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Spokeo 6 Months Later: An Undeniably Dramatic Impact

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Law360, New York (December 6, 2016, 12:17 PM EST) -- It has been six months since the U.S. Supreme Court's much-anticipated decision in Spokeo Inc. v. Robins[1]. The decision immediately sparked predictions in the class action bar as to the future of statutory damage claims in consumer class actions. And that issue is being vigorously litigated in federal courts throughout the country. This article takes stock of the decision's initial impact and some trends observed to date.

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Briefly, in Spokeo the Supreme Court clarified that "Article III standing requires a concrete injury even in the context of a statutory violation."[2] A plaintiff, for instance, cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury in fact requirement of Article III."[3] While Congress can "identify intangible harms that meet minimum Article III requirements,"[4] it "cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[5] That holding impacts statutory consumer class action cases because a number of federal statutes allow for the recovery of statutory damages even in the absence of actual damages, and these statutory damages provisions are therefore invoked in countless class actions.

With that as background, how has the Supreme Court's decision impacted statutory damages class actions? Since Spokeo, there have been at least 173 decisions interpreting and applying it. Of them, the majority deal with just four statutes — the Fair and Accurate Credit Transaction Act, the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and the Telephone Consumer Protection Act — reflected in the table below. The remaining decisions, categorized below as "other," address a variety of statutes, such as the Truth in Lending Act, the Cable Communications Privacy Act, the Video Privacy Protection Act, the Electronic Funds Transfer Act, the Driver's Privacy Protection Act, and the Real Estate Settlement Procedures Act.

	Standing	No Standing	Totals	Percent Finding Standing
FACTA	4	4	8	50%
FCRA	18	25	43	42%
FDCPA	24	3	27	89%
TCPA	23	6	29	79%
Other	36	30	66	55%
TOTAL	105	68	173	61%

Overall, it appears that a slight majority — about 60 percent — of courts analyzing questions of statutory standing after Spokeo have determined that the plaintiffs alleged a sufficiently "concrete" injury for Article III standing. As described below, how a court rules on a Spokeo challenge to standing may hinge on a number of factors, including the type of statutory claim, where the claim is brought (including whether the relevant circuit court has addressed Spokeo methodology), and the specific allegations of the claimed harm.

Fair and Accurate Credit Transaction Act

Among other things, FACTA prohibits printing more than the last five digits of the debit or credit card number or the expiration date upon any receipt provided to the cardholder at the point of sale.[6] In the last several months, at least eight district court decisions have addressed the effect of Spokeo on claims under FACTA for statutory damages. In four cases, the district court found standing.[7] In four cases, the district court held that plaintiffs lacked standing.[8]

All four cases where the court found standing are pending within the Eleventh Circuit. These courts reasoned that the violation of FACTA, on its own, is sufficient to confer standing because FACTA protects a "substantive" right to receive a receipt with truncated information.[9] Thus, according to these courts, a concrete harm sufficient to confer standing takes place once a receipt is printed and presented to the cardholder with an expiration date or with more than five digits of the card number.[10]

By contrast, those courts finding no standing to assert FACTA claims have held that an offending receipt does not automatically give rise to a concrete harm. Instead, a plaintiff must allege nonspeculative facts showing a resulting injury from the alleged violation, such as identity theft.[11]

Fair Credit Reporting Act

The statute at issue in Spokeo was the FCRA, which imposes certain procedural requirements designed to protect consumer credit information. The Supreme Court held that a plaintiff cannot satisfy the "demands of Article III by alleging a bare procedural violation" of the FCRA because "[a] violation of one of the FCRA's procedural requirements may result in no harm."[12] The Supreme Court provided two examples. While the dissemination of an incorrect zip code may violate the FCRA, the Supreme Court acknowledged that it is "difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm."[13] In addition, the failure to provide notification under the FCRA to a user of certain consumer information may result in no concrete harm, and, thus, no standing, particularly if the information is "accurate."[14]

Some trends have emerged with respect to FCRA cases. For one thing, venue matters. Thus, courts within the Sixth Circuit have frequently declined to find Article III standing — specifically the federal

district courts in Ohio[15] and Missouri.[16] Although the Sixth Circuit — in the single case it has decided under Spokeo — found standing where the plaintiffs alleged that their data had already been stolen.[17]

