

Class Action Litigation Risks and Compliance Updates

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Class Action Litigation Risks



- Class action attorneys continue targeting FIs –
 - Overdraft/NSF fees, Telephone Consumer Protection Act (TCPA), call recording, accurate credit reporting, debt collection
 - Unfortunately, some of these should be very familiar to CUs
 - We will focus on newer trends we are seeing in class action litigation

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Trends in class action litigation



- Overdraft class actions focused just on the content of Regulation E opt-in
- Military Lending Act (MLA)
- Guaranteed Asset Protection (GAP) waiver refunds
- Deferred Action for Childhood Arrivals (DACA)

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Overdraft Opt-In Forms



- Regulation E Section 1005.17 requires opt-in for payment of overdrafts resulting from ATM and one-time debit card transactions
 - Can't charge overdraft fee if consumer didn't opt in
 - Opt-in form "shall be substantially similar to Model Form A-9"
 - The A-9 form states: "An overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway."

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Overdraft Opt-In Forms (cont.)



- Class action attorneys targeting FIs that use the "enough money" language in the A-9 but use "available balance" to determine whether an overdraft fee is charged
 - Allege Regulation E violations – failure to accurately and clearly disclose overdraft practices
 - Also include "UDAAP" allegations – California Unfair Competition Law
 - These allegations made even though the FI's account agreement/overdraft disclosures clearly disclose "available balance" significance

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Overdraft Opt-In Forms (cont.)



- Insurance coverage issues
 - Consumer Legislation Endorsement under Bond
- Potential defenses
 - Reliance on “model” form – FIs arguing that they are using a “safe harbor” form and should not be liable
 - “Standing” – technical argument as to stricter federal court “injury” requirement

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MLA Litigation



- MLA background – applies to consumer loans made to a “covered borrower”
 - Imposes disclosure requirement
 - Prohibits certain types of provisions (e.g., arbitration provision)
 - Strict penalties for violations, including loan being void
 - Exempts purchase transactions
 - Problematic 2017 Department of Defense (DOD) interpretive rule indicated that a purchase transaction that also finances GAP or credit insurance is not considered eligible for this exemption

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MLA Litigation (cont.)



- After significant pushback from auto dealer lobby and lenders, the DOD withdrew its interpretive rule on GAP
 - Class action attorneys still have pursued claims involving purchase transactions that financed GAP, even after the DOD withdrew its rule
 - Favorable court decisions for lenders, but the class action attorneys are appealing
 - CFPB and DOD filed amicus brief on behalf of the plaintiffs (supporting the class action)

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GAP Waiver Refunds Litigation



- Increasing number of lawsuits targeting FIs that fail to refund “unearned GAP fees” when borrowers pay off indirect auto loan early – increasing number of these lawsuits being filed by some of the prominent FI class action lawyers
 - Language of GAP Waiver Addendum requires borrower to “contact the Dealer/Creditor” to obtain refund
 - Increasing number of lawsuits

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GAP Waiver Refunds Litigation (cont.)



- Lawsuits allege:
 - Breach of contract and covenant of good faith and fair dealing
 - Unjust enrichment
 - In California, include violations of Unfair Competition Law and Consumer Legal Remedies Act

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GAP Waiver Refunds Litigation (cont.)



- Some states require creditor to issue refund automatically if early payoff
 - Area of uncertainty in states where statute does not require automatic refund
 - California is one of those states, a lender isn't required to automatically refund upon early payoff – as a result, claims based on breach of contract, UDAAP allegations, rather than statutory violation
 - Wells Fargo settlement included California consumers but significantly less recovery for those consumers as compared to states where statute requires refunds

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DACA Litigation



- Lawsuits being filed on behalf of consumers who are being denied loans based on “alienage”
 - Allege violations of federal and California civil rights laws
 - 42 USC 1981: “All persons within...the United States...have the same rights...to make and enforce contracts”
 - Cal. Civ. Code 51: ““All persons within...this state...no matter what their...immigration status...are entitled to...full and equal privileges”

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DACA Litigation (cont.)



- Wells Fargo settled their lawsuit
 - More being filed, including against credit unions
 - Potential exposure in CA – requires review of lending policies, response where automatic denial of access to credit
 - Lawsuits outside California – less success for plaintiff’s lawyers

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Arbitration Agreements as Risk Mitigation Tool

- Implementing an arbitration agreement that includes a class action waiver can provide significant protection against class action litigation
 - Require consistency with state law – in California, per the California Supreme Court’s decision in *McGill v. Citibank*, even if an arbitration agreement bars a class action, “public injunctive relief” must remain available
 - More recent Ninth Circuit decisions limit the scope of the *McGill* rule – area to monitor

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Arbitration Agreements as Risk Mitigation Tool (cont.)

- Arbitration agreements that are entered into/provided to consumers electronically
 - Increasingly being challenged in litigation
 - Courts expect clear, prominent disclosure that sufficiently puts consumer on notice of the arbitration agreement

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Compliance Updates



- Regulators focusing on overdraft fees and so-called “junk fees”
 - CFPB study of overdraft fees
 - Focus on banks that heavily rely on “exploitative junk fees”
 - Examiners to prioritize exams of banks that are heavily reliant on overdraft fees
 - CFPB to take action against FIs whose overdraft practices violate law
 - CFPB also considering additional policy guidance outlining “unfair practices”

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Compliance Updates (cont.)



- Office of the Comptroller of the Currency (OCC) focus on overdraft program reform
 - Remarks by OCC Acting Comptroller – regulators’ “goal should be to improve people’s financial health”
 - According to the OCC, overdraft reform can help achieve that goal
 - Not charging fees on re-presented item, or for multiple transactions in a single day; providing a grace period before charging an overdraft fee; collecting overdraft fees from a consumer’s next deposit only after other items have been posted or cleared

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Compliance Updates (cont.)



- CFPB initiative on “junk fees” – seeking public input on fees associated with their bank, credit union, prepaid or credit card account, mortgage loan, or payment transfers:
 - Fees that seemed too high for the purported service
 - Unexpected fees for a product or service
 - Fees for things that people believed were covered by the baseline price of a product or service
 - Fees where it was unclear why they were charged

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Compliance Updates (cont.)



- Re-opening of closed accounts
 - During the pandemic, a number of clients wanted to know options when account that has been closed with negative balance receives incoming deposits (pandemic relief)
 - This practice was involved in a 2019 CFPB consent order with USAA Federal Savings Bank
 - Resulted in a settlement where the bank paid \$12 million restitution and a \$3.5 million penalty
 - More recently, there has been class action litigation involving this area

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Compliance Updates (cont.)



- LIBOR transition
 - FIs have used LIBOR as a common benchmark rate for variety of adjustable rate loans and other financial products
 - On June 30, 2023, the last tenors of USD LIBOR are expected to end
 - FIs transitioning away from LIBOR index, communicating with borrowers

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Compliance Updates (cont.)




- LIBOR transition
 - CFPB final rule – generally takes effect April 1, 2022
 - Closed-end loans – SOFR-based spread-adjusted indices recommended by the Alternative Reference Rates Committee (ARRC) for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index
 - HELOCs and credit card accounts also address replacement of the 1-month, 3-month, or 6-month USD LIBOR index with SOFR-based spread-adjusted indices recommended by the ARRC

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Thank you!


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