The Northern District of Georgia May Change Legal Landscape of the Fair and Accurate Credit Transaction Act Claims

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Identity theft is pervasive in today's day and age and can be devastating to an individual's credit. In fact, in 2014, identity theft topped the Federal Trade Commission's reported complaints for the fifteenth year in a row.[1] Common sources of identity theft center on the theft of consumers' credit card numbers.

Most recently, the news headlines have been flooded with accounts of cyber-attacks on companies, with consumers' credit card numbers being stolen. Over the last twelve months, hacking was responsible for the largest number of compromised personal records, involving nearly 43 million Americans.[2] Recent retailers falling victim to these cyber-attacks have included the likes of Target, Home Depot, DSW Shoes, Polo Ralph Lauren, and BJs Wholesale.

Less commonly seen in the news, but equally devastating to consumer's identities, are violations of the Fair and Accurate Credit Transactions Act ("FACTA"). FACTA is a federal law passed in 2003 and is an amendment to the Fair Credit Reporting Act. FACTA generally prohibits the printing of more than the last five digits of a credit card number or a card's expiration date. FACTA is designed to prevent "dumpster divers" from pulling consumers' credit card numbers off of discarded receipts and using the numbers to steal the person's identity and rack up endless amounts of credit card bills at the consumers' expense.

The Fair and Accurate Credit Transaction Act is codified at 15 U.S.C. § 1681 et seq. The provision pertaining to credit card receipts is found at 15 U.S.C. § 1681c(g) and provides:

> (g) Truncation of credit card and debit card numbers

> (1) In general
>
> Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.
>
> (2) Limitation
>
> This subsection shall apply only to receipts that are electronically printed, and shall not apply to transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by an imprint or copy of the card.

Since the Act's inception, many retailers have faced lawsuits for violating the FACTA. Most recently, in January 2015, the popular clothing retailer, J. Crew Group Inc., was named in a class action lawsuit for purportedly issuing credit card receipts displaying more than the last five digits of the consumer's credit and debit cards.[3] Airgas Inc., an industrial gas distributor, was also sued in a class action lawsuit in December 2014 for printing the expiration date in addition to the last five digits of the credit or debit card number on receipts.[4]

The results for violating this Act can be costly and reach fines in the millions of dollars, with each willful violation carrying a potential fine of $100 up to $1,000 per transaction in addition to an allowance for punitive damages and attorneys' fees.[5] The penalties for negligent noncompliance with the Act are the actual damages sustained by the consumer, with additional awards again permitted for attorneys' fees and the costs of the action.[6]

With such high dollar values at stake, the question then becomes: "Who is going to pay for all of this?" As is easy to imagine, retailers are turning to their insurers for any coverage that they can find. One common source of corporate insurance coverage is a commercial general liability ("CGL") insurance policy. These policies typically provide two types of coverage that are implicated in mass credit card theft cases: Coverage A (for bodily injury and property damage claims) and Coverage B (for advertising and personal injury claims). At the beginning of 2015, the Eleventh Circuit Court of Appeals weighed in on the issue of potential insurance coverage under a CGL policy for violations of the FACTA.

This article will first examine the potential coverage available for FACTA violations under Georgia law, with a focus on the Eleventh Circuit Court of Appeal's recent decision in *Travelers Property Casualty Company of America v. The Kansas City*

Landsmen, L.L.C. d.b.a. Budget Rent a Car.[7] The article concludes by providing an overview of other states' views on the issue.

I. Coverage for FACTA Violations under Georgia Law

Commercial General Liability Insurance policies typically provide coverage under two general provisions, Coverage A and Coverage B. Coverage A provides that an insurer, Insurance Service Office, or ISO, develops standard insurance forms that are widely used by many insurers in their policies. The main ISO form used in CGL policies is the Commercial General Liability Coverage Form CG 00 01 12 07. Under this form, Coverage A provides:

> SECTION I – COVERAGES
>
> COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> i. The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; [8]

Thus, in order for a loss or claim to be covered under Coverage A, there must first be "a bodily injury or property damage" caused by an occurrence.

