§ 9:14.50 "Injury in Fact": What happens to bad faith statutes? *[New]*

Claims handling and penalties statutes regulating the business of insurance may not any longer provide causes of action to many policyholders and claimants.

In 2016, the Roberts Court grafted a requirement onto the U.S. Constitution which is not found in it—standing — but which is instead found in the Court's cases. Cases decided in lower courts since the Roberts Court raised standing to a constitutional prerogative are divided over whether Congress and State Legislatures can provide standing by providing remedies for statutory violations.

In *Spokeo, Inc. v. Robins*,[1] the Court raised the judge-made doctrine of standing to constitutional status. "Standing to sue," the Court recognized, "is a doctrine rooted in the traditional understanding of a case or controversy. The doctrine developed in our case law," said the Court in *Spokeo, Inc. v. Robins*.[2]

One of the elements of standing is "injury in fact," which the *Spokeo* Court raised to "a constitutional requirement" which bars legislatures from conferring standing on people and organizations in most cases. To establish injury in fact, a person invoking a statutory remedy now must meet a newly-found ***constitutional requirement*** that she or he had a legally protected interest that is concrete and individualized to her or him, and that the harm is "actual" or "imminent," not "conjectural" or "hypothetical."[3] The *Spokeo* case itself was presented when Mr. Thomas Robins filed a lawsuit claiming an alleged violation of the Fair Credit Reporting Act by an internet search engine service which incorrectly provided information to the world about him. The Roberts Court remanded for a determination of whether Robins adequately ***alleged*** an ***injury in fact*** in his complaint.

As it has done by replacing "ultimate facts" pleading with "plausibility" pleading, in which allegations of fact in a complaint must be weighed by each individual judge who must dismiss the complaints that he or she does not think are "plausible," the Roberts Court has laid down another obstacle to filing lawsuits in Federal Courts.[4] It is fundamental to its process to note how many times the Court would have people believe that its work has consisted for several years now of finding procedural and constitutional limitations which other Courts somehow must have overlooked.

In an interesting application of the *Spokeo* "standing-means-injury—in-fact" requirement, the District Court in *Stromberg v. Ocwen Loan Servicing, LLC*[4.10] was confronted with a lawsuit filed as an alleged class action by "Plaintiff Bonnie Lynne Stromberg [who] asserts a California state law claim against two mortgage lenders and a mortgage loan servicing company for failing to reconvey a deed of trust on real property within thirty days after repayment of her home loan."[4.20] The Court rejected the mortgage lenders' and mortgage servicer's challenges to Ms. Stromberg's standing to sue them by ruling that she had sufficiently alleged "injury in fact" through these "conclusory" allegations (which she handily supported with an affidavit and which the Court considered together with the allegations in her complaint):

> The Court does not need to decide whether a bare procedural violation of California's analogous prompt-recording statute constitutes a concrete injury-in-fact for standing purposes because Stromberg has not alleged "a bare procedural violation, divorced from any concrete harm." Spokeo, 136 S. Ct. at

> 1549. To the contrary, she has alleged "*additional* harm beyond the one [the legislature] has identified." Spokeo, at 1549–50 (emphasis in original). In her complaint, Stromberg alleges that she "suffered injury in the form of slander of title, incurred costs, impaired credit and incomplete and inaccurate public records respecting her financial obligations and credit worthiness." Compl. ECF No. 58 ¶ 43. Even if this allegation regarding injury is, as Defendants contend, too conclusory by itself to establish an injury-in-fact, Stromberg has also submitted an affidavit that includes further factual support for her standing. ECF No. 101-1, Ex. A.[4.30]

Other Courts have found Spokeo standing to assert Fair Debt Collection Practices Act claims,[4.40] Telephone Consumer Protection Act claims,[4.50] Fair Credit Reporting Act claims alleged by a pro se plaintiff,[4.60] and products liability claims in multi-district litigation which include allegations of noncompliance with standards set under regulations issued by the federal Environmental Protection Agency and by the California Air Resources Board.[4.70]

As an example of lower federal courts actively seeking situations in which people simply cannot sue for alleged violations of State statutes, even though States have provided the statutory remedies alleged in the given case, the Eleventh Circuit Court of Appeals held after *Spokeo* that a borrower-mortgagor in New York State could not bring that particular lawsuit for an alleged violation of New York Real Property Law because now the United States Constitution forbids such a suit.[5] The Eleventh Circuit's decision in this case has been rejected by name in other Circuits,[6] and it has been distinguished in the Eleventh Circuit based, perhaps ironically, on other Eleventh Circuit case law.[7]

However, this decision is by no means alone.[8] In *Spokeo* itself, the Court deciding that case remanded for a determination of "plausibility," in effect, of whether Thomas Robins and persons like him had alleged injury in fact as the U.S. Constitution now apparently requires.

