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Spokeo 2 Years Later: As Split Grows, High Court Redo Looms

By **Allison Grande**

Law360 (May 18, 2018, 11:26 PM EDT) -- In the two years since the U.S. Supreme Court declared that concrete injuries are necessary to establish Article III standing, federal courts around the country have moved to apply the holding to scores of privacy and data breach cases. While some tentative lines have been drawn, the ruling is still being applied inconsistently, leading to what many attorneys believe will be another high court showdown in the near future.

The high court's **6-2 decision** in Spokeo v. Robins on May 16, 2016, shook the litigation world, as both sides of the class action bar rushed to claim that they stood to benefit from the justices' ruling that consumers must allege a tangible or intangible concrete injury and cannot rely solely on a mere statutory violation to establish standing. Plaintiffs said that the pronouncement supported their argument that intangible injuries such as an invasion of privacy were enough to get in the courthouse door, while defendants countered that the ruling foreclosed frivolous lawsuits based on claims divorced from any real-world harm.

Since then, dozens of federal district and appellate courts have been tasked with applying the justices' reasoning to suits over alleged violations of statutes ranging from the Fair Credit Reporting Act to the Telephone Consumer Protection Act and to claims stemming from massive data breaches. And as has been the case since the **very early post-Spokeo days**, these courts have been far from uniform in their pronouncements, in large part because the Supreme Court refused in its decision to apply its broad reasoning to the FCRA claims leveled against Spokeo.

"Lower courts are defining the concrete harm standard required to satisfy Article III, but reaching conflicting conclusions," Mayer Brown LLP partner Andrew Pincus said. "Many recognize that real world harm or the imminent threat of real world harm is what's required. But others have upheld standing based on a lesser standard — for example, failure to receive a notice even though the plaintiff suffered no adverse consequences from that failure."

The Supreme Court has been asked on more than one occasion in the past two years to tackle this divergent treatment among the circuits, but the justices have yet to agree. But as lower court decisions trickle out, attorneys predict that the confusion will only continue to mount and the high court won't be able to ignore the issue for long.

"It seems likely that intervention by the Supreme Court will be required to resolve these disagreements," Pincus said.

TCPA Cases Flourish

Given that the original dispute before the high court centered on claims that Spokeo had violated the FCRA by publishing inaccurate information about plaintiff Thomas Robins, the justices' decision has had the most direct and significant impact on statutory privacy cases, with the outcome of each dispute often dependent on the nature of the statute-at-issue, attorneys say.

For attorneys defending cases brought under the TCPA, Spokeo has done little to change their clients' fortunes at the outset

Spokeo Standing By Statute

of litigation, with the majority of courts that have weighed these types of challenges coming to the conclusion that the receipt of an unwanted phone call, fax or text, a practice that is explicitly barred by the statute, is enough for plaintiffs to move forward with their claims.

"In the TCPA context, standing arguments based on Spokeo have been less successful because courts have been willing to find that wasted time and loss of the use of a phone or fax machine amount to a concrete injury," Troutman Sanders LLP partner David Anthony said.

The trend has so far been endorsed by the Third Circuit, which in **a July ruling** revived a prerecorded sales call suit against Work Out World on the grounds that the plaintiff had alleged the type of concrete privacy injury squarely identified by Congress in the TCPA, and by the Ninth Circuit, which **in January 2017 found** that an ex-gym member suing Vertical Fitness over spam-like texts had standing because the invasion of privacy and disruption of solitude he experienced as a result of the communications constituted a sufficiently concrete injury.

TCPA defendants have had a tough time winning standing arguments because of the nature of the 1991 statute, which was designed to shield consumers from having their privacy invaded by calls and other forms of communications transmitted without their consent. They also have to contend with the Supreme Court's declaration in Spokeo that the history and judgment of Congress in crafting a statute are "instructive" in determining whether an intangible harm constitutes a concrete injury, and Congress is "well positioned" to identify intangible harms that meet the Article III standing bar.

Circuit courts have dealt a blow to some statutory privacy claims while giving a boost to others in the two years since the high court's Spokeo standing ruling.

