
Supreme Court Vacates Ninth Circuit Decision in *Spokeo*, Remands for Analysis of Concrete Harms

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On Monday, the Supreme Court issued its decision in *Spokeo v. Robins*, which posed the question of whether Article III standing requires a plaintiff to have a concrete injury when alleging a statutory violation under the Fair Credit Reporting Act (“FCRA”). The decision is likely to have broad implications for financial services companies and others who face civil actions alleging bare statutory violations under the FCRA and other laws.

In the case, Thomas Robins alleged that Spokeo, an online people-search database, had gathered and disseminated incorrect information about him in violation of the FCRA, which imposes certain requirements on “consumer reporting agencies”—including numerous procedural requirements—concerning the creation and use of “consumer reports.” The FCRA provides for per-violation statutory and other civil damages under some circumstances. After his claim was dismissed by the district court, the Ninth Circuit held that Robins’s alleged violations of the FCRA were sufficient to meet the “injury-in-fact” requirement for Article III standing.

The Supreme Court reversed, holding that the Ninth Circuit had improperly failed to consider whether Robins’s alleged injury was “concrete.” To meet Article III’s injury-in-fact requirement, the Court explained, a plaintiff must allege a violation that is both “particularized” and “concrete”: “[A] bare procedural violation, divorced from any concrete harm” does not suffice. The Court further explained, however, that “intangible injuries can nevertheless be concrete,” and the “risk of real harm” may satisfy the concreteness requirement. The Court cited libel, slander *per se*, and actions involving voters’ “inability to obtain information” to which they were statutorily entitled as examples of injuries sufficiently concrete to confer standing. The Court remanded for the Ninth Circuit to decide in the first instance whether Robins’s alleged injury met the test of concreteness. The Court provided guidance, observing that “even if a consumer reporting agency fails to provide the required notice to a user of the agency’s consumer information, that information regardless may be entirely accurate” and thus would cause no concrete harm sufficient to create Article III standing. “In addition,” the Court continued, “not all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how

the dissemination of an incorrect zip code, without more, could work any concrete harm.”

While it remains for the Ninth Circuit and other courts to implement *Spokeo*,¹ the decision appears likely to have a significant effect on future civil litigation under consumer financial laws. In addition to the FCRA, numerous other federal banking statutes, as well as some state consumer protection laws, provide for both detailed procedural requirements and private rights of action with potential statutory damages for violations—federal examples include the Real Estate Settlement Procedures Act, Truth In Lending Act, Telephone Consumer Protection Act, Electronic Fund Transfer Act, and Fair Debt Collection Practices Act. *Spokeo* is likely to curtail significantly the ability of plaintiffs to pursue class actions for mere procedural or other “technical” violations under such laws and to reduce the *in terrorem* effect such suits can frequently have.

¹ See *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 707 (6th Cir. 2009); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006); *Hammer v. Sam's East, Inc.*, 754 F.3d 492, 500 (8th Cir. 2014). The Second, Third, and Fourth Circuits, by contrast, have denied standing for claims involving statutory violations, but no actual injury, under federal statutes such as ERISA and the Lanham Act. See *Kendall v. Empls. Retirement Plan of Avon Prods.*, 561 F.3d 112, 121 (2nd Cir. 2009) (ERISA), abrogated on other grounds by *Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.*, No. 14-3993, 2016 WL 2772853, at *4 (2d Cir. May 13, 2016); *Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 176 (3d Cir. 2001) (Lanham Act); *David v. Alphin*, 704 F.3d 327, 338-39 (4th Cir. 2013) (ERISA).

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