In 2010, Thomas Robins brought a class action against Spokeo, Inc., alleging that the company violated his rights under the Fair Credit Reporting Act by maintaining an inaccurate consumer report about him on its website. Remarkably, six years later—and even after a U.S. Supreme Court decision—Robins still has not received a definitive ruling on whether he has Article III standing to assert his claims. He now shares this quandary with hundreds of other plaintiffs in pending federal cases who seek to recover statutory damages.

In *Spokeo Inc. v. Robins*, the Court focused on the first of three prerequisites for standing in federal cases: injury in fact (the other two are traceability and redressability). The majority provided some guidance regarding when harm is “concrete” but broke no new ground. Concrete means “real,” not “abstract,” but it is not “necessarily synonymous with “tangible”—the plaintiff need not have suffered a personal injury or loss of money. A harm can be actionable even if it is “difficult to prove or measure,” and intangible injuries also can be concrete if they are closely related to harms that traditionally provide a basis for a lawsuit, or if Congress has acknowledged that the intangible harm is legally cognizable.

The Court did not reverse the lower court’s holding that Robins had adequately alleged standing, but it vacated and remanded to the Ninth Circuit to consider a question it had not addressed in the case before: Did Robins’s allegations of procedural violations show a material risk of concrete injury?

*Spokeo* raises as many new questions as it answers. Not surprisingly, district and appellate federal courts have issued a flood of subsequent decisions trying to apply the *Spokeo* principles. These decisions have revealed some preliminary trends that may be helpful in future cases.

**Tangible v. intangible.** While *Spokeo* clearly establishes that concrete harms can be tangible or intangible, courts appear to be more comfortable dealing with the former. Given a choice, assert tangible injuries when possible.

*Spokeo* also distinguished between procedural and substantive rights but did not clearly explain the difference. Plaintiffs who have successfully defeated *Spokeo* challenges usually steer clear of attempting to vindicate bare procedural rights, instead alleging concrete harms caused by statutory violations couched as substantive rights.

**One size will not fit all.** After *Spokeo*, there is no single approach to determine applicable standards for standing in a statutory damages case. Each statutory claim must be analyzed in the context of the facts presented—based not only on the general statute it is derived from but also on the specific section setting forth the cause of action. Determining a harm’s concreteness under a statute—let alone between statutes—likely will vary from provision to provision.

**Common law claims.** Courts that have applied *Spokeo* have been favorably disposed to statutory claims that clearly are analogous to established common law actions. Many right-to-privacy cases, for example, have successfully tethered their claims to established common law precedents. Ask yourself whether you could have brought the claim under common law principles.

**Defer to Congress.** Courts also have been willing to defer to Congress’s determination that a statutory violation creates a material risk of real-world harm. Thus, in cases asserting informational injuries, some courts have held that as long as Congress has decided plaintiffs are entitled to the information, standing is satisfied. Weaving congressional findings into your pleadings will further enhance the likelihood of eventually winning a *Spokeo* dispute.

**The role of state legislatures.** *Spokeo* recognizes that Congress can identify and elevate intangible harms that fulfill Article III standing requirements, but it does not address the role of state legislatures in doing the same. Courts are split as to whether Article III standing to pursue statutory damages can be

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based on state statutory violations. A defendant successfully arguing that no Article III standing exists may find itself remanded to a state court with a lower standing threshold.

Overall, it is important to recognize and consider the factors that likely underlie the Supreme Court’s reasoning in Spokeo and that affect its application by lower courts. Who has been harmed? How have they been harmed? How should courts deal with these issues? Ultimately, Spokeo provides an analytic framework, allowing courts to weed out some cases deemed unworthy of consideration. It will be crucial to explain why your client’s claim matters. 

**Notes**

2. 166 S. Ct. 1540, 1547–48 (2016) (internal numbering omitted) (“The plaintiff must have suffered an injury in fact, that is fairly traceable to the challenged conduct of the defendant; and that is likely to be redressed by a favorable decision.”).
3. Id. at 1548–49.
4. Id. at 1549.
5. Id. (citing as examples Vt. Agency of Natural Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 775–77 (2000) and Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 (1992)). Other than right to privacy, typical common law claims that might be relevant to Spokeo analyses include trespass, slander of title, unlawful restraint, and defamation.
6. Id. at 1550 n.8.
7. The National Consumer Law Center maintains a website with a significant collection of these recent decisions, broken down by subject matter, along with other useful practice resources. See library.nclc.org/spokeo-resources—subscribers-and-non-subscribers.
10. Spokeo, 166 S. Ct. at 1549.
12. See, e.g., Church v. Accretive Health Inc., 654 F. App’x 990 (11th Cir. 2016) (debtors have standing to sue for failure to provide required disclosures under the Fair Debt Collection Practices Act); but cf. Nicklaw v. Citimortgage, Inc., 839 F.3d 998 (11th Cir. 2016) (dismissing mortgagee’s claim arising out of mortgagee’s failure to timely record the discharge).
15. See, e.g., Polo v. Innoventions Int’l, LLC, 833 F.3d 1193, 1196–97 (9th Cir. 2016) (holding that after finding no Article III standing, district court should have remanded to state court); Khan v. Children’s Nat’l Health Sys., 2016 WL 2946165, at *7 (D. Md. May 19, 2016) (finding no Article III standing and remanding to state court).