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FACTA CLASS ACTIONS – BEWARE THE TRUNCATION REQUIREMENT OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT

The truncation requirement of FACTA has spawned a wave of class action litigation with potentially ruinous damages for "willful" violations. The authors describe the court rulings in these cases at the pleading stage, at class certification, and at summary judgment. They also review state truncation laws, card network rules, and the PCI DSS. They close with suggested steps for businesses to take to reduce the potential for future FACTA lawsuits and mitigate damage awards in the event of such litigation.

By Burt Braverman and Micah J. Ratner *

All businesses, large and small, that issue electronically generated credit or debit card receipts to consumers at the point of transaction are subject to the "truncation" requirement of the Fair and Accurate Credit Transactions Act of 2003 ("FACTA" or "Act"). This seemingly modest provision, which forbids credit and debit card receipts, whether for $1 or $100,000, from displaying more than the last five digits of the cardholder's account number, unleashed a wave of class action litigation, no doubt due in large part to the Act's incorporation of a statutory damages provision of up to $1,000 per violation regardless of the occurrence of actual injury. Promoted by an active plaintiffs' bar, lawsuits have been filed against businesses of all types and sizes, ranging from small mom-and-pop stores to the likes of FedEx, Southwest Airlines, Adidas, 1-800-Flowers.com, and Avis Rent-A-Car. Even defendants who have dodged such claims through early motions to dismiss or by later defeating motions for class certification have had to bear the significant costs and risks of defending against class action litigation. Others, not so fortunate, who have failed to defeat class certification motions, generally have settled to avoid facing the risk of trial and potentially crippling damage awards. The lessons learned from the first decade of FACTA counsel that businesses should indeed fear the consequences of violating the Act's truncation requirement and be diligent in following some simple but essential safeguards.

ENACTMENT OF FACTA

In 2003, to combat the growing problem of identity theft, and credit and debit card fraud, Congress enacted FACTA,[1] as an amendment to the Fair Credit Reporting Act ("FCRA").[2] FACTA includes, among other things, a "truncation" requirement that a person who accepts credit or debit cards for the transaction of business may

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[1] Pub. L. No. 108-159, 117 Stat. 1952, 15 U.S.C. § 1681c(g).

[2] 15 U.S.C. § 1681 *et seq*.

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not print more than the last five digits of the card number or print the expiration date on any electronically printed receipt given to a cardholder at the point of the sale or transaction; the requirement does not apply to transactions in which the credit or debit card account number is entered by handwriting, or by an imprint or copy of the card. While the Act clearly applies to the issuance of paper receipts provided during face-to-face transactions, courts have disagreed over whether FACTA also applies when a business does not actually print the receipts, such as in Internet transactions where receipts are transmitted electronically to consumers.[3]

The statute of limitations for bringing suit to remedy an alleged FACTA violation is two years from discovery of the violation, but not later than five years from the violation.[4] The truncation provision, which had a phased-in effective date depending on when registers were manufactured, became fully effective in December 2006,[5] and was met with an almost overnight onslaught of class action lawsuits. In 2008, Congress observed that "[a]lmost immediately after the deadline for compliance passed, hundreds of lawsuits were filed alleging" violation of the expiration date truncation requirement.[6] In response to these lawsuits and what Congress acknowledged as ambiguity in FACTA's provision regarding the printing of expiration dates, Congress enacted the Credit and Debit Card Receipt Clarification Act of 2007. The Clarification Act provided that merchants that printed the expiration date on receipts but otherwise complied with FACTA would not be liable for willful violations and, therefore, not subject to statutory damage awards.[7] That grant of immunity, which was retroactive and expired June 3, 2008,[8] resulted in dismissal of many of the initial wave of FACTA lawsuits that were filed in the early years following the law's enactment. But FACTA litigation has continued unabated, with currently more than 125 FACTA actions pending nationwide.

FACTA'S DAMAGES PROVISIONS

FACTA's fear factor resides in its damages provisions. While Congress intended to stem the growth of identity theft and credit card fraud, it did not foresee that the damages provisions of the Act would result in potential damage awards of such magnitude as to be capable of causing the bankruptcy, and even the demise, of businesses held to have willfully violated its terms.

The Act provides that any person that negligently violates the truncation requirement is liable for actual damages, as well as attorneys' fees.[9] More significantly, in the case of "willful" violations, the Act provides for recovery of statutory damages of not less than $100 but not more than $1,000 per violation, as well as punitive damages and attorneys' fees.[10]

The meaning of "willful," which is not defined in the Act, was an early battleground in FACTA litigation. However, in *Safeco Insurance Co. of America v. Burr*,[11] the U.S. Supreme Court interpreted the willfulness requirement for statutory damages under FCRA as including not only a knowing violation, but also "reckless disregard" of the law's requirements.

[3] *Compare, e.g.*, *Simonoff v. Expedia, Inc.*, 643 F.3d 1202, 1205 (9th Cir. 2011) (affirming dismissal of claims under Fed. R. Civ. P. 12(b)(6) because "under FACTA, a receipt that is transmitted to the consumer via e-mail and then digitally displayed on the consumer's screen is not an 'electronically printed' receipt") *and Schlahtichman v. 1-800-Contacts, Inc.*, 615 F.3d 794, 798 (7th Cir. 2010) (explaining that the plain meaning of "print" excludes e-mail receipts) *with Romano v. Active Network Inc.*, No. 09 C 1905, 2009 WL 2916838, at *3 (N.D. Ill. Sept. 3, 2009) (finding that "print" means "publishing information" and, accordingly, a receipt issued for a transaction on the Internet is subject to the truncation provision).

[4] 15 U.S.C. § 1681p.

[5] *Id.* § 1681c(g)(3).

[6] Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, 122 Stat. 1565, § 1(a)(4) (June 3, 2008).

[7] *Id.* § 3.

[8] *Id.*; *see, e.g.*, *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708, 720 (9th Cir. 2010) (noting that, under the Clarification Act, "Congress . . . imposed a retroactive immunity for a sub-class of merchants who misunderstood FACTA's requirements . . . .").

[9] 15 U.S.C. § 1681o(a).

[10] *Id.* § 1681n(a).

[11] 551 U.S. 47 (2007).

"Recklessness" was explained as an action entailing "an unjustifiably high risk of harm that is either known or so obvious that it should be known." Thus, the Court said, "a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." In short, "recklessness" involves something more than negligence, but need not rise to the level of an intentional act. Lower courts have since applied *Safeco* in construing the willfulness element of FACTA.[12]

Significantly, a class action plaintiff claiming statutory damages on account of a willful violation of FACTA is not required to prove that identity theft, or any other actual injury, resulted to it or any member of the putative class. The mere issuance of an improperly truncated receipt to a consumer is deemed to itself constitute injury for purposes of the statute and to confer standing to sue.

