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11th Circuit Court of Appeals Rejects Class Action Alleging Violation of Mortgage Satisfaction Recording Laws, Finding Injury-In-Fact Lacking Under *Spokeo*.

On Oct. 6, 2016, the U.S. Court of Appeals for the 11th Circuit decided *Nicklaw v. CitiMortgage, Inc.*, -- F.3d --, 2016 WL 5845682, (11th Cir. 2016), holding that a class action plaintiff who alleged that CitiMortgage violated New York law by failing to timely record a satisfaction of mortgage, lacked Article III standing because he had suffered no concrete injury. *Nicklaw* is one of the 11th Circuit's first decisions applying the U.S. Supreme Court's opinion in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016), and suggests that class actions will continue to be closely scrutinized for injury-in-fact.

The *Spokeo* Decision

In *Spokeo*, Robins asserted that the defendant, a data aggregation website, had violated the Fair Credit Reporting Act case by reporting false information about him. Spokeo argued that the plaintiff lacked Article III standing because he had not suffered injury-in-fact. The Supreme Court reaffirmed that federal jurisdiction exists only where the plaintiff has "suffered (1) 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." The Court held that an injury must be "an invasion of a legally protected interest" that is both "concrete and particularized and actual or imminent, not conjectural or hypothetical." The Supreme Court emphasized that the plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation." Instead, the "concrete injury must be 'de facto'; that is, it must actually exist." It must be "real" and not "abstract."

However, the Court recognized that a concrete injury could be "tangible" or "intangible." Where the alleged harm is intangible, courts should look to whether the alleged harm has "a close relationship to harm that has traditionally been regarded as providing a basis for a lawsuit in English or American court." In some cases, Congress may elevate an intangible harm to the level of a *de facto* harm. The Court cautioned this "does not mean that a plaintiff automatically

satisfies 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.” A “bare procedural violation, divorced from any concrete harm,” does not satisfy the injury-in-fact requirement.

The Court recognized that the “risk of real harm” can satisfy the injury-in-fact requirement. As an example, the Court pointed to the recovery for libel and slander *per se*. The Court observed that “the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact,” and in such cases, a plaintiff “need not allege any *additional* harm beyond the one Congress has identified.” As an example, the Court cited to injury that could arise from failure to receive information required by law.

The Nicklaw Opinion

Nicklaw sold property in New York and used the proceeds to satisfy a mortgage held by CitiMortgage. New York law required CitiMortgage to record a certificate of discharge of the mortgage with the county clerk within 30 days after the satisfaction. Nicklaw charged that CitiMortgage had violated this statute and filed a class-action lawsuit seeking \$500 in statutory penalties per violation. CitiMortgage moved to dismiss the complaint based on lack of subject jurisdiction because the complaint did not allege that plaintiff had suffered an injury because of the late recording. The district court agreed and dismissed the action.

The 11th Circuit affirmed, holding that Nicklaw had not satisfied the injury-in-fact requirement because he had not alleged “harm” or “a material risk of harm.” The 11th Circuit rejected two arguments made by Nicklaw. First, Nicklaw argued that the New York legislature created a substantive right to have the certificate of discharge timely recorded, and CitiMortgage had violated that substantive right. The Court rejected the argument, observing that the “relevant question is whether Nicklaw was harmed when this statutory right was violated.” The Court held that a “concrete injury” is required “even in the context of a statutory violation.” The Court noted there were circumstances, such as violation of the Fair Credit Reporting Act through publishing an incorrect ZIP code, that “would not work any concrete harm.” The Court recognized there might be other circumstances, such as incorrectly reporting criminal history, that might “cause harm or a material risk of harm.” The 11th Circuit had previously issued an unpublished opinion that a violation of the right to receive certain informational disclosures under the Fair Debt Collection Practices Act was enough to satisfy *Spokeo’s* injury requirement.¹ But, the Court found that Nicklaw had not alleged a loss of money or credit standing. The Court noted that he did not even allege that he knew that the certificate of discharge had not been recorded, and did not file the class action until over two years after filing the satisfaction of mortgage.

Second, Nicklaw argued that New York courts had recognized historically recognized remedies for the removal of a cloud on title. The Court distinguished those situations, finding they were “a remedy to prevent the risk of harm that occurred while title to the property was wrongfully clouded, not a remedy *after* the cloud was lifted.”

Conclusion

After *Nicklaw*, the exact contours of *Spokeo’s* injury-in-fact requirement remain elusive. Other lower courts reached disparate results on whether a class action plaintiff can allege injury-in-fact based on a violation of New York’s mortgage recording laws. Some found the requisite injury-in-fact lacking, while others did not.² But *Nicklaw* is procedurally unique, and that may limit its utility. The injury-in-fact argument appears to have been raised by motion to dismiss for the first time on appeal, resulting in the 11th Circuit’s finding that, even at that late stage, Nicklaw had failed to allege a material risk of harm. *Nicklaw* confirms that federal courts will continue to guard the courthouse doors zealously and, even with a statutory violation, the class action plaintiff must allege harm or material risk of harm.

¹ *Church v. Accretive Health, Inc.*, No. 15-15708, 2016 WL 3611543, at *3 (11th Cir. Jul. 6, 2016) (unpublished).

² *Zia v. CitiMortgage, Inc.*, -- F. Supp.3d --, 2016 WL 5369316, at *1 (S.D. Fla. Sept. 26, 2016); *Villanueva v. Wells Fargo Bank, N.A.*, 2016 WL 5220065, at *5 (S.D.N.Y. Sept. 14, 2016); *Jaffe v. Bank of America, N.A.*, -- F. Supp.3d --, 2016 WL 3944753, at *4 (S.D.N.Y. Jul. 15, 2016); *Zink v. First Niagara Bank, N.A.*, -- F. Supp.3d --, 2016 WL 3950957, at *5 (W.D.N.Y. Jul. 1, 2016).

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