

April 2014

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Recommended Citation

Sayles, Rebecca J. (2012) "Get Your FACTAs Straight: The Application of FACTA's Truncation Provision to Online Transactions," *St. John's Law Review*. Vol. 86 : No. 3 , Article 6.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol86/iss3/6>

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GET YOUR FACTAS STRAIGHT: THE APPLICATION OF FACTA'S TRUNCATION PROVISION TO ONLINE TRANSACTIONS

REBECCA J. SAYLES[†]

INTRODUCTION

"But he that filches from me my good name/Robs me of that which not enriches him/And makes me poor indeed." – William Shakespeare¹

Unfortunately, an alarmingly high number of people in the United States are intimately familiar with the message artfully hidden within Shakespeare's words; identity theft is an extremely destructive crime. Defined by the United States Department of Justice as a crime "in which someone wrongfully obtains and uses another person's personal data in some way that involves fraud or deception, typically for economic gain,"² identity theft left over eleven million people victimized in 2009 alone.³ Moreover, identity theft is on the rise, as the number of victims in 2009 represented an increase of over one million victims as compared to 2008.⁴

Identity theft has not left its victims or the economy unscathed. Individual victims of identity theft spend an average of twenty-one working hours⁵ and an aggregated total of \$5 billion in out-of-pocket expenses in order to repair the damage

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¹ WILLIAM SHAKESPEARE, *OTHELLO* act 3, sc. 3.

² *Identity Theft and Identity Fraud*, U.S. DEPT OF JUSTICE, <http://www.justice.gov/criminal/fraud/websites/idtheft.html> (last visited Mar. 1, 2013).

³ JAVELIN STRATEGY & RESEARCH, 2010 IDENTITY FRAUD SURVEY REPORT: CONSUMER VERSION 5 (2010), available at https://www.javelinstrategy.com/uploads/files/1004.R_2010IdentityFraudSurveyConsumer.pdf.

⁴ *Id.*

⁵ *Id.*

caused by identity theft.⁶ Moreover, other intangible costs are associated with identity theft for victims, such as the mental anguish endured while repairing their financial reputation.⁷ In addition, United States businesses lose an estimated \$48 billion annually as a result of identity theft.⁸ Quite notably, it is estimated that in 2006 alone, online merchants lost \$3 billion in revenue as a result of transactions involving the fraudulent use of credit or debt card account numbers.⁹

As evidenced by the alarming cost of identity theft to online merchants, the crime has adapted itself to the evolving habits of consumers. Electronic commerce has consistently increased in recent years, with online retail sales continuing to increase their proportion of the overall retail market.¹⁰ Despite the sluggish economy, online retail is "red-hot by comparison," yielding a double-digit growth trajectory.¹¹ A new generation of buyers now purchases everything from clothing¹² and groceries¹³ to electronics¹⁴ and cars¹⁵ online. Many online merchants now provide e-mail receipts or purchase confirmations to their customers as a replacement for the paper receipt the customer would have obtained in a face-to-face transaction.¹⁶ In turn, consumers hold on to these so-called "e-receipts," just as they would for paper receipts, in case the product purchased turns out

⁶ Press Release, Fed. Trade Comm'n, FTC Releases Survey of Identity Theft in U.S. 27.3 Million Victims in Past 5 Years, Billions in Losses for Buss. & Consumers (Sept. 3, 2003), available at www.ftc.gov/opa/2003/09/idtheft.htm.

⁷ See *Identity Theft and Identity Fraud*, *supra* note 2.

⁸ Press Release, Fed. Trade Comm'n, *supra* note 6.

⁹ CYBERSOURCE, 8TH ANNUAL ONLINE FRAUD REPORT: ONLINE PAYMENT FRAUD TRENDS, MERCHANT PRACTICES & BENCHMARKS 3 (2007), available at http://www.lazworld.com/whitepapers/CYBS_2007_Fraud_Report.pdf.

¹⁰ U.S. CENSUS BUREAU, 2009 E-STATS 3 (2011), available at <http://www.census.gov/econ/estats/2009/2009reportfinal.pdf> [hereinafter "2009 E-STATS"]; see Paul Schottmiller et al., *Want Growth? Build Online Stores*, CISCO INTERNET BUS. SOLUTIONS GRP. 1 (May 2011), available at http://www.cisco.com/web/about/ac79/docs/retail/E-Commerce-Growth_IBSG_0520FINAL.pdf.

¹¹ Schottmiller et al., *supra* note 10, at 1.

¹² See, e.g., MACY'S, <http://www.macys.com> (last visited Mar. 1, 2013).

¹³ See, e.g., PEAPOD.COM, <http://www.peapod.com> (last visited Mar. 1, 2013).

¹⁴ See, e.g., APPLE STORE, <http://store.apple.com/us> (last visited Mar. 1, 2013).

¹⁵ See, e.g., *Cars & Trucks*, EBAY, <http://motors.shop.ebay.com/6001/i.html> (last visited Mar. 1, 2013).

¹⁶ Jason Fitterer, Comment, *Putting a Lid on Online Dumpster-Diving: Why the Fair and Accurate Credit Transactions Act Should Be Amended To Include E-Mail Receipts*, 9 NW. J. TECH. & INTELL. PROP. 591, 597 (2011).

to be unsatisfactory or defective.¹⁷ “Archive” and “search” functions offered by many e-mail providers allow users to store these e-receipts for years while enabling quick retrieval of a particular e-receipt at a later date.¹⁸

Identity thieves, because of this change in consumer behavior, have adapted their modus operandi to capitalize on the new technologies available to consumers. “Old fashioned” credit card fraud was often perpetrated through “dumpster diving,” in which perpetrators actually rummaged through dumpsters and trash bins outside of businesses and personal residences in search of bills, receipts, or other documents that contained valuable personal information such as Social Security numbers, phone numbers, and credit card or other financial account information.¹⁹ However, as a result of the changes in consumer habits outlined above, the Internet has become the modern-day dumpster.²⁰ Modern-day identity thieves are now turning to the Internet to find their next victim.²¹ As consumers make more purchases online and subsequently store their electronic receipts and purchase confirmations in e-mail archives, potential fraudsters are accessing this information by hacking into the victim’s account and taking advantage of the archive and search features to quickly and easily find these e-receipts that often contain sensitive information.²²

So, what happens when an online retailer sends its customers e-mail receipts or purchase confirmations containing potentially compromising information, such as a person’s credit card account number? In a recent example of exactly this situation, a customer noticed his full credit card number and

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *About Identity Theft*, FED. TRADE COMM’N, <http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/about-identity-theft.html> (last visited Mar. 1, 2013); *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearing on The Growing Problem of Identity Theft and Its Relationship to the Fair Credit Reporting Act Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 83–84 (2003) (statement of Timothy Caddigan, Special Agent In Charge, Criminal Investigative Div., U.S. Secret Serv.), available at <http://www.gpo.gov/fdsys/pkg/CHRG-108shrg95254/pdf/CHRG-108shrg95254.pdf>.

²⁰ Drew Voros, *Your Online Privacy Slips Through Web's Cracks*, CONTRA COSTA TIMES, October 19, 2010, available at http://www.insidebayarea.com/breaking-news/ci_16378229.

²¹ Fitterer, *supra* note 16, at 597.

²² *Id.*

security code on an order confirmation e-mail sent from the catalogue company Argos.²³ If any of Argos' customers who received such an email had their e-mail account compromised, the hacker would need only do a quick search of the e-mail's archive to find the customer's credit card information before he or she could begin making fraudulent purchases online.²⁴ The question then becomes: Do Argos's customers have any recourse against the company for subjecting them to an increased risk of identity theft?

Many people in such a position have turned to the Fair and Accurate Credit Transactions Act ("FACTA") for help. Passed in 2003, FACTA contains a provision mandating that no merchant who accepts credit or debit cards shall "print" more than the last five digits of the credit or debit card number, or the card's expiration date on any receipt that is "electronically printed" and provided at "the point of sale."²⁵ This "truncation" provision was aimed at furthering FACTA's overall purpose of preventing identity theft.²⁶ As many in the industry have noted, "receipts that include full account numbers and expiration dates are a gold mine for identity thieves,"²⁷ and the dangers of identity theft occurring as a result of a non-truncated credit card receipt are widely known.²⁸ FACTA's truncation provision was aimed at eliminating this risk for consumers.²⁹ Moreover, since identity theft is a nationwide concern, Congress believed a uniform national standard was the best way to help prevent it.³⁰ Therefore, FACTA provided that the truncation provision preempts state laws that attempted to regulate credit card

²³ John Leyden, *Argos Buries Unencrypted Credit Card Data in Email Receipts*, THE REGISTER (Mar. 5, 2010 11:49 GMT), http://www.theregister.co.uk/2010/03/05/argos_email_security_snafu.

²⁴ Fitterer, *supra* note 16, at 598.

²⁵ 15 U.S.C. § 1681c(g) (2006 & Supp. IV 2010).

²⁶ Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (codified at 15 U.S.C. § 1681a (2006 & Supp. IV 2010)).

²⁷ PRIVACY RIGHTS CLEARINGHOUSE, FACT SHEET 6A: FACTS ON FACTA, THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT 13, *available at* <https://www.privacyrights.org/fs/fs6a-facta.htm> (Jan. 2013).

²⁸ Daniel R. LeCours, Note, *Steering Clear of the "Road to Nowhere": Why the BMW Guideposts Should Not Be Used To Review Statutory Penalty Awards*, 63 RUTGERS L. REV. 327, 344-45 (2010).

²⁹ See 15 U.S.C. § 1681a.

³⁰ See 149 CONG. REC. H12,215 (daily ed. Nov. 21, 2003) (statement of Rep. Michael Oxley), *available at* <http://www.gpo.gov/fdsys/pkg/CREC-2003-11-21/pdf/CREC-2003-11-21-pt1-PgH12198.pdf>.

receipt truncation.³¹ In the event of a violation of the provision, FACTA provides that a consumer can recover either actual damages³² or, if the consumer is able to prove the violation was willful, statutory damages of \$100 to \$1,000 per violation.³³ Markedly, FACTA does not cap the amount of damages recoverable in a class action brought under the Act,³⁴ which has resulted in a vast majority of the lawsuits brought under FACTA being brought as class actions.³⁵

Nonetheless, the case for our Argos customer is not as black and white as it may seem. While Argos did not truncate its receipts in accordance with FACTA's truncation provision, courts are split as to whether the provision is even applicable to online transactions.³⁶ The conflict stems from the lack of a statutory definition for the term "print," the resulting divergent interpretations of its meaning, and the impact of those divergent interpretations upon FACTA's application to online transactions. Some courts reason that the plain meaning of the term "print" is clear—that the term ordinarily means recording information on paper.³⁷ Therefore these courts conclude that the term's plain meaning limits the applicability of the truncation provision to paper receipts printed by merchants in face-to-face transactions.³⁸ These courts bolster their reasoning by highlighting the potentially debilitating effects businesses may face as a result of a technical violation of the truncation provision, given the unlimited aggregated damages available in class actions brought under FACTA.³⁹ In contrast, other courts have held that based on the explicit congressional intent

³¹ 15 U.S.C.A. § 1681t(b)(5)(A) (West 2011).