Coverage B generally provides:

> COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY
>
> 1. Insurance Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those

damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply.[9]

II. Coverage B—"Personal and Advertising Injury"

When courts look at whether coverage is provided for violations of FACTA, the analysis most always involves looking at Coverage B, which provides coverage for "personal and advertising injury." "Personal and advertising injury" coverage only applies to injury arising out of the offenses specifically listed in the policy. In the most recent ISO version of the Commercial General Liability Coverage Form, "personal and advertising injury" includes:

> ... injury, including consequential "bodily injury", arising out of one or more of the following offenses:
>
> a. False arrest, detention or imprisonment;
>
> b. Malicious prosecution;
>
> c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
>
> d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
>
> e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
>
> f. The use of another's advertising idea in your "advertisement"; or
>
> g. Infringing upon another's copyright, trademark or slogan in your "advertisement".[10]

Most relevant to the identity theft and use of credit card numbers is the offense of "oral or written publications, in any manner, of material that violates a person's right of privacy." In fact, Coverage B is where the Eleventh Circuit Court of Appeals' analysis focused in the *Budget Rent a Car* case.[11]

In *Budget Rent a Car*, the Eleventh Circuit examined the availability of insurance coverage for a consumer's class action lawsuit filed against The Kansas City Landsmen, LLC, d/b/a Budget Rent A Car, and A Betterway RentaCar, Inc. (collectively "Budget Rent A Car").[12] In this lawsuit, the plaintiff alleged that Budget Rent A Car violated FACTA by printing credit card receipts that included more than the last five digits of the consumer's credit card number

and also listed the card's expiration date. The plaintiff sought to recover statutory and punitive damages on behalf of himself and others similarly situated under 15 U.S.C. Section 1681n(a), which provides for the willful violation of FACTA.[13]

Travelers Property Casualty Company of America ("Travelers") and St. Paul Fire and Marine Insurance Company ("St. Paul") (collectively referred to as the "insurers") both issued CGL policies to Budget Rent A Car. Travelers issued two consecutive primary insurance policies, and St. Paul issued corresponding excess insurance policies. The two insurers filed a declaratory judgment action in the United States District Court for the Northern District of Georgia seeking a declaration that they had no duty to defend or indemnify Budget Rent A Car for the lawsuit asserting FACTA violations.[14]

In an unconventional approach[15], the court first began with an analysis of relevant policy exclusions. All policies contained a knowing-conduct exclusion. This exclusion precluded coverage for "personal and advertising injury" caused by or at the direction of the insured with knowledge that the act would violate another's rights and would cause "personal and advertising injury."[16]

As referenced above, the plaintiff only brought his cause of action under 15 U.S.C. § 1681n, which provides the damages for *willful* violations of FACTA. Section 1681o allows for damages for negligent violations of the Act. Since the plaintiff chose to file his action only under the section for willful violations, the knowing-conduct exclusion would appear, at first glance, to preclude coverage for the plaintiff's claims. The Eleventh Circuit disagreed.[17]

In reaching this conclusion, the Eleventh Circuit looked to the meaning of willful within FACTA. The court noted that the United States Supreme Court has held that willfulness, within the meaning of Section 168In, includes not only knowing violations of the Act but also a reckless disregard" of the Act.[18] The distinction between knowing and reckless disregard of the Act were critical to the court's conclusion because the parties all agreed that knowing violations were precluded by the knowing-conduct exclusion, whereas reckless disregard violations were not.[19]

The district court concluded that the knowing-conduct exclusion applied to preclude coverage because the only allegations in the underlying complaint were for "knowing" "willful" violations rather than "reckless disregard" "willful" violations.[20] The Eleventh Circuit disagreed, concluding that the knowledge allegations in the complaint only referred to Budget Rent A Car's "alleged knowledge of FACTA's requirements, not their knowledge of any alleged *violations* of its requirements."[21] The court, however, noted that Section 168In's requirements "concerns itself with the mental state as it relates to alleged noncompliance—*i.e.*, violations—only, not with the defendant's mental state

with regard to the statute's requirements."[22]

Since there were no allegations in the underlying complaint that Budget Rent A Car's actions in actually violating the statute rose to a level of "knowing" willfulness, rather than just "reckless disregard" willfulness, and the underlying plaintiff could succeed on his claim under either theory, the court held that the knowing-conduct exclusion did not apply to preclude coverage.[23]