Likewise, the nature of the alleged FCRA violation may impact a standing determination. For instance, the FCRA provides that an employer may not procure a consumer report unless it first makes a written disclosure "in a document that consists solely of the disclosure[] that a consumer report may be obtained for employment purposes" and gets written authorization from the employee to do so.[18] On at least 13 occasions since Spokeo, courts have found that plaintiffs lack standing to assert claims challenging the format of FCRA disclosure and authorization forms, despite allegations of "privacy" and "informational" injuries.[19] Other courts have found that a lack of standing where the defendant published incorrect information about a consumer, but adhered to FCRA notification requirements and allowed the consumer to challenge the results of the background check.[20] By contrast, a third party hacking into a defendant's computer systems and stealing personal data has also been found to give rise to a sufficiently concrete injury, perhaps due to more plausible allegations of the potential for identity theft .[21]

Fair Debt Collection Practices Act

At least 27 decisions have addressed the meaning of Spokeo in cases brought under the FDCPA. The statute imposes certain notice, timing and other requirements on debt collectors, aimed at protecting consumers from abusive debt collection practices. Many of the cases found plaintiffs asserting claims under the FDCPA that successfully alleged standing,[22] with a number of them following the Eleventh Circuit's nonprecedential decision in Church v. Accretive Health Inc.[23]

In Church, the Eleventh Circuit held that a plaintiff who received a debt collection letter without the disclosures required by the FDCPA alleged standing under Spokeo, even though that plaintiff did not claim any actual damages. In its nonprecedential opinion, the Eleventh Circuit reasoned that under the facts of that case, the failure to receive the disclosures required by the FDCPA constituted a "concrete injury."[24] However, at least three district courts applying Spokeo outside the Eleventh Circuit have found a lack of standing in the FDCPA context, determining that the allegations in each instance involved bare procedural violations — minor inaccuracies and the failure to include certain informational disclosures in the notice letters[25] — that did not give rise to a concrete injury.

Telephone Consumer Protection Act

The impact of Spokeo has also been considered in a number of cases involving the TCPA — one of the most litigated privacy-related statutes of the last decade. The TCPA regulates forms of marketing to fax machines and telephones, including text messages, without consent of the recipient.[26] Of the 29 federal district court decisions reviewed, 23 found a concrete injury under Article III.[27] In those cases, the plaintiffs frequently alleged that they received repeated communications, that the defendants did not stop when asked, and the that the communications were costly and inconvenient.[28]

Courts finding a lack of standing also have characterized claims of unsolicited calls under the TCPA as going directly to the privacy-related concern addressed by Congress in enacting the statute.[29] In contrast, several courts have dismissed TCPA cases for lack of standing where the alleged violations appear minimal, such as a single call[30] or inclusion of a single line of advertising in otherwise permissible faxes.[31]

Other Statutory Claims

There are at least 66 decisions involving Spokeo challenges to standing in cases related to other federal and state statutes. The results here vary, too. Some examples include the Seventh Circuit's decision finding standing in a RESPA case alleging failure to inform borrowers of certain information. [32] Despite its decision, the Seventh Circuit cautioned that "alleging an injury for purposes of standing is not the same as submitting adequate evidence of injury under the statute."[33]

In a CCPA putative class action, the Eighth Circuit held that the plaintiff lacked standing because the plaintiff did not allege that the defendant used his information in any way or that any material risk of harm from defendant's retention existed.[34]

Conclusion

Overall, the six months of decisions interpreting Spokeo demonstrate that the Supreme Court's decision has impacted a wide range of litigation in federal courts. It has affected cases brought in federal court not just under the FCRA but under many other federal and state laws as well. The court's conclusion that the mere invocation of a statutory right created by Congress is not sufficient, by itself, to create Article III standing has provided an important tool for defendants — and a hurdle for plaintiffs — asserting statutory claims in federal court.

The cases also make clear that trial courts have reached different results in determining whether an injury is sufficiently "concrete" to satisfy the injury-in-fact requirement for Article III standing. Many of the Spokeo standing challenges to particular statutory claims ultimately will need to be resolved by the circuit courts. Nonetheless, while the standing analysis required by Spokeo will continue to be litigated for the foreseeable future, the dramatic impact of the decision on the American legal landscape is undeniable

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[1] 136 S. Ct. 1540 (2016), as revised (May 24, 2016).

[2] Id. at 1549.

[3] Id.

[4] Id. at 1549.

[5] Id. at 1548.

[6] 15 U.S.C.A. § 1681c(g).

[7] See Flaum v. Doctor's Associates Inc., No. 16-61198-CIV, 2016 WL 7015823 (S.D. Fla. Aug. 29, 2016); Wood v. J Choo USA, No. 15-cv-81487, 2016 WL 4249953 (S.D. Fla. Aug. 11, 2016); Guarisma v. Microsoft, No. 15-cv-24326, 2016 WL 4017196 (S.D. Fla. July 26, 2016); Altman v. White House Black Mkt. Inc., No. 15-cv-2451, 2016 WL 3946780 (N.D. Ga. July 13, 2016).

