

MAY 17, 2016

U.S. Supreme Court Holds Not Every Violation of a Federal Statute is a Ticket to File a Federal Court Lawsuit

BY ROD M. FLIEGEL, PHILLIP GORDON AND BARBARA CUSUMANO

On May 16, 2016, the U.S. Supreme Court issued its long-awaited opinion in *Spokeo, Inc. v. Robins*, a case raising the procedural question whether any and all violations of a federal statute are sufficient for a plaintiff to file a lawsuit in federal court (*i.e.*, satisfy the “injury-in-fact” requirement for standing under Article III of the U.S. Constitution). Reversing the Ninth Circuit’s ruling for the plaintiff, the majority declared that, although Congress has a vital “role in identifying and elevating intangible harms,” a plaintiff does not “automatically” have the requisite injury-in-fact “whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.” The Court’s opinion, which centers on the “concreteness” element of the standard for standing, should help abate the flurry of “no-harm,” technical violation class action claims against employers in federal court under various consumer protection statutes, including the federal Fair Credit Reporting Act (FCRA).

Allegations of the Complaint and Lower Court Decisions

The complaint alleged that Spokeo provides a “people search engine,” and that an unidentified person used Spokeo to conduct a search of the plaintiff, Thomas Robins. According to the complaint, Spokeo generates search results in response to an inquiry that includes a name, e-mail address and/or phone number by searching numerous databases for information, such as additional contact information, marital status, approximate age, occupation, hobbies, finances, shopping habits and musical preferences. Robins alleged that these search results may be used by employers for employment purposes, by prospective suitors for romantic evaluation, and by the simply curious. Based on these allegations, the complaint asserted, and the Court assumed without deciding, that Spokeo is a “consumer reporting agency” governed by the FCRA.

The gravamen of Robins' complaint was that Spokeo provided inaccurate search results to the unidentified searcher. These search results portrayed Robins as the holder of a master's degree, relatively affluent, and married with children. Ironically, Robins alleged that each of these search results was false. As compensation for the alleged inaccuracies, Robins sought statutory damages for a "willful" violation of the FCRA.

The Ninth Circuit, reversing the district court, determined that Article III of the U.S. Constitution conferred on Robins standing to sue Spokeo for alleged FCRA violations. The Ninth Circuit panel based its ruling on two factors. In the words of the Supreme Court:

First, the [Ninth Circuit] noted that Robins "alleges that Spokeo violated *his* statutory rights not just the statutory rights of other people." Second, the [Ninth Circuit] wrote that "Robins's personal interests in the handling of the credit information are *individualized rather than collective*."

Based on these two factors, the Ninth Circuit determined that Robins had alleged sufficient facts to invoke federal court jurisdiction and seek statutory damages.

The Supreme Court's Decision

The Court, with Justice Alito writing for the majority, rejected the Ninth Circuit's reasoning as incomplete. The Court began by noting that to establish standing, a plaintiff "must have (1) suffered injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." The Court explained that to satisfy the first prong of this analysis, the injury-in-fact must be both "particularized" and "concrete."

The Court found the Ninth Circuit's reasoning to be deficient because the two factors quoted above addressed only the particularized nature of Robins' alleged injury. Neither factor bore on whether Robins' injury was "concrete," which the Court defined as "'real' and not 'abstract.'"

In this regard, the Court ruled that the Ninth Circuit had erred by implicitly relying on Spokeo's alleged statutory violation, without more, to find concreteness. The Court reasoned, "Article III standing requires a concrete injury even in the context of a statutory violation."

The requirement to allege more than a statutory violation could, upon further inquiry, require dismissal of Robins' FCRA claim for lack of standing. The Court reasoned that "not all inaccuracies cause harm or present any meaningful risk of harm" and "[a] violation of one of the FCRA's procedural requirements may result in no harm." The Court therefore remanded the case to the Ninth Circuit to determine "whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement."

Takeaways

The FCRA was not enacted as an employment law *per se*, but has become a mainstay of class action litigation against employers based on court opinions refusing to dismiss "no-harm," technical violation claims (e.g., of the FCRA's "stand-alone" disclosure requirement).¹ *Spokeo* centered on the question of constitutional

¹ See Rod Fliegel, Jennifer Mora and William Simmons, *The Swelling Tide of Fair Credit Reporting Act (FCRA) Class Actions: Practical Risk-Mitigating Measures for Employers*, Littler Report (Aug. 1, 2014).

federal court standing, specifically the “concreteness” element of the standard for standing, and did not squarely rule on the merits of the plaintiff’s class action FCRA claims. The case is also not over because the Supreme Court remanded it to the Ninth Circuit to analyze the allegations in the complaint under the correct legal standard. What’s more, the text of the FCRA allows FCRA claims to be filed in either federal or state court, and whether the courts in all jurisdictions will impose a corresponding injury-in-fact requirement under state law now will have to be tested in the various state courts. Employers therefore have every good reason to continue to be mindful of, and comply with, the FCRA’s hyper-technical employment-purposes provisions.² Specific suggestions are as follows:

1. Employers should consider arranging for a privileged review of their background check disclosure and authorization forms. A thorough review of these forms may help avoid the types of claims raised in the line of cases that take issue with, for example, an employer’s inclusion of text beyond the absolute minimum necessary for the FCRA disclosure about requesting a background report (so called “extraneous” information).
2. Employers should implement procedures to help ensure that adverse action notices are sent *timely* relative to the initial pre-adverse action notice. Employers should also consider how best to record personnel decisions such that, if necessary, the employer can prove the timing of the “adverse action” (e.g., decision to reject a job applicant) and, as appropriate, that the reason an applicant was rejected was because of a poor interview, failure to provide requested follow-up information, drug test failure, etc., rather than based – even in part – on the background check report.
3. Employers should consider fortifying their efforts to ensure comprehensive FCRA compliance by refreshing policies and procedures and providing further education and training to employees involved in the hiring and screening process.

² See, e.g., Rod M. Fliegel, Philip L. Gordon and Jennifer L. Mora, *FTC Releases Updated FCRA Guidance On Background Checks*, Littler ASAP (May 11, 2016); Jennifer L. Mora, *Federal Courts Increase Scrutiny of Employer Compliance with the FCRA’s Adverse Action Requirements*, Littler Insight (Jan. 4, 2016).