



## FEDERAL COURTS FOLLOW TWO APPROACHES POST-SPOKEO WHEN ANALYZING STANDING

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Last term, in *Spokeo, Inc. v. Robins*,<sup>1</sup> the United States Supreme Court issued a much-anticipated opinion on Article III standing. The Court reiterated that to establish standing at the pleading stage, a plaintiff must allege an injury-in-fact that is both particularized *and* concrete. In other words, a plaintiff bringing suit upon an alleged statutory violation may not establish standing by merely alleging “a bare procedural violation, divorced from any concrete harm.”<sup>2</sup>

Much has been written about *Spokeo* in the intervening months. Some members of the plaintiffs’ bar have lauded the decision as purportedly protecting consumer rights; some members of the defense bar have suggested *Spokeo* may signal the end of statutory class actions. Yet, to date, courts have not taken a uniform, bright-line approach in applying *Spokeo* to civil litigation asserting statutory causes of action, including those styled as putative class actions. Even still, courts have begun to develop two apparent schools of thought on how to analyze standing under *Spokeo*, resulting in increasingly divided case law across the country.

Under one approach, courts analyze the statute at issue and decide whether it creates a right that, if violated, effectively constitutes a *per se* Article III injury. Under the second approach, regardless of the statute, courts look to the facts alleged by the plaintiff and determine whether those facts demonstrate concrete harm, that is “actual or imminent,” “fairly traceable to the challenged action,” and “redressable by a favorable ruling.”<sup>3</sup>

Which approach a court follows makes a difference in the plaintiff’s ability to adequately plead standing. As discussed below, decisions applying the “statutory” approach treat *Spokeo* as presenting a low bar to the plaintiff. These courts tend to view the statutes at issue as creating an automatic injury

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<sup>1</sup> --- U.S. ---, 136 S. Ct. 1540 (2016).

<sup>2</sup> *Id.* at 1549.

<sup>3</sup> See *Lujan v. Defenders of Wildlife*, 504 US 555, 560 (1992).

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when there is an alleged violation. Decisions applying the “factual” approach give *Spokeo* more teeth. These courts use the “concreteness” prong of Article III to test the adequacy of the plaintiff’s allegations (at the pleading stage) or evidence (at later stages). This LEGAL BACKGROUNDER analyzes a few notable decisions applying these two approaches and then considers the possibility that courts may begin to apply a third, “hybrid” approach.

## The Statutory Approach

Given that *Spokeo* addressed standing in the statutory context, it is not surprising that some courts analyze the statute at issue to assess whether an alleged violation itself creates the requisite concrete injury for purposes of Article III standing. Courts applying this approach appear more inclined to find that the plaintiff has adequately established sufficient injury based on the statutory violation in question.

For instance, two federal courts of appeals concluded a mere allegation that certain types of statutes were violated, even without further factual allegation of how the violation impacted the plaintiff, supports an inference of concrete injury.<sup>4</sup> In *Church v. Accretive Health, Inc.*, for example, the plaintiff brought a class action alleging that the defendant billing company violated the Fair Debt Collection Practices Act (FDCPA) by failing to include certain required disclosures.<sup>5</sup> The Eleventh Circuit did not consider whether the plaintiff alleged that the failure to provide the disclosures may have actually impacted her. Rather, the court concluded that the violation of the right under FDCPA to receive disclosures was itself a concrete injury that “Congress has elevated to the status of a legally cognizable injury through the FDCPA.”<sup>6</sup> Noting that *Spokeo* does not permit standing for “bare procedural violation[s],” *Church* concluded that the violation of FDCPA rights was “substantive” rather than procedural.<sup>7</sup>

