

STATE OF COLORADO

Department of Regulatory Agencies

M. Michael Cooke
Executive Director



Bill Owens
Governor

DIVISION OF BANKING

Richard Fulkerson
State Bank Commissioner

OPERATING MEMO

TO: Division of Banking Staff

FROM: Barbara M. A. Walker, State Bank Commissioner

DATE: January 10, 1992

RE: Liability of Consumer for Unauthorized Electronic Funds Transfers

Colorado law relieves a consumer (account holder) from all liability for an unauthorized electronic fund transfer unless the bank can establish that the unauthorized transfer occurred as a result of the account holder's fault, regardless of when the bank is given notice of the unauthorized transfer.

Both state and federal law regulate electronic fund transfers and contain distinct provisions expressly limiting the liability of a consumer who is the victim of unauthorized electronic fund transfers. As a general matter, federal law is set out in Regulation E, adopted by the Board of Governors of the Federal Reserve to implement Title IX (Electronic Fund Transfer Act) of the Consumer Credit Protection Act. See generally, 12 C.F.R., Part 205 (1990). Applicable Colorado law is found in the Bank Electronic Funds Act, article 6.5 of title 11, C.R.S. (1987) and the implementing regulations adopted by the State Banking Board, Rule EFT-9, 3 CCR 701-5. The language used in state and federal law differs somewhat in terminology, as well as substance. Both state and federal law cover transactions where a "consumer" (called an "account holder" by Colorado law) obtains access to his/her bank account through use of what federal law calls an "electronic terminal" and state law terms a "communications facility." Consumer transactions using automated teller machines and cash dispensing machines are covered by state and federal law.

State and federal law diverge as to the measure of liability which a bank may impose upon a customer who is the victim of an unauthorized electronic fund transfer. The federal standards set out in 12 C.F.R. Section 205.6(b)(2)(1990) are as follows:

- (2) If the consumer fails to report within 60 days of transmittal of the periodic statement any unauthorized electronic fund transfer that appears on the statement, the consumer's liability shall not exceed the sum of

- (i) The lesser of \$50 or the amount of unauthorized electronic fund transfers that appear on the periodic statement or that occur during the 60-day period, and
- (ii) The amount of unauthorized electronic fund transfers that occur after the close of the 60 days and before notice to the financial institution and that the financial institution establishes would not have occurred but for the failure of the consumer to notify the financial institution within that time.

The provisions of 12 C.F.R. Section 205.6(b)(3) and (4) provide for extenuating circumstances. Under federal law a consumer may have some liability to pay for unauthorized transfers subject to the above limitations, even where he or she was not at fault.

Colorado law, on the other hand, contains no time limit on when the account holder must give notice to the bank in order to avoid liability for unauthorized transfers. So long as the consumer was not at fault for the unauthorized use, no liability may be imposed for the unauthorized transfers under state law. Subsections 11-6.5-109(2) and (3), C.R.S. (1987) provide as follows:

- (2) With respect to any card or other device issued to an account holder for use at a communications facility, any account holder whose card or device is lost or stolen and subsequently used by an unauthorized person shall only be liable for the lesser of fifty dollars or the amount of money, goods or services obtained by the unauthorized use prior to notice to the Colorado bank which issued the card or device of the theft or loss. If the unauthorized use occurs through no fault of the account holder, no liability shall be imposed on the account holder.
- (3) No account holder shall be liable for any loss occurring as the result of any tampering or manipulation of a communications facility unless he performs or authorizes such acts.

(Emphasis added)

As stated previously, it is the position of the Division of Banking that Colorado law relieves an account holder from all liability for an unauthorized transfer unless the bank can establish that the unauthorized transfer occurred as a result of the account holder's fault, regardless of when the bank is given notice of the unauthorized transfer. In this respect, a direct conflict exists between Colorado and Federal law.

Regulation E anticipates the possibility of such a conflict and, as a matter of federal law, directs that a state law which imposes lesser liability on the consumer shall prevail over the federal standard. 12 C.F.R. Section 205.7(b)(5) states:

If applicable State law or an agreement between the consumer and financial institution imposes lesser liability than that provided in paragraph (b) of this section, the consumer's liability shall not exceed that imposed under that law or agreement.

To comply with applicable law, a bank agreement must either include the liability limitation found at Section 11-6.5-109(2), C.R.S. (1987) or must state that account holders "have no liability for unauthorized use of their card at a communications facility." See Rule EFT 9.2(a) and (b), 3 CCR 701-5. Although a bank may provide liability protection to its customers greater than that required by federal or state law, it is not permitted to increase the customer's liability by contract or otherwise beyond the ceiling set by federal or state law. See Russell v. First of American Bank Michigan, N.A., (W.D. Mich. 1988), 1988-89 Decisions CCH Federal Banking Law Rptr., para. 87,524.

The Colorado Bank Electronic Funds Act provision governing consumer liability for unauthorized transfers does cover those unauthorized transfers which do not result from misuse of a card or other device issued by a bank for use at a communications facility.

It would appear that the legislative intent of Section 11-6.5-109(2) was to provide protection for the customer regardless of whether the unauthorized transfer resulted from misuse of a card. For instance, subsection (3) of Section 11-6.5-109 is not so narrowly limited. That subsection states that no account holder "shall be held liable for any loss occurring as the result of any tampering or manipulation of a communications facility unless he performs or authorizes such acts."

The evident legislative intent in enacting this statute was to provide a broad measure of protection to consumers who engage in electronic fund transfers. The legislature choose to protect account holders from liability for unauthorized transfers which were not their fault, even though that protection comes at the expense of the bank.

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