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CLASS ACTIONS

In Potentially Significant Case, Supreme Court to Test Limits Of Privacy and Data Breach Class Actions Seeking Statutory Damages




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The Supreme Court is gearing up to hear a constitutional standing case with significant business implications this fall—one that could either dramatically limit the viability of multimillion-dollar class action lawsuits seeking statutory damages or encourage the filing of such lawsuits nationwide. The Court's decision in *Spokeo v. Robins* (No. 13-1339) promises to have an especially big impact on lawsuits involving data breaches, privacy violations and similar claims, which tend to affect thousands or even millions of people, but which involve injuries that are quite difficult to define.

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The Constitutional Standing Requirement

At issue in *Spokeo* is whether Congress can lawfully confer constitutional standing on a plaintiff for the violation of a federal statute in the absence of concrete harm, *i.e.*, for only "statutory" injury. Because Article III of the U.S. Constitution permits the judiciary to hear only "cases" and "controversies," the Supreme Court has long required a concrete and particularized, non-hypothetical injury-in-fact before any plaintiff can sue. *Spokeo* asks whether the violation of a plaintiff's statutory rights (such as the statutory right to the confidentiality of one's own consumer data) can suffice to establish an injury-in-fact entitling the plaintiff to sue—even absent any allegation of additional harm.

If that question sounds familiar, it should: the Supreme Court in 2011 granted certiorari on a similar statutory-injury standing issue in *First American Financial Corporation v. Edwards* (No. 10-708), which involved a violation of the Real Estate Settlement Procedures Act (RESPA). But that case was dismissed after oral argument as improvidently granted, with no explanation, leading many observers to wonder when the Court would take up the issue again. They had their an-

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swer when the Court granted certiorari in *Spokeo* in March.

The Facts

The case arises from a dispute between Spokeo Inc., the operator of a ''people search engine'' that generates search results about individuals gleaned from publicly available information, and Thomas Robins, one of the individuals who appeared in those results. Robins sued Spokeo in 2010, on behalf of a putative class of ''millions of individuals,'' after Spokeo allegedly published false information about him, such as his age, wealth, employment status, marital status and education level. He brought claims for willful violations of the Fair Credit Reporting Act (FCRA), a federal law regulating the use and confidentiality of consumer data. Claiming that Spokeo harmed his job prospects, Robins demanded statutory damages for himself and the class of up to $1,000 per violation—which, given the size of the putative class, put Spokeo's potential liability in the *billions*.

The district court dismissed the case for lack of standing, holding that Robins's claimed injury was too speculative and not sufficiently actual or imminent to satisfy Article III's ''injury in fact'' requirement.

The U.S. Court of Appeals for the Ninth Circuit reversed. It held that Robins possessed constitutional standing to bring suit because Congress had created a private right of action for willful FCRA violations. Relying on circuit precedent, the court held that regardless of whether his claimed injury was speculative, ''the violation of a statutory right is usually a sufficient injury in fact to confer standing'' by itself, and that no further injury allegation was required. *Robins v. Spokeo Inc.*, 742 F.3d 409, 412 (9th Cir. 2014).

After *Spokeo* petitioned for Supreme Court review, the Solicitor General urged the Court to deny certiorari or, at the very least, to narrow the question presented to the FCRA context. But, in granting certiorari, the Court declined both invitations, perhaps based on the countervailing exhortations of more than a dozen certiorari-stage *amici.* This group—which includes Facebook, Google, eBay, the National Association of Professional Background Screeners and the U.S. Chamber of Commerce—all urged the Court to put an end to abusive and costly ''no-injury'' class actions.

Why 'Spokeo' Is a Big Deal

The Court has now agreed to decide whether Congress can confer constitutional standing on a plaintiff who brings suit over a bare statutory violation, without any accompanying harm. That's an important question, both legally and practically.

Imagine there are, as Robins alleges, truly ''millions of individuals'' whose privacy rights were violated by Spokeo's search algorithms. If the Supreme Court affirms, and if Spokeo actually committed a willful FCRA violation, all those millions have standing to recover statutory damages. That's true regardless of whether a particular plaintiff actually suffered any financial harm or emotional distress—indeed, regardless of whether he or she was even aware of the statutory violation at all.