Similarly, in *In re Horizon Healthcare Services, Inc. Data Breach Litigation*, the Third Circuit applied the statutory approach to the plaintiffs’ claims under the Fair Credit Reporting Act (FCRA). The plaintiffs asserted that the defendant had failed to protect the plaintiffs’ personal information in connection with the theft of the defendant’s computer equipment.<sup>8</sup> In concluding that the plaintiffs had standing even in the wake of *Spokeo*, the court looked at FCRA as a whole—including its private right of action and provision for statutory damages for willful violations—and reasoned that the statute’s construction “clearly illustrates that Congress believed that the violation of FCRA causes a concrete harm to consumers.”<sup>9</sup> Courts have also applied the statutory approach when analyzing claims of federal privacy statute violations, including among others, the Video Privacy Protection Act, the Children’s Online Privacy Protection Act,<sup>10</sup> and the Fair and Accurate Credit Transactions Act amendments to FCRA.<sup>11</sup>

<sup>4</sup> See *Church v. Accretive Health, Inc.*, --- F. App’x ---, 2016 WL 3611543 (11th Cir. 2016) (*per curiam*); *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, No. 15-2309, slip op. (3d Cir. Jan. 20, 2017).

<sup>5</sup> 2016 WL 3611543, at \*1.

<sup>6</sup> *Id.* at \*3.

<sup>7</sup> *Id.* at \*3 n.2.

<sup>8</sup> No. 15-2309, slip op. at 3-8.

<sup>9</sup> *Id.* at 27-32 (“Plaintiffs here do not allege a mere technical or procedural violation of FCRA. They allege instead the unauthorized dissemination of their own private information—the very injury that FCRA is intended to prevent.”) (footnotes omitted).

<sup>10</sup> See *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d at 262.

<sup>11</sup> See *Altman v. White House Black Market, Inc.*, No. 1:15-cv-2451-SCJ, 2016 WL 3946780 (N.D. Ga. July 13, 2016).

In short, courts applying the statutory approach consider whether the mere violation of a congressionally-protected right is itself enough of an injury. As *Church* demonstrates, these courts have tended to conclude that a well-pleaded statutory violation suffices to demonstrate a concrete injury under *Spokeo*.

## The Factual Approach

On the other hand, several courts have adopted the factual approach in analyzing *Spokeo* issues. These courts focus on the manner in which the plaintiff has alleged that the statute at issue was violated rather than only examining whether the statute provides a right and the plaintiff has alleged a violation of that right.

For instance, the Eighth Circuit recently applied the factual approach in *Braitberg v. Charter Communications, Inc.*<sup>12</sup> In *Braitberg*, the plaintiff alleged that the defendant had violated § 551(e) of the Cable Communications Policy Act, which requires cable operators to destroy personally identifiable information if the information is no longer necessary for the purpose for which it was collected.<sup>13</sup> The plaintiff asserted that after he terminated his consumer relationship, the defendant had improperly retained certain of the plaintiff's personally identifiable information.<sup>14</sup> In affirming dismissal for lack of standing, the court noted *Spokeo* rejected the "absolute view" that every statutory violation which may provide a cause of action also gives rise to an Article III injury.<sup>15</sup> Accordingly, rather than examining the nature of the purported violation (*i.e.*, the retention of data), the court examined how that purported violation allegedly impacted the plaintiff. The Eighth Circuit concluded that the plaintiff had not adequately pleaded a concrete injury—for example, that his information was disclosed to a third party or used by a third party for its benefit, or that the alleged retention of his information had undermined the value of the services he had obtained.<sup>16</sup>

In *Hancock v. Urban Outfitters, Inc.*,<sup>17</sup> the District of Columbia Circuit reached a similar conclusion. The court applied the factual approach to the claim that the defendants had violated certain District of Columbia consumer-protection statutes by collecting the plaintiffs' zip codes in connection with credit card transactions. While assuming that a violation had occurred, the court nevertheless reasoned that the plaintiffs did "not allege ... any invasion of privacy, increased risk of fraud or identity theft, or pecuniary or emotional injury."<sup>18</sup>

Several federal district courts have also adopted the factual approach in applying *Spokeo*. For instance, in *Smith v. Ohio State University*,<sup>19</sup> the plaintiff employees claimed that the defendant university had violated FCRA by improperly including extraneous information on a background-check disclosure form. The Southern District of Ohio ruled that the alleged invasion of privacy and violation of

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<sup>12</sup> 836 F.3d 925 (8th Cir. 2016).

