

# High Court's Spokeo Punt Sets Bar For Class Action Injuries

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Law360, New York (May 16, 2016, 11:24 PM ET) -- The [U.S. Supreme Court](#) on Monday shut down consumers' efforts to sue businesses for technical violations of the Fair Credit Reporting Act and other consumer protection statutes, but its silence on whether claims against Spokeo fit the bill leaves both sides with ammunition in fights over statutory claims where plaintiffs allege intangible injuries.



The Supreme Court held that because the Ninth Circuit failed to consider both aspects of the injury-in-fact requirement, its Article III standing analysis was incomplete. (Credit: Law360)

In a 6-2 decision authored by Justice Samuel Alito, the high court [took the surprising step](#) of vacating and remanding the Ninth Circuit's [ruling from 2014](#) that plaintiffs do not need to allege actual injury to maintain statutory class action claims like the ones lodged by Thomas Robins. Robins had accused the self-proclaimed people search engine [Spokeo Inc.](#) of violating the FCRA by falsely reporting that he was wealthy and had a graduate degree when in fact he was struggling to find work.

Although the Supreme Court based its decision on the finding that the Ninth Circuit used an incomplete analysis when it ruled consumers can sue companies without alleging actual injury, the majority also articulated that Article III standing does require a concrete injury even in the context of a statutory violation and that a plaintiff cannot "automatically satisfy" the injury-in-fact requirement by merely citing a technical violation of a statute.

"The idea of pleading a concrete injury is clearly the law of the land, and all litigants will be held to that," said Jan P. Levine, the co-chair of the commercial litigation practice group

at [Pepper Hamilton LLP](#).

The holding is likely to wipe out the recent wave of litigation under the FCRA and similar statutes such as the Telephone Consumer Protection Act that seeks to hold businesses liable for technical violations, such as failing to print the required information on a consumer report, according to attorneys.

"This is an evolutionary rather than a revolutionary decision," Sidley Austin LLP consumer class action defense practice co-leader Michael Mallow said. "It's another in a line of cases that have really focused on doing away with no-injury, 'gotcha' type cases."

However, the justices in their ruling did leave an opening for plaintiffs to maintain cases based solely on statutory violations, as long as their assertion is accompanied by a showing of either tangible or intangible injury that has allegedly been caused by this violation.

"The court did not, as many in the defense bar hoped, go so far as to say that Congress has no power to create federal jurisdiction for plaintiffs who have suffered no harm," [Reed Smith LLP](#) partner Michael O'Neil said.

Instead, the majority made clear that plaintiffs can maintain statutory claims, as long as they've also articulated an accompanying injury that is both particularized and concrete, a holding that is likely to be applied in a range of consumer protection disputes as well as potentially even the swell of litigation that typically follows a consumer data breach, attorneys say.

"This decision is very useful because now we have an insight into the Supreme Court's reasoning, which provides a helpful road map of what is required to prove particularized injury and concrete harm," Seyfarth Shaw LLP partner Pamela Devata said.

But despite its efforts to lay out these parameters, the high court did not undergo the task of applying them to the specific dispute in front of it. Instead, the majority took the rare step of sending the dispute back to the Ninth Circuit to consider whether Robins had pled harm that was particularized and concrete, which would allow him to continue with the suit.

By failing to apply its test to the facts at hand, the justices left the door open for both sides to seize a victory and use the analysis in their favor, attorneys say.

On one hand, plaintiffs are likely to point to the portions of the opinion that endorse the power of Congress to create statutory remedies as they focus on attempting to plead intangible injury that Congress sought to address by enacting a specific statute. Meanwhile, defendants will emphasize the language in the opinion that procedural violations alone are not enough for standing and that such a breach must actually be in some way concrete and tied to the statute's intent, according to [Troutman Sanders LLP](#) partner David Anthony.

"Given the procedural nature of the court's holding, the debate over the contours of the decision will continue to play out in the lower courts," Anthony said.

The debate has already set off disagreements between the plaintiffs and defense bars over which side came out on top and who is likely to prevail on remand.

"While at first glance, the court's opinion appears to be a blow to privacy rights in the digital age, it did not adopt a real-world-injury test, so the opinion looks like a split decision between privacy advocates and companies that collect and repurpose the personal information of others," said Bradley S. Shear, managing partner of Shear Law LLC.

[Edelson PC](#) founder Jay Edelson, who represented Robins in the case, focused on the court's rejection of the "real-world" injury requirement in characterizing the ruling as a "90 percent win for consumers." He added that endorsing such an injury standard would have given fewer consumers access to the courts while empowering businesses to ignore the law.

The stance was backed by other members of the consumer class action plaintiffs bar, who told Law360 on Monday that the decision was "good news" for consumers and consumer advocates.

"This was supposed to be the case that the industry was going to be able to use to knock out statutory damage class actions," said Leonard A. Bennett, founding partner of Consumer Litigation Associates PC. "In addition to not doing that, the ruling specifically preserved statutory damage class actions and provided a road map for what needs to be pled to do that."

Specifically pointing to language that supports the notions that harm doesn't need to be

tangible and that risk of harm is sufficient to establish standing, both Bennett and plaintiffs attorney Jim Francis of [Francis & Mailman PC](#) asserted that they expect the ruling to strengthen their existing active litigation, which mainly focuses on the publication of allegedly inaccurate information or invasion of privacy under statutes such as the FCRA.

