ARTICLE III STANDING

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STANDING GENERALLY
* Cases and Controversies Requirement

* **U.S. Constitution, Article III, Section 2**: The judicial power shall extend to all cases, in law and equity, arising under this Constitution, . . . ; -- to all cases affecting ambassadors, other public ministers and consuls; -- to all cases of admiralty and maritime jurisdiction; -- to controversies to which the United States shall be a party; -- to controversies between two or more states; -- between a state and citizens of another state; -- between citizens of different states; -- between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.
• Critical Standing Cases
    • “Irreducible constitutional minimum” of standing consists of 3 elements:
      • Injury in Fact
        • Concrete and particularized; AND
        • Actual or imminent, not ‘conjectural’ or ‘hypothetical’
      • “Fairly traceable to the challenged action of the defendant, and not . . . The result of the independent action of some third party not before the court.”
      • “ Likely, as opposed to merely ‘speculative’ that the injury will be ‘redressed by a favorable decision’.”
• Critical Standing Cases
    • addressed Article III standing under a federal statute, the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1881a, which allows the acquisition of foreign intelligence information through the surveillance of individuals who are not “United States persons” and are reasonably believed to be located outside the United States
    • plaintiffs were “United States persons” who believed they might become entangled in the surveillance of the non-U.S. persons that were the targets of the statute, and they sought to enjoin any § 1881a-authorized surveillance
    • plaintiffs “cannot manufacture standing *merely by inflicting harm on themselves* based on their fears of hypothetical future harm that is not certainly impending.”
• Recent Focus: Injury-in-Fact Component

• *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)
  • Concrete and Particularized
    • *Concrete*: “de facto,” “real,” or “actual,” but an injury need not be tangible to be ‘concrete’: *Spokeo*, 136 S. Ct. at 1549
    • *Particularized*: “must affect the plaintiff in a personal and individual way”: *Lujan*, 504 U.S. at 560 n.1
  • These are necessary, but insufficient by themselves, to establish injury in fact
  • In some instances, violation of a procedural statutory right may be sufficient to establish a “concrete” injury, but not all statutory violations are created equally

• “Actual or Imminent”
• Frank v. Gaos, 139 S. Ct. 1041 (2019)

• Case brought under Stored Communications Act; settlement consisted of $5 million to cy pres recipients, $2 million to plaintiffs’ counsel, no money to absent class members

• Instead of addressing cy pres award (the basis for grant of certiorari), Court remanded case to Ninth Circuit and district court to assess whether plaintiff and class members had standing

• “Our decision in Spokeo abrogated the ruling . . . That the violation of a statutory right automatically satisfies the injury-in-fact requirement whenever a statute authorizes a person to sue for vindication of that right.” 139 S. Ct. at 1046 (citing Spokeo, 136 S. Ct. at 1549).
• Eleventh Circuit’s Post-Spokeo Jurisprudence (Class Actions)

- **Nicklaw v. Citimortgage, Inc.**, 839 F.3d 998 (11th Cir. 2016), reh’g den., 855 F.3d 1265 (11th Cir. 2017) – state mortgage satisfaction statute
- *Perry v. Cable News Network, Inc.*, 854 F.3d 1336 (11th Cir. 2017) – Video Privacy Protection Act
- *Florence Endocrine Clinic, PLLC v. Arriva Medical, LLC*, 858 F.3d 1362 (11th Cir. 2017) – Telephone Consumer Protection Act/Faxes
- *Pedro v. Equifax, Inc.*, 868 F.3d 1275 (11th Cir. 2017) – Fair Credit Reporting Act
- *Muransky v. Godiva Chocolatier*, 922 F.3d 1175 (11th Cir. 2019) – Fair and Accurate Credit Transactions Act

[bold/underline = court held no standing]
• Church

• Only one of these cases that is not precedential
• FDCPA plaintiff had standing to sue where “through the FDCPA, Congress created a new right – the right to receive the required disclosures in communications governed by the FDCPA – and a new injury – not receiving such disclosures”
• The alleged injury “is one that Congress has elevated to the status of a legally cognizable injury through the FDCPA”
**Nicklaw, Pedro, Perry**

- **Nicklaw:**
  - Violation of NY statute requiring mortgagee to file certificate of discharge within 30 days
  - No standing: “[T]he requirement of concreteness under Article III is not satisfied every time a statute creates a legal obligation and grants a private right of action for its violation.” 839 F.3d at 1003.
  - Judge Martin asked court to rehear the panel opinion, and dissented from denial of rehearing en banc: “I am afraid the holding of the Nicklaw panel opinion might end the private vindication of many societal harms identified by legislatures.” 855 F.3d at 1274.
  - Judges W. Pryor and Marcus filed their own opinion: “The panel opinion adhered to the requirement of a concrete injury under Article III, as required by *Spokeo*.” 855 F.3d at 1268.
• **Nicklaw, Pedro, Perry** (cont.)
  
