May 2016

Will *Spokeo* Undermine CAFA?

The Supreme Court's decision in *Spokeo v. Robins*, 578 U.S. __ (2016), has been nearly universally lauded by defense counsel as a new bulwark against class actions alleging technical violations of federal statutes. It may be that. But *Spokeo* also poses a significant threat to defendants by defeating their ability to remove exactly the types of cases that defendants most want in federal court. The decision circumscribes the federal jurisdiction, with all its advantages, that defendants have enjoyed under Class Action Fairness Act (CAFA) for the past decade.

Under *Spokeo*, a plaintiff needs more than a statutory right of action in order to sue; he or she also needs a concrete, particularized injury traditionally required by Article III. The plaintiff, Robins, accused *Spokeo* of violating the Fair Credit Reporting Act (*FCRA*) by reporting information about him that was not true: specifically, that he is married, has children, has a job, is relatively affluent and holds a graduate degree. Slip. Op. at 4. All false, according to Robins.

The Supreme Court found that while Robins had sufficiently alleged a statutory violation, he had not alleged a concrete injury sufficient to create Article III standing. The Court held that not every violation of a statute gives rise to federal standing, even where Congress has created a right of action for statutory violations. For instance, while reporting an incorrect zip code might technically violate the FCRA, "[i]t is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm." *Id*. at 11.

Defendants can now move to dismiss cases alleging technical statutory violations but no actual injury. But already, courts applying *Spokeo* have revealed that the decision is anything but an unalloyed boon to defendants. In *Khan v. Children's National Health System*, Case No. 8:15-cv-02125, 2016 U.S. Dist. LEXIS 66404 (D. Md. May 19, 2016), Judge Chuang considered a motion to dismiss a putative class action seeking recovery under a variety of consumer protection statutes for a data breach of a health care provider. The defendant had removed the case under CAFA. Relying on *Spokeo,* the court agreed that the plaintiff had not suffered a concrete injury and lacked standing — but instead of dismissing the case, Judge Chuang remanded it to state court. There lies the hidden danger of *Spokeo*.

Since 2005, defendants have been able to remove putative class actions from state courts under 28 U.S.C. § 1332(d) upon a showing of minimal diversity and a $5 million amount in controversy. With CAFA, defendants could escape the more plaintiff-friendly standards some states use in class actions, and take advantage of federal standards for class certification, summary judgment and admissibility of expert testimony, among other things.

But defendants cannot invoke CAFA jurisdiction (or any other type of jurisdiction) in cases in which the named plaintiffs lack Article III standing. *See*, *e.g.*, *Wallace v. ConAgra Foods Inc.*, 747 F.3d 1025 (8th Cir. 2014) (remanding action to state court after CAFA removal because named plaintiffs lacked Article III standing); *Reilly v. Ceridian Corp.*, 664 F.3d 38 (3d Cir. 2011) (affirming dismissal of data breach class action for lack of Article III standing). That would pose no problem for defendants if every state applied the same standing requirements as do federal courts. Of course, that is not true. Many states have virtually no standing requirement. For instance, the California Supreme Court has noted that while "Article III of the federal Constitution imposes a 'case-or-controversy' limitation on federal jurisdiction … [t]here is no similar requirement in our state Constitution." *Grosset v. Wenaas*, 42 Cal.4th 110, 1117

n.13, 175 P.3d 1184 (Cal. 2008). To sue in California, a plaintiff need only be a real party in interest — there is no "injury in fact" requirement. *Id*. at 434-35 & n.5 (distinguishing claims arising under California Unfair Competition Law, for which standing requirement was created by referendum).

