

# The Banking Law Journal

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# Overdraft Fees Continue to Invite New Legal Challenges and Regulatory Scrutiny

*By Sameer Aggarwal and Andrew Soukup\**

*In light of new legal challenges to overdraft fees, the authors of this article explain that financial institutions should reexamine their account agreements and overdraft disclosure materials to ensure they minimize risk and exposure.*

Class action litigation involving overdraft and nonsufficient funds charges is nothing new to many financial institutions. But in recent years, plaintiffs' lawyers have shifted tactics and changed the types of practices they are targeting. Financial regulators have also signaled their intention to place increased focus on these charges. Financial institutions should therefore re-examine their account agreements and overdraft disclosure materials to ensure they minimize risk and exposure.

## RECENT LITIGATION

Overdraft fees have been challenged in class action lawsuits under several different theories. Initially, many plaintiffs alleged that banks and credit unions violated the governing account agreement by using customers' available balances instead of their current balances to determine whether a transaction was subject to an overdraft fee.<sup>1</sup> Another common theory was that financial institutions intentionally reordered pending transactions from largest to smallest in order to maximize overdraft and nonsufficient funds fees.<sup>2</sup>

Although many financial institutions modified their practices to address threats posed by these lawsuits, plaintiffs have presented additional theories to challenge overdraft fees, asserting:

- That overdrafts constitute interest charges and exceed state usury limits.<sup>3</sup>

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<sup>1</sup> See, e.g., *Grenier v. Granite State Credit Union*, No. 21-cv-00534-LM (D.N.H. Nov. 8, 2021) (collecting cases).

<sup>2</sup> See *In re HSBC Bank, USA Debit Card Overdraft Fee Litig.*, 1 F. Supp. 3d 34 (E.D.N.Y. 2014).

<sup>3</sup> See *Walker v. BOKF, Nat'l Ass'n*, (D.N.M. July 15, 2019). But see *Johnson v. BOKF Nat'l*

- That their bank charges multiple fees for the same transaction, if a merchant submits a transaction more than once.<sup>4</sup>
- That the bank automatically charges overdrafts as soon as a transaction is made if the transaction amount is greater than the available account balance, even if the transaction has not yet settled.<sup>5</sup>
- That the bank charges overdraft fees when, in fact, there were sufficient funds in the account holder's account.<sup>6</sup>
- That banks use overdraft protection services to charge customers additional overdraft protection transfer fees and heightened interest rates after funds are advanced from the customer's credit card to cover the overdraft.<sup>7</sup>
- That overdraft charges were assessed on authorize positive, settle negative transactions. where the account balance was allegedly positive at the time the charge was authorized but negative when the transaction settled.<sup>8</sup>
- That overdraft charges were assessed on transfers from one account with the bank to another, and on micro-deposit transactions used for verification purposes, which have been referred to as "phantom transactions."<sup>9</sup>
- Even when a bank accurately describes its overdraft practices in its account agreement, banks have been sued on the theory that their overdraft opt-in notices do not satisfy the requirements of Regulation E of the Electronic Funds Transfer Act—even when a bank uses the same opt-in form approved by federal regulators.<sup>10</sup>

These cases usually accuse defendants of breaching account agreements or claim that defendants did not clearly disclose their fee-charging practices. Courts have often rebuffed defendants' attempts to dismiss these cases on the grounds that the contracts are ambiguous.

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*Ass'n*, 15 F.4th 356 (5th Cir. 2021) (holding extended overdraft charges are not interest).

<sup>4</sup> See *Roy v. ESL Fed. Credit Union*, (W.D.N.Y. 2020).

<sup>5</sup> See *In re TD Bank*, 325 F.R.D. 136 (D.S.C. 2018).

<sup>6</sup> See *Johnson v. Bank OZK*, (M.D. Ga. Apr. 27, 2021).

<sup>7</sup> See *El-Hage v. Comerica Bank*, (E.D. Mich. Dec. 16, 2020).

<sup>8</sup> See, e.g., *Lussoro v. Ocean Fin. Fed. Credit Union*, 456 F. Supp. 3d 474 (E.D.N.Y. 2020).

<sup>9</sup> See, e.g., *Kelly v. Community Bank, N.A.*, (N.D.N.Y. Feb. 18, 2020).

<sup>10</sup> See *Adams v. Liberty Bank*, No. 3:20-cv-1601 (D. Conn. Aug. 23, 2021).

## REGULATORY SCRUTINY

While overdraft fees are being evaluated by courts in litigation, they have also been increasingly scrutinized by federal regulators. The Consumer Financial Protection Bureau (“CFPB”) recently published two reports on overdraft fees: one which documented<sup>11</sup> financial institutions’ reliance on these fees, and another which described<sup>12</sup> the impact these fees can have on consumers. The upshot of the reports is that, in the CFPB’s view, financial institutions have become too reliant on these fees and the fees are harmful to consumers.

CFPB Director Rohit Chopra has also shared his view<sup>13</sup> that overdraft fees fall in a bucket of what he called “exploitative junk fees”<sup>14</sup> that need to be reined in. Chopra opined that banks’ use of overdraft fees represents a “clear market failure” and that the CFPB “will be enhancing its scrutiny of banks that are heavily depending on overdraft fees.” This scrutiny, Chopra promised, will come in the form of new rules, enforcement actions, and open banking reforms that will make it easier for customers to switch between financial institutions.

## THE RESPONSE FROM FINANCIAL INSTITUTIONS

Financial institutions have responded to this scrutiny in several ways. Some have relied on arbitration agreements to reduce the threat of class action exposure. Some have revised their account agreements and related disclosure materials. And some financial institutions have responded by modifying their overdraft practices entirely, such as by providing a grace period<sup>15</sup> to cure an overdraft before a fee is charged, by reducing an overdraft fee,<sup>16</sup> or by eliminating<sup>17</sup> them entirely.<sup>18</sup>

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<sup>11</sup> [https://files.consumerfinance.gov/f/documents/cfpb\\_overdraft-call\\_report\\_2021-12.pdf](https://files.consumerfinance.gov/f/documents/cfpb_overdraft-call_report_2021-12.pdf).

<sup>12</sup> [https://files.consumerfinance.gov/f/documents/cfpb\\_overdraft-core-processors\\_report\\_2021-12.pdf](https://files.consumerfinance.gov/f/documents/cfpb_overdraft-core-processors_report_2021-12.pdf).

<sup>13</sup> <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-rohit-chopra-overdraft-press-call/>.

<sup>14</sup> <https://www.nytimes.com/2022/01/26/business/cfpb-junk-fees.html>.

<sup>15</sup> <https://newsroom.wf.com/English/news-releases/news-release-details/2022/Wells-Fargo-to-Help-Millions-of-Consumer-Customers-Avoid-Overdraft-Fees-and-Meet-Short-Term-Cash-Needs/default.aspx>.

<sup>16</sup> <https://newsroom.bankofamerica.com/content/newsroom/press-releases/2022/01/bank-of-america-announces-sweeping-changes-to-overdraft-services.html>.

<sup>17</sup> <https://www.capitalone.com/about/newsroom/eliminating-overdraft-fees/>.

<sup>18</sup> <https://media.ally.com/2021-06-02-Ally-Bank-eliminates-all-overdraft-fees,-ending-centuries-old-industry-practice-and-lifting-consumer-burden>.