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Privacy Class Actions Post-Spokeo: Leveraging Injury-In-Fact Requirements

Establishing or Refuting Concrete and Particularized Injury

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Today's faculty features:

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Privacy Class Actions Post-Spokeo

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Spokeo, Inc. v. Robins

The key takeaways:

- Article III standing requires an injury be both *particularized* and *concrete*.
- Concrete *does not* mean tangible; injuries may also be intangible (*i.e.*, violations of free speech or free exercise of religion).
- The risk of real harm may also suffice as concrete.
- Congress may define rights and chains of causation that give rise to a case or controversy where none before existed, *but* the injury-in-fact requirement will not be met just because Congress grants people a right and the ability to vindicate that right.

Spokeo, Inc. v. Robins

So what does it all mean?

- A violation of a Congressionally conferred right *does not* automatically result in Article III standing.
- The Supreme Court provided two such examples:
  - (1) A violation that results in no harm –
    - "For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate."
  - (2) A violation that results in extremely *de minimis* harm –
    - "It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm"

Spokeo, Inc. v. Robins

Tangible v. Intangible

- In evaluating intangible harms, the Supreme Court advised looking to (i) history and (ii) the judgment of Congress.
- In the months post-*Spokeo*, a number of courts have identified intangible injuries that may constitute an injury-in-fact *per se*.
  - *Guarisma v. Microsoft,* No. 15-24326-CIV, 2016 WL 4017196, at *4 (S.D. Fla. July 26, 2016) (FACTA credit card digit requirement)
  - *Church v. Accretive Health*, No. 15-15708, 2016 WL 3611543, at *3 (11th Cir. July 6, 2016) (FDCPA disclosure requirement)
  - *Jaffe v. Bank of Am., N.A.*, No. 13 CV 4866 (VB), 2016 WL 3944753, at *1 (S.D.N.Y. July 15, 2016) (violation of New York state mortgage reporting requirement)
  - *Thomas v. FTS*, No. 3:13-CV-825, 2016 WL 3653878, at *10 (E.D. Va. June 30, 2016) (FCRA failure to provide proper disclosure)

Spokeo, Inc. v. Robins

Tangible v. Intangible

- Has *Spokeo* been taken out of context?
  - The Supreme Court identified two specific cases in support of its position that harms may be intangible:
    - *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (free speech)
    - *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993) (free exercise)
- Numerous courts have specifically disregarded a key point *Spokeo* made concerning intangible injuries:
  - "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."
  - *Hancock v. Urban Outfitters, Inc*., No. 14-7047, 2016 WL 3996710, at *3 (D.C. Cir. July 26, 2016) ("Some statutory violations could 'result in no harm,' even if they involved producing information in a way that violated the law.")

Spokeo, Inc. v. Robins

Tangible v. Intangible

- So what intangible harms are *insufficient* post-*Spokeo*?
  - *McCollough v. Smarte Carte, Inc.*, No. 16 C 03777, 2016 WL 4077108, at *3 (N.D. Ill. Aug. 1, 2016) (Biometric Information Privacy Act violation for retention of fingerprint data without risk of disclosure is insufficient)
  - *Gubala v. Time Warner Cable, Inc.*, No. 15-CV-1078-PP, 2016 WL 3390415, at *1 (E.D. Wis. June 17, 2016) (Cable Communications Policy Act violation for retention of personal information is insufficient)
  - *Hancock v. Urban Outfitters, Inc.*, No. 14-7047, 2016 WL 3996710, at *3 (D.C. Cir. July 26, 2016) (request for zip code in violation of DC statute is insufficient)

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Disclosure v. Retention of Information

- Courts are currently drawing an Article III distinction between claims that derive from the disclosure or failure to disclose information and the retention of information.
- Courts thus far have held that FACTA, FDCPA and VPPA/VRPA claims constitute concrete injury, but BIPA and CCPA claims do not.
  - *Boelter v. Hearst Commc'ns, Inc.*, No. 15 CIV. 3934 (AT), 2016 WL 3369541, at *3 (S.D.N.Y. June 17, 2016) (VRPA case holding disclosure of information to third parties constitutes concrete injury)
  - In re Nickelodeon Consumer Privacy Litig., No. 15-1441, 2016 WL 3513782, at *7 (3d Cir. June 27, 2016) (VPPA case holding "unlawful disclosure of legally protected information" constitutes concrete injury)
  - *McCollough v. Smarte Carte, Inc.*, No. 16 C 03777, 2016 WL 4077108, at *3 (N.D. Ill. Aug. 1, 2016) (Biometric Information Privacy Act violation for retention of fingerprint data without risk of disclosure is insufficient)

