periods. This prolongation in turn negatively affects the ability of the parties to settle, because it delays the date on which the door is finally shut to new claims. As this article explains, *American Pipe* was never intended to allow this practice, and courts should not permit its use in this manner.

I. The Discovery Rule

The first question in the statute of limitations analysis is when the clock starts ticking. A cause of action accrues when a plaintiff incurs an injury, but the date of injury does not necessarily constitute *accrual* for statute of limitations purposes. For personal injury cases, most states have adopted a discovery rule. Under a typical discovery rule, a claim accrues and the limitations period begins ticking once a plaintiff is aware, or should reasonably be aware, that he has been injured, and that the injury was caused by the tortious act of another.[2] As the Tennessee Supreme Court explained in *Foster v. Harris*, the discovery rule has been deemed necessary because "no judicial remedy [i]s available to [a] plaintiff until he discovered, or reasonably should have discovered, (1) the occasion, the manner and means by which a breach of duty occurred that produced his injury; and (2) the identity of the defendant who breached the duty."[3]

The discovery rule is consistent with the basic purposes of statutes of limitations. As the Supreme Court has explained, "[s]uch statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.... [E]ven if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation.'"[4] Enforcement of limitations periods serves institutional purposes as well. "[T]he courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights."[5] These purposes are not frustrated by the discovery rule because a plaintiff cannot fairly be accused of "sleeping on his rights" when he does not even know that he has been injured, or when it is truly impossible to determine that an injury was caused by another's negligence.

It is not uncommon for a news event to supply the critical information that gives rise to a mass tort. These news events are often cited by courts as putting

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FACTA Truncation: Applicable to the Digital World?

by Shawn J. Organ

Since December 2006, much has been written about the truncation provisions in the Fair and Accurate Credit Transactions Act (FACTA), including an article in the September 2007 issue of *Class Action Watch*, and others I have penned.[1] The writings all generally identify the truncation requirement—that is, that "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] But an interesting and foreseeable battleground has emerged as a subset of these FACTA cases: does FACTA apply to internet transactions? These cases present a host of new and interesting issues, and federal courts decisions are just starting to emerge.

The General Truncation Requirement

By way of background, FACTA was enacted as part the Fair Credit Reporting Act on December 4, 2003. There are several aspects to FACTA, but the primary focus for our purposes will be on the truncation requirement, 15 U.S.C. § 1681c(g)(1), because it is that provision that has spawned over 300 class action lawsuits, filed throughout the country. The truncation requirement, set forth above, was phased in over time to allow large and small businesses to conform to the requirements and update the cash registers and/or Payment Card Industry ("PCI") terminals in service. It became fully phased-in as of December 4, 2006. Once fully phased-in, the class action lawsuits quickly followed.

Virtually every lawsuit leveled the same allegations: that the retailer at the checkout provided the plaintiff with a receipt with an expiration date in violation of FACTA.[3] These cases were not brought as a single plaintiff case. Rather, the lawsuits were filed seeking class certification on a state, regional, or national basis. And these class claims were not filed pursuant to § 1681o, claiming the defendant acted negligently, because under a negligence claim the plaintiff must prove actual damages, which is tough to prove and rarely amounts to much. Rather, the class allegations are always coupled with a § 1681n claim that the defendant's conduct was a "willful violation" of FACTA, thereby allowing the plaintiff class to seek statutory damages of $100 to $1,000 for each alleged violation. Although the plaintiff and any purported class experienced no actual damages, the potential damages

claim under an alleged "willful violation" quickly become staggering.[4]

To properly allege a violation, the statute requires that:

1. There must be a "person;"

2. That person must accept credit or debit cards for the transaction of business;

3. That person must "[electronically] print" more than the last 5 digits of the card number or the expiration date;

4. The last 5 digits of the card number or the expiration date must be electronically printed on the "receipt";

5. That electronically printed receipt must be printed off of a "cash register or other machine or device that electronically prints receipts for credit or debit card transactions"; and

6. That "printed" "receipt" must be provided to the cardholder at "the point of sale or transaction."[5]

With the potential for very large statutory damages, plaintiffs' lawyers quickly took note, and shortly after December 4, 2006, hundreds of class actions lawsuits were filed against traditional retailers and restaurants. Thereafter, plaintiffs leveled their sights on internet retail transactions. But with those suits came unique issues.

