Client Alert

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Second Time's the Charm? Supreme Court Takes Up Landmark FCRA Case to Address Whether Congress Can Create Standing

By Angela Kleine and Nancy Thomas

Zombie or no-injury plaintiffs seeking to represent zombie or no-injury classes are on the rise. In these suits, plaintiff was not injured, and there's no way to prove who, if anyone, in the class was. Thomas Robins is one of those plaintiffs who brought suit on behalf of a class of similarly situated consumers against Spokeo for alleged violations of the Fair Credit Reporting Act (FCRA). The Ninth Circuit found Robins had standing to pursue his claim for statutory damages authorized by the FCRA and, of course, attorney's fees for class counsel.

The Supreme Court tried once before to consider whether Congress can create Article III standing by including a right to recover statutory damages. *Edwards v. First American Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (2011), *cert. dismissed as improvidently granted*, 132 S. Ct. 2536 (2012). After agreeing to hear the case despite the Solicitor General's view otherwise, and after hearing oral argument, the Court dismissed certiorari without explanation.

The Supreme Court has now decided to consider the issue again, granting certiorari on "Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute." *Spokeo, Inc. v. Thomas Robins*, No. 13-1339. If the Court reaches the finish line this time, the decision could have significant implications for claims brought under the FCRA and numerous other statutes.

THE BACKDROP

Spokeo operates a website where users can find information about individuals. The information ranges from address and phone number to things like "economic health" and online purchases, which Spokeo collects from various public sources. Spokeo allegedly markets and sells this information to employers evaluating possible hires, among other purchasers.

Thomas Robins sued in federal court under the FCRA's express private right of action, alleging that Spokeo displayed a "consumer report" about him that inaccurately reported his age, wealth, employment, marital status, and education, which he contends harmed his employment prospects. *Robins v. Spokeo, Inc.* ("*Spokeo*"), Case No. CV10-05306 ODW (AGRx) (C.D. Cal. filed July 20, 2010). Robins asserts that this allegedly inaccurate information violated the FCRA because the information published about him qualified as a "consumer report" under the FCRA and Spokeo is a "consumer reporting agency" that failed to follow the statute's accuracy and procedural requirements.

Robins did not allege any injury caused by this alleged FCRA violation, aside from speculative potential harm to future employment prospects. Instead, he brought suit seeking statutory damages. Article III requires plaintiff to plead and prove "injury in fact"—a "concrete and particularized harm" fairly traceable to the challenged practice. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Robins contended the FCRA entitled him to bring suit because it provides a private right of action to ensure consumer reporting agencies provide accurate information even in the absence of any concrete injury. Spokeo moved to dismiss for lack of standing, arguing Congress could not remove the Article III standing requirement by statute.

THE *SPOKEO* RULINGS AND RELATED NINTH CIRCUIT PRECEDENT

The district court initially rejected Spokeo's argument, but then reconsidered and dismissed the complaint for lack of standing. *Spokeo*, No. CV10-05306 ODW (AGRx), 2011 WL 11562151 (C.D. Cal. Sept. 19, 2011). The court held that Robins's alleged injury was too speculative and that a bare violation of the FCRA does not confer standing, noting, "Otherwise, federal courts will be inundated by web surfers' endless complaints." *Id.*, at *1.

The Ninth Circuit reversed, holding that the alleged violation of Robins' rights under the FCRA, which provides for statutory damages in cases of willful violations of the statute, was "sufficient to satisfy the injury-in-fact requirement of Article III." *Spokeo*, 742 F.3d 409, 713-14 (9th Cir. 2014).

In doing so, the Ninth Circuit followed the Sixth Circuit, which held that "[t]he Act does not require a consumer to wait for unreasonable credit reporting procedures to result in the denial of credit or other consequential harm before enforcing her statutory rights." *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705 (6th Cir. 2009); *see also Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (reversing a denial of class certification, holding that statutory damages are available under the FCRA "without proof of injury"). The Eighth Circuit followed the Ninth and Sixth Circuits in allowing a no-injury plaintiff to pursue a FCRA claim. *Hammer v. Sam's East, Inc.*, 754 F.3d 492, 500 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 1175 (2015).

