The Banking Law Journal

Established 1889

An A.S. Pratt™ PUBLICATION

OCTOBER 2020

LexisNexis

THE BANKING LAW JOURNAL

VOLUME 137 **NUMBER 9** **October 2020**

LexisNexis®

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ISBN: 978-0-7698-7878-2 (print)
ISSN: 0005-5506 (Print)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

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MATTHEW BENDER

(2020-Pub.4815)

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THE BANKING LAW JOURNAL (ISBN 978-0-76987-878-2) (USPS 003-160) is published ten times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to bankers, officers of financial institutions, and their attorneys. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL LexisNexis Matthew Bender, 230 Park Ave, 7th Floor, New York, NY 10169.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207.

Spokeo, Inc. v. Robins: An Underutilized Defense Against Claims Brought Under Federal Consumer Finance Statutes

Alfred W.J. Marks and Michael K. Lane*

Since the U.S. Supreme Court's decision in Spokeo, Inc. v. Robins*, courts have recognized increasingly that not all disputes have a home in federal court, and have ruled in favor of defendants who challenge the court's jurisdiction over procedural violations of a variety of consumer finance statutes. The authors of this article discuss recent decisions on the issue of standing post-*Spokeo.

Recent appellate decisions involving claims under the Fair Debt Collection Practices Act ("FDCPA"), Fair Credit Reporting Act ("FCRA"), Real Estate Settlement Procedures Act ("RESPA"), and Truth in Lending Act ("TILA"), continue to heed the U.S. Supreme Court's reminder in *Spokeo, Inc. v. Robins*,[1] that a plaintiff's claims in federal court cannot prevail unless the plaintiff independently establishes Article III standing by suffering a concrete and particularized injury-in-fact. Yet many defendants overlook this defense when responding to such claims.

Lenders, servicers, reporting agencies, and others engaged in debt collection, when facing claims under the FDCPA, FCRA, RESPA, and TILA, often direct their dispositive motions against the merits of the plaintiff's damage allegations, as opposed to focusing on whether the plaintiff can even maintain an action in federal court under the confines of the United States Constitution. These defendants attempt to pit their motions against liberally construed pleading standards and remedial consumer-protection statutes (wherein plaintiffs may recover for non-pecuniary damages such as emotional distress and pain and suffering), and try to focus the court's attention on determining whether the plaintiff has sufficiently alleged a causal connection between the claimed

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[1] 136 S. Ct. 1540 (2016).

damages and the statutory violation.[2] At the motion to dismiss stage, these efforts must face an often-time insurmountable hurdle in order to prevail. Even on a summary judgment motion, a plaintiff's self-proclaimed distress and anxiety may preclude dismissal of the case.

Since the Supreme Court's decision in *Spokeo*, courts have recognized increasingly that not all disputes have a home in federal court, and have ruled in favor of defendants who challenge the court's jurisdiction over procedural violations of FDCPA, FCRA, RESPA, and TILA. Many courts have even raised *sua sponte* the lack of Article III standing where the parties failed to consider or raise the issue. With this in mind, defendants should consider raising a standing defense based on *Spokeo* in order to defeat claims under FDCPA, FCRA, RESPA, and TILA, as opposed to automatically descending into merit-based analyses and motion practice.

THE LIMITATIONS OF FEDERAL COURT JURISDICTION

"The Constitution confers limited authority on each branch of the Federal Government. It vests Congress with enumerated 'legislative Powers,' Art. I, § 1; it confers upon the President '[t]he executive Power,' Art. II, § 1, cl. 1; and it endows the federal courts with '[t]he judicial Power of the United States,' Art. III, § 1. In order to remain faithful to this tripartite structure, the power of the Federal Judiciary may not be permitted to intrude upon the powers given to the other branches."[3] Article III limits the judicial power of federal courts to resolving actual "Cases" and "Controversies," not theoretical questions.[4] One telltale requirement of a case or controversy is that the parties have standing to bring it.[5] In *Spokeo*, the Supreme Court reaffirmed that to have Article III standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." "Injury in fact is a constitutional requirement, and '[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'"[6]

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[2] *See, e.g.*, *Lawson v. Mich. First Credit Union*, No. 20-CV-10460 (E.D. Mich. May 5, 2020).

[3] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1546 (2016), as revised (May 24, 2016).

[4] U.S. Const. art. III, § 2.

