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CALIFORNIA DISTRICT COURT RULES ON EFTA CONDITIONING CASE

A Northern District of California court granted borrowers' motion for summary judgment, finding that a lender violated the Electronic Fund Transfer Act ("EFTA") and Regulation E by conditioning an extension of credit on repayment by pre-authorized electronic fund transfer ("EFT") when the lender initially required consumers to check a box authorizing withdrawals of scheduled loan payments from consumers' accounts in order to obtain a loan. *De la Torre v. CashCall, Inc.*, No. 08-cv-03174-MEJ, 2014 WL 3752796 (N.D. Cal. Jul. 30, 2014). Once approved, the lender claimed that borrowers could cancel their EFT authorization at any time and make loan payments by other means, including cancellation of their EFT authorization before the first payment was due.

Section 1693k(1) of the EFTA provides that no person may condition an extension of credit to a consumer on the consumer's repayment by "preauthorized EFT," defined as an EFT authorized in advance to recur at substantially regular intervals. The borrowers argued that a right to later cancel EFT payments does not negate a lender's liability for initially conditioning. The lender argued that the EFTA simply prohibits conditioning *all* loan payments by EFT during the life of a loan. The lender argued that the promissory note authorized, but did not require, repayment by EFTs.

The *De la Torre* court concluded that the lender's arguments were unsupported by the plain language of Section 1693k(1) and its legislative history. The plain language Section 1693k(1) unambiguously provides for a violation at the moment conditioning occurs – the moment a creditor requires a consumer to authorize EFTs as a condition of extending credit. The court noted that its interpretation of Section 1693k(1) is supported by the section's legislative history, which indicates the purpose of Section 1693k(1) is to insure that consumers are not forced to use EFT.

The *De la Torre* court also considered *Federal Trade Commission v. Payday Financial LLC*, the only other district court case to consider this particular conditioning issue. 989 F.Supp.2d 799 (D.S.D. 2013). *De la Torre* and *Payday Financial* addressed similar EFT authorizations. In *Payday Financial*, the defendant-lenders argued that they were not liable under the EFTA because (i) a consumer could revoke EFT authorization at any time and (ii) the defendant provided pre-authorization for a consumer's convenience.

The defendant-lender failed to convince the court. The court held that the EFTA has no "consumer convenience" exception and the revocability of an EFTA authorization is irrelevant to the court's EFTA liability determination.

The following facts were central to the *Payday Financial* court's holding: (i) the lender never issued a consumer loan without the consumer initially entering into a loan agreement containing a EFT authorization and (ii) there was no language expressly stating that the extension of credit is not conditioned on agreement to EFT or explaining how a consumer might otherwise obtain a consumer loan from the lender. The *De la Torre* court found similar deficiencies with lender's practices and EFT authorization clause. The court granted the borrowers' motion for summary judgment that the lender violated the EFTA's prohibition on conditioning.

Clients should review their lending and payment practices periodically to ensure continued compliance with the EFTA, Regulation E, Check 21 and the NACHA Rules. □

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