In contrast, the Second and Fourth Circuits have come out differently in cases involving other federal statutes. *See Kendall v. Empls. Retirement Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (ERISA); *David v. Alphin*, 704 F.3d 327, 338-39 (4th Cir. 2013) (ERISA); *see also Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 176 (3d Cir. 2001) (holding plaintiff who never sold vodka in the United States lacked the requisite injury to establish standing to bring a Lanham Act claim based on defendants' use of Smirnoff name). It seems likely these Circuits would reach the same result if faced with a FCRA claim, just as the Ninth Circuit did when it applied its prior standing decisions. *See Spokeo*, 742 F.3d at 412-13 (citing *Edwards*, 610 F.3d at 517).

THE SUPREME COURT PROCEEDINGS SO FAR

Spokeo petitioned the Supreme Court to review the holding. *Spokeo*, Case No. 13-1339 (May 1, 2014). The Supreme Court invited the Solicitor General to file a brief expressing the views of the United States as to whether certiorari should be granted. In response, the Solicitor General and the Consumer Financial Protection Bureau filed an amicus brief recommending that the Supreme Court deny certiorari. They argued that the law is clear that the FCRA grants individual consumers a statutory entitlement to be free from a credit reporting agency's dissemination of inaccurate information about themselves, noting that the FCRA requires consumer reporting agencies to employ reasonable procedures to ensure maximum possible accuracy. They viewed disseminating

inaccurate information about Robins, in violation of his asserted FCRA rights, as a tangible harm, even if Robins was not actually injured in any concrete way.

This brief offers a rare glimpse into the Bureau's views on the FCRA. In the wake of the Dodd-Frank Act, the authority to publish FCRA rules, regulations, and guidelines transferred from the Federal Trade Commission (FTC) to the CFPB, and the FTC rescinded its existing guidance interpreting the statute. The Bureau, for its part, has yet to issue interpretive guidance or regulations, leaving entities subject to the FCRA to read the tea leaves in such filings. In the amicus brief, as anticipated, the CFPB interprets the statute broadly, in a way that maximizes potential economic recovery by consumers, even where the consumers have not alleged any actual injury.

THE POTENTIALLY FAR-REACHING IMPLICATIONS OF THE COURT'S DECISION

The FCRA broadly governs the collection, assembly, and use of consumer report information, and provides the framework for the credit reporting system. As the *Spokeo* case demonstrates, though, plaintiffs are increasingly attempting to apply the FCRA outside the traditional realm of consumer reporting agencies. The statute's broad and, as the Supreme Court has put it, "less than pellucid language" has made these types of FCRA claims an increasingly attractive endeavor for the plaintiffs' bar and regulatory agencies. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 (2007).

Spokeo and the related decisions have upped the ante in these cases. The statute imposes extensive technical requirements on any entity reporting, obtaining, or furnishing consumer reporting information as defined by the statute. *See, e.g.*, 15 U.S.C. §§ 1681b-1681x. The statute further provides for automatic statutory damages of $100-$1,000 per violation in the case of "willful" violations, "actual damages" for negligent violations, as well as punitive damages and attorneys' fees and costs. 15 U.S.C. §§ 1681n, 1681o. The highly technical statutory framework combined with the large dollar amounts attached to each alleged violation—regardless of whether any consumer was actually harmed—can add up to enormous potential paydays in class actions. An affirmance by the Supreme Court would fan those flames, expanding what has become an enticing target for plaintiffs' class action lawyers by lowering the bar to class certification and providing settlement leverage even in meritless FCRA class actions.

The implications of a Supreme Court decision in *Spokeo* go well beyond the FCRA. The same standing question arises under numerous other federal statutes that also provide private rights of action and authorize recovery of statutory damages, including the Truth in Lending Act, the Fair Debt Collection Practices Act, the Electronic Fund Transfer Act, the Video Privacy Protection Act, and the Electronic Communications Privacy Act. Claims under the federal privacy statutes in particular have been the subject of standing challenges, with defendants arguing that plaintiffs cannot pursue claims for violation of these federal statutes absent allegations of some actual, concrete injury. The Supreme Court's ruling will likely impact the standing requirements of these statutes as well.

The ruling likely also will have implications for certification of classes pursuing these no-injury claims. Whether the challenged practice caused injury to plaintiff and each putative class member often creates an individualized issue that is not subject to common proof. The Supreme Court's views on whether no-injury plaintiffs can certify no-injury classes will have an enormous impact on the class action landscape.

Client Alert

Contact:

Angela E. Kleine
(415) 268-6214
akleine@mofo.com

Nancy R. Thomas
(213) 892-5561
nthomas@mofo.com

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