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Client Alert

National Class Action Practice Group

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Spokeo, Inc. v. Robins: Supreme Court Holds Class-Action Plaintiff Must Suffer Concrete Harm to Sue in Federal Court

On May 16, the United States Supreme Court issued its much-anticipated decision in *Spokeo, Inc. v. Robins*, a class action brought under the Fair Credit Reporting Act (FCRA). The Court had granted *certiorari* to decide 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." [1] In a 6-2 decision, the Court answered "no" to that question, holding that a federal-court plaintiff must establish a "concrete" injury to satisfy Article III's standing requirement. The Court reasoned that, although Congress has an important role to play in identifying legally cognizable injuries, a bare violation of a statutory right—without more—cannot serve as a substitute for the concrete injury required by Article III.

Background

Spokeo, Inc. operates a "people search engine."[2] If a person visits Spokeo's website and provides an individual's name, Spokeo searches for information "in a wide variety of databases and provides information about the subject of the search."[3]

The plaintiff, Thomas Robins, alleged that someone ran a Spokeo search on him, and that some of the information Spokeo gathered and disseminated about him was inaccurate.[4] For example, Spokeo falsely reported that Robins is married, has children, is in his 50s, has a job, and is "relatively affluent."[5]

Robins filed a class-action complaint in federal court in Los Angeles, California, asserting violations of the FCRA, which (among other things) requires "consumer reporting agencies" to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports.[6] Robins alleged that Spokeo was a consumer reporting agency and that it violated the FCRA when it published inaccurate information about him.[7] He sought statutory, but not actual, damages for Spokeo's alleged "willful" violation of the FCRA.[8]

The district court found that Robins had not adequately pled an injury in fact, and thus dismissed the case for lack of Article III standing.[9] The Ninth Circuit reversed, ruling that Robins had pled an Article III injury in fact

For more information, contact:

David L. Balser
+1 404 572 2782
dbalser@kslaw.com

Jeffrey S. Cashdan
+1 404 572 4818
jcashdan@kslaw.com

Jonathan R. Chally
+1 404 572 4673
jchally@kslaw.com

Barry Goheen
+1 404 572 4618
bgoheen@kslaw.com

S. Stewart Haskins, II
+1 404 572 4687
shaskins@kslaw.com

L. Joseph Loveland
+1 404 572 4783
jloveland@kslaw.com

Zachary A. McEntyre
+1 404 572 4636
zmcentyre@kslaw.com

Lawrence A. Slovensky
+1 404 572 2764
lslovensky@kslaw.com

John C. Toro
+1 404 572 2806
jtoro@kslaw.com

King & Spalding
Atlanta
1180 Peachtree Street, NE
Atlanta, Georgia 30309-3521
Tel: +1 404 572 4600
Fax: +1 404 572 5100

www.kslaw.com

because he had alleged that Spokeo violated *his* statutory rights (not just the statutory rights of others) and because his "'personal interests in the handling of his credit information are individualized rather than collective.'"[10]

The Supreme Court's Opinion

Following oral argument in November, the Supreme Court vacated the Ninth Circuit's judgment in a 6-2 opinion written by Justice Alito. The Court began by reaffirming that a plaintiff must suffer an "injury in fact" to establish standing to sue under Article III of the Constitution.[11] As the court put it, "[i]njury in fact is a constitutional requirement, and it is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[12]

To establish an injury in fact, a plaintiff must show that he or she suffered a harm that is both "particularized" and "concrete."[13] For an injury to be particularized, it cannot be a generalized grievance, but must have affected the plaintiff in a "personal and individual way."[14] And while "[p]articularization is necessary to establish injury in fact, … it is not sufficient"—there is an "independent requirement" that the injury be "concrete."[15] This, the Court explained, is where the Ninth Circuit erred: it held that Robins had satisfied Article III's injury-in-fact requirement simply because his injury was particularized, but did not separately consider whether the injury was concrete.[16]

To be "concrete," an injury must be "*de facto*," meaning it must "actually exist"; abstract injuries do not count.[17] Nevertheless, the Court held, an injury need not be tangible. "[I]ntangible injuries can … be concrete" for purposes of Article III.[18] Nor can concreteness be equated with probability or measurability. "[T]he law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure," *e.g.*, in the case of slander *per se*.[19]