³² *Id.* § 1681o.

³³ 15 U.S.C. § 1681n(a) (2006 & Supp. II 2008).

³⁴ LeCours, *supra* note 28, at 344.

³⁵ Michael E. Chaplin, *What's So Fair About the Fair and Accurate Credit Transactions Act?*, 92 MARQ. L. REV. 307, 411 (2008).

³⁶ *Compare* Smith v. Under Armour, Inc., 593 F. Supp. 2d 1281, 1287 (S.D. Fla. 2008) *and* Narson v. Godaddy.com, Inc., No. CV-08-0177-PHX-SRB, 2008 WL 2790211, at *5 (D. Ariz. May 5, 2008) *with* Grabein v. 1-800-Flowers.com, Inc., No. 07-22235-CIV, 2008 WL 343179, at *3 (S.D. Fla. Jan. 29, 2008) *and* Vasquez-Torres v. Stubhub, Inc., No. CV 07-1328 PSG, 2007 U.S. Dist. LEXIS 63719, at *9 (C.D. Cal. July 2, 2007).

³⁷ *See, e.g.*, Shlahtichman v. 1-800 Contacts, Inc., 615 F.3d 794, 799 (7th Cir. 2010).

³⁸ *Id.*

³⁹ *See, e.g.*, Lopez v. KB Toys Retail, Inc., No. CV 07-144-JFW, 2007 U.S. Dist. LEXIS 82025, at *14 (C.D. Cal. July 17, 2007).

underlying FACTA, namely to prevent identity theft and to create a uniform national standard to further that end, the term "print" should be broadly interpreted so as to include electronic receipts.⁴⁰ Therefore, these courts conclude that the truncation provision should be applicable to e-mail receipts generated in online transactions.⁴¹

This Note argues that FACTA's truncation provision should apply to online transactions and e-mail receipts as currently written, but recognizes the necessity of limiting the potentially devastating liability that online merchants would face for a technical violation of the provision in a class action lawsuit. Part I of this Note explores FACTA's statutory landscape, paying particular attention to the truncation and statutory damages provisions. Part II analyzes the conflicting viewpoints that have arisen through attempts to apply FACTA's truncation provision to online transactions. Finally, Part III argues that an interpretation of the truncation provision that does not make it applicable to online transaction is an improper interpretation of the provision given FACTA's legislative purpose, its statutory language, and overall public policy concerns. However, in light of the probability that online merchants would be subject to debilitating liability for technical violations of the provision in a class action situation, this Part also proposes that Congress amend the statutory relief provision so as to limit potential class action liability.

I. FACTA'S STATUTORY LANDSCAPE

"Get your facts first, and then you can distort them as much as you please." – Mark Twain⁴²

The FACTA was passed in 2003 in response to growing concerns of identity theft. Enacted as an amendment to the Fair Credit Reporting Act of 1970 ("FCRA"), FACTA was explicitly intended to prevent identity theft through the implementation of various provisions specifically designed to protect consumers,⁴³ including a requirement that merchants truncate the credit card information contained on receipts provided to their customers.⁴⁴

⁴⁰ See, e.g., *Vasquez-Torres*, 2007 US Dist. LEXIS 63719, at *8–9.

⁴¹ *Id.* at *9.

⁴² ROBERT ANDREWS, *THE COLUMBIA DICTIONARY OF QUOTATIONS* 741 (1993).

⁴³ See, e.g., 15 U.S.C. § 1681c-1 (2006 & Supp. IV 2010).

⁴⁴ *Id.* § 1681c(g) (2006 & Supp. IV 2010).

This Part describes FACTA's statutory landscape in detail, first explaining the limitation of FCRA that brought about FACTA's enactment, then exploring the Act itself, paying particular attention to the truncation and relief provisions.

FCRA was passed in 1970 in response to the growth of the consumer credit reporting industry.⁴⁵ As a consumer protection statute, FCRA was designed to address concerns over the accuracy of consumer credit reports and the transparency of consumer reporting agencies.⁴⁶ More specifically, a key purpose of FCRA was to prevent these agencies from maintaining secret consumer files that could potentially contain inaccurate information.⁴⁷ The concern was that these inaccuracies could negatively affect a consumer's ability to obtain credit.⁴⁸ Under FCRA, these agencies are required to "maintain reasonable procedures" designed to prevent inaccuracies in consumer credit reports⁴⁹ and to notify consumers whenever an investigative consumer report is being prepared on their behalf.⁵⁰ In 1996, in response to assertions from consumer credit agencies that accuracy and completeness of consumer reports would be further enhanced by a national standard,⁵¹ Congress amended FCRA to "create a uniform national standard for consumer protections governing credit transactions."⁵² Congress achieved this by providing for federal preemption of state laws, but the preemption was subject to a sunset provision that went into effect on January 1, 2004.⁵³

As FCRA was designed primarily to ensure the accuracy of credit reports by regulating the procedures of credit reporting agencies,⁵⁴ it was not adept at handling the new breed of errors contained in consumer credit reports as a result of the emerging

⁴⁵ Gail Hillebrand, *After the FACTA: State Power To Prevent Identity Theft*, 17 LOY. CONSUMER L. REV. 53, 54 (2004).

⁴⁶ 15 U.S.C. § 1681 (2006) (stating that the FCRA was designed "to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy").

⁴⁷ Hillebrand, *supra* note 45, at 54.

⁴⁸ *Id.*

⁴⁹ 15 U.S.C.A. § 1681e (2006 & Supp. IV 2010).

⁵⁰ 15 U.S.C. § 1681d (2006).

⁵¹ Hillebrand, *supra* note 45, at 55.

⁵² H.R. REP. NO. 108-263, at 24 (2003).

⁵³ *Id.*

⁵⁴ *See* 15 U.S.C. § 1681 (2006).

problem of identity theft.⁵⁵ In response to these concerns, Congress further amended FCRA in 2003 by passing FACTA.⁵⁶

As a “comprehensive consumer protection bill[],”⁵⁷ FACTA amended FCRA with the explicit purpose of preventing identity theft.⁵⁸ To achieve that end, FACTA contained several provisions specifically intended to help consumers combat identity theft.⁵⁹ Most importantly for this Note, one of these new protections was a credit card number truncation requirement for receipts,⁶⁰ which was specifically aimed at “prevent[ing] criminals from obtaining easy access to such key information.”⁶¹ According to this “truncation provision,” “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 sale or transaction.”⁶² The provision limits its applicability to those receipts that are “electronically printed,” and explicitly exempts “transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by an imprint

⁵⁵ Brandon McKelvey, Comment, *Financial Institutions' Duty of Confidentiality To Keep Customer's Personal Information Secure from the Threat of Identity Theft*, 34 U.C. DAVIS L. REV. 1077, 1091 (2001) (“The limited protection of . . . the FCRA has proved insufficient to prevent identity theft.”).

⁵⁶ Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (“An Act [t]o amend the Fair Credit Reporting Act.”) (codified at 15 U.S.C. § 1681a (2006 & Supp. IV 2010)).

⁵⁷ 149 CONG. REC. 21,708, 21,739 (2003) (statement of Rep. Michael Oxley).

⁵⁸ Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (“An Act . . . to prevent identity theft”) (codified at 15 U.S.C. § 1681a (2006 & Supp. IV 2010)).

⁵⁹ S. REP. NO. 108-166, at 3 (2003) (Conf. Rep.) (“The bill contains numerous measures which protect consumers from identity thieves.”).

⁶⁰ 15 U.S.C. § 1681c(g) (2006 & Supp. IV 2010). FACTA also includes provisions designed to better enable consumers to monitor credit, thereby helping to stifle the effects of any identity theft. For instance, FACTA explicitly empowers consumers to request and obtain one credit report per year from each of the three major credit-reporting agencies free of charge, to enable consumers to monitor their reports so as to ensure that no fraudulent activity has occurred. *Id.* § 1681j. In addition, under another provision, consumers are able to create a fraud alert on their account, which then mandates that the consumer be notified of any new credit activity, while simultaneously requiring that the business processing the credit request take “reasonable steps” to ensure the request is not fraudulent. *Id.* § 1681c-1. Moreover, consumers are able to block any negative information resulting from fraud or identity theft from their credit reports. *Id.* § 1681c-2. Finally, FACTA also provides businesses with mandatory procedures for disposing of consumer credit information. *Id.* § 1681w.

⁶¹ S. REP. NO. 108-166, at 3 (2003) (Conf. Rep.).

⁶² 15 U.S.C. § 1681c(g)(1) (2006 & Supp. IV 2010).

or copy of the card.”⁶³ Lastly, the provision contains a staggered implementation schedule, providing that the provision would become effective either “3 years after December 4, 2003” or “1 year after December 4, 2003,” depending upon the date that the “machine or device that electronically prints receipts for credit card or debit card transactions” was put into use.⁶⁴

To further achieve its goal of preventing identity theft, FACTA also terminated FCRA’s preemption sunset provision, with the result that regulation of consumer reporting agencies is now permanently subject to federal preemption.⁶⁵ FACTA also explicitly provided that the provisions aimed at stifling identity theft, most importantly the truncation provision, would similarly be subject to permanent federal preemption.⁶⁶ Echoing the reasoning behind FCRA’s 1996 amendments,⁶⁷ Congress explained that a uniform national system was the best way to deal with identity theft since it is such a national concern.⁶⁸ As one Congressman noted, to not provide federal preemption on this key provision would hurt consumers.⁶⁹ More specifically the Congressman queried, “what [would] happen with consumers and businesses who [would] not know what State law applie[d] and [would] find themselves caught in conflicting State

⁶³ *Id.* § 1681c(g)(2).

⁶⁴ *Id.* § 1681c(g)(3). For machines put into use before January 1, 2005, the three-year grace period applied. *Id.* § 1681c(g)(3)(A). On the other hand, if a machine was put into use on or after January 1, 2005, the merchant would only be allowed a one-year grace period before compliance with the truncation provision would become mandatory. *Id.* § 1681c(g)(3)(B).

⁶⁵ Hillebrand, *supra* note 45, at 57; 149 CONG. REC. H12,219 (daily ed. Nov. 21, 2003) (statement of Rep. Kanjorski) (“If we fail to extend the expiring provisions of the Fair Credit Reporting Act before the end of this year, conflicting state laws could place financial institutions in a difficult compliance position . . .”).

