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FACTA Update: Amendment Renders Most Class Actions Under Statute Moot

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Section 1681c(g) of the Fair and Accurate Credit Transactions Act of 2003 (“FACTA”) prohibits businesses that accept credit or debit cards from including “more than the last five digits of the card number or the expiration date” on electronically printed receipts provided to the customer at the point of sale or transaction. Since FACTA took full effect, hundreds of nearly identical class action suits have been filed in federal courts nationwide against a broad range of retailers and restaurants. A recently enacted amendment to FACTA renders most of these class action cases moot.

In FACTA cases generally, plaintiffs claim that the failure to truncate the credit or debit card number or mask the expiration date on customer receipts was done knowingly and willfully. If proven, the alleged willful noncompliance entitles plaintiffs to awards of statutory damages of \$100 to \$1,000 for each alleged violation under the umbrella statute FACTA is contained within: the Fair Credit Reporting Act (“FCRA”) at 15 U.S.C. § 1681n. Because FCRA does not cap the aggregate of statutory damages that can be awarded in a consumer class action suit, the potential liability for businesses that violated FACTA can range from millions to billions of dollars. Plaintiffs additionally seek punitive damages and attorney’s fees, but do not allege negligence or seek actual damages.

On June 3, 2008, President Bush signed into law H.R. 4008, the Credit and Debit Card Receipt Clarification Act of 2007. H.R. 4008 amends FACTA by clarifying the definition of “willful noncompliance,” for the time period from December 4, 2004, until the enactment of H.R. 4008. Specifically, the amendment states that printing the credit and debit card expiration date on customer receipts in violation of FACTA does not constitute willful noncompliance with FCRA. As a result of this amendment, any person who complied with the card number truncation requirements of FACTA but printed an expiration date on customer receipts was not in willful noncompliance of FCRA and therefore not liable for statutory or punitive damages. The amendment therefore eliminates the statutory basis for maintaining so-called “pure expiration date” FACTA class actions that seek statutory damages for conduct between December 4, 2004 and June 3, 2008.

In passing H.R. 4008, Congress expressly found that FACTA's requirements were confusing to many merchants. Many thought that by truncating account numbers to the last five digits they would be in compliance with FACTA, based on "the language of the provision as well as the publicity in the aftermath of the passage of the law." Congress also expressly found that "[n]one of these lawsuits contained an allegation of harm to any consumer's identity."

While H.R. 4008 will affect many FACTA cases, it does not apply to customer receipts containing more than the last five digits of the card number or to actions that have become final, nor does it affect the enforceability of FACTA after June 3, 2008. Therefore, any person who, on or after June 4, 2008, provides to their customers receipts that do not comply with FACTA, either by improperly truncating the card number or by including the expiration date, or both—if found to have acted willfully—could face statutory and/or punitive damages for such conduct.

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