Internet Transactions

In a traditional brick and mortar retail store or restaurant, the credit or debit transaction is done face-to-face at the checkout counter or table. The receipt is printed by the cash register or credit/debit card PCI terminal and is typically handed to the customer. The customer signs the receipt, returns the "merchant" copy, and keeps the "customer" copy. All too often, however, the customer wads up his copy and tosses it in the nearest trash receptacle. There was concern that those customers, by throwing away their printed receipts, were opening themselves up to identity theft. The commonly articulated fear was that an unscrupulous "dumpster diver" might retrieve the receipt and use the customer's credit card number to make unauthorized purchases.[6]

Compare and contrast the typical brick and mortar transaction with an online retail transaction. With an online transaction, the customer could be anywhere in the world (as long as the retailer ships to that location), likely sitting at a computer, at home or at work. The

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Silberblatt v. Morgan Stanley: Class Action Court Protects Unnamed Class Members

by Jack Park

When a federal district court is called on to approve the settlement of a class action, it rarely, if ever, receives much input from any party that does not have a significant interest in the outcome. The class representative and class counsel want the deal approved so that they can receive its benefits, and, assuming he has not agreed to remain silent, the defendant, too, wants the deal to go forward to bind as many potential claimants as possible. The court, likewise, has a strong institutional interest in disposing of such a case. Only a limited number of unnamed class members are likely to object, and only some of those objections, however strongly felt and expressed, are likely to be helpful to the court when it determines whether the settlement is fair, reasonable, and adequate.

In *Silberblatt v. Morgan Stanley, et al.*, the court was confronted by all of these obstacles, and overcame them, slashing a requested fee award and freeing up a greater amount of the cash consideration for the class members to share.[1] The court did all this without any apparent hiccup from the defendants and without any objection by an unnamed class member. It did so independently, taking seriously its duty "to make a considered and detailed assessment of the reasonableness of the proposed settlement."[2]

The plaintiff class representative in *Silberblatt* alleged that the Morgan Stanley defendants misled him about their handling of precious metal bars or units which the plaintiff had purchased and left in their custody. The plaintiff claimed that the plaintiff class was "misled into believing that specific bars or units of precious metals were allocated to them and, therefore, not subject to claims of creditors of defendants."[3] In addition, the plaintiff alleged that the defendants charged excessive storage fees. These contentions, which the defendants denied, were packaged in a complaint that sought money damages on claims of breach of contract, breach of fiduciary duty, unjust enrichment, negligent misrepresentation, and violations of state law; but the plaintiffs did not seek declaratory or injunctive relief.

20 *Id.* at 561 (Blackmun, J., concurring).

21 *Id.* at 562.

22 *See* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 355 (1983) (Powell, J., concurring) ("[W]hen a plaintiff invokes *American Pipe* in support of a separate lawsuit, the district court should take care to ensure that the suit raises claims that 'concern the same evidence, memories, and witness as the subject matter of the original class suit,' so that 'the defendant will not be prejudiced.'" (quoting *American Pipe*, 414 U.S. at 562 (Blackmun, J., concurring))).

23 *See* Mitchell A. Lowenthal & Norman Menachem Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 Geo. Wash. L. Rev. 532, 573 (1996) ("The message, at least to cynics, is that by filing a class action on behalf of the client you found today you may be able to represent the client you only find tomorrow.").

24 414 U.S. at 553-54,

25 *Id.* at 553.

26 *Id.* at 562 (Blackmun, J., concurring).

27 *See, e.g.*, Jolly v. Eli Lilly & Co., 751 P.2d 923, 937-38 (Cal. 1988) (admonishing that personal injury plaintiffs "would be ill advised to rely on the mere filing of a class action complaint to toll their individual statute of limitations. *The presumption, rather, should be to the contrary*...." (emphasis added)); *see also* Philip Morris USA, Inc. v. Christensen, 905 A.2d 340, 358-60 (Md. 2006) (expressing support for *Jolly*'s presumption against tolling in the mass tort context); *In re* Rezulin Prods. Liab. Litig., MDL No. 1348, 2005 WL 26867, at *3 (S.D.N.Y. Jan. 5, 2005) (noting that the "wisdom of adopting the *American Pipe* rule in mass tort cases is, to say the least, highly debatable"); Barela v. Showa Denko K.K., No. 93-1469 LH/RLP, 1996 U.S. Dist. LEXIS 7830, at *16 (D.N.M. Feb. 28, 1996) (expressing doubt whether a federal court should adopt *American Pipe* tolling for a state that had not adopted the doctrine in a mass-tort personal injury case in light of the fact that "most federal courts... refuse to permit the use of the class-action device in mass-tort cases" (citation and internal quotation marks omitted)).