When claims are aggregated in a class action on behalf of all customers of a merchant that failed to properly truncate credit card numbers, the amount of damages can be massive. For example, a single credit/debit card terminal that is improperly programmed could spew more than 40,000 inadequately truncated receipts to customers in a single year. Should such a failure to have properly truncated the receipts be found to have resulted from reckless conduct, statutory damages could amount to as much as $40,000,000, and the defendant also could be subject to an award of punitive damages and attorneys' fees. Where the failure to properly truncate receipts extends to scores or even hundreds of terminals, the number of unlawful receipts can rise into the hundreds of thousands or even millions, and the potential damages can be nothing short of catastrophic, with FACTA class actions against major retailers having been reported to involve potential damage claims amounting to billions of dollars (e.g., Costco - $17 billion;[13] StubHub - $2 billion;[14] Cost Plus - $3.4 billion;[15] and Weis Markets - $1 billion).[16] Given the magnitude of potential damages that has confronted defendants who have failed to defeat class certification motions, it is not surprising that such companies overwhelmingly have chosen to settle rather than risk going to trial.

FACTA CLASS ACTION LITIGATION

At the Pleading Stage

Courts have shown varying degrees of receptiveness to FACTA class actions. Complaints often have been bare-bones, reciting little more than the basic elements of a FACTA claim and the federal class action rule, but alleging few particularized facts to support claims of knowing or reckless violations. Federal district courts in the Northern District of Illinois,[17] District of Kansas,[18] Eastern District of Wisconsin,[19] Central District of California,[20] Southern District of

[12] *See, e.g.*, *Long v. Tommy Hilfiger U.S.A., Inc.*, 671 F.3d 371, 378 (3d Cir. 2012) (affirming dismissal where defendant printed the month – but not the year – of the expiration date, because, "[i]n light of *Safeco*, we conclude that Hilfiger's interpretation of the statute is not 'objectively unreasonable' and, thus, that Long has not stated a claim for a willful violation of FACTA").

[13] *Serna v. Costco Wholesale Corp.*, No. CV07-1491 AHM**,** 2008 U.S. Dist. LEXIS 52298, at *2 (C.D. Cal. Jan. 3, 2008).

[14] *Vasquez-Torres v. StubHub, Inc.*, No. CV 07-1328 FMC, 2008 U.S. Dist. LEXIS 22503, at *20 (C.D. Cal. Mar. 4, 2008).

[15] *Spikings v. Cost Plus, Inc.*, No. CV 06-8125-JFW, 2007 U.S. Dist. LEXIS 44214, at *12 (C.D. Cal. May 29, 2007).

[16] *Stillmock v. Weis Markets, Inc.*, 385 F. App'x 267, 279 (4th Cir. 2010) (Wilkinson, J., concurring) (noting that "[b]oth plaintiffs and Weis Markets have estimated that 'there are potentially over one million Class members.' Multiplying that estimate by the statutory damages range results in total liability of between $100 million and $1 billion dollars, without even accounting for the possibility of punitive damages, attorney's fees, and costs.").

[17] *Huggins v. SpaClinic, LLC*, No. 09 C 2677, 2010 WL 963924, at *2 (N.D. Ill. Mar. 11, 2010) (plaintiff did not plead facts specifically relating to defendant).

[18] *Komorowski v. All-American Indoor Sports, Inc.*, No. 13-2177-SAC, 2013 WL 4766800, at *2-4 (D. Kan. Sept. 4, 2013) ("Plaintiffs' assertions of both actual and constructive knowledge are based solely on the fact that during the three year phase-in period for the relevant FACTA requirement, there was extensive publicity regarding those requirements. But Plaintiffs neither assert nor show that this Defendant actually received, reviewed, or was otherwise apprised of those requirements. Thus, no inference of actual knowledge may reasonably be drawn.").

[19] *Gardner v. Appleton Baseball Club, Inc.*, No. 09-C-705, 2010 WL 1368663, at *5 (E.D. Wis. Mar. 31, 2010) ("[T]he complaint merely 'parrots' the statutory language without providing any specific facts.").

[20] *Seo v. CC CJV Am. Holdings, Inc.*, No. CV 11-05031 DDP, 2011 WL 4946507, at *2 (C.D. Cal. Oct. 18, 2011) ("The fact that information about FACTA was available to CJV does

Florida,[21] and District of Maine[22] have dismissed such complaints, finding that they inadequately plead the required elements of a claim for a knowing or reckless violation of FACTA. For example, in *Huggins v. SpaClinic, LLC*, the U.S. District Court for the Northern District of Illinois dismissed a FACTA class action complaint arising from printing the expiration date on customers' card receipts, explaining that "[p]ursuant to *Iqbal*, plaintiff must plead factual content that allows us to draw the reasonable inference that [defendant] knowingly or recklessly printed the expiration date on [his] receipt."[23]

Similarly, in *Gardner v. Appleton Baseball Club, Inc*., the Eastern District of Wisconsin dismissed a FACTA class action complaint against a minor-league baseball club that printed the expiration date on customers' card receipts because "the complaint merely 'parrots' the statutory language without providing any specific facts."[24] The court found insufficient the plaintiff's allegation that "[m]ost of defendant's business peers and competitors readily brought their processes into compliance with FACTA by programming their credit card machines and devices to comply with the truncation requirement."[25] The court reasoned:

> [T]he fact that most other businesses may have complied with FACTA raises no *specific* inference about willfulness on the part of the [defendants]. . . . The 'fact' that other businesses comply with the law is an assertion that could be leveled at *any* FACTA defendant, and thus in substance the complaint merely alleges that [defendant] violated the statute, and the violation itself is deemed sufficient evidence of willfulness. . . . These same facts could be alleged against *any* alleged FACTA violator, and as such they are essentially boilerplate. . . . No doubt Plaintiff's counsel could open the complaint in his word processor, delete [defendant's name], and substitute any other defendant in its place without disturbing much of the rest of the complaint at all. *Twombly* and *Iqbal* teach that such cut-and-paste jobs are not a substitute for real facts that plausibly 'show,' under Rule 8, that the Plaintiff is entitled to relief.[26]

The *Gardner* court also rejected the allegation, found in many FACTA complaints, that the merchant should be deemed to have willfully violated the Act because FACTA was enacted in 2003, the Act gave defendants three years to comply, the FTC publicized the requirements, and the grace period for compliance with the expiration date truncation requirement under the 2007 Clarification Act had already expired. As the court aptly observed, these allegations "merely establish[] that a violation occurred [] without saying anything about willfulness,"[27] and thus erroneously "conflate[] the occurrence of the act with the mental state of the actor and beg[] the question of willfulness. To say that a violation occurred after the grace period ended is to state only that a violation occurred, period."[28]

Even partial dismissal of a complaint, striking the allegations of a knowing or reckless violation, can put an end to a putative FACTA class action since, absent access to statutory damages, each class member would be required to prove that he/she suffered actual damages from an improperly truncated receipt, which not only would be impossible for most class members but likely would render the case unsuitable for class action treatment. In such cases, most class action plaintiffs and their lawyers will elect to withdraw their case rather than proceed. Indeed, with willfulness as the key to FACTA class actions, it is no wonder that some plaintiffs disclaim any violation based on negligence, and that defendants focus their attack on a complaint's allegations of willfulness.

