

CLASS ACTION AND REGULATORY UPDATES


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Class Action and Regulatory Update

- Unfortunately, the class action attorneys continue to come up with new types of lawsuits against financial institutions (FIs)
 - Overdraft and NSF fees class actions still remain active
 - More recently, seeing increase in lawsuits related to P2P services, convenience (“pay-to-pay”) fees, “wiretapping”, GAP contracts (to name a few)



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Class Action and Regulatory Update (cont.)

- Also seeing regulators begin to target some of the same practices as the class action attorneys
 - For example, the CFPB focusing on:
 - Overdraft “authorize positive, settle negative (APSN)” fees
 - GAP “unearned fees” refunds



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Class Action Litigation Risks

- Potential significant liability – damages, refunds of fees, class attorneys' fees
- Reputation risk
- Drain on resources
- Uncertainty as to insurance coverage



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Overdraft Fees Class Actions

- Item posting order (resequencing transactions in high-to-low dollar order) – resulted in more overdrafts/fees
 - Wells Fargo lost decision in 2010 – \$203 million
 - Attorney Richard McCune was involved, and continues to actively pursue different types of overdraft/NSF fees class actions against FIs
 - Most FIs no longer post in high-to-low dollar order, but also important to ensure that disclosures accurately explain item posting practices



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Overdraft Fees Class Actions (cont.)

- Actual vs. available balance
 - Most FIs charge overdraft fees if the account's available balance (as opposed to ledger or actual balance) is insufficient to pay a transaction, but it is paid anyway
 - Class action attorneys (McCune one of the first) target FI disclosures that do not specifically disclose details regarding use of available balance



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Overdraft Fees Class Actions (cont.)

- Available balance disclosure on overdraft opt-in form under Regulation E
 - Regulation E prohibits charging overdraft fees on ATM and "everyday" debit card transactions unless consumer opts-in after providing notice "substantially similar" to Model Form A-9
 - Class action attorneys (Richard McCune) challenging use of opt-in form if it doesn't disclose that overdraft fees result from payment of transactions when the available balance is insufficient



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Overdraft Fees Class Actions (cont.)

- “Authorize positive, settle negative” (APSN) class actions
 - FI charges overdraft fee for transactions involving merchant authorization hold – sufficient available balance at time of authorization, but not when the transaction posts, resulting in a fee
 - Target FI disclosures that do not specifically state overdraft fees are based on available balance at the time of posting – revising disclosures to address this is the recommendation (but see recent regulatory focus discussion later)
 - Attorney Jeffrey Kaliel files a lot of these lawsuits, although there are a number of copycat firms



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Overdraft Fees Class Actions (cont.)

- APSN class actions – target failure to disclose practice, not the practice itself
 - However, the FDIC and Federal Reserve Board have taken the position for years that APSN is a UDAP violation, even if the practice is disclosed
 - CFPB’s past (informal) interpretation was that APSN only violates UDAAP if not clearly disclosed (similar to what class action attorneys have asserted)



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Overdraft Fees Class Actions (cont.)

- Change of CFPB position in late 2022
 - Enforcement actions against Regions Bank and Wells Fargo Bank related to APSN as a practice violating UDAAP
 - Both banks disclosed APSN
 - CFPB Circular 2022-06 related to “unanticipated” overdraft fees – “overdraft fees assessed by financial institutions on transactions that a consumer would not reasonably anticipate are likely unfair.”
 - Overdraft fees incurred in APSN situation provided as example of UDAAP violation



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Overdraft Fees Class Actions (cont.)

- NCUA 2023 Supervisory Priorities
 - Include Consumer Financial Protection – overdraft programs, Fair Lending, Truth in Lending Act, and Fair Credit Reporting Act
 - Overdraft programs – “In 2023, examiners will expand the review of credit unions’ overdraft programs, including website advertising, balance calculation methods, and settlement processes. The NCUA will also evaluate... potential consumer harm from unanticipated overdraft fees.”



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Overdraft Fees Class Actions (cont.)

