



TUCKER ELLIS & WEST LLP
ATTORNEYS AT LAW

CLIENT ALERT

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**PLAINTIFFS RUSH TO FILE FACTA CLASS ACTIONS FOR PRINTING
TOO MUCH INFORMATION ON CREDIT CARD RECEIPTS**

The Fair and Accurate Credit Transactions Act (“FACTA”) went into full effect as of December 4, 2006. In an attempt to combat identity theft, FACTA amended the Fair Credit Reporting Act to say that businesses that accept credit or debit cards for the transaction of business and provide an electronically-printed receipt to the cardholder at the point of the sale or transaction cannot print more than the last five digits of the credit card number or the expiration date of the credit card on the receipt. Businesses that violate FACTA are liable to consumers either for actual damages or statutory damages of at least \$100 and not more than \$1,000. Liability likely will be imposed on any business that is aware *or should be aware* of the restrictions and prints a receipt that violates FACTA.

For those businesses that have not yet complied with these restrictions and who think the potential penalties imposed by FACTA are minor and might not outweigh the cost of upgrading any relevant hardware and/or software, think again. FACTA provides not only for statutory damages to the consumer, but for an award of the attorneys’ fees required to pursue relief. More importantly, plaintiffs’ lawyers have already found a way to make FACTA a potentially lethal statute for many businesses: the class action.

In the last few months, hundreds of lawsuits alleging violations of FACTA have been filed. Many of these are pending in federal court in Los Angeles, but this is just the tip of the iceberg. In the last month, dozens of FACTA cases have been filed outside of California, including Cleveland. Virtually all of

these cases are being filed as proposed class actions. This allows the lawyers to bring a single case against a defendant on behalf of possibly *thousands* of individual plaintiffs at the same time. The number of potential plaintiffs in a single class can be staggering, even for a relatively small business. One recent small retail establishment was named as a defendant in a FACTA class action. This business accepts credit cards at its single location and averages approximately 500 credit card transactions per week – this business printed perhaps as many as 18,000 credit card receipts from December 4, 2006, through August, 2007. If this class is certified and if only the *minimum* amount of statutory damages are awarded for each violation, the damages would be at least \$1.8 million. For larger businesses or businesses with multiple locations, those numbers grow exponentially.

Because courts are just starting to deal with issues raised by these proposed class actions, many issues remain unresolved. Nevertheless, courts have already determined that it is probably not necessary to demonstrate actual harm to award statutory damages. Plaintiffs do not need to show that they actually were the victim of identity theft or that there is an increased likelihood that they will be the victim of identity theft – once a statutory violation is established, statutory damages are awarded and the defendant likely will also be responsible for paying attorney fees and could face an award of punitive damages.

Nor is the plaintiffs’ bar bashful about what they want from the FACTA class actions – they want money. Plaintiffs’ lawyers typically

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Plaintiffs Rush to File FACTA Class Actions, continued

acknowledge that the named plaintiff seeking to represent the class suffered no actual harm. And plaintiffs' lawyers are working together – attorneys nationwide are exchanging information and discussing and developing strategy. Some of these class actions are being pursued by firms that historically have been primarily defense firms because it appears these cases are likely tremendous cash cows – they can quickly and easily be filed in large numbers. Lawyers for FACTA plaintiffs have given some indication that they may try to pursue point-of-sale service providers and credit card service vendors, even though FACTA does not speak to those parties or impose any obligations on them – they are merely trying to get as many people to the table as possible. Not surprisingly, FACTA plaintiffs' lawyers also are actively pursuing insurance that may cover these claims.

The worst part about this situation is that the problem often can be fixed within minutes by a simple software adjustment. Sometimes, the problem can be fixed from off-site. One recent point-of-sale service vendor corrected the problem of printing the expiration date on receipts by remote access, without coming to the store. Unfortunately, it was too late: the business already had been sued in a proposed FACTA class action.

Courts have made short work of motions to dismiss FACTA class actions and most arguments against class certification have been unsuccessful thus far. We are aware of only one case where class certification was denied; the argument against class certification that was successful turned on being able to convince the court that the statutory damages would likely bankrupt the business. Even if a business successfully fends off class certification, the legal fees necessary to do so will be substantial.

The plaintiffs' lawyers we have spoken to indicate that they have literally dozens if not hundreds of cases being worked up to be filed within weeks. This is a problem that cannot wait to be corrected – if you accept credit or

debit cards and print an electronic receipt at the point-of-sale to give to the customer, make sure that no more than the last five digits of the credit card number are printed on the receipt and also make sure that the expiration date of the credit card is not printed on the receipt. If your credit card receipts contain either more than the last five digits of the credit card number or the expiration date, do whatever is necessary to change that situation immediately.

For more information regarding FACTA, or if you have any questions regarding this client alert, please contact:

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