THE CONSUMER FINANCE PODCAST: RECENT TRENDS IN ARTICLE III STANDING
HOST: CHRIS WILLIS
GUESTS: JONATHAN FLOYD AND MEAGAN MIHALKO
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Chris Willis:

Welcome to the *Consumer Finance Podcast*. I'm Chris Willis, the co-leader of Troutman Pepper's Consumer Financial Services Regulatory Practice. And I'm really excited to bring you our episode today where we're going to talk all about developments in Article III standing in the federal courts in consumer litigation.

But before we jump into that topic, let me remind you to visit and subscribe to our blog, ConsumerFinancialServicesLawMonitor.com, where you'll see all the daily updates we post about what's going on in the consumer finance industry. And don't forget to check out our other podcasts. We have lots of them. We have *FCRA Focus*, all about credit reporting, *The Crypto Exchange* about all things crypto, and *Unauthorized Access*, which is our privacy and data security podcast. And of course, all of those are available on all the popular podcast platforms. And if you like this podcast, let us know. Leave us a review on your podcast platform of choice and let us know how we're doing.

Now, as I said today, we're going to be talking about Article III standing. And to talk about that, I've got two of our veteran consumer financial services litigators joining me. I've got Meagan Mihalko and Jonathan Floyd, both of whom are members of our consumer financial services group here at Troutman Pepper. So, Meagan, Jonathan, thanks for being on the podcast today.

Meagan Mihalko:

Hey Chris, thanks for having us. We're excited to do this. This is my first podcast, so we'll see how it goes. I'm excited to be involved.

Jonathan Floyd:

Me as well, Chris. Very happy to be here. Happy to talk about something that we spend a lot of our time on now, in the litigation department.

Chris Willis:

Yeah. And you mentioned you're spending a lot of time about it, and it feels to me like Article III standing has been an incredible point of contention between litigants and also even among the federal courts in consumer litigation for the past, I don't know, six or seven years. So, Meagan, why don't you start off by just telling the audience why has this become such a big deal in consumer litigation?

Meagan Mihalko:

Yeah, thanks Chris. It's taking me back to when I joined the firm back in 2015. I was here for about a year and the Supreme Court then issued its opinion in the *Spokeo, Inc. v. Robins* case. And that was back in 2016 where the court comes out with this decision on Article III standing and what it means in the context of litigating and what a plaintiff or a claimant has to have and be able to allege in order to be in federal court. And so, we see the court in 2016 coming out with this decision saying, hey, if you're going to be in federal court, a plaintiff's not going to be able to assert a bare or a technical violation, especially in the context of these consumer protection statutes that we all litigate in every day. And so the court's revisiting this issue and emphasizing that an injury or a harm has to be concrete and particularized.

And so, after the decision in 2016, for the next several years, we see a ton of litigation and people taking their shot at challenging whether lawsuits should be in federal court and whether there's sufficient

allegations or harm to remain in federal court and litigate these types of cases. So that takes us to the summer of 2021 where the Supreme Court looks at the issue again and issues its decision in *TransUnion v. Ramirez*. In that case, the Supreme Court concludes that each and every member of a class has to demonstrate the particularized and concrete harm required for Article III standing in order to sue in federal court. And what we see the court looking at specifically in *Ramirez* is the central inquiry about assessing the concreteness or whether and asserted harm has a close relationship to the harm that's traditionally recognized as providing a basis for a lawsuit in American courts.

So, we're looking at is there something close to or akin to physical harm or monetary harm, or some of these maybe other intangible harms or reputation of harms. But there has to be something there. There can't just be a technical violation of a statute. And so, once we've got these two decisions, *Spokeo* and *Ramirez*, we continue to see a lot of litigation challenging Article III standing. And after that we're kind of off to the races in federal courts where we're seeing a lot of challenges and we see people making arguments about what Congress intended when it created these statutes and whether the violations are sufficient to provide Article III standing to be in court to litigate these issues or whether these cases are better suited to be in state court.

Chris Willis:

Perhaps one would think that if we've had two Supreme Court decisions on this issue, *Spokeo* and *Ramirez*, that the law would be totally settled and clear and the lower federal courts would all be on the same page in terms of how to ascertain standing in consumer protection cases following these two Supreme Court cases. But Jonathan, is that the case? Are courts actually applying *Spokeo* and *TransUnion* consistently with one another?

