

Banking and Finance Law Daily Wrap

Up,SUPREME COURT DOCKET—U.S.: Court puts off full inquiry into credit report suit standing,(May 16, 2016)

By [Richard A. Roth, J.D.](#)

The Supreme Court has decided not to address the ultimate question of whether a consumer who claimed to have been the subject of an inaccurate consumer report could sue a consumer reporting agency based only on a violation of his statutory rights under the Fair Credit Reporting Act. According to Justice Alito's majority opinion, the U.S. Court of Appeals for the Ninth Circuit's analysis of the standing to sue issue was insufficient because the appellate court did not consider whether the consumer had outlined a concrete injury that would give him standing under the U.S. Constitution (*Spokeo, Inc. v. Robins*, May 16, 2016, Alito, S.).

The consumer's allegations were relatively simple. He claimed that Spokeo, Inc.'s website that published personal information about individuals had included inaccurate information about him, such as that he held an advanced degree, was married, and was comparatively wealthy. This inaccurate information was interfering with his ability to get a job and causing him emotional distress. He also charged the website knew the information was inaccurate, and that it marketed its information for purposes that were covered by the FCRA. Based on these claims, he sued for damages.

Standing to sue. Establishing standing to sue under Article III of the Constitution, which limits federal court jurisdiction to cases and controversies, requires clearing several hurdles, Justice Alito's majority opinion said. The most important of these hurdles was showing an injury in fact.

To show an injury in fact, a person must show that:

- He has suffered an injury from an invasion of a legally protected interest.
- The injury is both concrete and particularized.
- The injury is actual or imminent.

The Ninth Circuit determined that the consumer had satisfied the requirements. Focusing on the second of the three, which was at issue in the case, the Ninth Circuit said that he had described a "concrete, de facto" injury that was both particularized and concrete (*Robins v. Spokeo, Inc.*, discussed in [Banking and Finance Law Daily, Feb. 6, 2014](#)).

Inadequate analysis. For an injury to be particularized, it had to affect the consumer in an individual and personal way, the majority opinion first said. That clearly was the situation here, as the inaccurate information published by Spokeo resulted in an incorrect description of the consumer individually.

However, the Ninth Circuit had failed to consider separately whether the consumer's claimed injury was concrete—real, as opposed to abstract—according to the majority.

An injury that is intangible can nevertheless be concrete, the majority opinion conceded. Congress has the authority to elevate an intangible injury to the level of a concrete injury. However, that authority was not unlimited. A "bare procedural violation" would not confer standing if it did not at least threaten concrete harm. As an example, the majority opinion said that providing an incorrect zip code alone could not cause any harm and thus would not confer standing.

Remand. The Ninth Circuit "failed to fully appreciate the distinction between concreteness and particularization," the majority opinion complained. On remand, the appellate court was to consider whether the specific violations alleged by the consumer "entail a degree of risk sufficient to meet the concreteness requirements." The majority, however, gave no useful guidance on what that degree of risk might be or how that risk should be measured.

Concurring opinion. While he voted with the majority, Justice Thomas also wrote a concurring opinion that looked at the issue from the perspective of whether the consumer was attempting to vindicate public rights or private rights. Congress cannot authorize an individual to vindicate public rights in his own name unless the individual has suffered a concrete harm that is particular to him.

From that principle, the consumer in this case had no standing to sue over many of the violations he claimed, Justice Thomas said. However, there was one possible exception. The FCRA requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of the information *concerning the individual about whom the report relates*" (15 U.S.C. §1681e(b)) (emphasis in the opinion). The Ninth Circuit should consider whether this language created a duty on the part of Spokeo to protect the accuracy of information that was owed to the consumer personally. If so, the consumer would have standing to sue for a violation of that duty.

Dissenting opinion. Justices Ginsburg and Sotomayor, on the other hand, would have affirmed the Ninth Circuit's determination that the consumer has shown enough. Much of the majority opinion was correct, Justice Ginsburg wrote, but there was no need to require the Ninth Circuit to consider whether the consumer's injury was concrete.

The inaccuracies claimed by the consumer were concrete, the dissenting opinion asserted. The consumer was not complaining of an incorrect zip code, as in the majority opinion's example. He was complaining of inaccuracies about his age, education, marital status, financial status, and professional status. Even a photograph on the website was wrong, the consumer claimed. These inaccuracies clearly could affect the consumer's job prospects, Justice Ginsburg said, and that made a remand to the Ninth Circuit unnecessary.

The case is [No. 13-1339](#).

© 2016 CCH Incorporated. All rights reserved.