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Kimberly Moyal

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Kimberly Moyal, J.D. Candidate 2023

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Introduction

The Fair Debt Collection Practices Act ("FDCPA") was passed to prohibit a debt collector from engaging in abusive debt collection practices.[1] The FDCPA serves to protect a consumer by giving a consumer a statutory claim against an abusive debt collector.[2] In 2016, the U.S. Supreme Court, in *Spokeo, Inc. v. Robins,* ruled that a party pursuing a statutory claim, like an FDCPA claim, must meet the Article III standing requirements of the U.S. Constitution.[3] To establish the first element of the Article III standing analysis, the plaintiff must prove that they suffered a "concrete and particularized" injury.[4]

After *Spokeo*, federal circuit courts have determined whether a certain intangible injury sustained by a consumer qualifies as a concrete injury under the first element of the Article III standing analysis.[5] For example, circuit courts have had to determine whether a consumer's confusion or a debt collector's omission caused a consumer to suffer a concrete injury.[6]

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[1] 15 U.S.C. § 1692 (2018).
[2] *Id.*
[3] 578 U.S. 330, 337–338 (2016).
[4] *Id.*
[5] Casillas v. Madison Ave. Assocs., 926 F.3d 329, 331 (7th Cir. 2019).
[6] Ward v. National Patient Account Services Solutions, 9 F.4th 357, 359 (6th Cir. 2021) (noting that a consumer's confusion over a debt collector's identity alone was not a concrete injury for Article III standing purposes); Casillas,

This memorandum examines what types of intangible injuries satisfy the concrete injury prong under the first element of the Article III standing analysis. Part I of this memorandum outlines the FDCPA requirements and the Article III requirements for a consumer to have standing to bring an FDCPA claim in federal court. Part II of this memorandum explains how circuit courts are split over what intangible injuries—including: (A) confusion, (B) stress or anxiety, and (C) omissions—are "concrete" under Article III.

Discussion

I. The FDCPA holds a debt collector accountable for their conduct.

A. A consumer generally has a claim against a debt collector that engages in any prohibited conduct under 15 U.S.C. § 1692(d), (e), and (f).

A consumer generally has the right to pursue an FDCPA claim against a debt collector in federal court under Article III of the U.S. Constitution.[7] A debt collector that collects a debt from a consumer is subject to the FDCPA.[8] A consumer has a cause of action under the FDCPA when a debt collector: (1) "harass[es], oppress[es], or abus[es] any person;" (2) "use[s] false, deceptive, or misleading representation[s];" or (3) "use[s] unfair or unconscionable means" to collect debts.[9]

The FDCPA gives a consumer the right to sue a debt collector that violates any provision of the FDCPA.[10] A consumer can sue a debt collector for "such additional damages as the court

926 F.3d at 331 (noting that a debt collector's omission did not constitute a concrete injury for Article III standing purposes).

[7] *See* 15 U.S.C. § 1692; *see* U.S. Const. art. III, §§ 1–2.

[8] 15 U.S.C. § 1692(a) (defining a "debt collector" as "any person who . . . regularly attempts to collect, directly or indirectly, debts owed or due" and defining a "consumer" as "any natural person obligated or allegedly obligated to pay any debt").

[9] 15 U.S.C. §§ 1692(d), 1692(e), 1692(f).

[10] *See* 15 U.S.C. § 1692(k).

may allow, but not exceeding $1,000" or "not to exceed the lesser of $500,000" in a class action case.[11] A consumer may also sue for the costs of the action and reasonable attorney's fees.[12]

Section 1692(d) of the FDCPA gives a consumer a cause of action against a debt collector that "harass[es], oppress[es], or abuse[s] any person in connection with the collection of a debt." For example, a debt collector is prohibited from using threats, violence, criminal means, profane language, publicizing a consumer who owes debts, advertising the sale of debts, and constantly calling a consumer to collect debts.[13]

Section 1692(e) of the FDCPA gives a consumer a cause of action against a debt collector that uses "any false, deceptive, or misleading representation or means in connection with the collection of any debt." For example, a debt collector is prohibited from falsely representing an affiliation with the United States or any state.[14] A debt collector is prohibited from misrepresenting the amount or legal status of a debt or misrepresenting that a communication is from an attorney.[15] Additionally, a debt collector is prohibited from claiming that the nonpayment of any debt will result in the arrest or seizure of property or wage of a consumer.[16] A debt collector is also prohibited from omitting or failing to disclose written communication with the consumer.[17]

15 U.S.C. § 1692(f) gives a consumer a cause of action against a debt collector that "use[s] unfair or unconscionable means to collect or attempt to collect any debt." For example, a debt collector is prohibited from charging any interest or fee that was not expressly authorized.[18]

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[11] *Id.*
[12] *Id.*
[13] 15 U.S.C. § 1692(d)(1)–(5).
[14] 15 U.S.C. § 1692(e)(1).
[15] 15 U.S.C. § 1692(e)(2).
[16] 15 U.S.C. § 1692(e)(4).
[17] 15 U.S.C. § 1692(e)(11); 15 U.S.C. § 1692(e)(1)–(16).
[18] 15 U.S.C. § 1692(f)(1).

