Qued In

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Seventh Circuit Affirms District Court Decision That "Electronically Printed" Receipts Under FACTA Does Not Include Receipts E-mailed to Consumers

By: Terrence Guolee - Chicago office

By its terms, the Fair and Accurate Credit Transactions Act of 2003 ("FACTA") amendments to the Fair Credit Reporting Act. 15 U.S.C. § 1681 et seq., prohibit vendors who accept credit or debit cards as a means of payment from "print[ing] 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 prohibition "appl[ies] only to receipts that are electronically printed," as opposed to those on which the credit or debit card information is written by hand or taken by imprint or photocopy. § 1681(c)(g)(2). FACTA also provides for private suits, statutory damages, attorney fees and punitive damages for vendors found in violation.

Since its passage, retailers around the country have been hit with a wave of expensive class action and individual claims under FACTA, resulting in millions of dollars in verdicts and settlements, that often are uninsured. Moreover, recently, a second wave of class action claims seeking statutory damages for Internet and e-mail confirmations has spread throughout the country. However, a recent decision of the Seventh Circuit Court of Appeals seems likely to have protected Internet retailers from the potential devastation that can hit vendors found violating the terms of FACTA.

In this respect, on August 10, 2010, the U.S. Court of Appeals for the Seventh Circuit upheld an earlier ruling by Judge Darrah of the Northern District of Illinois, Eastern Division, holding that e-mail order confirmations are not "electronically printed" receipts under FACTA. *Shlahtichman v.1-800 Contacts Inc.*, Case No. 09-4073 (7th Cir.; Aug. 10, 2010). *[Editor's note: We wrote on Judge Darrah's ruling in our March 2010 Qued In newsletter – available at: http://www.querrey.com/assets/attachments/304.pdf.]*

The appellate court – in the first appellate level decision addressing such Internet and e-mail confirmation claims - affirmed the dismissal of Eduard Shlahtichman's complaint against 1-800 Contacts Inc., that involved an electronic order confirmation containing Shlahtichman's credit card expiration date.

In the decision, the Seventh Circuit followed the majority view among district courts that "the term 'electronically printed' covers only those receipts that are printed on paper." *Citing, Turner v. Ticket Animal, LLC*, No. 08-61038-CIV, 2009 WL 1035241 (S.D. Fla. Apr. 16, 2009); *Smith v. Under Armour, Inc.*, 593 F. Supp. 2d 1281 (S.D. Fla. 2008); *Smith v. Zazzle.com, Inc.*, 589 F. Supp. 2d 1345, 1348 (S.D. Fla. 2008); *Grabein v. Jupiterimages Corp.*, No. 07-22288-CIV, 2008 WL 2704451 (S.D. Fla. Jul. 7, 2008) (report and recommendation of magistrate judge), adopted, 2008 WL 2906866 (S.D. Fla. Jul. 28, 2008); *King v. Movietickets.com, Inc.*, 555 F. Supp. 2d 1339, 1340 (S.D. Fla. 2008); *Haslam v. Federated Dep't Stores, Inc.*, No. 07-61871 CIV, 2008 WL 5574762 (S.D. Fla. May 16, 2008); *Narson v. GoDaddy.com, Inc.*, No. CV-08-0177, 2008 WL 2790211 (D. Ariz. May 5, 2008). Likewise, the court rejected the minority of courts that concluded that the term should be understood to reach electronic receipts that are displayed on the consumer's computer. *Rejecting, Romano v. Active Network, Inc.*, No. 09 C 1905, 2009 WL 2916838 (N.D. Ill. Sept. 3, 2009); *Harris v. Best Buy Co.*, 254 F.R.D. 82, 86-87 (N.D. Ill. 2008); *Grabein v. 1-800-Flowers.com, Inc.*, No. 07-22235-CIV, 2008 WL 343179 (S.D. Fla. Jan. 29, 2008); *Vasquez-Torres v. Stubhub, Inc.*, No. CV 07-1328, 2007 U.S. Dist. LEXIS 63719 (C.D. Cal. Jul. 2, 2007).

