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HERE'S WHAT'S WRONG WITH HUNSTEIN: Here's the Simple and Obvious Spokeo Error That Lead to the SCARIEST FDCPA Case Ever

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So I put these thoughts together for my friends at the MBA over the weekend but there's no reason not to share them more broadly–always happy to discuss.

Let's state it as simply as possible.

Spokeo says an injury is only "concrete" if it actually exists. That is, only if there is an injury in fact.

Injuries can be tangible or intangible–and even the risk of injury is a form of injury–but *no matter what* a mere statutory violation without *any* injury cannot afford standing.

The violation of some statutes will automatically cause an injury-intangible or otherwise. This occurs where there is no "gap" between the protection afforded by the statute and the underlying harm the statute seeks to protect.

Where there is a gap–such as where a violation of a statute's provisions do not *necessarily* cause harm–allegations of actual harm are required. This is true regardless of whether the purported harm is tangible, intangible, or just a risk of harm.

In the setting of an intangible harm there is a second issue as well: is the harm the sort that Congress even has the right to "elevate" to a right of action to begin with (i.e. was it historically protected such that an intrusion on the intangible harm raises a case or controversy). If not, then there is no actionable intangible harm and there can be no claim and Congress just wasted its time. If so, then an injured party may make use of the private right of action to redress the intangible harm he/she suffered– but *only* if he/she actually suffered that harm.

The *Hunstein* decision erred by failing to consider whether or not actual harm occurred as a result of the statute. It found that a violation of 1692 can–sometimes–cause intangible harm. And then it stopped.

Not cool.

The proper second step of the analysis was to query whether the intangible harm the 1692 sought to prevent *actually occurred* as a result of the specific statutory violation at issue in Plaintiff's case. This second step is necessary because not every violation of 1692 will cause harm–a fact the *Hunstein* panel remarkably admitted later in the ruling. But because not every violation of 1692 will cause intangible harm, allegations of actual harm are needed.

In a sentence: the *Hunstein* panel erred by applying a different test to "intangible harm" than to tangible harm and assumed that the violation of a statute that protects intangible harm always affords standing. But that is not, at all, what *Spokeo* says.

Interestingly, its not even what Eleventh Circuit law says. In *Nicklaw v. Citimortgage*, Inc., 839 F. 3d 998, 1002 (11th Cir. 2016) the Court recognized that even in the context of purported intangible harm "the relevant question is whether [a plaintiff] was harmed when this statutory right was violated." This is true even where a statute can–at times–protect from intangible harm.

And assessing whether or not an intangible harm actually occurred turns on context and the facts of each case. This is a qualitative assessment, as yet more Eleventh Circuit *Spokeo* case law teaches us.

In Salcedo *v. Hanna*, 936 F. 3d 1162 (11th Cir. 2019), for instance, the Eleventh Circuit observed that the privacy rights historically protected by Congress differed qualitatively from the injury Plaintiff claimed to have suffered. See *Salcedo* at 1172 ("inconsequential annoyance are categorically distinct from those kinds of real but intangible harms. The chirp, buzz, or blink of a cell phone receiving a single text message is more akin to walking down a busy sidewalk and having a flyer briefly waived in one's face. Annoying, perhaps, but not a basis for invoking the jurisdiction of the federal courts. All told, we conclude that Salcedo's allegations do not state a concrete harm that meets the injury-in-fact requirement of Article III.")

The circumstances in *Hunstein* are similar.

Yes, public disclosures of private facts has long been barred by privacy law. But *private* disclosures of private facts are not—unless the facts are untrue. Plus public disclosures must be "highly offensive." In *Hunstein* the Plaintiff's data was shared only with a mail vendor and only for one purpose– to send him some mail. So there was no public disclosure of private facts and the private facts disclosed were accurate. Plus the disclosure was made to an interested party to facilitate a lawful activity. There is zero corollary common law protections for this sort of "disclosure" and zero real world harm resulted.

This is less than a "chirp" or a "buzz." This is the tree you didn't know fell in a forest you never heard about.

Its the classic "zip code" case. And ya'll *Spokeo* nerds know what I'm saying.

As was the case in *Hanna*, therefore, just because some disclosures by a debt collector may call to mind the historical protections of common law (such as where a debt collector supplies false information to a vendor or truly publicizes, in an offensive manner, truthful information) that doesn't mean that all Plaintiffs can sue for a violation of 1692. Hunstein's injury was qualitatively different.

So he suffered no intangible injury-in-fact.

So he lacks Article III standing.

But that’s the easy part.

Now the interesting question…can he sue on his federal claim in state court?

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