In contrast, other courts have not applied as discriminating an eye to FACTA class action

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footnote continued from previous page…

nothing to support Defendant's naked assertion that CJV was notified of FACTA's provisions and knowingly ignored them. Plaintiff has . . . failed to adequately plead a willful violation of FACTA.").

[21] *Rosenthal v. Longchamp Coral Gables LLC*, 603 F. Supp. 2d 1359, 1362 (S.D. Fla. 2009) ("In view of *Twombly*, *Safeco* and the Clarification Act, the Court finds Plaintiff's allegations insufficient to establish that Defendant acted recklessly.").

[22] *Vidoni v. Acadia Corp.*, No. 11-cv-00448-NT, 2012 WL 1565128, at *4 (D. Me. Apr. 27, 2012) ("The allegation that the Defendant actually was complying with FACTA at other locations undermines the Plaintiff's claim that the Defendant willfully violated FACTA at the Jordan Pond House Restaurant.").

[23] *Huggins*, *supra* note 17 at *2.

[24] *Gardner*, *supra* note 19 at *5.

[25] *Id.* at *3.

[26] *Id.* at *5-6.

[27] *Id.* at *5.

[28] *Id.*

complaints, even when presented with little more than conclusory allegations of willfulness, choosing to defer consideration of such issues to either the class certification hearing or trial, but not through an early motion to dismiss. Notwithstanding the U.S. Supreme Court's articulation of heightened pleading standards in *Bell Atlantic Corp. v. Twombly*[29] and *Ashcroft v. Iqbal*,[30] U.S. district courts in the Middle and Southern Districts of Florida,[31] Northern District of Illinois,[32] and District of Maryland[33] have found conclusory allegations of willfulness – including some of the same ones held to be inadequate by courts that have granted motions to dismiss – to be sufficient to withstand early stage dismissal.

For instance, the Middle District of Florida denied a motion to dismiss, based merely on the complaint's allegation that plaintiff's full account number was printed on his receipt and a conclusory allegation that "defendants knew of the relevant provisions of FACTA, and willfully violated and continue to violate FACTA's requirements."[34] The court found that, "[t]aking all allegations as true at this stage of the proceedings, plaintiffs have sufficiently pled for purposes of FED. R. CIV. P. 8 to provide defendant with notice that statutory damages will be sought. Whether plaintiffs will actually be able to demonstrate willfulness will be determined at summary judgment or at trial."[35] Likewise, in *Buechler v. Keyco, Inc.*, the U.S. District Court for the District of Maryland denied a restaurant defendant's motion to dismiss for failure to plausibly allege willfulness based on allegations in the complaint that, "despite the well-publicized enactment of [the] FACTA provision in 2003; FTC guidance; the 2007 Clarification Act (which required expiration date truncation); similar requirements in the private sector; and FACTA compliance by its competitors, Keyco issued a non-compliant receipt to [plaintiff] on May 31, 2009."[36]

Other plaintiffs have pleaded too much, and consequently suffered the dismissal of their claim of willful violation, by alleging that the merchant mistakenly – and therefore negligently – provided the "merchant" copy of the receipt to the plaintiff.[37] The issue of merchants' copies frames another area of disagreement that has led to divergent decisions at the pleading stage. Courts have recognized that merchants may retain unmasked merchant copies because, "if a question arises, such as the validity of a transaction, the identity of the purchaser, or in the case of a return, full information may be necessary."[38] Although some courts

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[29] 550 U.S. 544 (2007).

[30] 556 U.S. 662 (2009).

[31] *Desousa v. Anupam Enters., Inc.*, No. 2:09-cv-504-FtM-29DNF, 2010 WL 2026114, at *3 (M.D. Fla. May 20, 2010) (denying motion to dismiss despite merely conclusory allegations, unsupported by any facts, that defendants knew of FACTA and violated it willfully); *Steinberg v. Stitch & Craft, Inc.*, No. 09-60660-CIV, 2009 WL 2589142, at *2-4 (S.D. Fla. Aug. 18, 2009) (denying motion to dismiss, finding that plaintiff sufficiently alleged willfulness by averring that "major credit card companies 'notified the merchants, including the Defendant, that the FACTA prohibited the printing of more than the last five digits of the credit/debit card number and/or the expiration dates associated with the credit/debit card account, and that they were required to comply with the FACTA," and that defendants refused to comply with the requirements because of the expense).

[32] *Sanders v. W & W Wholesale Inc.*, No. 11 C 3557, 2011 WL 4840978, at *2 (N.D. Ill. Oct. 12, 2011) ("Plaintiffs have not been allowed to conduct discovery in this case and cannot be expected to have any more detailed insight into the state of mind of individuals working for W & W at this juncture. While Plaintiffs' allegations, even if true, do not on their face conclusively show W & W acted willfully, they are sufficient at the motion to dismiss stage to plausibly suggest a willful violation of FACTA."); *Romano*, 2009 WL 2916838, at *3 ("ANI argues that Romano does not allege sufficient facts to indicate a willful violation of FACTA. There is, however, no requirement that a plaintiff provide such specificity.").

[33] *Buechler v. Keyco, Inc.*, No. WDQ-09-2948, 2010 WL 1664226, at *3 (D. Md. Apr. 22, 2010).

[34] *Desousa*, 2010 WL 2026114, at *2-3.

[35] *Id.* at *3.

[36] *Buechler*, *supra* note 33 at *3.

[37] *Vinton v. First Date Merch. Servs.*, No. 1:10-CV-312, 2010 WL 5834048, at *2 (W.D. Mich. Nov. 30, 2010), *report and recommendation adopted, opinion amended by*, 2011 WL 776135 (W.D. Mich. Mar. 1, 2011) (dismissing willfulness claim when plaintiff alleged merchant mistakenly provided merchant's receipt with full credit card number and expiration date to consumer); *Zaun v. J.S.H. Inc., of Faribault*, No. 10-2190 (DWF/JJK), 2010 WL 3862860, at *2-3 (D. Minn. Sept. 28, 2010) (dismissing willfulness claim, reasoning that plaintiff cannot allege willfulness, merely negligence, by alleging that merchant mistakenly gave plaintiff the merchant receipt bearing an expiration date); *Turner v. Matador Argentinian Steakhouse Corp.*, No. 08-60968-CIV, 2008 WL 4935445, at *2 (S.D. Fla. Nov. 18, 2008) (dismissing willfulness claim when plaintiff alleged that merchant gave plaintiff both the merchant and customer copies to plaintiff but mistakenly allowed plaintiff to retain the untruncated merchant copy).

