United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Blanche M. Manning	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	07 C 5758	**DATE**	February 6, 2009
CASE TITLE	*Barbieri v. Redstone American Grill, Inc.*		

DOCKET ENTRY TEXT

For the reasons stated below, the defendant's motion for summary judgment [49-1] is granted. Civil Case terminated. The clerk is directed to enter a Rule 58 judgment.

■[For further details see text below.]

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Plaintiff Carole Barbieri filed suit on October 11, 2007, alleging that defendant Redstone American Grill, Inc. violated the Fair and Accurate Credit Transaction Act ("FACTA") amendment to the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq*., by improperly printing her credit cards' expiration dates on two of her receipts. The plaintiff's first amended complaint seeks relief for Redstone's purported willful violation of FACTA. Redstone moves for summary judgment on the ground that the Credit and Debit Card Clarification Act of 2007 ("Clarification Act") extinguished the plaintiff's claim. The plaintiff, in response, contends that the Clarification Act is unconstitutional.

Pursuant to Fed. R. Civ. P. 24, the court notified the government that the plaintiff was challenging the constitutionality of the Clarification Act and granted the government's motion to intervene. The government has filed briefs in support of the constitutionality of the Clarification Act, which the court has considered in addressing the defendant's motion for summary judgment. For the reasons stated below, the defendant's motion for summary judgment is granted.

A. Background

Although the defendant has moved for summary judgment, it did not file a Local Rule 56.1 Statement of Undisputed Facts as resolution of the motion is a purely legal issue. Indeed, the parties do not dispute the material facts at issue. Accordingly, the court lays out the facts as stated by the parties in their summary judgment papers.

FACTA provided, in relevant part, that "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." 15 U.S.C. § 1681c(g)(1). The statute required that all machines in use prior to January 1, 2005, be brought into compliance by December 4, 2006, and all machines first used after January 1, 2005, comply immediately. I5 U.S.C. § 1681c(g)(3). Any

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person who willfully failed to comply with this section of FACTA with respect to any consumer was liable for actual damages sustained by the consumer or statutory damages not less then $100 and not more than $1,000. 15 U.S.C. § 1681n(a)(1)(A). As noted by the government, the Senate committee stated that this portion of FACTA was intended to "protect consumers from identity thieves" and "to limit the number of opportunities for identity thieves to 'pick off' key card account information." S. Rep. No. 108-166, at 3 (2003). The plaintiff alleges that on August 30, 2007, and October 8, 2007, Redstone violated FACTA's expiration-date requirement by printing the expiration dates for her credit cards on her receipts.

On June 3, 2008, the Clarification Act was signed into law. The "Findings" section of the Act states that:

> (4) Almost immediately after the deadline for compliance [with FACTA] passed, hundreds of lawsuits were filed alleging that the failure to remove the expiration date was a willful violation of the Fair Credit Reporting Act even where the account number was properly truncated.
> (5) None of these lawsuits contained an allegation of harm to any consumer's identity.
> (6) Experts in the field agree that proper truncation of the card number, by itself as required by the amendment made by the Fair and Accurate Credit Transactions Act, regardless of the inclusion of the expiration date, prevents a potential fraudster from perpetrating identity theft or credit card fraud.
> (7) Despite repeatedly being denied class certification, the continued appealing and filing of these lawsuits represents a significant burden on the hundreds of companies that have been sued and could well raise prices to consumers without corresponding consumer protection benefit.

Clarification Act., Pub. L. 110-241, § 2(a), June 3, 2008, 122 Stat. 1565.

Due to the burdens identified in the "Findings" section of the Act, Congress amended section 616 of the Fair Credit Reporting Act, 15 U.S.C. 1681n, by adding a new subsection as follows:

> d) CLARIFICATION OF WILLFUL NONCOMPLIANCE.--For the purposes of this section, any person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004, and the date of the enactment of this subsection but otherwise complied with the requirements of section 605(g) for such receipt *shall not be in willful noncompliance with section 605(g) by reason of printing such expiration date on the receipt.*

Id. at § 3(a)(emphasis added). The Act further states that:

> (b) SCOPE OF APPLICATION.--The amendment made by subsection (a) shall apply to any action, other than an action which has become final, that is brought for a violation of 605(g) of the Fair Credit Reporting Act to which such amendment applies without regard to whether such action is brought before or after the date of the enactment of this Act.

