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All the Injury Required? How the Supreme Court's *Spokeo* Decision May Alter the Road for Privacy Litigants

By Colin R. Jennings and Philip M. Oliss*

This article explains a recent U.S. Supreme Court ruling that signals stricter judicial scrutiny for individual and class action plaintiffs in federal privacy cases arising under laws like the Fair Credit Reporting Act, which provide a private right of action and statutory damages without requiring any actual injury.

The U.S. Supreme Court recently issued an opinion in *Spokeo, Inc. v. Robins*, a Fair Credit Reporting Act ("FCRA") case, where the Court considered the nature of the injury required for a plaintiff to sue in federal court.[1] For years, courts throughout the country have struggled with whether simply alleging the violation of a statute that creates a private right of action is all the injury required to meet the constitutional requirements of the standing doctrine. The ruling in *Spokeo* signals stricter judicial scrutiny for individual and class action plaintiffs in federal privacy cases arising under laws like the FCRA, which provide a private right of action and statutory damages without requiring any actual injury. Such statutes include the Telephone Consumer Protection Act ("TCPA"), consumer protection and deceptive trade practices acts, and the Wiretap Act.[2] *Spokeo* makes clear that, irrespective of whether a plaintiff has stated a technical statutory violation, he or she must further affirmatively plead particularized and concrete injury to establish Article III standing.

THE PRIVACY LITIGATION LANDSCAPE BEFORE *SPOKEO*

As technology has advanced in recent years and become an integral part of the daily lives of millions of people, so too have concerns over the protection of personal data that is input into, and generated by, and which also sustains, that technology. With increasing frequency, these concerns have given rise to litigation. The data privacy landscape is now dotted with consumers battling companies like Home Depot and

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[1] No. 13-1339, 578 U. S. ____ (2016).

[2] Cases arising under a number of other federal statutes are likely implicated by the *Spokeo* decision. Those statutes include Video Privacy Protection Act, Cable Communications Privacy Act, Truth in Lending Act, and the Fair Debt Collection Practices Act.

Target over alleged failures to safeguard their personal information, and lawsuits over the alleged use of consumer information without consent by technology mainstays such as Google, Facebook, and Hulu.

Typically, plaintiffs, either individual or acting as a class, have sued under various federal and state privacy laws, like the FCRA, TCPA, and Wiretap Act. In response to such claims, defendants first tend to assert that the statutory violation did not cause the plaintiff to suffer an injury (for example, where the defendant sold advertising targeted to consumers based on their personal information). On this basis, defendants move to dismiss for lack of standing under Article III of the Constitution. Article III standing requires that a plaintiff experience an "injury-in-fact" to maintain his or her suit. To establish such an 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] Defendants may aver that, in the case of technical statutory violations especially, the plaintiffs' injuries are speculative (or non-existent), not concrete, and as such, their claims must fail. Plaintiffs respond that the violation of the statute in and of itself is all the injury they constitutionally require. Before *Spokeo*, courts throughout the country reached different conclusions about who was right.

Courts in the U.S. Courts of Appeals for the Sixth, Seventh, Eighth, Ninth, Tenth, and District of Columbia Circuits have concluded that a plaintiff need only allege the violation of a statutory right, if the statute also creates a private right of action, for the plaintiff to have Article III standing. For example, in *In re Facebook Privacy Litigation*, one of plaintiff's claims was that Facebook had transmitted user information in violation of the Wiretap Act, which creates a right of action for any person whose "wire, oral, or electronic communication is intercepted, disclosed, or intentionally used" in violation of the Act. The district court denied Facebook's motion to dismiss, reasoning that "Plaintiffs allege a violation of their statutory rights under the Wiretap Act" and that as such the plaintiffs had "alleged facts sufficient to establish that they have suffered the injury required for standing under Article III."[4] Likewise, in *In re Hulu Privacy Litigation*, a district court concluded that the plaintiffs had sufficiently established the required injury-in-fact for standing where the plaintiffs had simply alleged a wrongful disclosure of personal information in violation of the Video Privacy Protection Act ("VPPA") without additional injury, reasoning that the violation of a statutorily created right was sufficient to satisfy Article III's injury-in-fact standard.[5]

On the other hand, courts in the Second, Third, and Fourth Circuits have held the opposite – that allegations of statutory violations do not "in and of themselves"

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[3] *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992).

