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Valuable Lessons for Resolving Other Large Consumer Class Actions

Over the past several years, hundreds of businesses have faced millions, and in some cases billions, of dollars in potential liability in consumer class actions premised on the information printed on their credit and debit card receipts. The claims in these cases were brought under the amendments to the federal Fair Credit Reporting Act (FCRA) that are collectively known as the Federal Fair and Accurate Credit Transactions Act of 2003 (FACTA). The massive scope of the potential damages in these cases prompted one court to comment that "FACTA is, on its face and in application to these defendants, a bomb that has already exploded or is sure so [sic] to explode that it needs defusing." *Grimes v. Rave Motion Pictures Birmingham, LLC,* 552 F.Supp.2d 1302, 1309 (N.D. Ala. 2008).

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This article examines several of the most notable decisions in the FACTA litigation, subsequent congressional action and how it affected the litigation, some of the innovative settlements that provided relief to the putative class members without bankrupting the retailers, and a few of the challenges in securing court approval of those settlements. The settlements discussed offer valuable lessons for resolving other significant consumer class actions.

The Statute

Under FACTA, businesses can be held liable for statutory damages for each credit or debit card receipt provided to a customer that does not properly truncate the card's number or expiration date. The relevant provision of FACTA, 15 U.S.C. §1681c(g), states that anyone who accepts credit and debit cards may not print "more than the last five digits of the card number or the expiration date" on electronically printed receipts provided to consumers at the point of sale.

Since the credit and debit card provisions of FACTA took full effect in December 2006, hundreds of businesses have been sued in putative class action lawsuits across the country, alleging that the defendants failed to truncate the information contained in receipts provided to customers properly. *See Revisions Trigger Wave of Litigation*, In-House Defense Quarterly, Spring 2008.

Violations of FACTA's truncation requirements are subject to the "two-tier" damages structure of the FCRA. The FCRA provides for statutory damages of between $100 and $1,000 per violation for "willful" violations, in addition to possible punitive damages and attorneys' fees. 15 U.S.C. §1861n. A plaintiff who shows a negligent violation of the Act, but cannot establish a willful violation, by contrast, may only recover actual damages and attorneys' fees. 15 U.S.C. §1861o.

These statutory damages apply equally to every credit or debit card transaction, whether the purchase was a 50¢ newspaper or a $2,000 flat-screen television. Given the prevalence of credit and debit card use at most businesses, the potential damages in a FACTA class action can be staggering. For example, in one case in the United States District Court for the Central District of California, the retailer defendant printed approximately 3.4 million allegedly noncompliant receipts. As a result, the defendant faced possible statutory damages of between $340 million and $3.4 billion. *Spikings v. Cost Plus, Inc.*, No. 06-8125, 2007 U.S. Dist. LEXIS 44214, at *12 (C.D. Cal. May 29, 2007).

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Defense Strategies

Businesses that were named in FACTA lawsuits pursued several different strategies, which included lobbying Congress for relief, litigating class certification, and arguing that FACTA itself is unconstitutional, with varying degrees of success.

After the initial wave of FACTA lawsuits (most of which were premised only on the defendant having printed the expiration date on its receipts, as opposed to printing the full card number), retailers lobbied Congress for legislative relief. In June 2008, that effort succeeded in part when Congress passed, and President Bush signed, the Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, 122 Stat. 1565 (enacted June 3, 2008) ("The Clarification Act"). The law amended §1681n of the FCRA to provide partial relief from statutory damages by declaring that receipts that merely printed the expiration date of a consumer's credit or debit card on a receipt prior to June 3, 2008 did not evidence a willful violation of the statute. Receipts printed with expiration dates after the June 2008 amendment and all receipts containing more than the last five digits of the card number, however, remained subject to statutory damages, even after the amendment.

Initially, the most effective litigation strategy for businesses in FACTA cases was to argue against the certification of the proposed classes. Judge Florence-Marie Cooper's decision in *Bateman v. American Multi-Cinema, Inc.*, 252 F.R.D. 647 (C.D. Cal. 2008) was representative of more than a dozen decisions in California alone that denied motions for class certification. Judge Cooper based her decision in *Bateman* on her view that the enormous magnitude of the statutory liability under FACTA ($29 million to $290 million in *Bateman*) was completely out of proportion to any harm suffered by the plaintiff or potential class members. *Id.* at 651. As such, Judge Cooper held that the motion for class certification in *Bateman* failed to satisfy the superiority requirement of Rule 23(b)(3).

