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Consumer Protection

Both Sides Claim Victory in Supreme Court Class Suit Over Statutory Standing

Both sides claimed victory from the U.S. Supreme Court's holding in a closely watched statutory violation suit May 16, that plaintiffs must show concrete—but not necessarily tangible—injury to access the federal courts (*Spokeo Inc. v. Robins*, U.S., No. 13-1339, 5/16/16).

Congress can elevate intangible harms to the status of legally cognizable concrete injuries, Justice Samuel A. Alito Jr. wrote for the 6-2 court in the proposed class suit alleging violations of a law covering credit report information.

But that doesn't mean a "bare procedural violation, divorced from any concrete harm" would satisfy the injury-in-fact requirement of Article III, he said.

The court declined to determine whether plaintiff Thomas Robins's allegations that website Spokeo Inc. posted inaccurate, but not necessarily negative, information about him are sufficiently concrete to confer standing.

Instead it sent the question back to the U.S. Court of Appeals for the Ninth Circuit to expand on its "incomplete" injury-in-fact analysis.

Tangible and Intangible. Andrew J. Pincus, who argued for Spokeo, told Bloomberg BNA May 16 that the ruling is broad and says that an allegation of a statutory violation by itself doesn't create standing.

"That legal theory is no longer permissible so that's going to change significantly how these cases are litigated and in fact whether they can even be brought," Pincus, of Mayer Brown LLP in Washington, said.

But counsel for Robins, Jay Edelson of Edelson P.C. in Chicago, said the court declined to adopt the "very extreme" standard the defendants were pushing for—that only "real world" injuries are enough to confer standing.

"The court flatly rejected that," he told Bloomberg BNA May 16. "Every single justice said that's not the case."

The court went out of its way to say that "concrete" includes tangible and intangible harms, Edelson said. "That was always the big debate, and we won it," he said. "That debate is now put to rest."

What Happens on Remand? Samuel Bagenstos, who teaches constitutional and civil rights law at the University of Michigan Law School in Ann Arbor, Mich., said the rule the court adopted "is a much more pro-plaintiff

ruling than you could have imagined the court adopting."

But it does leave a lot of unanswered questions, including what happens on remand and in a potential appeal, he said. "I don't think that *Spokeo* is going to be the last word on these issues."

Edelson predicts his side will win at the Ninth Circuit. "I don't think there's any question about that." He pointed to Justice Ruth Bader Ginsburg's dissent, which argued that the lower court already held that Robins's injury was concrete.

Pincus, however, is equally confident the defendants will win on remand. And even if they don't, the plaintiffs will have to show standing with respect to each class member to certify a class, he said.

"That is going to be an individualized inquiry because it's going to require showing falsity with respect to everybody," he said. "The mere fact of a statutory procedural violation is not going to be sufficient."

Concrete Harm. Spokeo aggregates personal information about individuals from around the web. Robins filed a class action against the company alleging it violated the Fair Credit Reporting Act, 15 U.S.C. § 1681, by posting inaccurate, but not necessarily negative, information about him (See previous story, 11/03/15).

The Supreme Court said here that to establish an injury in fact, a plaintiff must prove his injury was "concrete and particularized."

But the Ninth Circuit elided these two requirements, the court said. It determined that Robins's injury was particularized, but didn't address its concreteness.

"Concrete" is not, however, necessarily synonymous with "tangible," it said. To determine whether an intangible harm is sufficient, "both history and the judgment of Congress play important roles."

It also held that the "risk of real harm" can satisfy the requirement of concreteness.

The court didn't specifically address whether Robins's allegations—that Spokeo reported his age, marital status, education level and economic health incorrectly—rise to the level of concrete injury.

It only gave the example that an incorrect zip code alone wouldn't constitute concrete harm.

Ginsburg, joined by Justice Sonia Sotomayor, said in her dissent that Robins's allegations are "far from an incorrect zip code." She argued that Robins's complaint already conveys concretely that the misinformation caused actual harm to his employment prospects.

Effect on Class Certification. Defense attorney David S. Almeida of Sheppard Mullin Richter & Hampton LLP in Chicago said the decision will have the greatest effect at the class certification stage.

“Putative classes are generally drawn broad enough to include a high percentage of individuals with nothing more than a technical claim,” he told Bloomberg BNA in a May 16 e-mail.

“From that perspective, *Spokeo* helps answer the question *Tyson Foods* did not,” he said. He referred to *Tyson Foods Inc. v. Bouaphakeo*, 2016 BL 87179, U.S., No. 14-1146, 3/22/16 (See previous story, 03/23/16), a labor law violation case in which the court didn’t reach the “no-injury” question raised by the defendants.

“If courts have to hold mini trials as to whether putative class members in these no-harm class actions actually suffered anything more than a purely procedural violation, then it is hard to imagine how these cases will be able to pass the Rule 23 predominance inquiry,” Almeida said.

Ruling Narrow to Garner Votes. Professor Bagenstos said the breakdown of the justices was fairly predictable, and likely dictated the scope of the opinion.

“You would imagine that Justices Breyer and Kagan would be the ones most likely to join the majority here, and probably that they wouldn’t have joined a broader ruling for the defendant,” he said.

“So they might have been both crucial to have in the majority but also crucial to the case being so narrowly written and as tilted toward the plaintiffs as it was.”

Justice Clarence Thomas joined the majority, but also wrote a separate concurrence to explain how the injury-in-fact requirement applies differently to public and private rights.

Edelson, and Rafey Balabanian, Steven Woodrow, Roger Perlstadt and Ben Thomassen of Edelson P.C. in Chicago; and Deepak Gupta, Brian Wolfman and Peter Conti-Brown of Gupta Beck PLLC in Washington represented Robins.

Pincus, and Archis A. Parasharami and Stephen Liley in Washington, Donald M. Falk in Palo Alto, Calif., and John Nadolenco in Los Angeles, all of Mayer Brown LLP, represented Spokeo.

By PERRY COOPER

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The opinion is at http://www.bloomberglaw.com/public/document/Spokeo_Inc_v_Robins_No_131339_2016_BL_154331_US_May_16_2016_Court.