



## Labor & Employment and Litigation ADVISORY ■

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### Causation Counts: Strategic Use of Summary Judgment Post-*Spokeo*

Early scorecards in the aftermath of the U.S. Supreme Court's decision in *Spokeo Inc. v. Robins* all note high marks in the plaintiffs' column, especially at the motion to dismiss stage. Emboldened by these decisions, plaintiffs continue to resist the idea that the plain language of *Spokeo* disallows standing for bare procedural violations of the Fair Credit Reporting Act (FCRA) and other comparable statutes. Instead, plaintiffs' counsel across the country have insisted that the *Spokeo* decision was essentially meaningless—i.e., that it merely affirmed existing law authorizing Congress to create purely procedural rights, the violation of which equates to actual harm sufficient to confer standing under Article III.

Despite class action plaintiffs' early successes, a new strategy illustrates a second potential approach for defendants to fight back and counter any perceived momentum that plaintiffs may have gained on the motion to dismiss front since *Spokeo* was decided. Defendants, of course, should not hesitate to make a *Spokeo* attack at the motion to dismiss stage on the sufficiency of a complaint alleging claims under the FCRA (or any other statute). That said, an attack on the pleadings alone should not be the only weapon in your arsenal.

Nothing about the *Spokeo* opinion limits it to the motion to dismiss context. Defendants, therefore, should think strategically about how to leverage the decision at each litigation milestone. Those strategic considerations should include, at a minimum:

- Whether to frontload discovery on the plaintiff's actual harm in order to force an early determination on standing before the floodgates of discovery are opened.
- Whether a defendant has enough evidence from efficient discovery tools, such as interrogatory responses and requests for admission that, when combined with evidence adduced by its own witnesses, could lead to a case-dispositive result.

Indeed, a named plaintiff's lack of evidence of actual harm from an alleged procedural violation can be used effectively both to underscore the illusory nature of the alleged injury and to demonstrate that the plaintiff cannot meet the bare minimum requirements for Article III standing no matter how much additional discovery is sought. Not only can this strategy be effective for obtaining a favorable dispositive result, but when paired with an effort to prevent the plaintiff from going down the rabbit hole of class discovery, it can be highly cost-effective too.

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## The *Spokeo* Opinion and Its Immediate Aftermath

The issue accepted by the Supreme Court for review in *Spokeo* was whether a bare procedural violation of the FCRA is sufficient for Article III standing, which requires that an injury be both (1) concrete and particularized; and (2) actual or imminent.

In its majority opinion, the Supreme Court vacated the Ninth Circuit's decision, holding that although the appellate court addressed the "particularized" prong, it had failed to consider the "concrete" requirement of Article III standing. The Court stopped short, however, of determining whether the plaintiff's alleged injuries-in-fact passed the concreteness test. Instead, the Court remanded the case to the Ninth Circuit to complete its analysis on that front.

In the six months since the *Spokeo* opinion was rendered, courts have been busy attempting to interpret the Supreme Court's guidance and apply the articulated rationale of the standing test. Particularly at the motion to dismiss stage, courts have developed an array of interpretations in a relatively short period of time and left observers with a mixed bag of results.

For example, in *Thomas v. FTS USA LLC*, the Eastern District of Virginia looked to the legislative intent behind the FCRA and sided with the plaintiff's argument that he had standing based on an alleged pre-adverse action notice violation and a claim that the defendant employer impermissibly used his credit report. In that case, the court was particularly persuaded by the fact that Congress, in enacting the FCRA, had recognized certain intangible harms, such as the right to receive information before an adverse action is taken against you. The inclusion of an actual damages provision as an alternative to statutory damages further suggested to the court that the statute was intended to protect against intangible harms for some FCRA claims where actual damages might be particularly hard to prove.

In line with *Thomas*, courts in other circuits, including the Fourth, Ninth and Eleventh Circuits, have also found that some procedural violations of the FCRA can still confer Article III standing based on the statutory violation alone. Consequently, those cases allowed a bare procedural FCRA claim to survive a motion to dismiss seemingly in spite of the guidance handed down by the Supreme Court in *Spokeo* last May.

