Legal Backgrounder

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LITIGATION ALCHEMY:

WILL "FACTA" AMENDMENT END CONJURING OF CASH FROM CREDIT CARD RECEIPTS?

by

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For some plaintiff's lawyers, one particular federal law must be causing them sore arms – a result of pinching themselves so many times. But they aren't dreaming. There really is a law that allows for liability to be proven in a catching-fish-in-a-barrel-like manner, with no need to show actual damages and circumstances that are ripe for class actions – not to mention with millions of potential class members in some cases.

This exception to the almost infallible rule that if something sounds too good to be true . . . . is the Fair and Accurate Credit Transaction Act (FACTA). The law empowers plaintiffs' lawyers with a sort of litigation alchemy – the ability to turn credit card receipts into cash. It works like this. A person enters a retail establishment (store, restaurant, etc.) and makes a purchase using a debit or credit card. The merchant completes the transaction and hands the customer back a printed electronic receipt. If the receipt contains more than the last five digits of the customer's debit or credit card account number, *or even just the card's expiration date*, the merchant has violated FACTA. The customer may now be entitled to recover statutory damages between $100 and $1,000.

At first glance, the law seems reasonable enough. Identity theft is a serious problem and anything that helps to reduce the amount of paper floating around that contains credit card numbers is a good idea. But the law went awry. The way it was drafted, a merchant violates the law if it prints a receipt containing a card's expiration date – even if the card numbers are properly truncated. It turned out that many merchants believed that they were in compliance with FACTA by simply truncating their customers' card numbers on receipts. That seems like an honest mistake. After all, simply knowing the expiration date of a credit card does not lead to identity theft.

But the statute says what it says. As a result, many thought-to-be-compliant merchants found themselves being sued for issuing non-compliant receipts. Nobody is injured by a receipt that contains a credit card expiration date, without also containing sufficient accompanying card numbers. But FACTA

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eliminates the need to prove actual injury by allowing for an award of statutory damages between $100 and $1,000 for a willful violation. And, of course, where there is one non-compliant receipt, there are sure to be many – thousands, even hundreds of thousands, and perhaps even millions in some cases. Translation – class action. Do the math: thousands or hundreds of thousands of violations, with each one giving rise to damages between $100 and $1,000. With apologies to Roy Schieder – "You're gonna need a bigger calculator."

It should come as no surprise that some lawyers saw the statute as chum, and suits were filed in the hundreds. What is a surprise is that a *bipartisan* Congress also moved quickly to end (at least for some violators) the litigation abuse. That the amendment passed the House by a vote of 407-0, and the Senate by Unanimous Consent, speaks volumes about just how abusive the litigation was.

FACTA – ACT I

FACTA complaints generally conform to the following script: Plaintiff so and so went into a store or restaurant and used a credit card to make a purchase; plaintiff was provided with a receipt that contained more than the card's last five digits and/or expiration date; this violates FACTA; the merchant's violation was willful (for various reasons); statutory damages are therefore owed; and a class should be certified. Simple as that – this isn't antitrust.

While the complaints have been similar, judicial responses to the litigation have varied widely. FACTA complaints have been met with an assortment of decisions from the bench – with merchants usually coming out on the losing end. A LEXIS search for the term "FACTA" returned 85 hits within the past year's time period.

Courts nationwide have consistently denied defendants' motions to dismiss, reasoning that the complaints provide allegations that, if taken as true, plead sufficient facts to substantiate a willful violation. *See, e.g., In re: TJX Companies, Inc.*, 2008 U.S. Dist. LEXIS 38258 (D. Kan. May 9, 2008) (court noted that Congress had given defendants three years to comply with the statute, credit card companies had notified defendants of FACTA's requirements and most of defendant's peers and competitors had complied with the statute).

