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Litigation

The U.S. Supreme Court announced its long-awaited decision in *Spokeo, Inc. v. Robins*, with a ruling that may prove significant to the analysis a trial court must conduct in deciding whether to certify a class—including potentially data breach cases—under federal rules, the authors write.

Supreme Court to Ninth Circuit in *Spokeo*—Get 'Real' on Injury




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In *Spokeo, Inc. v. Robins*, decided May 16, the U.S. Supreme Court ruled that plaintiffs who allege violations of statutes that contain a private right of action and statutory damages do not have automatic ''standing'' to sue. The Court instead found that to meet the constitutional requirement of standing, the plaintiff must establish not only the ''invasion of a legally protected interest'' defined by Congress, but also that the plaintiff suffered a ''concrete and particularized'' harm to that interest.

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The Supreme Court held that the U.S. Court of Appeals for the Ninth Circuit had erred by analyzing only whether the plaintiff's claim—that he was injured by dissemination of inaccurate information—was ''particular'' to the plaintiff, without separately considering whether the injury was ''concrete'' (13 PVLR 256, 2/10/14). The Court remanded to the Ninth Circuit to determine the concreteness of the claimed informational injury. The Court also provided useful guidance on the meaning of actual injury. Significantly, the Court acknowledged that while intangible injuries can indeed be ''real'' and ''concrete,'' such injuries can give rise to standing only where they pose some *de facto* risk of harm to the plaintiff. ''Bare'' or immaterial procedural violations will not suffice.

This holding should enhance the ability of companies to defend lawsuits under privacy, data security, informational rights statutes and perhaps other consumer protection statutes, where the plaintiffs advance proce-

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dural violations whose practical effects on the plaintiffs' own interests are so abstract, ethereal or implausible as to appear unreal. And now that the Court has established a demanding standard to judge the concreteness of harm even where Congress has expressly specified the underlying legal right, it should also follow that in non-statutory cases, where neither the Constitution nor any legislature has established a clearly defined legal right, intangible injury will have to be evaluated in accordance with standards at least as stringent as those established in *Spokeo* (and *Clapper* before it).

As discussed below, it may be that the Justices in the 6-2 majority in *Spokeo* simply could not take Mr. Robins' claims here seriously. His case was predicated on the arguably implausible claim that he was injured because the defendant disseminated information about him that was far better than the true facts about his life and (or so he claims) hindered his ability to improve his circumstances.

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Discussion

Spokeo arose under the Fair Credit Reporting Act (FCRA). 15 U.S.C. § 1681 *et seq*. FCRA is an information rights statute that promotes ''fair and accurate credit reporting,'' and requires ''consumer reporting agencies'' to ''follow reasonable procedures to assure maximum possible accuracy of'' consumer reports. *Id. at* § 1681e(b). The Court assumed without deciding that Spokeo, described as an online ''people search engine,'' Slip op. at 1, was a consumer reporting agency (CRA), which FCRA defines to include essentially any person or entity that ''regularly engages . . . in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. . . .'' 15 U.S.C. § 1681a(f). FCRA further defines a consumer report as ''information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used . . . for the purpose of serving as a factor in . . . eligibility for . . . credit or insurance . . . employment . . . or any other purpose [involving legitimate business needs in connection with transactions or accounts, or capacity for making child support payments, etc., as specified in [15 U.S.C. § 1681b].'' *Id. at* § 1681a(d)(1).

The Act also provides that ''[a]ny person who willfully fails to comply with any requirement . . . with respect to any consumer [defined as ''an individual''] is liable to that consumer'' for, among other things, either ''actual damages'' or statutory damages of $100 to $1,000 per violation, costs of the action and attorney's fees, and possible punitive damages. *Id.* § 1681n(a).

Although Congress has the power to "define" or "elevate" injuries, it can provide "instructive and important" guidance in identifying legally cognizable intangible harms, and can "give rise to a case or controversy where none existed before," it has limited power to confer standing.

According to the plaintiff, Spokeo provides its services to employers as well as ''those who want to investigate prospective romantic partners or seek other personal information.'' Slip op. at 4. He alleges that the profile Spokeo had generated about him was very inaccurate. The profile indicated Robins was married, with children, in his 50s, has a job, is relatively affluent, and holds a graduate degree. But according to Robins' complaint, all of this was incorrect. He allegedly is single, has no children, was unemployed and has neither the advanced education nor wealth that Spokeo reported.