The court noted that a printed receipt brings to mind "a tangible document" and "ordinarily connotes recording it on paper." The court

rejected the plaintiff's argument that the use of "electronically" in section 1681c(g) reflects a congressional intent to broaden the meaning to include more modern usages. Rather, the court interpreted that language to suggest an intention to capture receipts that are printed by a machine, rather than credit card slips or receipts that are imprinted or handwritten.

Important in the court's decision was the overall statutory context of FACTA. On this, the court noted that the truncation requirements apply to receipts "that are printed and 'provided to the cardholder at the point of the sale or transaction.'" The court concluded that "the statute contemplates transactions where receipts are physically printed using electronic point of sale devices like electronic cash registers or dial-up terminals." In particular, the court stated:

> Ultimately, "[s]tatutory language only has meaning in context," [ ] and the overall statutory context of FACTA suggests, consistent with the ordinary meaning of the word "print," that the statute is aimed at paper receipts. The statute's ban on printing more than the last five digits of a debit or credit card or the expiration date of the card applies to receipts that are printed and "provided to the cardholder at the point of the sale or transaction." § 1681c(g)(1). This language has a ready application to face-to-face transactions that take place in a "bricks-and-mortar" store or some comparable physical location at which the consumer is handed a receipt…

Finally, and perhaps most importantly for defendants currently the subject of cases involving more typical "brick and mortar" paper receipt FACTA claims, the court noted that even if e-mail order confirmations were "electronically printed" receipts for FACTA purposes, the dismissal of Shlahtichman's complaint was appropriate because Shlahtichman sought the statutory damages authorized only for willful violations of the truncation requirement and 1-800 Contacts had not willfully violated the statute.

CASE SUCCESS

Guolee Obtains Dismissal of Clients in Two Serious Claims

Chicago shareholder **Terrence Guolee** recently obtained the dismissal of claims against his clients in two serious lawsuits. In this first case, Terrence represented a manufacturer of metal "threaded rods" used in the construction of a work stage involved in an accident at a Deep Tunnel project worksite on Northerly Island in Chicago. In the case, it was alleged that threaded rods snapped, causing the stage to heave under the pressure of the crane lifting it, resulting in the traumatic amputation of a tunnel worker's leg. Through analysis of project records, Terrence was able to document that the rods were manufactured to relevant specifications and that there was no proper way for the claimant to show that the client's threaded rods were used on the stage in question. Following presentation of these defenses, Terrence's client was dismissed from the matter.

Terrence also obtained an order dismissing a class action claim filed against an international Internet retailer charged with violating the Fair and Accurate Credit Transactions Act, 15 U.S.C. § 1681et seq. (FACTA). In the case, the plaintiff purchased a book over the Internet and received an electronic e-mail confirmation. Because that confirmation allegedly reflected the expiration date of the credit card used for the purchase, plaintiff sued and sought class action status. Following the development of Seventh Circuit appellate authority rejecting such claims based on the reading of FACTA to apply "only to receipts that are electronically printed," and "provided to the cardholder at the point of the sale or transaction," the case was dismissed without the need for expensive discovery or class certification litigation.

On this, the court noted that, even if it construed FACTA too narrowly, dismissal of Shlahtichman's complaint remained appropriate because 1-800 Contacts did not willfully violate the statute. As Shlahtichman alleged no actual injury and instead only sought the statutory damages authorized for willful violations of the truncation requirement per § 1681n(a)(1)(A), and there had been no contrary opinion from a court of appeals or federal agency suggesting that FACTA would cover e-mail confirmations, it would have been objectively reasonable for 1-800 Contacts to have concluded its actions were proper or, alternatively, there would be no basis to conclude it acted knowingly or recklessly. *Citing, Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69-70 & n.20, 127 S. Ct. 2201, 2215-16 & n.20 (2007); *Levine v. World Fin. Network Nat'l Bank*, 554 F.3d 1314, 1319 (11th Cir. 2009) ("Safeco makes clear that evidence of subjective bad faith cannot support 'a willfulness finding . . . when the company's reading of the statute is objectively reasonable' "); *Movietickets.com*, 555 F. Supp. 2d at 1342-43.