TCPA: Standing
- 3rd Circ. in Susinno v. Work Out World Inc.
- 9th Circ. in Van Patten v. Vertical Fitness Group

FACTA: No Standing
- 2nd Circ. in Crupar-Weinmann v. Paris Baguette and Katz v. The Donna Karan Co.
- 7th Circ. in Meyers v. Nicolet Restaurant of De Pere
- 9th Circ. in Bassett v. ABM Parking Services

FCRA: Mixed Rulings
- 9th Circ. in Spokeo v. Robins (on remand) and Syed v. M-I LLC
- 3rd Circ. in Horizon Healthcare Data Breach Litigation found standing
- D.C. Circ. in Owner-Operator Independent Drivers Assoc v. DOT found standing
- 7th Circ. in Groshek v. Time Warner Cable found no standing
- 4th Circ. in Dreher v. Experian Information Solutions found no standing

Cable Act: No Standing
- 7th Circ. in Gubala v. Time Warner Cable Inc.
- 8th Circ. in Braitberg v. Charter Communications Inc.

VPPA: Standing
- 9th Circ. in Eichenberger v. ESPN
- 11th Circ. in Perry v. CNN

"We've been seeing courts looking at the legislative history in some of these cases more than they otherwise would have before Spokeo," Sheppard Mullin Richter & Hampton LLP attorney David Poell said. "When it comes to the TCPA, not only the text itself but the legislative history shows that Congress was aiming to guard against all forms of harassing telemarketing calls under the TCPA and gave plaintiffs a right of action to sue, and that's held a lot of sway for the majority of courts in finding standing even if a plaintiff can't show economic harm."

While TCPA defense attorneys were initially optimistic that Spokeo would be "another bow in our quiver" in their attempts to chip away at the recent flood of suits under the statute, the stream of plaintiff-friendly decisions has caused some defendants to elect to forego making the lack of standing argument altogether and focus instead on proving such defenses as an autodialer wasn't used, or the proposed class doesn't share common injuries, Manatt Phelps & Phillips LLP attorney Diana L. Eisner said.

"Spokeo hasn't given us the ammunition we thought it might — it's sort of preserved the status quo in many ways — so bringing a Spokeo motion isn't one of the tried and true defense tactics at this point," Eisner said, adding that these standing decisions have prompted more plaintiffs' attorneys to draft new complaints or amend older filings to include allegations of loss of battery life, nuisance and other injuries that are increasingly being embraced by courts as constituting concrete harm.

Turning their efforts beyond the pleading stage may hold some promise for defendants, attorneys noted, especially in light of decisions such as the Northern District of Illinois' August ruling in Legg v. PTZ Insurance Agency Ltd., rejecting a motion to certify a TCPA class on the grounds that Article III standing concerns regarding individual class members' consent created individualized issues that predominated over any common class questions, according to Anthony.

"This decision does offer some strategic avenues to defendants facing TCPA class actions at least where consent may be at issue," Anthony said.

Credit Card Receipt Cases Dwindle

The defense bar has seen better fortunes with the Fair and Accurate Credit Transactions Act, which prohibits retailers from printing more than the last five digits of a credit card number or the card's expiration on sales receipts.

"Spokeo has had the effect of essentially wiping out FACTA class actions, at least in federal court," Poell said.

In enacting FACTA in 2003 as an amendment to the FCRA, Congress identified the primary purpose of the law as being to reduce the risk of identity theft by regulating how consumer account information is handled. However, in applying Spokeo to disputes accusing Burger King, Subway, Exxon Mobil and scores of others of printing too many credit card digits on receipts, federal district and appellate courts have for the most part refused to allow plaintiffs to move forward with their claims on the grounds that the offending receipts were never seen by anyone but the customer and therefore didn't expose them to any real threat of identity theft.

"Before Spokeo, you wouldn't have filed a standing motion in a FACTA case because that argument had lost so many times, most courts were finding standing for those claims," said Benesch Friedlander Coplan & Aronoff LLP partner David Almeida. "From our vantage point, Spokeo has allowed courts to do what they've always wanted to do, which is get cases like these FACTA disputes that are based on extreme technicalities off their dockets."

