



REGULATORY AND LITIGATION UPDATE

February 15, 2024 | Raza Ali & Alex Wade

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REGULATORY AND LITIGATION UPDATE

- The CFPB had a busy 2023 (and 2024 so far)
 - “Junk” fees initiative
 - Fair Lending
 - Enforcement actions
 - Pending rules
- Class action litigation activity
 - Overdraft and NSF fees class actions
 - Returned deposited items



CFPB “JUNK” FEES INITIATIVE



CFPB TARGETING “JUNK” FEES

- Targeting fees charged by financial institutions (“FIs”) that are
 - Unexpected fees for a product or service
 - Fees that consumers believed were covered by a product or service’s baseline price
 - Fees that seem high for the product or service
 - Fees where it is unclear why they were charged

OVERDRAFT FEES

- Overdraft fees charged on “authorized positive, settled negative” (“APSN”) transactions
 - Fees charged if “available” balance insufficient at time a transaction posts, even if the transaction was authorized with sufficient available funds
 - These fees were initially targeted beginning in Oct. 2022 enforcement actions
 - CFPB then released its Circular 2022-06, “Unanticipated Overdraft Fee Assessment Practices” – APSN fees are “unfair” even if disclosed
 - Focus on those fees continued in 2023, with the CFPB’s March 2023 “Supervisory Highlights Junk Fees Special Edition”



REPRESENTED ITEM FEES

- Represented item fees
 - The CFPB’s March 2023 “Supervisory Highlights Junk Fees Special Edition” also identified these fees being charged as “unfair”
 - If a transaction is returned unpaid due to insufficient available funds, a merchant may resubmit the same transaction at a later time, and if the consumer still has insufficient available funds when the transaction is represented, the consumer may incur additional fee on the represented item



RETURNED DEPOSITED ITEM FEES

- The CFPB's October 2022 Bulletin - Blanket policies of charging RDI fees for all returned transactions irrespective of the circumstances or patterns of behavior on the account are likely unfair under the Consumer Financial Protection Act ("CFPA").
- Bulletin focuses on FI's' policies that broadly impose RDI fees even under circumstances where consumers do not know whether checks will be returned.

RETURNED DEPOSITED ITEM FEE

- The CFPB stated that it is unlikely that FIs will violate the prohibition on unfair practices under the CFPA if the method in which RDI fees are assessed is tailored to only charge consumers who could reasonably avoid the injury, such as repeatedly depositing bad checks from the same originator or depositing unsigned checks.
- The Bulletin does not completely ban the ability to assess RDI fees but does place boundaries and limitations on such assessment – which may be unreasonable and hard to track.

NCUA CHAIRMAN REMARKS (JUNK FEES)



TODD HARPER REMARKS ON JUNK FEES

- Problematic overdraft program fees include:
 - Fees that aren't reasonable and proportional
 - Authorize positive and settle negative fees
 - Multiple representment fees
- Decline of overdraft programs.



NCUA SUPERVISORY HIGHLIGHTS

(OVERDRAFT PROGRAMS)



NCUA SUPERVISORY HIGHLIGHTS: OVERDRAFT PROGRAMS

- Overdraft Fees - In 2024, examiners will continue to address consumer compliance risk and potential consumer harm from unexpected overdraft fees.
- Examiners will also continue an expanded review of credit unions' overdraft programs, including website advertising, balance calculation methods, and settlement processes.



CONVENIENCE FEE UPDATE



DFPI CONSENT ORDER AGAINST CREDOVA FINANCIAL

- On January 9, 2024, the DFPI announces a consent order against Credova Financial regarding its convenience fee practices (also referred to as pay-to-pay fees) .
- The DFPI determined that failing to disclose potential convenience fees **before** consumers entered into the financing contracts was deceptive and therefore violated the California Consumer Financial Protection Law.
- Pursuant to the settlement, Credova was required to pay a \$50,000 penalty and disclose potential third-party convenience fees to consumers in the future.



