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Making Sense Of 9th Circ. Spokeo Decision On Remand

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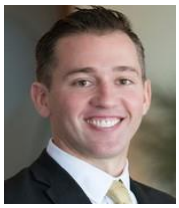
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Law360, New York (September 1, 2017, 10:18 AM EDT) --
The key facts in Spokeo Inc. v. Robins, 136 S. Ct. 1540 (2016), are well known. The plaintiff, Thomas Robins, brought a class action against Spokeo, a popular website that builds consumer-information profiles, contending that Spokeo willfully violated the Fair Credit Reporting Act by failing to implement reasonable procedures to ensure the accuracy of report information about him, such as his age, marital status, educational background and wealth. Robins did not claim any actual damages, but alleged that the inaccurate information could harm his employment prospects. The district court dismissed the action for failure to plead a cognizable injury-in-fact necessary for Article III standing, the Ninth Circuit reversed, and the U.S. Supreme Court agreed to hear the case. In its much heralded decision, the Supreme Court held that the Ninth Circuit failed to apply the correct standing test and remanded the case to the Ninth Circuit to evaluate whether Robins' allegations of an alleged procedural violation of the FCRA constitutes a sufficiently concrete harm to satisfy Article III of the U.S. Constitution.

On Aug. 15, 2017, the Ninth Circuit issued its long-awaited opinion on remand.[1] In a unanimous decision, the Ninth Circuit held that Robins had standing to pursue his claims in federal court. While the result was largely expected, the analysis deployed by the court to reach that result is significant in at least three important ways.

Concrete Injury

The Ninth Circuit made clear that violation of a procedural statutory provision, without more, often will not constitute a concrete injury.

As a threshold matter, the Ninth Circuit confirmed what is apparent from many decisions regarding the FCRA around the country — that many plaintiffs can no longer expect to bring FCRA or other actions in federal court based simply on the violation of a statute's procedural provisions. As we have shown in our earlier analysis regarding the hundreds of post-Spokeo decisions interpreting the statute, many courts have recognized that purely technical violations of the FCRA typically do not give rise to Article III standing.[2] For example, numerous courts have held that an employer's inclusion of extraneous language in an FCRA background check disclosure form — in

violation of the alleged "stand-alone" FCRA disclosure rule — does not give rise to a concrete injury sufficient for Article III standing.[3] Likewise, courts have held that a plaintiff lacks standing to bring an FCRA claim based upon a minor delay in providing a background check report and an opportunity to dispute it.[4] Courts also have applied this principle to hold that plaintiffs lack standing to bring claims for technical violations of other statues, such as the Cable Communications Privacy Act and the Fair Credit Transactions Act.[5]

The Ninth Circuit confirmed this basic rule, noting that "in many instances, a plaintiff will not be able to show a concrete injury simply by alleging that a consumer-reporting agency failed to comply with one of the FCRA's procedures."[6] Indeed, the very test used by the Ninth Circuit suggests that the violation of any statutory provision geared towards protecting only "procedural rights" is per se insufficient.[7] This recognition is significant; it confirms that, in the Ninth Circuit, Spokeo has and will continue to limit whether plaintiffs can bring putative FCRA (and other) class actions in federal court for statutory damages.

Conflict with Supreme Court's Directive

Despite articulating the proper test for Article III standing, the Ninth Circuit failed to properly apply it.

After articulating the "injury-in-fact" standard for Article III standing set forth by the Supreme Court in Spokeo, the Ninth Circuit significantly expanded it, holding that the dissemination of inaccurate, but positive information that might affect someone's employment prospects is a "concrete harm" sufficient for Article III standing. In our view, this holding conflicts with the Supreme Court's directive that courts must ensure that harm resulting from a statutory violation is "concrete" — that is, a real-world harm with real-world consequences to a plaintiff.

The Supreme Court made clear that while Article III standing may exist if a statutory violation creates an "intangible" injury to the plaintiff, any such injury only exists if the plaintiff experiences actual harm or the material risk of harm.[8] The Ninth Circuit puzzlingly assumed that the dissemination of false information itself, rather than the consequences of that false information, amounted to a concrete harm — for example, a potential lost job. Indeed, the Ninth Circuit candidly acknowledged that the positive incorrect information published about Robins sufficed, discussing future possible consequences from that false information in probabilistic, open-ended terms.