Jonathan Floyd:

Absolutely not. We see it consistently across the board that even courts within the same federal circuit are struggling as to how to assess Article III standing, particularly in the federal consumer protection statutes.

Chris Willis:

And so, given that the courts are not all on the same page, are we seeing yet another circuit split develop in the area of what's enough to constitute Article III standing?

Jonathan Floyd:

I think we are. And I think we're actually building towards another Supreme Court decision that's going to further define Article III standing for us. And I don't even know if that would get us all the way. But as an example, and although I'm based in Richmond, Virginia, I'm also a New York lawyer, I spend a lot of time in the New York state and federal courts. The Second Circuit has actually been one of the most aggressive courts in throwing out federal cases for lack of Article III jurisdiction. I had probably at one point a dozen cases within a month that were remanded sua sponte by the judge. One case even was so far as we were post briefing on a motion for summary judgment, the motion had been pending for over a year, pro se litigant. And out of nowhere, one day an ECF pops up we're like, "Oh, wow. We finally got a decision in our case," and it was a sua sponte remand back to state court because we had previously four years ago removed the case.

So the Second Circuit has really taken the position, post *TransUnion*, that conclusory allegations in a federal consumer case like loss of credit opportunity or mental and emotional distress or confusion as to the contents of a debt collection letter. The Second Circuit has largely found that those allegations alone are not enough to establish Article III standing and looking at that, some other federal circuits have jumped on board, and we have odd bedfellows here because the Fifth Circuit and the Second Circuit are almost perfectly aligned. The Fifth Circuit probably makes more sense than the Second Circuit, but the Fifth Circuit also believes a plaintiff can only establish Article III jurisdiction upon a showing that the type

of harm they've suffered is similar to a kinder type of harm that the common law recognized as actionable, like Meagan was talking about earlier.

So they're both kicking out cases. The Second Circuit is really coming at it from a, we don't want to actually look at the harm. And then the Fifth Circuit is really looking at it as to say the harm, how is it connected to a common law cause of action that you could bring in a Texas state court? And it's a slight deviation, but it's leading to very similar results. Along with that, as we talk about odd bed fellows, the Ninth Circuit is largely on board, although I will say there is some inconsistency against district courts, but largely we're seeing the Ninth Circuit applying *TransUnion* in a very similar fashion. With that said, some courts within the Ninth have held that alleging a statutory violation is sufficient to confer Article III standing. And largely that has come up in the fair credit reporting context when you have what I would call very technical statutes that wouldn't exist under common law. So, credit reporting not something that the common law traditionally considers.

In those cases, the Ninth Circuit has essentially said in these very technical statutes, we're going to be more likely to find Article III standing just because we recognize there is no actual or very similar state equivalent under common law. Another case they had was under the Electronic Funds Transfer Act where they found Article III standing and what we would consider a very technical violation. But again, applying this idea that these highly technical federal statutes were more likely to find standing.

And last but not least, the Second, the Fifth, the Ninth, and to a certain extent, the Third Circuit are all kind of aligned in this idea that informational injuries without some other downstream consequence are simply not enough to confer Article III standing. And the example I often like to give is, let's say I'm a debt collector and I send a consumer collection letter, I'm subject to the FDCPA, the account is time-barred by the statute of limitations, and I do not disclose that to the consumer.

If that's where the facts end, I have failed to disclose that the consumer suffered an informational injury, but that's it. And so, it's likely that case would not have Article III standing in one of those four jurisdictions. Now, if there's downstream consequences, let's say I didn't disclose that their account was time-barred, but I later sued them on the same account, now there's a downstream injury. Or let's say they saw that, they were afraid of being sued and they made a payment. Now there's a downstream injury from my misrepresentation. In the Third circuit, you're really likely to find Article III standing there. In the Ninth circuit, probably. Second and Fifth, it might be a tossup. But anything along those lines, we're seeing that those four circuits are kind of aligned with a little variation amongst the district courts, which hopefully the courts of appeal will work through at some point, but they're going to have a lot of work to do.

Chris Willis:

Got it. So we've got these four circuits that you just mentioned that all appear to be roughly consistent with each other, but I feel like there's a but coming here. What are the circuits that are going the other way, Meagan, or are there any?

