

ATM Operators Beware**Aaron T. Winn***Partner*

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In the past few weeks, there have been several class action lawsuits filed against ATM operators for allegedly failing to comply with the ATM notice requirements of the Electronic Fund Transfer Act (EFTA). To avoid becoming the next target of one of these class action lawsuits, immediately check your ATMs to ensure that they comply with EFTA's notice requirements.

The Notice Requirements

EFTA requires ATM operators to notify consumers of ATM fees in two locations: on the screen *and* on the machine itself.

The notice on the screen must state that a fee will be imposed and state the amount of the fee. (This notice may also be provided on paper so long as it is delivered to the consumer after the transaction begins but before the consumer is committed to paying the fee.)

The notice on the machine must state that a fee will be imposed. (If there are circumstances when a fee is not imposed, the notice may state that a fee "may" be imposed.) And the notice must be posted in a prominent and conspicuous location.

The Consequences for Failing to Post the Required Notice

ATM operators that fail to comply with EFTA's notice requirements may be liable to consumers for actual damages (i.e., the amount of the transaction fee), statutory damages, and attorney fees.

In class actions, the amount of the statutory damages is determined by factoring the frequency, nature, and persistence of noncompliance, the resources of the defendant, the number of persons adversely affected, and the extent to which the noncompliance was intentional. But under all circumstances, statutory damages cannot exceed the lesser of \$500,000 or 1% of the defendants' net worth.

Potential Defenses

There are some limited defenses to alleged violations of EFTA's notice requirements. For example, ATM operators are not liable for technical violations if (1) the on-machine notice was removed, damaged, or altered by someone other than the operator of the ATM; (2) the on-screen notice was inadequate because of a technical malfunction that the consumer knew about when initiating the transaction; or (3) the violation was not intentional and resulted from a bona fide error notwithstanding reasonable maintenance procedures.

If ATM operators are aware of some period of noncompliance, but have not yet been sued, they can also limit or avoid statutory damages by notifying consumers who used their noncompliant ATMs and paying the actual damages incurred by the consumers.

EFTA class actions are also subject to traditional class action arguments, e.g., atypical claims, predominance of individualized issues, insufficient class size, and inadequate class representation.

Don't Delay

To avoid becoming the next target of an EFTA class action, immediately confirm that your ATMs comply with EFTA's notice requirements, regularly inspect your ATMs to ensure that the on-machine notice has not been removed or damaged, and document the dates and results of your inspection and maintenance efforts.

To learn more about avoiding and handling class action litigation, including EFTA class actions, contact Aaron Winn at awinn@luce.com or 619.699.2579.