



Louisiana Bankers Association 2023

Regulatory and Litigation Activity: Overdraft Fees, NSF Fees, and Unauthorized Transactions

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Class Action Litigation Risks 2023

Major Liability Theories & Defenses

- Multiple NSF-Fee Theories (and Regulatory Context);
- Authorize-Positive Overdraft Theories;
- Zelle Payments & EFTA;
- Balance-Inquiry ATM Fees;
- Account Verification Theory;
- ACH Push/Pull & Wire-Transfer Fees;
- What's Next?
- CFPB Litigation and Tactics

Retry Fees Tied to Insufficient Funds

- Core theory: one bill, so one fee?
- Plaintiffs focus on fee schedule, not Disclosures
- Ps argue that “Per Item” must mean one fee per payment authorization by Plaintiff to the merchant

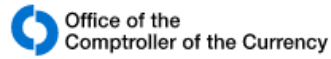
Retry Fee Claims--Context

- CONTEXT: *Wallace v. Bank of Bartlett*, 55 F.3d 1166, 1169-70 (6th Cir. 1995): CUs and Banks set NSF fees “**to discourage NSF check-writing**” and that by doing so are “maintaining the safety and soundness of the institution.”
- CONTEXT: Fees serve an important purpose

Some personal responsibility seems to be lacking—“never mind that I didn’t have the funds in my account to pay for an item/goods that I received and agreed to timely pay for, I shouldn’t get more than one NSF fee” appears to be a cliff note version of the Plaintiffs’ Complaint. . . . *NSF fees are designed to offset . . . costs but also to incentivize the customer to have enough money to cover the claim.*

Fenton v. Tri-County Bank & Trust Co., 2020 WL 8673276, *1 (Putnam Cnty. Super. Ct. Dec. 29, 2020), *vacated by settlement*, (March 2, 2021) (emphasis added).

Regulatory View Detour: Mixed Signals – *That was then....*



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How many times will a bank allow an insufficient funds (NSF) check to be redeposited/resubmitted?

Generally, a bank may attempt to deposit the check two or three times when there are insufficient funds in your account. However, there are no laws that determine how many times a check may be resubmitted, and there is no guarantee that the check will be resubmitted at all.

Overdraft or insufficient funds fees can be assessed each time the check is submitted. Review your bank's deposit account agreement for its policies regarding overdrafts and the presentment of checks.

Regulatory View (OCC) – *That was then...*

Deterring of misuse by borrowers. Certain deposit account services provided by banks, such as the honoring of checks drawn against nonsufficient funds, have the potential for misuse. It has been the Office position that ***service charges should discourage customers from frequently writing checks in amounts greater than their account balances.*** Such a practice, if left uncontrolled, provides a customer with automatic loans. Alternatively, the bank could automatically dishonor all checks drawn on nonsufficient funds. A bank, however, may hesitate to do this because of the embarrassment to its customer. An appropriate option, the Office believes, ***is to establish service charges to be levied in connection with the writing of nonsufficient fund checks by borrowers to discourage customers from frequently writing such checks.***

OCC, 48 Fed Reg 54319-01, 1983 WL 110730 (1983); see also 12 CFR § 7.4002(b)(2) (National Banks must set fees to deter account misuse).

CFPB 2017 Rulemaking Regarding Retry Fees

- In connection with Payday Lender rules, CFPB limited payday lenders to one re-presentment, rather than two per NACHA, but recognized:
 - “[I]t is a common practice among many [merchants] to obtain authorization to initiate [ACH] payment withdrawal attempts from the consumer's transaction account, and that provides the “ability to initiate withdrawals without further action from the consumer,” which “*consumers and lenders have found that they can be a substantial convenience for both parties.*” Id. at *54720
 - “Consumers who are subject to the lender practice of attempting to withdraw payment from an account after two consecutive attempts have failed *are likely to have incurred two NSF fees from their account-holding institution.*” Id. at 54733 (thus, the CFPB recognizes that re-try NSF fees are common and likely);
 - “The Bureau draws the line at two re-presentments ... in *an attempt to avoid regulating potentially more legitimate justifications for re-presentment.*” Id.
 - “The Bureau recognized that *taking a consumer's authorization to withdraw funds from her account without further action by the consumer is a common practice that frequently serves the interest of both lenders and consumers, and does not believe that this practice, standing alone, takes unreasonable advantage of consumers.*” Id. at 54743.
 - “[R]e-presentment implicates certain *additional countervailing benefits*, as lenders may have simply tried the first presentment at the wrong time, and *consumers may find it more convenient not to have to reauthorize after just one failed attempt.* Additionally, if lenders only have one try, it may cause them to be overly circumspect about when to use it, which *could undermine the benefits of ease and convenience for consumers.* Id. at 54752-53.

Regulatory View (FDIC)

- As recently as December, the FDIC acknowledged each ACH may cause a fee:
 - “Automated Clearing House (**ACH**) **transactions** ... may be declined if you do not have enough funds in your account and be subject to an NSF fee. **Banks typically charge a NSF fee for each transaction**, and these fees too can be costly as they can have ripple effects similar to overdraft fees. It is your responsibility to stay current with the checks and transactions you have made from your bank account. Make sure to look at your bank statements and try to use online banking and alerts to help you keep track of your bank account transactions.
- FDIC Consumer News, Overdraft and Account Fees (Dec. 2021) (emphasis added), available at <https://www.fdic.gov/resources/consumers/consumer-news/2021-12.html>.

The FDIC Follows the Plaintiff's Bar on Re-Presentation

- **Re-presentation of Unpaid Transactions: Heightened Risk for Section 5 Violations**
- Financial institutions commonly charge a non-sufficient funds (NSF) fee when a charge is presented for payment but cannot be covered by the balance in the account. Some financial institutions charged additional NSF fees for the **same transaction** when a merchant re-presented an automated clearinghouse (ACH) payment or check on more than one occasion after the transaction was declined.
- Re-presentation practices have recently been spotlighted in public statements by other Federal and state regulators, and announcements by financial institutions including those regulated by the FDIC. Re-presented transactions **have also been the subject of a number of recent class action lawsuits involving financial institutions**, including some supervised by the FDIC.
- Consumer Compliance Supervisory, HIGHLIGHTS, at 8 (FDIC March 2022)

