

New Ruling by U.S. Supreme Court on Standing to Pursue Litigation – Alleging a “Mere Statutory Violation” Is Not Sufficient to Confer Article III Standing for a Federal Cause of Action

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Consumer protection claims have been a source of significant financial drain for businesses. These claims typically provide for statutory damages in lieu of proving actual damages, thus making it easy for plaintiffs to initiate actions where no harm has been suffered. The United States Supreme Court has now severely limited plaintiffs' ability to pursue these claims in federal courts on an individual or class basis. That decision, *Spokeo, Inc. v Robins*,¹ specifically addresses causes of action based merely upon claims for statutory damages, and the implications are significant for both the plaintiffs' bar and for businesses.

The 6-2 decision in *Spokeo* was authored by Justice Alito and released on May 16, 2016. The Court held that the Court of Appeals for the Ninth Circuit had failed to determine whether a website operator's alleged violations of the Fair Credit Reporting Act of 1970 ("FCRA"), 15 USC 1681e(b) and 1681n(a), caused the kind of concrete injury required for Article III standing. Sections 1681e(b) and 1681n(a) of the FCRA require consumer reporting agencies to follow reasonable procedures to assure maximum accuracy of consumer reports and imposed liability on any person who willfully fails to comply with any requirement of the Act with respect to any individual. The Court in *Spokeo* held that the consumer could not satisfy the injury-in-fact demands of Article III standing by alleging a bare procedural violation of the FCRA. Justice Thomas filed a concurring opinion. Justice Ginsburg filed a dissenting opinion, in which Justice Sotomayor joined. The decision of the Ninth Circuit was vacated and the case was remanded to the Ninth Circuit for

further consideration. While the Court held that Robins cannot satisfy the demands of Article III by alleging a bare procedural violation, the majority opinion expressly stated that it took no position on the ultimate question of whether Robins had adequately alleged an injury in fact.²

The *Spokeo* opinion creates significant hurdles for individual and class plaintiffs to pursue consumer claims based upon technical statutory violations that provide for statutory damages. Commercial litigators confronted with these issues should consider the following:

- Alleging a mere statutory violation, without more, is not going to be sufficient to confer federal standing on a party seeking redress from such a violation.
- A plaintiff must allege with specificity the actual harm and "injury-in-fact" that is particular to *and* has been suffered by the individual to establish constitutional Article III standing.
- A plaintiff must carefully assess and delineate the actual harm that has been suffered. The fact that the statutory violation at issue may entitle the plaintiff to statutory damages for a violation does not mean that the party has suffered actual damages. Clearly, some actual harm must be shown, but the nature and extent of the actual harm necessary to confer standing was not clearly articulated by the Court.
- Defense counsel must evaluate whether the plaintiff has plead both

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“actual damages” and “injury-in-fact” with sufficient specificity. Based on that evaluation, counsel should consider filing a motion to dismiss for lack of standing at the onset of the case.

- From a practical perspective, this new ruling will certainly make it more difficult for plaintiffs to establish a basis to pursue businesses that encounter or are confronted with a statutory violation and, may even extend to data breaches because, absent demonstrable “actual harm,” the plaintiff will not be able to satisfy the standard articulated by the Court.

Facts of the Case

Spokeo, Inc. (“Spokeo”) operates a “people search engine.” If someone visits the website and inputs a person’s name, a phone number, or an e-mail address, Spokeo conducts a computerized search in a wide variety of databases and provides information about the subject of the search. Spokeo performed such a search about Thomas Robins (“Robins”), and some of the information it gathered and disseminated was incorrect. When Robins learned about the inaccuracies, he filed a complaint on his own behalf and on behalf of a class of similarly situated individuals. In particular, Robins alleged that Spokeo posted a picture purporting to be an image of Robins that was not in fact of him and incorrectly reported that Robins was in his 50’s, married, employed in a professional or technical field and had children. Robins also alleged that Spokeo’s profile of him continued to misrepresent that he had a graduate degree, and that his economic health and wealth level was in the top 10 percent. Robins alleged that he was out of work and actively seeking employment and, because of the misinformation, he had encountered imminent and ongoing actual harm to his employment prospects. Moreover, he contended that Spokeo’s report made him appear (i) overqualified for jobs that he might have gained, (ii) expectant of a higher salary than employers would be willing to pay, and (iii) less mobile because of family responsibilities.