[5] *Id.*

[6] *Spokeo,* 136 S. Ct. at 1547–48 (quoting *Raines v. Byrd*, 521 U.S. 811 (1997); *see also Strubel v. Comenity Bank*, 842 F.3d 181, 188 (2d Cir. 2016) ("But even where, as here, Congress has statutorily conferred legal interests on consumers, a plaintiff only has standing to sue if she can

To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical. For an injury to be particularized, it must affect the plaintiff in a personal and individual way. An injury in fact must also be concrete and not abstract for a plaintiff to satisfy Article III standing such that a plaintiff may not maintain a suit in federal court by alleging bare procedural violations, divorced from any concrete harm.[7] Additionally, a favorable decision must likely redress the alleged injury.

STANDING IS A SUBJECTIVE INQUIRY

Although the substantive law for a cause of action may employ an objective standard, such as the "least sophisticated consumer," it is important to recognize that the analysis for standing is subjective.

In *Frank v. Autovest, LLC*,[8] a debt collector filed affidavits during collection proceedings which allegedly contained false or misleading statements. During the discovery phase of plaintiff's claim under the FDCPA, plaintiff testified that she felt misled and scammed by the collection agency's statements, but admitted that she did not submit any payments, take any different action, or refrain from taking any action as a result of the statements. In granting summary judgment for the defendants, the district court reasoned that the false statements were not actionable on the merits under the FDCPA because they did not impact plaintiff's ability to respond or contest the debt. However, the U.S. Court of Appeals for the D.C. Circuit vacated the grant of summary judgment and remanded with instructions to dismiss the complaint for lack of standing despite noting that the parties and lower court had failed to consider the issue. The court of appeals reasoned that plaintiff's emotional distress and incurrence of legal fees related to the collection proceedings themselves, and were not directly connected to the false affidavits that formed the basis of her FDCPA complaint. Accordingly, she did not suffer a concrete personal injury traceable to the false affidavits themselves, and lacked standing to maintain her action.

Clarifying further, the *Frank* court explained that:

> [a] misrepresentation in a debt collector's court affidavit—including a false statement about the affiant's employer—is certainly capable of causing a concrete and particularized injury. But Frank has not demonstrated that these statements had that effect. Without that

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allege concrete and particularized injury to that interest.").

[7] *Spokeo,* 136 S. Ct. at 1548.

[8] *Frank v. Autovest, LLC*, 961 F.3d 1185, 1189 (D.C. Cir. 2020).

> showing, Frank lacks standing—even if [defendants] violated the FDCPA.[9]

Finally, the *Frank* court explained that, under the merits of plaintiff's FDCPA claims, an unsophisticated consumer may have been misled by the false affidavits and possess a claim, but the substantive standard for a claim under the FDCPA does not fulfill plaintiff's independent burden to also establish standing. The court noted that "[t]his mismatch between the (objective) merits inquiry and the (subjective) standing inquiry is not unique to the FDCPA, but it can trip up an unsuspecting plaintiff."[10]

Although the Supreme Court's decision in *Spokeo* was issued more than four years ago, recent cases continue to illustrate the surprising number of plaintiffs and defendants who overlook the issue of standing. Like the appellate court in *Frank*, a recent decision from the U.S. Court of Appeals for the Eleventh Circuit examined two lower court decisions in which no party raised the question of Article III standing.[11] In *Trichell v. Midland Credit Mgmt., Inc.*, two separate plaintiffs brought FDCPA claims after their receipt of collection letters relating to time-barred debts. Neither plaintiff, however, made a payment relating to the time-barred debt after receipt of such letters. On appeal, the court likened the FDCPA claims asserted to claims traditionally brought for fraudulent or negligent misrepresentations, which require both justifiable reliance and damages.

In remanding the case for dismissal due to lack of standing, the *Trichell* court rejected plaintiffs' arguments that standing could be established from the risk that the debt communications would mislead an unsophisticated consumer, when the plaintiffs themselves were not misled. In so holding, the Eleventh Circuit rejected contrary rulings from the U.S. Courts of Appeals for the Sixth and Second Circuit.[12] The U.S. Court of Appeals for the Seventh Circuit has likewise rejected the Sixth Circuit's prior decision on the issue[13] and the Sixth

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[9] *Frank,* 961 F.3d at 1189.

[10] *Id.*

[11] *Trichell v. Midland Credit Mgmt., Inc.*, No. 18-14144 (11th Cir. July 6, 2020).

