Class Action ATM Lawsuits – An In-Depth Analysis

By Thomas B. Alleman

Community banks rely on their ATMs to provide convenience for their customers. Those ATMs are increasingly the basis for class action litigation by attorneys who use technical provisions in the Electronic Funds Transfer Act and the specter of facing a “class action” as a device to force settlements and payments of attorney’s fees from banks and other ATM providers. Once armed with the basic information on how this stratagem works, banks can take steps to avoid future liability. There also are ways to fight back if the bank is victimized by one of these “class Actions.”

WHAT IS THIS ALL ABOUT?

The genesis of this stratagem, which is spreading like a measles epidemic throughout Texas and elsewhere in the United States, is in the Electronic Funds Transfer Act, 15 U.S.C. § 1693 or “EFTA.” Passed in 1978 to help bring order to electronic funds transfers, EFTA and the Federal Reserve Board’s Regulation E (12 C.F.R. Part 205) require each ATM to have two separate forms of notice concerning fees. The first is a notice posted “in a prominent and conspicuous location on or at the automated teller machine” stating what, if any, fee will be imposed for performing a transaction on that ATM. The second is an identical notice on the ATM screen or by a paper delivered prior to completing the transaction; this notice must advise the user that they can avoid paying the fee and abort the transaction. Unless the machine has both notices, it is not in compliance with EFTA and the Bank faces potential civil liability equal to a customer’s actual damages or statutory damages equal to at least $100 and not more than $1000 per customer. EFTA specifically states that these “damages” can be pursued in a class action.

WHAT HAPPENS?

In Texas, fewer than five law firms appear to be responsible for the vast bulk of the over 100 class actions against community banks for alleged EFTA violations. The firms all follow a similar path in pursuing these claims. When they find a person who has made a withdrawal for an ATM lacking both forms of notice, they file a lawsuit with that person as the putative representative of a class of all persons who used the allegedly offending ATM during the year preceding the plaintiff’s use of the ATM. The same plaintiffs often appear in multiple lawsuits against different banks, and the complaints generally are identical except for the parties’ names and the transaction dates.

It is here that the potential difficulty begins. Though these cases are styled as “class actions,” the plaintiff’s attorney likely will call the bank’s counsel and offer to settle the individual plaintiff’s claim for more than $1000 (plus their attorney’s fees) in return for which the case is dismissed and no effort is made to certify a class. The plaintiff’s attorney may even offer never to sue the bank again in return for a settlement now. The bank faces an obvious problem: does it incur the cost and fees necessary to fight a potential class action
or does it simple swallow hard, pay the settlement (which isn’t too large after all) and hope that nothing else happens?

**HOW DO I RESPOND?**

The best way to avoid measles is to be immunized and the best way to avoid EFTA suits is by making sure all ATMs have the proper notice. EFTA contains two limited safe harbor provisions to protect banks. 15 U.S.C. § 1693h contains exemptions from liability for problems caused by acts of God or for damage to required signage caused by third parties without the fault of the bank. Section 1693m(c) allows a bank to escape liability if it shows that the failure to comply was unintentional and the result of a bona fide error despite the existence of procedures designed to prevent it. Both of these provisions put the burden of proof on the ATM operator.

To have the benefit of any of these defenses, the Bank has to have in place procedures to ensure that its ATMs meet the EFTA signage requirements prior to any claim being made and that those procedures are regularly and routinely followed and that there are adequate records to show that the procedures were followed. Checking an ATM once a year for signage is not enough. There should be signed and dated records showing that checks were made and signs replaced. The plaintiffs’ lawyers who pursue these claims take pictures of noncompliant ATMs for use as evidence; you should take dated pictures of compliant ATMs or dated “before and after” shots to show that repairs were made. These pictures also help show that the notice was placed as it should have been on or in close proximity to the ATM.

**THE BANK STILL GOT SUED. WHAT NOW?**

Don’t despair. Because of the relatively small amounts involved, the plaintiffs’ lawyers who pursue these actions cannot afford to invest substantial time or resources into any one case because it reduces the profit on each case. Getting the bank to settle early is the only way for these cases to be profitable. (Think of it this way: how much time can you invest in underwriting a $1,000 loan before the cost eats up any return?) The complaints and class settlement proposals have never seriously been challenged by banks because the cost of doing so seemed high relative to what the plaintiff was offering to settle for. That’s why these cases can seem like the measles – you can find yourself saying, “Neither is really that bad so why should I go pay a professional? I’ll just grin and bear it and get down the road.” That thinking may work for today’s measles outbreak but it doesn’t get rid of the disease. In fact it is what the plaintiffs’ lawyers who file these cases count on. Only by fighting back everywhere can we hope to eradicate the disease.

There are strategies that can be used to fight back. Our firm has used a method authorized by the Federal Rules of Civil Procedure to try and limit the damages and attorney’s fees that can be awarded. Other strategies exist and we are using cases as laboratories to test their efficacy. ATM operators like Wal-Mart and banks which operate on a nationwide basis are fighting back, but the likely result will be to increase the pressure on community banks. To protect yourself, check your ATMs for compliance now and every week. If sued, consult your attorneys promptly.

*Thomas B. Alleman is an attorney in the Dallas office of Cox Smith. He can be reached at 214.698.7830.*

*June 6, 2011*