This decision represents a proper limitation on the expansion of a statute that was not directly intended by the drafters. Clearly, FACTA was targeted at paper receipts and stopping the damaging effects of "dumpster divers" collecting discarded receipts and accessing credit card information sufficient to make illegal purchases. Nevertheless, it remains good practice for retailers to review their credit card processing operations to ensure they are properly protecting their customers' private information. Indeed, while it is believed that other federal district and appellate courts will follow the reasoning of the Seventh Circuit in *Shlahtichman*, at present the decision only protects retailers sued in the federal district courts in Illinois, Indiana and Wisconsin. Moreover, while it is not expected the case will be accepted for further review, plaintiff counsel in the *Shlahtichman* case has expressed an intent to seek review of the decision before the United States Supreme Court. Additionally, while they have not spawned the number of lawsuits around the country that have been seen under FACTA, there are many state statutes prohibiting the disclosure of credit card information that retailers can violate if not careful.

Querrey & Harrow has successfully represented several vendors sued in FACTA claims through the years. These claims have involved both paper and electronic receipts and claims against vendors located throughout the country. Our firm has also represented both vendors and insurance carriers in insurance coverage litigation connected to FACTA claims. If you have any questions regarding your company's credit processing practices, or receive notice of a FACTA claim, please contact Terrence Guolee at 312-540-7544.

* * *

***Terrence Guolee**, a shareholder in our Chicago office, has successfully represented defendants, plaintiffs and insurance carriers in dozens of complex, multi-million dollar claims covering a wide area of facts and law. Included in Terrence's practice is the representation of several businesses sued as defendants in statutory consumer rights class action clams —including several FACTA claims.*

If you are facing a FACTA claim, whether on the defense or coverage side, or should you have any questions regarding this article, please contact Terrence via 312-540-7544 or via tguolee@querrey.com.

Q&H Defeats Another Police Excessive Force Claim at Trial


Chicago shareholders **Brandon Lemley** and **April Walkup** obtained a "not guilty" verdict recently in a civil rights trial in the Federal District Court for the Northern District of Illinois, Eastern Division, alleging the excessive use of force against the Village of Oak Lawn and one of its police officers.

Medical Malpractice Update: Summary Judgment Upheld for Failure to Establish Proximate Cause

By: Anton Marqui – Chicago office

The First District recently examined the proximate cause element of a medical malpractice action in *Johnson v. Ingalls Memorial Hospital et al.*, --- N.E.2d ---, 2010 WL 2635824 (1st Dist. 2010). In upholding summary judgment in favor of the defendants, the Court found that plaintiff failed to present competent evidence to establish the alleged deviations from the standard of care proximately caused the injury.

In 2001, the plaintiff Chakena Johnson was pregnant with her third child. Her two previous deliveries had been by caesarean section. In June, 2001, Ms. Johnson began receiving prenatal care though Dr. Hidvegi at Lincoln Medical Center. Dr. Hidvegi was a semi-retired board-certified obstetrician and did not maintain staff privileges. It was understood that Ms. Johnson's baby would be delivered at Ingalls Memorial Hospital by obstetricians affiliated with the Hayes Obstetrical Group.

Ms. Johnson had periodic visits with Dr. Hidvegi over the next few months. On November 5, 2001, Ms. Johnson was between 37 and 38 weeks pregnant. Dr. Hidvegi performed an examination and had difficulty hearing a fetal heart tone. Dr. Hidvegi instructed Ms. Johnson to go to Ingalls to obtain fetal heart monitoring and an ultrasound to establish the well-being of the baby.

Ms. Johnson proceeded to Ingalls but her insurance was not accepted so she was sent to St. Francis Hospital. Ms. Johnson was seen by a labor and delivery nurse and informed the nurse that she had been sent for fetal heart tone testing and ultrasound. Ms. Johnson was placed on a fetal heart monitor. The monitor revealed reassuring heart tones and what the nurse deemed as mild to moderate Braxton Hicks contractions, not labor contractions.