Similarly, in Massachusetts, a plaintiff need not have suffered a concrete injury to recover statutory damages under some consumer protection statutes. For instance, to recover under Massachusetts General Law Chapter 93A, which proscribes deceptive trade practices, a plaintiff need not actually incur a loss — "if he or she is ready, willing, and able to purchase the product or service at a price consistent with the relevant statute," that is typically injury enough.[1] *Herman v. Admit One Ticket Agency LLC*, 454 Mass. 611, 618, 912 N.E.2d 450, 456 (Mass. 2009). Chapter 93A entitles plaintiffs to recover statutory damages even in the absence of proof of actual damages (in addition to equitable relief, attorney's fees and other remedies). *See Aspinall v. Philip Morris Cos., Inc.*, 442 Mass. 381, 400, 813 N.E.2d 476 (Mass. 2004). And Chapter 93A specifically authorizes class actions. *See* Mass. Ge. L. ch. 93A, § 9(2).

Plaintiffs seeking recovery under these sorts of state consumer protection statutes — where actual harm is not necessarily required and statutory damages can be ruinous — might now be protected from removal to federal court. Thus, in the very cases for which CAFA was devised, it might no longer apply. Moreover, *Spokeo* may incentivize the filing of cases with named plaintiffs that barely chin the bar — those who can allege a statutory violation with no concrete injury — to avoid federal court and also maximize the size of the putative class.

So, for instance, a plaintiff could file a putative class action in California state court seeking recovery under the Song-Beverly Credit Card Act, Cal. Civ. Code § 1747, et seq., alleging that a store wrongfully asked for his or her zip code during a credit card transaction. Without more, is there a concrete injury? Maybe not. After all, it's a fact pattern closely parallel to Judge Alito's example in *Spokeo* of what wouldn't suffice as a concrete injury for Article III purposes: zip code missteps. But it is also a fact pattern in which federal jurisdiction has been a benefit to defendants.[2] *See Yeoman v. Ikea U.S.A. West, Inc.*, Case No. 11-cv-00701, 2014 U.S. Dist. LEXIS 168968 (S.D. Cal. Dec. 4, 2014) (decertifying class seeking recovery under Song-Beverly for improper request for zip code). And it is a fact pattern that might no longer be susceptible to federal jurisdiction.

Moreover, *Spokeo* might not merely roll back CAFA jurisdiction over class actions seeking recovery under state consumer protection statutes. There is a very real possibility that it could limit federal question jurisdiction in unintended ways. *Spokeo* itself, after all, addressed FCRA violations. Robins likely could have filed suit in California state court seeking recovery for the same statutory violation. Post-*Spokeo*, a defendant could not remove a procedural injury case, *even on federal question grounds*. The same is true for other federal statutes for which Congress has created concurrent federal and state jurisdiction, like the Truth in Lending Act or the Telephone Consumer Protection Act. After *Spokeo*, state courts — at least those that have a lower standing bar than federal courts — will essentially have exclusive jurisdiction over federal statutory actions that allow statutory damages for technical or procedural violations.

Spokeo is a limitation on federal jurisdiction, and whatever the immediate benefits to defendants, limitations on federal jurisdiction will rarely inure solely to their advantage. The defense bar must develop strategies for countering the tactical pleading that is likely to be part of *Spokeo*'s legacy.

---

[1] Some case law suggests that Massachusetts is moving closer to requiring a concrete injury for recovery. *See*, *e.g.*, *Hershenow v. Enterprise Rent-A-Car Co. of Boston*, 445 Mass. 790, 797, 840 N.E.2d 526 (Mass. 2006).

[2] That is not to say that state courts are uniformly hostile to defendants in Song-Beverly cases, or other consumer class actions. For instance, in *Harrold v. Levi Strauss & Co.*, 236 Cal. App. 4th (2015), the California Supreme Court recently affirmed denial of certification in a case in which the plaintiff alleged the defendant violated Song-Beverly by soliciting email addresses after credit card transactions. It is no secret, however, that defendants and defense counsel typically prefer to defend putative class actions in federal court.

Contacts

Neil K. Gilman
ngilman@hunton.com

John J. Delionado
jdelionado@hunton.com

Michael J. Mueller
mmueller@hunton.com

Thomas R. Waskom
twaskom@hunton.com