After finding the knowing-conduct exclusion did not apply to preclude coverage, the court then returned to the main provisions of coverage to evaluate whether the alleged violations of the FACTA was generally covered under Coverage B.[24] The primary and excess policies each contained a slightly different definition of "personal injury" or "advertising injury." The offense most related to FACTA violations under all policies related to oral, written or electronic publication of material that violates a person's privacy rights.[25]

The parties all agreed that there would be no coverage under the policies if the credit card receipts were only provided to the credit card users.[26] This is because for coverage to be provided, the policies required that the information be published. The parties agreed "that the term 'publication' contemplates dissemination to at least someone other than the person who provided the credit card information at issue to" Budget Rent a Car.[27] Because the parties all agreed on this issue, the court did not consider whether "publication" could result when a nonconforming credit card receipt is returned to the paying cardholder.[28]

The issue in this case with respect to coverage provided under Coverage B was whether "publication" could occur in the unique business of rental cars. Budget Rent A Car contended that under it business model, payment is taken at the time of the initial rental of the car but the credit card receipt for payment of the rental is not provided until the car is returned. As a result, the person who receives the credit card receipt for the rental may not be the same person who rented the car or owned the credit card paying for the rental.[29] Budget Rent A Car claimed that it considered the person returning the rental car to be a customer, regardless of whether they owned the credit card, and argued that it could be held liable in the underlying complaint for furnishing the receipts to such persons.[30]

The court determined that before it could evaluate whether the underlying complaint involved a "personal or advertising injury," an ambiguity in FACTA must be resolved.[31] The court found an issue as to whether the statute prohibited vendors from providing credit card receipts to their customers who did not actually own the credit card accounts.[32] This is because § 1681c(g)(l) only prohibited the printing of receipts with more than the last five digits of the credit card or the expiration date when they were "provided to the cardholder."[33] Because § 1681c(g)(l) does not define the term

"cardholder," and because the issue was one of first impression, the court ultimately elected to remand the question to the lower court for further proceedings and suggested that the Federal Trade Commission, agency charged with administering FACTA, may also with to intervene and provide guidance.[34]

As of the publishing of this article, we were unaware of any action taken by the United States District Court for the Northern District of Georgia on remand. The Eleventh Circuit, however, makes an interesting point that other courts have not recognized in that the act read literally may only apply when the receipt is provided directly to the cardholder but not when it is provided to a third-party. As the Eleventh Circuit mentioned,

> Some might suggest that such an interpretation would create plainly absurd results, ... , that fly in the face of FACTA's stated purpose of preventing identity theft, "... particularly because FACTA has been described as a remedial statute that should be construed broadly... . On the other hand, some might disagree that the results are absurd, since Congress is not required to address every aspect of a problem whenever it decides to act."[35]

If FACTA is read literally and only applies when a nonconforming receipt is provided directly to the cardholder, this creates an issue for companies seeking coverage for such violations under their CGL policies. As discussed below, other courts around the country addressing this issue refuse to find coverage under Coverage B where the receipt was only provided to the cardholder because no "publication" occurred. If FACTA is so limited, it appears that insureds will never have coverage for such violations under Coverage B of their CGL policies.

III. Coverage A—"Bodily Injury" and "Property Damage"

We have not seen many cases around the country addressing whether violations of the FACTA might fall within the parameters of Coverage A of a CGL Policy. Coverage A generally provides coverage for "bodily injury" or "property damage" caused by an "occurrence." Before coverage can be found, there must necessarily first be a "bodily injury" or "property damage."

FACTA generally permits recovery of "actual damages" under 15 U.S.C. Section 1861n and o. Courts around the country have found that "actual damages" within the meaning of the Fair Credit Reporting Act, of which FACTA is a part, includes damages for mental or emotional injuries under certain circumstances.[36]

Georgia courts follow the majority of jurisdictions throughout the country and interpret "bodily injury" to only include coverage for nonphysical, emotional, or mental harm where the nonphysical harm has

in some way physically manifested.[37] Thus, a plaintiff's claim for mental or emotional injury under FACTA would only constitute a covered "bodily injury" within the meaning of Coverage A where that nonphysical harm caused the plaintiff some physical ailment.

