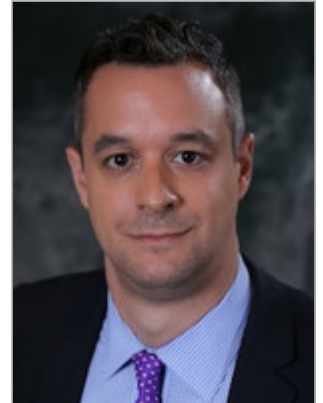


OPINION: Spokeo's Federalism Problem

Law360, New York (August 8, 2016, 11:26 AM ET) -- In its recent decision in *Spokeo, Inc. v. Robins*, the U.S. Supreme Court reiterated that federal courts must defer to Congress's intentions when determining whether a private citizen has constitutional standing to bring a lawsuit in federal court over a violation of statutory rights.[1] But what about state statutes — do federal courts owe state legislatures the same level of deference?

The question is especially relevant when litigants seek compensation in federal court under state laws that protect individuals' rights in ways that federal laws do not. The number of federal lawsuits in this category has ballooned in the past decade thanks to the Class Action Fairness Act of 2005. CAFA gives federal courts jurisdiction over most multiplaintiff class actions filed in state courts under state law,[2] but only if the plaintiffs have standing — i.e., the right to sue — under Article III of the U.S. Constitution.



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Although *Spokeo* demands deference to Congress, it makes no corresponding pronouncement urging deference to state legislatures. Now some creative defense lawyers are arguing that federal lawsuits based upon state law claims should be dismissed for lack of Article III standing. While clever, this argument is short-sighted, as it undermines CAFA's intent to protect defendants from the vicissitudes of state courts.

The tendency to rely on state law statutes in federal lawsuits is perhaps most noticeable in data breach litigations. The largest data breaches occur when identity-thieving hackers circumvent the computer security of a major merchant or employer, and steal the business's vast repository of customer or employee personal information. When victims of a data breach seek to bring suit, they quickly find that there is no federal statute setting the standard for data security.

However, many states have statutes requiring a minimum standard of data-breach prevention, enabling data breach victims to pursue state law remedies.[3] Because these cases wind up in federal court pursuant to CAFA,[4] these lawsuits can succeed or fail there depending on whether a federal judge thinks the injury from a state law violation passes the Article III standing test.[5]

In addition to the data breach cases, plaintiffs' reliance on state statutes is also apparent in federal lawsuits over mass-scale privacy intrusions[6] and mortgage recordation abuses.[7]

In most federal judges' minds, the answer to all of this is clear: Violations of state law lead to Article III injuries just as readily as those of federal law do.[8] However, a minority have ruled that the violation of a state privacy or consumer protection statute does not give rise to an Article III injury, because state legislators do not deserve the same level of deference as their federal counterparts.[9] Post-*Spokeo*, this minority position has been advocated by at least one federal judge, from the District of Maryland.[10]

Some defense attorneys have been quick to call attention to this perceived distinction in order to try to get their cases kicked out of federal court.[11] But cooler heads within the defense bar recognize such arguments as being penny-wise, pound-foolish. In a commentary published shortly after *Spokeo* was issued, Hunton & Williams' privacy law team called on fellow defense lawyers to

avoid undermining CAFA by taking potshots at state law claimants' ability to litigate in federal court.[12]

Any attempt by the defense bar to fight CAFA's original-jurisdiction provisions is laden with irony. CAFA was heavily lobbied for by the business community, which had long pursued strategies for avoiding the jurisdiction of state courts perceived to be plaintiff-friendly. As Hunton & Williams put it, CAFA was meant to keep out of state court "exactly the types of cases that defendants most want in federal court." [13]

Prior to CAFA, defense attorneys feared nothing more than the prospect of having to defend a wealthy corporation in a so-called "judicial hellhole," a disparaging term for state court jurisdictions in which the majority of potential jurors are believed to be unduly plaintiff-friendly. [14] In post-CAFA complex litigations in which the relevant state court jurisdiction is seen as plaintiff-friendly, the plaintiffs are as desperate to figure out a way to somehow litigate their claims in state court as the defendants are to have the case removed to federal court (and kept there).[15]

Defense attorneys can't really be faulted for seeking to squeeze as much leverage out of Spokeo as possible. But they do so at great risk to their client base.

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[1] 578 U.S. ___, ___, 136 S. Ct. 1540, 1549 (2016).

[2] See CAFA, 28 U.S.C. § 1332(d) (extending federal jurisdiction to cover class and mass actions involving, inter alia, more than \$5 million and at least 100 plaintiffs).

[3] See, e.g., New Jersey Identity Theft Protection Act (NJITPA), N.J. Stat. Ann. § 56:11-44 et seq.; see also Compl. ¶¶ 70–76, Reilly v. Ceridian Corp., No. 2:10-cv-05142-JLL-CCC (D.N.J. Oct. 7, 2010), ECF No. 1 (data breach plaintiffs' raise claims under NJITPA).

[4] See CAFA, 28 U.S.C. § 1332(d); see also Khan v. Children's Nat'l Health Sys., No. TDC-15-2125, 2016 U.S. Dist. LEXIS 66404, at *3–4 (D. Md. May 19, 2016) (Chuang, J.) (data breach victims' claims under state statutes transferred to federal court system pursuant to CAFA).

