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Will the Eleventh Circuit Fall in Line with its Sister Circuits in Interpreting Spokeo's Standing Requirements in FACTA Cases?

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If you are a typical shopper, the last thing on your mind at the checkout counter is your printed credit card receipt. As you juggle your grocery store bags, you might absentmindedly fold the receipt into your wallet, or crumble it up and drop it into the depths of your bag.

However, for more than a decade, printed credit card receipts have been the subject of considerable litigation all over the country. The Fair and Accurate Credit Transactions Act ("FACTA"), enacted in 2003, prohibits retailers from printing "more than the last 5 digits of the credit card number or the expiration date" on a consumer's receipt. The potential penalty for a FACTA violation is harsh: the statute awards up to $1,000 damages per violation when the conduct is willful, making it an area ripe for class action lawsuits—with restaurants, grocery stores, and other food retailers being primary targets.

Post-*Spokeo v. Robins*, however, the question of a plaintiff's standing to assert statutorily-based claims (like FACTA violations) has become the subject of considerable confusion and debate. See *Spokeo*, 136 S. Ct. 1540 (2016) (holding that a plaintiff does not "automatically satisf[y] 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" and that a "bare procedural violation" of a statute "divorced from any concrete harm" is simply not enough).

Over the past several years a prevailing view has emerged that plaintiffs need to show something more than just a bare procedural violation (i.e. that the receipt was printed) to satisfy *Spokeo*. Indeed, the Second, Third, Seventh, and Ninth Circuits all have all upheld dismissals of FACTA claims for lack of standing.

For example, in *Katz v. Donna Karan Co., L.L.C.,* 872 F.3d 114, 116 (2d Cir. 2017), the Second Circuit affirmed the district court's holding that the plaintiff lacked standing because the first six digits of a credit or debit card "do not disclose any information about Plaintiff; but rather identify the institution that issued the card to the card holder," and therefore, did not give rise to a concrete injury. *See Katz*, 872 F.3d at 118, 119.

Similarly, in *Noble v. Nevada Checker Cab Corp.,* 726 Fed. App'x 582, 584 (9th Cir. 2018), the Ninth Circuit held that disclosure of first digit of card number was not "the sort of revelation of information that Congress determined could lead to identity theft" because a card network/brand could be printed without violating FACTA. *See also Bassett v. ABM Parking Servs*., 883 F.3d 776, 777-78 (9th Cir. 2018) (affirming dismissal of FACTA claim based on disclosure of expiration date where "private information was not disclosed to anyone but [the plaintiff]"); *Meyers v. Nicolet Rest. Of De Pere, LLC,* 843 F.3d 724, 727-28 (7th Cir. 2016) (affirming dismissal of claim alleging violation of FACTA based on printing of an expiration date for lack of standing where plaintiff failed to allege that he either suffered concrete harm because of the violation, or that the violation created "any appreciable risk of harm" where no one else saw the receipt); *Kamal v. J. Crew Grp., Inc.,* 918 F.3d 102, 115-19 (3d Cir. 2019) (affirming dismissal of FACTA complaint based on printing of first six digits and last four digits of card number and holding claimed injury of heightened risk of identity theft was bare procedural violation that did not confer standing).

In April of this year, the Eleventh Circuit issued its holding in *Muransky v. Godiva Chocolatier, Inc.,* 922 F.3d 1175 (11th Cir. 2019), a case that has been viewed as an outlier on the issue of FACTA standing.

While the District of Columbia Circuit issued an opinion in July of this year in *Jeffries v. Volume Servs. Am., Inc.,* 928 F.3d 1059, 1062 (D.C. Cir. 2019) recognizing the plaintiff's standing in a particularly egregious FACTA fact pattern (the receipt disclosed all sixteen digits of the credit card number, the expiration date, and the name of the plaintiff's card provider), *Muransky* represents the only Circuit decision to hold that the disclosure the first six digits on a receipt—digits that correspond exclusively to bank issuer information and not cardholder information—is sufficient to confer standing absent a plaintiff's showing of tangible injury.

The holding in *Muransky* was limited: it was expressly predicated on a facial challenge levied by the defendant, which, as the Eleventh Circuit noted, required the Court to accept as true Plaintiff's allegation that the printing of the first six and last four digits of his credit card exposed him to a "heightened risk of identity theft." *Muransky*, 922 F.3d at 1190. Indeed, the Eleventh Circuit distinguished *Muransky* from the *Katz* case, where the defendant provided the district court with evidence that the first six digits of a credit card number "simply identify the card issuer and provide no personally identifying information about the plaintiff." *Katz*, 872 F.3d at 116.

Nevertheless, not surprisingly, since *Muransky* was issued earlier this year, FACTA class action cases have been filed in the Eleventh Circuit with increasing frequency. And because a petition for rehearing en banc was submitted in *Muransky* (along with several amicus briefs), many district court cases within the circuit have been in limbo, awaiting the appellate court's decision on the petition.

On Friday, a new development emerged: the Eleventh Circuit entered an order granting the petition to rehear the case en banc, and vacating the panel's prior opinion. *See Muransky v. Godiva Chocolatier, Inc.,* No. 16-16486 (11th Cir. Oct. 4, 2019). The Court has not yet indicated when the case will be heard, but given the stakes for FACTA litigation, it is one to watch over the coming months.

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