

NINTH CIRCUIT RULING REJECTS FACTA SUIT UNDER SPOKEO, AVOIDING CIRCUIT SPLIT

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The Ninth Circuit recently held in *Bassett v. ABM Parking Services, Inc.* that a plaintiff cannot establish Article III standing to maintain a Fair and Accurate Credit Transactions Act ("FACTA") [1] claim merely by pleading that a business printed a credit card expiration date on the plaintiff's receipt. [2] In so ruling, the Ninth Circuit followed similar rulings by the Second and Seventh Circuits, avoiding a potential circuit split. As explained below, the *Bassett* decision is the latest in a growing majority of cases in the wake of *Spokeo, Inc. v. Robins* [3] that demand a plaintiff allege actual harm to maintain a FACTA damages claim—even one for statutory damages based on an alleged willful violation.

BACKGROUND

FACTA prohibits businesses from "print[ing] more than the last 5 digits of [a credit or debit] card number or the expiration date upon any [electronically-printed] receipt provided to the cardholder at the point of the sale or transaction." [4] Part of the Fair Credit Reporting Act ("FCRA"), consumers may bring a civil claim for negligent or willful violation of FACTA, the latter of which can give rise to statutory and punitive damages. [5]

In *Bassett*, the plaintiff alleged that when he used his credit card to pay in the defendant's parking garage, the defendant printed the card expiration date on his receipt. [6] But he did not allege that the receipt was ever lost, stolen, duplicated, or otherwise seen by anyone else, let alone that he had suffered identity theft. [7] The district court dismissed the plaintiff's putative class action, concluding that he had alleged a mere procedural FACTA violation without concrete injury, which was insufficient to establish standing under *Spokeo*. [8] On appeal, the Ninth Circuit affirmed the dismissal. [9]

ANALYSIS

Like the Second and Seventh Circuits before it, [10] the Ninth Circuit ruled that the *Bassett* plaintiff did not plead a sufficiently concrete injury merely by alleging the defendant had printed his card expiration date on his receipt, violated FACTA in doing so, and thus created the potential for identity theft. [11] Noting first that *Bassett*'s "theory of injury is not supported by historical practice," the court reasoned that "even assuming that unauthorized disclosures of information are legally cognizable, [the defendant] did not disclose *Bassett*'s information to anyone but *Bassett*." [12] Thus, there could not have been any implication of privacy-based rights that would constitute

concrete injury.

Moving on to reviewing Congress's intent and authority to "elevat[e]" certain injuries "to the status of legally cognizable injuries," the Ninth Circuit reasoned that "*Spokeo* laid to rest the notion that because the FCRA authorizes citizen suits and statutory damages, it must mean that allegations of a statutory violation meet the standing requirement." [13] Again, like the Second and Seventh Circuits had done, the Ninth Circuit found it significant that Congress enacted the Credit and Debit Card Receipt Clarification Act of 2007 (the "Clarification Act"). [14] Although "Congress did not eliminate [FACTA's] expiration date requirement in the Clarification Act," Congress's "finding that a disclosed expiration date by itself poses minimal risk and the law's temporary elimination of liability for such violations counsel that Bassett did not allege a concrete injury." [15]

Finally, the Ninth Circuit rejected the plaintiff's "alternative statutory theories of injury." [16] First, "Bassett's argument that Congress 'created a substantive right that is invaded by a statutory violation' is unconvincing because it depends entirely on the framing of the right." [17] In other words, even if FACTA provided the right, for instance, "to be free from identity theft," it does not mean every FACTA violation constitutes a substantive injury. This is because many receipts that violate the statute—like the plaintiff's—are discovered by the cardholder and never give rise to identity theft. [18] Second, the plaintiff's reliance upon the "risk" of identity theft was too attenuated for the Ninth Circuit under *Spokeo* given the conclusory nature of his allegations. [19] Thus, "[l]ike the dissemination of an incorrect zip code," the example of a violation without concrete injury the Supreme Court used in *Spokeo*, the Ninth Circuit reasoned that "it is difficult to see how issuing a receipt to only the card owner and with only the expiration date, 'without more, could work any concrete harm.'" [20] The court concluded by summarizing its holding as follows: "We need not answer whether a tree falling in the forest makes a sound when no one is there to hear it. But when this receipt fell into Bassett's hands in a parking garage and no identity thief was there to snatch it, it did not make an injury." [21]

