

Third Circuit Rules That FACTA Violation Is Not Willful, Withholds Statutory Damages

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In a decision further limiting the ability of plaintiffs to collect statutory damages under the Fair and Accurate Credit Transactions Act (FACTA), the U.S. Court of Appeals for the Third Circuit refused to impose statutory damages on retailer Tommy Hilfiger U.S.A., Inc. (Hilfiger), despite finding that the retailer had committed a *per se* violation of the statute. *Long v. Tommy Hilfiger U.S.A., Inc.*, No. 11-1554 (3rd Cir. Jan. 24, 2012).

The action arose from the plaintiff's purchase of neckwear from the retailer's Grove City, Pennsylvania, store in 2009. After using his credit card to make the purchase, the plaintiff received a receipt listing only the last four digits of his credit card number, in accordance with FACTA. The receipt also listed the month, but not the year, of his card's expiration date, giving rise to the plaintiff's claim.

FACTA provides that "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. § 1681c(g)(1). The court considered whether printing only the month, and not the year, of the expiration date violated the terms of the statute. The court held that it did, reasoning that if Congress had intended for a partial redaction of the expiration date to be acceptable, it would have addressed it in the statute, given that Congress explicitly addressed the partial redaction of the credit card number. Carried to its logical conclusion, Hilfiger's interpretation of the law would have permitted retailers to print all but one number of the expiration date, providing little protection for consumers and contravening the intent of Congress in enacting FACTA. The court also held that the plaintiff's reliance on the Credit and Debit Card Receipt Clarification Act of 2007 (Clarification Act) [see "Congress Restricts FACTA Statutory Damages Class Actions"] was misplaced, as the Clarification Act only provided a safe harbor for retailers that had printed credit card expiration dates on customers' receipts between December 4, 2004, and June 3, 2008.

Despite finding that Hilfiger's action constituted a violation of FACTA, the plaintiff was unable to recover the statutory damages available under the statute for "willful" violations of FACTA. 15 U.S.C. § 1681n(a). In holding that Hilfiger's violation was not willful, the court relied on the Supreme Court's decision in *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007). The Supreme Court, interpreting the Fair Credit Reporting Act, stated that the willfulness component is not met "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.” *Safeco*, 551 U.S. at 69. The Court held that an interpretation of a statute does not constitute a willful violation unless it is “objectively unreasonable.” *Id.* Applying this standard, the Third Circuit found that Hilfiger's interpretation of the statute was not objectively unreasonable, as the retailer had some basis for its belief that the plain meaning of the term “expiration date” meant the entire expiration date. Because the plaintiff did not plead actual damages, the court concluded there was no relief available to the plaintiff and affirmed the lower court's decision to dismiss the complaint. As courts continue to construe the willfulness standard under FACTA narrowly, retailers' potential liability under the statute continues to shrink.