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## ***Whole Enchilada, Inc. v. Travelers: Taking a Bite Out of FACTA Litigation***

BY RANDY J. MANILOFF

FACTA litigation and all its abusiveness have been **chronicled in detail at Point of Law**. Here's the elevator pitch. Identity theft is a serious problem. So Congress set out to reduce the amount of financially sensitive paper floating around by prohibiting merchants from printing identifying credit and debit card information on receipts. But the Fair and Accurate Credit Transaction Act went awry.

When it comes to identity theft, the receipts to worry about are those that contain more than the last five digits of a customer's card number. However, the law was drafted in such a manner that it is violated if a merchant prints a receipt containing nothing more than a card's expiration date—even if the card numbers were properly truncated. It turned out that many merchants assumed that they were in compliance with FACTA by simply truncating their customers' card numbers on receipts, and didn't realize they needed to omit the expiration date as well. That seems like an honest mistake, and one without likely consequences most of the time: after all, knowing the card's expiration date will not enable identity theft if the would-be thief lacks access to sufficient accompanying card numbers. But the statute says what it says. As a result, many thought-to-be-complaint merchants found themselves being sued for issuing non-compliant receipts.

The question here was not whether stores would pay for someone's actual experience of identity theft. FACTA eliminates the need to prove actual injury by allowing for an award of statutory damages in an amount between \$100 and \$1,000 for a willful violation. That doesn't sound like much. But the law also allows for the recovery of attorney's fees—the magic provision that can turn lawyers into social activists. Not to mention that where there is one FACTA violation there are sure to be many (many, many). Enter the class action lawyers, coupon settlements and six-figure attorney's fees awards. See, for example, *Palamara v. Kings Family Restaurants*, 2008 U.S. Dist. LEXIS 33087 (W.D. P.A. April 22, 2008) (court approves FACTA settlement that awards each class member their choice of ice cream, soup, salad or homemade pie from the defendant's restaurant, with a value of up to \$4.68. As for the plaintiffs' attorney's fees: an amount not to exceed \$75,000).

There is nothing new in itself about this type of litigation business model. But most of the time the laws invoked in attorney's-fee-driven suits at least address some genuine wrong to be righted or injury to be recompensed, and the exploitation is (one hopes) just an unfortunate and unintended consequence. FACTA is different. It has been the Olympics of gaming the system. In many instances it serves no purpose whatsoever. Federal judges have said so; but they have also said that they are powerless to do anything about it.

### **FACTA: The Congressional Fix**

FACTA is unique for another reason. Avoiding the political divisiveness that so often accompanies any effort at tort reform, Congress stepped in relatively quickly to close the loophole that allowed for basing liability on nothing more than an expiration date violation. That it did so with virtually no attempts at opposition—the House voting 407-0 and the Senate by unanimous consent—speaks volumes about just how abusive the litigation was.

This summer President Bush signed into law the Credit and Debit Card Receipt Clarification Act (Public Law No. 110-241). The Act states that any person who printed an expiration date on a receipt that was provided to a consumer between December 4, 2004 and June 3, 2008, but which otherwise complied with the card number truncation requirement, shall not be deemed in willful noncompliance with FACTA.

**CATEGORIES:**

The Act does not do away with the basing of FACTA violation solely on expiration dates. Rather, by deeming that an expiration date violation taking place during this window will not be considered "willful," it does away with the customer's ability to recover statutory damages (which, of course, are the only damages that matter since actual damages can't be sustained). The Act went into effect, and poof, a boatload of FACTA cases disappeared.

### **FACTA - The Insurance Fix**

The Receipt Clarification Act served to retroactively eliminate the potential for damages in likely hundreds of FACTA cases. But any merchant that commits an expiration date violation after the Act's effective date of June 3rd is back in the soup, subject to statutory damages if "willfulness" can be proven.

So despite Congress's efforts, FACTA lives on and the possibility of a second wave of litigation looms. At this point, however, it seems likely that those retailers that are still printing expiration dates on receipts are the proverbial mom and pops, such as—to cite personal experience—the kids' shoe store and deli in my neighborhood. The national franchise retailers and restaurants have already been put through the drill. If the remaining FACTA malefactors are small retailers and restaurants (which, small though they may be, might have printed thousands of non-compliant receipts at \$100 to 1,000 a pop), then the availability of insurance to fund the litigation will likely become a crucial factor in determining how FACTA litigation evolves from here.

Because this litigation is driven by attorneys' economic self-interest, there will be far less enthusiasm for pursuing it if insurance proceeds are not available for FACTA damages and in particular for the attorney's fees needed to settle. If insurance money is available, FACTA will remain, as it has been, low-hanging litigation fruit. Plaintiffs will file suit and seek to settle, using as leverage the insurers' exposure to defense costs as well as the always-present risk of a runaway verdict. But it is much more difficult to reach a settlement with or collect a judgment from a small business when there is no insurer to deal with. Therefore, resolution of the insurance coverage questions will likely go a long way toward determining FACTA's future.