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Procedural v. Substantive

- In *Spokeo*, the Supreme Court stated:
  - "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."
  - "Robins cannot satisfy the demands of Article III by alleging a bare procedural violation."
- On the one hand, the Supreme Court indicates that any statutory violation—whether a substantive or procedural right—requires concrete harm. On the other hand, the Supreme Court appears to cabin its holding to procedural rights.

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Procedural v. Substantive

- Courts have thus far divided over whether the procedural/substantive dichotomy is relevant:
  - *Tourgeman v. Collins Fin. Servs., Inc*., No. 08-CV-1392 CAB (NLS), 2016 WL 3919633, at *2 (S.D. Cal. June 16, 2016) ("The bare allegation of a statutory violation however does not satisfy the Article III requirement that a plaintiff demonstrate actual harm to establish standing.")
  - *McCollough v. Smarte Carte*, No. 16 C 03777, 2016 WL 4077108, at *4 (N.D. Ill. Aug. 1, 2016) ("This Court finds that plaintiff has alleged the sort of bare procedural violation that cannot satisfy Article III standing.")
  - *Hancock v. Urban Outfitters, Inc*., No. 14-7047, 2016 WL 3996710, at *3 (D.C. Cir. July 26, 2016) ("[T]he Supreme Court cautioned in Spokeo that some statutory violations could 'result in no harm,' even if they involved producing information in a way that violated the law. 'Robins cannot satisfy the demands of Article III by alleging a bare procedural violation.'")
  - *Guarisma v. Microsoft*, No. 15-24326-CIV, 2016 WL 4017196, at *4 (S.D. Fla. July 26, 2016) ("in enacting the FACTA, Congress created a substantive right for consumers to have their personal credit card information truncated on printed receipts.")
  - *Church v. Accretive Health*., No. 15-15708, 2016 WL 3611543, at *3 (11th Cir. July 6, 2016) ("Church has not alleged a procedural violation. Rather, Congress provided Church with a substantive right to receive certain disclosures and Church has alleged that Accretive Health violated that substantive right.").

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Procedural v. Substantive

- For every court to find a right "substantive," there appears to be a countervailing court that finds the right "procedural."
  - *Guarisma v. Microsoft*, No. 15-24326-CIV, 2016 WL 4017196, at *4 (S.D. Fla. July 26, 2016) (finding FACTA substantive)
  - *Cruper-Weinmann v. Paris Baguette Am., Inc*., No. 14-3709-CV, 2016 WL 3553448, at *1 (2d Cir. June 30, 2016) (implying FACTA's requirements may be procedural)
  - *Collier v. SP Plus*, No. 15-00180 (S.D. Ohio) (dismissing FACTA case under *Spokeo*)
  - *Church v. Accretive Health*., No. 15-15708, 2016 WL 3611543, at *3 (11th Cir. July 6, 2016) (finding FDCPA claim per se concrete)
  - *Tourgeman v. Collins Fin. Servs., Inc*., No. 08-CV-1392 CAB (NLS), 2016 WL 3919633, at *2 (S.D. Cal. June 16, 2016) (finding FDCPA claim non-concrete)
  - *Mey v. Got Warranty, Inc*., No. 5:15-CV-101, 2016 WL 3645195, at *6 (N.D.W. Va. June 30, 2016) (finding TCPA claim inherently concrete)
  - *Sartin v. EKF Diagnostics, Inc*., No. CV 16-1816, 2016 WL 3598297, at *3 (E.D. La. July 5, 2016) (finding TCPA claim not inherently concrete)

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Informational Injury

- Post-*Spokeo*, courts have indicated that the deprivation of legally required information can be a concrete injury.
  - *Thomas v. FTS USA*, No. 3:13-CV-825, 2016 WL 3653878, at *9 (E.D. Va. June 30, 2016) ("Thomas has alleged that he was deprived of a clear disclosure stating that Defendants sought to procure a consumer report before the report was obtained.")
  - *Friends of Animals v. Jewell*, No. 15-5223, 2016 WL 3854010, at *2 (D.C. Cir. July 15, 2016) ("a plaintiff seeking to demonstrate that it has informational standing generally 'need not allege any additional harm beyond the one Congress has identified.'")
- Informational injury, post-*Spokeo*, seems to be stemming from a clear misreading of *Spokeo*. The Supreme Court held:
  - "Even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate" and thus incapable of causing concrete harm.
  - This is in direct contravention of the above cases.

