act, the statute involved in *Spokeo,* have been a mixed bag. The Fourth and Seventh Circuits have held that alleged informational and privacy injuries are insufficient to establish standing when, for example, a reporting agency does not disclose the source of the information on a consumer's credit report or when an employer gives a prospective employee a document that discloses that the employer is going to run a credit check on the prospective employee but also includes other information. *See Dreher v. Experian Information Solutions, Inc.,* 856 F.3d 337 (4th Cir. 2017); *Groshek v. Time Warner Cable, Inc.,* No. 16-3355 (7th Cir. Aug. 1, 2017). These courts found it instructive that the plaintiffs did not plead any factual allegations suggesting they would have acted any differently had they been given the information to which they claimed they were entitled. *See Dreher,* 856 F.3d at 346-347; *Groshek,* at *3-4. They therefore did not allege they suffered a concrete injury sufficient to satisfy the requirements of Article III standing.

The Ninth Circuit has come to the opposite conclusion. In *Syed v. MI, LLC,* 853 F.3d 492 (9th Cir. 2017), the court held that a consumer has standing to sue for a violation of the FCRA where his prospective employer's disclosure form contained extraneous information, because the consumer is *per se* deprived of his ability to meaningfully authorize a credit check. Likewise, in its recent opinion in *Robins v Spokeo,* No. 11-56843

(9th Cir. Aug. 15, 2017), on remand from the Supreme Court, the Ninth Circuit found that the plaintiff had standing under the FCRA where he alleged that *Spokeo* published an allegedly inaccurate report about him on its website as a result of its failing to follow reasonable procedures to assure accuracy. The court observed that the FCRA provision at issue was designed to protect consumers' concrete interests, and the inaccurate report represented a concrete harm to the plaintiff's employment prospects. *Id.* at *7.

Our office regularly defends actions brought under the Fair Debt Collection Practices Act, and we were eager to see how the courts of appeals would apply *Spokeo* in the FDCPA context. Eagerness has mostly given way to disappointment. The Second, Fourth, Fifth and Eleventh Circuit all have found that a technical violation of the FDCPA is sufficient to confer Article III standing on a debtor. The Eleventh Circuit's decision in *Church v Accretive Health, Inc.,* 654 Fed.Appx. 990 (11th Cir. 2016) was one of the first court of appeals opinions to address the impact of *Spokeo.* Church alleged that the defendant debt collector failed to include certain disclosures required by the FDCPA in its initial communication. The court found that was sufficient to constitute a concrete injury: "The invasion of Church's right to receive the disclosures is not hypothetical or uncertain; Church did not receive information to which she alleges she was entitled." *Id.* at 995. Similar conclusions were reached by the Second, Fourth and Fifth Circuits. *See Papetti v Does 1-25,* No. 16-2582 (2nd Cir. May 26, 2017); *Ben-Davies v. Blibaum & Associates, P.A.,* No. 16-2188 (4th Cir. June 1, 2017); *Moore v. Blibaum & Associates, P.A.,* No. 17-1153 (4th Cir. July 19, 2017); *Sayles v. Advanced Recovery Systems, Inc.,* No. 16-60640 (5th Cir. July 6, 2017).

Happily, the Sixth Circuit has separated itself from this pack and found that an FDCPA plaintiff did not have standing to proceed with a misrepresentation claim. In *Lyshe v Levy,* 854 F.3d 855 (6th Cir. 2017), the plaintiff alleged a violation of his rights under the FDCPA arising out of misrepresentations made by the defendants in discovery requests in a state court collection action. The plaintiff alleged the misrepresentations constituted deceptive conduct made in connection with the collection of a debt, in violation of the FDCPA. The Sixth Circuit found that the plaintiff did not have Article III standing, because:

> [The] violation alleged here — a violation of a state law procedure not required under [the] FDCPA — is not the type contemplated by *Spokeo,* which dealt with the failure to comply with a statutory procedure that was designed to protect against the harm the statute was enacted to prevent. The goal of the FDCPA is to eliminate abusive debt collection practices. [Id. at 859.]

Notably, the *Lyshe* court expressly declined to follow the Eleventh Circuit's decision in *Church, supra.* Instead, the court elected to follow the circuits that have held, albeit not in the FDCPA context, that more is required than a technical statutory violation to plead concrete harm to satisfy the requirements of Article III standing. *Lyshe,* 854 F.3d at 860-861.

Several other statutory violations have been addressed by the courts of appeals as well with equally divergent results. One court of appeals has found that a technical violation of the Real Estate Settlement Procedures Act amounts to a concrete injury, and another court of appeals has found that it does not. *See Diedrich v. Ocwen Loan Servicing, LLC,* 839 F.3d 583 (7th Cir. 2016); *Mejia v. Ocwen Loan Servicing, LLC,* No. 16-16353 (11th Cir. Aug. 8, 2017); *Meeks v. Ocwen Loan Servicing, LLC,* 681 Fed.Appx. 791 (11th Cir. Mar. 1, 2017). One court of appeals has found that some technical violations of the Truth in Lending Act amount to a concrete injury, while other technical violations of the Truth in Lending Act do not. *See Strubel v. Comenity Bank,* 842 F.3d 181 (2nd Cir. 2016). Two courts of appeals have found that a victim of a data breach has suffered a concrete injury, and one court of appeals has

found that the victim has not. *Galaria v. Nationwide Mutual Ins. Co.,* 663 Fed.Appx. 384 (6th Cir. 2016); *Attias v. Carefirst, Inc.,* No. 16-7108 (D.C. Cir. Aug. 1, 2017); *Beck v. McDonald,* 848 F.3d 262 (4th Cir. 2017). There are other statutes implicated as well, but the confused state of the doctrine is clear enough.

Among the courts of appeals to have addressed the impact of *Spokeo* on two or more occasions, only the Third and Ninth Circuit are consistent in their holdings that a technical violation of a consumer statute amounts to a concrete injury sufficient to establish Article III standing to sue. All other courts of appeals to have addressed the issue twice or more have issued mixed opinions.

Conclusion

The most we can say at this stage is that the results at the court of appeals level appear to be end driven. An unwanted telephone call? That is a concrete injury. A technical misrepresentation by a debt collector? Most circuits say it is a concrete injury. An expiration date printed on a receipt? That is not a concrete injury. This is likely because telemarketing and debt collection are viewed as industries that are prone to abuse, whereas retail stores are not so viewed. At the end of the day, though, a plaintiff must allege enough factual matter to "'nudg[e]'" his claim "'across the line from conceivable to plausible,'" which is "a context -specific task" requiring a court to "draw on its judicial experience and common sense." *See Ashcroft v. Iqbal,* 556 U.S. 662 (2009), quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007). An allegation of mental distress from opening a collection letter and other such implausible allegations of injury do not pass muster under this standard, in more of these consumer cases than the courts of appeals are willing to admit.

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