Id. at § 3(b). Thus, the express language of the Clarification Act effectively eliminated any claim for a willful violation of FACTA based on the alleged failure to delete the expiration date from a receipt issued between December 4, 2004, and June 3, 2008, the effective date of the Act. Accordingly, the defendant has moved for summary judgment based on the amendment to the FACTA. The plaintiff contends in her response brief that the Clarification Act is unconstitutional because it violates separation of powers principles, and the equal protection and due process clauses.

B. Analysis

1. Separation of Powers

The plaintiff first argues that the statute violates separation of powers principles. As noted by the United States Supreme Court:

> Article III establishes a "judicial department" with the "province and duty ... to say what the law is" in particular cases and controversies. The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy-with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments."

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995)(internal citations omitted). Therefore, pursuant to the separation of powers doctrine, "Congress cannot direct the outcome of a pending case without changing the law applicable to that case." *Paramount Health Systems, Inc. v. Wright*, 138 F.3d 706, 710 (7th Cir. 1998). As stated by the government, "Congress can change pre-existing law, even where doing so controls the results in pending lawsuits; what Congress cannot do is prescribe a rule of decision in a particular case without also changing the underlying law." United States' Reply, Dkt. #72 at 6-7 (citations omitted).

According to the plaintiff, the Clarification Act violates separation of powers principles for two reasons: first, she contends that the Clarification Act did not change the substantive law and second, she asserts that the Clarification Act improperly usurped the judiciary's function by directing the courts to make factual findings with respect to individuals who received receipts between December 4, 2006, and June 3, 2008, and by directing the outcome of the pending cases.

a. *Did the Clarification Act change the substantive law*?

The plaintiff argues that the Clarification Act did not change the substantive law because it did not prescribe new rules or requirements. In support, she points out that businesses are still required to comply with FACTA by redacting the expiration date, but they simply cannot be found by the court to have willfully violated the statute. *See, e.g.*, 154 Cong. Rec. S4440 (May 20, 2008)(in introducing the proposed bill, Senator Schumer noted that "Going forward, companies will still have to meet the same strict rules Congress originally passed in fact."); 154 Cong. Rec. E925 (May 14, 2008)(Congressman Mahoney and Congressman Maloney both stating that the Clarification Act "does not eliminate a business's obligation to properly truncate the account number or to redact the expiration date from its receipts."). Thus, the plaintiff asserts that the Clarification Act did not eliminate liability, it simply directed courts to find that businesses who were noncompliant from December 4, 2006 to June 3, 2008, "shall not be in willful noncompliance."

The court concludes that the Clarification Act did effect a change in the law and describes several cases which best illustrate the basis for this conclusion.

In *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), environmental groups, concerned about the continued well-being of a certain species of spotted owl, challenged in court the federal government's actions to allow harvesting of timber from some forests in the Pacific Northwest. In response

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to this litigation, Congress enacted § 318 of the Department of the Interior and Related Agencies Appropriations Act, known as the Northwest Timber Compromise. The controversial subsection of the Compromise "determined and directed" that specified actions, if taken by the Forest Service with respect to thirteen national forests that contained spotted owls, would be "adequate consideration for the purpose of meeting the statutory requirements that are the basis for the [pending] consolidated cases [filed by the environmental groups which were identified in the statute by name and docket number]." *Id*. at 434-35. The Ninth Circuit found that this provision impermissibly "direct[ed] . . . a particular decision" because it "does not, by its plain language, repeal or amend the environmental laws underlying this litigation,' but rather 'directs the court to reach a specific result and make certain factual findings under existing law in connection with two [pending] cases.'" *Robertson*, 503 U.S. 436 (*quoting Seattle Audubon Soc. v. Robertson*, 914 F.2d 1311, 1316 (1990))(brackets in original).

The Supreme Court reversed, finding that the statutory provision at issue did not violate the separation of powers because it effected a change in the law. *Id*. at 438 ("We conclude that subsection (b)(6)(A) compelled changes in law, not findings or results under old law.").

