

Spokeo Wants Justices To Revisit Last Year's Standing Ruling

By Allison Grande

Law360, New York (December 13, 2017, 10:50 PM EST) -- Spokeo is urging the U.S. Supreme Court to revisit the Article III standing bar it set last year in a dispute over alleged inaccuracies on a credit report, saying the justices' pronouncement that some intangible injuries could meet this threshold has spurred "widespread confusion" that "cries out" for an immediate resolution.

The self-proclaimed people search engine's petition for writ of certiorari, which was docketed Dec. 6, marks the latest chapter in a long-running and influential battle. The high court first weighed in on the case in May 2016, when it ruled that plaintiffs cannot rely on mere statutory violations to establish standing but must instead allege some tangible or intangible concrete injury.

However, the Supreme Court declined to apply that standard to the Fair Credit Reporting Act dispute between Spokeo and plaintiff Thomas Robins. Instead, it chose to send the case back to the Ninth Circuit to decide if Robins' claims that the company unlawfully reported inaccurate information about his education, wealth and job status met this concreteness bar.

On remand, the Ninth Circuit for the second time found that Robins had established standing by alleging an intangible statutory injury without any additional harm, finding that Congress had crafted the FCRA provisions at issue to protect consumers' concrete interests in accurate credit reporting about themselves.

In its newest petition for review, filed Dec. 4, Spokeo argued that it was necessary for the justices to once again weigh in on the dispute not only to address what it says is the Ninth Circuit's misapplication of the standing determination, but also to resolve the "confusion among the scores of lower court decisions" that have been handed down in the past 18 months.

Those decisions, it says, "have taken very different approaches in determining whether an asserted 'intangible harm' allegedly caused by a statutory violation is sufficient to satisfy Article III's injury-in-fact requirement."

The petition added later: "This deep conflict among the lower courts on the question of standing to sue — a fundamental aspect of the jurisdiction of the federal courts that arises in every case — should not be allowed to persist. Otherwise, the exercise of federal jurisdiction will continue to vary circuit by circuit and case by case. Given the issue's enormous practical significance, this court's review is plainly warranted."

Since the high court issued its landmark ruling, hundreds of lower courts have attempted to apply the standing bar to disputes over a range of statutory privacy violations, with drastically varying results, according to Spokeo.

It said some courts have found that the ruling meant plaintiffs needed to allege that a statutory violation resulted in real-world harm or an imminent risk of such harm to themselves, while other courts, including the Ninth Circuit on remand, have held that as long as a statute protects “concrete interests,” alleging a statutory violation is sufficient to establish standing even if the plaintiff himself did not suffer actual or imminent real-world harm.

The company argued that the latter approach embraced by the Ninth Circuit and others “effectively renders this court's opinion a nullity.”

“Notably absent from this reasoning is a finding of harm or risk of imminent harm to the plaintiff or evidence that Congress intended to make actionable an intrusion on a statutory interest without the real-world impact on the plaintiff ordinarily required to satisfy Article III,” Spokeo said.

The search engine company argues that to allow the Ninth Circuit's decision to stand, as well as a circuit split on what types of intangible injuries are sufficient to prop up statutory privacy violations, would have “significant implications” for litigation under a wide variety of statutes. It would enable plaintiffs' counsel to bring nationwide class actions in circuits that infer concrete harm from generalized statutory interests in order to avoid dismissal under “the more robust approach to standing” employed in other circuits, Spokeo said.

“By devising a standing inquiry that, at the end of the day, impermissibly conflates broad statutory purposes with a concrete injury in fact to the plaintiff, the Ninth Circuit has yet again opened the federal courts to a large class of lawsuits that do not involve an Article III injury-in-fact,” Spokeo argued, adding that the lower courts' “disarray over how to determine when an alleged intangible harm qualifies as injury-in-fact ... cries out for this court's review.”

Robins has until Jan. 5 to file a response to the petition, according to the Supreme Court's docket.

Counsel for Robins did not immediately respond to a request for comment Wednesday.

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

Robins was represented in the Ninth Circuit by Jay Edelson, Rafey S. Balabanian, Ryan Andrews, Roger Perlstadt and J. Aaron Lawson of Edelson PC, and William Consovoy and Patrick Strawbridge of Consovoy McCarthy Park PLLC.

The case is Spokeo Inc. v. Thomas Robins, case number 17-806, in the Supreme Court of the United States.

--Editing by Mark Lebetkin.