

Management Alert



Spokeo v. Robins: The U.S. Supreme Court Finds Concrete Injury Is Required Under Article III But Remands Back To The Ninth Circuit

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Seyfarth Synopsis: In deciding *Spokeo v. Robins*, the U.S. Supreme Court reaffirmed that plaintiffs seeking to establish that they have standing to sue must show “an invasion of a legally protected interest” that is particularized and concrete — that is, the injury “must actually exist.” Bare procedural violations are not enough.

Today, the U.S. Supreme Court issued its long awaited decision in *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. 2016), which we have been watching closely for its possible dramatic implications on the future of workplace class action litigation.

In a 6 to 2 opinion authored by Justice Samuel A. Alito, Jr., the Supreme Court held that the Ninth Circuit’s injury-in-fact analysis under Article III was incomplete. According to the Supreme Court, of the two required elements of injury in fact, the Ninth Circuit addressed only “particularization,” but not “concreteness,” which requires a plaintiff to allege a “real” and not “abstract” injury. Nevertheless, the Supreme Court took no position on the correctness of the Ninth Circuit’s ultimate conclusion: whether Robins adequately alleged an injury in fact.

Based on its conclusion, the Supreme Court vacated the Ninth Circuit’s ruling and remanded for further consideration consistent with the Opinion. Justice Thomas concurred, while Justice Ginsburg (joined by Justice Sotomayor) dissented.

Given the stakes and the subject matter, the ruling is a “must read” for corporate counsel and all employers.

The Case’s Background

In *Spokeo*, the issues focused on the Fair Credit Reporting Act (“FCRA”), which requires that consumer reporting agencies (“CRAs”) follow reasonable procedures to assure maximum possible accuracy of its consumer reports (15 U.S.C. § 1681e(b)), issue specific notices to providers and users of information (1681e(d)), and post toll-free phone numbers to allow consumers to request their consumer reports (1681b(e)).

The purported CRA in this case was Spokeo, Inc. (“Spokeo”), which operates a “people search engine” — it aggregates publicly available information about individuals from phone books, social networks, marketing surveys, real estate listings, business websites, and other sources, which it organizes into comprehensive, easy-to-read profiles. Notably, Spokeo specifically states that it “does not verify or evaluate each piece of data, and makes no warranties or guarantees about any of the information offered . . .,” and warns that the information is not to be used for any purpose addressed by the FCRA, such as determining eligibility for credit, insurance, employment, etc.

In July 2010, Plaintiff Thomas Robins filed a putative class action alleging that Spokeo violated the FCRA because it presented

inaccurate information about him. He alleged that Spokeo reported that he had a greater level of education and more professional experience than he in fact had, that he was financially better off than he actually was, and that he was married (he was not) with children (he did not have any). But beyond identifying the inaccuracies, he did not allege any actual damages. Instead, he argued that Spokeo's alleged FCRA violation was "willful" and therefore he sought statutory damages of between \$100 and \$1,000 for himself, as well as for each member of the purported nationwide class.

The district court dismissed the case, finding that "where no injury in fact is properly pled" a plaintiff does not have standing to sue. In February 2014, the U.S. Court of Appeals for the Ninth Circuit reversed, holding that the "violation of a statutory right is usually a sufficient injury in fact to confer standing" and that "a plaintiff can suffer a violation of the statutory right without suffering actual damages."

In its petition for certiorari, Spokeo posed the following question to the Supreme Court: "Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute." Spokeo highlighted a circuit split, as the Fifth, Sixth, and Seventh Circuits previously lined up with the Ninth Circuit's approach, while the Second, Third, and Fourth Circuits generally disagreed and required an actual, concrete injury.

After being granted certiorari, Spokeo argued that the Ninth Circuit's holding was inconsistent with the Supreme Court's precedents, the Constitution's text and history, and principles of separation of powers. More specifically, Spokeo argued that Robin's bare allegations of FCRA violations, without any accompanying concrete or particularized harm, were insufficient to establish an injury in fact, and thus failed to establish Article III standing.

Robins responded that the Supreme Court's precedent established that Congress *may* create private rights of action to vindicate violations of statutory rights that are redressable through statutory damages.

