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The End May Be Nigh For FACTA Claims

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Until last month, the Eleventh Circuit appeared to be the last place for class action plaintiffs to pursue run-of-the-mill statutory damage claims for failure to properly truncate credit card numbers under the Fair and Accurate Credit Transactions Act ("FACTA").[1] Over the past year, numerous federal courts — including two Courts of Appeals — have held that plaintiffs lack standing to pursue these claims because they've suffered no concrete harm. Now district courts in the Eleventh Circuit may be getting on board.

Last month, Judge Robert Scola in the Southern District of Florida dismissed Gesten v. Burger King Corporation,[2] after finding the plaintiff lacked standing to pursue his FACTA claim. In Gesten, a Burger King customer claimed his credit card receipt displayed the first six and last four digits of his credit card number, more than the last five digits that FACTA allows. Relying on Spokeo Inc. v. Robins,[3] the court rejected plaintiff's contention that he had standing to sue because the receipt exposed him to a heightened risk of identity theft or credit card fraud.

Standing means that a plaintiff must have suffered (1) an injury in fact; (2) fairly traceable to the challenged conduct of the defendant; and (3) that is likely to be redressed by a favorable judicial decision.[4] "Injury in fact," means, at a minimum, that the plaintiff must have suffered a material risk of harm.[5] In the typical FACTA case, plaintiffs will allege they have standing because they've suffered a "material risk of harm" — the defendant has handed them a credit card receipt displaying too many digits of their credit card number, which supposedly exposes them to a heightened risk of harm.

Since the Supreme Court's decision in Spokeo, district courts everywhere but the Eleventh Circuit have panned this "risk of harm" allegation. For example, just last year, the Southern District of Florida found standing in a virtually identical case, Guarisma v. Microsoft Corp.[6] In Guarisma, a Microsoft Store customer alleged that printing the first six and last four digits of his credit card number on his receipt violated FACTA. Even though Guarisma still had the receipt and could show little, if any, risk it could fall into an identity thief's hands, the district court nonetheless found he had standing. The court thought the legislative history of FACTA supported the creation of a substantive right for consumers, the violation of which was sufficient to confer standing.[7] In reaching this conclusion, the court relied on several statements from the Congressional record that the purpose of FACTA was to reduce of identity

theft, but failed to consider whether Guarisma himself alleged any material risk of identity theft.[8]

The same held true in the Northern District of Georgia in Altman v. White House Black Mkt. Inc., another FACTA case involving allegations that a merchant disclosed the first six and last four digits of customers' credit card numbers.[9] There, the district court was persuaded by Justice Clarence Thomas' concurring opinion in Spokeo that "it is well established that a violation of one's private or substantive rights (as opposed to public procedural rights) is enough, standing alone, to meet the injury requirement of the test for standing."[10] The district court found support for Justice Thomas' opinion that a violation of a Congressionally created right is all that is required for an injury in fact in several pre-Spokeo matters, including Hammer v. Sam's East Inc. and Church v. Accretive Health Inc.[11] Altman's allegations about the potential risk of identity theft and statements in the Congressional record that the injury FACTA sought to protect was the exposure of private information bolstered the court's finding.[12]

Similarly in Wood v. J. Choo USA Inc.,[13] Flaum v. Doctor's Assocs.,[14] and Bouton v. Ocean Props. Ltd.,[15] the Southern District of Florida found plaintiffs had standing to pursue FACTA claims without any meaningful analysis of the "harm" they allegedly suffered. The courts held that the violation of a claimed statutory right alone sufficed to confer standing.[16]

So what changed in the Southern District of Florida that led to Gesten? Is this recognition that Guarisma and its progeny were outliers? The Gesten court's standing decision likely came because the earlier district court opinions rested on outdated authority. In fact, Judge Scola in Gesten noted that the earlier district court cases relied heavily on an unpublished Eleventh Circuit decision in a Fair Debt Collection Practices Act case, Church v. Accretive Health Inc.[17] That decision predates the Eleventh Circuit's precedential decision in Nicklaw v. CitiMortgage Inc.,[18] where the court held, as it must under Spokeo, that the violation of a statute, without more, does not automatically constitute harm. Judge Scola also noted that the earlier district court cases relied on an Eighth Circuit decision — Hammer v. Sam's East Inc.[19] — that Spokeo effectively overruled.

