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Where Do Litigants “Stand” Following the U.S. Supreme Court’s Decision in *Spokeo, Inc. v. Robins*?

By R. Travis Campbell

On May 16, 2016, the U.S. Supreme Court issued the much anticipated decision in *Spokeo, Inc. v. Robins*, where it waded into the murky waters of Article III standing. The Court held that plaintiffs can no longer establish a sufficient “injury-in-fact” necessary to confer standing by merely alleging a “bare procedural violation” of a statute that is “divorced from any concrete harm.” Although the harm need not be “tangible,” gone are the days where a plaintiff can merely allege a statute has been violated to establish standing. *Spokeo* has the potential to weed out suits under a number of “consumer protection” statutes that frequently have been allowed to proceed by the lower courts. What type of injury—especially “intangible” injury—is sufficiently “concrete” to establish standing under various statutes remains unclear. But the Court did offer some guidance.

The factual background in *Spokeo* is straightforward. The plaintiff alleged that company named Spokeo, Inc.—a consumer reporting agency—violated portions of the Fair Credit Reporting Act (“FCRA”) by gathering and disseminating inaccurate information about him, including his age, marital status, educational level and employment status. The FCRA generally prohibits consumer reporting agencies from reporting information they know to be inaccurate. The Ninth Circuit held the plaintiff’s allegation that the company violated his statutory rights with respect to his credit information was sufficient to establish standing. The Supreme Court disagreed.

The Court confirmed the longstanding rule that, to satisfy Article III’s injury-in-fact standing requirement, the injury—in addition to being “particularized”—must also be “concrete.” The Ninth Circuit’s standing analysis, the Court held, was “incomplete” because it failed to determine whether the plaintiff’s purported injury was sufficiently “concrete.”

The Court explained that to be “concrete” an injury “must actually exist,” and not be “abstract.” The injury need not be “tangible.” “Intangible harm” may constitute injury-in-fact. The Court instructed lower courts to look to “whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts” and the judgment of Congress in enacting the statute at issue. The “risk of real harm” may also be sufficient. The Court emphasized, however, that the injury-in-fact requirement is not satisfied merely because

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1 136 S. Ct. 1540 (2016).
Congress conferred a statutory right that authorizes a person to sue to vindicate that right. In other words, as the Court explained, alleging a “bare procedural” statutory violation will not suffice.

The Court did not pass judgment on whether the plaintiff sufficiently alleged a “concrete harm” that stemmed from the alleged FCRA violation and, instead, remanded the case to the Ninth Circuit to decide the issue. The Court did provide two examples of “bare procedural violations” of the FCRA that “may result in no harm”: (1) a defendant’s failure to comply with statutory notice requirements; and (2) the dissemination of inaccurate information about a plaintiff, such as incorrect zip code, which does not “cause harm or present any material risk of harm.”

Although the Court did not go as far as defense attorneys had hoped, Spokeo will still have a significant impact on the ability of plaintiffs to bring cases under a wide range of consumer protection statutes, including the Fair Credit Reporting Act, Telephone Consumer Protection Act, Fair Debt Collection Practices Act and Truth in Lending Act. Courts will need to resolve on a case-by-case basis what constitutes sufficient “concrete harm” under these and other statutes. Previously, plaintiffs routinely alleged statutory violations without alleging they suffered any actual harm as a result of the alleged violation. Because Congress created a statutory right that could be enforced, courts generally held the plaintiffs did not need to allege they suffered actual harm. Spokeo makes clear this is no longer sufficient. What is less clear is what types of harm—be it “tangible” or “intangible”—courts will find sufficiently “concrete.”

Some courts have already begun to grapple with Spokeo and its effect on a wide range of statutes. For example, it appears that Spokeo will not deprive consumers of standing to assert claims under the Telephone Consumer Protection Act—which prohibits automatic dialer calls to cell phones without obtaining prior express consent—as long as they received the alleged unlawful calls. But what about consumers who were allegedly sent an offending communication under the TCPA, but never received it? It appears unlikely decisions holding a communication violates the statute merely because it was sent—but not received—will pass muster under Spokeo.

Similarly, under the Fair Debt Collection Practices Act, decisions like the Ninth Circuit’s 2014 decision in Touregman v. Collins Financial Services, Inc.—which held that a

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3 See Palm Beach Golf Ctr.-Boca, Inc. v. John G Sarris, D.D.S., P.A., 781 F.3d 1245, 1252 (11th Cir. 2015) (plaintiff has standing in a junk-fax scenarios under the Telephone Consumer Protection Act, despite the fact that there was no evidence anyone ever printed or saw faxes at issue).

4 755 F.3d 1109 (9th Cir. 2014).
plaintiff has standing to assert claims based on a letter that was sent but never received—appear inconsistent with Spokeo. At least one court has also held that Spokeo deprives a plaintiff of standing to assert violations of the Cable Communications Policy Act for the mere failure to destroy the plaintiff’s personally identifiable information.\(^5\)

Spokeo may also make it more difficult to certify consumer class actions under Rule 23 of the Federal Rules of Civil Procedure. For example, will plaintiffs be required to establish putative class members have suffered a “concrete” injury? If so, will determining whether class members have suffered such an injury predominate over common issues so as to preclude certification?