Ms. Johnson was also seen by Dr. Coupet. Dr. Coupet advised the nurse to contact Dr. Hidvegi regarding the fetal monitoring results and the need for an ultrasound. Dr. Coupet's notes reflected that Ms. Johnson was to return to Dr. Hidvegi for the ultrasound and that Dr. Hidvegi agreed. Following discharge, Ms. Johnson spoke with Dr. Hidvegi's nurse regarding her experience at Ingalls and indicated that she would see Dr. Hidvegi at her next scheduled appointment in two weeks.

Congratulation to Q&H's "Super Lawyers" and "Rising Stars"

Four Querrey & Harrow shareholders were selected for inclusion in Super Lawyers for 2011. Congrats go to: **Daniel F. Gallagher** - Personal Injury Defense: General; **Robert P. Huebsch** - Personal injury Defense: Medical Malpractice; **Roger Littman** - Personal injury Defense: Medical Malpractice; and **Bruce Schoumacher** - Construction/Surety.

Chicago shareholders **Cynthia Garcia** and **Jennifer Medenwald** along with Chicago associate **Stacey Atkins,** have been selected for inclusion on the *Illinois Rising Stars 2011* list, a division of *Illinois Super Lawyers* which promotes less experienced attorneys who are not yet eligible for the main Super Lawyers list.

Schoumacher Published in Illinois State Bar Association Newsletter

Chicago shareholder **Bruce Shoumacher's** article "Basic Construction Insurance Coverage" was recently published in the September 2010 edition of the Illinois State Bar Association's Real Property Newsletter. A copy of Bruce's article can be accessed at: http://www.isba.org/sites/default/files/sections/realestatelaw/newsletter/Real%20Estate%20Law%20September%202010.pdf

On November 6, 2001, Ms. Johnson was home and continued to experience slight contractions. On November 7, 2001 she began to experience severe and constant pain along with more frequent, stronger contractions. She was taken to Ingalls where she had an emergency caesarean section. During surgery, it was discovered that she had a ruptured uterus and that the baby was inside the abdominal cavity. The baby was diagnosed with brain damage and ultimately died on November 17, 2001.

Ms. Johnson brought a wrongful death and survival action against various defendants involved in her prenatal care. Generally, it was plaintiff's theory that the defendants' deviations from the standard of care "increased her risk of harm." More specifically, she argued that by failing to communicate increased risk of uterine rupture and failing to refer her to an obstetrician with delivery privileges on November 5, 2001, she did not receive required treatment. It was plaintiff's contention that had she seen the appropriate physician, she would have had a cesarean section before her uterine rupture on November 7, 2001, thereby preventing the injury and death of her child.

Plaintiff disclosed one medical expert in support of her claim, Dr. Charles Bird. At his deposition, Dr. Bird opined that it was a deviation from the standard of care by failing to advise Ms. Johnson on November 5 that she was at an increased risk for a ruptured uterus due to two prior cesarean sections. Further, had Ms. Johnson been referred to an appropriate delivering obstetrician on November 5, Dr. Bird stated that the standard of care would have required that Ms. Johnson have very close observation, meaning visits every other day or third day, that she be made aware that she was very high risk, and that if she had any problems she should notify the Hayes Group and be "evaluated appropriately."

Dr. Bird believed to a reasonable degree of medical certainty that the outcome of the case would have been different had one of the obstetrical associates seen her on November 5, and that caesarean section would have been within the standard of care if performed at that time. However, Dr. Bird also acknowledged that there were several factual scenarios that might have occurred had the defendants complied with the standard of care and he admitted that the standard of care did not require a caesarean section on November 5th.

The trial court granted defendants' motion for summary judgment. The question raised on appeal was whether the plaintiff's expert adequately established a material question of fact regarding proximate cause. At the outset, the Court noted that proximate cause must be established by expert testimony to a reasonable degree of medical certainty, and that the causal connection must not be "contingent, speculative, or merely possible." *Ayala v. Murad*, 367 Ill.App.3d 591, 601, 855 N.E.2d 261, 305 Ill.Dec. 370 (2006). An expert's opinion is only as valid as the basis for the opinion. Conclusory opinions based on sheer, unsubstantiated speculation are irrelevant. *Weidenbeck v. Searle*, 385 Ill.App.3d 289, 293, 895 N.E.2d 1067, 324 Ill.Dec. 352 (2008).

