

## Spokeo Ruling Deals Blow To Cos. But May Have Silver Lining

By Allison Grande

*Law360, New York (August 15, 2017, 11:38 PM EDT)* -- The Ninth Circuit's decision Tuesday that the harm stemming from an allegedly inaccurate consumer report published by Spokeo Inc. was concrete enough to establish standing gives class action plaintiffs a boost in their bids to block defendants from making quick exits, but the panel's fact-specific analysis may limit the ruling's broader application and leave companies with a stronger defense down the line, attorneys say.

The question of what statutory harms are sufficient to meet Article III's injury-in-fact requirement has been the topic of heated debate among the circuit courts since the U.S. Supreme Court last May issued its decision in the instant case. In that ruling, the justices found that plaintiffs must allege concrete harm and cannot rely on mere statutory violations to establish Article III standing. The high court remanded the dispute to the Ninth Circuit to decide if plaintiff Thomas Robins' Fair Credit Reporting Act claims met this concreteness standard.

In the latest data point in the standing conundrum, a unanimous Ninth Circuit panel ruled Tuesday that Robins' claims did meet this standing bar, since he had alleged FCRA violations that clearly implicated his "concrete interests in truthful credit reporting" that Congress had solidified in enacting the statute.

"The Ninth Circuit's decision makes it clear that when you have a statutory violation plus consequences, even if they're not monetary damages, you can have standing," said Kevin McGinty, a member at Mintz Levin Cohn Ferris Glovsky and Popeo PC. "In these modern economic times, defendants tend to want to reduce harm to dollars and cents, but injury doesn't have to be pecuniary losses."

Attorneys on both sides of the bar said that they weren't surprised by the Ninth Circuit's ruling, given that the high court had declined to overturn the appellate court's initial decision to find standing in 2014 and the traditional tilt of the Ninth Circuit, which since Spokeo has issued rulings in *Syed v. M-1 LLC* and



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Patten v. Vertical Fitness Group that found standing exists for claims issued under the FCRA and the Telephone Consumer Protection Act, respectively.

"Rather than laying out a meaningful defense for companies facing statutory-based class actions under the FCRA or TCPA, as many initially hoped, the Supreme Court's decision in practice has only established boxes for plaintiffs to check in their complaints in order to anticipate a Spokeo motion-to-dismiss challenge," Robins Kaplan LLP principal Michael Reif said. "In other words, even after the Supreme Court's reluctance to find an injury-in-fact based merely on a statutory violation, plaintiffs are having some success pleading around the court's decision by asserting both the concreteness and particularized nature of the injury they allegedly suffered."

Still, attorneys flagged Tuesday's ruling as significant, noting that it sets a fairly low standing bar for claims of failing to ensure maximum possible accuracy in credit reports and is likely to tip the balance toward plaintiffs at least when it comes to similar statutory claims.

"It's definitely going to be more difficult in terms of defendants trying to challenge standing for statutory injury cases in the Ninth Circuit," said Hanley Chew, of counsel at Fenwick & West LLP.

In reacting to the ruling, Edelson PC founder Jay Edelson, who represented Robins, told Law360 that his side believed the Ninth Circuit had issued "what will be seen as the definitive decision articulating Article III standing in the wake of the Supreme Court's ruling."

"Congress is allowed to define what constitutes an injury and pass a law, the violation of which can give rise to standing," Edelson said. "The court firmly rejected the 'something more' doctrine that Spokeo has been pushing for years. As the court explained, litigants need not show 'additional injury' beyond what Congress has articulated."

Plaintiffs attorney Jim Francis of Francis & Mailman PC, who specializes in FCRA class actions but was not involved in the Spokeo case, agreed that the Ninth Circuit's ruling follows both what the Supreme Court has instructed and what FCRA practitioners "have known for years": namely, that in passing the FCRA, Congress identified the substantive rights to be free from the reporting of inaccurate information and the protection of one's privacy.

"Any thoughtful or linear analysis of the claims asserted in Spokeo yields the same result as the Ninth Circuit," Francis said. "This decision is simply the application of existing long-standing precedent. Perhaps that is why there is no dissent."

However, not all attorneys agreed that the Ninth Circuit's ruling would have sweeping consequences that favored the plaintiffs.

"The significant question is whether the ruling will have implications beyond FCRA cases that allege a material misrepresentation of personal facts concerning the named plaintiffs," Carlton Fields shareholder Kristin Ann Shepard said. "When the Ninth Circuit went to address the concreteness of the injury, it looked at two things: the FCRA itself and its legislative history, and the common law of libel. That rationale lends [itself] to a rather narrow reading of the case."

When it comes to broader questions of standing for claims that aren't couched in libel or don't stem from statutory violations, such as those under the TCPA or Fair and Accurate Credit Transactions Act or those that arise in the wake of data breaches, the Ninth Circuit's ruling that inaccuracies in credit reports

are sufficiently concrete for standing may not be applicable, according to attorneys.