At bottom, Spokeo’s greatest impact will likely be to decrease the number of suits alleging companies failed to comply with procedural requirements of complex consumer statutes. The mere mishandling of consumer information or failure to adhere to some technical requirement of a statute, like the FCRA, is no longer sufficient by itself to establish standing, regardless of whether Congress granted a statutory remedy for the alleged violation. Plaintiffs must be prepared to explain how the alleged violation caused them actual harm. Defendants, on the other hand, should review consumer complaints carefully to determine if the alleged statutory violation caused the plaintiff (or putative class) any real injury or is merely an attempt to enforce an obscure “procedural violation” that is “divorced from any concrete harm.”

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Recent Developments in Foreign Corrupt Practices Act Enforcement

By Erica J. Geibel and Todd M. Garland

Despite a 2015 downturn in enforcement of the Foreign Corrupt Practices Act ("FCPA"),¹ the United States Department of Justice ("DOJ") has made clear that FCPA litigation remains a priority. Indeed, 2016 has already seen a sharp increase in the number of FCPA settlements, including a landmark $795 million global settlement with the world’s sixth-largest telecommunications company, VimpelCom Limited.

This article discusses the most notable FCPA developments in 2015 and 2016 from an enforcement policy perspective, including: (1) an increase in the government's FCPA compliance resources; (2) the issuance of a memorandum by Sally Q. Yates, Deputy Attorney General, providing guidance on the government's prosecution of individuals for corporate wrongdoing; and (3) the launch of a new FCPA pilot program for companies that violate the FCPA to obtain credit for disclosure and cooperation.

FCPA Compliance Resources

DOJ recently announced that it has significantly augmented its resources by more than 50%, adding 10 to 15 more prosecutors to its ranks in an effort to both increase the number of cases it is able to prosecute and decrease the length of time required to investigate, prosecute, or settle FCPA matters. The FBI is also adding three new squads of special agents devoted to FCPA investigations and prosecutions.² Before this addition, the FBI had only one dedicated FCPA squad, which was located in Washington, D.C. The three new squads will be located across the country in Washington, D.C., New York, and Los Angeles.³ The new squads will be composed of agents, analysts, and other professional staff and will be equipped with a number of investigative tools, including financial analysis, court-authorized wiretaps, undercover operations, informants, and sources.

In addition, the DOJ Fraud Section has created a new position of Compliance Counsel. The Compliance Counsel, Hui Chen, has been tasked with providing expert guidance to Fraud Section prosecutors as they consider the factors enumerated in United States Attorneys’ Manual Section § 9-28.000, when reaching a decision as to the proper

¹ 15 U.S.C. §§ 78dd-1 et seq.
treatment of a corporate target. The Compliance Counsel's duties include providing guidance on the existence and effectiveness of any corporate compliance program that the corporation had in place at the time of the alleged criminal conduct, and the sufficiency of the corporation’s remedial actions, including implementation of compliance measures to detect and prevent future wrongdoing. The Compliance Counsel also will be responsible for helping prosecutors develop appropriate benchmarks for evaluating corporate compliance and remediation measures and communicating with stakeholders in setting those benchmarks.

Creation of these additional positions demonstrates that DOJ intends to increase its pursuit of FCPA matters and the speed with which it prosecutes them. Further, while the results of the appointment of DOJ's Compliance Counsel remain to be seen, DOJ is no doubt placing a renewed emphasis on the existence and efficacy of corporate anticorruption compliance programs. It will be more important than ever for corporations and compliance professionals to stay attuned to compliance practices and trends.

The Yates Memorandum

On September 9, 2015, DOJ issued a major policy memorandum by Deputy Attorney General Yates, intended to provide guidance regarding the government's prosecution of individuals for corporate misconduct (the "Yates Memo"). The Yates Memo provides "six key steps" that seek to strengthen DOJ's "pursuit of individual corporate wrongdoing" in white-collar matters, including FCPA actions and cases under the False

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4 See U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-28.000 (listing ten factors).
7 In November 2015, DOJ revised the United States Attorneys' Manual ("USAM"), which provides federal investigation and charging criteria for prosecutors, to formally implement the Yates Memo’s guidance. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL §§ 9-28.000, 4-3.100, 1-12.000 (2016). DOJ's most significant revisions were to Section 9-28.000, "Principles of Federal Prosecution of Business Organizations," including a new section, 9-28.210, "Focus on Individual Wrongdoers." DOJ also added to the chapter on civil cases a new section—Section 4-3.100, "Pursuit of Claims Against Individuals"—which directs civil attorneys to follow the same guidelines that apply to criminal prosecutors. Additionally, DOJ updated the USAM's parallel proceedings section to provide specific steps "prosecutors and civil attorneys handling white collar matters" should take regarding communications and referrals, with the intent to "to hold accountable individuals who commit corporate malfeasance.

