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Defense strategies shift in *Spokeo*'s wake

By Cary Sullivan and Chris Waidelich

It has been more than 18 months since the U.S. Supreme Court issued its decision in *Spokeo v. Robins*, holding that a bare, technical violation of the Fair Credit Reporting Act is not sufficient to confer Article III standing. Some defense-oriented commentators quickly speculated that *Spokeo* might represent a paradigm shift in defending against so-called "no injury" class actions. While *Spokeo* so far hasn't proven to be a game changer, defendants have been able to use the ruling to their advantage.

Challenging Article III Standing

Perhaps the most immediate impact of *Spokeo* has been almost universal Rule 12(b)(1) challenges at the outset of "no injury" class actions. Some challenges have been dismissed with minimal analysis. For example, courts may inquire only as to whether the specific statutory provision at issue protects a concrete interest, declaring a mere violation of such a provision automatically results in Article III injury, even where the plaintiff has not alleged specific harm. *See, e.g., Church v. Accretive Health, Inc.*, 654 F. App'x 990 (11th Cir. 2016) (Fair Debt Collection Practices Act class action); *George v. Wright, Lerch & Litow, LLP Attorneys at Law*, 15CV-00811JMSDML (S.D. Ind. Nov. 29, 2016) (same); *Mey v. Got Warranty, Inc.*, 193 F. Supp. 3d 641, 646 (N.D.W. Va. 2016) (Telephone Consumer Protection Act class action).

At least a few courts, however, have granted Rule 12(b)(1) motions where the alleged injuries are too speculative, like where the complaint states only that the plaintiff's "privacy and statutory rights" have been impaired. *See, e.g., Nokchan v. Lyft, Inc.*, 15-CV-03008-JCS (N.D. Cal. Oct. 5, 2016) (granting motion where Lyft driver alleged that he "did not receive required disclosures in a separate document or that he did not receive a summary of his rights under the FCRA," but failed to allege that because of "Lyft's failure to provide the disclosures in a separate document or to notify him of his right to receive a summary of his legal rights he was confused about his rights or that he would not have consented to the background checks had he understood his rights."). Courts have also rejected so-called "informational injuries," where the only alleged harm is that information was shared (or not shared) about the plaintiff. *See, e.g., Taylor v. Med. Data Sys., Inc.*, 3:17CV263-HEH (E.D. Va. July 13, 2017).

In addition, courts appear more willing to entertain jurisdictional discovery in determining standing. For example, in *Katz v. Donna Karan Company, LLC,* 872 F.3d 114 (2nd Cir. 2017), the plaintiff alleged a Fair and Accurate Credit Transactions Act violation upon receiving a receipt containing the first six digits of his credit card number. While the appellate court ultimately upheld the trial court's factual determination of standing, based upon limited evidence, it advised, "going forward, where a defendant makes a fact-based Rule 12(b)(1) challenge to jurisdiction, we are confident that district courts will oversee the appropriate extent of fact-finding necessary to resolve the contested issue, and the parties should be on renewed notice of both the right to introduce such evidence and the plaintiff's burden of proof to do so even at the motion-to-dismiss stage." The circuit court suggested affidavits and "in some circumstances a fact-finding hearing with expert witness testimony may very well be appropriate, depending upon the novelty of the issue, the extent of the material dispute of facts, and the statutory prohibition in question." *See also Cottrell v. Alcon Labs.*, 874 F.3d 154, 168 (3d Cir. 2017) (relying on scientific studies regarding eye medication dispensers to support a finding of concrete economic injury sufficient for Article III standing).

Challenging Class Certification

In an attempt to head off potential Rule 12(b)(1) challenges, class plaintiffs now generally include particularized allegations of individual injury. This can present new opportunities to challenge commonality or predominance at the certification stage.

In *Britts v. Steven Van Lines, Inc.*, 15 CV 1267 (N.D. Ohio Feb. 28, 2017), for example, a driver for Steven Van Lines filed a class complaint asserting violations of Truth in Leasing regulations and seeking to certify a class of all drivers since 2011. In opposing certification, Steven Van Lines "provided supporting evidence to support its position that it fronted different amounts of money to different drivers with different pay-back arrangements in each case." Id. The court denied certification, holding that the determination of standing would require an individualized "determination of whether damages are owed, or whether they may be off-set by unpaid loans or advances." Id. This ruling is not unique. *See, e.g., Legg v. PTZ Ins. Agency, Ltd.*, 14 C 10043 (N.D. Ill. Aug. 15, 2017) (certification denied in TCPA class action because defendant presented evidence that putative class members consented to the calls and thus lacked standing); *Sandoval v. Pharmacare US, Inc.*, 15-CV-0120-H-JLB (S.D. Cal. June 10, 2016) (class certification was denied upon evidence that putative class members "obtained full refunds" and thus "have no cognizable injury").

Conclusion

The defense strategies above are not revolutionary, and they have not always succeeded. But given even moderate success, these strategies might ultimately lead plaintiffs to pursue more narrow classes. Further, a renewed focus on jurisdictional discovery, which likely will increase early-stage litigation costs, may dissuade plaintiffs from asserting marginal claims. In other words, while not a paradigm shift, *Spokeo* does offer some value for defendants.

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The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.


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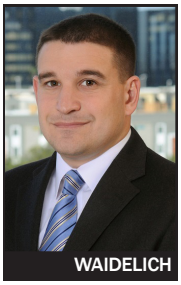
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