The second component of coverage under Coverage A is for "property damage." In Georgia, money and financial accounts are intangible property not generally covered by commercial general liability policies.[38] Therefore, a plaintiff's financial losses as a result of his or her credit card information being stolen off of a receipt, which violated the FACTA, is unlikely to amount to "property damage" within the meaning of Coverage A.

Should "bodily injury" or "property damage" be found, there must also be an occurrence for Coverage A to apply. The typical CGL policy defines occurrence as, "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[39] The policies do not generally define accident, but Georgia statute generally defines "accident" as "an event which takes place without one's foresight or expectation or design."[40] When used in an insurance policy, the definition of accident "has a further meaning limited by the occurrence or event as to causation of injury or damage; '[a]n accident is an unexpected happening rather than one occurring through intention or design.'"[41] More specifically, if an insured performs a deliberate act negligently, an accident can result, "'if the effect is not the intended or expected result.'"[42] Thus, an "occurrence" is likely in FACTA cases, because, while an insured may act intentionally in printing a receipt with more than the last five digits of a credit card and an expiration date, presumably, most insureds would not also have intended to harm the credit cardholder and desired to put their personal information at risk.

While there could be an "occurrence" to result in FACTA cases, coverage under Georgia law would only possibly result in the very narrow of circumstances where the consumer alleges "bodily injury" by suffering such an emotional or mental distress that it resulted in a physical manifestation and injury.

IV. Coverage for FACTA Violations in Other Jurisdictions

A few other courts across the country have evaluated coverage for violations of the Fair and Accurate Credit Transactions Act ("FACTA") under CGL policies. These cases focus on the basic requirements to trigger coverage under a general liability policy and shed light on some of the issues to be considered when evaluating coverage for FACTA claims.

A. *Whole Enchilada, Inc. v. Travelers Property and Casualty Company of America*

One of the earliest cases discussing liability insurance coverage for violations of the Fair and Accurate

Credit Transactions Act in depth is *Whole Enchilada, Inc. v. Travelers Property Casualty Company of America*.[43] In *Whole Enchilada*, the policy holder filed a declaratory judgment action against Travelers Property and Casualty Company of America ("Travelers") seeking coverage for a class action lawsuit brought against it for allegedly violating the FACTA.[44] Specifically, the underlying class action alleged that Whole Enchilada violated the FACTA by printing more information than the last five digits of consumers credit and debit cards on customer receipts, thus violating 15 U.S.C. Section 168l(c).[45] The class action plaintiffs alleged that Whole Enchilada printed the expiration dates of their credit cards on receipts, along with the last five digits of the applicable credit card number.[46]

The underlying litigation was ultimately resolved by settlement, which was approved by the court and with judgment entered accordingly.[47] Whole Enchilada then filed suit against Travelers seeking a declaration that Travelers was required to defend and indemnify it for the underlying class action under two policies.[48]

The policies at issue in *Whole Enchilada* were CGL policies issued by Travelers, providing liability coverage for personal and advertising injuries under Coverage B.[49] Under Coverage B, the policies provided coverage for "personal and advertising injury" arising out of "[o]ral or written publication, in any manner, or material that violates a person's right of privacy."[50]

The policies at issue contained a WEB XTEND endorsement that modified Coverage B by deleting and replacing the standard Coverage B insuring agreement with one that provided coverage for "'personal injury', 'advertising injury' or 'web site injury'".[51] Under the WEB XTEND endorsement, "advertising injury" included injury arising out of "oral, written or electronic publication of material that appropriates a person's likeness, unreasonably places a person in a false light or gives unreasonable publicity to a person's private life...".[52] "Personal Injury" was defined by the endorsement as "injury, other than 'bodily injury' arising out of...oral, written or electronic publication of material that appropriates a person's likeness, unreasonably places a person in a false light or gives publicity to a person's private life."[53]

In the declaratory judgment action, Whole Enchilada argued that the WEB XTEND endorsement was represented to be an extension of coverage, and instead, improperly narrowed coverage.[54] Whole Enchilada argued that the underlying complaint alleged publication as defined by the WEB XTEND endorsement, that it alleged unreasonable publicity and appropriation of likeness, and sought damages covered by the policies.[55]

