"Probabilistic Injury": The Odds Aren't Good

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Bradford Mank, Summers v. Earth Island Institute *Rejects Probabilistic Standing, But a "Realistic Threat" of Harm is a Better Standing Test*, **40 Env. L. 89** (2010), available at SSRN.

The case of *Summers v. Earth Island Institute*, 129 S.Ct. 1142 (2009), is notable from several administrative law perspectives, but potentially its major impact is one that many commentators have missed – its rejection of "probabilistic standing." In *Summers*, Justice Scalia, writing for the Court, rejected out of hand Justice Breyer's suggestion that the plaintiff environmental groups had satisfied the "injury" prong of standing by showing "a realistic likelihood" of injury to one or more of their members. Characterizing this suggestion as "a hitherto unheard-of test for organizational standing," Justice Scalia wrote that to accept as "injury" the fact that "there is a statistical probability that some of those members are threatened with concrete injury" would "make a mockery of our prior cases, which have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm."

If Justice Scalia had not heard of probabilistic injury before, he has not been reading the numerous circuit court decisions addressing the probability of injury and when it is sufficient for standing. But Professor Mank has, and even before *Summers* he authored an article, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 Ecology L.Q. 665 (2009), dealing with the subject. In his most recent article, however, he takes it a step further, addressing Justice Scalia's opinion for the majority in *Summers* and Justice Breyer's for the dissent, relating them to some of the lower court opinions dealing with probabilistic injury, in particular two D.C. Circuit decisions, *Public Citizen v. National Highway Traffic Safety Administration*, 489 F.3d 1279 (2007), *modified on rehearing*, 513 F.3d 234 (D.C. Cir. 2008), and *Natural Resources Defense Council v. EPA*, 440 F.3d 476, *withdrawn*, 464 F.3d 1 (D.C. Cir. 2006). In addition, Professor Mank explains how all these cases relate to the Supreme Court's earlier decision in *Friends of the Earth, Inc. v. Laidlaw Env. Services, Inc.*, 528 U.S. 167 (2000).

In short, in *Summers* the concrete injury claimed by plaintiffs was the destruction of their recreational enjoyment from Forest Service timber sales in areas affected by forest fires, but their challenge was to a Forest Service regulation exempting such sales from prior notice and comment, as well as from administrative appeal. While the plaintiff environmental organizations had affidavits from a few members who walked in areas that might be subject to such sales, they hundreds of thousands of members who generally enjoy the outdoors, and the Forest Service conceded they would likely have thousands of such timber sales. The problem according to the majority was that there was no particular identified member for whom it could be said that he would indeed have his recreational enjoyment destroyed by such a timber sale. The dissent argued that there was a realistic likelihood that one or more members of the organizations would in fact have their recreational enjoyment destroyed by a such a sale, even if the particular member or members could not be identified at this time. This, the dissent believed, should qualify as constitutional injury for standing purposes.

Laidlaw involved persons who recreated on or around a river into which the defendant discharged mercury in violation of its permit under the Clean Water Act. These persons sued under the citizens suit provision in the Act, alleging that they no longer engaged in their recreational activities on and around the river because of these illegal discharges. Unfortunately, however, the plaintiffs could not provide

any proof that there was actually any harm to the environment from the discharges or that they would in fact be harmed if they continued their recreational activities such as boating, swimming, and fishing on the river. Nevertheless, the Supreme Court in an opinion by Justice Ginsburg held the plaintiffs had standing because their unwillingness to engage in the recreational activities was based upon a "reasonable fear" caused by the defendant's discharges.

While the majority in *Summers* did not feel the need to distinguish *Laidlaw*, nor did the dissent cite it in support of its argument, Professor Mank rightfully recognizes that the standing decision in *Laidlaw* inevitably is a decision based upon a finding of probabilistic injury. That is, to say that the plaintiffs' fear was reasonable in the circumstances is necessarily to say that the plaintiffs would be subject to an increased risk of injury by recreating on and around the river, or stated otherwise, that they would be have a higher probability of injury than if the discharges did not take place. Professor Mank points out the incongruity between *Summers* with its rejection of probabilistic injury and *Laidlaw*'s implicit acceptance of it, when the plaintiff forgoes recreational activity because of an increased probability of injury.

The two D.C. Circuit decisions Professor Mank analyzes both utilized a probabilistic injury standard to determine if the plaintiffs had standing. In *NRDC v. EPA*, the court found standing because, on a statistical risk basis, 2-4 of NRDC's 490,000 members would contract a non-fatal skin cancer as a result of EPA's failure to regulate ozone depleting gases as strictly as NRDC had urged. In *Public Citizen*, however, the court denied standing because Public Citizen could not quantify how many of its members would be injured by accidents caused as a result of NHTSA's failure to require the tire pressure monitoring system advocated by Public Citizen. As Professor Mank notes, even if Public Citizen had provided a quantification of statistical injuries suffered by its members, neither that showing nor the showing accepted in *NRDC v. EPA* would satisfy the requirement stated by Justice Scalia in *Summers* – the need to identify a particular member of the organization who would be injured.

Finding neither the "reasonable fear" standard of *Laidlaw* nor the rejection of "probabilistic injury" in *Summers* acceptable, Professor Mank argues for the "realistic threat" standard espoused by the *Summers*' dissent. If he were arguing on a blank slate, I might agree with him, but he is not. *Summers* is the law, even if Justice Kennedy penned another of his inscrutable concurrences about how he might have reacted if Congress "had sought to provide redress for a concrete injury." To distinguish *Summers* plaintiffs will have to characterize their "increased risk of injury" as a present and particularized concrete injury. Such a characterization can reference *Laidlaw* as support, arguing that the "reasonable fear" standard there is equivalent to "increased risk" as a present injury.

Professor Mank's article is a great introduction to these issues, and lawyers and academics concerned about standing should read it.

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