

Spokeo Leaves Lower Courts to Wrangle With Article III Standing Issues

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The United States Supreme Court issued its decision in *Spokeo, Inc. v. Robins* on May 16, 2016. At the time, the degree to which the decision was a punt was somewhat underreported. The five-judge majority opinion actually declined to answer the specific certified question: Whether a plaintiff suing for violation of a federal statute satisfied Article III's standing requirement by alleging no concrete injury stemming from the violation. Instead, the Court vacated and remanded the case to the Ninth Circuit to address whether the plaintiff satisfied the "concreteness" requirement for Article III standing. The oral argument on remand was conducted by the Ninth Circuit on December 13, 2016. That case will likely garner some attention when the Ninth Circuit panel opinion is issued. However, it is actually one of the less interesting cases making its way through the federal courts. In fact, the panel even entertained the idea of further remanding to the trial court to allow the plaintiff to replead the complaint in light of the appellate guidance on the issue. The action in these cases has been mostly in the federal district courts, as hundreds of post-*Spokeo* opinions have been issued. But the federal circuit courts have also been busy. While some general principles appear to be developing, in many respects, these cases have become subject to statute-by-statute and circuit-by-circuit analyses. So while much of the nation was transfixed on Washington, D.C., on January 20, the federal circuit courts were busy producing catnip for Article III standing aficionados. Three post-*Spokeo* opinions issued that day are memorialized within a few hundred pages of each other in volume 846 of the *Federal Reporter*, Third Edition. The Ninth Circuit held in *Syed v. M-I, LLC* that the disclosure requirement at issue in the case, 15 U.S.C. § 1681b(b)(2)(A)(i), creates a right to information by requiring prospective employers to inform job applicants that they intend to procure their consumer reports as part of the employment application process. The authorization requirement, § 1681b(b)(2)(A)(ii), creates a right to privacy by enabling applicants to withhold permission to obtain the report from the prospective employer, and a concrete injury when applicants are deprived of their ability to meaningfully authorize the credit check. By providing a private cause of action for violations of Section 1681b(b)(2)(A), Congress has recognized the harm such violations cause,

thereby articulating a “chain[] of causation that will give rise to a case or controversy.” The Third Circuit held in *In re Horizon Healthcare Servs. Inc. Data Breach Litig.* that “the congressional decision to create a remedy for the unauthorized transfer of personal information” under the Fair Credit Reporting Act “gives rise to an injury sufficient for Article III standing.” The court thus held that, “[e]ven without evidence that the [p]laintiffs’ information was in fact used improperly, the alleged disclosure of their personal information created a *de facto* injury.” The Seventh Circuit held in *Gubala v. Time Warner Cable, Inc.* that even if the defendant cable provider violated the Cable Communications Policy Act (47 U.S.C. § 551(e)) by failing to destroy plaintiff’s personally identifying subscriber information for many years after plaintiff cancelled his cable subscription, the plaintiff nonetheless did not actually identify a plausible risk of substantial harm as a result of the violation. The court thus affirmed the lower court’s dismissal of the case for lack of standing.

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