Gesten also comes on the heels of two influential Second Circuit decisions: Katz v. Donna Karan Company LLC,[20] and Crupar-Weinmann v. Paris Baguette Am., Inc.[21] In those cases, the Second Circuit found that printing the first six digits of a credit card number (Katz) or the card's expiration date (Crupar-Weinmann) presents no material risk of harm, particularly where the receipt is not alleged to have ended up in the hands of someone looking to steal an identity or commit fraud, and thus affirmed the Southern District of New York's dismissals. On Dec. 13, 2016, the Seventh Circuit had likewise found no standing where a restaurant's receipts disclosed the expiration date of its customer's credit cards.[22]

Whatever precipitated the change, Gesten reflects a fundamental shift away from the generous reading of Spokeo Eleventh Circuit plaintiffs have so far enjoyed. Gesten will likely appeal, so the Eleventh Circuit will soon weigh in — but likely only after the Ninth Circuit has its say.

The Ninth Circuit is set to hear oral argument in Noble v. Verifone, another FACTA case, on Nov. 16, 2017.[23] In Noble, six taxi companies were sued in a class action for allegedly violating FACTA by printing the first and last four digits of customers' credit card numbers on their receipts.[24] The district court dismissed the case for lack of standing after finding no material risk of harm.[25]

The pending Ninth Circuit appeal, and the likely Eleventh Circuit appeal in Gesten, may determine the fate of FACTA litigation. If they join the Second and Seventh Circuits, the once frenzied world of FACTA litigation may soon come to a close.

DISCLOSURE*: One of the authors of this article, John Papianou, is counsel of record for Verifone in Noble v. Verifone and Stelmachers v. Verifone Sys. Inc.*

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[1] 15 U.S.C. § 1681c(g)(1).

[2] No. 1:17-cv-22541-RNS (S.D. Fla. Sept. 27, 2017).

[3] 136 S. Ct. 1540 (2016).

[4] Spokeo, 136 S. Ct. at 1547.

[5] Spokeo, 136 S. Ct. at 1550.

[6] Guarisma, 209 F. Supp. 3d 1261 (S.D. Fla. 2016).

[7] Guarisma, 209 F. Supp. 3d at 1266-67.

[8] Id.

[9] No. 1:15-cv-2451-SCJ, 2016 WL 3946780, at *6 (N.D. Ga. July 13, 2016), motion to certify appeal denied, No. 1:15-cv-2451-SCJ, 2016 WL 9047107 (N.D. Ga. Oct. 13, 2016).

[10] Altman, 2016 WL 3946780, at *3-4, citing Spokeo, 136 S. Ct. at 1553.

[11] Id.

[12] Id. at *5.

[13] 201 F. Supp. 3d 1332 (S.D. Fla. 2016).

[14] 204 F. Supp. 3d 1337, 1342 (S.D. Fla. 2016), motion to certify appeal denied, No. 16-cv-61198, 2016 WL 8677304 (S.D. Fla. Oct. 27, 2016).

[15] 201 F. Supp. 3d 1341 (S.D. Fla. 2016).

[16] Wood, 201 F. Supp. 3d at 1340; Flaum, 204 F. Supp. 3d at 1342; Bouton, 201 F. Supp. 3d at 1352.

[17] 654 F. App’x 990 (11th Cir. 2016).

[18] 839 F.3d 998 (11th Cir. 2016).

[19] 754 F.3d 492 (11th Cir. 2014).

[20] 2017 WL 4126942 (2d Cir. Sept. 19, 2017).

[21] 861 F.3d 76 (2d Cir. 2017).

[22] Meyers v. Nicolet Restaurant of De Pere LLC, 843 F.3d 724 (7th Cir. 2016).

[23] Noble v. Nevada Checker CAB Corp., No. 2:15-cv-02322-RCJ-VCF, 2016 WL 4432685, at *4 (D. Nev. Aug. 19, 2016), appeal pending, No. 16-16573 (9th Cir.).

[24] Noble, 2016 WL 4432685, at *2.

[25] Id.

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