[38] *Ehrheart v. Bose Corp.*, No. 07 Civ. 350, 2008 WL 64491, at *4 & n.4 (W.D. Pa. Jan. 4, 2008).

have suggested that merchant copies categorically cannot give rise to liability under FACTA,[39] the Southern District of New York directly rejected this argument, finding that a plaintiff adequately stated a FACTA claim by alleging that the merchant has a practice of handing unmasked merchant receipts to customers.[40]

At Class Certification

Denying Certification. At the class certification stage, a number of courts have denied certification, focusing on the potentially annihilative amount of damages that a defendant could incur, and the disproportionate relationship of such damages to the absence of actual economic injury suffered by the plaintiff and class members. Those courts have expressed concern that the potentially enormous aggregation of statutory damages threatens to violate the due process rights of defendants, and to have an "*in terrorem* effect," pressuring defendants to accept unfair settlements, even when meritorious defenses exist, to avoid facing the risk of ruinous liability. In the words of one court:

> [T]o grant the requested class relief would allow this Plaintiff, and his counsel, to dangle the Sword of Damocles over Defendant, without any showing of actual economic harm. . . . [T]he threat of annihilation associated with certification does not serve the purpose of the legislation, and moreover, is simply unnecessary to effectively enforce the Act and compensate victims of identity theft.[41]

Fourth Circuit Judge J. Harvie Wilkinson III expressed a similar concern, stating that "[i]t staggers the imagination to believe that Congress intended to impose annihilating damages on an entire company and the people who work for it for lapses of a somewhat technical nature and in a case where not a single class member suffered actual harm due to identity theft."[42] In recognition of this vulnerability, whereas many plaintiffs sought to define as large a class as possible, some plaintiffs' counsel have now taken to defining the putative class more narrowly, on geographic or other bases, in anticipation of the annihilation defense, to ensure that potential damages in the case, while substantial, will remain in the non-lethal zone.[43]

Additional factors have influenced courts to deny class certification. In at least one case, the court denied class certification based on expert testimony that printing the expiration date on an otherwise properly truncated receipt cannot possibly cause identity theft or other actual injury.[44] In some cases, courts have considered a defendant's prompt efforts to properly

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[39] *See, e.g., id.* at *4 n.4 ("The statute specifically excludes merchants' copies of receipts from the truncation requirement.").

[40] *Engel v. Scully & Scully, Inc.*, 279 F.R.D. 117, 125 (S.D.N.Y. 2011) (finding that plaintiff adequately pleaded a willful violation of FACTA by alleging that defendant had a practice of providing to customer either a merchant or a customer copy of the receipt – both of which were non-compliant receipts).

[41] *Leysoto v. Mama Mia I., Inc.*, 255 F.R.D. 693, 699 (S.D. Fla. 2009) (denying certification due to threat of annihilative damages); *Rowden v. Pacific Parking Sys., Inc.*, 282 F.R.D. 581, 587 (C.D. Cal. 2012) (same).

[42] *Stillmock*, *supra* note 16 at 278-80 (Wilkinson, J., concurring).

[43] *See, e.g., Evans v. U-Haul Co.*, No. CV 07-2097-JFW, 2007 U.S. Dist. LEXIS 82026, at *15-16 (C.D. Cal. Aug. 14, 2007) ("Plaintiff's counsel attempts to avoid these large damage numbers, and thus avoid a denial of this class certification motion, by defining the classes in this motion as including only transactions at the four stores from which Defendant received receipts. However, this attempt falls short for two reasons. First, even limiting the classes to the four stores visited will still result in a damage award that is out of proportion given the lack of any actual harm. . . . Second, certifying classes that are limited to Defendant's four stores from which Plaintiff received receipts would defeat the purposes of class certification under Rule 23(b)(3) of efficiency and economy . . . ."); In *In re Toys "R" Us-Delaware, Inc. FACTA Litig.*, No. MDL 08-01980 MMM, 2010 WL 5071073, at *13 (C.D. Cal. Aug. 17, 2010) (following the reasoning of *U-Haul*).

[44] In *In re Toys "R" Us-Delaware, Inc. FACTA Litig.*, *supra* note 43, the district court found, based on expert testimony, that printing the first four to six digits of the card number did not increase the risk of identity theft to consumers because those numbers merely identify the card issuer. The court denied certification for lack of superiority, finding that the actual harm was disproportionate to the enormity of the potential damages – a theory that the Ninth Circuit later rejected in *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010). After *Bateman*, the district court reversed itself and certified the class. *In re Toys "R" Us-Delaware, Inc. FACTA Litig.*, 295 F.R.D. 438 (C.D. Cal. 2014). Defendants may still wish to employ expert testimony to show that printing the first four digits of a cardholder's account number would not increase the risk of identity theft (1) in other circuits where disproportion between the alleged harm and potential damages is still deemed relevant to class certification, and (2) at the damages phase in the event of trial.

truncate receipts after learning of the non-compliance (also known as the "good faith" defense). For example, in a FACTA truncation case against a municipal parking garage, the court relied on the defendant's compliance, albeit somewhat delayed, noting that, "after learning of the possible FACTA violations, Laguna Beach eventually took corrective measures."[45]

In other cases, courts have considered the fact that denial of class certification would not prevent persons who actually suffered injury from bringing individual claims for compensatory damages, or persons who suffered no actual injury from bringing individual actions to recover statutory damages plus attorneys' fees. Under Federal Rule of Civil Procedure 23(b)(3)(A), in determining superiority, courts are to consider "the class members' interests in individually controlling the prosecution or defense of separate actions." A number of courts[46] have found the class action mechanism not to be superior to all other methods of adjudicating FACTA claims because the statute "provides a specific, individual remedy for aggrieved parties in that it allows any person who is the victim of a statutory violation to recover between $100 and $1000," plus fees and punitive damages.[47] "These remedies give individuals truly harmed by a FACTA violation a more than sufficient incentive to bring an action even if the amount of recovery is difficult to quantify or relatively small."[48]

Finally, some courts have denied certification for lack of ascertainability or predominance on the ground that "an individual, fact-specific inquiry is necessary to determine whether every member of the proposed class is properly considered a consumer" entitled to sue under the FCRA.[49] Only "consumers," defined as "individuals," possess a private right of action under FCRA – "not business customers."[50] These courts reason that "for a class action under FACTA to proceed, every member of the class must have used a personal credit or debit card, rather than a business or corporate card," requiring each member of the class to prove his or her consumer status and negating the efficiencies of a class action.[51] Similarly, courts have denied class certification for lack of typicality because the class representative used a business card and, therefore, is subject to a unique defense.[52]

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[45] *Rowden*, *supra* note 41 at 587; *Leysoto*, *supra* note 41 at 697 (noting that the damages, compared to the actual economic injury, were probative of whether a class action was superior, in part, because "this lawsuit has already achieved FACTA's public policy goal in bringing Plaintiff's receipt system into compliance with federal law").

