

EFT/ACH Becoming the New Bad Checks with Bad Customers?

As the ratio of business-to-business transactions increasingly moves away from paper checks and snail mail toward technology-fueled options like electronic funds transfer (EFT) and automated clearing house (ACH), problems generated by bad actors are becoming more frequent. Creditors familiar with bad check writers in the past are now finding more rejections of EFT and ACH transactions because of insufficient funds, especially in high-turn/frequent delivery industries related to food products and other perishables.

"We do more and more with EFT and ACH every day; and for the most part, we have great success with it. But, as with checks, there are returned items, and there are more issues simply because this is where the industry is going," said Michael Castania, controller and former credit manager at McAneny Brothers, Inc. "Bad check laws are pretty clear-cut, but you run into a grey area with ACH." It has become a hot topic in the PACM (Pennsylvania Association of Credit Management) Food Group, added Castania, who chairs that NACM Industry Trade Group.

Though far from widespread, bad EFT/ACH payment incidents have become more frequent in Pennsylvania, Ohio and West Virginia, according to Nick Krawec, Esq., partner at law firm Bernstein Burkley PC. Statutory language from state to state typically addresses bad check situations, but it rarely specifies or defines EFT or ACH protocol and can be wildly inconsistent, said Krawec as well as PACM President Harold Booth, CGA and NACM-National Executive Vice President Rudet Fountain, previously of United TranzActions. In addition, enforcement at the local magistrate level can be even worse, in part because there is less familiarity with EFT and ACH compared with bad checks.

"A check is a legal binding contract with a signature, and there is definite intent to pay somebody," Fountain said. "With ACH, most often you don't have a signature. Because of this, all you can do in a lengthy dispute is go to court and make your case and explain your agreement with the debtor. But you won't have much case law behind you and intent is harder to prove. For that reason, UTA has always been careful to remind that you don't necessarily have that legal binding contract with ACH and EFT."

In the absence of widespread statutory language changes or demands from state or federal officials for greater enforcement:

- Look at your forms/documents. "With the right documents and forms, you can more easily get legal professionals involved," said Booth.
- Document relationships with customers thoroughly and early. "The better-worded and more clear-cut your documentation is, the better your chances are," said Castania.
- Try to reach out/work with the customer first. "If they're willing to work with us, it doesn't need to go further," said Castania.
- Change access to certain payment methods. "Require checks or wire transfers or some other form of payment for a habitual offender," said Fountain.
- If not resolved quickly, try using bad check precedent with the customer and "send a Notice of Dishonor saying they need to make good," said Krawec. Payment will often follow, despite legal statute vagaries.
- If all else fails, go to court. "The only way to find out if bad check law applies to EFT is to take it to court ... Maybe it takes a court decision or two to show what the appetite for this issue is," said Krawec.
- Contact state or federal elected representatives. Tell lawmakers, "I couldn't get a judgment because of the way the statute is written. What are you going to do about that?" Remind them that you vote, said Krawec.