Rochelle Serves as Panelist on Chicago Bar Association Sports Law Discussion

On August 13, 2010, Chicago office associate **R. Scott Rochelle**, served as one of three panelists for the Chicago Bar Association's Sport Law Committee's Presentation on "Breaking into Athlete Representation." On the panel with Scott was Super agent Mark Bartelstein and Frank Murtha. Scott spoke on balancing athlete representation with a full-time legal practice and the challenges of a young agent.

Scott was also recently featured in a Chicago RedEye newspaper's blog and was interviewed as part of the RedEye's "Job Fantasy Camp." A reader, who aspires to become a sports agent, was able to spend time with Scott and learn what it takes to be a sports agent. The article and photos can be viewed at: http://www.chicagonow.com/blogs/brokeass-blog/2010/08/ever-heard-the-saying-behing.html#slide

With these principles in mind the Court found the testimony of plaintiff's expert inadequate. Dr. Bird's admission that cesarean was not required on November 5 was significant. There was simply no factual support for Dr. Bird's conclusions that a cesarean section would have been done sooner or that the failure of any defendant to refer Ms. Johnson to a delivering obstetrician increased her risk of harm. Simply arguing that treatment would have been sooner and sooner would have been better is insufficient as the conclusion alone does create a question of fact. The Court held that Dr. Bird's opinion would have left a jury to improperly speculate as to when definitive treatment would have been undertaken. Thus, plaintiff had presented a case of mere possibility and was unable to sustain her burden of proof of proximate causation. Summary judgment in favor of defendants was affirmed.

The First District's ruling is consistent with a line of cases which generally provide that a broad, conclusory statement that proximate cause exists is insufficient. In medical negligence cases, it is often the focus of experts to hammer at alleged deviations in the standard of care, overlooking causation. Proximate cause is typically a question of fact to be determined by a jury. However, where a gap exists between the act and the outcome and the expert testimony fails to form a substantiated causal connection, a motion for summary judgment must be in the litigation plan.

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*Chicago office associate **Anton Marqui** concentrates his practice in medical malpractice, nursing home litigation and transportation liability. Tony has tried and assisted on multiple jury and bench trials and has handled numerous disputes through arbitration and mediation. Prior to joining Querrey & Harrow, Tony worked for a small Chicago-based firm in the above practice areas, and also gained experience in premises liability, construction injury and insurance coverage.*

Please contact Tony with any questions you may have via amarqui@querrey.com or via 312-540-7584.

Attention Contractors in Illinois: You Must Investigate Whether Your Project Is Covered By The Prevailing Wage Act!

By: Christopher Harney - Chicago office

In *The People ex rel. The Department of Labor v. Sackville Construction, Inc.*, the Appellate Court held a subcontractor liable for back-pay and penalties under the Prevailing Wage Act ("the Act"), even though the subcontractor had no notice that the construction project was being funded by a public body and that the project was covered by the Prevailing Wage Act.

I. Background Facts

In February 2006, a private developer, Rock Island Industrial Partners ("the Developer"), entered into a contract with Hy-Brand Contractors ("the General Contractor") to build an industrial complex in downtown Rock Island ("the Project"). Shortly thereafter, the Developer entered into a contract with the City of Rock Island, wherein the Developer agreed to invest $1.5 million into the Project and the city conveyed title of the Project site to the Developer in consideration of $1.00. Furthermore, the city agreed to contribute $150,000.00 for use in the Project and up to $57,000.00 for the cost of site clearance and demolition.

In March of 2006, the General Contractor entered into an oral contract with Sackville Construction, Inc. ("the Subcontractor") to provide laborers for the Project. At no point in time did the General Contractor inform the Subcontractor that the City of Rock Island was partially funding the Project, or that the Prevailing Wage Act applied.

In December 2007, the Department of Labor filed a complaint against the Subcontractor alleging violation of the Prevailing Wage Act. The matter went to trial. The trial court held in favor of the Subcontractor, ruling that while the Prevailing Wage Act applied, it was "unfair to require payment of prevailing wages when [Sackville] had no reason to believe the project was covered by the Prevailing Wage Act." The Department of Labor appealed the matter to the Appellate Court of Illinois Third District.