CONSUMER REQUESTS FOR INFORMATION



CONSUMER “BASIC” REQUESTS FOR INFORMATION

- CFPB issued an advisory opinion on October 11, 2023, providing guidance on Section 1034(c) of the Consumer Financial Protection Act (“CFPA”) and basic information requests about accounts.
- CFPB noted that the practice of charging fees to respond to a consumer’s request for basic information would generally unreasonably impede consumers’ exercise of their rights under section 1034(c), and thus violate the provision.



LITIGATION UPDATE:

OVERDRAFT AND NSF FEES



OVERDRAFT AND NSF FEES CLASS ACTIONS

- Overdraft and NSF fees class actions continue against FIs
 - APSN class actions – target disclosures that do not disclose the FI will charge an overdraft fee based on available balance at the time of posting a transaction, even if the transaction was authorized with sufficient available funds
 - Represented items fees class actions – target disclosures that fail to disclose that fees may be charged if a transaction is represented
 - ATM and one-time debit card transaction overdraft opt-in form – target use of the “model” A-9 form if the FI’s system charges fees based on insufficient available balance (rather than the “actual” or “ledger” balance)
 - The class action attorneys’ focus so far has generally been on whether these practices are disclosed, not targeting as an “unfair” practice the way CFPB is for APSN and represented items



LITIGATION UPDATE: RETURNED DEPOSITED ITEM FEES



RETURNED DEPOSITED ITEM FEE LITIGATION

- Pending Lawsuit
 - We anticipate that class action law firms are going to be very active in this space in the coming year and will be filing more class actions.
 - Class action allegations and the CFPB's October 2022 Bulletin
 - Allegations regarding account agreement and fee schedule



RETURNED DEPOSITED ITEM FEE LITIGATION

- Navy Federal Credit Union Lawsuit
 - Claims Navy Fed unlawfully charged accountholders a \$15 RDI fee
 - Navy Fed’s motion to dismiss was granted with leave to amend on 1/26/2024.
 - The court ruled that Plaintiff ignored that “supervisory guidance,” including guidance issued in CFPB bulletins, “does not have the force and effect of law.”
 - The court also applied the federal preemption argument: “[I]t is well established that state law claims regarding a federal credit union’s failure to disclose certain fee practices or any perceived unfairness in the fee practices themselves are preempted.” *Lambert v. Navy Fed. Credit Union*, No. 1:19-CV-103-LO-MSN, 2019, WL 3843064, at *2 (E.D. Va.) Aug. 14, 2019.



ZELLE CLASS ACTION UPDATE



REG E - ZELLE CLASS ACTION TAKEAWAY

- Bank of America, Wells Fargo, and Navy Federal Credit Union (among others) were all sued by customers and members for violation of the EFTA.
- Recent favorable rulings regarding the EFTA claims.
- Recent rulings in *Natalie Tristan v. Bank of America* issued on June 28, 2023, and October 26, 2023, by Judge Carter in the Central District of California.
- Dismissed EFTA claims.
- However, the plaintiff's breach of the implied covenant of good faith and fair dealing claims survived the motion to dismiss (for a second time). The definition of "unauthorized transaction" was a key issue.



NY ATTORNEY GENERAL LAWSUIT

(DENIED FRAUD CLAIMS)



NY ATTORNEY GENERAL LAWSUIT

- On 1/30/2024, New York Attorney General Letitia James sued Citibank, N.A. for allegedly failing to protect and refusing to reimburse victims of fraud. The Complaint includes robust allegations including:
 - Citi violated NY law when it failed to comply with the EFTA or the UCC in its handling of consumers' notices of fraudulent electronic payment activity.
 - Took issue with the fact that Citi's unauthorized transaction affidavit and related investigations documents did not mention the EFTA/Reg E.
 - Citi treated consumer claims as solely claims for unauthorized Payment Orders governed by the UCC and did not apply the EFTA to its own unauthorized EFTs initiated electronically by scammers.
 - Citi did not provisionally credit consumers' accounts and did not cap consumers' liability for unauthorized EFTs per the EFTA.
 - Citi did not treat intra-bank transfers among accounts that provide funds for fraudulent activity as unauthorized EFTs.

