2024 NASCUS Class Action Litigation Update

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Davis Wright Tremaine LLP

Arbitration At the Forefront

- Why Do Credit Unions Want Arbitration Provisions?
  - Avoid Class Action Exposure Risk
  - Because the FAA preempts state-law limits on class action waivers;
    - Note: some states allow class-action waivers in contracts generally, regardless whether the provision is within an arbitration clause, so perhaps not necessary;
    - **Cases:** It would make "little sense that an arbitration agreement could take the more drastic step of entirely waiving a federal court forum, including the right to proceed collectively, but an employment contract could not waive the right to proceed collectively in court while preserving the right to bring suit on an individual claim." Mazurkiewicz v. Clayton Homes, Inc., 971 F. Supp. 2d 682, 692 (S.D. Tex. 2013). [T]here is no logical reason to distinguish a waiver in the context of an arbitration agreement from a waiver in the context of any other contract. ... The validity of a class action waiver has nothing to do with the advantages of arbitration or some sort of trade-off. Instead, class action waivers are upheld because they are contractual provisions that do not affect any substantive rights." Palmer v. Convergys Corp., 2012 WL 425256, *2 (M.D. Ga. Feb. 9, 2012). "[N]umerous district courts" have upheld class action waivers "in the non-arbitration context," because the right to litigate collectively is not "a substantive right," it is a "procedural one subject to waiver" even "outside the arbitration context." Delaney v. FTS Int'l Services, LLC, 2017 WL 264463, *7-9 (M.D. Penn. Jan. 20, 2017) (collecting cases). Other courts within the Ninth Circuit agree. See, e.g., Laver v. Credit Suisse Sec. (USA), LLC, 976 F.3d 841, 846-49 (9th Cir. 2020) (enforcing class action waiver in FINRA case); Archer v. Carnival Corp. & PLC, 2020 WL 6260003, *7 (C.D. Cal. Oct. 20, 2020) (enforcing class action waiver under federal maritime law); Benedict v. Hewlett-Packard Co., 2016 WL 1213985, *5 (N.D. Cal. Mar. 29, 2016) (enforcing class action waiver); Roman v. Spirit Airlines, Inc.,, 1315 (S.D. Fla. 2020), *aff'd* 2021 WL 4317318 (11th Cir. 2021) (enforcing class-action waiver under Florida law)*; Hancock v. Jackson Hewitt Tax Serv., Inc.*, 2020 WL 2487562, *3 (W.D. Tex. May 14, 2020) 482 F. Supp. 3d 1304 (enforcing class-action waiver under Texas law); *Copello v. Boehringer Ingelheim Pharm. Inc.*, 812 F. Supp. 2d 886, 893 (N.D. Ill. 2011) (enforcing class-action waiver under Connecticut law); *Convergys Corp. v. Nat'l Labor Relations Bd.*, 866 F.3d 635, 638 (5th Cir. 2017) (class-action waiver "must be enforced according to its terms" and is not limited to arbitration); *Korea Week, Inc. v. Got Cap., LLC*, 2016 WL 3049490, *9-10 (E.D. Penn. May 27, 2016) ("We turn, then, to whether a class action waiver independent and outside of an arbitration agreement is unenforceable. We find the Supreme Court's decision in American Express Co. v. Italian Colors Restaurant supports our conclusion class action waivers outside of arbitration are enforceable."); *Cohen v. UBS Fin Servs., Inc.*, 799 F.3d 174, 179 (2d Cir. 2015) (enforcing "class or collective action waiver" and distinguishing it from arbitration context); *Horowitz v. AT&T Inc.*, 2019 WL 77306, *3 (D.N.J. Jan. 2, 2019) (upholding class action waiver without an arbitration clause); Serrano v. Globe Energy Serv., LLC, 2016 WL 7616716, *5 (W.D. Tex. Mar. 3, 2016) (same); *Mark v. Gawker Media LLC*, 2016 WL 1271064, *6 (S.D.N.Y. Mar. 29, 2016) (upholding standalone class action waiver); *Kubischta v. Schlumberger Tech Corp*, 2016 WL 3752917, *7 (W.D. Pa. July 14, 2016) (stand-alone class waiver enforceable in severance contract).

Plaintiffs' Lawyers Don't Care About Members

Firm's Dead Lead Plaintiff Litigated as if He Were Alive (1)

COLUMN

Roy Strom
Reporter

Welcome back to the Big Law Business column. I'm Roy Strom, and today we look at a plaintiffs' law firm whose clients have died while litigating multiple class actions over bank "junk fees." Sign up to receive this column in your Inbox on Thursday mornings.

