NO HARM, NO FOUL... NO CASE

CONSUMERS NEED INJURIES SET IN CONCRETE TO SUE

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It seems a simple premise: a person should not be allowed to ask a court to preside over a lawsuit unless she actually points to *an injury* she suffered. Yet, only recently, in *Spokeo v. Robins*, 578 U.S. __, 136 S. Ct. 1540 (2016), did the Supreme Court confirm that without a claim of actual harm you have no place being in federal court. Formulaic recitation of what a statute prohibits, coupled with the facts of your story, is insufficient: you need to allege a company actually harmed you in a concrete way.

Though the decision is favorable for companies, some may – perhaps rightly – consider it a soft victory. Indeed, the elusiveness of the Court's decision is perhaps best illustrated by the fact that, after the decision came down, both sides declared victory. Spokeo, Inc. viewed the decision as a win given the simple yet significant fact that the case was reversed and remanded to the Ninth Circuit to determine whether a "concrete" harm was alleged at all. On the other hand, Thomas Robins celebrated that the Supreme Court stopped short of outright rejection of the idea that "intangible harms" could constitute concrete injuries.

But what *Spokeo* did do, unquestionably, is take away an argument from plaintiffs that had been finding a foothold in district courts: namely, that alleging a company violated a statute is sufficient to confer standing to sue in federal court.

And, now that the Supreme Court has spoken, many federal district courts are taking a second look at plaintiffs with statutory claims. What has emerged in the short time since *Spokeo* is a willingness on the part of some federal judges to dig deeper to scrutinize whether allegations of concrete harm lie beneath the rudimentary claims of a statutory violation. Indeed, a handful of federal district courts have already tossed out class-action lawsuits, halting, at the outset, the attempted pursuit by some plaintiffs of a class action potentially worth millions.

Therefore, faced with a case anchored in the prohibitions of a federal statute (or regulation, even), brought inevitably as a class-action lawsuit, companies now have – and should use – this powerful tool to seek dismissal at the outset based on a no-injury case.

SPOKEO V. ROBINS

This recent Supreme Court case starts, as most do these days, with the internet. Spokeo, a self-described "people search engine," is in the business of compiling information about individuals from publically available sources in order to create a profile, of sorts, online. According to Thomas Robins, the problem with this, for him, was that most of the information reported on Spokeo's website in his profile was incorrect. This troubled Robins because he was

searching for a job and believed this inaccurate information hurt his chances of finding employment.

Robins brought suit against Spokeo under the Fair Credit Reporting Act (FCRA), which, as relevant here, requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports. It imposes liability on any person who willfully fails to comply with any requirement of the Act with respect to any individual.

After filing suit, Spokeo moved to dismiss, arguing that Robins lacked standing under Article III of the Constitution because he did not suffer an injury. In response, Robins claimed that alleging a violation of a federal statute is sufficient to confer standing. The district court in California rejected this argument and held that Robins, at most, alleged a possible *future* injury, which is insufficient to satisfy the "injury-in-fact" requirement of Article III.

Robins appealed this decision, and the Ninth Circuit Court of Appeals reversed, finding an alleged violation of a statutory right that was particular to Robins. The Court noted that Congress has the power to create "legally cognizable injuries" and to make those injuries "concrete" via legislation that creates a statutory right. The Ninth Circuit held that because Robins alleged a violation of FCRA, and because Spokeo's actions specifically affected Robins, he suffered an "injury-in-fact" sufficient to satisfy Article III.

THE SUPREME COURT'S DECISION

The Supreme Court disagreed. In a 6-2 decision, the Court found the Ninth Circuit failed to consider whether Robins suffered a concrete injury beyond any alleged violation of his statutory rights. The Court explained that, although Congress has the ability to elevate "intangible harms" to the status of legally protected rights, it does not follow that every violation of a statutory right automatically results in an Article III injury.

