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Article III Standing: You May Be Particularized But Are You Concrete?

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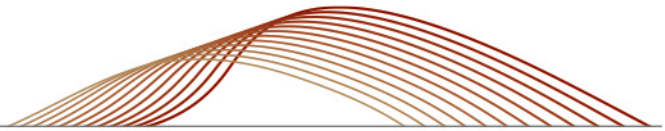
In *Spokeo, Inc. v. Robins*,[1] the Supreme Court confirmed the power of the word "and." In a six to two decision, the Court confirmed that to satisfy the "injury-in-fact" prong of the three-part test to establish Article III standing, plaintiffs must show that the injury was both "concrete" **and** "particularized."

Spokeo was a case of particular interest to those companies facing privacy class actions and other consumer class actions where the plaintiffs claimed no substantive injury but sought recovery based on violations of procedural statutes. Courts had been divided over the question of whether the statutory violation alone is sufficient to give Article III standing to the named plaintiff in those cases. *Spokeo* laid to rest confusion amongst lower courts as to whether the term "concrete and particularized" was a definitional phrase – denoting only one requirement – or whether the term obligated satisfaction of two separate requirements. Those two potential readings are different, and the difference, at least conceptually, is important. As the Court made clear, a statutory violation that is particular to one plaintiff may not be concrete to that same person.

By answering one question, however, the Supreme Court raised several others. While the requirement that an injury be "particularized" – *i.e.*, be "personal and individual[ized]"[2] – is simple enough to understand, it is less clear what kind and degree of injury will be sufficiently "concrete in future cases." In the context of the Fair Credit Reporting Act – the claim at issue in *Spokeo* – and of privacy law in general, where it is often difficult to demonstrate any injury at all, it is now increasingly unclear what kind or level of harm will constitute a "concrete" injury. Justice Ginsburg, joined by Justice Sotomayor, argued that plaintiff Robins had alleged a sufficiently "concrete" injury to satisfy the requirement, refusing to join in the Court's judgment. The majority of the Court disagreed, refusing to hold that the mere procedural violation Robins alleged necessarily granted standing. Instead, the Court remanded to the Ninth Circuit for application of the confirmed test, leaving uncertain precisely how meaningful the Court's new test will prove to be.

Background

In *Spokeo,* plaintiff sued Spokeo Inc. on behalf of himself and a class of those similarly situated under the federal Fair Credit Reporting Act[3] ("FCRA"). Spokeo operates an Internet "people search engine,"[4] that upon request searches a variety of databases to compile personal information about a particular person.[5] The FCRA, aimed at ensuring "fair and accurate credit reporting," imposes various



requirements on consumer reporting agencies, including "reasonable procedures to assure maximum possible accuracy of" consumer reports.[6]

When Robins discovered inaccurate information about himself displayed on the Spokeo website, he filed a class-action complaint on behalf of himself and others, alleging that Spokeo was a consumer reporting agency and that it "willfully" failed to comply with the FCRA.[7] Robins argued that misinformation displayed on the Spokeo website about him, including about his "education, family situation, and economic status," negatively affected his employment prospects.[8] The District Court dismissed the complaint, holding that Robins had failed to properly plead "injury-in-fact" to establish Article III standing."[9] The Ninth Circuit reversed, basing its decision on the allegation that Spokeo had violated Robins' own statutory rights, "not just the statutory rights of other people," and that Robins' "personal interests in handling his credit information" was "individualized rather than collective."[10]

Supreme Court Distinguishes the Requirements for a "Particularized" and "Concrete" Injury

The Supreme Court reversed the Ninth Circuit's decision.

The Court began by acknowledging that the "irreducible constitutional minimum" of standing under Article III of the U.S. Constitution requires "plaintiffs to have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[11] To satisfy the "injury in fact" prong, the Court explained, the plaintiff must allege "an invasion of a legally protected interest," that is "concrete and particularized," and "actual or imminent.[12]

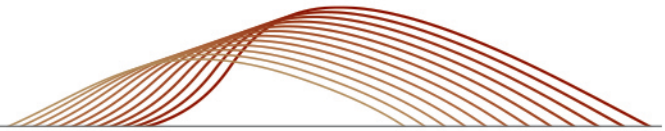
The Court then held that the Ninth Circuit had erred, not necessarily in holding that Robins' injury was "concrete and particularized," but by failing to analyze the two requirements – "concrete" and "particularized" – separately.[13] The Court stated that because the Ninth Circuit had failed to "appreciate the distinction between concreteness and particularization, its standing analysis was incomplete."[14]

Fortunately, the Court also provided some guidance on what constitutes a "concrete" injury. The Court stated that a "concrete" injury must be "'*de facto*'; that is, it must actually exist."[15] Furthermore, it must be "'real,' and not 'abstract.'"[16] The Court, however, also hastened to add that this does not necessarily require an injury to be "tangible," and that intangible injuries, such as violations to the right to free speech, have nevertheless been recognized as concrete.[17]

In determining whether an **intangible** injury was nevertheless a concrete one, the Court provided two touchstones:

- First, whether the "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."[18] The closer the relationship to those traditional categories of harm, the more likely the intangible harm would be recognized as "concrete."[19]

- Second, the Court highlighted Congress' judgment, stating that Congress was "well positioned to identify intangible harms that meet Article III requirements,"[20] but qualified that Congress' granting of a statutory right did not automatically grant standing, and a "bare procedural violation, divorced from any concrete harm," would still be insufficient in the context of vindicating statutory rights.[21]



The Court also explained that the "risk of real harm," without actual harm, in some cases, could satisfy the concreteness requirement.[22]