When Fred Burnside sat down to Google the name of a lead plaintiff in a class action case against his client, he didn't expect this: The man had been dead for years.

A research team at his law firm, Davis Wright Tremaine, confirmed his finding with a death certificate. Joe Villanueva had died six months after filing the class action lawsuit against Burnside's client, Rabobank, in 2018.

In the ensuing five years, Villanueva's lawyers had litigated as if he were alive. They made seven-figure settlement demands; rejected settlement offers; filed amended complaints; and certified in court records that their deceased client had reviewed documents provided by the defendant, according to a motion for sanctions filed by Burnside.

Documents

- Motion for Terminating Sanctions
- Declaration of Fred Burnside

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June 29, 2023, 2:00 AM PDT

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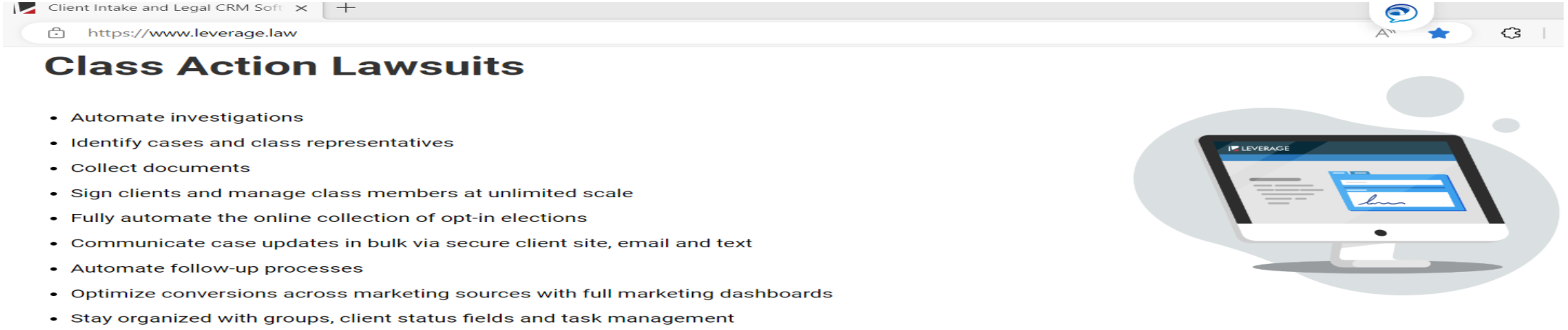
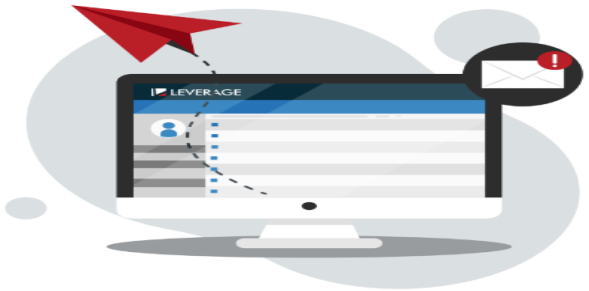
Davis Wright Tremaine

The Case Against Arbitration (Mass Arbitration)

- Plaintiffs' lawyers are using tech platforms to find Plaintiffs via social media:





Mass Actions and Arbitration Swarms

- Fully (or partially) automate screening, interviewing, and signing of prospective clients
- Keep clients informed with updates via secure client site, emails and texts
- Automate follow-up processes
- Optimize conversions across marketing sources with full marketing dashboards
- Manage individual client data with CRM and client tracking functionality
- Stay organized with groups, client status fields and task management

Case Example: Mass Arbitration

- Midwest Bank Adds Arbitration Clause
  - Gets notice from a Plaintiffs' class action firm that they have 4,600 claimants claiming improper NSF and OD fees, and sends the list;
  - Bank determines that 36% never had an account at all;
  - Of the remaining 64%, only 20% had any OD or NSF fees;
  - Of that group, only 20% had retry NSF fees or APSN OD fees;
  - Total amount at issue was less than $3 million.
- Plaintiffs' lawyers don't care—pay $16.5 million in arbitration fees and make that argument, or pay us $10 million for release now.
- Bank paid $8 million to resolve $2.9 million in (fully disclosed) fees.
- Mass Arbitration Shakedown, Coercing Unjustified Settlements: available at https://instituteforlegalreform.com/research/mass-arbitration-shakedown-coercing-unjustified-settlements/

Defenses to Mass Arbitration:

- Updated Notice and Cure Provision:
  - Add language to account agreement that states that if either side has a dispute, that one party will contact the other about the dispute, in writing, signed by the party
    - Prevents mass intakes where people do not even realize they were signed up as claimants;
  - Add language that says that before either side can resort to litigation, that the parties ***must speak***, in person or on the phone;
- Update Delegation Clause
  - Everyone wants to get to arbitration, so FIs typically delegate ever decision to arbitrator;
  - That's a mistake. Reserve whether the parties complied with notice and cure to the Courts, so that if you get a demand for 4,600 claimants, you can decide once, for a $250 filing fee.