[5] See Khan, 2016 U.S. Dist. LEXIS 66404, at *21–22 (denying Article III standing to data breach victim relying on state law claims).

[6] See In re Nickelodeon Consumer Privacy Litig., No. 15-1441, 2016 U.S. App. LEXIS 11700, at *17 (3d Cir. June 27, 2016) (children alleging media company unlawfully tracked their online browsing habits using "cookies" lodged claims under California privacy laws); In re Google Inc. Cookie Placement Consumer Privacy Litig., 806 F.3d 125, 133 (3d Cir. 2015) (Internet users alleging unlawful tracking through cookies lodged claims under California privacy laws); Boelter v. Hearst Commc'ns Inc., Nos. 15 Civ. 3934 (AT), 15 Civ. 9279 (AT), 2016 U.S. Dist. LEXIS 85025, at *2–3 (S.D.N.Y. June 17, 2016) (Torres, J.) (magazine publisher sued under Michigan privacy law for selling subscribers' personal information to data mining companies).

[7] See Jaffe v. Bank of Am., N.A., Nos. 13 CV 4866 (VB), 14 CV 947 (VB), 2016 U.S. Dist. LEXIS 92899, at *5–6 (S.D.N.Y. July 15, 2016) (Briccetti, J.) (listing cases in various federal jurisdictions in which financial institutions are accused of similar violations of New York state statutes governing recordation of mortgage satisfactions).

[8] See Jaffe, 2016 U.S. Dist. LEXIS 92899, at *12 ("The injury recognized by [New York State's mortgage satisfaction recordation statutes] is no less concrete than the examples of intangible,

concrete injuries given by the Supreme Court in *Spokeo Inc. v. Robins.*"); *Emilio v. Sprint Spectrum L.P.*, No. 11-CV-3041, 2016 U.S. Dist. LEXIS 88495, at *4–6 (S.D.N.Y. July 7, 2016) (Oetken, J.) (Article III standing for consumers who sued cellular service provider under Kansas consumer protection law for alleged hidden price increases); *Boelter*, 2016 U.S. Dist. LEXIS 85025, at *10–11 (Article III standing for magazine subscribers who alleged publisher violated state privacy statute by selling their personal information to data miners).

[9] See *Jaffe*, 2016 U.S. Dist. LEXIS 92899, at *10 (“[I]t is an open question in the Second Circuit whether a *state* statute can define a concrete injury for the purposes of Article III standing.” (emphasis original)) (citing *Ross v. AXA Equitable Life Ins. Co.*, 115 F. Supp. 3d 424, 434 (S.D.N.Y. 2015) (Furman, J.) (denying Article III standing to life insurance policyholders who claimed insurer violated New York state insurance statute by misrepresenting its financial strength)).

[10] See *Khan*, 2016 U.S. Dist. LEXIS 66404, at *21–22 (Chuang, J.) (no Article III standing for data breach victim suing under state law).

[11] See Def.’s Letter Concerning Supplemental Authority at 2, *Boelter v. Advance Magazine Publishers Inc.*, No. 1:15-cv-05671-NRB (S.D.N.Y. July 6, 2016), ECF No. 50 (filed by Sandra D. Hauser, Partner, Dentons, New York, N.Y.) (citing *Khan* in support of argument that magazine subscribers lack Article III standing to sue publisher under state privacy law for selling their personal information to third parties) (“Here, it is not Congress, but a *state legislature* that purports to define an injury.” (emphasis original)); see also Pl.’s Letter Concerning Supplemental Authority at 1, *Boelter*, No. 1:15-cv-05671-NRB (S.D.N.Y. July 26, 2016), ECF No. 53 (filed by Joseph I. Marchese, Partner, Bursor & Fisher, New York, N.Y.) (noting that “[i]n *Jaffe*, Judge Briccetti considered—and rejected—[Advance Magazine’s] argument that a state statute may not define a concrete injury for the purposes of Article III standing”).

[12] Will Spokeo Undermine CAFA?, *Hunton & Williams Client Alert* (May 2016), available at <https://www.hunton.com/files/News/c569a953-0990-48d7-be43-194e427c68e6/Presentation/NewsAttachment/4f7185aa-f9c7-4394-9e67-1a62acff22c8/will-spokeo-undermine-cafa.pdf>.

[13] *Id.* (discussing CAFA, 28 U.S.C. § 1332(d)). The available data indicate that CAFA lived up to its intended function of sweeping class actions out of state courts and into the federal system. See Steven S. Gensler, *The Other Side of the CAFA Effect: An Empirical Analysis of Class Action Activity in the Oklahoma State Courts*, 58 *Kan. L. Rev.* 809, 810–11, 815–16 (2010) (“Taken together, the data suggest that CAFA may have shifted class actions from state court to federal court generally ...”).

[14] See Jessica K. Pruitt, “CAFA-nated”: A Jittery Interpretation of Forum Selection in *Standard Fire Insurance Co. v. Knowles*, 68 *Ark. L. Rev.* 511, 512 (2015) (internal quotation marks and citation omitted).

[15] See *Brown v. C.R. Bard Inc.*, 942 F. Supp. 2d 549, 549, 551–52 (E.D. Pa. 2013) (Pratter, J.) (users of allegedly defective blood-clot filter who sued its manufacturer argued that they lacked Article III standing to litigate in federal court, and insisted their case be tried in Philadelphia County trial court).