FDIC 2022

- During 2021, the FDIC identified consumer harm when financial institutions charged multiple NSF fees for the re-presentment of unpaid transactions. Some disclosures and account agreements explained that one NSF fee would be charged “per item” or “per transaction.” These terms were not clearly defined and disclosure forms did not explain that **the same transaction** might result in multiple NSF fees if re-presented.
- [T]he failure to disclose material information to customers about re-presentment practices and fees may be deceptive. This practice may also be unfair if there is the likelihood of substantial injury for customers, if the injury is not reasonably avoidable, and if there is no countervailing benefit to customers or competition. For example, there is risk of unfairness **if multiple fees are assessed for the same transaction** in a short period of time without sufficient notice or opportunity for consumers to bring their account to a positive balance.
- Additionally, although class action settlements may result in banks providing some restitution to its customers, the FDIC has determined that, in some instances, **the restitution provided did not fully redress the harm caused by the practice. As such, the FDIC required such institution to provide additional restitution.**

FDIC 2022 Continued – Supervisory Guidance on Multiple Re-Presentment NSF Fees (Aug. 2022)

- Reads like it was drafted by the Plaintiffs' bar
- Problems with FDIC Guidance:
 - It simply assumes that a re-presented payment the same transaction;
 - Forgets that it costs the bank money every time a new transaction must be processed;
 - It also assumes that a re-presented transaction is the same “item” each time;
 - It also elevates the disclosures to require “clear and conspicuous” disclosures and suggests that any such failure is necessarily a “material” omission, which can result in burden shifting in some places;
- The FDIC threatens monetary penalties and restitution for those that don't self-identify that they lack adequate disclosures and preemptively give away money.

State Regulators Follow Suit

- MA:
 - “Standard industry deposit account agreements and fee schedules ... may not properly explain an institution’s actual NSF fee practice as disclosed to the customer. While some disclosures and account agreements explain that one NSF fee will be charged “per item” or “per transaction,” these commonly used forms may not consistently explain that the same processed item may trigger multiple NSF fees.” See <https://www.mass.gov/info-details/supervisory-alert-letter-representment-issue>
- NY:
 - “The practice of charging a consumer Multiple NSF Fees is **deceptive** where the Institution’s disclosures fail to disclose expressly that multiple fees may be charged ‘per item’ or ‘per transaction.’ Further, it is deceptive when the Institution represents that only one NSF fee will be charged ‘**per item**’ or ‘**per transaction**’ without disclosing that the same processed item may trigger Multiple NSF Fees. Accordingly, the Department expects that Institutions currently charging Multiple NSF Fees make clear, conspicuous, and regular disclosure to consumers that they may be charged more than one NSF fee for the same attempted debit transaction when that debit is represented after being declined for insufficient funds.
 - The Department considers “clear, conspicuous and regular disclosure” to mean that Institutions will include this disclosure in their regular communications with consumers (e.g., **in each account statement**, rather than in account-opening materials only) together with a direct point of contact for consumers who may have been subject to Multiple NSF Fees. ... The practice of charging Multiple NSF fees is also potentially **unfair**. Consumers have no control over, or involvement in, the representment of debit transactions and no way to avoid representments once a consumer has attempted a transaction.
https://www.dfs.ny.gov/industry_guidance/industry_letters/il20220712_overdraft_nsf_fees

The Federal Reserve Offers a Contrary View on OD Fees...

- ABSTRACT:
- Would a cap on overdraft fees increase financial inclusion? Studying an event in which state-level caps were relaxed for national banks, we find that caps constrain the supply of overdraft credit and deposit accounts. **Absent caps, banks charge customers more for overdraft but bounce fewer checks and reduce required minimum deposits. Low-income households are both more likely to open accounts and less likely to lose them, suggesting they prefer being banked despite higher overdraft fees. Overdraft fee caps thus hamper, rather than foster, financial inclusion.**
 - Who Pays the Price? Overdraft Fee Ceilings and the Unbanked, Jennifer L. Dlugosz, Brian T. Melzer, and Donald P. Morgan, Federal Reserve Bank of New York Staff Reports, no. 973, June 2021; revised December 2021

Federal Reserve Bank Paper Cont'd

- Fed reaches four primary conclusions:
 - “[I]n the absence of fee caps national banks raised overdraft fees **but also expanded overdraft credit**. Relative to state banks, national banks increased their fees by 10% and their provision of overdraft credit by 16%. These findings confirm the basic rationing prediction.”
 - “[N]ational banks expanded deposit supply by ***lowering minimum balance requirements 25% or more*** relative to state banks. **High minimum balance requirements rank first among reasons unbanked households are without an account** (FDIC, 2020), so this result is notable.”
 - Returned checks “declined by 15% in affected states. Since a check is returned when overdraft credit is denied, the decline in returned checks provides additional evidence of increased overdraft credit provision. It also implies savings to depositors on fees associated with bouncing checks.”
 - “[***T***he share of low-income households with a checking account rose by 10% following preemption. This increase in account ownership accords with the expansion in deposit supply and may also reflect increased demand from households who value overdraft coverage.”

Federal Reserve Bank Cont'd

- “[A]ny benefit of a[n OD] fee limit **may come at the cost of more unbanked, low-income households.**”
- “Using repeated observations of households over time, ***we find that low-income households are both more likely to gain accounts and less likely to lose them*** [where OD fees are not limited]. The rise in account ownership persists for several years after preemption, suggesting ***the newly banked households are better off ex post – after learning about the costs and benefits of their account [with OD fees] – and not just in expectation.***”
- “Having the overdraft covered instead of ‘bounced’ spares depositors that second NSF and any associated stigma.”
- “Providing overdraft credit is risky to banks because depositors may fail to repay the credit and fees. ***Banks closed 30 million accounts between 2001 and 2005 due to unpaid overdrafts. The average loss per closure in 2007 was \$310, with such losses accounting for 12.6 percent of total loan losses at financial institutions.***”

Federal Reserve Bank Conclusions:

- “[W]e find the federal preemption of state overdraft fee limits increased checking account ownership among low-income households. The increase reflected more households gaining accounts and fewer households losing them, whether voluntarily or otherwise. The increase was also persistent, suggesting to us that the newly included households preferred being banked to being unbanked.”
- “[O]verdraft fee caps hinder financial inclusion. When constrained by fee caps, banks reduce overdraft coverage and deposit supply, causing more returned checks and a decline in account ownership among low-income households. ... “[O]ur evidence suggests low-income households prefer being banked. They are not only more likely to open accounts but also less likely to lose them, leading to a persistent increase in account ownership.”
- “The positive result in our paper is that **expanding overdraft credit increases financial inclusion**, suggesting that policies promoting competition and transparency might be a better path than fee caps.”