Class Action Litigation Continues

- Still many cases involving retry NSF fees
- Still many cases involving OD fees authorized into a positive balance.
- New Theories:
  - Return-Check Deposit Charge;
  - Regulation E claims;
  - Account-Verification Theory

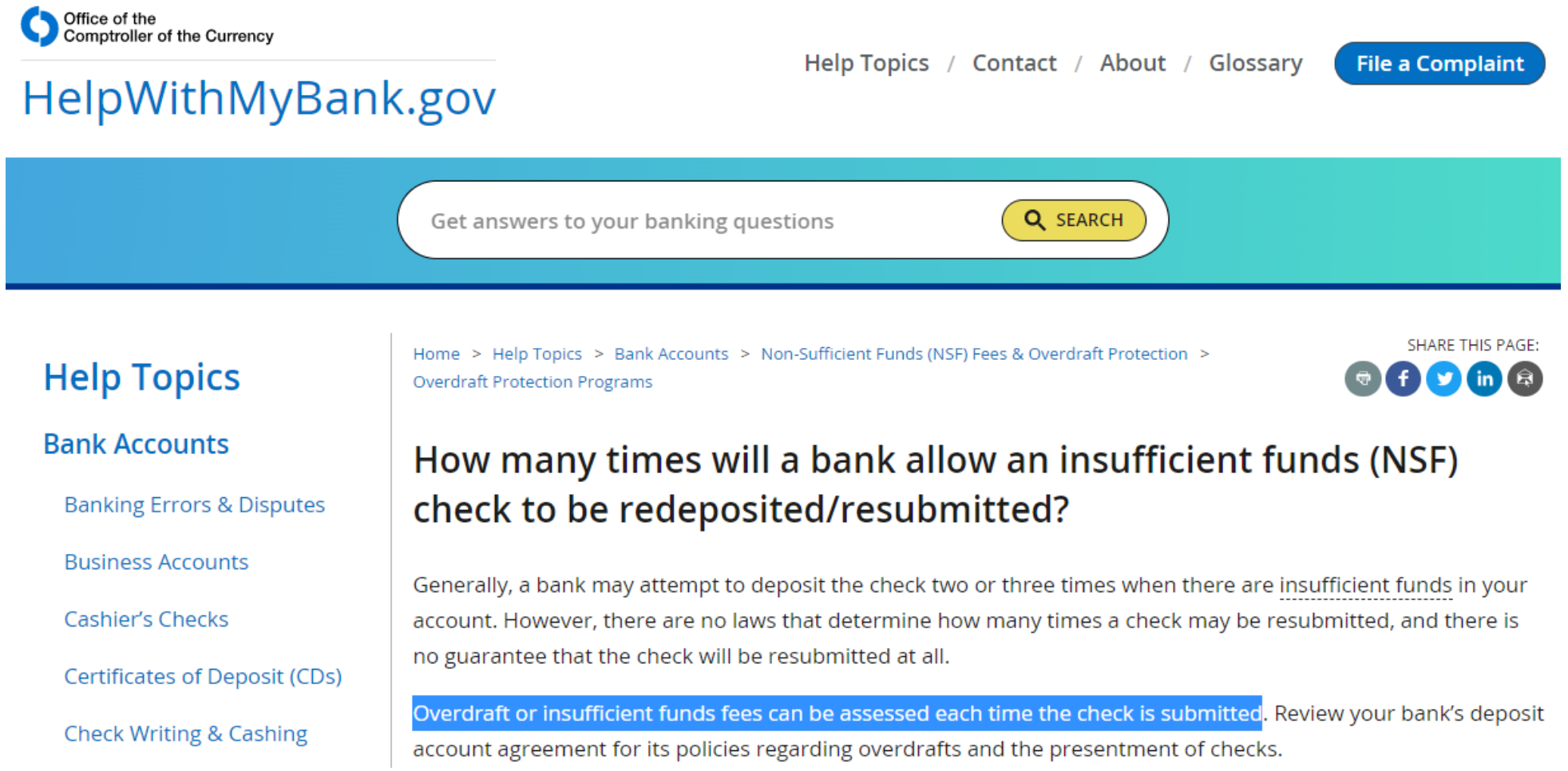
Context for Fees

- Every fee collected reduces interest rates on loans;
- Every fee collected allows for higher interest rates on savings accounts;
- Every fee collected allows for lower monthly minimum balance requirements;
- Every fee collected allows for lower monthly maintenance fees;
- Fees deter account misuse;
- Absent a second NSF fee for a represented payment, there is no incentive for a member to put money back into the account to ensure the merchant gets paid;
- Fees and disclosures are already heavily regulated at the state and federal level—don't need a class action lawyer to dictate policy;
- ROAD TO HELL: Banking Oases because $ must come from somewhere.

Returned Deposited Item Fees

- Basic premise is that it is unlawful to charge a member a fee if a check the member deposits bounces;
  - CFPB has suggested it does not like this practice. CFPB Bulletin 2022-06: Unfair Returned Deposited Item Fee Assessment Practices, 87 FR 66940 (2022).
- Of course, litigation ensued. *See* King v. Navy Federal Credit Union, -- F. Supp. 3d ---, 2024 WL 441131 (C.D. Cal. 2024)
  - Court granted Motion to Dismiss.
    - Fully disclosed so no contract breach;
    - UCL claims preempted by FCUA and TISA
    - No fraud claim because no misrepresentation.

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



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).

CFPB Rulemaking Relevant to 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***." 82 Fed. Reg. 54472, 54720 (2017)

- "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.

CFPB Rule Making re Re-Presentment and Payday Loans (With a Splash of the FRB)

- "[T]he average return rate for debit transactions in the ACH network across all industries was just 1.36 percent." 82 Fed. Reg. 54,472, 54,725 (Nov. 17, 2017).
  - In other words, only 1.36 percent of debit transactions have the potential to be re-presented.
  - The CFPB indicated in most industries, there are not "high rates of re-presentment," and the 1.36 percent is "more likely to simply constitute the typical rejection rate for initial presentments." *Id*. at 54,741.
- Relatedly, the Federal Reserve has examined similar issues, and in two pairs of proposed and final staff interpretations issued between 2001 and 2006, concluded that the ***merchant*** should generally be responsible for notifying the consumer if the merchant planned to electronically re-present a consumer's returned check

