Bloomberg BNA

The United States
Law Week

Case Alert & Legal News™

Civil Procedure

Class Actions

Foley & Lardner LLP attorney Joe Jacquot argues that the U.S. Supreme Court's pending decision in *Spokeo Inc. v. Robins* may have a substantial impact on the business community. Jacquot, who filed an amicus brief supporting the petitioner in the case, says that depending on how the court rules, it may usher in a new era of no-harm class actions. He also stresses that the role of the federal judiciary, separation of powers and federalism are core concerns in the case.

Trillions in the Balance: Which Way Will the Wheels of Justice Turn in *Spokeo v. Robins*?

BY JOSEPH W. JACQUOT

The U.S. Supreme Court stirred constitutional intrigue in a case heard November 2, yet the Court itself may bear the next twist in the plot. Moreover, this case, *Spokeo Inc. v. Robins*, U.S., No. 13-1339, *argued* 11/2/15 (84 U.S.L.W. 3230, 11/3/15), has significant implications for the business community, namely the potential to unleash a wave of class action suits. *Spokeo* will determine whether courts can try lawsuits when no one is harmed, putting major industries in an untenable position.

Joe Jacquot is a partner at Foley & Lardner LLP and the former Deputy Attorney General of Florida. He filed an amicus brief supporting the petitioner in Spokeo v. Robins on behalf of the Coalition for Sensible Public Records Access.

Unlike recent constitutional cases concerning Congress' or the President's authority, *Spokeo* entertains a unique protagonist. The question here is the limit on the courts' own power to take a case. Article III of the Constitution restricts courts to hear ''Cases and Controversies.'' This limitation allows judicial review only where a plaintiff has suffered an injury ''in fact,'' or actual harm. Yet under a number of federal laws, no harm is necessary for a company to violate the law and to be penalized.

In the case at hand, Robins claims that Spokeo, a website that aggregates data on persons, violated the Fair Credit Reporting Act (FCRA) by posting online inaccuracies about him. These inaccuracies listed his age as younger than he is, his wealth as larger than it is, and him as married rather than single. Robins suffered no denial of credit or loss of a job opportunity, and he wasn't a victim of discrimination. He only insists his statutory rights were violated by the very existence of the inaccurate information. As FCRA provides a $1000 penalty per willful violation regardless of any harm to the individual, Robins sued to assert his rights in court and be awarded the penalty amount.

The question before the Court is whether the mere violation of a federal statute that provides a right to

 ISSN 0148-8139

monetary penalties is enough to satisfy the Constitution for judicial review, or must the constitutional standard be met independently by a real-world injury?

In oral arguments, the lawyer for Spokeo clarified that Congress can certainly transform an action into a violation of law, but Congress cannot make something an injury in fact when it is not actually a harm. What Congress made a violation under FCRA was the failure of certain companies to use reasonable procedures to ensure against inaccuracies—that's a regulatory violation. Congress did not identify misinformation itself as the violation; if a company didn't use reasonable procedures to handle information, it could be penalized regardless of the falsity of the information.

Implications for Future Litigation. Yet if Robins prevails, plaintiffs' lawyers will gain entry into a nationwide field of ''no-harm'' class actions. As a result, increased liability exists under laws that contain automatic statutory penalties covering housing (Real Estate Settlement Procedures Act), lending (Truth in Lending Act), advertising (Telephone Consumer Protection Act), and electronic communication (Video Privacy Protection Act).

No-harm lawsuits put businesses in a Catch-22. Companies would have to choose between the potential for massive penalties if they defend the case, or settle quickly to minimize further liability. For instance, technology companies often handle millions of pieces of data. Consequently, under a law like FCRA, harmless errors penalized at $1,000 each could result in a staggering trillion-dollar lawsuit. More absurd, a company dealing with a multitude of government public records, such as recorded mortgages or criminal background information, could face litigation due to errors committed by the government itself.

Depending on how *Spokeo* is decided, harmless errors penalized at $1,000 each under the FCRA could result in a staggering trillion-dollar lawsuit.

For example, under another statute with automatic penalties of up to $2500, the Driver Privacy Protection Act, plaintiffs sued for *$5 trillion dollars*. Although the case involved a class of 20 million Texas drivers, not one claimed an injury in fact or any disclosure of personal information. While the appellate court affirmed dismissal of the case on failure to state a claim, the court noted that plaintiffs otherwise may have had standing. (*Taylor v. Acxiom Corp.*, 612 F.3d 325 (5th Cir. 2010).

In some federal circuit courts, even the faithful reporting of public records is not enough to avoid litigation. Claiming an inaccurate tax lien appeared on his credit report, a plaintiff sued the credit bureau after the company continued to report the public record information. The court allowed the lawsuit to move forward even though the Federal Trade Commission that very year gave guidance that faithfully reported public records should satisfy the FCRA's accuracy requirements. *Yourke v. Experian Information Systems*, No. C 06-2370, 2007 BL 306608 (N.D. Cal. June 20, 2007). Unfortunately the Consumer Financial Protection Bureau (CFPB) essentially rescinded that guidance in assuming oversight of FCRA.

Other Class Action Concerns. Including *Spokeo*, the Supreme Court has taken three cases this Term that zero in on potential limitations to class action litigation. Looking at judicial power under Article III, *Campbell-Ewald Co. v. Gomez*, U.S., No. 14-857, *argued* 10/14/15 (84 U.S.L.W. 3205, 10/20/15), considers whether an offer of full relief moots a case. As Chief Justice Roberts asked in oral argument, ''If you are getting everything you want, what is the case or controversy?'' The statute at issue in this case, the Telephone Consumer Protection Act (TCPA), happens to contain automatic penalties, for which a defendant may offer complete relief to a plaintiff. Several Justices pondered aloud whether tendering complete payment into the court might end the case, or whether the plaintiff was entitled to a judgment. The larger sticking point, however, appeared to be whether the case could be kept alive solely for the purpose of class certification and the significant attorneys' fees involved.