The conclusion drawn in *Thomas* and similar cases, however, has not been unanimous, arguably because *Thomas* reached the wrong result and one that is inconsistent with *Spokeo's* guidance. In the Sixth Circuit, courts have found plaintiffs to lack standing when they failed to allege that they suffered any consequential damage as a result of a purported FCRA violation. In *Smith v. Ohio State University*, for example, the Southern District of Ohio found no concrete harm from disclosures that did not comply with the FCRA when the employer conducted an employment-related background check.

## Reversing the Tide – Attacking at Summary Judgment

Each of these cases involved an attack on the sufficiency of a complaint at the motion to dismiss stage. But evidentiary proof that a named plaintiff suffered no concrete injury as a result of an alleged FCRA violation adds more arrows to a defendant's quiver. When hard evidence can disprove that a plaintiff suffered a cognizable injury caused by a procedural violation, laying out that evidence at summary judgment can be an effective tactic for early resolution or paring down of a plaintiff's claims. This was the strategy we utilized

in *Dutta v. State Farm Mutual Automobile Insurance Company* in the Northern District of California. In that case, the causation element—i.e., the causal nexus connecting the alleged FCRA violation to the plaintiff's claimed harm—served as a foothold for us to argue that the plaintiff's "harm" would have occurred regardless of the alleged violation, and therefore it could not have caused the plaintiff any actual harm.

Plaintiff Bobby Dutta—a former applicant for a position as an insurance agent—alleged that the defendant had violated the FCRA's pre-adverse action notice requirement when it allegedly denied his job application due to negative information in his credit report before providing him with a copy of his report and certain other statutorily required disclosures. Although Dutta did not dispute that he received his pre-adverse action notice, Dutta claimed it was untimely and failed to give him a "reasonable opportunity" to dispute his credit information before the adverse decision was communicated to him.

While a motion to dismiss had already been denied pre-*Spokeo*, the defendant utilized its own internal fact investigation, and basic initial discovery requests, to develop an evidentiary record on Dutta's individual claim that demonstrated the deficiency of his alleged injury. Simultaneously, the defendant requested a bifurcated discovery process to frontload discovery only on the actual harm element in the initial phase. Thus, the defendant's motion for summary judgment served a dual purpose—it requested dispositive relief, but also illustrated, at a minimum, why it made practical sense to address the actual harm issue first, before unnecessary expenses and judicial resources were wasted.

In moving for summary judgment on Dutta's individual claim, the defendant laid out the reasons why Dutta had suffered no concrete harm from the FCRA violation he alleged. For Dutta, even if he had received a timely FCRA notice, the result of his job application would have been the same—i.e., he still would have suffered the adverse action by having his application denied. In *Spokeo*, the Court provided two explicit examples of when an FCRA procedural violation may result in no harm: when a consumer reporting agency fails to provide a required notice to a user of the agency's consumer information but the information is nonetheless entirely accurate, and the dissemination, without more, of an incorrect zip code in a person's report. In Dutta's case, the defendant argued that his claim fell into both of these categories—that while the defendant allegedly failed to provide him with a copy of his report before taking an adverse action, not only was the information that led to the decision entirely accurate, but the purportedly inaccurate information was demonstrably immaterial to the adverse decision. Accordingly, the defendant argued, Dutta had alleged precisely the kind of "bare procedural violation" that does not result in concrete harm, which *Spokeo* held to be insufficient to confer standing under Article III.

To underscore this point with evidence in our summary judgment motion, we developed the record and harmonized its affirmative evidence with Dutta's own interrogatory responses and complaint exhibits. For example, the following evidence was instrumental in obtaining summary judgment:

- **Plaintiff's discovery responses.** Dutta initially provided an interrogatory response indicating that his harm stemmed from not receiving a pre-adverse action notice, resulting in vaguely defined emotional distress. Only later in the proceedings, in an affidavit, did Dutta allege in a conclusory manner that the violation resulted in a lost job opportunity.

- **Plaintiff's identification of the disputed credit information.** Dutta's own exhibit to the complaint spelled out what he claimed was inaccurate on his credit report—namely, a debt charge-off that he did not deny but rather claimed should have been dated several years earlier than it showed on his report.
- **Defendant's credit review scoring guidelines.** Dutta did not dispute the fact of the charge-off, but rather contended that, if the date were accurate, the charge-off would have fallen outside the defendant's timeframe for evaluating applicants' credit information. The defendant was able to demonstrate, however, that the charge-off was appropriately considered under its guidelines and that, under those same guidelines, the undisputed fact that the charge-off occurred was a disqualifying event that was fatal to Dutta's job application.
- **Accounting principles and other FCRA provisions regarding charge-offs.** By conducting a deep dive into accounting principles, the defendant was able to show the court how Dutta's dispute resulted from his own misunderstanding of what a debt charge-off is and how it is reflected on a consumer report. The defendant further buttressed its argument by pointing to another FCRA provision that a charge-off can legally remain on a credit report for seven years. In other words, Dutta was mistaken and his report was ultimately correct.

