

Scalia's Death Adds To Uncertainty In Class Standing Fight

By Allison Grande

Law360, New York (February 16, 2016, 10:45 PM ET) -- U.S. Supreme Court Justice Antonin Scalia's unexpected death on Saturday creates a clear opening for the high court to split evenly on whether consumers can sue companies for technical statutory violations without alleging an actual injury, in a ruling that would preserve uncertainty and divergent standards nationwide for businesses and plaintiffs alike.

The sudden passing at age 79 of Justice Scalia, who sat on the bench's 5-4 conservative majority, threw into disarray the fate of several of the Supreme Court's most high-profile cases, including ones involving hot-button topics like affirmative action, abortion, immigration and class action standards.

One case that is likely to be impacted by Justice Scalia's absence is the closely watched dispute between Spokeo and Thomas Robins, a consumer who sued the "people search engine" for allegedly violating the Fair Credit Reporting Act by falsely reporting that he was wealthy and had a graduate degree when in fact he was struggling to find work.

During oral arguments in November, the high court appeared to be divided on whether to uphold the Ninth Circuit's finding that plaintiffs do not need to allege actual injury to maintain statutory class action claims, with Justice Anthony Kennedy in the middle of the traditional split between conservative and liberal justices.

"The unexpected death of Justice Scalia could have a very significant effect on the outcome of Spokeo," Sheppard Mullin Richter & Hampton LLP partner David Almeida said. "If history is any guide, Justice Scalia was poised to be a reliable vote in favor of reversing the Ninth Circuit's ruling in Spokeo and thus one of the crucial votes in a 5-4 majority holding that Congress cannot confer standing in the absence of an injury-in-fact."

If Justice Kennedy sides with the conservatives, as his questioning during oral arguments indicated he may, Justice Scalia's passing would plunge the court into a 4-4 tie and force the justices either to issue a decision without precedential value affirming the Ninth Circuit or to relist the dispute to be heard again next term.

Either way, the divide would leave both plaintiffs and businesses to continue to wade through an uncertain legal landscape when it comes to liability for a wide range of alleged privacy and data security violations, attorneys say.

The standing issue is an important one for businesses such as Facebook Inc., Google Inc. and Yahoo Inc., which filed an amicus brief with the high court in June 2014 arguing that allowing the Ninth Circuit's ruling to stand would open the floodgates to a barrage of "no injury" class actions.

"This is a question that is becoming more significant across the country, with pretty substantial businesses facing these issues, and a split will result in them being stuck in the same spot that they have been in for years," Foley & Lardner LLP partner Joseph Jacquot said. "It means that businesses are going to face different precedent from circuit to circuit, which is difficult to

manage when you have a nationwide business platform, and it may make litigation gravitate toward those circuits that have more lax standing rules.”

Up until Saturday, the fate of the Spokeo case rested largely on Justice Kennedy, according to attorneys who have studied the transcripts and audio recordings from the Nov. 2 oral arguments session.

Judging by the tone of the questions posed by Chief Justice John Roberts as well as Justices Samuel Alito and Scalia, the three seemed to be aligned in their belief that standing should be limited to those who can show an actual concrete injury rather than those who can allege a mere statutory violation, as the four liberal justices seemed to hold.

“There’s been a lot of reporting about whether Justice Kennedy is going to side with the four liberal justices in establishing a broader right of action for consumers under the FCRA or the four conservative justices and limit standing to injury in fact,” Podhurst Orseck PA partner Roy Altman said.

Justice Kennedy appeared to tip his hand slightly during oral arguments by indicating his concern about Congress’ power to create a cause of action that would allow consumers to sue in situations where they can’t prove an actual injury, according to Altman.

“That suggested to me that Justice Kennedy is likely to side with the other conservatives in finding that the FCRA does not allow for consumers to sue under the statute without proving injury in fact,” Altman said.

If the forecast is accurate, Justice Kennedy would have been the fifth vote to overturn the Ninth Circuit — a majority that would evaporate without Justice Scalia’s vote, attorneys noted.

Without a majority, the decision of the lower court would be affirmed by an evenly divided court in a ruling that would have no precedential value, meaning the status quo the Supreme Court had hoped to address by taking up the dispute in April would remain unchanged.

