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The Seventh Circuit Rules That Electronic Confirmations of Internet Transactions Are Not Actionable Under FACTA

Client Alert

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In a ruling that will have far reaching implications for the ever-increasing number of companies transacting business over the Internet, the United States Court of Appeals for the Seventh Circuit recently ruled, in *Shlahtichman v. 1-800 Contacts, Inc.*, that The Fair and Accurate Transactions Act, 15 U.S.C. § 1681c(g) ("FACTA"), does *not* apply to electronic displays or e-mail confirmations of Internet transactions. Case No. 09-4073 (7th Cir. Aug. 10, 2010).

FACTA, which is part of the Fair Credit Reporting Act, was passed in 2003 in order to curb "low-tech" means of identity theft and credit card fraud such as "dumpster diving." To that end, FACTA provides that "[n]o person that accepts credit 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 sale or transaction." A willful violation of FACTA could result in the imposition of up to $1,000 in statutory damages without the need to prove any actual damages.

Due to confusion of whether FACTA required truncating the credit or debit card number to the last five digits *and* masking the card's expiration date, hundreds of class action lawsuits were filed despite the lack of any actual injuries (*i.e.*, credit card fraud or identity theft). The epidemic of FACTA lawsuits, many of which were based solely on the display of expiration dates, became so rampant that, in May 2008, Congress passed the Credit and Debit Card Receipt Clarification Act in order "to rescue merchants that had included expiration dates on receipts from civil FACTA liability."

Spurred on by the ever-increasing volume of business conducted on-line (the Court noted in its opinion that "retail sales via the Internet reached $56 billion in the United States in [2003]"), plaintiff's lawyers turned to the Internet in hopes of finding more fertile ground for class action lawsuits. In *Shlahtichman*, plaintiff alleged that, after using his credit card (on June 2, 2009) to purchase contact lenses over the Internet, he received an e-mail confirming his transaction which he alleged violated FACTA because it displayed the expiration date of his credit card (the Clarification Act only insulates merchants from expiration date liability for receipts printed prior to June 3, 2008). Although suffering no actual damages, Shlahtichman sought, on behalf of himself and a class of similarly situated persons, statutory damages of $1,000 per receipt.

The Seventh Circuit's ruling turned on the definition of "print," a term regrettably left undefined in the FACTA statute. The Court affirmed the lower court's dismissal of the complaint for failure to state a claim reasoning that an e-mail confirmation of an Internet transaction is *not* an electronically printed receipt because "when one refers to a printed receipt, what springs to mind is a tangible document. To 'print' a receipt thus ordinarily connotes recording it on paper." *1-800 Contacts*, Case No. 09-4073, slip op. at *8. In so doing, the Court adopted the colorful language from a federal judge in Florida who, in reaching the same conclusion, stated that:

> That is why [Plaintiff] had to *print* a copy of his receipt to get it off his computer; *it is why the machine used to transfer text from a computer to paper is called a printer, and it is why a judge who asks for a law clerk to print a case does not intend for the clerk to merely display the case on his computer screen.*

Id. (citing *Grabein v. Jupiterimages*, 2008 WL 2704451, at 8 (S.D. Fla. 2008)).

Moreover, the Court stated that Congress' purpose in enacting FACTA—to curb "low tech"

means of identity theft, like dumpster diving, was not consistent with the expansion of FACTA to e-commerce transactions because numerous federal laws already existed to protect e-mail and electronic documents; "[FACTA] makes no use of terms like 'Internet' or 'email' that would signal an intent to reach paperless receipts transmitted to the consumer via e-mail." *1-800 Contacts,* Case No. 09-4073, slip op. at *14.

The Court also noted that even if its interpretation of the term "print" was too narrow, dismissal of Shlahtichman's case was nonetheless appropriate because 1-800 Contacts' alleged conduct – displaying the expiration date of Plaintiff's card number on an email confirmation of an Internet transaction – could not be a willful violation as a matter of law. *Id.* at *19. Since Plaintiff did not assert any actual injuries, but rather sought statutory damages of up to $1,000 per receipt, he was required to allege (and ultimately to prove) that 1-800 Contacts willfully violated FACTA. The Court held that 1-800 Contacts could not have willfully violated FACTA because "there had been no contrary [ruling] suggesting that the company's understanding of the statute was wrong" and, even if it was, its interpretation was an "objectively reasonable" one.

Although the *Shlahtichman* decision is not binding on federal courts outside of the Seventh Circuit (Illinois, Wisconsin and Indiana), it will, as the only federal appellate opinion on point, be extremely persuasive authority for other courts around the country. Notwithstanding this ruling, as well as others in Florida and Arizona at the trial court level, companies are well advised to make sure that all receipts, including, brick and mortar paper receipts, e-mail confirmations and invoices, display no more than the last five digits of consumers' credit or debit card numbers as well as mask expiration dates entirely.