Washington Legal Foundation

December 16, 2016

On the Merits:

HELENE CAHEN, *et al.*,

Plaintiffs-Appellants,

v.

TOYOTA MOTOR CORPORATION, TOYOTA MOTOR SALES, USA, INC., AND GENERAL MOTORS LLC,

Defendants-Appellees.

No. 16-15496

U.S. Court of Appeals for the Ninth Circuit

Question Presented: Whether the district court correctly dismissed Plaintiffs' putative class action for lack of an imminent, concrete, and particularized injury under Article III.

Summary of the Case: Plaintiffs brought a putative class action against Toyota Motor Corp. (Toyota) and other vehicle manufacturers (Defendants), alleging that Defendants: (1) equipped their vehicles with defective "CAN bus technology" that is susceptible to computer hacking by third parties seeking to take control of the basic functions of a vehicle; and (2) improperly collected and transmitted information about the performance and geographical location of the vehicles sold in violation of Plaintiffs' right to privacy.

Defendants moved to dismiss the complaint arguing, in part, that Plaintiffs lack Article III standing. In granting Defendants' motion to dismiss, the district court held that Plaintiffs failed to establish Article III standing as to all of their claims because they failed to plead any credible risk of harm. Specifically, the complaint contained no allegations that Plaintiffs (1) face a credible, impending risk of vehicle hacking; (2) have suffered credible economic harm flowing from the speculative risk of future vehicle hacking; or (3) face a credible risk of future theft, breach, or widespread publication of their personal identification information, or that they have themselves been affected by the defendants' geographic tracking and data-collection practices.

On the Merits:
Judgment for Defendants-Appellees
Frank Cruz-Alvarez
Shook, Hardy & Bacon LLP

Plaintiffs contend that they have Article III standing because they suffered: (1) an economic harm by overpaying for a vehicle that had defective technology; and (2) an invasion of privacy in that Toyota collected and transmitted drivers' personal data without consent. At the time of the district court's ruling, it did not have the benefit of the U.S. Supreme Court's opinion in *Spokeo, Inc. v. Robins*, 194 S. Ct. 1540 (2016). We now hold that under the *Spokeo* paradigm, the district court properly granted Toyota's motion to dismiss because Plaintiffs failed to plead an "invasion of a legally protected interest" that is both "concrete and particularized."

To prove 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." *Spokeo, Inc.*, 136 S. Ct. at 1547 (citations omitted). This case rises and falls on injury in fact. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (citation omitted). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Ibid.* (citation omitted). "An injury in fact must also be 'concrete.'" *Ibid.* "A 'concrete' injury must be '*de facto*'; that is, it must actually exist." *Ibid.* (citation omitted).

Plaintiffs first assert that Toyota violated their statutory rights by failing to disclose its alleged technology defect at the time they purchased their vehicles. While successfully pleading that they suffered a particularized injury, Plaintiffs failed to demonstrate that Toyota's nondisclosure entails a degree of risk sufficient to effectuate a concrete injury. *Spokeo* requires more than mere procedural or statutory violations for Plaintiffs' injuries to be concrete.

Two cases are instructive. In *Birdsong v. Apple, Inc.*, 590 F.3d 955 (9th Cir. 2009), the plaintiffs sued Apple for manufacturing allegedly defective iPods because users "face an unreasonable risk of noise-induced hearing loss," which made the iPods "worth less than what [plaintiffs'] paid for them." *Id.* at 956. This Court rejected that argument, reasoning that an inherent risk of hearing loss is not a cognizable defect and the alleged loss in value does not constitute a concrete injury because it rests on a hypothetical risk of hearing loss to other consumers who may or may not use their iPods in a risky manner. *Id.* at 961.

In *Lassen v. Nissan N. Am., Inc.*, No. CV1506491ABMRWX, 2016 WL 5868101 (C.D. Cal. Sept. 30, 2016), the plaintiffs alleged they suffered economic injury because had they known the vehicles they purchased lacked an Auto-Off feature, they would not have purchased or leased their vehicles or else paid less for them. *Id.* at *8. The court rejected plaintiffs' argument reasoning that "[p]laintiffs have pled only a conjectural and hypothetical injury: their vehicles have the *capability* of causing carbon monoxide poisoning" and that the risk depends entirely on user error—inadvertently leaving the vehicle running—and not vehicle malfunction. *Id.* at *10 (emphasis in original); *see also Targan v. Nissan*, No. C 09-3660 SBA, 2013 WL 3157918, *3–5 (N.D. Cal. 2013).

Here, Plaintiffs face the same problems raised in *Birdsong* and *Lassen*. At best, Plaintiffs allege that some researchers have found in a controlled setting that hacking of the technology is theoretically possible. Plaintiffs, however, have not alleged that their vehicles or other Toyota vehicles were hacked or that third parties attempted to hack the technology, or any other information that points to a negative market perception of the vehicles' technology that would have affected the value of Plaintiffs' vehicles at time of purchase. Moreover, Plaintiffs' alleged economic injury is too attenuated because the risk of harm depends on the criminal acts of third parties. Plaintiffs can only speculate as to a "highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1148–49 (2013). To confer Article III standing on a class of plaintiffs alleging claims based on speculative risks from a potential—but not yet materialized—security breach of a device, would expose manufacturers to enormous liability that could have far-reaching consequences. Moreover, it would circumvent the intent of Article III standing. Thus, we hold that Plaintiffs' alleged economic injury is not sufficiently concrete.

