Class Action Watch

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Omission in FACTA Might Be Windfall for Plaintiff's Bar

by Ted Frank

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 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, Latturner & Goodwin, LLC[4] 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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In *City of St. Louis v. Benjamin Moore & Company*, a divided Missouri Supreme Court rejected a public nuisance claim brought by St. Louis to recover costs the city incurred as part of a program to abate or remediate lead paint in private residences.[1] The city admitted that it could not identify the manufacturer of any lead paint allegedly present at, or abated from, the properties. A majority of the court held, "Absent product identification evidence, the city simply cannot prove actual causation." The court also rejected the city's argument that its status as a governmental entity, or the public nature of the injury, should set the city's claim apart from other public nuisances or subject the city to a lesser causation standard. The court said the traditional tort law requirement of causation "applies with equal force to public nuisance cases brought by governmental entities for monetary damages accrued as an alleged result of the public nuisance."

Days after the *City of St. Louis* decision, the New Jersey Supreme Court, in *In re Lead Paint Litigation*, rejected consolidated complaints by twenty-six state municipalities and counties seeking to recover from former lead paint manufacturers and distributors the costs of detecting and removing lead paint from homes and buildings, of providing medical care to residents affected with lead poisoning, and of developing programs to educate residents about the hazards of lead paint exposure.[2] The court said the government entities' claims "would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance."[3]

The court reached its decision after thoroughly examining the historical underpinnings of the tort of public nuisance and analyzing legislative enactments governing both lead paint abatement programs and products liability claims. First, the court explained, "a public nuisance, by definition, is related to conduct, performed in a location within the actor's control, which has an adverse effect on a common right." In the subject appeal, however, the conduct that created the problem was the poor maintenance of the premises by their owners —neither the location nor the conduct was within the defendants' control. Second, "a public entity which proceeds against the one in control of the nuisance may only seek to abate, at the expense of the one in control of the nuisance." Because the governmental entities sought damages rather than abatement, their claims "f[e]ll outside the scopes of remedies available **to** a public entity plaintiff." Third, under the tort of public nuisance, "a private party who has suffered special injury may seek to recover damages to the extent of the special injury and, by extension, may also seek to abate." The court said that even if the governmental entities could proceed in the manner of private plaintiffs, they could not identify any special injury. Rather, all of the injuries identified by the plaintiffs were general to the public at large. The court, quoting two federal appellate court opinions, concluded that if it were to ignore the fundamental legal underpinnings for public nuisance claims and find a cause of action to exist, "nuisance law 'would become a monster that would devour in one gulp the entire law of tort." This is not something the New Jersey Supreme Court was willing to permit.

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Endnotes

1 226 S.W.3d 110 (Mo. 2007).

2 924 A.2d 484 (N.J. 2007).

3 *See also* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rationale Boundaries on a Rational Tort*, 45 Washburn L.J. 541 (2006).