“The spilt among the circuits would remain, which makes it likely that someone will bring another suit to the Supreme Court and we may see Spokeo 2 come up in 2017 or 2018,” said Lewis S. Wiener, co-chair of the Telephone Consumer Protection Act defense practice at Sutherland Asbill & Brennan LLP.

The justices could potentially resolve the issue sooner, if they choose to forgo issuing a decision and instead elect to list the case for reargument next term in order to allow for a full slate of justices to consider the hot-stakes issue.

“However, given the recent statements from Republican senators indicating their collective opposition to holding confirmation hearings on any Supreme Court nominee put forth by President Obama, it is possible that we will have to wait for a ninth justice until after the inauguration of the next president in 2017,” Almeida noted. “If Spokeo is still on the docket next year, that would mean that there would be no final decision in Spokeo until late spring or summer 2017 at the earliest.”

That delay would further prolong uncertainty among companies that are increasingly being hit with suits under statutes such as the FCRA and TCPA and for plaintiffs who are searching for ways to topple standing hurdles in cases over data breaches and other privacy violations where harm isn't evident or quantifiable, attorneys say.

"Companies have already been waiting for several years in this case, and rearguments next term would have that much greater of an impact on the class action bar and employers who are watching this case closely," Akin Gump Strauss Hauer & Feld LLP partner James Tysse said.

A third option, for which there is actually some precedent in the context of disputes over class action standing, is that the justices could reject the case as improvidently granted.

The high court in 2012 dismissed as "improvidently granted review" *First American v. Edwards*, which challenged whether plaintiffs had standing to bring claims under the Real Estate Settlement Procedures Act without showing tangible injury.

When the justices elected to take up the Spokeo dispute, court watchers took the move to mean the court was finally ready to tackle the issue it had punted in the Edwards case.

But without Justice Scalia's vote, it may be difficult for the court to get a majority on the question of whether the U.S. Constitution allows a court to hear a case in which the plaintiff is not harmed. This could leave the justices more likely to dismiss the case without issuing a formal opinion, Jacquot said.

"It's a rare thing for the court to dismiss a case as improvidently granted, but the possibility of history repeating itself is a little more likely without Justice Scalia's vote because if four justices decide that there is harm, then they don't agree with the condition of the narrow question presented to them and can't decide the case," Jacquot said.

Even if the justices are able to cobble together a decision that isn't evenly split, attorneys agreed that their reasoning for their conclusion could be different without Justice Scalia's influence.

"Justices Scalia, Roberts and Alito seemed to agree [during oral arguments] that the plaintiff would need to show actual harm," Haynes and Boone LLP partner M.C. Sungaila said. "Absent Scalia, however, [we should] query whether there are a sufficient number of votes for that particular line of reasoning."

On the other side of the bar, plaintiffs attorney Jim Francis of Francis & Mailman PC, who specializes in FCRA class actions, said that he didn't believe that Justice Scalia's absence would have a material impact on what he saw as the inevitable outcome: an affirmation of the Ninth Circuit's ruling to avoid upending established case law by pushing more class actions to state court.

"However, Justice Scalia's passing could have an effect on the timing as to when the decision will issue," Francis acknowledged. "If the court were to hold the decision in abeyance pending confirmation of the next justice, rather than issue the decision with eight justices, it will create more delay and provide a basis for re-examining whether existing Spokeo stays should be lifted."

Jay Edelson, the founding partner of Edelson PC who is representing Robins before the high court, expressed his condolences for Justice Scalia's passing, although he declined to comment on how his absence would impact the simmering class action dispute.

"Though I did not always see the world as [Justice Scalia] did, I have great respect for his intellect and passion for the law," Edelson said. "The implications of the open seat are best left to others."

Counsel for Spokeo did not immediately respond to a request for comment on Tuesday.

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 Jay Edelson, Rafey S. Balabarian, Ryan Andrews and Roger Perlstadt of Edelson PC and Will Consovoy, J. Michael Connolly, Michael Park and Patrick Strawbridge of Consovoy McCarthy Park PLLC.

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

— Editing by Kat Laskowski and Ben Guilfoy.