

Spotlight On Spokeo: A Win For Consumers

Law360, New York (May 23, 2016, 10:40 PM ET) -- *In one of the term's most talked-about cases, the U.S. Supreme Court was asked whether consumers can sue companies for statutory violations in the absence of actual injury.*

In Spokeo Inc. v. Robins et al., Thomas Robins sued internet database Spokeo under the Fair Credit Reporting Act, claiming that the website published incorrect information about him. On May 16, the Supreme Court ruled that a consumer could not sue Spokeo for mere technical violations of the Fair Credit Reporting Act, and found that the Ninth Circuit used an incomplete analysis when it concluded plaintiffs can sue companies without alleging actual injuries.



*This Law360 **Expert Analysis series** will assess the potential impact of the ruling, featuring commentary from a defense attorney, two plaintiffs attorneys and a privacy law professor.*



Nicholas R. Diamand

Last week, in *Spokeo v. Robins*, the U.S. Supreme Court reaffirmed that plaintiffs harmed by illegal conduct have standing to defend their privacy rights. The court, although split on whether Robins himself had standing, unanimously rejected the defense bar's proposed cramped construction of Article III standing that would have eliminated whole categories of injury long-recognized by Congress, but that do not involve easily measured harm, including violations of privacy rights. The court also expressly confirmed that Congress has the power to define injuries and create causes of action that did not exist before. While protecting access to justice for plaintiffs with legitimate complaints about corporate conduct, the court precluded lawsuits based on bare statutory violations unaccompanied by any semblance of actual harm. Spokeo not only refused to accept a narrow theory of standing that would prohibit genuine cases, but also expressly stated that its holding does not diminish plaintiffs' rights to proceed as a class: overall, an excellent outcome for consumers.



Andrew Kaufman

Spokeo operates a "people search engine" that publishes reports on consumers containing personal information, including addresses, home photos, phone numbers, age, occupation, education, marital status, and the names of siblings and parents. Thomas Robins sued Spokeo under the Fair Credit Reporting Act (FCRA), a statute regulating companies that publish information for use by creditors and employers. Robins alleged that Spokeo violated the FCRA by, among other things, failing to maintain reasonable procedures to ensure that the information posted about him was accurate, and by failing to post toll-free numbers on its website for consumers to request their own reports. The FCRA provides for statutory damages up to \$1,000 for a willful violation.

In response, Spokeo claimed that Robins had no right to sue because he lacked the requisite standing. The Supreme Court has long held that a plaintiff has standing to bring a lawsuit only if he has suffered a "particularized" and "concrete" injury. The Ninth Circuit held that Robins could sue Spokeo because his claimed injury — his personal interest in the handling of his credit information — was personal to him, and not shared with the public at large.

The Supreme Court vacated the Ninth Circuit's decision and ordered the Court of Appeals to take another look. In an opinion written by Justice Samuel Alito, the court explained that the Ninth Circuit erred by

addressing only whether Robins' injury was "particularized" and not whether it was "concrete." Justice Clarence Thomas concurred, stating his view that Robins might have standing to enforce his private right against the publication of inaccurate information concerning him, but not a public right, for example, to a toll-free telephone number. Justice Ruth Bader Ginsburg, joined by Justice Sonia Sotomayor, dissented. The dissenters largely agreed with the majority's framework, but would have held, based on the allegations in the complaint, that the publication of misinformation about Robins was a concrete injury to his privacy, rather than remand that question to the Ninth Circuit. The court was unanimous on the standing framework to be applied, disagreeing only as to the disposition of Robins' claims.

The court's measured approach confirms that injured consumers can sue when they have suffered — or are at risk of suffering — a harm tethered to real-world concerns, or one recognized in claims available at common law. This includes, the court explained, classic tangible dollars-and-cents injuries, but also intangible inherently difficult-to-measure injuries, such as the right to free speech, the right to exercise one's religion and the right to privacy.