28 *See* Staub v. Eastman Kodak Co., 726 A.2d 955, 967 (N.J. Supr. Ct. App. Div. 1989).

29 *See, e.g.*, Portwood v. Ford Motor Co., 701 N.E.2d 1102, 1103, 1105 (Ill. 1998).

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customer selects the item(s) for purchase and begins the checkout process. The process varies to some extent between retailers, but generally speaking the first step will be to provide identification and contact information such as your name, address, the shipping address (if different than the billing address), an email address for confirming emails, and a retyping of your email address to confirm it and other non-financial information. Often, that non-financial identification information is confirmed with the next screen, identifying either that the information has been input correctly or—as many online shoppers are all too familiar—that the highlighted boxes where the customer has failed to provide the information or input it incorrectly.

Once the name, address, and contact information are conveyed the customer is asked to provide financial information to begin the process of making the purchase. That information includes the type of credit or debit card you are using (VISA, MasterCard, Discover), your credit card number, your expiration date, and your CVV code number (often referring you to the three digits on the back of your card or four digits on the front.)[7] Typically, after inputting the financial information, that information, along with your order, are confirmed on the next screen. Once the order is placed, you may receive any combination of (1) an order confirmation email, (2) an order shipped email, and/or (3) a receipt email. Sometimes, rather than a receipt sent by email, the receipt is shipped with the product.

Comparatively, the online transaction is more complex and contains multiple steps, unlike the simple and routine credit or debit transaction at a brick and mortar retailer. Consequently, the online transaction does not lend itself cleanly and easily to a FACTA analysis—but that has not deterred plaintiffs from seeking its application and courts from wrestling with FACTA's scope.

The Courts Begin to Weigh-In

Three cases in particular have begun to shape the landscape for internet transaction FACTA cases—*Stubhub,*[8] *MovieTickets.com,*[9] and *Bose.*[10]

Stubhub. The *Stubhub* case, decided July 2, 2007, was the first to comment on one of the key issues unique to FACTA internet cases: can the requirement that the

defendant "electronically print" the receipt be satisfied by an electronic email receipt sent to the plaintiff?

Stubhub is an online ticket broker for concerts and sporting events and, according to its website, "[t]he largest ticket marketplace in the world, based on sales."[11] According to the plaintiff, Stubhub violated FACTA by "provid[ing] Plaintiff with one or more electronically printed receipts on each of which Defendants printed... the expiration [date] of Plaintiff's credit or debit card."[12] These alleged "electronically printed receipts" were emails sent to the plaintiff. Stubhub moved to dismiss the plaintiff's complaint, arguing that it "does not and indeed cannot state a claim for relief under [15 U.S.C. §] 1681c(g) because [Defendant] did not 'print' the [receipt] within any reasonable interpretation of the word."[13]

The court correctly noted that the term "print" is not defined in the statute.[14] The court further stated that "the statute should be construed to give the term its ordinary meaning,"[15] and that "[d]ictionary definitions are commonly consulted to 'clarify'... ordinary meanings."[16]

With that, the court seemed poised to entertain the battle of competing definitions. *Webster's Third New Int'l Dictionary* provides that "print" means "to make an impression in or upon."[17] But the court noted that, for example, the *Merriam-Webster's Collegiate Dictionary*, 10th ed., defines "print" as "to display on a surface (as a computer screen) for viewing." It seemed like a fair fight until the court held that even the definition cited by Stubhub supports the plaintiff's position. Without any elaboration, it held that "Plaintiff's [Complaint] is consistent with the claim that Defendant 'made an impression' on Plaintiff's computer screen including credit or debit card information in violation of 15 U.S.C. § 1681c(g)."[18] Concluding that an email is sufficient to meet the print requirement, the motion to dismiss was denied.[19]

Interestingly, however, although the motion was denied and the court had made no finding that the statute was ambiguous on its face, the court went on, in dicta, to address the "intent of Congress" in enacting FACTA. The court stated, "had Congress desired [to exclude online transactions], they would have explicitly done so, as they did for 'transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by and imprint or copy of the card.... Failure to do so supports Plaintiff's interpretation of 'print' as being facially reasonable."[20] But in *MovieTickets.com* the same "language of the statute" analysis was considered—with a quite different result.

