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JUDICIAL DECISIONS

Spokeo's Impact on Data Breach Cases: The Class Action Floodgates Have Not Been Opened, But the Door Has Not Been Locked

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The Supreme Court's highly anticipated decision in *Spokeo, Inc. v. Robins*, 2016 WL 2842447, 578 U.S. ___ (2016) is the latest in a series of federal court decisions addressing the threshold issue of Article III standing. The May 16, 2016 decision has significant implications for data breach cases, which have largely focused on the issue of standing. We analyze this decision and provide insight on what it means for the future of data breach class actions, including a discussion of the aftermath of some cases in which parties have already attempted to apply its reasoning.

See also "*When Do Consumers Have Standing to Sue Over Data Breaches?*" (May 11, 2016).

Establishing Standing

The Supreme Court has deep-rooted rules to determine if a plaintiff has the standing to sue under Article III of the United States Constitution. As the Court declared in *Spokeo*, "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. The doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood." 2016 WL 2842447, at *6.

Specifically, plaintiffs seeking standing must establish three elements: "(1) an injury in fact; (2) a sufficient causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision." (Citations and internal quotation marks omitted). *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014).

See also "*Making Sense of Conflicting Standing Decisions in Data Breach Cases*" (Mar. 30, 2016).

The Spokeo Decision

The Alleged Facts

In *Spokeo*, the plaintiff, Robins, was looking for a job. A "people search engine" operated by Spokeo incorrectly reported that Robins was married, had children, was in his 50s, was currently employed, was relatively affluent and had a graduate degree. All of these facts, Robins alleged, were not only false, but they made him a less desirable candidate for many of the jobs he was hoping to find.

Was There an Injury in Fact?

According to the Supreme Court, the "injury in fact" component of the standing analysis, has two subparts:

1) the plaintiff's injury is particularized; and
2) the injury is sufficiently "concrete."

The Court determined that the Ninth Circuit failed to consider the second aspect of the analysis, and remanded the case to the Circuit Court for that determination. "Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be 'concrete.' Under the Ninth Circuit's analysis, however, that independent requirement was elided." *Spokeo*, 2016 WL 2842447, at *8.

Because the Court did not decide whether the injury was sufficiently concrete, *Spokeo* is unlikely to resolve the circuit split on standing in data breach cases. This however, will not prevent defendants opposing standing from citing *Spokeo* for the absolute proposition that there is no injury in fact – and therefore no Article III jurisdiction – unless the plaintiff's injury is "concrete." Plaintiffs, on the other hand, are likely to quote *Spokeo*'s further explanation: "'Concrete' is not,

however, necessarily synonymous with 'tangible'" and that "[t]his does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness." *Spokeo*, 2016 WL 2842447, at *7, 8(emphasis added) (citing Clapper, 133 S.Ct. 1138).

The dissent's analysis might also suggest how *Spokeo*, a case brought under the Fair Credit Reporting Act, will be applied in data breach cases grappling with the standing issue. The concrete harm suffered by Robins, according to Justice Ginsburg, is to his prospects; i.e., something that seems to look toward future occurrences. So too, a data breach victim may argue that the prospect of his data getting misused has increased, causing him concrete harm.

Likely Outcome on Remand

On remand, the Ninth Circuit likely will find standing and concreteness – and the court may even quote Justice Ginsburg's dissent, which stated that "Robins' complaint already conveys concretely [that] Spokeo's misinformation 'cause[s] actual harm to [his] employment prospects.'" *Id.* at *16.

Justice Ginsburg agreed with Robins that Spokeo's representations concretely injured his employment prospects by "ma[king] him appear overqualified for jobs he might have gained, expectant of a higher salary than employers would be willing to pay, and less mobile because of family responsibilities." *Id.* at *14 (Ginsburg, J., dissenting).

Statutory Violations Will Not Preclude All Class Actions

The *Spokeo* case had the potential of establishing a statutory violation as a basis for standing based solely on the violation of the statute. Had the Court so held, we could have expected to see an avalanche of statutory class actions.

But the Court's ruling in *Spokeo*, like its prior ruling in Clapper, is far more nuanced. The Court explained that in premising a complaint on a statutory violation, plaintiffs' standing will be determined based on whether they are seeking to redress a harm to the public at large or harm to themselves.

While *Spokeo* may preclude class actions based merely on hypertechnical statutory violations where there has been no real harm, it will not preclude class actions where the harm is real. Writing for the Court, Justice Alito used the example of an incorrect zip code as a harmless typographical error that would not give rise to concrete harm. In remanding the case, the Court expressly noted, "We take no position as to whether the Ninth Circuit's ultimate conclusion – that Robins adequately alleged an injury in fact – was correct." *Spokeo*, 2016 WL 2842447, at *8.

