

## Post-Spokeo Issues Emerge In The 5th Circ.

*Law360, New York (February 9, 2017, 10:58 AM EST)* -- The U.S. Supreme Court's landmark decision in *Spokeo v. Robins* declared that constitutional standing requires plaintiffs to establish "a concrete injury even in the context of a statutory violation." [1] Spokeo has the potential to be a powerful tool for defendants who face in terrorem pressure to resolve class actions that are based on alleged violations of purely statutory rights and brought by plaintiffs lawyers hoping to avoid individualized issues of actual injury. Spokeo's ultimate impact, however, will depend on how lower courts implement its requirement that a plaintiff have a "concrete" or "de facto" injury.

Although the Fifth Circuit and its district courts have addressed Spokeo issues numerous times since the Supreme Court issued its decision, Spokeo's future in the Fifth Circuit remains unclear. Recent opinions underscore that litigants should be prepared to argue not only about Spokeo's significance for pre-existing case law, but also the scope of its applicability.

To date, the Fifth Circuit's only in-depth analysis of Spokeo was in *Lee v. Verizon Communications Inc.*, a class action involving alleged breaches of fiduciary duties imposed by the Employee Retirement Income Security Act. [2] The plaintiff, a beneficiary of a plan governed by ERISA, argued "that he directly suffered constitutionally cognizable injury through invasion of his statutorily created right, specifically that the alleged fiduciary breach from the mismanagement of plan assets constitutes an invasion of his statutory rights to proper plan management," regardless of whether it affected the plan's ability to pay his benefits. [3] The Fifth Circuit initially ruled that the plaintiff lacked standing, explaining "that the invasion of statutory rights might create standing" if the violation of that right was a "de facto injury" but that a breach of fiduciary duty was not necessarily such an injury. [4]

The Fifth Circuit's initial opinion in *Lee* predated Spokeo. As a result, the Supreme Court granted certiorari, vacated the judgment and remanded to the Fifth Circuit for reconsideration in light of Spokeo. [5] After supplemental briefing, the Fifth Circuit reaffirmed its prior decision: "a de facto injury is not alleged by reference to fiduciary misconduct under ERISA alone." [6]

The Fifth Circuit refused to modify its earlier ruling on the ground that Spokeo did not make new law, but simply reaffirmed pre-existing principles of



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constitutional standing. For example, on remand, the plaintiff argued “that Spokeo requires consideration of historical practice in determining whether an intangible harm constitutes injury-in-fact” and that “common-law trust principles” demonstrate that fiduciary misconduct constituted a de facto injury. The court refused to consider this argument because the plaintiff waived it by failing to raise it in the pre-Spokeo briefs. According to the court, even before Spokeo, the relevance of historical practice should have been clear.[7] Thus, the Lee court strictly applied Spokeo to limit a plaintiff’s ability to sue, but it did so in a manner that minimized Spokeo’s importance by suggesting it had not significantly changed standing law.

While Lee is the leading Fifth Circuit opinion on Spokeo itself, the Fifth Circuit addressed a similar issue exactly one day earlier in *Planned Parenthood of Gulf Coast Inc. v. Gee*. In that case, plaintiffs, including prospective patients, challenged Louisiana’s decision to terminate Medicaid agreements with a Planned Parenthood affiliate.[8] Louisiana argued that the patient plaintiffs who wanted to use Medicaid funds at the Planned Parenthood affiliate lacked constitutional standing because they did not have a right to choose that particular provider. The court rejected that argument, “not[ing] that a violation of a statutory right, *even standing alone*, is sufficient to satisfy the injury requirement.”[9] The court did not qualify its conclusion with any caveats about separately assessing whether the statutory right was sufficiently “de facto” or concrete. And, interestingly, *Gee* did not discuss or even cite Spokeo, which had been published months earlier. Although the parties briefed standing, it does not appear that they drew the court’s attention to Spokeo.

Despite the fact that *Gee* does not analyze Spokeo, plaintiffs lawyers have already begun to cite it for the proposition that violations of statutory rights satisfy the injury requirement of constitutional standing, without the need for any further analysis.[10] That position is certainly difficult to square with Spokeo itself. Even so, *Gee* — a post-Spokeo Fifth Circuit opinion on standing — is sure to sow continued confusion. Whether and how useful it will be for plaintiffs lawyers might ultimately depend on how the Fifth Circuit applies its prior-precedent rule.