  • **Perry:**
    
    • alleged violations of Video Privacy Protection Act
    
    • Applying *Spokeo* but not citing *Nicklaw*, court held standing: “[T]he VPPA’s creation of a cause of action for this type of invasion of privacy ‘has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.’” 854 F.3d at 1340-41 (quoting *Spokeo*, 136 S. Ct. at 1549). Thus, “violation of the VPPA constitutes a concrete harm.” *Id.* at 1340.

  • **Pedro:**
    
    • Author: W. Pryor; Martin on panel
    
    • Alleged FCRA violations: “[T]he reporting of inaccurate information about Pedro’s credit to a credit monitoring service – has a close relationship to the harm caused by the publication of defamatory information, which has long provided the basis for a lawsuit in English and American courts.” 868 F.3d at 1279-80.
• **Muransky**
  
  • FACTA case; defendant gave plaintiff a printed receipt that displayed first 6/last 4 digits of plaintiff’s credit card number
  
  • District Court denied defendant’s MTD
  
  • Parties settled on classwide basis in late 2015
  
  • Two objectors contested plaintiff’s Art. III standing
  
  • District Court approved settlement
  
  • Only the objectors appealed
  
  • Eleventh Circuit opinion author: Judge Martin
  
  • First holding: Objectors – members of class – had right to appeal: “we conclude that class members who object to Rule 23(b)(3) class settlements but do not opt out are “parties” for purposes of appeal.” 922 F.3d at 1184.
• **Muransky** (cont.)

- Holding re Article III Standing: “the heightened risk of identity theft Dr. Muransky experienced as a result of the FACTA violation constitutes an injury in fact.” *Id.* at 1185.

- “First, Congress judged the risk of identity theft Dr. Muransky suffered to be sufficiently concrete to confer standing. Second, the risk of identity theft bears a close enough relationship to the common law tort of breach of confidence to make Dr. Muransky’s injury concrete. Either is enough on its own to establish standing.” *Id.* at 1187.

  - “In our view, if Congress adopts procedures designed to minimize the risk of harm to a concrete interest, then a violation of that procedure that causes even a marginal increase in the risk of harm to the interest is sufficient to constitute a concrete injury. And that is what Congress did here.” *Id.* at 1188.
• **Muransky** (cont.)
  • Alternative standing holding: “His standing also independently rests on the similarity between the harm he alleges and the common law tort of breach of confidence.” *Id.* at 1190.
  • “[I]n enacting FACTA, Congress sought to mitigate the risk of disclosure of credit card information, which we think sufficiently analogous to the disclosure of confidential information that the common law remedied by the breach of confidence tort.” *Id.* at 1191.
  • **Concurring Opinion:** “I write separately to note that Mr. Isaacson, a class member and one of the appellants, may lack Article III standing to challenge the Article III standing of Dr. Muransky, the named plaintiff and class representative.” *Id.* at 1197 (Jordan, J., concurring). “In an appropriate case, we may need to address whether a class member like Mr. Isaacson has standing on appeal to challenge the standing of a class representative who obtained a settlement providing economic benefits to the entire class.” *Id.* at 1199.
• **Muransky** (cont.)
  
