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Opinion No. 11-40

Definition of the Term "Check" in the Deferred Presentment Services Act

QUESTION

Does the term "check" as defined in the Deferred Presentment Services Act include electronic fund transfers ("EFTs") in which funds are moved from one account to another through use of an electronic terminal, such as wire transfer, telephone, automatic teller machine, magnetic tape or computer, without employing paper documents?

OPINION

No. The term "check" as defined in the Deferred Presentment Services Act does not include electronic fund transfers ("EFTs") in which funds are moved from one account to another through use of an electronic terminal without employing paper documents. The deferred presentment services governed by the Act contemplate the use of a conventional paper check.

ANALYSIS

You ask whether the term "check" that is defined in Tenn. Code Ann. § 45-17-102(1) of the Deferred Presentment Services Act ("DP Act") includes electronic fund transfers ("EFTs"). This question requires construction of the statute. When construing a statute, the primary goal of the courts is to give effect to the intent of the legislature without broadening the statute beyond its intended scope. *In re Estate of Davis*, 308 S.W.3d 832, 837 (Tenn. 2010). The search for the meaning of statutory language begins with the statute itself. *BellSouth Telecommunications, Inc. v. Greer,* 972 S.W.2d 663, 673 (Tenn. Ct. App. 1997). The words of a statute are given their natural and ordinary meaning unless the legislature used them in a specialized sense. *Id*. In attempting to resolve a statutory ambiguity, courts may look beyond the statutory text to, among other things, the legislative history, the caption of the act, and the entire statutory scheme related to the statute. *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 528 (Tenn. 2010). Statutes *in pari materia* – those relating to the same subject or having a common purpose – are to be construed together, and the construction of one such statute may be aided by considering the words and legislative intent indicated by the language of another statute. *Graham v. Caples*, 325 S.W.3d 578, 582 (Tenn. 2010). Legislative intent also may be ascertained through applying the principle of *expressio unius est exclusio alterius* ("to express one thing is to exclude others"). *Overstreet v. TRW Commercial Steering Div.*, 256 S.W.3d 626, 633 (Tenn. 2008).

Application of these rules leads to the conclusion that the term "check," as defined in the DP Act, excludes EFTs. The DP Act defines "check" as "a check signed by the maker and made payable to a person licensed under this chapter." Tenn. Code Ann. § 45-17-102(1). A "licensee" is "a person licensed to provide deferred presentment services pursuant to this chapter." Tenn. Code Ann. § 45-17-102(5). "„Deferred presentment services' means a transaction pursuant to a written agreement involving the following combination of activities in exchange for a fee: (A) Accepting a check dated on the date it was written; and (B) Holding the check for a period of time prior to presentment for payment or deposit." Tenn. Code Ann. § 45-17-102(3).

The ordinary meaning of "check" is "[a] written order to a bank to pay the amount specified from funds on deposit." AMERICAN HERITAGE COLLEGE DICTIONARY 238 (3d ed. 1997). "Check" is also defined by the Uniform Commercial Code ("UCC") as "a draft, other than a documentary draft, payable on demand and drawn on a bank." Tenn. Code Ann. § 47-3-104(f). A "draft," in turn, is an "unconditional order to pay a fixed amount of money." Tenn. Code Ann. § 47-3-104(a)-(b) & (e). Checks are governed primarily by Articles 3 and 4 of the UCC and "Regulation CC" promulgated by the Federal Reserve Board. *NBT Bank, Nat'l Ass'n v. First Nat'l Community Bank*, 393 F.3d 404, 410-11 (3rd Cir. 2004); *C-Wood Lumber Co., Inc. v. Wayne County Bank*, 233 S.W.3d 263, 281 (Tenn. Ct. App. 2007). EFTs involving consumers, however, are not governed by these laws. *Bradford Trust Co. v. Texas American Bank-Houston*, 790 F.2d 407, 409 (5th Cir. 1986); *Evra Corp. v. Swiss Bank Corp*. 673 F.2d 951, 955 (7th Cir. 1982); *Hospicomm, Inc. v. Fleet Bank*, 338 F.Supp.2d 578, 585 (E.D.Pa. 2004).

The DP Act does not define EFTs. An EFT system, however, is defined by the Tennessee Savings and Loan Act as "a computer payment system for transferring funds from one (1) party to another." Tenn. Code Ann. § 45-3-104(8). This definition is consistent with the definition of "electronic fund transfer" found in the federal Electronic Fund Transfer Act ("EFTA"):

> The term "electronic fund transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, direct deposits or withdrawals of funds, and transfers initiated by telephone.

15 U.S.C. § 1693a(6). The EFTA and "Regulation E" promulgated by the Federal Reserve Board are primary laws governing EFTs affecting consumer accounts. *Wike v. Vertrue, Inc*., 566 F.3d 590, 592 (6th Cir. 2009); *Bank of America v. City and County of San Francisco*, 309 F.3d 551, 564 (9th Cir. 2002); *Bank One, Utah v. Guttau*, 190 F.3d 844, 850 (8th Cir. 1999). The EFTA, however, does not apply to transactions originated by check, and Regulation E expressly excludes checks from its requirements. 15 U.S.C. § 1693a(6); 12 C.F.R. § 205.3(c)(1).

