

## EXPERT ANALYSIS

### Keeping it 'Real': Supreme Court Holds That Consumers Must Allege Real Harm

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In *Spokeo Inc. v. Robins*, 136 S. Ct. 1540 (2016), the U.S. Supreme Court issued yet another narrow decision — apparently designed to avoid a 4-4 deadlock — in another hard-fought, potentially divisive case on its docket this term. On May 16, the court held 6-2 that the 9th U.S. Circuit Court of Appeals had erred in not asking whether plaintiff Thomas Robins had alleged that he suffered a “concrete” harm — actual, rather than hypothetical, damage — as a result of alleged statutory violations by defendant Spokeo Inc.

In reaching this decision, the court reaffirmed that plaintiffs bringing class actions in federal court must do more than allege a “mere technical violation” of a statute or regulation. To demonstrate that they have a real stake in the case — or standing — as required in federal court by Article III of the Constitution, they must also explain how the alleged violation caused them real harm. At the same time, however, the majority was careful to point out that, “in some circumstances,” plaintiffs could base standing on procedural or technical violations if those violations are coupled with a “real risk of harm.” And the court remanded the specific question of whether Robins had alleged that he suffered real harm as a result of Spokeo’s purported technical violations.

In sending the case back to the 9th Circuit, the high court left the deeper issues in the case unresolved, inviting further litigation over what its holding means going forward.

#### TECHNICAL VIOLATIONS AND 'REAL' HARM

*Spokeo Inc. v. Robins* addressed this question: If a company posts online information about an individual that is false but not inherently negative or damaging, can that individual claim to have suffered real harm, especially without any evidence that anyone else even saw the false information?

Spokeo is a “people search engine” that compiles and disseminates online a wide array of personal information about consumers. Robins filed a class action lawsuit against Spokeo in the U.S. District Court for the Central District of California, alleging the company violated the Fair Credit Reporting Act, 15 U.S.C.A. § 1681. The FCRA was enacted because the U.S. “banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.”

To that end, the statute requires consumer reporting agencies to “adopt reasonable procedures for meeting the needs of commerce” in a manner “fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization” of the information gathered.

Robins filed the suit after discovering inaccurate information in his online Spokeo profile, which the company marketed to entities performing background checks. Citing these inaccuracies, he sued on behalf of a class of similarly situated consumers, alleging that Spokeo had failed to adopt and follow reasonable procedures to assure maximum possible accuracy of its online consumer reports.



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Although he did not cite any damage he suffered due to these alleged procedural errors, Robins expressed concern that his ability to obtain credit, employment, insurance and the like would be adversely affected by the inaccurate information. He further alleged that each procedural violation was willful, meaning that he and other class members were entitled, at a minimum, to statutory damages of \$100 to \$1,000 per violation, irrespective of the exact losses — if any — they actually suffered.

Spokeo, however, told the District Court that Robins had a standing problem because he did not allege that he had in fact suffered any injury resulting from the company’s alleged conduct.

Standing, of course, is a fundamental constitutional requirement for plaintiffs bringing suit in federal court. Under settled Supreme Court precedent, a plaintiff has standing where he has suffered an injury-in-fact, there is a causal connection between the injury and the conduct complained of, and it is likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Robins responded that he met the requirements of standing simply by alleging that Spokeo had violated a statute that grants individuals a private right of action.

The District Court agreed with Spokeo and dismissed the lawsuit, finding that Robins had not pleaded that he suffered any “injury in fact” resulting from the defendant’s procedural violations. “Even when asserting a statutory violation,” the court explained, “a plaintiff must allege ‘the Article III minima of injury-in-fact.’” *Robins v. Spokeo Inc.*, No. 10-cv-5306, 2011 WL 597867 (C.D. Cal. Jan. 27, 2011) (quoting *Gomez v. Alexian Bros. Hosp. of San Jose*, 698 F.2d 1019, 1020-21 (9th Cir. 1983)). For the purposes of standing, an injury-in-fact must be actual or imminent and not conjectural or hypothetical.

Robins had not suffered an injury-in-fact, the lower court found, because he failed to allege that Spokeo caused him “any actual or imminent harm.” The court said, “Plaintiff only expresses that he has been unsuccessful in seeking employment, and that he is ‘concerned that the inaccuracies [in] his report will affect his ability to obtain credit, employment, insurance, and the like.’”

On appeal, however, the 9th Circuit disagreed, explaining that “the violation of a statutory right is usually a sufficient injury-in-fact to confer standing.” The court said Robins had a sufficient stake in the case because Spokeo had allegedly violated the statute by mishandling his personal information specifically. His “personal interests in the handling of his credit information [were] individualized rather than collective,” the appeals court said, because “Spokeo [had] violated his rights, not just the statutory rights of other people.”

