

# Consumer Protection in an E-World ?????

Iowa State Bar Association: E-Commerce Seminar  
December 18, 2002

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## 1. DISCLOSURES

### A. Federal

*Electronic Signatures in Global and National Commerce Act*, (federal “E-sign”)15 U.S.C. § 7001, *et seq.*

Where the law requires written disclosures, they may be made electronically, provided:

- \* the consumer affirmatively consents to receive them electronically
- \* prior to giving consent, the consumer was notified of
  - the right to have it in paper
  - the right to withdraw consent (and any conditions thereon, & process to do so)
  - whether the consent applies only to the instant transaction, or to other identified categories of records that may come up during their long and happy commercial relationship
  - how the consumer can update his or her contact information
  - how they can request a paper copy, and whether there will be a fee
  - the hardware and software requirements for getting the electronic records
- \* the consumer must consent or confirm consent in a way that “reasonably demonstrates” that the consumer can access the information.
  - [NOTE: This provision is aimed at situations like these:
    - > a car salesman gets the consent in a “sign here, sign here, sign here” closing, but the buyer has no computer at home, or no internet access, or otherwise is unable to actually get any documents.
    - > the door-to-door salesman with a lap top types in consent to the sale and financing, from a home with no computer or internet access, etc. (After all, if these guys will sell \$3000 satellite dishes to an 80-year old who doesn’t own a television, and who then

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<sup>1</sup> Assistant Attorney General, Deputy Administrator of the Iowa Consumer Credit Code. The opinions expressed herein are those of the author, and not necessarily those of the Attorney General nor the Office of the Attorney General. One further caveat: she is a Luddite, and has generally tried to avoid thinking about all the scary implications of e-commerce.

thinks there's a UFO in her back yard, this would be an easy dodge....)

\* if a change in specs create a "material risk" to access, the provider must notify the consumer of the revised specs, and comply with the consent requirements again, without cost.

Failure to comply with the consent requirement does not "solely" constitute grounds for denying the legal effectiveness of a contract.

15 USC § 7001(c).

Pursuant to the federal E-Sign law, the Federal Reserve Board promulgated interim rules in 2001 for each of its consumer protection regulations which require disclosures. However, industry comments raised operational concerns, so compliance with these rules is optional until further notice. (66 Fed. Reg. 41438 (Aug. 8, 2001).) Consumer comments to the rules, which also raised concerns, can be accessed through the NCLC web site. (See # 6, below.)

It appears as though few providers are complying now, preferring to wait to change their systems until the final rules (or perhaps "final interim rules") are in place. But watch these spaces:

<i>Truth in Lending Act</i>	<i>Reg. Z:</i>	12 C.F.R. § 226.36
<i>Consumer Lease Act</i>	<i>Reg. M:</i>	12 C.F.R. § 213.6
<i>Equal Credit Opportunity Act</i>	<i>Reg. B:</i>	12 C.F.R. § 202.17
<i>Electronic Funds Transfer Act</i>	<i>Reg. E:</i>	12 C.F.R. § 205.17
<i>Truth in Savings</i>	<i>Reg. DD:</i>	12 C.F.R. § 230.10

B.     State: (But see the preemption caveat, "C" below.)

The state UETA (Chapter 554D) excludes from its coverage disclosures associated with a consumer credit transaction, including, but not limited to: charitable organizations solicitations (Chap. 13C); motor vehicle damage disclosures and odometer disclosures (§§ 321.69 & .71); car rentals (Chap. 516D); funeral services and merchandise (Chap 523A); business opportunity promotions (Chap. 523B); cemetery merchandise (Chap. 523E); invention development services (Chap. 523G); payday loans (Chap. 533D); ICCC transactions (Chap. 537); motor vehicle service trade practices (auto repair) (Chap. 537B); credit repair (Chap. 538A); fitness clubs (Chap. 552); buying clubs (Chap. 552A); door-to-door sales (Chap. 555A); time-shares (Chap. 557A); campground memberships (Chap. 557B); real estate disclosures (Chap. 558A); landlord-tenant (Chap. 562A); mobile homes (Chap. 562B); consumer fraud (UDAP) (§ 714.16); prize promotions (Chap. 714B); and telecommunications service provider fraud (Chap. 714D).