As to Plaintiffs' invasion-of-privacy claims, Plaintiffs' complaint suffers from two fatal flaws: the alleged injury is neither particularized nor concrete. There is no particularized injury because Plaintiffs did not allege any injuries personal to them—they allege harm only to "drivers." *See Birdsong*, 590 F.3d at 961. No concrete injury exists because Plaintiffs failed to plead any threat of real or immediate harm stemming from Toyota's data collection and sharing with third parties. There is no allegation of misuse of the data, or that the data was

sensitive or could be used for reprehensible purposes if in the wrong hands. And Plaintiffs concede that Toyota discloses its data-sharing practice to drivers in numerous documents. Plaintiffs simply have failed to articulate a "coherent and factually supported theory" of injury from their general allegations about the automotive industry and its practices. Plaintiffs' allegations are therefore not sufficient to confer Article III standing. *See In re iPhone Application Litig.*, No. 11-MD-02250-LHK, 2011 WL 4403963, at *5 (N.D. Cal. Sept. 20, 2011).

Accordingly, under the standard set forth in *Spokeo*, Plaintiffs' claims against Toyota fail because they lack Article III standing. They failed to properly allege that they suffered "an invasion of a legally protected interest" that is "concrete and particularized." The well-reasoned decision of the district court is affirmed.

Dissenting View:
Alan Butler
Electronic Privacy Information Center (EPIC)

Plaintiffs brought a putative class action against defendant car manufacturers alleging that they knowingly sold unsafe vehicles and collect and transmit data in violation of the drivers' privacy rights—both in violation of California law. Even though Plaintiffs allege the Defendants violated their legally protected interests, the lower court found that Plaintiffs lack standing to sue. The trial court erred in dismissing Plaintiffs' claims for want of Article III jurisdiction.

In *Spokeo*, the Court held that a plaintiff must show three things to establish an "injury in fact" necessary to confer Article III standing: that she suffered "an invasion of a legally protected interest" which is (1) particularized, (2) concrete, and (3) actual or imminent, not conjectural or hypothetical. 136 S. Ct. at 1548. The Court in *Spokeo* found that the Ninth Circuit erred when it failed to consider whether the alleged violation of the Fair Credit Reporting Act by the defendant was sufficiently "concrete" to confer standing. *Id*. at 1550. The Court stressed that "concrete" is not synonymous with "tangible" and that *intangible* injuries can be concrete, depending on "both history and the judgment of Congress." *Id*. at 1549.

The lower court made two critical and interrelated errors at the outset in this case. First, the court conflated the *injury* that gave rise to Plaintiffs' suit with the *harm* that Plaintiffs alleged would result from that injury. The injuries in this case are the unfair business practices, breaches of implied warranties, fraudulent concealments and misrepresentations, and invasions of privacy that Plaintiffs have alleged based on Defendants' prior actions. These injuries are distinct from the harms (damages) that Plaintiffs allege are likely to result from Defendants' actions (*e.g*., hacking, theft, loss of value, and identity theft).

Second, the district court mistakenly analyzed Plaintiffs' claims under the "certainly impending" injury standard laid out by the Supreme Court in *Clapper*, 133 S. Ct. at 1138, which concerned an "imminent," not an "actual," injury claim. The plaintiffs in *Clapper* sued to enjoin future government surveillance, but the Court found that "the theory of *future* injury [was] too speculative" to meet the "certainly impending" standard. *Clapper*, 133 S. Ct. at 1143 (emphasis in original). In contrast, Plaintiffs here are suing based on "actual" common law and statutory injuries that have already occurred; they are not seeking to enjoin future injuries.

In any event, the lower court failed to faithfully apply the injury-in-fact standard articulated by the Supreme Court in *Spokeo*. The district court did not conclude that Plaintiffs' alleged injuries were insufficiently particularized, except for an entirely unsupported conclusion regarding Plaintiffs' invasion-of-privacy claims. (Not even Defendants argue that most of the alleged injuries lack particularity.) Nor did the district court analyze whether Plaintiffs' alleged injuries were sufficiently concrete, despite the Court's recognition in *Spokeo* that "the law has long permitted recovery" for tort and other common-law injuries. *Spokeo*, 136 S. Ct. at 1549. Rather, the lower court's sole focus in this case was on the "imminence" standard under *Clapper*, which is wholly inapplicable to a claim based on actual—not future—injury.

Even the "future harms" that the district court focused on—the threat of hacking and invasion of privacy—are not at all speculative in light of numerous government and independent reviews outlining vehicle cybersecurity vulnerabilities. Ample support exists for Plaintiffs' highly plausible allegations that Defendants are collecting and disclosing their personal driver data without their consent. These alleged violations are precisely the types of injuries that California sought to avoid.

Plaintiffs argue that they have suffered an invasion of their rights under various California laws, their privacy rights under the California Constitution, and their common-law contractual rights. Many of their alleged injuries (fraud, misrepresentation, and unjust enrichment) are common in consumer-protection cases and have long been recognized as giving rise to Article III standing. *See Hinjos v. Kohl's Corp.*, 718 F.3d 1098 (9th Cir. 2013). Because Plaintiffs have sufficiently alleged that their rights were violated by Defendants' actions, and that those violations are the types of concrete injuries courts have historically recognized, the decision below should be reversed.

Frank Cruz-Alvarez is a Partner in the Miami, FL office of Shook, Hardy & Bacon LLP, where his practice focuses on the defense of complex commercial and product-liability cases, including nationwide class actions and mass torts. **Alan Butler** is Senior Counsel for the Electronic Privacy Information Center (EPIC), a public-interest research center in Washington, DC that focuses public attention on emerging privacy and civil-liberties issues.

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