[4] *In re Facebook Privacy Litigation*, 791 F. Supp. 2d 705, 712 (N.D. Cal. 2011), *aff'd sub nom In re Zynga Privacy Litig.*, 750 F.3d 1098 (9th Cir. 2014).

[5] *In re Hulu Privacy Litig.*, No. C 11-03764 LB, 2012 U.S. Dist. LEXIS 80601, at *20 (N.D. Cal. June 11, 2012).

constitute an injury-in-fact sufficient to meet constitutional requirements. For example, in the context of an ERISA[6] case, the Fourth Circuit opined that the argument "that the deprivation of [the plaintiffs'] statutory right is *sufficient* to constitute an injury-in-fact for Article III standing . . . conflates statutory standing with constitutional standing."[7] Likewise, the district court in *Sterk v. Best Buy Stores*, in contrast to the court in *In re Hulu Privacy Litigation*, found that a plaintiff had to plead an injury beyond a statutory violation of the VPPA to meet the standing requirements of Article III.[8] Other circuit and district courts have expressed a similar view.[9]

The divergent results of these decisions have left data privacy litigants (and their counsel) wondering whether Congress' creation of a private right of action itself confers constitutional standing on plaintiffs. And in those jurisdictions where constitutional standing has been found based on alleged facial statutory violations alone, defendants, who may provide services to millions of users and face potentially astronomical statutory damages if they are found liable, may feel compelled to settle class action litigation even where no class member could demonstrate any actual injury.

Spokeo clearly indicates that lower courts may not necessarily find constitutional standing based solely on the existence of a facial statutory violation alone, but must fully analyze whether a plaintiff has alleged an injury that is both individualized *and* concrete. The Court acknowledged that, in some circumstances, an "intangible" injury-in-fact will be sufficient to confer standing, and the contours of what constitutes a concrete injury will be litigated for some time to come. For now, however, the *Spokeo* decision provides welcome guidance on future standing challenges for individual and class action privacy litigants.

THE *SPOKEO* DECISION

Spokeo, a "people search engine," operates a commercial website, which aggregates personal information like marital status, age, occupation and educational levels and makes this information available to the public. Thomas Robins, a Virginia resident, contended that Spokeo violated the FCRA when it published inaccurate information about him on its website in "willful" violation of the FCRA. By means not set forth in the complaint, Robins became aware of the inaccurate information in his Spokeo profile, which said that he is married, has children, is in his 50s, has a job, is relatively

[6] The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for most voluntarily established pension and health plans in private industry to provide protection for individuals in these plans.

[7] *David* v. *Alphin*, 704 F.3d 327, 338 (4th Cir. 2013) (emphasis added). Following *David*, district courts in the Fourth Circuit indicated that they thought the particular phrasing of the ERISA statute was determinative on the issue of standing and have reached different results outside of that context.

[8] *Sterk v. Best Buy Stores, L.P.*, No. 11 C 1894, 2012 U.S. Dist. LEXIS 150872, at *16-17 (N.D. Ill. Oct. 17, 2012).

[9] *See e.g., Doe* v. *National Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999).

affluent and holds a graduate degree. None of that information was true. Robins sued Spokeo in a purported class action, alleging that Spokeo's conduct ran afoul of the FCRA's requirement that "consumer reporting agencies" take "reasonable procedures" to ensure the accuracy of consumer credit information reports. Before the Supreme Court, Robins, who was unemployed, argued that this information interfered with his job search as it made him look overqualified for certain positions.

The district court dismissed the case, finding that Robins had failed to allege that he suffered any "actual or imminent harm" as required by Article III and that he consequently lacked the required constitutional standing to sue. On appeal, the Ninth Circuit reversed that decision, finding instead that the violation of a statutory right, there the FCRA, was a sufficient allegation of an injury-in-fact to confer standing on a plaintiff.

In a six-two decision, the Supreme Court vacated and remanded the Ninth Circuit's decision. The Court concluded that the appellate court had failed to consider whether Robins' alleged injury was "concrete" and if the alleged "procedural violations" of the FCRA carried a "degree of risk" sufficient to satisfy that aspect of constitutional standing.

