



ALAN WILSON
ATTORNEY GENERAL

July 11, 2017

The Honorable Edward Tallon, Member
South Carolina House of Representatives
District No. 33
518-B Blatt Building
Columbia, SC 29211

Dear Representative Tallon:

You seek clarification regarding two previous opinions interpreting a provision of the Deferred Presentment Services Act. See S.C. Code Ann. Section 34-39-270(F). Your issue involves the use of “debit card payments for deferred presentment transactions.” Your concern is a perceived inconsistency between our Opinion of May 20, 2015, concluding that a debit card is the equivalent of “cash” for purposes of the Act, and our Opinion of January 6, 2017, which reaffirmed the earlier opinion, but also quoted language from a decision of the Court of Appeals for the District of Columbia [NACS v. Bd. Of Governors of Fed. Reserve System, 746 F.3d 474 (2014)]. This has apparently caused confusion and concern regarding the proper interpretation of § 34-39-270(F) and the meaning of when a transaction is “paid in full” if a debit card is used.

By way of background, you state as follows:

In Section 34-39-270(F) of the South Carolina Deferred Presentment Services Act, a licensee is required to close the transaction and notify the database provider when a transaction is “paid in full.” A transaction is “paid in full when the payor bank makes final payment on the consumer’s check pursuant to Section 36-4-215 or the consumer has redeemed the check with a cash payment in full.” *Id.* (emphasis added.) If a debit card payment is the equivalent to a cash payment, then the transaction should be considered “paid in full” at the time of the payment and thus closed on the database at that time. In contrast, the Clarifying Opinion attempts to apply the check clearing requirements of Section 36-4-215 to debit cards, which in effect would delay the closing of the transaction until the payment is “settled” with the bank, which is approximately two banking days after the debit card payment is processed (or longer if not electronically presented by the depository bank).

The Clarifying Opinion references NACS v. Bd. of Governors of Fed. Reserve Svs., a District of Columbia Court of Appeals case describing the debit card payment process in three stages: (i) authorization, (ii) clearance, and (iii) settlement. While we agree with the description of the debit card payment process, it fails to explain an important element of the debit card settlement process: a “dual loop” system that is

different than check clearance. Once a debit card transaction is authorized at the point of sale using the card network [e.g. VISA or MasterCard), an immediate hold is placed on the consumer's funds and the consumer is immediately deprived of the funds at the time the authorization is provided. From that point forward, the card network rules (the "Rules") guarantee the payment to the authorizing merchant. While the time for settlement -- the date on which funds are deposited into the merchant's account by its payment processor -- may take longer, the authorization process, in addition to depriving the consumer the use of the funds, assures the merchant that there are sufficient funds in the consumer's account and those funds will be transmitted to the merchant. There is no credit risk to the merchant as the Rules guarantee that the funds have been held and will be settled. The settlement process simply serves as a mechanism to transfer funds from the consumer's account, to the consumer's bank's settlement account, to the merchant's bank's settlement account, then to the merchant's account. These settlements occur through aggregation of multiple transactions and use of "block" settlements. See <http://www.bankrate.com/banking/swipe-how-do-debit-cards-work/>: and <http://www.yapstone.com/online-payment-processing/debit-card/>.

Thus, the debit card payment can be distinguished from the check clearing process described in Section 36-4-215 because unlike a check, the licensee knows that the payment will clear at the time the debit card is accepted. The authorization sequence provides a guarantee under the Rules that payment will be received when presented for settlement. When depositing a check, a licensee has no way of knowing whether a consumer has sufficient funds in her/his account until those funds are received and "Final Payment" is received on the check. The Original Opinion noted that Black's Law Dictionary defines "cash" to include "balances in bank accounts." There is no need to require bank-to-bank settlement in order to determine whether the debit card transaction has been paid, the deferred presentment obligation discharged, and the debt satisfied. Upon authorization, the licensee may treat the transaction as "paid in full." At the time the payment is taken, a licensee has a right to the funds even if the funds are not in the licensee's possession. Under the Rules, the consumer's bank must make settlement on the transaction if an authorization was obtained. In contrast, at the time of a check deposit, a licensee has no way to know if the consumer has a sufficient "balances in bank accounts" to guarantee payment from the consumer.