So, for example, in the Telephone Consumer Protection Act, Congress recognized what every person knows: unwanted telemarketing and debt collection calls are harassing and annoying. Spokeo affirms consumers' rights to sue the companies making those calls because the injury is based on legitimate concerns that the calls are invasive and irritating, and involves claims (like nuisance or harassment) long captured by common law. Congress authorized statutory damages to ensure that corporate wrongdoers are not immunized simply because the harm they cause is difficult to quantify.

The court also recognized that the risk of real harm is a concrete injury sufficient for standing. For example, traditional tort law accepts that certain false statements — such as allegations that a person committed a crime — are so inherently damaging that a person may sue for slander without showing actual damages to his reputation.

In a modern context, when a company publishes false and misleading credit reports, the affected consumer may sue without waiting for a creditor or an employer to make an adverse decision based on the inaccurate information. Similarly, if a company employs lax data security and allows hackers to steal protected private data, consumers are not forced to wait until the hackers steal their identities before suing the company. The same is true if a company obtains a person's name and address from the DMV and sells it in violation of the Driver's Privacy Protection Act. This is simply common sense in action: you don't wait for the storm to reinforce the roof.

By emphasizing the necessity of concrete harm, the court properly circumscribed "gotcha" lawsuits that are untethered to legitimate, real-world concerns, and lack a connection to well-established common law claims. Those kinds of lawsuits may not justify the hammer of statutory damage awards or the use of judicial resources. For, example, the court explained, publication of an incorrect zip code, "without more," would not work sufficient concrete harm.

What the court did not do is create and expand unprecedented limits on standing and require that consumers suffer quantifiable financial injury before Congress could give them the power to sue. Spokeo and its amici asked the court to throw out legitimate lawsuits based on real-world harm and with the kinds of injuries long-recognized at common law. Think back to zip codes. If a person sued simply because a company incorrectly published her zip code as 10025 (the Upper West Side) instead of 10029 (the Upper East Side), and the consumer alleged the inaccuracy and nothing more, those allegations would not confer standing under Spokeo. But if a company published inaccurate zip codes and created a cognizable risk that plaintiffs would be assigned to the wrong school district or denied the right to vote, that would be a concrete injury satisfying Spokeo. Similarly, substantive allegations that unscrupulous and predatory pay-day lenders set their targets based on specific zip codes could constitute the "more" that Spokeo requires.

Or consider the case of *Ramirez v. Trans Union*, in which a class was recently certified, and which revealed that Spokeo amicus Trans Union routinely sold consumer reports that inaccurately labeled consumers as terrorists. Trans Union was sued (and rightly so) for haphazardly matching consumers to the government's terrorist watchlist without verifying that the person was the same person who was on the list. Consumers are not required to be denied a job or credit because they are believed to be an enemy of the state before suing to correct the false information.

Some have sought to portray Spokeo as a "punt" by a court missing its ninth justice. Not at all. The court meaningfully considered — and unanimously agreed on — the appropriate framework for standing. The justices simply disagreed whether the Ninth Circuit's analysis of Robins' claims had properly applied that framework.

Moreover, the court did not limit Congress' power to create remedies for injured plaintiffs, including when the crux of the injury is an invasion of privacy. As the court reiterated, "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." In other words, Congress can create the power to sue for injuries that lack a direct common law analogue or that may be difficult to measure or prove.

One other point. Our friends in the defense bar, still smarting from the outcomes in Campbell-Ewald and Tyson Foods, have already begun to try to spin Spokeo as creating new limits on class actions. But the court's opinion, in the sure-to-be-cited footnote 6, expressly said that whether a case is a class action "adds nothing to the question of standing." So long as the class representatives allege concrete and particularized injuries, standing poses no barrier to class certification and relief. In cases like Spokeo where Congress has authorized statutory damages for real-world, concrete harms that are difficult to measure, a class of allegedly injured consumers may join together to recover those damages. There is no basis for the argument that Spokeo requires every class member to suffer precisely the same degree of injury. Nor, for that matter, that the ruling disrupted the Ninth Circuit's correct conclusion that Robins' class action complaint satisfied the particularity requirement.

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