Because Dutta's report was accurate, and because his charge-off was disqualifying, no amount of notice or "opportunity to dispute" his report with the defendant would have prevented the denial of his application. The alleged FCRA violation, in other words, was not causally connected to Dutta's fate. Put simply, as the court observed in its opinion, Dutta's claim boiled down to the fact that he "wanted the timely chance to dispute how [the defendant] treated accurate information, rather than the timely chance to correct inaccurate information. That is not what the FCRA protects."

In a concise opinion, Judge Charles R. Breyer—brother of U.S. Supreme Court Justice Stephen Breyer—cut to the core of Dutta's failure to plead a concrete injury and granted summary judgment on the entirety of his complaint. Pointing out the logical inconsistencies of Dutta's speculative injury, the court noted that "[d]enial of access to information can be a concrete harm under the right circumstances. But there must be an actual denial of information—not just a delay in getting it." Whether Dutta had standing to bring a claim for the alleged timing violation, then, "hinges on whether he suffered a concrete injury from the delay. He did not." Summing up Dutta's desire, the court held that "[a]t bottom, Dutta complains that [the defendant] denied him the chance to raise a doomed dispute three days earlier." Because Dutta's dispute was doomed from the start, regardless of the alleged pre-adverse action notice violation, the court found his claim to be a "textbook example" of the kind of "bare procedural violation" that cannot confer Article III standing after *Spokeo*.

## Key Takeaways

From the result in *Dutta*, there are several key takeaways defendants should note for attacking FCRA claims, as well as any other statutory claims that fall under the *Spokeo* penumbra:

- **Attack, Attack, Attack.** A motion to dismiss is a defendant's first salvo, not a last stand. Defendants should fight using *Spokeo* at each stage in the litigation—motion to dismiss, summary judgment, class certification and so on. Even after a denial, each stage will present additional opportunities for using *Spokeo* to point out why a plaintiff has alleged nothing more than a statutory harm divorced from any actual individual injury.
- **Leverage the Supreme Court's examples.** The examples noted in *Spokeo* suggest at least two categories of violations where a procedural violation may not lead to concrete harm: (1) when there is a failure to provide a required notice, but the consumer information at issue is not inaccurate; and (2) when some information is inaccurate, but the inaccuracy is inconsequential and unlikely to cause any concrete harm. Defendants facing procedural statutory claims should look for ways to frame the plaintiff's allegations within one or both of these categories and should conduct discovery and look for dispositive motion opportunities with this framework in mind.
- **Dig deep on details.** Defendants should not be afraid to look into the specifics of a putative class plaintiff's individual claim in order to show a lack of concrete harm from the alleged violation. Developing a detailed track record of why the plaintiff suffered, at most, de minimus harm relieves the court and the parties of expansive discovery while cutting to the core of the issues.
- **Put the individual first.** Bifurcating discovery is key, both strategically and for mitigating discovery costs. For purely procedural injuries, especially ones where plaintiffs allege no other actual injury, the nature of the alleged injury will be relatively uniform across the putative class. Accordingly, seeking resolution of the individual claims and asking the court to apply *Spokeo* as a threshold issue presents multiple strategic advantages. First, it reduces expansive class discovery costs. Second, in turn, it forces a plaintiff to tell the court up front why its claim sufficiently confers Article III standing. Third, if *Spokeo* is unsuccessful at summary judgment, it can be a clear signal to a defendant (and plaintiff) that settlement should be imminent.
- **Muddy up the individual record.** Even an unsuccessful summary judgment motion can pay dividends. By drawing back the curtain on the named plaintiff's individual circumstances, the court creates a track record of what individualized issues might differentiate the putative class. For instance, Judge Breyer concluded that "there are so many individual issues that you can't simply say because 10,000 people didn't get their form as required by law, therefore it's a class action." No matter if *Dutta* met Article III requirements (which he did not), the defendant gave the court a goal line for class certification that the plaintiff could never cross.

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