Types of Payments We Will Cover

• Checks: UCC (and common law)
  – Traditional check
  – Check that was imaged per Check 21
  – Remotely created check (RCC)
• ACH payments: EFTA/Reg E/NACHA
  – Preauthorized payment
  – Electronic bill payment
  – Check converted to EFT
  – Re-presented check entry (RCK) (UCC, not EFTA)
  – Merchant return fee collected by ACH
• Remotely created payment order: ???
Authorization of RCC

• A “signature” can be an authorized mark.
• “unauthorized signature” is “w/o actual, implied, or apparent authority.” UCC 1-201(41)
• State contract law on agency governs. UCC 3-402(a)
• If contract is void for illegality, authorization may be void.
• Telemarketing sales rule: need “express verifiable authorization” for an RCC
• FTC proposes to ban RCCs under TSR

Rights if Check Unauthorized

• Check not “properly payable,” drawee (consumer’s bank) must reimburse. UCC 4-401 & cmt 1, 3-401, 3-403.
• But drawee may defend if consumer was negligent, UCC 3-406, or “ratified” the check, i.e. by retaining the benefits of the transaction. UCC 3-403(a) cmt 3.
• But with RCCs, under Reg. CC, the originating bank warrants its validity, must reimburse drawee bank.
Right to Stop Payment

- Absolute right to stop payment for any reason or no reason at all. UCC 4-403(a)
- UCC doesn’t regulate fees
- Must identify check “with reasonable certainty”; difficult for RCCs.
- Altered check (i.e., adding 4¢) not properly payable beyond authorized amount.
- Manipulations to defeat stop payment should be against public policy, unfair

UCC and Bounced checks:
Re-presentation and return fees

- UCC silent on re-presentation (authority or # of times)

- If fee collected by RCC, UCC governs, fee must be authorized.
Right to Close Bank Account

- Customer “may stop payment … or close the account by an order to the bank…” UCC 4-403(a)
- “stopping payment and closing an account is a service which depositors expect and are entitled to receive from banks notwithstanding its difficulty, inconvenience and expense.” UCC-404(a) cmt 1
- Order to close is an order not to honor new items (once bank has time to act).
- Future items are not properly payable.

Authorization of ACH Payments

- No general Reg E authorization rules
- NACHA Operating Rules:
  – clear and readily understandable terms
  – Web: evidence of consumer identity and consent; clear, conspicuous, identifiable, readable authorization terms
- Telephone authorizations: TSR, FDCPA, NACHA rules
Reg E: Unauthorized Charges

• “unauthorized”=“without actual authority ... and from which the consumer receives no benefit.” 12 CFR 1005.2(m)

• Bank must reverse unauthorized ACHs if given notice within 60 days of statement. If 60-120 days, up to $500 liability.

Preauthorized EFTs

• Special Reg E rules apply to preauthorized electronic fund transfers (PEFTs)
• PEFT=“authorized in advance to recur at substantially regular intervals”
• Series of single payment loans can be PEFT
Authorization of PEFTs: Reg E

- Must be in “writing,” “readily identifiable as [an authorization] and the terms … are clear and readily understandable.”
- Consumer must get a copy.
- Inconspicuous web disclosures, terms on another page, are not clear.
- If transfers vary in amount, must send 10-day advance notice. Consumer option of notice only if outside a range of amounts.

Stopping Payment of EFT

- NACHA: bank must honor stop payment of if given reas. time
- Reg E: PEFT only; right to stop if provide 3 biz days notice
- Notice can be oral but bank can require written confirmation, notice to payee, w/in 14 days
- Bank must block all future payments for the particular debit by that payee
Revoking Authorization of PEFT

• Caselaw: charge is unauthorized if authorization is revoked, even if contract requires longer notice.
• Banks shouldn’t be able to charge a fee to reverse an unauthorized charge, but a fee for stopping it in the first place may be different.

Re-presentment and Return Fees by ACH

• NACHA: only 3 presentments of check or ACH (original plus 2 re-presentments)
• New NACHA bulletin on re-initiation
• Reg. E: Consumer authorizes one-time fee if she receives notice of return fees and goes forward with the transaction. §1005.3(b)(3).
• No UCC or Reg E rules on bank NSF fees (which are not a check, EFT or ACH).
For More Information

- Treatises

- NCLC website: Issues/Banking & Payment Systems/Mobile, Electronic Payments & Remittances

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