

## SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

## Expert Analysis

# Stricter Standards For Standing

Following the U.S. Supreme Court's May 2016 decision in *Spokeo v. Robins*, \_\_ U.S. \_\_, 136 S. Ct. 1540 (2016), courts have been re-examining whether plaintiffs seeking statutory damages, particularly under various consumer protection laws, have Article III standing to pursue their claims. With guidance from the Second Circuit's post-*Spokeo* decision in *Strubel v. Comenity Bank*, 842 F.3d 181 (2d Cir. 2016), courts in the Southern District of New York are beginning to flesh out the new approach to standing in such cases. We discuss below a handful of recent cases that chart this developing area of the law.

### 'Spokeo' and 'Strubel'

The "irreducible constitutional minimum" of standing consists of three elements: (1) injury in fact to the plaintiff (2) that is fairly traceable to the defendant's conduct (3) and that is likely to be redressed by a

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EDWARD M. SPIRO and JUDITH L. MOGUL are principals of Morvillo Abramowitz Grand Iason & Anello P.C., both concentrating in commercial litigation and co-authors of "Civil Practice in the Southern District of New York," 2d ed. (Thomson West 2016).



By  
Edward M.  
Spiro



And  
Judith L.  
Mogul

favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Injury in fact must be "concrete and particularized" as well as "actual or imminent." *Id.* In *Spokeo*, the Supreme Court focused on the "concreteness" requirement in the context of a claim

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for statutory damages under the Fair Credit Reporting Act of 1970 (FCRA). The plaintiff in that case asserted that a search engine geared at collecting and disseminating information about individuals had generated a profile for him containing inaccurate

information. He alleged that Spokeo qualified as a consumer reporting agency under FCRA, which seeks to ensure fair and accurate credit reporting and which provides for statutory damages of \$100-\$1,000 per violation, among other remedies. Notably, although the complaint specified the inaccurate information collected and disseminated by Spokeo (including information about plaintiff's family and employment status, age, education and relative affluence), it did not allege to whom the information was disseminated.

The *Spokeo* majority took issue with the Ninth Circuit's observation below that the "violation of a statutory right is usually a sufficient injury to confer standing." Recognizing that Congress plays an important role in identifying and elevating certain intangible harms to legally cognizable injuries, the court concluded that a plaintiff suing to vindicate such a statutory right does not automatically satisfy the injury-in-fact requirement. It concluded that the allegation of a "bare procedural violation, divorced from any concrete harm" would not alone create Article III standing. Rather, for a procedural violation to meet the concreteness

requirement, it must entail a sufficient degree of risk of real harm. Because the Ninth Circuit had not examined whether the claim in *Spokeo* met that standard, the court remanded for further consideration. 136 S. Ct. at 1550.

In its November 2016 decision in *Strubel v. Comenity Bank*, the Second Circuit measured the plaintiff's challenges to various credit card disclosures under the Truth in Lending Act (TILA) in light of *Spokeo*. 842 F.3d at 190 (internal citations omitted). *Strubel* held that the plaintiff had standing to pursue claims related to two of the challenged credit card disclosures, but that she lacked standing to pursue claims based on two other alleged disclosure defects. Specifically, the court held that the plaintiff had standing to pursue challenges to disclosures related to (1) limitations on rights to dispute credit card purchases and (2) procedures for disputing credit card purchases, because these two disclosures served to protect a consumer's concrete interest in avoiding the uninformed use of credit, one of the central purposes of the TILA. Observing that a consumer who is not informed of his own obligations is likely not to satisfy them, the court concluded that the creditor's alleged violation of these notice requirements gave rise to a "real risk of harm" sufficient to satisfy the concreteness requirement. *Id.* at 191.

By contrast, the court held that plaintiff lacked standing to challenge defects in mandated disclosures related to rights under an automatic payment plan, because the bank defendant did not even

have an automatic payment plan, and thus its disclosures posed no risk of harm to plaintiff. Similarly, it held that plaintiff lacked standing to challenge defects in the disclosures related to the bank's notice obligations in the case of a corrected billing error, in part because such a defect could not affect consumer behavior or harm a consumer's concrete interests in informed credit decisions. *Id.* at 192-93. Although the *Strubel* court went on to grant summary judgment to the bank even as to the disclosure challenges that the plaintiff had standing to assert, its discussion regarding

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standing gives meaningful guidance on the application of *Spokeo*'s concreteness requirement.

### Recent S.D.N.Y. Decisions

Judges in the Southern District of New York have considered post-*Spokeo* standing challenges to statutory claims asserted under a number of federal and state consumer protection statutes.