[46] *See, e.g.*, *Soualian v. Int'l Coffee & Tea LLC*, No. CV 07-502 RGK, 2007 U.S. Dist. LEXIS 44208, at *11 (C.D. Cal. June 11, 2007); *Hammer v. JP's Southwestern Foods LLC*, No. 08-00339, 2012 U.S. Dist. LEXIS 102713, at *4 (W.D. Mo. July 24, 2012) ("[S]ince FACTA provides plaintiffs with both costs and reasonable attorneys' fees in a successful action, there are adequate alternatives for consumers to bring individual suits under FACTA."); *Singletery v. Equifax Info. Servs., LLC*, No. 2:09-cv-489-TMP, 2011 WL 9133115 (N.D. Ala. Sept. 22, 2011) (refusing to certify FCRA class because, among other things, financial incentives to pursue individual litigation under §§ 1681n and 1681o rendered a class action proceeding superior), *report and recommendation adopted*, No. 2:09-CV-0489-SLB, 2012 WL 4329273 (N.D. Ala. Sept. 18, 2012), *aff'd in part*, 540 F. App'x 939 (11th Cir. 2013) (holding in part that the certification issue was moot); *Gist v. Pilot Travel Ctrs., LLC*, No. 5:08-293-KKC, 2013 U.S. Dist. LEXIS 113185, at *22 (E.D. Ky. Aug. 12, 2013) (holding a class action was not superior, in part, because "FACTA does provide plaintiffs with both costs and reasonable attorney fees in a successful action. This statutory right to recover fees makes individual suits a more adequate alternative") (hyphens removed); *Medrano v. Modern Parking, Inc.*, No. CV 07-2949 PA, 2007 U.S. Dist. LEXIS 82024, at *17 (C.D. Cal. Sept. 17, 2007) ("[D]enial of class certification . . . does not prevent any of Defendants' customers who may have suffered actual damages as a result of Defendants' conduct from proceeding with individual cases to recover those damages. Likewise, any individual who feels that his or her rights under FACTA have been violated but who has not suffered any actual harm can, as Plaintiff has, file a lawsuit to recover statutory damages and, if successful, attorney's fees."); *Grimes v. Rave Motion Pictures Birmingham, L.L.C.*, 264 F.R.D. 659, 669 (N.D. Ala. 2010) ("Individual actions are not only feasible, but they are much more manageable than a class action would be, especially where there might be victims in many states.").

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[47] *Rowden*, *supra* note 41 at 586 (citing 15 U.S.C. § 1681n).

[48] *Id.*

[49] *See*, *e.g.*, *Rowden*, *supra* note 41 at 585 (denying certification, in part, for lack of ascertainability); *Najarian v. Avis Rent A Car Sys.*, No. CV 07-588-RGK, 2007 WL 4682071, *3-4, (C.D. Cal. June 11, 2007) (denying motion for class certification, in part, for lack of predominance because of individual inquiries into whether class members are "consumers").

[50] *Rowden*, *supra* note 41 at 585 (citing 15 U.S.C. § 1681(a)) (for purposes of FACTA, "consumer" means an "individual").

[51] *Id.*

[52] *Pezl v. Amore Mio, Inc.*, 259 F.R.D. 344, 349 (N.D. Ill. 2009) (denying certification for lack of typicality because plaintiff admitted card was issued to a business).

Granting Certification. Other courts, however, including the Fourth, Seventh, and Ninth Circuits, have certified classes, either rejecting the annihilation and good faith defenses and other attacks on certification, or deciding that such issues should be addressed after trial, if liability is found, in the damages phase of the case.[53] In *Bateman v. American Multi-Cinema, Inc.*, the Ninth Circuit reversed and remanded denial of a FACTA plaintiff's motion for class certification, holding that the district court abused its discretion by finding superiority lacking on the basis that potential damages of $29 million to $290 million would be enormous and disproportionate to any actual harm suffered.[54] The court reasoned that "whether the potential for enormous liability can justify a denial of class certification depends on congressional intent" and that "allowing consideration of the potential enormity of any damages award would undermine the compensatory and deterrent purposes of FACTA":

> [T]he reason that damages can become enormous under FACTA 'does not lie in an 'abuse' of Rule 23; it lies in the legislative decision to authorize awards as high as $1,000 per person,' combined with multiple violations of the statute. . . . [Yet] [n]othing in the plain text of the statute or in its legislative history suggests that Congress intended to place a cap on potentially enormous statutory awards or to otherwise limit the ability of individuals to seek compensation [even though] the Clarification Act represented a prime opportunity for Congress to [do so]. Indeed . . ., when Congress has been concerned about the enormity of potential liability in cases like this one, it has placed caps on aggregate liability.[55]

The court also rejected a defense to certification based on prompt compliance with the truncation provision after learning of the violation, holding that "the district court's consideration of [defendant]'s post-complaint good faith compliance was inconsistent with congressional intent in enacting FACTA. Congress did not include any safe harbor or otherwise limit damages for good faith compliance with the statute after an alleged violation."[56]

Similarly, the Fourth Circuit, in an unpublished decision, rejected predominance and superiority challenges to a putative FACTA class.[57] On predominance, the court held:

> While we agree with the district court's implicit holding that statutory damages under § 1681n(a)(1)(A) are to be awarded on a per-consumer basis [rather than a per-receipt basis], we also agree with Plaintiffs that the district court erred in concluding that individual issues of damages would predominate over issues common to the class . . . . [W]here, as here, the qualitatively overarching issue by far is the liability issue of the defendant's willfulness, and the purported class members were exposed to the same risk of harm every time the defendant violated the statute in the identical manner, the individual statutory damages issues are insufficient to defeat class certification under Rule 23(b)(3).[58]

Plaintiffs also were held to have met the superiority requirement because the panel found that the low amount of statutory damages available, even with the potential for punitive damages and the availability of attorneys' fees and costs, was insufficient to give the plaintiffs an incentive to bring individual actions in a way that would be comparable to a class action.[59] Addressing the distinction between consumer and business plaintiffs, and in contrast to the cases noted above, other courts have certified FACTA classes despite defendants' assertion that individual questions, such as whether each class member used a personal or business card, would undermine superiority.[60]

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[53] *Bateman*, *supra* note 8 at 710-11; *Stillmock*, *supra* note 16 at 272-76; *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953-54 (7th Cir. 2006).

[54] *Bateman*, *supra* note 8 at 710-11.

[55] *Id.* at 722.

[56] *Id.* at 723.

[57] *Stillmock*, *supra* note 16 at 272-76.

[58] *Id.* at 272-73.

[59] *Id.* at 274-75.

