



## IN SPOKEO REMAND, NINTH CIRCUIT ADOPTS HYBRID APPROACH TO STATUTORY-STANDING ANALYSIS

by Andrew C. Glass, Gregory N. Blase, Roger L. Smerage, and Hollee M. Watson

The U.S. Court of Appeals for the Ninth Circuit has opined, again, on whether a statutory violation of the Fair Credit Reporting Act (“FCRA”)—by itself—constitutes a concrete injury for Article III standing. Last year, in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the United States Supreme Court vacated and remanded the Ninth Circuit’s original opinion on the issue. Although the Ninth Circuit had reviewed the plaintiff’s allegations for a particularized injury, it had not separately analyzed whether the allegation described a sufficiently concrete harm. The Supreme Court ruled that “a bare procedural violation [of a federal statute], divorced from any concrete harm,” does not suffice to “satisfy the injury-in-fact requirement of Article III.” *Id.* at 1549. In its ruling, however, the Court declined to define a “bare procedural violation” in favor of allowing the Ninth Circuit to first consider the question. *Ibid.*

### Analysis

Since the Supreme Court’s decision, federal courts have developed two approaches when analyzing whether a plaintiff has Article III standing to assert a federal statutory claim. Under one approach, courts analyze the statute at issue and decide whether it creates a right that, if violated, effectively constitutes a *per se* Article III injury. Under the other approach, courts look to the facts alleged by the plaintiff, regardless of the statute, and determine whether those facts demonstrate concrete harm for purposes of Article III standing.\*

On remand, the Ninth Circuit adopted a hybrid of these two approaches. The court acknowledged that although an injury-in-fact may not be shown by simply pointing to a statutory violation, “the Supreme Court also recognized that *some* statutory violations, alone, do establish concrete harm.” *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1113 (9th Cir. 2017) (emphasis in original). Thus, the court ruled that in evaluating whether a claim of harm is sufficiently concrete to establish Article III standing, it must determine “(1) whether the statutory provisions at issue were established to protect [the plaintiff’s] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests.” *Ibid.*

The Ninth Circuit answered the first question with a straightforward analysis. It reviewed the purposes of the FCRA and concluded that Congress had enacted the provision at issue to protect consumers’ concrete interest in “accurate credit reporting about themselves.” *See id.* at 1113-15. In answering the second

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\* For additional information regarding these two approaches, see Andrew C. Glass, et al., *Federal Courts Follow Two Approaches Post-Spokeo When Analyzing Standing*, WLF LEGAL BACKGROUNDER, Vol. 32 No. 4 (Jan. 27, 2017), [http://www.wlf.org/upload/legalstudies/legalbackgrounder/012717LB\\_Glass.pdf](http://www.wlf.org/upload/legalstudies/legalbackgrounder/012717LB_Glass.pdf).

question, the court delved into the “somewhat murky area” of “intangible injuries,” in light of the plaintiff’s claim that the defendant aggregated and published information about him that was incorrect but not facially derogatory. *See id.* at 1112, 1115-17. The court’s case-specific analysis of the plaintiff’s allegations focused on the types of violations alleged to determine whether he had asserted actual harm, or the material risk of harm, to the particular concrete interests at issue. As the Ninth Circuit wrote, the Supreme Court’s decision “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 FCRA protects.” *Id.* at 1116 (emphasis in original).

In doing so, the Ninth Circuit held that the plaintiff “is not correct that any FCRA violation premised on *some* inaccurate disclosure of ... information is sufficient” to establish a concrete harm. *Id.* (emphasis in original). Although it declined to “conduct a searching review” to determine what types of incorrect credit reporting may give rise to actual harm, the Ninth Circuit concluded that the plaintiff’s allegations reflected sufficiently serious inaccuracies in his consumer report to establish actual harm, or a material risk of harm, to his protected, concrete interest of having an accurate consumer report. *See id.* at 1117. The court opined, for instance, that the information suggesting that the plaintiff was wealthier than he actually was could seem harmless but nonetheless could have a negative impact on the plaintiff’s job prospects. *See ibid.* “Even if their likelihood actually to harm Robins’s job search could be debated, the inaccuracies alleged in this case do not strike us as the sort of mere technical violation[s] which are too insignificant to present a sincere risk of harm to the real-world interests that Congress chose to protect with FCRA.” *Id.* (quotations omitted). Thus, the court ruled that the plaintiff had standing to pursue his claims, *see id.* at 1118, and remanded the case to the district court for a determination on the merits of plaintiff’s claims.

Yet, the Ninth Circuit emphasized the case-specific nature of its hybrid approach, “caution[ing] that [its] conclusion on Robins’s allegations does not mean that *every* inaccuracy in these categories of information (age, marital status, economic standing, etc.) will necessarily establish concrete injury under FCRA.” *See id.* at 1117 n.4 (emphasis in original). This is because “[t]here may be times that a violation leads to a seemingly trivial inaccuracy in such information (for example, misreporting a person’s age by a day or a person’s wealth by a dollar).” *Id.* The court, however, expressed “no opinion on the circumstances in which alleged inaccuracies of this nature would or would not cause a concrete harm.” *Ibid.*

## Conclusion

The Ninth Circuit’s decision may prompt another petition for *certiorari* to the Supreme Court. Possible questions for the Court’s consideration include whether the hybrid approach to the concreteness analysis is correct, and, if so, did the Ninth Circuit correctly apply that approach to the plaintiff’s allegations? Given the developing divergence of views among the federal courts of appeals, the Supreme Court may find the former question, in particular, worthy of review.

The decision may also impact how federal district courts analyze motions for class certification under Federal Rule of Civil Procedure 23 in class actions alleging statutory violations. Indeed, the Ninth Circuit’s analysis regarding the “nature” of the conduct at issue focused more on the specific allegations in the complaint than some other courts have done after the Supreme Court’s decision in *Spokeo*. Such analysis could support a FCRA defendant’s argument that individual issues regarding the nature of each putative class member’s injury predominate over any issues that are common to the class and thus that a class action is not superior to other available methods for fairly and efficiently adjudicating the controversy.

The legacy of the *Spokeo* litigation is likely to continue evolving as questions such as these and the question of standing under other statutory regimes are litigated.