

---

# Credit Union Attorney

## Law Letter

A Law Letter for Credit Unions, Financial Institutions, and Attorneys

---

Vol.14 No.11

November 2002

### Cases Reported

|  |   |
|--|---|
| Cities Cannot Prohibit Banks from Charging ATM Fees to Non-Depositors, <i>Bank of America v. City and County of San Francisco</i> .....  | 1 |
| Creditor and Its Debt Collector Sanctioned For Failing to Dismiss State Court-Collection Action Pending for 31 Days After Debtor Filed Bankruptcy Petition, <i>Eskanos &amp; Adler, P.C., v. Leetien</i> .....                                 | 2 |
| Trial Court Did Not Err in Keeping from Jury a Letter of Determination Written by the Equal Employment Opportunity Commission Concluding that Employee Was Likely a Victim of Gender & Race Discrimination, <i>Coleman v. Home Depot</i> ..... | 3 |

### **Cities Cannot Prohibit Banks from Charging ATM Fees to Non-Depositors**

In *Bank of America v. City and County of San Francisco*, No. 00-16355 (9th Cir. Oct. 25, 2002), the Ninth Circuit held that federal law prevented two cities from enforcing ordinances prohibiting banks (and other financial institutions) from charging ATM fees to non-depositors.

#### ATM Fees

In October 1999, Wells Fargo, Bank of America, and other banks operating in San Francisco and Santa Monica, California, charged non-depositors who used their ATM machines a \$1.50 “surcharge” per transaction. This was in addition to a \$.50 “interchange fee” that they charged each non-depositor’s “home” bank in connection with a transaction. In addition, each home bank generally charged its depositor a \$2.00 “foreign fee” for using an ATM operated by another bank.

#### Ordinances

In October and November 1999, the cities of Santa Monica and San Francisco, California, enacted virtually identical ordinances prohibiting “financial institutions” from charging surcharge ATM fees to non-depositors (the

\$1.50 charge). A “financial institution” was defined as “any bank, savings association, savings bank, credit union, or industrial loan company.” The cities gave two reasons for passing the ordinances: (1) that ATM surcharge fees are unduly burdensome to the elderly, the disabled, and the poor because they have “lower mobility and [a] relative lack of choice over which ATMs to use”; and (2) that ATM surcharge fees undermine competition in the local banking industry because people seek to avoid the fees by transferring their accounts to banks that operate more ATMs in the city. The ordinances granted private citizens the right to enforce them by suing financial institutions for actual and punitive damages, injunctive relief, and attorneys fees.

#### Suit Over Validity of Ordinances

Upon passage of the ordinances, Bank of America and Wells Fargo suspended their ATM surcharge fees. Then, they, along with the California Bankers Association and the California Federal Bank (hereafter collectively “the Banks”), sued the cities seeking to prevent enforcement of the ordinances. The Banks argued that they were authorized by two federal laws, the National Bank Act, 12 U.S.C. § 24 (Seventh), and the Home Owners’ Loan Act, 12 U.S.C. §§ 1461-70 (“HOLA”), to levy surcharge ATM fees and that the Supremacy Clause of the U.S. Constitution prohibited the cities from passing contrary

laws. The cities responded they were authorized by the federal Electronic Funds Transfer Act, 15 U.S.C. §§ 1693-1693r (“EFTA”), to prohibit ATM surcharge fees as a consumer protection measure.

After hearing the arguments, a federal district court ruled with the Banks and enjoined the cities from enforcing their ordinances. The cities appealed to the Ninth Circuit.

