

Client Alert

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Supreme Court Issues Decision in *Spokeo v. Robins*; Must Allege Concrete Injury For Technical Statutory Violations

On May 16, 2016, the United States Supreme Court rendered its [decision](#) in *Spokeo, Inc. v. Robins*, Case No. 13-1339, a case that businesses and the plaintiffs' bar have been following closely, due largely to its potential effect on class actions predicated on alleged statutory violations and seeking solely statutory damages. Retailers are no strangers to these types of spurious claims, including, for example, the recent wave of class action lawsuits alleging violations of the Telephone Consumer Protection Act arising out of retailers' attempts to communicate with and provide information to their customers. In an opinion authored by Justice Alito, the Court held that a plaintiff must do more than plead a statutory procedural violation to establish standing; to plead an injury in fact, a plaintiff also must allege a harm that is both "concrete" and "particularized." However, the Court did not apply its holding to the facts, instead remanding for further analysis by the Ninth Circuit. While both plaintiffs' attorneys and defense attorneys are claiming a "victory," *Spokeo* provides some ammunition for businesses that find themselves facing so-called "no-injury" class action lawsuits predicated on consumer protection statutes.

Spokeo involved alleged violations of the Fair Credit Reporting Act ("FCRA"). In particular, the plaintiff claimed Spokeo, a web-based information service, allegedly disseminated false statements about him concerning his education, family situation and economic status. The Ninth Circuit had held that the plaintiff met the constitutional Article III injury-in-fact requirement because he alleged a violation of his personal statutory rights regarding the handling of his personal information.

To establish injury in fact for Article III standing purposes, the Supreme Court reiterated its longstanding test that a plaintiff must allege a harm that is both particularized *and* concrete. Because the Ninth Circuit had analyzed only the former - *i.e.*, whether inaccuracies in a personal information report constituted a particularized injury - the Supreme Court remanded the case with instructions to consider whether the plaintiff also alleged an injury that was sufficiently concrete.

The Court clarified the distinction between the "particularized" and "concrete" injury requirements for standing purposes. According to the Court, an injury is particularized when it affects the plaintiff in a personal and individual way. Concrete injuries, in turn, must be "de facto" - they must actually exist, they must be real and they cannot be abstract.

Notably, the Court did not limit concrete injuries to tangible ones. According to the Court, injuries may be concrete even if they are intangible or difficult to measure (*e.g.*, injuries resulting from libel or slander *per se*).

The Court noted two sources to help guide whether a particular intangible harm is sufficiently concrete - history and the judgment of Congress. As to history, the Court referred to harms that traditionally have been regarded as providing a basis for a lawsuit in English or American courts. As to Congress, the Court held that, even though it can statutorily create private rights of action for intangible harms, that alone does not confer Article III standing; concrete injuries are required even in the context of statutory violations. However, in some instances, even the "risk" of real harm may suffice. The majority opinion noted that, in certain unspecified circumstances, the violation of a procedural statutory right could be sufficient without a

need for the plaintiff to allege any *additional* harm.

As to the particular facts in *Spokeo*, the Court held that Congress, through the FCRA, sought to curb the dissemination of false information by adopting procedures designed to decrease that risk. However, a plaintiff cannot satisfy Article III merely by alleging a bare procedural violation of the FCRA, because that theoretically could result in no harm. As an example, the Court noted that a consumer reporting agency could fail to provide the required notice to a user of the agency's consumer information, but the information could be entirely accurate. Similarly, not all inaccuracies, such as an incorrect ZIP code, will cause harm or present the material risk of harm. The Court left it to the Ninth Circuit to consider on remand whether other types of false information merited similar treatment.

Justice Thomas concurred with the majority and wrote separately to explain how he believed the injury-in-fact requirement applies to public and private rights. According to Justice Thomas, the requirement is applied less rigorously when a private plaintiff seeks to vindicate his own private rights, as opposed to public rights. In those situations, the plaintiff does not need to assert an actual injury beyond the violation of his personal legal rights. If a plaintiff seeks to vindicate a public right embodied in a statute, however, he must demonstrate the violation of that public right caused him concrete, individualized harm. Because Justice Thomas viewed the FCRA as creating regulatory duties owed to the public collectively, a plaintiff must show that he suffered concrete, particularized harm.

Justice Ginsburg, joined by Justice Sotomayor, dissented. Although Justice Ginsburg agreed with much of the majority's opinion, she believed remand was unnecessary to determine whether the plaintiff's allegations adequately showed concrete harm. She believed they did, in that the alleged misinformation - which concerned the plaintiff's education, family situation and economic status - could affect his fortune in the job market.

The Supreme Court's decision will likely be cited by both plaintiffs *and* defendants in upcoming battles over standing. A few strategic considerations are suggested by the Court's opinion:

- Businesses faced with a class action predicated on an alleged statutory violation seeking statutory damages should continue to file motions to dismiss directed to the issue of standing. This issue will continue to arise under a variety of statutes, including not only FCRA, but also the Telephone Consumer Protection Act, the Video Privacy Protection Act, the Stored Communications Act and a wide variety of state statutes. In the wake of *Spokeo*, it can be expected that the plaintiffs' bar will devise artful ways to plead "concrete" injuries, and briefing on that issue will give the lower courts an opportunity to flesh out the meaning of the *Spokeo* opinion in a variety of contexts.
- Businesses should consider the extent to which *Spokeo*'s articulation of the standing analysis precludes class certification. For example, to the extent falsity is a necessary predicate to concrete injuries under the FCRA, that may make such claims less amenable to class treatment - particularly if each and every putative class member must prove the credit reporting agency disseminated false information about them.
- It remains for a future case whether *every* member of a class must have suffered injury, and when that issue must be addressed (*i.e.*, pre-certification, or only during resolution of the merits). Until the Supreme Court offers guidance, businesses should continue to raise this issue at various phases of litigation.

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