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Supreme Court Rules that Bare Statutory Violation without Other Concrete Harm Cannot Provide Federal Court Standing

MAY 17, 2016 Written by C. Allen Garrett Jr., James F. Bogan III and Michael J. Breslin

On May 16, 2016, the United States Supreme Court issued its opinion in *Spokeo v. Robins*, No. 13-1339, which presented the question of whether a plaintiff has standing in federal court to assert a claim where the only "injury-in-fact" is a violation of a statute conferring a right to sue. The Court's opinion reaffirmed the constitutional requirement that federal standing requires an injury that is both concrete and particularized and rejected the idea that a plaintiff can allege nothing more than a statutory violation.

In the underlying case, Robins sued Spokeo, an internet information aggregator, for allegedly violating the Fair Credit Reporting Act ("FCRA") when it attributed inaccurate personal information to him (in an online profile), including misinformation about his family, employment status and affluence. He alleged that Spokeo violated the FCRA's requirement to use reasonable procedures to ensure the accuracy of the information, but he did not allege he had lost a job, been denied credit, or otherwise been "harmed" (in the traditional sense) by Spokeo's actions. The district court dismissed the complaint for lack of standing, but the Ninth Circuit reversed, finding that the statutory violation itself constituted the "harm" conferring Article III standing.

Following a contentious oral argument in November 2015, in which the now-deceased Justice Scalia participated, the Court issued its decision on May 16, 2016, vacating the Ninth Circuit's opinion and remanding the case for further proceedings. Justice Alito, writing for a five-Justice majority, focused the analysis on the foundational first element of standing: injury-in-fact and the requirement that injury-in-fact be supported by a showing of "concrete and particularized" harm. Slip Op. at 7. A "particularized" injury is one that affects the plaintiff in a personal and individual way, rather than the public at large. *Id*. The Court found Robins had alleged a particularized injury because he claimed *his* statutory rights had been violated, and held the Ninth Circuit had correctly found as much. *Id*. at 7-8.

The Court then discussed the deficiency in the Ninth Circuit's ruling—its failure to consider whether Robins had also alleged an injury that was "concrete," meaning one that "actually exist[s]." Slip Op. at 8. Cautioning that "concrete" is not synonymous with "tangible," and recognizing that Congress can fashion remedies for intangible harms, the Court nonetheless held that a plaintiff does not automatically satisfy the injury-in-fact requirement simply because "a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id*. at 9. The Court went on to state that standing in federal court "requires a concrete injury *even in the context of a statutory violation*," and Robins therefore "could not . . . allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id*. at 9-10 (emphasis added). In sum, the Court held that a statutory violation, standing alone, does not rise to the level of a "concrete" injury for Article III purposes—though it did recognize later in the opinion that a "risk of real harm" could provide that requisite "concreteness." *Id.* at 10.

The Court buttressed its conclusion by explaining that procedural violations of the FCRA "may result in no harm." Slip

Op. at 10. It gave two examples. First, it noted that even if a consumer reporting agency failed to provide a notice to a user as required by 15 U.S.C. § 1681e(d), the information reported may be accurate nonetheless, making the failure to provide a notice immaterial. *Id*. at 10-11. Second, the Court noted that not all inaccuracies "cause harm or present any material risk of harm," giving the example of an error in a zip code, which it found "difficult to imagine" could be the source of any real harm. *Id.* at 11.

The Court found that the Ninth Circuit had failed in its analysis to appreciate the distinction between "concreteness" and "particularization," rendering the analysis not necessarily incorrect, but instead, "incomplete." *Id.* The Court took no position on whether Robins had alleged an injury-in-fact, and remanded the case to the Ninth Circuit to resolve an issue the Court was capable of resolving itself.

Justice Thomas filed a concurring opinion focusing on the difference between actions to vindicate private versus public rights. He noted that the "concrete-harm requirement does not apply as rigorously when a private plaintiff seeks to vindicate his own private rights," as opposed to vindicating a public right embodied in a federal statute. Slip Op. at 5 (Thomas, J., concurring). Accordingly, he concluded a plaintiff "seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right," whereas a plaintiff seeking to vindicate a statutory public right "must demonstrate that the violation of that public right has caused him a concrete, individual harm distinct from the general population." *Id*. at 6. He concurred with the majority's decision to vacate and remand because he agreed that, absent a showing of concrete and particularized harm, Robins could not sue for violations of FCRA duties owed to the public collectively. Surprisingly, however, he took a more forgiving view of the limits of standing with respect to Robins' claim for violation of § 1681e(b), which requires reasonable procedures to ensure maximum possible accuracy of reported information. Justice Thomas suggested that that particular statutory provision may confer a private rather than a public right, which, if true, would allow Robins to sue for its violation without establishing any particular and concrete injury. Thus, Justice Thomas's concurrence leaves the door open for the Ninth Circuit to conclude on remand that Robins may maintain at least one of his claims without having to satisfy the concrete injury requirement.

Justice Ginsburg, joined by Justice Sotomayor, dissented. Justice Ginsburg disagreed with the majority's (somewhat implicit) finding that Robins had failed to demonstrate concreteness of his injury. She pointed to the fact that Robins had described difficulty finding employment, and that the precise nature of the information he alleged to have been inaccurate could have reasonably caused him to face employment difficulties. Those allegations, she argued, provided the concreteness that the inquiry demands.

Ultimately, the takeaway from *Spokeo* is that a plaintiff must have some occurrence or risk of actual harm, separate and apart from the violation of a statute, to satisfy Article III's injury-in-fact requirement. Whether Robins sufficiently alleged such injury in the underlying lawsuit is now up to the Ninth Circuit to determine on remand, but *Spokeo* at least provides some clarity for future cases: there must be something more than a technical statutory violation to sustain a claim in federal court.

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