NY ATTORNEY GENERAL LAWSUIT

- Allegations regarding Citi's systems and procedures:
 - Citi did not implement strong online protections to stop unauthorized account takeovers.
 - Citi did not adopt enhanced anti-fraud defenses to prevent scammers from stealing consumers' funds.
 - Citi's systems did not respond effectively to red flags, such as scammers using unrecognized devices, are accessing accounts from new locations, or changing banking passwords or usernames.
 - Citi's systems did not flag and stop efforts to transfer funds from multiple accounts into a single account
 - Citi did not automatically initiate investigations or report fraudulent activity to police or law enforcement authorities when consumers first reported it to Citi.



CFPB RULEMAKING: OVERDRAFT LOANS AND NSF FEES



CFPB RULEMAKING – OVERDRAFT LOANS

- Proposed rule on overdraft loans issued January 2024 – according to CFPB, these products have provided a “loophole” exploited by FIs
 - Would apply just to credit unions and banks over \$10 billion in total assets
 - Traditionally, the Truth in Lending Act (“TILA”) exempted most overdraft loans from loan-related disclosure requirements where overdrafts are paid as a “courtesy” and not subject to a finance charge as defined in Regulation Z
 - The CFPB’s proposed rule would limit regulated FIs to either offering courtesy overdraft services with “breakeven” fees or profitable overdraft loans that meet TILA requirements



CFPB RULEMAKING – OVERDRAFT LOANS

- Proposed rule provides regulated FIs two options
 - Option 1: Courtesy overdraft service with “breakeven” fees
 - FI may determine amount of fee it needs to charge to “break even”; or
 - FI may charge a benchmark fee, which could be as low as \$3
 - Option 2: Overdraft loans complying with TILA
 - Consumer must apply and FI must determine ability to repay
 - Meet TILA disclosure requirements
- Rule has limited application for vast majority of FIs – but indicative of CFPB’s view of overdraft products, and likely to lead to more FIs discontinuing service



CFPB RULEMAKING – INSTANTANEOUS NSF FEES

- Proposed rule issued in January 2024 – would prohibit FIs charging fees, such as nonsufficient funds fees, when consumers initiate payment transactions that are instantaneously declined
 - Proposed rule adds a new Part 1042, to identify certain abusive acts or practices in connection with certain consumer transactions by covered FIs
 - Would apply to all FIs as defined in Regulation E Section 1005.2
 - Identifies charging an NSF fee for an attempt by a consumer to withdraw, debit, pay, or transfer funds from their account that is declined instantaneously or near-instantaneously an “abusive” practice and prohibits charging NSF fee for such a “covered transaction”
- Most FIs do not charge an NSF fee in this circumstance



CFPB RULEMAKING: CREDIT CARD PENALTY FEES



CREDIT CARD PENALTY FEES

- The CFPB proposed significant amendments to Regulation Z's rules on credit card late fees.
- The CFPB proposed to (1) adjust the safe harbor dollar amount for late fees to \$8 and eliminate a higher safe harbor dollar amount for late fees for subsequent violations of the same type; (2) provide that the current provision that provides for annual inflation adjustments for the safe harbor dollar amounts would not apply to the late fee safe harbor amount; and (3) provide that late fee amounts must not exceed 25 percent of the required minimum payment.
- Per the CFPB's Fall Agenda, the credit card penalty fee matter is in the Final Rule Stage.



CFPB GUIDANCE: CROSS-COLLATERALIZATION



CROSS-COLLATERALIZATION

- In its Supervisory Highlights dated July 26, 2023, the CFPB found that servicers were engaging in illegal collection practices after repossession when carrying out the practice of blanket cross-collateralization.
- Cross-collateralization as a practice could potentially be targeted as unfair.