Robins further claimed that this alleged misinformation caused ''[imminent and ongoing] actual harm to [his] employment prospects.'' Complaint at ¶ 35, *Robins v. Spokeo, Inc.* (C.D. Cal. 2011) (No 10-cv-05306) (10 PVLR 844, 6/6/11). He says Spokeo's report made him appear overqualified for jobs, seem likely to expect a higher salary than employers would be willing to pay, and less mobile because of family responsibilities.

The six-Justice majority took no position on whether these claimed failures of informational accuracy give rise to standing, but remanded the case to the Ninth Circuit to consider whether they satisfy the requirement that a plaintiff in federal court must allege (and eventually prove) a ''concrete'' injury to his or her interests.

Citing *Clapper v. Amnesty Int'l USA*, 568 U. S. ___, ___ (2013) (12 PVLR 350, 3/4/13), the Court wrote that the ''[t]he law of Article III standing . . . serves to prevent the judicial process from being used to usurp the powers of the political branches,'' and that the ''irreducible constitutional minimum'' of standing consists of three elements. . . .The plaintiff must 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.'' Slip op. at 6 (citing *Lujan v Defenders of Wildlife*, 504 U. S. 555, 560 (1992)). And, to establish 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.'' *Id.* at 7.

The Supreme Court noted that the Ninth Circuit relied on Circuit precedent to the effect that ''the violation of a statutory right is usually a sufficient injury in fact to confer standing.'' Such precedent included a case involving alleged informational injury under the Real Estate Settlement Procedures Act (RESPA). The Court had previously granted certiorari to consider those Ninth Circuit precedents, but then punted without de-

  PVLR ISSN 1538-3423

ciding the issue (or even explaining its decision to punt). *Edwards v. First American Corp.*, 610 F. 3d 514 (9th Cir. 2010), cert. granted *sub nom. First American Financial Corp. v. Edwards*, 564 U. S. 1018 (2011), cert. dism'd as improvidently granted, 567 U. S. ___ (2012) (*per curiam*). The Court then took up this same question in *Spokeo*.

The Court held that ''[p]articularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be 'concrete.' '' Slip op. at 8. While the Ninth Circuit had adequately determined that the plaintiff alleged ''particular'' and ''individualized'' injury to him, its error lay in its failure to consider whether that alleged injury was ''concrete.''

The Court's opinion went on to discuss the meaning of the ''concreteness'' component of Article III standing, including whether Congress may create new, actionable injuries by prescribing procedural or informational requirements, whether ''bare'' procedural violations are actionable, and whether intangible injuries could be sufficiently concrete.

Power of Congress to Define Intangible Procedural or Informational Injuries

The Court conceded that ''concrete'' injuries are not ''necessarily synonymous with 'tangible,' '' slip op. at 8-9, even while observing that tangible injuries ''are perhaps easier to recognize.'' *Id.* at 9. In particular, the Court noted that cases involving First Amendment interests like free speech or the free exercise of religion, tort injuries involving libel or slander, and informational/procedural cases concerning a plaintiff's ''inability to obtain information'' about voter or federal advisory committee data had all been found to satisfy standing requirements. The Court clarified, however, that to be ''concrete,'' any such intangible injury must be ''de facto,'' ''that is, it must actually exist.'' *Id* at 8.

Therefore, while Congress has the power to ''define'' or ''elevate'' injuries, it can provide ''instructive and important'' guidance in identifying legally cognizable intangible harms, and can ''give rise to a case or controversy where none existed before,'' the Constitution nonetheless limits the power of Congress to confer standing. Slip op. at 9.

The Court's discussion on this point merits quoting at length:

> In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles. Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, 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*. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U. S. 765, 775–777 (2000). In addition, *because Congress is well positioned to identify intangible harms* that meet minimum Article III requirements, *its judgment is also instructive and important*. Thus, we said in *Lujan* that Congress may ''elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'' 504 U. S., at 578. Similarly, Justice Kennedy's concurrence in that case explained that *''Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'' Id.*, at 580 (opinion concurring in part and concurring in judgment).
>
> 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. *Id.* (emphasis added).

One point that bears watching is whether the ''concreteness'' requirement will bolster defendants' efforts to defeat class certification in informational and procedural injury cases.

Materiality of Procedural Injury

The upshot is that even where Congress has created a statutory right with respect to an intangible injury, a plaintiff ''cannot satisfy the demands of Article III by alleging a bare procedural violation.'' Slip op. at 10. Turning specifically to the statute at hand, the Court noted that some violations of FCRA's procedural requirements might not result in any inaccuracy at all, and that ''not all inaccuracies cause harm or present any material risk of harm.'' For example, the Court said, ''[i]t is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.'' Slip op. at 11.