On appeal, however, the Ninth Circuit rejected Judge Cooper's reasoning, holding that courts are not permitted to consider either the enormity of the potential liability or the proportionality of the potential liability to the harm alleged in their Rule 23(b)(3) analyses in FACTA cases. *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708, 721 (9th Cir. 2010). According to the court of appeals, the plain text of the statute and congressional silence on the issue of class relief, both "strongly suggest that the proportionality of the damages is an irrelevant consideration in effectuating FACTA's compensatory and deterrence purposes." *Id.* The Ninth Circuit also concluded that there was nothing to suggest that Congress intended to place a cap on potentially enormous statutory awards or otherwise to limit the ability of individuals to seek compensation under FACTA, particularly given its failure to address the issue in the Clarification Act. *Id.* As a result, the Ninth Circuit reversed the district court's denial of class certification. *See id.* at 711.

The Ninth Circuit's decision in *Bateman* changed the legal landscape for district courts in California that had previously rejected class certification motions. For example, the district court overseeing a FACTA class action against Toys "R" Us found that class certification was appropriate in light of *Bateman*, after originally denying certification in 2010 for failure to satisfy the superiority prong of Rule 23(b)(3). *See Toys "R" Us*, No. MDL 08-1980 (C.D. Cal. Jan. 11, 2013). In its initial decision, the *Toys "R" Us* court had emphasized that

the class was seeking statutory damages of $2.9 billion to $29 billion, even though the net worth of the defendant and its parent company at the time was only $117 million. *See In re Toys "R" Us—Delaware, Inc.—Fair and Accurate Credit Transactions Act (FACTA) Litigation*, No. MDL 08-01980, 2010 WL 5071073, at *13 (C.D. Cal. Aug. 17, 2010). Approximately a month after the court reversed course and granted certification, the parties notified the court of a tentative settlement. *See Toys "R" Us*, No. MDL 08-1980 (C.D. Cal. Jan. 11, 2013). (The final approval and fairness hearing in the case was held on November 4, 2013. As of the date of publication, the motion for final approval of the settlement still was under submission with the court.)

Another litigation strategy pursued by some businesses was to attack the constitutionality of FACTA itself. For example, in *Grimes v. Rave Motion Pictures*, the defendants argued, and the court agreed, that FACTA's imposition of what was essentially strict liability for failing to truncate card numbers on receipts violated the defendants' due process rights, given the alleged vagueness of the damages provision and the possibility of punitive damages without any actual harm. 552 F.Supp.2d at 1307-09. The Eleventh Circuit, however, disagreed and reversed the decision, holding that FACTA is neither unconstitutionally vague nor excessive on its face. *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1307-08 (11th Cir. 2009).

Challenges to Settling

Faced with a mixed record in litigation, less than complete relief from Congress, and potentially crushing liability, many FACTA defendants are naturally interested in exploring settlement. Even so, there are several logistical challenges that must be overcome to settle FACTA class actions successfully.

As with any other matter in federal court, class-wide settlements in FACTA lawsuits require court approval under Rule 23 of the Federal Rules of Civil Procedure. Before that approval will be given, however, the court must make written findings that the settlement is "fair, reasonable, and adequate" to class members. Fed. R. Civ. P. 23(e)(1)(C). Over the past several years, courts have not hesitated to overturn class settlements found not to be fair, reasonable, and adequate. *Dennis v. Kellogg Co.*, 697 F.3d 858, 861 (9th Cir. 2012) (reversing the district court's approval of a settlement given that class members would receive at most $15 and the recipients of $5.5 million *cy pres* award were not identified); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1040 (9th Cir. 2011) (finding that the proposed *cy pres* award failed to address the objectives of the underlying statute, target the plaintiff class, or provide reasonable certainty that any class member would benefit); *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 189 (3d Cir. 2012) (overturning the district court's approval of a class settlement where priority was given to a subclass that included all of the class representatives over consumers in another subclass).

> Another way in which the FACTA class settlements have evolved is that most recent settlements now establish a minimum amount of relief that must be distributed, regardless of the number of claims that are submitted by class members.

One challenge to settling FACTA class actions is how to go about identifying and contacting putative class members. As part of the class settlement approval process under Rule 23, the court must "direct to class members the best notice practicable under the circumstances…" Fed. R. Civ. P. 23(c)(2)(B). Even where class settlements are approved by the courts, defendants remain at risk to subsequent claims that the notice was inadequate. *See, e.g., Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218 (2d Cir. 2012) (refusing to bind the plaintiff to the terms of a court-approved class settlement where the only notice of the settlement was publication in a single issue of a national newspaper).

Providing notice in FACTA cases is complicated by the fact that retailer-defendants typically have no way of identifying and locating their customers who pay with credit or debit cards that are not affiliated with the retailers (such as cards that rely on the networks operated by companies such as Visa and MasterCard). Often the receipts do not even contain the cardholders' names. Thus, the only way that some retailers can obtain all of the putative class members' names and addresses is to: 1) identify all of the banks that issued the class members' cards; and 2) request the names and contact information for all of the class members from those banks. Financial institutions, however, are understandably reluctant to release such information voluntarily without a court order.

