Overdraft / NSF Fee Lawsuits Again
Target Credit Unions

Class action lawsuits against credit unions relating to overdraft and NSF fees have again ramped up. This new round of lawsuits contains slightly different twists that credit unions should be aware of.

Details
Credit unions are being targeted by law firms with class action lawsuits related to overdraft and NSF fees. Recent lawsuits reported by credit unions allege:

• Credit unions improperly charged multiple NSF fees on the same transactions. These transactions were generally electronic payments made by members from their credit union account that were returned unpaid due to insufficient funds triggering an NSF fee. The payees reinitiated / resubmitted the transactions which were returned again due to insufficient funds triggering another NSF fee. Plaintiff attorneys allege the member account agreement allows the credit union to charge only one NSF fee on a transaction.

  For example, a member authorizes a creditor to debit the member’s credit union account for a loan payment. The creditor initiates an ACH debit against the account which the credit union returns unpaid due to insufficient funds and assesses an NSF fee. The creditor reinitiates / resubmits the ACH debit a few days later which the credit union again returns due to insufficient funds and charges another NSF fee. Under NACHA Rules, an Originating Depository Financial Institution (ODFI) can reinitiate / resubmit an ACH debit returned due to NSF or uncollected funds up to two times.

• Credit unions improperly charged overdraft fees on debit card transactions. Plaintiff attorneys acknowledge the process of credit unions placing a preauthorization hold on sufficient available funds for debit card transactions which reduces the available balance. The complaints indicate the funds are “set aside” to cover these specific transactions which is reflected in the available balance. However, transactions may occur after the preauthorization hold that reduces the balance (e.g., a previously written check clears the account) before the final debit card transaction posts to the account. If the available balance is insufficient when the debit card transaction finally posts to the account, an overdraft fee is assessed which plaintiff attorneys allege is improper since the funds were previously set aside to cover the transactions.
Prior overdraft fee lawsuits alleged credit unions were improperly assessing overdraft fees and/or NSF fees based on the “available balance” in the account rather than the “actual balance” / “ledger balance” and that credit unions failed to accurately describe this in agreements – member account agreements and/or Regulation E’s (Reg E) opt-in agreement for ATM and one-time debit card transactions.

Risk Mitigation

Consider these risk mitigation recommendations:

• Review your processes for handling reinitiated / resubmitted incoming electronic debits to member accounts that your credit union previously returned unpaid due to insufficient or uncollected funds resulting in an NSF fee.

If your credit union charges another NSF fee for reinitiated / resubmitted items that are returned unpaid again, review your account agreement to ensure it discloses that NSF fees may be imposed on the same transaction.

• If your credit union assesses overdraft fees based on available balance rather than actual balance / ledger balance, review your account agreement to ensure it contains a description of how certain transactions, such as debit card preauthorization holds and check holds, impact the available balance including examples of each.

For debit card preauthorization holds, ensure the account agreement discloses how subsequent debits to the account (e.g., a check clearing the account) impact the available balance and that an overdraft fee could be assessed when the debit card transaction posts to the account taking it negative.

• If a lawsuit is filed against your credit union, or you receive a demand letter threatening a lawsuit, policyholders should immediately report it to CUNA Mutual Group’s Third Party Litigation team (800.637.2676, Option 2, then Option 1).

Risk Prevention Resources

Access CUNA Mutual Group’s Protection Resource Center at cunamutual.com for exclusive risk and compliance resources to assist with your loss control. The Protection Resource Center requires a User ID and password.

Review this resource to learn more:

• RISK Alert: Credit unions face overdraft fee lawsuits

Access the Protection Resource Center for exclusive resources:

• Loss Prevention Library for white papers & checklists
• Webinars and Education
• RISK Alerts Library

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Interested in learning more about emerging risks?

Contact CUNA Mutual Group’s Risk & Compliance Solutions at 800.637.2676 or by email at riskconsultant@cunamutual.com.