The following case did not directly involve the *Spokeo* "injury in fact" directive, but it does illustrate the relative probabilities of success of any statutory action under a "Consumer Protection Act" by whatever name. In *Fat Bullies Farm, LLC v. Devenport*,[9] potential sellers of real property brought a New Hampshire Consumer Protection Act ("CPA") claim against prospective purchasers on account of the alleged conduct of the prospective purchasers. To describe the

attitude of the New Hampshire Supreme Court in rejecting a New Hampshire CPA claim in this case as hostile, is to put it mildly. It is nonetheless instructive:

> Viewing Fat Bullies and Simmons's [the prospective purchasers'] misrepresentation in conjunction with the remainder of their course of conduct does not alter our determination. Even taken together, the acts of showing up unannounced with an attorney and an option agreement, not recommending that the Devenports [the potential sellers of the real property] obtain legal counsel, attempting to negotiate price, not explaining the meaning of the language contained in the draft agreement, threatening and attempting to enforce an option agreement, and pursuing a contentious litigation strategy would not "raise an eyebrow of someone inured to the rough and tumble of the world of commerce." (Citations omitted.) We cannot conclude that the subject conduct offends established public policy, is immoral, unethical, oppressive, or unscrupulous, or causes substantial injury. (Citation omitted.)
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> For these reasons, we reverse the trial court's ruling on the Devenports' CPA claim and its award of attorney's fees to the Devenports as damages under the CPA.[10]

If the idea of "injury in fact" has been elevated surreptitiously from standing to the U.S. Constitution, it can certainly have an effect on claims based on State statutes providing remedies to 'private attorneys general' that the States rely on to enforce the laws. Time will tell whether State Unfair Claim Handling Practices Acts and Penalties Statutes governing the business of insurance will feel the effects and, if so, how.

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[1]Spokeo, Inc. v. Robins, __ U.S. __, 136 S. Ct. 1540 (2016).

[2]Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016).

[3]Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547-48 (2016).

[4]See, e.g., Klika v. Capital One Bank, N.A., No. C15-0107RSL, 2016 WL 4544373 at *1 (W.D. Wash. June 30, 2016), and "PLAUSIBILITY AS A STANDARD? DON'T BELIEVE IT," published on Insurance Claims and Issues Blog on Monday, May 1, 2017, at http://insuranceclaimsissues.typepad.com/insurance_claims_and_issu/2017/05/plausibility-as-a-standard-dont-believe-it-its-just-another-way-of-saying-theres-nothing-left-to-lose-with-apologies-to-m.html.

[4.10]Stromberg v. Ocwen Loan Servicing, LLC, No.15-cv-04719-JST, 2017 WL 2686540 (N.D. Cal. June 22, 2017).

[4.20]Stromberg v. Ocwen Loan Servicing, LLC, No.15-cv-04719-JST, 2017 WL 2686540 at*1 (N.D. Cal. June 22, 2017).

[4.30]Stromberg v. Ocwen Loan Servicing, LLC, No.15-cv-04719-JST, 2017 WL 2686540 at*6 (N.D. Cal. June 22, 2017).

[4.40]*E.g.,* Ferrell v. HSI Fin. Serv's, LLC, No. 1:16-cv-04624-RWS-AJB, 2017 WL 8186795 at *4 (N.D. Ga. December 22, 2017) ("After careful consideration of the pleadings and the rapidly expanding catalogue of case law interpreting and applying *Spokeo*, the undersigned is persuaded that Plaintiff's pleadings are sufficient to establish standing. The Court finds Defendant's motion unavailing on several grounds."); Abraham v. Ocwen Loan Servicing, LLC, 321 F.R.D. 125, 166 (E.D. Pa. 2017) ("Numerous courts have applying Spokeo found a sufficient 'injury in fact' to support a FDCPA claim from allegations that a plaintiff suffered an 'informational injury' because the character of a debt had been misrepresented.").

[4.50]Progressive Health & Rehab Corp. v. Strategy Anesthesia, LLC, 271 F. Supp. 3d 941 (S.D. Ohio 2017) ("Indeed, as Plaintiff points out, the overwhelming number of courts that have addressed standing in a TCPA case subsequent to *Spokeo* have found standing.") (pinpoint page references not available in April 2018).

[4.60]Lovess v. Embrace Home Loans, Inc., No. JKB-17-2212, 2017 WL 4745452 at *2 (D. Md. October 20, 2017) ("This case is very close to *Spokeo*, but not quite there. Plaintiff is similarly alleging a procedural violation of FCRA and claiming that she is harmed by potential future consequences. But she has also alleged actual damages in the amount of $100,000 stemming from emotional distress and mental anguish, and therefore this is not a 'bare' procedural violation of the type at issue in *Spokeo*.").

[4.70]In re Chrysler-Dodge-Jeep Ecodiesel Marketing, Sales Practices, & Prod's Liab. Lit., No. 17-md-02777-EMC, 2018 WL 1335901 at *6 (N.D. Cal. March 15, 2018) ("Because Plaintiffs allege a financial injury, *Spokeo* does not support dismissal of their case.").

[5]Nicklaw v. Citimortgage, Inc., 839 F.3d 998, 1002-03 (11th Cir. 2016).

[6]*See, e.g.*, Weldon v. MTAG Services, LL, No. 3:16-cv-783 (JCH), 2017 WL 776648 at *6 (D. Conn. Feb. 28, 2017).

[7]*See* Tillman v. Ally Fin. Inc., No. 2:16-cv-313-FtM-99CM, 2016 WL 6996113 at *4 n.7 (M.D. Fla. Nov. 30, 2016).

[8]*See also* Michael G. McLellan, "Finding a Leg to Stand On: Spokeo, Inc. v. Robins and Statutory Standing in Consumer Litigation," 31 *Antitrust* 49 (Summer 2017).

[9]Fat Bullies Farm, LLC v. Devenport, 170 N.H. 17, 28, 164 A.3d 990 (2017).

[10]Fat Bullies Farm, LLC v. Devenport, 170 N.H. 17, 164 A.3d 990, 998–99 (2017).