



# FDCC E-Newsletter

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## Data Breach, Privacy & Insurance Law Section

### The Evolving *Spokeo* Precedent

Ever since the Supreme Court (sans Scalia) decided *Spokeo v. Rollins*, lower courts have grappled with the meaning and parameters of the 6-2 May, 2016 decision. In *Spokeo*, the Court attempted to address whether violations of regulations in and of itself, supplied the requisite Article III standing irrespective of whether actual harm, occurred.

The key issue facing the Court in *Robins* was whether Article III standing could be conferred when a plaintiff suffers no injury, but instead seeks only to recover statutorily imposed penalties. Article III of the U.S. Constitution requires that a plaintiff suffer an injury in fact – injury or damage that is concrete and which the law recognizes – in order to maintain an action. The importance of the decision the Supreme Court faced was significant. Most privacy-related statutes contain monetary penalties recoverable by affected consumers or users; it is the compounding effect of such penalties across a class of individuals that have the plaintiffs' class action bar salivating.

While the *Spokeo* Court was clear that the mere allegation of the violation of a statute that contains a monetary penalty would not support standing, it left open the door for claims that involve only a statutory violation and penalty where some sort of "close relationship" between the penalty and tangible or intangible harm is alleged. How this must be pled and established is open to interpretation-SCOTUS didn't say. As predicted (see [Spokeo v. Robins: a Well Executed Punt?](#)), the lack of guidance by the Court has resulted in a lack of predictability of results among the Circuits.

So recently, two different federal appellate courts reached seemingly different conclusions about whether lower courts properly dismissed putative privacy data breach class actions for failure to satisfy Article III's concrete injury requirement. *In re: Horizon Healthcare Services Inc. Data Breach Litigation*, No. 15-2309, 2017 WL 242554 (3d Cir. Jan. 20, 2017) ("Horizon") (reversing dismissal); *Gubala v. Time Warner Cable, Inc.*, No. 16-2613, 2017 WL 243343 (7th Cir. Jan 20, 2017) ("Gubala") (affirming dismissal)

In *Horizon*, the plaintiffs asserted claims under the Fair Credit Reporting Act (FCRA). The claims were based on the theft of two laptops owned by their insurance carrier which contained unencrypted personally identifiable information. According to the plaintiffs, the carrier failed to adequately protect the confidentiality of their personal information.

Rejecting a *Spokeo*-based challenge, the Third Circuit held that because of the congressional decision to create a remedy for the unauthorized transfer of personal information through the FCRA penalty provisions, a violation of FCRA gave rise to an injury sufficient for Article III standing purposes. According to the Court, the alleged disclosure of their personal information created a *de facto* injury even though there was no evidence that the Plaintiffs' information was used improperly or even revealed. According to the Court, "*Spokeo* itself does not state that it is redefining the injury-in-fact requirement. Instead, it reemphasizes that Congress 'has the power to define injuries.'" The Third Circuit concluded that *Spokeo* did not require dismissal because Congress exercised the power to define injury "with the passage of FCRA" to "establish[] that the unauthorized dissemination of personal information by a credit reporting agency causes an injury in and of itself – whether or not the disclosure of that information increased the risk of identity theft or some other future harm."

In *Gubala*, the plaintiff asserted that his former cable provider, Time Warner, violated the Cable Communications Policy Act (CCPA) by continuing to store his personal information long after he had cancelled his subscription. The Seventh Circuit noted that retaining the data was an apparent but uncertain violation of the CCPA and held plaintiff lacked standing. According to the Court, *Gubala* asserted only that "the retention of the information, on its own, has somehow violated a privacy right or entailed a financial loss." According to the *Gubala* Court, there was no standing under *Spokeo*: "while the [plaintiff] might well be able to prove a [statutory] violation . . . , he ha[d] not alleged any plausible (even if attenuated) risk of harm to himself from such a violation – any risk substantial enough to be deemed 'concrete.'" In other words, there was no concrete injury based on plaintiff's right to privacy because he failed to allege an actual or threatened release or dissemination of his personal information.

On their face, it's a little hard to reconcile the two findings. In each case there was a statutory violation but in each case there was no showing that the information in issue had been disclosed to anyone. Perhaps a more imminent risk could be inferred from the theft of the laptops in *Horizon* than the mere unauthorized retention of data in *Gubala*. And indeed the failure to encrypt the data on the stolen laptop may have struck a nerve with the *Horizon* Court as well. Nevertheless, given the lack of definitive guidance by the Supreme Court in *Spokeo*, judicial results in this area will continue to be difficult to predict.