For instance, the Ninth Circuit's decision stated that it "does not take much imagination to understand how inaccurate reports on such a broad range of material facts regarding Robins' life could be deemed a real harm" or "may be important to employers."[] Likewise, the court then noted that the Consumer Financial Protection Bureau has argued that "even seemingly flattering inaccuracies can hurt an individual's employment prospects" and "may cause harm."[10] The court even acknowledged that the "likelihood" of the report "actually to harm Robins' job search could be debated."[11] These observations make sense in the Supreme Court's framework only if one agrees with the Ninth Circuit's conclusion that false positive information itself is a "concrete harm," absent any later consequences. But if so, the term "harm" has little meaning. Indeed, even the Ninth Circuit expressed confusion on this point, oscillating between describing the dissemination of false, though positive, information about Robins as a future "risk of harm" and as an intangible harm that already had occurred.[12]

Tellingly, Robins did not identify any specific job opportunity that he lost as a result of the Spokeo report, did not show any denial or weakening of credit from the inaccurate report, and no negative financial consequences. Nonetheless, the Ninth Circuit concluded that the dissemination of false, though

positive, information about him created a "risk of harm" that was substantially concrete. In other words, the Ninth Circuit assumed that possible future real-world harm to Robins was "concrete" based on its judgment of the potential significance of the inaccurate information on Spokeo's website. This conclusion is very difficult to square with the Supreme Court's requirement that harm sufficient for Article III purposes "must actually exist." It is even harder to reconcile with the Supreme Court's requirement that possible future harms do not confer Article III standing unless they are "certainly impending."[13]

Defeating Class Certification

The Ninth Circuit's methodology for determining Article III standing nonetheless provides an avenue to defeat class certification.

Despite the apparent flaws in the Ninth Circuit's standing determination, its methodology provides opportunities for defendants to defeat class certification in federal court by arguing that the individualized inquiry required to determine whether standing exists for each putative class member under Spokeo precludes a finding of adequacy, typicality and/or predominance. Historically, claims for statutory damages, like those brought under the FCRA, have been a favorite of the plaintiffs class action bar, in part because they can argue that the bare technical violation of a statutory provision — without the need for any showing of injury or harm — gives Article III standing to the named plaintiff and each putative class member. Either the defendant committed the statutory violation or it did not. Thus, according to plaintiffs, there was no need to consider individualized issues of standing, injury and damages in connection with the Rule 23 analysis.

But the Ninth Circuit's decision casts doubt on that view. The required standing analysis set forth by the Supreme Court — and applied by the Ninth Circuit in Spokeo — is quite individualized. As the Ninth Circuit explained with respect to the particular FCRA violation at issue, determining standing "requires some examination of the nature of the specific alleged reporting inaccuracies."[14] The court examined, among other things, whether the inaccurate report about Robins was published, the breadth of the information contained in it, and whether or not that information was "material." That analysis is inherently individualized. Even if Robins has standing, other putative class members may not, based upon the content and use of the reports they received, requiring a myriad of "standing mini-trials." Such an individualized analysis should preclude a finding that common issues predominate.

Indeed, even before the Ninth Circuit's ruling, district courts had noted this inevitable consequence of the Supreme Court's Spokeo decision. Several courts have found Article III standing for the representative plaintiff but denied class certification, in part, due to the need to determine whether standing exists as to each putative class member's claims.[15] For instance, in one recent case brought under the Telephone Consumer Protection Act, which, like the FCRA, allows for statutory damages, a district court relied on Spokeo principles to deny class certification on standing grounds. The district court emphasized that even if a technical violation of the TCPA had been committed (because express written consent was not obtained before automated calls were made to class members), individualized questions predominated about whether or not each putative class member suffered a concrete harm, based on whether he or she consented orally to receive the calls.[16] Similarly, a Southern District of California judge denied class certification in a false labeling case due, in part, because the proposed class consisted of consumers who lacked standing and suffered no cognizable injury, including those entitled to full refunds of the product at issue.[17] Although the district court noted that Ninth Circuit law is not entirely clear as to whether standing must be shown as to each absent class member,[18] Spokeo militated against certifying a class with members who lack Article III standing.[19]

We appreciate the counterargument that some circuits have stated, in particular cases, that plaintiffs need not show that each member of the putative class has standing.[20] But those decisions were decided before Spokeo and did not address the issue of standing in the context of Rule 23's requirements. By contrast, as described by the Supreme Court and the Ninth Circuit, an individualized analysis — such as evaluating the "nature" of each FCRA disclosure and report — may be required to determine whether class members have suffered a concrete injury for purposes of Article III standing. Under the Rules Enabling Act, this individualized analysis should not be abandoned merely because an action is brought under Rule 23; it must be repeated for each putative class member. The most lasting effect of Spokeo, therefore, may be that class certification is inappropriate in federal court in many cases.

