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Where class actions belong

By Stephen J. Newman

In its next term, the U.S. Supreme Court likely will address one of the most controversial issues in current class action jurisprudence: whether class litigation may be pursued by or on behalf of persons with no real world injury, against a defendant alleged only to have violated a technical legal requirement. On April 27, the Supreme Court granted certiorari in *Spokeo v. Robins*, 13-1339, to address the question: "Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute."

Many statutes permit a plaintiff to collect statutory damages from a violator as a kind of bounty to encourage compliance. These often are relatively small amounts. *Spokeo*, for example, involves the Fair Credit Reporting Act (FCRA), which permits recovery of between $100 and $1000, plus attorney fees, for willful violations of statutory requirements set forth in the act. (Actual damages may be recovered upon proof of negligence.)

In recent years, however, cases asserting statutory violations not causing actual harm have been brought on a class action basis, with the plaintiff claiming that the bounty should be paid not simply to the individual plaintiff who noticed the alleged violation and brought it to the defendant's attention, but also to everyone else potentially exposed to it, whether or not the alleged violation actually harmed them in some practical way. Accordingly, when a business operates on a state wide or national scale, even a small issue could lead to hypothetical exposure in the millions or even billions of dollars.

Some of the claims in Spokeo, for example, allege that the defendant is a "consumer reporting agency" within the meaning of the FCRA, but failed to make certain disclosures required of such agencies by the act.

The defendant, an Internet-based service that collects, compiles and sells publicly available information about individuals, apparently did not believe itself to be subject to FCRA regulation, and if its belief ultimately is determined to be in bad faith and a willful violation of statutory requirements, the defendant may face potential exposure of between $100 and $1,000 not simply to the specific plaintiff who sued, but to each subject of a report — thousands or perhaps millions of people — whether or not the alleged failure to disclose actually harmed anyone.

As one judge said of similar claims, where the potential aggregation of penalties overwhelmed any effort to determine actual harm to the public, "I worry that the exponential expansion of statutory damages through the aggressive use of the class action device is a real jobs killer that Congress has not sanctioned. ... Certainly nothing in [FCRA] would lead us to believe that Congress intended the modest range of statutory damages to be transformed into corporate death by a thousand cuts through Rule 23." *Stillmock v. Weis Mkts., Inc.*, 385 Fed. Appx. 267, 276 (4th Cir. 2010) (Wilkinson, J., concurring specially).

Recognizing the apparent unfairness of allowing an uninjured plaintiff to threaten the continued existence of a significant business, the district court in *Spokeo* granted a motion to dismiss. According to the defendant, the report about plaintiff made him appear to be more employable than he actually was, and the plaintiff failed to allege how Spokeo's failure to make FCRA-mandated disclosures harmed him. Thus, pursuant to *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), the district court found that the complaint was fatally defective because it lacked allegations sufficiently showing a causal connection between the alleged statutory violations and any present injury-in-fact.

The 9th U.S. Circuit Court of Appeals reversed, finding that Congress could authorize statutory damages as a remedy for even an uninjured plaintiff. In doing so, the 9th Circuit followed its earlier analysis in *Edwards v. First American Corp.,* 610 F.3d 514 (9th Cir. 2010), where the Supreme Court initially granted certiorari, but later dismissed the case without rendering a decision or any opinion as to whether the 9th Circuit's reasoning was valid. See 132 S. Ct. 2536 (2012) (dismissing certiorari as improvidently granted). According to the 9th Circuit, Congress may constitutionally conclude that a threat of severe penalties is essential to ensure that corporations take their compliance obligations seriously, and that moreover the Constitution permits Congress to create new legal rights and duties, and to empower courts to enforce them.

Nothing in the Constitution, argue supporters of the 9th Circuit's analysis, mandates that bodily harm and financial loss are the only interests the law may recognize. For example, the Obama administration, in an amicus curiae brief urging the Supreme Court to deny certiorari in *Spokeo*, argued there is a long tradition in American jurisprudence to allow claims based on reputational harm or informational injury (the harm that allegedly results when legally required information is withheld). Similarly, the common law historically recognized many circumstances where nominal damages could be awarded, such as for an intentional trespass to land that does not impair the owner's use and enjoyment of the property.

In its amicus brief, the government did not directly address the practical problems posed by broadly drafted class action allegations, but instead argued that because Spokeo was a ruling at the pleading stage, it is too soon, procedurally, for the Supreme Court to address some of the bigger questions about whether broad statutory damages class actions are being abused, whether plaintiffs and class members receive undue windfalls or whether business activity is impaired by exposure to such cases. By deciding to accept *Spokeo* for review, in spite of its early procedural stage, the lack of a developed evidentiary record and the government's strong opposition to certiorari, it appears that the Supreme Court wishes to address where class actions fit within our legal system, and whether their use should be restrained.

In the past, Congress has stepped in to address claims that the class device was being abused, and may do so again here. For example, in 1995 it enacted the Private Securities Litigation Reform Act and in 1998 it enacted the Securities Litigation Uniform Standards Act; these laws limited securities class actions. In 2005, Congress enacted the Class Action Fairness Act, which expanded federal jurisdiction over a broad range of class cases and imposed new standards for settlement approval proceedings in federal court.

Following this historical precedent, some members of Congress already have taken notice of the expansion of statutory damages class actions, and even if the Supreme Court does not limit them in *Spokeo*, Congress may act on its own. While the Spokeo petition for certiorari was pending, Rep. Bob Goodlatte of Virginia introduced H.R. 1927, the proposed Fairness in Class Action Litigation Act of 2015, which would prohibit federal courts from certifying any class unless the proponent of the class "affirmatively demonstrates through admissible evidentiary proof that each proposed class member suffered an injury of the same type and extent as the injury of the named class representatives." The proposed legislation also would define injury as impact to "body or property." The bill is currently being considered by the House Judiciary Committee's Subcommittee on Constitution and Civil Justice. If enacted, this legislation would prohibit the claim being asserted in *Spokeo*.

In his published remarks for an April 29 subcommittee hearing, Goodlatte criticized "class actions filed by lawyers on behalf of classes including members who have not suffered any actual injury … that do not even know they have been harmed, do not care about the minor or nonexistent injuries the lawsuit is based on, and generally have no interest in pursuing wasteful litigation." He said that such cases "siphon off limited compensatory resources from those who are injured, or who have suffered injuries of greater extent, and lead to substantial under-compensation for consumers who have suffered actual or greater harm." Thus, regardless of the outcome of *Spokeo* itself, or how broadly or narrowly constitutional standing requirements are defined, the Supreme Court may not in fact have the last word on the ultimate scope of statutory damages class actions brought on by or on behalf of uninjured persons. In the end, Congress may delimit the legal boundaries for these cases.


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