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by: Colin E. Flora
Associate Civil Litigation Attorney

Short-Sighted Invocation of *Spokeo v. Robins* May Lead to Exclusive Jurisdiction for Statutory Claims in State Courts

In May, the Supreme Court handed down the much-anticipated *Spokeo Inc., v. Robins*. Ostensibly, the case was to decide the extremely broad question presented in the petition for certiorari: “Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.” As a decision from yesterday out of the Northern District of West Virginia aptly noted:

In *Spokeo*, the defendant sought a ruling that would have eviscerated causes of action seeking statutory damages. But the Supreme Court did no such thing. Instead, it issued a narrow ruling remanding the case to the Ninth Circuit solely on the basis that it failed to address the extent to which Robins’ injuries were “concrete” as opposed to merely particularized, notwithstanding prior Supreme Court precedent requiring a finding of both. The Supreme Court explicitly took no position on whether Robins’ injuries were in fact concrete for standing purposes.

Spokeo thus created no new law; it merely remanded the case to allow the Ninth Circuit to conduct the proper analysis. As Justice Alito

noted, “[w]e have made it clear time and time again that an injury in fact must be both concrete *and* particularized.”

In the end, *Spokeo* did little more than to emphasize a previously overlooked portion of the standing requirement. It did note that merely violating a statute may not be enough, at least where the injury stems from a violation of a merely procedural requirement. In the context of the Fair Credit Reporting Act, the Supreme Court used the example of an inaccurate zip code as a merely technical violation, which would not occasion concrete injury.

Contrary to a vast misconception, *Spokeo* did not even decide that the plaintiff in that case lacked standing. All the Supreme Court decided was that the Ninth Circuit had not considered whether the injury was concrete. Consequently, the Supreme Court remanded the case to the Ninth Circuit. A quick note on that decision: As appellate courts, the Ninth Circuit is, legally speaking, no more well situated to answer that question than the Supreme Court. Nevertheless, the answer, at least in the *Spokeo* case itself, is left to the Ninth Circuit. Notably, the only difference between the six-justice majority and the two-justice dissent was that the dissent thought the answer clear that Robins had alleged a concrete injury.

Both the plaintiffs’ bar and the defense bar have treated the decision as a victory. A post on the Technology & Marketing Law Blog does a good job delving into the dichotomy of celebrators. In the weeks since the decision, cases all over the nation that were stayed pending the resolution have gotten back under way and battles over standing have risen to the fore in cases where it would never have been considered before *Spokeo*. Unsurprisingly, early signs from the district courts indicate that *Spokeo* will ultimately do little to shift the legal landscape. For example, the Northern District of West Virginia case we discussed above concluded that plaintiffs have standing under the Telephone Consumer Protection Act where they have been the victim of robocalls.

Nevertheless, all across the nation, intrepid defense attorneys are arguing that *Spokeo* means the plaintiffs lose. There is a wrinkle to this argument that was exposed two days ago in the case *Davis Neurology v. DoctorDirectory.com, LLC* from the Eastern District of Arkansas. To understand what happened in *Davis Neurology* we need to look at a different procedural tool: removal.

We’ve discussed the concept of subject matter jurisdiction before. Since this installment of the Hoosier Litigation Blog is really targeted to lawyers, I am not going to delve much into subject matter jurisdiction other than to say it is the concept of whether a specific court has the authority to hear a specific case. Notably, although federal courts *may* have the authority to hear certain cases, jurisdiction

may be concurrent with state courts. Where this occurs, the plaintiff may choose to file a claim in state court and the defendant may then opt to remove the case to federal court pursuant to 28 U.S.C. § 1446. We have previously discussed removal in the context of the Class Action Fairness Act. The defendant can only do so, however, if the federal court actually has jurisdiction. That is where *Spokeo* and removal mix.

