§ 3:28.50. "Injury in Fact": What happens to bad faith statutes?

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 she or he 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.

Recently, the *Spokeo* decision has been rejected by name. It has been pointed out that there is a split among the federal courts in deciding whether to follow it, and that in any case

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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.
See generally Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 Wm. & Mary L. Rev. 2285 (May 2018).

Spokeo is a federal decision that is not binding on the state courts when interpreting state laws:

> FedEx contends we should follow the federal cases that require Duncan to show she suffered a concrete injury in addition to a procedural violation of FACTA, but there is no consensus among the federal courts on this issue.

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> Furthermore, Illinois courts are not required to follow federal law on issues of justiciability and standing.[4.03]

Illustrating the federal courts' conflict over applying Spokeo's "injury in fact" addition to the U.S. Constitution, allegations of "financial injury"[4.05] or "economic loss"[4.07] have satisfied the federal standing requirement for justiciability in federal court, even after the Supreme Court's *Spokeo* addition.

In 2019, a federal court decided the question of whether an "injury in fact" was alleged in an action involving a consumer protection statute in New York State, N.Y. General Business Law §349. The ruling came on a motion to dismiss. The Court equated plausibility of stating a substantive claim under the New York statute with plausibility of stating a claim of concrete and particularized injury for standing purposes, at least in a case of alleged "economic injury," namely, overpaying based on the defendant's affirmative misrepresentations.[4.08]

In a federal case in which the claims are at least facially based on procedural violations of statutes, the Ninth Circuit Court of Appeals wrote in an insurance case, *Dutta v. State Farm Mutual Automobile Insurance Co.*,[4.09] to provide some guidance for complying with the

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[4.03] Duncan v. Fedex Office and Print Serv's, Inc., 2019 IL App. (1st) 180857, ¶¶20 & 21, 123 N.E.3d 1249, ¶¶20 & 21, 2019 WL 346593, at *4, ¶¶20 & 21 (Ill. 1st DCA Jan. 25, 2019).

[4.05] In re Chrysler-Dodge-Jeep Ecodiesel Marketing, Sales Practices, and Product Liab. Litig., 295 F. Supp. 3d 927, 947 (N.D. Cal. 2018) ("Because Plaintiffs have alleged a financial injury, *Spokeo* does not support dismissal of this case."). The Chrysler-Dodge-Jeep decision was distinguished on the ground that the claims in that case involved an "'overpayment' damages claim" which was not the case in LaRoe v. FCA US, LLC, No. 17-2487-DDC-JPO, 2019 WL 1429652 (D. Kan. March 29, 2019). Therefore there was no standing since there were no "alleged injuries in the form of out-of-pocket expenses" in that case. *LaRoe*, 2019 WL 1429652, at *9-*10.

[4.07] In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litig., 336 F. Supp. 3d 1256, 1332 (D. Kan. 2018) ("Although the class plaintiffs here never allege that they purchased a defective product, the court finds that they have adequately alleged economic loss sufficient to discharge the standing requirement.").

> "[I]t is sufficient for standing purposes that [Gordon] seek[s] recovery for an economic harm" that he allegedly suffered. [Citations omitted.] Gordon's allegation that the drop-fire defect has decreased his P320's resale value, even with the availability of the Voluntary Upgrade Program, is sufficient to allege economic loss that could be redressed by a judgment ordering compensation.

Gordon v. Sig Sauer, Inc., No. H-19-585, 2019 WL 4572599, at *7 (S.D. Tex. September 20, 2019). The Roberts Court has pronounced other "reinterpretations" of settled law including in the areas of personal jurisdiction, pleading, class actions, and arbitration, among others. Arbitration under first-party policy requirements is the subject of §11:18, *infra*.

[4.08] *See* Cummings v. FCA US LLC, 401 F. Supp. 3d 288, 304, 307 (N.D.N.Y. 2019).