Here, similar to *Robertson* and contrary to the plaintiff's position, the Clarification Act did change the law. Before the Clarification Act, the failure to redact the expiration date could constitute a willful violation; however, after the Clarification Act, it cannot (provided that the other provisions of FACTA are followed). As stated by the government, the relevant language of the Clarification Act "exempts a particular category of past violations from 'willful noncompliance,' thus changing the application of a specific and legally significant term." United States' Reply at 10.

In addition, the court finds this case analogous to *Berning v. A.G. Edwards & Sons, Inc*., 990 F.2d 272 (7th Cir. 1993). In *Berning*, Congress changed the statute of limitations for implied private actions under § 10(b) of the Securities Exchange Act of 1934 while the plaintiffs' case against their brokers was on appeal. On appeal, the brokers argued that the section amending the statute of limitations, § 27A, violated the separation of powers because it did not change existing law or create new law "but rather commands the courts to decide pending cases in a particular manner. . . ." *Id*. at 278. The Seventh Circuit disagreed stating that while § 27A:

> does not apply to all private section 10(b) actions, it changes the law governing the limitations period for all cases filed prior to *Lampf*, by replacing *Lampf's* uniform limitations period with the limitations periods previously in effect in each jurisdiction. Section 27A thus does not direct courts to decide cases without regard to governing law. Rather, it alters the governing law itself.

Id.

As in *Berning*, the Clarification Act changed the governing law itself by excluding the failure to redact a credit card expiration date from the definition of "willful" violations. As noted by the Supreme Court, "[a]ltering statutory definitions, or adding new definitions of terms previously undefined, is a common way of amending statutes. . . ." *Rivers v. Roadway Express, Inc*., 511 U.S. 298, 308 (1994). *See also Walker v. Harris*, 335 F.2d 185, 195 (5th Cir. 1964)("Congress has a right to legislate by definition if it chooses")(internal quotation marks and citation omitted).

Contrary to the plaintiff's contention, the court in *Follman v. Village Squire, Inc*., 542 F. Supp. 2d 816, 821 n.3 (N.D. Ill. 2007), did not "recognize" that the Clarification Act did not effect a change in the law pursuant to separation of powers principles. In *Follman*, the court declined the defendant's invitation to consider the Clarification Act language in ruling on the defendant's motion to dismiss a FACTA claim because, at the time, the Act was pending as a bill and had not yet been passed. The court went on the state that the Clarification Act did not amend "that section" (i.e., § 1681c(g), requiring that the expiration date be truncated), and the plaintiff seeks to use this statement to her benefit. As an initial matter, the *Follman* court is correct in that the Clarification Act did not amend the section requiring truncation of the expiration date; rather, it amended the section dealing with willful noncompliance, § 1681n(a). Moreover, the *Follman* court was not addressing the constitutionality of the Clarification Act. Accordingly, the court finds that the *Follman* court's remark about the Clarification Act as not amending a certain section of FACTA is inapposite.

b. *Does the Clarification Act improperly usurp the judiciary's role as factfinder*?

The plaintiff asserts that the Clarification Act usurps the judicial function by impermissibly dictating the outcome of pending litigation. Specifically, she points out that the Supreme Court recently defined "willful" behavior under the FCRA to include reckless or knowing noncompliance. *Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201, 2208-10 (2007). The plaintiff contends that it is the function of the judiciary to make findings of fact and to apply existing law to those facts. According to the plaintiff, the facts in the instant case would show that despite receiving clear instructions on numerous occasions, Redstone willfully failed to redact the expiration date. However, the plaintiff asserts, "[d]espite these allegations, the Clarification Act directs this court to find Redstone was not in 'willful noncompliance' by reason of printing such expiration date." Response at 10.

The court finds the change articulated in the Clarification Act is within the province of Congress' power. Although perhaps inartfully stated, the statute changed the type of relief that one can obtain when a merchant fails to redact the expiration date from a credit card receipt but otherwise complies with FACTA. As the Supreme Court has stated, when "Congress creates a statutory right, it clearly has the discretion, in defining that right, to . . . prescribe remedies . . . . Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right that is has created." *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982).