In the past two years, the Second, Seventh and Ninth Circuits have all backed the toss of credit card receipt claims lodged against businesses such as The Donna Karan Co. and ABM Parking Services, and attorneys see little indication that courts would be willing to find the printing of excess digits that either can't be used to identify a specific card or were never exposed to a third party to be anything more than a pure statutory violation without any concrete harm.

"Spokeo really gives judges the opportunity to say in cases like these that nothing's happened and there's no harm here, so I'm not going to destroy a company over this," Almeida said.

Fine Lines Emerging

While many lower courts are still issuing wild cards when interpreting Spokeo, attorneys are seeing faint lines being drawn between cases where personal information becomes public, and times when that data remains under wraps.

"The biggest dividing line we've seen because of Spokeo is a major distinction between the disclosure of information being put out in the public and claims related to information merely being held onto," Almeida said.

The division is most obvious when it comes to claims that have been brought under statutes such as FACTA and the Cable Communications Policy Act, which requires cable operators "to destroy personally identifiable information if the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information."

The Seventh and Eighth Circuits have most notably weighed in on how the Spokeo standing bar applies to claims that Time Warner Cable and Charter Communications, respectively, held onto customers' personal data after they had canceled their services, and in doing so agreed that both sets of plaintiffs lacked standing because the data hadn't been leaked or exposed in any way.

On the other hand, appellate courts **have been more willing** to find standing when it comes to the Video Privacy Protection Act, which centers on preventing the disclosure of consumers' video-viewing histories. The Ninth and Eleventh Circuits in cases brought against ESPN and CNN separately found that the sharing of customers' viewing data was enough to give the plaintiffs standing, although both disputes were tossed for failure to state a viable claim under the statute.

"In VPPA cases, the argument is that the company gave your information to a third party and now that third party has it," Almeida said. "There's a big difference between a third party having seen personal information and the hypothetical risk that it could get that information, and the courts seem to be recognizing that. It's a fine line, but it's a firm line."

The two worlds come to a head when it comes to the FCRA, the statute at the heart of the Supreme Court's Spokeo ruling and the one that in court cases has produced the most mixed results post-Spokeo.

The appellate court authority on the FCRA comes primarily from decisions from the Ninth, D.C. and Third Circuits finding standing for alleged statutory violations, and the Seventh and Fourth Circuits finding no standing for similar claims.

The decisions that did find standing include Robins' claims that Spokeo reported inaccurate information about him — which the Ninth Circuit **concluded in August** on remand from the Supreme Court — as well as allegations that a subsidiary of oilfield services giant Schlumberger Ltd. improperly placed a liability waiver on job application disclosure forms, that Horizon Healthcare failed to shield protected information from a data breach and that the U.S. Department of Transportation mishandled and misreported safety citation records that can hurt truckers' job prospects and business reputations.

"In issuing its opinion on remand, the Ninth Circuit looked generally at the interests protected by the statute and didn't require Robins to show real world actual injury that he suffered and was unique to him," Orrick Herrington & Sutcliffe LLP attorney Marc R. Shapiro said about the Spokeo decision. "The court looked to the statute and what Congress was generally trying to accomplish and found the intent behind what Congress did was enough."

Conversely, the Seventh Circuit refused to find standing for claims that Time Warner and Great Lakes Higher Education Corp. secured a consumer report using a disclosure and authorization document that violated the FCRA, and the Fourth Circuit axed a $12 million class action judgment against a unit of credit report provider Experian PLC over its alleged failure to disclose the source of its credit information, with both courts finding that simply being denied access to information or failing to secure a disclosure required by law doesn't amount to a concrete injury necessary to meet the Spokeo standing bar.

"These courts have taken a little broader view of standing and concluded that just because Congress had someone likethe plaintiff in those cases in mind when it created the statute doesn't mean that they have standing," Shapiro said.

The Supreme Court has been asked to hear several of the statutory privacy cases that have been decided by the federal appellate courts, including the FCRA decisions in the remanded Spokeo lawsuit and the Time Warner dispute out of the Seventh Circuit, but the high court — which had just eight justices at the time of the Spokeo ruling, just after the death of Justice Antonin Scalia — has refused to reconsider the issue at full strength.

