

# Client Alert

Latham & Watkins  
Litigation Department

## Credit/Debit Card Litigation Under the Fair and Accurate Credit Transactions Act (FACTA)

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### Summary

*Any party that generates electronically-printed credit or debit card receipts in the course of business is strongly advised to investigate whether it is fully conforming with FACTA. A company that finds itself out of compliance must work to become compliant as quickly as possible since plaintiffs do not have to establish actual injury in order to recover damages and the potential for costly litigation and damages is high.*

### Introduction

What information does your business print on credit and debit card receipts? Consumer class action lawyers want to know and are likely now in the process of finding out. With dozens of lawsuits currently pending, class actions against companies alleging violations of the Fair and Accurate Credit Transactions Act (FACTA) are one of the latest trends in class action lawsuits.<sup>1</sup> More than 200 such suits have been filed in the last year, and many more such filings are likely.

### FACTA Prohibits Printing More Than the Last Five Digits of a Credit or Debit Card

FACTA is part of a broader statutory scheme known as the Fair Credit Reporting Act (FCRA) and requires companies who accept credit or debit cards to provide receipts containing no more than the last five digits of the card number, while omitting the card's expiration date.<sup>2</sup> The law applies to receipts printed electronically, which includes most receipts generated by most businesses.<sup>3</sup> As of December 4, 2006, all businesses with machines (e.g., cash registers) that electronically print receipts were required to be in compliance with the law.<sup>4</sup> Any business thereafter failing to truncate the information on a customer's credit or debit card receipts is subject to liability under FACTA. Consumers, in turn, typically seek redress for such violations through consumer class action lawsuits, often filed in multiple jurisdictions.<sup>5</sup>

Suing for FACTA violations is attractive to plaintiffs (and their counsel), because penalties available under FACTA can be substantial. Any party that negligently

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violates FACTA is liable for actual damages. 15 U.S.C. § 1681o. "Willful" noncompliance by a party, however, results in liability irrespective of actual damages, with minimum penalties of \$100 per statutory violation (*i.e.*, per offending receipt) and maximum penalties of \$1,000 per transaction.<sup>6</sup> Unlike the Truth in Lending Act or the Fair Debt Collection Practices Act, however, both of which cap damages at \$500,000 or 1 percent of the offender's net worth, Congress has *not* limited damages under FACTA.<sup>7</sup> Moreover, prevailing plaintiffs under FACTA can recover reasonable attorney fees and costs, and in some cases, even punitive damages. *See* 15 U.S.C. § 1681n(a)(2)-(3).

### **Defendants Struggle to Obtain Dismissal of FACTA Suits**

With the passing of the December 4, 2006 deadline for compliance, plaintiffs' lawyers have been quick to bring suit against alleged FACTA offenders. Defendants have, in turn, sought to dismiss these lawsuits on a variety of grounds, including the following theories: (1) the statute is void for vagueness; (2) the plaintiffs failed to sufficiently plead "willfulness"; (3) the plaintiffs must demonstrate actual harm in order to recover; and/or (4) statutory damages are too excessive to be imposed. Thus far, however, courts have been unwilling to grant dismissal on these (or any other) grounds.<sup>9</sup> Indeed, with respect to the question of willfulness, at least one court has found that Section 1681c(g) — the section of FACTA requiring receipts to contain only the last five digits of a credit or debit card number while omitting the card's expiration date — "can reasonably be interpreted in only one way." *Arcilla*, 2007 WL 1498334, at \*5.<sup>10</sup> Consequently (at least according to this court), the mere allegation of a "knowing" violation is sufficient to plead willfulness. *Id.*

Nor have courts been willing to dismiss these lawsuits on grounds that the damages imposed could be "annihilating." *Pirian*, 2007 WL 1040864, at \* 5.<sup>11</sup> Rather, courts have found that "concerns regarding excessive damages are best addressed if the class is certified and damages are assessed." *Id.* As discussed below, however, defendants have had *some* success defeating class certification on grounds that damages could in fact be "ruinous" to the defendant. *See, e.g., Spikings v. Cost Plus, Inc.*, CV 06-8125-JFW (AJWx) (Mem. Op. and Order, C.D. Cal. May 25, 2007) (unpublished) (*Spikings*).

### **Defendants Have Some Success Defeating Class Certification in FACTA Suits**

In order to obtain class certification, a plaintiff must satisfy (among other things) the requirements of Federal Rule of Civil Procedure 23(b)(3), which requires plaintiff to show that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3) (Rule 23(b)(3)). This is known as the "superiority" requirement and means that in order to certify the class, a court must find that a class action is the "appropriate" way to adjudicate the dispute. *See id.; Spikings*, Mem. Op. and Order at p. 3.

