

Client Alert

National Class Action Practice Group

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***Meyers v. Nicolet Restaurant of De Pere, LLC*: Seventh Circuit Rules Mere Failure to Truncate Credit Card Expiration Date Under FACTA Insufficient to Confer Article III Standing.**

In *Meyers v. Nicolet Restaurant of De Pere, LLC*, an opinion issued on December 13, 2016, the United States Court of Appeals for the Seventh Circuit held that a proposed class action suit brought under the Fair and Accurate Credit Transactions Act (“FACTA”) should be dismissed due to the named plaintiff’s failure to establish Article III standing.¹ The Court applied the Supreme Court’s May 2016 decision *Spokeo, Inc. v. Robins* to conclude that the plaintiff had not suffered a concrete injury-in-fact simply by asserting a bare statutory violation, reasoning that “Congress’ judgment that there should be a legal remedy for the violation of a statute does not mean each statutory violation creates Article III injury.”² Rather, the statutory violation must cause the plaintiff concrete harm.³

Background

The *Meyers* case is one of two FACTA class action suits the same plaintiff filed in April 2015. Both suits contend that the defendant failed to truncate credit card receipts as required by FACTA, the 2003 amendment to the Fair Credit Reporting Act that prohibits the display of certain credit and debit card information in printed receipts. *Meyers* sought only statutory damages for himself and on behalf of the putative class based on a restaurant’s alleged statutory violations. He did not allege that anyone else received a copy of the receipt or that he suffered identity theft of any kind as a result. The district court denied the motion for class certification and *Meyers* appealed.⁴

The Seventh Circuit’s Opinion

On appeal, the Seventh Circuit declined to address the class certification issues, instead analyzing the plaintiff’s standing and holding that he failed to allege a sufficiently concrete injury-in-fact that would establish Article III standing. Reciting Supreme Court standing principles, the court explained that “[t]o establish standing, *Meyers* ‘must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.’”⁵ *Meyers* argued “that Congress, through the FACTA amendment[,] granted him the legal right to receive a receipt that truncates the expiration date on his credit card” – the violation of which, he alleged, was an actionable injury-in-fact sufficient to confer Article III standing.⁶ The court rejected that

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argument, explaining that under *Spokeo*, “a concrete injury is required ‘even in the context of a statutory violation.’”⁷ “Congress’ judgment that there should be a legal remedy for the violation of a statute does not mean each statutory violation creates an Article III injury.”⁸

The court observed that Meyers did not allege any harm beyond the alleged violation itself. Critically, he did not allege that anyone even saw the challenged receipt. Consequently, the court reasoned, “it is hard to imagine how the expiration date’s presence could have increased the risk that Meyers’ identity would be compromised.”⁹ Further, the court noted that even Congress had recognized “that failure to truncate a card’s expiration date, without more, does not heighten the risk of identity theft.”¹⁰ Rather, the Credit and Debit Card Receipt Clarification Act of 2007 confirmed that Congress recognized “the continued appealing and filing of these lawsuits represents a significant burden on hundreds of companies that have been sued and could well raise prices to consumers without corresponding consumer protection benefits.”¹¹ Accordingly, the court held 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.”¹²

The Significance of *Meyers*

Meyers is the first federal court of appeals opinion to apply *Spokeo* to determine standing in a FACTA class action suit. But more broadly, the Seventh Circuit’s opinion cautions plaintiffs against relying on a statutory violation alone to establish Article III’s requisite injury-in-fact. Indeed, as the court noted in its opinion, the circuit courts of appeals, post-*Spokeo*, consistently have rejected the proposition that a mere statutory violation, without proof of a concrete injury, is sufficient to establish Article III standing.¹³ Going forward, defendants should be able to rely on *Meyers* to challenge a plaintiff’s standing in the Seventh Circuit, making it more difficult for plaintiffs to cast an alleged statutory violation as a concrete injury-in-fact sufficient to confer Article III standing.

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¹ *Meyers v. Nicolet Restaurant of de Pere, LLC*, ___ F.3d ___, No. 16-2075, 2016 WL 7217581, at *4 (7th Cir. Dec. 13, 2016).

² *Id.* at *3 (citing *Diedrich v. Ocwen Loan Servicing, LLC*, 839 F.3d 583, 590-91 (7th Cir. 2016)).

³ *Id.* at *3, n.5.

⁴ *Meyers v. Nicolet Restaurant of de Pere, LLC*, 2016 WL 1275046 (E.D. Wis. Apr. 1, 2016).

⁵ 2016 WL 7217581 at *2 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

⁶ *Id.*

⁷ *Id.* (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1545 (2016)).

⁸ *Id.* at *3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* (citing Pub. L. 110-241 § 2(a)(7)).

¹² *Id.*

¹³ See *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 514 (D.C. Cir. 2016) (District of Columbia consumer protection statute); *Lee v. Verizon Comms., Inc.*, 837 F.3d 523, 529-30 (5th Cir. 2016) (ERISA); *Braitberg v. Charter Comms., Inc.*, 836 F.3d 925, 930-31 (8th Cir. 2016) (Cable Communications Policy Act); *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998, 1102-03 (11th Cir. 2016) (state satisfaction-of-mortgage statute).