High Court Poised To Set Pace Of Privacy Class Actions

Law360, New York (April 28, 2015, 10:21 PM ET) -- The U.S. Supreme Court on Monday agreed to take up the hotly debated question of whether consumers can sue companies for technical violations of the Fair Credit Reporting Act and similar statutes without alleging an actual injury, a decision that will likely determine whether the recent stream of privacy class actions will continue to flow or be sharply stemmed.

The case the justices **have elected to hear** has broad implications for establishing standing under statutes like the FCRA, which respondent Thomas Robins claims petitioner Spokeo Inc. violated by falsely reporting that he was wealthy and had a graduate degree when in fact he was struggling to find work.

The dispute hinges on whether an alleged violation of statutory rights sufficiently satisfies Article III's injury-in-fact requirement for standing. The Ninth Circuit in February **sided with Robins** in finding plaintiffs do not need to allege actual injury to maintain statutory class action claims, but Spokeo has countered that plaintiffs such as Robins must show actual harm rather than a mere fear that potential employers may rely on the allegedly inaccurate data.

"No matter how the court comes down, the decision will bring clarity and guidance in terms of what needs to be shown to maintain class action claims based on the FCRA and similar statues," Troutman Sanders LLP partner David Anthony said.

If the high court agrees with Spokeo and its many supporters from the business community and takes a harsh view of the standing requirement, that outcome could significantly curtail consumer class action claims, according to attorneys.

"Clarifying that plaintiffs can satisfy Article III standing only where they can articulate concrete harm suffered would hopefully reduce the filing of lawsuits where no actual harm could be shown and therefore only allow plaintiffs who can actually allege harm suffered to file suit," Perkins Coie LLPpartner James Snell said.

But if the court takes the opposite view and upholds the Ninth Circuit ruling, there will likely be "an explosion in class actions," Anthony noted.

"I don't think we'll end up with a stagnancy," he said. "There will either be a lot more or a lot less class actions."

The decision is likely to have the most obvious and most immediate effect on claims under the FCRA, which forms the basis of the dispute before the high court.

According to attorneys, consumer reporting agencies and employers during the past decade have been facing more class actions that are based on technical violations of the statute, such as failing to disclose the correct information to potential employees or furnishing reports that misstated a covered but nonvital piece of information.

The aggressive approach by the plaintiffs bar in pursuing claims based on technical statutory violations that have arguably caused little to no harm have resulted in favorable decisions on their behalf and multimillion-dollar settlements, including a recent deal that Home Depot Inc. **announced to end a putative class action** accusing it of violating the FCRA by using flawed job applicant background check forms.

"For all those cases that are based on strictly technical noncompliance, this Spokeo cert grant is significant because it might put those claims out of business," Rod Fliegel, chair of Littler Mendelson PC's hiring and background checks practice group, said.

But while the case before the high court deals with the FCRA, attorneys were quick to predict that its effect was likely to extend well beyond the credit reporting statute.

"In general, while the case involves the FCRA, the implications of the decision could potentially impact a host of different state and federal statutes that confer a private right of action and statutory damages," Snell said.

Like with the FCRA, the plaintiffs bar has been significantly stepping up its use of statutes such as the Telephone Consumer Protection Act, the Video Privacy Protection Act, the Stored Communications Act and others that provide for hefty automatic statutory penalties in order to support their cases for alleged privacy violations and data security failings.

A wide range of high-profile businesses including Facebook Inc., eBay Inc., Google Inc. and Yahoo Inc. highlighted the increased use of such statutes in **a June amicus curiae brief** arguing that allowing the Ninth Circuit's ruling to stand would open the floodgates for an even larger barrage of "no injury" class actions under various consumer protection statutes than what they and their competitors are already facing.

The high court could still craft an opinion that limits the application of its conclusions to the FCRA. But attorneys say that the apparent persuasive effect the businesses' brief had on the court, coupled with the fact the justices, in granting review, went against the **wishes of the solicitor general** that they either leave the lower court's ruling intact or narrow the question presented to pertain to only the FCRA, makes it more than likely that the high court will finally hand down a sweeping ruling.

"This case is shaping up to be one the biggest corporate cases for this upcoming term, as it promises to have a broad impact on class actions," Akin Gump Strauss Hauer & Feld LLP counsel James Tysse said.

The Supreme Court has twice had the opportunity to definitively address the standing issue but in both cases has failed to issue broad opinions that would put the question to rest.

In the first instance, the justices in 2012 **dismissed as "improvidently granted review"** First Americans v. Edwards, which challenged whether plaintiffs had standing to bring claims under the Real Estate Settlement Procedures Act without showing tangible injury. The court followed that decision up with **its 2013 ruling** in Clapper v. Amnesty International holding that the

plaintiffs need to prove they have suffered actual harm or a certainly impending injury to satisfy Article III.

With the issue of standing for alleged statutory privacy violations now squarely before the justices, the court has at least two paths to consider.

If the court concurs with businesses that neither Congress nor state legislatures are allowed to trump the constitutional requirement that plaintiffs must show actual injury to maintain their claims by enacting a statute that allows for damages without injury, then not only will suits likely dissipate, but those that do survive will have a harder time becoming massive class actions, defense attorneys say.

"Rather than finding a named plaintiff and trying to certify a class of millions who have alleged the same injury based on the same statutory violation, every class member would have to allege and then show at the certification stage that they suffered a concrete and particularized injury of their own," Tysse said.

But while the defense bar is optimistic the high court will at least ease the barrage of class action claims currently facing businesses, the plaintiffs' bar remains confident the Ninth Circuit's ruling was the right one.

"My prediction is that Spokeo is going to end up backfiring on the industry groups behind the cert effort," said plaintiffs attorney Jim Francis of Francis & Mailman PC, who specializes in FCRA class actions.

According to Francis, case law already allows for plaintiffs to sue for informational and privacy injuries such as reputational damage and invasion of privacy that are protected by the FCRA and similar statutes, and there is no reason for the court to go against that precedent now.

"I do not see the high court undoing years of clear and consistent precedent," he said.

Francis also noted that, even if the Supreme Court does limit the kinds of injuries that are sufficient to confer standing, plaintiffs will still be free to bring their class action claims in state courts, which have different rules regarding standing.

"For years, the defendant industry groups wanted all class action suits out of state court and into federal court," he said. "They achieved some success with [the Class Action Fairness Act]. Now, if taken to its extreme, Spokeo could undo all of that."

While attorneys on both sides of the bar don't expect the filing of statutory privacy cases to wane while they await the decision, which they predict will be a split one, they do expect a barrage of stay requests and potentially even settlements to hit the lower courts before the high court issues its final determination.

"There's likely to be a flurry of activity in trial courts, because the issue is really a central one to so many of these cases," Fliegel said.

Spokeo is represented by John Nadolenco, Andrew J. Pincus, Archis A. Parasharami, Stephen Lilley and Donald M. Falk of Mayer Brown LLP.

Robins is represented by Deepak Gupta of Gupta Beck PLLC and Jay Edelson and Rafey S. Balabanian of Edelson PC.

The case is Spokeo Inc. v. Thomas Robins et al., case number 13-1339, in the Supreme Court of the United States.