The Clarifying Opinion notes that in some instances debit card payments are returned unpaid, but that is not an accurate characterization. A debit card transaction, for which an authorization was given, may not be returned for "insufficient funds," "account closed," or similar defenses to payment. An authorized debit card transaction will always be paid. However, under Regulation E (implementing the Electronic Funds Transfer Act), after those funds have been transferred from the consumer's bank account, consumers have the right to dispute the charge with their bank as unauthorized or fraudulent. Under Regulation E, the consumer's bank must investigate the transaction and the merchant must substantiate the authorization. During the investigation, the bank will provisionally credit the funds back to the consumer's account. If the merchant is unable to substantiate the charge, the funds

will be debited against the merchant's settlement account and credited back to the consumer's bank (having already provisionally credited the consumer). This is referred to as a charge back. It is not a returned payment. No authorized payment may be returned.

Not only are there no returned payments in a debit card "dual loop" authorization system, the number of chargebacks is extremely low. An example company reported only 16 charge backs out of 33,562 debit card payments in April of 2017, which is only .0005% of all debit card payments. This frequency of charge backs is hardly enough to justify the requiring settlement of the funds before a transaction can be closed. Even the receipt of paper currency as payment does not represent 100% certainty of satisfaction of a debt, as the currency can be incorrectly totaled, counterfeit, or stolen. To the extent that a licensee prematurely marks a transaction as closed when the consumer did not authorize the debit card transaction, it is to the consumer's benefit and there are built-in safeguards, under the Rules and pursuant to Regulation E to protect the consumer and licensee.

We believe the two Opinions are not in conflict and explain their reconciliation below.

Law/Analysis

In our May 20, 2015 Opinion, we concluded that a debit card meets the common and ordinary definition of "cash" for purposes of § 34-39-270(F). We stated:

[w]hile there is reference in his provision for a "cash payment in full," we believe that based upon the ordinary meaning of the term "cash," payment through a debit card -- withdrawing funds directly from the borrower's checking account -- would constitute a "cash payment in full." It would, in our opinion, be unreasonable to restrict the statute entirely to currency or cash money in the traditional sense, inasmuch as a debit card is tied directly to funds in the cardholder's checking account.

In this regard, we noted that the term "cash" ordinarily means "Money or its equivalent." (quoting Black's Law Dictionary). Further, we referenced the language in State v. Castillo, 252 P.3d 760, 764 (N.M. 2011) as follows:

[i]n this case, evidence was presented that debit cards are tied to individual checking accounts, as opposed to lines of credit or guarantee of payment by the issuing bank. Sherry DeFoor, the banking manager at Bank of America, testified that a "debit card" is different from a "credit card" because a "credit card" relies on a line of credit. In contrast, a "debit card" is tied to the individual cardholder's checking account, and when the debit card is used, the money is taken directly out of that checking account....

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(emphasis added). We also noted that it was “our understanding that, for purposes of a debit card, there must be sufficient funds in the checking account to cover a purchase or the debit card transaction will be denied.”

Our January 6, 2017 Opinion reaffirmed the May 20, 2015 Opinion, rejecting various arguments made that the earlier opinion misconstrued the Deferred Presentment Service Act. We noted that an item is not “paid in full,” pursuant to § 34-39-270(F), until “the payor bank makes final payment on the customer’s checks’ or ‘the customer has redeemed the check with a cash payment in full.” However, the Opinion further recognizes that “if the Legislature intended to exclude debit cards from the term ‘cash payment’ such exclusion likely would have been expressly stated as it was in Section 59-150-70(D)(2)” [relating to the State Lottery].

The confusion is created by a single sentence in our January 6, 2017 Opinion. Based upon certain language in the NACS case, referenced above, we advised that “a court would likely find a licensee’s duty under Section 34-39-270(F) to notify the database provider that a transaction is paid in full does not accrue until the licensee’s account is credited at the settlement phase of a debit card payment transaction process.” (emphasis added). Based upon this sentence, your letter states:

[i]n Section 34-39-270(F) of the South Carolina Deferred Presentment Services Act, a licensee is required to close the transaction and notify the database provider when a transaction is “paid in full.” A transaction is “paid in full when the payor bank makes final payment on the consumer’s check pursuant to Section 36-4-215 or the consumer has redeemed the check with a cash payment in full.” Id. (emphasis added.) If a debit card payment is the equivalent to a cash payment, then the transaction should be considered “paid in full” at the time of the payment and thus closed on the database at that time. In contrast, the Clarifying Opinion attempts to apply the check clearing requirements of Section 36-4-215 to debit cards, which in effect would delay the closing of the transaction until the payment is “settled” with the bank, which is approximately two banking days after the debit card payment is processed (or longer if not electronically presented by the depository bank).

