

Supreme Court: ‘Actual Injury’ Needed to Establish Standing to Sue for Violations of Fair Credit Reporting Act

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Plaintiffs must show they suffered from an actual injury, not just a “bare procedural violation,” in order to sue in federal court, the U.S. Supreme Court has ruled in its long-awaited decision in [*Spokeo, Inc. v. Robins*](#), No. 13-1339 (May 16, 2016).

By a 6-2 vote, the Court vacated the decision of the U.S. Court of Appeals for the Ninth Circuit and remanded the case for consideration of whether the plaintiff, Thomas Robins, had adequately alleged injury-in-fact under the proper legal standard articulated by the Supreme Court.

Facts

Spokeo, Inc. is an internet “people search engine” service. It compiles information about individuals from data on the World Wide Web and offers options for obtaining that information, including certain basic information available for free on its website to anyone having access to the internet.

In 2010, Thomas Robins brought a class action under the Fair Credit Reporting Act against Spokeo. Robins alleged that Spokeo’s website contained inaccurate personal information about him. The Spokeo site reported that Robins had a graduate degree, that he was employed in a professional or technical field, that his “economic health” was “very strong” and his wealth level was in the “Top 10%,” and that he was a married man in his 50s with children. In fact, Robins had no graduate degree, was out of work and seeking employment, was not in his 50s, and was unmarried and had no children.

The complaint alleged that Spokeo violated the FCRA, 15 U.S.C. § 1681e(2), by failing to follow reasonable procedures to “assure maximum possible accuracy” of the reports it prepared. The FCRA provides for the recovery of actual damages sustained and, where the violation is “willful,” for statutory damages of not less than \$100 and not more than \$1,000. Robins alleged that Spokeo’s violations were willful and sought an award of statutory damages for himself and members of the class, along with attorneys’ fees and punitive damages.

Spokeo moved to dismiss the complaint, contending that Robins had not alleged any concrete injury to himself apart from the alleged violation of statutory rights created by the FCRA. Spokeo argued that Robins’s failure to allege such “injury in fact” meant that Robins lacked standing under Article III

of the U.S. Constitution to bring the lawsuit. Spokeo also asserted that it was not a consumer reporting agency within the meaning of the FCRA and, therefore, was not subject to the FCRA requirements alleged in the complaint. The Court's opinion, however, assumed that Spokeo was a consumer reporting agency, as Robins had alleged in his complaint.

The federal district court granted Spokeo's motion and dismissed the case with prejudice, ruling that a mere violation of the FCRA does not confer Article III standing where no injury is present. On appeal, the Ninth Circuit (in San Francisco) reversed, holding "the violation of a statutory right is usually a sufficient injury in fact to confer standing," even without any other alleged injury.

The Supreme Court agreed to review the case on the following question: "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."

Oral argument before the Court took place on November 2, 2015. (See our article, [U.S. Supreme Court Hears Argument on Viability of 'No-Injury' Class Actions under Fair Credit Reporting Act and Other Statutes](#).) Before the Court could render a decision, however, Justice Antonin Scalia died, leaving the Court with only eight Justices.

Majority Opinion

Writing for the majority, Justice Samuel Alito emphasized that to establish injury-in-fact, a plaintiff must allege an injury that was both "concrete *and* particularized." (Emphasis added.) Justice Alito wrote that the Ninth Circuit's analysis of the standing issue was incomplete, because the appeals court focused only on one of the requirements of injury-in-fact (particularity) while ignoring the other requirement (concreteness).

The Court vacated the Ninth Circuit's decision and remanded "for the Ninth Circuit to consider *both* aspects of the injury-in-fact requirement." (Emphasis added.) The Court stated that it expressed "no position as to whether the Ninth Circuit's ultimate conclusion — that Robins adequately alleged an injury in fact — was correct."

There was no dispute that Robins had satisfied the particularity requirement of injury in fact. The injury he alleged was based on the violation of his own statutory rights and was due to the inaccurate information about him. However, the Court stated, particularization is "necessary...but not sufficient to establish injury in fact." An injury also must be "concrete," which is what the Ninth Circuit failed to adequately consider.

The Court said that a concrete injury must be "de facto" — *i.e.*, "it must actually exist." A concrete injury must be "real" and not "abstract." The Court emphasized that a concrete injury is required for standing "even in the context of a statutory violation," stating that "Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement."

There are three aspects of concreteness. First, it is not synonymous with being tangible. A concrete injury need not be tangible. Intangible injuries, such as the abridgment of free speech rights, can be concrete. Second, the judgment of Congress in enacting legislation is "instructive and important," but that "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that

right.” Third, “the risk of real harm” can constitute a concrete injury, even if the harm may be difficult to prove or measure.

Applying these principles, the Court in *Spokeo* stated that the overriding purpose of the FCRA was “to curb the dissemination of false information by adopting procedures designed to decrease that risk.” In what businesses and FCRA practitioners likely will consider the key section of the opinion, the Court stated:

Robins cannot satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the FCRA’s procedural requirements may result in no harm. For example, 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. In addition, not all inaccuracies cause harm or present any material risk of harm.

The Court directed the Ninth Circuit to consider “whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement.”

Justice Clarence Thomas joined the majority’s opinion, but also wrote a separate concurring opinion in which he explained that the requirement of a concrete injury will vary depending on whether the statutory right to be enforced is a public or a private right.

Dissenting Opinion

Justice Ruth Bader Ginsburg, joined by Justice Sonia Sotomayor, dissented. The dissent did not take issue with any of the standing principles discussed by the majority. Instead, the dissent argued that no remand was necessary because the allegations in the complaint were sufficient to establish concreteness. Justice Ginsburg stated that Robins complained of (a) inaccurate information that (b) could affect his employment prospects, for example, by creating the erroneous impression that he was overqualified for a particular job. The combination of erroneous information and actual harm to Robins’s employment prospects qualified as a concrete injury.

Implications

Although *Spokeo* involved the FCRA obligations of consumer reporting agencies, its holding and rationale are applicable directly to the issues raised in FCRA class actions in the employment context. These class actions continue to grow in number. They often involve plaintiffs (job applicants and employees) who have not been injured in the slightest by the alleged FCRA violation. The two most common alleged “no-injury” violations are the inclusion of purportedly extraneous language in an FCRA written disclosure document and the rejection of a job applicant without sufficient advance notice, even though it is based on accurate information in a background report. For the most part, these claims allege “bare” statutory violations that defense attorneys are likely to argue should not survive under the *Spokeo* holding and rationale.

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