The U.S. Solicitor General also weighed in, appearing as an *amicus* in support of Robins, and argued that the Supreme Court should focus on the specific alleged injury — the public dissemination of inaccurate personal information — and, specifically, the FCRA. The Government argued that the FCRA confers a legal right to avoid the dissemination of inaccurate personal information, which is sufficient to confer standing under Article III.

The Supreme Court's Decision

Writing for the majority on the Supreme Court, Justice Alito held that Ninth Circuit failed to consider both aspects of the injury-in-fact requirement under Article III when analyzing Robin's alleged injury, therefore its Article III standing analysis was incomplete. Slip. Op. at *8. The Supreme Court determined that to establish injury in fact under Article III, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is both "concrete and particularized." Slip. Op. at *7. For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." *Id.* "Concreteness," the Supreme Court found "is quite different from particularization." *Id.* at *8. A concrete injury must "actually exist" and must be "real" and not "abstract." *Id.*

The Supreme Court further stated that concreteness includes both easy to recognize tangible injuries as well as intangible injuries. *Id.* at 8-9. The Supreme Court instructed that when considering intangible injuries, "both history and the judgment of Congress play important roles." *Id.* In particular, Congress may identify intangible harms which meet Article III's minimum requirements. *Id.* Nevertheless, the Supreme Court cautioned that plaintiffs do not "automatically" meet the injury-in-fact requirement where the violation of a statutory right provides a private right of action. *Id.* Thus "Robins could not, for example, allege a bare procedural violation divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* The Supreme Court also added that the "risk of real harm" may also satisfy the concreteness requirement, where harms "may be difficult to prove or measure." *Id.*

Viewing the FCRA in light of these principles, the Supreme Court recognized that while Congress "plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk . . . [.] Robins cannot satisfy the demands of Article III by alleging a bare procedural violation." For example, the Supreme Court noted it would be "difficult to

imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.” *Id.* at * 11.

Justice Thomas concurred, reviewing the historical development of the law of standing and its application to public and private rights of action, finding the standing requirement a key component to separation of powers.

Justice Ginsburg, joined by Justice Sotomayor, largely agreed with the majority, but nevertheless dissented. She departed from the majority’s reasoning on the issue of concreteness, but based on the injury alleged, not on the fact that concrete harm wasn’t required. *Id.* at *3 (Ginsburg, J., dissenting). Under her analysis, Justice Ginsburg would have found that the nature of Robin’s injury was sufficiently concrete because of his allegation that the misinformation caused by Spokeo “could affect his fortune in the job market.” *Id.* at *3-5 (Ginsburg, J., dissenting).

Implications For Employers

Spokeo can be interpreted as a compromise – with some useful language and reasoning for employers to use in future cases. While the Supreme Court avoided a broader question of Congress’s ability to create private rights of action and other weighty separation of powers issues, it announced the proper analytic framework for assessing the injury-in-fact requirement under Article III. The Supreme Court provided some good news for employers, consumer reporting agencies, and other corporate defendants, as well as potential plaintiffs with respect to class action litigation under a variety of federal statutes, including the FCRA. In particular, the Supreme Court was clear that alleged injuries must be both particular and concrete, meaning that injuries must be “real” and not “abstract.” Thus, a mere procedural violation without any connection to concrete harm cannot satisfy the injury-in-fact requirement of Article III.

However, the Supreme Court may not have shut the door on lawsuits alleging intangible injuries based on violations of statutory rights. While the Supreme Court’s opinion today may discourage some consumer, workplace, and other types of class actions seeking millions in statutory damages, potential litigants will likely have to be more creative in how they frame alleged injuries tied to violations of statutory rights.

Spokeo also transcends the employment context, as the constitutional requirement of Article III applies in all civil litigation. Plaintiffs seeking to file lawsuits in other regulated areas, such as under ERISA, the Americans with Disabilities Act, as well as a host of other statutes are likewise affected by today’s decision. Without particularized, concrete injury, federal jurisdiction is beyond the reach of plaintiffs seeking statutory damages for technical violations.

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