Third Circuit Rejects Consumer Claim of Injury-in-Fact Based on an Alleged Risk of Harm

Akin Gump
STRAUSS HAUER & FELD LLP

Class Action Alert

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Contact Information

Kathryn Deal
Partner
kdeal@akingump.com
Philadelphia
+1 215.965.1219

Meredith Slawe
Partner
mslawe@akingump.com
Philadelphia
+1 215.965.1202

Michael McTigue
Partner
mmctigue@akingump.com
Philadelphia
+1 215.965.1265

Key Points

- On March 8, the Court of Appeals for the Third Circuit issued a precedential opinion upholding dismissal of a putative consumer class action where the plaintiff failed to plead a concrete injury-in-fact stemming from an alleged technical violation of the Fair and Accurate Credit Transactions Act of 2003.
- Companies facing consumer class action exposure should be aware of this new decision, as it may be useful to combat abusive litigation where plaintiffs seek to impose significant liability in the absence of any cognizable harm)

On March 8, 2019, a panel of the Court of Appeals for the Third Circuit issued a precedential opinion affirming the dismissal of a putative class action under the Fair and Accurate Credit Transactions Act of 2003 (FACTA). Specifically, in *Kamal v. J. Crew Group, Inc.*, -- F.3d --, 2019 WL 1087350 (3d Cir. Mar. 8, 2019), the court ruled that the plaintiff failed to plead a concrete harm sufficient to confer Article III standing under the analysis set forth by the U.S. Supreme Court in Spokeo, Inc. v. Robins.

The *Kamal* decision is notable, in part, because the Third Circuit has upheld Article III standing in other post-Spokeo cases, where an alleged injury from a procedural violation "had already materialized." *See id*. at *5–6. According to the court, however, the Kamal decision was its first "occasion to review standing where a procedural violation allegedly presents a 'material risk of harm.'" *Id*. at *6. In rejecting the plaintiff's standing arguments based upon a "risk" of harm, the Third Circuit reached a result that is consistent with a recent Second Circuit decision under FACTA, but inconsistent with a recent Eleventh Circuit decision under the same statute. *See Katz v. Donna Karan Co.*, 872 F.3d 114, 116 (2d Cir. 2017) (finding plaintiff lacked standing based on improper truncation of plaintiff's credit card number under FACTA); *Muransky v. Godiva Chocolatier, Inc*., 905 F.3d 1200, 1210–11 (11th Cir. 2018) (finding improper truncation of plaintiff's credit card number created a concrete injury sufficient to confer standing). Notably, the U.S. Supreme Court is expected to address injury-in-fact requirements again in the pending *Frank v. Gaos* appeal, where the parties completed supplemental briefing on Article III standing at the end of last year. In the meantime, however, the *Kamal* decision is the latest federal appellate pronouncement on the subject in the consumer class action context.

In *Kamal*, the plaintiff, Ahmed Kamal, alleged that he had made three credit card purchases at J. Crew stores, and that, on each of those occasions, J. Crew printed both the first six digits and last four digits of his credit card number in violation of FACTA. 2019 WL 1087350, at *2. He claimed that the mere printing of those extra digits on his receipts constituted an actionable injury, and further that such alleged statutory noncompliance increased his risk of identity theft. *Id*.

To evaluate plaintiff's standing, the Court of Appeals analyzed the Article III requirement of an injury-in-fact. The court recognized that:

> [A] plaintiff does not automatically satisfy the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Congress cannot statutorily manufacture Article III standing in the case of a bare procedural violation, divorced from any concrete harm. Rather, a procedural violation must yield or risk actual harm to meet the requirements of Article III.

Id. at *5 (internal quotations and citations omitted).

Applying this standard, the court rejected both of plaintiff's alleged injury-in-fact arguments. Under guidance from Spokeo, the court found that the mere procedural violation of printing extra credit card numbers on plaintiff's receipts did not closely relate to the kinds of privacy violations that historically gave rise to cognizable injury. *Id*. at *7–8. The court identified the actionable harms redressable under "traditional privacy torts" and found that the most analogous torts to Kamal's allegations were "unreasonable publicity given to the other's private life" and "breach of confidence." *Id*. at *7. The harm underlying both of those actions, however, exists only when a third party gains unauthorized access to the plaintiff's personal information. *Id*. Because Kamal did not allege disclosure of his information to a third party, his purported injury did not have the requisite "close relationship" to the traditional harms actionable under the common law. *Id*. at *8. As a result, under *Spokeo*, the court found that "absent unauthorized third-party disclosure, Kamal's alleged FACTA violation is not an injury in and of itself." *Id*. at *8.

The court also found that Kamal had not pleaded an injury-in-fact based on the allegedly increased risk of identity theft stemming from J. Crew's technical violation of FACTA. It was not enough for the plaintiff to merely point to Congress's general intent to reduce the risk of identity theft in enacting FACTA. *Id*. at *8–9. Rather, the court analyzed whether the plaintiff "clearly and specifically set[] forth facts showing a risk of harm particular to Kamal." *Id*. at *8. He had not. The alleged risk of identity theft "consist[ed] of a highly speculative chain of future events." *Id*. at *9. To find a material risk of harm, the court would have had to speculate that Kamal would lose or throw away the receipts at issue, a hypothetical third party would discover those receipts and then that party would also discover the remaining six digits of Kamal's credit card, along with additional information to use the card, such as the expiration date, security code or zip code. Id. In other words, because Kamal neither alleged "third-party access" to his personal information nor that the receipts at issue included enough information "to likely enable identity theft," his alleged risk of harm was too conjectural to confer Article III standing. *Id*.

In short, the *Kamal* decision is the latest federal appellate ruling to reach a reasonable result in the face of putative consumer class action exposure that is entirely untethered to any cognizable injury. Due to the potential availability of aggregated statutory damages under statutes like FACTA, the Fair Credit Reporting Act (FCRA), the Telephone Consumer Protection Act (TCPA) and other privacy-based laws, plaintiffs have sought to impose disproportionate liability on companies for technical, statutory violations without any plausible allegation (much less evidence) of actual harm. The *Kamal* decision provides defendants facing such lawsuits within the Third Circuit a precedential decision to rely upon to combat such class action abuses.

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