Motions to dismiss have also been filed in cases alleging FACTA violations for online transactions. Defendants in these cases claimed that their conduct did not constitute "printing" according to the statute. Plaintiffs alleged that the "printing" requirement was satisfied by defendant sending electronic transmissions to the class members' computers. *See Harris v. Walmart Stores*, 2007 U.S. Dist. LEXIS 76012 (N.D. Ill. October 10, 2007); *Vasquez-Torres v. Stubhub*, 2007 U.S. Dist. LEXIS 63719 (C.D. Cal. July 2, 2007) (court denied the motion because defendant failed to demonstrate that plaintiff's interpretation of "print" was unreasonable, and, therefore, plaintiff may be able to establish a valid claim at trial). *But see King v. MovieTickets.com, Inc.*, 2008 WL 2127995 (S.D. Fla. May 20, 2008) (granting defendant's motion to dismiss on the basis that the person accepting the credit card must also print the receipt in order to be subject to the requirements in the statute).

Even though FACTA appears to present the right ingredients for a class action, defendants, at least in the Central District of California, have succeeded in defeating class certification. *See, e.g., Najarian v. Charlotte Russe, Inc.*, 2007 U.S. Dist. LEXIS 59879 (C.D. Cal. June 12, 2007). These courts have found that the plaintiffs could not satisfy Fed. R. Civ. P. 23(b)(3) because they failed to meet the "superiority requirement," which mandates that the plaintiff demonstrate that a class action is superior to other available methods of adjudication. Class treatment for FACTA fails to meet this requirement because of the disproportionality of the damage award in relation to the harm actually suffered by the class and the due process concerns associated with such an impact. *Najarian*, 2007 U.S. Dist. LEXIS 59879 at *7. One court recognized that, "if a class is certified and plaintiff prevails, even the minimum statutory damages would be ruinous to the defendant." *Spikings v. Cost Plus, Inc.*, 2007 U.S. Dist. LEXIS 44214 *11 (C.D. Calif. May

29, 2007). Courts denying class certification also found that a class action was not the superior method because it opened up the possibility of abuse by attorneys. You don't say.

On the other hand, courts granting class certification have found that plaintiffs fulfilled the superiority requirement because concerns regarding excessive awards and violations of a defendant's due process rights should be dealt with after a class has been certified. *See Meehan v. Buffalo Wild Wings*, 2008 U.S. Dist. LEXIS 14133 (N.D. Ill. Feb. 26, 2008).

The legislative history of FACTA calls into question whether the consequences for printing an expiration date on a receipt were actually intended. However, courts have refused to read beyond the statute, finding President Bush's signing statement, Senate reports, and various commentaries irrelevant. *See Arcilla v. Adidas Promotional Retail Operations, Inc.*, 488 F. Supp. 2d 965 (C.D. Calif. 2007) (reasoning that the legislative materials offered by the defense are essentially irrelevant since they do not conflict with a straightforward interpretation of the statute).

Recently, an Alabama court found FACTA to be unconstitutional and granted all defendants' motions for summary judgment. *See Grimes v. Rave Motion Pictures*, 2008 U.S. Dist. LEXIS 42581 (N.D. Ala. May 28, 2008). The court reasoned that the most obvious denial of due process comes from the statute's vague description of damages. The *Grimes* court noted that jury trials require understandable and rational criteria to determine damages, and the statute provides no guidance for deciding between $100 and $1,000, completely leaving discretion to the jury. The court stated that it "must insist upon a jury's having a chance at fairly performing its adjudicative function and not simply flying by the seat of its pants." *Id.* at *12.

The abusive litigation is most evident in settlements where plaintiffs' attorneys are cashing in and their clients are receiving nominal awards in the form of discount coupons and vouchers. *See Palamara v. Kings Family Restaurants*, 2008 U.S. Dist. LEXIS 33087 (W.D. P.A. Apr. 22, 2008). Here the court approved a settlement that awarded each class member their choice of ice cream, soup, salad or homemade pie from the defendant's restaurant, with a value of up to $4.68. As for the plaintiffs' attorneys – the full buffet: fees not to exceed $75,000. The inability of plaintiffs to prove "willfulness" is a legitimate defense in FACTA cases. But as is so common in class actions, defendants are forced to the settlement table because they can't afford to lose.