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Claims Act. The steps are described as "best practices that are already employed by many federal prosecutors."9

One significant change DOJ announced in the Yates Memo is the requirement for corporations to identify “all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct.”10 While DOJ has always encouraged corporations to identify and investigate individual wrongdoers, under this new policy DOJ will no longer take a "sliding scale" approach when determining how much cooperation credit corporations will receive. A corporation’s full cooperation and disclosure of all relevant facts is a prerequisite to receiving any credit.11 The Yates Memo also includes a new requirement for prosecutors to provide in writing whether they intend to investigate and prosecute individuals before entering a corporate settlement agreement.12

The Yates Memo came in the wake of recent DOJ settlements that appear to reflect this policy approach. For example, in late 2014, Alstom SA, a French power and transportation company, agreed to pay $772 million to settle violations of the FCPA’s books and records internal controls provisions.13 Included among the factors the DOJ considered in reaching the settlement figure were Alstom’s failure to voluntarily report and failure to cooperate with the Department’s investigation. Specifically, the plea agreement noted that Alstom’s “initial failure to cooperate impeded the [DOJ’s] investigation of individuals involved in the bribery scheme. At a later stage in the investigation, the Defendant began providing thorough cooperation, including assisting in the [DOJ’s] investigation and prosecution of individuals and other companies that had partnered with the Defendant on certain projects.”14 DOJ noted that the cooperation did not occur until after it had publicly charged multiple Alstom executives and employees.15 By comparison, DOJ declined to prosecute PetroTiger, Ltd., in connection with bribes the company’s top executives paid to a Colombian official for a $39 million contract. DOJ based its decision on PetroTiger’s “voluntary disclosure, cooperation, and

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8 28 U.S.C. §§ 3729 et seq.
9 Yates Memo, supra note 5, at 2.
10 Id. at 2 (emphasis added).
12 Yates Memo, supra note 5, at 5.

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remediation, among other factors.” Notably, DOJ prosecuted at least three former PetroTiger executives—all plead guilty.

After releasing the Yates Memo, DOJ issued two significant clarifications: (1) DOJ will assess companies seeking cooperation credit under a best practices standard, meaning companies need not identify culpable individuals if they cannot do so, but companies must "provide[] the government with the relevant facts and otherwise assist[] . . . in obtaining evidence"; and (2) prosecutors will not request companies to waive attorney-client privilege, but to receive full cooperation credit the companies must disclose all relevant facts from an internal investigation.17

Given the release of the Yates Memo and these examples of the treatment corporations may receive based on the willingness, or unwillingness, to identify the wrongdoers and cooperate with the government, it is clear that DOJ is placing a renewed emphasis on individual defendants. As such, corporations should emphasize a “tone from the top” compliance culture and work to ensure corporate leaders fully embrace the anticorruption message.

Department of Justice Pilot Program

On April 5, 2016, DOJ announced its initiation of one-year FCPA pilot program,18 designed to promote two goals: (1) provide guidance to DOJ prosecutors for resolution of corporate FCPA cases; and (2) motivate companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the DOJ's Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs.19 DOJ's announcement of the program was accompanied by a new policy memorandum20 setting forth factors DOJ historically considered when providing mitigation credit to corporations for disclosing violations and cooperating in investigations. The

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18 The pilot program, which took effect on April 5, 2016, and will last for one-year, is limited to DOJ's FCPA Unit.
memorandum is significant because it "articulates in a written framework" the fine reductions and incentives DOJ will consider for FCPA violations, expressly quantifying the amount of credit companies can receive.\textsuperscript{21} 

The pilot program and accompanying policy memorandum provide for companies to receive a declination of prosecution, or up to a 50\% reduction off the bottom end of the fine range in the Sentencing Guidelines, if certain requirements are met. Specifically, companies seeking to receive credit must voluntarily self-disclose FCPA violations, proactively and fully cooperate in any investigation, and timely and appropriately implement remediation efforts to prevent recidivism and deter individual wrongdoing. DOJ will only grant mitigation credit for companies that meet the requirements set forth in the memorandum and that "disgorge all profits resulting from the FCPA violation."\textsuperscript{22} Additionally, meeting the requirements of DOJ's FCPA guidance will also assist the Department in determining the need for oversight by an independent compliance monitor.\textsuperscript{23} DOJ intends to review the program at the end of the pilot year at which time the Department may end, limit, or expand it.

This new guidance is far from a sea change. Many elements are consistent with DOJ's existing policies or the requirements in the U.S. Sentencing Guidelines. However, DOJ's pilot program provides some new insight into the benefits of early and complete self-disclosure, cooperation, and remediation, and the consequences for failing to voluntarily disclose. Notably, DOJ retains its discretion in calculating the fine, to which any discount would be applied.

The ultimate effects of the developments mentioned above remain to be seen. The business and legal communities will likely not realize the full impact for months or even years as FCPA matters are investigated, prosecuted, and resolved.

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\textsuperscript{21} Id. at 3.  
\textsuperscript{22} Id. at 2.  
\textsuperscript{23} Id. at 8.
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For article topics that are approved, authors must submit draft articles and author agreements by Friday, September 9, 2016. Articles should be on recent legal developments and 600 to 1,200 words in length. The form of author agreement is available here.