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Confusion and Anxiety Fail to Satisfy a Plaintiff's Burden Under the Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act ("FDCPA") was enacted in 1977 to eliminate abusive debt collection practices. 15 U.S.C. § 1692(e). To further that goal, section 1692e of the FDCPA prohibits a debt collector from using false, deceptive, and misleading representations; section 1692f prohibits a debt collector from using unfair or unconscionable means; and, section 1692g requires a debt collector to provide certain information (the amount of the debt, name of creditor, and explanation of right to dispute a debt) to a consumer.

Congress conferred a private cause of action for violations of these sections of the FDCPA. An individual can sue a debt collector to recover actual damages, "such additional damages as the court may allow, but not exceeding $1,000," costs, and reasonable attorney's fees. 15 U.S.C. § 1692k(a). For decades, consumers have relied on the FDCPA to assert claims against debt collectors for technical violations of the statute that had no actual impact on the consumer.

Five years ago, the U.S. Supreme Court issued a landmark ruling regarding standing to pursue statutory claims in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). The court explained 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." *Id.* at 1547–48. Article III standing requires an injury in fact, which requires a plaintiff to "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.'" *Id.* at 1548 (citations omitted). Thus, a plaintiff cannot "allege a bare procedural violation [of a statute], divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* at 1549.

Spokeo involved a plaintiff who asserted a claim under the Fair Credit Reporting Act—another federal consumer protection statute. Yet, for a couple years after *Spokeo*, lower courts seemed reluctant to apply these standing requirements to FDCPA claims. See, e.g., *Cohen v. Rosicki, Rosicki & Assocs., P.C.*, 897 F.3d 75, 81 (2d Cir. 2018) (holding that sections "1692e and 1692g protect an individual's concrete interests, so that an alleged violation of these provisions satisfies the injury-in-fact requirement of Article III."); *Moore v. Blibaum & Assocs., P.A.*, 693 F. App'x 205, 206 (4th Cir. 2017) (finding standing when plaintiff alleged she suffered "emotional distress, anger, and frustration" from defendant's attempt to collet an inflated sum).

However, there has been a noticeable shift recently. At the end of 2020, multiple Seventh Circuit decisions held that plaintiffs lacked standing to assert FDCPA claims under the guidance set forth in *Spokeo*. The court explained that it must be reasonable to infer that a plaintiff "would have pursued a different course of action were it not for the statutory violation." *Larkin v. Fin. Sys. of Green Bay, Inc.*, 982 F.3d 1060, 1066 (7th Cir. 2020). A plaintiff's confusion and annoyance was not sufficient injury to confer standing. See *Brunett v. Convergent Outsourcing, Inc.*, 982 F.3d 1067, 1068 (7th Cir. 2020) ("The state of confusion is not itself an injury."); *Gunn v. Thrasher, Buschmann & Voelkel, P.C.*, 982 F.3d 1069, 1072 (7th Cir. 2020) ("it is hard to imagine that anyone would file any lawsuit without being annoyed (or worse)….Yet the Supreme Court has never thought that having one's nose out of joint and one's dander up creates a case or controversy."). Those opinions are explained in more detail here.

The Seventh Circuit was not alone in barring FDCPA claims based on standing in 2020. Multiple other circuit courts applied *Spokeo* to find that FDCPA plaintiffs lacked standing:

- *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855 (6th Cir. Jan. 3, 2020): Plaintiff claimed letters from law firms made him anxious about possible legal action, in violation of section 1692e. The Sixth Circuit held the consumer lacked standing because his fear did not relate to future litigation that was "certainly impending" and his fear was "self-inflicted" as he would only be sued if he chose not to pay his debts. The court was "reluctant to find that what the Supreme Court held in *Spokeo*—that an allegation of a 'bare procedural violation' cannot satisfy Article III—can be undone by the simple addition of one

word ['anxiety'] to a pleading." *Id.* at 865.

- *Frank v. Autovest, LLC*, 961 F.3d 1185 (D.C. Cir. June 9, 2020): Plaintiff claimed defendants violated sections 1692e and 1692f by filing false affidavits. The D.C. Circuit held the plaintiff lacked standing because the affidavits did not mislead her. *Id.* at 1188. "After *Spokeo*, a plaintiff must demonstrate a subjective—that is, an actual—personal injury for standing even when his merits argument [under the FDCPA] turns on the perspective of an objective, unsophisticated consumer." *Id.* at 1190.
- *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990 (11th Cir. July 6, 2020): Plaintiffs claimed letters offering discounts on time-barred debts were misleading and unfair. The Eleventh Circuit held that neither plaintiff "suffered an injury in fact when they received allegedly misleading communications that did not mislead them." *Id.* at 1005. The court rejected plaintiffs' argument that any violation of the right to receive truthful information under the FDCPA qualifies as a concrete injury. *Id.* at 1003.
- *Adams v. Skagit Bonded Collectors, LLC*, No. 20-35158, 2020 WL 7055395 (9th Cir. Dec. 2, 2020): Plaintiff claimed defendant violated sections 1692e and 1692g by sending letters that failed to clearly identify his current creditor. He alleged "that he was harmed as a result because, 'upon reading the letter, [he] was unsure of who the current creditor was.'" *Id.* at *1. The Ninth Circuit held that plaintiff's "bare allegation of confusion" was insufficient to confer standing since he did not allege that "he took or forewent any action because of the allegedly misleading statements in the letters." *Id.* at *2.

The Eleventh Circuit recognized a disagreement among the circuits. *Trichell*, 964 F.3d at 1002. We will wait to see if the Supreme Court believes there is a circuit split and decides to clarify how *Spokeo* applies to FDCPA claims.

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