In *Davis Neurology*, the problem for the defendant was that it removed the case to federal court then argued, because of *Spokeo*, that the plaintiff lacked standing. The problem is that standing, which is derived from Article III of the U.S. Constitution, does not actually apply to the power of the individual to seek redress; it acts as a limitation on the authority of the court to hear a case. Just because a party does not have standing to be heard in federal court does not mean that it lacks standing to be heard in state court; the standards are different. For example, from the founding of the nation, the Supreme Court has held that “the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.” Indiana, however, is different. As the Indiana Supreme Court has said:

It is true that moot cases are ordinarily dismissed. But that is not always the case. The jurisdiction of federal courts is limited by Article III of the federal constitution to “cases and controversies,” and that language has long been taken to prohibit advisory opinions. The Indiana Constitution has no comparable limitation on “the judicial power of the State” conferred on the courts by article 7, section 1 of the Indiana Constitution. This Court can, and does, issue decisions which are, for all practical purposes, “advisory” opinions.

This is where the double-edged sword of *Spokeo* swoops in. It is no secret that defendants generally prefer to be in federal court and plaintiffs in state. In Indiana, as we’ve discussed, this is primarily due to the fact that the federal summary judgment standard is considerably more favorable to a defendant than the Indiana summary judgment standard. Consequently, defendants try to remove to federal court whenever they can. That is what happened in *Davis Neurology*. There, the defendant removed to federal court then argued that *Spokeo* barred standing for the plaintiff. Judge Miller recognized the contradiction:

Davis Neurology filed suit in state court, but Doctor Directory removed. Although both state and federal courts can hear cases involving the TCPA, federal courts are limited by Article III of the Constitution and statutes enacted by Congress. One such limitation is that *Davis Neurology* must have standing, which speaks to the jurisdiction of the federal courts. Since Doctor Directory removed, it

has the burden of proving that jurisdiction exists.

Doctor Directory finds itself in a contrarian position: by forcing this case into federal court through removal, it asserts jurisdiction exists; however, by arguing Davis Neurology lacks standing after *Spokeo v. Robins*, it asserts that jurisdiction is lacking. Although *Spokeo* expanded the discussion, courts have observed that the Supreme Court did not answer the ultimate question. If there is any doubt, however, remand is appropriate. Indeed, now that Doctor Directory essentially concedes there is a lack of standing – and thus a lack of jurisdiction – the correct remedy is not judgment, but rather remand back to state court.

Interestingly, in 2012, the Supreme Court had to settle a circuit split, in which some circuits held that TCPA cases were the exclusive jurisdiction of state courts. Ironically, if defendants across the nation succeed in their *Spokeo* challenges, this may ignite a return to exclusive jurisdiction in state courts for many cases. Indeed, in nationwide class actions, if federal courts do not have jurisdiction but even one of the fifty states, or even a territory for that matter, allows standing, the class action could be filed in that jurisdiction and there is nothing the defendant could do to stop it. The classic approach of removal to federal court then transferring venue would not be available.

Take, for example, the Seventh Circuit case we discussed a few weeks ago. There, an attorney who was unsuccessful in a putative class action case in Wisconsin federal court, filed a new case in Arkansas state court for damages resulting from a flood in Wisconsin. The case was removed to an Arkansas federal court and transferred to Wisconsin. The Seventh Circuit ultimately affirmed sanctions against the attorney for, among other things, filing the case in Arkansas state court where there was no connection whatsoever. That result was only occasioned by the fact that the case could be removed to federal court. If short-sighted defense attorneys across the nation have their way and succeed in kicking whole statutes out of federal courts, they will have succeeded in doing nothing more than giving plaintiffs' attorneys their long-sought exclusive jurisdiction in state court.

Of course, the result in *Davis Neurology* is only true in cases that were removed. It is impossible to remand a case that did not start in state court. But that can be really just a minor technicality in many cases. Even if the case is dismissed from federal court, such a dismissal would not bar filing the exact same case in state court. Even a case dismissed after the statute of limitations has expired may be re-filed in state court under state journey's account statutes. This can be doubly

true in class action cases in which the class claims may have tolled the claims of others pursuant to *American Pipe Construction Co. v. Utah*.

Put simply, *Spokeo*, if ever a victory for defendants, may prove to be Pyrrhic.

Join us again next time for further discussion of developments in the law.

Sources

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