Travelers argued that the plain language of the WEB XTEND endorsement indicated that it replaced the traditional Coverage B language in its entirety. Travelers argued that there was no coverage for the

underlying complaint, as (l) it did not allege publication, nor did it allege "publicity to private life"; (2) it did not allege publication or appropriation of plaintiffs' likeness; and (3) it did not allege injury or damage potentially within the personal injury coverage.[56] Further, Travelers argued that the underlying complaint only sought statutory penalties, punitive damages, costs of the suit, and injunctive relief, none of which were covered under the policy.[57]

1. THE WEB XTEND Endorsement Replaced the Terms of Coverage B

The court rejected Whole Enchilada's first argument that the WEB XTEND Endorsement could not limit coverage, as it was represented to be an extension of coverage.[58] Where the WEB XTEND Endorsement unambiguously stated that it changed the policy, based on the plain language therein, the endorsement language modified that in the standard policy form.[59] The court noted that, under Pennsylvania law, where an endorsement conflicts with the standard insuring agreement, the terms of the endorsement prevail.[60]

2. Printing a Receipt Does Not Constitute Publication Under Pennsylvania Law

The court next examined whether the underlying class action lawsuit sufficiently alleged "publication", as necessary to trigger coverage under the policies.[61] The policies did not define "publication."[62] The court looked to the Webster's Dictionary definition of "publish" to evaluate coverage, noting that it required facts to either be made known generally, made public, disseminated to the public, or released for distribution.[63] As the receipts that were printed in violation of the FACTA were only given to the cardholder, the information on the receipts was not made generally known, publically announced, or disseminated to the public.[64]

3. Private Financial Information is not Part of a Person's Likeness

Whole Enchilada further argued that publication of material that appropriates a person's likeness was covered.[65] It argued that financial information is part of a person's identity, and thus, a person's likeness.[66] The court rejected this argument as well, noting that such a characterization of financial information was too far beyond the language of the policies and Pennsylvania law.[67] The court reasoned that "appropriation of a person's likeness ... is use of a person's actual physical likeness ... without permission."[68]

Nonetheless, the underlying class action lawsuit merely alleged the failure to truncate credit card numbers, thus exposing cardholders to potential fraud.[69] There were no allegations that Whole Enchilada wrongfully utilized the financial information in any way, and thus, there was no allegation of appropriation.[70]

4. The FACTA Complaint Did Not Allege Unreasonable Publicity to the Cardholders' Private Lives

The court noted that under Pennsylvania law, "publicity" requires that a matter be made public, communicated to the public at large, or communicated to so many people that the information is substantially certain to become public.[71] The receipts at issue in the underlying litigation were only provided to the cardholders.[72] Because there was no allegation of communication of the card numbers publically, the court held that there was no disclosure causing publicity to a person's private life.[73]

B. *Creative Hospitality Ventures, Inc. v. US. Liability Insurance Company*

Courts have also found a lack of publication sufficient to trigger Coverage B in policies containing a standard commercial general liability form without a similar WEB XTEND endorsement.[74]

In *Creative Hospitality Ventures, Inc. v. U.S. Liability Insurance Company,* the Eleventh Circuit examined, under Florida law, coverage under a commercial general liability policy for a class action lawsuit brought against restaurant operator Creative Hospitality.[75] The underlying class action alleged that Creative Hospitality violated the FACTA by printing more than the last five digits of cardholders' credit card numbers and/or expiration dates on receipts.[76]

U.S. Liability Insurance Company ("U.S. Liability") and Essex Insurance Company ("Essex") issued CGL coverage to Creative Hospitality, providing, in part, coverage for damages because of "personal and advertising injury", defined to include "[o]ral or written publication, in any manner, of material that slanders or libels a person ..." and "[o]ral or written publication, in any manner, or material that violates a person's right of privacy ..."[77]

The *Creative* declaratory judgment action involved claims against both U.S. Liability and Essex pertaining to claims for coverage under the FACTA.[78] Both Essex and U.S. Liability filed Motions to Dismiss at the district court, arguing that printing credit card receipts did not constitute publication necessary to trigger coverage.[79] The district court referred the motions to the magistrate judge, who concluded that the language "publication, in any manner" included the FACTA violation claims.[80]

Essex appealed the magistrate court ruling, and the district court came to the opposite conclusion, finding that "publication" did not cover FACTA violations.[81] In doing so, the district court relied on the Florida Supreme Court's definition of "publication" as "communication (of news or information) to the public: public announcement", based on the holding in *Penzer v. Transportation Insurance Company*.[82]