Accordingly, when considering a plaintiff's standing to sue on an intangible injury that stems from a claimed violation of an informational or procedural requirement, a court must now determine whether the alleged violation ''entail[s] a degree of risk sufficient to meet the concreteness requirement.'' *Id.* The case cannot proceed in federal court unless the intangible injury is ''*de facto*,'' ''real'' and ''not abstract,'' and poses an actual, material, or sufficient risk of harm—''that is, it must actually exist.'' Slip op. at 8.

Concurrence of Justice Thomas—Vindicating Public Versus Private Rights

Justice Thomas wrote separately to explain his view that modern standing doctrine plays a critical role in ensuring that the courts do not become entangled in disputes that are essentially political in nature. Where ''public rights'' are involved—namely, duties owed to the community at large—it is generally only the government that can sue to enforce the obligation. In the limited cases where private plaintiffs may sue, they must establish some ''particular'' damage to themselves that is distinct from any impact on community at large. Justice Thomas further distinguished between cases where a private plaintiff sues the government to uphold a statutory right and cases where a private plaintiff sues another private party to vindicate a statutory right. In the former case, standing requirements must be enforced more strictly to prevent Congress from imper-

missibly delegating law enforcement authority from the President to a private individual.

Dissent in 'Agreement'

While many observers anticipated that *Spokeo* would produce a sharp ideological divide, that prediction did not pan out in the end. Not only did two members of the Court's so-called liberal wing (Justices Breyer and Kagan) join Justice Alito's majority opinion, but in her dissent, Justice Ginsburg stated that she ''agree[d] with much of the Court's Opinion.'' Slip op. at 2 (Ginsburg, J. dissenting).

Justice Ginsburg disagreed only about whether it was necessary to send the case back to the Ninth Circuit to determine whether Robins' injury was concrete, as measured under the standards described in the majority opinion. She noted that Robins claimed a violation of his statutory right to truthful information about him personally, and was not asserting some generalized grievance to the ''citizenry,'' or public at large. Justice Ginsburg thus viewed the case as presenting a real controversy about whether Spokeo's alleged misinformation—which may have caused Robins to look like a more substantial, qualified and settled employment candidate than he truly was—had caused actual harm to his employment prospects.

Twombly/*Iqbal* Plausibility Standards and the "Concreteness" of Informational Injuries

One key question that remains to be resolved is whether the Ninth Circuit—and future courts considering informational injury—will assess with care whether plaintiffs' allegations of ''concrete'' injury are ''plausible,'' and thus satisfy the pleading standards articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Spokeo does not expressly indicate that *Twombly*/*Iqbal* standards should apply to a court's evaluation of whether the Article III ''concreteness'' requirement has been met. *Spokeo* did make clear, however, that ''at the pleading stage, the plaintiff must clearly allege facts demonstrating each element'' of the claim. Slip op. at 6. This language echoes prior standing decisions like *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), which state that the elements of standing ''must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.'' It should follow that the *Twombly*/*Iqbal* test applies with full force to whether a plaintiff has sufficiently pleaded a ''concrete'' injury.

Potential New Constraints on Class Action Suits?

Another point that bears watching is whether the ''concreteness'' requirement will bolster defendants' efforts to defeat class certification in informational and procedural injury cases. Mr. Robins, for example, seeks to represent a class consisting of ''[a]ll individuals in the United States who have had information relating to their credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living compiled and displayed by Spokeo Inc.'' since July 2006. Compl. at ¶ 38.

The Court's determination that ''concrete'' injury must be proved by a plaintiff could prove significant to the analysis that a trial court must conduct in deciding whether to certify a class under federal rules. For example, under Rule 23(b)(3), a class may not be certified unless the court determines that questions common to the class predominate over questions pertinent only to individual cases. Mr. Robins attempted to satisfy this requirement by pleading that every class member (i.e., essentially every person with a Spokeo profile) had been affected in substantially the same way by Spokeo's handling of personal information. But as the Court's opinion suggests, that approach to class-action pleading is problematic because ''[a] violation of one of the FCRA's procedural requirements may result in no harm.'' Slip op. at 10. Thus, as the Court's remand implies, and the separate opinions of Justices Thomas and Ginsburg each demonstrate, the question of whether any such harm has been adequately pleaded will in most cases call for a carefully individualized analysis of how the alleged informational violation has affected the plaintiff. In such a case, it seems unavoidable that individualized questions going to whether the plaintiff suffered any harm will predominate over any common questions (such as the adequacy of the defendant's policies on the collection and disclosure of information).

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