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The end of professional plaintiffs?

- *Stoops v. Wells Fargo Bank, N.A.*, No. CV 3:15-83, 2016 WL 3566266 (W.D. Pa. June 24, 2016)
  - Plaintiff was a professional TCPA plaintiff who owned 40 cell phones she kept in a shoebox. She intentionally purchased phones with Florida area codes because Florida was hard hit by the recession.
  - Court held:
    - (i) "As her testimony establishes, Plaintiff's privacy interests were not violated when she received calls from Defendant. . . . Because Plaintiff has admitted that her only purpose in using her cell phones is to file TCPA lawsuits, the calls are not a nuisance and an invasion of privacy."
    - (ii) "Because Plaintiff has admitted that her only purpose in purchasing her cell phones and minutes is to receive more calls, thus enabling her to file TCPA lawsuits, she has not suffered an economic injury."

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The *Havens* analogy

- How does a Fair Housing discrimination case help establish Article III standing for TCPA, FACTA, FDCPA cases and others?
- *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)
  - *Havens* involved "testers" who, without any intent to rent/purchase a house posed as renters to collect evidence of unlawful practices.
  - The Fair Housing Act makes it unlawful to "represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."
  - The issue was whether a tester, who has no intent to rent, can suffer an Article III injury in fact when discriminated against, and the Court held he did.
- Multiple courts—most prominently in *Church v. Accretive Health*., No. 15-15708, 2016 WL 3611543, at *3 (11th Cir. July 6, 2016) –have turned to *Havens* to establish standing post-*Spokeo*.
- Is an analogy to actual discrimination apt?

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What should defendants argue?

- Highlight the distinction between procedural and substantive rights.
  - A procedural right "helps in the protection or enforcement of a substantive right." Black's Law Dictionary (10th ed.).
  - A substantive right is one "of substance rather than form." *Id.*
- Highlight the actual analysis of *Spokeo*.
  - Indicated two specific *statutory* violations of FCRA would not suffice to constitute concrete injury.
  - Post-*Spokeo*, there cannot be a *per se* concrete injury based on a statutory claim.
- Highlight what happened in *this* case.
  - While, for example, FACTA violation could raise risk of identity theft generally, is there any risk *here* for *this* plaintiff.
- Highlight the absence of a disclosure to a third party.
- Highlight that the plaintiff would have been no better off had the defendant refrained from the unlawful acts (*i.e.*, manually dialed versus ATDS calls).
  - *See, e.g.*, *Silha v. ACT, Inc.*, 807 F.3d 169, 174 (7th Cir. 2015) ("A plaintiff who would have been no better off had the defendant refrained from the unlawful acts of which the plaintiff is complaining does not have standing under Article III . . . .").

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Right place, right time

- Some judges have simply read *Spokeo* broader than others:
  - *Romero v. Dep't Stores Nat'l Bank*, No. 15-CV-193-CAB-MDD, 2016 WL 4184099, at *4 (S.D. Cal. Aug. 5, 2016)
    - "No reasonable juror could find that one unanswered telephone call could cause lost time, aggravation, distress, or any injury sufficient to establish standing."
    - "Congress's finding that the proliferation of unwanted calls from telemarketers causes harm does not mean that the receipt of one telephone call that was dialed using an ATDS results in concrete harm."
  - *Groshek v. Time Warner Cable*, No. 15-cv-157 (E.D. Wisc. Aug. 9, 2016)
    - Finding no standing for a FCRA for obtaining an unlawful report where "The plaintiff has not alleged that he did not get the job he applied for as a result of the consumer report the defendant obtained. He has not alleged that the defendant released the information in the report to other people, causing him embarrassment or damaging his credit."
  - *Smith v. Ohio State Univ.*, No. 2:15-CV-3030, 2016 WL 3182675, at *4 (S.D. Ohio June 8, 2016)
    - Finding no standing for a FCRA violation where the plaintiffs got the job.

