

Client Alert

National Class Action Practice Group

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***Spokeo II*: On Remand from Supreme Court, Ninth Circuit Finds Statutory Violation of Fair Credit Reporting Act Sufficient to Confer Article III Standing**

On August 15, 2017, in a much-anticipated opinion in a case that has drawn national attention in the past three years, the United States Court of Appeals for the Ninth Circuit held that an alleged violation of the Fair Credit Reporting Act (“FCRA”) constitutes a sufficiently concrete injury-in-fact for purposes of Article III standing to sue notwithstanding the absence of any actual harm.¹ In 2016, the United States Supreme Court had vacated the Ninth Circuit’s 2014 decision² permitting the plaintiff to sue for the statutory FCRA violation on the basis that, in its “injury-in-fact” analysis, the Ninth Circuit had failed to consider whether the alleged injury was sufficiently concrete to confer Article III standing.³ The Supreme Court remanded the case back to the Ninth Circuit, which held oral argument in the fall of 2016 on the concreteness issue before issuing its decision on August 15, 2017, in an opinion destined to be called “*Spokeo II*.”

Background

Thomas Robins brought suit against Spokeo, Inc., a “people search engine,” after discovering allegedly incorrect information about him on Spokeo’s website.⁴ In a class-action complaint, Robins claimed that, by publishing incorrect information, Spokeo violated the FCRA.⁵ Because the FCRA permits an award of statutory damages in a range of \$100 to \$1,000 for each proven violation, Robins asserted that he was not required to allege any actual injury or harm in order to recover statutory damages.⁶

In 2011, the district court dismissed the complaint, finding that Robins alleged only a bare statutory violation that did not rise to the level of an injury-in-fact sufficient to confer Article III standing.⁷ The Ninth Circuit reversed, holding that Robins established Article III standing because the alleged violation concerned his personal statutory rights.⁸ The Supreme Court granted certiorari, vacated the Ninth Circuit’s decision, and remanded, explaining that an injury-in-fact must be both concrete and particularized and instructing the court to consider “whether Robins’s alleged injuries ‘meet the concreteness requirement’ imposed by Article III.”⁹

For more information, contact:

Barry Goheen
+1 404 572 4618
bgoheen@kslaw.com

Paige Nobles
+1 404 572 3560
pnobles@kslaw.com

King & Spalding
Atlanta
1180 Peachtree Street, NE
Atlanta, Georgia 30309-3521
Tel: +1 404 572 4600
Fax: +1 404 572 5100

www.kslaw.com

The Ninth Circuit's Opinion on Remand

On remand, in an opinion written by Judge O'Scannlain, the Ninth Circuit held that Robins alleged sufficiently concrete injuries for purposes of Article III standing. Robins argued that the "failure reasonably to ensure the accuracy of his consumer report[] is, alone, enough to establish a concrete injury" because the "FCRA exists specifically to protect consumers' concrete interest in credit-reporting accuracy."¹⁰ The court acknowledged that the "FCRA allows [Robins] to sue for willful violations without showing that he suffered any additional harm," but explained that "the mere fact that Congress said that a consumer like Robins may bring such a suit does not mean that a federal court necessarily has the power to hear it."¹¹ Rather, a plaintiff must show that the statutory violation "caused some real—as opposed to purely legal—harm to the plaintiff."¹² The court explained, however, that "the Supreme Court also recognized the *some* statutory violations, alone, do establish concrete harm."¹³

After considering other circuit opinions, the Ninth Circuit characterized the issue as "(1) whether the statutory provisions at issue were established to protect his 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."¹⁴ The court held "that Congress established the FCRA provisions at issue to protect consumers' concrete interests" as the "FCRA aims 'to ensure fair and accurate credit reporting' and to 'protect consumer privacy.'"¹⁵ The court added that the "interests protected by [the] FCRA's procedural requirements are 'real,' rather than purely legal creations," explaining that "the real-world implications of material inaccuracies in [consumer] reports seem patent on their face."¹⁶ It also noted that "Congress has chosen to protect against a harm that is at least closely similar *in kind* to others that have traditionally served as the basis for lawsuit" such as libel and slander per se.¹⁷

For these reasons, the Ninth Circuit held that Robins's claims were sufficiently concrete and did not fail for lack of Article III standing. Accordingly, as it had done in 2014, it reversed and remanded the district court's dismissal.¹⁸

The Significance of *Spokeo II*

The Ninth Circuit's decision in *Spokeo II* makes clear that certain procedural violations of federal statutes, standing alone, may confer Article III standing. There is no question that the defendant will, once again, file a petition for writ of certiorari with the Supreme Court, and many commentators believe that the Supreme Court will review the case a second time. Unless and until that happens, however, class-action defendants, especially those defending cases in the Ninth Circuit, should consider, in cases that seek only statutory damages or penalties for alleged violations of statutes with no accompanying actual harm, whether the statute allegedly violated resembles an actionable injury at common law and should challenge statutory violations that do not.

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¹ *Robins v. Spokeo, Inc.*, ___ F.3d ___, No. 11-56843, 2017 WL 3480695 (9th Cir. Aug. 15, 2017).

² *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014).

³ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016).

⁴ *Spokeo*, 2017 WL 3480695, *2.

⁵ *Id.*

⁶ *Id.*

⁷ *Robins v. Spokeo, Inc.*, No. 10-05306, 2011 WL 597867, at *1-2 (C.D. Cal. Jan. 27, 2011).

⁸ *Spokeo*, 742 F.3d at 414.

⁹ *Spokeo*, 136 S. Ct. at 1550.

¹⁰ *Spokeo*, 2017 WL 3480695, *3.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*, *4 (emphasis in original).

¹⁴ *Id.*

¹⁵ *Id.* (quoting *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007)).

¹⁶ *Id.*

¹⁷ *Id.*, *5.

¹⁸ *Id.*, *8.