A debt collector is also prohibited from soliciting postdated checks, depositing or threating to deposit postdated checks, or threatening to take any nonjudicial action.[19]

B. A consumer must have standing under Article III to bring an FDCPA claim.

"Under Article III of the Constitution, federal courts are limited to deciding actual cases or controversies."[20] To have standing to bring an FDCPA claim in federal court, "[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."[21] The injury-in-fact element has two sub-elements.[22] The injury must be "concrete and particularized."[23]

In the years following *Spokeo*, circuit courts have been split over what types of injuries satisfy the "concrete" prong of the injury-in-fact element under Article III standing.[24] "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."[25] A "concrete injury" means that the injury "'must be *de facto*; that is, it must actually exist."[26] Additionally,

> a concrete harm must have a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts.' Tangible harms, including '[m]onetary harms' are among those that 'readily qualify as concrete injuries under Article III.' Intangible harms also may be concrete, provided they satisfy the 'close relationship' analysis, in which the 'inquiry [is] whether plaintiffs

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[19] 15 U.S.C. § 1692(f)(1)–(4); 15 U.S.C. § 1692(f)(1)–(8).
[20] Moore v. Blibaum & Associates, P.A., 693 Fed.Appx. 205, 205 (4th Cir. 2017).
[21] *Spokeo, Inc.*, 578 U.S. at 338.
[22] *Id.* at 339.
[23] *Id.* (noting that "[f]or an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way'" and that "a 'concrete' injury must . . . actually exist . . . [be] 'real,' and not 'abstract'").
[24] *See* Trichell v. Midland Credit Management, Inc., 964 F.3d 990, 1001–02 (11th Cir. 2020).
[25] *Spokeo*, 578 U.S. at 339.
[26] *Id.*

> have identified a close historical or common-law analogue for their asserted injury.'[27]

"When a plaintiff alleges an intangible injury from a statutory violation, history and the judgment of Congress 'play important roles' in determining whether the injury is sufficiently concrete."[28]

Overall, a consumer has standing to bring an FDCPA claim in federal court if he or she proves that the intangible harm they suffered, such as extreme stress, resulted in a concrete injury.[29]

II. Courts continue to determine what intangible injuries qualify as "concrete" injuries under Article III in FDCPA claims.

A. Confusion experienced by a consumer alone is generally not a concrete injury.

The United States Courts of Appeals for the Sixth, Seventh, Ninth, and Eleventh Circuits have held that a consumer's confusion alone does not satisfy the concrete injury requirement under Article III.[30] For example, in a case before the Sixth Circuit, the consumer argued that the confusion he suffered, although intangible, qualified as a concrete injury.[31] The consumer alleged that the debt collector allegedly misrepresented its true name and caused the consumer to

[27] Age Kola v. Forster & Garbus LLP, 2021 U.S. Dist. LEXIS 172197, at *11–12 (S.D.N.Y. 2021) (quoting *Spokeo*, 578 U.S. at 341); TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2197 (2021) ("Physical or monetary harms readily qualify as concrete injuries under Article III, and various intangible harms—like reputational harms—can also be concrete.").
[28] Cooper v. Atl. Credit & Fin. Inc., 822 Fed.Appx. 951, 953 (11th Cir. 2020).
[29] Rivas v. Midland Funding, LLC, 842 Fed.Appx. 483, 486 (11th Cir. 2021) (holding that the consumer had standing to bring an FDCPA claim in federal court because the debt collector misrepresented the amount of debt owed on their website, which caused the consumer extreme stress and loss of sleep).
[30] Ward v. National Patient Account Services Solutions, 9 F.4th 357, 363 (6th Cir. 2021); Pennell v. Global Trust Management, LLC, 990 F.3d 1041, 1045 (7th Cir. 2021); Adams v. Skagit Bonded Collectors, LLC, 836 Fed.Appx. 544, 547 (9th Cir. 2020); Cooper, 822 Fed.Appx at 954 (noting that the consumer's claim that "[the debt collector's] alleged violations . . . left her 'confused about her statutory rights' . . . [was] insufficient to establish that [the consumer] had standing to bring her claim" in federal court); Trichell v. Midland Credit Management, Inc., 964 F.3d 990, 1001–02 (11th Cir. 2020).
[31] *Ward*, 9 F.4th at 363.

mail a cease-and-desist letter to the wrong entity.[32] But the Sixth Circuit rejected the consumer's claim that his "confusion" led him to sustain a cognizable concrete injury because the confusion did not lead the consumer to take some sort of detrimental action.[33] The confusion merely led the consumer to send a letter to the wrong entity.[34]