Congress Steps In

On June 3rd, President Bush signed into law the Credit and Debit Card Receipt Clarification Act of 2007 (Public Law No. 110-241). The Act states that any person who printed an expiration date on a receipt that was provided to a consumer between December 4, 2004 and the date of enactment of the Act, but which otherwise complied with the card number truncation requirement, shall not be in willful noncompliance of FACTA.

The Act does not eliminate a FACTA violation based on an expiration date. Rather, it simply deems that an expiration date violation, taking place during this window, will not be considered "willful," which eliminates the customer's ability to recover statutory damages (which, of course, are the only damages that matter since actual damages can't be sustained). Thus, while the Act serves to retroactively eliminate the potential for damages in likely hundreds of cases, any merchant that commits an expiration date violation after the Act's effective date is right back in the soup – subject to statutory damages if willfulness can be proven.

It leaves you scratching your head, asking why Congress chose not to re-write the statute to exclude expiration date violations going forward, considering that one express purpose of the amendment is to "limit abusive lawsuits." *See* § 2(b). This purpose was also conveyed by New York's Senator Chuck Schumer. He stated "Congress never intended for the law [FACTA] to be used to drive companies out of business with expensive legal cases that don't involve any harm to consumers." Cynthia Cotts, *Senate Amends Credit-Card*

Law to Protect Retailers, BLOOMBERG/AMERICAN BANKER, May 20, 2008.

The Congressional Solution in Action

It didn't take long for the impact of the Credit and Debit Card Receipt Clarification Act of 2007 to be felt. On June 13th, the Western District of Pennsylvania used the Act to put the kibosh on a class action settlement that had been preliminarily approved by the court but was not yet final. The court concluded that the plaintiffs' causes of action had been "statutorily eliminated" before the court had an opportunity to discharge its duty of ensuring that the settlement was fair, adequate and reasonable. Therefore, the court vacated its Preliminary Approval Order. *See Ehrheart v. Verizon Wireless*, 2008 U.S. Dist. LEXIS 47224 (W.D. Pa. June 13, 2008).

There was a lot at stake in the *Verizon Wireless* settlement – at least for class counsel. The settlement called for each participating claimant to receive a phone card with an approximate value of $5.00 or a voucher for a 15% discount on wireless accessories – note: excluding handsets – up to a maximum discount of $7.00. Fees for class counsel – up to $207,500, subject to court approval, and with an agreement from Verizon Wireless not to oppose the fee petition. No wonder the plaintiffs filed a Motion for Reconsideration six days after the Preliminary Approval Order was vacated.

What's Next for FACTA

The Credit and Debit Card Receipt Clarification Act of 2007 will surely go a long way toward curbing FACTA litigation. Existing FACTA defendants in expiration date-only cases will likely file the appropriate dispositive motion, since the Act applies to actions brought before its enactment. At that stage, questions may arise whether some of the class members were also provided with receipts that contained more than the last five digits of their credit card number. It also seems conceivable that someone will challenge the Act's retroactivity.

Most importantly, because the law only applies to receipts that were printed between December 4, 2004 and the date that the law was enacted, a retailer that prints an expiration date on a receipt after the enactment date of the law could face liability just as in the past. So look for more FACTA cases to be filed as plaintiffs' attorneys hunt for non-compliant receipts.

At this point, it seems likely that many of the retailers that will still be printing expiration dates on receipts, after the enactment of the Act, will be the proverbial "mom and pops." Therefore, the availability of insurance to fund the litigation will likely become front and center. After all, if insurance dollars are not available for FACTA damages (in particular, the attorneys' fees needed to settle), it will surely diminish the plaintiff's enthusiasm for pursuing a defendant if the ability to collect a judgment may be much more difficult than simply dealing with an insurer. Therefore, resolution of the insurance coverage questions – of which there has been none so far – will likely go a long way toward determining what route FACTA takes from here. Lastly, even for claims that are dismissed under the new law, there are likely going to be disputes that continue on over the availability of coverage for past defense costs.

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