⁶⁶ H.R. REP. NO. 108-263, at 26. (“The Committee’s review of the FCRA’s expiring uniform national standards included extensive consideration of proposals for assisting consumers in preventing identity theft . . .”); 149 CONG. REC. H12,215 (daily ed. Nov. 21, 2003) (statement of Rep. Michael Oxley) (“[T]he uniform national standards for identity theft were limited to the subject matters that the bill’s provisions actually address, such as fraud alerts, blocking bad credit information, and truncating credit card account numbers at the point of sale.” (emphasis added)).

⁶⁷ See *supra* notes 51–53 and accompanying text.

⁶⁸ 149 CONG. REC. H12,215 (daily ed. Nov. 21, 2003) (statement of Rep. Michael Oxley).

⁶⁹ 149 CONG. REC. 21,708, 21,739 (2003) (statement of Rep. Michael Oxley) (“[A]llowing different State standards on key protections will hurt, not help, consumers.”).

requirements that [could not] be adequately complied with.⁷⁰ If the truncation provision was not uniformly applicable nationwide, it would water down the protections against identity theft available to Americans.⁷¹ Therefore, FACTA explicitly provided that the truncation provision will preempt state law “with respect to the conduct required” by the provision itself.⁷² That is, the truncation provision creates a uniform national standard for the actual conduct required thereunder, namely the truncation of credit card account numbers on receipts.⁷³

FACTA piggybacks on the enforcement provisions of FCRA.⁷⁴ FACTA provides that a consumer can recover any actual damages, together with the costs of the litigation and reasonable attorneys fees, sustained as a result of a negligent violation.⁷⁵ However, if a consumer is able to prove a willful⁷⁶ violation of FACTA, he or she can collect statutory damages of “not less than \$100 and not more than \$1,000” per violation, along with the costs of suit and punitive damages, without having to prove actual injury.⁷⁷ Notably, FACTA does not limit the amount of damages recoverable in a class action brought under the Act.⁷⁸ As a result, the overwhelming majority of lawsuits brought under FACTA are brought as class actions,⁷⁹ given the relatively low amount of statutory damages authorized and the commonality of material facts amongst the class of plaintiffs.⁸⁰

After FACTA was enacted, many of the initial class actions being brought under the Act claimed willful violations of the truncation provision as a result of a merchant's failure to properly truncate the expiration date of the consumers' credit cards.⁸¹ However, many of the merchants claimed that they

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² 15 U.S.C.A. § 1681t(b)(5)(A) (West 2011).

⁷³ Hillebrand, *supra* note 45, at 72.

⁷⁴ LeCours, *supra* note 28, at 350.

⁷⁵ 15 U.S.C. § 1681o (2006).

⁷⁶ The Supreme Court has determined that the statute's “willfulness” requirement includes reckless disregard of the duty imposed by the statute. See *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 71 (2007).

⁷⁷ 15 U.S.C. § 1681n(a)(1)(A) (2006 & Supp. II 2008).

⁷⁸ Chaplin, *supra* note 35, at 311.

⁷⁹ *Id.* (“The lion's share of the FACTA lawsuits have been filed as putative class actions, which means that the litigant seeks relief on behalf of a class of individuals that received receipts that contained more information than FACTA permits.”).

⁸⁰ LeCours, *supra* note 28, at 342.

⁸¹ Fitterer, *supra* note 16, at 400.

believed they were in compliance with the statute by truncating the credit card account number.⁸² As a result, Congress enacted the Credit and Debit Card Receipt Clarification Act of 2007 (“CDCRCA”) in order to resolve the ambiguity regarding the provision.⁸³ This amendment essentially provides merchants with “one free bite at the apple,” as it limits liability for violations resulting from the inclusion of an improperly truncated expiration date which occurred between the enactment of FACTA and the enactment of the CDCRCA, but clarifies that future inclusions of a card’s expiration date will nonetheless constitute a violation.⁸⁴

II. CONFLICTING INTERPRETATIONS OF “PRINT” AND THE APPLICATION OF THE TRUNCATION PROVISION TO ELECTRONIC RECEIPTS

“[A]ll meanings, we know, depend on the key of interpretation.”
– George Eliot⁸⁵

The divergent viewpoints on the truncation provision’s applicability to e-receipts have emerged as a result of differing interpretations of the term “print” in FACTA’s truncation provision. This Part will explore this conflict in more detail. First, Part II.A. describes the arguments favoring the truncation provision’s application to online transactions, highlighting the clearly defined underlying congressional intent of the truncation provision as the case-in-chief argument of proponents of its application to e-receipts. Then, Part II.B. surveys the arguments against the provision’s application to online transactions, noting the prominence of the allegedly plain meaning of the provision’s language amidst the arguments made by opponents to the provision’s application to e-receipts.

⁸² Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, § 2(a)(3), 122 Stat. 1565 (2008).

⁸³ See *id.* § 2(b).

⁸⁴ Chaplin, *supra* note 35, at 313 (“That is, the law appears to say: ‘Okay, you were wrong, but we won’t count it against you—just don’t do it again.’”).

⁸⁵ 1 GEORGE ELIOT, DANIEL DERONDA 56 (Little, Brown, & Co. 1900) (1876).

A. *A Purposivist Approach: FACTA's Truncation Provision Applies to E-Receipts*

"Woe to the makers of literal translations, who by rendering every word weaken the meaning!" – Voltaire⁸⁶

A California District Court recently had the opportunity to address the issue of whether FACTA's truncation provision applies to online receipts.⁸⁷ In *Vasquez-Torres v. Stubhub, Inc.* the court held that electronic receipts are subject to the truncation provision.⁸⁸ The plaintiff in *Vasquez-Torres* purchased tickets from defendant Stubhub, Inc.,⁸⁹ an online "fan-to-fan ticket marketplace."⁹⁰ The defendant provided the plaintiff with an electronic receipt, which contained the expiration date of plaintiff's credit or debit card.⁹¹ As a result, the plaintiff brought a class-action suit under FACTA, claiming a violation of the statute's truncation provision.⁹² The defendant then moved to dismiss for failure to state a claim upon which relief can be granted, asserting that since it did not "print" the receipt under any reasonable interpretation of the term, the truncation provision was inapplicable to the transaction.⁹³ The court disagreed with the defendant, holding that electronic receipts do fall within the truncation provision's domain.⁹⁴ The court explained that when the defendant asserted that the definition of "print" was "to make an impression in or upon," it failed to realize that this definition encompassed receipts displayed on a consumer's computer screen, noting that when the defendant sent the e-receipt to the plaintiff, it had "made an impression on Plaintiffs [sic] computer screen."⁹⁵ Moreover, the court noted that other definitions of "print," such as "to display on a surface (as a computer screen) for viewing," clearly include electronic

⁸⁶ ROBERT ANDREWS, *THE COLUMBIA DICTIONARY OF QUOTATIONS* 920 (1993).

⁸⁷ *Vasquez-Torres v. Stubhub, Inc.*, No. CV 07-1328, 2007 U.S. Dist. LEXIS 63719, *6 (C.D. Cal. July 2, 2007).

⁸⁸ *Id.* at *6–9.

⁸⁹ *See id.* at *2.

⁹⁰ *About Us*, STUBHUB.COM, <https://www.stubhub.com/about-us/> (last visited Mar. 1, 2013).

⁹¹ *Vasquez-Torres*, 2007 U.S. Dist. LEXIS 63719, at *2.

⁹² *Id.* at *1–2.

⁹³ *Id.* at *5.

⁹⁴ *Id.* at *9.

⁹⁵ *Id.* at *7 (internal quotation omitted).

receipts.⁹⁶ Finally, the court emphasized that a statute should be interpreted in accordance with its legislative purpose.⁹⁷ As FACTA was enacted to prevent identity theft, a broad interpretation of the term “print,” so as to include e-receipts, better comports with Congress’ will.⁹⁸ In addition, the court noted that Congress had expressly provided for exceptions for handwritten and imprinted receipts within the provision and concluded that had Congress intended a similar exception to apply to e-receipts, it would have similarly expressly provided such an exception.⁹⁹

1. Congressional Intent.

Others in the field agree with the California District Court’s reasoning and advocate for the truncation provision’s application to electronic receipts.¹⁰⁰ According to such advocates, it is the congressional intent underlying the provision that dictates that the provision should so apply.¹⁰¹ When interpreting a statute, the “goal . . . is to ascertain the intent of Congress in order to give effect to its legislative will.”¹⁰² Since the legislative will behind FACTA’s enactment was plainly stated by Congress as a desire to help protect consumers against identity theft,¹⁰³ it seems likely Congress intended to prevent all forms of identity theft and not limit the statute’s protections to the narrow subset of risks posed by paper receipts.¹⁰⁴

Proponents of the truncation provision’s application to e-mail receipts bolster their argument by highlighting the fact that nothing in the text of the statute reveals that Congress intended to exclude online receipts from the provision’s domain.¹⁰⁵ The statute states that no merchant shall “print” more than the last five digits or the expiration date of a consumer’s credit or debit card on an “electronically printed” receipt, “[e]xcept as otherwise

⁹⁶ *Id.*

⁹⁷ *Id.* at *8.

⁹⁸ *Id.* at *8–9.

⁹⁹ *Id.* at *9.

¹⁰⁰ *See, e.g.,* Grabein v. 1-800-Flowers.com, Inc., No. 07-22235-CIV, 2008 WL 343179, at *3 (S.D. Fla. Jan. 29, 2008).

¹⁰¹ *Vasquez-Torres*, 2007 U.S. Dist. LEXIS 63719, at *8.

¹⁰² *See* Alarcon v. Keller Indus. Inc., 27 F.3d 386, 389 (9th Cir. 1994).

¹⁰³ Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (codified at 15 U.S.C. § 1681a (2006 & Supp. IV 2010)).

¹⁰⁴ *Vasquez-Torres*, 2007 U.S. Dist. LEXIS 63719, at *8–9.

¹⁰⁵ *See* 15 U.S.C. § 1681c (2006 & Supp. IV 2010).

provided in [the provision].”¹⁰⁶ The statute goes on to state that the subsection “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.”¹⁰⁷ Thus, it appears that Congress created a broad rule with a narrow exception. More specifically, when Congress decided that handwritten and imprinted receipts were not to be included within the truncation’s domain, it made it clear that such receipts were exempt under the truncation provision.¹⁰⁸ However, Congress made no mention of electronic receipts or confirmations being similarly excluded under the provision.¹⁰⁹ “[H]ad Congress desired such an exclusion, they would have explicitly done so,” as they did for handwritten and imprinted receipts.¹¹⁰

According to proponents of this view, this reasoning is reinforced in light of FACTA’s remedial nature.¹¹¹ In enacting FACTA, Congress intended to create a broad consumer protection scheme to help remedy the damaging effects of identity theft.¹¹² As a remedial statute, its protections should be broadly construed and given liberal interpretation while its exceptions should be read narrowly to affect only the remedy Congress intended.¹¹³ Such a broad reading would necessitate the inclusion of electronic receipts within the truncation provision’s protections.