[60] *See, e.g., Shurland v. Bacci Café & Pizzeria on Ogden Inc.*, 259 F.R.D. 151 (N.D. Ill. 2009) (certifying FACTA class despite defendant's argument that the consumer versus business distinction defeated superiority, finding that "isolating 'consumer' cardholders from entity cardholders is unlikely to prove insurmountable for class identification purposes"); *Beringer v. Standard Parking Corp.*, Nos. 07 C 5027, 07 C 5119, 2008 WL 4390626, at *6 (N.D. Ill. Sept. 24, 2008)

At Summary Judgment

A court may also grant summary judgment, disposing of the action or limiting the scope of the liability to a class.[61] For example, courts have often decided on summary judgment whether the plaintiffs are consumers or businesses, and thus whether they are entitled to sue. The Northern District of Illinois granted a defendant's motion for summary judgment when the class representative admitted that he used a business card.[62] Similarly, the Western District of Missouri granted summary judgment to defendants as members of a class who used a card issued to a business or who used a personal card for a business-related purpose.[63]

However, plaintiffs also have benefited from summary judgment, with courts either denying defendants' motions for summary judgment or granting plaintiffs' motions.[64] For example, in contrast to the *Pezl* and *Hammer* decisions, the Eastern District of Wisconsin held on summary judgment that a consumer who uses a consumer card for business purposes may bring a FACTA action, finding that "[t]he purpose of [the consumer's] card use is irrelevant" because "the danger of identity theft by [defendant's] FACTA violation ran to [the consumer] and not a corporate entity."[65]

In many early FACTA cases, defendants took the position that they were unaware of the Act's truncation requirement. While that defense may have had some teeth back then, today, with the Act now 10 years old and given the widespread publicity surrounding the law, including industry advisories and even the imposition of compliance requirements by the major credit and debit card companies, it has become increasingly difficult for a merchant to assert that it was unaware of FACTA's existence or requirements, and more likely that disregard of the Act's requirements will be deemed to be reckless, if not knowing. For example, in a 2013 decision, the Eastern District of Wisconsin rejected the defendant's argument on summary judgment that it had no knowledge of the Act's requirements because plaintiff showed that defendant actually had received numerous notices from its payment processor about Visa and MasterCard truncation rules, and state and federal truncation law, and defendant signed a payment processor contract stating that it knew the Visa and MasterCard rules applied.[66] Thus, the court found a jury reasonably could conclude that the defendant acted recklessly, and therefore willfully, as to FACTA's requirements.[67]

STATE TRUNCATION LAWS

Numerous states have enacted statutes that purport to regulate printing account numbers and expiration dates on credit and debit card receipts, including requiring truncation of *merchant* copies of receipts and non-electronic receipts, or imposing greater fines or even criminal penalties for violations.[68] But in enacting

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(certifying class despite superiority challenge based on the consumer versus business distinction, because the "problem" was not "insurmountable"); *cf. Friedman-Katz v. Lindt & Sprungli (USA), Inc.*, 270 F.R.D. 150, 156 (S.D.N.Y. 2010) (rejecting defendant's argument that the class definition failed to sufficiently allege typicality because it failed to distinguish between consumers and businesses, finding plaintiff alleged she was a consumer).

[61] *See, e.g.*, *Broderick v. 119TCbay, LLC*, 670 F. Supp. 2d 612, 614 n.3, 620-21 (W.D. Mich. 2009) (granting summary judgment to hotel defendant that printed the first digit and the last four digits of plaintiff's credit card number on a receipt because it did not print more than five digits of card number).

[62] *Pezl*, *supra* note 52 at 347 (granting summary judgment to defendant when plaintiff admittedly used a business card, concluding that FACTA provides a private right of action only to individual consumers to enforce the truncation provision).

[63] *Hammer*, *supra* note 46 at 1163-64 (granting defendant's motion for partial summary judgment as to non-consumer class members).

[64] *See, e.g.*, *Aliano v. Joe Caputo & Sons – Algonquin, Inc.*, No. 09 C 910, 2011 WL 1706061 (N.D. Ill. May 5, 2011) (denying defendant's motion for summary judgment and noting that plaintiff "received a receipt from the store that showed the first six digits and last four digits of her credit card number, which violates the Fair and Accurate Credit Transactions Act . . . ."); *Hammer*, *supra* note 46 at 1166 n.5 (granting plaintiff partial summary judgment on liability, noting that "this truncation does not satisfy the requirements of FACTA, as both the first four and last four digits of the credit card number appeared on the 'truncated' receipts, exceeding the number required by FACTA").

[65] *Armes v. Sogro, Inc.*, 932 F. Supp. 2d 931, 938 (E.D. Wis. 2013) (denying defendant's motion for summary judgment, in part, on this ground).

[66] *Id.* at 939 (rejecting defendant's lack of knowledge defense, but nonetheless denying cross-motions for summary judgment); *Shurland*, *supra* note 60 at 156-57 (denying defendant's motion for summary judgment on the same ground).

[67] *Sogro*, *supra* note 65 at 939.

[68] *See, e.g.*, Alaska Stat. § 45.48.750 (2013) (same as FACTA, except prohibits printing more than the last four digits on receipts and provides a right of action only for those plaintiffs

FACTA, Congress accorded the account truncation provisions broad preemption over state laws, providing that "[n]o requirement or prohibition may be imposed under the laws of any state with respect to the conduct required by the specific provisions of [15 U.S.C.] section 1681c(g)" – the account truncation provision.[69]

The Ohio Court of Appeals applied this provision to preempt an Ohio state truncation statute that required truncation of expiration dates on electronically printed receipts.[70] The court explained that "[t]he language that Congress employed in the exception evidences a broad preemptive purpose and expresses its intent that Section 1681c(g) preempt any state law imposing a requirement or prohibition concerning the conduct Section 1681c(g) requires: the truncation of credit and debit card information on electronically printed receipts provided to a cardholder."[71] In addition, the court explained that the provision preempts not only "a state law that specifically addresses the conduct at issue, but also sweeps within its broad preemptive scope the [Ohio Consumer Sales Practices Act governing unfair or deceptive acts or practices], a law of general application, to the extent that the state consumer protection laws provide for a cause of action premised upon conduct within Section 1681c(g)'s boundaries."[72] Similarly, in *Shlahtichman v. 1-800 Contacts, Inc*., the Seventh Circuit noted in *dicta* that the preemption "provision forecloses regulation by the States of any conduct regulated by the individual provisions of the statute, including the truncation provision."[73]

Courts have not directly addressed whether the truncation preemption provision completely overrides state truncation laws that impose supplemental or greater requirements – such as truncation of non-electronic receipts or merchants' copies of receipts. But the legislative history favors preemption in those circumstances. Congress explained:

> [T]he section establishes national uniform standards and preempts State law with respect to the truncation of credit card and debit card numbers . . . . [N]o state or local jurisdiction may add to, alter, or affect the rules established by the statute or regulations thereunder in any of these areas . . . . All of the statutory and regulatory provisions establishing rules and requirements governing the conduct of any person in these specified areas are governed solely by federal law and any State action that attempts to impose requirements or prohibitions in these areas would be preempted.[74]

Thus, state laws that "add to, alter, or affect" the federal FACTA truncation provision almost certainly will be held to be preempted.

