90 Days Post-Spokeo: 5 Key Class Action Defense Takeaways

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After three months of conflicting lower court decisions interpreting the U.S. Supreme Court's opinion in Spokeo Inc. v. Robins,[1] one thing (and perhaps not much more) is clear: Those who predicted that Spokeo rang the death knell for so-called "no injury" or "gotcha" class actions under federal statutes were, in a word, wrong. But, while Spokeo is not the silver bullet some thought it would be, it can still be a useful weapon for defendants when used appropriately and not oversold. Before discussing how defendants can and should use the case, however, one must first look at what the Supreme Court did and said.

Spokeo operates a "people search engine." You can go to Spokeo's website, type in a person's name, phone number or email address, and obtain information about the person. Robins alleged that some of the information about him was inaccurate. The district court dismissed his claims under the Fair Credit Reporting Act for lack of Article III standing, but the Ninth Circuit reversed. The U.S. Supreme Court held that the Ninth Circuit erred because it failed to determine whether Robins alleged a "concrete" injury, as necessitated by the "injury in fact" requirement for Article III standing.[2]

"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized'" and "actual or imminent, not conjectural or hypothetical.'"[3] The court explained that "[f]or an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'"[4] However, the court made clear that a particularized injury is not enough: "Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be 'concrete.'"[5]

The court then elaborated on the "concreteness" requirement, making three significant points. First, a "concrete" injury must be "de facto," i.e., "it must actually exist," and it must be "'real,' and not 'abstract.'"[6] Second, "concrete" is not the same as "tangible," because an injury that is "intangible" can still be "concrete."[7] Third, "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles."[8]

Thus, in analyzing whether an intangible harm is nonetheless "concrete" a court must consider both Congress' judgment on that issue and "whether [the] alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[9]

The court cautioned, however, that: "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies 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, [a plaintiff] could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III."[10]

But, "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact."[11] Stated otherwise, "a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified."[12]

Applying these principles to the plaintiff's FCRA claims, the court concluded that:
On the one hand, Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk. On the other hand, [the plaintiff] cannot satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the FCRA's procedural requirements may result in no harm. For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.[13]
Because the Ninth Circuit failed to address Article III's "concreteness" requirement, the court remanded to allow the Ninth Circuit to determine "whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement."[14]

As can be gleaned from the above description, Spokeo contains a little bit of something for everyone (ready sound bites for both plaintiffs and defendants), and the lower courts have been left to sort out its meaning. In the approximately three months since Spokeo was decided, there have been four court of appeals decisions and 28 district court decisions that: (a) cite Spokeo, (b) were published (in the Federal Reporter and/or on Westlaw), (c) were issued in class actions, and (d) substantively address Article III standing.[15]

Of those 32 decisions, 22 have concluded that the plaintiff(s) had Article III standing,[16] seven have concluded that the plaintiff(s) did not have Article III standing,[17] and three were split decisions (e.g., the court found standing as to some plaintiffs, claims, or theories, but not all).[18]

Post-Spokeo, lower courts have found class action plaintiffs to have Article III standing under the FCRA;[19] the Fair and Accurate Credit Transactions Act;[20] the Fair Debt Collections Practices Act;[21] the Wiretap Act;[22] the Video Privacy Protection Act;[23] the Stored Communications Act;[24] 28 U.S.C. § 1983;[25] the Telephone Consumer Protection Act;[26] the Truth in Lending Act;[27] the Video Rental Privacy Act;[28] the Securities Act;[29] and various state laws.[30] On the other hand, lower courts have found class action plaintiffs to lack Article III standing under TILA,[31] the TCPA,[32] the Cable Communications Policy Act,[33] and various state laws.[34]

So what does all of this mean? The following are, from a defense perspective, five key takeaways from the first 90 days of lower court decisions interpreting Spokeo.

