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Be Careful What You Wish for When Asserting Article III Standing Challenges

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A recent Seventh Circuit decision should give class action defendants pause before asserting Article III standing challenges. In *Collier v. SP Plus Corporation*, 889 F.3d 894 (2018), both parties readily acknowledged that the plaintiffs lacked Article III standing. Yet they vigorously debated whether the district court should have dismissed the action or remanded back to state court in light of the admitted lack of standing. Illustrating vividly the importance of thinking strategically about challenging federal court standing in a removed case, the Court of Appeals held the case should be remanded to state court.

In *Collier,* the named plaintiffs, who parked at an airport public parking facility operated by the defendant, filed a class-action complaint on behalf of other parking lot patrons in the Circuit Court of Cook County, Illinois. They alleged that the defendant, SP Plus Corporation, willfully violated the Fair and Accurate Credit Transaction Act ("FACTA") by displaying credit and debit card expiration dates on parking receipts.

The complaint, which requested statutory and actual damages without any specificity, did not describe any concrete harm suffered by the plaintiffs or other putative class members as a result of the exposed credit card expiration dates on the parking receipts. In other words, the plaintiffs did not point to any "concrete and particularized" and "actual or imminent" assault on a legally protected interest, a requirement recently clarified by the Supreme Court in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

The defendant removed the action to the Northern District of Illinois on federal question grounds and then moved to dismiss the complaint for lack of Article III standing, alleging that the plaintiffs had not alleged any injury in fact. In response, the plaintiffs acknowledged the lack of concrete injury, argued that the defendant bore the burden of establishing all elements of jurisdiction – including Article III standing requirements – upon removal, and moved the district court to remand for lack of subject matter jurisdiction. The district court sided with the defendants and dismissed the action rather than remanding to state court. *Collier v. SP Plus Corp.*, No. 16 CV 10587, 2017 WL 4585572, at *2 (N.D. Ill. Apr. 28, 2017) (denying motion to remand because claim arose under a federal statute).

The Seventh Circuit disagreed and reversed. While the appellate court agreed that the plaintiffs lacked Article III standing, the court sided with the plaintiffs in determining that the district court lacked jurisdiction to enter a dismissal order based on their undisputed lack of standing. Instead, the Seventh Circuit ordered the district court to remand back to state court, noting that 28 U.S.C. § 1447(c) required the district court to remand because, without Article III standing, the case never belonged in federal

court to begin with.

The Seventh Circuit found no unfairness to the defendants in remand because, it observed, the defendants could re-remove the action pursuant to 28 U.S.C. § 1446(b)(3) if either (1) the plaintiffs amended their complaint in a manner sufficient to establish Article III standing, or (2) the defendants came into possession of documentation demonstrating "affirmatively and unambiguously" that the constitutional requirements for removal had been met. *Collier*, 889 F.3d at 897.

The *Collier* opinion is already making waves in the Seventh Circuit. In *Soto v. Great America LLC*, No. 17-CV-6092, 2018 WL 2364916 (N.D. Ill. May 24, 2018), the plaintiffs asserted similar class claims under FACTA and the Fair Credit Reporting Act ("FCRA"), alleging that electronically printed receipts they received at the defendant's Six Flags theme park unlawfully included both the first eight digits as well as the last four digits of their debit card numbers. *See id.*, 2018 WL 2364916, at *1. The defendant removed the class action to federal court on the basis of federal question and Class Action Fairness Act ("CAFA") jurisdiction, and the plaintiffs in turn moved to remand. After noting it was undisputed that the plaintiffs lacked Article III standing to assert their claims, the court concluded that *Collier* "controls the outcome here" and remanded the case to state court. *Id.* at *4; *see also Kiefer v. Bob Evans Farms, LLC*, No. 1:17-cv-01544-JES-JEH, 2018 WL 2329787, at *2 (N.D. Ill. May 23, 2018) (relying on *Collier* in concluding that remand to state court "is this Court's only option").

The court in *Soto* also disagreed with the defendant's argument that remand would be futile because state courts are "not bound to follow Article III's requirements in the same way that federal courts are." 2018 WL 2364916, at *1.

In *Dixon v. The Washington & Jane Smith Cmty.-Beverly*, the class action defendants removed the case to federal court pursuant to CAFA and then filed Rule 12(b)(6) motions to dismiss. No. 17 C 8033, 2018 WL 2445292, at *1 (N.D. Ill. May 31, 2018). The plaintiff, in turn, filed a motion to remand the case to state court. *See id.* Following the Seventh Circuit's guidance in *Collier*, the district court first determined that the plaintiff had in fact alleged sufficient Article III standing to pursue her claims and then denied the remand motion, implying that remand would have been the appropriate course of action rather than dismissal if Article III standing had been lacking. *See id.* at *10; *see also Howe v. Speedway LLC*, No. 17-cv-07303, 2018 WL 2445541, at *3-4 (N.D. Ill. May 31, 2018) (citing to *Collier* in commenting on the parties' procedurally "awkward position," where in order to avoid remand the defendant had to establish that the plaintiff suffered a sufficient injury for Article III standing purposes, while simultaneously arguing that the plaintiff lacked statutory standing). The *Dixon* court went on to grant in part and deny in part the defendants' motion to dismiss plaintiff's claims under Rule 12(b)(1), relying in part on its reasoning in support of its determination that plaintiff had established Article III standing. 2018 WL 2445292, at *10-*16.

In a post-*Spokeo* world, *Collier* confirms the need to think strategically about raising standing challenges in actions removed from state court. On the one hand, raising the Article III standing flag could lead to a remand order, undoing the benefit of removing the class action in the first place. On the other hand,

many states have standing or “case and controversy” requirements similar to the federal court requirements, including requiring a showing of a concrete injury. If a state has stringent standing requirements, then a federal court order finding a lack of Article III standing could be persuasive to the state court in a post-remand motion to dismiss. But before rolling the Article III dice, be careful what you wish for – you just might get it.