CONCLUSION

To some, the decision in *Bassett* may come as a surprise, given the Ninth Circuit's historical reputation and its recent conclusion on remand in *Spokeo* that the plaintiff had alleged a concrete injury by merely alleging that the defendant had published false, but likely not harmful, information on his consumer report. [22] By joining the Second Circuit, Seventh Circuit, and the growing majority of courts, the Ninth Circuit avoided creating a circuit split on the FACTA standing issue.

Yet, another panel of the Ninth Circuit is currently considering the same issue with respect to the FACTA provision prohibiting the printing of more than the last five digits of a card number on a customer receipt. [23] The court heard argument on that case in November 2017. The Third Circuit also heard argument on the FACTA standing issue in a card number case earlier this month, [24] and the Fifth Circuit has before it a pair of appeals that raise the issue in expiration date cases. [25] Although the majority of courts currently require a plaintiff to plead actual harm to establish FACTA standing, a contrary decision in any one of the pending appeals could lead to a circuit split and eventually to Supreme Court review.

[1] Pub. L. No. 108-159, 117 Stat. 1952, *codified at* 15 U.S.C. § 1681c(g).

[2] No. 16-35933 (9th Cir. Feb. 21, 2018).

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

[4] 15 U.S.C. § 1681c(g).

[5] 15 U.S.C. § 1681n-1681o.

[6] *Bassett*, slip op. at 5.

[7] *Id.*

[8] *Id.* at 6.

[9] *Id.* at 3, 15.

[10] For further discussion about the Second Circuit's decision in *Crupar-Weinmann v. Paris Baguette America, Inc.*, 861 F.3d 76 (2d Cir. 2017), the Seventh Circuit's decision in *Meyers v. Nicolet Restaurant of De Pere, LLC*, 843 F.3d 724 (7th Cir. 2016), and the majority trend regarding standing in FACTA cases after *Spokeo*, see the K&L Gates alert *Standing to Sue under the Fair and Accurate Credit Transactions Act after Spokeo*.

[11] *See Bassett*, slip op. at 9.

[12] *See id.* at 9-10 (internal quotations omitted).

[13] *See id.* at 10-11.

[14] Pub. L. No. 110-241, 122 Stat. 1565.

[15] *See Bassett*, slip op. at 11-12. Pursuant to the Clarification Act, the printing of an expiration date on a cardholder receipt subject to FACTA between December 4, 2004, and June 3, 2008, was not a willful violation. 15 U.S.C. § 1681n(d); *see* Clarification Act, § 3, 122 Stat. 1565, 1566 (2007).

[16] *See Bassett*, slip op. at 12.

[17] *See id.* at 13.

[18] *See id.* at 13-14.

[19] *See id.* at 14-15.

[20] *See id.* at 15 (quoting *Spokeo*, 136 S. Ct. at 1550).

[21] *Id.*

[22] *See Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1113-17 (9th Cir. 2017).

[23] *Noble v. Nevada Checker CAB Corp.*, No. 16-16573 (9th Cir.). In card number cases, only one federal court of appeals—the Second Circuit—has addressed the issue, reaching the same conclusion it did with respect to expiration date violations in *Crupar-Weinmann*. *See Katz v. Donna Karan Co.*, 872 F.3d 114, 119-20 (2d Cir. 2017).

[24] *Kamal v. J. Crew Group, Inc.*, Nos. 17-2345, 2453 (3d Cir.).

[25] *Gant v. Fondren Orthopedic Group L.L.P.*, No. 17-20407 (5th Cir.); *Batra v. RLS Supermarkets LLC*, No. 17-11014 (5th Cir.).

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