The policyholders appealed to the Eleventh Circuit, arguing that the phrase "in any manner" contained in the policies broadened the scope of publication under the policy.[83] In the alternative, the policyholders argued that the term "publication" was ambiguous, and should be construed against the insurer.[84]

The Eleventh Circuit cited to *Penzer*, noting that the Florida Supreme Court looked to the dictionary definition of "publication", finding it to mean communication or information disseminated to the public.[85] The court held that providing a receipt to a customer who already had the credit card number and expiration date, did not constitute publication sufficient to trigger coverage under the policy.[86] The court further rejected the argument that "the phrase 'in any manner' expands the definition of 'publication' to include the provision of a written receipt," but instead "merely expands the categories of publication (such as email, handwritten letters, and, perhaps, "blast-faxes") covered by the Policy."[87]

C. *Ticknor v. Rouse's Enterprises, LLC*

The United States District Court for the Eastern District of Louisiana has also found that FACTA violations are not covered under general liability Coverage B for lack of publication.[88] In *Ticknor v. Rouse's Enterprises, LLC*, a consumer class action was brought against an insured grocery store operator, Rouse, alleging it failed to truncate expiration dates on receipts.[89] The class action plaintiffs did not allege actual damages, instead claiming that the grocer "knowingly, willfully, intentionally, and reckless[ly] violated ..." the FACTA.[90] The underlying plaintiffs sought statutory damages, punitive damages, costs, attorneys' fees, and an injunction.[91]

The policy at issue was provided to Rouse by Evanston Insurance Company ("Evanston"). The policy provided coverage for Personal and Advertising Injury Liability under Coverage B, for damages because of "personal and advertising injury" ... arising out of the "oral or written publication, in any manner, of material that violates a person's right of privacy."[92] The policy did not include a WEB XTEND or similar endorsement, but instead contained the standard Coverage B form.

The main issue presented in *Ticknor* was whether providing non-truncated receipts to cardholders was "publication" sufficient to trigger Coverage B.[93] Evanston relied on *Whole Enchilada* and *Creative Hospitality* to support its argument that the FACTA violation did not constitute a publication.[94] Rouse argued that publication means "to produce or release for publication; specifically: print", and thus, printing the receipt was sufficient to establish publication [95]

The *Ticknor* court rejected the argument that publication did not require transmission of information to a third-party.[96] The court adopted the reasoning set forth in *Creative Hospitality* differentiating between mass facsimiles and FACTA receipt

violations.[97] Like in *Whole Enchilada*, the *Ticknor* court looked to the dictionary definition, finding no publication where the receipts at issue were only provided to the cardholders for their own personal transactions.[98]

The Evanston policy also contained exclusions for "personal and advertising injury" (1) "caused by or at the direction of the insured with knowledge that the act would violate the rights of another ..."; and (2) "arising...out of any action or omission that violates or is alleged to violate ... [a]ny statute, ordinance or regulation ... that prohibits or limits the sending, transmitting, communicating or distribution of material or information."[99] Because the court found that coverage was not triggered under Coverage B, it did not evaluate whether these exclusions applied to preclude coverage.[100] Though it is unclear whether these exclusions would have been applicable to the FACTA claims in the *Ticknor* case, the court's approach in *Budget Rent a Car* makes it clear that such exclusions should be examined closely when determining coverage for FACTA claims.

V. Conclusion

Under the current legal landscape, insureds have little hope of coverage for FACTA claims under the traditional commercial general liability policy. The United States District Court for the Northern District of Georgia's response to the issues in *Budget Rent a Car* could have a profound effect on the future of coverage for FACTA violations and the interpretation of the FACTA statute as a whole going forward.

End Notes

[1]www.ftc.gov/news-events/press-releases/2015/02/identitytheft-tops-ftcs-consumer-complaint-categories-again-2014 (last visited April 13, 2015).

[2]www.privacymatters.com/identity-theft-information/identity-theft-computer-hacking.aspx (last visited April 13, 2015).

[3]www.law.com/sites/articles/2015/01/15/j-crew-sued-over-alleged-violations-of-credit-transactions-act/ (last visited April 13, 2015).