  • Conflicted with every court of appeals opinion that preceded it:
    
    • *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776 (9th Cir. 2018); *Crupar-Weinmann v. Paris Baguette Am., Inc.*, 861 F.3d 76 (2d Cir. 2017); *Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724 (7th Cir. 2016) (all dealing with exposed expiration dates, not “first 6/last 4” violations)
    
    • *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 113 (3d Cir. 2019)
    
    • *Noble v. Nev. Checker Cab Corp.*, 726 Fed. Appx. 582 (9th Cir. 2018)
    
    • *Katz v. Donna Karan Co. L.L.C.*, 872 F.3d 114 (2d Cir. 2017)
    
    • “Congress intended to draw the line at the risk that comes of printing the untruncated card number, irrespective of whether anyone saw the receipt. And we decline to follow opinions from our sister circuits’ opinions that rely on a contrary interpretation of the law.” 922 F.3d at 1190.
• **Muransky** (cont.)
  • Procedural History
    • Original Eleventh Circuit opinion issued in October 2018, see *Muransky v. Godiva Chocolatier, Inc.*, 905 F.3d 1200 (11th Cir. 2018)
    • Petition for rehearing immediately filed
    • In April 2019, the Eleventh Circuit panel *sua sponte* withdrew the 2018 opinion and substituted a new opinion, 922 F.3d 1175 (11th Cir. 2019), amending the standing discussion
    • Petition for rehearing filed following the April opinion; petitions remain pending at present
    • Since April, one court of appeals has adopted the *Muransky* ruling: *Jeffries v. Volume Services America, Inc.*, 928 F.3d 1059 (D.C. Cir. 2019)
• *Salcedo*

  • In 2016, plaintiff Salcedo, a former client of Florida attorney Alex Hanna and his law firm, received a multimedia text message from Hanna offering a ten percent discount on his services.

  • Plaintiff filed class action under TCPA based on the unsolicited text.

  • District Court denied defendant’s motion to dismiss but allowed interlocutory appeal under 28 U.S.C. § 1292(b).
• **Salcedo** (cont.)
  
  • “Is receiving a single unsolicited text message, sent in violation of a federal statute, a concrete injury in fact that establishes standing to sue in federal court? To answer that question, we have examined the statute, our precedent, and—following the Supreme Court’s guidance—history and the judgment of Congress, and we conclude that the allegations in this suit do not establish standing.” __ F.3d at __, 2019 WL 4050424, *1.
  
  • Distinguished the Circuit’s leading TCPA standing case of *Palm Beach Golf Center–Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1252 (11th Cir. 2015), which found standing for a plaintiff who alleged that receiving a junk fax in violation of the TCPA harmed him.
  
  • Rejected the only other court of appeals decision on point: *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (holding that the receipt of two unsolicited text messages constituted an injury in fact).
• **Salcedo** (cont.)

  • Like *Muransky*, court applied *Spokeo*’s guidance on whether the alleged harm equated to a common law cause of action
  
  • **Invasion of privacy rejected**: “we look to the generally accepted tort of intrusion upon seclusion, which creates liability for invasions of privacy that would be “highly offensive to a reasonable person.” *Restatement (Second) of Torts § 652B*. The requirement that the interference be “substantial” and “strongly object[ionable]” instructs us that a plaintiff might be able to establish standing where an intrusion on his privacy is objectively serious and universally condemnable. *See id. cmt. d* (no liability for one, two, or three phone calls; liability “only when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff”). By contrast, Salcedo’s allegations fall short of this degree of harm. We do not see this type of objectively intense interference where the alleged harm is isolated, momentary, and ephemeral.” *Id.*, *6.*
• Salcedo (cont.)

  • **Trespass and nuisance rejected:** “Trespass requires intentionally “enter[ing] land in the possession of the other,” id. § 158(a), and private nuisance is “a nontrespassory invasion of another’s interest in the private use and enjoyment of land,” id. § 821D. Although, as we have noted, Congress was concerned about intrusions into the home when it enacted the TCPA, Salcedo has alleged no invasion of any interest in real property here.” *Id.*

  • **Conversion and trespass to chattel rejected:** “Conversion is an interference with chattel “which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.” Restatement (Second) of Torts § 222A. Salcedo’s allegations are nowhere near a complete and permanent dominion over his phone, so recourse to this serious kind of tort is unhelpful. The same is true for the tort of trespass to chattel, which involves intentionally “using ... a chattel in the possession of another.” *Id.* § 217(b).” *Id.*, *7.*
• **Salcedo** (cont.)

• “Salcedo has not alleged anything like enjoying dinner at home with his family and having the domestic peace shattered by the ringing of the telephone. Nor has he alleged that his cell phone was searched, dispossessed, or seized for any length of time. Salcedo’s allegations of a brief, 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.” *Id.*

• Rehearing petitions filed in September
QUESTIONS?