



JONES DAY
COMMENTARY

NEW CLASS ACTIONS TARGETING ATM OPERATORS ALLEGING FAILURE TO COMPLY WITH ATM NOTICE REQUIREMENTS

Plaintiffs' attorneys have begun targeting "ATM operators"¹ with class actions related to ATM fee disclosures. Multiple class action claims alleging that ATM operators failed to comply with the ATM notice requirements under the Electronic Fund Transfer Act ("EFTA") were recently filed in multiple federal courts. These class action complaints seek not only damages for the plaintiffs, but also attorneys' fees and costs.

WHAT IS THE EFTA AND WHAT DOES IT REQUIRE OF ATM OPERATORS?

Background of the EFTA. According to the statute, Congress enacted the EFTA to protect individual consumer rights by "provid[ing] a basic framework

establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems." 15 U.S.C. § 1693(b). In order to be covered by the EFTA, electronic fund transfers must (1) involve a transfer of funds, (2) that is initiated by electronic means, and (3) debits or credits a consumer account. *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1328 (7th Cir. 1997).

EFTA requires ATM operators to provide notice of any fees charged to consumers. An ATM operator that imposes a fee on the consumer must, at the time the service is provided, tell the consumer that a fee is imposed and the amount of the fee. 15 U.S.C. § 1693b(3)(A). EFTA also requires ATM operators to provide the fee notice on both the machine and the

1. "Automated teller machine operator" means any person who—
 (i) operates an automated teller machine at which consumers initiate electronic fund transfers; and
 (ii) is not the financial institution that holds the account of such consumer from whom the transfer is made.
 15 U.S.C. § 1693b(3)(D)(i).

ATM screen. 15 U.S.C. § 1693b(3)(B). The requirements for the content of the notice differ for the two locations. The “on the machine” notice must “be posted in a prominent and conspicuous location on or at the automated teller machine...” and must state that a fee is charged for use of the ATM. 15 U.S.C. § 1693(3)(B)(i). The “on the screen” notice must notify the consumer that a fee is imposed and state the amount of the fee. 15 U.S.C. § 1693(3)(B)(ii). In addition, the “on the screen” notice must be given after the transaction is initiated but “before the consumer is irrevocably committed to completing the transaction...” *Id.*

Regulations promulgated by the Board of Governors of the Federal Reserve Board implement EFTA. The regulation regarding notice requirements is found in 12 C.F.R. § 205.16. Prior to February 9, 2006, that regulation stated:

An automated teller machine operator that imposes a fee on a consumer for initiating an electronic fund transfer or a balance inquiry shall:

(1) Provide notice that a fee *will* be imposed... (emphasis added).

The regulation's use of the word “will” at that time prompted some class action claims against ATM operators.² Effective February 9, 2006, 12 C.F.R. § 205.16 was amended to allow ATM operators to use the word “may” if there are circumstances under which the ATM operator will not impose a fee.

Earlier Class Actions Under EFTA Involved the Sufficiency of the Notice. Earlier class actions filed under EFTA focused on whether the specific notice language used by the ATM operator provided sufficient notice to the consumer. *Brown v. Bank of America*, 457 F.Supp.2d 82, 85 (D. Mass. 2006); see also *Morrisey v. Webster Bank, N.A.*, 417 F.Supp.2d 183, 187 (D. Mass. 2006).³ In *Brown*, the bank did not charge its customers fees to use the bank's ATM. *Id.* at 84. The bank did, however, always charge non-customers fees for using the ATM. *Id.* The notice decal posted on the bank's

ATMs stated, “Bank of America may charge a \$1.50 fee...” *Id.* Plaintiffs asserted that the bank's use of the verb “may” rendered the notice insufficient because 12 C.F.R. § 205.16 required that the notice use the verb “will.”⁴ *Id.* at 85. In other words, plaintiffs claimed that the notice must state “Bank of America will charge a \$1.50 fee.” The court rejected plaintiffs' argument, holding that the use of “may” in situations in which a fee is not always imposed provided sufficient notice to non-bank customers. *Id.* at 88-89.

