MAYER·BROWN

Recent Trends and Status of FACTA Class Action Litigation

Lucia Nale & John Nadolenco

Partners

Mayer Brown LLP

May 6, 2008

General Overview of FACTA

- Fair and Accurate Credit Transactions Act
- Amendment to the Fair Credit Reporting Act (FCRA), 15 U.S.C. §1681 et seq.
- Enacted December 4, 2003

Truncation Requirement

- 15 U.S.C. §1681c(g)(1):
  - "Except as otherwise provided in this subsection, no person that accepts credit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction." (Emphasis added.)

Implementation/Effective Dates

- January 1, 2005
  - Cash registers first put into use after this date were immediately subject to truncation requirements
- December 4, 2006
  - All cash registers, regardless of date first put into use, are subject to truncation requirements

Damages Recoverable Under FACTA

- Actual Damages
  - Under Section 1681o(a)(1), a plaintiff may bring an action and recover actual damages for a negligent violation of the Act
- Statutory Damages
  - Under Section 1681n(a)(1)(A), a plaintiff may bring an action and recover statutory damages between $100 and $1,000 for a willful violation of the Act
- Punitive Damages
  - Under Section 1681n(a)(2), a plaintiff may also seek punitive damages
- Attorneys' Fees
  - Under Sections 1681n(a)(3) and 1681o(a)(2), a plaintiff may also seek costs, including attorneys' fees
- NOTE: There is no statutory limit on recoverable damages

Class Action Filings Begin

- Plaintiffs' firms begin filing class action lawsuits after December 2006 effective date
  - Spiro Moss Barness LLP (Los Angeles)
  - The Linde Law Firm (Los Angeles)
  - Keller Grover LLP (San Francisco)
  - Herbert Hafif Law Offices (Claremont)
- By January 2008, approximately 440 putative nationwide class actions have been filed
  - Many of these—approximately 140—filed in U.S. District Courts for the Central District of California (Los Angeles) and Northern District of California (San Francisco)

Common Class Action Allegations in First Wave of Cases

- Putative class actions allege willful violations under Section 1681n
  - Plaintiff was not injured (no identity theft)
  - Plaintiff received credit card receipt with expiration date (relatively few cases where card number was not truncated)
  - Putative class includes all similarly situated cardholders across the U.S. dating back to December 4, 2006

Ninth Circuit Viewed as More Lenient on Willfulness

- In *Safeco v. Burr* and *Geico v. Edo*, the Ninth Circuit held that a "willful noncompliance" with FCRA could be shown by proving "reckless disregard" of FCRA requirements
  - In defining reckless disregard, the Ninth Circuit stated that a company may be deemed to have acted recklessly if it relied, even in good faith, on an interpretation of FCRA that later was determined to be unreasonable, implausible, creative or untenable
- Other Circuits had a more conservative interpretation of FCRA, requiring that willfulness be shown by proving that defendant had knowledge of the violation

Motions to Dismiss Were Not Working —And Backfiring

- Defendants claimed FCRA did not create a private right of action
  - FCRA allows "consumers" to sue
  - FACTA applies to "cardholders"
  - Court disagreed: *Eskandari v. IKEA* held that "cardholders" are "consumers" who have a private right of action
- Unconstitutionally vague whether "5 digits" modifies just "card number" or "expiration date" as well
  - U.S. Attorney's Office has filed a brief in support of the constitutionality of FACTA

The Tide Begins to Turn: *Safeco v. Burr*

- The Supreme Court clarifies willfulness standard (June 4, 2007)
  - "Reckless" conduct entails "conduct violating an objective standard: action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known"
  - "Thus, a company subject to FCRA does not act in reckless disregard of it unless the action 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."

The Tide Begins to Turn: Central District Judges Deny Certification

- May 25, 2007: In *Spikings v. Cost Plus, Inc.*, Judge Walter denied class cert based on superiority grounds, stating that a class action is not superior (a) when "even an award of the minimum statutory damages . . . would put Defendant out of business" and (b) when certifying a class "could possibly open the potential for abuse by the attorneys"
- June 13, 2007: In *Najarian v. Avis Rent a Car System*, Judge Klausner additionally denied class certification based on commonality/predominance grounds given Avis' inability to easily determine whether class members were "consumers" who obtained "receipts"
- September 28, 2007: In *Simon v. Ashworth, Inc.*, Judge King denied class certification finding the lead plaintiff was not an adequate representative (e.g., no discernable interest in the case, did not review documents, did not know role or duties, merely gave credit card receipts to attorneys)

California Certification Decisions

- Certification Denied
  - In the Central District, at least twelve judges have denied certification (Anderson, Carney, Cooper, Fisher, King, Klausner, Matz, Otero, Schiavelli, Walter, Wright, Wu)
  - In the Northern District, at least two judges have denied certification (Ilston and Armstrong)
- Certification Granted
  - In the Central District, only Judge Selna has granted certification in three cases before him (one is now before the 9th Circuit)
  - In the Northern District, Judge Breyer granted certification

A Closer Look at Decisions Denying Class Certification

- Superiority
  - Proceeding as a class is not superior because of potentially annihilating damages that would result despite no actual injury
- Due Process
  - Potential damages are excessive and disproportionate to the Plaintiffs' actual harm (this argument remains even for class actions limited to single-store patrons)
- Commonality/Individualized Issues
  - *E.g.*, whether transactions were "consumer" or nonactionable business transactions; whether class members received receipts or other printouts
- Adequate Representation/Risk of Abuse by Counsel
  - Lead Plaintiff is not actively supervising the case; litigation appears to be controlled by plaintiffs' lawyers; a handful of plaintiffs' firms are responsible for filing a majority of cases