Thus, your question is when is the licensee “paid in full” for purposes of § 34-39-270(F) when a debit card is used to redeem the consumer’s check? Cases recognize that a person may be deemed to have been “paid” even though there is not a physical exchange of cash money. As one court has noted, a debt is “paid” when, by mutual intention of the parties, money or something of value is given and accepted in satisfaction thereof. Dudley v. Whatley, 10 So.2d 43, 44 (Ala. 1942). To be “credited” may mean that one is “paid” just as surely as if the money was physically handed over. Welsh v. Canfield, 66 Md. 469, 475, 1883 WL 6103 (Md. 1883). Thus, a physical exchange of money is not always necessary for someone to have been “paid.”

With respect to the use of the debit card, this is indeed the case. The Kansas Attorney General has offered the following explanation for the debit card process which further illuminates the issue:

[a] key feature of any debit card transaction is that triggers a transfer of funds from the patron's checking account. For example, if a customer purchases groceries using a PIN debit card, the PIN authorization network will debit funds from the customer's checking account immediately. If the same customer purchases groceries using a signature debit card, the signature debit authentication network will post a memo to the customer's checking account to hold funds for the transaction, but the debit transaction will not fully clear the customer's account for two to three days. In this way, signature debit cards function much like a paper checking, in that the funds are drawn on a checking account, but the debt does not occur immediately. However, at no time may a signature debit card user defer payment of a debt, and for this reason a signature debit card is not a credit card under the Act [Kansas Expanded Lottery Act]. We would not consider a paper check or a signature debit transaction to be a form of loan or credit, but rather a payment from the customer's checking account that requires some time to clear through ordinary banking channels.

Op. Kan. Att'y Gen., 2011 WL 6286248 (December 12, 2011) (emphasis added).

In addition, authorities recognize that a debit card transaction, unlike a check, is "final" at the point of sale. As one commentator has noted, "[d]ebit cards involve . . . transactions [which] are connected to a bank account that already has the customer's money in it and the money is automatically deducted as a final and immediate payment upon approval." Ormand, "Pending U.S. Legislation to Prohibit Offshore Internet Gambling May Proliferate Money Laundering," 10 Law and Business Review of the Americas 447, 452-53 (Spring, 2004) (emphasis added). Another commentator states:

[h]ence, unlike a credit card transaction (and for that matter a check transaction), the debit-card transaction is functionally final at the moment of sale, with no party having a later right to retrieve the payment from the merchant except through the cumbersome device of a suit claiming the merchant breached its obligations in the transaction.

Mann, "Information Technology and Non-Legal Sanctions in Financing Transactions," 54 Vanderbilt L.Rev. 1627, 1633-34 (May 2001). Thus, we believe it is at the point of sale or when the debit card payment is approved for release of funds that is a "payment in full."

Conclusion

It is our opinion that a transaction is "paid in full" with a debit card at the moment of sale, in this instance, when the debit card transaction is authorized to be withdrawn from the individual's checking account.

We readily acknowledge that the questions addressed in our 2015 Opinion and our January 6, 2017 Opinion deal with evolving questions of law. In the 2015 and 2017 Opinions, we concluded that the weight of legal authority counsels that debit card transactions are the

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equivalent of cash payments for purposes of § 34-39-270(F). We remain confident in this conclusion and reaffirm it today. The final paragraph in the January 6, 2017 Opinion, which related to settlement dates for purposes of the transaction database, was intended to point out the complexities of debit transactions, including the methods of verification (e.g. PIN or signature). Such complexities make this an area of law which is particularly uncertain. Thus, legislative clarification is warranted.

Nonetheless, we emphasize here, that our January 6, 2017 Opinion addressed the “duty” of the licensee with respect to the transaction database. Thus, this paragraph was inserted only to emphasize that our 2015 Opinion might “be construed to require licensees to notify the database provider an item is paid in full by a debit card transaction before settlement.” Op. S.C. Att’y Gen., 2017 WL 1017487 (January 6, 2017) (emphasis added). Such language related solely to what a court might “require” as a matter of statutory obligation, but was never intended to be construed as precluding or permitting a licensee from providing notification to the database sooner than final settlement. As one commentator has recognized,

. . . unlike a credit-card transaction (or for that matter a check transaction), the debit-card transaction is functionally final at the moment of sale, with no party having a later right to retrieve the payment from the merchant except through the cumbersome device of a suit claiming the merchant breached its obligations in the transaction.

Mann, supra. (emphasis added).

Thus, it is our opinion that a transaction is “paid in full” with a debit card at the moment of sale, in this instance, when the debit card transaction is authorized to be withdrawn from the individual’s checking account. Therefore, the licensee at that point may (but is not required to) report such transaction to the database. When the licensee accepts the debit card as payment, and that transaction is approved at the point of sale, there is a “payment in full” for purposes of § 34-39-270(F).

Sincerely,



Robert D. Cook
Solicitor General