



## Supreme Court Review

Reprinted with permission of *Trial*<sup>®</sup> (February 2017)  
Copyright © 2017 American Association for Justice<sup>®</sup>,  
Formerly Association of Trial Lawyers of America (ATLA<sup>®</sup>)  
[www.justice.org/publications](http://www.justice.org/publications)

# Still Standing After *Spokeo*

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.<sup>1</sup> 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).<sup>2</sup> The majority provided some guidance regarding when harm is “concrete” but broke no new ground.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup>

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?<sup>6</sup>

*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.<sup>7</sup> 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.<sup>8</sup>

**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.<sup>9</sup> Ask yourself whether you could have brought the claim under common law principles.<sup>10</sup>

**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.<sup>11</sup> 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.<sup>12</sup> 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

### Stuart T. Rossman

is the director of litigation at the National Consumer Law Center in Boston. He may be reached at [ssrossman@nclc.org](mailto:ssrossman@nclc.org).

based on state statutory violations.<sup>13</sup>

**Removal to state court.** Finally, *Spokeo*'s application to state cases removed to federal court under the Class Action Fairness Act creates interesting conundrums.<sup>14</sup> A defendant successfully arguing that no Article III standing exists may find itself remanded to a state court with a lower standing threshold.<sup>15</sup>

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. ■

(dismissing as a "bare procedural violation" the claim that company retained personal information longer than statutorily permitted).

9. See, e.g., *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 290–91 (3d Cir. 2016) (upholding claim that website operator collected children's personal information by analogy to "intrusion upon seclusion" cause of action); *Galaria v. Nationwide Mut. Ins. Co.*, 2016 WL 4728027, at \*5 (6th Cir. Sept. 12, 2016) (upholding data breach cause of action).
10. *Spokeo*, 136 S. Ct. at 1549.
11. *Compare Garisma v. Microsoft Corp.*, 2016 WL 4017196, at \*4 (S.D. Fla. July 26, 2016) ("legislative history supports the Court's finding Congress desired to create a substantive legal right") with *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 514 (D.C. Cir. 2016) (dismissing claim that company unlawfully requested customers' ZIP codes).
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 mortgagor's claim arising out of mortgagee's failure to timely record the discharge).
13. *Compare, e.g., Matera v. Google, Inc.*, 2016 WL 5339806, at \*14 (N.D. Cal. Sept. 23, 2016) (Cal. Invasion of Privacy Act), and *Jaffe v. Bank of Am., N.A.*, 2016 WL 3944753, at \*4 (S.D.N.Y. July 15, 2016) (N.Y. Mortgage Satisfaction Statute), with *Attias v. CareFirst, Inc.*, 2016 WL 4250232, at \*5 (D.D.C. Aug. 10, 2016) (D.C. Consumer Protection Statute), and *Villanueva v. Wells Fargo Bank, N.A.*, 2016 WL 5220065, at \*4–5 (S.D.N.Y. Sept. 14, 2016) (N.Y. Mortgage Satisfaction Statute).
14. Class Action Fairness Act, 28 U.S.C. §1332(d) (2012).
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).

## NOTES

1. Fair Credit Reporting Act, 15 U.S.C. §1681 (2012).
2. 136 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](http://library.nclc.org/spokeo-resources-subscribers-and-non-subscribers).
8. See, e.g., *Mey v. Got Warranty, Inc.*, 2016 WL 3645195, at \*2–3 (N.D. W. Va. June 30, 2016) (upholding Telephone Consumer Protection Act claim as invasion of privacy rights); but cf. *Braitberg v. Charter Commc'ns*, 836 F.3d 925, 930 (8th Cir. 2016)

## The Lawyers' Computer Games

# BE AN EVIDENCE EXPERT! Guaranteed!

## 20 Years & Running!

## Best Lawyer Videogame:

# OBJECTION!



All games include the book *Is it Admissible?*  
Hyperlinked on CD-ROM  
By author Ashley S. Lipson,

"It's addictive and thrilling..."

- Steve Irvin, INFO WORLD

"A wonderful computer videogame for lawyers"

- John Tredennick, Jr., Chairman, ABA USER'S GROUP

"...challenging and fun... Objection! teaches the player to make objections quickly."

- Kurt Copenhagen, HARVARD LAW RECORD

"...cerebral, realistic and intense."

- Jasper Sylvester, COMPUTER GAMING WORLD

"It is rare that one gets to study the rules of evidence and enjoy oneself at the same time"

- Joshua Kaufman, WASHINGTON LAWYER MAGAZINE

## Have Fun and Earn CLE Credits!

To order today-call 310-246-9900 ext 202  
Fax: 310-246-9900

|                                       |            |
|---------------------------------------|------------|
| Objection!!.....                      | \$129      |
| Civil Objection!! AutoNeg.....        | \$129      |
| Civil Objection!! SlipFall.....       | \$129      |
| Expert Witness!.....                  | \$129      |
| SivPro!.....                          | \$129      |
| Objection!! Audio tapes (3 hours).... | \$49       |
| All 5 games together.....             | only \$399 |

CLE credits vary by state, call for more info.  
Shipping & Handling is \$10.00 per order.

TRANSMEDIA  
INC.

429 N. Oakhurst Dr. Suite 103, Beverly Hills, CA 90210

## The Lawyers' Computer Games