

## Litigation Alert

August 17, 2017

### Key Points

- The 9th Circuit held that an alleged procedural violation of a statute can by itself manifest concrete injury sufficient for Article III standing where Congress conferred the procedural right to protect a plaintiff's concrete interests, and the procedural violation presents a "risk of real harm" to that concrete interest.
- The 9th Circuit's decision adds to the apparent circuit split in resolving issues of Article III standing. Based on recent decisions in data breach cases from February and May of this year, courts within the 2nd and 4th Circuits are more likely to hold that consumers lack standing under Article III where consumers' data was not actually misused because the threat of harm is insufficient to establish standing.
- This issue is ripe for review and the Supreme Court is expected to resolve this apparent conflict in the near future.



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## 9th Circuit Clarifies Standard For Article III Standing Based On Statutory Violations

On August 15, 2017, the 9th Circuit, in *Thomas Robins v. Spokeo, Inc.*, reversed the district court's dismissal of an action alleging willful violations of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.* The 9th Circuit held that plaintiff Thomas Robins' alleged injuries were sufficiently "concrete" for purposes of Article III standing, in part because Robins alleged harm to his employment prospects beyond a bare procedural violation.

### Background

According to Robins' complaint, Spokeo, Inc. operates a website that compiles consumer data and builds individual profiles based on that data. At no cost, consumers can use [spokeo.com](http://spokeo.com) to view a report containing details about a person's life, such as the person's age, contact information, marital status, occupation, hobbies, economic health and wealth. More detailed information is available for users who pay subscription fees. Spokeo markets its services to businesses, claiming that its reports provide a good way to learn more about prospective business associates and employees.

Robins alleged that Spokeo published an inaccurate report about him on its website. Specifically, Robins alleged that Spokeo's report falsely stated his age, marital status, wealth, education level and profession.

Robins further alleged that these errors harmed his employment prospects and that he continues to be unemployed and suffers emotional distress.

According to Robins, Spokeo willfully violated various procedural requirements of the FCRA, including failing to follow reasonable procedures to ensure the accuracy of the information in his consumer report. In certain circumstances, consumers may recover statutory damages pursuant to the FCRA for willful violations, even in the absence of actual damages.

The district court dismissed Robins' complaint, holding that he lacked standing under Article III because he alleged only a bare violation of the FCRA. In 2014, the 9th Circuit reversed, holding that Robins suffered a "concrete" and "particularized" injury in part because he alleged that Spokeo violated his statutory rights as opposed to collective harms. In 2016, the Supreme Court vacated the 9th Circuit's opinion (*Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)) on the grounds that the 9th Circuit did not properly analyze whether Robins' alleged injury was sufficiently "concrete."

### **The 9th Circuit's Decision In *Spokeo***

On remand from the Supreme Court, the 9th Circuit again held that Robins' alleged injuries were sufficiently "concrete" for purposes of Article III standing.

First, the 9th Circuit held that Congress established the FCRA provisions at issue to protect consumers' concrete interests (as opposed to purely procedural rights). In particular, the 9th Circuit concluded that the FCRA provisions in this case were crafted to protect consumers' concrete interests in "accurate credit reporting" about themselves. The 9th Circuit was persuaded in part by the legislative record, which included "pages of discussion of how such inaccuracies may harm consumers in light of the increasing importance of consumer reporting." The 9th Circuit found that "Congress's judgment as to what amounts to a real, concrete injury is instructive."

Second, the 9th Circuit held that Robins alleged FCRA violations resulting in "concrete" injury to him. To establish this injury, "the plaintiff must allege a statutory violation that caused him to suffer some harm that 'actually exist[s]' in the world; there must be an injury that is 'real' and not 'abstract' or merely 'procedural.'" Robins met this standard because Spokeo's alleged inaccuracies about Robins' age, marital status, educational background and employment history were alleged to constitute a real harm to his employment prospects.

Lastly, the 9th Circuit rejected Spokeo's contention that Robins' allegations of harm were too "speculative" to establish concrete injury, based on Robins' allegations that Spokeo had already published an allegedly inaccurate consumer report about Robins and that the alleged "harm" or "material risk of harm" caused by the report had thus already occurred. The 9th Circuit also held that Robins did not need to allege any "additional concrete harm," such as the loss of a specific job opportunity. The 9th Circuit found that Robins has a concrete interest in a truthful credit report, and, thus, the publishing of false and material information in that report creates a "material risk of real harm" sufficient for concrete injury under Article III.

The 9th Circuit distinguished Spokeo's allegations from the "many instances [in which] a plaintiff will not be able to show a concrete injury simply by alleging that a consumer-reporting agency failed to comply with one of FCRA's procedures." As an example of an instance that would not confer standing, the 9th Circuit pointed to an FCRA violation that "may not result in the creation or dissemination of an inaccurate consumer report," which, in turn, "would not materially affect the consumer's protected interests in accurate credit reporting." Additionally, while an inaccurate credit report generally causes real harm to consumers, "it cannot be the case that every trivial or meaningless inaccuracy does so."

## Takeaways

The 9th Circuit's opinion holds that an alleged procedural violation of a statute can, by itself, manifest concrete injury where (1) Congress conferred the procedural right to protect a plaintiff's concrete interests, and (2) the procedural violation presents a "risk of real harm" to that concrete interest.

One open question is whether the 9th Circuit's decision is consistent with Supreme Court precedent. In its earlier decision in *Spokeo*, the Supreme Court cautioned that the publishing of minor falsehoods, such as incorrect zip codes, does not raise a "material risk of harm," but left open the possibility that meaningful inaccuracies (such as those likely to impact employment) are sufficient. On the other hand, the 9th Circuit's decision arguably runs contrary to the Supreme Court's holding in *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013) that an alleged injury must be "imminent" and "certainly impending." Hypothetical harms, including an undefined risk of injury, arguably fall short of the "actual" or "imminent" injury required.

Defendants challenging Article III standing within the 9th Circuit are not without recourse. It is far from clear whether the 9th's Circuit opinion will have implications beyond FCRA cases alleging material falsehoods impacting potential employment. The 9th Circuit's opinion rests on the nature of the FCRA and the harms that it was designed to protect against. Courts may narrowly construe that holding as inapplicable to other statutory violations, such as violations of the Telephone Consumer Protection Act, where injuries are arguably trivial and may not present a "risk of real harm." Moreover, defendants are most likely to successfully attack Article III standing where a series of speculative events must occur in order for plaintiffs to actually be injured, as was the case in *Clapper*.

Lastly, the 9th Circuit's opinion adds to the apparent circuit split in resolving issues of Article III standing. Based on recent decisions in data breach cases from February and May of this year, courts within the 2nd and 4th Circuits are more likely to hold that consumers lack standing under Article III where consumers' data was not actually misused because the threat of harm is insufficient to establish standing. This issue is ripe for review, and the Supreme Court is expected to resolve this apparent conflict in the near future.

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