- “Futile” overdraft transfers class actions
 - Overdraft transfer fee charged in addition to overdraft fee for going negative on checking account
 - Insufficient funds to cover from overdraft transfer account (e.g., savings), but still transferred subject to an overdraft transfer fee, and the remaining amount of an overdraft covered by taking checking account negative, resulting in separate overdraft fee
 - These lawsuits are rare, most FIs do not charge both for same overdraft – ideally, avoid charging in this situation; if can’t change practice, it should be disclosed



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Overdraft Fees Class Actions (cont.)

- NSF fees on represented items class actions
 - Insufficient available balance for a merchant transaction, which is returned unpaid due to insufficient funds and NSF fee charged
 - Merchant resubmits the same transaction and available balance is still insufficient, resulting in additional NSF fee on representation
 - Most FIs charge fees on represented items – practice should be disclosed
 - FDIC Supervisory Guidance on Multiple Re-Presentation NSF Fees – UDAP concern where “disclosures... did not fully or clearly describe”



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P2P Services Class Actions

- A lot of regulatory and litigation activity arising from consumers suffering fraud losses through P2P services
 - As a starting point, consumer transactions through P2P likely an “electronic fund transfer” (EFT) under the federal Electronic Fund Transfer Act
 - CFPB FAQs specify that unauthorized EFT through a P2P service is subject to Regulation E limits on consumer liability
 - FI responsible for complying with Regulation E error resolution rules if it has an agreement with the P2P provider (e.g., FI has contract with Zelle)



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P2P Services Class Actions (cont.)

- More recently, seeing class actions targeting FIs where the EFT is not considered “unauthorized” – Zelle transactions authorized by consumer who was victim of fraud
 - Class actions target FIs who do not reimburse consumers when the transaction is authorized – allege unfair practices, deception as to safety of service
 - Pressure on CFPB to expand Regulation E protections through rules or guidance to protect consumers in this situation



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Convenience Fees Class Actions

- Lawsuits challenging the charging of “convenience fees” for certain loan payments (e.g., telephone or online payments)
 - Allege charging these fees violates the borrower’s contract with the lender
 - CFPB advisory opinion under Fair Debt Collection Practices Act (FDCPA) – fees cannot be charged unless stated in loan agreement or permissible under applicable law



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Convenience Fees Class Actions (cont.)

- The federal FDCPA doesn’t apply to creditors collecting their own debt
 - But many states have their own debt collection statutes
 - The California Rosenthal Act applies to creditors and applies many of the federal FDCPA’s requirements applicable to creditors



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Wiretapping Class Actions

- Allege that tracking of consumers' online activities are in violation of state wiretapping laws
 - The California Invasion of Privacy Act prohibits anyone reading, or learning the contents or meaning of any message, report, or communication without the consent of all parties to the communication
 - Recent case law related to "session replay" software used to monitor a website visitor's activities on and interactions with the website has encouraged class action attorneys



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Wiretapping Class Actions (cont.)

- Class action attorneys targeting the chat services on credit union websites, which are typically offered through a third-party vendor
 - Lack of prior consent to tracking of online activities
 - Demand letters being sent prior to the filing of lawsuits
 - Should ensure that online tracking is adequately disclosed and consented to



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Video Privacy Protection Act Class Actions

- Same law firm pursuing these claims
- The Video Privacy Protection Act prohibits a video tape service provider knowingly disclosing “personally identifiable information concerning any consumer”
 - Personally identifiable information includes information identifying consumer as having requested or obtained specific video materials from the video tape service provider
 - New lawsuits target business that track the videos that visitors to their website watch and share with Google and Facebook



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GAP Contract Refund Class Actions

- Certain states by law require refund of “unearned” GAP fees (until recently, California did not require a refund)
 - Numerous class actions against FIs on behalf of consumers in those states, but some also included consumers in non-refund states
 - Wells Fargo settled nationwide class action, but consumers in states like California received minimal amounts when compared to consumers in states requiring refund by law



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GAP Contract Refund Class Actions (cont.)

