

## NEWS & INSIGHTS

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### DOES THE PLAINTIFF HAVE STANDING TO ASSERT EACH CLAIM?

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Class actions against product manufacturers and retailers often involve claims of diminution in value of the product arising from a breach of warranty or misrepresentation about the product. The threshold question in any case, and particularly in these types of product class actions, is whether the plaintiff actually has standing to assert each claim.

The answer is found in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), in which the Supreme Court clarified the injury-in-fact requirement necessary for standing in federal court. “To establish injury in fact, a plaintiff must show that he or she [1] suffered ‘an invasion of a legally protected interest’ that is [2] ‘concrete and [3] particularized’ and [4] ‘actual or imminent, not conjectural or hypothetical.’” (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The plaintiff must satisfy all of these components to have standing.

*Spokeo* made clear that the twin requirements of a “concrete and particularized” injury are in fact “quite different.” For an injury to be “particularized,” it “must affect the plaintiff in a personal and individual way.” In other words, the injury must be “individualized rather than collective.” For an injury to be “concrete,” “it must actually exist,” i.e., be “real, not abstract.” While intangible injuries can be “concrete,” the injury cannot be “divorced from any concrete harm.” Applying these principles, the Court addressed whether a “bare procedural violation” of a federal statute was sufficient to confer standing upon the plaintiff. The Court concluded that it could but only if “the particular procedural violations ... entail a degree of risk sufficient to meet the concreteness requirement.”

In the product liability context, standing issues may come into play as a possible threshold ground for dismissal in two primary ways. First, if the plaintiff alleges the product has decreased in value because of a risk inherent in the product, but the risk has not manifested in any actual harm and is not present in all of the products, the plaintiff may lack standing because the claimed harm is not concrete or imminent. See *Cahen v. Toyota Motor Corp.*, No. 16-15496, 717 Fed. App'x 720 (9th Cir. 2017) (class plaintiffs lacked standing where risk that vehicles' computer systems could be hacked was “speculative” and theory that vehicles had declined in value as a result of risk was “not credible”). Second, if the plaintiff alleges the product costs more than it should because of the manufacturer's way of selling the product, the plaintiff may lack standing because the claim does not invade a legally protected interest. See *Eike v. Allergan*, 850 F.3d 315 (7th Cir. 2017) (class plaintiffs lacked standing to sue for difference in price of eye drops that were sold in allegedly “unnecessarily large” packages approved by the FDA).