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Impact on Class Certification

- There is little doubt plaintiffs' counsel will take great pains to creatively plead harms in an effort to avoid the impact of *Spokeo* on the named plaintiff.
  - *i.e.*, an unsolicited phone call draining the battery or a VPPA plaintiff claiming the devaluation in their personal information.

- The central issue going forward is going to be whether *Spokeo* creates a necessarily predominating individual inquiry as to whether members of the putative class have Article III standing.
  - *See, e.g.*, *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("[N]o class may be certified that contains members lacking Article III standing.").
  - A recent TCPA decision highlights the potential hurdle at the class certification stage: "Although a defendant violates the TCPA by dialing a cell phone with an ATDS, it is possible that the recipient's phone was not turned on or did not ring, that the recipient did not hear the phone ring, or the recipient for whatever reason was unaware that the call occurred. *Romero v. Dep't Stores Nat'' Bank*, No. 15-CV-193-CAB-MDD, 2016 WL 4184099, at *3 (S.D. Cal. Aug. 5, 2016)

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Statutes potentially impacted by *Spokeo*:

- FACTA
  - *Spokeo* calls into question whether printing too many digits / expiration date can amount to concrete harm.
- TCPA
  - *Spokeo* calls into question whether violations of the various hypertechnical FCC requirements standing.
- VPPA / VRPA
  - *Spokeo* calls into question whether provision of viewing history to a third party constitutes concrete harm.
- BIPA
  - *Spokeo* calls into question whether the failure to obtain written consent / have a written policy confers standing.

Privacy Class Actions Post-Spokeo

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Article III Standing Is Supported by a Claim Having Long Historical Antecedents

- *Spokeo*, at 1549: Look to whether harms claimed by plaintiff have "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."
- *E.g. In re Nickelodeon Consumer Privacy Litigation*, 2016 WL 3513782 (3d Cir. June 27, 2016)
- (Finding standing where "Congress has long provided plaintiffs with the right to seek redress for unauthorized disclosures of information that, in Congress's judgment, out to remain private.")
- *Mey v. GOT Warranty*, 2016 WL 3645195 (N.D. W. Va. June 30, 2016) (finding standing, analysis includes the fact that right to privacy was protected under the common law and the Constitution)

Article III Standing Is Supported by a Claim Having Long Historical Antecedents

- *Potocnik v. Carlson*, 2016 WL 3919950 (D. Minn. July 15, 2016) (finding standing, noting that even though tort claims had been dismissed, statutory claims needed only have a "close relationship" to traditional claims, so "an injury that would *not* give rise to recovery in a tort action could nevertheless be sufficiently concrete to give a plaintiff standing to seek recovery in a statutory action)
- Note: at common law, a number of torts (including defamation and trespass) did not require a showing of actual damages. Also, English and American courts have recognized causes of action for invasion of privacy for a very long time. E.g., *Pasevich v. New England Life Ins. Co.*. 50 S.E. 68, 70 (Ga. 1905) (the right to privacy is identified as "derived from natural law," and traced back to Roman and early English traditions).

Article III Standing Is Supported by a Claim Having Long Historical Antecedents

- "The fact that damages resulting from an invasion of the right of privacy cannot be measured by a pecuniary standard is not a bar to recovery." *Fairfield v. Am. Photocopy Equip. Co.*, 291 P.2d 194, 198 (Cal. Dist. Ct. App. 1955) (listing cases).
- Common law has also traditionally recognized a specific right to privacy of information pertaining to individuals' financial accounts. In 1923, in the seminal case of *Tournier v. National Provincial and Union Bank of England*, 1 K.B. 461 (1923), the English Court of Appeal recognized the common-law right to strict confidence of bank account information, arising from an implied contractual duty of nondisclosure. A similar common-law right has long been recognized in American courts. *See, e.g.*, *Peterson v. Idaho First Nat'l Bank*, 367 P.2d 284, 290 (Idaho 1961).

Courts Have Found Standing Where Claims Are Deemed Substantive Rather than Procedural

- *Church v. Accretive Health*, 2016 WL 3611543 (11th Cir. July 6, 2016)
  Failure to include certain disclosures with initial communication to debtors was a substantive right, not a procedural violation, and thus Article III standing existed.

