

Practitioner's Perspective

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Practitioner's Perspective appears periodically in the monthly Report Letter of the CCH Guide to Computer Law. Various practitioners provide in-depth analyses of significant issues and trends.



Wolters Kluwer
Law & Business

Merchant "receipts"

"Applause is a receipt, not a bill." That's how Artur Schnabel, a pianist, explained why he did not provide an encore in response to applause.¹ Yet in today's data protection world, merchant receipts are more like bills creating liabilities for merchants to pay.

This is partially because at least electronic receipts are no longer viewed as innocuous documentation of a purchase. Instead, they are viewed as potential carriers of data that can be used by an identity thief if the receipt falls into the wrong hands. Receipts can also become carriers for disclosures. This column discusses some of the current situations in which persons dealing with receipts are in jeopardy of incurring liability because of problems with the receipt.

1. The FACT Act Rule.

That the world has traditionally viewed receipts as innocuous is evidenced by what some customers have typically done with them, *e.g.*, leave them with clerks or in gas station or parking dispensers, litter, or toss them out without shredding. Rather than trying to change customer habits, in recent years states began passing laws prohibiting inclusion of certain data on credit and debit card receipts. In 2003, the federal government weighed in with the Fair and Accurate Credit Transactions Act (FACT), which amends the Fair Credit Reporting Act (FCRA).

FACT included a transition period for merchants to get their receipts into shape, but some merchants still are not aware of FACT; some became aware too late; and most may be in jeopardy under new judicial interpretations of FACT or new state laws.

So let's go back to basics before fast forwarding back to the present. FACT (now FCRA) covers only **electronically** printed credit and debit card receipts and provides as follows:

(g) TRUNCATION OF CREDIT CARD AND DEBIT CARD NUMBERS—

- (2) IN GENERAL—Except as otherwise provided in this subsection, 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**.
- (3) LIMITATION—This subsection shall apply only to receipts that are **electronically** printed, and shall not apply to transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by an imprint or copy of the card.²

FACT is the reason that most credit and debit card receipts show truncated card numbers and do not show the expiration date. FACT contained a transition period:

(3) **Effective date.** This subsection shall become effective—

(A) 3 years after December 4, 2003, with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions that is in use before January 1, 2005; and

(B) 1 year after December 4, 2003, with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions that is first put into use on or after January 1, 2005.³

Time is up under every alternative. Even so, an ordinary shopping day will reveal that some receipts continue to be noncompliant. That is one way a receipt can turn into a bill.

Why haven't merchants fixed this? There are a number of reasons, and they have little to do with any desire not to comply. A basic reason is that historically, merchant contracts for credit cards, for example, required merchants to acquire receipt software showing what the law now prohibits, the full card number and expiration date. Merchants risked breach of contract if their receipts did not have that information. They learned and paid for systems implementing the inclusion rule (thou shalt **have** a receipt including the full card number and expiration date).

When the world shifted to the exclusion rule (thou shalt **not have** a receipt including the full card number and expiration date), many merchants did not realize there had been a shift and had contracts mandating the opposite. Also, even the new law allows continued use of card "imprint" machines which, via carbon paper, imprint the full card number and expiration date onto paper receipts. That part of a merchant's world did not change, since FACT applies only to electronically printed receipts. This occurred in a payment system arena where card associations have "secret" rules to which merchants do not have access;⁴ where merchants depend on processors to learn of new rules; where some processors believe they are not timely told about new rules or do not pass them on; where contracts lag behind the law; and where contract amendments are not always delivered timely or at all. In short, it is not as simple as it may look, and everyone has a legitimate story to tell.

Regardless, some merchants complied too late and some still have not complied. This is not surprising, even though media reports regarding inevitable litigation, which includes class actions with potentially catastrophic damages,⁵ tend to castigate merchants for failing to see what should have been obvious. In fact, nothing was obvious. The reality for most of the new data protection laws is that society as a whole is undergoing a seismic shift in attitude towards

"personally identifying information" and simultaneously acting as if those who cannot quickly imagine or adjust to the shift are culpable. Granted, a partial shift needs to be made, but no "easy" button exists that can instantly transform traditional practices.

2. California: Becoming the Promised Land for Fraud and Identity Theft?

As noted, payment system contracts used to require inclusion of card numbers and expiration dates on receipts. But now, for electronically printed receipts provided at the point of sale, such numbers and dates are prohibited. If all merchants finish their about-face systems change, may they finally rest in peace? No. By 2009, at least merchants subject to California law will need to redo their systems again, but this time for certain copies kept by the merchant! The California statute reads like this (emphasis added):

Printing credit or debit card receipts; restrictions.

- (a) Except as provided in this section, no person, firm, partnership, association, corporation, or limited liability company that accepts credit or debit cards for the transaction of business shall print more than the last five digits of the credit or debit card account number or the expiration date upon any of the following:
 - (1) Any receipt **provided to the cardholder**.
 - (2) Any receipt **retained by** the person, firm, partnership, association, corporation, or limited liability company, which is printed at the time of the purchase, exchange, refund, or return, and is **signed** by the cardholder.
 - (3) Any receipt **retained by** the person, firm, partnership, association, corporation, or limited liability company, which is printed at the time of the purchase, exchange, refund, or return, but is **not signed** by the cardholder, **because the cardholder used a personal identification number** to complete the transaction.
- (b) This section shall apply only to receipts that include a credit or debit card account number that are **electronically printed** and shall not apply to transactions in which the sole means of recording the person's credit or debit card account number is by handwriting or by an imprint or copy of the credit or debit card.
- (c) This section shall not apply to documents, other than the receipts described in paragraphs (1) to (3), inclusive, of subdivision (a), used for internal administrative purposes.
- (d) **Paragraphs (2) and (3) of subdivision (a) shall become operative on January 1, 2009.**⁶

One can begin to understand why merchants faced with setting up systems for whip-sawing legislation may begin

to despair of every decreasing their technology budgets or they may decide to return to the horse and buggy age of carbon paper.