Similarly, in the United States Court of Appeals for the Seventh Circuit, a consumer claimed that she sustained a concrete injury because the debt collector sent her a letter regarding her outstanding debt even though the consumer allegedly sent a cease-communication request.[35] But the Seventh Circuit held, as it has before, that "'the state of confusion is not itself an injury'" especially when the consumer did not take action to pay the debt and when the debt collector never received the cease-communication request in question.[36] Additionally, the Ninth Circuit held that the "bare allegation of confusion" did not prove a concrete injury because the consumer failed to prove that "he forwent any action because of the allegedly misleading statements in the [debt collector's] letters."[37]

Conversely, the United States Court of Appeals for the Second Circuit held that confusion can satisfy the concrete injury requirement under Article III.[38] In the Second Circuit case, the consumer's confusion over who to pay could have "deprived [the consumer] of information relevant to the debt prompting the foreclosure proceeding, posing a 'risk of real

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[32] *Id.*
[33] *Id.*
[34] *Id.* (noting that the Sixth Circuit has repeatedly held that "confusion alone is not a concrete injury for Article III purposes"); *see* Garland v. Orlans, PC, 999 F.3d 432, 437–38 (6th Cir. 2021); Age Kola, 2021 U.S. Dist. LEXIS 172197, at *17 (relying on the Sixth Circuit to determine that "receiving a letter from a debt collector that [is] confusing . . . as to the amount owed" is also not a concrete harm).
[35] *Pennell*, 990 F.3d at 1045 ("For the alleged injury to be concrete, a plaintiff must have acted 'to her detriment, on that confusion'"); Brunett v. Convergent Outsourcing Inc., 982 F.3d 1067, 1068 (7th Cir. 2020); Wadsworth v. Kross, Lieberman & Stone, Inc., 12 F.4th 665, 668 (7th Cir. 2021).
[36] *Pennell*, 990 F.3d at 1045.
[37] *Adams,* 836 Fed.Appx. at 547.
[38] Cohen v. Rosicki, Rosicki & Associates, P.C., 897 F.3d 75, 82 (2d Cir. 2018).

harm' insofar as it could hinder the exercise of his right to defend or otherwise litigate that action."[39]

B. Stress, anxiety, or fear experienced by a consumer are sometimes concrete injuries.

The United States Courts of Appeals for the Fourth and Eleventh Circuits have held that a consumer suffers a concrete injury under Article III when a consumer experiences extreme stress caused by a debt collector's actions.[40] For example, in a case before the Fourth Circuit, the debt collector violated the FDCPA by "demanding payment [from the consumer] at an inflated sum based on an improper interest rate."[41] The Fourth Circuit held that the consumer's suffering of "'emotional distress, anger, and frustration'" from the debt collector's actions satisfied the injury-in-fact element of Article III.[42] Similarly, in a case before the Eleventh Circuit, the debt collector published the wrong amount of debt owed by the consumer on their website.[43] When the consumer saw the wrong amount of debt on the website, the consumer "became so 'stressed and worried' that he 'couldn't sleep.'"[44] Thus, the Eleventh Circuit held that the consumer's injuries of extreme stress and loss of sleep were "sufficiently tangible—and therefore concrete—to confer Article III standing."[45]

However, the United States Courts of Appeals for the Sixth and Eighth Circuits have held that a consumer does not suffer a concrete injury under Article III when a consumer experiences anxiety and fear caused by a debt collector's actions.[46] In the Sixth Circuit case, the

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[39] *Id.* (concluding that the consumer "ha[d] alleged an injury-in-fact and therefore ha[d] standing").
[40] Moore v. Blibaum & Associates, P.A., 693 Fed.Appx. 205, 206 (4th Cir. 2017).; Rivas v. Midland Funding, LLC, 842 Fed.Appx. 483, 486 (11th Cir. 2021).
[41] *Moore*, 693 Fed.Appx. at 206.
[42] *Id.*
[43] *Rivas*, 842 Fed.Appx. at 486.
[44] *Id.* (noting that the wrong debt amount remained on the website for around six months).
[45] *Id.*
[46] Buchholz v. Meyer Njus Tanick, PA, 946 F.3d 855, 859 (6th Cir. 2020); Frank v. Autovest, LLC, 961 F.3d 1185, 1188 (D.C. Cir. 2020); Ojogwu v. Rodenburg Law Firm, 26 F.4th 457, 463 (8th Cir. 2022).

consumer alleged that the letters he received from the debt collector "made [the consumer] feel anxious and fear that [the debt collector] would sue him if he did not promptly pay."[47] The Sixth Circuit held that the consumer's anxiety and fear of a future harm—litigation—was not a concrete injury.[48]