¹⁰⁶ *Id.* § 1681c(g).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (Congress explicitly provided an exemption within the truncation provision itself for “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.”).

¹⁰⁹ *See id.* § 1681c.

¹¹⁰ *Vasquez-Torres v. Stubhub, Inc.*, No. CV 07-1328, 2007 U.S. Dist. LEXIS 63719, at *9 (C.D. Cal. July 2, 2007).

¹¹¹ *See Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 716 (9th Cir. 2010) (“[W]e must examine FACTA to determine whether the denial of class certification is consistent with congressional intent and FACTA’s remedial scheme” (emphasis added)).

¹¹² *See* 15 U.S.C. § 1681a (2006 & Supp. IV 2010).

¹¹³ *See Piedmont & N. Ry. Co. v. Interstate Commerce Comm’n*, 286 U.S. 299, 311–12 (1932) (“The Transportation Act was remedial legislation, and should therefore be given a liberal interpretation . . . but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended.”).

2. Statutory Language

Proponents of the truncation provision's application to online transactions also cite the language of the statute itself as evidence that an emphasis on the congressional intent underlying the statute in the interpretation process does not circumvent an application of the specific words chosen by Congress.¹¹⁴ Since FACTA does not explicitly define "print," courts must construe the term so as to give effect to its ordinary meaning and can look to dictionaries when determining a term's ordinary meaning.¹¹⁵ One of the typical definitions of the word "print," which is often used to help exclude e-receipts from the truncation provision, is "to make an impression, in or upon."¹¹⁶ It is argued that an e-receipt or online confirmation does in fact "ma[k]e an impression" on the computer screen upon which it is displayed.¹¹⁷ Therefore, such e-receipts fall within the ordinary meaning of the term "print."¹¹⁸ Furthermore, other definitions of "print" expressly include things like displays on a computer screen or other surface within the ordinary meaning of the term.¹¹⁹

Nonetheless, even if a court finds that the more plausible meaning of "print" is such as to preclude the inclusion of electronic receipts, advocates of the provision's application to e-mail receipts contend that, in light of the interpretation above, it is not the only reasonable interpretation of the term.¹²⁰ Therefore, it is maintained that the term "print" is sufficiently ambiguous so as to justify consideration of FACTA's purpose and legislative history to resolve the ambiguity.¹²¹ Based on the clear legislative will,¹²² such advocates maintain that the truncation provision should apply to Internet transactions. To hold otherwise would be a frustration of the statute's clearly stated purpose of preventing identity theft.

¹¹⁴ See *Vasquez-Torres*, 2007 U.S. Dist. LEXIS 63719, at *6-7.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at *7.

¹¹⁷ *Id.*

¹¹⁸ See *id.*

¹¹⁹ *Id.* ("defining 'print' as 'to display on a surface (as a computer screen) for viewing'") (citing MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 924 (10th ed. 2002)).

¹²⁰ See *supra* notes 87-118 and accompanying text.

¹²¹ See *Colon v. Option One Mortg. Corp.*, 319 F.3d 912, 917 (7th Cir. 2003).

¹²² See *supra* notes 99-112 and accompanying text.

3. Policy

Proponents of this view also note that the inclusion of electronic receipts within FACTA's domain is further supported by common sense and policy reasoning. Online commerce's prevalence was well established in 2003¹²³ when Congress was drafting and considering FACTA.¹²⁴ Therefore, it seems unlikely that Congress would have desired the statute's protections to apply to face-to-face transactions and not to online transactions in a world where the former are becoming more and more obsolete while the latter are continuing to have a growing impact on our economy.¹²⁵ In fact, the legislative history reveals that Congress was duly aware of the impact that the Internet has had on identity theft, making it much easier for potential fraudsters to access consumer information.¹²⁶ Further, one of the mischiefs Congress sought to remedy by its enactment of the truncation provision was dumpster diving.¹²⁷ The Internet is the modern-day dumpster, where modern-day identity thieves turn to access an unwary consumer's personal information.¹²⁸ As a result of identity thieves hacking into various consumer websites, online transactions pose an even greater risk of interception by an identity thief during a transaction than does the physical handling of a paper receipt. Therefore, to find FACTA's truncation provision inapplicable to e-receipts would be to weaken the strong consumer protections intended by Congress.¹²⁹ This seemingly contradictory result is exacerbated in a world where online transactions are continuing to increase in proportion to in-person transactions.¹³⁰

¹²³ U.S. CENSUS BUREAU, 2003 E-STATS 1 (May 11, 2005) [hereinafter "2003 E-STATS"], available at <http://www.census.gov/econ/estats/2003/2003finaltext.pdf>.

¹²⁴ See Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (codified as amended at 15 U.S.C. § 1681a (2006 & Supp. IV 2010)).

¹²⁵ See 2003 E-STATS, *supra* note 123.

¹²⁶ See e.g., 149 CONG. REC. S13,856 (daily ed. Nov. 4, 2003) (statement of Sen. Jim Bunning) ("The internet is making it easier for thieves to access consumer information.").

¹²⁷ *Id.* ("[T]he bill contains strong identity theft and privacy protections . . . that will help prevent thieves who go 'dumpster diving' or try to steal credit reports from mail boxes.").

¹²⁸ Voros, *supra* note 20.

¹²⁹ See 149 CONG. REC. 21,708, 21,739 (2003) (statement of Rep. Michael Oxley) (limiting FACTA to paper receipts would result in the "weakening [of] the national credit system and [the] undercutting [of] the uniform consumer protections this bill provides . . .").

¹³⁰ Schottmiller et al., *supra* note 10, at 1.

In addition, proponents of this view contend that FACTA's truncation provision must apply to electronic receipts in order to avoid undermining the statute's goal of creating a uniform national system to help prevent identity theft.¹³¹ FACTA permanently extended the preemption provisions of the FCRA and explicitly included the truncation provision within the realm of federal preemption.¹³² Congress specifically noted that the provisions of FACTA aimed to combat identity theft were deserving of a uniform standard because "identity theft is a national concern, not only because of its impact . . . but because it knows no boundaries."¹³³ The ubiquitous threat of identity theft is aggravated by a system of electronic commerce that similarly knows no bounds, as the parties to any given online transaction are often in different states, if not different countries. If the federal truncation provision does not apply to these transactions, they will be governed by the truncation laws of the states in which the transactions take place.¹³⁴ This would create the very chaotic state of affairs that the FCRA's preemption provision was meant to avoid.¹³⁵ On one side, it would leave consumers unsure whether their credit or debit card information and data are safe.¹³⁶ On the other side, merchants would be left to the mercy of the varying laws of the states, being forced to comply with the potentially incompatible laws of each state in which it does

¹³¹ See *Vasquez-Torres v. Stubhub, Inc.*, No. CV 07-1328 PSG, 2007 U.S. Dist. LEXIS 63719, at *8-9 (C.D. Cal. July 2, 2007).

¹³² 15 U.S.C.A. § 1681t(b)(5)(A) (West 2011).

¹³³ 149 CONG. REC. H12,215 (daily ed. Nov. 21, 2003) (statement of Rep. Michael Oxley).

¹³⁴ See, e.g., CAL. CIV. CODE § 1747.09 (West 2006); FLA. STAT. ANN. § 501.0118 (West 2003).

¹³⁵ See 149 CONG. REC. H12,215 (daily ed. Nov. 21, 2003) (statement of Rep. Michael Oxley).

¹³⁶ See 149 CONG. REC. 21,708, 21,739 (Sept. 10, 2003) (statement of Rep. Michael Oxley) ("[A]llowing different State standards on key protections will hurt, not help, consumers.").

business over the Internet.¹³⁷ The creation of such chaos seems contrary to the expressed goals of creating a uniform national standard in order to prevent identity theft.

Finally, in response to the argument that the availability of statutory damages for a violation of FACTA's truncation provision results in crippling effects for many businesses and that limiting the statute's applicability to paper receipts would help to minimize such ill effects, proponents of the provision's application to e-receipts maintain that Congress has already weighed such harms and determined that "the penalty fits the 'crime.'" ¹³⁸ These proponents reiterate that the statute's purpose is to prevent identity theft. It would be contradictory to achieving this purpose if the statute's regulatory scheme required plaintiffs to actually become victims of identity theft in order to bring suit under the statute.¹³⁹ Rather, since the policy of preventing identity theft is "sufficiently important to protect, a forceful regulatory scheme is necessary to assure compliance [and] [t]he penalty must be large enough to remove the incentive to disregard or disobey it."¹⁴⁰ Moreover, the Internet has revolutionized business, making it cheaper and easier for companies to access a broad consumer base. However, it can only function if consumers remain confident in the security of their credit information. It follows that, despite the risk of large damages being awarded for violations of the truncation provision in online transactions, online merchants stand to benefit from increased business due to consumer confidence in the security of their credit card account information.

¹³⁷ For example, Oregon's statute states that a merchant cannot "create" a receipt showing "more information about a customer than the customer's name and five digits of the customer's credit or debit card number." OR. REV. STAT. ANN. § 646A.204 (West 2007). In contrast, the Illinois statute seems broad enough to be read to apply to internet transactions, providing that a merchant cannot "print or otherwise produce or reproduce or permit the printing or other production or reproduction of . . . any part of the credit card or debit card account number, other than the last 4 digits . . ." 815 ILL. COMP. STAT. ANN. 505/2NN(b) (West 2011).

¹³⁸ LeCours, *supra* note 28, at 350. "Congress has concluded, albeit implicitly, that even the largest penalty within the range is appropriate for any qualifying violation." *Id.* at 351.

¹³⁹ *Id.* at 354.