Rulings of Courts Below

The District Court dismissed the complaint for lack of standing. On appeal, a panel of the Ninth Circuit reversed and noted that Robins had alleged that “Spokeo violated *his* statuto-

ry rights, not just the statutory rights of other people.” Moreover, “Robins’ personal interests in the handling of his credit information were individualized rather than collective.” Based thereon, the Ninth Circuit held that Robins had adequately alleged injury-in-fact, a requirement for standing under Article III of the Constitution; thus, the alleged violations of his statutory rights were sufficient to satisfy the injury-in-fact requirement. Spokeo then sought review from the United States Supreme Court, which was granted last year.³

Note that the Ninth Circuit opinion highlighted a growing split among the circuits. The Second and Fourth Circuits have held that a mere statutory violation that does not result in actual harm does not provide standing for a plaintiff. Whereas, the Sixth and Seventh Circuits have found Article III standing based on violation of minor statutory rights.⁴

The Ruling of the U.S. Supreme Court

The Court began its analysis by acknowledging that the Constitution confers limited authority on each branch of government and, in the case of the judicial branch, the power and authority only extends to “cases” and “controversies.” Accordingly, in order for a litigant to have Article III standing to bring a cause of action in the federal court, the plaintiff must show that (i) it suffered an injury-in-fact, (ii) that is fairly traceable to the challenged conduct of the defendant, and (iii) that is likely to be redressed by a favorable judicial decision – the so-called “irreducible constitutional minimum.” The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements. To satisfy the first element—injury-in-fact—a plaintiff must show that he or she suffered “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” For an injury to be “particularized,” according to the Court, it “must affect the plaintiff in a personal and individual way”—*i.e.*, allege that he/she has personally suffered some actual or threatened injury. The Ninth Circuit concluded that this element had been satisfied by Robins in his complaint by alleging “concrete, *de facto*” injuries based on (i) the alleged violation of his statutory rights (as opposed to the rights of others) by Spokeo, and (ii) his personal interest in

the handling of his credit information being individualized (rather than collective), both of which, according to the Court, concerned particularization and not concreteness.

However, the Court noted that demonstrating "particularization" alone, is not sufficient to confer Article III standing. The plaintiff must also show that the injury-in-fact is "concrete," something that the Ninth Circuit did not consider. According to the Court, "[a] 'concrete' injury must be '*de facto*,' that is, it must actually exist." It must be "real" and not "abstract." The injury alleged need not be tangible to meet "concreteness." The Court then indicated that:

Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury in fact requirement of Article III...⁵

Nevertheless, the Court also recognized that, if a party can demonstrate the risk of real harm, the requirement of concreteness can be satisfied. The Court also noted that not all violations or, in this case, the alleged inaccuracies, cause harm or present any material risk of harm (such as publishing an inaccurate zip code). Because the Ninth Circuit failed to fully appreciate the distinction between particularization and concreteness, its standing analysis, according to Justice Alito, was incomplete. On remand, the Ninth Circuit must address and consider whether the particular violations alleged in the complaint entail a degree of risk sufficient to meet the concreteness requirement.

Concurring Opinion by Justice Thomas

Justice Thomas filed a concurring opinion to explain how the injury-in fact requirement applies to different types of rights. Justice Thomas first reviewed the judicial power of the common law courts and, in the process, noted that standing and remedies for private-right causes of actions are not contingent on a plaintiff's allegation of damages beyond the

violation of his private legal right (*i.e.*, such as for trespass, infringement of intellectual property and unjust enrichment). However, when the injury relates to violations of "public rights" - rights involving duties owed to the whole community - generally, only the government has the authority to vindicate a harm borne by the public at large, except in certain limited cases involving some extraordinary or special damage (*i.e.*, a nuisance). It is this difference that, according to Justice Thomas, underlies the modern "injury-in-fact" standing doctrine. The requirement that a concrete injury for standing be demonstrated safeguards and protects the separation of powers and precludes the impermissible delegation of law enforcement authority from the executive/legislative branch to the private individual. While recognizing that Congress can create new private causes of action and can authorize private parties to sue based on a violation of such rights, nevertheless, absent showing that the violation of the public right has caused the individual a concrete, individual harm, distinct from the general population, the private party lacks constitutional standing to enforce such public rights (*i.e.*, statutory violations).