[4.09] Dutta v. State Farm Mut. Auto. Ins. Co., 895 F.3d 1166 (9th Cir. 2018).

oracle-like pronouncements in *Spokeo*:

> On remand from the Supreme Court, in *Spokeo II*, we considered how courts should evaluate whether a concrete harm based on the procedural violation of a statute exists. We concluded that courts must "ask: (1) whether the statutory provisions at issue were established to protect [the plaintiff's] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in [the] case actually harm, or present a material risk of harm to, such interests." [Citation omitted.] In making the first inquiry, we ask whether Congress enacted the statute at issue to protect a concrete interest that is akin to a historical, common law interest. The second inquiry "requires some examination of the *nature* of the specific alleged [violations] to ensure that they raise a real risk of harm to the concrete interests [the statute] protects." [Citation omitted.] In other words, we must consider whether, in the case before us, the procedural violation caused a real harm or a material risk of harm.[4.10]

The claim in the *Dutta* case, that State Farm violated Dutta's statutory rights under the Fair Credit Reporting Act or FCRA, to information concerning the use of his consumer credit report and to an opportunity to discuss the report with State Farm before any adverse action taken against Dutta,[4.11] ultimately failed to state a claim in that case, the Ninth Circuit held.[4.12]

In an interesting application of the *Spokeo* "standing-means-injury--in-fact" requirement, the District Court in *Stromberg v. Ocwen Loan Servicing, LLC*[4.13] 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]

[4.10] Dutta v. State Farm Mut. Auto. Ins. Co., 895 F.3d 1166, 1174 (9th Cir. 2018).

[4.11] *Dutta*, 895 F.3d at 1174.

[4.12] *Dutta*, 895 F.3d at 1176.

[4.13] 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).

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] Fair and Accurate Credit Transaction Act (FACTA) claims,[4.70] 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.[4.80]

In what appears to be a direct rebuke of the Roberts Court's decision in *Spokeo*, a Federal District Judge ruled that a class of plaintiffs can sue a company for invasion of privacy because invasion of privacy is both "concrete" and "particularized" enough to sustain a claim. This ruling came despite the District Judge's recognition that the claims alleged against Facebook in this federal lawsuit involve "an intangible privacy injury[.]"[4.81]

"This lawsuit, which stems from the Cambridge Analytica scandal, is about Facebook's

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[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] Gennock v. Budal, No. 17-454, 2017 WL 6883933 (W.D. Pa. November 29, 2017) (Mitchell, USMJ), report and recommendation adopted by U.S. District Judge, No. 2:17cv454, 2018 WL 350553 (W.D. Pa. Jan. 9, 2018) (Cercone, Senior U.S.D.J.).

[4.80] In re Chrysler-Dodge-Jeep Ecodiesel Marketing, Sales Practices, & Prod's Liab. Lit., 295 F. Supp. 3d 927, 947 (N.D. Cal. 2018) ("Because Plaintiffs allege a financial injury, *Spokeo* does not support dismissal of their case.").

[4.81] In re: Facebook, Inc., Consumer Privacy User Profile Litig., 402 F. Supp. 3d 767, 786 (N.D. Cal. 2019). This is a Multi-District Litigation Case, MDL No. 2843, No. 18-md-02843-VC.

practice of sharing its users' personal information with third parties."[4.82]

The plaintiffs alleged four categories of actionable conduct:

> The plaintiffs allege that Facebook violated their privacy rights (and other rights) because: (i) they engaged in sensitive communications that included photographs, videos they made, videos they watched, Facebook posts, likes, and private one-on-one messages; (ii) they intended to share these communications only with a particular person or a group of people; (iii) Facebook made those communications widely available to third parties in a variety of ways; and (iv) as a result, third parties were able to develop detailed dossiers on the plaintiffs including information about their locations, their religious and political preferences, their video-watching habits, and other sensitive matters.[4.83]

In the face of these allegations, Facebook filed a motion to dismiss based on several grounds, one of which we will address here. Facebook advocated that the invasion of privacy lawsuit against it should be dismissed by this federal court because, Facebook argued, "that even if its users had a privacy interest in the information they made available only to friends, there is no standing to sue in federal court because there were no tangible negative consequences from the dissemination of this information."

