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Ikea Ruling Puts Stamp On Novel Post-Spokeo Strategy

By **Allison Grande**

Law360, New York (January 18, 2017, 10:27 PM EST) -- The Ninth Circuit on Friday backed an Ikea shopper's unorthodox argument that her ZIP code collection claims against the retailer should return to state court because she lacked standing to pursue them in federal court, giving ammunition to a class action litigation strategy many predicted would gain traction in light of the U.S. Supreme Court's Spokeo ruling.

In a **brief ruling**, a three-judge panel resolved an appeal filed by plaintiff Rita Medellin of a lower court's decision to decertify a class that had accused the company of illegally collecting customer ZIP code data, concluding Medellin didn't plead the concrete harm necessary under Spokeo to give her standing to bring a suit.

The high court's 2016 Spokeo v. Robins decision established that a plaintiff's standing requires the demonstration of a concrete injury, not merely a statutory violation.

But in a somewhat unusual twist, the appellate panel based its decision to vacate the decision and direct the lower court to dismiss the case without prejudice on the plaintiff's own concession that she had failed to allege more than a bare procedural violation of the Song-Beverly Credit Card Act and that, due to this lack of standing, her case belonged in state court.

"This decision really goes to the heart of why Spokeo was a double-edged sword," Sheppard Mullin Richter & Hampton LLP partner David Almeida said. "At the outset, the general gut instinct on the defense side is to raise a standing issue in a case like this, but this shows that the worst-case scenario oftentimes is that you just get suck in state court."

On the plaintiffs' side, Edelson PC partner Christopher Dore — whose firm represented plaintiff Thomas Robins in the Spokeo case but wasn't involved in the Ikea matter — characterized the outcome of the Ninth Circuit dust-up as a confirmation of what his side has been forecasting since the high court handed down its ruling in May.

"The thrust of the Spokeo ruling was really about not if a case can be brought, but rather where that case can be brought," he said. "Even though a defendant may be successful on the standing argument in federal court doesn't mean plaintiffs can't move forward in state court, and the Ninth Circuit seems to be endorsing that idea."

Shook Hardy & Bacon LLP data security and privacy group co-chair Al Saikali backed this assessment that

Spokeo was always more about where certain types of privacy cases should be litigated than whether they can be litigated.

"The 'bad cases' — where there were only allegations of a statutory violation but no actual harm — should be in state court, while the cases where measurable harm was involved remain in federal court," Saikali said. "This is an example of that."

But while both sides of the bar had always known that the push to get back to state court was likely to intensify post-Spokeo, Friday's ruling shows the prediction is more than just a possibility.

"It effectively gives plaintiffs a second bite of the apple if the facts are right," Seyfarth Shaw LLP senior counsel John Tomaszewski said. "This is a pretty fact-specific case, but it is the first time we've seen plaintiffs use Spokeo as a way to avoid a detrimental ruling."

Having the Ninth Circuit at least implicitly give its blessing to this strategy additionally adds significant weight to the proposition that this tactic has legs.

"It's an important decision because it's coming from the Ninth Circuit, where there is so much class action litigation, and will both be the law throughout the Ninth Circuit and persuasive authority elsewhere," said Thomas Zych, chairman of Thompson Hine LLP's emerging technologies practice. "It offers one more wrinkle for both sides in how they form their strategy of where to file cases as a plaintiff and where to keep them as a defendant."

The Ninth Circuit's ruling comes less than two months after an Illinois district court offered its own input on the jurisdictional quandaries presented by Spokeo.

In that case, AllSaints USA Ltd. removed a Fair and Accurate Credit Transactions Act case accusing the retailer of printing too many credit card digits on receipts from Cook County to federal court in August, and subsequently moved for dismissal a month later, arguing that the case didn’t meet the standing bar created by Spokeo.

But U.S. District Judge Elaine E. Bucklo dealt a double blow to AllSaints in December, electing not only to send the case back to state court on the grounds that the plaintiff's ability to satisfy the Spokeo test had no impact on her posture in state court, but also to order the retailer to pay the plaintiff $58,113 in attorneys’ fees.

"It's becoming a tricky issue where before raising a Spokeo defense, the first thing that needs to be done on the defense side is start researching the standing law in whatever state court you may end up in," Almeida said. "Spokeo certainly has its place in a defense strategy, but it can't be a reflexive argument because it has a double-edged nature to it."

However, despite the difficulties that Spokeo seems to have created for defendants in keeping their claims in federal court and making rulings from these courts stick, the high court's ruling didn't create an obstacle-free path for plaintiffs either.

"State court may be where most plaintiffs want to be in the first place," Fenwick & West LLP privacy and information security group co-chair Tyler Newby said. "The risk plaintiffs run when making these arguments, however, is that there may be statutory standing requirements that require proof of actual loss."

For instance, the California Consumers Legal Remedies Act expressly requires some actual harm for a claim to proceed, Troutman Sanders LLP partner David Anthony said.

"So depending on the plaintiff's claim, the question of actual harm may remain a key issue in state court," Anthony added.

Another consideration that the plaintiffs bar should take into consideration is that in instances where a statute gives the court broad discretion in determining the amount of a civil penalty, "an admission that the plaintiff has not suffered any actual injury may end up ultimately pushing the penalty toward the nominal range at the time of judgment or in settlement negotiations," according to Newby.

Typically, the plaintiffs bar is likely to be hesitant to fight for a suit to go back to state court if they can't preserve the value of the damages or size of the class that they would have in federal court, Tomaszewski noted. So disputes where only a small fraction of class members would be able to continue in state court, or where there's not a strong state court law equivalent to the federal allegation being asserted, may not be attractive for remand from the plaintiffs' standpoint, attorneys say.

"This isn't necessarily a panacea because state courts have their own idiosyncrasies," Tomaszewski said. "As a consequence, it's not always going to be a double-edged sword."

But regardless of where these disputes ultimately end up, Dore noted that one thing is still likely.

"The end result is almost always going to be that these cases move forward; it's just a question of where," Dore said.

Medellin, the plaintiff in the Ikea case, is represented by Timothy G. Blood and Paula M. Roach of Blood Hurst & O'Reardon LLP, and Gene J. Stonebarger and Richard D. Lambert of Stonebarger Law.

Ikea is represented by Michael A. Geibelson, Jill S. Casselman and Nicole S. Frank of Robins Kaplan LLP and Kenneth S. Kawabata of Manning & Kass Ellrod Ramirez Trester LLP.

The case is Medellin v. Ikea U.S. West Inc., case number 15-55174, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Philip Shea and Mark Lebetkin.