MovieTickets.com. On February 13, 2008, Judge Gold of the United States District Court, Southern District of Florida, expressly declined to follow *Stubhub* and *1-800-Flowers.com*, "because neither considered the plain meaning of the word 'printed,' within the context of the entire § 1681c(g)...."[21] On that basis, the court granted defendant MovieTicket.com's motion to dismiss.

In that decision, it noted that "[a]lthough the word 'print' in § 1681c(g) is not defined in the statute, the meaning of 'print' in § 1681c(g) is crucial to this case."[22] In attempting to determine the meaning of "print," the court said that several canons of statutory construction guided its analysis of these issues.[23] In applying the canons of statutory construction, the court stated:

> [C]ourts always begin the interpretation of a statute by looking at the plain language of the statute itself[24].... Court's 'read the statute using the normal meanings of its words,' while considering the entire context of the statute[25].... To this end, canons of construction are tools which assist courts in focusing on the context of the entire statute, as opposed to looking at one word in isolation[26].... Applying these canons of statutory construction, I conclude that the plain meaning is evident from the language of the statute.[27]

To that end, the court held that, "[b]y emailing Plaintiff an 'Order Confirmation,' Defendant has not printed a receipt under 1681c(g)."[28] The court, in so holding, stated that "Plaintiff does not allege that Defendant ever sent Plaintiff physical, paper copy of the emails at issue."[29] Here, the court also relied upon a dictionary definition of "print," this time turning to *Webster's New World Dictionary*, 2d College Ed.:

> 1. to mark by pressing or stamping; make a print on or in 2. to press or stamp (a mark, letter, etc.) on or in a surface 3. to draw, trace, carve, or otherwise make a (a mark, letter, etc.) on a surface 4. to produce on the surface of (paper, etc.) the impression of ink type, plates, etc. by means of a printing press....[30]

The court stated that based on these dictionary definitions of "print," one draws the "common sense impression that a 'printed' item is something physical and tangible that can be impressed or marked upon, such as a printed paper."[31] Confirming his common sense impression, Judge Gold stated that "[w]hen § 1681c(g) is looked at as a whole, it is clear that this subsection focuses on paper receipts electronically printed by a cash register or other machine and provided to consumers at the point of sale or transaction."[32]

In contrast to *Stubhub*, where the court concluded that the statute was silent on excluding internet transactions from FACTA's scope, the *MovieTickets.com*

court found silence to have a different impact. "[T]he language of the statute only addresses printed receipts [meaning, according to this Court, physically printed on paper at the point of sale].... Congress included no language to specifically extend the statute's restrictions to email transmissions, and such silence is controlling."[33]

Bose. In *Ehrheart v. Bose Corporation,* the United States District Court for the Western District of Pennsylvania wrestled with a different issue. In *Bose* the issue was where (or when) the "point of the sale or transactions" lies in an internet FACTA case.[34]

The facts were simple and undisputed. The plaintiff—about one week after FACTA went into effect—telephoned the Bose Factory Store to purchase headphones with her credit card.[35] The headphones were shipped and there was a receipt in the package, exactly as she would have received in the store, containing her credit card's expiration date.[36] Although Ehrheart did not experience identity theft or any other harm as a result of the receipt containing her credit card's expiration date, she filed suit against Bose—one of several she filed against various defendants under FACTA—seeking statutory damages, and to certify a class of similarly situated individuals.[37]

Bose argued that because the order was taken over the phone, Ehrheart was not provided an electronically printed receipt at "the point of the sale or transaction."[38] Bose argued that the point of the sale or transaction "denotes a "precise location within a store."[39] Ehrheart responded that "the phrase [point of the sale] refers not to a place, but 'to an event in time, *i.e.*, when payment (or exchange) is being made with a merchant.'" [40]

The court, finding that this was a question of first impression, denied the underlying motion, concluding that FACTA could apply even though the transaction took place over a phone, and not face-to-face. In reaching that conclusion, the court also commented not that there is not a point of sale (a physical location) because it is a telephonic transaction, but rather, that the point of sale is a "time or event":