Don't Fall into the Trap of Implied Racism

- Umbrellas do not cause rain.
- Fees do not target groups of people.
- CFPB and others cite Financial Health Network report to improperly suggest overdraft fees target African Americans and the poor: “Black households and those with low-to-moderate incomes are almost twice as likely to incur OD Fees as white households or those with higher incomes.”
 - This is misleading and incorrectly suggests fees are tied to race, rather than financial health. But the report explains that “people who are not Financially Healthy are more likely to be people of color and to have lower incomes.” https://s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2021/04/19180204/FinHealth_Spend_Report_2021.pdf, at 11.
- Thus, it is not race, but financial health, that is the predictor of whether someone is likely to overdraft. This is no surprise, and confirms prior studies showing that “FICO score is the best predictor of overdraft usage,” and that “**gender, age, occupation, income, and wealth were found not to correlate to overdraft behavior.**” Moeb's Servs., Who uses Overdrafts (June 2009) (emphasis added), available at: <http://www.moeb's.com/press-releases/ctl/details/mid/380/itemid/194>.

Academic Research Beats Sound Bites

- Fusaro, Marc Anthony, and Richard E. Ericson. 2010. “The Welfare Economics of ‘Bounce Protection’ Programs.” *Journal of Consumer Policy* 33 (1): 55–73:
 - ***OD programs (with fees) are welfare enhancing for many consumers*** and neutral for others: “[F]or middle-income consumers, [OD] is welfare enhancing under the individualistic criteria of neoclassical economics, while for low-income consumers, its welfare impact is neutral.”
- G. Michael Flores, “An Assessment of Usage of Overdraft Protection by American Consumers,” American Bankers Association, April 2017
 - “[T]here is no “typical” user of overdraft protections; consumers across the income spectrum use overdraft protection and do so for many different reasons.”
- “Design and Testing of Overdraft Disclosures: Phase Two,” Submitted to Board of Governors of the Federal Reserve System by ICF Macro (Oct. 2009):
 - “[H]alf of participants said that they ***were pleased that the bank paid the transaction that overdrew their account and were willing to pay a fee for this program.*** These participants indicated that it ***was important to them that their transaction be paid, or that they were concerned about the effect that having a transaction denied would have on their credit scores.***”

Back to Our Regularly Scheduled Programming: Defenses

Defenses to Retry Fees

- NACHA Rules help:
 - NACHA Rule 8.37 = Entry Defined as Item;
 - NACHA Rule 8.38 = Erroneous Entry
 - NACHA definition of Duplicate Entry
- NACHA Commentary and cases help;

Retry Defenses

- Pre-Litigation Notice Provision?
 - What is an error or problem?
- Arbitration Provision?
- TISA (and NBA preemption, if parity statute)
 - Cannot use state law to mandate disclosures
- Re-Orient the court: Q is not could disclosures be better, but did we breach;
- Further reorient the court: the question is not how many checks I bounced but how many times I bounced them

Further Defenses to Retry Fee Theories

- Make sure these were retry attempts
- Were the fees paid (closure or refund)?
- SOL?
 - Contractual SOL?
- UCC
 - Midnight deadline analogy: *See Huntmix Inc. v. Bank of Am. Trust & Sav. Ass'n* (1982), 134 Cal. App. 3d 347, 349. Must a bank must issue a second “notice of dishonor” if a merchant seeks payment through a check previously returned for insufficient funds? Yes. Court held that Fis must treat **each presentment** of a check as a **new** item, evaluating whether there are sufficient funds upon each presentment, and if not, sending a new notice of dishonor, whether the merchant seeks payment on a check for the first or second time. *Id.* at 359-60.
- Reject their “weight of authority” argument
 - Each agreement is unique;
 - 50+ voluntary dismissals inflates batting av’g

Litigating Post-Motion To Dismiss – Consider a Consumer Survey

- Tried this and found helpful data:
 - 656 people surveyed that were from the state where the CU was located
 - Presented basic facts of bounced payment, return, NSF fee, then re-presented payment against insufficient funds:

VI. FINDINGS NSF

As noted in Table 4, if a check is returned to a merchant unpaid by their bank or credit union and a \$30.00 NSF fee is charged when the check is returned (the first attempt), over half of all respondents (56.7%) believe that another \$30.00 NSF fee would be charged when the merchant re-submits the check and the bank or credit union returns it a second time due to continued insufficient funds. Similarly, when a rejected check is re-submitted by a merchant, and the bank or credit union pays the check (despite continued insufficient funds), 65.6% of customers expect the bank or credit union to charge a \$30.00 overdraft fee, in addition to the \$30.00 NSF fee charged when the check was first presented and returned unpaid due to insufficient funds.

Helpful Case Law – Every Appellate Court Affirms Dismissal of NSF Retry Fee Claims–Turning Tide?

- Page v. Alliant Credit Union, 52 F.4th 340 (7th Cir. Oct. 25, 2022)
 - Disclosures “permit[ted] [the credit union] to charge an NSF fee each time a [merchant] attempt[ed] to make an ACH debit from an account with insufficient funds,” and did “not prohibit [the credit union] from charging multiple NSF fees for a transaction that [a merchant] presented and [the credit union] rejected several times.
 - Whether Credit Union “**could have drafted the Agreement more clearly than it did ... is not the question** before this court,” which is “whether Alliant promised ... not to charge multiple fees when a transaction is presented to it multiple times,” and because Alliant “made no such promises,” the contract cause of action fails.
- Winamaki v. Umpqua Bank, --- P.3d ---, 322 Or. App. 588 (Nov. 9, 2022)
 - Court held that because “item” included ACH transfers, and those “occur[] each time a merchant attempts to process a payment,” charging a fee per item meant the disclosures “unambiguously authorized defendant to charge a fee of \$35 each time” the defendant bank “returned transactions reprocessed by a merchant.” Id. at 594; (Petition for Review Pending).
- See Saunders v. Y-12 Fed. Credit Union, 2020 WL 6499558 (Tenn. Ct. App. 2020) (similar).

Helpful Cases on Retry Fee Claims

NSF FEE RETRY DISMISSALS:

- *Choy v. Space Coast Credit Union*, 2020 WL 3039243, *3 (Fla. Cir. Ct. 2020) (dismissing NSF re-presentation theory; contract “states that the NSF fees may be charged each time a pre-authorized transfer is presented for payment,” and “[r]eading this provision in the context of the whole agreement leads to the inescapable conclusion that Defendant is clearly empowered to charge more than one NSF fee if a transaction is resubmitted.”);
- *Lambert v. Navy Federal Credit Union*, 2019 WL 3843064, *3 (E.D. Va. 2019). “When Plaintiff’s insurer ‘re-presented’ the request for payment, it was a new ACH debit item—just as a second check would be a new check even if it was by the same merchant, in the same amount, for the same purpose—and was therefore eligible for a fee when it was returned for nonsufficient funds.” *Id.* at *4.

More Helpful Cases ...