Conclusion

The debate about what harm is sufficiently "concrete" for Article III standing will undoubtedly continue. The Ninth Circuit's decision on remand — the second round of the Spokeo saga — marks an important and controversial step on that journey. While the ultimate result may be questionable, the Ninth Circuit's analysis recognizes that many plaintiffs will be unable to satisfy Article III standing in class actions based on technical statutory violations. And the Spokeo Supreme Court and Ninth Circuit authority offers defendants a potential tool to oppose class certification where class members' standing must be determined on an individualized basis. Based on the many decisions that have focused on Spokeo issues since the Supreme Court's decision, we expect that the contours and impact of that decision and the Ninth Circuit's decision on remand will continue to be explored in the months and years to come.

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[1] Robins v. Spokeo Inc., No. 11-56843, 2017 WL 3480695, at *6 (9th Cir. Aug. 15, 2017).

[2] Bultemeyer v. CenturyLink Inc., No. CV-14-02530-PHX-SPL, 2017 WL 634516, at *1 (D. Ariz. Feb. 15, 2017)

[3] Groshek v. Time Warner Cable Inc., No. 16-3355, -- F.3d -- , 2017 WL 3260080, at *4 (7th Cir. Aug. 1, 2017); Stacy v. Dollar Tree Stores Inc., No. 16-61032-CIV, 2017 WL 3531513, at *7 (S.D. Fla. Aug. 14, 2017).

[4] Dutta v. State Farm Mutual Automobile Insurance Co., No. 3:14-CV-04292-CRB, 2016 WL 6524390, at *1 (N.D. Cal. Nov. 3, 2016)

[5] Braitberg v. Charter Comms. Inc., 836 F.3d 925, 930-31 (8th Cir. 2016); Meyers v. Nicolet Rest. of De Pere LLC, 843 F.3d 724, 727 (7th Cir. 2016).

[6] Robins, 2017 WL 3480695, at *6.

[7] The Ninth Circuit held that the appropriate test is "(1) whether the statutory provisions at issue were established to protect his concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests." Robins, 2017 WL 3480695, at *4. Under this test, as formulated, the violation of a statutory provision enacted to protect "purely procedural rights," as opposed to "concrete interests," is always insufficient to create Article III standing.

[8] Spokeo, 136 S. Ct. at 1549.

[9] Robins, 2017 WL 3480695, at *7.

[10] Id.

[11] Id.

[12] Compare id. at *7 (reasoning that inaccuracies in report are not "too insignificant to present a sincere risk of harm") with id. at *8 (reasoning that attendant injury has "already occurred").

[13] Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409, 415 (2013).

[14] Robins, 2017 WL 3480695, at *7

[15] See, e.g., Legg v. PTZ Ins. Agency, Ltd., No. 14 C 10043, 2017 WL 3531564, at *4 (N.D. Ill. Aug. 15, 2017); Sandoval v. Pharmacare US Inc., 2016 WL 3554919, at *8 (S.D. Cal. 2016) (concluding that class certification was not proper to the extent that the representative plaintiffs raised claims and theories they did not have standing to raise, and to the extent that the proposed class included consumers who had no cognizable injury such as those who obtained full refunds).

[16] Legg v. PTZ Ins. Agency Ltd., No. 14 C 10043, 2017 WL 3531564, at *4 (N.D. Ill. Aug. 15, 2017).

[17] Sandoval v. Pharmacare US Inc., 2016 WL 3554919, at *8 (S.D. Cal. 2016).

[18] Compare Mazza v. American Honda Motor Co., 666 F.3d 581, at 594 (9th Cir. 2012) (Ninth Circuit held that "[n]o class may be certified that contains members lacking Article III standing") with Bates v. United Parcel Services Inc., 511 F.3d 974, 985 (9th Cir. 2007) (en banc) (Ninth Circuit held that "[i]n a class action, standing is satisfied if at least one named plaintiff meets the requirements…"); see also Ramirez v. Trans Union LLC, No. 12-CV-00632-JSC, 2016 WL 6070490, at *5 (N.D. Cal. Oct. 17, 2016) (recognizing tension within the Ninth Circuit).

[19] Sandoval, 2016 WL 3554919, at *8.

[20] Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 366 (3d Cir. 2015) ("We decline Volvo's invitation to impose a requirement that all class members possess standing"); Bates, 511 F.3d at 985.