Turning to Robin's claim, the Court explicitly rejected the idea that he could "satisfy the demands of Article III by alleging a bare procedural violation." The Court noted that not all inaccurate information that is published causes harm. For instance, reporting an incorrect zip code, by itself, would not constitute a "concrete harm." Though "concrete" is not necessarily synonymous with "tangible," the Supreme Court explained, a bare violation of a procedural requirement is not enough. In other words, even if Spokeo did not follow certain statutory procedures, Robins needed to plead an injury-*in-fact* as a result of Spokeo's wrongdoing. Accordingly, the Court reversed and remanded the case.

RIPPLE EFFECTS OF *SPOKEO*

Though the Court didn't reach the ultimate merits of Robins' allegations, since *Spokeo*, several district courts have considered, and rejected, statutory claims given the lack of a concrete injury.

Earlier this summer, in *Gubala v. Time Warner Cable*, a federal court in Wisconsin rejected the plaintiff's claims under the Cable Communications Policy Act, wherein the consumer claimed Time Warner unlawfully retained his personally identifiable information beyond the statutory time period. Viewing this as a technical violation of the statute, the court found that such a claim, alone, was not enough to constitute a "concrete" harm.

A week earlier, in *Smith v. Ohio State University*, an Ohio federal court similarly dismissed a plaintiff's case under FCRA in which the plaintiff alleged the defendant failed to make the proper statutory disclosures on authorizations to do credit checks. The court held that the plaintiff had not alleged how these improper disclosures harmed her in a concrete way.

And, in May, a Maryland federal court, in *Khan v. Children's National Health System*, noted the import of *Spokeo* in an alleged data breach case against a hospital system, explaining that a plaintiff's allegation of a violation of state law could not "manufacture Article III standing for a litigant who has not suffered a concrete injury."

Though not yet the subject of a significant court case, there are other statutes that may fall within *Spokeo*'s purview, including certain claims brought under the Telephone Consumer Protection Act, a favorite of the plaintiffs' bar due to the $500 liquidated damages provision. For instance, the TCPA requires prior express *written* consent for telemarketing phone calls, meaning that even if a plaintiff "consented" to calls – and thus did not suffer the annoyance or invasion of privacy occasioned by *unsolicited* phone calls – a company may still be on the hook for not following the procedural requirement of obtaining consent "in writing." 47 C.F.R. § 64.1200(a)(2). Under *Spokeo*, this "procedural" harm, by itself, may not be enough to constitute a concrete injury.

Moreover, a larger significance to these decisions, including *Spokeo*, should not be missed: in each instance, the plaintiffs had alleged that a class of persons, similarly situated, had also been harmed. Such class actions, if allowed, can take seemingly small, statutory claims and transform them into a bet-the-company scenario. But, if crafted properly and with the right statute, *Spokeo* may provide substantial advantages in opposing class certification should a plaintiff survive a motion to dismiss. For instance, whether each person in the class suffered a concrete injury as opposed to a procedural one may be something that can only be determined on a case-by-case basis, thus, making a class action untenable. It is unclear how successful such a position would be as certain courts, sitting in the Seventh Circuit, for instance, consider only whether the named plaintiff has standing, i.e., has suffered a concrete injury, and not whether absent class members do.

All-in-all, whether *Spokeo* will dramatically change the landscape in so-called "no harm" statutory causes of action or whether it is just a blip on the radar remains to be seen. Companies should take a close look at claims grounded in statutory violations and marshal arguments provided by *Spokeo* for a quick dismissal of a lawsuit. Since many of these cases are brought as class actions, *Spokeo* may provide a "silver bullet" defense in a multi-million dollar class action lawsuit based on a procedural statutory violation. At the same time, look for the plaintiffs' bar to advance increasingly creative arguments for what constitutes a "concrete" injury. In the right jurisdiction and with a critical mass of cases in their win column, consumers may tip the scale in the other direction. Only time will tell.

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