

Obscuring Credit Card Numbers on Receipts: The Stakes Just Got Higher

FACTA RECEIPT REQUIREMENTS

With the Supreme Court's recent decision in *Safeco v. Burr* (see KDW Summer 2007 Client Advisory), the wave of class actions filed initially in the Ninth and Third Circuits alleging that companies are violating the Fair Credit Reporting Act ("FCRA") by failing to obscure certain credit/debit account-specific information on customer receipts is fast becoming a nationwide tsunami. For companies that have been slow to comply with FACTA receipt requirements, the time to act to modify existing systems is now or risk incurring potentially staggeringly high statutory damages.

STATUTORY REQUIREMENTS UNDER FCRA AS AMENDED BY FACTA

In an effort to minimize the risk of identity theft, in 2003 Congress amended FCRA through Section 1681(c) (known as the Fair and Accurate Transactions Act or "FACTA"). Under § 1681c, the following statutory guidelines for masking payment card numbers and expiration dates apply effective December 2004 for receipt machines put in use after January 2005 and December 2006 for machines in use before January 2005:

(g) Truncation of credit card and debit card numbers

(1) In general

Except as otherwise provided in this subsection, 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.

(2) Limitation

This subsection shall apply only to receipts that are electronically printed, and shall not apply to transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by an imprint or copy of the card.

(3) Effective date

This subsection shall become effective—

(A) 3 years after December 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

(B) 1 year after December 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 first put into use on or after January 1, 2005.

RECENT CASES

In the wake of FACTA taking effect in December of 2006 for receipt devices in use prior to 2005, there was a flurry

of complaints filed in the Ninth and Third Circuits against businesses alleging that their receipts included more than just the five digits of the consumer's credit card number and/or the expiration date. The first cases were filed primarily in these circuits to take advantage of the circuits' perceived liberal interpretation of what constitutes a "willful" violation of FCRA. Under the FCRA, absent a willful violation, a consumer is entitled only to actual damages suffered. Willful violations carry statutory damages. The difference is substantial. Actual damages associated with failure to obliterate payment information are limited to actual monetary harm suffered as a result of the inappropriate disclosure and are typically difficult to prove, if they can be demonstrated at all. Statutory damages for willful violation of FCRA can be imposed regardless of the existence of actual damages and can range from \$100 to \$1000 per violation, plus punitive damages. Multiply that number by the number of receipts generated on any given day by a high-volume merchant and you begin to get some perspective on the risks associated with non-compliance.

Until the Supreme Court's decision in *Safeco*, the circuits were split over the standard necessary to establish willfulness, with the Ninth and Third Circuits applying a "reckless disregard" standard of the statutory requirements, and other circuits, such as the Seventh, requiring knowledge of the violation and an intent to violate the statute. In *Safeco*, the Supreme Court adopted the more relaxed Ninth and Third Circuit standard, triggering a nationwide spike in class actions alleging FACTA-violation and targeting all types of major retailers.

With statutory damages of \$100 to \$1000 per violation, and the number of credit card receipts printed every day by retailers and other businesses, the stakes are huge. To date, although the defendants generally have been unsuccessful in defeating these complaints at the motion to dismiss stage, they are experiencing success at the class certification stage. Courts have denied class certification in these cases on the ground that they fail to meet the "superiority" requirements of Federal Rule of Civil Procedure 23(b)(3). Courts have reasoned that certifying a class would violate due process by subjecting defendants to liability disproportionate to any harm suffered by the class members for mere technical violations of FACTA.

IMPLICATIONS

Given the relatively early stages of this litigation, the import of *Safeco* and these early decisions is difficult to gauge with any certainty. However, certain things are clear.

First, and most importantly, businesses should ensure that they are in compliance with FACTA. The cost of compliance pales by comparison to the potential exposure.

Second, if a business is sued under FACTA, it should immediately identify the compliance issues and correct them. Remember, this is a "reckless disregard" standard, and subsequent compliance efforts likely will support the argument that the violation was not "willful."

Third, although to date defendants generally have not experienced success at the motion to dismiss stage, their chances of prevailing at the class certification and summary judgment stages are likely good.

At the class certification stage, a defendant may successfully argue that the superiority argument may not be met. At the summary judgment stage, plaintiffs likely will experience difficulty establishing, pursuant to Safeco, that the printing of a credit or debit card number or expiration date constitutes “action entailing ‘an unjustifiably high risk of harm that is either known or so obvious that it should be known’ such that it meets the “reckless disregard” standard. This is particularly true given that in cases where detailed personal information, including Social Security numbers, has been lost or stolen, the instances of identity theft have been rare.

FOR MORE INFORMATION

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