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Spokeo Across the Federal Circuits: Current Status of the Law and Implications for Insurers and Insureds

I. Brief Review of *Spokeo* and Post-*Spokeo* Jurisprudence

A. The Vexing *Spokeo* Decision

The U.S. Supreme Court's decision in *Spokeo v. Robins*, 136 S. Ct. 1540 (2016), was a confused ruling that spawned a vast array of contradictory jurisprudence regarding Article III standing. The central issue in *Spokeo* was whether a plaintiff could satisfy the "injury in fact" requirement by seeking the recovery of statutory damages, despite the absence of cognizable actual harm. Observers were hoping that the ruling would clarify the law in this area. The defense bar was hoping that the Court would put to rest the developing tidal wave of class-action cases in which the plaintiffs suffered no real compensatory damages. Class-action plaintiffs were hoping that the Court would make clear that statutory penalties were a sufficient basis on which to sustain their lawsuits.

Unfortunately, both sides won and lost, depending on the interpretation of the ruling. The Court did proclaim, clearly and definitively, that "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* at 1549. That principle was hardly new law, in that the requirement of a "concrete" injury was established long ago, but it gave a shot in the arm to defendants litigating against claims based solely on statutory penalties rather than compensatory damages. Fortifying this expectation was the Court's emphasis that Congress (and presumably states) "cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Id.* at1548.

However, almost in the same breath, the Court gave the class-action plaintiffs' bar substantial weaponry to sustain these lawsuits. Intangible injuries, according to the Court, "can nevertheless be concrete" and sufficient to satisfy Article III standing requirements. As examples, the Court referenced certain constitutional injuries, such as violations of the First

Amendment, but the Court expanded its ruling beyond harm to such fundamental rights. In determining whether intangible injuries are sufficiently concrete, the Court held, "both history and the judgment of Congress play important roles," and "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.*

If that were not sufficiently confusing, the Court also offered "that the risk of real harm can satisfy the requirement of concreteness." *Id.* at 1549. Where that line is drawn, however, is unstated in *Spokeo*. In remanding the case to the Ninth Circuit, the Court instructed that the alleged danger (in *Spokeo*, the alleged online reporting of inaccurate information about plaintiff) must present a "material risk of harm." *Id.* at 1550. How lower courts are supposed to measure and assess materiality and risk, again, was unstated.

B. Post-*Spokeo* Jurisprudence

Not surprisingly, post-*Spokeo* jurisprudence has been as confused as the decision itself. At the latest count, approximately 175 cases have adjudicated the extent to which plaintiffs have satisfied Article III standing requirements under *Spokeo*. Those decisions have no coherent pattern. Indeed, the most significant factor determining standing appears to be the jurisdiction in which the case is decided. Some courts, such as those in the Seventh, Ninth, and Eleventh Circuits, have interpreted *Spokeo* broadly, finding standing for pure statutory violations for a number of reasons, including the type of statutory claim and the specific language of plaintiffs' pleadings. Other courts, notably several in the Sixth Circuit, have dismissed cases because of the absence of standing under *Spokeo*, though again the pleadings and allegations in these cases are indistinguishable from those in which other courts have found standing.

Conflicts, therefore abound in the post-*Spokeo* world. It is probable if not likely that these conflicts will again reach the Supreme Court. Furthermore, it is reasonable to predict that the Court, when it again adjudicates Article III standing in cases lacking actual injuries, will take a harsher view than the Court did in *Spokeo*, particularly given the inevitable shift of the Court towards a more conservative bent.

That said, insurers, insureds, and defense counsel need to address the implications of *Spokeo* and its progeny now, in the fuzzy and incoherent jurisprudential climate.

1. Data-Breach Cases

Spokeo, focusing just on its facts, is not a data-breach case. It is a case focused on statutory penalties – specifically, the extent to which plaintiffs have standing if they seek statutory penalties yet lack allegations of cognizable, actual damages. Nevertheless, *Spokeo* has had a profound impact on standing jurisprudence in data-breach cases, and federal circuits have been grappling with applying *Spokeo*'s vague and contradictory language in cases filed by plaintiffs who allege that their data was stolen yet who may lack allegations and evidence that they have suffered monetary harm.

Most federal circuits have imposed a low burden for such plaintiffs. The D.C. Circuit, for example, has held that plaintiffs may have standing if there is a "substantial risk" of harm, in that data thieves "can use identifying data" to commit "various financial misdeeds." *Attias v. CareFirst, Inc.*, 865 F.3d 620 (D.C. Cir. Aug. 1, 2017). The Sixth Circuit has held that plaintiffs' "allegations of a substantial risk of harm, coupled with reasonably incurred mitigation costs, are sufficient to establish a cognizable Article III injury at the pleading stage of litigation." *Galaria v. Nationwide Mut. Ins. Co*., 2016 U.S. App. LEXIS 16840 (6th Cir. Sept. 12, 2016). Similarly, the Ninth Circuit has held that standing was sufficient based on allegations "that the defendants' database had been breached, that the breach exposed the PII of approximately 80 million individuals, and that the defendants' database contained the PII of the putative class members' PII. *In re Anthem, Inc. Data Breach Litig*., 2016 U.S. Dist. LEXIS 70594 (N.D. Ca. May 27, 2016).