¹⁴⁰ *Id.*

B. *A Textualist Approach: FACTA's Truncation Provision Does Not Apply to E-Receipts*

"How strangely will the Tools of a Tyrant pervert the plain Meaning of Words!" – Samuel Adams.¹⁴¹

Recently, the Seventh Circuit had the opportunity to address the issue of whether FACTA's truncation provision applies to the Internet. In *Shlahtichman v. 1-800 Contacts, Inc.*,¹⁴² a case of first impression at the federal appellate level,¹⁴³ the court held that the provision does not apply to electronic receipts and confirmations.¹⁴⁴ In *Shlahtichman*, the plaintiff Eduard Shlahtichman went onto the defendant 1-800 Contacts's¹⁴⁵ website to purchase contact lenses with his credit card.¹⁴⁶ Shlahtichman received an automatically generated e-mail confirmation of the order that same day and noticed that the e-receipt included the expiration date of the credit card that he had used to make the purchase.¹⁴⁷ As a result, Shlahtichman filed a class-action suit against 1-800 Contacts under FACTA, alleging that the defendant's inclusion of the expiration date constituted a willful violation of FACTA's truncation provision, and sought statutory damages.¹⁴⁸ 1-800 Contacts moved to dismiss the complaint for failure to state a claim upon which relief could be granted, arguing that e-receipts and confirmations do not fall within the purview of the truncation provision.¹⁴⁹ The court agreed with the defendant and held that e-receipts are outside the scope of FACTA's truncation provision.¹⁵⁰ The court explained that the plain meaning of the term "print" clearly

¹⁴¹ Letter from Samuel Adams to John Pitts (Jan. 21, 1776), available at <http://www.revolutionary-war-and-beyond.com/samuel-adams-quotes-2.html>.

¹⁴² *Shlahtichman v. 1-800 Contacts, Inc.*, 615 F.3d 794 (7th Cir. 2010).

¹⁴³ Note that even more recently, the Ninth Circuit joined the Seventh Circuit to hold that FACTA's truncation provision does not apply to receipts that are "sent to a customer's email account and then displayed on a screen." *Simonoff v. Expedia, Inc.*, 643 F.3d 1202, 1210 (9th Cir. 2011).

¹⁴⁴ *Shlahtichman*, 615 F.3d at 796.

¹⁴⁵ 1-800 Contacts is the world's largest contact lens store, selling contact lenses by phone, the internet, mail, and fax. *Company Information*, 1-800 CONTACTS.COM, <http://www.1800contacts.com/ExternalRelations/TheCompany.aspx> (last visited Mar. 1, 2013).

¹⁴⁶ *Shlahtichman*, 615 F.3d at 796.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 797.

¹⁴⁹ *See id.*

¹⁵⁰ *Id.* at 796.

conveys that the provision is limited to physical receipts.¹⁵¹ The court noted that this conclusion is further supported when viewed within the context of the statute as a whole and in conjunction with Congress' failure to explicitly provide for the provision's application to e-receipts when it has unequivocally done so in other statutes.¹⁵²

1. Statutory Language

Other courts and commentators in the field agree with the Seventh Circuit and argue that the truncation provision is not applicable to online transactions. According to these courts and commentators, the plain language of the statute clearly indicates that the provision's applicability is limited to tangible paper receipts.¹⁵³ That is, according to a well-established principle of statutory interpretation, the first step in a case involving statutory construction is an examination of the statute's language itself,¹⁵⁴ and if the language is plain, courts must give effect to the statute's ordinary and natural meaning.¹⁵⁵ Moreover, if the statute leaves a key term undefined, it is presumed that Congress intended the term to carry its ordinary meaning.¹⁵⁶ Accordingly, in such situations, courts look to the common or natural meaning of the term, and many courts have noted that "[d]ictionaries are a helpful resource in ascertaining the common meaning of terms that a statute leaves undefined."¹⁵⁷ Finally, when seeking to establish the ordinary meaning of a term, courts must consider the meaning of the word "in the context of the statutory scheme in which [it] appear[s]."¹⁵⁸

Applying these rules of statutory construction, proponents of the view that the truncation provision does not apply to e-receipts contend that the truncation provision covers only tangible *printed* receipts and does not apply to onscreen displays

¹⁵¹ *Id.* at 799.

¹⁵² *Id.* at 800–02.

¹⁵³ *See, e.g.*, *Narson v. Godaddy.com, Inc.*, No. CV-08-0177-PHX-SRB, 2008 WL 2790211, at *6 (D. Ariz. May 5, 2008); *Fitterer*, *supra* note 16, at 604–05.

¹⁵⁴ *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

¹⁵⁵ *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000).

¹⁵⁶ *Williams v. Taylor*, 529 U.S. 420, 431 (2000).

¹⁵⁷ *Shlahitichman v. 1-800 Contacts, Inc.*, 615 F.3d 794, 799 (7th Cir. 2010).

¹⁵⁸ *Pace v. DiGuglielmo*, 544 U.S. 408, 420 (2005).

of information.¹⁵⁹ The statute states that no merchant that accepts credit or debit cards shall “print” a receipt that includes more than the last five digits of the card number or the expiration date thereupon, but does not provide a definition for the term “print.”¹⁶⁰ The argument is that, as used in the statute, to “print” a receipt generally or ordinarily means to record the receipt’s information on paper and that “when one refers to a printed receipt, what springs to mind is a tangible document.”¹⁶¹ Moreover, such proponents note that the majority of dictionaries confirm this ordinary meaning of the term, noting that when used in its “transitive verb” form, the term print “ordinarily connotes the transfer of words or images to a tangible medium—often paper.”¹⁶²

Next, opponents of the truncation provision’s application to online transactions assert that as “[s]tatutory language only has meaning in context,”¹⁶³ FACTA’s statutory context confirms that the use of the term print was meant to limit the provision’s application to physical receipts.¹⁶⁴ According to section 1681c(g)(1), the truncation requirement applies only to receipts “provided to the cardholder at the *point of sale or transaction*.”¹⁶⁵ These opponents contend that such language clearly contemplates a transaction occurring at a physical brick-and-mortar type of location where the seller actually provides the tangible, physical receipt to the customer.¹⁶⁶

¹⁵⁹ *Shlahtichman*, 615 F.3d at 798–802.

¹⁶⁰ 15 U.S.C. § 1681c(g) (2006 & Supp. IV 2010).

¹⁶¹ *Shlahtichman*, 615 F.3d at 799.

¹⁶² *Id.* (citing Oxford English Dictionary Online, Merriam-Webster Dictionary Online, and Dictionary.com). However, in a recent interpretive exercise by the Seventh Circuit, the court noted that the same dictionaries also recognize that the term can also “be understood to mean the display of text on a computer’s viewing screen.” *Id.* Nonetheless, the court noted that this meaning of the term, while increasing in usage in recent years, had not yet reached the level of an “ordinary or natural meaning of ‘print.’” *Id.*

¹⁶³ *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 415 (2005).

¹⁶⁴ *Shlahtichman*, 615 F.3d at 800. See also *Turner v. Ticket Animal, LLC*, No. 08-61038-CIV, 2009 WL 1035241, at *3 (S.D. Fla. Apr. 16, 2009) (“The terms ‘point of the sale’ and ‘any cash register or other machine or device’ immediately evoke the image of a paper receipt.”).

¹⁶⁵ § 1681c(g)(1) (emphasis added).

¹⁶⁶ *Narson v. Godaddy.com, Inc.*, No. CV-08-0177-PHX-SRB, 2008 WL 2790211, at *5 (D. Ariz. 2008).

Further, even if a point of sale can be established for an online transaction, two other sections of the statute reinforce the notion that the provision only applies to traditional in-store transactions with paper receipts.¹⁶⁷ First, section 1681c(g)(2) further limits the truncation provision's application to "electronically printed" receipts and expressly eliminates receipts generated by "handwriting or by an imprint or copy of the card."¹⁶⁸ Once more, the argument is that this language seemingly evokes the understanding that the provision applies to tangible paper receipts, as it discusses only means of physical transfer of a card's information to a tangible medium.¹⁶⁹

Second, in section 1681c(g)(3), Congress provided two different dates for when the truncation provision went into effect, which were based on the date that the "*cash register or other machine or device that electronically prints receipts*" went into use.¹⁷⁰ Applying *ejusdem generis*, a canon of statutory interpretation,¹⁷¹ opponents to the truncation provision's application to online transactions note that based on the term "cash register" being used as a lead example, "other machine or device" should be interpreted as meaning only such machines or devices that print receipts at a physical location, reasoning that "few terms bring to mind a store better than 'cash register.'"¹⁷² Moreover, these opponents note that the differing dates in section 1681c(g)(3) only work together as an effective implementation scheme if the provision's application is limited to receipts printed on paper by a cash register or similar device.¹⁷³ If the provision applied to e-receipts, the "machine" in question would be the personal computer of the consumer.¹⁷⁴ Such an

¹⁶⁷ See § 1681c(g)(2)-(3).

¹⁶⁸ *Id.* § 1681c(g)(2).

¹⁶⁹ *Narson*, 2008 WL 2790211, at *5.

¹⁷⁰ § 1681c(g)(3) (emphasis added).

¹⁷¹ In describing the canon's application, the Supreme Court has stated that "where general words follow a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated." *United States v. Turkette*, 452 U.S. 576, 581 (1981).

¹⁷² *Shlahtichman v. 1-800 Contacts, Inc.*, 615 F.3d 794, 800 (7th Cir. 2010). However, the Seventh Circuit acknowledged that as a growing number of businesses now use the same type of computer that consumers use in their homes to generate receipts at their brick-and-mortar stores, the line between a cash register and personal computers is blurring. *Id.*

¹⁷³ *Id.* at 800-01.

¹⁷⁴ *Id.* at 801.

application would make the effective date of the provision dependent on a fact entirely outside of the control of the merchant, namely the date that the consumer's personal computer went into use.¹⁷⁵ Therefore, proponents of this view maintain that Congress would not have premised a merchant's liability under the provision on circumstances entirely outside of its control.¹⁷⁶

Therefore, opponents to the provision's application to online transactions argue that when taken as a whole, it is clear that the truncation provision is meant to apply only to physical, paper receipts.¹⁷⁷ As a result, they argue the plain language of the provision makes it clear that it does not apply to online receipts displayed onscreen which may later be printed by the consumer.¹⁷⁸ Since the plain meaning rule dictates that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms,"¹⁷⁹ proponents of this view note that courts must dismiss any action brought under the truncation provision that is based on a non-tangible, electronic receipt.¹⁸⁰

2. Congressional Intent

While the plain language argument holds the weight of the rationale for the view that the truncation provision does not apply to online transactions, proponents of this view also cite congressional intent to further validate their viewpoint.¹⁸¹ Such proponents point to legislative history that reveals that FACTA's truncation provision was passed in order to combat

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Narson v. Godaddy.com, Inc.*, No. CV-08-0177-PHX-SRB, 2008 WL 2790211, at *6 (D. Ariz. May 5, 2008).

¹⁷⁸ *Id.*

¹⁷⁹ *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotations omitted).

