



## RISK ALERT

### Overdraft Class Action Lawsuits Increasing

#### SUMMARY

Several financial institutions are being served and investigated by consumer's attorneys asserting unfair NSF fee practices. Attorneys are trolling financial institution websites in search of inadequate account agreement disclosures. A class action lawsuit ensues since all account holders who were charged an NSF fee during the discovery period are included in the punitive class.

#### MOST RECENT ALLEGATIONS

- Lawsuits are alleging breach of contract claims based on omission of terms and/or ambiguous language in the account holder agreement/disclosure.
- UDAP (Unfair & Deceptive Acts and Practices) accusations.
- Multiple NSF fees are charged on the same transaction. Some disclosures may indicate that one NSF fee will be charged "per item" or "per transaction." It has been asserted that the language may not adequately explain that a single transaction can initiate multiple NSF fees. Without clear specific language, charging multiple NSF fees could be viewed as inconsistent with what was disclosed to the account holder.
- Improperly charging NSF fees on the "available balance" versus the "actual balance".
  - Debit card signature-based transactions when preauthorization holds were placed on available funds.
  - Electronic payments (ACH) returns.

#### RISK MITIGATION STEPS

Review your account agreement/disclosure to ensure it matches your practices and procedures. Disclose the precise manner in which fees are charged.

- Specifically disclose if you are charging additional fees for resubmitted items.
- Use descriptive terms such as “per presentment”, “for every time any item (check, ACH, debit, or any method of payment) is presented for payment. Avoid terms that are ambiguous.
- State that transactions authorized on a positive account balance can incur overdraft fees. Explain how the account balance is calculated to assess fees for pending debit card transactions.

Ensure that all overdraft-related disclosures and communications are consistent across all channels, including print and online.

- Remove your account agreement/disclosure from your financial institution web site.

If using a third -party vendor to supply your disclosures be particularly meticulous that the forms fully describe your practices.

Verify that your core processor handles account holder transactions according to your account agreement/disclosure.

- Balance used (actual or available) when paying each type of transaction, the order in which items are processed and when NSF fees are charged.

Consider including a properly drafted arbitration clause in the account agreement/disclosure. Arbitration clauses can deter a case proceeding as a class action.



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