C.     Federal Preemption

Since this is a non-standard provision in our UETA, and the Iowa ETA was enacted

prior to June 30, 2000 (by six weeks), state law may be preempted, to the extent it is inconsistent with federal law. [But note that the consent provisions of E-sign would still have to be complied with.] 15 U.S.C. § 7002(a).

*While UETA, UCITA, E-sign generate concerns about the integrity of legal documents, accessibility of information and the like, these are still largely concerns about the future (near though it may be). But the future is here today when it comes to problems with the integrity of payment systems, as too many people have access to information about credit card accounts and bank accounts, or are not loathe to get that information through deception. The next sections deal with problems about credit card charges and bank account debits which are on the rise with e-commerce, and what rights consumers have to address them.*

## **2. UNAUTHORIZED USE**

### **A. Credit Cards**

15 U.S.C. § 1643 -- Truth in Lending Act (TIL)

Reg. Z, 12 C.F.R. § 226.12(b); Official Staff Commentary thereto.

Resources: National Consumer Law Center, *Truth in Lending* § 5.15 (4<sup>th</sup> Ed. 2000 and supp.) {hereafter NCLC, *Truth in Lending*}; National Consumer Law Center, *Consumer Banking and Payments Law*, § 3.3 (2d ed. 2002), [hereafter NCLC, *Banking*];. Ralph J. Rohner & Fred H. Miller, *Truth in Lending*, ¶ 10.03, 10.09[2] (American Bar Assoc. 2000) [hereafter, *Rohner*]

\* Maximum liability, the **lesser** of \$50 or the charges incurred before the card issuer is notified.

\* There is no liability to the consumer unless the card issuer has complied with certain prerequisites: a) the card is an accepted credit card; b) the card issuer has provided notice of the cardholder's maximum liability, and informed the consumer of how to notify the card issuer orally or in writing; and c) the card issuer has provided a means to identify the cardholder or authorized user. The latter condition comes into play in e-commerce. If the card itself isn't used (such as a phone or Internet transaction), the card holder cannot be held liable for unauthorized use. OSC § 226.12(b)(2)(iii)-3.

\* Unauthorized use is defined as use by one without "actual, implied, or apparent authority for such use, and from which the cardholder receives no benefit." Reg. Z, § 226.12, note 22, as determined under state law, OSC § 226.12(b)(1)-1.

### **B. Debit Cards & other "access devices" by which consumers can electronically initiate electronic transactions**

15 U.S.C. § 1693g -- Electronic Funds Transfer Act (EFTA)

Reg. E, 12 C.F.R. § 205.6, Official Commentary thereto

Resource: National Consumer Law Center, *Consumer Banking and Payments Law*, § 4.5 (2d ed.

2002).

\* Maximum liability – a 3- tiered structure, depending on the consumer’s notice, and whether an access device was used in the unauthorized transfer:

- “Timely notice: given.” If the consumer notifies the institution within 2 business days of learning of the lost or theft of the device, the liability is the **lesser** of \$50, or the amount of unauthorized transfers that occur prior to notice:

- “Timely notice not given.” If the 2-day notice of theft or loss has not occurred, then the maximum liability is the **lesser** of a) \$500 or b) the sum of

(i) the lesser of \$50 or the two days worth of unauthorized transfers, plus

(ii) the unauthorized transfers that occurred between the close of the first 2-day window and prior to when notice was given, but only if the institution establishes that the transfers wouldn’t have happened had notice been given within the two-day window.

- “Periodic statement; timely notice not given.” A consumer has 60 days to report an unauthorized electronic transfer from the time it appears on a periodic statement. If the consumer fails to do so, the maximum is the amount that was transferred between the close of the 60 days and the time notice was given, but only if the institution can establish that the charges would not have occurred if notice had been given within the 60 day window. If the unauthorized user uses an access device, the consumer may also be liable for amounts described in the first two tiers.