The Court made clear that determining whether an intangible injury qualifies as an injury in fact is not subject to any bright-line rule. Rather, courts must look to "both history and the judgment of Congress."[20] Thus, courts should be more likely to find standing where an intangible harm has a "close relationship" to a harm that has traditionally been regarded as providing a basis to sue in English or American courts.[21] So too, Congress's judgment is "instructive and important" in determining whether a given intangible injury is sufficient.[22] The Court reaffirmed that "Congress may 'elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law'" and that "'Congress has the power to define injuries … that will give rise to a case or controversy where none existed before.'"[23]

But there are limits on what Congress can do, and a plaintiff does not "automatically" establish an injury in fact just because a statute grants her a right and purports to authorize her to sue to vindicate it.[24] Even in the context of a statutory right, a concrete injury is still required. So, for example, a "bare procedural violation, divorced from any concrete harm," is not an injury in fact.[25] With regard to the FCRA in particular, the Court noted that a consumer report may be accurate even if the consumer reporting agency did not follow the statute's procedures for preparing the report.[26] The Court also said that not every inaccuracy could be expected to cause concrete harm. For example, "[i]t is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm."[27] But the Court expressed "no view about any other types of false information that may merit similar treatment," leaving that issue—along with the question whether Robins had suffered concrete harm—for the Ninth Circuit to decide on remand.[28]

The Impact of *Spokeo*

Spokeo is not the sweeping ruling for which many class action defense counsel had hoped. Although the Court held that something more than a bare violation of an individualized statutory right is required for Article III standing, it offered little guidance on what that something more is. The Court did rule that the violation of a procedural right alone is not sufficient. Beyond that, however, it will be up to the lower courts to determine whether and when an alleged harm

qualifies as a "concrete" injury. The law on what constitutes concrete injury will necessarily be developed on a case-by-case basis.

Looking ahead, *Spokeo* could have a significant impact on class action lawsuits filed under federal statutes—particularly the FCRA. Class action defendants should consider taking advantage of *Spokeo* in at least two ways. *First*, defendants should analyze whether the named plaintiff has established a concrete injury within the meaning of Article III. As the Supreme Court noted, "even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong."[29] If the named plaintiff has no concrete injury, the entire action should be dismissed for lack of subject matter jurisdiction. *Second*, class action defendants should analyze *Spokeo*'s impact on class certification. A defendant may be able to defeat class certification by demonstrating that the issue of whether each putative class member suffered concrete harm would require individualized determinations preventing adjudication on a class-wide basis.

As the case law develops, courts may provide additional avenues for class-action defendants to use *Spokeo* to their advantage. We will continue to monitor developments in the lower courts and provide additional alerts as relevant decisions are issued.

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[1] *Spokeo, Inc. v. Robins*, 13-1339, "Questions Presented," *available at* http://www.supremecourt.gov/qp/13-01339qp.pdf.
[2] *Spokeo, Inc. v. Robins*, No. 13-1339, Slip. op. at 1 (U.S. May 16, 2016).
[3] *Id.*
[4] *Id.* at 4.
[5] *Id.*
[6] *Id.* at 3-4 (quoting FCRA).
[7] *See id.* at 4.
[8] *Id.*
[9] *Id.* at 4.
[10] *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413-14 (9th Cir. 2014).
[11] *Spokeo, Inc. v. Robins*, No. 13-1339, Slip. op. at 6 (U.S. May 16, 2016).
[12] *Id.* at 7 (internal citation omitted).
[13] *Id.*
[14] *Id.* at 7.
[15] *Id.* at 7-8.
[16] *See id.* at 8.
[17] *Id.* at 8.
[18] *Id.* at 8-9.
[19] *Id.* at 10.
[20] *Id.* at 9.
[21] *Id.* at 9.
[22] *Id.* at 9.
[23] *Id.* at 9 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578, 580 (1992)).
[24] *Id.* at 9.
[25] *Id.* at 9-10. The Court qualified this statement by explaining that "the violation of a procedural right can be sufficient in some circumstances to constitute injury in fact," such as when the procedural right is sufficiently bound up with a concrete harm. *See id.* at 10.

[26] *See id.* at 10-11.
[27] *Id.* at 11.
[28] *Id.* at 11 n.8.
[29] *Id.* at 7 n.6 (citation omitted).