

# Client Alert

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## The Supreme Court's *Spokeo* Decision: Concrete Shoes For Consumer Class Actions?

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Today the Supreme Court issued its highly anticipated decision in *Spokeo, Inc. v. Robins*. The decision takes on a hot topic in consumer class action law today—what must a plaintiff plead and prove to have standing to sue for a violation of a federal statute? The Court held that an allegation of a statutory violation, without some showing of concrete harm, is not enough. Instead, in this Fair Credit Reporting Act (FCRA) case, the issue is “[w]hether the particular procedural violations alleged . . . entail a degree of risk [of harm] sufficient to meet the concreteness requirement.” In its focused 11-page opinion, the Court declined to decide to evaluate that risk on the record before it and, instead, remanded the case to the Ninth Circuit for further proceedings. However, the Court did provide several guideposts for how the Ninth Circuit, and courts around the country evaluating standing questions, may consider plaintiffs’ claimed injuries.

The decision was reached 6-2, with Justice Alito delivering the short opinion on behalf of the Court. Justices Ginsburg and Sotomayor dissented, and Justice Thomas filed a concurrence.

### BACKGROUND

Thomas Robins sued Spokeo, alleging that Spokeo sold an online report about him that contained false information about his age, wealth, employment, marital status, and education. *Robins v. Spokeo, Inc.*, Case No. CV10-05306 ODW (AGRx) (C.D. Cal. filed July 20, 2010). He asserts that the sale of this allegedly inaccurate information violated the FCRA because the information qualified as a “consumer report” under the FCRA and Spokeo is a “consumer reporting agency” that failed to follow the statute’s accuracy and procedural requirements. Robins did not allege any actual injury caused by this alleged violation, aside from potential harm to future employment prospects. Instead, he brought suit seeking statutory damages.

The district court initially rejected Spokeo’s argument, but then reconsidered and dismissed the complaint for lack of standing. *Spokeo*, No. CV10-05306 ODW (AGRx), 2011 WL 11562151 (C.D. Cal. Sept. 19, 2011). The court held that Robins’s alleged injury was too speculative and that a bare violation of the FCRA does not confer standing, noting, “Otherwise, federal courts will be inundated by web surfers’ endless complaints.” *Id.* at \*1.

The Ninth Circuit reversed, holding that the alleged violation of Robins’ rights under the FCRA was “sufficient to satisfy the injury-in-fact requirement of Article III.” *Spokeo*, 742 F.3d 409, 713-14 (9th Cir. 2014). In doing so, the Ninth Circuit deepened a circuit split. It followed the Sixth and Seventh Circuits, see *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705 (6th Cir. 2009) and *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006), and the Eighth Circuit followed suit shortly thereafter, see *Hammer v. Sam’s East, Inc.*, 754 F.3d 492, 500 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 1175 (2015). In contrast, the Second and Fourth Circuits have come out differently in “no injury” cases involving other federal statutes. See *Kendall v. Empls. Retirement Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (ERISA); *David v. Alphin*, 704 F.3d 327, 338-39 (4th Cir. 2013) (ERISA); see also *Joint Stock Soc’y v. UDV N. Am., Inc.*, 266 F.3d 164, 176 (3d Cir. 2001) (Lanham Act).

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## THE SUPREME COURT'S DECISION TODAY

The Supreme Court reversed the Ninth Circuit's order, holding that a violation of the FCRA was not, standing alone, enough to give Robins standing to sue. The plaintiff must also adequately allege that the violation caused him concrete harm. It held that the Ninth Circuit's "standing analysis was incomplete" in this regard, explaining that a "concrete" injury "must be 'de facto'; that is, it must actually exist," but that "concrete" is not "necessarily synonymous with 'tangible.'" The Court continued: "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation."

The Court was quick to reiterate, however, that "the risk of real harm" can satisfy the concreteness requirement, and "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact"—i.e., "a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified."

Libel and slander *per se* were two examples the Court offered for where there is a "risk of real harm," even though that harm may be difficult to measure or prove. Other types of harms where there was a concrete injury in the context of a statutory violation included: *Federal Election Comm'n v. Akins*, 524 U.S. 11, 20-25 (1998) ("confirming that a group of voters' 'inability to obtain information' that Congress had decided to make public is a sufficient injury in fact to satisfy Article III"), and *Public Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989) ("holding that two advocacy organizations' failure to obtain information subject to disclosure under the Federal Advisory Committee Act 'constitutes a sufficiently distinct injury to provide standing to sue'").

With respect to the FCRA, the Court explained that, while "Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk," a plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation." This is because a "violation of one of the FCRA's procedural requirements may result in no harm." The Court offered two such FCRA examples where there would be no injury:

1. Failure to provide a required notice to a consumer report user: "even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate."
2. Incorrect zip code: "not all inaccuracies cause harm or present any material risk of harm," such as "the dissemination of an incorrect zip code, without more."

Justice Ginsburg's dissent takes issue with this approach, writing that Robins did not allege "a 'bare' procedural violation," resulting "in no harm," but rather, "Robins complains of misinformation about his education, family situation, and economic status, inaccurate representations that could affect his fortune in the job market." Because Robins' complaint conveyed that "Spokeo's misinformation 'cause[s] actual harm to [his] employment prospects," Justice Ginsburg, joined by Justice Sotomayor, dissented.

## POTENTIAL IMPLICATIONS OF THE DECISION

Overall, the decision promises to narrow some potential claims, while leaving the playing field open for further analysis in the years to come. The decision ought to make it more difficult for consumer class action lawyers

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seeking statutory damages payouts to sustain claims for purely technical or procedural violations. For example, cases seeking statutory damages for failure to provide required notices, or for provision of notices departing from the format required, may be less likely to go the distance.

On the other hand, the decision continues to permit—and require—a fact intensive inquiry into potential harm. It recognizes that concrete injury can be intangible and may include a “real” “risk” of harm that has not yet come to pass. The Court seemed particularly sensitive to the publication of false information in this context. Accordingly, while complaints asserting harmless technical or procedural violations of statutes generally ought to be susceptible to dismissal for lack of standing, what other kinds of harms may satisfy the concreteness requirement remains an open question.

In addition, such putative class actions involving alleged statutory violations may be more difficult to certify because of individualized questions of harm. The Supreme Court made clear that “a bare procedural violation, divorced from any concrete harm,” does not “satisfy the injury-in-fact requirement of Article III.” Further, the Court was unable to conclude that Robins’ allegations that inaccurate information about him had the potential to harm his employment prospects were facially sufficient to plead concrete injury. If individual standing on FCRA “accuracy” claims depends on individualized, consumer-specific consequences of error, such claims may not be suitable for resolution in class actions.

### WHAT HAPPENS NEXT

The Supreme Court declined to address the adequacy of Robins’ underlying allegations of injury because the Ninth Circuit “did not address the question framed by our discussion, namely, whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement.” On remand, it is unclear how the Ninth Circuit will rule, or whether it will further remand the case to the district court for reconsideration in light of the Supreme Court’s holding.

We do know what the district court thought about Robins’ damages theory. As discussed above, it originally held that Robins’ claim—that an overly flattering presentation of his employment and family background somehow hurt his employment prospects—was too speculative. We see no particular reason why the Supreme Court’s decision today would change the district court’s mind about that. However, the Court’s dicta about “concrete” “risk” of harm, and citation to cases about information disclosure and libel, will leave room for argument. What the Ninth Circuit does with that remains to be seen.

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