The facts in a pair of United States Supreme Court cases assist in demonstrating why the Clarification Act does not violate separation of powers principles. *Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 54 U.S. 518 (1852)("Wheeling I"); *Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 59 U.S. 421 (1855) ("Wheeling II"). In *Wheeling I*, the Supreme Court held that a suspension bridge located over the Ohio River was "an obstruction and nuisance" and ordered that the bridge be elevated or removed. *Wheeling I*, 54 U.S. at 626-27. Several months later, Congress enacted a statute which stated that the bridge at issue in *Wheeling I* and other bridges "are hereby declared to be lawful structures, in their present position and elevation, ans shall be so held and taken to be, any thing in any law or laws of the United States to the contrary notwithstanding." *Wheeling II*, 59 U.S. at 426 (citation omitted). The state of Pennsylvania then brought suit against the Wheeling Bridge Company after the bridge was blown down in a storm and the Wheeling Bridge Company made plans to rebuild the bridge in its original state. Pennsylvania moved for an injunction arguing in part that the Supreme Court had declared in *Wheeling I* that the bridge was to be removed or elevated and that Congress could not declare the bridge to be a "'lawful structure,' because congress has no judicial authority to review or reverse the judgment of the supreme court, and such declaration is not within the scope of the legislative authority of congress." *Wheeling II*, 59 U.S. at 427.

The Supreme Court rejected Pennsylvania's position, concluding in part that:

> So far, therefore, as the bridge created an obstruction to the free navigation of the river, in

> view of the previous acts of congress, they are to be regarded as modified by this subsequent legislation; and, although it still may be an obstruction in fact, is not so in the contemplation of the law.

Wheeling II, 59 U.S. at 430. While the dissenting opinion concluded that congress' action was an improper foray into judicial factfinding, *Wheeling II*, 59 U.S. at 44041 ("Whether [the bridge] be a nuisance or not, depends upon the fact of obstruction; and this would seem to be strictly a judicial question"), the majority disagreed.

Similarly, in this case, while inclusion of the expiration date could have constituted willful noncompliance prior to the Clarification Act, it no longer can and the change was a proper use of congressional power.

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), is also helpful in illustrating why the Clarification Act is a proper use of congressional power despite the fact that the plaintiffs in the lower court challenged the relevant statutory section on due process grounds rather than on separation of powers grounds. In *Usery*, the court addressed certain sections of the Federal Coal Mine Health and Safety Act of 1969 as amended by the Black Lung Benefits Act of 1972 (the "Federal Coal Mine Act"), which provided benefits to coal mine workers who were deemed to be totally disabled. One section of the Federal Coal Mine Act, § 411(c)(3), stated that a miner who was shown by clinical evidence to be afflicted with pneumoconiosis (i.e., black lung disease) was "irrebuttably presumed" to be totally disabled. *Usery*, 428 U.S. at 10-11. The plaintiffs challenged this section on the ground that the Federal Coal Mine Act's presumptions "unconstitutionally impair[ed] the operators' ability to defend against benefit claims." *Id.* at 12. The district court found § 411(c)(3) to be unconstitutional because it "foreclose[d] all fact finding as to the effect of that disease upon a particular coal miner. . . ." *Id.* at 22. The Supreme Court reversed, concluding that no due process violation resulted from the legislatively-imposed irrebuttable presumption:

> Since Congress can clearly draft a statute to accomplish precisely what it has accomplished through s 411(c)(3)'s presumption of disability, the argument is essentially that Congress has accomplished its result in an impermissible manner by defining eligibility in terms of "total disability" and erecting an "irrebuttable presumption" of total disability upon a factual showing that does not necessarily satisfy the statutory definition of total disability. But in a statute such as this, regulating purely economic matters, we do not think that Congress' choice of statutory language can invalidate the enactment when its operation and effect are clearly permissible.

As the Seventh Circuit has noted:

> In civil litigation, . . . , no person has an absolute entitlement to the benefit of legal principles that prevailed at the time the case began, or even at the time of the bulk of the litigation. The legislature may change a statute of limitations at the last instant, extending or abrogating the remedy for an established wrong. It may create a remedy years after the fact, although any earlier litigation would have been doomed. And it may create an obligation to pay attorneys' fees for litigation that preceded the enactment of the statute.

