

One Minute Memo™



Consumers Initiate Class Actions Against Retailers Under the Fair and Accurate Credit Transaction Act

In a spate of recently filed class action lawsuits, consumers allege that retailers have violated the Fair and Accurate Credit Transactions Act (FACTA). The law, which added new sections to the Fair Credit Reporting Act, was intended to help consumers minimize the risk of identity theft.

FACTA sets a national standard requiring truncation of credit and debit card information. Pursuant to the statute, credit and debit card receipts may not include more than the last five digits of the card number. In addition, the card's expiration date may not be printed on the cardholder's receipt.

The Act applies to all businesses that generate electronic point of sale receipts. The Act does not apply, however, to receipts for which the sole means of recording a debit or credit card number is by handwriting or by an imprint or copy of the card.

The effective date of the Act varied depending on the equipment used to generate receipts. Specifically, businesses had until December 4, 2006 to modify or replace equipment that was in use before January 1,

2005. Equipment first put into use on or after January 1, 2005 immediately had to be compliant with the statutory truncation requirements.

Plaintiffs' lawyers began filing a flurry of class actions against retailers almost immediately after the December 4, 2006 grace period had expired. All of the lawsuits seek monetary relief and some also seek injunctive relief.

Businesses that "willfully" print receipts in violation of FACTA are subject to an award of actual damages or statutory damages of at least \$100 and no more than \$1,000 per violation. The Act also provides for recovery of court costs, reasonable attorneys' fees, and punitive damages.

One of the key issues will be whether a defendant's conduct in failing to comply with the statute is "willful." The issue presently is before the United States Supreme Court in *Safeco v. Burr/GEICO v. Edo* (consolidated) (on appeal from the Ninth Circuit). In that case the Supreme Court will address the appropriate standard for determining "willful noncompliance" under 15 U.S.C. §1681n. The Ninth Circuit has adopted a "reckless disregard" standard, while

all other circuits require a finding of actual knowledge of the statute, coupled with an intentional violation. The Supreme Court heard oral argument in January and is likely to rule before the end of its current term.

If you have questions or would like additional information, please contact the Seyfarth Shaw LLP attorney with whom you work or any member of the Commercial Class Action Defense Group listed on our website at www.seyfarth.com.

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