"The decision affirms the concept that plaintiffs cannot simply get by [in these cases] by pointing to statutory violations and indicates that courts will likely be a little bit more analytical in terms of the facts alleged in each particular case and place greater emphasis on each plaintiff's specific allegations of harm or wrongdoing," Seyfarth Shaw LLP attorney Robert Szyba said.

The decision may not even be broad enough to automatically confer standing to all plaintiffs who go to the Ninth Circuit with FCRA claims, attorneys said, noting the Ninth Circuit's insistence that some harm must be alleged and that not every "minor inaccuracy reported in violation of the FCRA" would give rise to standing.

"To be sure, there are still some instances where a violation of the FCRA alone will not meet the standing requirement," Shook Hardy & Bacon LLP data security and privacy group chair Al Saikali said, pointing specifically to instances where the inaccuracy is "trivial."

Troutman Sanders LLP partners David Anthony and Cindy Hanson in a joint email noted the importance of the Ninth Circuit emphasizing that "in many instances, 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 the FCRA's procedures," and that the consumer must rather show that the violation materially affected the consumer's protected interests in accurate credit reporting.

"Courts will therefore have to analyze the 'nature of the specific alleged reporting inaccuracies' to ensure that the plaintiff has suffered a real risk of harm," they said.

Given the Ninth Circuit's fact-specific focus, courts will likely be tasked with deciding where the line is between FCRA injuries that constitute trivial inaccuracies that don't confer standing and more serious errors that do give rise to concrete harm, attorneys noted.

"The [Ninth Circuit] decision casts the test as whether the alleged procedural violation actually harms the concrete interest the procedural right is trying to protect," said Michael Rhodes, chair of Cooley's privacy and data protection practice group. "But in practice that still leaves some discretion to the district courts facing the Article III standing inquiry since the Ninth Circuit doesn't offer much specific guidance on this point."

Benesch Friedlander Coplan & Aronoff LLP partner David Almeida added that while the Ninth Circuit concluded that not all reporting inaccuracies cause material harm, it "dropped the ball" by failing to explain how Robins' allegation that Spokeo published inaccurate information about him harmed his job prospects.

"This hypothetical harm would seem to fall well short of the Supreme Court's Clapper analysis," Almeida said, referring to the Supreme Court's 2014 ruling in *Clapper v. Amnesty International* that an injury must be "concrete, particularized, and actual or imminent," and a future injury must be "certainly impending."

"Indeed," Almeida said, "the Ninth Circuit disregarded Clapper entirely, which we think is clearly a mistake."

Ropes & Gray LLP counsel David T. Cohen agreed that the Ninth Circuit's essential "end-run around

Clapper” in holding that Congress can convert a material risk like a threat to Robins’ employment prospects into an actual injury to create standing without meeting the Clapper standard was “particularly remarkable and troubling.”

“This will make the decision very vulnerable at the Supreme Court,” Cohen said.

The Ninth Circuit's decision to find standing was likely "strongly colored" by the fact that Spokeo allegedly got a "number of important things" about Robins wrong, such as his age, marital status, wealth, education level and profession, as well as his photograph. But the panel's focus in its "very fact-dependent" decision on details such as the report being published, and its insistence that there must be “examination of the nature of the specific alleged reporting inaccuracies to ensure that they raise a real risk of harm,” may give a boost to defendants, according to Morgan Lewis & Bockius LLP partner Ezra D. Church.

"The emphasis on the need to examine the nature of the specific inaccuracies may be a silver lining for defendants, emphasizing that questions of standing may raise individualized issues that will be hard to adjudicate in a class action context," Church said.

Spokeo pointed to this potential side effect in its response to the ruling Tuesday, saying that the Ninth Circuit's endorsement of a fact-specific analysis of harm could "make it very difficult for the plaintiffs to meet the requirements for certifying a class action" since individualized inquiries would likely be necessary to make sure that every claimant met this standard.

In the meantime, attorneys expect the issue of standing to make its way back to the Supreme Court in the near future, especially given that the Ninth Circuit decision helps to deepen the divide with other circuits, most notably the Seventh Circuit's ruling in *Groshek v. Time Warner Cable Inc.*, that have found standing for similar FCRA claims.

"We can expect this case to advance the debate [over standing], but not end it in any way," Wiley Rein LLP privacy practice chair Kirk Nahra said.

U.S. Circuit Judges Diarmuid F. O’Scannlain, Susan P. Graber and Carlos T. Bea decided the appeal.

Robins is represented by Jay Edelson, Rafey S. Balabanian, Ryan Andrews, Roger Perlstadt and J. Aaron Lawson of Edelson PC, and William Consovoy and Patrick Strawbridge of Consovoy McCarthy Park PLLC.

Spokeo is represented by Andrew J. Pincus, Donald M. Falk, John Nadolenco, Archis A. Parasharami, Stephen C.N. Lilley and Daniel E. Jones of Mayer Brown LLP.

The case is *Thomas Robins v. Spokeo Inc.*, case number 11-56843, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Pamela Wilkinson and Breda Lund.