[12] *But see Macy v. GC Servs. L.P.*, 897 F.3d 747 (6th Cir. 2018) (finding standing based on the increased forfeiture risk to consumers in general, without any showing that the failure to provide notice placed the plaintiffs at greater risk); *Cohen v. Rosicki, Rosicki & Assocs., P.C.*, 897 F.3d 75, 80–82 (2d Cir. 2018) (finding sufficient standing to assert FDCPA claims based only on a risk of harm from misleading communications, even though the plaintiff never alleged that the communication at issue might have affected him personally).

[13] *See Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 335 (7th Cir. 2019).

Circuit itself has declined to extend its prior decision to other scenarios wherein a consumer alleges intangible injuries stemming from statutory violations of the FCRA.[14]

ANXIETY AND EMOTIONAL DISTRESS MAY NOT CONSTITUTE A CONCRETE INJURY

The failure of the plaintiffs in *Trichell* to submit any payment or otherwise alter their conduct after receipt of the debt collection letters ultimately doomed their assertions of standing, but the extent to which allegations of subsequent anxiety and emotional distress may satisfy a plaintiff's burden to establish standing was recently examined by the Sixth Circuit. In *Buchholz v. Meyer Njus Tanick, PA*,[15] the plaintiff alleged that debt collection letters violated provisions of the FDCPA and gave him the false impression that an attorney had reviewed plaintiff's case and determined that the debts were valid. Like the *Trichell* plaintiffs, Buchholz did not actually submit a payment in response but, instead, he alleged that the debt collection letters left him with an undue sense of anxiety that he would be sued if he did not promptly submit a payment. He then consulted with an attorney and thereafter filed his FDCPA claim against the debt collector law firm. The Sixth Circuit affirmed dismissal of plaintiff's FDCPA claims for lack of standing, noting Supreme Court precedent that "psychological consequence presumably produced by observation of conduct with which one disagrees" is "not an injury sufficient to confer standing under Art. III" and that "general emotional 'harm,' no matter how deeply felt, cannot suffice for injury-in-fact for standing purposes."[16]

The *Buchholz* court also observed that the plaintiff "cites no case from this court holding that anxiety, on its own, is an injury in fact—and as best we can tell, no such case exists."[17] The court went on to conclude that fear of future injury could not satisfy Article III standing requirements unless the future harm is "certainly impending" and that a plaintiff cannot create an injury by taking precautionary measures against a speculative fear, such as meeting with attorneys.[18] Likewise, other courts have held that "a reference to invaded

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[14] *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458, 463 (6th Cir. 2019), cert. denied, 140 S. Ct. 1117, 206 L. Ed. 2d 185 (2020); *see also Butt v. FD Holdings, LLC*, 799 F. App'x 350, 353 (6th Cir. 2020).

[15] *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 861 (6th Cir. 2020).

[16] *Id.* at 861.

[17] *Id.* at 863.

[18] *Id.*

'privacy and statutory rights,' . . . [is] insufficient to describe a concrete and particularized harm."[19]

STATUTORY VIOLATIONS DO NOT ALWAYS CAUSE A CONCRETE INJURY

As courts turn their focus away from the merits of underlying causes of action and towards the requirements for standing, the analysis shifts to whether, subjectively, the statutory violation caused the type of concrete injury that Congress sought to prevent.

In *Baehr v. Creig Northrop Team, P.C.*,[20] home buyers brought putative class action claims under RESPA, alleging a kickback scheme between their real estate brokerage firm and title company. Plaintiffs admitted that defendant—their real estate brokerage firm—was reputable and had their best interests at issue, and therefore plaintiffs took no steps to investigate the suggested title company, inquire about rates or quality of service, or seek out other settlement providers. They also admitted that the settlement fees charged by the title company were similar to those they had paid for a prior home purchase and that they were not overcharged. Facing a motion for summary judgment based on lack of standing, plaintiffs brought forward evidence of a sham marketing agreement between the real estate brokerage firm and title company to establish a kickback scheme in violation of RESPA. Plaintiffs argued that this evidence was sufficient to satisfy their burden of proof and that they were not required to establish overcharging to possess standing under the statute.

Affirming the lower court's entry of summary judgment in favor of the defendants, the U.S. Court of Appeals for the Fourth Circuit rejected the assertion that Congress, through RESPA, could elevate "the deprivation of impartial and fair competition between settlement services providers to the status of a legally cognizable injury."[21] The *Baehr* court reasoned that, although RESPA prohibits such kickback schemes, it does so because Congress sought to prevent the tendency of such schemes to cause overcharging and, accordingly, the kickback scheme itself, in the absence of overcharging, could not establish a concrete injury in fact. Finally, the *Baehr* court went on to note that plaintiffs' reliance on prior precedent holding that a violation of 12 U.S.C. § 2607(a) is

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[19] *Orpilla v. Schenker, Inc.*, No. 19-CV-08392-BLF (N.D. Cal. May 12, 2020) (*quoting Moore v. United Parcel Serv., Inc.*, No. 18-CV-07600-VC (N.D. Cal. May 13, 2019)).

