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PERSPECTIVE

A tug of war between Congress and the courts

By Deborah J. La Fetra

Can Congress deem someone injured? The U.S. Supreme Court granted certiorari in *Spokeo Inc. v. Robins* purportedly to address that issue. But, as is becoming a trend on the eight-member court, the justices dodged the question in its decision on Monday.

The case arose when Spokeo, a data-aggregating "people search engine," published false information about Thomas Robins. Specifically, although Robins was single, unemployed and lacked post-graduate education, Spokeo said that Robins was married, wealthy and had a graduate degree. Any publication of false information violates the Fair Credit Reporting Act (FCRA), incurring penalties for each violation. Robins believed the false information about him hindered his job search but his complaint was filed as a purported class action (that was not yet certified) on behalf of anyone about whom Spokeo published false information.

The trial court held that publication of these particular "facts" did not cause Robins any real injury that gave him Article III standing. Article III of the U.S. Constitution allows federal courts to hear only "cases or controversies," defined as cases brought by plaintiffs who have suffered actual (not speculative) harm that can be redressed by court action. The general test for standing is that a 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. The 9th U.S. Circuit Court of Appeals' decision reversing the trial court held that *any* statutory violation suffices to confer standing. The court thus collapsed the three-part standing inquiry — injury, causation and redressability — into a single question of whether the plaintiff properly alleged a statutory violation.

The 9th Circuit first announced this theory in *First American Corp. v. Edwards* (2010), which made its way to the Supreme Court only to have the petition dismissed as improvidently granted on the last day of the 2011 term. The 9th Circuit premised its decision in *Spokeo* on *First American*, again holding that when Congress passes a law that allows people to sue for violation of that law, plaintiffs can sue to enforce that law even if they show no harm from the violation.

In a 6-2 decision, the Supreme Court in *Spokeo* did not directly answer the question presented, instead it determined that the 9th Circuit failed to analyze whether Robins alleged a concrete injury under existing case law. Justice Samuel Alito, writing for the majority, focused on cases that require an injury in fact to be both "particularized" — that is, affecting the plaintiff in "a personal and individual way" — and "concrete." The 9th Circuit analyzed the "particular" nature of Robins' claims, but failed to consider whether the harm alleged was "concrete."

Relying on dictionary definitions, the court announced that a "concrete" injury "must actually exist;" it cannot be abstract. This does not eliminate standing for plaintiffs alleging intangible harm, however. An intangible harm may be "concrete" if it "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." The court noted as an example that long-standing tort doctrine permits recovery in tort for libel or slander per se even if the plaintiff cannot precisely measure or prove the harm. Justice Clarence Thomas' concurrence delved further into the historical requirements implied by the court's test, noting that "[c]ommon-law courts more readily entertained suits from private plaintiffs who alleged a violation of their own rights, in contrast to private plaintiffs who asserted claims vindicating public rights."

The New York Times

The Capitol Building seen from the steps of the U.S. Supreme Court building in Washington, shortly after the death of Justice Antonin Scalia.

In a passage to ensure that academics and lawyers have plenty to argue about, the court invoked its inner Tevye from "Fiddler on the Roof": On the one hand, "Congress is well positioned to identify intangible harms that meet minimum Article III requirements." On the other hand, this "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." Justice Alito hypothesized publication of an incorrect zip code — a statutory violation of the FCRA, to be sure, but difficult to imagine the violation causing any concrete harm.

Ultimately, the court held that Robins' allegation of a "bare procedural violation, divorced from any concrete harm" could not satisfy the injury-in-fact requirement even though "Congress plainly sought to curb the dissemination of false information" because a violation of FCRA's procedural requirements may or may not result in actual harm. The court left to the 9th Circuit to decide on remand whether Robins satisfied the requirement of showing a concrete harm.

Resolution of the larger issue awaits another case, but the court's ruling does say that Congress lacks carte blanche to expand Article III standing unilaterally. The *Spokeo* decision respects the language of the constitution that provides the minimum requirements for any federal lawsuit, and reaffirms the key elements of standing announced in previous cases. Meanwhile, the narrowness of the decision itself probably will not rein in the 9th Circuit's expansive approach to standing, which has serious adverse consequences, particularly in the context of class action litigation. Robins did not merely seek statutory damages for Spokeo's publication of his own information. He purports to represent an entire class of people allegedly "injured."

By leveraging his own non-injury into a class action, Robins sought substantial statutory damages — potentially running to tens or hundreds of millions of dollars — for technical violations that caused no actual harm. Of course, a significant portion of those damages, or settlement, will be paid to Robins' lawyers, which is why the number of FCRA class actions has steadily increased since the 9th Circuit gave the green light. Given the potential for exorbitant damage awards and attorney fees, these actions impose massive transaction costs and are difficult to defeat early in the litigation process. "No harm" lawsuits — particularly "no harm" class actions — are a drain on both economic and judicial resources, to no one's benefit except the plaintiffs' bar.

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