

Retailer Says Spokeo Dooms Receipt Suit In NC State Court

By **Shayna Posses**

Law360, New York (May 11, 2017, 8:22 PM EDT) -- A bedding and home goods retailer has urged a North Carolina state court to dismiss litigation accusing it of violating the Fair and Accurate Credit Transactions Act by including too many card digits on receipts, saying the consumer leading the suit lacks standing under the U.S. Supreme Court's landmark Spokeo decision.

Timothy Miles bases his suit on a mere technical violation of FACTA rather than alleging any actual or threatened injury stemming from receiving a Company Store Inc. receipt that included 10 digits of his credit card number, which isn't enough to establish injury-in-fact under North Carolina standing jurisprudence nor the high court's Spokeo Inc. v. Robins decision, the retailer argued in a Monday dismissal bid.

David S. Almeida, who represents the retailer, told Law360 on Thursday that as far as the defense knows, this is one of the first instances where Spokeo has been argued to apply at the state level. In the May 2016 decision, the justices held that a bare statutory violation divorced from any concrete harm isn't enough to establish Article III standing.

The ruling has by and large been kept to federal court, but, Almeida said, "There are a number of state courts — and we think North Carolina is one of them — that follow federal standing jurisprudence pretty closely and would find Spokeo persuasive."

The fact that the decision is still fairly new and federal courts nationwide are still figuring out how to interpret it "makes it all the more important to get the ball rolling in state court and try to hammer down a universal interpretation," Almeida said.

Miles filed suit in late December, alleging that within the last two years, he received one or more electronically printed receipts from the Company Store that included more than the last five digits of his payment card number, according to the dismissal motion. In fact, Miles alleged, the receipt included the first six digits and the last four digits of his card number, the motion said.

The consumer said this practice violated FACTA and sought to represent a class of all people who received an allegedly noncompliant receipt from the retailer over the last two years, the motion said.

However, there are some key flaws with these allegations that doom the suit, the retailer argued, noting that Miles apparently still has the receipt in question and doesn't allege that it was viewed by a single third party, instead merely contending that he faces a higher risk of identity theft.

"It is flatly implausible to suggest that plaintiff, as the only person who holds and has seen the receipt at issue, is somehow at an increased risk of identity theft or credit card fraud as a result of the alleged receipt," the retailer said.

Ultimately, the retailer added, this is "the exact type of hypothetical, ephemeral risk of harm that North Carolina courts (and the United States Supreme Court) hold is insufficient to establish an injury in fact."

North Carolina precedent requires plaintiffs to have suffered an injury-in-fact to have standing, and the U.S. Supreme Court made it clear in *Spokeo* that a technical statutory violation isn't enough to fulfill that requirement, the retailer argued.

After *Spokeo*, the majority of courts have dismissed FACTA claims for lack of standing, following the Seventh Circuit's reasoning in a 2016 ruling in *Meyers v. Nicolet Rest. of De Pere LLC*, the Company Store argued. There, the panel held that "without a showing of injury apart from the statutory violation, the failure to [redact a credit card] is insufficient to" establish injury-in-fact, according to the retailer.

Miles hasn't even tried to allege a concrete injury beyond a mere statutory violation, so he lacks Article III standing, the retailer contended.

"Courts throughout the country are routinely dismissing these opportunistic, lawyer-driven FACTA cases for lack of standing, and this court should do the same here," the retailer said.

Representatives for Miles didn't immediately return a request for comment Thursday.

Miles is represented by Stephen Ashley of the Ashley Law Firm PC, Brian Herrington of Herrington Law PA and Chant Yedalian of Chant & Co.

The retailer is represented by Randall M. Roden of Tharrington Smith LLP and Mark S. Eisen and David S. Almeida of Benesch Friedlander Coplan & Aronoff LLP.

The suit is *Miles v. The Company Store Inc. et al.*, suit number 16-cvs-2346, in the Alamance County Superior Court in North Carolina.

--Editing by Kelly Duncan.

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