

# SPOKEO REDUX: NINTH CIRCUIT HOLDS THAT A STATUTORY VIOLATION UNDER FCRA MAY, WITHOUT MORE, ESTABLISH A CONCRETE INJURY FOR PURPOSES OF ARTICLE III STANDING

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## Financial Institutions and Services Litigation Alert

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The Ninth Circuit has opined, again, on whether a statutory violation of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681, et seq.—by itself—constitutes a concrete injury for Article III standing purposes. Last year, in *Spokeo, Inc. v. Robins*, [1] the United States Supreme Court vacated and remanded the Ninth Circuit's original opinion on the issue. Although the Ninth Circuit had reviewed the plaintiff's allegations for existence of a particularized injury, it had not separately analyzed whether they described a sufficiently concrete injury.[2] In *Spokeo*, the Supreme Court ruled that "a bare procedural violation [of a federal statute], divorced from any concrete harm," does not suffice to "satisfy the injury-in-fact requirement of Article III." But the Court declined to define a "bare procedural violation" in favor of allowing the Ninth Circuit to first consider the question.[3] Now that the Ninth Circuit has done so, the Supreme Court may take up the question once more.

## ANALYSIS

Since the Supreme Court's *Spokeo* decision, federal courts have developed two approaches when analyzing whether a plaintiff has Article III standing to assert a federal statutory claim. Under one approach, courts analyze the statute at issue and decide whether it creates a right that, if violated, effectively constitutes a per se Article III injury. Under the other approach, courts look to the facts alleged by the plaintiff, regardless of the statute, and determine whether those facts demonstrate concrete harm for purposes of Article III standing.[4]

In the most recent *Spokeo* decision, the Ninth Circuit adopted a hybrid of these two approaches. The court held that in certain circumstances, an alleged violation of a consumer's statutory rights under FCRA, alone, is sufficient to establish a concrete harm for purposes of Article III standing.[5]

In reaching this decision, the Ninth Circuit acknowledged that although an injury-in-fact may not be shown by simply pointing to a violation of a statute, "the Supreme Court also recognized that *some* statutory violations, alone, do establish concrete harm." [6] Thus, the court ruled that in evaluating whether a claim of harm is sufficiently concrete to establish Article III standing, it must determine "(1) whether the statutory provisions at issue were established to protect [the plaintiff's] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests." [7] Based on this framework, the Ninth Circuit delved into the "somewhat murky area" of

"intangible injuries," in light of the plaintiff's claim that the defendant violated FCRA simply by aggregating and publishing information about him that was incorrect but not facially derogatory.<sup>[8]</sup>

The Ninth Circuit answered the first question with a straightforward analysis. It reviewed the purposes of FCRA and concluded that Congress had enacted the FCRA provision at issue, 15 U.S.C. § 1681e(b), to protect consumers' real, concrete interests, namely their concrete interest in "accurate credit reporting about themselves."<sup>[9]</sup> In answering the second question, the court conducted a more nuanced and case-specific analysis of the plaintiff's allegations. The court particularly focused on the *nature* of the alleged violations to determine whether the plaintiff had alleged a FCRA violation that actually harmed, or created a material risk of harm to, the concrete interests established by Section 1681e(b). As the Ninth Circuit wrote, the Supreme Court's decision "requires some examination of the nature of the specific alleged reporting inaccuracies to ensure that they raise a real risk of harm to the concrete interests that FCRA protects."<sup>[10]</sup>

In doing so, the Ninth Circuit determined that while it "is not correct that any FCRA violation premised on some inaccurate disclosure of [] information is sufficient" to establish a concrete harm, it is "clear" that the plaintiff's allegations reflected sufficiently serious inaccuracies in his consumer report to establish actual harm, or a material risk of harm, to his protected, concrete interests of having an accurate consumer report.<sup>[11]</sup> So, although the Supreme Court recognized that the inclusion of an incorrect zip code on a consumer report might give rise to a violation without concrete injury, the Ninth Circuit explained that it "need not conduct a searching review for where that line [of when incorrect information begins to give rise to injury] should be drawn in this case ... because it is clear to us that Robins's allegations relate facts that are substantially more likely to harm his concrete interests than the Supreme Court's example of an incorrect zip code."<sup>[12]</sup> The Court reasoned that although the inaccurate information regarding the plaintiff's marital status, age, wealth, and employment status could seem harmless (because the information suggested, for example that the plaintiff was wealthier than he actually was), it could have a negative impact on the plaintiff's ability to seek employment.<sup>[13]</sup> "Even if their likelihood actually to harm Robins's job search could be debated, the inaccuracies alleged in this case do not strike us as the sort of mere technical violation[s] which are too insignificant to present a sincere risk of harm to the real-world interests that Congress chose to protect with FCRA."<sup>[14]</sup>

Based on its two-pronged analysis, the Ninth Circuit was "satisfied" that the plaintiff had alleged injuries, based solely upon a violation of FCRA, that are "sufficiently concrete for purposes of Article III" and that the plaintiff had standing to pursue his claims.<sup>[15]</sup> Thus, the Ninth Circuit reversed the District Court's decision and remanded the case, again, for a determination on the merits of plaintiff's claims. Yet, the Ninth Circuit emphasized the case-specific nature of its hybrid approach, "caution[ing] that [its] conclusion on Robins's allegations does not mean that every inaccuracy in these categories of information (age, marital status, economic standing, etc.) will necessarily establish concrete injury under FCRA."<sup>[16]</sup> This is because "[t]here may be times that a violation leads to a seemingly trivial inaccuracy in such information (for example, misreporting a person's age by a day or a person's wealth by a dollar)."<sup>[17]</sup>

## CONCLUSION

As with the Ninth Circuit's previous decision in *Spokeo*, its recent decision is likely to prompt a petition to the Supreme Court for further review. Possible questions for the Supreme Court's consideration include whether the

Ninth Circuit's hybrid approach to the concreteness analysis is correct and, if so, whether the Ninth Circuit applied that approach to the plaintiff's allegations correctly. Whether the Supreme Court accepts the case again remains to be seen, but even if *Spokeo* does not reach the Supreme Court again, the Court may eventually take review of a case presenting similar questions given the different approaches various courts are developing under *Spokeo*.

**Notes:**

1. 136 S. Ct. 1540 (2016).
2. *Id.* at 1549.
3. *See id.*
4. For additional information regarding these two approaches, please read our article titled "Federal Courts Follow Two Approaches Post-*Spokeo* When Analyzing Standing," which was originally published in the January 27, 2017 issue of the Washington Legal Foundation's Legal Backgrounder, Vol. 32 No. 4.
5. *See Robins v. Spokeo, Inc.*, No. 11-56843, 2017 WL 3480695 (9th Cir. Aug. 15, 2017).
6. *Id.* at \*4 (emphasis in original).
7. *Id.*
8. *See id.* at \*3.
9. *See id.* at \*4-5.
10. *Id.* at \*6 (emphasis in original).
11. *See id.* at \*6-7.
12. *Id.* at \*7.
13. *See id.*
14. *Id.* (quotations omitted).
15. *See id.* at \*8.
16. *See id.* at \*7 n.4 (emphasis in original).

17. See *id.* ("We express no opinion on the circumstances in which alleged inaccuracies of this nature would or would not cause a concrete harm.").

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