Banking and Finance Law Daily Wrap Up, FAIR CREDIT REPORTING—11th Cir.: Failure to truncate credit card number caused concrete injury, (Apr. 23, 2019)

Banking and Finance Law Daily Wrap Up

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By Richard A. Roth, J.D.

A consumer suffered a concrete injury when a merchant printed too much of the consumer's credit card account number on a point-of-purchase receipt, even if the consumer's identity had not been stolen. The increased risk of identity theft alone was a concrete injury.

A consumer's increased risk of identity theft arising from a merchant's inclusion of too much of his account number on a credit card receipt was enough to constitute a concrete injury that gave him standing to sue, the U.S. Court of Appeals for the Eleventh Circuit has determined. The amount by which the risk increased was irrelevant, the court said, as no more than "an identifiable trifle" of an injury is needed to confer standing (*Muransky v. Godiva Chocolatier, Inc.*, April 22, 2019, Martin, B.).

The Fair and Accurate Credit Transactions Act, as modified by a subsequent clarification act, limits what a merchant can include on a credit card transaction receipt printed at the point of sale. The merchant cannot include the card expiration date, and it can include no more than the last five digits of the account number. In this case, a consumer filed a class action against Godiva Chocolatier, Inc., complaining that one of its stores had printed the first six and last four digits of his account number on a receipt.

When the consumer and the chocolate company sought approval of a proposed settlement of the class action, two unnamed class members objected. One basis for the objection was that the consumer, who was the class representative, did not have standing to sue because he had not suffered a concrete injury.

Standing to sue. A plaintiff must have standing to sue for a federal court to have subject matter jurisdiction; it is an indispensable part of the Constitution's requirement that there be a case or controversy. Demonstrating standing requires satisfying three criteria. The plaintiff must show that:

1. he has experienced an invasion of a legally protected interest;
2. the invasion is concrete, particularized, and either actual or imminent; and
3. the court can provide an effective remedy.

In *Spokeo, Inc. v. Robins* (*Banking and Finance Law Daily*, May 16, 2016), the Supreme Court attempted to clarify one aspect of standing—a concrete injury. Analyzing *Spokeo*, the Eleventh Circuit concluded that a concrete injury must actually exist, but it could be intangible. Moreover, the injury need not be substantial—"a small injury" or "an identifiable trifle" would suffice.

The Supreme Court also said that it was necessary to look to both Congressional judgment and historical practices to determine whether a concrete injury exists. Both considerations showed that this class representative had standing to sue, the Eleventh Circuit decided.

Congressional judgment. FACTA was intended to protect consumers from identity theft, the court said. In response to a plethora of suits, the later clarification act gave merchants a grace period during which they could not be sued for including card expiration dates, but they were given no relief from the ban on including more than five digits of an account number. This distinction, the court said, was because Congress determined that account number truncation was more useful in preventing fraud.

Consumers have a concrete interest in not having their identities stolen, the court pointed out, and that was precisely the interest that FACTA was intended to protect. A court should not substitute its judgment for

Congress's judgment on how many account number digits could be printed before a risk of identity theft became concrete. "In our view, if Congress adopts procedures designed to minimize the risk of harm to a concrete interest, then a violation of that procedure that causes even a marginal increase in the risk of harm to the interest is sufficient to constitute a concrete injury," the court said.

Common law cause of action. The consumer also could base his claim of standing on the similarity between the FACTA cause of action and the common law breach of confidence cause of action, the court continued. A breach of confidence suit can be brought when a person gives another private information, in confidence, and the recipient reveals the information. The harm occurs if the information is revealed, the court observed, regardless of whether there are further consequences.

A consumer who uses a credit card entrusts his private information to the merchant, according to the court. That created a relationship between the two causes of action that was sufficiently close to give the class representative standing.

Disagreement with other circuits. In reaching its conclusion, the Eleventh Circuit considered and rejected decisions by several other U.S. appellate courts. Perhaps of the most interest is the decision of the U.S. Court of Appeals for the Third Circuit in *Kamal v. J. Crew Grp., Inc.* (*Banking and Finance Law Daily*, March 12, 2019).

In *Kamal*, the Third Circuit considered precisely the same issue and reached the opposite conclusion—the consumer did not have standing to sue. The Eleventh Circuit interpreted the Third Circuit decision as saying a consumer had no standing to sue over a violation of the truncation requirement unless his identity actually had been stolen. The clarification act precluded that result, the Eleventh Circuit said, because Congress did not change consumers' ability to sue for truncation violations; rather, it gave merchants relief only from suits over including the card expiration date.

The Third Circuit also did not give enough weight to the fact that a risk of harm could be a concrete injury, the Eleventh Circuit added.

The Third Circuit's *Kamal* decision specifically rejected the similarity between a FACTA cause of action and a breach of confidence cause of action, the Eleventh Circuit said. However, in the Eleventh Circuit's view, the relationship between the two was close enough to show that the class representative had standing to sue.

The Eleventh Circuit also rejected a decision by the U.S. Court of Appeals for the Second Circuit. In *Katz v. Donna Karan Co., L.L.C.*, (*Banking and Finance Law Daily*, Sept. 20, 2017), the Second Circuit said a consumer had no standing to sue when the merchant printed the first six digits of an account number on a receipt. According to the Second Circuit, there was no concrete injury because the first six digits identified the credit card issuer, not the consumer.

Noting first that *Katz* was procedurally different, since the trial court had engaged in limited fact-finding, the Eleventh Circuit expressed unease over a court making factual findings about risk to a consumer that would override what Congress had decided. Moreover, the record before the Eleventh Circuit included no fact-finding at all. The class representative should not be bound by the results of a questionable finding of facts by a different court, in a different case, the Eleventh Circuit said.

The case is No. 16-16486 and No. 16-16783.

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