¹⁸⁰ *See, e.g., Shlahtichman*, 615 F.3d at 796. In further strengthening their position, opponents note that this understanding of the plain meaning of the term "print," and the inapplicability of the provision to online receipts, is in line with a majority of courts that have addressed the issue to date. *Id.* at 798. However, the interpretation is not unanimous, as a minority of courts have concluded that "print" and the truncation provision should be read to encompass electronic receipts that are displayed on the consumer's computer screen. *Id.*

¹⁸¹ *See id.* at 801-02.

misappropriation of paper receipts through low-technical identity theft techniques such as "dumpster diving."¹⁸² While those adhering to this viewpoint concede that e-receipts can also be misappropriated by identity thieves, they maintain that paper receipts pose "unique, if not greater, dangers," especially in terms of the low-technical identity theft techniques the statute was designed to protect against.¹⁸³ That is, a physical paper receipt that a consumer obtains at the point of sale is much more apt to being inadvertently discarded by the consumer in any number of places where a potential identity thief can gain access to it.¹⁸⁴ On the other hand, electronic receipts do not possess those characteristics that cause paper receipts to be vulnerable to such misappropriation, unless consumers print the receipts on their own.¹⁸⁵ Opponents of the provision's application to online transactions contend that Congress likely thought it more appropriate to address the specific concerns surrounding online identity theft to other statutory provisions that specifically deal with the concerns of misuse for online data and information.¹⁸⁶

Opponents of the truncation provision's application to e-mail receipts also look to the language Congress did not include within FACTA's truncation provision for further evidence that Congress intended the provision to cover only paper receipts. Specifically, they note that "where Congress knows how to say something but chooses not to, its silence is controlling."¹⁸⁷ Such opponents highlight that electronic commerce was prevalent in 2003 when FACTA was enacted, as Internet retail sales topped fifty-six

¹⁸² See, e.g., 149 CONG. REC. S13,856 (daily ed. Nov. 4, 2003) (statement of Sen. Bunning) ("[T]he bill contains strong identity theft and privacy protections . . . that will help prevent thieves who go 'dumpster diving' or try to steal credit reports from mail boxes.").

¹⁸³ *Shlahtichman*, 615 F.3d at 802-03.

¹⁸⁴ *Id.* at 802.

¹⁸⁵ See *id.* at 802-03.

¹⁸⁶ *Id.* at 803. For example, the Electronic Communications Privacy Act of 1986 deals exclusively with electronic communications and criminalizes the unauthorized interception of such communications, 18 U.S.C. § 2511(1)(a) (2006 & Supp. II 2008), and the Stored Wire and Electronic Communications and Transactional Records Access Act of 1986 specifically authorizes a victim of unauthorized, intentional access to communications held in electronic storage to bring suit, 18 U.S.C. § 2701 (2006).

¹⁸⁷ *In re Griffith*, 206 F.3d 1389, 1394 (11th Cir. 2000) (internal quotations omitted).

billion dollars that year in the United States.¹⁸⁸ Nevertheless, Congress made no mention of the Internet in the truncation provision, nor did it do so in another provision in the Act.¹⁸⁹ In comparison, elsewhere Congress has explicitly provided for the application of a provision to electronic media and transactions.¹⁹⁰ Therefore, “[i]n view of such statutory provisions, it is reasonable to expect that Congress would have used similar terminology had it meant to reach electronic receipts viewed or printed by the consumer.”¹⁹¹

Nonetheless, opponents of the truncation provision’s application to e-receipts recognize that requiring its application to electronic receipts would undoubtedly be consistent with the overall purpose of FACTA to combat identity theft.¹⁹² However, these opponents remain steadfastly committed to the notion that courts cannot ignore the “unambiguous language of the statute in order to further Congress’s expressed purpose in enacting the statute.”¹⁹³ In light of their view that the language of the provision clearly dictates that its application is limited to physical receipts, such opponents contend that to include e-receipts within the provision’s domain would be to “broaden the statute’s reach beyond the words that Congress actually used.”¹⁹⁴

¹⁸⁸ 2003 *E-Stats*, *supra* note 123, at 4; *see also Shlahitichman*, 615 F.3d at 801 (discussing the absence of terms such as “Internet” or “email” from FACTA despite the prevalence of electronic transactions in 2003).

¹⁸⁹ *Shlahitichman*, 615 F.3d at 801.

¹⁹⁰ *See, e.g.*, Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 1278(c)(1)(A) (2006 & Supp. II 2008) (“Any advertisement by a retailer, manufacturer, importer, distributor, or private labeler (*including advertisements on Internet websites* or in catalogues or other printed materials) that provides a direct means for the purchase or order of a product for which a cautionary statement is required under subsection (a) or (b) shall include the appropriate cautionary statement displayed on or immediately adjacent to that advertisement” (emphasis added)); *see also Shlahitichman*, 615 F.3d at 801.

¹⁹¹ *Shlahitichman*, 615 F.3d at 802.

¹⁹² *Id.*

¹⁹³ *Id.*; *see also Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct 2869, 2886 (2010) (“It is our function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve.”).

¹⁹⁴ *Shlahitichman*, 615 F.3d at 802.

3. Policy

Next, opponents of the provision's application to e-receipts also contend that limiting the truncation provision's application to paper receipts would be in line with public policy, as it would help protect business from crippling liability. FACTA does not impose a ceiling on the amount of statutory damages recoverable in a lawsuit brought as a result of a violation of the truncation provision.¹⁹⁵ Therefore, there is real potential for absolutely devastating total damages in class action lawsuits.¹⁹⁶ One court estimated that given a potential class of plaintiffs of 2.9 million people, "statutory damages alone would range from a *minimum* of \$290 million to a maximum of \$2.9 billion."¹⁹⁷ These damages are often greater than the net worth of a business.¹⁹⁸ Moreover, the damaging effects may be magnified even further given the expansive customer base that many online retailers enjoy,¹⁹⁹ thereby further exacerbating the crippling effects FACTA liability could have on businesses. The debilitating effects seem even more devastating in light of the fact that most FACTA lawsuits do not allege actual consumer harm.²⁰⁰ Therefore, limiting FACTA's application to paper receipts is necessary to help minimize these negative effects on business, by removing the risk of liability under FACTA's truncation provision for its online transactions.

According to proponents of this view, limiting FACTA's applicability also serves consumers.²⁰¹ While identity theft experts have noted that the truncation of credit and debit card numbers does accomplish FACTA's stated purpose of preventing identity theft, FACTA lawsuits, most often in the form of class actions seeking hundreds of millions of dollars in statutory damages, rarely allege actual consumer harm.²⁰² However, if the

¹⁹⁵ LeCours, *supra* note 28, at 344.

¹⁹⁶ Chaplin, *supra* note 35, at 311.

¹⁹⁷ See *Lopez v. KB Toys Retail, Inc.*, No. CV 07-144-JFW, 2007 U.S. Dist. LEXIS 82025, at *14 (C.D. Cal. July 17, 2007).

¹⁹⁸ Chaplin, *supra* note 35, at 311. See also *Lopez*, 2007 U.S. Dist. LEXIS 82025, at *14.

¹⁹⁹ See Schottmiller et al., *supra* note 10, at 2.

²⁰⁰ See CONG. REC. E925 (daily ed. May 14, 2008) (statement of Rep. Maloney), available at <http://www.gpo.gov/fdsys/pkg/CREC-2008-05-14/pdf/CREC-2008-05-14-pt1-PgE925-2.pdf>.

²⁰¹ *Id.*

²⁰² *Id.*

truncation provision applies to Internet transactions, thereby exacerbating the crippling effects on business, consumers would in fact be harmed.²⁰³ Specifically, consumers would face higher prices and less competition as businesses, many of which can only function as a result of the low operating costs of conducting their business online,²⁰⁴ are forced to close their doors and shut down operations because they cannot afford their resulting litigation costs.²⁰⁵ Therefore, limiting the truncation provision to physical receipts would help to alleviate this negative effect on consumers.

Finally, opponents of FACTA's application to online transactions argue that extending federal preemption to this area only serves to hinder consumer rights.²⁰⁶ More specifically, "federal preemption stymies the development of new consumer protections to respond to both old and new credit related problems."²⁰⁷ This result occurs because state legislatures are often better able to respond to emerging consumer issues than is Congress.²⁰⁸ If electronic receipts are deemed outside the domain of FACTA, the states will maintain their ability to more effectively moderate the consumer protection issues that arise in such contexts.²⁰⁹

²⁰³ *Id.*

²⁰⁴ See Schottmiller et al., *supra* note 10, at 1.

²⁰⁵ See CONG. REC. E925 (daily ed. May 14, 2008) (statement of Rep. Maloney), available at <http://www.gpo.gov/fdsys/pkg/CREC-2008-05-14/pdf/CREC-2008-05-14-pt1-PgE925-2.pdf>.

²⁰⁶ Hillebrand, *supra* note 45, at 59.

²⁰⁷ *Id.*

²⁰⁸ *Id.* (noting that many of FACTA's provisions were largely based on existing state consumer protection statutes).

²⁰⁹ See *id.*

III. FACTA'S TRUNCATION PROVISION APPLIES TO ELECTRONIC RECEIPTS, RENDERING CHANGES TO THE ACT'S STATUTORY DAMAGES PROVISION NECESSARY

"Being right half the time beats being half right all the time." – Malcolm Forbes²¹⁰

FACTA's truncation provision has spawned substantial litigation.²¹¹ The existence of this litigation and the conflicting outcomes of many of these cases as to whether the provision applies to online receipts seemingly make but one thing clear: The language of the statute is not so "clear and unambiguous" as some have contended.²¹² Given this ambiguity, it becomes appropriate and necessary to look beyond the plain meaning of the provision in order to ascertain its meaning.²¹³ Such an endeavor illustrates that the provision as written should apply to online receipts. More specifically, FACTA's underlying legislative purpose, the language of the statute, and public policy considerations all support the provision's application to e-receipts. However, applying the provision to online transactions may increase the crippling effects the statute potentially inflicts upon businesses. That is, if the provision is applied to e-receipts, the potential pool of class action plaintiffs will likely increase for most business defendants, as many online merchants enjoy larger customer bases than the average brick and mortar retailer, thanks to the vast reach of the Internet. As a result, the potential awards for aggregated statutory damages in such class action situations stand to reach astronomical amounts. Such debilitating effects could not have been intended or anticipated by Congress. Therefore, steps should be taken to avoid unduly harsh penalties for technical violations of the provision.

This Part will explore each of these points in more detail. First, Part III.A. demonstrates why FACTA's truncation provision should be interpreted so as to apply to online receipts by vindicating the purposivist arguments made by advocates of this position. This Part goes on to provide further support for the

²¹⁰ Malcolm Forbes, *Thoughts On The Business Of Life*, FORBES, <http://thoughts.forbes.com/thoughts/right-malcolm-forbes-being-right-half> (last visited Mar. 1, 2013).

²¹¹ Chaplin, *supra* note 35, at 311.

²¹² See *supra* Part II.

