

Spokeo—Round 3: The Ninth Circuit Finds Alleged Statutory Violation Sufficiently “Concrete” To Satisfy Article III Standing

Article By:

Paul A. Werner

David M. Poell

The Ninth Circuit recently issued its long-awaited opinion in *Robins v. Spokeo, Inc.*, — F.3d —, 2017 WL 3480695 (9th Cir. Aug. 15, 2017), on remand from the United States Supreme Court. Once again, the Ninth Circuit reversed the district court’s dismissal of plaintiff’s lawsuit alleging willful violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* (“FCRA”), holding plaintiff’s alleged injuries were sufficiently “concrete” to satisfy Article III standing requirements. This most recent *Spokeo* decision (a/k/a *Spokeo III*) is the latest in a series of appellate decisions during the last year that have determined whether, and under what, circumstances a defendant’s alleged violation of a federal statute, without more, may satisfy Article III’s “injury-in-fact” requirement.

The issue before the Ninth Circuit in *Spokeo* was “whether an alleged violation of a consumer’s rights under the [FCRA] constitutes a harm sufficiently *concrete* to satisfy the injury-in-fact requirement of Article III of the United States Constitution.” (Slip at 4.) Plaintiff Robins alleged that Spokeo—which operates a website that compiles consumer data and builds customer-information profiles—published an allegedly inaccurate report about him on its website. (*Id.* at 5.) Plaintiff sued Spokeo for the publication of the inaccurate information and alleged Spokeo *willfully* violated FCRA. (*Id.*) Plaintiff claimed the inaccurate information contained on Spokeo’s website (e.g., his age, marital status, wealth, education level, and profession) harmed his employment prospects when he was unemployed. (*Id.* at 6.) Ironically, the alleged false statements actually portrayed plaintiff *more* favorably than his actual credentials. He also alleged emotional distress. (*Id.*)

The district court dismissed plaintiff’s complaint for lack of Article III standing. On initial appeal, the Ninth Circuit reversed the district court’s dismissal of the complaint, holding plaintiff’s allegations established a cognizable injury-in-fact because he alleged Spokeo violated his FCRA statutory rights. *See Robins v. Spokeo, Inc. (Spokeo I)*, 742 F.3d 409, 414 (9th Cir. 2014).

The Supreme Court granted *certiorari* and ultimately vacated the Ninth Circuit’s decision after finding that court’s standing analysis incomplete. *See Spokeo, Inc. v. Robins (Spokeo II)*, 136 S. Ct. 1540 (2016). The Supreme Court held the Ninth Circuit neglected to consider whether plaintiff’s “injury”

arising from the alleged FCRA violation was sufficiently *concrete* for Article III purposes. As a result, the Supreme Court vacated the Ninth Circuit's ruling and remanded the case back to the Ninth Circuit for consideration of this issue.

On remand, the Ninth Circuit rejected plaintiff's suggestion that Spokeo's alleged violation of FCRA (*i.e.*, its failure to reasonably ensure the accuracy of his consumer report) is, standing alone, enough of a concrete injury to confer Article III standing. (See Slip at 7.) The Ninth Circuit explained "the mere fact that Congress said a consumer like Robins may bring such a suit does not mean that a federal court necessarily has the power to hear it." (*Id.* at 8.) Rather, "even when a statute has allegedly been violated, Article III requires such violation to have some real—as opposed to purely legal—harm to the plaintiff." (*Id.*)

Nevertheless, the Ninth Circuit relied heavily on "congressional judgment" in its concreteness inquiry given the "the plaintiff alleges that he suffered an *intangible* harm." (*Id.* at 9.) Looking to recent standing decisions from the Second, Sixth, and Ninth Circuits, the *Spokeo III* court concluded that "*Spokeo II* instruct[s] that an alleged procedural violation [of a statute] can by itself manifest concrete injury where Congress conferred the procedural right to protect a plaintiff's concrete interests and where the procedural violation presents 'a risk of real harm' to that concrete interest." (*Id.* at 10 (quoting *Strubel v. Comenity Bank*, 842 F.3d 181, 190 (2d Cir. 2016)).) And based on its analysis of legislative history of FCRA dating back to the 1970s and "historical practice," the Ninth Circuit recognized "that the FCRA procedures at issue in this case were crafted to protect consumers' (like plaintiff's) concrete interest in accurate credit reporting about themselves." (*Id.* at 15.)

With this understanding of the statute's purpose in mind, the Ninth Circuit went on hold plaintiff had alleged FCRA violations that caused him *actual* harm, or at least created a "material risk of harm" to, this concrete interest. (*Id.*) Thus, while the court rejected plaintiff's claim that "any FCRA violation premised on *some* inaccurate disclosure of his information is sufficient" (*Id.* at 16.), it found that the information at issue here "is the type that may be important to employers or others making use of a consumer report." (*Id.* at 18.) The court further explained that "[e]nsuring the accuracy of this sort of information thus seems directly and substantially related to FCRA's goals." (*Id.*)

At this point, is unclear whether *Spokeo III* is a fact-bound standing decision or whether it articulates a broader standing rule for alleged violations of certain statutory rights. The Ninth Circuit itself took pains to make clear it was not articulating a new rule for statutory standing post-*Spokeo*. It expressly "caution[ed] that [its] conclusion on Robins's allegations does not mean that *every* inaccuracy in these categories of information . . . will necessarily establish concrete injury under FCRA." (*Id.* at 19 n.4.) And it was also careful to "express no opinion on the circumstances in which alleged inaccuracies of this nature would or would not cause a concrete harm." (*Id.*) However, depending on how courts interpret the holding of *Spokeo III*, the decision could have major implications in putative class actions that are predicated upon statutory violations of federal laws such as FCRA and the Telephone Consumer Protection Act, 227 U.S.C. § 227 ("TCPA"). The issue of a plaintiff's standing in these types of cases could transform into a fact-driven, case-by-case inquiry that would make it much more difficult to certify a class under Rule 23 going forward.

The Ninth Circuit is not alone in weighing in on the meaning of the Supreme Court's *Spokeo II* decision. Both the Second and Seventh Circuits have held that a mere statutory violation of the Fair and Accurate Credit Reporting Act, 15 U.S.C. § 1681c(g) ("FACTA"), which is part of FCRA and prohibits the printing of more than the last 5 digits of a credit or debit card number on an electronically-printed customer receipt, does *not* constitute a concrete injury for Article III purposes. See *Crupar-Weinmann v. Paris Baguette Am., Inc.*, 861 F.3d 76, 80-82 (2d Cir. 2017); *Meyers v. Nicolet*

Restaurants of De Pere, LLC, 843 F.3d 724, 727 (7th Cir. 2016). Taken together, these decisions signal continued uncertainty among the lower courts on how to apply *Spokeo II* and when alleged statutory violations may be sufficiently “concrete” to confer Article III standing. Following the Ninth Circuit’s decision, Spokeo may indeed seek review before the newly constituted Supreme Court to dispel such uncertainty – again.

For earlier commentary on *Spokeo* decisions, see:

- [Update on Data Breach and Data Privacy Class Actions Post-*Spokeo*](#)
- [U.S. Supreme Court Remands *Spokeo*; Ninth Circuit Must Consider Whether “Concrete” Injury Occurred](#)
- [Reading The Tea Leaves – How Will The U.S. Supreme Court Decide *Spokeo*?](#)

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