"It will be interesting to see if the justices have any appetite for revising the Article III standing issue in the context of the FCRA or another federal statute," Poell said.

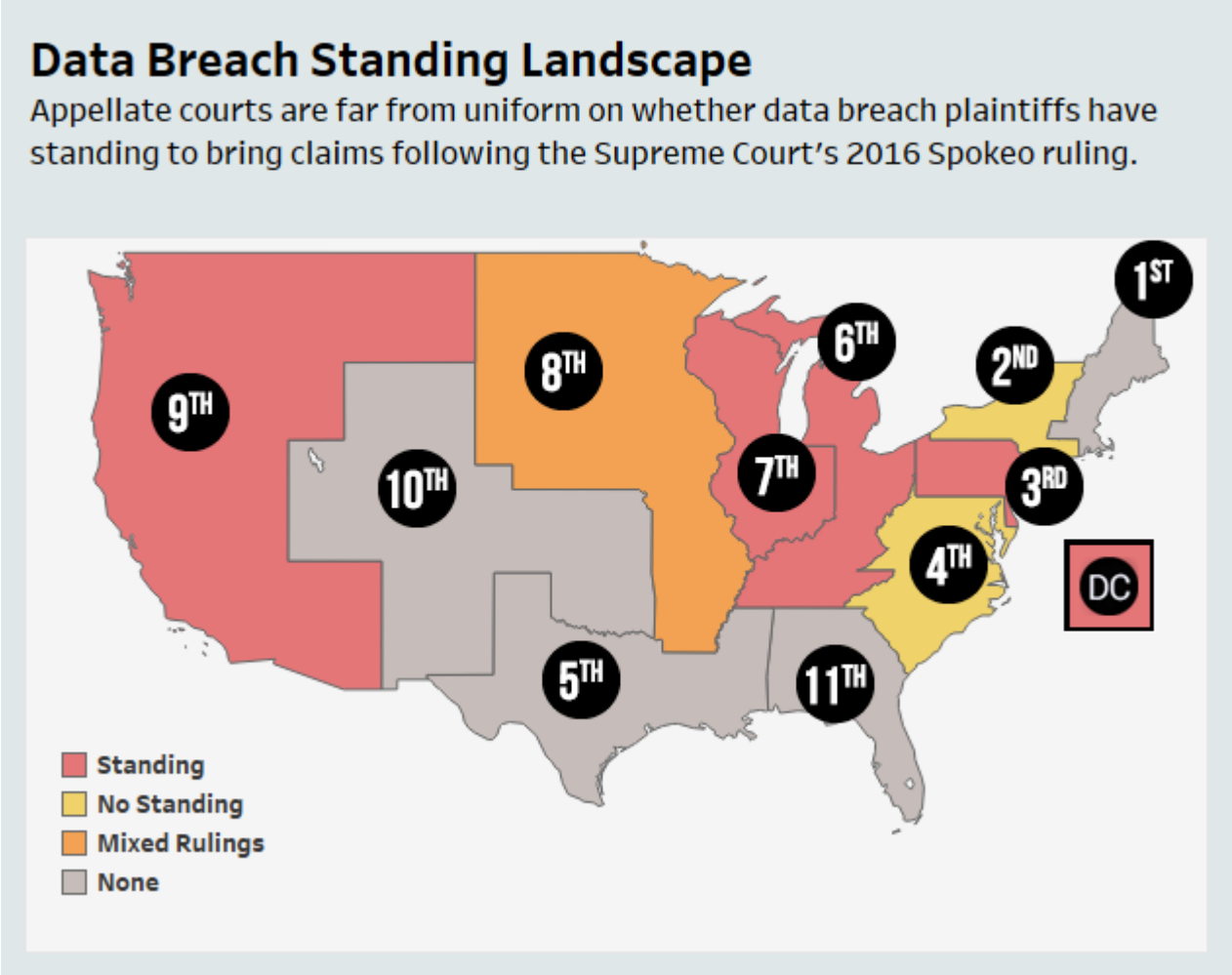
No Uniformity In Data Breach Cases

The justices' holding that injuries must be concrete in order to meet the bar for Article III standing has also repeatedly been used to justify the toss and retention of cases alleging negligence, contractual breaches and other claims in the wake of high-profile data breaches.