Even if it were possible to obtain all of the class members' names and addresses, depending on the size of the class, the cost of direct mail notice in FACTA cases can be prohibitive. For example, in the *Spikings* case identified above, where approximately 3.4 million allegedly noncompliant receipts were at issue, postage costs alone would exceed $1 million if a separate notice were mailed for every receipt. *See* 2007 U.S. Dist. LEXIS 44214, at *12.

Successful Settlements: Characteristics of Approved Class Relief

Despite the challenges, dozens of FACTA class settlements have been approved in the federal courts since the statute took effect in December 2006. Many of the FACTA settlements to date have been in the federal courts in Pennsylvania.

While a few of those settlements have provided for cash payments to settlement class members, *e.g., Klingensmith v. BP Prods. N. Am., Inc.*, No. 07-1065 (W.D. Pa. Jan. 6, 2009) (approving class settlement that provided for class members who submitted a receipt to receive $25 for each receipt in violation of FACTA, with a maximum payment of $100 per class member and $5.00 for class members who did not

submit a receipt), these settlements more typically call for class members to receive vouchers that can be redeemed for goods or services offered by the defendant.

As a result of concerns regarding so-called "coupon settlements" that force class members to spend money and do business with the defendant in order to realize the benefit of the settlement, courts have expressed a preference for relief that can be redeemed for the full price of a given product or service, as opposed to a discount on a future purchase from the defendant. *See, e.g., Hanlon v. Palace Entm't Holdings, LLC*, No. 11-987, 2012 WL 27461, at *5 (W.D. Pa. Jan. 3, 2012) (noting that unlike "coupon settlements," the free admission ticket that was being offered to class members was "for the full price of admission, not merely 'redeemable toward the purchase' of an expensive product.") (internal citation omitted).

The retail value of the class relief that has been offered in FACTA class settlements has ranged from $5 to $50. *Compare Hanlon v. Aramark Sports, LLC*, No. 09-00465 (W.D. Pa. Apr. 3, 2010) (approving class settlement that provided for class members to receive a voucher good for either a product with a suggested retail value of up to $55 or $50 toward the purchase of any item at the defendant's stores with a price of more than $100), *with Long v. Joseph-Beth Group, Inc*., No. 07-cv-00443 (W.D. Pa. May 5, 2007) (approving class settlement that provided for class members to receive a voucher good for $5 toward any purchase at the defendant's stores).

The trend in these cases has been toward a higher-value of relief to individual class members, particularly after the June 2008 amendments to the statute. Whereas many of the early FACTA settlements offered relief with a retail value of between $5 and $15, more recent settlements commonly provide for class members to receive a voucher or a product valued at more than $20. *See, e.g., Palace Entm't*, No. 11-987 (W.D. Pa. Apr. 3, 2012) (approved FACTA class settlement provided for class members to receive a free admission ticket with an average retail price of $27.58); *Smith-Harrison v. Global Fitness Holdings, LLC*, No. 10-1105 (W.D. Pa. Sept. 15, 2011) (approving FACTA class settlement that provided for class members to receive a voucher with an approximate retail value of $20); *Aramark Sports, LLC*, No. 09-00465 (W.D. Pa. May 19, 2010) (approving FACTA class settlement that provided for class members to receive, among other things, a voucher good for one product with a suggested retail value of up to $55). One explanation for the increase in the value of the relief offered in FACTA settlements is that plaintiffs (and their attorneys) have become increasingly aggressive, believing that the amount of time that has elapsed since FACTA and its amendments first went into effect will make it easier to show willfulness and recover statutory damages.

Another way in which the FACTA class settlements have evolved is that most recent settlements now establish a minimum amount of relief that must be distributed, regardless of the number of claims that are submitted by class members. Under many of the early FACTA class settlements, relief that was earmarked for the settlement would revert back to the defendant if it went unclaimed by class members. *See, e.g., Curiale v. Hershey Entm't & Resorts Co*., No. 07-cv-00651, (M.D. Pa. May 21, 2008) (approving settlement that provided for participating settlement class members to receive a voucher good for select items from the defendant's restaurants with a total retail value of $8.33 or an $8.00 discount on admission to the defendant's theme park with no guarantee as to the number of vouchers to be distributed); *Long*, No. 07-cv-00443 (W.D. Pa. May 5, 2007) (distributing vouchers on a claims-made basis).