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with actual damages, along with civil penalties of up to $3,000); Cal. Civ. Code § 1747.09 (Deering 2014) (same as FACTA, except applies to receipts retained by merchants); 815 Ill. Comp. Stat. 505/2NN (LexisNexis 2013) (same as FACTA, except prohibits printing more than four digits on the receipt and provides that a violation is deemed a deceptive trade practice); Mich. Comp. Laws § 445.903(1)(ii) (LexisNexis 2013) (same as FACTA, except prohibits printing more than the last four digits on receipts); Nev. Rev. Stat. Ann. § 597.945 (LexisNexis 2013) (same as FACTA, except applies to receipts retained by merchants and provides for civil penalties of $500 for the first violation and up to $4,500 in total penalties thereafter); Ohio Rev. Code Ann. § 1349.18 (LexisNexis 2013) (same as FACTA, except makes violation an unfair or deceptive act or practice); S.C. Code Ann. § 16-13-512 (2013) (same as FACTA, except makes violation a crime); Tenn. Code Ann. § 47-18-126 (2013) (same as FACTA, except applies to receipts retained by merchants); Tex. Bus. & Com. Code Ann. § 502.002 (LexisNexis 2013) (same as FACTA, except prohibits printing more than the last four digits on receipts, provides for civil penalties of up to $500 per month, and prohibits certification of class actions); Va. Code Ann. § 6.2-429 (LexisNexis 2013) (same as FACTA, except prohibits printing more than the last four digits on receipts that are handwritten, or imprints, or copies of cards); Wash Rev. Code. § 63.14.123 (LexisNexis 2013) (same as FACTA, except applies to receipts retained by merchants).

[69] 15 U.S.C. § 1681t(b)(5)(A); *see also* FACTA, Pub. L. No. 108-159, § 711, 117 Stat. 1952, 2011 (Dec. 4, 2003).

[70] *Ferron v. RadioShack Corp.*, 886 N.E.2d 286, 292 (Ohio Ct. App. 2008) (vacating and remanding for evidentiary hearing on whether the point-of-sale terminals were put into use before or after the FACTA truncation provision went into effect and explaining that violations occurring on terminals put in use after FACTA would be preempted).

[71] *Id.* at 291.

[72] *Id.*

[73] *Shlahtichman*, *supra* note 3 at 803 (holding that plaintiff waived the "argument that construing the truncation provision not to apply to e-mail receipts is inconsistent with the FCRA's preemption provision" and "that if e-mail receipts are not covered by the federal statute, then States will be free to impose their own truncation requirements on e-mail receipts, producing the very crazy quilt of State laws that FCRA's preemption provision was meant to avoid").

[74] 149 Cong. Rec. E2512, E2518-19 (daily ed. Dec. 9, 2003) (statement of Rep. Oxley).

CARD NETWORK RULES AND THE PCI DSS

In addition to complying with FACTA, merchants also should pay heed to their card network rules and the Payment Card Data Security Standard (PCI DSS).

For example, MasterCard and Visa require in their network rules that all but the last four digits of the cardholder account number be masked on the customer's copy of an electronically generated receipt.[75] MasterCard requires masking the expiration date on both the customer *and* merchant copies of receipts, while Visa requires masking on only customer receipts.[76] Although there is no provision in the rules by which the network can directly fine a merchant,[77] as the networks have privity – and thus enforcement authority – only over their members (which include merchant acquiring banks) – acquiring banks' agreements with merchants include provisions under which the merchant provides indemnification for an acquirer's loss due to a merchant's violation of networks' rules.[78] Thus, if an acquiring bank is fined by a network due to a merchant's violation of the account truncation provisions of the network's rules, the merchant may be required to indemnify the acquiring bank and, in some cases, the acquiring bank may even increase the fine on the merchant above what the network imposes.[79]

The network rules include tables of fines applicable to, among other things, truncation violations.[80] Visa's fines range from $1,000 (for the first violation) to $25,000 (for the fourth violation) in the 12 months after the merchant is notified – while granting Visa discretion to impose greater fines for five or more violations in a 12-month period.[81] The Visa rules also impose an additional fine equal to all previous fines in the current 12-month period if the member violated any of the Visa rules in the previous 12-month period and the fines in the current period total $25,000 or more.[82] Willful violations are subject to even greater fines.[83] MasterCard's rules also impose penalties for violations, including truncation violations, providing for fines up to: (1) $20,000 for the first violation to as much as $100,000 per violation for four or more violations in a year; (2) $1,000 per occurrence (by affected device or transaction)

[75] Visa International Operating Regulations, Suppression of Account Information, at 442 (Oct. 15, 2013), http://usa.visa.com/download/merchants/Public-VIOR-15-October-2013.pdf ("In the U.S. Region, *effective through 30 September 2014***,** the Account Number must be disguised or suppressed on the Cardholder's copy of the Transaction Receipt, except for the final 4 digits. . . . In the U.S. Region, for terminals installed after 1 July 2003, the expiration date must not appear or must be disguised or suppressed on the Cardholder's copy of the Transaction Receipt."); MasterCard Security Rules and Procedures, Merchant Edition, 3.11.4 Primary Account Number Truncation and Expiration Date Omission, at 3-8 (Aug. 30, 2013), http://www.mastercard.com/us/merchant/pdf/SPME-Entire_Manual_public.pdf ("The Cardholder and Merchant receipts generated by all electronic POS Terminals . . . must omit the Card expiration date. In addition, the Cardholder receipt generated by all electronic POS Terminals . . . must reflect only the last four (4) digits of the PAN. . . . MasterCard strongly recommends that if an electronic POS Terminal generates a Merchant copy of the Cardholder receipt, the Merchant copy should also reflect only the last four (4) digits of the PAN . . . ."). The other major networks – Discover and American Express – do not publish their rules, but make them available to participating merchants through their acquiring banks. At a minimum, merchants accepting American Express and Discover cards must comply with FACTA and PCI DSS. *See American Express Merchant Reference Guide – U.S.* (Oct. 2013), www209.americanexpress.com/merchant/singlevoice/singlevoiceflash/USEng/pdffiles/MerchantPolicyPDFs/US_%20RefGuide.pdf; Discover Information Security & Compliance, http://www.discovernetwork.com/merchants/data-security/disc.html.

[76] *Id*.

[77] Visa Rules at 69; MasterCard Rules, 5.2.

[78] Visa Rules at 69 ("All fines imposed by Visa are fines imposed on Members. A Member is responsible for paying all fines, regardless of whether it absorbs the fines, passes them on, or increases them in billing its customer (e.g., Cardholder, Merchant). A Member must *not* represent to its customer that Visa imposes any fine on its customer."); MasterCard Rules. 5.2 Merchant and Sub-Merchant Compliance with the Standards, at 5-4 (Dec. 13, 2013) ("MasterCard Rules"), http://www.mastercard.com/us/merchant/pdf/BM-Entire_Manual_public.pdf ("Failure by a Merchant, Sub-merchant, or Acquirer to comply with any Standard may result in chargebacks, an assessment to the Acquirer, and/or other disciplinary action."); *id*. 5.2.1 Non-compliance Assessments, at 5-5 ("If the Corporation becomes aware of a Merchant's non-compliance with any Standard, the Corporation may notify the Acquirer and may assess and/or otherwise discipline the Acquirer for such non-compliance, and the Acquirer must promptly cause the Merchant to discontinue the non-compliant practice.").

[79] Visa Rules at 69.

[80] The Visa Rules do not define "violation."

[81] *Id.* at 68.