- *Toth v. Scott Credit Union*, 2021 WL 535549, *6-*7 (S.D. Ill. Feb. 12, 2021) (“SCU did not breach by charging its members an NSF fee every time a merchant presented an item for payment against insufficient available funds”);
- *Foltz v. Matanuska Valley Federal Credit Union*, 2021 WL 865542, *8 (Alaska Super 2021) (“The Agreement therefore gives MVFCU the right to charge a fee for each presentment of an ACH request for payment, even if the request is by the same merchant, in the same amount, and for the same purpose. The Agreement’s language therefore supports MVFCU’s interpretation and position that the contract is unambiguous. ***When Foltz’s merchant “re-presented” the request for payment, it was a new ACH item and was eligible for a fee when it was returned for insufficient funds.***”) (emphasis added)

Helpful Cases ...

- *Fenton v. Tri-County Bank & Trust Co.*, 2020 WL 8673276, *1 (Putnam Cnty. Super. Ct. Dec. 29, 2020), *vacated by settlement*, (March 2, 2021)
 - “Plaintiffs appear at the onset to attempt to mislead the court in its first count. ... [by claiming] the word “single” (fee) appears in the documents—which the Defendant points out it does not. The adjective used is “an.” Clearly, the bank can charge “an” NSF for each time the claim is submitted, pursuant to the plain reading of the terms. . . . [The Court] sets a Show Cause Hearing for Plaintiffs’ counsel to appear, as to why the court should not sanction for falsely stating to the court that the word “single” appears in the bank contract when it does not.”)
- *Thompson v. Municipal Credit Union*, 2022 WL 2717303 (S.D.N.Y. 2022)
 - “The NSF language applicable to FasTrack Checking Accounts is unambiguous and permits Defendant to assess a new fee each time a debit request or check is presented for payment, regardless whether that same debit request or check previously has been presented for payment and rejected for insufficient funds”

More Good Cases

- ***Haines v. Wash. Trust Bank***, 2020 WL 6861458 (Wash. Superior Ct. 2020) (defendant “did precisely what [it] said [it] would do— it] charged a \$30 NSF fee each time a third-party made an ACH withdrawal request when insufficient funds existed”);
- ***Dog Walkin’ Divas v. Wash. Fed. Bank, N.A.***, 2021 WL 2309675, *2-*4 (W.D. Wash. 2021) (dismissing NSF fee retry claims because plaintiff never paid NSF fees before account closure);
- ***Levow-Guerra v. State Employees’ Credit Union***, No. 18-cvs-15198 (N.C. Sup. Court April 1, 2019) (granting Motion to Dismiss NSF re-presentment claims);
- ***Marical v. Boeing Employees’ Credit Union***, No. 19-2-20417-6 KNT (Wash. Sup. Ct. Oct. 31, 2019) (granting state court motion to dismiss NSF re-presentment contract claims).

A Few More Good Cases

- *Averette v. Red River Bank*, No. 698-896 (19th Judicial Dist., E. Baton Rouge Parish May 14, 2021) (granting Peremptory Exception for No Cause of Action based on NSF fee retry theories) (“Quite frankly, in reviewing the petition defendant can do what he did and it is very well spelled out in the contract. I do not take the plaintiff’s argument of ... an “item” quote “item” to mean her interpretation of it. That’s not how the contract interprets it either. The item is a presentment issue and this matter there were three presentations, an initial and two subsequent, and everything that was done follows all of the terms of the contract itself. ... I looked at the facts set forth in the petition it does not set forth a cause of action for a breach of contract because what was done in here was done pursuant to the terms of the contract and did not vary from the contract itself.” *Id.* Tr. at 24:26-25:17.
- *Williams v. Happy State Bank*, Case No. 44794, Order on Final Summary Judgment (84th Judicial District, Hutchinson County Texas No. 30, 2021) (granting summary judgment on retry fee claims and awarding Defendant \$60,544.50 in attorneys’ fees).

Two more

- *White v. Bank OZK*, 2021 WL 6098351, *2 (Ark. Cir. 2021) (dismissing retry NSF fee claim because plaintiff had a “duty” to “report errors in their account within sixty days from receiving [a monthly bank] statement,” including “multiple charges . . . for insufficient funds” resulting from a single alleged “item.”; ***“The Plaintiffs statement ... that the Bank will assess a single fee of \$35.00 for a returned item does not exist in the contract.*** The word single is added by the Plaintiffs.”; dismissing because account agreement allowed bank to charge an NSF fee “each time the payment is rejected by the [bank] for insufficient funds”).
- *Ross v. NavyArmy Community Credit Union*, 2022 WL 100110, *4 (S.D. Tex. Jan. 11, 2022) (“The Court finds that the discovery rule does not apply in this case. Importantly, Plaintiff knew or should have known of her alleged injury within the two-year limitations period because the injury was not “inherently undiscoverable,” as Plaintiff could have discovered the alleged injury by reviewing the Account Agreement or her monthly account statements. Reviewing these statements would have shown her that she was being charged two \$30 NSF fees, which is the basis of Plaintiff's claims.”; ***even if “single” item was presented and returned more than once, that contract language “does not place a limit on how many fees [defendant] may charge if an item is presented multiple times” against insufficient funds.***).

Retry NSF Fee Class Certification Decisions

- Many Banks, if they lose a MTD, feel pressured to settle because:
 - Class Certification on form-contract can be hard to beat;
 - Ambiguity tends to be resolved by fact finder (jury);
 - Fear of large exposure causes banks to not want to risk it and settle between 40-70%
- There is Hope:
 - *Bernard v. First Nat'l Bank of Ore.*, 275 Or. 145 (1976) (different understandings of “per annum” defeated class certification)
 - *Hollingsworth v. Pinnacle Bank, Newton Cnty. Georgia*, Order Denying Class Cert. Dec. 29, 2022):
 - *Wilkins v. Simmons Bank*, 2023 WL 1868142 (E.D. Ark. Feb. 9, 2023) (denying class certification);

Class Cert Denials – Old & New

- Bernard v. First Nat'l Bank of Ore.:
 - Contract promised interest “per annum,” but counted only 360 days not 365;
 - This was apparently not uncommon at the time;
 - Putative class alleged damages tied to loss of 5 days’ interest;
 - Court found term was ambiguous, but that “parol evidence would be admissible to show that individual borrowers knew of the ‘technical’ meaning employed by the banks.”
 - This meant class membership would turn on knowledge of each class member, and class certification was denied.
 - “Per annum” similar to “per item” in this context.

Class Certification Denials

- Hollingsworth:
 - P could not answer even basic questions at deposition about what the case was about;
 - P testified contrary to allegations of complaint – admitted she knew bank did not unilaterally re-process transactions and that merchant re-presented transactions with authorization
 - Could not point to agreement term allowing only one fee.
 - Was solicited via online ad and spent 20 minutes total on case
 - Rendered P inadequate;
 - P called in and asked about fees, had knowledge, and engaged in same conduct anyway; not typical;
 - Raised voluntary payment doctrine as an issue
 - P may have committed COVID relief fraud for her business;

Class Certification Denial Continued ...