- Extension of time. The institution can extend the times where delay was due to extenuating circumstances.

\* There is no liability unless the institution provided disclosures explaining the liability rules and how to notify the institution. If the unauthorized transfer involved the use of an access device, it must be an accepted device, and the institution must have provided a means of identification.

\* “Access device” is a “card, code, or other means of access to a consumer’s account, or any combination thereof, that may be used by the consumer to initiate electronic funds transfer. This includes debit cards, PINs, telephone transfer and phone bill-paying codes. An “accepted access device” means the consumer requests and receives, signs, or uses the device, requests validation, or receives a renewal or substitute device.

- Checks: “Access device” does not include a check or draft used to get the code for an ACH debit. However, an ACH transfer where a consumer gives a check to the merchant (blank or filled out) to initiate the transfer is an “electronic fund transfer” covered by EFTA. OSC §§ 205.2(a)-2, 205.3(b)-1(v).

\* “Unauthorized use” means an electronic funds transfer initiated by a person other than the consumer without actual authority to initiate the transfer and from which the consumer gets no benefit. (Note the distinction from TIL’s credit card definition, above, which specifies without

actual “implied or apparent” authority.) If the consumer gives the device to someone, then it’s not an unauthorized use until the consumer notifies the institution that the person is not authorized. (In other words, it’s all or nothing: the consumer is liable even if the person exceeds any limitations that went with the authority to use the card. OSC § 205.2(m)-2.)

C. Demand Drafts, “Tele-checks”, Preauthorized Drafts

Resource: National Consumer Law Center, *Consumer Banking and Payments Law* § 1.9 (2d Ed. 2002)

This is a real problem for consumers, one for which the law hasn’t really caught up with. Telephone scammers use fraudulent means to get codes from consumers; debt collectors use the check a consumer gave them to then make unauthorized debits,<sup>2</sup> merchants or service providers with whom the consumer no longer does business (or wishes she weren’t) continues to use the information from a prior check payment to continue to debit the account. Scammers often obtain taped “verification” of the authorization, but these are often not quite what they seem.

\* UCC Article 3 & 4 rules should apply as for regular checks. *Interbank of New York v. Fleet Bank*, 730 N.Y.S.2d 208 (2001).

\* Reg. E. dispute procedures apply (though the check is not an “access device.”), so the consumer has 60 days to dispute. (See # 3(B), below.)

\* Financial institutions follow industry operating rules for ACH transactions. The National Automated Clearing House Association (NACHA) publishes ACH Rules. SHAZAM circulated an Operations Bulletin from NACHA on September 19, 2002 regarding the increasing number of fraudulent telephone-initiated drafts to its members, with instructions about ACH rules. The NACHA Operating Rules and Operating Guidelines govern procedures financial institutions should use to assure that these transactions are authorized, and how to deal with unauthorized drafts. The consumer is likely to be requested to sign an affidavit of forgery or unauthorized use.

SHAZAM, a regional payments association active in Iowa, is a NACHA member, which offers training to its members – which are financial institutions. It gives its members a free copy of the ACH rule book annually, so your local bank should have a copy.

\* Special Telemarketing Rule: The FTC Telemarketing Rule, 16 C.F.R. § 310.3(a)(3) defines as a deceptive practice getting or submitting a draft without express, verifiable authorization. This may include taped oral authorization, which includes specified information. The tape must be

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<sup>2</sup> This is arguably an unfair or deceptive practice under fair debt collection practices laws, triggering remedies under those statutes. 15 U.S.C. § 1692 *et seq.* (third party collectors); Iowa Code §§ 537.7103, 537.5201(creditors and third party collectors).

made available upon request to the customer's bank.

### **3. BILLING ERRORS/ DISPUTE PROCEDURES**

#### **A. Credit Cards**

(1) *Billing Errors* (a defined term):

15 U.S.C. § 1666

Reg. Z, 12 C.F.R. § 226.13, and Official Staff Commentary

Resources: NCLC, *Truth in Lending* § 5.8; Rohner, Chap. 9

(2) *Cardholder claims against card-issuer of claims and defenses arising out of credit card transactions* (i.e. the kind of FTC anti-holder rule, but for purchases paid for with credit cards from unrelated card issuers)

15 U.S.C. § 1666i

Reg. Z, 12 C.F.R. § 226.12(c), and Official Staff Commentary

Resource: NCLC, *Truth in Lending* § 5.16; Rohner, ¶ 10.04.