2. Statutory-Penalty Cases

The insureds' risks depend not only on the governing jurisprudence applying *Spokeo*, but also on the specific statutes under which the penalties may be applied. For example, courts appear more receptive to finding standing in cases brought under the Telephone Consumer Protection Act ("TCPA"), which are pervasive. TCPA cases involve allegations that defendants engaged in certain marketing practices – such as telephone robo-calls and text messages – without the recipients' consent. Courts consistently have found standing based on allegations that plaintiffs received repeated solicitations and suffered heightened burdens of cost and inconvenience as a result. These allegations often suffice to establish a "concrete" injury under *Spokeo*, though there are exceptions, including cases in which the alleged violations were isolated. Accordingly, insurers and brokers need to be aware of whether their insureds/clients are engaging in these types of activities, the extent and intensity thereof, and pertinent standing decisions in states in which these insureds/clients do business.

Similarly, courts generally are receptive to standing arguments alleging violations of the Fair Debt Collection Practices Act ("FDCPA"), which restricts debt-collection activities and protects consumers from abusive practices by creditors. Following the pattern of TCPA cases, these decisions often find standing based on allegations that plaintiffs have suffered sufficiently "concrete" harm as a result of these alleged abuses. Again, however, there are exceptions, particularly in connection with cases focused on relatively isolated procedural violations tenuously connected to any actual harm. Given these variations, insurers and brokers need to understand the types of debt-collection practices in which their insureds/clients are engaged, as well as the governing jurisprudence applying *Spokeo* where the insureds/clients are doing business.

Less successful are cases alleging standing under the Fair Credit Reporting Act ("FCRA"), which is the statute under which *Spokeo* was decided. The FCRA imposes various requirements to protect the privacy and accuracy of consumers' credit-related information, and it has generated dozens of class-action lawsuits. Many of those cases were dismissed on standing

grounds, usually because the alleged violations were procedural in nature. *Spokeo*, in fact, expressly doubted the standing of plaintiffs alleging FCRA violations of such procedural requirements such as the disclosure of accurate zip codes. *Id.* at 1550. Despite that dicta, plaintiffs have tried to launch and sustain lawsuits raising procedural FCRA violations, and these lawsuits frequently are dismissed. That said, many FCRA class actions have survived dismissal motions premised on standing arguments, particularly in connection with allegations of actual harm suffered as a result of the non-compliant conduct. All of these variations speak to the need for insurers and brokers to become familiar with the credit-related conduct of their insureds/clients, as well as the case law adjudicating standing in analogous factual contexts.

These statutes are just several of a vast array of federal laws under which penalties are available. There also is a panoply of state statutes permitting plaintiffs to seek statutory penalties, including many modeled under federal statutes but also others reaching into various other areas of corporate conduct. It is critical for insurers and brokers to investigate and understand which of these federal and state statutes apply to their insureds/clients, and how courts apply standing principles under those statutes in the jurisdictions where the insureds/clients are doing business.

II. Implications for Insurers and Brokers

Insurers and brokers need to spot coverage issues regarding exposure to statutory penalties. These coverage issues are broad and varied, and it is beyond the scope of this panel to address them. Nevertheless, in addition to standing, insurance coverage for statutory penalties is a critical and complex area that insurers and brokers would be remiss (or worse) to neglect. Professional liability policies, for example, often exclude "fines, penalties, forfeitures, or sanctions." Does this exclusion apply to class-action lawsuits seeking statutory penalties? The answer may depend on whether the penalties are deemed to be compensatory or punitive in nature. Also, some courts have found coverage by analogizing statutory penalties to "statutory liquidated damages" for harm that is difficult to quantify. Sometimes the statutory language is clear on these points, but often it is unclear, and courts have wrestled with these coverage questions, frequently to different, and sometimes contradictory, results.

Also significant – and sometimes dispositive – is the policy language. Is the exclusion of "penalties" part of the specific exclusion of governmental taxes and fines? If so, it is more likely than not that a court will find that the "penalties" exclusion does not apply to private actions. These types of decisions require both insurers and brokers to be particularly cognizant of the precise policy language in assessing the extent to which their insureds/clients are covered in their exposure to statutory penalties.