[8] See Stelmachers v. Verifone Sys. Inc., 5:14-cv-04912-EJD, 2016 WL 6835084, at *4 (N.D. Cal. Nov. 21, 2016); Kamal v. J. Crew Grp. Inc., No. 2:15-0190 (WJM), 2016 WL 6133827, at *3 (D.N.J. Oct. 20, 2016); Thompson v. Rally House of Kansas City et al., 15-cv-00886-GAF, slip op., at *9 (W.D. Mo. Oct. 6, 2016); Noble v. Nevada Checker CAB Corp., 2:15-cv-02322-RCJ-VCF, 2016 WL 4432685, at *3 (D. Nev. Aug. 19, 2016).

[9] See, e.g., Wood, 2016 WL 4249953, at *5-6.

[10] Id.

[11] See, e.g., Stelmachers, 2016 WL 6835084, at *4.

[12] Spokeo, 136 S.Ct. at 1550 (emphasis added).

[13] Id.

[14] Id.

[15] See, e.g., Kevin Schartel, et al., v. One Source Tech. LLC, No. 1:15 CV 1434, 2016 WL 6024558 (N.D. Ohio Oct. 14, 2016); Disalvo v. Intellicorp Records Inc., No. 1:16 cv 1697, 2016 WL 5405258 (N.D. Ohio Sept. 27, 2016); Smith v. The Ohio State Univ., No. 2:15-CV-3030, 2016 WL 3182675 (S.D. Ohio, June 8, 2016).

[16] Detter v. KeyBank NA, No.16-00498-CV-W-ODS, 2016 WL 6699283 (W.D. Mo. Nov. 14, 2016); Boergert v. Kelly Services Inc., No. 02:15-cv-04185-NKL, 2016 WL 6693104 (W.D. Mo. Nov. 14, 2016); Timothy Woods, Individually & as a representative of the class, v. Caremark LLC, No. 4:15-CV-00535-SRB, 2016 WL 6908108, at *2 (W.D. Mo. July 28, 2016)

[17] Galaria v. National Mutual Insurance Co., Nos. 15-3386, 3387, 2016 WL 4728027 (6th Cir. Sept. 12, 2016).

[18] 15 U.S.C. § 1681b(b)(2)(A)(i)-(ii).

[19] Case v. Hertz Corp., No. 15-CV-02707-BLF, 2016 WL 6835086, at *3-5 (N.D. Cal. Nov. 21, 2016); Boergert v. Kelly Servs. Inc., No. 2:15-CV-04185-NKL, 2016 WL 6693104, at *3-4 (W.D. Mo. Nov. 14,

2016); Kirchner v. First Advantage Background Servs. Corp., No. CV 2:14-1437 WBS EFB, 2016 WL 6766944, at *2-3 (E.D. Cal. Nov. 14, 2016); Gunther v. DSW Inc., No. 15-C-1461, 2016 WL 6537975, at *5 (E.D. Wis. Nov. 3, 2016); Tyus v. United States Postal Serv., No. 15-CV-1467, 2016 WL 6108942, at *6 (E.D. Wis. Oct. 19, 2016); Hopkins v. Staffing Network Holdings LLC, No. 16 C 7907, 2016 WL 6462095, at *4 (N.D. Ill. Oct. 18, 2016); Shoots v. iQor Holdings US Inc., No. 15-CV-563, 2016 WL 6090723, at *8 (D. Minn. Oct. 18, 2016); Berrelez v. Pontoon Sols. Inc., No. 15-cv-1898-CAS(FFMx), 2016 WL 5947221, at *5 (C.D. Cal. Oct. 13, 2016); Nokchan v. Lyft Inc., No. 15-cv-03008, 2016 WL 5815287, at *1 (N.D. Cal. Oct. 5, 2016); Landrum v. Blackbird Enterprises LLC, No. CV H-16-0374, 2016 WL 6075446, at *4 (S.D. Tex. Oct. 3, 2016); Fisher v. Enter. Holdings Inc., No. 4:15CV00372 AGF, 2016 WL 4665899, at *1 (E.D. Mo. Sept. 7, 2016); Groshek v. Time Warner Cable Inc., No. 15-c-157, 2016 WL 4203506, at *2 (E.D. Wis. Aug. 9, 2016); Smith v. Ohio State Univ., No. 2:15-CA-3030, 2016 WL 3182675, at *4 (S.D. Ohio June 8, 2016).