In a more recent Sixth Circuit case, plaintiffs brought suit under EFTA asserting that EFTA required an on-screen notice stating that “a fee ‘is’ or ‘will’ be charged if Key Bank in fact charges a fee to a non-customer using its ATM.” *Clemmer v. Key Bank National Assoc.*, 539 F.3d 349, 350 (6th Cir. 2008). The Sixth Circuit rejected plaintiffs' argument, instead holding that an on-screen notice that states a fee “may” be charged, coupled with the requirement that the consumer press “yes” to accept the fee, satisfies the EFTA notice requirements. *Id.* at 353.

RECENT EFTA CLASS ACTIONS SEEK DAMAGES FOR FAILURE TO POST THE REQUIRED NOTICE

Plaintiffs have recently begun filing class action claims under EFTA alleging that the ATM operators failed to post the required notice on the ATM. Plaintiffs assert that there was no label or sign physically present on the ATM. Here are some points to consider if you are targeted by failure-to-post claims under the EFTA.

Seek Dismissal of the Class Action for Failure to Satisfy Certification Requirements. In order to proceed with their class action claims that an ATM operator violated the EFTA, the plaintiffs must first satisfy the requirements for certification as a class action. Satisfying the class action certification requirements in Fed. R. Civ. P. 23 may be problematic for the ATM plaintiffs. For example, one class certification requirement is commonality, *i.e.*, the entire class must have

2. See, “Earlier Class Actions Under EFTA Involved the Sufficiency of the Notice,” on this page.

3. Court held that use of “may” in fee notice was sufficient under EFTA where bank did not charge non-customers a fee for all ATM services.

4. *Brown* was decided prior to the amendment to 12 C.F.R. § 205.16.

common issues of law and fact. This requires plaintiffs to establish that the class action involves issues susceptible to classwide proof. At least one federal district court has held that plaintiffs cannot meet this class certification requirement by merely alleging that *one* customer using *one* ATM failed to receive the proper notice. *Polo v. Goodings Supermarkets, Inc.*, 232 F.R.D. 399, 406 (M.D. Fla. 2004).

Further, the issues in a class action that are subject to generalized proof must predominate over those subject only to individualized proof. See Fed. R. Civ. P. 23(b)(3). In order to receive damages under EFTA, the plaintiffs must prove actual compensatory damages. 15 U.S.C. 1693m(a)(1). This would require the court to determine for each plaintiff whether the plaintiff actually relied on the lack of notice and was actually harmed or adversely affected thereby. *Polo*, 232 F.R.D. at 408. This is another factor weighing against class certification.

“Good Faith” Defense to Failure to Post Notice Claims.

The EFTA recognizes that despite an ATM operator’s best efforts, the required notice may be missing due to circumstances beyond the ATM operator’s control. This “good faith” defense relieves an ATM operator from any and all liability for failure to post notice if the ATM operator posted the notice and the notice was subsequently removed, damaged, or altered by someone other than the ATM operator. 15 U.S.C. §§ 1693h(d) and 1693m(d).

Damages Under the Electronic Fund Act Are Not Automatic. While EFTA does allow damages for failure to comply with certain notice requirements, damages are not automatic. Damages may not be available to plaintiffs if:

- The notice was posted and subsequently removed, damaged, or altered by anyone other than the ATM operator.
- The alleged violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such error. 15 U.S.C. § 1693h(d) and 15 U.S.C. § 1693m(c).
- The ATM operator demonstrates good faith compliance with any rule, regulation, or interpretation by the Board of Governors of the Federal Reserve Board. 15 U.S.C. § 1693m(d).

In order to recover actual damages, each plaintiff must establish the amount of harm suffered due to the ATM operator’s failure to comply with the notice provisions of the EFTA. 15 U.S.C. § 1693m(a). As stated earlier, this can be difficult in a class action. Further, in order to recover actual damages, plaintiffs must establish harm in the form of detrimental reliance. *Brown*, 457 F. Supp. 2d at 90. This is not an easy task.

In addition, any actual damages in a class action are limited by the:

- Frequency and persistence of noncompliance.
- Nature of such noncompliance.
- Number of persons adversely affected.
- Extent to which the noncompliance was intentional. 15 U.S.C. 1693m(b)(2).

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com.

Shawn J. Organ

1.614.281.3961

sjorgan@jonesday.com

J. Todd Kennard

1.614.281.3989

jtkennard@jonesday.com

Phyllis J. Shambaugh

1.614.281.3824

pjshambaugh@jonesday.com

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