<sup>13</sup> 47 U.S.C. § 551(e).

<sup>14</sup> *Braitberg*, 836 F.3d at 926.

<sup>15</sup> *Id.* at 930.

<sup>16</sup> *Id.* at 930-31; *see also Gubala v. Time Warner Cable, Inc.*, No. 16-2613, slip op. at 3-5 (7th Cir. Jan. 20, 2017) (affirming dismissal of similar claim for want of standing in light of *Spokeo*).

<sup>17</sup> 830 F.3d 511 (D.C. Cir. 2016).

<sup>18</sup> *Id.* at 514-15.

<sup>19</sup> No. 2:15-CV-3030, 2016 WL 3182675 (S.D. Ohio June 8, 2016).

FCRA's "clear and conspicuous disclosure" requirement were not enough by themselves to constitute a concrete injury. It reasoned that "Plaintiffs admitted that they did not suffer a concrete consequential damage as a result of [the university's] alleged breach of the FCRA," such that "the Court cannot find that Plaintiffs have suffered an injury-in-fact from [the] alleged breach of the FCRA."<sup>20</sup> Other district courts have applied the factual approach, as well.<sup>21</sup>

### A Possible Third Approach

Notwithstanding the development of these two schools of thought, it is a distinct possibility that courts could apply a third, hybrid approach to *Spokeo* issues. *Spokeo* requires a plaintiff to establish a concrete injury with respect to each "particular procedural violation[]" asserted.<sup>22</sup> As a result, courts must separately analyze the concreteness of the alleged injury in connection with each alleged violation at issue.

Thus, courts may end up looking to each statutory provision at issue in a case to place a plaintiff's factual allegations in context when assessing his or her standing to sue, generally, and his or her purported concrete injury, specifically. Such a hybrid approach would likely demand more than a passing analysis. Courts applying it would have to parse the particularities of each of the statutory provisions in question in the context of the plaintiff's allegations and review evidence to determine whether injury "actually exist[s]."<sup>23</sup> It remains to be seen whether courts will begin to blend the statutory and factual approaches into one, hybrid approach when applying *Spokeo*.

### Conclusion

The long-term impact of the Supreme Court's landmark decision in *Spokeo* remains unsettled, even more than six months after its issuance. With both sides of the bar trying to make affirmative use of the decision, courts have predictably applied *Spokeo* on a case-specific basis, leading to a lack of uniformity in the decision's application. Decisions applying *Spokeo* suggest two initial analytical approaches. A possible third, hybrid approach may exist, but it remains to be seen whether courts move toward it. It is still too soon to tell whether one of these approaches will eventually dominate courts' analysis. But if the current trends continue, the courts' differing approaches may well require resolution by the Supreme Court.

<sup>20</sup> *Id.* at \*4 (internal citations omitted).

<sup>21</sup> See *Romero v. Department Stores Nat'l Bank*, No. 15-CV-193-CAB-MDD, 2016 WL 4184099 (S.D. Cal. Aug. 5, 2016) (plaintiff failed to provide specific proof of harm flowing from each call that was traceable to alleged violation of the Telephone Consumer Protection Act (TCPA), namely the use of an automatic telephone dialing system (ATDS)); *Ewing v. SQM US, Inc.*, No. 3:16-CV-1609-CAB-JLB, 2016 WL 5846494 (S.D. Cal. Sept. 29, 2016) (finding no standing in TCPA case where plaintiff alleged that he received only one call from the defendant through an ATDS and that the call had caused him to waste time and drain phone's battery; concluding that the plaintiff would have spent the same amount of time and would have incurred the same amount of battery depletion if the defendant had made the call manually, which would not have violated TCPA).

<sup>22</sup> See 136 S. Ct. at 1550.

<sup>23</sup> See *id.* at 1548 ("A 'concrete' injury must be 'de facto'; that is, it must actually exist.").