

[Spokeo, Inc. v. Robins, No. 13-1339](#)

The Supreme Court today issued its decision in *Spokeo, Inc. v. Robins*, a closely-watched case presenting the question whether Article III's "injury-in-fact" requirement for standing to sue in federal court may be satisfied by alleging a statutory violation without any accompanying real-world injury.

The Court held that a plaintiff must allege "concrete" harm—which it described as harm that is "real"—to have standing to sue, and that the existence of a private right of action under a federal statute does not automatically suffice to meet the "real" harm standard. The decision is likely to have a meaningful impact on class action litigation based on alleged statutory violations. Justice Alito authored the opinion for the Court, joined by Chief Justice Roberts and Justices Kennedy, Thomas, Breyer, and Kagan. (Mayer Brown represented Spokeo before the Supreme Court.)

The case involved claims that Spokeo, a web-based search engine, violated several provisions of the Fair Credit Reporting Act in connection with information about the plaintiff. The named plaintiff sought statutory damages on behalf of himself and every other individual whose information appeared on Spokeo's website. The Ninth Circuit found that he had standing based simply on the plaintiff's allegation that Spokeo "violated *his* statutory rights" and the fact that the plaintiff's "personal interests in the handling of his credit information are *individualized*."

The Supreme Court held that "the injury-in-fact requirement requires a plaintiff to allege an injury that is both 'concrete and particularized.'" The Ninth Circuit erred, the Court explained, because it ignored the "concreteness" element, which requires that the plaintiff show that his or her alleged concrete injury "actually exist[s]" and that it is "'real,' and not 'abstract.'"

The Court pointed out that it previously has held that "intangible injuries" can qualify as "concrete." It stated: "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." Therefore "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." And, Congress's judgment about whether a particular intangible harm satisfies Article III is "instructive and important."

But, the Court cautioned,

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.

A "bare procedural violation, divorced from any concrete harm," cannot "satisfy the injury-in-fact requirement of Article III." That is a square rejection of the legal theory on which lower courts—most prominently the Ninth Circuit—have upheld standing in class actions under more than a dozen federal statutes.

The Court pointed out that the plaintiff need not have suffered concrete harm in order to sue: a "risk of real harm" can in some circumstances satisfy the concrete harm requirement. It cited its prior ruling in *Clapper v. Amnesty International USA*, which stated that a "'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient."

Significantly, the Court in *Spokeo* emphasized that violations of FCRA procedural rights do not necessarily result in concrete harm. And "not all inaccuracies cause harm or present any risk of harm."

The Court remanded the case for the Ninth Circuit to consider whether "the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement."

Justice Thomas joined the Court's opinion but wrote separately to explain his view of how the injury-in-fact requirement applies to "public" versus "private" rights. Justice Ginsburg, joined by Justice Sotomayor, filed a dissenting opinion. Although "agree[ing] with much of the Court's opinion," Justice Ginsburg did not think it was necessary to remand the case to determine whether the plaintiff had alleged a concrete injury.

The decision in *Spokeo* eliminates the "no injury" class action. Plaintiffs' lawyers will now be required to demonstrate that the named plaintiff, and each class member, suffered "real harm" or faced a "certainly impending" risk of real harm. And to the extent the alleged harm is intangible, they will have to demonstrate that it "has a close relationship" to injury deemed sufficient to permit suit at common law and that Congress has made a judgment that the intangible harm should satisfy Article III. Although both of these inquiries are "instructive," the ultimate judgment is one for the courts.

Even if the concrete harm test is satisfied, class action lawyers will face an additional hurdle—the obligation to demonstrate that each class member has standing will create a significant individualized issue that may well preclude class certification on the ground that common issues do not predominate.

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