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Guest Commentary

First FACTA class settlement approved

By R. Frank Springfield and Alan D. Leeth*

The first-ever reported class settlement for alleged violations of the Fair and Accurate Credit Transaction Act of 2003 relating to truncations on credit card receipts was approved by the U.S. District Court, Western District of Pennsylvania in *Klingensmith v. Max & Erma's Restaurants, Inc.*, CV 07-0318 (W.D. Pa. 10/23/07).

Congress enacted FACTA on Dec. 4, 2003, to amend portions of the Fair Credit Reporting Act to further protect consumers in the ever-growing realm of identity theft. One particular area that FACTA addresses is electronic receipt printouts from the use of credit/debit cards. Specifically, FACTA provides that "no person that accepts credit cards or debit 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 the sale or transaction." (15 USC § 1681c(g)(1).)

This portion of FACTA is limited to "receipts that are electronically printed, and does not apply to transactions in which the sole means of recording a credit card or debit card number is by handwriting or by an imprint or copy of the card." (15 USC § 1681c(g)(2).) Under FACTA, however, a person who "willfully" fails to comply with the statute may be liable to the consumer regardless of whether the consumer suffered actual damages. Therefore, a company that is found to have "willfully" violated this statute can be required to pay between $100 and $1,000 per violation, attorney's fees, costs, as well as punitive damages. (*See* 15 USC § 1681n(a)(1)-(3).)

'Willfulness' considered

The U.S. Supreme Court's recent opinion in *Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201 (U.S. 2007), a case which involved claims for failure to transmit adverse action notices reflecting negative credit reports, provides insight into what constitutes a "willful" violation under FCRA. Importantly, the Court noted that "willful" included both a knowing violation as well as a reckless violation of the statute. (*See Safeco* at 2208-10.) However, the Supreme Court stated that a "company does not act in reckless disregard of FCRA unless the action is not only a violation under a reasonable reading of the statute, 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." (*Id.* at 2204.)

Subsection 3 of FACTA also provided a grace period of three years for businesses to comply with the credit/debit card receipt requirements. Therefore, the statute did not become effective until three years after Dec. 4, 2003, "with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions that is in use before January 1, 2005;" and one year after Dec. 4, 2003, "with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions" that was first put into use on or after Jan. 1, 2005. (15 USC § 1681c(g)(3).)

'FACTA attack'

Since Dec. 4, 2006, the plaintiff's bar has launched a FACTA attack against retailers that issue credit/debit card receipts by filing countless class action complaints all across the country. These complaints generally allege that the issuer of credit/debit card receipts has willfully violated FACTA by issuing receipts to customers containing more than the last five digits of a customer's credit/debit card and/or the credit/debit card's expiration date, and seek statutory damages and attorney's fees.

For the most part, the efforts of the plaintiff's bar have proven unsuccessful, as courts have denied class certification based on plaintiffs' inability to satisfy the requirements of Fed. R. Civ. P. 23(b), which require in part that a class action be superior to other methods for resolving the controversy. One such case is *Soualian v. Int'l Coffee and Tea LLC*, CV 07-0502 (C.D. Cal. 06/11/07). *Soualian* is currently on appeal to the 9th U.S. Circuit Court of Appeals and has FACTA-watchers all across the country paying close attention to learn more about the fate of FACTA class actions. (*See Soualian*, No. 07-80100 (9th Cir. 09/13/07, *appeal docketed*.)

In the interim, however, the District Court's decision in *Klingensmith* has stolen the show and provided some hope for the plaintiff's bar when it approved a FACTA class settlement on Oct. 23, 2007. The action commenced on March 13, 2007, when Melanie A. Klingensmith filed a FACTA class action complaint against Max & Erma's Restaurants Inc., alleging that Max & Erma's willfully issued receipts containing the expiration dates of customers' credit/debit cards between December 2006 and March 2007. During this time period, Max & Erma's issued approximately 225,000 receipts that displayed credit/debit card expiration dates.

(See **FACTA** on page 20)

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FACTA (continued from page 19)

Settlement reached

The parties entered into a preliminary class settlement in July of 2007, which was later conditionally certified by the Court for settlement purposes. The proposed class was defined in the settlement agreement to include:

[A]ll persons who received electronically printed receipts from Max & Erma's at the point of sale or transaction, in a transaction occurring after Dec. 4, 2006, wherein the receipt displayed the expiration date of the person's credit or debit card number.

The proposed settlement agreement also required Max & Erma's to: 1) submit to a consent decree to remain in full compliance with the FACTA; 2) disseminate 225,000 vouchers consisting of two $4 discount-from-purchase certificates; 3) disseminate an additional 500 vouchers to a mutually agreed-upon charity; 4) pay class representative a $2,500 incentive award; and 5) pay $110,000 in counsel fees and costs.

At an October 2007 fairness hearing following the publication of the proposed settlement, the parties requested, and the court agreed, to amend the class definition to exclude victims of identity theft or credit/debit card fraud, and those who sustained actual damages.

'Superiority' challenged

In its final order approving the settlement, the District Court held that the requirements of Rule 23(a) were satisfied. In addressing the Rule 23(b) requirements, the court acknowledged other courts' reluctance to find class actions as a superior method to resolving FACTA cases where there is no evidence of actual harm and the minimum award could destroy a defendant's business.

The court brushed off this concern, providing that "concerns regarding the disproportionality and/or unconstitutionality of an award are more appropriately reserved until after class certification and trial/resolution," and concluded that the requirements of Rule 23(b) had been met.

The court also found the proposed settlement "fair, adequate, and reasonable as to the intended class members" after considering the nine factors enunciated in *Girsh v. Jepson*, 521 F.2d 153 (3rd Cir. 1975).

As demonstrated by this case, a technical violation such as failing to simply remove from the receipt the expiration date of the credit/debit card has the potential to lead to enormous liability and protracted litigation. ❑