The Supreme Court found that Ninth Circuit's opinion had "elided" any consideration of whether Robins' injury was concrete. The Ninth Circuit had essentially concluded that Robins' injury was "concrete" just because it was "particularized" to him, as Spokeo had actually put up inaccurate information about his life. The Supreme Court reemphasized that standing requires a showing of both "concrete" *and* "particularized" harm, which is a "constitutional requirement" that Congress "cannot erase."

The majority opinion returned the case to the Ninth Circuit for the Court to consider both elements of standing. In doing so, the Court emphasized that no longer should a bare statutory violation alone be enough for standing because some statutory violations will cause no real harm to the plaintiff at all. In the context of *Spokeo*, which involved the dissemination of inaccurate information, the Court offered the example of an "incorrect zip code," explaining that it was difficult to imagine how the dissemination of an inaccurate zip code "could work any concrete harm" for a plaintiff.

NAVIGATING "CONCRETE" BARRIERS IN PRIVACY CASES AFTER *SPOKEO*

The full meaning and impact of *Spokeo* remains to be seen. Courts throughout the country have already begun to analyze it and are reaching different conclusions.[10] This

[10] *Hochendoner v. Genzyme Corp.*, Nos. 15-1446, 15-1447, 2016 U.S. App. LEXIS 9438, at *20 (1st Cir. May 23, 2016) (upholding dismissal of claims by plaintiffs who had not pled a particular injury but vacating dismissal of plaintiff who had pled an injury); *Errington v. Time Warner Cable Inc.*, No. 2:15-CV-02196 RSWL (DTB), 2016 U.S. Dist. LEXIS 66317, at *7 (C.D. Cal. May 18, 2016) (narrowly construing *Spokeo* to have declined to definitely rule on the issue of whether a statutory violation was enough for Article III standing because it remanded to the Ninth Circuit to determine whether the injury was "concrete").

much is plain: *Spokeo* does clearly signal for privacy litigants that a statutory violation alone is not all that is constitutionally required for standing. This provides helpful guidance for plaintiffs and defendants alike in privacy disputes.

In light of *Spokeo*, defendants should strongly consider challenging a plaintiff's standing where the plaintiff is seeking statutory damages and has not articulated any concrete and particularized harm beyond a technical statutory violation. The Supreme Court's decision clarifies and enforces the constitutional barrier that plaintiffs suing under statutes like the FCRA, TCPA or Wiretap Act must overcome. Rather than merely alleging a statutory violation, plaintiffs must demonstrate some real injury flowing from it. As such, *Spokeo* may work to curtail attorney-driven class actions because a named plaintiff, like Robins, must now sufficiently allege that he or she suffered a "concrete" injury in order to survive a motion to dismiss for lack of Article III jurisdiction. In jurisdictions like the Sixth, Seventh, Eighth, Ninth, Tenth, and DC Circuits, where those allegations were formerly sufficient, this will have a particularly profound impact on individual and class action privacy claims. In any case, plaintiffs' lawyers can no longer fail to set forth facts that demonstrate that the named plaintiff suffered an actual injury in the Complaint.

The Supreme Court has properly recognized the danger of allowing individual plaintiffs who have not suffered a concrete injury to, nevertheless, sue to enforce the law in the abstract. One such danger, of course, is the threat that the rules governing class action litigation would necessarily be relaxed because all class members could more easily be said to have suffered a common injury – which is to say, in the context of mere technical statutory violations – no injury at all. Eliminating the requirement of individual and concrete injury – and replacing it instead with an "injury-in-law" standard – would have thus eased the way for class actions of the least desirable kind. The *Spokeo* decision, while not as broad as some would have hoped, could and should prove to be an effective bulwark against lawyer-driven class action litigation that, in the privacy context and elsewhere, seeks to right no wrong or compensate no injury, but nevertheless, imposes huge risk and expense on defendants. *Spokeo* should work against the misuse of the class action vehicle to enrich plaintiffs' lawyers based on an expensive and due process-challenged game of "gotcha," rather than to redress efficiently actual harm to class members.