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Newsletters

Consumer Financial Services Newsletter - October 2016

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- Courts Are Giving "Standing" Teeth After Spokeo
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- Fourth Circuit Further Develops FDCPA Definition of "Debt Collector" to Include Foreclosure Counsel

Courts Are Giving "Standing" Teeth After *Spokeo*

Since the U.S. Supreme Court ruling in *Spokeo, Inc., v. Robins,* courts have further clarified and interpreted the *Spokeo* decision. Spokeo held that (i) in order to establish Article III standing, a plaintiff must allege an injury-in-fact that is both "concrete and particularized," and (ii) the plaintiff cannot "automatically satisf[y] 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." Courts have begun to give this ruling some force by dismissing claims where plaintiffs fail to show any concrete injury despite alleging a technical statutory violation. However, it appears courts are still hesitant to dismiss claims as they have not granted dismissals where there is a risk of real harm, making clear that a tangible injury is not necessary to have standing.

This month, the U.S. Courts of Appeals for the Eighth and Sixth Circuits became the first circuit courts to analyze Article III standing after the Supreme Court's decision in *Spokeo*. Examination of these recent rulings shed light on the ways in which Article III standing may provide a defense in consumer and privacy cases.

In *Braitberg v. Charter Communications, Inc.* No. 14-1737, 2016WL 4698283, at *1 (8th Cir. Sept. 8, 2016), the Eighth Circuit affirmed dismissal of a claim for violating Cable Communications Policy Act (CCPA). The consumer filed a class action suit against the cable company for violations of the CCPA based on defendant's retention of plaintiff's personally identifiable information. Plaintiff alleged that defendant's retention of personally identifiable information caused harm by invading his federally protected privacy rights. The district court dismissed plaintiff's complaint upon defendant's motion challenging Article III standing. On appeal, the Eighth Circuit, relying on *Spokeo*, affirmed holding that plaintiff's complaint failed to allege injury in fact because his complaint asserted

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a bare procedural violation, divorced from any concrete harm. The Court noted that the consumer had not alleged that the cable company disclosed his information to a third party, that any outside party had accessed the information, or that the company had otherwise used the information in any way.

How are courts applying Spokeo to the TCPA?

In an interesting set of facts involving manufactured claims under the Telephone Consumer Protection Act (TCPA), the United States District Court for the Western District of Pennsylvania recently entered judgment in favor of the defendant for lack of standing. In *Stoops v. Wells Fargo Bank, N.A.,* No. 3:15-cv-00083-KRG, 2016 U.S. Dist. LEXIS 82380 (W.D. Pa. June 24, 2016), the district court concluded that while the consumer had statutory standing, she failed to satisfy the prudential and constitutional standing requirements set forth in *Spokeo*.

The court rejected the consumer's claim that she was "disturbed" by 85 phone calls from defendant bank. The consumer purchased cellular phones and intentionally assigned them to phone numbers from impoverished areas with the hope of receiving debt collection and other calls from creditors attempting to contact the previous owners (i.e. debtors) of the phone numbers, and then filed TCPA suits claiming she was being called without her consent. In moving for summary judgment, defendant bank raised a number of defenses including lack of standing, prior express consent, and assumption of risk. The court concluded that allegations that she received over 20 phone calls did not qualify as an invasion of her privacy interests in such a way that would constitute the necessary injury-in-fact requirement for a finding of Article III standing under *Spokeo.*

Unique to this case was the court's utilization of the plaintiff's remarkably transparent deposition testimony. Plaintiff explained that she quite literally was in the business of bringing TCPA lawsuits for her own profit by purchasing prepaid ("pay-as-you-go") cell phones to manufacture claims against various companies and debt collectors. Plaintiff purchased more than 35 cell phone numbers, which she never used to make calls, intentionally assigned the numbers to ZIP codes from economically depressed areas, such as Lakeland, Florida, where she believed there to be significant consumer debt default, and then simply waited for them to ring. The court held plaintiff did not have standing because she admitted that she bought phones for the purpose of filing TCPA lawsuits, the calls could not be considered a nuisance and invasion of privacy from which Congress intended to protect consumers against. The court further noted she could not manufacture a harm by choosing to make expenditures on minutes that would be used by calls she hoped to receive.

