

CLASS ACTION WATCH

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Omission in FACTA Might Be Windfall for Plaintiff's Bar

In 2003, Congress passed the Fair Credit Transactions Act (FACTA), with the goal of preventing identity theft. The Act restricts information that can be printed on electronically-generated credit-card receipts: “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.”¹ “Willful” violation of FACTA entitles a plaintiff to recovery between \$100 and \$1000, plus punitive damages (if the violation was knowing) and attorney’s fees.² Unlike many other statutes with statutory damages,³ there is no cap on total recovery under FACTA. Thus, in a class action, damages for a “willful” violation could be in the hundreds of millions.

FACTA took effect on December 4, 2006. For reasons not in the record of any of the cases, much of the retail industry interpreted the statute to permit the printing of credit card and debit card receipts that included three to five of the last digits of the credit card *and* the expiration

by Ted Frank

date. Plaintiffs argue that the printing of the expiration date alone violated the ambiguous statute and, with no dispositive court or regulatory ruling on the meaning of “or,” and millions of potential violations

occurring every day in the first weeks after FACTA took effect, such an opportunity has attracted the entrepreneurial trial bar. The Chicago law firm of Edelman, Combs, Lattuner & Goodwin, LLC⁴ has been advertising for clients to bring class actions;⁵ Los Angeles firm Spiro Moss Barness LLP has filed more than forty lawsuits.⁶

There are state law precedents to both the federal law and the litigation. For example, Ohio has a similar law, which passed and took effect in 2004.⁷ An entrepreneurial lawyer, John Ferren, and his client, Nathaniel Burdge, brought a series of suits. Burdge “purposely made purchases at stores that were printing his expiration date on his receipt in order to recoup statutory damages totaling at least \$12,800.”⁸ But Ohio’s law required a plaintiff to be “a person injured by a violation.”⁹ Courts found that Burdge’s deliberately seeking out credit card receipts suggested profit-seeking, rather than injury, rejected his suit and sanctioned him and his attorney \$3,000.¹⁰ Burdge had

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NEW JERSEY AND MISSOURI SUPREME COURTS REJECT LEAD PAINT PUBLIC NUISANCE CLAIMS

by Mark Behrens & Christopher Appel

In June of 2007, the Missouri and New Jersey Supreme Courts issued important rulings rejecting public nuisance claims in mass actions against former lead paint and pigment manufacturers. The courts’ decisions may have a significant influence on courts deciding similar lead paint cases and in other cases where plaintiffs may seek to avoid traditional products liability and class certification requirements through government-sponsored public nuisance claims.

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previously unsuccessfully litigated an identical claim against a movie theater.¹¹ The Ohio courts do not appear to have considered whether the state law was preempted by federal law.

The federal law does not have the “person injured by a violation” limitation, however. Section 1681n(a) states “Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer.” A negligent violation only entitles a customer to actual damages.¹²

A recent Supreme Court case, *Safeco v. Burr*, addressed the meaning of willfulness under § 1681n(a).¹³ The Fair Credit Reporting Act, 15 U.S.C. § 1681m(a) (FCRA), requires notice to a consumer subjected to “adverse action” based in whole or in part on information contained in a consumer credit report. (An “adverse action” in this context is any “increase in any charge for... any insurance, existing or applied for.”)¹⁴ Insurance companies have found that credit reports accurately predict insurance claims rates, and perform “credit scoring” on applicants to determine insurance rates. Respondents applied to Safeco for auto insurance, and received offers of initial rates higher than the best rates possible, but Safeco sent no “adverse action” notice; a class action alleged willful violation of the FCRA. The district court held that a single, initial insurance rate was not “adverse action,” and granted summary judgment for Safeco. The Ninth Circuit reversed, and further held that a party willfully fails to comply with FCRA if it acts in reckless disregard of a consumer’s FCRA rights.¹⁵

The Supreme Court reversed. While it found that Safeco’s offer of initial rates was “adverse action,” it found that Safeco’s conduct was not willful because its reading of the ambiguous statute (which had yet to be interpreted by the FTC or Court of Appeals) was not objectively unreasonable. But the Court also held that “[w]illful failure covers a violation committed in reckless disregard of the notice obligation.”¹⁶ Plaintiffs seek class certification in FACTA cases over the question of willfulness, and the vague standards of *Safeco* present obvious dangers to defendants. A fast food restaurant or supermarket may face \$100 to \$1000 in damages for a transaction where there is a gross margin of a dollar or two.

In a number of FACTA cases, Judge Walter of the Central District of California has rejected class certification for FACTA cases, thus limiting the ability of the plaintiffs’ bar to threaten astronomical damages. In the first such case, *Spikings v. Cost Plus, Inc.*, plaintiffs sought to certify a nationwide class of 3.4 million members against a defendant whose net worth was \$316 million and whose net sales revenues were \$20 million/year.¹⁷ The minimum statutory damages would have put the defendant out of business. This threat was sufficient for the court to deny certification, especially where the defendant had immediately acted to correct its printing of the expiration date on credit-card receipts. Moreover, the availability of individual actions for actual damages plus attorneys’ fees meant that a class action was not needed to vindicate individual rights. Finally, and perhaps most importantly, in terms of precedent, the danger that certification would create the potential for attorney abuse of the class action procedure would be an undesirable result and encourage unnecessary litigation.