***Fair and Accurate Credit Transactions Act (FACTA)***. Judge Katherine Polk Failla in *Fullwood v. Wolfgang's Steakhouse*, 2017 WL 377931 (S.D.N.Y. Jan. 26, 2017), along with Judge Jed S. Rakoff in *Cruper-Weinmann v. Paris Baguette Am.*, 2017 WL 398657

(S.D.N.Y. Jan. 30, 2017) each dismissed cases for lack of standing brought under FACTA. Plaintiffs in both cases alleged that the defendant restaurants had willfully violated FACTA by failing to redact the expiration dates from their credit card receipts. FACTA, enacted with the purpose of preventing identity theft, requires businesses that accept credit and debit cards to redact all but the last five digits of the card number as well as the card's expiration date. In creating a retrospective safe harbor in 2007 for businesses that had printed the expiration date on credit card receipts, but had otherwise complied with FACTA, Congress found that experts had agreed that truncation of the credit card number alone, "regardless of inclusion of the expiration date, prevents a potential fraudster from perpetrating identity theft or credit card fraud." Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, 122 Stat. 1565, §2(a)(6). Congress nevertheless retained the requirement that expiration dates be redacted.

In both cases, the court found that the plaintiffs lacked standing. Judge Failla found the conclusory allegation that plaintiff received a receipt displaying the expiration date "and was damaged thereby" plainly insufficient to plead plausibly that plaintiff had suffered a concrete injury. 2017 WL 377931, at \*\*5-6. Similarly, Judge Rakoff noted that in the absence of an allegation that a third party ever saw or accessed the improperly redacted receipt, "it is not apparent how the presence of the full expiration date ...

might have threatened the security of [plaintiff's] identity.”

**Truth in Lending Act (TILA).** Judge Failla also issued a decision in *Schwartz v. HSBC Bank USA, N.A.*, 2017 WL 95118 (S.D.N.Y. Jan. 9, 2017), finding, in light of *Spokeo* and *Strubel*, that the plaintiff in that class action had not alleged a concrete injury arising from the defendant's alleged failure to comply with TILA disclosure requirements that failure to make the minimum payment by the due date would result in the imposition of a penalty interest rate. After detailing the alleged TILA violation, she noted that “[t]he problem for Plaintiff is that his specificity with respect to violation is outpaced by his imprecision with respect to consequent injury.” Judge Failla rejected as insufficient the complaint's allegations that members of the class suffered concrete harm or the risk of concrete harm because the disclosure omissions “impinged on their awareness of the cost of credit,” finding that “mere incantations” of concrete harm and of the purpose of TILA are insufficient to plead concrete injury.

Significantly, she noted that what the complaint lacked in specificity was actually contained in the plaintiff's briefing, which explained that the failure to disclose that a missed payment subjected the consumer to losing the standard interest rate on future balances, and deprived the consumer of information that would permit effective comparison shopping, thereby defeating the purposes of TILA. Notwithstanding the fact that

the injuries as described in the briefing were similar to those the Second Circuit found sufficient to support standing in *Strubel*, Judge Failla held that the plaintiff could not fill the “gaping hole” in his pleading through briefing. She went on to dismiss the complaint for lack of standing, declining to permit plaintiff an opportunity to replead because he had not requested leave to do so, but granting the dismissal without prejudice.

**New York Real Property Law §275.** A number of Southern District judges have recently considered whether plaintiffs have standing to assert claims for statutory damages against banks for late filing of mortgage satisfaction notices in violation of New York Real Property Law §275. That law requires such notices to be filed within 30 days and provides for escalating statutory damages of \$500-\$1,500 pegged to the length of delay in filing. Judge Vincent L. Briccetti in *Jaffe v. Bank of America, N.A.*, 2016 WL 3944753 (S.D.N.Y. July 15, 2016) and Judge Nelson S. Roman in *Bellino v. JP Morgan Chase Bank, N.A.*, 2016 WL 5173392 (S.D.N.Y. Sept. 20, 2016), certified for interlocutory appeal, 2017 WL 129021 (S.D.N.Y. Jan. 13, 2017), found that claims based on late filing alone, without allegations of other injury, alleged sufficiently concrete injury to satisfy the injury-in-fact requirement.

In both cases the courts found that the failure to timely file a mortgage satisfaction notice was sufficient to confer standing in that it created a real risk of harm by clouding the title to plaintiffs' properties. *Jaffe*, 2016 WL 3944753, at

\*4; *Bellino*, 2016 WL 5173392, at \*\*7-9. Interestingly, in *Strubel*, the Second Circuit cited with approval a decision from the Eleventh Circuit which reached the opposite conclusion, holding that violation of a statutory requirement to timely file a mortgage satisfaction did not manifest concrete injury when the action was commenced after the satisfaction was filed and the plaintiff did not allege financial loss or injury to credit. See *Strubel*, 842 F.3d at 195 n.15 (citing *Nicklaw v. Citimortgage*, 839 F.3d 998 (11th Cir. 2016)).

## Conclusion

These cases make clear that judges in the Southern District of New York are still refining how to evaluate standing following *Spokeo*. In assessing concreteness, judges are looking carefully at the complaint's specific allegations of harm and testing them against the purposes served by the statutes in question, the rights they confer, and the harm they seek to redress.