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# Community Banks and Credit Unions Are Targeted with Class Action Lawsuits for Non-Sufficient Funds and Overdraft Charge Practices

***William T. Repasky and Shannon M. Kuhl****

*The latest wave of class actions targeting financial institutions is directed at institutions that impose multiple non-sufficient funds charges on a single "item" and/or that assess overdraft fees on certain debit card transactions. For banks and credit unions that want to understand more about these new lawsuits, and ideally those who would like to proactively plan mitigation strategies, this article covers some of the lessons to be learned in terms of the allegations and issues involved in these cases.*

Many banks and credit unions are only too well aware that they are the targets of an industry of plaintiff's law firms. The latest wave of class actions targeting financial institutions is directed at institutions that impose multiple non-sufficient funds ("NSF") charges on a single "item" and/or that assess overdraft ("OD") fees on certain debit card transactions.

There are a number of law firms' websites currently soliciting disgruntled customers/members to serve as plaintiffs in lawsuits that those plaintiff's law firms hope to bring against financial institutions. But, when one studies the large, and occasionally very large, dollar settlements that are being reported from these lawsuits, one understands that the prospect of a sizeable payday is driving this litigation trend. For example, one of the most recent publicly available settlement agreements records a bank's consent to the plaintiffs' class counsel request for attorney fees in the amount of 30 percent of the settlement's purported $70-million value.

## THREE THINGS OF NOTE

Three things of particular note standout when these cases are considered at their highest level. First, they are being filed against institutions of all sizes, from the largest banks to small community institutions. For smaller institutions, the adage of "flying under the radar" does not appear to count for much. Second,

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these are not "one hit and the pain is over" scenarios. Banks are being named in different lawsuits for different types of activities in different class periods. For example, one of the nation's most important banks settled a 2011 class action relating to its processing order for $410 million, but yet was named in January 2020 in a new class action lawsuit alleging the bank failed to adhere to its overdraft fee disclosures. Third, and the subject of this article, is that to be forewarned is to be forearmed.

## MITIGATION STRATEGIES

For banks and credit unions who want to understand more about these new lawsuits, and ideally those who would like to proactively plan mitigation strategies, this discussion covers some of the lessons to be learned in terms of the allegations and issues involved in these cases.

### Class Action Issues

The complexity of class action litigation is not something covered in banking school. However, it is undoubtedly a primary driver for this new wave of litigation. Plaintiff's law firms recognize that an individual customer's grievance, even if meritorious, is generally not an attractive business proposition. However, if that law firm can use a single aggrieved customer to sue on behalf of a large number of customers in the form of a class action lawsuit, then the case against a particular bank or credit union begins to make greater economic sense.

If confronted with a newly filed class action of this genre, associating defense counsel skilled with class action work is at least as important as retaining trial counsel who is well schooled in the vagaries of deposit operations law and regulations. Being able to beat, or at least credibly threaten the ability to defeat, the plaintiff-firm's ability to carry the case forward as a class action can be as important as being able to prevail on the substantive banking law issues.

One question that arises: Is it advisable to include a class action waiver clause within a financial institution's standard account agreement terms? That decision often turns on applicable state law (state laws addressing arbitration and/or class action waivers varies) and the individual financial institution's business interest. The Consumer Financial Protection Bureau ("CFPB") issued a rule limiting waivers of class action remedies for consumer customers and members.

However, in 2017, the CFPB's rule was blocked by Congress. In 2018, the U.S. Supreme Court appeared to grant its consent to such waiver terms when concluding that arbitration clauses in employment agreements were enforceable and could prevent workers from joining together in certain class actions. Consequently, in certain situations, class action waivers can deprive the current wave of litigation of its economic fuel.

**Account Terms and Disclosures**

One of the predominant allegations made in these new class action lawsuits is that multiple NSF fees are charged on the same transaction, in violation of the institutions' account terms. A complaint's allegations often claim that the bank or credit union's account agreement documents do not permit multiple NSF fees or that those agreement's terms are too vague to allow the financial institution to rely upon its account rules as a defense. This becomes important as financial institutions often respond to these complaints by seeking the dismissal of the lawsuit. Unfortunately, there are now a number of reported court rulings finding that the defending bank's account terms are not sufficiently clear as to justify early dismissal, and often on the grounds that additional litigation discovery is required to resolve the ambiguities.