> The Plaintiff points out that although Congress has used the term "point of sale" to apply to a location, it has also used the phrase to identify a point in time. For example, Section 707(b)(5) of the National Oilheat Research Alliance Act of 2000, 42 U.S.C. § 6201, (repealed), addressed assessments on oil imported by the owner "after the point of sale". *See* § 707(b)(5). She also cites case law in which the term "point of sale" was used to refer to a foreclosure sale in a bankruptcy proceeding. *In re Lenton Brunson McGill*, 78 B.R. 777, 779 (Bankr.D.S.C.1986). According to Ehrheart, logic requires the court to find that the phrase "point of sale or transaction" is ... meant to refer to the sale or transaction itself, thereby excluding all other instances where a cardholder may, for legitimate reasons, request and be provided with a receipt bearing their [sic] credit/debit card information."
>
> * * *
>
> Having carefully reviewed the parties' submissions on this issue against the background of relevant law, the court is convinced that there is no definitive legal authority addressing the meaning to be assigned to the phrase "point of sale or transaction" as that phrase is used in FACTA. The words do not appear to have a fixed meaning, but have been defined instead by the context in which they are used. The term has been applied to denote a time or an event, as opposed to a location.[41]

With these three cases the courts have begun to wrestle with the question of whether FACTA applies to internet transactions and, if so, how it applies. The decisions reflect that the issue is far from settled. The vast differences between them raise yet another interesting question: if the courts cannot agree on whether FACTA applies to internet transactions, how can any retailer have acted willfully (knowingly or recklessly) in allegedly violating the statute?

** Shawn J. Organ, a partner in the Columbus, Ohio office of the international law firm of Jones Day, is a trial lawyer who focuses his practice in the areas of complex litigation, such as class action defense work, including several FACTA cases.*

Endnotes

1 Ted Frank, *Omission in FACTA Might Be Windfall for Plaintiff's Bar*, Class Action Watch, September 2007; Shawn J. Organ & Mark Herrmann, *If Your Company Accepts Credit Cards, You Need to Read This*, The Metropolitan Corporate Counsel, October 2007; Shawn J. Organ & Kasey Ingram, *FACTA Truncation – A Small Answer to Identity Theft or a Big Problem for Businesses?*, CCH Financial Privacy Law Guide, Oct. 17, 2007.

2 The Fair Credit Reporting Act ("FCRA"), 15 U.S.C § 1681c(g)(1).

3 There are cases alleging a violation of the truncated credit card number requirement, but they are relatively few.

4 In the suit against Cost Plus the court noted that the company's net worth is approximately $316 million, with net income for fiscal 2005 of approximately $20 million, yet plaintiffs were seeking between $340 million and $3.4 billion for alleged violations related to the truncation of the expiration date. Spikings v. Cost Plus, Inc., Case No. CV 06-8125-JFW (AJWx), 2007 U.S. Dist. LEXIS 44214, at *4 (C.D. Cal. May 25, 2007).

5 § 1681c(g):

(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 transactions.

(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.

6 There is active debate over what, if any, import the expiration date has related to identity theft. "Some credit industry watchers believe that, like the appendix, a credit card expiration date is one of those things that used to be a lot more practical than it is now." Dana Dratch, *Why Do Credit Cards Expire?*, www.bankrate.com/brm/news/cc/20050202a1.asp. While one credit card company and some banks acknowledge that the expiration date provides one more verification point for fraud protection *in manually processed transactions* (if expired, the card is rejected), in the United States that is of little significant because manually processes transactions are rare. *Id*. What all banks agree upon, however, is that having an expiration date allows: (1) the card to be replaced periodically, before the magnetic strip wears out; (2) updates to the magnetic strip, where information is stored, and (3) the bank a reason to be in communication with their consumer every so often to market other services. *Id*.

7 This is the Card Verification Value code ("CVV"). This is an authentication feature developed by the credit card companies to reduce fraud in internet transactions. It requires the cardholder to enter the information during the transaction to prove that the consumer has the card in their hand. It is a three or four digit code that provides a cryptographic check of the information embossed on the card. Each credit card company has its own name for the CVV code, but it works the same for each credit card company. Visa refers to the code as "CVV2"; MasterCard calls it "CVC2"; American Express and Discover refer to the code as the "Card ID" or "CID".

