Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

3rd Circ. TCPA Ruling Saps Spokeo Defenses In Class Actions

By **Dan Packel**

Law360, Philadelphia (July 12, 2017, 5:49 PM EDT) -- A recent Third Circuit ruling allowing a woman to bring a suit under the Telephone Consumer Protection Act over a single pre-recorded message left on her voicemail shows that defendants cannot count on the U.S. Supreme Court's pivotal Spokeodecision to end consumer protection class actions, experts say.

The appellate panel reversed a district court ruling when it sided with lead plaintiff Noreen Susinno, who claimed her privacy was violated by an unauthorized call from fitness club Work Out World Inc. in 2015. The judges concluded that the type of injury claimed by Susinno was squarely identified by Congress in the TCPA, which directly addresses and prohibits pre-recorded calls in the interest of protecting privacy.

The panel invoked the Supreme Court's ruling in Spokeo v. Robins, which determined that Article III standing required a concrete injury even in the context of a statutory violation.

"What the court is doing is saying, 'If Congress recognizes these issues as an invasion of a right, all you have to show is that a right was invaded,'" explained Gavin Rooney, chair of class action litigation at Lowenstein Sandler LLP. "I think it's truncating the scope and effect of Spokeo."

Fueled by the potential to recover uncapped statutory damages of between $500 and $1,500 per violation, the plaintiffs bar in recent years has used the TCPA statute, which was drafted in 1991, to support claims that debt collectors and other businesses have peppered consumers with unwanted calls.

Attorney John Keefe Jr., whose Keefe Law Firm represents plaintiffs in a range of matters, says that new technology has allowed businesses to become more aggressive in their solicitation of consumers. He hailed the court's decision as a necessary check on increasingly intrusive behavior by marketers.

"Had the Third Circuit not gone this way, it would have eroded the TCPA's purpose and the protections that Congress gave us with this act," he said. "It was starting to offend traditional notions of privacy."

Observers, both in the plaintiffs and defense bars, were not surprised by the ruling. In a May analysis published in Law360, a group of Morgan Lewis & Bockius LLP attorneys found that district courts had granted standing in 87 percent of the TCPA cases decided in the 12 months since the Spokeo ruling.

"Courts around the country have dealt with Spokeo in the context of alleged TCPA violations," said John Papianou, the co-chair of the litigation department at Montgomery McCracken Walker & Rhoads LLP. "They've almost uniformly found that a violation is sufficient to confer standing."

The case also builds on the Third Circuit's jurisprudence from a prior decision interpreting Spokeo. In the Horizon Healthcare Services Inc. Data Breach Litigation, the appeals court revived a putative class action on the grounds the plaintiffs didn't need to prove their compromised data was misused, but instead could rely on alleged violations of the Fair Credit Reporting Act to continue with their claims. The same logic in Horizon applied to Susinno's claim as well, the appellate panel said Monday.

"It seems like the court is definitely making an effort to provide some consistent guidance to litigants on the interpretation of Spokeo," Morgan Lewis partner Ezra Church said in an email.

Nonetheless, attorneys in the defense bar were concerned that a purported misstep as minimal as one voice mail message was sufficient to confer standing.

"Here, the woman certainly didn't seem to have any real injury; she didn't take the call," said Jeff Greenbaum, chair of the class action practice at Sills Cummis & Gross PC. "The court seems to be taking a minimalist view of the type of injury necessary to invoke federal jurisdiction."

He added that Congress, when it passed the TCPA in 1991, did not anticipate the rise of plaintiffs' lawyers treating consumer protection laws allowing uncapped statutory damages as lucrative veins to be tapped.

"The opinion has the potential to open the floodgates to a cottage industry of plaintiffs' class action TCPA lawyers," he said.

Church also expressed disappointment in the court's minimalist reading of injury.

"I think many people viewed the single-call scenario as one circumstance where a TCPA plaintiff really might not have standing," he said. "Spokeo held that Article III standing needs to be considered even for a federal statutory claim, and a plaintiff needs to allege an injury that is sufficiently concrete. The idea that a single phone call could be sufficiently 'concrete' seems to really minimize that requirement."

Even with the adverse rulings in Horizon and Monday's case — and in other appellate courts — the defense bar is unlikely to abandon the Spokeo decision in future litigation.

"I think we can assume that defendants, in spite of the Third Circuit's repeated rulings, will attempt to use Spokeo to block plaintiffs' cases," said Bruce Greenberg, who represents plaintiffs in consumer protection cases at Lite DePalma Greenberg LLC. "But the Third Circuit has really made it clear that Spokeo is not a new weapon for defendants."

Greenberg's conclusion will undoubtedly be tested when the court is asked to determine standing tied to other consumer protection statutes. One likely prospect is New Jersey's Truth in Consumer Contract, Warranty and Notice Act, which allows for a $100 civil penalty for each violation.

Rooney noted that in 2016 alone, 50 or 60 cases had been filed in the District of New Jersey in which plaintiffs had alleged violations of requirements for standard form contracts. While these cases have largely been dismissed on standing grounds, he questioned whether the harm associated with these

violations was any different than the harm Susinno sustained from the voice mail message.

"That's probably one of the next iterations that the circuit will look at," he said.

--Additional reporting by Steven Trader. Editing by Philip Shea and Catherine Sum.