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Standing In Consumer Finance Cases After *Spokeo*

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The United States Supreme Court's May 16, 2016 decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, may no longer be news, but how lower courts are struggling to understand and apply that decision is. Unfortunately for financial institutions, federal courts are far from uniform in their interpretations of the majority decision, and it is likely that those institutions will continue to be plagued by consumer claims brought by plaintiffs who have suffered no obvious injury yet are seeking to capitalize on statutory damages made available by Congress. The heart of the problem for federal courts lies in the Supreme Court's pronouncement that an injury can be "concrete" yet "intangible," coupled with its reticence to provide any clear guidance on how to recognize such intangible but still concrete harms.

As has been true well before *Spokeo*, in federal courts, constitutional standing to sue requires that the plaintiff allege an "injury-in-fact," which means "an injury that is both 'concrete and particularized.'" *Id.* at 1545 (emphasis original). An injury is particularized if it "affect[s] the plaintiff in a personal and individual way." *Id.* at 1548. To be concrete, the injury "must be 'de facto'; that is, it must actually exist. When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'" *Id.* (citations omitted). Yet, "[c]oncrete is not ... necessarily synonymous with 'tangible.'" *Id.* at 1549. Courts are to look to "history" in resolving disputes over whether intangible harms are nonetheless concrete: "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.*

The *Spokeo* majority acknowledges at the outset of the decision that "[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Id.* at 1547-48 (citation omitted). It is, perhaps, mysterious then that the majority goes on to hold that "the judgment of Congress" plays an "important role[]" in determining whether an intangible injury is nonetheless concrete. *Id.* at 1549. Citing

an earlier decision, the Court held that "Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" *Id.* (citation omitted). Still, though, the Court says: "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies 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." *Id.* A "bare procedural violation" of a statute, "divorced from any concrete harm," cannot confer standing. *Id.* At the same time, "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact." *Id.*

Some commentators have described the ruling in *Spokeo* as "incomprehensible." If a lack of uniformity in interpreting the decision is any evidence, the lower federal courts agree. The difficulty lies in applying the majority's conclusion that a harm can be simultaneously "concrete" yet "intangible," coupled with a warning that "bare procedural harms" do not constitute concrete injury yet also coupled with a holding that procedural harms sometimes do, alone, constitute injury-in-fact. This lack of clarity is proving to be particularly vexing in the context of the types of statutory claims often asserted by consumers against the consumer finance industry. Indeed, courts post-*Spokeo* have relied on *Spokeo* to find both that consumers who were the "victims" of violations of statutory prohibitions but suffered no other harm have no standing and, conversely, that such consumers have standing.

A recent decision of the Southern District of California is an example of the first line of cases. See *Romero v. Department Stores National Bank*, No. 3:15-cv-00193-CAB-MDD, 2016 U.S. Dist. LEXIS 110889 (S.D. Cal. Aug. 5, 2016). That court was presented with a plaintiff who had received debt collection calls on her cellphone, in violation of the Telephone Consumer Protection Act (TCPA). The only injury alleged in the complaint was the statutory violation itself, as well as "lost time, aggravation and distress," which could not be traced to any individual call. The plaintiff argued that, under *Spokeo*, she had alleged enough to establish a concrete injury because her privacy rights had been violated by the unauthorized calls—which was the precise harm Congress sought to vitiate through the TCPA. She relied, in large part, on the theory that actions for breach of privacy existed under the common law, and that a key purpose of TCPA was to codify that common-law claim. The district court disagreed. It held that the fact that plaintiff's personal information was accessed created an injury that was particularized to her, but not one that was concrete, because absent the fact of the "bare procedural violation" of the statute she alleged no additional injury: "This argument relates to the 'particular' component, not the 'concrete' component, of an injury in fact and ignores *Spokeo's* holding that a statutory violation alone does not eliminate the requirement that a plaintiff establish a concrete injury caused by that statutory violation." *Id.* at *9. The court rejected the reasoning of several other district courts who have held to the contrary. Similarly, the Southern District of Ohio concluded in a Fair Credit Reporting Act (FCRA) case that a plaintiff's concession that she did not suffer "concrete **consequential** damage" as a result of an alleged procedural violation of the FCRA was fatal to standing, notwithstanding an allegation that her privacy rights were violated. *Smith v. Ohio State Univ.*, No. 2:15-CV-3030, 2016 U.S. Dist. LEXIS 74612, *11 (S.D. Ohio June 8, 2016) (emphasis added).

Two recent circuit court decisions are along similar lines. In *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511 (D.C. Cir. 2016) the court held that the collection of address information in violation of the District of Columbia's Consumer Identification Information Act did not constitute a concrete injury in the absence of an allegation that plaintiff suffered an injury apart from the collection of the information itself. In like fashion the Eighth Circuit has held that the retention of personally identifiable information in violation of the Cable Communications Policy Act, without more, does not constitute a concrete injury that can confer

standing. *Braitberg v. Charter Communs., Inc.*, 836 F.3d 925 (8th Cir. 2016).

By contrast, two interlocutory decisions from the Eastern District of Virginia have applied *Spokeo* to find standing in FCRA cases. *Thomas v. FTS USA, LLC*, No. 3:13-cv-825-REP, 2016 U.S. Dist. LEXIS 85545 (E.D. Va. June 30, 2016); *Burke v. Federal National Mortgage Assoc.*, No. 3:16-cv-153-HEH, 2016 U.S. Dist. LEXIS 105103 (E.D. Va. August 9, 2016). Both of those cases rely on a decision from the Third Circuit Court of Appeals, decided outside the consumer finance context. See *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262 (3d Cir. 2016). Nickelodeon takes almost the opposite approach than that reflected in *Romero*. The Court considered whether plaintiffs have standing to assert a violation of the Video Privacy Protection Act (VPPA) when they allege that a defendant unlawfully collects information about their on-line video-viewing history through "cookies" and then permits transfer of viewing history to a third party through those cookies. Although the plaintiffs alleged no harm resulting from the disclosure, the Court held that the disclosure itself constituted a *de facto* harm because it violated the prohibition against disclosure. The Court noted that the plaintiffs, who were children, had a privacy interest that was vindicated through the VPPA.

Similar is a decision from the Eleventh Circuit, in which the Court held that a borrower's receipt of a collection letter that lacked disclosures required by the Fair Debt Collections Practices Act (FDCPA) alone constitutes a concrete injury even in the absence of any resulting harm: "[T]hrough the FDCPA, Congress has created a new right—the right to receive the required disclosures in communications governed by the FDCPA—and a new injury—not receiving such disclosures." *Church v. Accretive Health, Inc.*, No. 15-15708, 2016 U.S. App. LEXIS 12414, at *9 (11th Cir. July 6, 2016). *But see Nokchan v. Lyft, Inc.*, No. 15-cv-03008-JCS, 2016 U.S. Dist. LEXIS 138582, at *25-26 (N.D. Cal. Oct. 5, 2016) (expressly refusing to follow *Church* in a FCRA case and holding that a disclosure prohibited by FCRA without more is not sufficient to confer standing).

Unfortunately, *Spokeo* seems not to have answered the question put to the Court: under what circumstances, if at all, is a statutory violation without separate consequential damages itself an injury that is concrete enough to confer Article III standing. The developing split in the circuits and district courts leaves only one certainty: lenders and those who deal with consumers face several years of litigation over this question before the Supreme Court ultimately answers it.