

APRIL 2019

Five Essential Tips for Surviving the Supreme Court's Tectonic Changes to the Meaning of "Jurisdiction" and the **Spokeo** Standing Earthquake



When Dorothy reacted to the earthshaking storm by telling Toto they weren't in Kansas anymore, she was expressing what litigators may feel when examining the tectonic changes underway in the U.S. Supreme Court as to what is meant by "subject matter jurisdiction" and Article III standing. And make no mistake about it, surviving these tremblors means more than a quick reading of the hot-off-the-press June 2019 decision in *Fort Bend County* as the latest word on jurisdiction and other recent cases addressing the *Spokeo* juggernaut.

"Jurisdiction" – the Word With Limited Meaning under *Fort Bend County*

It's late in the case (maybe even after an appeal and remand) and for the first time you've spotted a "defect" in the plaintiff's Title VII case: she failed to file a claim with the EEOC and the statute bars the employment claim for failure to exhaust administrative remedies. And you took Civil Procedure in law school and remember that if the defect is "jurisdictional" it can be raised at any time free from waiver, estoppel or forfeiture.¹

Not so fast. The Supreme Court, in its sparkling new decision with just these facts in *Fort Bend County, Texas v. Davis, 2019 U.S. LEXIS 3891 (June 3, 2019)*, now definitively has ruled that exhaustion rules are not jurisdictional unless Congress expressly so provides. Rather, such requirements are mere "claims-processing" rules subject to forfeiture if not timely raised.

In *Fort Bend*, Justice Ginsburg writing for the Court

reaffirmed that "the word 'jurisdictional' generally is reserved for prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction)." In contrast, reasoned the Court, an exhaustion requirement—even if mandated by statute—is a claims-processing rule that will be enforced if properly raised, but one that may be forfeited if the party waits too long to raise the point.

Thus, the High Court continued its attack on what it calls the "profligate use" of the term "jurisdiction" in situations where Congress did not expressly and clearly describe the requirement as jurisdictional in nature.² It is only when a rule is characterized as jurisdictional (e.g. complete diversity, amount in controversy), Justice Ginsburg reasoned, that the "unique" and "harsh" consequences of subject matter jurisdiction come into play, i.e.,

- Its absence may be raised at any time,
- A party cannot waive, forfeit or otherwise be estopped from raising the subject matter jurisdiction challenge, and
- The Court has an obligation *sua sponte* to raise such a subject matter jurisdictional defect.

The *Fort Bend* court stressed that merely because a statute mandates certain actions (e.g. filing within a prescribed statute of limitations) only means that the court will enforce its mandate if properly raised by the attacking party. If, as in *Fort Bend*, the party impermissibly delayed raising the

exhaustion defense, it was waived. Significantly, the Court noted it had previously ruled in an array of cases that mere claims-processing rules will not be found to be jurisdictional in nature. These non-jurisdictional defects include:

- The Copyright Act's requirement that parties register the copyright,³
- Title VII's limit of covered employers to those with more than 15 employees,⁴ and
- Rule 23(f)'s time limit for filing a discretionary appeal from a class certification ruling.⁵

Spokeo and its Progeny: Standing is Jurisdictional

Not ironically, but at the same time, the Supreme Court has triggered a reverse jurisdictional earthquake with its decision in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016). In *Spokeo*, the Court ruled that if a party alleges bare procedural credit reporting violations but has suffered no concrete and particular injury, there is no standing. As such, what might previously have seemed like a simple absence of proof of damages is now treated as a lack of Article III standing stripping the court of, you guessed it, subject matter jurisdiction.

There was nothing particularly new or earth shattering in the *Spokeo* majority's recitation of the "injury in fact" rule. To establish Article III standing, a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."⁶ However, the *Spokeo* progeny has emphasized that the rule can now best be summarized as "no harm, no foul." In other words, what might previously have seemed like a no-damages case subject to a *Twombly/Iqbal* Rule 12(b)(6) dismissal, is now a jurisdictional defect to be raised at any time free of forfeiture.⁷

Simply put, there is no subject matter jurisdiction due to a lack of standing unless the plaintiff can show that he or she suffered some actual—not theoretical—injury. "After *Spokeo*, the courts know there is no such thing as an anything-hurts-so-long-as-Congress-says-it-hurts theory of Article III injury."⁸

Five Essential Principles to Survive the Supreme Court Jurisdictional Earthquakes

In light of these tectonic no jurisdiction/jurisdiction Supreme Court decisions, survival in federal litigation requires knowledge of five essential principles. For at bottom, litigants suffer greatly if either (1) the statutory defect is not

jurisdictional and hence is forfeited for failure to preserve it, or conversely (2) subject matter jurisdiction is lacking and is raised for the first time late in the case after great expenditures of time and money.