[20] Alston v. Experian Info. Solutions Inc., No. PJM 15-3558, 2016 WL 4555056 (D. Md. Aug. 31, 2016); See also Patel v. Trans Union LLC, No. 14-CV-00522-LB, 2016 WL 6143191 (N.D. Cal. Oct. 21, 2016).

[21] In re: Community Health Systems Inc., 15-CV-222-KOB, 2016 WL 4732630; Galaria v. National Mutual Insurance Co., Nos. 15-3386, 3387, 2016 WL 4728027 (6th Cir. Sept. 12, 2016).

[22] Hill v. Accounts Receivable Servs. LLC, No. CV 16-219 (DWF/BRT), 2016 WL 6462119 (D. Minn. Oct. 31, 2016); Hayes v. Convergent Healthcare Recoveries Inc., No. 14-1467, 2016 WL 5867818 (C.D. Ill. Oct. 7, 2016); Macy v. GC Services Limited Partnership, No. 3:15-cv-819, 2016 WL 5661525 (W.D. Ky. Sept. 29, 2016); Saenz v. Buckeye Check Cashing of Illinois, No. 16 CV 6052, 2016 WL 5080747 (N.D. Ill. Sept. 20, 2016); Linehan v. Allianceone Receivables Mgm't Inc., C15-1012-JCC, 2015 WL 4765839 (W.D. Wash. Sept. 13, 2016); Sayles v. Advanced Recovery Sys. Inc., No. 3:14-CV-911-CWR-FKB, 2016 WL 4522822 (S.D. Miss. Aug. 26, 2016); Hall v. Global Credit & Collection Corp., No. 8:16-cv-1278-T-30AEP, 2016 WL 4441868 (M.D. Fla. Aug. 23, 2016); Mogg v. Jacobs, No. 15-CV-1142-JPG-DGW, 2016 WL 4395899 (S.D. Ill. Aug. 18, 2016); Prindle v. Carrington Mortg. Servs. LLC, No. 3:13-CV-1349-J-34PDB, 2016 WL 4369424 (M.D. Fla. Aug. 16, 2016); Quinn v. Specialized Loan Servicing LLC, No. 16-C-2021, 2016 WL 4264967 (N.D. Ill. Aug. 11, 2016); Daubert v. NRA Group LLC, No. 3:15-CV-00718, 2016 WL 4245560 (M.D. Pa. Aug. 11, 2016); Yeager v. Ocwen Loan Servicing LLC, No. 1:14-CV-117-MHT-PWG, 2016 U.S. Dist. LEXIS 105007 (M.D. Ala. Aug. 8, 2016); Irvine v. I.C. Systems, No. 14-CV-01329-PAB-KMT, 2016 WL 4196812 (D. Colo. July 29, 2016); Dickens v. GC Servs. Ltd. P'ship, No. 8:16-CV-803-T-30TGW, 2016 WL 3917530 (M.D. Fla. July 20, 2016); Lane v. Bayview Loan Servicing LLC, No. 15-C-10446, 2016 WL 3671467 (N.D. Ill. July 11, 2016).

[23] Church v. Accretive Health Inc., No. 15-15708, 2016 WL 3611543 (11th Cir. July 6, 2016).

[24] Id. at *3. We note that a more recent precedential Eleventh Circuit decision has stated that the "relevant question" for standing under Spokeo is not whether a statue has been violated or whether the legislature intended to grant a "substantive" right, but whether the plaintiff suffers "some harm or risk of harm from the statutory violation to invoke the jurisdiction of a federal court." Nicklaw v. Citimortgage Inc., 839 F.3d 998, 1102-3 (11th Cir. 2016).

[25] Jackson v. Abendroth v. Russell PC, No. 4:16-cv-00113, 2016 WL 4942074 (S.D. Iowa Sept. 12, 2016); Perry v. Columbia Recovery Grp. LLC, No. C16-0191JLR, 2016 WL 6094821 (W.D. Wash. Oct. 19, 2016); Provo v. Rady Children's Hospital - San Diego, No. 15cv00081-JM(BGS), 2016 WL 4625556 (S.D. Cal. Sept. 6, 2016).

[26] 47 U.S.C.A. § 227(b)(1).

