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How to Minimize Your Risk of FACTA Liability in Credit or Debit Transactions

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More than 100 class action lawsuits alleging violations of the Fair and Accurate Credit Transactions Act ("FACTA") have recently been filed in a number of different jurisdictions. These class action lawsuits have been filed against businesses that accept credit and debit cards as a form of payment from consumers. In Illinois, the suits are typically based upon allegations that retailers, restaurants and other businesses have electronically printed a receipt that displayed the expiration date from the consumer's card in violation of FACTA. Frequently, the suits allege that it is possible for thieves to replicate a credit card number using the combination of the expiration date and the last four digits of the card number. The suits seek statutory damages of between \$100 and \$1,000 per violation, plus punitive damages, and attorneys' fees. Multiplying each alleged statutory violation by the countless receipts printed each day translates into potentially massive exposure.

The Terms of the Act

The purpose of this Act, which is an amendment to the Fair Credit Reporting Act (FCRA), was to prevent theft of identity by manipulation of certain data on a consumer's card. The key provision in FACTA is:

"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."

This provision 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 copy of the card. FACTA was signed into law on December 4, 2003; however, its effective date was delayed to no later than December 4, 2006, to allow merchants to prepare for compliance.

The type and amount of damages available for violations of FACTA vary depending on whether the violations were "negligent" or "willful." The suits have consistently alleged "willful" violations because customers need only prove a technical violation, without regard to actual harm, to be entitled to an award of statutory damages of between \$100 and \$1,000 per violation. Plaintiffs generally allege that defendants were informed about FACTA and its specific requirements, such that the violation is in knowing disregard of these requirements.



Key Issues under the Act

Since adjudication of these cases has only recently commenced, this law presents several unresolved questions. The first question of import is what constitutes “willfulness” under the Act. Unless plaintiffs can prove a willful violation of the Act, they cannot recover statutory damages and their ability to certify a class is doubtful. As a potential resolution of the issue of what state of mind belies willful conduct: the United States Supreme Court has granted certification of a case regarding this issue of willful conduct under a different provision of FCRA. The Supreme Court will be reviewing a decision of the Ninth Circuit Court of Appeals, which held that willfulness can be established by a showing of “reckless disregard” of the requirements of FCRA. The Seventh Circuit has adopted a more narrow interpretation, holding that the defendant had to have knowingly and intentionally violated the statute. It is anticipated that the Supreme Court will reach a ruling before the end of June.

The second question of interest is whether the statute requires both avoidance of printing the expiration date on the receipt **and** the truncating of the credit card number on the receipt. Thus far, there have been few decisions interpreting the scope or breadth of the Act. On April 5, 2007, a federal district court in California interpreted FACTA to require both the truncation of credit/debit card numbers and the elimination of expiration dates.

This April 2007 federal district court decision has huge implications because countless retailers, merchants, and other businesses continue to generate, electronically, scores of receipts of credit or debit card transactions that include the expiration date. Multiplying these potential infractions by the minimum statutory damages of \$100 per alleged violation translates into potential statutory exposure reaching millions of dollars for just one merchant.

Conclusion

The conservative and prudent course of conduct should be for each business to take immediate steps so that its electronically printed credit and debit card receipts contain no more than the last 5 digits of the card number and no expiration date. If a suit is filed, it is important to retain defense counsel experienced in defeating such class action claims.

About Our Class Action Practice

SmithAmundsen offers experienced counsel to defend against a wide array of class action litigation. We understand the importance of these types of claims to our clients and constantly seek the speediest cost-effective solution consistent with our client’s goals. We provide a litigation plan and case analysis tailored to meet client objectives.

If you have any questions regarding the requirements of the law, or if you are named as defendant in a lawsuit, please contact Eric Samore at 312-894-3251 or at esamore@salawus.com.