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There's No Harm In Asking For Harm Post-Spokeo

Law360, New York (February 27, 2014, 5:41 PM ET) -- Over the past several years, plaintiffs in putative data privacy class actions increasingly have asserted claims alleging violations of federal or state statutes that may not contain an actual harm requirement. Indeed, because the harm alleged in data privacy lawsuits is often theoretical, speculative or implausible, plaintiffs who typically could not satisfy Article III standing (which requires allegation of actual injury) have turned to such statutory rights to attempt to make up for their lack of articulable injury.

The Ninth Circuit may have given some of these plaintiffs a potential boost on Feb. 4, 2014, when a three-judge panel held that a plaintiff could establish Article III standing at the pleading stage by alleging a claim for a willful violation of the Fair Credit Reporting Act — even though he suffered no actual harm.

In Robins v. Spokeo Inc., the plaintiff claimed that Spokeo — a website that aggregates data (e.g., geographic information, marital status, age, family background and social profiles) from online and offline sources about individuals had willfully violated the FCRA by posting inaccurate information about him, thereby damaging his employment prospects and causing him emotional distress.

The district court held that the plaintiff failed to articulate specific, concrete harm in his complaint and dismissed the case with prejudice. It ruled that an alleged violation of the FCRA did not confer Article III standing where the complaint lacked sufficient allegations of actual harm. The district court held that "the alleged harm to [p]laintiff's employment prospects is speculative, attenuated and implausible. Mere violation of the Fair Credit Reporting Act does not confer Article III standing, moreover, where no injury in fact is properly pled. Otherwise, federal courts will be inundated by web surfers' endless complaints."

But the Ninth Circuit reversed, holding that allegations of actual injury were not required to establish standing at the pleading stage because the plaintiff sought to enforce a statutory right provided by the FCRA that has no damages requirement.

The Robins ruling relied in part on the Ninth Circuit's 2010 opinion in Edwards v. First American Corp., 610 F.3d 514 (9th Cir. 2010), which involved an alleged violation of the Real Estate Settlement Procedures Act. In that case, the court held that the plaintiff had adequately pled Article III standing based on an alleged violation of that statute even though the plaintiff had suffered no actual harm.

Like Edwards, Robins is likely to be cited by plaintiffs' lawyers in data privacy cases for the proposition that merely alleging a violation of a federal statute containing a private right of action is sufficient at the pleading stage to establish standing (at least where the statute itself does not contain an actual harm requirement). As discussed below, however, defendants should continue to vigorously challenge the

standing of plaintiffs who have suffered no actual harm at every stage of the proceedings.

Even Where Actual Harm Is Speculative, a Potential Green Light to Litigate

In Robins, the plaintiff's allegations of harm were sparse. He alleged that Spokeo caused "actual and/or imminent harm [to his employment prospects] by creating, displaying and marketing inaccurate consumer reporting information ..." The plaintiff further alleged that remaining unemployed financially damaged him and caused him "anxiety, stress, concern and/or worry about his diminished employment prospects."

The district court found that the alleged harm to the plaintiff's employment prospects resulting from the information posted on Spokeo's website was speculative and implausible and dismissed the complaint for lack of Article III standing.

The district court's decision was not surprising. Allegations of speculative harm should fail to establish standing under traditional Article III standards, which require that: (1) the plaintiff has suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely that the injury will be redressed by a favorable decision.

Indeed, just last year, in Clapper v. Amnesty International USA, the U.S. Supreme Court reiterated that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Cases and controversies, in turn, require a cognizable injury in fact. The Supreme Court in Clapper held that an alleged threatened injury does not pass Article III muster where it is overly speculative; rather, the "threatened injury must be certainly impending to constitute injury in fact," and "[a]llegations of possible future injury are not sufficient."

In reversing the district court's ruling in Robins, the Ninth Circuit did not directly take issue with these bedrock principles. Instead, it wrote that the injury Article III requires "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." The court held that because the FCRA "does not require a showing of actual harm when a plaintiff sues for willful violations," a "plaintiff can suffer a violation of the statutory right without suffering actual damages."