“Billing errors” is almost always what people – including the customer service departments at the credit card issuers – think of. “Billing errors” is a defined term, and when a consumer has a dispute with the merchant whose goods or services were paid for with a third-party credit card (like MasterCard or VISA), the consumer may at first get resistance from the card issuer. But there is a separate law which governs card issuer liability for claims and defenses the consumer has against the seller of goods or services paid for by credit card. (In some circumstances, there is overlap between the two, and the consumer could invoke either.) Note the preconditions necessary for the consumer to assert each of these rights.

The card issuer's duty is to investigate. These rules do not dictate particular results. In the second situation – the card-holders' claims and defenses – whether the consumer's claim or defense against the merchant is meritorious is a determination which must be made under applicable law.

#### **B. Electronic Funds Transfers**

15 U.S.C. § 1693f

Reg. E, 12 C.F.R. § 205.11 and Official Staff Commentary

Resource: NCLC, *Consumer Banking* § 4.6.

Like the credit card billing disputes, “error” is a defined term, the consumer must follow specified procedures, and the institution has a duty to investigate.

#### 4. MISCELLANEOUS: Preauthorized Electronic Funds Transfers

A “preauthorized electronic funds transfer” is an “electronic fund transfer authorized in advance to recur at substantially regular intervals.” Reg. E, § 205.2(k). (“Electronic fund transfer” is defined at § 205.3). To constitute a “preauthorized transfer,” the payments must take place without further action by the consumer. OSC § 205.2(k)-1. The authorization must be in writing or similarly authenticated.

A. Prohibition against compulsory use of preauthorized electronic funds transfer: no conditioning the extension of credit on consumer’s use of preauthorized electronic fund transfers for repayment

15 U.S.C. § 1693k(1)  
Reg. E, 12 C.F.R. § 205.10(e)  
Resource: NCLC, *Banking*, § 4.4.5

Note that this is one provision of EFT that applies to persons other than the financial institution. Among credit extenders who may violate this law: payday lenders; fitness clubs.

B. Right to cancel preauthorized electronic transfers

Reg. E, 12 C.F.R. § 205.10(c)

Consumers have a right to cancel preauthorized transfers by notifying the financial institution with their account at least 3 days before a scheduled transfer. The notice may be oral, but the financial institution may require written confirmation.

Misuse of preauthorized transfers has occurred, for example, by merchants who wished to ignore the provisions of Iowa Consumer Credit Code § 537.3310, which gives consumers in consumer credit transactions a right to cancel executory contracts. On occasion, a financial institution has told the consumer that it can’t cancel the preauthorized transfer, saying “you have a contract with the merchant.” Whether the merchant has an enforceable contract with the consumer is between the merchant and the consumer. The bank cannot force the consumer to pay someone else by refusing to honor the consumer’s revocation of authorization for preauthorized transfers.

#### 5. REMEDIES FOR ELECTRONIC FUNDS TRANSFER ACT VIOLATIONS

15 U.S.C. § 1693m

Actual damages, plus individual statutory damages of \$100 to \$1000, plus costs and reasonable attorneys fees. Class damages limited to the lesser of \$500,000 or 1% of net worth (same as TIL.)

## **6. BRAVE NEW WORLD??**

There's a lot of promise in the brave new world of technology for commerce, but a lot of room for scammers and cheaters. As for whether the existing law is sufficient to provide a sound balance, it's probably too soon to tell.

For some comments from consumer advocates relating to UETA, E-Sign, UCITA, electronic disclosures and various other e-world issues, visit the web site of the National Consumer Law Center, [www.consumerlaw.org](http://www.consumerlaw.org), and click on "Consumer Initiatives – E-Commerce." Consumers Union has also been quite active in the e-commerce developments.