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No Injury? No Problem. - Spokeo v. Robins

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The Supreme Court recently granted certiorari in *Spokeo v. Robins*, a case that has the potential to redefine standing in federal court. The Ninth Circuit's February 2014 decision permitted plaintiff Thomas Robins to establish standing under the Fair Credit Reporting Act ("FCRA") with nothing more than a speculative injury. This contravenes Supreme Court precedent, which finds standing when a plaintiff suffers a harm that is actual, distinct, palpable, and concrete; attenuated and hypothetical injuries do not constitute an injury-in-fact. The implications of the Ninth Circuit's holding in *Spokeo v. Robins* has grabbed the attention of companies in nearly every industry. Their concern, as expressed by the U.S. Chamber of Commerce – granting standing to plaintiffs who have not suffered an injury-in-fact will open the flood gates to no-injury class actions brought under statutes that authorize a private right of action. But, in truth, the implications to businesses could extend beyond this.

Robins initiated a putative class action against Spokeo for violating the FCRA. Spokeo aggregates data from phone books, social networks, marketing surveys, real estate listings, business websites, and other sources into an online database. The FCRA regulates consumer information – including consumer credit information – that is collected, disseminated, and used in consumer reports. Spokeo allegedly posted false information about Robins' wealth, education, and marital status. Robins claims that these misrepresentations will negatively affect his credit, insurance and employment prospects. While the Ninth Circuit found that Robins had not suffered actual damages, it ultimately held that the statutory FCRA violation satisfied Article III's injury-in-fact requirement. The Supreme Court has granted cert to determine "[w]hether Congress can create Article III standing by authorizing a remedy for a bare statutory violation."

The FCRA engenders dozens of federal class actions each year. That number has jumped since the Ninth Circuit's decision — 29 FCRA class actions were filed in the first four months of 2014. Many federal statutes authorize a private right of action. For example, internet firms interact with millions of individuals and are subject to numerous federal statutes with private rights of action. Facebook, eBay, Google, and Yahoo! expressed concern in their amicus brief that, under the Ninth Circuit's holding, if any of these users was "willing (or enticed by a plaintiff's attorney) to allege that a generalized practice or act violated a law providing a private cause of action and statutory damages, then she could launch a putative class action on behalf of herself and millions of other 'similarly situated' users . . . [and] pursue a multi-billion dollar statutory damages claim despite the lack of

injury . . . .”

What do no-injury class actions mean for manufacturers? It could mean lawsuits based on “defective products” that allegedly violate a state or federal statute but have not caused any harm. For example, the food and beverage and cosmetic industries are often accused of misleading consumers through false advertising, labeling, and packaging. ConAgra was sued under the Magnuson-Moss Warranty Act and state consumer protection laws for advertising its cooking oils, which were made from GMOs, were 100% natural. And Maybelline was sued under state consumer fraud and consumer protection acts because its “Super Stay” lipstick allegedly didn’t stay on the advertised 10-14 hours.
Under *Robins*, plaintiffs in these no-injury, statutory-based class actions would not need to establish that they were physically injured to survive a standing challenge. Will creative plaintiff lawyers be able to craft an argument that extends the no-injury standing rule in *Robins* to non-statutory violations?

The Sixth, Eighth, and Ninth Circuits permit statutory violations to confer standing whereas the Second, Fourth, and Federal Circuits require plaintiffs to prove an injury-in-fact. Tune in for oral arguments this Fall.

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