In this case, the District Court denied Facebook's motion to dismiss and rejected Facebook's standing argument in particular: "That too is wrong." The Federal District Judge explained that "the law has long recognized that a privacy invasion is itself the kind of injury that can be redressed in federal court, even if the invasion does not lead to some secondary economic injury like identity theft."[4.84]

The ruling in this case began with the U.S. Supreme Court's standing requirements, which have come to be known as the *Spokeo* "injury in fact" requirement. To say again and simply put, the *Spokeo* decision found a requirement in the U.S. Constitution that a plaintiff in a lawsuit in federal court must allege an actual or concrete injury in order to have a constitutionally required "case or controversy" that a federal court can adjudicate.

Here, the ruling began by pronouncing *Spokeo* to be "black-letter law[.]" After bowing to the supremacy of the Supreme Court, the District Court proceeded to quote the Supreme Court's *Spokeo* decision to reject the argument in this particular case that an injury must not only be "concrete" and "particularized," but the alleged injury must always be "tangible," too:

> But it's black-letter law that an injury need not be "tangible" to be cognizable in federal court. *Spokeo, Inc. v. Robins*, _ U.S. _, 136 S. Ct. 1540, 1549, 194 L.Ed.2d 635 (2016) ("Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete."). And courts have often held that this particular type of intangible injury--disclosure of sensitive private information, even without further consequence--gives rise to Article III standing.[4.85]

After establishing that at least some so-called intangible injuries can constitutionally be redressed in federal courts, the District Court addressed the twin *Spokeo* requirements that the alleged injuries be both "concrete" and "particularized."

The injury alleged in this case "is 'concrete' largely for the reasons already discussed," namely, if you use a company's social media platform to share your sensitive information only

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[4.82] In re: *Facebook, Inc., Consumer Privacy User Profile Litigation*, 402 F. Supp. 3d at 776.

[4.83] In re *Facebook Consumer Privacy User Profile Litigation*, 402 F. Supp. 3d at 786-87.

[4.84] In re: *Facebook, Inc., Consumer Privacy User Profile Litigation*, 402 F. Supp. 3d at 777.

[4.85] In re: *Facebook, Inc., Consumer Privacy User Profile Litigation*, 402 F. Supp. 3d at 784.

with your friends, "then you suffer a concrete injury when the company disseminates that information widely."

The alleged injury was "particularized, at least for some of the plaintiffs," because it was allegedly suffered "directly by the individual plaintiff" and was different from the generalized injury "that members of the public at large might have to a defendant's unlawful conduct."[4.86]

"Accordingly, for all the claims addressed by this ruling, Facebook cannot obtain dismissal for lack of Article III standing."[4.87]

Whether and for how long this ruling will survive scrutiny by the *Spokeo* Court, remains to be seen.[4.88]

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.

If the idea of "injury in fact" has been elevated surreptitiously from standing to the U.S.

[4.86] In re: *Facebook, Inc., Consumer Privacy User Profile Litigation*, 402 F. Supp. 3d at 786.

[4.87] In re: *Facebook, Inc., Consumer Privacy User Profile Litigation*, 402 F. Supp. 3d at 787.

[4.88] *See*, in addition, Patel v. Facebook, Inc., 932 F.3d 1264, 1270-75 (9th Cir. 2019), cert. denied, _ U.S. _, 140 S. Ct. 937 (2020) (holding that a concrete, particularized injury was sufficiently alleged to confer standing to sue in federal court under the Illinois Biometric Information Privacy Act or BIPA).

[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, e.g.*, Exum v. Nat'l Tire & Battery, No. 9:19-CV-80121, 2020 WL 429111, at *6 (S.D. Fla. January 28, 2020); Loughlin v. Amerisave Mort. Corp., No. 1:14-CV-03497-LMM-LTW, 2018 WL 1887292, at *7 (N.D. Ga. March 19, 2018) (distinguishing *Nicklaw* because the plaintiffs alleged that they "'lost money.'" How much? "[A]pproximately [an] additional $80" apiece.); 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).

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.