

## CLIENT MEMORANDUM

# Subway Settles FACTA Class Action Lawsuit for Record-Breaking \$30.9 Million in Bellwether for High-Stakes Data Privacy Litigation

March 23, 2017

## AUTHORS

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On March 21, 2017, the lead plaintiff in a putative class action lawsuit against Doctor's Associates, Inc., the owner and operator of the SUBWAY sandwich restaurant chain ("Subway"), moved for court approval of a record-breaking \$30.9 million settlement of claims under the Fair and Accurate Credit Transactions Act of 2003 ("FACTA").<sup>1</sup> If approved by the court, this settlement would be the largest FACTA settlement in history and a harbinger of additional high-stakes class action litigation based only on statutory violations.

## **Background**

Subway is the owner and operator of the world's largest fast food restaurant chain with over 44,000 locations around the world and over 26,000 locations in the United States.<sup>2</sup> Shane Flaum, the lead plaintiff in the Florida class action, claims that he purchased goods from one such Subway franchise located in Pompano Beach, FL, in June 2016, and received a

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<sup>1</sup> Plaintiff's Motion for Preliminary Approval of Class Action Settlement, *Flaum v. Doctor's Associates, Inc.*, No. 1:16-CV-61198-CMA (S.D. Fla. Mar. 21, 2017). A related case, *Alan v. Doctor's Associates, Inc.*, was filed against Subway in the Central District of California on July 6, 2016, and subsequently consolidated with *Flaum* in the Southern District of Florida. See *Alan v. Doctor's Associates, Inc.*, No. 2:16-CV-04945 (C.D. Cal. July 6, 2016).

<sup>2</sup> See Explore Our World, SUBWAY, <http://www.subway.com/en-us/exploreourworld> (last visited Mar. 22, 2017, 4:20 PM).

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printed receipt that reflected the full expiration date and last four digits of his debit card number. Flaum filed a class action complaint against Subway a few days later, claiming that Subway willfully violated FACTA by printing and distributing to him and other customers receipts bearing credit card and debit card expiration dates. After several months of litigation and negotiations—including motion practice, fact and expert discovery, and private mediation sessions—Flaum and Subway agreed to a settlement that anticipates an award of \$30.9 million distributed pro rata among a potential class of over 2.6 million customers.

### **FACTA Receipt Provision and Potential Damages**

FACTA is an amendment to the Fair Credit Reporting Act that requires, among other things, that businesses not print receipts reflecting either (1) more than five digits of a customer’s credit card or debit card number, or (2) the expiration date of a customer’s credit card or debit card.<sup>3</sup> If a business is found to have *willfully* violated the “receipt provision” of FACTA, it may be found liable for statutory damages ranging from \$100 to \$1,000 per violation.<sup>4</sup> Class action lawsuits that aggregate millions of FACTA claims therefore result in massive potential liability totaling billions of dollars.

### **Defending FACTA Class Action Lawsuits After *Spokeo v. Robins***

Commentators have speculated that the U.S. Supreme Court’s landmark decision on standing in *Spokeo v. Robins* would decrease the viability of class action lawsuits premised on statutory or “technical” violations, such as violations of FACTA’s receipt provision.<sup>5</sup> In *Spokeo*, the Court clarified that alleging a “bare procedural violation” without further injury does not establish Article III standing because plaintiffs must allege both “concrete” and “particularized” harm.<sup>6</sup>

Lower courts grappling with *Spokeo*’s application to FACTA class actions have split on the issue of whether plaintiffs alleging violations of FACTA’s receipt provision allege sufficient harm to establish standing. District courts in the Eleventh Circuit, where *Flaum* was brought, have consistently held post-*Spokeo* that plaintiffs may establish standing by asserting a technical violation of the FACTA receipt provision.<sup>7</sup> However, one of the most recent opinions to address this question—from Judge Jed Rakoff in the Southern District of New York—dismissed a putative class action complaint because the allegations in that complaint alleged only a technical violation and failed to demonstrate an increased risk of identity theft.<sup>8</sup> While it is too early to tell whether Judge Rakoff’s reasoning will percolate through lower courts nationally,

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<sup>3</sup> 15 U.S.C. § 1681c(g) (2017). Sections 1681n and 1681o of Title 15 provide consumers with a private right of action to seek damages for negligent and willful violations of the FACTA receipt provision.

<sup>4</sup> 15 U.S.C. § 1681n(a) (2017).

<sup>5</sup> See, e.g., Supreme Court Solidifies “Concreteness” Prong of Standing Analysis for Privacy and Data Security Class Actions in *Spokeo v. Robins*, Willkie Farr & Gallagher LLP (May 20, 2016), available [here](#).

<sup>6</sup> *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548-49 (2016).

<sup>7</sup> See, e.g., *Guarisma v. Microsoft Corp.*, No. 15-24326-CIV-CMA, at \*7 (S.D. Fla. July 26, 2016).

<sup>8</sup> See *Cruper–Weinmann v. Paris Baguette Am., Inc.*, No. 13 CIV. 7013 (JSR), 2017 WL 398657, at \*5 (S.D.N.Y. Jan. 30, 2017).

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and the Supreme Court has not indicated whether it will provide further guidance on whether a statutory violation can be sufficient by itself to provide standing,<sup>9</sup> defendants have persuasive arguments at their disposal to defeat FACTA claims in similar high-stakes class action lawsuits depending on where the lawsuit is filed.

### **Breaking the Upward Trend in FACTA Class Action Settlements**

The proposed settlement in *Flaum* is the latest example of an emboldened plaintiffs' bar pursuing higher settlements for statutory or technical violations of FACTA's receipt provision; other significant FACTA settlements have ranged from \$1.8 million to \$11 million.<sup>10</sup> Defendants in FACTA class action lawsuits should therefore be prepared to defend themselves early and aggressively to minimize the impact of this upward settlement trend.

In light of both uncertainty in the lower courts following *Spokeo* and the upward trend in FACTA class action settlements, businesses would be well advised to prevent statutory violations in the first instance by enhancing data security compliance programs and internal controls.

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March 23, 2017

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<sup>9</sup> At least one FACTA claimant has filed a writ of certiorari with the Supreme Court contending that this issue is ripe for review, but the Court has not yet granted or denied that petition. See Allison Grande, Justices Asked To Tackle *Spokeo* Divide In Card Receipt Row, *Law360* (Mar. 20, 2017), available [here](#).

<sup>10</sup> See, e.g., *Lumos v. Sw. Airlines Co.*, No. 3:13-CV-01429-CRB (S.D. Cal. Oct. 18, 2013) (\$1.8 million settlement); *Muransky v. Godiva Chocolatier, Inc.*, No. 0:15-CV-60716 (S.D. Fla. Sept. 28, 2016) (\$6.3 million settlement); *Legg v. Spirit Airlines, Inc.*, No. 0:14-CV-61978 (S.D. Fla. Aug. 2, 2016) (\$7.5 million settlement); *Legg v. Lab. Corp. of America Holdings*, No. 0:14-CV-61543-RLR (S.D. Fla. Feb. 18, 2016) (\$11 million settlement).