The majority of the more recent settlements, by contrast, have included a "floor" guaranteeing that a certain amount of relief will be distributed, regardless of the number of claims submitted by class members, to offset the concern that a low response among class members will reduce the total value of the settlement. *See Klingensmith v. Max & Erma's Rests., Inc*., No. 07-0318, 2007 U.S. Dist. LEXIS 81029, at *18 (W.D. Pa. Oct. 23, 2007) ("The parties' agreement that any unclaimed vouchers will be distributed to restaurant customers offsets, to some degree, a decreased class value attributable to non-distribution"). Under these more recent settlements, any unclaimed relief must be distributed to charities or customers of the defendant until the "floor" has been reached. *See, e.g., Palace Entm't*, No. 11-987 (W.D. Pa. April 3, 2012) (providing that, in the event that less than 60,000 settlement class members submitted claims, the defendants would provide settlement relief to customers and children's charities until a total of 60,000 admission tickets had been distributed); *Global Fitness Holdings*, No. 10-1105 (providing that, in the event that less than 5,500 settlement class members submitted claims, the defendants would provide settlement relief vouchers to customers or potential customers until a total of 5,500 vouchers had been distributed). The amount of guaranteed relief under these settlements typically depends on the number of noncompliant receipts estimated to have been presented to customers.

Successful Settlements: Approved Forms of Notice

Faced with the near impossibility of identifying and then contacting putative class members, courts have frequently permitted settling parties to use alternatives to direct mail notice of proposed FACTA class settlements. While publication in one or more newspapers is almost always an element of such alternative notice, most courts have required more than publication notice by newspaper alone before they will approve proposed FACTA class action settlements. In *Palamara v. Kings Family Restaurants*, for example, the court found that notice by newspaper alone "may not be the best notice practicable under the circumstances" and that "posting the notice in each [of the defendant's] restaurant[s] would ensure more class members were made aware of the settlement." No. 07-cv-00317, slip op. at 14 (W.D. Pa. Nov. 13, 2007).

In most of the FACTA class settlements that have been approved to date, notice has typically been accomplished through some combination of publication of notice in a newspaper of general circulation in the region(s) where class members are believed to reside, on a website maintained by the defendant, and a posting in the defendant's stores. *See, e.g., Hoxha v. Primanti Bros.*

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Rest. Corp., No. 10-cv-00355 (W.D. Pa. Mar. 9, 2011) (approving FACTA class settlement where notice was given on consecutive Sundays in two Pittsburgh newspapers and at the entrances of one of the defendant's restaurants for a period of 120 days); *Joseph-Beth Group, Inc.*, No. 07-cv-443 (approving notice in the leading newspapers in seven cities and in seven of the defendant's stores for a period of 30 days); *Palamara v. Kings Family Rests.*, No. 07-cv-317 (W.D. Pa. Apr. 22, 2008) (approving notice given on consecutive Sundays in three newspapers in Pennsylvania and Ohio, on the defendant's website, and in the defendant's restaurants for a period of 75 days).

In nationwide class actions, where class members are believed to reside throughout the country, courts have often permitted the publication portion of the class notice to be given in one newspaper with a nationwide circulation, such as *USA Today*, rather than requiring that notice be published in a separate regional newspaper for each region in which class members are believed to reside. *See, e.g., Palace Entm't,* No. 11-cv-00987 (notice by publication in the *USA Today National Edition* approved and final approval given, where non-compliant receipts were presented to customers in California, Connecticut, Florida, Hawaii, New Hampshire, New Jersey, New York, North Carolina, and Pennsylvania); *Carusone v. Joe's Crab Shack Holdings, Inc.,* No. 07-cv-320 (W.D. Pa. May 28, 2008) (notice by publication in the *USA Today Weekend Edition* approved and final approval given, where the settlement class included all customers who used a credit or debit card at the defendant's national restaurant chain during a given time period).

Where defendants have other available means of identifying potential class members, such as customer email lists, courts have encouraged the use of these mediums to give class members notice. *See, e.g., Palace Entm't*, 2012 WL 27461, at *6 (recognizing that "the use of [the defendant's] email promotional database [to give class notice] provides a direct avenue to the persons most likely to be potential class members."); *Global Fitness Holdings, LLC*, No. 10-cv-1105 (FACTA class settlement given preliminary and final approval, where notice was given in certain regional editions of *USA Today* and by email to all customers and former customers for whom the defendant possessed an email address); *Hershey Entm't*, No. 07-cv-00651 (FACTA class settlement given preliminary and final approval, where notice was given in two regional newspapers and in the defendant's e-newsletter). Another option that defendants in FACTA class settlements may want to consider is notice through social media, such as Facebook or Twitter.

Lessons

The litigation that followed the enactment of FACTA demonstrates the importance to business leaders of keeping abreast of new statutory and regulatory requirements that could threaten their businesses. The creative and alternative approaches that were used to settle many of the FACTA class actions, in the face of the potentially staggering statutory damages possible in these cases, offer a fresh perspective to settling other consumer class actions.