

What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR



[Caren Enloe](#) leads Smith Debnam's consumer financial services litigation and compliance group. In her practice, she defends consumer financial service providers and members of the collection industry in state and federal court, as well as in regulatory matters involving a variety of consumer protection laws. Caren also advises fintech companies, law firms, and collection agencies regarding an array of consumer finance issues. An active writer and speaker, Caren currently serves as chair of the Debt Collection Practices and Bankruptcy subcommittee for the American Bar Association's Consumer Financial Services Committee. She is also a member of the Defense Bar for the National Creditors Bar Association, the North Carolina State Chair for ACA International's Member Attorney Program and a member of the Bank Counsel Committee of the North Carolina Bankers Association. Most recently, she was elected to the Governing Committee for the Conference on Consumer Finance Law. In 2018, Caren was named one of the "20 Most Powerful Women in Collections" by *Collection Advisor*, a national trade publication. Caren oversees a blog titled: [Consumer Financial Services Litigation and Compliance](#) dedicated to consumer financial services and has

Inaccurate TILA Disclosures Not Enough to Create Standing

March 10, 2017 | by

A district court from New York recently ruled that even assuming a creditor's initial TILA disclosures falls short under the statutory requirements, the plaintiff must show an injury in fact in order to have standing under Article III. In *Kelen v. Nordstrom*, the plaintiff sued the retailer alleging the retailer's disclosures in connection with its credit card accounts violated the Truth in Lending Act. Specifically, the plaintiff alleged that the initial disclosures failed to accurately disclose the fees for returned payments and the complete method for the late payment fee including limitations on the maximum fee. While the plaintiff did not allege she had been charged for a return check or a late fee, she contended the retailer's deficient disclosure "constituted a concrete harm and created a material risk of concrete harm to *Kelen* and to other creditors." *Kelen v. Nordstrom, Inc.*, 2016 U.S. Dist. LEXIS 175028, *4 (S.D.N.Y. Dec. 16, 2016).

The court granted the retailer's motion to dismiss and determined that the plaintiff lacked standing. Even assuming the disclosures were deficient, the court determined the plaintiff had not pled a sufficient injury in fact. The court reasoned that while the plaintiff had a legally protectable right to receive specified disclosures, the plaintiff must demonstrate that as to each of her TILA disclosure challenges, the retailer's "actions injured her in a way distinct from the body politic." *Id.* at *8. In following the Second Circuit's recent decision in *Strubel v. Comenity Bank*, 842 F.3d 181 (2d Cir. 2016), the district court stated that "the dissemination of incorrect information to a plaintiff does not alone create a risk of real harm to the plaintiff. Rather, Article III requires some indication that the inaccuracy would harm the plaintiff, and some "misinformation may be too trivial to cause harm or present any material risk of harm." *Id.* at *9-10 (internal citations omitted). The court concluded that the plaintiff's pleadings fell short of the mark because they did not allege a tangible injury to herself and did not explain the risk of concrete harm.

Kelen's claim...begins and ends with the fact of the alleged TILA violation. The [complaint] did not claim she changed her behavior in any way based on Nordstrom's allegedly insufficient disclosures as to the circumstances under which fees for late or returned payments might fall short of the disclosed maximum fees. It does not allege that Nordstrom

been published in a number of publications including the Journal of Taxation and Regulation of Financial Institutions, California State Bar Business Law News, Banking and Financial Services Policy Report and Carolina Banker.

ever charged her either a late payment fee or a returned payment fee, let alone an improperly calculated one. Indeed, the [complaint] does not allege that Kellen ever read the disclosures she challenges relating to such fees. In light of these Spartan pleadings, Kelen's claim to have suffer[ed] a concrete, particularized injury falls short of the standards set by the case law, which requires alleging more than a mere fact of a violation of a disclosure statute for a plaintiff to plead a material risk of harm.

Id. at *10.

Parties filing complaints asserting violations of consumer protection claims should take note. While the Supreme Court's decision in *Spokeo v. Robins* may not have altered the standard for standing, it has heightened the pleading standard. Plaintiffs must now tie the violation of the statute to its specific impact on them.

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