But if the Supreme Court reverses, it's not just Robins who will need to show that Spokeo harmed his job prospects; all of his absent co-plaintiffs will need to allege and show, at least on a classwide basis, a concrete-and-particularized injury, too. That result would radically shrink the potential class—which, needless to say, would have no small impact on a defendant facing statutory damages of up to $1,000 per violation. As the class size diminishes, so too will plaintiffs' settlement leverage and perhaps even their incentive to sue in the first place.

As Spokeo and its *amici* told the Court, large companies are increasingly forced to defend against class action lawsuits demanding statutory damages for technical violations of a host of federal laws regulating virtually every major consumer-facing industry.

That's why the practical consequences of a broad ruling in *Spokeo* are likely to reverberate nationwide, and well beyond the context of this specific statute. As Spokeo and its *amici* told the Court, large companies are increasingly forced to defend against class action lawsuits demanding statutory damages for technical violations of a host of federal laws regulating virtually every major consumer-facing industry.

Beyond FCRA and RESPA, statutory damages provisions are integral parts of the Fair Debt Collection Practices Act, the Lanham Act, the Truth in Lending Act, the Fair and Accurate Credit Transactions Act, the Telephone Consumer Protection Act, the Video Privacy Protection Act, the Electronic Communications Privacy Act, the Stored Communications Act and the Cable Communications Privacy Act, among others. Such provisions are also embedded in laws of general applicability—including the Employee Retirement Income Security Act and the Americans with Disabilities Act—meaning virtually every major American company is vulnerable. And because these laws often provide statutory damages of $1,000 or more per violation, some defendants may face massive liability for technical violations of federal law that result in no real harm.

With the amount of money on the line, it's no wonder that class actions based on FCRA and other statutory-damages laws are being filed at an increasing rate. As Spokeo told the Supreme Court, more than two dozen FCRA class actions were filed in federal court in the first few months of 2014 alone. Nor should it be surprising that such lawsuits often lead to high-figure settlements, with little recovery for class members that have suffered no actual harm. To take one recent example, in 2010 Facebook settled a multimillion-member class action involving federal and state statutory privacy claims for $9.5 million; approximately $3 million went to attorneys' fees and costs, with the remaining $6.5 million going to a charity Facebook created. The Ninth Circuit affirmed. *See Lane v. Facebook Inc.*, 696 F.3d 811, 817 (9th Cir. 2012).

Whether similar lawsuits survive the motion-to-dismiss or class-certification stages going forward may well hinge on the Court's decision in *Spokeo*.

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Practice Tips

Given the stakes, frequent class action targets should take note: a Supreme Court decision requiring a showing of concrete and individualized harm as a predicate for obtaining statutory damages would prove to be a potent defense against costly statutory-injury class actions, and even discourage some plaintiffs from bringing suit altogether.

Accordingly, conscientious class action defense counsel facing federal claims should be sure to:

- seek dismissal based on Article III standing—although constitutional standing is jurisdictional (and thus not subject to waiver), an early ruling might avoid expensive discovery and briefing;
- request a stay of class certification or appellate proceedings pending the *Spokeo* decision, which may well impact the merits of certification or at least reduce the size of the class;
- pursue discovery regarding any injury-in-fact allegedly suffered by both named and absent class-members;
- use *Spokeo*'s pending status as leverage for settlement on favorable terms;
- appeal any adverse district court judgments or file a Supreme Court petition for a writ of certiorari, to ensure that clients receive the benefit of any favorable ruling; and
- consider filing, on behalf of clients who are frequent targets of statutory-injury lawsuits, an amicus brief urging the Supreme Court to end or limit these types of class actions.

As things are, this closely watched case is shaping up to be one of the biggest constitutional and corporate cases of the upcoming term. The merits briefs in *Spokeo* are due this summer, and the case will likely be argued this fall.