- Wilkins:
 - Court struck Art Olsen as expert because he could not apply his methodology for calculating damages class-wide (largely for uncoded re-tries);
 - Held that plaintiff's failure to bring account current between fees was a material breach of the contract and that a Plaintiff who breaches first has no claim:
 - Plaintiff was a former customer and thus could not seek injunctive relief.
 - Also addressed D's MSJ;
 - Not great re NACHA or re "item" and ambiguity, but overall, good analysis of the types of individual issues that arise.

Counterclaims for Vexatious Litigation?

- Livingston v. Trustco Bank, 2023 WL 2563208 (N.D.N.Y. March 17, 2023)
 - Defendant lost MTD on EFTA claims over OD fees and disclosures;
 - Defendant Answered Complaint, brought Counterclaim:
 - N.Y. Civil Rights Law § 70 : “If a person vexatiously or maliciously ... in the name of an unknown person, commences or continues, or causes to be commenced or continued, an action or special proceeding, in a court, ... an action to recover damages therefor may be maintained against him by the adverse party to the action.”
 - D argued that a review of account statements would have shown claims as baseless
 - P moved to dismiss, arguing that this statute would deter consumer class actions
 - Court did not care: “[T]hese allegations suggest that Plaintiffs commenced and continued this action on behalf of themselves and “other persons similarly situated” without first reviewing available documentation that would have undermined their claims, rendering their action “vexatious[].”

Authorized Positive, Settled Negative ...

- Theory: if I had enough \$ at authorization I can never get an OD fee at posting
- Operates on the theory that funds are “set aside”
- Conflicting regulator comments re practice, but trend is overwhelmingly negative
- Regions Bank just settled with CFPB for \$141 million
- But see: *Schwartz v. Community 1st CU*, 2021 WL 9540152 (Iowa Dist. 2021)
 - Instead of a filing a petition with a short and plain description of his claims, Plaintiff's petition goes to great lengths to allege wealth disparities between the parties, references the amount of revenue allegedly generated by Defendant and other financial institutions and asserts Plaintiffs are financially vulnerable and being deceived. The petition references other contracts by nonparties and position papers by advocacy groups. These are unhelpful. ***The issue is whether this contract between these parties was breached. Courtrooms are venues to assess facts and the law. They are not forums for policy making.***

Authorize Positive Defenses

- Were the OD fees on authorized charges?
 - Or just regular payment that caused OD?
- Did Plaintiff actually pay the fee? (Refunded?)
- Contracts discuss available balance;
- Contracts address fees as assessed at **posting**, not authorization;
- Theory conflicts with funds-availability and posting order provisions
- Would cause consumers **more fees** (but allow for fraud under Reg CC);

CFPB 2017 View re Authorized Positive Payments ...



“Just because your account has enough funds when you’re at the checkout counter doesn’t mean you’ll have the funds later when the transaction finally settles. ... Debit card overdraft fees can occur on transactions that were first authorized when there were sufficient funds to cover them, but took the account negative when the transaction settled.”

www.consumerfinance.gov/about-us/blog/understanding-overdraft-opt-choice/ (emphasis added)

CFPB: Regions Bank Consent Order

- Consent order related to OD fees on certain ATM withdrawals and debit card purchases
- Regions banned from charging authorized-positive OD fees
- \$141 million in redress
- \$50 million fine

ADMINISTRATIVE PROCEEDING
File No. 2022-CFPB-0008

In the Matter of:

CONSENT ORDER

REGIONS BANK

The Consumer Financial Protection Bureau (Bureau) has reviewed the overdraft-fee practices of Regions Bank (Respondent or Bank, as defined below) and has identified the following law violations: the Bank committed unfair and abusive acts and practices when it charged overdraft fees on transactions that had a sufficient balance at the time the Bank authorized the transaction but then later settled with an insufficient balance (*i.e.*, “Authorized-Positive Overdraft Fees”). Under Sections 1053 and 1055 of the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. §§ 5563, 5565, the Bureau issues this Consent Order (Consent Order).

CFPB Issues APPSN Guidance

Consumer Financial Protection Circular 2022-06

Unanticipated overdraft fee assessment practices

October 26, 2022

Question presented

Can the assessment of overdraft fees constitute an unfair act or practice under the Consumer Financial Protection Act (CFPA), even if the entity complies with the Truth in Lending Act (TILA) and Regulation Z, and the Electronic Fund Transfer Act (EFTA) and Regulation E?

Response

Yes. Overdraft fee practices must comply with TILA, EFTA, Regulation Z, Regulation E, and the prohibition against unfair, deceptive, and abusive acts or practices in Section 1036 of the CFPA.¹ In particular, overdraft fees assessed by financial institutions on transactions that a consumer would not reasonably anticipate are likely unfair. These unanticipated overdraft fees are likely to impose substantial injury on consumers that they cannot reasonably avoid and that is not outweighed by countervailing benefits to consumers or competition.

As detailed in this Circular, unanticipated overdraft fees may arise in a variety of circumstances. For example, financial institutions risk charging overdraft fees that consumers would not reasonably anticipate when the transaction incurs a fee even though the account had a sufficient available balance at the time the financial institution authorized the payment (sometimes referred to as “authorize positive, settle negative (APSN)”).

- “Charging an unanticipated overdraft fee may generally be an unfair act or practice. Overdraft fees inflict a substantial injury on consumers. ... [C]onsumers likely cannot reasonably anticipate them and thus plan for them.”
- “[A] consumer cannot reasonably avoid unanticipated overdraft fees, which by definition are assessed on transactions that a consumer would not reasonably anticipate would give rise to such fees.”
- “[U]nanticipated overdraft fees are caused by often convoluted settlement processes of financial institutions that occur after the consumer enters into the transaction, the intricacies of which are explained only in fine print, if at all.”

Cases?

- APPSN Claims have been dismissed depending on contract language
 - *Razavi v. Green State CU*, Iowa court dismissed APPSN Claim
 - *Whittington v. Mobiloil FCU*, USDC for ED of Texas dismissed APPSN Claim
 - *Choy v. Space Coast CU*, Florida court dismissed APPSN Claim
 - *Boone v. MB Financial Bank*, USDC for ED of Illinois dismissed APPSN Claim
 - *Foltz v. Matanuska Valley Federal Credit Union*, 2021 WL 865542 (Alaska Super. 2021)
 - *McCollam v. Sunflower Bank, N.A.*, 2022 WL 1134276, -- F. Supp.3d -- (D. Colo. 2022) ;
 - *Scwhartz v. Community 1st CU*, 2021 WL 9540152 (Iowa Dist. Ct. 2021)
- However, many motions have been denied based on findings that contract language is ambiguous.
 - A motion for summary judgment was granted in USDC for the ED of Texas on an APPSN claim.
- No classes have been certified in APPSN cases beyond settlement.