II. The Appellate Court of Illinois Third District Decision

The Subcontractor argued that the trial court's decision should be affirmed because (1) the Developer did not qualify as a "public body" as defined by the Prevailing Wage Act, (2) the Project did not qualify as "public works" as defined by the Prevailing Wage Act, and (3) notice that the contract was a prevailing wage contract was required. The Appellate Court reversed the trial court's decision for the Subcontractor and held as follows:

A. The Developer was a "public body" under the Prevailing Wage Act

The Subcontractor argued that the Developer was not a public body under the Act because it was a private entity that operates independently of public funding. The Subcontractor further argued that the Project was only partially funded and was not wholly funded by public funds. The Appellate Court rejected these arguments and found that the Developer was a public body in this case because it was supported in part by public funds from the City of Rock Island.

B. The Project was "public works" under the Prevailing Wage Act

The Subcontractor next argued that the Project was not public works because it was not funded by one of the financing statutes specifically listed in the Act. The appellate court rejected this argument and found that public works was defined as "all fixed works constructed by any public body" and was not limited to those funded by the financing statues specifically listed in the Prevailing Wage Act.

C. The Subcontractor was not required to receive notice that the Prevailing Wage Act applied

Finally, the Subcontractor argued that it was entitled to notice that public funds were being used in order for the Prevailing Wage Act to apply. The appellate court held that while the Act does require the public body to include the prevailing rate in the Project specifications and the contract, this is not a condition precedent to application of the Act. In sum, the Subcontractor was liable under the Act regardless of whether or not it received notice that public funds were being used on the Project.

D. Penalties applied under the Act

The appellate court further held that the Act required that any violators are liable to [Department] for 20% of any underpayments. The case was reversed and remanded to the trial court for calculations of penalties.

Bream Once-Again Heads "Character Counts" Program in Glenview

Chicago shareholder **Jim Bream** addressed the Glenview Park District Board on August 26, 2010 on CHARACTER COUNTS! in sports. CHARACTER COUNTS' goal is to make Glenview a leader in honor and integrity in youth sports. Jim also serves Glenview as President of the Glenview/Northbrook School District 30 Board of Education.

III. Contractors' strategies for avoiding liability

This seemingly harsh ruling by the Appellate Court puts the onus on contractors to find out whether or not the project they are working on is covered by the Prevailing Wage Act. As a result, prior to entering into any contract, contractors should request the other contracting party to confirm in writing whether or not public funds are being used on the project.

Furthermore, contractors should consider adding an indemnity provision in the contract requiring the other contracting party to indemnify them against any back wages or liabilities under the Prevailing Wage Act if they were not provided with actual notice of its application.

* * *

***Christopher Harney**, an associate in our Chicago office, concentrates his practice in bankruptcy matters, construction liens/disputes and mortgage foreclosures. He also currently assists in a variety of general litigation matters, including: premises liability, drafting commercial contract provisions and auto liability cases.*

If you have any questions regarding this article, please contact Chris via charney@querrey.com, or via 312-540-7622.

SEMINARS

Schoumacher and Rabel to Host Construction Lien Webinar

On December 1, 2010, Chicago office shareholders **Bruce Schoumacher** and **Tim Rabel** will present a 90-minute teleconference regarding Illinois Construction Liens in conjunction with Lorman Education Services.

The teleconference is designed for contractors, owners, developers, subcontractors, suppliers, architects, engineers, lenders, accountants, and allied construction professionals. Topics will include and overview, the importance of deadlines, priority of liens, and recent developments.

Walkup and O'Grady to Present at Illinois Municipal League Conference

On September 25, 2010, Chicago shareholders **April Walkup** and **Paul O'Grady**, along with Dan Omiecinski (Human Resources Director for the Village of Oak Lawn), will present a program entitled, "Employment Pitfalls, Hiring and Firing Employees," at the 97th Annual Conference of the Illinois Municipal League.

The conference will be held at the Chicago Hilton, and the complete program description is available at: http://conference.iml.org/files/pages/5582/Program-2010.pdf.