FAIR LENDING UPDATE



FAIR LENDING – DACA CLASS ACTION LITIGATION

- Class action litigation by consumers with Deferred Action for Childhood Arrivals (“DACA”) status continue
 - In 2017, the Mexican American Legal Defense and Educational Fund sued Wells Fargo Bank (“MALDEF”) – ultimately that class action was settled by the Bank for \$19 million
 - These lawsuits typically allege violations of a federal civil rights statute and state civil rights law (in California, under the “Unruh” Civil Rights Act) against applicants with DACA status, who allege they were automatically denied access to loans because of their immigration status
 - One recent lawsuit alleges that the borrower would have qualified under FNMA standards



FAIR LENDING – DACA CLASS ACTION LITIGATION

- MALDEF continues to actively file lawsuits against FIs and investigate claims by DACA recipients
 - Recommend that FIs look at their lending policies, and whether they automatically deny access to credit
 - Particular risk in California, because of Unruh Act generally prohibiting discrimination based on “immigration status”
 - Unruh Act requires a showing of a compelling societal interest to justify the business practice – can be a high bar to meet

REGULATORY GUIDANCE – FAIR LENDING

- CFPB and DOJ recently issued a joint statement regarding the use of immigration status.
- Limit reliance on immigration status to determining **rights or remedies for repayment.**
- Important that policies and procedures are narrowly tailored to address repayment rights when considering immigration status.
- If a discriminatory disparate impact is found, must be prepared to explain the business necessity for such treatment and provide documentation in support of its business necessity analysis.



REGULATORY GUIDANCE – FAIR LENDING

- NCUA Supervisory Highlights (2024) re: Fair Lending - NCUA will review policies and practices for redlining, marketing, and pricing discrimination risk factors (steering).
- Always be mindful of discriminatory disparate impacts on a prohibited basis.



ARBITRATION UPDATES



ARBITRATION AGREEMENT UPDATES

- Arbitration agreements that include class action waivers remain one of the best protections against class actions
 - The arbitration agreements have to meet the requirements of state law
 - Generally, that means meeting “fairness” standards under case law
 - Mutually applicable
 - Availability of remedies that a court could offer
 - Costs of arbitration
 - Ability to opt out
 - Compliance with arbitration forum (AAA or JAMS) rules
 - Compliance with arbitration forum (AAA or JAMS) rules



AAA – ARBITRATION AGREEMENT REGISTRATION

- Space Coast Credit Union lawsuit – motion to compel arbitration denied, arbitration agreement was not registered with AAA.
- AAA Rules: If the business does not register in advance of a dispute being filed with AAA, AAA will review in connection with that dispute and charge a fee (\$300) for an “immediate review” on top of the \$600 for initial review. There’s also a yearly \$600.
- Registering arbitration agreements with AAA.



ARBITRATION AGREEMENT: CHANGE IN TERMS PROCESS

- The delivery of the arbitration agreement is arguably equally as important as the terms of an arbitration agreement.
- More and more plaintiffs are arguing they never received the agreement, or they were not aware of the terms of the agreement as it was not properly delivered.
- Ensure that the change of terms notice specifically calls out the arbitration agreement.

MASS ARBITRATIONS

- Mass arbitrations – consumer attorneys simultaneously file a large number of virtually identical arbitration demands against a business on behalf of consumers (it can be thousands of consumers)
 - This triggers significant arbitration fees/costs for the business
 - Doordash had to pay arbitration fees of \$1,900 for each of over 5,000 individual disputes
 - Uber had approximately \$92 million in arbitration costs
 - Used as a tool by consumer attorneys to leverage large settlements
 - Consumer attorneys advertise to try to get a large number of consumer claimants, often with dubious (if any screening)

MASS ARBITRATIONS

- Mass arbitrations
 - Still relatively rare and implicate larger businesses, which makes it easier for consumer attorneys to find their “clients”
 - Are seeing some businesses amend their arbitration agreements to address mass arbitration risk
 - Live Nation recently lost a decision after the business changed to an arbitration forum for a more streamlined mass arbitration process
 - AAA changed its rules for mass arbitration
 - Lower costs, but still substantial
 - Business can request a Process Arbitrator to address threshold issues before significant per case fees are owed
 - Rapidly evolving area that FIs should continue to monitor

SOLAR LENDING



SOLAR LENDING UPDATES

- Consumer and state attorneys general complaints.
- One attorney general coined the term the “Solar Bubble” likening it to the mortgage loan crisis.
- Concerns with installers.
- Actions based on the lender’s conduct.
- Concerns with aggressive sales tactics and promises regarding tax credits.
- Responding to civil investigative demands and subpoenas and deciding which documents to produce and how to respond is critical.

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