Meagan Mihalko:

That's a good question, Chris, and there are. Two of the circuits that Jonathan didn't mention are the Tenth and Eleventh, which I'll touch on briefly here. But based on what we heard from Jonathan and just thinking through how this litigation has developed, I think the theme that we have here is when you are litigating and you're thinking about whether to raise an Article III challenge to a lawsuit, you've got to be really aware of what the case law is in your circuit and what developments are taking place here. Because clearly even within the Ninth Circuit, as Jonathan discussed, you've got variations on how courts are taking these issues up.

Like I just mentioned, the Tenth and the Eleventh are not falling in line with the circuits that Jonathan just discussed. And about a year ago, we've got a case coming out of the District of Colorado, and that's the *Ozuna v. Budget Control Services* case where the court looked at an FDCPA claim there and found that a

misrepresentation and connection with the collection of a debt was close enough to one of those common law causes of action that have historically been sufficient to have this concrete and particularized harm.

And what they compared this misrepresentation in the debt collection to was looking at historical common law, the torts of fraud and misrepresentation. And so while some of us might look at this as more of a technical violation, or we're looking at this congressionally created debt collection statute, the Tenth Circuit's willing to look at that and say, well, we can compare that to fraud and misrepresentation. And those historically have harms that are sufficient to give rise to Article III standing.

The Eleventh Circuit has taken a similar position and even looking not necessarily at more technical violation, but looking at frustration and humiliation and some of these types of allegations that sometimes we look at and they're kind of mushy and we're like, is there really enough there? Well, in the Eleventh Circuit, they are finding that those types of allegations are sufficient enough to have a concrete and particularized injury such those cases can remain in federal court.

Chris Willis:

Well, it seems like it makes all the sense from the world, Meagan, because I'm sure if we go back and look at Blackstone's commentaries or something, we're going to see a lot of discussion about the exact correct wording of a 1692(g) notice, right?

Meagan Mihalko:

Yeah, Chris. Didn't we all learn about that in torts in law school?

Chris Willis:

Right. Yeah, right next to the rule against perpetuities. It's all ancient common law stuff. Kidding aside, we have to understand the practical implications of where we are on Article III standing when we're defending against consumer litigation. And so, let's talk about that for a minute. Let's take one scenario, first. We've been sued in state court under some say federal statute, like the FDCPA, the Fair Credit Reporting Act, EFTA, whatever it happens to be. What are the considerations or implications for us when we're in state court and we're thinking about maybe removing the federal court? Jonathan, do you want to talk about that for a second?

Jonathan Floyd:

Absolutely. It used to be that, and it's different for every defendant, but nine times out of 10, defendants in these types of cases love to be in federal court as opposed to state court. We find more consistent results, it's logistically easier. Federal filing is more straightforward and there's less chance for mischief. We prefer federal court. And pre-TransUnion and especially pre-Spokeo, we essentially removed every case under federal question jurisdiction, which is a very straightforward removal.

And then I was talking about the Second Circuit, I started getting cases kicked back under federal question removal because they said, well, obviously you have federal question because you've been sued under a federal act. But where's the concrete and particularized harm? And so, we had a problem then. If you are removed without assessing standing and standing is not apparent from the pleadings, then you very well may get remanded.

And then you're at a dangerous point because most federal courts have ruled that the defendant only gets one shot per type of removal. So, let's say you remove under federal question jurisdiction and get remanded, and then later during discovery you find out there is concrete and particularized harm. You can't, again, remove under federal question jurisdiction because you've already tried that. So even though the facts are different, you've already used up that chance.

Now, could you remove under diversity? Yes, but that's very difficult, particularly in the class case. Could you remove under CAFA? Yes, but then you're going to need $5 million at issue and 100 punitive members of your class. It gets very complicated. So, if you've been sued in state court, do not remove it

blindly. The first thing you should do is you should address Article III standing and analyze it, both within the wording of the complaint, the types of damages that they're looking for, and then against the law of the court and the federal circuit that you're with.

I'll give you a great example. In the Fair Debt Collection Practices Act, actual damages are available and a lot of consumers and their council will include actual damages in their ad damnum clause, right? Give us $1,000, waive our debt, give us actual damages that's determined appropriate by the court. We were removing cases based on a demand for actual damages, and the courts were remanding them in the Second Circuit because the complaint itself didn't have allegations regarding the actual damages. Simply asked for it. So, analyze whether or not you have standing, a concrete particularized harm. And if you do, address that in your notice of removal, because it's going to come up on remand. If you don't have it, don't fret. Do discovery. What you're looking for is do as much discovery as you can within one year of the filing of the complaint.