Regulatory View (FDIC)

- As recently as December 2021, 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-Presentment

- **Re-presentment 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.
- Disclosure and fee practices for re-presentments may result in heightened risk of violations of Section 5 of the FTC Act, which covers both business and consumer accounts. Re-presentment 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***.

Minn. Bankers Ass'n v. FDIC, (D. Minn.)

- MBA sued FDIC for violating APA in issuing FIL guidance and enforcing it against banks regarding re-presentment NSF fees.
  - FDIC Statements in Response:
    - FIL 32 "does not ban this practice, it does not create new obligations or independent legal consequences, and it does not serve as a basis for future enforcement actions."
    - "The FDIC does not hold out FILs as binding rules, but instead issues them as guidance to its regulated banks; there are over 700 FILs on the agency's website dating back to 1995."
    - "Nothing in the guidance requires banks to discontinue assessing multiple NSF fees; rather, the clear intent of the FDIC's guidance is to advise financial institutions about the potential risks associated with assessing these fees. In other words, FIL 32 is a statement of policy that does not declare a particular practice risky, unfair, or deceptive. It simply alerts the banking industry of risks associated with a particular practice."
    - "In short, FIL 32 does not impose rights or obligations, does not give rise to legal consequences, and was not intended as a binding legislative rule. It is a general statement of policy."
    - "FIL 32 does not declare specific conduct unfair or deceptive as Plaintiffs allege.
    - The guidance … does not ban this practice, it does not create new obligations or independent legal consequences, and it does not serve as a basis for future enforcement actions."
    - "Nothing in the guidance requires banks to discontinue assessing multiple NSF fees; rather, the clear intent of the FDIC's guidance is to advise financial institutions about the potential risks associated with assessing these fees. In other words, FIL 32 is a statement of policy that does not declare a particular practice risky, unfair, or deceptive. It simply alerts the banking industry of risks associated with a particular practice."
    - "In short, FIL 32 does not impose rights or obligations, does not give rise to legal consequences, and was not intended as a binding legislative rule. It is a general statement of policy."

FDIC Wins Dismissal, 2024 WL 1521418 (D. Minn.)

