

Avoiding Close Calls: Sixth Circuit's *Galaria v. Nationwide* Decision Offers Valuable Pleading Tips

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Steven Blickensderfer



The Sixth Circuit's split decision last month finding Article 3 standing in a data breach case is the first of its kind post-*Spokeo*. See *Galaria v. Nationwide* Nos. 15-3386/3387 (6th Cir. Sept. 12, 2016) (unpublished). It is significant in many ways related to its substance, and for good reason. By its decision, the Sixth Circuit seems to have created an even deeper divide between the circuits on the issue of consumer standing to pursue data breach claims in federal court.

Although not as cutting-edge of an issue, the case is also notable for the preservation-related pleading lessons that can be learned from the majority and dissenting opinions.

Galaria arose out of a data breach of Nationwide's computer network in 2012, in which hackers stole the personal information of 1.1 million consumers. In two separate cases that ultimately were combined, the putative class action plaintiffs filed a five-count complaint asserting violations of the Fair Credit Reporting Act, negligence, invasion of privacy by public disclosure of private facts, and bailment.

The district court dismissed the complaints for lack of Article 3 and statutory standing. Significantly, the plaintiffs moved for reconsideration and leave to amend the complaint as to the statutory claim, but decided not to move for reconsideration on the other claims that were dismissed – including the negligence claim – and, instead, maintained their right to appeal the dismissal. As the Sixth Circuit explained in footnote 1 of its opinion, however, plaintiffs thus missed an opportunity to bolster their allegations in support of Article 3 standing.

Although the majority ultimately decided the plaintiffs had originally alleged enough to show standing, they made a risky tactical pleading decision, given the fact that the standing issue was one of first impression in this circuit and the appellate court was split in its decision. The dissent found that the complaints failed to allege sufficient facts to support a finding that the alleged harm was fairly traceable to the defendant, and would have affirmed the dismissal. Just one vote would have changed the result, based on the pleading posture.

Preservation Issue:

Moving for reconsideration and/or amendment after the dismissal of pleadings on some claims may result in waiver of the opportunity to bolster your allegations or affirmative defenses as to other claims.

Tips:

Regardless of where the court fell on the overarching standing issue, the dissent's ultimate conclusion shows the dangers in proceeding without moving for reconsideration and/or to amend. When faced with an adverse ruling on the pleadings, whether you are the plaintiff or defendant, it is important to consider whether it is necessary to bolster and support your position by seeking reconsideration and/or amending the pleading to include additional factual allegations.

If the Sixth Circuit would have affirmed based on the pleading upon which the plaintiffs elected to stand, the plaintiffs would have effectively waived the right to amend prior to the appeal during the pleading stage. Such a course of conduct is risky, particularly in important cases where the law is not well-settled.

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