[4]www.law360.com/articles/605654/airgas-credit-card-receipts-violate-fcra-class-says (last visited April 13, 2015).

[5] 15 U.S.C. § 1681n.

[6] 15 U.S.C. § I68I0.

[7] No. 14-11006, 2015 WL 137816 (11th Cir. Jan. 12, 2015).

[8] CG 00 01 12 07, Section I, Coverage A, Paragraphs 1(a) and (b).

[9] CG 00 01 12 07, Section I, Coverage B, Paragraph 1(a).

[10] CG 00 01 12 07, Section V, Paragraph 14.

[11] *Travelers Property Casualty Company of America v. The Kansas City Landsmen, L.L.C. d.b.a. Budget Rent a Car,* No. 14-11006, 2015 WL 137816 (11th Cir. Jan. 12, 2015).

[12] *Id.*

[13] *Id.* at *1-2.

[14] *Id.* at *2.

[15] The approach of analyzing policy exclusions first is unconventional because an analysis of the application of an insurance policy's exclusions are only necessary if the court first finds that there is generally coverage under the coverage granting provisions of the policy. If the claim does not fall within the general coverage grant, there is no reason to then analyze policy exclusions.

[16] *Budget Rent a Car,* 2015 WL 137816, at *2.

[17] *Id.* at *7.

[18] *Id. citing Safeco Ins. Co. v. Burr,* 551 U.S. 47, 71, 127 S.Ct.2201, 2216, 167 L.Ed.2d 1045 (2007).

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id. citing* 15 U.S.C. § 1681n ("Civil liability for *willful noncompliance.* (a) In general[:] Any person who *willfully fails to comply* with any [FACTA] requirement ... is liable…").

[23] *Id.* at *6.

[24] *Id.* at *7-11.

[25] *Id.* at *3.

[26] *Id.* at *7.

[27] *Id.*

[28] *Id.*

[29] *Id.* at *8.

[30] *Id.*

[31] *Id.* at *8-9.

[32] *Id.* at *9.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Taylor v. Tenant Tracker, Inc.,* 710 F.3d 824 (8th Cir. 2013) (mental pain and anxiety can constitute "actual damages" under the Fair Credit Reporting Act); *Edeh v. Equifax Info. Svs., LLC,* 974 F. Supp. 2d 1220 (D. Minn. 2013) (emotional damages can constitute "actual damages" under the Fair Credit Reporting Act); *Neclerio v. Trans Union, LLC,* 983 F. Supp. 2d 199 (D. Conn. 2013) (in order to recover mental damages under the Fair Credit Reporting Act, plaintiff must prove an actual injury, supported by more than his or her own testimony); *Van Veen v. Equifax Info.,* 844 F. Supp. 2d 599, 610 (E.D. Pa. 2012) ("The FCRA permits recovery for emotional harm stemming from erroneous credit reporting."); *Konter v. CSC Credit Svs., Inc.,* 606 F. Supp. 2d 960 (W.D. Wis. 2009) (emotional distress damages were not recoverable under the Fair Credit Reporting Act where the plaintiff, not the defendant, told others about problems with information on his credit report); *Tilley v. Global Payments, Inc.,* 603 F. Supp. 2d 1314 (D. Kas. 2009) (humiliation and mental distress can constitute actual damaged under the Fair Credit Reporting Act even where the consumer did not incur any out of pocket losses); *Whiting v. Harley-Davidson Fin. Svs.,* 534 F. Supp. 2d 823 (N.D. 111. 2008) (emotional distress can, in certain circumstances, constitute actual damages within the meaning of the Fair Credit Reporting Act); *Garrett v. Trans Union, LLC,* No. 2:04-CV-00582, 2006 WL 2850499 (S.D. Ohio Sept. 29, 2006) (holding that "[w]hile 'actual damages' may include emotional distress, because emotional distress damages are so easy to manufacture, courts have imposed a strict standard to be applied for them to be recoverable"); *Schaffhausen v. Bank of Am., N.A.,* 393 F. Supp. 2d 853 (D. Minn. 2005) (plaintiff must prove genuine injury before emotional damages are recoverable under the Fair Credit Reporting Act); *Sampson v. Equifax Info. Svs., LLC,* No. CV204-187, 2005 WL 2095092, at *4 (S.D. Ga. Aug. 29, 2005) ("Mental anguish constitutes a compensable harm under the FCRA, and emotional distress damages may be recovered even absent a denial of credit."); *Spector v. Equifax Info. Svs.,* 338 F. Supp. 2d 378 (D. Conn. 2004) (plaintiff must prove causal link between the violation of the Fair Credit Reporting Act and the emotional injury); *McKeown v. Sears Roebuck & Co.,* 335 F. Supp. 2d 917 (W.D. Wis. 2004) (emotional distress damages permitted and survived summary judgment);*Boris v. Choicepoint Svs., Inc.,* 249 F. Supp. 2d 851 (W.D. Ky. 2003); *Lewis v. Ohio Prof1 Elec.Network, LLC,* 248 F. Supp. 2d 693 (S.D. Ohio 2003).

