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Financial Services Alert: High Court Hears Argument in *Spokeo, Inc. v. Robins*

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During Monday's oral argument in *Spokeo, Inc. v. Robins*, No. 13-1339, the Supreme Court appeared sharply divided on the issue of whether a plaintiff has standing to sue for a technical violation of a federal consumer law even when there is no indication that the plaintiff has actually been harmed by the violation. The case involves a putative class action initiated against the "people search engine," Spokeo, by an individual who claimed that the website described him as married, while he was single, and better educated and wealthier than he actually was.

The potentially far-reaching question before the Supreme Court is whether, by authorizing a private right of action, Congress can confer standing on plaintiffs who have not suffered a concrete injury. The Court's answer to this question may either pave the way for class actions by otherwise uninjured plaintiffs under all sorts of statutes, or further reign in class action litigation following the *Wall Mart Stores Inc. v. Dukes*, 131 S.Ct. 2541 (2011) decision.

In his proposed class action, Mr. Robins claimed that Spokeo's incorrect information violated the Fair Credit Reporting Act (FCRA). The FCRA requires consumer reporting agencies, among other things, to create and follow procedures that ensure accuracy of information they report about consumers. Mr. Robins did not allege that he suffered any specific injury in fact based on Spokeo's report; he did not allege that he was denied a job or fired from a job or suffered any adverse credit decision due to the report.

Counsel for Spokeo, Andrew J. Pincus, argued that the Court's threshold inquiry for finding standing has always been the existence of an injury-in-fact. Absent a clear statement from the Congress that it has defined a new injury-in-fact sufficient to trigger Article III jurisdiction, an injury cannot be presumed based simply on a statutory violation (the Court has previously found that Congress may elevate to the status of an injury-in-fact concrete *de facto* injuries that had not been previously recognized as such under common law).

Counsel for Robins, William S. Consovoy, argued that the FCRA created a legal right in favor of consumers to sue based on inaccurate information published about them because the statute requires reporting agencies to devise procedures to ensure accuracy of the information they report, thus no concrete injury needs to be demonstrated.

Justices Sotomayor and Ginsburg appeared to lean in favor of finding standing in circumstances where a party alleges only a violation of a right created by statute without necessarily needing to show a specific injury-in-fact to a particular plaintiff. Both suggested in their exchanges with Mr. Pincus that a violation of a legal right granted by the legislature should be treated as an injury-in-fact similar to any common law injury (like trespass) where damages may be awarded to someone who has no out-of-pocket loss.

On the other end of the spectrum, Chief Justice Roberts, and Justices Scalia and Alito suggested through their questions to Mr. Consovoy that they may consider that more than just a violation of a legal right created by Congress was necessary to establish standing. Justice Scalia pointed out that the FCRA requires the reporting agencies to provide a 1-800 number, and, under Robins' theory, a violation of this requirement would allow anyone to sue, even if they were not affected by the lack of a call-in number in violation of the statute. Justice Thomas did not participate in any of the exchanges, but he often sides with Justices Roberts, Scalia and Alito.

In the middle, Justices Kagan and Breyer's questioning suggested an alternative that may allow the Court to avoid issuing a far-reaching decision in either direction. Both Justices Kagan and Breyer expressed an understanding that publication of false information about Robins in itself was the "concrete injury" sufficient to establish standing, because it is impossible to know who would view such false information at any given time and what kind of decisions would be made on the basis of that information. Justice Breyer also suggested that false information causes "psychic harm." However, since the question before the Court is whether Congress can permit a lawsuit by a plaintiff who suffered *no* harm at all where the claim is based on statutory violations, it is not clear whether this middle ground approach would resolve anything. Justice Sotomayor joined in the discussion, offering that theoretically, single people may check on-line information to determine if their prospective dates are married.

Justice Kennedy, who often fills the role of tie-breaker, did not engage with either advocate in a way that would signal his position. He did suggest at one point that a company that positions itself as a credit reporting agency, like Spokeo, should be held to a higher standard of accuracy, but also referred Mr. Consovoy to the Court's precedent requiring an actual injury to establish standing.

Decision from the Court is expected in the early 2016.

The transcript of the oral argument is available [here](#).