FOLLOW THE LEADER: THE SIXTH CIRCUIT APPLIES *SPOKEO*, RULING THAT CERTAIN STATUTORY VIOLATIONS MAY, WITHOUT MORE, ESTABLISH ARTICLE III STANDING TO BRING AN FDCPA CLAIM

Date: 16 August 2018

U.S. Financial Institutions and Services Litigation Alert

By: Andrew C. Glass, Gregory N. Blase, Roger L. Smerage, Hollee M. Boudreau

A panel of the Sixth Circuit recently concluded that a certain alleged violation of the Fair Debt Collection Practices Act ("FDCPA") by itself constitutes a concrete injury-in-fact establishing Article III standing. In *Macy v. GC Services L.P.*,[1] the Sixth Circuit held that the plaintiffs had standing to assert a claim for a certain type of technical FDCPA violation—namely, the defendant's alleged failure to inform the plaintiffs that disputes regarding their debt must be made in writing to preserve certain rights. The court followed the analytical framework set out by the Ninth Circuit in its *Robins v. Spokeo, Inc.*[2] decision on remand from the U.S. Supreme Court. In doing so, the Sixth Circuit held that the alleged violation alone created a substantial "risk of real harm" to the interests that Congress intended the FDCPA to protect. Yet, the *Macy* decision is limited in scope, and thus, the Sixth Circuit did not provide overarching resolution of all questions regarding Article III standing under the FDCPA.

BACKGROUND

After defaulting on their credit card accounts, the plaintiffs received letters notifying them that their accounts had been referred to the defendant for collection.[3] In the letters, the defendant included a debt-validation notice that informed the plaintiffs generally regarding the steps they needed to follow in order to request: (1) verification of their debt, or (2) information regarding the original creditor in order to dispute their debt.[4] The letters, however, allegedly did not inform the plaintiffs that they must make any such requests in writing to trigger the defendant's obligation to provide information under Section 1692g of the FDCPA.[5] On the basis of that alleged omission, the plaintiffs commenced a putative class action lawsuit against the defendant for alleged violation of the FDCPA.[6]

The defendant moved to dismiss for lack of Article III standing because the plaintiffs had not pleaded any actual injury resulting from the alleged FDCPA violation.[7] The district court denied the motion. It held that the allegedly deficient letters "created a 'substantial' risk that consumers would waive important protections afforded to them by the FDCPA by following [the defendant's] deficient instructions for obtaining verification of the debt or the identity of the original creditor."[8] The plaintiffs then moved for class certification, which the defendant opposed based upon lack of evidence of Article III standing.[9] The district court, unpersuaded by the defendant's challenge, granted class certification.[10] The defendant filed a petition for interlocutory review, which the Sixth Circuit granted.[11]

ANALYSIS

The panel of the Sixth Circuit affirmed. Specifically, the Sixth Circuit held that "[a]ssuming arguendo that the language of [the defendant's] letters constitutes a procedural violation of the FDCPA, Plaintiffs have demonstrated a sufficient 'risk of real harm' to the underlying interest to establish concrete injury without the 'need [to] allege any additional harm beyond the one Congress has identified.'"[12]

In doing so, the Sixth Circuit relied on its analysis of the stated congressional purpose of the FDCPA, namely to prevent unfair, deceptive, and abusive debt collection practices. It also applied the analytical framework for assessing Article III standing based on statutory violations from the Ninth Circuit's decision on remand in *Spokeo*.[13] There, the court ruled that confronting claims based on procedural or technical violations of a statute poses two questions: "(1) whether the statutory provisions at issue were established to protect [a] concrete interest[ ] (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests."[14] Under the Ninth Circuit's framework, only where a "bare" procedural violation does not meet this standard must a plaintiff allege "*additional* harm beyond the one Congress has identified" to establish Article III standing.[15]

Applying this framework, the Sixth Circuit concluded that "Plaintiffs allege[d] a risk of harm that is traceable to [the defendant's] purported failure to comply with federal law, namely the possibility of an unintentional waiver of FDCPA's debt-validation rights.… Without the information about the in-writing requirements, Plaintiffs were placed at a materially greater risk of falling victim to 'abusive debt collection practices.'"[16] As a result, the Sixth Circuit affirmed the district court orders denying the defendant's motion to dismiss and granting class certification.

In reaching its decision, the *Macy* panel rejected the defendant's reliance on the Sixth Circuit's decision in *Hagy v. Demers & Adams*.[17] In *Hagy*, a different Sixth Circuit panel held that the plaintiffs, who filed suit against a mortgage servicer for technical violations of the FDCPA, had "not shown that … th[e] failure to disclose [the mini-Miranda in a debt collection letter] caused them any actual harm beyond that 'bare procedural violation.'"[18] The *Macy* panel held that *Hagy* was not dispositive because (1) the *Macy* plaintiffs alleged a violation of a different provision of the FDCPA that, in the court's view, conferred additional rights, and (2) the *Hagy* plaintiffs did not allege any facts establishing either an actual injury from the FDCPA violation at issue or, as the *Macy plaintiffs had done*, a *risk* of injury from the FDCPA violation.[19]

CONCLUSION

The *Macy* decision may provide some predictability to businesses, including those in the financial services industry, in operating their businesses against the evolving legal landscape of Article III standing following *Spokeo*.[20] As to the type of FDCPA violation at issue in *Macy*, the Sixth Circuit has provided explicit guidance. But where the line falls between that type of violation and the one at issue in *Hagy*, which was not sufficient to establish standing without additional allegations of injury, remains unclear. Whether the Sixth Circuit will endeavor to clarify the situation any time soon—such as through rehearing of the *Macy* decision by the full court—remains to be seen.

Notes:

[1] -- F.3d --, 2018 WL 3614580 (6th Cir. July 30, 2018).
[2] 867 F. 3d 1108 (9th Cir. 2017).
[3] *Macy*, 2018 WL 3614580, at *1.

[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* at *6 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)).
[13] *Id.* at *4-6.
[14] *Id.* at *4 (quoting *Spokeo*, 867 F. 3d at 1113).
[15] *Id.* at *5 (citing *Spokeo*, 136 S. Ct. at 1549) (emphasis in original).
[16] *Id.* at *7.
[17] 882 F.3d 616 (6th Cir. 2018).
[18] *Id.* at 622.
[19] *Macy*, 2018 WL 3614580, at *9.
[20] For additional information regarding *Spokeo* and *Hagy*, please read our articles titled "*Spokeo* Redux: Ninth Circuit Holds That a Statutory Violation under FCRA May, without More, Establish a Concrete Injury for Purposes of Article III Standing" and "Dismissing FDCPA Lawsuit, Sixth Circuit Calls Out Congress for Creating Statutory Remedies Where No Harm Has Occurred," each of which can be found at our blog, K&L Gates Consumer Financial Services Watch or the K&L Gates HUB.

KEY CONTACTS

ANDREW C. GLASS
PARTNER

BOSTON
+1.617.261.3107
ANDREW.GLASS@KLGATES.COM

GREGORY N. BLASE
PARTNER

BOSTON, NEW YORK
+1.617.951.9059
GREGORY.BLASE@KLGATES.COM