The Ninth Circuit affirmed. Looking first at the supremacy question, the court explained that Congress’s extensive regulation in the area of banking has created a presumption that federal banking laws preempt state and local laws attempting to regulate banking and that state and local “regulation of banking is permissible [only] when it ‘does not prevent or significantly interfere with [a] national bank’s exercise of its powers.’” The court then looked at the National Bank Act and the HOLA--and federal regulations interpreting and implementing them--to see whether they confer on national banks the power to levy ATM surcharge fees. The court concluded that they do. Specifically, the federal Office of the Comptroller of the Currency, which is authorized to issue regulations under the National Bank Act, has issued regulations authorizing banks to charge ATM fees that make no distinction between depositors and non-depositors. *See* 12 C.F.R. §§ 7.4002, 7.4003, 7.5002. Similarly, the federal Office of Thrift Supervision, which is authorized to issue regulations under the HOLA, has issued a regulation permitting federal savings associations to transfer funds, “with or without fee.” *See* 12 C.F.R. § 545.17. The regulations authorize imposition of a fee regardless of whether the “customer” is a depositor or a non-depositor.

The court also rejected the cities’ argument that the EFTA authorizes the prohibition of ATM fees as a consumer protection measure. The court said that the EFTA is aimed at promoting disclosure, preventing fraud, and allocating liability not at activities like regulating ATM fees.

\*\*\*

## **Creditor and Its Debt Collector Sanctioned For Failing to Dismiss State Court-Collection Action Pending for 31 Days After Debtor Filed Bankruptcy Petition**

In *Eskanos & Adler, P.C., v. Leetien*, no.01-56203 (9th Cir. Nov. 7, 2002), the Ninth Circuit affirmed a bankruptcy court ruling imposing sanctions against a creditor and its debt collector for allowing a state-court collection action to remain active for 31 days after a debtor filed a petition of bankruptcy.

### **Facts**

On August 18, 2000, Somkiat Leetien filed a chapter 7 bankruptcy petition. She listed First Select, Inc., as an unsecured creditor. First Select received notice of Leetien’s bankruptcy via certified mail on August 23, 2000. By that date, First Select had already turned Leetien’s debt over to the law firm of Eskanos & Adler, P.C., for collection. First Select is a large organization and its data processing department did not enter notice of Leetien’s bankruptcy into its computer system until September 12, 2000.

In the meantime, on August 28, 2000, Eskanos filed a collection action in a California state court on behalf of First Select against Leetien. Leetien received notice of the collection action on September 5. The next day, Leetien’s attorney telephoned Eskanos and left a message with a legal assistant that Leetien had a pending bankruptcy petition. The same day, Leetien’s attorney sent Eskanos a fax, requesting that the state-court action be dismissed by September 20, 2000. His grounds for requesting dismissal was the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362. It prohibits the commencement or continuation of all judicial actions against someone who had filed a bankruptcy petition. It also provides for the recovery of actual and punitive damages against those who violate the provision.

Eskanos did not dismiss the state-court action until

September 29, 2000. Four days later, Leetien's attorney filed a motion in her bankruptcy action seeking damages from Eskanos and First Select for violating the automatic stay provision by refusing to dismiss the state-court collection action sooner.

### The Sanctions Issue

Eskanos argued that its delay in dismissing the collection action was caused by problems with its process server and misplacing the collection action case number. Eskanos also argued that section 362(a)'s prohibition against continuation of actions should be construed narrowly to require some conduct on the part of the creditor or collector beyond maintaining an active claim. Eskanos asserted that it did not carry forward or persist in its collection action, but merely calendared the action for future determination.

The bankruptcy court rejected Eskanos's excuses and arguments and awarded Leetien \$1,000 in sanctions against Eskanos and First Select, jointly.

Eskanos appealed, first to a district court, and then to the Ninth Circuit, both of which affirmed the bankruptcy court's ruling and imposition of sanctions. Responding to Eskanos arguments, the Ninth Circuit said:

"Maintenance of an active collection action in state court does nothing if not carry forward or persist against a debtor. A debtor enjoys little satisfaction from a creditor's honest words that it files a collection action in state court but refrains from persisting in the collection action until bankruptcy proceedings sort itself out. Active state filings exist as more than placeholders -- the risk of default judgment looms over the debtor throughout. Counsel must be engaged to defend against a default judgment. Additionally, state collection actions are not to be used as leverage in negotiating collection over the debtor's estate already in bankruptcy.

"....

".... [Further,] Eskanos's internal disorder does not excuse it from complying with the

automatic stay."

