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Supreme Court's *Spokeo* decision hasn't resolved issues of concreteness

In a much-anticipated decision, the U.S. Supreme Court recently ruled on a critical question in privacy and consumer class-action litigation — whether plaintiffs who may have suffered no actual injury beyond an alleged violation of a consumer protection statute can bring suit.

In a 6-2 decision, the court in *Spokeo v. Robins* concluded that while a plaintiff does not automatically satisfy the "injury in fact" requirement of Article III when a statute grants a right and authorizes a suit to vindicate that right, intangible injuries such as the risk of real harm may be enough to constitute injury in fact for the purposes of standing.

Both sides of the case are claiming victory.

Both plaintiffs and defense lawyers are predicting that the ruling will have significant impact on the future of consumer class-action litigation in a number of arenas, including privacy, data breach and Telephone Consumer Protection Act cases, among others.

And plaintiffs and defendants — and their lawyers — in multiple cases across the country are claiming the case bolsters their side of the standing argument.

Spokeo operates a "people search engine" through which employers and potential romantic interests (among others) can search for and review Spokeo-generated profiles containing personal information about prospective employees.

After discovering that his profile inaccurately showed him as an affluent 50-something man who was married with children and held an advanced degree, plaintiff Thomas Robins filed a federal class action alleging that Spokeo willfully failed to comply with the Fair Credit Reporting Act of 1979, which requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy" of consumer reports.

The U.S. District Court dismissed the case for lack of standing, but the 9th U.S. Circuit Court of Apppeals reversed, concluding that Robins had adequately alleged injury-in-fact.

The court's opinion, written by Justice Samuel A. Alito Jr., and joined by Chief Justice John G. Roberts Jr. and Justices Stephen G. Breyer, Elena Kagan, Anthony M. Kennedy and Clarence Thomas, reiterated prior holdings that the Article III injury-in-fact requirement requires a plaintiff to show that he or she suffered a "concrete and particularized" injury that is "actual or imminent, not conjectural or hypothetical," even in the context of a statutory violation.

The court also found that the 9th Circuit had focused on the particularized element of the requirement and failed to consider the concreteness aspect. In describing what constitutes a "concrete" injury, the court explained that an injury must be "de facto" or that it must actually exist. In sum, it must be "real" and "not abstract."

Concrete does not mean "tangible," however.

Noting that while "tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete."

The court also explained that Congress is particularly well suited to "identify intangible harms that meet minimum Article III requirements."

At the same time, the court explained (if somewhat murkily) that a "bare procedural violation" of a consumer statute, "divorced from any concrete harm" is not enough to establish standing, although "in some circumstances," the violation of a procedural right granted by statute can constitute injury-in-fact, without the plaintiff having to allege any additional harm.

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The court suggested that broad categories of intangible injuries can establish standing, citing by way of example, prior decisions in which it held that the inability to obtain information subject to disclosure under federal law was a sufficient injury-in-fact.

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The court's interpretation of the Fair Credit Reporting Act — the statute at issue in the underlying case — seemed to suggest that the power of Congress to define concrete injuries is limited. That is, Congress cannot simply equate a violation of any statutory provision with concrete harm sufficient to establish standing, even though the particular law does not expressly state that a showing of additional harm is required.

The opinion attempts to clarify its analysis by stating that some "technical" violations of the reporting act — like failure to provide required notice and some inaccuracies in credit reports, such as an incorrect ZIP code — may not be sufficiently concrete to provide constitutional standing.

The court stated, it is "difficult to imagine how the dissemination of an incorrect ZIP code, without more, could work any concrete harm."

With this framework in mind, the court sent the case back to the 9th Circuit to complete the standing analysis. In particular, it directed the appeals court to "examine whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement."

In the dissenting opinion, Justice Ruth Bader Ginsburg, writing for herself and Justice Sonia M. Sotomayor, argued that because Robins alleged Spokeo's misinformation caused actual harm to his employment prospects, and the reporting act's procedural requirements regarding accurate information were aimed at preventing this type of harm, he had satisfied the concrete harm "threshold." Therefore, there was no need to remand the case for further proceedings.

Court watchers predicted that the *Spokeo* decision could have a major impact on the use of private lawsuits, and in particular class actions, to enforce privacy and consumer protection laws by providing some concrete guidance on what actually is required to establish injury in fact for Article III standing.

At least immediately, however, it seems that the absence of a clear standard in the opinion may just lead to more of the same old, same old. In the wake of *Spokeo*, plaintiffs may feel emboldened by the court's rejection of the strict "real world injury" standard, to continue to file class actions alleging violations of privacy, data breach and consumer protection statues like the TCPA and arguing that these actions should proceed even in the absence of an actual or precise economic harm.

And defendants will continue to assert lack of standing in those cases that allege the violation of statute without setting forth concrete harm. Defendants also may rely on *Spokeo* to challenge class certification, by arguing that establishing the existence of a concrete injury will require unique inquiries about each particular plaintiff's circumstances, making them ill-suited for a class action.

In fact, this scenario is already playing out in courtrooms across the country. In a data breach class action pending in the Northern District of Illinois, Barnes & Noble booksellers argued that the suit should be dismissed in the wake of *Spokeo* because the consumers failed to show that they have been harmed.

Because three out of four lead plaintiffs failed to allege that anything adverse happened to them or their information and the fourth plaintiff actually alleged facts that disprove a plausible connection between her alleged injury and the security breach, Barnes & Noble argued that the lack of concrete injury warrants dismissal under *Spokeo*.

In response, the plaintiffs claimed that the *Spokeo* ruling actually cuts the other way, in that it reaffirmed the proposition that the risk of real harm can satisfy the requirement of concreteness.

The plaintiffs argued that the risk of real harm has been established in their case, in which "63 Barnes & Noble locations were infiltrated by skimmers who gained unauthorized access to its payment processing network with the obvious purpose" of stealing personally identifiable information.

In another case, a federal judge in Wisconsin dismissed a putative class action against a cable company, alleged that the company collected personal information from customers and maintained the information even after those customers canceled their subscription plans. The court found that the lead plaintiff customer lacked Article III standing under *Spokeo*, because the complaint failed to allege any concrete injury, since the plaintiff did not claim any misuse of his personal information as a result of its retention.

And in a case that is already reverberating through federal courtrooms, the 3rd U.S. Circuit Court of Appeals found that plaintiffs in a class-action lawsuit alleging federal and state claims related to the collection and sharing of data on children's internet video-watching habits did have standing under *Spokeo*, because "the purported injury here is clearly particularized, as each plaintiff complains about the disclosure of information relating to his or her online behavior," and "the harm is also concrete in the sense that it involves a clear de facto injury, i.e., the unlawful disclosure of legally protected information."

In the longer term, while the decision makes clear that the ability of Congress to provide individuals with the private right of action for violations of consumer protection statutes is not unlimited and remains constrained by Article III, the court's clear statement that Congress is "well positioned" to identify and elevate intangible harms not previously adequate to satisfy the injury-in-fact-requirement "to the status of legally cognizable," suggests Congress has broad latitude in crafting privacy and consumer protection laws.