[82] *Id.*

[83] *Id.* at 70.

for the first 30 days to as much as $8,000 per occurrence after 90 days; or (3) $0.30 per affected card.[84]

The networks grant themselves wide discretion over whether to investigate, when to find a violation, and how much to fine an acquirer (which, in turn, may fine the merchant) within the amounts specified in the fine tables.[85] The acquirer has a right to appeal findings of violations, and fines imposed, by the network.[86] But the acquirer must pay Visa $5,000, and "may" pay $500 under MasterCard's rules, for the right to appeal.[87] Under Visa's rules, the acquirer, and thus the merchant, receives that fee back only if the appeal is successful.[88] In extreme cases, the network may suspend, or even terminate, the merchant from participating in a particular network by requiring the acquirer to terminate the merchant agreement, as in the case where the merchant ignored the network or acquirer's requests to comply with the account truncation requirements.[89]

In addition, the PCI DSS also applies to merchants through their contracts with acquiring banks. These "are technical and operational requirements" established by the PCI Security Standards Council "to protect cardholder data."[90] The Council is made up of networks, such as American Express, Discover, MasterCard, and Visa, which have agreed to "incorporate the PCI DSS as the technical requirements of each of their data security compliance programs."[91] However, it bears noting that the PCI DSS is not entirely coextensive with either FACTA or some of the networks' security rules. On the one hand, the PCI DSS permits merchants to display more digits of the account number than the FACTA truncation requirement or the Visa and MasterCard rules, stating that the "first six and last four digits are the maximum number of digits to be displayed."[92] On the other hand, it is more restrictive than FACTA and the network rules in several respects. For example, the PCI DSS requires merchants to mask the card account number when displayed on computer screens, faxes, and printouts.[93] It also applies not only to customers but to anyone without a "legitimate business need" to view the full account number.[94] Merchants should be aware that they risk significant liability under FACTA or fines under the card network rules if they comply solely with the PCI DSS.

FACTA SAFEGUARDS

There are a number of steps that a business can, and should, take to discover any current or past FACTA non-compliance, reduce the likelihood of future FACTA violations, lessen exposure from past, present, or future violations, and be positioned to respond to class action

[84] MasterCard Rules, 2.1.3 Non-compliance Categories, at 2-2; *id.*, 2.1.4 Non-compliance Assessments, at 2-3 to 2-4; MasterCard Security Rules, *supra* note 78, 1.1 Compliance with the Standards, at 1-1 (applying "category B" non-compliance category to security rules, including the account number truncation rule). The MasterCard Rules do not define "violation" or "occurrence."

[85] Visa Rules, at 64 ("At Visa's sole discretion, at any time, Visa may, either itself or through an agent . . . [i]nvestigate, review, audit, and inspect a Member, or the Member's agents or Merchants . . ."); *id.* at 67 ("The *Visa International Operating Regulations* contain enforcement mechanisms that Visa may use for violations of the *Visa International Operating Regulations* . . . . Visa may levy fines and penalties as specified in the *Visa International Operating Regulations* . . . . These procedures and fines are in addition to enforcement rights available to Visa under other provisions of the *Visa International Operating Regulations*, the applicable Certificate of Incorporation and Bylaws, or through other legal or administrative procedures."); MasterCard Rules, 2.1.2 ("In lieu of, or in addition to, the imposition of a non-compliance assessment, the Corporation, in its sole discretion, may require a Customer to take such action and the Corporation itself may take such action as the Corporation deems necessary or appropriate to ensure compliance with the Standards and safeguard the integrity of the MasterCard system.").

[86] *Id.* at 70.

[87] *Id.*; MasterCard Rules, 2.1.6 Review Process, at 2-6.

[88] *Id.* at 70. The rules do not specifically address whether the merchant has a right to appeal when the member passes a fine onto it, or to appeal if a member elects not to appeal a network fine. Under the Visa rules, the member has the right to appeal within 30 days of the member's receipt of the notification of the violation or fine. Visa Rules, at 70-71. Merchants with sufficient market power may include an express provision in the merchant agreement that requires the member to assist the merchant in filing an appeal.

[89] *Id.* at 71-72, 367; MasterCard Rules, 7.6.4. Authority to Terminate Merchant Agreement or ATM Owner Agreement, at 7-13.

[90] How to Be Compliant, Getting Started with PCI Data Security Standard Compliance, https://www.pcisecuritystandards.org/merchants/how_to_be_compliant.php.

[91] About Us, About the PCI Security Standards Council. www.pcisecuritystandards.org/organization_info/index.php.

[92] PCI DSS v.3.0, Requirement 3.3, at 37 (Nov. 2013), www.pcisecuritystandards.org/documents/PCI_DSS_v3.pdf.

[93] *Id.*

[94] *Id.*

FACTA litigation, should it arise. These steps not only will reduce the potential for future lawsuits and mitigate any potential damage award in such litigation – particularly by reducing the likelihood of a violation being found to have been willful or reckless – but also may assist defense lawyers in negotiating an early settlement of FACTA litigation by demonstrating the weakness of the plaintiff's claim of a willful violation. The steps we suggest are as follows:

- Review all current register and terminal supply, software, and service contracts to determine whether vendors have been made responsible for FACTA compliance. If they have not, seek to amend the contracts (e.g., through contract extensions) to clearly (i) delegate responsibility to them for ensuring that terminals properly truncate receipts in compliance with FACTA requirements, (ii) impose liability and defense costs on vendors should they fail to do so, and (iii) be named as an additional insured on vendors' insurance policies.

- Prospectively, include similar provisions in all new contracts with vendors and service providers.

- Review current insurance policies to determine whether they provide coverage for defense of FACTA claims and, if they do not, explore the availability and cost of securing such coverage.

- Adopt a written FACTA compliance policy.

- Routinely, and preferably on a quarterly basis, check all terminals to confirm that they are operating in compliance with FACTA truncation requirements.

- Inform employees of FACTA's truncation requirements and employees' responsibility to promptly inform management of any instance where they observe that receipts issued to consumers are not properly truncated or that merchant copies violate the company's compliance policy.

- If a potential FACTA violation is discovered, (i) take immediate action to determine the extent of non-compliance (i.e., how many registers are issuing non-compliant receipts), the reason for the non-compliance (e.g., intentional failure to correctly program registers, or error by the manufacturer or service provider), the time period during which non-compliant receipts were issued, and the number of non-compliant receipts that were issued to consumers; (ii) immediately take improperly programmed registers out of service and maintain them in quarantine until they can be examined, pertinent evidence is preserved, and counsel determines that they can be adjusted and returned to service; (iii) verify that all other registers are properly truncating account numbers; (iv) review contracts with service providers to determine the scope of their responsibility for the violation and its consequences, and any notice requirements; and (v) review insurance policies to determine the extent of any coverage and applicable notification requirements. These actions should be taken under the supervision of counsel in order to maintain all available privileges that may apply (e.g., attorney-client privilege and privilege for voluntary self-corrective actions), and to avoid spoliation and other evidence-related issues that could arise in ensuing litigation.

CONCLUSION

Identity theft is a significant, and growing, worldwide problem. In this environment, FACTA litigation shows no sign of abating and the risks will continue to be substantial. Therefore, FACTA should be not just feared, but shown a healthy degree of respect through the adoption of appropriate and consistently applied compliance and due diligence policies and practices. ■