

# *Spokeo* and the Present and Future of Class Actions

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# *Spokeo, Inc. v. Robins*

## **Facts:**

Spokeo published a profile of the plaintiff, Thomas Robins, that he alleges was riddled with inaccuracies about his employment, financial, and marital statuses. Robins brought a putative class action against Spokeo, alleging violations of the Fair Credit Reporting Act.

## **Question Presented:**

“Whether Congress may confer Article III standing upon a plaintiff who suffers ***no concrete harm***, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a ***bare violation*** of a federal statute.”



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# *Spokeo, Inc. v. Robins*

- **Spokeo's argument:** Article III's injury-in-fact requirement cannot be satisfied absent "concrete harm." Mere "legal violations," without more, are not sufficiently concrete harms.
- **Robins's argument:** A concrete and particularized invasion of a statutory right is an Article III injury. There is a long tradition of courts hearing cases alleging legal violations without a showing of consequential harm.



# The Court's decision in *Spokeo*

- 6-2 consensus decision breaks little new ground—reiterates principles but fails to apply them. Remands to the Ninth Circuit.
- **Alito** delivers the opinion of the Court—joined by Roberts, Kennedy, Thomas, Breyer, and Kagan.
- **Thomas** concurs: “Common-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.”
- **Ginsburg** joined by Sotomayor, files a dissenting opinion. “I agree with much of the Court’s opinion” but “part ways with the Court, however, on the necessity of a remand.”



# The Court's decision in a nutshell

- *First*, although **tangible injuries** (like physical or economic harm) are “perhaps easier to recognize” as “concrete injuries, **intangible injuries** “can nevertheless be concrete,” as can injuries based on “**risk of harm.**”
- *Second*, to evaluate intangible harms, “[b]oth **history** and the **judgment of Congress** play important roles.”
- *Third*, Congress can elevate even the violations of procedural rights to a concrete injury, if they protect against an identified harm and “a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified.”



# Standing after *Spokeo*: a framework

Three-step approach laid out in a memo available at [www.guptawessler.com/spokeo](http://www.guptawessler.com/spokeo)

- (1) Link the case to established concrete injuries—whether tangible or intangible
- (2) Identify historical analogues
- (3) Focus on Congress's power to elevate rights – the role of legislative history, fact-finding, and predictive judgments



# Step 1: What's the concrete injury?

- **Tangible injuries**

- Loss of money or property
- Loss of time
- Physical or emotional injury

- **Intangible injuries**

- Informational injuries: (a) misrepresentation, (b) denial of informational content, (c) denial in time & manner
- Reputational injuries
- Invasion of privacy
- Risk-of-harm or probabilistic standing



# Tangible injuries

- Can you reframe your case as a case about tangible injury? Don't ignore the possibility. It may be possible for even seemingly technical notice requirements.
- **(1) Loss of money or property**
- **(2) Loss of time**
- **(3) Physical or emotional injury**





# Informational injury

- Spokeo acknowledges this category, cites *FEC v. Akins* and *Public Citizen v. Dep't of Justice*.
- (1) Misrepresentation—right to truthful info.
  - *Havens Realty Corp v. Coleman*
  - What about *de minimis* misrepresentations?
- (2) Denial of informational content
- (3) Denial of info in required time/manner

# Risk-of-harm/probabilistic standing

- *Spokeo*: “risk of real harm” can be enough
- “Substantial risk of harm” test
  - *Massachusetts v. EPA* (2007)
  - *Monsanto v. Geertson Seed Farms* (2010)
- “Certainly impending” test
  - *Clapper v. Amnesty Int’l USA* (2013): fn. 5
  - *Remijas v. Neiman Marcus* (7th Cir. 2015)



# Step 2: Any historical analogues?

If the “alleged intangible harm has a **close relationship** to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts,” it is considered a “concrete” harm for Article III purposes. 136 S. Ct. at 1549.

- Informational injuries and disclosure in commercial transactions
- Reputational injury and defamation
- Invasion of property (especially in robocall cases) and trespass
- Invasion of privacy and misuse of confidential information
- Conflicts of interest in consumer transactions



# Step 3: What was Congress doing?

- “In determining whether an intangible harm constitutes injury in fact,” the “**judgment of Congress**” plays an “**instructive and important**” role. *Spokeo*, 136 S. Ct. at 1549.
- Congress may “elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were **previously inadequate** in law.” *Spokeo*, 136 S. Ct. at 1549.
- Congress’s “conclusions are entitled to much deference.” *Boerne v. Flores*.
- *Mass. v. EPA*: Article III requires that Congress establish some reasonable connection between an identified injury and a class of plaintiffs entitled to seek redress for that injury.



# A TCPA hypo

Del Sol, Inc. (a California corporation) marketed its solar energy systems to consumers in California and Washington by placing automated pre-recorded calls to residential landlines and cellular telephones and by sending faxes.

- DSI robocalled Kim, a California resident, on her cell phone and left a vmail with a pre-recorded message. The records show that DSI called Kim an additional 30 times; 10 of those calls connected but no messages were left because Kim hung up. Kim does not recall the other 20 calls.
- DSI robocalled Kanye, a California resident, on his residential landline, the call connected, but the answering machine was full, so no message was left.
- DSI faxed an advertisement to Kris, a California resident, tying up her fax line so she couldn't receive her weekly coupon for takeout from Joe's Falafel.
- Kylie, a California resident, bought a solar system from DSI but failed to pay the last installment payment; DSI robocalled her cell phone 150 times to demand payment.
- Kylie picked up the first fifty times, but then stopped answering after she recognized the number. DSI did not leave messages.
- DSI robocalled Kendall, who recently moved to Washington State, hoping that Kylie (who, according to Instagram, was visiting Kendall) might answer the phone. Kendall immediately hung up.



# How to frame the complaint

- What scope of class to plead?
  - Can you CAFA-proof it?
- Which claims to include?
  - Can you pare down the claims to those that present classwide concrete harm?
  - Which concrete and particularized harms to include/emphasize?
  - How do you win the standing battle and not lose the class certification war?
- Separate the allegations of concrete harm by claim, statute, theory, analogue
  - Legislative intent the same for telemarketing and debt collection?
  - Type of harm/common law analogue similar for cellular telephones v. landline v. fax?



# Model TCPA Allegations, Post- *Spokeo*

- P and class members have been harmed by D's unlawful calls to cellular telephones. D's calls caused economic harm by using up P's and class members' cellular telephone minutes.
- D's calls harmed P and class members by depriving them of the use of their cell phone for a period of time. While the unlawful calls were in progress, D trespassed upon P's and class members' right to use their person property without interference. During this time, P and class members could not place an outgoing call or receive another incoming call.
- P and class members have been further harmed by the acts of D because their privacy has been violated, and they were subject to annoying and harassing calls that constitute a nuisance. D's calls intruded upon the rights of P and class members to be free from invasion of their interest in seclusion.



# Further Resources

- **Gupta Wessler PLLC:**
  - Strategy memo, briefs, & commentary
  - <http://guptawessler.com/spokeo/>
  - Password: “concreteness”
  - Contact: [spokeo@guptawessler.com](mailto:spokeo@guptawessler.com)
- **National Consumer Law Center:**
  - Statute-specific treatise updates & brief bank
  - <http://www.nclc.org/litigation/spokeo-v-robins.html>