Similarly, the United States Court of Appeals for the Eighth Circuit did not find a concrete injury when the consumer claimed that the debt collector caused him "fear of answering the telephone, nervousness, restlessness, irritability, amongst other negative emotions" when the consumer received a copy of a garnishment summons from the debt collector.[49]

C. A consumer rarely proves that an omission by a debt collector is a concrete injury.

The United States Court of Appeals for the Seventh Circuit does not consider an omission made by a debt collector to be a concrete injury under Article III.[50] In *Casillas*, the debt collector omitted "the process that the [FDCPA] provides for verifying a debt" from the letter sent to the consumer.[51] In response, the Seventh Circuit held that receiving an "incomplete letter" was not a concrete harm under Article III.[52]

By contrast, the United States Court of Appeals for the Second Circuit has held that an

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[47] *Buchholz*, 946 F.3d at 859.
[48] *Id.* at 864 (noting that a cognizable intangible injury could have been inferred if "the debt collector either knowingly litigated a time-barred claim or where the debt collector threatened the consumer with arrest and criminal prosecution unless the consumer paid promptly"); Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018) (holding that the consumer lacked standing to bring an FDCPA claim because the consumer failed to prove that the debt collector's FDCPA violation "created a risk of double payment, caused anxiety, or led to any other concrete harm").
[49] *Ojogwu,* 26 F.4th at 463 (agreeing with the Sixth Circuit that "sending a letter merely inform[ing] the plaintiff of his debts" is not a concrete injury because "'[t]he cause of [the consumer's] anxiety falls squarely on [the consumer] because *he* chose not to pay his debts—and now fears the consequences of his delinquency'").
[50] Casillas v. Madison Ave. Assocs., 926 F.3d 329, 332 (7th Cir. 2019).
[51] *Id.* at 331 ("The [FDCPA] requires debt collectors to notify consumers about the process that the statute provides.").
[52] *Id.* at 332; *see, e.g.*, Markakos v. Medicredit*,* Inc., 997 F.3d 778, 780 (7th Cir. 2021) (noting that the Seventh Circuit has repeatedly held that a debt collector omitting certain information in violation of the FDCPA does not definitively cause an injury-in-fact to confer Article III standing).

omission made by a debt collector can satisfy the concrete injury requirement under Article III.[53] In *Strubel*, the debt collector did not tell the consumer that she must exercise her rights under the FDCPA in writing.[54] In *Strubel,* the Second Circuit held differently than the Seventh Circuit in *Casillas* because of the following[55]:

> *Strubel* is materially different from [*Casillas*]. When the plaintiff in *Strubel* received the incomplete notice, she did not yet know whether she would ever object to a credit card purchase. When [the plaintiff in *Casillas*] received the incomplete notice, she already knew that she would not dispute her debt. In other words, unlike [the plaintiff in *Casillas*], the plaintiff in *Strubel* alleged at least a possibility that the omission would hurt her.

Conclusion

"As explained in *Spokeo* and *Casillas*," it is impermissible for plaintiffs "to invoke the power of the federal courts to litigate an alleged FDCPA violation that did not injure them in a concrete way, tangible or intangible."[56] Generally, intangible injuries such as the confusion of a consumer and an omission by a debt collector alone do not qualify as concrete harms for Article III standing purposes.[57] However, other intangible harms such as stress or anxiety sometimes qualify as concrete harms for Article III standing purposes.[58] Additionally, proving that an intangible harm is "concrete," can be difficult for a consumer, which in turn, may block a consumer from having standing to bring an FDCPA claim in federal court.[59] All in all, the circuit

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[53] Strubel v. Comenity Bank, 842 F.3d 181, 185 (2d Cir. 2016).
[54] *Id.*
[55] *Casillas*, 926 F.3d at 336; *Strubel*, 842 F.3d at 200 (holding that the debt collector's omission of the consumer's rights under the FDCPA could have caused "a real harm necessary to concrete injury and Article III standing").
[56] Larkin v. Finance System of Green Bay, Inc., 982 F.3d 1060, 1066–67 (7th Cir. 2020).
[57] Ward v. National Patient Account Services Solutions, 9 F.4th 357, 363 (6th Cir. 2021); Casillas, 926 F.3d at 336.
[58] Rivas v. Midland Funding, LLC, 842 Fed.Appx. 483, 486 (11th Cir. 2021).
[59] *See, e.g.*, Markakos, 997 F.3d at 780; Ewing v. MED-1 Solutions, LLC, 24 F.4th 1146, 1151 (7th Cir. 2022) (noting that "[i]ntangible harms can be more difficult to assess" unless the consumer shows that their injury is closely related to the intangible harm in question).

split has left some allegedly injured consumers without standing to bring FDCPA claims in federal court under Article III.[60]

[60] *Ward*, 9 F.4th at 363; *Casillas*, 926 F.3d at 331.