Real World Consequences

- Overdrafts create institutional risk:
 - “Overdraft protection programs may expose an institution to more credit risk (e.g. higher delinquencies and losses) than overdraft lines of credit and other traditional overdraft protection options to the extent these programs lack individual account underwriting.” NCUA comments, 70 Fed. Reg. 9129 (2005), Joint Guidance on Overdraft Protection Programs, Safety and Soundness Considerations.
- Assessing OD Fees at Authorization Rather than Posting ***Hurts*** Consumers
 - Roberts v. Capital One -- \$250 v. \$10K in fees if switched;
 - Will cause OD fees on transactions that never overdraw or are canceled.
 - Lose lag time to deposit funds.
 - The road to hell is paved with good intentions.

Ledger v. Available Balance ...

- What does the contract say?
 - Available must modify something ...
- Focus on common sense
- Regulatory materials address disclosures for changes to method, not use of method

Context for Available Balance

- “At first blush, the Complaint appears to allege garden-variety breach of contract claims, a few extra- contractual claims, and a federal consumer protection law violation against a credit union by one of its members. But below the surface, **there is an ongoing national battle between certain interest groups against federal credit unions, with consumers attacking overdraft fee disclosures via attempted class action lawsuits. Federal credit unions are now being forced to defend membership agreements and overdraft fee disclosures from technical accounting arguments, even though the consumers incurring the penalties literally appear to be spending more money than they actually have.** Although most federal credit unions will undoubtedly respond with revised membership agreements and opt-in contracts to eliminate any ambiguities, this Motion is Defendant's attempt to neutralize an attack on its own overdraft practices. The Court will grant Defendant's Motion in its entirety.”
 - *Rader v. Sandia Laboratory Fed. Credit Union*, 2021 WL 153364 (D. N.M. 2021)

Available Balance is Arguably the Dominant Balance Used

- NAFCU Letter to CFPB (2019): “Clarifying or improving the safe harbor would help offset the risk of overdraft litigation that is premised on alleged discrepancies between the Model Form and the method used to assess overdraft fees Although the Overdraft Rule does not expressly use the term “**available balance,**” *the method was the standard and prevailing technique for assessing overdrafts at the time the rule was promulgated and remains so today.*”
 - <https://www.nafcu.org/system/files/files/7-1-19%20Letter%20to%20CFPB%20on%20Overdraft%20Rule%20Review.pdf>
- Data Point: Checking Account Overdraft at Financial Institutions Served by Core Processors, at 2 (CFPB Dec. 2021) (“nearly all credit unions (99.5%) in the dataset reportedly used available balance to determine whether to charge an overdraft fee”; banks split 45.2 v. 54.8 using ledger vs. available balance)

What do the cases hold?

- Motions to Dismiss have been granted depending on the contract language:
 - *Chambers v. NASA Fed. Credit Union*, 222 F. Supp. 3d 1 (D.D.C. 2016);
Domann v. Summit Credit Union, 2018 WL 4374076 (W.D. Wis. Sept. 13, 2018)
 - In both cases, the court held that the account agreements unambiguously informed plaintiff that her **available** balance would be used in assessing overdraft fees
 - *Tilley v. Mountain Am. Fed. Credit Union*, 2018 WL 4600655, at *3-5 (D. Utah Sept. 25, 2018) (A9 form covers using available balance)
- *Page v. Alliant*, 52 F.4th 340 (7th Cir. 2022) (contract “informs the customer that whenever someone attempts a debit but the account lacks “sufficient available funds,” Alliant may charge a fee. ... It is implausible that a reasonable person would think that, without expressly saying so, the Agreement used two different methods of calculating the account balance in consecutive sections.”)
- *Silvey v. Numerica Credit Union*, --- Wn. App. 2d ---, 2022 WL 3209419 (Wn. Ct. App. 2022)
- *But see Tims v. LGE Cmt. Credit Union*, 935 F.3d 1228 (11th Cir.) (using available balance is ambiguous)

Out-of-Network ATM Fees

- Theory is that all actions taken at a non-network ATM are part of the same transaction, so only get one fee
- Typically challenging balance inquiry fee on top of withdrawal fee
- Largely tied to disclosures, of course, but nobody likes ATM Fees
- Make sure fee schedule mirrors disclosures – separate line item for each fee

Defenses to ATM Fee Cases

- What does the Account Agreement Say?
- Explain that each transaction costs you \$
 - Both from ATM Operator and ATM Network
- EFTA allocates disclosures at third-party ATMs to those ATMs, not us.
 - We have no control over what ATM operator puts on the screen;
- Explore facts and location for salient facts:
 - App use?
 - Close Network ATM for free?
 - Past experience?

Survey Says ... Not Good.

- Similar survey – 350 participants (not all completed the entire survey)
 - Presented facts and disclosures.
- Results show people don't expect ATM fees for BI:

Table 3

Fee Expectations at Out-of-Network ATMs

Scenario	No fee	One \$2.00 fee	Two \$2.00 fees	Three \$2.00 fees	Don't know	Number
Check balance	46 (65.7%)	23 (31.4%)			2	70
Withdraw funds	19 (27.1%)	49 (70.0%)			2	70
Check balance & withdraw finds	20 (29.0%)	35 (50.7%)	10 (14.5%)		4	69

FX Fees

- Class actions alleging charging of foreign transaction fees for online transactions where customer is in USA
- Disclosures often state fees are charged for purchases “made in foreign countries.” Ambiguous?
- *Morrow v. Navy Federal Credit Union*, 2022 WL 2526676 (4th Cir. 2022), holds yes, reversed Motion to Dismiss grant.
- Make sure disclosures confirm that the location of the merchant will dictate any fees.

FX Fee Class Action Defenses

- P's Theory is that so long as she is in the US, then the transaction is not subject to a FX Fee;
 - First defense is a solid disclosure or update as to one;
 - Look for FX fees outside the SOL;
 - Look to see if multiple accounts opened, and if a new account opened after knowing about FX fee;
 - Ask in deposition whether Plaintiff, if sitting in Mexico on vacation, ordered goods online to be delivered to home in US whether FX was appropriate;
 - Look at websites where transactions took place—any disclosure there?
 - Just trying to set up individual issues that show each consumer might believe something else.

Zelle EFTA Claims

- Same lawyers have been pursuing EFTA/Contract/UDAP claims based on Zelle
- Theory is that if a scammer induces a customer to send \$ directly to the scammer, that CU should deem it an unauthorized transaction under EFTA and give a refund.
- But EFTA defines unauthorized transaction as one initiated by someone other than the consumer, so claims fail.
- CFPB is all over this and thinks FIs should be liable.