- *Thomas v. FTS*, 2016 WL 3653878 (E.D. Va. June 30, 2016)
  Section 1681(b)(2) and (3) of FCRA "are clearly substantive, and neither technical nor procedural."

- *Hawkins v. S2Verify*, 2016 WL 3999458 (N.D. Cal. July 26, 2016)
  Finding that Article III standing exists for FCRA claims, distinguishing examples given in Spokeo on grounds that they involved procedural violations.

Courts Should Defer to Congressional Finding that A Statutory Violation Constitutes An Injury

- *Spokeo*, at 1549: Congress may "elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law…."
- *Id:* "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important."

Courts Should Defer to Congressional Finding that A Statutory Violation Constitutes An Injury

- *Thomas v. FTS*, 2016 WL 3653878 (E.D. Va. June 30, 2016)

  ("In sum, the FCRA reflects Congress' concern with the "need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(4). It is clear from the statute's legislative history that Congress intended that the FCRA be construed to promote the credit industry's responsible dissemination of accurate and relevant information and to maintain the confidentiality of consumer reports. To that end, it was Congress' judgment, as clearly expressed in §§ 1681b(b)(2) and (3), to afford consumers rights to information and privacy.")

Courts Should Defer to Congressional Finding that A Statutory Violation Constitutes An Injury

- *Rogers v. Capital One Bank (USA), N.A.*, 2016 WL 3162592 (June 7, 2016)

  ("With respect to the TCPA, . . . Congress intended to create a concrete injury where the statute was violated, meaning so long as the plaintiff has been affected personally by the conduct that violates the statute, standing exists.")

In the Wake of Spokeo, Courts Have Found Article III Standing Under Key Consumer Protection Statutes, Including the FCRA, TCPA, FDCPA

FDCPA

- *E.g., Lane v. Bayview loan Servicing,* 2016 WL 3671467 (N.D. Ill. July 11, 2016) (right to information required by FDCPA, to demand verification of a monetary obligation, gives rise to a concrete injury)
- *In re Robinson*, 2016 WL 4069395 (Bkr., W.D. La. July 28, 2016) ("If the claim was improperly filed under the FDCPA and she seeks disallowance, then at a minimum she has been injured by the required payment of these additional attorney fees.")
- *Chapman v. Dowman, Heintz, Boscia & Vician, P.C.*, 2016 WL 3247872 (N.D. Ind. June 13, 2016) (*Spokeo* "did not clearly disrupt appellate precedent holding that plaintiffs in Ms. Chapman's position have standing to bring this type of claim under the FDCPA.")

In the Wake of Spokeo, Courts Have Found Article III Standing Under Key Consumer Protection Statutes, Including the FCRA, TCPA, FDCPA

TCPA

- *Mey v. GOT Warranty*, 2016 WL 3645195 (N.D. W. Va. June 30, 2016) (unwanted "calls also cause intangible injuries. . . . [including] (a) invasion of privacy, (2) intrusion upon and occupation of the capacity of the consumer's cell phone, and (3) wasting the consumer's time or cause the risk of personal injury due to interruption and distraction.")
- *Ung v. Universal Acceptance Corp.*, 2016 WL 4132244 (D. Minn. Aug. 3, 2016) (it has been "repeatedly recognized that the receipt of unwanted phone calls constitutes a concrete injury sufficient to create standing under the TCPA") (collecting cases).

In the Wake of Spokeo, Courts Have Found Article III Standing Under Key Consumer Protection Statutes, Including the FCRA, TCPA, FDCPA

FCRA

- *Hawkins v. S2Verify*, 2016 WL 3999458 (N.D. Cal. July 26, 2016)
- *Lewis v. Southwest Airlines*, 2016 U.S. Dist. LEXIS 74887 (N.D. Cal. 2016)

FACTA

- *Guarisma v. Microsoft Corp.*, 2016 WL 4017196 (S.D. Fla. July 26, 2016)

STATE CONSUMER PROTECTION ACT CLAIMS

- *Emilio v. Sprint Spectrum, LP*, 2016 WL 3748482 (S.D.N.Y. July 7, 2016) (denying motion to dismiss claims under Kansas Consumer Protection Act)
- *Boelter v. Hearst*, 2016 WL 3369541 (S.D.N.Y. June 17, 2016) (plaintiff has Article III standing under Michigan's Preservation of Personal Privacy Act)