\*\*\*

## **Trial Court Did Not Err in Keeping from Jury a Letter of Determination Written by the Equal Employment Opportunity Commission Concluding that Employee Was Likely a Victim of Gender & Race Discrimination**

In *Coleman v. Home Depot*, nos. 00-3496 & 00-3656 (3d Cir. Oct 9, 2002), the Third Circuit has affirmed a jury verdict for an employer in an action alleging gender and race discrimination despite the employee's objection that the trial court erred by keeping from the jury a letter of determination written by an investigator with Equal Employment Opportunity Commission ("EEOC"). The determination letter stated among other things that it was "reasonable to conclude that the [employee] was discriminated against on the basis of sex ... and race."

### Facts

Mary Coleman, a black female, applied at a New Jersey Home Depot for any position. She stated on her application that she had experience/skills on a cash register, in hardware, plumbing, lumber, paint, and electrical. A store manager interviewed her. During the interview, Coleman stated that she was most interested in a sales position. According to Coleman, the store manager told her there were no sales positions open and that, if hired as a cashier, she would have an opportunity to transfer later. According to the store manager, he asked Coleman during the interview questions designed to reveal her knowledge of hardware, hand tools, and electrical tools, and, based on her answers, he decided not to offer her a sales position but offered her a cashier position.

Coleman began working as a cashier in July 1996. Over the next six months, she received nine separate written warnings about her job performance, mostly related to shortages and overages in her drawer at day's end. During the same period, Coleman requested a

transfer to a sales position. Home Depot denied her transfer request. Both the store manager and his assistant testified that Home Depot did not transfer employees with poor performance records like Coleman's. Thereafter, Coleman received other written warnings about her poor job performance. Eventually, Home Depot terminated her for poor performance.

### **EEOC Charge, Investigation, and Determination Letter**

After termination, Coleman filed a charge of discrimination with the EEOC against Home Depot. She alleged, among other things, that Home Depot had discriminated against her because of her sex and race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), by refusing to offer her a sales position, by refusing to transfer her to a sales position, and by firing her.

Following an investigation, the EEOC issued a Letter of Determination in which it concluded that reasonable cause existed to believe that Home Depot had discriminated against Coleman. The letter stated in pertinent part:

“Evidence reveals that after [Coleman] was hired as a cashier, she constantly requested to be transferred to hardware or another sales position in areas in which she was highly experienced. During the same period that she was requesting to be transferred, males with less experience were being hired directly into sales positions.

“....

“The evidence as a whole makes it reasonable to conclude that [Coleman] was discriminated against because of her sex (Female) and race (Black) with respect to ... hiring, transfer, and/or job assignment and

discharge allegation[s].”

### **Title VII Suit**

After the EEOC issued this letter, Coleman filed a Title VII lawsuit against Home Depot. During the trial, Coleman sought to give the jury the EEOC letter as evidence that Home Depot had discriminated against her. Home Depot objected to the jury seeing the letter on several grounds, among them, that it was more prejudicial than probative, meaning it was more inclined to give a jury the impression (true or not) that Home Depot had discriminated than to reveal facts from which a jury could find that Home Depot had actually discriminated. The trial court pointed out that, ordinarily EEOC determination letters are admissible, but, in this case, the court agreed with Home Depot. Here, the court stated that the letter should be excluded because the evidence that Coleman had introduced at trial did not match the evidence that the EEOC investigator had described in the determination letter; specifically, there was no evidence introduced at trial that Coleman was highly experienced for sales.

At the close of the trial, the jury ruled in favor of Home Depot. Coleman appealed, arguing that the judge should not have kept the EEOC letter from the jury.

On appeal, the Third Circuit affirmed the trial court's ultimate decision, though not for the exact reasons stated by it. Essentially, the appeals court believed that introducing the letter would have unnecessarily prolonged the trial by requiring Home Depot to introduce evidence to contradict the letter when Home Depot had already given adequate non-discriminatory reasons for the hiring, transfer, and discharge decisions made in Coleman's case, i.e., her lack of knowledge of hardware and her poor job performance.

\*\*\*