Zelle continued

- From a MTD in a related case:

Plaintiff Robert Arant decided he wanted to buy expensive kittens from a stranger he found on the internet. What could go wrong? The catch, however, was the out-of-state internet kitten vendor would only accept payment using the Zelle payment service, which allows people to transfer money directly from their bank account to a third party. Undeterred by the prospect of sending money to a distant stranger he found online, Plaintiff logged into his account with Defendant Boeing Employees' Credit Union (BECU's) and signed up for Zelle. In that process, BECU repeatedly warned him he should use Zelle only to send money "to people you know," there is no protection "if you do not receive the goods or services that you paid for," and "when you send the payment, you will have no ability to stop it." BECU cautioned Plaintiff that Zelle:

IS INTENDED FOR SENDING MONEY TO FAMILY, FRIENDS, AND OTHERS WITH WHOM YOU TRUST. YOU SHOULD NOT USE ZELLE® TO SEND MONEY TO PERSONS WITH WHOM YOU ARE NOT FAMILIAR OR YOU DO NOT TRUST. ZELLE® DOES NOT OFFER A PROTECTION PROGRAM FOR AUTHORIZED PAYMENTS MADE THROUGH THE SERVICE.

Zelle Continued ...

14 Disregarding these warnings, Plaintiff authorized multiple Zelle payments directly to the
15 unknown kitten vendor, totaling \$4,400. When no kittens arrived and the vendor stopped
16 responding, Plaintiff realized he had been scammed. Plaintiff now blames BECU for his
17 decision to send money to strangers for internet kittens he had never physically seen—i.e., using
18 Zelle in precisely the way BECU warned against. BECU did not promise to be the guarantor for
19 every financial transaction Plaintiff later regrets, and his claims have no merit. The Court should
20 dismiss Plaintiff's Electronic Funds Transfer Act (EFTA), contract, and Consumer Protection
21 Act (CPA) claims for the following reasons:

- Plaintiff settled for a small sum after this was filed.

More Zelle (and good news)

- *Wilkins v. Navy Federal Credit Union*, 22-2916 (D. N.J. Jan 18, 2023):
 - Granted MTD
 - Notes that transaction at issue was not one where Navy Federal committed an act in connection with the sale of goods or services—transaction was between plaintiff and third party
 - Lots of UDAP statutes similar – CLRA, OR UTPA, NV UTPA
 - Held that Rule 9(b) particularity requirement for fraud applied to UDAP and not met b/c Navy did not misrepresent anything—“safe, secure,” etc., too generic to be actionable.
 - Held that no claim regardless—statements about safe and secure were mere “puffery”
 - Held no false representation by Navy Federal—Zelle worked exactly as advertised
 - Held none of the transactions were “unauthorized” so no contract claim

ACH Push/Pull

- Bruin v. Bank of America, 2022 WL 992629 (D. N.C. 2022)
 - Same counsel (Kaliel et al.)
 - UDAP theory that it is unfair/deceptive for Plaintiff's bank to charge ACH fee to transfer (i.e., push) money out of account (\$3 for three days, \$10 for next day, \$30 same day), when there is no fee charged if Plaintiff asks receiving bank to pull funds out.
 - Defendant fully disclosed fees for services
 - Also discloses no fee for using Zelle
 - Plaintiff argued the implication was that the only way to transfer funds was through these methods, and BofA failed to disclose that ACH pull by receiving bank was free.
 - Court refused to dismiss Complaint, alleging that disclosure was not enough, disparity of bargaining power, and omissions theory could survive.

Venmo/Square/PayPal Account-Verification Claim

- Customer has a negative balance of -\$10.00;
- Signs up with Venmo, PayPal, Square, etc.
- Agrees to a “micro” transaction—deposit of \$.01, followed by withdrawal of \$.01
- Venmo deposits \$.01 – Balance shifts to -\$9.99;
- Venmo goes to withdraw \$0.1, but insufficient funds=OD fee of \$35
- Argument is that the OD was not necessary to cover the transaction because funds were already there from earlier transaction

Account Verification OD Fee Theory

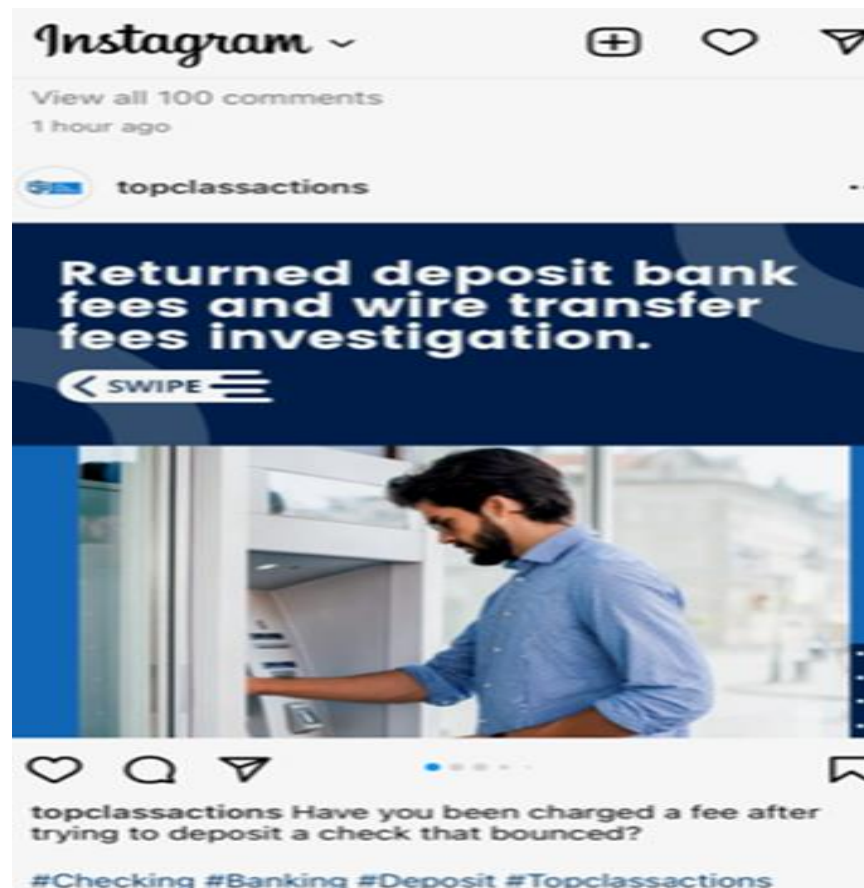
- *Kelley v. Community Bank*, 2020 WL 777463, *6 (N.D.NY 2020):
 - “Phantom transactions,” or micro-deposits, do not reduce the account balance. See *id.* Rather, the funds necessary to cover the transaction are deposited into the account and then subsequently withdrawn by the depositing company. The agreement, when read in its entirety, gives the impression that overdraft fees are assessed only on transactions which reduce the account balance. In fact, the agreement describes an overdraft as occurring “when you do not have enough money in your account to cover a transaction, but we cover the transaction on your behalf.” Because the agreement implies that an overdraft only occurs when the account balance is not sufficient to cover the charge, and micro-deposits include the funds necessary to cover the charge, reasonable minds could differ as to the meaning of this term.
- **Square:** “Insufficient Funds. To verify your bank account, Square will transfer and withdraw a small amount. Sometimes this transfer and withdrawal may process simultaneously, ***so you’ll need at least \$1.00 in your bank account before you begin the verification process. If your verification has failed due to insufficient funds, make sure you have at least \$1.00 in your account and re-enter your account information.***” <https://squareup.com/help/us/en/article/6097-bank-account-troubleshooting>