Checks and EFTs, therefore, are not generally interchangeable terms, and the statutory language used in the DP Act does not indicate that EFTs are to be included in its definition of "check." Consistent with its ordinary meaning, a "check" under the DP Act is one that is written

and signed by its maker. Tenn. Code Ann. §§ 45-17-102(1) & -102(5)(A). Neither a writing nor a signature is required for payment of funds by EFT. 15 U.S.C. § 1693a(6). Further, a review of legislative history does not reveal any indication that the General Assembly intended EFTs to be covered by the DP Act. Although the DP Act was debated extensively prior to its enactment, inclusion of EFTs within its scope was never discussed. *See State v. Alford*, 970 S.W.2d 944, 947 (Tenn. 1998) (finding that an insurer was not a "victim" under a restitution statute due to the absence of legislative history indicating otherwise). Given the statutory text and legislative history, it appears that the General Assembly neither envisioned nor intended the DP Act's application to EFTs.

The caption of the DP Act and its statutory scheme buttress the conclusion that EFTs are excluded from its definition of "check." The DP Act governs "deferred presentment services" in which a "check" may be held "for a period of time prior to presentment for payment or deposit." Tenn. Code Ann. § 45-17-102(3)(B). "Presentment" is a payment procedure governed by Article 3 of the UCC that is applicable to paper instruments (including checks):

> "Presentment" means a demand made by or on behalf of a person entitled to enforce an instrument to (i) pay the instrument made to the drawee or a party obliged to pay the instrument, or, in the case of a note or accepted draft payable at a bank, to the bank, or (ii) to accept a draft made to the drawee.

Tenn. Code Ann. § 47-3-501(a). "Presentment may be made at the place of payment of the instrument and must be made at the place of payment if the instrument is payable at a bank in the United States." Tenn. Code Ann. § 47-3-501(b)(1). A person presenting an instrument for payment must, upon demand: (1) exhibit the instrument; (2) give reasonable identification; and (3) if presenting on behalf of another, give reasonable evidence of authority to do so. Tenn. Code Ann. § 47-3-501(b)(2). A person presenting an instrument also must sign a receipt on the instrument for any payment made or surrender the instrument if full payment is made. *Id*. A person to whom the presentment is made may return the instrument for lack of a necessary endorsement or refuse acceptance of it for failure of the presentment to comply with the terms of the instrument. Tenn. Code Ann. § 47-3-501(b)(3). Presentment may be made electronically by transmission of either an image of the instrument or a "presentment notice" describing the instrument. Tenn. Code Ann. § 47-4-110.

Thus, presentment of a check for payment or deposit, as is described in the DP Act's definition of "deferred presentment services," contemplates the use of a conventional paper check. And as noted previously, the presentment procedures for checks established by Article 3 of the UCC do not apply to EFTs. *See also In re Snowden*, 422 B.R. 737, 742-43 (Bankr. W.D.Wash. 2009) (concluding that a creditor's using information obtained from a debtor's check to complete a one-time electronic fund transfer was not a "presentment" of the check for payment under the UCC).

It is further apparent that EFTs are excluded from the definition of "check" when Tenn. Code Ann. § 45-17-102(1) is considered *in pari materia* with the deferred presentment procedures statute. Tenn. Code Ann. § 45-17-112 establishes the procedures that persons licensed under the DP Act must follow when providing deferred presentment services to the

public. Many of the statute's procedures applicable to checks would have little or no application to a payment of funds by EFT. The statute, for example:

- Permits a licensee to charge a fee for, among other things, photographing the person signing the check and securing the check in a safe, fire-proof place;

- Requires a licensee to endorse the check with the actual name under which the licensee is doing business prior to presentment for payment or deposit;

- Requires a licensee to provide each prospective customer with a clear written explanation of the date on which the check will be deposited or presented by the licensee;

- Provides the maker of a check the right to redeem it before the agreed date of deposit by paying the amount of the check to the licensee;

- Requires a licensee to notify the district attorney general after being advised of a check that has been altered, forged, stolen, obtained fraudulently or illegally, negotiated without proper authority, or represents the proceeds of illegal activity; and prohibits the licensee's release of any such check without the consent of the district attorney general or other investigating authority;

- Grants a licensee all civil means allowed by law to collect a check that has been returned due to insufficient funds, closed account, or stop payment order;

- Permits a licensee to assess only one handling charge against the maker of a check even if the check has been re-deposited and returned more than once;

- Prohibits a licensee from altering or deleting the date on any check accepted by the licensee and from accepting an undated check or a check dated on a date other than the date on which the licensee accepts the check;

- Requires a licensee to pay in cash or by check issued by the licensee the full amount of any check cashed, less only the fees permitted by the DP Act;

- Prohibits a licensee or related person from having more than two outstanding checks from any one customer at any one time, and restricts the aggregate face value of the outstanding checks to no more than $500; and

- Requires a licensee to ask persons seeking deferred presentment services about their outstanding checks to other licensees and prohibits the licensee from accepting another check for deferred presentment from any person representing that he or she has three or more checks outstanding to any licensee(s) with an aggregate face value of $500 or more.

Tenn. Code Ann. § 45-17-112(b)-(e), (g), (i), (j), (m), (o) & (p). Construing this language *in pari materia* with Tenn. Code Ann. § 45-17-102(1), it is evident that "check," as that term is used in the DP Act, refers to a conventional paper check.

Finally, under the maxim of *expressio unius est exclusio alterius*, which states the principle that the expression of one thing implies the exclusion of all things not expressly mentioned, it would be inappropriate to expand the scope of the DP Act to include EFTs. The DP Act defines "deferred presentment services" as a transaction involving a licensee's accepting a "check" and holding it for a period of time prior to presentment for payment or deposit. Tenn. Code Ann. § 45-17-102(3). It is noteworthy that the General Assembly did not mention EFTs but instead contemplated physically holding a paper instrument. Had the General Assembly intended the DP Act to apply to customer transactions by EFT, it is reasonable to conclude that it would have expressly incorporated them into the statutory scheme.

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