



Labor & Employment and Litigation ADVISORY ■

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No Concrete Harm, No Foul: The Supreme Court's *Spokeo* Decision

The U.S. Supreme Court on Monday announced a decision in *Spokeo Inc. v. Robins* (No. 13-1339) that may have far-reaching implications for plaintiffs seeking to enforce purely statutory rights under statutes like the Fair Credit Reporting Act (FCRA), Telephone Consumer Protection Act (TCPA), Fair Debt Collection Practices Act (FDCPA), Real Estate Settlement Procedures Act (RESPA), Truth in Lending Act (TILA), Lanham Act and Employee Retirement Income Security Act (ERISA). Particularly in the class action context, the new ruling has the potential to substantially limit claims alleging a purely technical violation of a statute absent actual harm or a material risk of harm, adding a further inquiry to complicate Rule 23's commonality and predominance requirements.

Case Background

In *Spokeo*, plaintiff Thomas Robins alleged that Spokeo was a "consumer reporting agency" under the FCRA. Robins discovered that Spokeo's website had published allegedly false information about him, including incorrect reports that he was married, in his fifties, had children, held a job, was relatively affluent and had a graduate degree. Based on Spokeo's publication of this purportedly inaccurate information, Robins filed a putative class action alleging a willful violation of various provisions of the FCRA and sought the maximum statutory damages.

In his complaint, Robins made vague allegations that the inaccurate report affected his employment opportunities, as well as his credit and insurance. The district court dismissed Robins's complaint, focusing on the lack of alleged harm and finding that Robins lacked standing because he had failed to properly plead an "injury in fact" as required by Article III of the U.S. Constitution. On appeal, the Ninth Circuit Court of Appeals reversed the trial court's ruling, finding that the FCRA does not require a showing of actual harm when a plaintiff sues for willful violations. *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014). Instead, the Ninth Circuit held that a violation of a statutory right created by the FCRA is a "concrete, *de facto* injur[y]" sufficient to confer standing. In so holding, the Ninth Circuit found that Robins had a personal interest in the handling of his credit information, and that misreporting Robins's credit information was a violation of that interest sufficient for him to claim injury-in-fact. Although the Ninth Circuit acknowledged that there are constitutional limits on Congress's power to confer standing by statute, it did not find those limits exceeded by its interpretation of the FCRA.

The Supreme Court's Holding

The Supreme Court granted certiorari in *Spokeo* to determine whether a bare violation of the FCRA is sufficient for Article III standing, which requires that an injury be both (1) concrete and particularized; and (2) actual or imminent. In its majority opinion, the Supreme Court vacated the Ninth Circuit's decision, holding that although the appellate

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court addressed the “particularized” prong, it had failed to consider the “concrete” requirement of Article III standing. But the Court stopped short of determining whether Robins’s alleged injuries-in-fact met the test for concrete injury, and the Court remanded the case to the Ninth Circuit to reevaluate its analysis consistent with the Court’s opinion.

In *Spokeo*, the Court rejected the notion that Congress can confer standing to a litigant by statute. The Court made clear that a plaintiff does not “automatically [satisfy] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.” Absent any tangible damage resulting from a procedural statutory violation, the Court noted that a person must face at least “the risk of real harm” to satisfy the concreteness requirement. A “bare procedural violation” will not suffice. The Court did, however, conclude that Congress can “identify intangible harms that meet minimum Article III requirements,” but did not define what types of intangible harms are sufficient.

The Aftermath

Spokeo may signal the end of “gotcha” class actions based on alleged technical statutory violations where no concrete harm is alleged or later demonstrated. Going forward, an independent Article III analysis will be required to assess whether the injury-in-fact requirement has been met on the particular facts of a cause of action seeking statutory damages.

Overall, defendants facing claims for purely statutory violations under the FCRA and similar statutes—such as the TCPA, FDCPA, TILA and others—should be encouraged by the *Spokeo* opinion. In such cases, however, lower courts will need to grapple with the distinction created by *Spokeo* between “bare procedural violation[s]” and violations that “cause harm or present [a] material risk of harm.”

Although all parties await how the Ninth Circuit, other appellate courts and district courts will implement the *Spokeo* test, defendants should waste no time attacking the standing of plaintiffs who attempt to assert standing based solely on alleged procedural violations of federal statutes. This should happen at each stage of the litigation:

- *At motion to dismiss.* Defendants should use *Spokeo* to attack the sufficiency of the allegations—specifically, a plaintiff’s allegations of harm, if any, must now go beyond purely procedural statutory violations. Conclusory allegations that merely track the statutory language and contend that a plaintiff’s statutory rights were violated may not be sufficient.
- *At class certification.* Bifurcated discovery may be warranted, with initial discovery focused on the standing issue and whether the named plaintiff suffered a concrete injury. And in opposing a class certification motion, drill down on the individualized inquiries necessary to ascertain whether each individual class member suffered injury beyond an intangible statutory violation.
- *At summary judgment.* Focus on the plaintiff’s assertion of harm—or lack thereof—and use evidence obtained in discovery to prove that the plaintiff suffered nothing more than a purely procedural violation of a statute without any tangible harm.

Even left unsettled, defendants can use the open-ended *Spokeo* opinion to undermine lawsuits based on purely procedural statutory violations that, when successful, have required defendants to compensate plaintiffs who have suffered absolutely no harm. The *Spokeo* decision, while perhaps not the death knell for the no-injury class action, provides powerful ammunition for defendants at every stage of class action litigation.

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