If one thinks of the “paper imprint” version of card receipts, there is a merchant copy, bank copy and customer copy, all of which still may contain the full card number and expiration date. For electronic equivalents, the FACT rule precludes inclusion. By analogy, the California statute migrates beyond the customer copy to the other copies. Whether FACT’s provisions are preemptive of this kind of state non-uniformity will be the subject of future interpretations of FACT and constitutional challenges under the Dormant Commerce Clause. In the meantime, merchants will be faced with having to decide whether they must overhaul their systems yet again. Ironically, and given other California restrictions regarding collection, use or retention of identifying information, California is emerging as a pretty good place for criminals bent on fraud or identity theft because it is increasingly difficult to collect or retain enough data to know or prove who your customer was. The corollary is that California is becoming a rather bad place for merchants and consumers to whom merchants must pass on costs and consequences.

3. FACT’s New Frontier: Websites

What other new liability is on the horizon for receipts under FACT (as it amended FCRA)? One word: websites. We do not yet know whether or which website screens might be construed to constitute “receipts provided to the customer” under FACT, but claims are being made in litigation that some screens are receipts. In essence, the claims are that confirmation pages, “thank you for your order” pages, and “order status” pages *etc.* are receipts that may not show the full credit or debit card number or expiration date. Contrary arguments can be made so again there will be confusion. However, courts initially addressing the issues are not dismissing the claims.⁷ Rather than litigate, it may be better to assume FACT coverage and remove display of the data.

4. Receipts as Disclosures

Some receipts must contain certain information by virtue of contracts or state or federal laws. As noted, payments system contracts contain changing provisions on what receipts must contain, and some laws also apply. For example, federal Regulation E regarding electronic fund transfer lists what must be on a receipt for a debit card transaction exceeding \$15 initiated at an electronic terminal.⁸ In some situations (such as when a debit card issuer is not the same entity as the financial

institution holding the customer’s deposit account), certain error inquiry information must be provided “on or with” the receipt.⁹ If a merchant uses a method known as “ECK” for electronically converting paper checks into an electronic fund transfer (ACH debit) from a consumer’s account, receipts can also be relevant. In an ECK transaction, the check doesn’t clear as a check but is converted into an ACH debit. If the payee desires also to electronically debit a fee due if the check “bounces” or is otherwise returned, special notices must be given at the point-of-sale and a copy given to the consumer. That copy does not have to be printed on the receipt. One method of providing the copy is to put the notice on the receipt.¹⁰ One begins to wish for that “easy” button.

In summary, traditionally applause is a receipt, not a bill; and traditionally, receipts end a transaction instead of creating new liabilities. Not so in modern commerce, however. Accordingly, merchants may wish to take a new look at receipts to avoid a bill they will not want to pay.

Endnotes

- ¹ <http://www.poemhunter.com/search/?q=receipt&Submit=Find&w=quotation>, citing Irving Kolodin, “Ovation and Triumph,” *The Musical Life* (1958).
- ² Fair and Accurate Credit Transactions Act of 2003. Pub. L. No. 108-159, § 113 (2003) creating 15 U.S.C. § 1681c(g) (emphasis added).
- ³ *Id.* at (3).
- ⁴ See *e.g.*, *In Re TJX Companies Retail Security Breach Litigation*, 524 F.Supp.2d 83 (D. Mass., 2007) (in camera review of confidential MasterCard and Visa regulations) (CCH COMPUTER CASES ¶ 49,420).
- ⁵ For examples of class actions, see *e.g.*, *Ramirez v. Midwest Airlines, Inc.*, 2008 WL 682438 (D. Kan.) (CCH COMPUTER CASES ¶ 49,508); *Redmon v. Uncle Julio’s of Illinois, Inc.*, 2008 WL 656075 (N.D. Ill.); and *Matthews v. United Retail, Inc.*, 2008 WL 618960 (N.D. Ill.).
- ⁶ Cal. Civ. Code § 1747.09.
- ⁷ See *e.g.*, *Harris v. Best Buy Co.* (ND Ill no. 1:07-cv-02559, 2008); *Vasquez-Torres v. Stubhub, Inc.*, 2007 ILRWeb (P&F) 2297(C.D. Cal 2007); and *Soualian v. International Coffee & Tea, LLC*, (not reported in F.Supp.2d), 2008 WL 410618 (C.D. Cal.); and *Grabein v. 1-800-Flowers.com, Inc.*, Slip Copy, 2008 WL 343179 (S.D. Fla.).
- ⁸ See 12 CFR § 205.9 regarding imitation of debit card transactions at electronic terminals.
- ⁹ See 12 CFR § 205.14(b)(1)(iii).
- ¹⁰ See 71 FR 69430,69436 (12/1/06).