[37] *Nationwide Mut. Fire Ins. Co. v. Somers,* 261 Ga. App. 421, 427, 591 S.E.2d 430, 435 (2003); *Bates v. Guar. Natl Ins. Co.,* 223 Ga. App. 11, 13, 476 S.E.2d 797, 799 (1996).

[38] *See e.g., Nationwide Mut. Fire Ins. Co. v. City of Rome,* 268 Ga. App. 320, 321, 601 S.E.2d 810, 812 (2004) (holding that loss of grant money as result of failure to timely submit application was not "property damage" within meaning of policy); *Mack v. Nationwide Mut. Fire Ins. Co.,* 238 Ga. App. 149, 517 S.E.2d 839 (1999) (concluding that loss of money as result of alleged usury in retail installment contract was not "property damage").

[39] CG 00 01 12 07, Section V, Paragraph 13.

[40] O.C.G.A. § l-3-3(2).

[41] *Custom Planning & Dev., Inc., v. Am. Nat'l Fire Ins. Co.,* 270 Ga. App. 8, 9-10, 606 S.E.2d 39, 41 (2004) *quoting City of Atlanta v. St. Paul Fire & Ins. Co.,* 231 Ga. App. 206, 498 S.E.2d 782 (1998).

[42] *HDI-Gerling Am. Ins. Co. v. Morrison Homes, Inc.,* 701 F.3d 662, 668 (11th Cir. 2012) *quoting Am. Empire Surplus Lines Ins. Co. v. Hathaway Devi. Co, Inc..,* 288 Ga. 749, 752, 707 S.E.2d 369, 372 (2011).

[43] 581 F. Supp. 2d 677 (W.D. Pa. 2008).

[44] *Id.* at 681-682.

[45] *Id.* at 682.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 681.

[49] *Id.* at 683.

[50] *Id.* at 685.

[51] *Id.* at 685.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 691.

[55] *Id.* at 688.

[56] *Id.*

[57] *Id.* at 686.

[58] *Id.* at 692.

[59] *Id.*

[60] *Id.* at 693.

[61] *Id.* at 696.

[62] *Id.* at 697.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 698.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 699.

[72] *Id.* at 700.

[73] *Id.* at 701.

[74] *Creative Hospitality Ventures, Inc. v. U.S. Liability Ins. Co.,* 444 Fed. Appx. 370 (11th Cir. 2011).

[75] *Id.*

[76] *Id.* at 371-372.

[77] *Id.* at 371.

[78] *Id.* at 372.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* at 373 *quoting* Penzer, 29 So.3d 1000, 1005 (Fla. 2010) (evaluating definition of publication under insurance policy in case involving mass facsimiles sent to customers in violation of the Telephone Consumer Protection Act).

[83] *Id.*

[84] *Id.*

[85] *Id.* at 375.

[86] *Id.* at 376.

[87] *Id.*

[88] *Ticknor v. Rouse's Enterprises, LLC,* 2 F.Supp.3d 882 (E.D. La. 2014).

[89] 2 F.Supp.3d 882 (E.D. La. 2014).

[90] *Id.* at 887.

[91] *Id.*

[92] *Id.* at 889.

[93] *Id.* at 893.

[94] *Id.*

[95] *Id.* at 894.

[96] *Id.* at 896.

[97] *Id.* at 895.

[98] *Id.* at 896.

[99] *Id.* at 890.

[100] *Id.* at 896-897.