²¹³ See *Colon v. Option One Mortg. Corp.*, 319 F.3d 912, 917 (7th Cir. 2003).

provision's application to electronic receipts by way of the language of the statute and public policy. Second, Part III.B. begins by explaining why the statutory damages provision should not be eliminated in its entirety and proposes that Congress amend the provision so as to limit the maximum class action liability for a violation of the truncation provision.

A. *Purposivism Vindicated: Online Receipts Are Subject to FACTA's Truncation Provision*

"To know the laws is not to memorize their letter but to grasp their full force and meaning." – Marcus Tullius Cicero²¹⁴

Despite suggestions to the contrary,²¹⁵ the truncation provision should apply to online receipts. FACTA's underlying legislative purpose, the statutory language itself, and overall public policy considerations all support the provision's application to e-receipts.

Much of the controversy surrounding the truncation provision's application to online transactions stems from divergent interpretations of the term "print."²¹⁶ The existence of this controversy knocks the wind out of the argument that the provision's language is "clear and unambiguous," and renders it appropriate to look to FACTA's legislative purpose to determine the term's meaning.²¹⁷ As a result, it becomes apparent that those advocating for the truncation provision's application to e-receipts are correct in their interpretation of the term. Most notably, Congress made sure its intent behind FACTA was clear by explicitly including the statute's purpose, namely to prevent identity theft, within the Act itself.²¹⁸ Commentators have noted the "very real and tangible risk" that untruncated e-receipts pose for consumers, especially as such receipts are often held in a consumer's e-mail inbox indefinitely and can be retrieved in a matter of seconds using the archive and search functions

²¹⁴ Marcus Tullius Cicero, *Quotes*, DICTIONARY.COM, http://quotes.dictionary.com/To_know_the_laws_is_not_to_memorize (last visited Mar. 1, 2013).

²¹⁵ See *supra* Part II.B.

²¹⁶ See *supra* Part II.

²¹⁷ See *Colon*, 319 F.3d at 917.

²¹⁸ Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 ("An Act [t]o amend the Fair Credit Reporting Act, to *prevent identity theft*" (emphasis added)) (codified at 15 U.S.C. § 1681a (2006 & Supp. IV 2010)).

provided by most major e-mail service providers.²¹⁹ As a result, interpreting the term “print” so as to exclude online receipts from the truncation provision would frustrate the Act’s purpose, as it would subject consumers to greater risks of identity theft rather than helping protect them against it.

In addition, the language of the statute further supports the provision’s application to online transactions. However, this language has been largely untapped by proponents of its application to e-receipts. That is, most courts and commentators have focused on the term “print” in determining the application of the truncation provision to online transactions.²²⁰ However, the statute explicitly provides that the provision applies to “electronically printed” receipts.²²¹ By overlooking or not emphasizing “electronically” in their analyses, courts and commentators have violated the basic principle of statutory interpretation that courts should “give effect . . . to every clause and word of a statute”²²² “so as to avoid rendering [a term] superfluous.”²²³ Adherence to this principle seemingly requires that the term “electronically” provide meaning to the provision.

Therefore, it is necessary to ascertain the meaning of the term “*electronically printed*.” However, just as Congress did not provide a definition for “print” within FACTA, it similarly left “electronically printed” undefined by the statute.²²⁴ According to the principle of statutory interpretation often cited by opponents of the truncation provision’s application to online transactions, when a key term has been left undefined by a statute, it will be presumed that Congress intended the term to carry its ordinary meaning.²²⁵ We therefore must determine the ordinary meaning of “electronically printed.”

²¹⁹ Fitterer, *supra* note 16, at 605.

²²⁰ See *supra* Part II. Courts and commentators have generally limited their reliance on the term “electronically printed” to providing secondary support to their arguments. See *id.*

²²¹ 15 U.S.C. § 1681c(g)(2) (2006 & Supp. IV 2010).

²²² *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

²²³ *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991).

²²⁴ See 15 U.S.C. § 1681c (2006 & Supp. IV 2010).

²²⁵ *Shlahtichman v. 1-800 Contacts, Inc.*, 615 F.3d 794, 798 (7th Cir. 2010).

“Electronically printed” is a contemporary term used in a twenty-first century modernization of an older statute. It refers to much more than the transferring of information onto paper.²²⁶ Rather, it encompasses electronic books, newspapers, and journals,²²⁷ all generated electronically and later displayed digitally. Therefore, given that Congress enacted FACTA in 2003, in an age where the Internet, online newspapers, and online shopping were commonplace, an application of the ordinary and natural meaning of the term “electronically printed” necessitates the provision’s application to e-receipts that are electronically generated by the merchant and displayed digitally on the consumer’s computer screen. Moreover, the Act goes on to exclude two types of traditional “printing” from the truncation provision, namely handwritten and imprinted receipts,²²⁸ and further excludes any receipt not involving a cash register or “other machine,”²²⁹ further evidencing Congress’ intention of a modern interpretation of the term “electronically printed.”

Although the Act further limits the provision’s application to receipts provided “at the point of sale,”²³⁰ this does not render the provision inapplicable to electronic receipts. While opponents to the provision’s application to online receipts contend that a point of sale is nearly impossible to establish for an online transaction,²³¹ such a location could easily be the place where the order is received and processed and/or where the e-receipt is created. In fact, one court specifically rejected the notion that point of sale denotes a “precise location within a store.”²³²

Moreover, the staggered implementation schedule provided by the Act does not inhibit the application of the truncation provision to online transactions. The Act provides that the provision’s effective date is dependent upon the year in which the

²²⁶ See, e.g., *Electronic Printing*, THE CENTER FOR SUSTAINABLE DESIGN, http://www.cfsd.org.uk/PSS/Ex_Electronic_Newspaper.htm (last visited Mar 1, 2013) (describing various types of electronic printing).

²²⁷ *Id.*

²²⁸ 15 U.S.C. § 1681c(g)(2).

²²⁹ See *id.* § 1681c(g)(3).

²³⁰ *Id.* § 1681c(g)(1).

²³¹ *Shlahtichman v. 1-800 Contacts, Inc.*, 615 F.3d 794, 800 (7th Cir. 2010).

²³² *Ehrheart v. Bose Corp.*, No. 07-350, 2008 WL 64491, at *3–5 (W.D. Pa. Jan. 4, 2008).

machine that electronically prints the receipts went into use.²³³ It has been contended that if the truncation provision applied to online transactions, the implementation provision would become nonsensical, making the merchant's potential liability contingent upon the date the customer obtained a personal computer.²³⁴ However, that is simply not the case. Rather, if the "electronic printing" is deemed to occur when the merchant generates the receipt, it is the merchant's computer that controls, not the consumer's device that merely receives and displays the e-receipt.

Lastly, policy considerations serve as further support for the truncation provision's application to online transactions. Requiring online merchants to truncate credit and debit card receipts in accordance with FACTA's truncation provision and subjecting online merchants to liability for violations of the provision does not inflict an undue burden on them. Complying with the truncation provision is relatively easy and inexpensive for online merchants.²³⁵ All it takes is a revision to the programming code that generates the e-receipts and confirmations.²³⁶ For many online merchants, a free download from their service provider is all that would be necessary in order to be fully compliant with the provision.²³⁷

Moreover, concluding that online transactions are outside of the truncation provision's domain would put consumers at a disadvantage to the identity thief. As Verizon's Executive Director of Corporate Marketing noted, "[a]fter years of Internet scams, today's online shoppers have become much more savvy—but, unfortunately, so have the bad guys."²³⁸ Without requiring that merchants truncate e-receipts, consumers will be at the mercy of potential fraudsters, combing the Internet for their next victim, as an improperly truncated receipt has all the information they would need to perpetrate identity theft.

²³³ 15 U.S.C. § 1681c(g)(3).

²³⁴ See *supra* notes 173–76 and accompanying text.

²³⁵ Fitterer, *supra* note 16, at 605.

²³⁶ *Id.*

²³⁷ See, e.g., *Account Truncation Law*, MERCHANT SOURCE, <http://www.merchantsource.com/truncation.html> (last visited Mar. 1, 2013).

²³⁸ Verizon, *Verizon Offers Tips to Protect Personal Data While Making Online Purchases*, PR NEWSWIRE, <http://www.prnewswire.com/news-releases/cyber-monday-alert-stay-safe-while-shopping-online-this-holiday-season-72597482.html> (last visited Mar. 1, 2013).

Therefore, contrary to the suggestions otherwise, the truncation provision should apply to online transactions and e-mail receipts. FACTA's underlying purpose, its language, and policy considerations all support this conclusion.

B. FACTA's Statutory Damages Provision Should Be Amended To Limit a Merchant's Maximum Class Action Liability

"Why then, can one desire too much of a good thing?" – William Shakespeare.²³⁹

Statutory damages are a necessary and proper relief for a violation of FACTA's truncation provision. Statutory damages promote compliance with the provision without requiring that consumers fall victim to identity theft before having the incentive to vindicate their interest through litigation, a result that would frustrate the purpose of the Act itself. However, given the debilitating effects that the provision's application stands to inflict on online merchants, Congress should limit the maximum class action liability for violations of the provision.

Opponents of the truncation provision's application to online transactions often bolster their argument by noting the potentially debilitating effects that the application of the provision has on business.²⁴⁰ As damages of \$100 to \$1,000 are recoverable for each violation of the provision, and the statute does not cap the amount of statutory damages recoverable in a class action, the damages in class action lawsuits brought under the provision are often greater than the net worth of a business.²⁴¹ This supposed undue hardship is worsened by the fact that most of these lawsuits do not allege consumer harm.²⁴² Moreover, this burden would be exacerbated if the truncation provision applied to online transactions, as most online merchants enjoy larger customer bases than brick-and-mortar stores, creating an even greater pool of potential class action plaintiffs, and a larger potential liability.²⁴³

²³⁹ WILLIAM SHAKESPEARE, AS YOU LIKE IT act 4, sc. 1.

²⁴⁰ See *supra* notes 195–200 and accompanying text.

²⁴¹ See *supra* notes 195–200 and accompanying text.

²⁴² See *supra* notes 195–200 and accompanying text.

²⁴³ See, e.g., Schottmiller et al., *supra* note 10.