The case before the Supreme Court thus boiled down to a central question: Did Robins have standing to sue based purely on his allegations that Spokeo had technically violated the FRCA by mishandling and misstating his personal information, even without alleging specific harm resulting from these alleged procedural violations? Given the proliferation of class action litigation focusing on companies’ alleged mishandling of consumers’ private or personal information, class action practitioners were eager to hear the court weigh in on this issue.

The Supreme Court largely avoided answering the question. Instead, in a narrow ruling seemingly intended to secure the 6-2 majority, the court decided to send the case back to the 9th Circuit to plug a gap in its reasoning. As Justice Samuel Alito explained for the majority, the 9th Circuit simply did not go far enough in its “injury-in-fact” analysis. It was not enough to conclude that Robins pleaded a violation that was “particularized,” or individual, to him, the court said. Rather, the 9th Circuit should also have asked whether he had alleged an injury that was “concrete” — that is, “‘real,’ and not ‘abstract,’” it explained.

Correcting the 9th Circuit’s view that the violation of a statutory right is usually enough, the court emphasized that “Article III standing requires a concrete injury even in the context of a statutory violation.” The fact that Spokeo had run afoul of the FCRA by mishandling Robins’ information was not necessarily enough; a concrete injury resulting from that violation, the majority explained, must actually exist.

“For that reason, 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,” the court said. The court therefore remanded the case to the 9th Circuit to reconsider whether Robins’ alleged harm was sufficiently real and “concrete,” with the express instruction that Robins cannot satisfy the demands of Article III by alleging a bare procedural violation.

In finding the 9th Circuit had erred, though, the court was careful not to say that Robins did not, or could not, allege a real harm resulting from the alleged technical violations at issue. The requirement of pleading concrete harm did not mean, for instance, “that the risk of real harm cannot satisfy the requirement of concreteness,” the court said.

Likewise, the court said the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute an injury-in-fact, although it stopped short of explaining what those circumstances were. In short, the majority left unanswered many of the more granular questions that most interest practitioners in consumer class action law.

### WHAT DOES SPOKEO MEAN GOING FORWARD?

Despite its deliberately narrow scope, the *Spokeo* decision is important for class action defendants and practitioners. Most notably the court corrected the 9th Circuit by reaffirming that technical or procedural violations of statutes or regulations —without more — are usually not enough to establish standing. Instead, plaintiffs must further allege some real, non-hypothetical harm, or risk of harm, resulting from the violation at issue — even where the statute or regulation at issue authorizes automatic statutory damages for any violation.

This instruction alone is meaningful, as the FCRA is far from the only statute that provides for statutory damages even where the plaintiff has not shown additional actual harm. Several other consumer protection statutes likewise authorize set damages per violation, including the Telephone Consumer Protection Act (\$500 to \$1,500 per violation), the Truth in Lending Act (\$1,000), the Fair Debt Collection Practices Act (\$1,000) and the Video Privacy Protection Act (\$2,500), among others. And all of these statutes have spawned extensive class action litigation.

The court’s reasoning should apply just as forcefully to many state statutes, such as California’s unfair-competition law, that allow private plaintiffs to sue based on technical or procedural violations of other laws or regulations. To the extent plaintiffs sue under such statutes in federal court, the principle announced in *Spokeo* controls: To establish Article III standing and proceed in federal court, plaintiffs must allege concrete harm that goes beyond the mere fact of the violation itself.

The *Spokeo* ruling should have an impact on federal court class actions predicated on the “unlawfulness” prong of California’s Unfair Competition Law, Business & Professions Code § 17200, which makes any technical violation of applicable laws or regulations actionable as “unlawful” conduct. In some cases brought under that statute, a plaintiff will allege that a product technically violates a regulation but will not clarify how or why the violation translates into a “concrete,” particularized injury. At least in federal court, *Spokeo* suggests, that is no longer enough.

### CONCLUSION

Exactly what “concreteness” requires is the big question on which *Spokeo* offers little clarity. Going forward, the decision leaves the details of these unresolved issues to parties, practitioners and judges to hammer out in specific cases. *Spokeo*, then, is just one step. The real battle, as usual, is only beginning.

That said, the decision does breathe new hope into a class action defendant’s ability to either escape or narrow the scope of a case at an early stage by way of a motion to dismiss that attacks insufficiently pleaded allegations of actual harm. There is little doubt that this issue will be hotly litigated in class actions, at least until the courts offer some guidance as to what *Spokeo* means in actual practice. The 9th Circuit’s decision on remand will also be closely watched, if for no other

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reason than to see if it does anything more than declare that the risk of harm alleged by Robins is “concrete” — potentially inviting yet another appeal.

In short, despite its limited scope, the *Spokeo* decision, and its instruction that plaintiffs must allege more than a statutory violation creating a private right of action, should — at the very least — force more district courts to think hard about whether a complaint alleges more than a bare technical violation.



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