III. Implications for Defending Class Actions

It is axiomatic that any meaningful data breach raises the risk of a class-action lawsuit. *Spokeo* complicates the defense against any such lawsuit based on statutory damages or attenuated allegations of actual harm.

As a general proposition, motions to dismiss based on Article III standing are getting harder to win. Standing jurisprudence already was muddled before *Spokeo*. Most courts, however, were applying standing precedent – in particular the Supreme Court's decision in *Clapper v. Amnesty International*, 133, S. Ct. 1138 (2013) – to dismiss complaints lacking in allegations of real, tangible harm. *Clapper* made clear that plaintiffs had to allege harm that was "certainly impending." Although there were notable exceptions, many courts found that plaintiffs did not satisfy that standard if they did not allege that their hacked or compromised data was used in some manner.

Since *Spokeo*, however, the "certainly impending" standard has given way to amorphous language that intangible harm may be sufficiently "concrete" to establish Article III standing. As discussed above, the jurisprudence is wildly varied, inconsistent, and often contradictory.

Accordingly, defense counsel must undertake an immediate analysis of governing precedent that applied *Spokeo* to the same or similar allegations. Unfortunately for the defense bar, it is becoming easier for plaintiffs to anticipate this exercise and draft their pleadings to allege actual harm. If these plaintiffs cannot allege present harm, they frequently include allegations that future harm is imminent, real, unavoidable, and impossible to compensate or address through whatever remedial measures have been offered by defendants (such as identity-theft protection). Courts increasingly are agreeing with plaintiffs that these allegations are sufficient to establish standing under *Clapper* and *Spokeo*.

Class-action plaintiffs also have learned the benefits of alleging violations that supposedly represent breaches of fundamental rights, constitutional or otherwise time-honored, such that the legislatures intended aggrieved plaintiffs to pursue lawsuits regardless of the presence of actual harm. These types of complaints, drafted around the language in *Spokeo* recognizing standing in such contexts, increasingly survive motions to dismiss.

Nevertheless, defense counsel should lean heavily toward moving to dismiss cases alleging statutory penalties or attenuated actual harm. As an initial matter, the absence of a motion to dismiss ensures that the lawsuit will proceed into the certification and discovery processes, which are protracted, complex, and expensive. Moreover, some district courts are dismissing these cases based on a lack of Article III standing, even in those jurisdictions in which appellate courts have issued pro-plaintiff rulings, including courts in the Sixth and Seventh Circuits.

Although a motion to dismiss may not dispose of the entire case, there may be opportunities to secure dismissal of substantive damages allegations that are overly attenuated and disconnected with actual harm. For example, most courts are highly skeptical of allegations that plaintiffs suffered actual harm because they supposedly "overpaid" for defendants' products and/or services. These allegations are based on the inventive theory that the prices of those products and/or services incorporate a premium for the purchasers' security. However, courts usually reject these fanciful damages theories, with the notable example of a case involving Jimmy John's, in which the court made clear that plaintiffs did not purchase their meals "with a side order" of data security.

A motion to dismiss also may make use of damages arguments beyond the standing context. There are some decisions granting motions to dismiss, despite the presence of Article III standing, because plaintiffs failed to allege legally cognizable damages under the operative statutes and governing case law.

Even if a motion to dismiss fails, there are additional opportunities to attack standing under *Spokeo* and its progeny. Just because plaintiffs may plead actual harm does not mean that they can prove it. Accordingly, defense counsel should focus early discovery efforts on forcing plaintiffs to produce documents and information supporting their damages allegations. These discovery efforts may create opportunities to move for summary judgment based on the failure to raise a genuine issue of material fact as to the plaintiffs' damages and standing.

There also are opportunities to attack precarious damages assertions in the class-certification phase. Courts may be amenable to arguments that the class must be restricted to those persons who have suffered the specific type of harm that suffices to establish Article III standing. These classes will be substantially smaller than the classes of persons whose data allegedly was hacked or compromised, hence reducing defendants' exposure, perhaps dramatically.

Finally, defense counsel must be cognizant of the *risks of winning* a motion to dismiss under Article III. The proverb sometimes holds true: Be careful for what you wish. If courts dismiss class-action lawsuits on Article III grounds, there is nothing to stop plaintiffs from re-filing in state courts. Some states have standing rules and precedent that are substantially broader than federal standing precedent under Article III. Indeed, some states have virtually no standing restrictions. As a result, a successful motion to dismiss may simply land a defendant in a state court, which may be substantially more attractive to a class-action plaintiff and lawsuit. In this respect, there is a potentially tangible risk of getting dismissed from federal court, depriving a defendant of potential advantage of being there (for which the Class Action Fairness Act was designed in making it easier to remove cases), and going from the frying pan to a potential fire of state-court judges and juries.