

## Case Study: Bateman V. AMC

Law360, New York (October 19, 2010) -- In *Bateman v. American Multi-Cinema Inc.* --- F3d --- (Ninth Circuit, Sept. 27, 2010), a case involving claims under the Fair and Accurate Credit Transactions Act (FACTA), the Ninth Circuit held that the district court abused its discretion by denying class certification due to the potential for damages which are disproportionate to the actual injury suffered.

To protect against identity theft, FACTA requires, among other things, that credit and debit card receipts issued to consumers not contain the card's expiration date or more than the last five digits of the card.

For each willful violation, FACTA permits the recovery of either actual damages or alternatively, if a plaintiff so elects, statutory damages from \$100 to \$1,000. Importantly, permitting the recovery of statutory damages relieves a party from having to prove their damages as a prerequisite for recovery.

In 2007, Bateman sued American Multi-Cinema Inc., (AMC) alleging that AMC had violated FACTA by printing cinema receipts containing the first four and last four digits of his credit card number. Preliminary discovery revealed that, between Dec. 4, 2007, and Jan. 29, 2007, more than 290,000 noncompliant receipts had been printed for different cinema patrons. As a result, Bateman filed a motion to certify the class of cinema patrons.

The district court denied Bateman's motion for certification, concluding that Bateman had failed to demonstrate that a class action would be superior to other available methods of adjudicating the claim, and thus would not meet the "superiority" requirement of Fed. R. Civ. P. 23(b)(3).

According to the district court, certifying the class would render the magnitude of AMC's potential liability "enormous and completely out of proportion to any harm suffered by plaintiff." The district court also considered significant AMC's good faith effort to bring the machines that printed the receipts into compliance shortly after Bateman filed his lawsuit.

On appeal, the Ninth Circuit concluded that the district court's decision was an abuse of discretion, and provided a thorough treatment of the issue, including an analysis of the seminal cases on the issue of proportionality. In distinguishing Bateman from earlier cases, the Ninth Circuit focused on the congressional intent of FACTA's damages provision.

### **Proportionality Between Liability and Actual Harm**

While courts have typically assumed that proportionality is a proper superiority consideration, the Ninth Circuit distinguished claims made under FACTA. Congress' intent in enacting FACTA was to combat identity theft. Losses from individual FACTA violations are often small and difficult to prove.

For this reason, FACTA gave plaintiffs the option to recover either actual or statutory damages, a scheme which enhances the compensatory and deterrent effects of the statute: "Allowing consumers to recover statutory damages [deters] businesses from willfully making consumer financial data available, even where no actual harm results."

Given this, the Ninth Circuit concluded that even though Bateman or any of the class members may not be able to prove actual harm resulting from AMC's violations, they are entitled to statutory damages, and there is no language in FACTA or its legislative history that gives a court discretion to alter the damages scheme.

In other words, FACTA permits each plaintiff, whether suing as a unitary class, or separately as individuals, to compensation within the statutory range — an entitlement which holds regardless of the number of individual plaintiffs. The overall potential liability is simply a matter of arithmetic. And despite Congress' awareness of class actions, it did not include in FACTA a cap on the amount of aggregate damages, a limitation on class size or any limitation on the number of individual suits that could be brought against a merchant.

Therefore, the Ninth Circuit held that proportionality (and for the same reasons, the potential for enormous liability) was not a proper consideration in deciding class certification under FACTA.

### **Good Faith Compliance Post-Suit**

Likewise, the Ninth Circuit held that the district court should not have considered AMC's swiftness in changing the contents of its receipts to comply with FACTA after Bateman filed the case. Rule 23(b) makes no suggestion that good faith compliance with the law, after a suit is filed, is a proper consideration in the superiority analysis.

Indeed, to deny class certification on this ground would likely diminish the deterrent effect of FACTA by communicating to would-be violators that they may avoid the burden of defending class action suits.

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