December 8, 2014

InsideCounsel.com

BUSINESS INSIGHTS FOR LAW DEPARTMENT LEADERS

In privacy cases, should statutory standing be sufficient to satisfy Article III?

Some are questioning whether statutory standing should be sufficient to meet the 'injury in fact' required by Article III

BY HON. JAMES WARE (RET.)

In recent years, there have been many privacy lawsuits targeting the giants of the Internet economy. Google, Facebook, Yahoo and LinkedIn all have been sued for allegedly violating their users' privacy. The cases have involved complicated federal statutes and a host of state law claims. Regardless of the legal framework under which the plaintiffs have asserted their claims, however, one common question is posed by all of these cases—namely, how is it that the plaintiffs have standing to appear in federal court?

In order to maintain a lawsuit in federal court, the case must satisfy the "case or controversy" requirement of Article III: It must be ripe, the claim must not be moot, and the plaintiff must have standing to sue. In order to satisfy the standing requirements of Article III, it is well known that a plaintiff must demonstrate that the plaintiff has suffered some "injury in fact." But as any user of Gmail or Facebook is aware, those companies provide their services to consumers free of charge. How, then, have plaintiffs—who received their email accounts and social media pages for free, and thus cannot have suffered any economic harm in regard to them—been able to show that their right to privacy was injured by those companies' practices?

In the 9th Circuit—the home of Silicon Valley, and thus a frequent venue for many of these cases—the answer is simple. The court has held (In re Zynga Privacy Litig.) that statutory standing is sufficient. A plaintiff may establish standing by virtue of bringing a claim "under a statute that prohibits the defendant's conduct," so long as that statute grants "persons in the plaintiff's position a right to judicial relief." Thus, the mere fact that a plaintiff alleges that a defendant violated the Wiretap Act—a popular source of potential liability in privacy cases—is itself "sufficient to establish standing," insofar as that statute both prohibits certain uses of electronic communications and permits those whose communications have been so used to recover in a civil lawsuit, per 2013's In re Google Inc.

Attorneys representing these companies and others are questioning whether statutory standing should be sufficient to meet the "injury in fact" required by Article III. In a recent dissent in Hammer v. Sam's East, Inc., Chief Judge Riley of the 8th Circuit argued that his court had erred by adopting the same broad approach to standing as in the 9th Circuit. As Judge Riley observed, the "invasion of a statutory right is an injury in law." However, as he also noted, such "injury without damage" is not the "injury in fact" that is required by Supreme Court precedent for standing. And in contrast to the 9th Circuit, the 3rd Circuit held in Doe v. Nat'l Bd. of Med. Examiners that the "proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated."

The 9th Circuit's statutory standing requirement could be scrutinized by the Supreme Court if the Court grants certiorari in Spokeo v. Robins. The issue in Spokeo is whether a plaintiff who "suffers no concrete harm" may nonetheless have Article III standing conferred upon him by a law "authorizing a private right of action based on a bare violation of a federal statute." As Spokeo's petition observes, the courts of appeals are divided over whether an "injury in law" can suffice to establish standing under Article III. Moreover, an amicus brief filed by a number of leading technology companies has urged the Court to grant certiorari, on the ground that the 9th Circuit's rule allows plaintiffs to pursue lawsuits "even where they are not actually harmed by an alleged statutory violation," and thus to "seek class action damages that could run into the billions of dollars." As the amici observe, this has the pernicious effect of creating a "strong incentive to settle even the most baseless suits, rewarding plaintiffs (and their attorneys) for filing meritless strike suits in circumstances where no one has been harmed."

The Supreme Court appeared ready to consider this question two years ago through First American Financial Corp v. Edwards, in a case that presented this precise issue, but ultimately dismissed the writ of certiorari as improvidently granted. However, there is reason to think that the Court might be willing to revisit the issue. In October, the Supreme Court invited the Solicitor General to file a brief in Spokeo to express the views of the United States. Those interested in this issue should follow that case. If the Court accepts certiorari this would provide it with an opportunity to lend clarity to whether statutory standing is sufficient to confer Article III standing.

Judge James Ware (Ret.) is a full-time arbitrator and mediator with JAMS, based in San Francisco. Prior to joining JAMS he spent 16 years as a civil litigator, and 24 years as a judge. He can be reached at jware@jamsadr.com.