9th Circuit Appeals

- *Soualian v. International Coffee*
  - Appeal from denial of certification by Judge Klausner
  - Defendant's responding brief was filed 2/26. Plaintiff's reply brief is due 3/10.
  - Appeal does *not* squarely raise the annihilating-damages issue because International Coffee issued credit-card receipts only on purchases over $25, which was not particularly common. Thus, there were not enough customer receipts printed to make exposure potentially annihilating.
  - Case has settled
- *Reynoso v. South County Concepts*
  - Appeal from grant of certification by Judge Selna. Petition to appeal was granted 1/14/08.
  - Lower court rejected "disproportionate damages" argument under *Murray*. Defendant had argued that even the minimum damages award would put them out of business.

Trends

- Litigation moved to other jurisdictions (*e.g.*, the Northern District of Illinois)
  - The Seventh Circuit has not recognized annihilating damages as a bar to class certification, finding that excessive damages can be reduced after verdict. *Murray v. GMAC Mortgage Corp*., 434 F.3d 948 (7th Cir. 2006)
- Current count: 28 decisions denying certification; 9 granting
- Vast majority of cases in Ninth Circuit have denied certification on superiority grounds
- Northern District of Illinois
  - At least four judges have granted certification:
    - *Halperin v. Interpark* (Judge Bucklo); *Troy v. The Red Lantern Inn, Inc*. (Judge Aspen); *Meehan v. Buffalo Wild Wings, Inc*. (Judge Lindberg); *Harris v. Best Buy* (Judge St. Eve)
    - In each case, the court focused on primarily on superiority and certified the class under the Seventh Circuit's decision in *Murray*
- Plaintiffs began limiting class size by <u>store</u> so as to take away annihilating damages argument
  - Defendant can still challenge due process based on disproportionality of damages
  - Narrower class did not work in *Medrano v. Modern Parking* (C.D. Cal. Sep. 17, 2007)

Trends

- Central District Judges began to hear summary judgment motions regarding willfulness. Judge Morrow has denied summary judgment; Judge Klausner has both denied (in *Soualian v. International Coffee*) and granted (in *Najarian v. Charlotte Russe*)
  - In *International Coffee*, Judge Klausner found a triable issue of willfulness based on defendant's contractual agreement to review all reports from its bank and a handwritten notation by defendant on one such report discussing truncation (Order Feb. 9, 2008)
  - In *Charlotte Russe*, he granted summary judgment where defendant had requested that its vendor implement a program to mask the expiration date, but then did not realize that the vendor had failed to do so (noting that the evidence showed "carelessness" at best, rather than willfulness) (Order Aug. 16, 2007)

Other Interesting Decisions

- Northern District of Illinois
  - In *Blahnik v. Quigley's Irish Pub, Inc*., shortly after the case was filed, Judge Shadur issued a minute order calling plaintiff's counsel a "serial filer" and raising issues as to his, and the named plaintiff's, suitability to represent a class
- Northern District of Alabama
  - Judge Acker stayed his four FACTA cases and invited motions for summary judgment on "the alleged constitutionality" of FACTA on its face "and/or its unconstitutionality in application to a particular defendant." See *Grimes v. Rave Motion Pictures*, AR07-1397 (Order Feb. 14, 2008)
  - Judge Acker stated that he believes FACTA may be unconstitutional because the statute (1) lacks criteria a jury can use to determine what amount of statutory damages to award; and (2) potentially allows for an impermissible double penalty (where willful damages are coupled with punitive damages)

Online Receipts

- Recap of 15 U.S.C. §1681c(g)(1):
  - "… no person that accepts credit cards for the transaction of business shall **print** more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction."
- Does that apply to electronic receipts?
  - 3 courts say "yes" (BestBuy, 1-800 Flowers and Stubhub)
  - 1 court says "no" (MovieTickets.com)

What Does "Print" Mean?

- Dictionaries support either interpretation: printed on paper and "display[ed] on a surface (as a computer screen) for viewing"
- Common usage seems to indicate information printed on paper receipts
  - "The common meaning of the word 'print,' … confirms my common sense impression that a 'printed' item is something physical and tangible that can be impressed or marked upon, such as a printed paper." (*MovieTickets.com*)

Other Clues to the Meaning of "Print"

- Congress knows how to use "display" to mean "to show messages, data, or graphics on a monitor"
- FACTA followed numerous state laws that regulated what could be included on receipts—and chose only "print"
  - Merchants shall not "print or otherwise produce or reproduce, or permit the printing or other production or reproduction" (Louisiana)
  - Merchants shall not issues a receipt "that displays" prohibited information (Michigan)
  - Merchants shall not "disclose" prohibited information (Missouri)
  - Merchants shall not issue a receipt "that shows" prohibited information (Oregon)
- Plaintiffs: "other machine or device" in §1681c(g)(3) = computer screen
  - Defendants: general words that follow specific; means similar POS devices

Final Thoughts on Online Receipts

- Vagueness in "print" may help company establish that it did not "willfully" violate the statute
  - At least one court concluded FACTA didn't apply to online receipts; and one of the courts that concluded it did admitted it was close call
- Possible individualized issues if customer can choose to print
  - May depend if company can readily determine if customer chose to print
  - $100 v. $1,000

Contact Information

- Lucia Nale
  - lnale@mayerbrown.com
  - 312.701.7074
- John Nadolenco
  - jnadolenco@mayerbrown.com
  - 213.229.5173