

Fifth circuit affirms certification of class holding that Electronic Funds Transfer Act amendment is not retroactive

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Beginning in 2010, numerous lawsuits were filed against automated teller machine ("ATM") operators in Texas asserting violations of the Electronic Funds Transfer Act ("EFTA"). The EFTA protects consumer accounts established primarily for personal, family or household purposes. During the time period at issue in these lawsuits, the EFTA required ATM operators to notify consumers when a fee would be imposed by posting a notice in a prominent and conspicuous location on or at the ATM ("External Notice") and on the ATM's screen, or on a paper notice issued from the machine, after the transaction was initiated and before the consumer was irrevocably committed to completing the transaction. In the absence of these notices, no fee could be imposed.

Congress amended the EFTA to eliminate the External Notice requirement on December 20, 2012. Nonetheless, lawsuits filed before the External Notice requirement was amended remain and they are making their way through the Fifth Circuit Court of Appeals. In *Frey v. First Nat. Bank Southwest*, No. 13-10375, 2015 WL 728066 (5th Cir. Feb. 20, 2015), the trial court certified a class of consumers who were charged withdrawal fees at a single ATM between November 9, 2010 and April 26, 2012—the date the ATM operator posted an External Notice on the ATM.

The Fifth Circuit affirmed certification, rejecting the bank's argument that the EFTA amendment was retroactive. Citing its late-2014 decision in another EFTA case, *Mabary v. Home Town Bank, N.A.*, 771 F.3d 820 (5th Cir. 2014), the Fifth Circuit stated that there is a "deeply rooted" presumption against retroactivity. The court further observed that the text of the EFTA amendment is silent as to retroactive application and that applying the statute retroactively would impermissibly destroy a cause of action that had already accrued. As a result, the Fifth Circuit held that the EFTA amendment had no effect on the district court's certification of the class.

The upshot of these rulings is that banks will need to rely on defenses other than the December 20, 2012 amendment of the EFTA in defending External Notice lawsuits pre-dating the amendment. Fortunately, the number of External Notice lawsuits remaining in Texas courts is dwindling and given that the EFTA has a one-year statute of limitations, any lawsuit based on External Notices filed after December 21, 2013 should be barred.

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