Plaintiffs have responded tactically to such dismissals. In a case against U-Haul,¹⁸ plaintiffs attorney Farris Ain of the Herbert Hafif Law Offices in Claremont, California, has sought to certify a class limited to customers who rented in four California stores, in the alternative to a statewide class.¹⁹ A multiplicity of such suits would still be profitable for plaintiffs’ attorneys, but the smaller individual cases’ damages would avoid one of the rationales for refusing certification in *Spikings*. But Judge Walter did not countenance to workarounds of *Spikings*. On August 15, he rejected class certification. *First*, individualized questions predominated over common questions because of the need of individualized factual determinations as to which customers qualified as “consumers” under the statute and received a FACTA-violative “receipt.” *Second*, with an unlimited size of the class, damages sought would range from \$115 million to \$1.15 billion. Such “ad absurdum” damages would be “enormous and completely out of proportion to any harm suffered by the plaintiff” and thus violate due process.²⁰ But even limiting the class to four stores, there would be nearly 29,000 transactions, with damage figures ranging from 20 to 200% of the defendant’s net income. Moreover, piecemeal class certification would defeat the efficiency purposes of class actions. The court went on to repeat the other rationales in *Spikings* for denying class certification.

With the possibility of a lottery-sized damages award motivating the losing plaintiffs, the Ninth Circuit will surely see one of these class certification denials on appeal. In similar circumstances, a Judge Easterbrook

opinion rejected flexibility in Rule 23 to bar certification of class actions just because the damages were wildly disproportionate.²¹ In Judge Easterbrook's view, the appropriate role of the judicial branch is to enforce the statute as written, absurd results of disproportionate damages and all, and then impose constitutional limits on the judgment. This interpretation of Rule 23 seems uncharacteristically naïve, given that Judge Easterbrook is also the author of *In re Bridgestone/Firestone, Inc.*, where he recognized the dynamic that a single action can force a defendant into settling an unmeritorious case, rather than risk bankruptcy from an astronomical, but mistaken, judgment.²² But perhaps Easterbrook's opinion reflects the fact that the due process argument was not addressed (and thus perhaps not raised) in *Murray*. Still, if Judge Easterbrook's view about the scope of Rule 23 carries the day in the Ninth Circuit over that of Judge Walter, Congress would need to act rapidly to prevent small and medium businesses from being punitively bankrupted by FACTA and similar statutes.

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Endnotes

1 15 U.S.C. § 1681c(g).

2 15 U.S.C. § 1681n(a).

3 *See, e.g.*, 15 U.S.C. §1692k(a)(2) (Fair Debt Collection Practices Act) (capping class damages at lower of \$500,000 or 1% of net worth of debt collector); 15 U.S.C. §1640(a)(2)(B) (Truth in Lending Act) (same); 15 U.S.C. §1693m(a)(1) (Electronic Fund Transfer Act) (capping class damages at \$500,000).

4 If the name of the law firm sounds familiar, it is because it is the successor to the similarly named one that negotiated the infamous *Hoffman v. BancBoston* class action settlement where class members lost money to pay attorneys' fees. *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348 (7th Cir. 1996).

5 Walter Olson, "Turn those credit slips into gold," *Overlawyered.com* (blog), http://www.overlawyered.com/2007/05/turn_those_credit_slips_into_g.html (May 10, 2007).

6 Robin Sidel, *Retailers Whose Slips Show Too Much Attract Lawsuits*, *WALL ST. J.*, Apr. 28, 2007.

7 Ohio R.C. 1345.18.

8 *Burdge v. Supervalu Holdings, Inc.*, No. C-060194, 2007 WL 865483 (Ohio Ct. App. Mar. 23, 2007).

9 Ohio R.C. 1345.18.

10 *Supervalu Holdings, supra* note 8.

11 *Burdge v. Kerasotes Movie Theaters*, No. CA2006-02-023, 2006 WL 2535762 (Ohio Ct. App. Dec. 5, 2006). In a telling example of the "Pigs get fed, hogs get slaughtered" saying, Burdge had originally settled the case for \$2525, but decided to demand more, and lost the case at the trial-court level and on appeal on the same lack-of-injury grounds as in *Supervalu Holdings. Id.*

12 15 U.S.C. § 1681o(a).

13 No. 06-84 (June 4, 2007).

14 15 U.S.C. § 1681a(k)(1)(B)(i).

15 *Spano v. Safeco*, 140 Fed. Appx. 746 (9th Cir. 2005).

16 *Safeco v. Burr, supra* note 13. The Court also held, in a parallel case, *GEICO v. Edo*, No. 06-100, that GEICO's conduct of offering a neutral rate based on a credit score was not an "adverse action."

17 Case No. 06-cv-8125-JFW (C.D. Cal. May 29, 2007).

18 *Evans v. U-Haul Co. of Calif. Inc.*, No. 07-cv-2097-JFW (C.D. Cal. Aug. 15, 2007).

19 Matthew Hirsch, *Plaintiffs Attorneys Think Globally, Act Locally in Financial Privacy Cases*, *THE RECORDER*, Aug. 27, 2007.

20 *Evans, supra* note 18, citing *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 n. 5 (11th Cir. 2003) (citing *Kline v. Coldwell Banker & Co.*, 508 F.2d 226 (9th Cir. 1974) (Truth-in-Lending Act)).

21 *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006). *Murray* is also notable because the Seventh Circuit endorsed the notion that a "professional" plaintiff who brings many suits can be an appropriate class representative, though the Court did not expressly address the "typicality" requirement of the class representative in Rule 23(a)(3).

22 288 F.3d 1012, 1015–16 (7th Cir. 2003).