

Duff on Hospitality Law

## **Get Noticed: Ensure Your ATMs Are Up to Par or Lawsuit Trolls May Laugh All the Way to the Bank**

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Do you feature ATMs in your hotel, restaurant or conference center? If yes, you may be an unwitting target for ATM fee notice lawsuits. Here's why:

The Electronic Funds Transfer Act (EFTA) contains a provision requiring owners of ATMs to provide adequate notice to consumers about fees charged for using ATMs not owned by the consumers' own bank. The EFTA states that you must notify these consumers twice regarding such fees:

1. You must post an external notice on the body of the ATM "in a prominent and conspicuous location" stating what the exact fee imposed will be for performing a transaction on the ATM, and
2. There must be a second notice on the screen, or by paper issued from the machine, which advises the user that they can avoid paying the fee and terminate the transaction before the consumer is irrevocably committed to completing the transaction.

Don't have both notices? Then your ATM is not in compliance with the EFTA and if you own or operate the machine, you could face penalties for damages incurred by the ATM customer plus a statutory penalty of up to \$1000. Worse, if a case is brought against you as a class action, you could be liable for up to \$500,000 or 1% of your net worth—whichever is smaller—plus costs and reasonable attorney fees. That adds up to a significant potential recovery, which is why there are lawsuits being filed across the country as we type.

Lawsuit trolls have been searching out ATMs that are missing these notice requirements—typically looking for machines without the required external notice—performing a transaction, documenting the missing notice (often by a cell phone photo) and then seeking out plaintiffs' attorneys who can file a lawsuit with the troll as the putative representative of a class of persons who have used the offending ATM during the previous year. (The statute of limitations on these claims is 1 year from the offending transaction). Sound unbelievable? Hundreds of cases have been filed across the country alleging these types of facts.

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Not an owner or operator of an ATM? The EFTA defines the term “automated teller machine operator” as “any person who– (I) operates an automated teller machine at which consumers initiate electronic fund transfers; and (II) is not the financial institution that holds the account of such consumer from which the transfer is made.” If you simply lease an ATM from a vendor that is the actual owner or operator you should still carefully review your concession contracts to (a) make clear that the vendor (not you) is the operator of the machine, (b) ensure that your vendor is following all applicable laws, including the EFTA, and (c) ensure that you have broad indemnification protection if they are not. It’s a good practice for owners and operators to frequently monitor their machines by taking regular dated photographs of the compliant ATMs and keeping records of when the machines were inspected. If you are not the owner or operator, you should also ask the vendors of these machines to maintain these types of records.

In the not-to-distant future, Congress may come to the rescue of ATM operators. A bill to amend the EFTA to limit the notice requirement to the *screen only* (H.R. 4367) was passed in the House of Representatives on July 9, 2012. While H.R. 4367 was received in the Senate on July 10, 2012, and a related bill (S.3204) is currently before the Senate, no vote has yet been taken. Even with the upcoming election, these bills appear to have bi-partisan support. While it seems likely that the physical notice requirement will be eliminated in the near future, ATM operators should remain vigilant until that time.

**Bottom line: All ATM operators should confirm that its ATMs provide notice of fees to consumers on both the machine and on the screen. If you are not the owner or operator, understand the nature of your contractual relationship with your vendors that lease these machines and take steps to ensure they are following the law.** Need more information about the EFTA and whether you are an owner or operator of your ATM, please feel free to contact [Greg](#).

**Tags:** ATM, Electronic Funds Transfer Act