

Concrete or Not So Concrete: That is the Question

Amundsen Davis Class Action Alert
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Two days ago, in a heavily-anticipated Supreme Court opinion likely celebrated by companies tired of no-injury class actions, the Court held that a lawsuit should have been dismissed because the plaintiff had not claimed a “concrete” injury. The Court’s ruling rested on a simple premise: when they say “and” they mean “and.”

Thomas Robins claimed that Spokeo’s online profile of him contained inaccurate information about him—his age, marital status, employment history, and the like. *Spokeo, Inc. v. Robins*, 578 U.S. ___, ___ S. Ct. ___ (2016). Spokeo had violated the Fair Credit Reporting Act, Robins urged, because the federal statute requires a company to take certain steps to ensure the accuracy of such reports. The federal district court that first considered the case dismissed it, finding Robins had not alleged an injury and therefore had no standing. The Ninth Circuit disagreed. It concluded that violation of a statutory right, particular to Robins, was sufficient to confer standing.

Not so, found the Supreme Court, which vacated the decision and explained that plaintiffs must claim a concrete *and* particularized injury. The Court accepted the argument that Robins’s allegations revealed a particularized injury—indeed he claimed not to have the spouse, children, graduate degree, or “top 10%” wealth level that Spokeo’s profile attributed to him. But the Ninth Circuit had fallen short by not analyzing whether Robins alleged a “concrete” injury – in other words, that these inaccuracies actually *harmed* him. Put more plainly: even if Spokeo did not follow certain statutory procedures, Robins needed to plead a controversy based upon his suffering a real-world impact.

Though the decision is favorable for companies, some will consider it a soft victory. The Court made clear that complaining parties must allege an actual injury in order to sue – it is not enough to claim a defendant violated a statute. Yet, at the same time, the Court remanded to the Ninth Circuit with the unhelpful statement that the majority of the justices took “no position as to whether the Ninth Circuit’s *ultimate conclusion* – that Robins adequately alleged an injury in fact—was correct.” “Concrete” is not necessarily synonymous with “tangible,” the Supreme Court explained, but violation of a procedural requirement may not be enough.

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At this juncture, a significant takeaway is that *Spokeo* limits a company's exposure for mere technical infractions. Particularly in the class action context, this ruling could also restore some sanity by limiting putative classes to individuals who have actually been harmed. However, at the same time, the Court stopped short of providing clear boundaries on where a technical or procedural violation stops and where a concrete—be it tangible or intangible—injury starts.

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