In two recent cases, defendants were able to use the superiority requirement to defeat class certification in FACTA suits. In *Spikings*, the court refused to certify a class to adjudicate defendant's alleged FACTA violations on grounds that the proposed class failed to meet the superiority requirement. *See Spikings*, Mem. Op. and Order at p. 3. The court based this conclusion on several grounds. First, the court noted that the defendant's "liability would be enormous and completely out of proportion to any harm suffered by the plaintiff." *Id.* at pp. 3-4. In reaching

this conclusion, the court considered evidence that the plaintiff suffered no actual damage as a result of the expiration date appearing on her credit card receipt, as well as evidence that it appeared “unlikely, if not impossible” for the inclusion of the expiration date on a credit card or debit card receipt to result in identity theft or any other actual harm. *Id.* at p. 5.

Second, the court in *Spikings* observed that the defendant took “immediate” action to correct the offending receipts (which improperly contained the expiration dates), correcting the violations within one month of allegedly becoming aware of the problem. *Id.* Noting that “even the minimum statutory damages would be ruinous to Defendant,” the court found this fact also supported denial of class certification in light of defendant’s “immediate action to comply with FACTA’s requirements.” *Id.*

Finally, the court in *Spikings* noted that the “potential for abuse” by plaintiff’s counsel was still another reason why maintenance of a class action would not be appropriate under the circumstances. *Id.* at p. 6. The court concluded that the minimal harm suffered by the class as compared to the significant liability to be suffered by defendant created a circumstance where the class action statute could possibly be used “as a device for the solicitation of litigation.” *Id.* Thus, the court decided that the most appropriate way in which aggrieved plaintiffs could obtain relief would be on an individual basis, not as a class. *Id.* at p. 5. The reasoning in *Spikings* was subsequently adopted in *Soualian v. International Coffee and Tea LLC*. *Soualian v. International Coffee and Tea LLC*, No. CV 07-502-RGK (JCx) (Mem. Op. and Order, C.D. Cal. June 11, 2007) (unpublished).

It is important to note, however, that in the context of other types of FCRA violations, numerous courts have

rejected the idea that the possibility of “annihilating damages” should even be a factor in determining whether to certify a class under Rule 23(b)(3). *See, e.g., Murray v. GMAC Mortgage Corp.*, 483 F.Supp.2d 636, 645 (N.D. Ill. 2007) (“The substantial nature of a potential damages award, even one based on merely ‘technical’ violations of FCRA, is not a proper ground on which to deny class certification”); *White v. E-Loan, Inc.*, No. C 05-02080 SI, 2006 WL 2411420, at \*9 (N.D. Cal. Aug. 18, 2006) (same). Given the fact that a plaintiff must prove willfulness in order to recover statutory (as opposed to actual) damages under FACTA, however, it is nonetheless important for a defendant accused of FACTA violations to rectify such violations immediately, demonstrate where possible that no actual damage did or could have occurred, show how the potential damages are disproportionate to any possible harm suffered and generally build a record demonstrating the defendant’s good faith.

## Conclusion

FACTA is intended to address the problem of identity theft, privacy and inaccuracies of the consumer reporting system, thereby providing greater protection to consumers. It has, however, also become the latest consumer class action tool. Courts have repeatedly rejected defendants’ attempts to resolve these cases on motions to dismiss, leaving companies vulnerable to the specter of protracted litigation and large settlements. Moreover, although defendants have had some success defeating class certification under Rule 23(b)(3), the authority on this issue is clearly split. Companies facing these suits must litigate them wisely and aggressively in order to reduce the likelihood of facing enormous statutory penalties and fees.