- "As discussed above, there are no legal consequences that flow from FIL 32—the FDIC will not institute any enforcement actions based on FIL 32, but rather will take action for violations of an institution's statutory obligations."
- "Nor have Plaintiffs demonstrated that the FDIC applies FIL 32 in a way to indicate that it is binding. FIL 32 describes certain conduct that could, depending on the circumstances, violate the FTCA."
- "FIL 32 ***does not state that charging multiple re-presentment fees for the same transaction will violate the FTCA, but rather that doing so and failing to adequately disclose the practice*** may be a violation of the statute."
- "FIL 32 is not a final action to which the APA applies. Plaintiffs have not established that their alleged injury will be redressed by the relief they request, and they therefore lack standing."

Is Disclosure Enough?

- CFPB Suggests Not (Informally), Supervisory Highlights Junk Fees, Update Special Edition, Issue 31, Fall 2023. https://files.consumerfinance.gov/f/documents/cfpb_supervisory_highlights_junk_fees-update-special-ed_2023-09.pdf
  - "These injuries were not reasonably avoidable by consumers, regardless of disclosures in account-opening documents, because consumers did not have a reasonable opportunity to prevent another fee after the first failed presentment attempt. **And the injuries were not outweighed by countervailing benefits to consumers or competition.**" *Id.* at 5
  - Compare ***"[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. 82 Fed Reg. 54472, 54752-53 (2017)
- CLRA Claim – Violate the CLRA if inserting unconscionable contract term into agreement (and enforce it).

Overdraft Fees—What Do the Data Show?

- Overdraft fees get a bad rap from the Biden administration and similar state regulators.
- As shown below, capping or limiting OD fees harms low-income consumers;
- Limiting OD options and revenue will create bad behavior
  - More overdrawn accounts, will lead to more returned payments, and (where applicable) more closed accounts;
  - Limiting income streams will cause increase in monthly fees and minimum balances;
  - Competing against large banks with different income streams will create banking deserts.

OD Fees -- Federal Reserve Bank of NY Provides Context

- 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 July 2023

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
- Regions Bank settled with CFPB for $141 million
- “Surprise OD fees”
  - Only one surprised is the CU;
  - Trying to use a tool designed to help members avoid OD fees as a sword to allow overspending without consequence.

APSN Charges—Solution is Worse than the Problem (More Customer Fees)

- Theory is that OD fees should be determined at authorization
  - Restaurant example;
  - Gas station example;
  - Contracts address fees as assed at payment, not authorization;
  - Theory conflicts with funds-availability and posting order provisions
  - Would cause consumers ***more fees*** (but allow for fraud under Reg CC)
  - FRB, when promulgating regulations on overdraft programs, explained how debit card transactions actually work and rejected this very theory:
    - "Several industry commenters stated that the rule and model language should focus on the 'authorization' of ATM and one-time debit card transactions, rather than 'payment' of such transactions. The final rule generally retains the language regarding 'payment' of ATM and one-time debit card transactions as proposed. While an institution decides whether or not to authorize an overdraft, fees are typically charged for the institution's payment of the transaction. … Moreover, some transactions that are authorized into overdraft settle into good funds and do not result in overdraft fees. Electronic Funds Transfers, 74 Fed. Reg. 59033, 59041 (2009) (emphasis added).
    - This is because, among other reasons, "***a majority of debit card transactions that are authorized into overdraft later settle into good funds***." *Id*. at 59039.