Tonya K. by Diane K. v. Board of Educ. of City of Chicago, 847 F.2d 1243, (7th Cir. 1988)(internal citations omitted).

Here, the purpose and effect of the Act was to change the definition of what acts constitute willful

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noncompliance. Because this was an appropriate action by Congress, the court rejects the plaintiff's assertion that the Act is unconstitutional on the ground that it violates separation of powers principles.

2. Due Process and Equal Protection

The plaintiff also asserts that the Clarification Act violates due process and equal protection principles because it strips a class of litigants of their right of access to the courts without any compelling reason. The plaintiff contends that the Clarification Act is subject to strict scrutiny because it infringes the fundamental right of access to the courts.

The court concludes that, contrary the the plaintiff's assertion, the Clarification Act does not prevent the plaintiff's right of access to the court. As noted by the Seventh Circuit, "the First Amendment right to petition the government includes the right to file other civil actions in court that have a reasonable basis in law or fact." *Snyder v. Nolen*, 380 F.3d 279, 290 (7th Cir. 2004). *See also Vasquez v. Hernandez*, 60 F.3d 325, 328 (7th Cir. 1995)("The right of individuals to pursue legal redress for claims which have a reasonable basis in law and fact is protected by the First and Fourteenth Amendments.")(citations omitted). In other words, the "right of access to the courts is the right of an individual, whether free or incarcerated, to obtain access to the courts without undue interference." *Id*. at 291. Simply because the Clarification Act has now precluded the plaintiff from recovering for a willful violation does not mean that she has been denied her right of access to the courts. *Bowman v. Niagara Mach. and Tool Works, Inc*., 832 F.2d 1052, 1054 (7th Cir. 1987)("[The plaintiff] cannot claim that he has been denied access to court simply because the Indiana legislature has restricted a particular cause of action in a way that makes it unavailable to him.").

Because the plaintiff has not been denied access to the court, the Clarification Act need only pass the rational basis test. *Id.* at 1055 ("Because the judicial process is open to him, even if the cause of action he would pursue is not, we conclude that [the plaintiff] has failed to present a claim of denial of access to courts by operation of Ind. Code § 33-1-1.5-5, and therefore that the statute need only be examined under the 'rational basis' test.").

As noted by the government and the defendants, the Clarification's Act purpose is rationally related to a legitimate government interest. The stated purpose of the Act is to:

> ensure that consumers suffering from any actual harm to their credit or identity are protected while simultaneously limiting abusive lawsuits that do not protect consumers but only result in increased cost to business and potentially increased prices to consumers.

122 Stat 1565, § 2(b). Congress' decision to exclude the failure to redact the expiration date from "willful noncompliance" is rationally related to its dual purpose of protecting consumers while controlling abusive lawsuits. *See Wilson v. H & R Block Enterprises, Inc*., Nos. 07-0437-CV-W-ODS, 07-0599-CV-W-ODS, 2009 WL 32584, at *2 (W.D. Mo. Jan. 6, 2009)(in addressing due process challenge to the Clarification Act, stating that "[the plaintiff] does not have a Due Process interest sufficient to overcome Congress' power to regulate economic and business affairs. Congress acted with a rational purpose-it was concerned about the burdens associated with noncompliance, which it viewed as disproportionate to the failure to truncate the expiration date.").

Accordingly, the plaintiff's argument that the Clarification Act is unconstitutional on due process and equal protection grounds because it infringes her fundamental right of access to the courts is denied.

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C. Conclusion

In the instant case, the plaintiff seeks only actual damages for a purported willful violation of FACTA based on the defendant's failure to redact the expiration date from the plaintiff's receipts. Because the Clarification Act eliminated that theory of recovery, the court finds that no genuine issues of material fact exists and that, as a matter of law, the Clarification Act precludes the plaintiff's (and any putative class members') claim for willful violation under 15 U.S.C. § 1681n. *Wright v. Califano*, 603 F.2d 666 (7th Cir. 1979)("For until the class was certified, the claims of the class members were technically not before the court and the vitality of their claims could not save an otherwise moot case."). As a result, the defendant's motion for summary judgment is granted. Civil case terminated. The court directs the clerk to enter a Rule 58 judgment.

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