

Publications

To Err Is Human: New Opportunities for Forgiveness in Ohio

Related Industries

Financial Institutions

AUTHORED ARTICLE | Winter 2019

By **Jeffery E. Smith**

(Published in the Winter 2019 issue of *The Bankers' Statement*)

Being an Ohio-chartered bank or trust company, or institution-affiliated party of same (IAP), becomes a bit more comfortable with the addition of the new “bona fide error” protections of Ohio Sub. H.B. 489, effective March 20, 2019.

Under new Section 1121.61 of the Ohio Revised Code (ORC), Ohio banks will not be held civilly liable or subject to regulatory actions by the Ohio Division of Financial Institutions (ODFI) under Title XI of the ORC (the Ohio banking code), or Chapters 1309 (secured transactions), 1317 (retail installment sales) or 1345 (consumer sales practices) of the ORC, so long as they take certain actions upon becoming aware of an “unintentional clerical, calculation, computer malfunction or programming, or printing error.”

Qualifying Conditions to Assert the Defense require:

1. A showing by a preponderance of the evidence that the compliance failure was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error; AND
2. Notice by the institution to the Superintendent and the impacted consumer(s) within 60 days after discovering the error, and prior to initiation of any action by the ODFI or the receipt of written notice of the error from a consumer, of the error and the manner in which the institution intends to make full restitution to the consumer; AND
3. Reasonable restitution to the consumer.

In the event of a compliance failure, if the institution fails to meet the foregoing qualifying conditions, a consumer injured by the error can in fact institute an action to recover damages.

Very importantly, however, that action cannot be maintained as a class action.

Practical Implications

The new section is not a blank “get out of jail free” card. In order to take advantage of the protections afforded by the new statute, impacted institutions must (1) maintain adequate and appropriate controls to meet the requirements of Condition 1, (2) act quickly when an “issue” is discovered, and (3) be prepared to reimburse an impacted party or parties for financial losses incurred as a result of the issue.

However, the new law is a very important step in the right direction to acknowledge that in spite of maintaining appropriate policies, procedures and controls mistakes can and do happen, and to provide protections for institutions that discover true mistakes and endeavor to address those mistakes quickly and without being required by regulators to do so.

The elimination of class action liability in certain instances is likewise a very important part of this legislation while preserving the ability of impacted consumers to recover actual damages for the bona fide error.

Conclusions

The new legislation encourages institutions to institute and maintain important controls while acknowledging that mistakes do happen and should not penalize institutions that discover mistakes, take prompt action to correct the mistake and reimburse customers for any financial damages caused by the mistake. It is a reasoned approach to addressing an issue faced by all institutions, and provides fair treatment for parties that are adversely impacted by a bona fide error. It is limited however in its scope, and will require proactive management of problems by institutions that discover an issue.

How this new protection will impact Ohio-chartered institutions and their IAPs remains to be seen.