- CFPB focus on GAP refunds
 - CFPB guidance in Spring 2022 and Fall 2022 Supervisory Highlights
 - Failure to ensure consumers received refunds for unearned fees related to add-on products (e.g., GAP) was an “unfair” practice
 - CFPB Consent Order with Wells Fargo
 - Failure to ensure that unearned GAP fees were refunded to all borrowers who paid off their loans early was an “unfair” practice
 - The CFPB also required the Bank to make full refunds to class members who filed a claim in its GAP refund class action



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California Assembly Bill (AB) 2311

- Amends the Rees-Levering Motor Vehicle Sales Finance Act
 - New disclosure requirements related to GAP waivers
 - Caps on cost of GAP waiver
 - Requires refund of unearned GAP waiver fees upon triggering event
 - Penalties for violating refund obligation



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California AB 2311 (cont.)

- Some of the questions we are being asked:
 - Does this apply retroactively?
 - Does this cover other “ancillary products”?
 - Does this apply to direct loans?
 - Does our FI have the responsibility to make a refund if the GAP administrator or dealer don’t refund a borrower?



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California Senate Bill (SB) 1311

- This bill added a few different protections for service members, but the key provision we are getting asked about relates to the financing of “ancillary products” in connection with a motor vehicle loan
 - A security interest in a motor vehicle is void if it would cause a loan to a covered service member in the course of purchasing the vehicle to be exempt from the federal Military Lending Act and the loan also funds the purchase of a credit insurance product or credit-related ancillary product



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Arbitration Agreement Updates

- Arbitration agreement including a class action waiver remains the best defense against a class action
 - But there are some recent issues to be mindful of
 - Must be sufficiently fair to consumer to be enforceable in California
 - Opt-out right
 - Costs of arbitration
 - Availability of all remedies



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Arbitration Agreement Updates (cont.)

- *Burghardt v. Golden 1 Credit Union* – California Court of Appeals held that an arbitration agreement cannot be added to an existing agreement unless the original contract expressly contemplated the future addition of an arbitration agreement
 - Flawed decision that is inconsistent with U.S. Supreme Court precedent preventing arbitration agreements from being singled out for disfavored treatment compared to other contracts.
 - But the U.S. Supreme Court denied Golden 1's petition for review



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Arbitration Agreement Updates (cont.)

- Electronic notification of changes adding arbitration agreement
 - Must be sufficiently clear and prominent to put consumer on notice of the changes



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Arbitration Agreement Updates (cont.)

- Individual arbitration of claims
 - Consumer plaintiffs' attorneys taking advantage of favorable arbitration agreements to pursue claims
 - Require the business to advance costs, review of arbitration agreement by AAA, attorneys' fees recovery if consumer prevails
 - Frequent claims in indirect auto loan context under the retail installment sales contract arbitration provision
 - Some of the overdraft class action attorneys are also willing to arbitrate individually – much less liability than in a class action, but still expensive to resolve individually



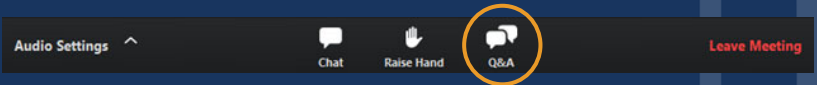
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QUESTIONS?

IN-PERSON ATTENDEES:
Please raise your hand if you have a question;
We will pass a microphone to you.


VIRTUAL ATTENDEES:
Please click the Q&A button on the bottom of your Zoom window to open the Q&A window;
Enter your question into the Q&A box, then click Send.




The screenshot shows the Zoom meeting control bar. From left to right, it includes: 'Audio Settings' with an upward arrow, 'Chat' with a speech bubble icon, 'Raise Hand' with a hand icon, 'Q&A' with a speech bubble icon (circled in orange), and 'Leave Meeting' in red text. A small '31' is visible in the bottom right corner of the slide.


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THANK YOU!

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