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Companies Face Potentially Ruinous Damages from FACTA Lawsuits

Lawsuits have been filed against more than 100 companies in 2007 for violating a key provision of the Fair and Accurate Credit Transactions Act of 2003 (FACTA). These suits, which seek relief on behalf of classes of consumers, expose defendants to the risk of potentially ruinous statutory penalties.

FACTA, which was enacted in December 2003, amended a variety of provisions of the Fair Credit Reporting Act (FCRA). The key provision for purposes of these lawsuits is 15 U.S.C.A. § 1681c(g), which mandates that machine-printed consumer copies of receipts for credit or debit card transactions display no more than the last 5 digits of the card number and not display the card's expiration date. The law became effective on December 4, 2004, as to new machines. Existing credit card machines had until December 4, 2006, to become compliant. The statute allows prevailing plaintiffs to be awarded actual damages or, in the case of defendants who willfully fail to comply with the law, statutory penalties under 15 USCA § 1681n of between $100 and $1,000 per affected consumer.

Since the law became fully effective on December 4, 2006, the courts have seen an explosion of cases against retailers alleging willful violations of the act. These cases typically seek relief on behalf of nationwide classes of individuals who received electronically printed credit or debit card receipts that contained more than the last five digits of the account number and/or the expiration date of the card. Plaintiffs originally filed most of these suits in the Ninth Circuit – in particular, the Central District of California – which until recently had a less stringent standard for a showing of willful behavior under 15 USCA § 1681n than other circuits.

In the spring of 2007, two events changed the landscape of FACTA litigation. First, on June 4, the U.S. Supreme Court issued a ruling that, while agreeing with the Ninth Circuit's interpretation of the term "willfully" as used in 15 U.S.C. § 1681n as including a "reckless disregard of the law," sharply disagreed with the Ninth Circuit's standard for determining recklessness. [1] Instead, the Court held that an action is not in reckless disregard of FCRA unless it "is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." [2] According to the Court, an action could not be deemed willful where statutory text was unclear and companies operated without "the benefit of guidance from the courts of appeals or the [FTC]." This "objectively unreasonable" standard significantly raises the bar for plaintiffs trying to prove willfulness and greatly aids companies that have acted in a legal grey-zone.

At around the same time as the Supreme Court decision, the second event that altered the FACTA litigation landscape occurred: courts in the Ninth Circuit began denying class certification. Rather, the courts concluded that class treatment was not the superior way of proceeding given the potentially "annihilating" statutory damages exposure where plaintiffs suffered no actual injury. One case, for example, sought relief on behalf of a class of 3.4 million people. Statutory damages in that case would range between $340 million and $3.4 billion; the defendant company had a net worth of $314 million. Under such circumstances, the courts reasoned, the superiority requirement of Rule 23 had not been met.

It has not taken the plaintiffs' bar long to regroup. Now that the same "willfulness" standard applies in every district, and because the Ninth Circuit was not as obliging in granting class certifications, plaintiffs have made the Northern District of Illinois their new venue of choice. This is because some cases in the Seventh Circuit and the Northern District of Illinois have rejected the argument that disproportionately large statutory penalties should act as a barrier to

class certification. Indeed, Seventh Circuit case law instead suggests that unconstitutionally excessive damages may be reduced after a class has been certified and a judgment obtained. *See, e.g. Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006). It remains to be seen whether the reasoning of *Murray* will prevail in the long run; it has been rejected by courts in the Second, Ninth, and Tenth Circuits, among others, and may be inconsistent with the Rule 23(b)(3), which is inherently discretionary and expressly permits the denial of certification where a class action is not "superior to other available methods for the fair and efficient adjudication of the controversy." In the meanwhile, plaintiffs have begun filing suits in the Northern District of Illinois, seemingly in the hopes of avoiding the kinds of decisions issued in the California courts. As of early August, dozens of new FACTA cases have been filed in the Northern District of Illinois, and we anticipate that more complaints will be filed.

Mayer Brown has defended, and continues to defend, companies involved in FACTA litigation in California, Illinois, and elsewhere. While the requirements of FACTA may seem deceptively simple, the reality is that hundreds of companies have found themselves defending lawsuits that seek potentially ruinous statutory damages. Companies with retail operations must take care to ensure that printed credit and debit card receipts are in compliance with the law. If those receipts were not in compliance by December 4, 2006, they should prepare for FACTA litigation.

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[1] *Safeco Ins. Co. of America v. Burr*, 127 S. Ct 220 (2007).
[2] *Id*. at 2215.

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