ALERTS AND UPDATES

Electronic Funds Transfer Act: Class Actions Surge Highlighted by Recent Cases

November 2, 2011

The Electronic Funds Transfer Act, 15 U.S.C. § 1693 et seq. (EFTA), and its regulations promulgated by the Federal Deposit Insurance Corporation (FDIC), Reg E, 12 C.F.R. sect; 205.16, require, in relevant part, that banks charging a fee to non-bank cardholders for automatic teller machine (ATM) withdrawals must:

1. Post in a prominent and conspicuous location on or at the automated teller machine a notice that:

   (i.) A fee will be imposed for providing electronic fund transfer services or for a balance inquiry; or

   (ii.) A fee may be imposed for providing electronic fund transfer services or for a balance inquiry, but the notice in this paragraph (c)(1)(ii) may be substituted for the notice in paragraph (c)(1)(i) only if there are circumstances under which a fee will not be imposed for such services; and

2. Screen or paper notice. Provide the notice required by paragraphs (b)(1) and (b)(2) of this section either by showing it on the screen of the automated teller machine or by providing it on paper, before the consumer is committed to paying a fee.

There is a burgeoning cottage industry in EFTA lawsuits around the United States brought as class actions by professional plaintiffs. These are often regarded as "cookie-cutter" lawsuits, in which the plaintiffs' bar are usually looking for a "quick hit" and often will settle the case for little more than their attorneys' fees, which are allowed under the statute. Banks are the usual targets, although the industry has recently spread its focus to include restaurants and other locations in which an ATM operator may have a machine. The operator (possibly a bank), rather than the restaurant, is the responsible party under EFTA.

Uncertainty exists concerning whether EFTA actually requires both a physical notice on the machine and an on-screen notice. Although Reg E uses the conjunctive "and," EFTA does not.[1] At least one court has resolved a motion to dismiss in favor of a bank on the basis that EFTA does not require a posted notice on the machine where compliant on-screen notice is given. *See Dover v. Union Building and Loan Savings Bank*, No. 2:09-cv-708, 2009 WL 2612355 (W.D. Pa. Aug. 24, 2009) (concluding that good-faith compliance with the FDIC examination handbook relieves a defendant of civil liability for failure to post "on the machine" notice).

Several weeks ago, a federal district court in Mississippi refused to dismiss putative class actions by users of Regions Bank ATMs who contended that there were no fee-disclosure notices posted on the exterior of the machines. *In Re: Regions Bank ATM Fee Notice Litig.*, Civil Action No. 2:11-MD-2202-KS-MTP (S.D. Miss. Sept. 12, 2011). Regions Bank chose not to argue that "on the machine notice" was not required—wisely it would seem, given that the court's decision assumes that both notice on the machine and on the screen are legally necessary. *Id.*, slip op. at 4–5. Rather, the *Regions Bank* decision is significant for banks and bank holding companies because the ground upon which Regions Bank sought dismissal—lack

of Article III standing to sue—is the same ground that the U.S. Supreme Court will consider this term in a class action brought under provisions of the Real Estate Settlement Procedures Act (RESPA). 12 U.S.C. § 2607(a).

On June 20, 2011, the U.S. Supreme Court granted certiorari in *First American Financial Corp. v. Edwards*, No. 10-708, in which the question presented is whether Edwards, a purchaser of real estate settlement services, had standing under Article III Section 2 of the U.S. Constitution. Edwards contended that she was entitled to statutory damages in the amount of the cost of the services for which she contracted under RESPA, which allows homebuyers to sue banks and title companies when they pay illegal referral fees for closing a mortgage loan. Edwards acknowledged that the alleged kickback in her case did not affect the price or quality of the services provided to her—an admission she had to make given that under applicable state regulations, everyone paid the same price. Accordingly, Edwards had no actual harm to allege, but nevertheless sought the statutory penalty allowed under RESPA. In this regard, Edwards is typical of class action representative plaintiffs in that, by focusing entirely on the legality of the defendant's conduct and seeking only statutory damages, she attempts to eliminate individual issues that might defeat class certification.

In *Regions Bank*, the plaintiffs similarly alleged only the violation of a statutory right, which the court described as "their right to the particular form of notice required by the EFTA and its implementing regulations." *Id.*, slip op. at 5. The *Regions Bank* plaintiffs withdrew cash from the ATMs in question *after* receiving the "on-the-screen notice" and with full knowledge that an "on-the-machine" notice was, in their view, required and missing. In short, if the violation of these plaintiffs' rights was a concrete, particularized injury, it was self-inflicted. The *Regions Bank* court nevertheless held "that Congress intended to create a statutory right and a mechanism to redress violations thereof." *Id.*, slip op. at 7. This, the court decided, was enough for standing under Article III. *Id.*

The *Edwards* case asks the Supreme Court whether that is truly enough to proceed in federal court or if Article III requires a concrete and particularized injury over and above the alleged violation of a congressionally created right. The distinction that the defendant in Edwards draws, which the *Regions Bank* court does not plainly confront, is between a statute that creates a remedy for an actual harm for which there had not previously been redress under federal law—which *First American* concedes creates standing—and the invention of new, purely statutory "harms" that the Supreme Court has not previously recognized as constituting the kind of concrete and particularized injury that Article III requires.

Like numerous other federal statutes, EFTA creates an obligation toward consumers and aims to create a statutory remedy for the failure to measure up, even in the absence of actual pecuniary or even informational injury or deprivation of any kind. While this may appear to make EFTA an ideal vehicle for starting class actions, the Supreme Court may construct a roadblock. We will continue to monitor how the Supreme Court acts, because its answer in the Edwards' lawsuit may determine the viability of numerous other suits in which plaintiffs seek to certify a class of "uninjured" plaintiffs.

For Further Information

If you have any questions about this *Alert* or would like more information, please contact Charles M. Hart, any member of the Trial Practice Group, any member of the Capital Markets industry group or the attorney in the firm with whom you are regularly in contact.

Note

1. EFTA states that regulations must "require any automated teller machine operator who imposes a fee on any consumer for providing host transfer services to such consumer to provide notice in accordance with subparagraph (B) to the consumer (at the time the service is provided) of—(i) the fact that a fee is imposed by such operator for providing the service; and (ii) the amount of any such fee." 15 U.S.C. § 1693b(d)(3)(A). Subparagraph (B)(i), respecting notice "on the machine," states that the notice required under clause (i) of subparagraph (A) "shall be posted in a prominent and conspicuous location on or at the automated teller machine at which the electronic fund transfer is initiated by the consumer." 15 U.S.C. § 1693b(d)(3)(B)(i). This is immediately followed by clause (B)(ii), respecting notice "on the screen," which states: "The notice required under clauses (i) and (ii) of subparagraph (A) with respect to any fee described in such subparagraph shall appear on the screen of the [ATM], or on a paper notice issued from such machine, after the transaction is initiated and before the consumer is irrevocably committed to completing the transaction." 15 U.S.C. § 1693b(d)(3)(B)(ii). The statute can be read to provide that an "on-the-screen notice" compliant with § 1693b(d)(3)(B)(ii) suffices to provide all the notice required by § 1693b(d)(3)(A)(i) and (ii).

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