1. See if Congress Describes the Defect as Jurisdictional

As shown above and per the new *Fort Bend County* case, if Congress does not describe in statutory language that a defect in a claim is jurisdictional, then ordinarily it is not. In other words, the courts "leave the ball in Congress' court."⁹ Therefore, the litigator's survival tip is to check both the legislative language and history, while at the same time consulting resources like my federal practice guide that sets forth the many, many statutory requirements on which courts have already ruled.¹⁰

2. Be Aware: An Absence of Injury Triggers a *Spokeo* Standing Challenge

In many cases, the plaintiff's complaint will identify a statutory violation that can lull defense counsel into the belief that statutory violations themselves confer standing. Wrong. A mere, nominal violation of statute (even if resulting in conduct prohibited by Congress) does not support Article III standing and subject matter jurisdiction without proof and allegations of actual injury. For example, a defendant's application website might be challenged under the ADA by a visually-impaired person as failing to have otherwise required enhancements; however, absent a showing the plaintiff otherwise was qualified to be so admitted, the bare statutory violation fails the *Spokeo* test.¹¹

3. Know the "Clap" in the Clapper Decision

In a case that presaged *Spokeo*, the Supreme Court in *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013) held there was no standing based on a case alleging future governmental interception of telephone calls. The High Court reasoned that a possible, but not certain,

violation does not satisfy Article III standing. Thus, the “clap” sound of this case (as emphasized later in *Spokeo*) is that the absence of concrete and particularized injury is more than an elemental defect in the complaint—it is jurisdictional. Be sure on the plaintiff’s side that such allegations and proof support the claim.

4. Don’t Get Carried Away with Big Data Cases

In these modern times of big data and electronic privacy concerns, there are more and more federal statutes protecting plaintiffs (e.g. FCRA, TCPA, etc.). However, the *Spokeo* “no harm, no foul” standing rule has been applied with special focus to calm this storm of consumer litigation. Again, be sure that in each such case, your plaintiff has shown both a statutory violation and injury that resulted from that particular wrongdoing.¹²

5. Pay Particular Attention to *Spokeo* in Class Actions

Since the named plaintiffs must have standing for a class action to be certified,¹³ practitioners must pay special attention to the *Spokeo* standing rule or risk a jurisdictional dismissal of the case even after much work has been performed in the action. Class actions have become a well-used tool in consumer privacy cases, and standing may be the primary challenge.

You need read no further than the Supreme Court decision this term in *Frank v. Gaos*, 139 S. Ct. 1041 (2019) to see how an asserted absence of standing can cause an unintended earthquake of its own in class actions. There, the plaintiff class sued Google under a state privacy statute for allegedly sharing private search term data with companies being searched. After granting certiorari with the focus of the parties aimed at the pivotal cy pres issue, the High Court called for further briefing and remanded for consideration of a *Spokeo* standing issue, i.e., the possible absence of any actual injury on behalf of the plaintiffs in the class. This can be no small problem as the case law attests.

Conclusion

Jurisdiction and standing are not just civil procedure professors’ intellectualisms—they can prove the difference between winning and losing your case in federal court. Buy “earthquake insurance” by mastering these new cases and staying on top of it all.



Authority you can trust, James M. Wagstaffe

Renowned author James M. Wagstaffe is a preeminent litigator, law professor and expert on pretrial federal civil procedure. He has authored and co-authored a number of publications, including *The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial*, which includes embedded videos directly within the content on Lexis Advance. As one of the nation’s top authorities on federal civil procedure, Jim has been responsible for the development and delivery of federal law, and regularly educates federal judges and their respective clerk staffs. Jim also currently serves as the Chair of the Federal Judicial Center Foundation Board—a position appointed by the Chief Justice of the United States Supreme Court.

¹ See *The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial*, § 2-II (LexisNexis 2019) for a full discussion of the non-waivability of subject matter jurisdiction issues.

² *Fort Bend*, supra, citing *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 153 (2013); see also *The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial*, § 2-IV (LexisNexis 2019).

³ *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157 (2010).

⁴ *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 503-504 (2008).

⁵ *Neutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019) (no jurisdictional consequences to procedural rule but nevertheless waived for alternative reasons).

⁶ See *Spokeo, Inc. v. Robins*, supra, 136 S.Ct. at 1547; see also *Frank v. Gaos*, 139 S. Ct. 1041 (2019).

⁷ See, e.g., *Casillas v. Madison Ave. Assoc.*, 2019 U.S. App. LEXIS 16797 (7th Cir. June 4, 2019) (no standing in Fair Debt Collection Practices Act simply because debtor nominally violated the statute by failing to notify consumer about process for verifying debt when no proof of actual injury resulting therefrom).

⁸ *Huff v. Telecheck Servs.*, 2019 U.S. App. LEXIS 13367 (6th Cir. May 3, 2019) (no standing in consumer’s Fair Credit Reporting Act (“FCRA”) suit for defendant’s failure to include statutorily required information in credit check when no evidence any of consumer’s transactions were dishonored).

⁹ *Arbaugh v. Y & H Corp.*, supra, 546 U.S. at 515-516.

¹⁰ *The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial*, § 2-IV (LexisNexis 2018).

¹¹ *Griffin v. Dept. of Labor Federal Credit Union*, 912 F.3d 649 (4th Cir. 2019).

¹² See, e.g., *Casillas v. Madison Ave. Assoc.*, supra (no standing if FDCA violation without injury); *Huff v. Telecheck Servs.*, supra (same); *Hutton v. Nat’l Bd. of Examiners in Optometry, Inc.*, 892 F.3d 613 (4th Cir. 2018) (no standing for breach of consumer’s statutory privacy without showing of actual injury); *St. Louis Heart Center v. Nomax*, 899 F.3d 500 (8th Cir. 2018) (same).

¹³ *NEI Contracting and Engineering, Inc. v. Hanson Aggregates Pacific Southwest, Inc.*, 2019 U.S. App. LEXIS 16885 (9th Cir. June 5, 2019).

¹⁴ See, e.g., *NEI Contracting and Engineering, Inc. v. Hanson Aggregates Pacific Southwest, Inc.*, supra; *Beck v. McDonald*, 848 F.3d 262 (4th Cir. 2017).