

FOCUS ON LITIGATION

U.S. Supreme Court in *Spokeo* Requires Concrete Injury for Claimed FCRA Statutory Violations

On May 16, 2016, the U.S. Supreme Court released its much anticipated opinion in *Spokeo, Inc. v. Robins*, No. 13-1339, 578 U.S. ____ (2016). There, the Court considered whether a bare statutory violation of a procedural right under the Fair Credit Reporting Act (FCRA) is sufficient to confer Article III standing. The Court held that to confer standing, the statutory violation must present an injury-in-fact which is “concrete and particularized.” But because the Ninth Circuit’s analysis focused solely on the particularization requirement, and omitted the requisite concreteness analysis, the Court remanded the case back to the Ninth Circuit. The *Spokeo* decision is an encouraging development for companies facing high-stakes, “harm-less” class action litigation based on alleged technical statutory violations.

Spokeo runs a “people search engine.” This service allows a user to discover information about individuals by inputting their names, phone numbers or email addresses. In his complaint, Robins alleged that someone made a Spokeo search request for information about him, but that the information provided by Spokeo was inaccurate. Based on this purportedly inaccurate information, Robins filed a putative class action alleging, among other things, that Spokeo willfully failed to comply with procedural requirements under FCRA. The district court dismissed the case, finding that Robins had not properly pled an injury-in-fact, as required by Article III. The Ninth Circuit reversed because it was satisfied that Robins had met the injury-in-fact requirement.

But Justice Samuel Alito, writing for the majority, explained that the injury-in-fact requirement for Article III standing requires an injury to be 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.* For it to be concrete, it must be “real” and “not abstract.” *Id.* at *8. “Concreteness, therefore, is quite different from particularization.” *Id.*

The Court found that, while the Ninth Circuit had considered the particularization component of the injury-in-fact requirement, it had not properly considered concreteness. *Id.* at *8. The Ninth Circuit had held that Robins’ complaint

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alleged “concrete, *de facto*” injuries because (1) he alleged that Spokeo “violated his statutory rights, and not just the statutory rights of other people,” and (2) “Robins’ personal interests in the handling of his credit information are *individualized rather than collective*.” *Id.* But these observations, concluded the Court, concerned particularization, not concreteness. *Id.*

The Court then explained that “concrete” injuries can be easy-to-recognize “tangible injuries,” as well as “intangible” ones. *Id.* at *9. When analyzing whether an intangible harm constitutes an injury-in-fact, “history and the judgment of Congress play important roles.” *Id.* But the injury in fact requirement is not “automatically satisfied” simply because Congress authorizes a right of action for a statutory violation. *Id.* As a result, “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.* at *9-10.

Applying the articulated principles to this case, the Court noted that “Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk.” *Id.* at *10. But “Robins cannot satisfy the demands of Article III by alleging a bare procedural violation” because “[a] violation of one of the FCRA’s procedural requirements may result in no harm.” *Id.* For example, even if a credit reporting agency fails to provide the required notice, the information may be entirely accurate. *Id.* at *10-11. And not all inaccuracies cause harm or material risk of harm, like the dissemination of an incorrect zip code. *Id.* at *11.

In general, this decision is a victory for companies confronting class actions based on alleged technical statutory violations with no real-world harm. Plaintiffs must show that the harm they allege is both concrete and particularized to satisfy the standing requirements of Article III. Bare technical violations of statutes with no relation to some concrete harm cannot satisfy the injury-in-fact element. Companies facing FCRA suits should stay tuned for the Ninth Circuit’s concreteness analysis on remand. That decision will likely begin to shape the contours of what constitutes a concrete harm for technical violations of the statute.