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Merchants Beware: Federal Law Prohibits Printing Any Portion of Expiration Date on Credit, Debit Card Receipt

Litigation and Dispute Resolution Client Alert

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On January 24, 2012, the U.S. Court of Appeals for the Third Circuit held that it is a violation of the Fair and Accurate Credit Transactions Act (FACTA) to include **any** portion of a credit or debit card's expiration date on an electronically printed customer receipt. Although the defendant in that case was spared from having to pay statutory damages, punitive damages, or attorneys' fees to the plaintiff, the Court's opinion suggests that businesses that make such a mistake in the future may not be so fortunate. All businesses—large or small—that accept payment by credit or debit card should carefully review their policies concerning credit and debit card sales to ensure that they are in full compliance with FACTA and should seriously consider the implications of this decision. Financial institutions or other businesses that provide point-of-sale terminals to merchants should also take note of the Third Circuit's reasoning.

The plaintiff in *Long v. Tommy Hilfiger U.S.A., Inc.*, ___ F.3d __ (3d Cir. Jan 24, 2012), purchased a \$25 necktie at a Hilfiger store in Pennsylvania using his credit card. The electronically printed receipt provided to him by the store identified the last four digits of his credit card number and the month, but not the year, of the card's expiration date. Specifically, the credit card number was listed as "#####9802," while the expiration date was listed as "EXPIRY: 04/##." Two months later, the plaintiff asserted a putative nationwide class action against Hilfiger seeking statutory damages, punitive damages, and attorneys' fees for violating FACTA by not fully redacting the expiration date from the credit card receipt.

FACTA—enacted in 2003 in an effort to prevent identity theft—provides in pertinent part: "[N]o person that accepts credit cards or debit cards for the transaction of business shall print more than the last five 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 15 U.S.C. § 1681c(g)(1). The statute imposes civil liability for violations of the law, but the available remedies are dependent on whether the violation was negligent or willful. Liability for negligent violations is limited to actual damages, but if the violation is deemed willful, the statute allows either actual damages or statutory damages between \$100 and \$1000 (plus recovery of attorneys' fees), with the possibility of punitive damages. 15 U.S.C. § 1681n(a).

¹ This subsection is expressly limited "to receipts that are electronically printed, and [does] 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." 15 U.S.C. § 1681c(g)(2).

The lower court accepted Hilfiger's argument that merely printing the month of the credit card's expiration date did not constitute a violation of FACTA's prohibition on printing "the expiration date" on the receipt and dismissed the plaintiff's complaint for failure to state a claim. The Third Circuit disagreed and concluded that Hilfiger had, in fact, violated FACTA. Writing for the unanimous panel, Circuit Judge Maryanne Trump Barry stated:

Taking Hilfiger's argument to its logical conclusion, a merchant would not violate FACTA so long as it redacted even a single number from either the month or year of the card's expiration date. Furthermore, different merchants could each choose to redact different portions of the expiration date, making it possible to ascertain the entire expiration date from multiple receipts. This, of course, would be inconsistent with the statute's objective of preventing identity theft and a result certainly not intended by Congress.

Nevertheless, the Court found that Hilfiger's violation of the statute was only negligent, as opposed to willful, because it was not "objectively unreasonable" for Hilfiger to read the statute as allowing the expiration date to be truncated as opposed to completely eliminated from the receipt. The court noted that "there was no guidance from the federal courts of appeal on this issue" and that the handful of district court opinions addressing similar FACTA violations were "not directly on-point because they involve[d] merchants who, unlike here, printed the entire expiration date." Because it was undisputed that the plaintiff had not suffered any actual damages as a result of Hilfiger's violation of FACTA, the Court affirmed the lower court's dismissal of the plaintiff's complaint.

Although this was a victory for Hilfiger, the Court's decision suggests that, going forward, merchants who are sued for identical, post-January 24, 2012 violations of FACTA could face liability for willfully violating the statute, and might risk an award against them of statutory damages, punitive damages, and attorneys' fees. Fortunately, there is an apparently easy fix for merchants: completely remove the expiration date from electronically printed credit and debit card receipts.

Patton Boggs would be pleased to assist any business or financial institution that has questions or concerns about FACTA compliance. In situations such as this, an ounce of prevention may truly be worth a pound of cure. Please direct any questions or requests on this issue to Jason Rockwell, Justin Strohlic, or Brendan Walsh.

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