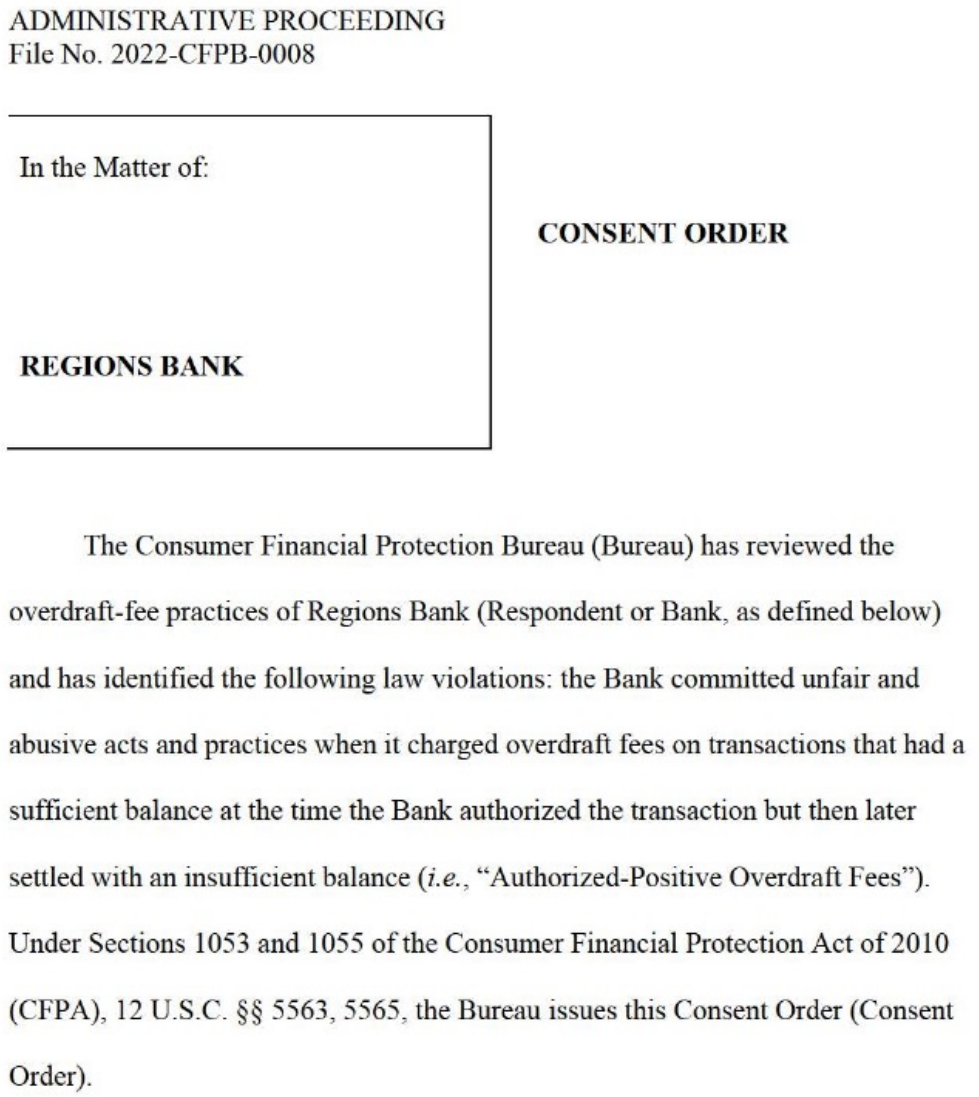
CFPB 2017 View re Authorized Positive Payments …

"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:

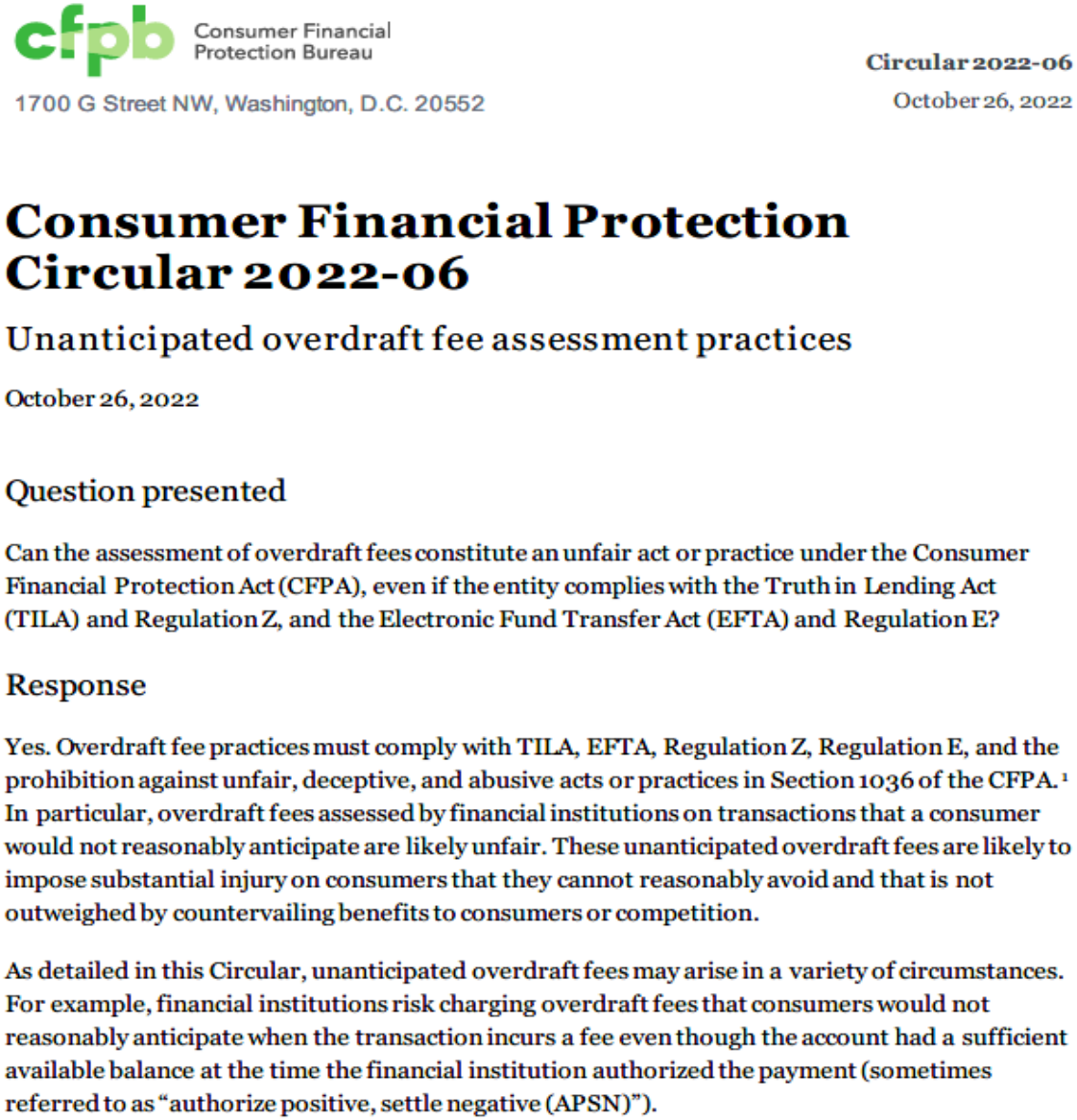
REGIONS BANK

CONSENT ORDER

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 APSN Guidance

- "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."



cfpb Consumer Financial Protection Bureau

1700 G Street NW, Washington, D.C. 20552

Circular 2022-06

October 26, 2022

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)").

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

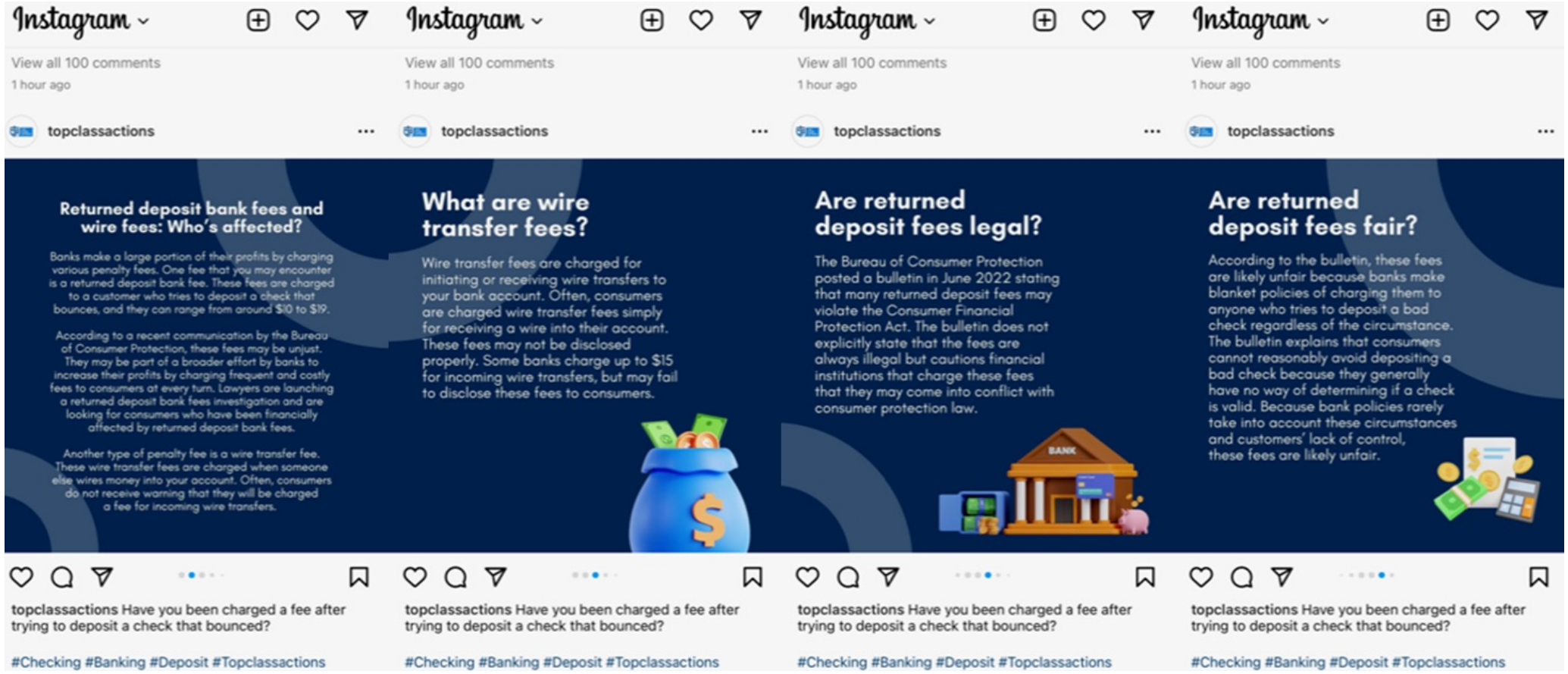
Account Verification OD Fee Theory Cont'd

