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Consumer Financial Services Newsletter - July 2017

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Sixth Circuit Rings the *Spokeo* Bell in FDCPA Ruling Involving Discovery Statute Violation

In May 2016, the U.S. Supreme Court ruled on whether the Fair Credit Reporting Act (FCRA) created a right confering Article III standing for plaintiffs in consumer litigation. The decision, *Spokeo, Inc. v. Robins,* 136 S.Ct. 1540 (2016), now known simply as "*Spokeo*" – which was widely interpreted to raise the bar on standing – has also become a tool for plaintiffs seeking to allege Article III injury on the basis of statutory violations.

On April 20, 2017, the United States Court of Appeals for the Sixth Circuit joined several other federal courts of appeal in clarifying what constitutes concrete harm as a result of a state procedural violation. In *Lyshe v. Yale R. Levy, et al.*, Appellees brought a collection action against consumer, Lyshe. Soon after bringing the action, Appellees served Lysche with discovery requests. In doing so, Appellees provided mistaken statements associated with their discovery requests. Upon receipt of the discovery requests, Lyshe brought suit against Appellees, claiming Appellees violated the Fair Debt Collection Practices Act (FDCPA) by violating the Ohio Rules of Civil Procedure as to discovery. Lyshe contended state discovery procedure errors created a cognizable intangible injury under the FDCPA. The Court disagreed.

The Sixth Circuit held that *Spokeo* does not eliminate the requirement that a plaintiff actually suffer harm that is concrete, and the consumer's type of harm was not concrete. The Sixth Circuit cited *Spokeo*, in stating that "bare procedural violation[s]," like the violation alleged by Appellant, could not satisfy the injury-in-fact requirement if it is "divorced from any concrete harm." Lyshe did not suffer the concrete harm he alleged, when Appellees made misstatements in their discovery requests about state procedural rules. The procedural violation alleged by the consumer – a violation of state law procedure not required under the FDCPA – is not type of harm contemplated by *Spokeo*.

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The Sixth Circuit clarified that *Spokeo* dealt with the failure to comply with a statutory procedure that was designed to protect against the harm the statute was enacted to prevent. The Sixth Circuit further explained that the intent of the FDCPA is to eliminate abusive debt collection practices, not potential discovery issues. A statutory violation in and of itself is insufficient to establish standing. Notably, the Sixth Circuit made a point to explicitly decline to follow *Church v. Accretive Health, Inc.*, 654 F. App'x 990 (11th Cir. 2016) (*Church*), a case commonly cited by plaintiffs for use in establishing standing. The reason being that *Church* is an unpublished decision, which was rejected months later by the Eleventh Circuit, in *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998 (11th Cir. 2016) (emphasizing that standing is not met simply because a statute creates a legal obligation and allows a private right of action for failing to fulfill this obligation). Thus, Lyshe's "bald allegations" of state procedural violations were insufficient to confer standing as they were not a concrete harm.

For more information, please contact your regular Hinshaw attorney.

City of Miami Gets Green Light on Standing to Challenge Predatory Lending Practices Under the FHA

By a 5-3 vote, the U.S. Supreme Court recently ruled that under the Fair Housing Act (FHA) the City of Miami has standing to sue two banks for predatory lending practices which negatively affect racial integration and desegregation within the city. The FHA allows an "aggrieved person" to file suit for damages in violation of the statute. The Supreme Court specifically ruled that the City of Miami met the standard of an "aggrieved person" under the FHA, and therefore had standing to sue Bank of America and Wells Fargo ("the Banks").

The City of Miami accused the Banks of having "intentionally issued riskier mortgages on less favorable terms to African-American and Latino customers than they issued to similarly situated white, non-Latino customers…" The City argued that it is an "aggrieved person" under the FHA, because the Banks discriminatory lending practices disproportionately caused foreclosures and vacancies in minority communities in Miami," and frustrated the City's goals to integrate the city and to promote fair housing. This in turn decreased property-tax revenues and caused the City to spend additional funds on municipal services.

The District Court had dismissed the City's Complaint, holding that (1) the City's was not an "aggrieved person," because its alleged harms were economic and not discriminatory, thus the City fell out of the zone interest the FHA protects; and (2) the Complaint failed to demonstrate a causal connection between the City's injuries and the Bank's alleged conduct. However, the Eleventh Circuit Court of Appeals reversed the District Court's holding, finding that the City's injuries did in fact fall within the zone of interest making the City an "aggrieved person" under the statute. The Eleventh Circuit also held that the City's Complaint adequately alleged that the Banks proximately caused the City's alleged injuries. The Supreme Court affirmed the Eleventh Circuit's first holding, and sent the case back to the district court to determine whether there was proximate causation.

By "zone of interest," the Court refers to the class or type of interests that are meant to be protected by a statute such as the FHA. Justice Breyer emphasized that "[t]his Court has repeatedly written that the FHA's definition of person 'aggrieved' reflects congressional intent to confer standing broadly." According to the Court, the City's economic injuries were at least arguably within the zone of interest. The Court reasoned that the alleged unlawful conduct by the Banks "hindered the City's efforts to create integrated, stable neighborhoods… And highly relevant here, they reduced property values, diminishing the City's property-tax revenue and increasing demand for municipal services." This, according to the Court, gave the City of Miami standing to sue Wells Fargo and Bank of America.

The Court also addressed the remaining question of causation – "whether the Banks' allegedly discriminatory lending practices proximately caused the City to lose property-tax revenue and spend more money on municipal services?" According to the Court, the Eleventh Circuit erred in establishing proximate causation. A Plaintiff's alleged harm may not be too remote from the Defendant's alleged misconduct. The Eleventh circuit incorrectly held that foreseeability was sufficient to establish proximate causation. The Court explained that proximate causation under the FHA requires a direct relation between the alleged conduct and the alleged injury – foreseeability alone is not enough. Because the Eleventh Circuit did not apply the correct theory, the Supreme Court remanded the case to the lower court to decide how the correct proximate cause standard applies to the City's claim.

For more information, please contact Brittney Cato, or your regular Hinshaw attorney.

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