Aftermath of the Spokeo Decision

Almost as soon as the *Spokeo* decision was announced, litigants pounced. As made clear from the arguments presented in multiple cases, we can predict overstatements of the import of *Spokeo*. Plaintiffs will characterize it as opening the floodgates and defendants will claim that it slammed the door shut.

Letter to Court on Pending Motion to Dismiss

On May 16, 2016, the same day on which the *Spokeo* decision was issued, counsel for the plaintiff in *Boelter v. Advance Magazine Publishers, Inc.*, No. 15-cv-05671-NRB (S.D.N.Y.) wrote a letter to Judge Buchwald to bring the *Spokeo* decision to the court's attention on a pending motion to dismiss. Counsel, quoting *Spokeo*, stated: "the violation of a procedural right granted can be sufficient in some circumstances to constitute injury in fact."

The May 18, 2016, letter response filed by the defendant in Boelter, stated "contrary to what Plaintiff asserts in her letter, *Spokeo*'s relevance is to confirm, once and for all, that Plaintiff cannot establish the injury in fact required for Article III standing." The response further declared that "Plaintiff avoids what the Supreme Court actually

had to say about those concepts – and why the opinion lends no support to, but instead forecloses, her attempt to establish injury in fact. . . ."

While the defendant may prevail based on the facts in Boelter, no one should assume that *Spokeo* "once and for all" "forecloses" claims such as those of plaintiffs like Robins.

Motion to Lift Stay

Similarly, on May 17, 2016, the plaintiff in *Lopez v. Miami-Dade County*, No. 1:15-cv-22943-MGC (S.D. Fla.) filed a motion to lift a stay and stated that in *Spokeo* "every justice agreed, consistent with prior precedent, that consumers can bring claims for purely statutory damages where the defendant must pay a fixed sum, even if the harm is difficult to measure, and even if the consumer has not lost money or suffered a personal injury." Motion to Lift Stay and Notice of Decision in *Spokeo v. Robins* at 2, *id.*

But, the *Spokeo* Court did not hold that every consumer has standing to bring a claim "even if the consumer has not lost money or suffered a personal injury." None of the justices went that far. The Court explained: "the power of the Federal Judiciary may not be permitted to intrude upon the powers given to the other branches." *Spokeo*, 2016 WL 2842447, at *5. Respecting the Separation of Powers, Congress cannot legislate standing:

> Injury in fact is a constitutional requirement, and "[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."
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> * * *
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> 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. Article III standing requires a concrete injury even in the context of a statutory violation.

Id. at *6, 7.

Removal Petition on Standing

In a decision dated May 18, 2016, the federal court in *Khan v. Children's Nat'l Health Sys.*, No. 8:15-cv-02125-TDC (D. Md. May 19, 2016) addressed the issue of standing and the impact of a removal to federal court. In *Khan*, the court chronicled the split in the circuits regarding Article III standing in data breach cases, but harmonized the conflicting results: "Although these courts reached conflicting results, the difference appears to arise not from the application of a different legal standard, but rather from crucial distinctions in the underlying facts." *Id.* at 8. The court said:

> [I]n the data breach context, plaintiffs have properly alleged an injury in fact arising from increased risk of identity theft if they put forth facts that provide either (1) actual examples of the use of the fruits of the data breach for identity theft, even if involving other victims; or (2) a clear indication that the data breach was for the purpose of using the plaintiffs' personal data to engage in identity fraud.

Khan, No. 8:15-cv-02125, at 11. The court concluded that "Khan's allegations fall short." *Id.*

The final argument addressed in *Khan* dealt with *Spokeo* in the context of state law statutory claims. The court held that a state statute – or state common law – cannot create Article III jurisdiction:

> Finally, Khan contends that the violations of state statutes and common law alleged in the Complaint establish standing. Khan conflates the question whether she has Article III standing to pursue that cause of action in federal court.
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> * * *
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> Here, where Khan alleges violations of state law, she advances no authority for the proposition that a state legislature or court, through a state statute or cause of action, can manufacture Article III standing for a litigant who has not suffered a concrete injury.

(Citations omitted). *Id.* at 14-15.

Significantly, the *Khan* court refused to dismiss the case even though it found that it, as a federal court, lacked Article III jurisdiction. Instead, it held that the plain language of 28 U.S.C. § 1447(c) required it to remand the case to state court. *Id.* at 15-16. It will be interesting to see how the Article III issue is addressed in future removal petitions.

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