Stoops presents a remarkably clear cut admission and explanation of a plaintiff's methodical manufacturing of TCPA lawsuits, which subjects many entities to potential lawsuits under consumer protection statutes. Prior to *Spokeo*, a claim like the one in *Stoops*, even if clearly manufactured, would have had a much greater chance of proving successful as a violation of the TCPA. However, in two other TCPA cases presenting a more "typical" set of facts, district courts declined to dismiss. In *Booth v. Appstack, Inc.*, No. 13-1533, 2016 U.S. Dist. LEXIS 68886, *16-17 (W.D.Wash. May 25, 2016), although neither party briefed *Spokeo*, the court addressed whether Plaintiff's TCPA allegations predicated upon autodialing constituted a "concrete injury." The Court reasoned that allegations of "wast[ing] time answering or otherwise addressing widespread robocalls" would constitute an injury if proven. Subsequently, in another TCPA class action, *Rogers v. Capital One Bank (USA),* N.A., No. 1:15-cv-4016, 2016 U.S. LEXIS 735605, (N.D. Ga. June 3, 2016), the court concluded that allegations that plaintiffs "suffered particularized injuries because their cell phone lines were unavailable for legitimate use during the unwanted calls" constituted concrete harm.

The aforementioned decisions provide clarity on how courts have begun to interpret and apply *Spokeo* in consumer cases, which often present no facts or evidence of a concrete injury. Many issues still remain to be addressed but we will keep you updated as courts continue to shed light on constitutional standing.

House Supports Update to Telephone Consumer Protection Act

Members of a House subcommittee recently showed support for updating the Telephone Consumer Protection Act (TCPA) to make it easier for businesses to place legitimate telemarketing calls without exposing themselves to lawsuits. During a hearing in late September, the House Energy and Commerce Committee's Communications and Technology Subcommittee examined the impact the TCPA has had on consumers and the legitimate businesses that are trying to contact them.

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"It's been 25 years since Congress passed the TCPA and the world has changed dramatically in that time period. Half of U.S. households are becoming wireless, eliminating land-line phones entirely. It's increasingly clear current law is outdated and in many cases counterproductive. It's time to modernize the current law to reflect the incredible technological changes in our culture." said Subcommittee Chairman Greg Walden. During the hearing, members from both sides of the aisle emphasized the need for our laws to evolve with technology all the while protecting consumer's privacy rights and promoting productivity.

Fourth Circuit Further Develops FDCPA Definition of "Debt Collector" to Include Foreclosure Counsel

McCray v. Federal Home Loan Mortgage Corporation, No. 15-1444, — F.3d —(Oct. 7, 2016)

Key Take Away: Law firms who pursue foreclosure on behalf of others can also be included as "debt collectors" under them FDCPA in connection with their activities in pursuing foreclosure after a borrower defaults.

The United States Court of Appeals for the Fourth Circuit expanded the definition of "debt collector" under the FDCPA to include the law firm retained to pursue foreclosure on behalf of the mortgagee and its members who were substituted as trustees on the borrower's deed of trust. In reaching this conclusion, the Fourth Circuit recognized that "debt collector" generally includes anyone who collects any debt or attempts to collect a debt on behalf of another. Here, the law firm mailed the plaintiff/borrower notices of intent to foreclose and then filed a foreclosure action against the property. According to the Fourth Circuit, even if the firm was pursuing foreclosure on behalf of another, the notices specifically stated foreclosure was being pursued because of one or more missed payments and unless the loan was brought current, foreclosure would proceed. Thus, the notices could be construed as seeking repayment of a debt regulated by the FDCPA bringing the law firm under the FDCPA's definition of "debt collector." In reversing the trial court's dismissal of the claim under Fed. R. Civ. P. 12(b)(6), however, the Fourth Circuit discussed only the issue of whether the firm was a "debt collector," and did not address whether the actions complained of stated a plausible violation under the FDCPA.

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