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## Consumer Finance Litigation

### Ninth Circuit Holds That Consumer Alleging FCRA Claim against Spokeo Sufficiently Pled a Concrete Harm to Confer Article III Standing

**Action Item: On remand from the United States Supreme Court, the United States Court of Appeals for the Ninth Circuit held that a consumer’s allegations that the operator of a website reported inaccurate information about him are sufficient to state claims for Fair Credit Reporting Act violations. The Ninth Circuit reached this conclusion based on its finding that the consumer specifically pled a concrete injury in addition to a particularized injury to a statutory right.**

In *Thomas Robins v. Spokeo, Inc.*, No. 11-56843 (9th Cir. Aug. 15, 2017) (“*Spokeo III*”), the United States Court of Appeals for the Ninth Circuit unanimously ruled that Thomas Robins (“Robins”), who accused Spokeo, Inc. (“Spokeo”) of violating the Fair Credit Reporting Act (the “FCRA”) by allegedly reporting inaccurate information about him on its website, claimed a sufficiently concrete injury to confer standing under Article III of the U.S. Constitution.

#### Background

Spokeo operates a website that compiles consumer data and builds individual consumer profiles containing details about a person’s life, including age, contact information, level of

education, marital status, employment status and wealth. Spokeo also markets its services to businesses as a way to learn about prospective employees. Robins sued Spokeo for willful violations of the FCRA, which, among other things, requires credit reporting agencies to take steps to ensure the information they provide to potential employers is accurate. 15 U.S.C. § 1681 *et seq.* Robins alleged Spokeo published an inaccurate report about him on its website, including that he was wealthy and had a graduate degree when in fact, he was struggling to find work.

Initially, the district court dismissed Robins’s suit based on its determination that Robins lacked standing to sue under Article III of the U.S. Constitution because Robins had not adequately pled that the alleged violation caused him an injury-in-fact. *Id.* at p.6. Robins appealed and the Ninth Circuit reversed on the basis that Robins established a sufficient injury-in-fact because he alleged that Spokeo violated specifically *his* statutory rights, which Congress established to protect against individual rather than collective harms. *Robins v. Spokeo, Inc. (Spokeo I)*, 742 F.3d 409, 413-14 (9th Cir. 2014) (emphasis added).

## The United States Supreme Court Decision

On Certiorari review, the United States Supreme Court vacated the *Spokeo I* opinion, because although it agreed with the Ninth Circuit’s analysis and determination that Robins established an alleged injury sufficiently particularized to him, the Ninth Circuit’s standing analysis was incomplete. *Spokeo, Inc. v. Robins (Spokeo II)*, 136 S. Ct. 1540 (2016). The Supreme Court held that a bare procedural statutory violation is insufficient to establish a concrete injury-in-fact to confer standing. *Id.* at 1548-49 (internal citations omitted). In *Spokeo II*, the Supreme Court reasoned that the reporting of an incorrect zip code, absent another misrepresentation, was unlikely to present any material risk of real harm. *Id.* at 1550. Thus, the Supreme Court remanded the case to the Ninth Circuit with instructions for it to consider whether, in addition to a particularized injury, Robins also sufficiently pled a concrete injury. *Spokeo III* at p.7.

## The Ninth Circuit’s Decision on Remand

On remand, the Ninth Circuit held that Robins had alleged injuries that were sufficiently concrete for purposes of Article III, and because the alleged injuries were previously determined to be sufficiently particularized, Robins adequately alleged all of the elements necessary to establish Article III standing. *Id.* at p.2. In reaching its conclusion, the Ninth Circuit conducted a two-fold analysis.

First, it considered whether Congress established the FCRA to protect consumers’ concrete interest in accurate credit reporting about themselves, and held that it did. The Ninth Circuit further noted the “ubiquity and importance of consumer reports in modern life” and held that the “real-world implications of material inaccuracies in those reports seem patent on their face.” *Id.* at p.12.

Second, the Ninth Circuit considered whether the FCRA violations that Robins alleged actually harmed or created a “material risk of harm” to his concrete interest in accurate crediting reporting about himself. *Id.* at p.15. (Internal citations omitted). The Court noted that Robins’s allegations were not minor and could be deemed a real harm because Robins specifically alleged that Spokeo falsely reported—and *published*—several inaccurate facts including his marital status, age, employment status, educational background and level of wealth. *Id.* at p.16. Further, even though some of the inaccuracies could be considered flattering and the likelihood to harm could be debated, the inaccuracies alleged did not

strike the Court as mere “technical violations” outside the scope of what Congress sought to protect with the FCRA. *Id.* (Internal citations omitted).

Importantly, however, the Ninth Circuit reiterated that *Spokeo II* “requires some examination of the nature of the specific alleged reporting inaccuracies to ensure that they raise a real risk of harm to the concrete interests that [the] FCRA protects.” *Id.* at p.17. The Ninth Circuit cautioned that not every minor inaccuracy would cause real harm. *Id.* at p.16. Thus, not every FCRA violation premised on some inaccurate disclosure of Robins’s information is sufficient. *Id.* at pp.16-17.

## Conclusion

The Ninth Circuit’s decision is significant for several reasons. First, while declining to express an opinion on the circumstances in which alleged inaccuracies of the kind pled by Robins would or would not cause concrete harm, the Court held that the allegations of Robins’s FCRA class action complaint, which are premised on a “material risk of harm” to his employment opportunities, should proceed past the initial pleading stage. Second, because the Ninth Circuit did not set a bright-line rule for what information necessarily establishes a “concrete injury” and declined to comment on whether Robins would have alleged a concrete injury had Spokeo merely produced, but not published the information, businesses will operate (and litigate) in a gray area until a case law framework for “concrete injury” is established.

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