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Spokeo Split: How High Court's Ruling Is Being Interpreted

By **Allison Grande**

Law360, New York (December 2, 2016, 7:58 PM EST) -- The U.S. Supreme Court's landmark ruling in Spokeo v. Robins that plaintiffs must allege concrete harm to bring statutory privacy claims has wreaked havoc on the lower courts over the last six months, producing divergent decisions in cases with similar fact patterns and building up to what many attorneys predict will be another high court showdown before a newly configured bench of justices.

Since the Supreme Court handed down its hotly anticipated opinion in May, there have been at least eight appellate court opinions and 50 district court decisions stemming from alleged violations of statutes ranging from the Fair Credit Reporting Act to the Telephone Consumer Protection Act that have relied on the justices' reasoning in deciding whether plaintiffs have Article III standing to continue with their claims, according to Law360's review of recent case law.

In **their 6-2 decision**, the high court justices held that consumers must allege a tangible or intangible concrete injury and cannot rely solely on a mere statutory violation to establish standing. However, the court declined to take the step of applying its reasoning to the FCRA claims being leveled against Spokeo, a refusal that attorneys forecasted at the time would lead to divergent lower court decisions — a prediction that has appeared to pan out.

"The fact that the Supreme Court punted on the issue of whether there was a concrete injury in the case before it has really led to a situation where there is no clear test or way for the court to uniformly apply Spokeo," Sheppard Mullin Richter & Hampton LLP attorney David Poell said. "The landscape is still very unsettled, and unless or until the Supreme Court or several other courts of appeal weigh in, we're going to continue to see a very messy landscape of case law."

Immediately following the Supreme Court's decision, both sides rushed to claim victory, which many attorneys characterized as another byproduct of the high court's lack of crystal clear guidance.

That trend has continued to proliferate in the months following the Spokeo decision. Fueled largely by their success in convincing courts to allow them to continue with TCPA claims, plaintiffs so far have enjoyed the edge in standing disputes, with district courts rejecting the defense's arguments and finding in favor of the plaintiffs roughly 65 percent of the time, according to Law360's analysis.

Plaintiffs' attorney Ryan Andrews of Edelson PC — the firm that represented plaintiff Thomas Robins before the high court and continues to aid him on remand before the Ninth Circuit — recently told Law360 that he believed that his side's prediction from the days that followed the high court ruling turned out "to be pretty much true."

"We said that the decision was going to allow judges to dismiss claims that were weak or frivolous and not have very much impact on stronger privacy claims, and that's pretty much what happened," Andrews said. "I don't disagree with a lot of the cases that the defense bar has won so far."

Seyfarth Shaw LLP senior counsel John Tomaszewski noted that Spokeo has "inadvertently created

a path forward" in statutory privacy cases by encouraging plaintiffs to identify and press actual, concrete injuries.

"What we were seeing before Spokeo with good plaintiffs attorneys was that they were coming up with creative ways to allege injury," he said. "So the trend that we were seeing before Spokeo has ended up being continued post-Spokeo."

Christine Reilly, a Manatt Phelps & Phillips LLP partner who co-chairs the firm's TCPA compliance and class action defense practice group, agreed that plaintiffs do appear to be alleging more specific allegations of harm in their complaints in an apparent attempt to preempt Spokeo-like arguments.

"What we're seeing now is that complaints are being filed that cite various injuries such as depletion of battery life, waste of time and energy, invasion of privacy," she said. "And because allegations in the complaint at the pleading stage must be taken as true, if a plaintiff does a good enough job of throwing out various types of alleged injuries, that makes it difficult, although not impossible, for the defense side to be successful on their Spokeo arguments."

One example of plaintiffs' success in this arena came in a dispute between Wal-Mart and its customers over the retailer's allegedly unlawful collection of ZIP codes. In an October decision, an Eastern District of California judge **concluded that the plaintiffs** did have standing to forge ahead with their proposed class action because the consumers' alleged exposure to unwanted marketing and fear of identity theft constituted sufficient concrete harm.

However, the defense bar has also benefited from the Spokeo decision, particularly the justices' conclusion that bare procedural violations are insufficient to support a case.

"We're definitely seeing defendants win cases that they would have not won before, because courts can't take the easy way out and say that as long as it's alleged that a statute has been violated, that's enough," said Kevin McGinty, a member at Mintz Levin Cohn Ferris Glovsky & Popeo PC. "Instead, they have to dig in and say that consumer injury is required."

