

Class Action Monitor

Supreme Court Reiterates Concrete Injury Requirement in Consumer Class Action Statutory Damages Case

by David Lender, Greg Silbert,
Eric Hochstadt and Gaspard Curioni

Yesterday, the Supreme Court issued a 6-2 decision in *Spokeo, Inc. v. Robins*,¹ a case closely followed by the class action bar to see how high a hurdle Article III's constitutional standing requirement is in class actions seeking large damages for technical or procedural alleged statutory violations that cause no actual injury. The Court made clear that Congress cannot manufacture Article III standing simply by creating statutory rights enforced by private rights of action. Instead, the Court reaffirmed its longstanding doctrine that a private litigant must assert at the pleading stage an injury that is not only "particularized" but also sufficiently "concrete" to present an actual case or controversy for a federal court to resolve. According to the Court, the injury-in-fact requirement for Article III standing must be determined on a case-by-case—and indeed statute-by-statute—basis. The decision's biggest impact may be on class certification: by underscoring that standing requires a particularized and concrete harm, *Spokeo* emphasizes individualized standing issues that may be difficult for plaintiffs to allege or prove on a classwide basis. Post-*Spokeo*, defendants now have a potentially powerful argument for challenging "gotcha"-type class actions under the guise of consumer protection both at the pleading and class certification stages.

Background

Thomas Robins brought a class action lawsuit against Spokeo—an online search engine that aggregates and offers information about individuals—for disseminating allegedly inaccurate personal and professional details. Specifically, Robins alleged that Spokeo had generated a profile that falsely listed him as married, with children, in his fifties, employed, with a graduate degree, and with "relatively affluent" means.² Robins claimed that Spokeo's inaccurate report violated the Fair Credit Reporting Act (FCRA), which provides in pertinent part that "consumer reporting agencies" must "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."³ Under the FCRA, "[a]ny person who willfully fails to comply with any requirement [of the FCRA] with respect to any consumer is liable to that consumer," either for actual damages or statutory damages ranging from \$100 to \$1000 per violation.⁴ The U.S. District Court for the Central District of California dismissed the complaint for lack of standing, but the Ninth Circuit reversed, holding that it sufficed for standing purposes that Robins alleged that "Spokeo violated his statutory rights" and that *his* "personal interest in the handling of his credit information are individualized rather than collective."⁵

Decision

The Supreme Court rejected the Ninth Circuit's analysis as "incomplete" because it focused narrowly on the asserted injury's "particularity" (*i.e.*, whether Robins suffered an injury that affected him "in a personal and individual way" when Spokeo allegedly failed to follow reasonable procedures to assure that his profile was accurate), while overlooking the issue of the asserted injury's "concreteness" (*i.e.*, whether Robins suffered a "real" injury when Spokeo allegedly failed to follow reasonable procedures).⁶ An injury must be both particularized and concrete to establish standing. The Court explained that "intangible" injuries could be "concrete" in certain circumstances, and Congress had a "role in identifying and elevating" intangible factual injuries not traditionally recognized at common law.⁷ However, the Court clarified that Congress could not bootstrap a concrete injury merely by "grant[ing] a person a statutory right and purport[ing] to authorize that person to sue to vindicate that right."⁸

In the context of Robins' grievance, this meant that Spokeo's "bare procedural violation [of the FCRA], divorced from any concrete harm," could not by itself establish standing, although a violation of a plaintiff's procedural rights could be sufficient if the violation entailed a "risk of real harm" to the plaintiff.⁹ To illustrate this distinction, the Court noted that an agency's reporting of an incorrect zip code in violation of the FCRA would not "work any concrete harm" to a consumer and was therefore insufficient to establish standing.¹⁰ Because the Ninth Circuit focused on "particularity" and neglected "concreteness" in its standing inquiry, the Court vacated and remanded the case to the court of appeals to determine "whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement."¹¹

Takeaways

The holding in *Spokeo* leaves the application of its particularized injury requirement to the lower courts to figure out in each case. Nevertheless, the Court reaffirmed well-settled doctrine against efforts by plaintiffs' counsel to short-circuit the constitutional standing analysis in actions dealing with statutorily created rights. The ruling effectively puts to rest the contention that the availability of statutory damages from an alleged technical violation is by itself sufficient to confer standing. *Spokeo* will likely impact litigation

throughout the federal courts under other consumer protection statutes, such as the Telephone Consumer Protection Act, which the plaintiffs' bar has leveraged in recent years to bring numerous class actions based on purely technical violations. Post-*Spokeo* companies facing such putative class actions can be expected to challenge vigorously a named plaintiff's standing at the pleading stage. The Court's decision in *Spokeo* may have implications for class certification as well. Even if a named plaintiff may have standing, the question of whether each absent class member has suffered concrete harm could be another avenue for companies to challenge class certification. For example, individual issues over whether each absent class member has suffered a concrete injury under *Spokeo* may either defeat certification or at the very least require a narrow class definition. Future decisions and aggressive use of *Spokeo* by companies facing minimum statutory damage class actions will reveal the full reach of the Court's decision, which may have a real impact in curbing some abuses of the class action process.

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1. *Spokeo, Inc. v. Robins*, No. 13-1339, 2016 WL 2842447 (U.S. May 16, 2016). Justice Thomas filed a concurring opinion, and Justices Ginsburg and Sotomayor filed a dissenting opinion.
 2. *Id.* at *4.
 3. 15 U.S.C. § 1681e(b). Importantly, the FCRA does not guarantee a right to accurate consumer reports, but to reasonable procedures designed to assure accurate reporting.
 4. § 1681n(a).
 5. *Robins v. Spokeo*, 742 F.3d 409, 413 (9th Cir. 2014).
 6. *See Spokeo*, 2016 WL 2842447, at *3, *6.
 7. *Id.* at *7.
 8. *Id.*
 9. *Id.* at *7-8.
 10. *Id.* at *8.
 11. *Id.* Justice Ginsburg's dissent disputed the need for remand and opined that the alleged harms, such as Robins' diminished employment prospects, were sufficiently concrete for Article III standing at the pleading stage. *Id.* at *16 ("Robins complains of misinformation about his education, family situation, and economic status, inaccurate representations that could affect his fortune in the job market.").

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If you have questions concerning the contents of this issue of *Class Action Monitor*, or would like more information about Weil's Class Action practice, please speak to your regular contact at Weil, or to the editors or authors listed below:

Editor:

David Singh (NY)	Bio Page	david.singh@weil.com	+1 212 310 8159
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Contributing Authors:

David Lender (NY)	Bio Page	david.lender@weil.com	+1 212 310 8153
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Gregory Silbert (NY)	Bio Page	gregory.silbert@weil.com	+1 212 310 8846
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Eric Hochstadt (NY)	Bio Page	eric.hochstadt@weil.com	+1 212 310 8538
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Gaspard Curioni (NY)	Bio Page	gaspard.curioni@weil.com	+1 212 310 8068
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