8 Vasquez-Torres v. Stubhub, Inc., Case No. CV 07-1328 (PSG) (SSx), 2007 U.S. Dist. LEXIS 63719 (C.D. Cal. July 2, 2007)

9 King v. MovieTickets.com, Case No. 07-22119-Civ-Gold/Turnoff, Order Granting Motion to Dismiss (S.D. Fla. Feb. 13, 2008) at 11 (MovieTickets.com Decision at __").

10 Ehrheart v. Bose Corp., Case No. 07-350, 2008 WL 64491 (W.D. Pa. Jan. 4, 2008).

11 Http://stubhub.com/about-us.

12 Vasquez-Torres v. Stubhub, 2007 U.S. Dist. LEXIS 63719 (C.D. Cal. July 2, 2007) at *1.

13 *Id.* at *2.

14 *Id*.

15 *Id.* at *6 (citing BP Am. Prod. Co. v. Burton, 127 S.Ct. 638, 643, 166 L. Ed. 2d 494, 502 (2006).

16 *Id.* at *6-*7 (citing U.S. v. Carter, 421 F.3d 909, 911 (9th Cir. 2005)).

17 *Id.* at *7.

18 *Id*.

19 In a similar case, *Grabein v. 1-800-Flowers.com, Inc*., Case No. 07-22235 (S.D. Fla. Jan 29, 2008)(Huck, J.), that Court also denied a motion to dismiss largely following the *Stubhub* analysis.

20 Vasquez-Torres v. Stubhub, 2007 U.S. Dist. LEXIS 63719 (C.D. Cal. July 2, 2007) at *9.

21 King v. MovieTickets.com, Case No. 07-22119-Civ-Gold/Turnoff, Order Granting Motion to Dismiss (S.D. Fla. Feb. 13, 2008) at 11 (MovieTickets.com Decision at __").

22 MovieTickets.com Decision at 6.

23 *Id.*

24 *Id.* at 6-7 (citing Snapp v. Unlimited Concepts, Inc., 208 F.3d 928, 934 (11th Cir. 2000).

25 *Id.* at 7 (citing Penn v. City of Montgomery, 381 F.3d 1059, 1062 (11th Cir. 2004)("We do not look at one word or term in isolation, but instead we look to the entire statutory text.").

26 *Id.* (citing CBS, Inc. v. Primetime 24 Joint Venture, 245 F.3d 1217, 1225 (11th Cir. 2001)).

27 *Id.* at 7-8.

28 *Id.* at 8.

29 *Id* at 10.

30 The court also noted that "Print," as defined in the online Merriam-Webster Dictionary (www.m-w.com), as of February 7, 2008, is (1)(a) "to impress something in or on" (b) "to stamp (as a mark) in or on something."

31 MovieTickets.com Decision at 9.

32 *Id.* at 10.

33 *Id*. (citing CBS, Inc. v. Primetime 24 Joint Venture, 245 F.3d 1217, 1226 (11th Cir. 2001)).

34 Ehrheart v. Bose Corp., Case No. 07-350, 2008 WL 64491 (W.D. Pa. Jan. 4, 2008).

35 *Id*. at *2.

36 *Id*.

37 *Id*.

38 *Id*. at *3.

39 *Id*.

40 *Id.*

41 *Id*. at *4 (citing *See e.g.,* Utica Mut. Ins. Co. v. Bancinsure, Inc., No: 4-06-cv664, 2007 WL 2860237 at * 11 (E.D.Missouri, September 25, 2007) (evaluating fraud after the point of sale when customers attempted to return purchases); Caremark, Inc. v. Goetz, 395 F.Supp.2d 683, 692 (D.Tenn.2005) (noting that insurer reimbursed at a lower rate for claim filed after the point of sale); Anderson v. Equitable Life Assur. Soc'y. of U.S., 248 F.Supp.2d 584, 592 (S.D.Miss.2003) (assessing whether there had been fraudulent concealment after the point of sale when plaintiffs were sent annual policy summaries); Ford Motor Co. v. Lloyd Design Corp., 184 F.Supp.2d 665, 676 (E.D.Mich.2002) (protecting trademarks required that court tolerate at least some confusion as to source or sponsorship after the point of sale).