[20] *Baehr v. Creig Northrop Team, P.C.*, 953 F.3d 244, 247 (4th Cir. 2020).

[21] *Id.* at 253.

a concrete injury regardless of any overcharge was misplaced, as the Supreme Court in *Spokeo* explicitly recognized that its decision abrogated such prior precedents.

WHEN STATUTORILY-MANDATED NOTICES ARE NOT PROVIDED, SOME INJURIES MAY OCCUR

The determination of whether a statutory violation has resulted in a concrete and particularized injury to confer standing is not always simplistic. Some required disclosures may be immaterial in a particular case, while others deprive a consumer of knowledge that Congress has deemed necessary.

The Second Circuit, in examining four distinct TILA claims, determined that some violations of statutorily mandated procedures may entail the concrete injury necessary for standing, while others might not.[22] In analyzing whether a lack of required disclosures necessarily harms or creates a risk of real harm to a plaintiff's concrete interests, case specific determinations are often made based on whether the risk of harm is considered material. For example, the Second Circuit determined that a credit issuer's failure to provide a borrower with required notices that (1) certain identified consumer rights pertain only to disputed credit card purchases not yet paid in full, and (2) a consumer dissatisfied with a credit card purchase must contact the creditor in writing or electronically, resulted in the sort of concrete injury for which Congress sought to prevent in its enactment of TILA and conferred standing.[23] Conversely, the failure to disclose a consumer's obligation to provide a creditor with timely notice to stop automatic payment of a disputed charge was found not to result in a concrete injury where the credit issuer did not offer an automatic payment plan at the time plaintiff held the credit card at issue.[24] Nor could a failure to disclose response obligations to reported billing errors create a concrete injury when no billing errors had occurred.[25] In another instance, a lender's failure to include a payment schedule with a loan in violation of TILA did not create a sufficient risk of harm to confer standing when the loan in question matured after a single month.[26]

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[22] *Strubel v. Comenity Bank*, 842 F.3d 181, 189 (2d Cir. 2016).

[23] *Id.* at 190–91.

[24] *Id.* at 191–92.

[25] *Id.*

[26] *Littlejohn v. Phoenix Title Loans LLC*, No. CV-18-04250-PHX-SMB (D. Ariz. May 15, 2020).

AN ASSESSMENT OF STANDING SHOULD BE CONDUCTED AT THE BEGINNING OF EVERY CASE

In light of the foregoing rulings and the increased willingness of federal courts to dismiss claims for lack of standing, defendants should raise such a defense whenever possible. Conducting an assessment of standing at the start of the case may provide an additional, and potentially more efficient and cost-effective, path towards dismissal of claims under the FDCPA, FCRA, RESPA, and TILA than litigating the case on the merits of the substantive law. Indeed, the recent decisions in which the courts have raised the issue of standing *sua sponte* highlight that federal courts are keenly focused on their limitations under Article III of the United States Constitution.

In defending these kinds of claims, defense counsel's initial case evaluation should first assess whether the allegations in the complaint establish that the plaintiff's subjective actions or decisions were impacted by the allegedly misleading, inaccurate, or missing information and whether a court's adjudication of the claims will place the plaintiff in a different position than at the time of filing the complaint. Where a plaintiff's actions *may* have been impacted by the allegedly prohibited conduct, targeted discovery can ascertain whether the plaintiff was actually impacted. For instance, targeted discovery may distinguish the plaintiff from the generic "least sophisticated consumer" or establish that the omissions of required disclosures were immaterial to a particular plaintiff and help establish a plaintiff's lack of standing to maintain the action. As explained by the *Trichell* court, even in instances where a consumer is misled by false information, the risk of any harm may have dissipated prior to filing suit, resulting in a lack of standing to maintain the action.[27]

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[27] *Trichell*, No. 18-14144 ("Even if Trichell and Cooper were placed at risk of being defrauded when they received their collection letters, the risk never materialized, had dissipated before the complaints were filed, and cannot possibly threaten any future concrete injury. For this additional reason, Trichell and Cooper cannot show Article III standing based on a risk of injury.").