The Ninth Circuit also collapsed the three-prong Article III standing inquiry (injury, causation and redressability), writing: "Where statutory rights are asserted ... our cases have described the standing inquiry as boiling down to 'essentially' the injury-in-fact prong." Therefore, where a plaintiff like the one in Robins might have difficulty establishing causation, connecting the allegations with a statutory right may buoy claims that otherwise might quickly sink.

Constitutional Questions

The Ninth Circuit's holding raises questions about what limitations exist on Congress's ability to circumvent Article III standing requirements. After all, if Congress can enact a statute with no actual harm requirement, and if the mere alleged violation of the statute is sufficient to satisfy Article III's requirements, has the constitutional injury-in-fact requirement lost all meaning?

The Robins court discussed this issue, acknowledging that "the Constitution limits the power of Congress to confer standing." The court wrote, however, that this "constitutional limit ... does not prohibit Congress from "elevating to the status of legally cognizable injuries concrete, de facto injuries that were

previously inadequate in law."

Citing a decision from the Sixth Circuit, the court identified "two constitutional limitations on congressional power to confer standing" — namely, that: (1) a plaintiff "must be 'among the injured,' in the sense that she alleges the defendants violated her statutory rights" and (2) "the statutory right at issue must protect against 'individual, rather than collective, harm.'"

Precisely how this two-pronged test will play out in future cases asserting violations of other statutes is unclear. The Ninth Circuit's holding highlights the need for Supreme Court guidance regarding the circumstances in which the alleged violation of a statute — in the absence of any concrete harm — can confer standing under Article III. The Supreme Court was poised to consider the issue when it granted certiorari in the Edwards case in 2011. In 2012, however, the Supreme Court decided that certiorari had been improvidently granted and dismissed the case, leaving the Ninth Circuit's decision intact and practitioners uncertain.

Alleged Statutory Violation or Not, Defendants in Data Privacy Class Actions Should Continue to Aggressively Litigate Cases Where the Named Plaintiff Has Suffered No Actual Harm

Following the Ninth Circuit's decision in Edwards, plaintiffs in data privacy class actions routinely sought to plead alleged violations of federal and state statutes that ostensibly contained no actual harm requirement — even when the statutes had little or nothing to do with the alleged wrongdoing — in order to get their foot in the Article III door. In the wake of Robins, that trend is likely to continue.

But just as Edwards was not a death knell for defendants in data privacy class actions, neither is Robins, and defendants should continue to aggressively defend against these cases at every stage of the proceedings.

First, depending on the specific statutes being asserted, defendants should still strongly consider mounting a standing challenge at the pleading stage. Edwards and Robins concerned two discrete statutes, and it does not follow that the result will be the same where other statutes are concerned.

Second, even if a privacy complaint manages to survive an initial standing challenge under Federal Rule of Civil Procedure 12(b)(1), many such complaints are susceptible to dismissal for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6).

Moreover, even if a complaint survives a motion to dismiss, a standing challenge may be successful at a later stage in the proceedings, such as summary judgment, when it will no longer be sufficient for the plaintiff merely to allege the violation of a statutory right.

Finally, the Supreme Court may provide guidance on these issues in a future case, and that guidance may differ from the holdings in Edwards and Robins.

In short, even if more privacy plaintiffs who have not suffered actual harm may be able to surmount the Article III hurdle at the pleading stage, their success is far from guaranteed as litigation progresses. Defendants should continue to aggressively defend against these privacy claims no matter which statutory right they are attached to, including by highlighting the lack of any actual harm.

Standing remains an important defense in data privacy lawsuits in which the named plaintiff cannot plead or prove cognizable harm traceable to the challenged conduct. Indeed, as one judge recently

stated, “even though injury-in-fact may not generally be Mount Everest ... in data privacy cases in the Northern District of California, the doctrine might still reasonably be described as Kilimanjaro.”

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