

10.4.1.2A Standing

In foreclosure and mortgage servicing cases, homeowners may raise a combination of federal and state claims (e.g., RESPA, TILA, state UDAP, and breach of contract). In addition to asserting a federal claim or diversity jurisdiction, borrowers wanting to maintain an action in federal court must demonstrate that an actual case or controversy exists.¹ Standing is fundamental to this case or controversy requirement. Standing must be shown for each cause of action for which federal subject matter jurisdiction is asserted.² Parties may not consent to or waive the defense of Article III standing.³ As a result, lack of standing may be raised at any stage of litigation or appeal. To establish Article III standing 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.”⁴ The party invoking federal jurisdiction bears the burden of establishing these elements.⁵

The Supreme Court in *Spokeo, Inc. v. Robins*,⁶ recently focused on the first of these elements—an injury in fact. The court stated that “[t]o 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.’”⁷ For an injury

¹ U.S. Const. art. III, § 2. Article III does not apply in state courts where standing requirements vary from state to state. *See, e.g.*, *Grosset v. Wenaas*, 175 P.3d 1184 (Cal. 2008) (“Article III of the federal Constitution imposes a ‘case-or-controversy limitation on federal jurisdiction’ . . . [t]here is no similar requirement in our state Constitution”); *Aspinall v. Philip Cos Morris, Inc.*, 813 N.E.2d 476 (Mass. 2004) (statutory damages under UDAP available even in absence of proof of actual damages). Importantly, state courts are considered courts of general jurisdiction presumed to have jurisdiction over federal claims unless Congress indicates otherwise, while federal courts are courts of limited jurisdiction requiring jurisdictional requirements to be satisfied. *See* *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 337 (2d Cir. 2006).

² *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008), *quoting* *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Federal courts may also have supplemental jurisdiction over certain state law claims. *See* § 10.4.1.3, *infra*.

³ *See* *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Because the case or controversy requirement goes to the subject matter jurisdiction of the federal courts, those courts, including appellate courts, have an obligation to determine whether standing exists, even in the absence of a challenge from any party. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

⁴ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *citing* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992); *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

⁵ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *citing* *FWIPBS, Inc. v. Dallas*, 492 U.S. 215, 231 (1990).

⁶ 136 S. Ct. 1540 (2016).

⁷ *Id.* at 1548.

to be particularized, it “must affect the plaintiff in a personal and individual way.”⁸ Concrete injuries need to be “real,” not “abstract,” but concrete is “not necessarily synonymous with ‘tangible.’”⁹ Therefore, the Court acknowledged that intangible harms may satisfy the injury in fact requirement.¹⁰

If a homeowner alleges, and can later prove, actual damages based on the defendant’s wrongful conduct, the injury in fact requirement should be easily satisfied. With respect to some causes of action, however, the homeowner may plead only a claim for statutory damages. When there is no allegation of actual damages, the homeowner must plead and prove “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.”¹¹ Significantly, *Spokeo* recognized that Congress “may elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law” and that “Congress is well positioned to identify intangible harms that meet minimum Article III requirements, [and] its judgment is also instructive and important.”¹² Analogizing to tort law, the Court also confirmed that “risk of real harm” is sufficient to satisfy concreteness.¹³ Thus, consumer attorneys should highlight the risk of harm that the relevant statute was designed to prevent when citing to intangible harms identified by Congress. Moreover, practitioners should highlight the real world consequences of statutory violations to distinguish them from “bare procedural violations.”¹⁴

A more detailed discussion on standing to seek statutory damages under specific federal consumer protection laws can be found in other NCLC treatises.¹⁵ A discussion of pleading standing under RESPA may be found at § 3.2.10.7, *supra*.

If a federal court dismisses a cause of action for lack of standing (i.e., lack of subject matter jurisdiction), the dismissal should be without prejudice, as the merits of the case were

⁸ *Id.*

⁹ *Id.* at 1548–1549.

¹⁰ *Id.* at 1549 (“we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete”).

¹¹ *Id.* at 1548.

¹² *Id.* at 1549.

¹³ *Id.*

¹⁴ *See id.* 1549–1550.

¹⁵ For Fair Credit Reporting Act violations, see National Consumer Law Center, Fair Credit Reporting § 11.2.1.3.9a (8th ed. 2013), *updated at* www.nclc.org/library. For Fair Debt Collection Practices Act violations, see generally National Consumer Law Center, Fair Debt Collection, Ch. 5 (8th ed. 2014), *updated at* www.nclc.org/library. For violations of the Truth in Lending Act or Telephone Consumer Protection Act, see respectively, National Consumer Law Center, Truth In Lending, Ch. 2 (9th ed. 2015), *updated at* www.nclc.org/library, and National Consumer Law Center, Federal Deception Law, § 6.9.2a (2d ed. 2016), *updated at* www.nclc.org/library.

not adjudicated.¹⁶ State courts may provide an alternative forum for prosecuting the homeowner's claims.

¹⁶ See *Hernandez v. Conriv Realty Assoc.*, 182 F.3d 121, 123–24 (2d Cir. 1999) (“Article III deprives federal courts of the power to dismiss a case with prejudice where federal subject matter jurisdiction does not exist”); *Freeman v. Oakland Unified Sch. Dist.*, 179 F.3d 846, 847 (9th Cir. 1999) (“Dismissals for lack of jurisdiction should be without prejudice so that a plaintiff may reassert his claims in a competent court.” (internal quotations omitted)).
