

Supreme Court Will Not Look at Spokeo Again, Leaving Lower Courts to Grapple with Article III Uncertainties

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On January 22, 2018, the United States Supreme Court, quietly and without commentary, declined to review the Ninth Circuit Court of Appeals' recent decision in the storied *Spokeo, Inc. v. Robins* case. In 2016, the Supreme Court [issued a decision](#) in the same case^[1] to provide guidance on how federal courts should analyze Article III standing in cases alleging statutory violations.

Yet the lower courts have struggled to apply that guidance, leading to some alarmingly varied results. This is perhaps best illustrated by the Ninth Circuit which, on remand from the Supreme Court, issued a [new opinion](#) in *Spokeo* that is in tension with holdings from other circuits, and which many commentators believe to be wholly inconsistent with the Supreme Court's core holding in its 2016 decision.

The defendant, Spokeo, Inc. ("Spokeo") petitioned the Supreme Court to take the case again. Spokeo's bid for further review by the high court was supported by a number of amicus curiae—*i.e.*, persons and groups from all segments of the economy who are not parties in the case but who have a strong interest in its outcome—who filed briefs in support of Spokeo's petition. However, the Supreme Court's decision not to accept the case means that, for the foreseeable future, lower courts will be left to grapple with the existing uncertainties and even conflicts about how to apply the Supreme Court's 2016 guidance.

The Supreme Court's 2016 *Spokeo* Opinion

The Supreme Court's 2016 decision in *Spokeo* addressed whether an alleged willful violation of the Fair Credit Reporting Act (FCRA), absent any claim of damages or other actual harm, constitutes sufficient injury to confer Article III standing. Vacating and remanding a 2014 Ninth Circuit decision finding that the plaintiff had standing,^[2] the Supreme Court, with only [eight justices at the time](#), issued a 6-2 decision reiterating the need for "concrete" harm (as well as harm that is particularized) and providing guidance for determining when the concreteness requirement may be satisfied.

The Supreme Court held that "Article III standing requires a concrete injury even in the context of a statutory violation," and, therefore, a plaintiff "could not . . . allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III."^[3] The Court allowed that "intangible injuries" can be concrete, pointing to free speech and free exercise cases as examples, but warned that "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."^[4] The Supreme Court did not apply its guidance to the record but instead remanded the case back to the Ninth Circuit to consider whether plaintiff Robins' injuries were sufficiently particularized and concrete to confer Article III standing.

The Ninth Circuit's *Spokeo* Decision on Remand



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On remand at the end of 2017, the Ninth Circuit once again held that Robins had standing. In so holding, the appellate court reasoned that the FCRA provisions at issue are intended to protect false credit information about a consumer from being disseminated and that this interest is concrete in nature.^[5] The court further found that the alleged FCRA violation presents a legitimate and material risk of actual harm to consumers generally, because false information about consumers may be significant to prospective employers (such that it could influence employment decisions), although Robins did not allege that any potential employer did not hire him based on any information (inaccurate or not) in his credit report.

In short, the Ninth Circuit concluded that the standing bar was met by virtue of the fact that Robins alleged a statutory cause of action and potential harm to him, because Congress crafted those FCRA provisions to protect consumers' concrete yet intangible interests in accurate credit reporting.

Spokeo's Bid to Have the Supreme Court Hear the Case Again

Spokeo asked the Supreme Court to again test the Ninth Circuit's analysis, making two primary arguments in support of its petition. First, Spokeo identified several errors in the Ninth Circuit's reasoning, including that the appellate court "impermissibly conflate[d] broad statutory purposes with a concrete injury in fact to the plaintiff," which "opened the federal courts to a large class of lawsuits that do not involve an Article III injury-in-fact."^[6] Second, Spokeo noted the general confusion among lower courts attempting to apply the Supreme Court's 2016 *Spokeo* decision. Citing several circuits' application of that decision to a variety of federal statutes, Spokeo argued that courts have taken different and inconsistent approaches to determine whether an "intangible harm" caused by a statutory violation is itself sufficient to confer Article III standing or whether real-world harm is required. Spokeo argued that the resulting confusion "cries out for this Court's review."^[7]

Amicus Curiae Provide Their Insight on the Need for Further Supreme Court Guidance

A number of amicus curiae filed briefs in support of Spokeo's petition.^[8] While amici's topics differed, all appeared to agree with Spokeo that the Ninth Circuit's interpretation of *Spokeo I* could render the Supreme Court's holding in *Spokeo I* a nullity.

One such brief—filed by the authors of this post on behalf of The American Escrow Association (AEA), The American Land Title Association (ALTA), The National Association of REALTORS® (NAR), and The Real Estate Service Providers Council (RESPRO®) (collectively, the Real Estate Amici)—discussed problematic interpretations of the Supreme Court's 2016 *Spokeo* decision under other federal statutes, including the Real Estate Settlement Procedures Act (RESPA). Real Estate Amici argued that statutes like RESPA are susceptible to abuse by opportunistic plaintiffs' attorneys under Article III approach like the one taken by the Ninth Circuit in *Spokeo*.^[9] Their brief included examples of no-injury RESPA class actions some of the Real Estate Amici's members have been forced to litigate. Without the proper Article III protections, such claims are often permitted to proceed to full discovery, which can take years of distraction, millions of dollars, and hundreds of hours of the court's time even where there is no Article III injury-in-fact. Many defendants cannot face such exposure and must succumb to "blackmail settlements."