Thomas Zych, chairman of Thompson Hine LLP's emerging technologies practice, concurred that there are now "more types of cases vulnerable to dismissal or summary judgment on Spokeo grounds," since the decision is "clear enough" that mere technical statutory violations won't cut it and plaintiffs need to "point to more concrete harm."

An example of defendants' good fortune runs directly counter to the Wal-Mart decision. In a case targeting Urban Outfitters' purportedly illegal gathering of ZIP codes after transactions, the D.C. Circuit **held in July** that plaintiffs "have not alleged any concrete injury in fact stemming from the alleged violations of" the law that prohibits such data collection efforts.

The Spokeo ruling has played a pivotal role in a host of consumer disputes, from beefs over data breaches to tiffs that allege violations of federal wiretap laws and state consumer protection laws such as New York's real property law. However, the decision most often rears its head in cases involving three statutes: the FCRA, the TCPA, and the Fair and Accurate Credit Transactions Act, which is an amendment to the FCRA.

Riding The TCPA Wave

The TCPA appears to offer both the largest sample size and the most fertile ground for plaintiffs when it comes to success in defeating Spokeo motions.

According to Reilly, whose firm has been tracking the decisions that have cited Spokeo since the day the ruling was handed down more than six months ago, the defense that a plaintiff doesn't have standing because he failed to meet the Spokeo bar has a much better chance of gaining traction in a case that doesn't involve the TCPA than in one that does.

"We estimate that the chances of a successful Spokeo defense in a TCPA dispute, based on the cases that have been decided so far, is between 20 and 25 percent," Reilly said. "That's quite in contrast to what we're seeing when the Spokeo defense has been asserted in a non-TCPA case,

where the odds are roughly 50-50 that the Spokeo defense will be successful."

Law360's review of court records turned up roughly 15 cases in which courts have rejected the Spokeo defense and found standing for plaintiffs since May, while Reilly said her firm has found 25 such cases. In denying the defense's motion to nix the suit, these judges have been concluding that injuries such as wasting consumers' time and energy by forcing them to field unwanted phone calls, causing them aggravation and stress, making them incur charges for a phone call or deplete their minutes, running down their battery life, wasting their ink when an unwanted fax comes in, and invading their privacy are concrete enough to establish standing under Spokeo.

"Those types of injuries are what's accounting for the 75 to 80 percent of cases that go against the defense," Reilly said.

For example, a Georgia federal judge in a June decision refused to toss litigation against Capital One Bank over unwanted phone calls to cell phone numbers on the grounds that the Eleventh Circuit has held that a violation of the TCPA is a concrete injury and that plaintiffs have also "suffered particularized injuries because their cellphone lines were unavailable for legitimate use during unwanted calls." Another Georgia federal judge cited that conclusion in **a November ruling** in which the court declined to nix claims against Hooters over allegedly unsolicited text messages after finding that sending a single message that violates the TCPA is enough to give the recipient standing.

And an Illinois federal judge overseeing a massive class action accusing cruise marketing companies of robocalling millions of Americans with offers for free cruises cited Spokeo in **refusing to decertify** two classes in August, finding that the plaintiffs substantive and not merely procedural rights to be free from telemarketing calls and that their claims that the cruise lines had "affirmatively directed their conduct at plaintiffs to invade their privacy and disturb their solitude" were sufficient to meet the Spokeo bar. Shortly after that decision was reached, the cruise companies, including Caribbean Cruise Line Inc. and subsidiary Vacation Ownership Marketing Tours Inc., **agreed to settle** the dispute for $76 million.

Despite plaintiffs' success in the TCPA arena, the results haven't been completely one-sided. Defendants have been able to use Spokeo to defeat TCPA class actions on at least seven occasions.

These instances include **a September ruling** in which a California federal judge found that a consumer lacked standing to bring litigation accusing Blue Shield of California Life & Health Insurance Co. and a customer satisfaction research firm of autodialing cellphones because he didn't connect alleged injuries like having to recharge his phone after receiving only one call to the TCPA, and a June decision in which a Pennsylvania judge rejected robocalling claims against Wells Fargo on the grounds that the plaintiff had admitted that "she files TCPA actions as a business," and therefore her privacy interests were never violated when she received the unwanted calls.

"While other courts have disagreed, notably in the Eleventh Circuit, it is promising that at least some courts want to see injury not just from receiving a call but an injury traceable to use of a dialer," Troutman Sanders LLP partner David Anthony said.

Mixed Bag For FCRA, FACTA

The playing field seems to level — although it is still deeply divided — when it comes to FCRA and FACTA claims.