Another concern in *Spokeo* is whether the Court will view the publication of false information as harmful itself. Whether a majority of Justices view it this way is unclear, though it appeared in oral argument that at least four Justices hold that view. If a majority instead finds that Robins was actually injured by the posting of inaccurate information, the Court could at least resist the potential massive, yet frivolous, class actions that allege only a pure violation of law distinguished from violations that themselves may cause harm. Yet technically the question before the Court, as it came from the Ninth Circuit, is whether Congress can authorize a lawsuit even when a plaintiff has not been harmed. And that may be the critical factor in the resolution of this case being the definitive limits of Article III.

The third class action case currently before the Supreme Court is *Tyson Foods Inc. v. Bouaphakeo*, U.S., No. 14-1146, *argued* 11/10/15 (84 U.S.L.W. 3267, 11/17/15), which tests class action litigation parameters including certification of a class in which hundreds of members are not injured. This case asks the court to consider whether a class can be certified on statistical evidence even when many members of the potential class are not harmed.

The trio of cases gives the Justices an opportunity to address a significant legal-policy debate on the extent to which class action litigation can be used to halt certain company practices and establish different corporate behavior, even when a plaintiff may have no actual adversity.

Constitution at Center Stage For the past half-decade, the Supreme Court has notably confronted the limits of federal power, from the 26 states challenging Obamacare to Arizona's immigration law, from the Defense of Marriage Act to the President's appointment of the CFPB Director. *Spokeo* asks the Court, in humility, to recognize the Constitution's limits on judicial interference.

The Founding Fathers restricted the federal courts from making decisions without adversaries; otherwise courts would be conducting policy-making which is exclusive to the other federal branches. Accordingly, *Spokeo* implicates the distinct functions of the Congress and the President, as well as the sovereignty of

   ISSN 0148-8139

States. In a single case, the Supreme Court could bolster principles of both separation of powers and federalism.

The so-called ''structural Constitution'' details the powers and limitations of the federal government and guarantees the place of States in our American system of governance. Predominantly emphasized in the Articles of the Constitution rather than the Amendments, these dispersed provisions set forth the distinct functions of the Congress, the President and the Court, as well as the relation of those federal branches to the States. Such provisions provide separation of powers and check-and-balances, which grapple with the authority of one federal branch to another, and ensure federalism which preserves the sovereignty of States.

While some commenters argue that a ruling in Spokeo's favor would deny Congress its power to establish effective laws, such a ruling instead would recognize that one branch of government cannot subvert the constitutional boundaries on another. Congress is welcome to use its authority to pass laws that may be violated without any resulting harm, but different constitutional equities are at stake on whether the courts can hear those no-harm cases.

Congress is welcome to use its authority to pass laws that may be violated without any resulting harm, but different constitutional equities are at stake on whether the courts can hear those no-harm cases.

In oral arguments on *Spokeo*, Chief Justice Roberts raised this point in a hypothetical about a law where Congress allows unemployed Americans in border states to sue any illegal immigrant with a job. If a plaintiff could enforce this fictitious law, there would have to be an assumption that the immigrant's job is the very same one in which the American would otherwise be employed, and thus he's harmed. Picking up and applying the hypothetical to FCRA, Justice Scalia asserted that just because false information has been given about a person doesn't necessarily mean that person is harmed. In other words, every time an inaccuracy about a person is posted online, or data is breached on a person, does not necessarily mean that every person is harmed. The class of people harmed will likely be much smaller than the class of those persons whose data is the subject of a violation of the statute.

Appropriate Enforcement Without the Courts. Ruling in favor of Spokeo, the Court would preserve the prerogatives of the Executive branch for enforcement, whether to prosecute or negotiate a settlement. Without an adversarial dispute over actual harm, federal courts are ill-equipped to redress what is really a matter of prosecutorial discretion. Indeed, the Federal Trade Commission already fined Spokeo $800,000 for the Robins inaccuracies. From Spokeo's argument, an injury-in-fact must be more than Congress allowing you to just enforce the law—that's the government's job.

Furthermore, a decision favoring Spokeo would respect federalism by leaving the States with a robust role. State Attorneys General retain the ability to bring enforcement actions to vindicate consumer interests on behalf of the citizens of their states. And Article III's limitations do not bind state courts; they remain free to hear litigation under laws equivalent to FCRA.

Justice Kennedy has written deciding opinions on the basis of structural constitutionalism. This may be another case. As he asked Spokeo's counsel, ''Are you saying in this case that Congress could have drafted a statute that would allow this individual to bring suit?'' The answer is yes—if the Court asserts Article III's limits, Congress could more clearly draft a law that requires tangible harm to trigger automatic penalties. Just as Congress cannot change the constitutional boundaries of other branches, no delineation of the courts' limits will inhibit Congress from passing an effective law that meets constitutional muster.

In sum, to adjudicate no-harm lawsuits undermines the choices of the President and of state officials to act, or not act, as they appropriately see fit. A ruling in support of Spokeo would limit baseless class actions filed not to remedy consumer harm, but too often to reward plaintiffs' lawyers. In *Spokeo*, the Court should let the Constitution have the last word.