Because if the complaint is not automatically removable upon first reading it, your 30-day window hasn't started. You're in a little, I won't say little known part, but you're in a subsection of the removal statute, section 1446, and I'm going to give you a citation here, Chris. So, get your pen ready. It's 28 U.S.C. section 1446 (b)(3), which allows you to remove a case either within 30 days of the filing or if it's not immediately removable within 30 days of receiving another paper, which lets you know that the case is removable.

So, if I conduct a deposition and I find out that there are actual or concrete damages at issue, then I have 30 days from that deposition to remove the case under the federal removal statute here. You have that one-year limit for all removals within that, if you can find something that gives you actual damages, concrete and particularized harm, you can still remove even if that original 30-day window has closed. You have a whole new 30 days in those circumstances. And then if you do remove, the last thing you should ever do and never, ever, ever remove a case from state court to federal court and then file a motion to dismiss for lack of Article III standing because the judge will hate you and you might get sanctioned. It sounds crazy that anyone would do that, but people have tried and it's a bad look for a defendant.

Chris Willis:

Sure, it makes sense. And by the way, I was really impressed at how you rattled off that citation, and I'm sure all of our listeners grabbed a pencil and physically wrote that down as you were saying it, Jonathan.

Jonathan Floyd:

I can only imagine they did, Chris.

Chris Willis:

Let's take the other scenario that sometimes happens. Let's say someone sues us under a federal question, same types of statutes, but they filed their lawsuit in federal court, and we've been reading *Spokeo* and *Ramirez* and we think, hey, we might be able to get this claim dismissed, that sounds like a fun thing to do. Meagan, what should we think about before we just reflexively file that no standing motion to dismiss?

Meagan Mihalko:

Well, Chris, what immediately comes to mind is, “Be careful what you wish for.” You might think you've got a great argument to get this case dismissed, but in reality, what does that dismissal get you? A lot of times what it's going to get you is a refiling in state court, and then you're faced with the, okay, I could have litigated this in federal court where I'm familiar with the rules, where I'm familiar with the procedures. I might even have a lot of good intel on my judge or the opportunities that I'll have for settlement conferences or the more formalities that we get in federal court. So, if you make that decision to challenge Article III standing, you've got to be prepared to live with the consequences that you might win that and

then the case gets refiled in state court. And if you and the client are comfortable litigating your case in state court, then that's totally fine. But that's, I think, the biggest risk that you've got to weigh in determining what move you're going to make.

At the same time though, Chris, you've got to do this analysis early on because if you look at your circuit, you look at the allegations, even if you don't make that argument, like Jonathan said, courts are starting to raise this issue, sua sponte. So, you might look at it and say, this is a close call. I don't know. I'm going to sit tight. Well, you might not be sitting tight for that long. You might find yourself in a Rule 16(b) conference where the judge looks at everyone and says, "How are y'all even here? What's the basis for Article III standing?"

You definitely want to be prepared and have a game plan whether it's okay, we think there could be an issue, we're not going to challenge it. But if it gets raised, we have a strategy on how to respond to that. Or if you are going to challenge it and you're okay going into state court, that's totally fine too.

One thing I think you also have to keep in mind, regardless of whether you hear the defendant challenging it or the court raises it sua sponte, if the case gets dismissed or if it gets remanded and then it gets refiled in state court, it's really important to make sure you're doing your math and looking at the statute of limitations, especially in these consumer litigation cases that we see, a lot of times you've got claims that are being filed right up against that deadline.

And so, if the case gets dismissed and that statute starts running again, you could sometimes be looking at a matter of weeks or even days before that, one or two-year statute of limitations totally runs. And so that's something that can be helpful for defendants, even if you don't want to be in state court but end up getting pushed back to state court. Take a close look at whether you've got an argument that the claim has expired while all this is happening. So, there's definitely a lot to consider and I think not legal advice, but being proactive in making sure you've got your arms around what could happen in your particular court is really important.

Chris Willis:

Those are great insights, Meagan, and thank you very much for sharing those. And Jonathan, thank you too for everything that you've shared with the audience on the podcast today. And of course, thank you to our audience for listening as well. Don't forget to visit our blog, ConsumerFinancialServicesLawMonitor.com, and hit that subscribe button so that you can get all of our daily updates about what's going on in the world of consumer finance.

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