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Game-Changer: Spokeo Revamps Standing for Statutory Class Actions

From the Experts

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As the saying goes, good things come to those who wait. The U.S. Supreme Court had attorneys waiting over seven months for its decision in *Spokeo, Inc. v. Robins*, and it did not disappoint. In a 6-2 decision authored by Justice Alito, the court held that a purely technical violation of a statute is insufficient to establish Article III standing.

The *Spokeo* case itself concerned the Fair Credit Reporting Act (FCRA), a so-called "bounty" statute that allows consumers with no injury whatsoever to file claims concerning technical statutory violations seeking statutory damages. Plaintiff Robins filed a putative class action lawsuit after discovering that some of the information Spokeo made available about him was inaccurate (the court presumed that Spokeo fit the definition of a credit reporting agency as is required under FCRA). The issue thus presented to the Supreme Court was whether allegations of inaccurate information sufficed for Article III standing purposes.

The NLJ/ Diego M. Radzinschi

U.S. Supreme Court building.

However, legal spectators and courts have long surmised that *Spokeo* could have a broad impact on similar statutes, like the Telephone Consumer Protection Act (TCPA), Fair and Accurate Credit Transactions Act (FACTA) and the Biometric Information Privacy Act (BIPA), all of which allow plaintiffs to similar pursue claims for statutory damages (often in the context of putative class actions) absent any actual harm.

These bounty statutes have turned into a niche industry of gotcha litigation, where plaintiffs' attorneys pursue multi-million dollar class actions with named plaintiffs and putative class members that have suffered no more than a bare technical statutory violation.

Most circuit courts, prior to *Spokeo*, had—like the U.S. Court of Appeals for the Ninth Circuit in *Spokeo*—held that Congress could in effect bestow Article III standing by creating a statutory right, the violation of which (even in the absence of damages) creates a cognizable claim. The Supreme Court, however, turned that logic completely on its head.

Specifically, the court held:

> Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfied 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. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.

And lest there be any confusion over the scope of the court's holding, the majority even provided some examples of FCRA claims that would fail the Article III threshold: (i) the failure to provide the required notice to a user of the agency's consumer information if that information is accurate, and (ii) de minimis inaccuracies (*i.e.*, an incorrect zip code) that do not present any material risk of harm.

Though the court remanded the case back to the Ninth Circuit to further analyze standing in light of its opinion, the potential impact of *Spokeo* is considerable. Many TCPA, FACTA and BIPA class actions (among others) are filed based on nothing more than hyper-technical violations of various consumer protection and privacy-related statutes. In the TCPA context, for example, many class actions are brought on the basis that written consent is necessary to make telemarketing calls, but only oral consent was obtained. In the FACTA context, many class actions are brought on the basis that a credit card receipt—the only copy of which the consumer still has—displays too many digits of the card number. And in the BIPA context, class actions are often based on the fact that a written policy concerning the use of biometric information does not exist, but absence of which has not impacted the consumer in any way.

These are the exact types of claims the Supreme Court has foreclosed through *Spokeo*. Extrapolating from the examples in the FCRA context, the court is sending the signal that technicalities do not provide Article III standing. If consent has been obtained in the TCPA context, then it does not matter whether that consent was oral or written. If, in the FACTA context, a receipt has too many digits, but the consumer retains the receipt, then there is simply no risk of concrete harm. And in the BIPA context, the simple absence of a written policy can hardly be said to cause concrete harm.

Perhaps the most significant impact of *Spokeo*, however, will likely be in the class certification context. There is no doubt plaintiffs' counsel can find named plaintiffs with more than a bare procedural violation, but putative classes are generally drawn broad enough to include a high percentage of individuals with nothing more than a technical claim. From that perspective, if courts have to hold mini trials as to whether putative class members in these no-harm class actions actually suffered anything more than a procedural violation, then it is hard to imagine how these cases will be able to pass the Rule 23(b)(3) predominance inquiry.

Spokeo is nothing short of a game-changer in the context of statutory class actions. While the Supreme Court largely punted on significant class action issues earlier in the term (*i.e.*, *Campbell-Ewald v. Gomez* and *Tyson Foods v. Bouaphakeo*), it certainly saved the best for last.

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