In the FCRA arena, which was the statute that underpinned the initial Spokeo decision, district courts have ruled on the standing issue in at least eight cases that have raised the statute since May.

Courts found standing for plaintiffs in five of these cases, including **an October ruling** in which a Pennsylvania federal judge found that plaintiffs could continue with claims against RealPage because Congress had elevated the inaccurate or incomplete disclosure of source information used by a credit reporting agency in a consumer report to the status of a legally cognizable injury.

On the flip side, a California federal judge **in October nixed claims** against Lyft over alleged privacy violations during the driver interviewing process after the judge concluded that the plaintiff had failed to allege that he suffered any real harm as a result of not receiving the required disclosures or a summary of his rights.

"The cases that stick out most in my mind that have been dismissed for lack of standing are the FCRA cases where it's claimed that a defendant had to give notice on a separate piece of paper," Andrews, the plaintiffs' attorney, noted.

A similar pattern has been observed in cases alleging violations of FACTA, which limits how much credit card data retailers can print on store receipts.

While Rally House and J. Crew escaped such claims after separate federal courts **ruled that a heightened risk** of future identity theft was not enough to establish a concrete injury, Microsoft, Subway and Jimmy Choo have had less success, with courts in those disputes concluding that even though the consumers hadn't shown they were the victim of any attempted identity theft, they **still had standing** because FACTA conferred a "substantive legal right" that allowed them to sue without alleging additional harm.

Appellate Split

While attorneys say they have yet to see an obvious split at the appellate court level, and the sample size is much smaller since cases take longer to work their way up the chain, several appellate courts have weighed in on Spokeo arguments in the past six months with — not surprisingly — mixed results.

One of the most notable contrasts came in decisions handed down just days apart by the Sixth and Eights Circuits.

In a published decision, the Eight Circuit **ruled in September** that a former Charter Communications customer could not maintain his claims under the Cable Communications Policy Act because he had alleged only that Charter had violated the statute by keeping his personal data after he canceled his service but had not identified any harm that resulted. Days later, the Sixth Circuit issued its own unpublished decision **reviving a proposed class action** over a 2012 data breach at Nationwide Mutual Insurance on the grounds that the plaintiffs did not have to wait for their information to actually be misused to meet the standing bar set by Spokeo.

The Eleventh Circuit has also waded into the debate with decisions on both sides of the divide.

In an unpublished July decision, the court upheld standing in a case brought against Accretive Health under the Fair Debt Collection Practices Act on the grounds that Congress had "created a new right" and "a new injury" in the form of not receiving the disclosures required by the statute. The court followed that up with a published opinion in October tossing a case against CitiMortgage on the grounds that plaintiffs had failed to allege anything more than a violation of the New York mortgage statute at issue.

"Over the next six to 12 months, we're going to be very closely watching the courts of appeal," Poell said, highlighting the Ninth Circuit's impending decision on the Spokeo remand, which will come before the justices for oral arguments on Dec. 13. "If a split at the appellate court level emerges on the question of what exactly is a concrete harm, then the issue may very well end up going back to the Supreme Court for Round 2."

High Court Sequel?

Given that the Supreme Court only had eight members when it decided Spokeo, and considering the results of the recent presidential election, the outcome of what many believe is an inevitable return trip for the standing issue is likely to be markedly different than the first time around, attorneys say.

"With a reconstituted nine-member court, it could be interesting to see if the more conservative justices want to take a harder line on standing and if we see a second Spokeo-esque decision that

makes the barriers to standing even more heightened that they are currently," Poell said.

Tomaszewski added that the unpredictability of President-elect Donald Trump and uncertainty over how he will handle the open Supreme Court seat makes any sort of definitive prediction about how the high court will handle another standing challenge almost impossible.

"If our president-elect appoints somebody for the open seat on the Supreme Court who is politically conservative but judicially active, then they'd be willing to push the envelop in terms of changing the law," he said, noting that such a personality may be required to fulfill Trump's pledge to upend the high court's Row v. Wade precedent. "All bets are off; there's no clue what to expect out of the new administration."

While they wait to see if the Supreme Court will provide any more clarity, attorneys will certainly have plenty to keep track of, from continuing to monitor how the dozens of pending dismissal and summary judgment motions citing Spokeo play out at both the district and appellate court levels and how, if at all, the ruling impacts arguments at the class certification stage that members don't share a common injury.

"Courts are still figuring out where the line is in these cases, and I think we'll have a lot more clarity about where it is in six months," Andrews said.

--Editing by Jill Coffey.