In light of these principles, the Court held that remand was necessary to determine whether the injuries that Robins alleged were "concrete."[23]

Justice Ginsburg, joined by Justice Sotomayor, while agreeing with most of the Court's reasoning, disagreed that Robins had failed sufficiently to plead a concrete injury. Justice Ginsburg reasoned that because the misinformation about Robins' "education, family situation, and economic status" could negatively "affect his fortune in the job market,"[24] and "FCRA's procedural requirements aimed to prevent such harm," Robins' complaint had sufficiently alleged "concrete" harm.[25]

It is interesting that the majority did not explicitly join the dissent on this point or otherwise respond to Justice Ginsburg's argument. Under one reading, it could simply mean that the majority and dissenters disagreed on whether Robins had sufficiently pleaded a "concrete" injury, that the majority believed Robins' allegations were insufficient, and that the dissenters thought otherwise. It may also suggest that the majority believed that it was better, as a matter of prudence, to allow the lower courts to make a determination on whether Robins had sufficiently pleaded a "concrete injury" in light of the Court's decision, even though procedurally the Supreme Court did have *de novo* review.[26] It may mean something else entirely.

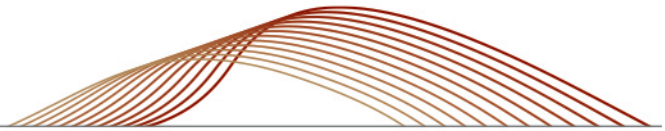
Ultimately, we will see on remand whether, although this specific complaint may have failed sufficiently to plead "concrete" injury, the harms at issue here still may prove sufficiently "concrete" if pled properly.

One Answer Leads to More Questions: What will Constitute "Concrete" Harm?

Now that plaintiffs must allege facts sufficient to show that an injury is both "particularized" **and** "concrete," the obvious question arises: what facts will need to be pled to satisfy this requirement? As mentioned above, the requirement that an injury be "particularized" is simple enough – the injury must be "personal and individual[ized]."[27] But what constitutes "concrete?" This question will have implications both in the privacy law context and, more broadly, for a range of class-action claims.

In the context of privacy harms, it is still an open question as to whether the types of privacy harms that Robins alleged could ever amount to "concrete injury," even if properly pled. *Spokeo*, at a minimum, suggests that allegations of misinformation regarding "education, family situation, and economic status," possibly leading to reduced job prospects, need to be articulated more robustly. Beyond that, all that can be deduced is that courts will begin placing more scrutiny at the pleading stage on whether the plaintiffs' alleged harm was "concrete." Considering that privacy plaintiffs have already encountered difficulty in establishing Article III standing, it will be interesting to see how *Spokeo* will effect plaintiffs' ability to bring suits based on privacy harms.[28]

Spokeo was originally thought to be most relevant to the emerging world of privacy class actions. But it may have an equally important impact for consumer class actions generally. In all class actions, Article III requires each plaintiff to have standing to sue.[29] Courts in past years have struggled to explain what a named plaintiff must do to show that all class members possess Article III standing. *Spokeo* adds some clarity to that question. While this is a case about the named plaintiff's standing, the Article III standard is the same. Now that it is clear each plaintiff must allege a "concrete" – an actual, *de facto* – injury, as well as a "particularized" one, so too must all class members.



In short, *Spokeo* suggests that no class should be certified, in any consumer context, privacy or otherwise, where the named plaintiff has not shown that the "concreteness" of each class member's standing is capable of class-wide resolution using common proof. Ultimately, that should prove the most lasting legacy of the Court's decision.

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1 *Spokeo, Inc. v. Robins*, No. 13-1339, 2016 WL 2832447 (U.S. May 16, 2016).

2 *Id* at *6.

3 15 U.S.C. § 1681, *et seq*.

4 *Spokeo*, 2016 WL 2832447, at *2.

5 *Id*. at *3; *see also Spokeo*, http://www.spokeo.com/ (May 19, 2016).

6 *Spokeo*, 2016 WL 2832447, at *3. Other duties imposed by FCRA relevant to the suit included: "to notify providers and users of consumer information of their responsibilities under the Act… to limit the circumstances in which such agencies provide consumer reports 'for employment purposes,'… and to post toll-free numbers for consumers to request reports." *Id*.

7 *Id* at *4.

8 *Id* at *16 (Ginsburg, J., dissenting).

9 *Id* at *4.

10 *Id*.

11 *Id* at *6 (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

12 *Id*.

13 *Id*.

14 *Id* at *8.

15 *Id* at *7.

16 *Id*.

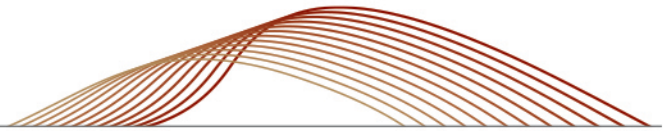
17 *Id*.

18 *Id*.

19 *Id*.

20 *Id*.

21 *Id*.



[22] *Id* at *8.

[23] *Id* at *3.

[24] *Id* at *16.

[25] *Id*.

[26] *See e.g. Harper v. Blockbuster Ent. Corp.*, 139 F. 3d 1385, 1387 (11th Cir. 1998) ("[t]he standard of review for a motion to dismiss is the same for the appellate court as it is for the trial court), *cert. denied*, 525 U.S. 1000 (1998).

[27] *See id* at *6.

[28] *See e.g. Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 (finding plaintiff's alleged privacy harms were a "speculative chain of possibilities" insufficient to grant Article III standing).

[29] "That a suit may be a class action...adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.'" *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 40, n. 20 (1976) (quoting *Warth v. Seldin*, 422 U.S.490, 502 (1975)).