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**STANDING****SUPREME COURT**

Two recent decisions highlight the continuing disagreement over Article III's concreteness requirement, attorneys David Lender, Eric Hochstadt and Luna Barrington say. The conflicting rulings leave room for litigants to argue the import of the Supreme Court ruling in *Spokeo v. Robins* for consumer class actions—arguments that may hinge on the statute at issue and the plaintiffs' specific allegations of concrete injury, the authors say.

**Lower Courts Continue to Disagree on Concreteness Requirement Post-*Spokeo***

BY DAVID LENDER, ERIC HOCHSTADT  
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**A** split is emerging among the Circuit Courts as to whether a violation of a right created by Congress, without more, could be sufficient for Article III standing under the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). This disagreement was on full display in two recent lower court decisions issued just three days apart.

*Fraser v. Wal-Mart Stores, Inc.*: In the United States District Court for the Eastern District of California, a court ruled in favor of the plaintiffs and refused to dismiss a putative class action lawsuit for lack of Article III standing. In particular, the court held that a procedural violation of a federal statute, in and of itself, was sufficient to satisfy Article III's standing requirement even without allegations of concrete harm. In that case, the plaintiffs alleged that the defendants requested and recorded customer's ZIP codes in connection with their

credit card purchases in violation of Section 1747.08(a)(2) of the Song-Beverly Credit Card Act of 1971. *See Fraser v. Wal-Mart Stores, Inc.*, No. 2:13-cv-00520, 2016 BL 353625 (E.D. Cal. Oct. 17, 2016). The plaintiffs alleged that the defendants' actions "exposed [the Plaintiffs] to the dangers the statute was designed to prevent," including "undesired marketing contact, credit card fraud, identity theft, stalking, and hackers." *Id.* The defendants did not dispute this practice, but explained that verification of a customer's ZIP code was done in accordance with agreements between the defendants and credit card companies to prevent criminal activity. *See id.*

In *Spokeo*, the Supreme Court stated that, while "Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law,'" Article III standing still requires a concrete injury even in the context of a statutory violation. *See Spokeo v. Robins*, 136 S. Ct. at 1549. In determining whether an intangible harm constitutes

injury in fact, the Court stated that “both history and the judgment of Congress play important roles.” *Id.*

The district court recognized that, under *Spokeo*, “a plaintiff cannot allege a bare procedural violation absent a concrete injury and still be able to satisfy the Article III injury-in-fact requirement.” *Fraser*. It nevertheless concluded that the plaintiffs’ allegations of procedural violations of Section 1747.08 were sufficiently concrete to confer standing on the plaintiffs because Section 1747.08 was designed to protect consumers from harms such as the type alleged here. *See id.* The district court therefore concluded that the plaintiffs “adequately allege a procedural violation of Section 1747.08 sufficient to satisfy Article III standing requirements.” *Id.* The district court further concluded that, even under *Spokeo*, plaintiffs had sufficiently alleged a concrete harm because they asserted that the defendants’ collection of their ZIP codes exposed them to undesired marketing contact, credit card fraud, identity theft, stalking and hackers.

Notably, the court declined to follow a recent D.C. Circuit case addressing similar facts. The court distinguished *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511 (D.C. Cir. July 26, 2016), on the grounds that the plaintiffs in *Hancock* did not allege “any invasion of privacy, increased risk of fraud or identity theft, or pecuniary or emotional injury,” whereas here, the plaintiffs alleged that the defendants’ actions exposed them to undesired marketing contact, credit card fraud, identity theft, and stalking. *See id.* The court, however, did not identify any facts in support of the plaintiffs’ allegations of injury.

*Kamal v. J. Crew Grp., Inc.*: Three days later, a court in the United States District Court for the District of New Jersey ruled in favor of the defendants and dismissed a putative class action lawsuit. In that case, the plaintiffs alleged that the defendants printed sales receipts with more than five digits of the customer’s credit card number in violation of the Fair and Accurate Credit Transactions Act (“FACTA”) amendment to the Fair Credit Reporting Act, 15 U.S.C. 1681, *et seq.* *See Kamal v. J. Crew Grp., Inc.*, No. 2:15-0190, 2016 BL 350270 (D.N.J. Oct. 20, 2016). The district court noted that *Spokeo* “confirmed that an ‘injury-in-fact’ must be

‘concrete’ even where Congress has authorized a private cause of action,” and that any allegations of a heightened risk of future harm must entail a degree of risk sufficient to meet that requirement. *Id.* The district court was therefore tasked with deciding whether, in light of Congress’ decision to authorize private suits under FACTA, printing ten rather than five credit card digits on a sales receipt elevated the risk of fraud to a concrete injury for the purposes of Article III standing.

The district court concluded that the plaintiffs’ allegation that the defendants’ conduct made them more susceptible to fraud did not entail a degree of risk sufficient to meet the concreteness requirement. *See id.* The district court noted that there was “no evidence” that anyone had accessed or attempted to access the plaintiffs’ credit card information. *Id.* Nor was there any indication in the record that anyone would *actually* obtain the plaintiffs’ discarded J. Crew receipts, identify the remaining six digits of the card number, and then proceed to use his credit card. *See id.* The court recognized Congress’ authority to define injuries that may give rise to a case or controversy, but stated that a plaintiff does not automatically satisfy the injury-in-fact requirement just because Congress grants a statutory right to sue. *See id.*

## Takeaway

These two cases only serve to highlight the continuing disagreement amongst the lower courts over Article III’s concreteness requirement. The Eastern District of California relied heavily on the State Legislature’s intent to conclude that even a procedural violation of the statute was sufficient to satisfy the concreteness requirement under Article III. The District of the New Jersey, on the other hand, found that even though Congress had granted a statutory right to sue, this alone did not satisfy Article III’s concreteness requirement. So while both considered the legislative intent of the statute, only the District Court of New Jersey considered whether the injury that was alleged was sufficiently concrete and not conjectural or merely hypothetical. These conflicting interpretations leave room for both plaintiffs and defendants to argue the import of *Spokeo* in consumer class action lawsuits, arguments of which will largely hinge on the federal or state statute at issue in the case and the plaintiffs’ specific allegations of concrete injury.

The lack of a uniform judicial view concerning the application of *Spokeo* means that the Supreme Court’s decision will remain a powerful weapon for defendants in defending against putative consumer class actions. At the pleading stage, depending upon the “concreteness” of the allegations of economic or intangible harm, as well as the Circuit where the case is pending, a defendant may be able to dismiss a case at the outset for lack of standing. Equally important, a powerful *Spokeo* motion to dismiss argument could allow a defendant to seek a stay of costly and burdensome discovery pending a ruling.

The issue of constitutional standing under *Spokeo* also is sure to be important at the class certification stage. The Supreme Court reiterated that standing for all class members is the same in a class action as it would be if each absent class member brought their claims individually. If, for example, some absent class members did not suffer any concrete injury, that could be used to illustrate individual issues that will need to

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be resolved in mini-trials, possibly rendering a class-wide proceeding inappropriate under Rule 23. Alternatively, lack of a concrete injury among certain categories or groups of absent class members could warrant a substantial narrowing of an overbroad putative class.

For all of these reasons, while the application of *Spokeo* will depend on the facts and circumstances of a given case and the jurisdiction in which it is litigated, we expect defendants to take full advantage of the Supreme Court's decision.