1. Don't Oversell Spokeo

The Supreme Court did not rewrite standing requirements or categorically bar "no injury" class actions or class actions seeking only statutory damages, so defendants relying on Spokeo should not present the decision in that way. Doing so can only hurt your (and your client's) credibility and create bad precedent.[35]

2. Know Your Venue

The early returns show that courts in some circuits have been more amenable than others to Spokeo standing arguments in class actions. For example, courts in the Eleventh Circuit have addressed Spokeo seven times in class action cases,[36] and courts in the Second Circuit have addressed it five times in such cases.[37] In all 12 twelve cases, the courts found the plaintiffs to have Article III standing. The

results from the courts in other circuits have been more mixed, although generally favoring a finding of standing. This is not to say defendants should not make a Spokeo-based standing argument in the Eleventh or Second Circuits, but they need to be aware of — and prepared to distinguish — the contrary precedent if they are going to do so.

3. Know Your Plaintiff's Claim(s)

In these early days, certain claims have proven more difficult to defeat for lack of Article III standing. For example, post-Spokeo, defendants have challenged class action plaintiffs' standing in FCRA cases five times[38] and FDCPA cases four times.[39] Plaintiffs have prevailed each time. The results have been more mixed as to TILA, TCPA and state law claims. Again, this is not to say that defendants should not challenge FCRA or FDCPA class action plaintiffs' Article III standing. However, when doing so, a defendant must be prepared to address the arguments — in particular arguments based on legislative history — that have caused courts to find standing as to those claims in other cases.

4. Consider Using Spokeo to Challenge State Law Claims

This could have been addressed under takeaway number three, but it raises some unique issues, so it merits its own takeaway. Of the seven post-Spokeo class action decisions that have found no Article III standing, five involved state law claims.[40] Defendants' relatively higher rate of success as to state law claims is, in part, due to an open question as to whether state legislatures (who, obviously, draft state laws) are entitled to the same level of deference that the court gave Congress in Spokeo. The court explained that:

[B]ecause Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in Lujan that Congress may "elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law." Similarly, Supreme Court Justice Anthony Kennedy's concurrence in that case explained that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[41]

Some courts have concluded that state legislatures should be given the same deference as Congress in defining cognizable harms;[42] other courts have disagreed.[43] The better view is that of the courts finding that state legislatures, while perhaps entitled to some deference, are not entitled to the same level of deference in this regard as Congress.

Only Congress has the power to create federal laws and to give citizens private rights of action to enforce those laws. In deciding whether and how to enact such laws, Congress must — or, at least, should — consider Article III standing requirements, because such claims will necessarily end up in federal court if either party desires them to be there.[44] The same simply cannot be said of state legislatures, which enact laws that can be enforced by citizens in state or federal courts.

Thus, there may be stronger arguments for using Spokeo to challenge class action plaintiffs' Article III standing to assert state law claims than to challenge such plaintiffs' standing to assert federal claims. However, there are strategic reasons for class action defendants to be careful when considering such a challenge. The result of a plaintiff's lack of Article III standing to assert state law claims is a dismissal without prejudice to refiling in state court. Most class action defendants prefer to litigate in federal court and the Class Action Fairness Act has ensured that a substantial majority of class actions now end up in federal court.

Therefore, it would seem counterproductive to make an argument the result of which, if successful, could be that your client winds up litigating the case in an undesirable venue. (This would be particularly true if the defendant had removed the case from state court to federal court based on CAFA.) But, your client may be in a situation where the state court alternatives are equal to or better — in the client's view — than the assigned federal court. In such circumstances, a standing challenge to plaintiff's state law claims could make sense.

Likewise, if a plaintiff asserts both federal and state law claims, and you do not fear the plaintiff pursuing the state law claims in a separate state court action, a defendant may want to consider an Article III standing challenge only to plaintiff's state law claims, knowing that the case likely will remain in federal court regardless of the result.[45] The bottom line is that post-Spokeo challenges to a class action plaintiff's Article III standing to assert state law claims could be meritorious, but whether to make such challenges must be carefully considered.

5. Using Spokeo to Defeat Class Certification

Several circuits have held that a class cannot be certified where class members lack Article III standing.[46] In such circuits, Spokeo's true value may be not as a tool to obtain dismissal for lack of Article III standing, but as a tool to defeat class certification. Defendants will often be able to persuasively argue that even if the plaintiff is able to establish Article III standing under Spokeo, whether all class members could do so based on their unique circumstances is an individualized factual question that defeats a finding of predominance.

Accordingly, despite the early results favoring class action plaintiffs' Article III standing, the Supreme Court's Spokeo decision can still be an effective weapon for class action defendants when wielded in an appropriate manner.

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