[27] Manuel v. NRA Group LLC, 1:15-CV-274, 2016 WL 6892377 (M.D. Pa. Nov. 22, 2016); JWD Auto. Inc. v. DJM Advisory Group LLC, 2:15-CV-793-FtM-29MRM, 2016 WL 6835986 (M.D. Fla. Nov. 21, 2016); Holderread v. Ford Motor Credit Co. LLC, No. 4:16-CV-00222, 2016 WL 6248707 (E.D. Tex. Oct. 26, 2016); Abramson v. CWS Apartment Homes LLC, No. CV 16-426, 2016 WL 6236370 (W.D. Pa. Oct. 24, 2016); LaVigne v. First Cmty. Bancshares Inc., No. 1:15-CV-00934-WJ-LF, 2016 WL 6305992 (D.N.M. Oct. 19, 2016); Griffith v. ContextMedia Inc., No. 16 C 2900, 2016 WL 6092634 (N.D. Ill. Oct. 19, 2016); Espejo v. Santander Consumer USA Inc., No. 11 C 8987, 2016 WL 6037625, at *1 (N.D. Ill. Oct. 14, 2016); Dolemba v. Illinois Farmers Insurance Co., No. 15 C 463, 2016 WL 5720377 (N.D. Ill. Sept. 20, 2016); Brodsky v. Humanadental Ins. Co., No. 1:10-cv-03233, 2016 WL 5476233 (N.D. Ill. Sept. 29, 2016); Physicians Healthsource Inc. v. A-S Medication Solutions LLC, No. 12-cv-05105, 2016 WL 5390952 (N.D. Ill. Sept. 27, 2016); Juarez v. Citibank NA, No. 16-CV-01984-WHO, 2016 WL 4547914 (N.D. Cal. Sept. 1, 2016); Cabiness v. Educ. Fin. Sols. LLC, No. 16-CV-01109-JST, 2016 WL 5791411, at *5 (N.D. Cal. Sept. 1, 2016); Fauley v. Drug Depot Inc., No. 15-C-10735, 2016 WL 4591831 (N.D. Ill. Aug. 31, 2016); Hewlett v. Consolidated World Travel Inc., No. 2:16-713 WBS AC, 2016 WL 4466536 (E.D. Cal. Aug. 23, 2016); Aranda v. Caribbean Cruise Line Inc., No. 12-C-4069, 2016 WL 4439935 (N.D. Ill. Aug. 23, 2016); A.D. v. Credit One Bank NA, No. 14-C-10106, 2016 WL 4417077 (N.D. Ill. Aug. 29, 2016); Krakauer v. Dish Network LLC, 168 F. Supp. 3d 843, 844 (M.D.N.C. 2016); Ung v. Universal Acceptance Corp., No. 15-127 (RHK/FLN), 2016 WL 4132244 (D. Minn. Aug. 3, 2016); Cour v. Life360 Inc., No. 16-CV_00805-THE, 2016 WL 4039279 (N.D. Cal. July 28, 2016); Caudill v. Wells Fargo Home Mortgage Inc., No. 5:16-066-DCR, 2016 WL 3820195 (E.D. Ky. July 11, 2016); Mey v. Got Warranty Inc., No. 5:15-CV-101, 2016 WL 3645195 (N.D.W.V. June 30, 2016); Rogers v. Capital One Bank (USA) NA, No. 1:15-CV-4016-TWT (N.D. Ga. June 3, 3016); Booth v. Appstack Inc., No. C13-1533JLR, 2016 WL 3030256 (W.D. Wash. May 25, 2016).

[28] Juarez v. Citibank NA, No. 16-CV-01984-WHO, 2016 WL 4547914, at *3 (N.D. Cal. Sept. 1, 2016) (plaintiff alleged he "repeatedly requested that defendant stop calling, informing defendant that he was not the individual they were attempting to contact," but continued to receive calls).

[29] Dolemba v. Illinois Farmers Insurance Co., No. 15 C 463, 2016 WL 5720377 (N.D. Ill. Sept. 30, 2016) (analyzing the TCPA and holding: "[The TCPA] establishes substantive, not procedural, rights to be free from telemarketing calls consumers have not consented to receive. Both history and the judgment of Congress suggest that violation of this substantive right is sufficient to constitute a concrete, de facto injury.").

[30] Smith v. Aitima Med. Equip. Inc., No. 16-CV-00339-AB (DTBx), 2016 WL 4618780 (E.D. Cal. July 29, 2016).

[31] Supply Pro Sorbents LLC v. Ringcentral Inc., No. C 16-02113 JSW, 2016 WL 5870111 (N.D. Cal. Oct. 7, 2016).

[32] Diedrich v. Ocwen Loan Servicing LLC, No. 15-2573, 2016 WL 5852453 (7th Cir. Oct. 6, 2016).

[33] Id. at *5.

[34] Braitberg v. Charter Comms. Inc., No. 14-1737, 2016 WL 4698283 (8th Cir. Sept. 8, 2016).