Account Verification OD Fee Theory Cont'd

- Townsley v. Atlantic Union Bank, 2020 WL 4890058, *4 (E.D. Va. 2020):
 - “Townsley, however, alleges that Square deposited the funds necessary to cover the withdrawal that occurred immediately after it made the deposit. Thus, Townsley alleges that the verification process did not further reduce her account balance because the process includes ‘the funds to cover’ the subsequent withdrawal, so the process does not qualify as an ‘overdraft.’ The contract, therefore, is sufficiently ambiguous to ‘preclude[] dismissal on a motion for failure to state a claim.’”
- So, make sure disclosures confirm that no matter how small a deposit and withdrawal, a lack of sufficient funds will cause a fee.
- Mostly OD fees, less about NSF fees

So, what's next?

- Top Class Actions is a good resource:



More What's Next ...

- EFTA/Reg E Claims:
 - Card-Present Transactions—Denials
 - Cloned card issues?
 - Process changes? Evidence that every transaction considered in denial?
 - Reg E Denial Letters: Must **explain** Findings 12 CFR 1005.11(d)(1) (“no error found” not sufficient)
 - In 2020 and 2021, the CFPB issued informal guidance stating as follows:
 - Both section 908(a) of EFTA and Regulation E require a financial institution investigating an alleged EFT error to communicate to consumers, among other elements, (1) the investigation determination; and (2) **an explanation of the determination when it determines that no error or a different error occurred within its report of results.**
 - To give purpose to both obligations, **the meaning of an “explanation” is not synonymous with that of a “determination.” Financial institutions must go beyond just providing the findings to actually explain or give the reasons for or cause of those findings.** Examiners found that one or more financial institutions violated Regulation E by failing to provide an explanation of its findings within the report of results.
 - CFPB Supervisory Highlights, § 2.3.3 Violation of Error Results Notice Requirements, 85 FR 55828-02, 2020 WL 5409070 (CFPB Sep. 2020) (emphasis added).

Leverage Regulatory Compliance to Resolve Litigation?

- **Fair Restitution With Fair Regulators:** Courts recognize that where there has already been a governmental investigation and resolution on behalf of the public, class treatment is particularly unsuitable. *Thornton v. State Farm Mut. Auto Ins. Co.*, 2006 US Dist LEXIS 83972, *7-*13 (N.D. Ohio 2006):
 - Proceedings by the state, whether in a judicial or an administrative forum, are presumably taken with the best interests of state residents in mind. Reasonable settlement by the accused should be encouraged. Indeed, *potential class members will often recover more than they would in a private action when costs and attorneys’ fees are factored in.* D. Bruce Hoffman, To Certify or Not: A Modest Proposal for Evaluating the ‘Superiority’ of a Class Action in the Presence of Government Enforcement, 18 Geo. J. Legal Ethics 1383, 1387 (2005). However, *if courts consistently allow parallel or subsequent class actions in spite of state action, the state’s ability to obtain the best settlement for its residents may be impacted, since the accused may not wish to settle with the state only to have the state settlement operate as a floor on liability or otherwise be used against it.*”
- *Id.* (citing cases). Resolving issues with regulators can eliminate class actions and provide relief that is adequate under the circumstances. *See, e.g., Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, (9th Cir. 1975).

CFPB And Arbitration

- New Tactic for CFPB is that in entering consent decrees, CFPB adds a provision that FI will not add an arbitration provision.
- The CFPB could not get legislation passed to ban it, so this is the latest back door;
- If you are considering arbitration, be careful. Lots of issues arising:
 - If ongoing litigation, disclose it in notice;
 - Give opt-out right for existing new members;
 - Over-disclose – make sure you disclose that continued use acts as assent; consider making affirmative response mandatory.
 - Ongoing issues likely to get before Supreme Court – Badie v. Bank of America issue.

CFPB Win Vacated by Ninth Circuit

- *CFPB v. Nationwide Bi-Weekly Admin. Inc.*, 2023 WL 566112 (9th Cir. Jan. 27, 2023)
 - Vacating \$8 million award against a mortgage service telemarketer so that the district court can consider the Fifth Circuit’s opinion in *Community Financial Services Association of America, Ltd. v. CFPB*, 51 F.4th 616 (5th Cir. 2022).
 - The CFPB alleged violations of Consumer Financial Protection Act by engaging in deceptive practices. The Ninth Circuit did not address merits, but vacated judgment to “allow[] [the district court] to reassess the case under the changed legal landscape since its initial order and opinion.”

CFPB Implements Public Shaming

- NSF Fee Shame Chart: [cfpb_nsf-fee-banks-chart_graphic_2023-02.jpg](https://cfpb.nsf-fee-banks-chart_graphic_2023-02.jpg) (1200x628) (consumerfinance.gov)

Non-sufficient fund (NSF) fee practices of the 25 banks reporting the most overdraft/NSF revenue in 2021

The chart reflects a snapshot of the CFPB's review of press releases, publicly available account disclosures, and news reports.

* Implementation dates vary; check with bank for details on timing.

** Some banks may be enacting changes that have not been publicly announced.



Banks that do not charge NSF fees, or have publicly announced eliminating them.*

Arvest	M&T
Bank of America	PNC
Bank of the West	Regions
Capital One	Santander
Citibank	SouthState
Citizens	TD Bank
First Horizon	Truist
Fifth Third	USAA
First Citizens	U.S. Bank
Green Dot	Wells Fargo
JPMorgan Chase	Woodforest
KeyBank	

Banks that have not publicly announced elimination of NSF fees as of 12/6/2022.**

First National Bank Texas/
First Convenience Bank
Huntington

Questions?



"C is for class action suit . . ."



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