

State Court Class Action Defendants to Face New Strategic Decisions

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September 1, 2016

The U.S. Supreme Court's recent *Spokeo v. Robins* decision has been heralded by the Texas business community as an important limitation on class action liability. The decision, however, has triggered concerns in at least some states that it might have the unintended consequence of creating more class action litigation in state court forums that are viewed by some defendants as less favorable. This article explores the reasons to believe Texas is probably not one of those states.

In *Spokeo*, the Supreme Court dealt with an important issue facing businesses across the country—the "no injury" class action based on technical violations of consumer protection statutes. Under a variety of federal statutes, such as the Fair Credit Reporting Act (FCRA), the Telephone Consumer Protection Act (TCPA), and the Fair and Accurate Credit Transactions Act (FACTA), class actions have been filed based on technical statutory violations. Because the statutes themselves provide for statutory damages, plaintiffs argued that such damages created federal standing even if the plaintiff could not point to any concrete injury. In *Spokeo*, the Supreme Court disagreed, holding that plaintiffs cannot establish standing in federal court merely by alleging a bare statutory violation without any actual injury. Instead, plaintiffs must allege and establish an actual injury in fact that is both particularized and concrete.

At first blush, *Spokeo* appears to be a favorable decision for the business community by limiting the situation in which "no injury" class actions can be filed. But the decision could have the unintended consequence of centralizing class actions in state court when they otherwise would have been filed in, or quickly removed to, federal court. This is because many state courts have a more lenient jurisdictional doctrine of standing than the rule from *Spokeo*. For instance, courts in California, Florida, Pennsylvania, New Jersey, and Nevada have recognized statutory standing even in situations where the plaintiff lacked actual injury. It is possible that much of the litigation that can no longer be brought in federal court may be pursued in state courts in these jurisdictions.

For Texas businesses and practitioners, the question becomes: How would a Texas state court treat a "no injury" class action alleging a technical violation of federal law? Although the question has not been answered expressly by the Texas Supreme Court, the court's guidance suggests that Texas would not recognize separate statutory standing without concrete injury. Traditionally, Texas courts have recognized a form of statutory

standing distinct from common law standing. As the Fort Worth Court of Appeals explained in *Everett v. TK-Taito, L.L.C.* in 2005, "[w]hen standing has been statutorily conferred, the statute itself serves as the proper framework for a standing analysis. The plaintiff must allege and show how he has been injured or wronged within the parameters of the language used in the statute."

However, in the 2008 Texas Supreme Court case of *DaimlerChrysler Corp. v. Inman*, the Court seemed to draw back the possibility of statutory standing without injury. The case involved allegations that car seat belts unlatched too easily. No plaintiff, however, alleged they had actually been injured by a malfunctioning seatbelt. Even though they alleged no concrete, pecuniary harm, the Austin Court of Appeals held that the plaintiffs possessed standing on all of their causes of action, including a Texas Deceptive Trade Practices Act claim. The court looked to the language of the DTPA and stated that "[t]he issue of DTPA standing asks whether the plaintiff is a consumer," not whether they suffered a pecuniary loss. The Texas Supreme Court reversed, holding that "concrete injury [is a constitutional requirement for standing], because if injury is only hypothetical, there is no real controversy." Without expressly addressing the issue of distinct statutory standing without injury, the holding implicitly rejected such an argument.

More recently, on May 20, 2016, days after the *Spokeo* decision, the Texas Supreme Court addressed a related issue in a way that further shows the difficulties in asserting a "no injury" class action in Texas. *Forte v. Wal-Mart Stores Inc.* involved a certified question from the Fifth Circuit as to whether statutory penalties under the Texas Optometry Act were considered exemplary damages under Section 41 of the Civil Practice & Remedies Code. The case involved optometrists who claimed no actual injury but had been awarded a multimillion dollar judgment in federal court (pre-*Spokeo*) based on technical violations of the Texas Optometry Act, which provides for civil penalties of \$400 per day. The court first questioned, without deciding, whether a private plaintiff could even recover civil penalties under the statute. Ultimately, the court held that civil penalties were exemplary damages and may be awarded only if damages other than nominal damages are awarded. Thus, even if statutory damages are permissible in Texas state court, the court may view them as exemplary damages and require that there be actual compensable injury tied to any award of statutory damages. Such a decision would implicitly preclude a no injury class action.

As a result of *Forte* and *DaimlerChrysler*, the Texas Supreme Court has signaled a reluctance to provide forums for plaintiffs to pursue claims if they lack concrete injury. As a result, Texas is unlikely to be a forum for significant no injury class action activity post-*Spokeo*. Nonetheless, until the issue has been concretely determined by the Texas Supreme Court, there still remains room for plaintiffs to argue that Texas should recognize statutory standing for "no injury" class actions after *Spokeo*. Ultimately, the Texas state Legislature or the Texas Supreme Court may decide this issue conclusively.

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