That process has now begun. When FACTA litigation first proliferated, many insurers faced the question of whether it posed a kind of liability included within the scope of commercial general liability coverage, especially as to the costs of defense. That assessment had to be undertaken without the benefit of case law on the subject. Now, at last, a FACTA coverage case has caught up to the litigation, with a Pennsylvania federal court issuing what is apparently the first decision to address insurance coverage for a FACTA action.

On September 29th, the Western District of Pennsylvania issued a decision in *Whole Enchilada, Inc. v. Travelers Property and Casualty*, No. 2:07-cv-1533, finding that no coverage was available to a policyholder under a commercial general liability (CGL) policy for an alleged violation of FACTA. The business in question, a restaurant in Pittsburgh, had provided the plaintiff in the underlying putative class action with an electronically printed receipt that included the expiration date of his credit or debit card. The question addressed by the court was whether coverage was available under the "Personal Injury" section of a CGL policy issued by Travelers Insurance to Big Burrito Holding Company.

Of note for insurance coverage mavens, the Travelers policy at issue initially contained a standard Insurance Services Office definition of "personal injury," which defined the term as "injury, including consequential 'bodily injury,' arising out of one or more of the following offenses:...e. Oral or written publication, in any manner, of material that violates a person's right of privacy."

However, the Travelers policy was amended by endorsement to define "personal injury" as "injury, other than 'bodily injury' arising out of one or more of the following offenses:...e. Oral, written or electronic *publication of material that appropriates a person's likeness, unreasonably places a person in a false light or gives unreasonable publicity to a person's private life.*" (emphasis added).

The *Whole Enchilada* decision is lengthy (50 pages). In general, the court concluded that, based on the nature of a FACTA violation—stemming for a one-on-one transaction between customer and merchant—it does not involve the kind of public communication to which the terms "publication" and "publicity" refer. The money paragraphs are as follows:

Here, however, the *Reed* Complaint does not allege publication that gives

unreasonable publicity to a person's private life. It does not allege that Whole Enchilada displayed the plaintiff's information to the public or took any action designed to disseminate the information to the public at large. Rather, the Complaint alleges factual allegations stating that the Reed plaintiffs' credit or debit card information was printed on a receipt that was handed back to them, in violation of FACTA. While the Complaint alleges that Whole Enchilada printed information, this Court finds it does not allege the kind of public communication to which the term "publicity" refers, thereby triggering coverage.

\* \* \*

In the context of the factual scenario surrounding Whole Enchilada's alleged violation of this provision of FACTA, the Court's reasoning becomes clear. At the point of sale transaction, a cardholder gives his or her credit or debit card to the individual at the cash register. The credit information is exchanged between the cardholder, Whole Enchilada and the cardholder's bank. There is no violation of a privacy right, insofar as the cardholder willfully gives over his or her credit information to Whole Enchilada so that the information can be used to process the sale. This factual scenario does not meet the requirement of publicity under the policies.

*Whole Enchilada*. at 36-37.

The *Whole Enchilada* court addressed coverage under a non-standard definition of "personal injury," namely, *publication* of material that gives unreasonable *publicity* to a person's private life. But most FACTA claims will test whether coverage is available for "personal injury" that is defined as oral or written *publication*, in any manner, of material that violates a person's *right of privacy*. However, while it addressed "publicity," the *Whole Enchilada* court also concluded that FACTA does not violate a person's "privacy right," when such policy language was not even before it.

Given the court's additional conclusion that a FACTA violation does not involve "publication" and its determination that the "statutory damages" being sought for a FACTA violation are not compensatory, and, therefore, do not satisfy the policy's "damages" requirement, *Whole Enchilada* is broad enough to encompass those claims that are brought under the standard ISO definition of "personal injury." That is the take-away point from the case. Also of great practical importance for the future, insurers have been adding specific FACTA exclusions to their policies and ISO has such an exclusion in the pipeline. So plaintiffs' lawyers are on notice that likely wellsprings of insurance money are drying up.

## Conclusion

On one hand, *Whole Enchilada* was a defeat for policyholders. Even those defendants that had their FACTA claims extinguished by the Receipt Clarification Act likely still have claims for defense costs and would have benefited from a finding of coverage. For such companies, there is no way to put a positive spin on the decision. On the other hand, if a second wave of FACTA claims is on the horizon aimed at small companies that have done no real injury to consumers, then the lack of insurance availability may help to prevent the claims from being brought in the first place. When it comes to collecting a settlement or judgment, plaintiffs seek the path of least resistance, most commonly via the insurance route. But if that road is blocked, plaintiffs may simply decide that the risk of being unable to settle a FACTA case or collect a judgment is too great and turn back. That would be an ultimate outcome much to be desired for insurance buyers, for insurers, and for our society as a whole.

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