



## Alerts

### Supreme Court Provides a Narrow Win for Defendant –With Chance for More–On "Actual Injury" Issue

May 16, 2016

*Consumer Financial Services Alert*

*Spokeo Inc. v. Thomas Robins et al.*, No. 13-1339 (2016)

On May 16, 2016, the U.S. Supreme Court, by a vote of 6-2, set aside a lower court decision on whether what might be a technical statutory violation gives a consumer standing to sue under the Fair Credit Reporting Act (FCRA). The Court ruled that the Ninth Circuit, in deciding that a plaintiff had satisfied Article III's "injury in fact" requirement, had given insufficient attention to whether the alleged injury, disseminating inaccurate information in violation of the Fair Credit Reporting Act, was "concrete" enough to satisfy Article III's requirement that an injury be both "concrete" and "particularized." The ruling provided an interim victory for defendant Spokeo, but did not fully resolve the issue of whether plaintiff Robins' allegations passed the Article III test. Nor did the Court actually take up the question some had hoped it would resolve in this case, which was whether Congress can provide Article III standing based on a mere statutory violation in the absence of an "actual injury."

Plaintiff Thomas Robins sued Spokeo, an online company that searches a wide spectrum of databases, compiles the data, and provides profiles of individuals. He alleged that Spokeo violated FCRA by posting inaccurate personal information about him, including his incorrect age, family and financial status, allegedly as a result of failing to follow certain procedures required under FCRA. Robins claimed this misinformation violated his statutory rights to the accurate dissemination of information about him under FCRA. (At several points the Court noted that Robins had not alleged how he came to learn that this misinformation was posted, suggesting that they may have wondered whether he found it himself, a fact that might reflect on his standing to sue.)

Petitioner Spokeo asked the Supreme Court to consider whether Congress can confer Article III standing simply by creating a statutory right and a corresponding legal claim when it has been violated, even in the absence of any harm other than that occasioned by the violation of the statutory right itself. Among other things, Article III requires that a plaintiff suffer an "injury in fact" which requires "an invasion of a legally protected interest" that is both "concrete and particularized." The Ninth Circuit said it was applying this test in allowing Robins to sue, but in the Supreme Court's view it focused too much on the fact that Robins alleged injury to himself and not to others (that is, whether his injury was "particularized"), and not enough on just what sort of injury he had suffered (that is, whether his injury was "concrete").

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Having decided that the Ninth Circuit had not adequately addressed "concreteness," the Supreme Court declined to decide the question itself, instead sending the case back to the Ninth Circuit for further consideration. Accordingly the Court did not resolve the "concreteness" issue—or, for that matter, the larger issue, relevant to a host of other federal right-to-sue statutes, of whether federal plaintiffs can sue based merely on the violation of a statutory right, an issue it has tried and failed to resolve at least twice before. But the Court did observe that not all violations of legally required procedures would cause cognizable injury, using as examples disclosure of an incorrect zip code. Defendants in these cases, while they await answers from the Ninth Circuit and other courts (and perhaps, eventually, the Supreme Court) can take some comfort in the fact that six of the eight Justices currently on the Court endorsed the distinction between whether an injury is "particularized" and whether it is "concrete," and have indicated that the latter requirement still has teeth. Meanwhile companies faced with so-called "statutory damages" claims should attack them on standing grounds, in the hope of gaining the benefit of a ruling on an issue that the Supreme Court will eventually have to resolve.

*This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.*