"I have two cases stayed right now in California on the basis of Spokeo, and I'm looking forward to going back there with Spokeo, which is empowering for those cases," Francis said.

While the plaintiffs' attorneys acknowledged that the ruling will likely make it much more difficult, if not nearly impossible, to maintain claims alleging companies violate the text of the statute without causing any type of injury, they said that plaintiffs counsel with experience in the field tend to shy away from these "hypertechnical" cases anyway. Instead, these attorneys tend to focus on statutory violations such as reporting inaccuracies and the risk of identity theft, which they say still have legs under the high court's ruling.

In responding to the ruling, Edelson also expressed confidence that his side would find success before the Ninth Circuit on remand, saying the appellate court's task of determining whether Robins has alleged that Spokeo disseminated the type of false information that Congress was concerned about when it passed the FCRA is "an easy question to answer."

The assertion was quickly disputed by the defense bar, with Spokeo and its attorneys from [Mayer Brown LLP](#) saying Monday that they were pleased that the high court rejected plaintiffs' attempts to bring massive "no-injury" class actions. They added that they don't believe that Robins has met the requirement of "real" harm articulated by the court in its opinion.

"For many years, there was a divide among the courts about whether class actions seeking billions of dollars could go forward when no one had suffered any real harm, and the only allegation was a technical violation of a federal statute," Mayer Brown partner Andrew J. Pincus said. "Today's decision makes clear that those class actions are not permissible."

The Mayer Brown attorneys that represented Spokeo added in a blog post Monday that even if the concrete harm test is satisfied by a named plaintiff, class action lawyers will still face the additional hurdle of demonstrating each class member has standing, which may well prove to be a significant barrier to class certification, a stance that won backing from

others in the defense bar.

"The Supreme Court's holding that mere procedural error without a substantive harm does not lead to a concrete harm will have important ramifications for class actions generally and privacy class actions in particular where plaintiffs have sought to rely on statutory violations to build a bigger class," Paul Hastings LLP partner Sean Unger said. "A number of Circuits have said that you can't certify a class that includes members that don't have Article III standing, and this decision is likely to reinject that discussion into the class certification analysis."

Besides agreeing that the path for established concrete and particularized injury for an entire consumer class was likely to be more difficult post-Spokeo, other defense attorneys asserted that the decision would force plaintiffs to put more efforts into their pleadings to ensure that they meet the injury-in-fact requirement set by the high court.

"The short-term is that had the decision gone the other way, it would've been much easier for plaintiffs lawyers to bring privacy class actions based on technical violation of the statute," [Dorsey & Whitney LLP](#) partner Robert Cattanaich said. "Longer term, plaintiffs lawyers will have to get a bit more creative in teasing out real 'harm' from conduct that might violate the statute but doesn't on its face suggest some real injury."

Littler Mendelson PC privacy and background checks practice group co-chair Rod Fliegel predicated that many plaintiffs' attorneys may be "reaching for the aspirin" following the high court's ruling, given that the decision appears to give the defense bar a weapon they can use to at least tie up cases in litigation for years.

"It's not rocket science to see that what's going to happen next is quite a bit of sorting out about what kinds of claims go into the bucket for being concrete enough to establish injury," he said.

The discrepancy between the interpretations of the ruling by the plaintiffs and defense bars is likely in large part attributable to the high court's decision to decline to specifically apply its reasoning to Robins' allegations, giving both sides wide latitude to pull out favorable nuggets from the courts' broad reasoning, attorneys noted.

"How common law typically develops is that the court establishes rules and applies them to

the facts of the case, which can then be used to decide whether the next case that comes along is more or less similar,” Haynes and Boone LLP partner M.C. Sungaila said. “But because the Supreme Court doesn’t actually apply it here, that leaves a lot of open questions.”

The surprising outcome of the dispute is also likely a byproduct of Justice Antonin Scalia’s [unexpected death in February](#), which threw into disarray the anticipated 5-4 balance of the court along ideological lines.

Instead of Justice Anthony Kennedy serving in his traditional role as a swing vote, it was Justice Elena Kagan that ended up casting the most surprising vote, siding with the court’s conservative wing in signing onto the majority opinion without qualification.

“Justice Kagan joining the majority was very interesting, and probably one of the reasons why the ruling was tempered to a remand rather than a reversal,” said Levine, who attended the oral argument session in November and noted that Justice Kagan appeared from her questioning to be poised to side with the court’s liberal wing.

With the case headed back to the Ninth Circuit, attorneys say that all eyes will now be on the appellate court to see how it applies the justices’ ruling and whether other Circuits ultimately agree with its conclusion.

“Fundamentally, Monday’s decision was a victory for the defendant [Spokeo] in the case,” Anthony said. “But the breadth of that victory will be debated especially given the stakes, with the same type of Circuit split that gave rise to the Spokeo decision potentially being repeated.”

Justice Samuel Alito delivered the opinion of the court, in which Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas, Stephen Breyer and Elena Kagan joined. Justice Thomas filed a concurring opinion. Justice Ruth Bader Ginsburg filed a dissenting opinion, in which Justice Sonia Sotomayor joined.

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

Robins is represented by Jay Edelson, Rafey S. Balabanian, Ryan Andrews and Roger

Perlstadt of Edelson PC and Will Consovoy, J. Michael Connolly, Michael Park and Patrick Strawbridge of [Consovoy McCarthy Park PLLC](#).

The case is Spokeo Inc. v. Thomas Robins et al., case number 13-1339, in the Supreme Court of the United States.