"For data breach cases, the decisions have been all over the place," Almeida said.

Depending on the type of information that has been compromised and whether any consumers can claim that they have incurred fraudulent charges on their credit cards or suffered identity theft, courts must take into account not only the concrete injury standard set by Spokeo but also the threshold for standing established by the high court in its 2013 decision in Clapper v. Amnesty International. In that case, the justices held that Article III standing requires a plaintiff to show they've suffered a real and personal harm traceable to the defendant's actions, or that it's imminent that the plaintiff will experience such a harm in the future.

The application of these two rulings has caused circuits to reach divergent conclusions when it comes to the question of whether an exposure of personal data that leads to an increased risk that the information will be misused is enough for Article III standing. The Third, Sixth, Seventh, Ninth and D.C. Circuits have all concluded that plaintiffs don't have to wait for their data to actually be misused to sue the company for allegedly failing to adequately protect that information, while the Second, Fourth and Eighth Circuits have issued decisions taking the opposite stance.



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"One area that needs to be flushed out more is this allegation that anxiety about dealing with a breach and the inconvenience with dealing with this problem is sufficient for standing," Poell said. "Some courts have held that it's enough, some courts have held that they need to be shown a little more than that."

A resolution on that issue would most likely have to come from the Supreme Court, which in February **passed up the opportunity** to review the D.C. Circuit's decision to revive a putative class action over a data breach at health insurer CareFirst on the grounds that the policyholders had "cleared the low bar to establish their standing at the pleading stage" by asserting there was a substantial risk that their stolen personal information could be used "for ill" purposes, such as identity theft, even though it had yet to be misused.

"It would be good for the justices to step in in the data breach context because these types of cases clearly aren't going away and federal courts are not uniform in figuring out these cases," Poell said. "The stakes are high. If the Supreme Court were to say that data breach plaintiffs need to show actual economic harm to get into court, that could have the potential of dramatically limiting classes, or if they say anyone who shopped at this store during the time period regardless of fraud charges have standing, that would have a dramatic impact on people bringing class claims as well."

The State Court Factor and Shifting Legal Theories

Attorneys on both sides of the bar have also observed that the Spokeo decision has impacted where suits are being filed and the strategy for removing them from that jurisdiction.

"Article III isn't about whether you're allowed to file suit, it's about where the suit can be heard," plaintiffs attorney Jay Edelson, the founder of Edelson PC, said **at a conference** in March.

When plaintiffs choose to file major suits in state courts, defendants typically try to remove the disputes to federal court due to the diversity of the location of the parties or one of the other grounds

for removal under the Class Action Fairness Act. However, what has become somewhat of an automatic move has been complicated to some degree by Spokeo.

As Edelson has noted, companies who remove suits to district court and then argue that the venue doesn't have standing to hear the dispute over Spokeo may face the risk of getting hit with sanctions for removing a suit that had no place in the federal system. The risk is causing some defendants to reevaluate their options based on the case law in their jurisdiction, and think twice before removal or making a Spokeo argument in the first place.

"Initially, the defense bar was overly excited and filed Spokeo motions without regard to what the effect might be," Poell said. "If a Spokeo motion is successful, the defendant might end up in state court, which could be perceived as a worst venue for them. The Spokeo ruling has created an option in a lot of these cases, but that option has to be exercised carefully."

As a result, defense counsel and their clients are paying more careful attention to the emerging case law and crafting defense strategies that for example, avoid state court in a TCPA case.

The biggest takeaway from Spokeo on the ruling's two-year anniversary, according to Anthony, is that litigants need to know the case law in their court.

"While a Spokeo argument may fail in one court, or even with one judge in that court, it could result in a dismissal with a different judge or in a different court," he said. "Following the trends in your particular jurisdiction will help guide litigants on whether a viable Spokeo argument may be worth pursuing, [and] given the potential significance of a successful Spokeo motion ... [they] will continue for the foreseeable future as the courts continue to wrestle with the contours of the particular claims and statutes at issue."

--Editing by Pamela Wilkinson and Kelly Duncan.