Finally, Justice Thomas agreed with the majority opinion that remand was required "because one claim in Robins' complaint rests on a statutory provision that could arguably establish a private cause of action to vindicate the violations of a privately held right" - that is, the requirement in Section 1681e(b) to follow reasonable procedures to assure maximum possible accuracy of information concerning the individual about whom the report relates. According to Justice Thomas:

If Congress has created a private duty owed personally to Robins to protect his information, then the violation of the legal duty suffices for Article III injury in fact. If that provision, however, vests any and all consumers with the power to police "reasonable procedures" of Spokeo, without more, then Robins has no standing to sue for its violation absent an allegation that he suffered individualized harm. On remand, the Court of Appeals can consider the nature of this claim.⁶

As is often the case, the Supreme Court's answer to one question, rather than providing clarity, simply leads to more questions.

Dissenting Opinion by Justice Ginsburg, joined in by Justice Sotomayor

While the justices agreed with the majority opinion in so far as delineating the requirements for Article III standing, Justice Ginsberg disagreed with the need to remand the case to the lower court to determine whether Robins' particularized injury was concrete. Justice Ginsberg believed that Robins' allegations satisfied the minimum standing requirements to get him "over the threshold," particularly at this early stage of the case in which the court, in the first instance, must assume the truth of Robins' factual allegations. Justice Ginsberg then took issue with the majority's focus on the distinction between the terms "concrete" and "particularized" as relates to establishing injury in fact to support Article III standing. After reviewing various cases relied on by the majority, Justice Ginsberg concluded that Robins had alleged sufficient injuries to grant him standing and, therefore, there was no utility in returning the case to the Ninth Circuit to address what the complaint already alleged—*i.e.*, that Spokeo's misinformation caused Robins actual harm to his employment prospects, which the procedural requirements of the FCRA were meant to protect.

Potential Ramifications and More to Come...

As is often the case, the Supreme Court's answer to one question, rather than providing clarity, simply leads to more questions. On the one hand, the Court made clear that a mere statutory violation without more is not sufficient to establish constitutional Article III standing, thereby making the pursuit of class actions for statutory violations more difficult. On the other hand, the Court noted that in some instances the breach of a "procedural right" may establish a "concrete injury" sufficient to confer standing on a plaintiff. It is entirely unclear, however, what types of procedural violations will be sufficient to establish standing.⁷ Some actual harm must be shown, but the nature and extent of the actual harm remains an open issue. Note that there are many other federal and state statutes that deal with privacy and data breaches that may present similar standing issues, and thus, the decision of the Supreme Court is likely to be far reaching beyond the FCRA.

From a practical perspective, this new ruling will certainly make it more difficult for

plaintiffs to establish a basis to pursue businesses, on an individual or class basis, for statutory damages for violations of consumer protection laws in federal courts, but not necessarily in state courts. Absent a showing of "actual harm," the plaintiff will not be able to satisfy the standard articulated by the Court in *Spokeo*. What the Court will find sufficient to constitute "actual harm," remains an open question.

NOTES

1. *Spokeo Inc v Robins*, ___ US ___, 136 S Ct 1540 (2016).
2. 136 S Ct at 1550.
3. 135 S Ct 1892 (2015).
4. See *e.g.*, *Beandry v TeleCheck Servs*, 579 F3d 702 (6th Cir 2009).
5. 136 S Ct at 1549.
6. 136 S Ct at 1553.
7. See *e.g.*, *Rogers v Capital One Bank (USA), NA*, No 1:15-CV-4016, 2016 US Dist LEXIS 73605 (ND Ga June 3, 2016). In *Rogers*, the Court went out of its way to find a concrete injury to justify Article III standing, while attempting to harmonize its decision with *Spokeo*. Query after *Spokeo* whether a party can automatically satisfy the injury requirement for standing when a claim is pursued under a statute that provides for a minimum damage amount, regardless of the existence of actual damages.



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