In the Wake of the Supreme Court's Decision Not to Review Spokeo Again, Lower Courts Will Continue to Grapple with the Proper Article III Analysis

On January 22, 2018, the Supreme Court denied Spokeo's petition. Without further guidance from the Supreme Court on the threshold Article III standing requirement in every case, the inconsistent rulings from circuit to circuit are likely to continue for the foreseeable future.

Some courts will continue to make the same kind of mistake made by the Ninth Circuit in its 2017 remand decision: focusing solely on the generalized interests behind the underlying statute rather than concrete harm to the plaintiff asserting the claim. Indeed, shortly before the Supreme Court denied Spokeo's petition, a new case was decided that further illustrates the tension among the lower courts on this issue. In *Gennock v. Kirkland's Inc.*,^[10] a district court in Pennsylvania considered the minimum showing required to have Article III standing in a case involving provisions of the Fair and Accurate Credit Transaction Act (FACTA), which prohibit retailers from printing more than the last five digits of a credit cards on physical sales receipts.^[11] The court in *Gennock* adopted a magistrate recommendation finding that the defendant's alleged violation of FACTA—printing the first six and last four digits of consumers' credit card numbers on sales receipts—was sufficient to confer Article III standing without a showing of real world harm to plaintiffs. The magistrate reasoned that FACTA prohibits printing such information because Congress expressly intended to prevent the risk of identity theft and credit card fraud; thus, because the defendant's alleged conduct implicated that stated Congressional interest, plaintiffs had standing to pursue their claim.^[12] The court acknowledged that it was not considering whether the

defendant's claimed conduct actually presented a risk of future harm to the plaintiffs. Instead, the court began and ended its analysis with a broad view of the congressional purposes of the statute.^[13]

Other courts, however, appropriately interpret the Supreme Court's 2016 decision as requiring a plaintiff to allege and ultimately prove that the claimed statutory violation produced real-world harm, or imminently poses a significant risk of real world harm, to the *plaintiff*. In the FACTA context, for example—and in contrast to *Gennock*—other lower courts have held that such alleged FACTA violations, without more, are insufficient to confer standing.^[14] Instead, those courts have required some allegation of harm stemming from the claimed statutory violation (e.g., that a third party had access to the receipts, that the risk of fraud or other harm increased, or that the plaintiff was forced to take certain steps to protect themselves as a result of the alleged violation) to confer Article III standing.^[15]

Regardless of the uncertainties, the Supreme Court's Spokeo opinion remains the law of the land. There is no doubt that the Supreme Court will be presented with requests to consider Article III standing issues in other cases in the future; the question is when and in what context the Court will take the opportunity to offer further guidance or resolve the conflicts arising from its initial decision.

[1] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

[2] *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014).

[3] *Spokeo, Inc.*, 136 S. Ct. at 1549.

[4] *Id.*

[5] *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1115–17 (9th Cir. 2017).

[6] Petition for Writ of Certiorari at 34, *Spokeo, Inc. v. Robins*, — S. Ct. — (Dec. 4, 2017) (No. 17-806), available [here](#).

[7] *Id.* at 13.

[8] Separate amicus briefs were filed by TransUnion LLC, the U.S. Chamber of Commerce, the National Association of Professional Background Screeners, The Consumer Data Industry Association, and the Retail Litigation Center, Inc. Each brief can be found [here](#).

[9] The Real Estate Amici's brief can be found [here](#).

[10] Case No. 2:17-cv-00454, Dkt. 28 (W.D. Pa. Jan. 9, 2018).

[11] Spokeo's petition for Supreme Court review addressed some FACTA cases applying the Supreme Court's 2016 *Spokeo* decision, but those cases involved different provisions of FACTA governing the inclusion of expiration dates on credit card receipts.

[12] *Gennock*, No. 2:17-cv-00454, Dkt. 25 at 2, 8.

[13] *Id.* at 9, 10 and n.3.

[14] See e.g., *Stelmachers v. Verifone Sys., Inc.*, No. 5:14-CV-04912, 2016 U.S. Dist. LEXIS 162081, at **7-10 (N.D. Cal. Nov. 21, 2016) (finding no Article III standing when plaintiff alleged that receipt included more credit card digits than Congress permitted under FACTA but did not allege that any third party had accessed his receipt or that it otherwise caused an injury, such that plaintiff alleged only a bare procedural violation); see also *Kamal v. J. Crew Grp., Inc.*, No. 2:15-CV-0190, 2016 U.S. Dist. LEXIS 145392, at *7-11 (D.N.J. Oct. 20, 2016) (finding no Article III standing when plaintiff alleged that receipt included more credit card digits than Congress permitted under FACTA but did not allege that someone accessed or attempted to access the credit card information such that plaintiff was more susceptible to actual fraud as a result); *Thompson v. Rally House of Kan. City*, No. 15-CV00886, 2016 U.S. Dist. LEXIS 146146, at *11-13 (W.D. Mo. Oct. 6, 2016) (finding no concrete, actual harm in FACTA case when plaintiff alleged that receipt included more credit card digits than Congress permitted under FACTA but did not allege that any third party had access to the receipt, that he had suffered any stress or psychological harm, or that he had undertaken any costly and burdensome measures to protect himself).

[15] *Id.*

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