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Newsletters

Consumer Financial Services Newsletter - December 2016

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- Seventh Circuit Dismisses Consumer's FACTA Case Pursuant to *Spokeo*
- Second Circuit Finds Standing for TILA Claims for Failing to Provide Specific Statutory Disclosures

Seventh Circuit Dismisses Consumer's FACTA Case Pursuant to *Spokeo*

The Seventh Circuit remanded a Fair and Accurate Credit Transactions Act (FACTA) case, *Jeremy Meyers v. Nicolet Restaurant of De Pere, LLC*, instructing the district court to dismiss the case due to lack of Article III standing. The consumer filed a putative class action against a restaurant alleging that it violated FACTA by failing to truncate plaintiff's credit card expiration date on a dinner receipt. Instead of ruling on the class certification issue, the Seventh Circuit instead held that plaintiff failed to establish jurisdiction as a threshold issue. Therefore, the Seventh Circuit remanded the case to the district court with instructions to dismiss it.

In its analysis, the Seventh Circuit concluded that the consumer never sufficiently alleged a concrete injury in the case pursuant to *Spokeo, Inc. v. Robins*. Therefore, the court held that both it and the district were without authority to consider the merits of action. The consumer argued that Congress, through the FACTA amendment to the Fair Credit Reporting Act (FCRA), had granted him a legal right to receive a receipt that truncates the expiration date on his credit card and that he was entitled to statutory damages. The Seventh Circuit, however, citing *Spokeo*, held that "Congress does not have the final word on whether a plaintiff has alleged a sufficient injury for the purposes of standing, because "not all inaccuracies cause harm or present any material risk of harm."

The Seventh Circuit held that the restaurant's printing of his expiration date on the dinner receipt failed to demonstrate that the consumer suffered any harm. The court further noted that the consumer discovered the violation immediately and no one else saw the receipt. In those circumstances, "it is hard to imagine how the expiration date's presence could have increased the risk that [plaintiff's] identity would be compromised." Therefore, the court concluded that "without a showing of injury apart from the statutory violation, the failure to truncate a credit card's expiration date is insufficient to confer Article III standing."

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Read the 7th Circuit decision here: *Jeremy Meyers v. Nicolet Restaurant of De Pere, LLC*, Case No.: 16-2075 (7th Cir., Dec. 13, 2016)

For more information, please contact Todd P. Stelter.

Second Circuit Finds Standing for TILA Claims for Failing to Provide Specific Statutory Disclosures

Strubel v. Comenity Bank, No. 15-528-cv, 2016 WL 6892197 (2nd Cir. Nov. 23, 2016)

In *Strubel v. Comenity Bank*, the U.S. Court of Appeals for the Second Circuit considered whether a credit card holder's claims under the Truth in Lending Act (TILA), alleging a bank's defective billing-rights disclosures, had constitutional standing under Article III. In *Spokeo, Inc. v. Robins,* the U.S. Supreme Court held that a plaintiff must have a concrete and particularized injury in order to have standing. The consumer alleged that the bank failed to make four different disclosures required by TILA. In determining whether the failure to provide the disclosures was sufficient to plead a concrete injury, the court evaluated each disclosure separately.

First, the court held no concrete injury resulted when the bank did not disclose a consumer's obligation to timely notify a creditor to stop automatic payment of a disputed charge, reasoning that the bank did not offer automatic payment at the time. Second, the court held that no concrete injury resulted when the bank did not disclose its obligation to acknowledge a billing error within 30 days of receiving notice. However, the court held that the cardholder suffered a concrete and particularized injury by not receiving the remaining two disclosures: (1) that certain rights pertain only to disputed purchases not paid in full, and (2) that a dissatisfied consumer must contact the creditor electronically or in writing. The court reasoned that both of these disclosures serve to alert the consumer about how his actions can affect his own credit transaction rights. Interpreting *Spokeo,* the court found that an alleged procedural violation can by itself create a concrete injury where Congress conferred the procedural right to protect a plaintiff's concrete interests and where the procedural violation presents a "risk of real harm" to that interest.

This decision further clarifies the effect of *Spokeo* on plaintiffs' standing to sue for intangible harms related to creditors' alleged statutory violations, but certainly does not provide a bright-line test, and therefore further clarification can be expected in the future.

For more information, please contact your Hinshaw attorney.

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