Because *Gee* predates *Lee* by a single day, to the extent there is any inconsistency between the two opinions, such an inconsistency should arguably be resolved in favor of *Gee*. However, although subsequent panels are generally required to follow precedent from prior panels, a pre-existing opinion does not qualify as binding precedent if it “fails to address a question squarely.”[11] Thus, defendants should argue that, even if *Gee* analyzed standing generally, it did not analyze the “de facto” requirement set out in Spokeo, so it is not binding precedent on that question.

As Fifth Circuit panels have arguably split with each other, district courts within the circuit have also not reached consensus. In *Sayles v. Advanced Recovery Systems*, the Southern District of Mississippi agreed that a plaintiff had “an adequate injury because Congress created a legal injury when it enacted the Fair Debt Collection Practices Act.”[12] Ruling that “Spokeo did not alter the existing precedent regarding standing,” the court’s analysis of concreteness was limited to noting that “plaintiff’s alleged injury is more than a bare procedural violation, it is the very type of injury Congress sought to eradicate and thus created a right of action to protect consumers.”[13] The court thus limited Spokeo’s “de facto” requirement to “procedural” statutory rights as opposed to “substantive” ones. The Southern District of Texas has drawn a similar distinction.[14]

The Eastern District of Texas, by contrast, has taken a different path. In *Morris v. UnitedHealthcare Insurance Co.*, the plaintiff sued over unwanted telephone calls that allegedly violated the Telephone Consumer Protection Act. Without analyzing the difference between substantive and procedural statutory rights, the court noted that the plaintiff might not have standing if the defendant had evidence

that the plaintiff maintained his telephone number “purely for the purpose of filing TCPA lawsuits.”[15] Although the court ultimately concluded that the plaintiff had standing because the offending calls invaded his privacy, it declared that “going forward,” TCPA cases involving serial litigants “merit[] close scrutiny on the issue of standing in light of Spokeo.”[16]

While Spokeo’s future in the Fifth Circuit remains unclear, the case law thus far emphasizes a few key issues. Litigants should be prepared to argue about the relative precedential value of Lee and Gee as well as the applicability of any distinction between procedural and substantive statutory rights to the Spokeo analysis.

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

[2] Lee v. Verizon Communications Inc., 837 F.3d 523 (5th Cir. 2016).

[3] Lee v. Verizon Communications Inc., 623 F. App’x 132, 149 (5th Cir. 2015).

[4] Id.

[5] Pundt v. Verizon Communications Inc., 136 S. Ct. 2448, 2448 (2016).

[6] Lee, 837 F.3d at 530.

[7] Id.

[8] 837 F.3d 477 (5th Cir. 2016).

[9] Id. at 487 (emphasis added).

[10] See Pl.’s Opp. Mot. Dismiss, *Batra v. RLS Supermarkets LLC*, No. 3:16-CV-02874-B (N.D. Tex. Jan. 20, 2017) (Doc. 17 at 9); *Br. Pls.-Appellees, Planned Parenthood of Kan. & Mid-Mo. v. Mosier*, 2016 WL 7010674, at \*23 n.10 (10th Cir. Nov. 28, 2016).

[11] *Thomas v. Texas Department of Criminal Justice*, 297 F.3d 361, 370 n.11 (5th Cir. 2002).

[12] *Sayles v. Advanced Recovery Systems Inc.*, 2016 WL 4522822, at \*2 (S.D. Miss. Aug. 26, 2016).

[13] Id.

[14] *Landrum v. BlackBird Enterprises LLC*, 2016 WL 6075446, at \*4 (S.D. Tex. Oct. 3, 2016).

[15] *Morris v. UnitedHealthcare Insurance Co.*, 2016 WL 7115973, at \*6 (E.D. Tex. Nov. 9, 2016) (magistrate judge's report and recommendation), adopted in 2016 WL 7104091, at \*1 (E.D. Tex. Dec. 6, 2016).

[16] *Id.*

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