- 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:

What's Next Continued (returned deposit item & wire transfer fees….)



Reg E and Related Claims

- EFTA/Reg E Claims:
  - 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).

Reg E Denial Claims

- Plaintiffs are demanding not just an explanation of findings, but a “substantive” explanation of not just the findings, but ***how*** you came to those conclusions
  - Regulation does not require that. 12 CFR 1005.11(d)(1).
  - *Cf* 12 U.S.C. § 5533(b)(2) (Dodd-Frank requires FIs to provide consumers some information but there is no obligation to disclose fraud-investigation methods).
  - *Compare* TILA, passed at the same time as part of the Consumer Credit Protection Act:
    - TILA requires the financial institution to provide an "explanation that sets forth the ***reasons*** for the creditor's belief that the billing error alleged by the consumer is incorrect in whole or in part." 12 CFR §1026.13(0(1) (emphasis added).
    - *Vs.* Regulation E: requiring only "a written explanation of the institution's findings." 12 CFR 1005.11(d) (emphasis

Silver Lining re Reg E Denial Claims

- EFTA liability cap of $500K
- How would you ever certify a damages class action based on whether someone was injured as a result of an inadequate denial?
  - Fundamentally individual;
    - “[N]umerous courts have held that [EFTA] class actions cannot be maintained for actual damages" for such claims.” Robinson v. OnStar, LLC, 2019 WL 13108704, *12 (S.D. Cal. 2019).
- Issue class?
- Bigger Risk: Regulatory Scrutiny and Restitution

Reg E “Burden of Proof” Claims

- Section 1693g(b) of EFTA provides:
  - “In ***any action*** which involves a consumer’s liability for an unauthorized electronic fund transfer, the burden of proof is upon the financial institution to show that the electronic fund transfer was authorized ….”
  - Ps argue that any denial shifts the burden to Ps to prove unauthorized, and thus EFTA Violation
  - But that statute references a Court “action,” not a denial.
  - The EFTA allows an "action for damages,"15 U.S.C. § 1693m(a), and specifies that "any action ... may be brought in any United States district court." *Id*. § 1693m(g) (emphases added).
  - An "action" in this context is not an investigation into an error; Section 1693g(b) merely "discusses a financial institution's burden of proof in court proceedings and, therefore, does not give rise to a claim for relief under the EFTA." *Cifaldo v. BNY Mellon Inv. Servicing Tr. Co*., 2017 WL 2259980, *5 (D. Nev. 2017).

Reg E Burden of Proof Cont'd

- Reg E never mentions BOP
- Would mean that CU could never deny a claim;
- That cannot be the law.
- *But see Sparkman v. Comerica Bank,* 2023 WL 5020269 (N.D. Cal. 2023)
  - Allowed claims to proceed based on BOP theory holding that burden reversal meant inadequate investigation.
  - Denial letter in that case:
    - Did not offer any findings and instead stated that the bank "could not confirm" whether fraud occurred; and
    - Did not identify any records the defendant reviewed.
  - Still, wrongly decided.

More Reg E? Sort of.

- Reg E bars waiver of EFTA rights in Contract and “Zero Liability” provisions are breached if there is liability.
- Some Ps argue that contract provisions that reserve the right to determine whether a transaction was authorized waive Reg E’s protections because it allows the CU to shift the burden to consumers and is contrary to “zero liability.”
  - *See Sparkman v. Comerica Bank*, 2023 WL 8852487 (N.D. Cal. 2023) ("Sparkman II") (denying MTD, but primarily on standing).
- Carefully review the contract language to ensure that contract states that contract rights are “in addition to” other rights.
- Not a breach to determine transactions are authorized.

Questions?

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