Another common allegation made in these new class actions relates to overdraft fees charged for Regulation E qualifying debit card transactions. This supposedly offensive practice is often described in the filed complaints as "Authorized Positive, Purportedly Settled Negative Transactions" or "APPSN Transactions," and allegedly occurs when an accountholder uses her or his debit card to make a transaction. It is claimed that the institution authorizes the transaction upon a sufficient account balance, but by the time the payment order is settled, the account will not support the transaction, perhaps because of intervening account activity. Again, the plaintiffs' basic claim is that they were misled by the institution's account terms or disclosures and that the imposition of an overdraft fee is consequently improper.

Plaintiffs are also alleging that multiple overdraft fees are charged on a single transaction each time an item is processed for payment. The claimed allegations appear to be largely centered on Automated Clearing House ("ACH") transactions and overdraft fees being charged for each time an ACH debit transaction is processed, returned, and then is re-processed.

A single item might be processed up to three times. This means, depending on your system parameters, that possibly three overdraft fees could be assessed for a single item. Plaintiffs argue these are consequently multiple fees on the "same transaction." While proof of insufficient funds is a common reason for a return, there are literally dozens of reasons for a return with various return date requirements that can further aggravate these scenarios.

Allegations that financial institutions are reordering transactions to (for example, from highest to lowest, so that fees are received on more items, the tale goes) to realize more overdraft fee income is now almost an old-school claim, but this too appears as an allegation in some of the more recently filed suits. Similarly, allegations that a financial institution has not processed deposits in a timely manner or in a consistent manner continue to be pleaded. Again,

re-study your state's Uniform Commercial Code provisions and then make sure that your account rules are where they should be, based on law and practice.

A key concept to remember here is that each bank and credit union has total control over its own account terms. Financial institutions should take proactive steps now to limit exposure to these class action suits.

First, operations personnel and experienced counsel should closely examine the account terms and disclosures against actual operations for accuracy.

Second, account terms and disclosures should be reviewed for "absolute" clarity to enable consumers to understand how NSFs and overdrafts are managed.

Third, repeat the first two steps on a recurring basis.

Even minor operational changes, or inadvertent changes to practices (formal or informal), can make a difference in how NSF and OD charges are disclosed to a consumer, resulting in the disclosures diverging from practice.

For optimists looking for a silver lining, there are lessons to be learned from this deluge of class action lawsuits. We now can better discern what language works and what language does not work. The time for making this review and implementing changes, as necessary, is now, and of course certainly before service is made of a new lawsuit targeting your institution.

**Record Retention**

It is possible that the size or scope of a potential class of plaintiffs may be affected by the records produced in discovery. All states have published record retention schedules, and the National Credit Union Administration posts guidance, concerning a financial institution's routine records and the time(s) for which each category of record must be retained. Re-familiarize yourself with those rules and ensure that your institution is in compliance. Also, if records are retained beyond the statutory or regulatory mandated timeframe, the defendant bank or credit union may be required to produce those "extra" records in the discovery process of a lawsuit.

**Check Insurance Coverage**

Plaintiff's counsel in this new wave of class actions perceive an advantage in asserting claims against financial institutions in a manner most likely to invoke coverage, because of the expected advantage of bringing the insurance provider into the litigation's discussion. If ever a financial institution is named as a defendant in a lawsuit, the bank or credit union's insurance agent and carrier should be promptly notified of the matter. As may be mandated by the terms of the policy, formal notification of the claim and a request for coverage may be required. The carrier will then respond with its position as to whether the claim

is covered under a policy of insurance; and if so, typically a reservation of right letter will be tendered to the insured institution.

**Fight Fire with Fire**

The law firms that typically bring these class actions perceive themselves to be expert litigators. Accordingly, financial institutions should weigh the value of bringing in as defense counsel trial lawyers who will command the plaintiff's law firm's respect. Whether the matter is resolved through settlement, motion practice or ultimately at trial, experienced banking and class action attorneys are necessary to safeguard the institution's business reputation and to achieve the best possible outcome. If the community bank has a go-to attorney for routine bank matters, consideration should be given to bringing in specialized support to assist in the litigation.