

Post-Spokeo, Not All Statutory Violations Are Created Equal

Law360, New York (February 10, 2017, 11:49 AM EST) --

When the U.S. Supreme Court decided *Spokeo Inc. v. Robins*, 136 S. Ct. 1540 (2016), a little over a year ago, many lawyers believed the court's decision would settle a rather simple question: If a defendant violates a statute, is that sufficient for a plaintiff to sue in federal court? Unfortunately, the Supreme Court's decision has not provided the hoped-for clarity, as practitioners and courts still struggle with whether a statutory violation is — by itself — sufficient to confer standing. Two recent appellate court decisions — decided the same day — highlight this issue.



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In *Gubala v. Time Warner Cable Inc.*, --- F.3d ---, 2017 (7th Cir. Jan. 20, 2017), Time Warner failed to destroy personal information belonging to the named plaintiff.

The facts were simple. The plaintiff subscribed to Time Warner's cable services.

When signing up, he gave Time Warner some personal information, including his date of birth, home address, phone number, Social Security number, and credit card information. Two years later, he canceled his subscription. Eight years after canceling his subscription, he discovered Time Warner still retained his personal information.

He sued Time Warner, claiming the company violated a federal statute that requires cable operators to destroy personal information when no longer necessary for the purpose for which it was collected. The district court dismissed the plaintiff's lawsuit on the ground that he lacked standing to sue. The Seventh Circuit affirmed.

Judge Richard Posner explained that even if Time Warner violated the federal statute, nothing happened to the plaintiff as a consequence. "[W]hile he might well be able to prove a violation of [the statute], he has not alleged any plausible (even if attenuated) risk of harm to himself from such a violation — any risk substantial enough to be deemed 'concrete.'" *Id.* at *2. His information remained within Time Warner's possession, and he failed to allege any plausible likelihood that Time Warner's conduct was or would be harmful to him.

The court also rejected the plaintiff's contention that he suffered harm because Time Warner violated his privacy rights. "[T]here is no indication that Time Warner has released, or allowed anyone to disseminate, any of the plaintiff's personal information in the company's possession." His information remained, at all times, in Time Warner's possession.

The same day the Seventh Circuit released *Gubala*, the Third Circuit decided *In re Horizon Healthcare Services Inc. Data Breach Litigation*, --- F.3d ---, 2017 (3d Cir. Jan. 20, 2017). There, two laptops containing personal information belonging to several plaintiffs and 839,000 others were stolen from

Horizon Healthcare. Plaintiffs sued under the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., claiming Horizon failed to take reasonable steps to safeguard their personal information from dissemination to third parties. The district court dismissed the plaintiffs' complaint for lack of standing. The Third Circuit reversed.

While the Third Circuit recognized that "there are some circumstances where the mere technical violation of a procedural requirement of a statute cannot, in and of itself, constitute an injury in fact," the court was moved by the fact that the plaintiffs' information had been disclosed to someone not authorized to have it by a defendant alleged to be a consumer reporting agency. The information stolen was "highly personal" and the theft appeared directed toward the acquisition of such information. 2017 at *10 & n.19. Moreover, the laptops were unencrypted, making the personal information easily accessible. *Id.* On these facts, the Third Circuit had little trouble concluding that the plaintiffs had standing to sue. They did not "allege a mere technical or procedural violation of [a statute]" but "instead the unauthorized dissemination of their own private information — the very injury that [the statute] is intended to prevent."

The takeaway from *Gubala* and *Horizon* is that not all statutory violations are created equal. Some statutory violations are, by themselves, enough to create standing. Other statutory violations are not enough — either because they do not cause a harm traditionally viewed as sufficient to create standing, or because they do not cause the harm that Congress was seeking to prevent by enacting the statute. Where, for example, a statutory violation results in no dissemination of personal information, and, as a consequence, no risk of harm, jurisdiction is likely lacking (*Horizon*).

Take, for instance, a proposed class action brought under the Fair and Accurate Credit Transactions Act, 15 U.S.C. § 1681c(g). FACTA makes it unlawful for merchants to print more than the last five digits of a credit card number on a receipt. A typical case looks like this: a customer walks into a store, purchases a good with his or her credit card and gets a receipt. The receipt displays a bunch of information about the transaction, including the expiration date of the customer's credit card. The customer sticks the receipt in his pocket, goes to a lawyer and files a class action, seeking to recover between \$100 and \$1,000 for every receipt the merchant printed. The claim is that the merchant willfully violated FACTA when it printed on a credit card receipt the expiration dates of customers' credit cards.

Before *Spokeo*, courts often found the customer had standing to sue because the merchant violated a federal statute. But *Spokeo* changed that. Sure, the customer got a receipt that included the expiration date of his credit card. But so what? How was the customer harmed? The credit cards in our wallets display the cards' full numbers, the cards' three or four-digit security code and the cards' expiration date. So getting a receipt that displays the expiration date of a credit card is not particularly alarming. After *Spokeo*, that's what courts have held.

In *Meyers v. Nicolet Restaurant of de Pere LLC*, 843 F.3d 724 (7th Cir. 2016), for example, the Seventh Circuit held that a plaintiff who was given a restaurant receipt that displayed the expiration date of his credit card did not have standing to sue the restaurant for a FACTA violation. Although the plaintiff claimed that the receipt increased his risk of harm, the Seventh Circuit noted that he never lost the receipt and nobody else ever saw it. *Id.* at 727 n.2. "In these circumstances, it is hard to imagine how the expiration date's presence could have increased the risk that Meyers' identity would be compromised." *Id.* at 727.

It remains to be seen whether — in the context of a FACTA case — a plaintiff can establish standing by plausibly alleging they lost their credit card receipt and that it has or is substantially likely to fall into the

hands of a person with nefarious motives. Unless that happens, it would appear that Gubala — rather than Horizon — dictates the outcome.

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