
Employers Beware: Your Background Checks Could Provide More Than You Bargained For

By Matthew Mitchell

The Fair Credit Reporting Act (“FCRA”) provides fertile ground for plaintiffs’ attorneys due to its numerous technical requirements and the availability of attorney fees and actual, statutory, and punitive damages. The past several years have seen a rise in putative class action litigation filed by disgruntled job applicants who allege violations of 15 U.S.C. § 1681b(b)(2)(A)(i). That provision prohibits an employer from procuring a consumer report before disclosing to the consumer that a report will be obtained for employment purposes. The employer must make the disclosure on a document *consisting only of the disclosure*. Though many hoped the U.S. Supreme Court’s decision in *Spokeo, Inc. v. Robins*, 136 S.Ct 1540 (2016) would put an end to these “stand-alone disclosure cases”, as discussed below, *Spokeo* did not result in the categorical edict many hoped for, and employers who do not proactively assess their policies and procedures relating to background checks may find themselves facing serious liability.

At their core, stand-alone disclosure cases typically involve allegations that the putative class members received too much information rather than too little. Consider the following fact pattern: A prospective employee walks through your door with a completed application for employment. You interview her, and the interview goes well. You decide to hire the applicant, pending a background check. She assures you her background won’t present a problem and signs the company’s standard form authorizing the background check. Unfortunately, once obtained, the report reveals the applicant has an extensive criminal history and, in fact, lied during the interview. You understandably decline to hire the applicant. A month later, she files a putative class action alleging that the company’s standard form violated § 1681b(b)(2)(A)(i) because, in addition to the required disclosure, the form included a waiver of any liability in connection with the background check.

This fact pattern has become all too familiar in FCRA litigation. Though allowing the job applicant in the above example to sue, let alone recover, hardly seems fair, section 1681b(b)(2)(A)(i)’s requirement that the employer use a form

consisting only of the disclosure is clear. Employers are not defenseless in these cases, however, as they and their attorneys have argued for years that plaintiffs lack standing to sue because they have suffered no tangible harm and therefore cannot satisfy Article III's "injury in fact" requirement. The plaintiffs' bar, on the other hand, has argued that a mere technical violation of the FCRA, even without any accompanying tangible harm, is enough to satisfy Article III. Many hoped that the U.S. Supreme Court would definitively settle the debate; however, its decision in *Spokeo* did not go as far as many employers hoped.

In that case, Defendant Spokeo operated a search engine that allowed users to input a person's name, telephone number or email address. Spokeo would then use that information to search various databases and produce a report on the search subject. *Spokeo, supra* at 1544. Plaintiff Robins alleged that Spokeo performed such a search on him, but gathered and distributed inaccurate information as a result. *Id.* Robins filed a putative class action against Spokeo in the United States District Court for the Central District of California. *Id.* at 1546. Spokeo filed a motion to dismiss claiming that Robins lacked Article III standing because he had not sufficiently pled an "injury in fact." The district court granted the motion. The U.S. Court of Appeals for the Ninth Circuit reversed. *Id.* at 1544-1545.

The U.S. Supreme Court, finding the Ninth Circuit's analysis "incomplete", reversed and remanded for further proceedings. *Id.* at 1546, 1550. In the majority opinion, Justice Alito stated that, though "concrete" is not "necessarily synonymous with tangible", a plaintiff cannot automatically satisfy the injury in fact element "whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* at 1549. For example, a "bare procedural violation" such as reporting of an "incorrect zip code" would not constitute a concrete harm. *Id.* at 1549-1550. Unfortunately, aside from its zip code example, the Supreme Court provided little guidance on what type of statutory violation would qualify as a "bare procedural violation" insufficient to confer standing. On remand, the Ninth Circuit held that Robins satisfied the concreteness prong of the injury in fact analysis because he alleged the publication of "inaccurate reports on such a broad range of material facts" about his life. *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1117 (9th Cir. 2017) (*On remand*).

The majority of courts since *Spokeo* have found violations of 15 U.S.C. § 1681b(b)(2)(A)(i)'s stand-alone disclosure rule are, in and of themselves, insufficient to satisfy Article III's concreteness requirement, so long as the

applicant knew he or she was authorizing the background check. For example, in *Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884, 889 (7th Cir. 2017), the U.S. Court of Appeals for the Seventh Circuit held that a job applicant's allegation that the disclosure included a liability waiver and other information was insufficient to confer standing because Groshek did not allege that he did not knowingly authorize procurement of the report. See *id.* at 887-889.

Not all cases have been favorable to employers however. In *Syed v. M-I, LLC*, 853 F.3d 492, 500 (9th Cir. 2017), the U.S. Court of Appeals for the Ninth Circuit held that the plaintiff had standing to sue where the employer included a release of FCRA liability along with its disclosure that a consumer report would be obtained for employment purposes. *Syed* appears to be the minority view.

Compliance should be proactive, not reactive. Decisions like *Syed* reinforce the risk of leaving your company's liability in the uncertain hands of judicial determination. If your company has failed to conduct a detailed compliance review of its background check forms, policies, and procedures, you may be leaving yourself open to expensive class action litigation and regulatory risk, even after *Spokeo*.