Spokeo, 21 Months Later

By Jesse L. Roth

We were deep into defending a Fair Credit Reporting Act matter last year when the United States Supreme Court issued its *Spokeo, Inc v. Robins* opinion. We were excited, to put it mildly. 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 told 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 21 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. With a manageable number of opinions issued by federal courts of appeals, this article focuses on those decisions.

Standing and *Spokeo*

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. 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 much 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." 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." 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.

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 honed 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." 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.

Post-*Spokeo* Courts of Appeals

Our review of these decisions from the courts of appeals has revealed certain trends. For example, several of the courts of appeals to have addressed the issue have found that a technical violation of the Fair and Accurate Credit Transactions Act 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. On the other hand, the courts of appeals have held 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. Cases under the Fair Credit Reporting Act,

the statute involved in *Spokeo*, have been a mixed bag, with some circuits holding that alleged informational and privacy injuries are insufficient to establish standing, and others holding that such injuries are sufficiently concrete to satisfy the requirements of Article III.

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, with most of the circuits to have addressed the issue finding that a technical violation of the FDCPA is sufficient to confer Article III standing on a debtor. 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.]

Several other statutory violations have been addressed by the courts of appeals as well with equally divergent results. Some courts have said that a technical violation of the Real Estate Settlement Procedures Act amounts to a concrete injury, and others have said it does not. One circuit 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. Some courts say that a victim of a data breach has suffered a concrete injury, and some say no. There

are other statutes implicated as well, but the confused state of the doctrine is clear enough.

Conclusion

The most one 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 nudge 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. 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.