**Endnotes**

- <sup>1</sup> Latham first addressed this issue in January 2007 in a *Client Alert* entitled "New Law Regarding Credit Card Receipts Results in Numerous Class Action Lawsuits." It can be found at [http://www.lw.com/upload/pubContent/\\_pdf/pub1767\\_1.pdf](http://www.lw.com/upload/pubContent/_pdf/pub1767_1.pdf). See, e.g., *Arcilla v. Adidas Promotional Retail Operations, Inc.*, 488 F.Supp.2d 965, 965, No. CV07-0211GAF(SHX), 2007 WL 1498334 (C.D. Cal. May 4, 2007) (noting that the FACTA case at bar was "one of as many as 70 filed in the Ninth Circuit").
- <sup>2</sup> 15 U.S.C. § 1681c(g)(1).
- <sup>3</sup> 15 U.S.C. § 1681c(g)(2).
- <sup>4</sup> 15 U.S.C. § 1681c(g)(3).
- <sup>5</sup> See, e.g., *Moon v. FedEx Kinko's Office and Print Servs., Inc.*, No. C 06-7657 SI, 2007 WL 1545827, at \*1 (N.D. Cal. May 25, 2007) (noting that two other putative nationwide class actions had been brought against FedEx Kinko's for the same FACTA violations).
- <sup>6</sup> Anyone who willfully violates the requirements with respect to any consumer is liable to that consumer for any actual damages that result from the violation or for statutory damages between \$100 and \$1,000. See 15 U.S.C. § 1681n(a)(1). This aspect of the statute could, of course, lead to substantial liability. For example, a retailer that printed prohibited information on the receipts of approximately 100,000 customers and whose FACTA violations were found to be "willful" would face between \$10,000,000 and \$100,000,000 in penalties, not including attorney fees. Courts may also factor into the damages calculus the risk of *potential* harm, e.g. the unrealized chance that a FACTA violation may lead to the theft of a consumer's identity. See *Pirian v. In-N-Out*, 2007 WL 1040864, at \*4.
- <sup>7</sup> Compare 15 U.S.C. § 1640(a)(2)(B) (Truth in Lending Act) (limiting total amount of recovery to "\$500,000 or 1 per centum of the net worth of the creditor") and 15 U.S.C. § 1692k(a)(2)(B) (Fair Debt Collection Practices Act) (same), with 15 U.S.C. § 1681n and 15 U.S.C. § 1681o (no such cap); see also *White v. E-Loan, Inc.*, 2006 WL 2411420, at \*8 (N.D. Cal. Aug. 18, 2006) (noting that "Congress has not acted to limit class action damages under the [FACTA]").
- <sup>8</sup> See n. 9, *infra*. For example, within a four-month period, nine of the ten California cases were filed by the same law firm.
- <sup>9</sup> A search of all federal courts failed to identify a single case in which a court disposed of a FACTA case on a motion to dismiss. See, e.g., *Eskandari v. IKEA U.S. Inc.*, No. SACV061248JVS(RNBX), 2007 WL 845948 (C.D. Cal. March 12, 2007) (denying defendant's motion to dismiss); *Clark v. Marshalls of MA, Inc.*, No. CV 06-8135 ABC (SHx), 2007 WL 1100412 (C.D. Cal. March 12, 2007) (same); *Aeschbacher v. California Pizza Kitchen, Inc.*, No. CV 07-215VBFJWX, 2007 WL 1500853 (C.D. Cal. April 3, 2007) (same); *Blanco v. El Pollo Loco, Inc.*, No. SACV 07-54 JVS RNBX, 2007 WL 1113997 (C.D. Cal. April 3, 2007) (same); *Pirian v. In-N-Out Burgers*, No. SACV061251DOCMLGX, 2007 WL 1040864 (C.D. Cal. April 5, 2007) (same); *Leowardy v. Oakley, Inc.*, No. SACV 07-53 CJCANX, 2007 WL 1113984 (C.D. Cal. April 10, 2007) (same); *Arcilla v. Adidas*, No. CV07-0211GAF(SHX), 2007 WL 1498334 (same); *Lopez v. The Gymboree Corporation*, No. C 07-0087 SI, 2007 WL 1690886 (N.D. Cal. June 9, 2007) (same).
- <sup>10</sup> "The question here is essentially whether Section 1681c(g) is sufficiently clear that its prohibitions would be understood by an ordinary person operating a profit-driven business. Section 1681c(g) easily meets this standard because its words have only one reasonable meaning . . . [The statute] clearly means that . . . a retailer must print no more than 5 digits of a card number, and also must omit the expiration date – doing either violates the statute." *Arcilla v. Adidas*, 2007 WL 1498334, at \*3.
- <sup>11</sup> See also *Aeschbacher*, 2007 WL 1500853, at \*3 (rejecting defendant's contention that the complaint be dismissed because the damages would be "disproportionately excessive"); *Blanco*, 2007 WL 1113997 at \*3 (rejecting defendant's arguments concerning the "enormous" statutory damages as "premature"); *Arcilla*, 488 F.Supp.2d 965, 2007 WL 1498334 \*6 (same).

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