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FACTA Litigation

Since December 2006, plaintiffs' class action firms in California and elsewhere have filed over 200 nationwide class actions in federal court against a broad spectrum of retailers and restaurants alleging violations of the Fair and Accurate Credit Transactions Act ("FACTA"). In addition to California federal courts, FACTA cases have been filed in federal courts across the country including in Pennsylvania, Illinois, New Jersey, Nevada, Maryland, Rhode Island, Minnesota and Kansas. FACTA added sections to the federal Fair Credit Reporting Act ("FCRA," at 15 U.S.C. § 1681 et seq.) as of December 4, 2003. The lawsuits specifically allege "willful noncompliance" (15 U.S.C. § 1681n) for claimed violations of 15 U.S.C. § 1681c(g), the so-called "truncation" provision of FACTA.

The timing of these suits coincides with the second and final phased-in effective date of FACTA's truncation provision; i.e., a December 4, 2006 effective date for receipts electronically printed by cash registers and similar point-of-sale machines placed into service before January 1, 2005. Most of these suits have been filed in the United States District Courts for the Central District of California (Los Angeles). Pillsbury Winthrop Shaw Pittman LLP currently represents several FACTA defendants as diverse as small, regional restaurant chains and large, publicly traded companies.

Section 1681c(g) of FACTA prohibits businesses that accept credit or debit cards from including "more than the last 5 digits of the card number or the expiration date" on electronically printed receipts provided to the customer at the point of sale or transaction. According to the complaints, each electronically printed receipt containing more than the last five digits of a credit or debit card number or a card's expiration date violates § 1681c(g). Plaintiffs repeat boilerplate conclusions that the conduct was knowing and willful, and seek statutory damages of $100 (minimum) to $1,000 (maximum) for each violation alleged, plus punitive damages and attorneys' fees. (Plaintiffs do not allege negligence (15 U.S.C. § 1681o), nor do they seek actual damages.)

Thus, a noncomplying retailer who generated, for example, one million electronically printed point-of-sale receipts during the most recent holiday season could, at least under plaintiffs' theory, be subject to an award of what courts have described as "annihilating" statutory damages ranging from $100 million to $1 billion, plus punitive damages and attorney's fees. Notably, FCRA does not cap the aggregate of statutory damages that can be awarded in a consumer class action. By contrast, similarly technical federal legislation such as the Truth-in-Lending Act (15 U.S.C. § 1601 et seq.) caps class action statutory damages awards at $500,000. In this regard, several recently-sued FACTA defendants have opposed plaintiffs' class certification motions on the

ground that FCRA's minimum statutory damage award of $100 each for hundreds of thousands of class members would be a grossly unjust punishment unrelated to any damage to the purported class or to any benefit to the defendant.

The Federal Trade Commission ("FTC") only recently issued an "FTC Business Alert" setting forth its interpretation of section 1681c(g). In a May 2007 bulletin, the FTC announced that "it's time for companies to check their receipts and make sure they're complying with a law that's been in effect for all businesses since December 1, 2006." The FTC alert explained, "You may include no more than the last five digits of the card number, and you must delete the card's expiration date." See *FTC Business Alert: Slip Showing? Federal Law Requires All Business to Truncate Credit Card Information on Receipts*; published by the Federal Trade Commission, Bureau of Consumer Protection, Division of Consumer & Business Education; May 2007.

Though courts thus far have not been receptive to motions to dismiss, the first judge to rule on class certification denied the plaintiff's motion to certify a class. Specifically, on May 29, 2007, the Hon. Judge John F. Walter denied the plaintiff's motion for class certification in a section 1681c(g) FACTA case on the ground that "a class action would not be the superior method for the fair and efficient adjudication of the controversy." See *Spikings v. Cost Plus, Inc.*, No. CV 06-8125-JFW (AJWx) (C.D. Cal. May 29, 2007) (order denying class certification). On June 11, 2007, the Hon. Judge R. Gary Klausner also denied class certification in *Taline Soualian v. International Coffee & Tea*, where Pillsbury represented International Coffee. Judge Klausner held that a class action was not superior "[G]iven the disproportionate consequences to Defendant's business and the lack of any actual harm suffered by members of the potential class …". Judge Klausner denied two similar class certification motions in cases against Avis and Charlotte Russe.

In addition to class certification, a key legal issue in these FACTA actions is whether a defendant's conduct constitutes willful noncompliance. Conduct that rises only to the level of negligence does not entitle a FCRA plaintiff to statutory or punitive damages. On June 4, 2007, the United States Supreme Court decided *Safeco v. Burr/GEICO v. Edo* (consolidated)(on appeal from the Ninth Circuit) on the meaning of "willful non-compliance" under FCRA. The Supreme Court held that the term "willfully" covers both knowing and reckless disregard of the law. Thus, "willful non-compliance" under 15 U.S.C. § 1681n can be established by a showing of "reckless disregard" for FCRA. The Court held further that "a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms 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." The Court analyzed recklessness under FCRA with reference to tort cases requiring an unjustifiably high or obvious risk of harm. Applying that law to the facts at hand, the Court held that Safeco's reading of the statute "albeit erroneous, was not objectively unreasonable" and noted that Safeco did not have the benefit of any court decisions or agency guidance.

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The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice.

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