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Trends in Overdraft Fee and NSF Litigation

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There has recently been an increase in class action lawsuits against banks and credit unions challenging the manner in which those institutions charge overdraft and non-sufficient funds fees. This alert provides an overview on the types of claims that plaintiffs are asserting and what financial institutions can do to protect themselves.

Authorize Positive, Settle Negative. In one line of cases, plaintiffs have asserted claims for breach of contract and unjust enrichment based on financial institutions' assessment of overdraft fees on transactions that the institutions authorized at a time when customers had sufficient funds in their accounts to cover the transactions, even though the customers later had insufficient funds in their accounts at the time of posting and settlement. The plaintiffs in these cases have typically argued that the account agreements at issue only authorized the institutions to charge overdraft fees when the accounts lacked sufficient funds, or that the institutions promised to set aside funds in accounts at the time of authorization to cover payments for the authorized transactions.

Some courts have allowed these types of claims to survive motions to dismiss, in some cases finding that language in account agreements was ambiguous regarding how the institutions would treat authorizations and settlements. *See, e.g., Lloyd v. Navy Fed. Credit Union*, No. 17-CV-1280-BAS-RBB, 2018 WL 1757609, at *1 (S.D. Cal. Apr. 12, 2018). At least one court has disagreed with the reasoning in those decisions, however, finding that a bank's account agreement expressly authorized the bank to charge an overdraft fee when a customer's account had insufficient funds at the time of posting and settlement. *See Boone v. MB Financial Bank, N.A.*, --- F. Supp. 3d ---, 2019 WL 1584553, at *1 (N.D. Ill. Apr. 12, 2019).

Available Balance / Ledger Balance. In a separate line of cases, plaintiffs have asserted breach of contract and unjust enrichment claims based on financial institutions' calculations of account balances at the time of posting and settling. In most of these cases, the plaintiffs alleged that the institutions used customers' available balance – including pending debit holds – and therefore charged overdraft fees when the customers had a sufficient ledger balance to cover the transactions. As in the "authorize positive, settle negative" cases, the plaintiffs in these cases have not challenged this practice as illegal per se – they have instead argued that the financial institutions failed to adequately disclose the practice in their account agreements.

Courts have reached different decisions on motions to dismiss in these cases, often depending on the specific language found in the account agreements. *See, e.g., Domann v. Summit Credit Union*, 2018 WL 4374076 (W.D. Wis. Sept. 13, 2018) (granting motion to dismiss after concluding that the bank's agreement unambiguously disclosed that it used the available balance to calculate overdrafts); *Smith v. Bank of Hawaii*, 2017 WL 3597522 (D. Haw. Apr. 13, 2017) (denying motion to dismiss after concluding that agreement was ambiguous as to whether the bank would use the available balance or ledger balance to calculate overdrafts).

Multiple NSF Fees on Single Transaction. More recently, plaintiffs – including some also asserting one of the overdraft theories above – have asserted new contract-based claims relating to non-sufficient fund and return item fees (NSF Fees). The plaintiffs allege that financial institutions breach their account agreements

when they assess more than one NSF Fee on represented transactions, arguing that those multiple transactions only constitute a single item or transaction.

At least one court has denied a motion to dismiss this type of claim, albeit with very little analysis supporting the decision. *See Morris v. Bank of Am., N.A.*, No. 3:18-CV-157-RJC-DSC, 2019 WL 1274928, at *2 (W.D.N.C. Jan. 8, 2019), *report and recommendation adopted in part, rejected in part*, No. 318CV00157RJCDSC, 2019 WL 1421166 (W.D.N.C. Mar. 29, 2019). Additional decisions on similar multiple NSF Fee claims are likely to be issued in the coming months.

Mitigating Risk. The common thread in each of the three types of claims is the alleged failure to disclose the precise manner in which a financial institution charged fees. Unlike the wave of high-to-low posting cases over the last decade, in which plaintiffs could often point to evidence that an institution's practice was designed to increase fees, these newer cases seek to capitalize on ambiguities in contract language that many institutions are simply unaware of. Despite that distinction, many financial institutions have chosen to settle such claims to avoid the burden and expense of litigation.

In order to mitigate against the risk of costly litigation, financial institutions should conduct periodic reviews of their systems, account agreements, and disclosures to identify potential gaps and ambiguities. Although these claims have not typically challenged the manner of charging fees as illegal per se, financial institutions may also want to conduct a review of their fee-charging practices and procedures from strategic, financial, and risk-management perspectives. Often, this review will include analysis of an institution's relationships with vendors who provide transaction-processing platforms and services.

Baker Donelson will continue to monitor developments in this area and will provide updates on further trends in these lines of cases. For further information, please contact Matt Mulqueen or Robert Tom.