However, this argument is fundamentally flawed. Statutory damages, "like the regulations to which they give force, are products of legislative determinations."²⁴⁴ As such, it is not up to the courts to evade proper application of the statute if results would be onerous on business—the appropriate resolution is not judicial fiat.²⁴⁵ Rather, in providing for statutory damages for a willful²⁴⁶ violation of the truncation provision, Congress has already decided that the punishment fits the crime.²⁴⁷ More specifically, Congress has decided that even damages at the highest end of the allowable range, namely \$1,000 per violation, are appropriate given the risk of identity theft of an improperly truncated receipt.²⁴⁸ Therefore, if such onerous results for business were not fully anticipated by Congress, then it should be left to Congress to amend the statute's penalty provisions.²⁴⁹ In the meantime, however, "[w]hile a statute remains on the books . . . it must be enforced rather than subverted."²⁵⁰

Statutory damages are designed to create interests worth protecting through litigation in situations where the actual or measurable harm is very small.²⁵¹ As a result, "statutory penalties provide remedies for the private consumer that it would be unlikely (or unable) to pursue otherwise."²⁵² Where the statutorily regulated activity is one against public policy, incentives to litigate serve as an effective enforcement mechanism.²⁵³ Therefore, statutory damages not only sanction

²⁴⁴ LeCours, *supra* note 28, at 328.

²⁴⁵ See *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 954 (7th Cir. 2006), *aff'd*, *Murray v. GMAC Mortg. Corp.*, 274 Fed. Appx. 489 (7th Cir. 2008).

²⁴⁶ Congress did not provide that any violation gives rise to statutory damages. Rather, the violation must have been "willful," which has been defined as including a reckless disregard for the statutory duty. See *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 71 (2007). Therefore, a business would not be subject to statutory damages for a mere negligent violation of the provision.

²⁴⁷ LeCours, *supra* note 28, at 350.

²⁴⁸ *Id.* at 351.

²⁴⁹ *Id.* at 343.

²⁵⁰ *Murray*, 434 F.3d at 954. See also LeCours, *supra* note 28, at 335 (explaining that while the Supreme Court has provided that punitive damages warrant heightened judicial review to assess whether the award is so excessive as to violate due process, the same standard cannot be applied in a review of statutory damages, as a heightened review would constitute an "impermissible invasion into the domain of the legislature").

²⁵¹ LeCours, *supra* note 28, at 343.

²⁵² *Id.* at 345–46.

²⁵³ *Id.* at 343.

wrongful conduct but also “vindicate the statutory policy.”²⁵⁴ The types of “injuries” that are well suited for statutory damages, namely those that are small yet numerous and identical, are often times also well suited for class actions.²⁵⁵ Class actions themselves add marketability to trivial claims, thereby further encouraging litigation.²⁵⁶ Together, statutory damages and class actions combine to uncover wrongdoing that would otherwise go undetected, thereby creating a deterrent effect and an effective enforcement mechanism for the statute.²⁵⁷

Congress had good reason to provide the remedy it did for a violation of FACTA’s truncation provision. Consistent with its overall purpose of preventing identity theft, FACTA’s truncation provision can be violated absent a showing of actual harm to the consumer. Therefore, absent the availability of statutory damages for a violation of the provision, it would not be worthwhile for consumers to vindicate their interests through litigation. Without litigation or the threat thereof as an enforcement mechanism, merchants would be more likely to continue to expose consumers to the risk of identity theft presented by an improperly truncated receipt, in frustration of the statute’s explicit purpose. Moreover, the subsequent reliance on class actions by plaintiffs in these suits was likely considered by Congress.²⁵⁸ Given the important policy interest behind FACTA, “a forceful regulatory scheme” is appropriate and “necessary to assure compliance.”²⁵⁹

However, as some commentators have noted, the current state of the statutory damages provision, allowing for unlimited damages in large class action lawsuits, creates the potential for over-deterrence.²⁶⁰ While the public policy interest FACTA seeks to vindicate requires a “forceful regulatory scheme” in order to assure compliance, the astronomical damages frequently sought in class actions brought under the truncation provision often exceed any reasonable level necessary to compel compliance.²⁶¹

²⁵⁴ Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 111 (2009).

²⁵⁵ LeCours, *supra* note 28, at 343.

²⁵⁶ Scheuerman, *supra* note 254, at 109.

²⁵⁷ *Id.*

²⁵⁸ LeCours, *supra* note 28, at 344.

²⁵⁹ *Id.*

²⁶⁰ See Scheuerman, *supra* note 254, at 108.

²⁶¹ *Id.* at 111.

For example, in one action brought under the provision, a class of 2.9 million people meant the potential liability of the defendant could be up to 2.9 billion dollars.²⁶² While some in the field have argued that Congress was aware of the potential for aggregation of statutory damage claims in a class action suit when it enacted FATCA,²⁶³ it seems implausible that Congress anticipated the catastrophic penalties businesses are facing for technical violations of a statutory provision that do not involve actual harm.²⁶⁴

Congress faced a very similar situation in the years following the enactment of a different statute with a very similar statutory damages provision.²⁶⁵ When Congress enacted the Truth in Lending Act ("TILA") in 1968, it provided for statutory damages of \$100 to \$1,000 for failure to comply with the statute's disclosure requirements.²⁶⁶ The provision was intended "to make it worthwhile for an individual to bring an enforcement action even if actual damages amounted to only a few dollars."²⁶⁷ However, courts and commentators began to highlight the "potentially devastating" nature of these damages when aggregated through class actions.²⁶⁸ In response, Congress amended TILA's statutory damage provision in 1974 to limit the maximum class action liability for a violation of the disclosure requirement.²⁶⁹ Congress noted that the purpose of the statutory damages provision, namely to compel compliance "without relying upon an extensive new bureaucracy," could be achieved "without subjecting creditors to enormous penalties for violations which do not involve actual damages and may be of a technical nature."²⁷⁰ Therefore, in limiting aggregated statutory damages, Congress was "protect[ing] small business firms from

²⁶² See, *Lopez v. KB Toys Retail, Inc.*, No. CV 07-144-JFW (CWx), 2007 U.S. Dist. LEXIS 82025, at *14 (C.D. Cal. July 17, 2007).

²⁶³ LeCours, *supra* note 28, at 344.

²⁶⁴ See Scheuerman, *supra* note 254, at 145.

²⁶⁵ See *id.* at 143-46.

²⁶⁶ 15 U.S.C. § 1640(a)(2)(A)(ii) (2006 & Supp. IV 2010).

²⁶⁷ Scheuerman, *supra* note 254, at 110.

²⁶⁸ See *id.* at 143-44.

²⁶⁹ Act of Oct. 28, 1974, Pub. L. No. 93-495, § 408(A), 88 Stat. 1500, 1518. Congress originally set the cap at the lesser of \$100,000 or 1% of the net worth of the creditor. *Id.* However, in 1976, Congress raised the maximum dollar amount to \$500,000. Consumer Leasing Act of 1976, Pub. L. No. 94-240, § 4(3), 90 Stat. 257, 260 (codified as amended at 15 U.S.C. § 1640(a) (2006 & Supp. IV 2010)).

²⁷⁰ Scheuerman, *supra* note 254, at 145.

catastrophic judgments,” while nonetheless maintaining the enforcement mechanisms of statutory damages and class actions.²⁷¹

The concerns surrounding FACTA’s statutory damage provision are analogous to those that influenced Congress to place a cap on aggregated statutory damages under TILA. Under both statutes, the statutory damages provisions were intended to make individual claims marketable and thereby serve as an incentive for businesses to comply with the law.²⁷² Moreover, like the original provision in TILA, FACTA currently allows statutory damages ranging from \$100 to \$1,000 for each violation of the statute’s truncation provision and does not limit the amount of aggregated statutory damages available in a class action situation.²⁷³ In addition, just as criticism of the damages provision’s application in class action suits began in the wake of TILA’s enactment, shortly after FACTA was enacted in 2003, courts and commentators began to criticize its statutory damages provision as applied to class action suits, noting the debilitating awards resulting from aggregated statutory damages in such situations.²⁷⁴ Therefore, given the similar concerns of crippling effects on business surrounding FACTA’s statutory provisions to those concerns that compelled Congress to place a cap on class action liability in TILA, Congress should enact an analogous solution under FACTA. Limiting the maximum amount of aggregated statutory damages available in class action suits brought under FACTA’s truncation provision would continue to make use of statutory damages and class actions as enforcement mechanisms, thereby compelling compliance and vindicating the statutory policy of preventing identity theft, just as the limit did under TILA. Furthermore, just as under TILA, imposing such a cap would accomplish such compliance without subjecting merchants to astronomical penalties for violations that are technical in nature and allege little to no actual harm.

²⁷¹ *Id.* at 145–46.

²⁷² *Id.* at 110 (discussing TILA); LeCours, *supra* note 28, at 344 (discussing FACTA).

²⁷³ 15 U.S.C. § 1640(a)(2)(A)(ii).

²⁷⁴ *Lopez v. KB Toys Retail, Inc.*, No. CV 07-144-JFW (CWx), 2007 U.S. Dist. LEXIS 82025, at *14 (C.D. Cal. July 17, 2007) (“[A]n award of even the minimum statutory damages would put [d]efendant out of business.”).

Therefore, Congress should not do away with the statutory damages provision altogether. However, Congress should take steps to avoid the potentially crippling effects of the statutory damages provision on businesses. This concern seems especially poignant given the changing habits of consumers and the resulting expanded customer bases of online merchants, as this leads to larger pools of potential class action plaintiffs. This Note proposes that Congress amend the statutory damage provision so as to limit the maximum liability in a class action suit, as it did when similar concerns arose under TILA. Consistent with policy considerations, while a violation of the statute would still subject merchants to significant liability,²⁷⁵ it would no longer be debilitating for businesses.

CONCLUSION

“All’s well that ends well.” – William Shakespeare²⁷⁶

When Congress enacted FACTA, it made sure that its purpose was clear. Explicitly including its goal of preventing identity theft within the statute itself, Congress likely did not anticipate any subversion of its intent. However, interpreting FACTA’s truncation provision as inapplicable to online transactions would frustrate the statute’s purpose, leaving consumers at risk of falling victim to identity theft. Moreover, such a reading cannot be reconciled with the statute’s language, nor with public policy concerns. On the other hand, interpreting the truncation provision as applicable to online transactions makes it consistent with Congress’s goal of preventing identity theft. Requiring merchants to truncate a consumer’s credit or debit card information on e-receipts would help prevent identity theft by removing one more avenue potential fraudsters have to obtain a consumer’s sensitive information.

Moreover, while the availability of statutory damages for a willful violation of the truncation provision is appropriate given the important public policy interests underlying the provision, the debilitating effect that limitless per violation statutory damages have had on businesses in large class actions could not

²⁷⁵ For instance, if Congress adopts the same cap they did under TILA, a merchant’s liability would be the lesser of \$1,000,000 or 1% of the merchant’s net worth.

²⁷⁶ WILLIAM SHAKESPEARE, *ALL’S WELL THAT ENDS WELL* act 4, sc. 4.

have been intended or anticipated by Congress. Therefore, Congress should revisit the damages provision so as to help prevent such unreasonable imposition on business for technical violations of the statute. Specifically, Congress should amend the damages provisions to limit the maximum liability in cases where statutory damages are aggregated in class actions.

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