Overdraft / NSF Fee Demand Letters and Lawsuits Continue

Plaintiff attorneys continue to send demand letters and/or file lawsuits against credit unions alleging improper assessment of overdraft and/or NSF fees. Reports of these cases are occurring at a faster rate than the past. Recent trends also show smaller credit unions are being targeted. Plaintiff attorneys pursue potential clients through websites and social media – some websites even identify specific financial institutions. They also search for member account agreements and other docs on CU websites.

Details

Recent demand letters and lawsuits reported-continue to allege improper assessment of overdraft and/or NSF fees. Allegations include:

• Credit unions improperly charged multiple NSF fees on the same transactions. These transactions are primarily electronic payments (ACH debits) submitted to the credit union by the payees’ financial institution (Originating Depository Financial Institution or ODFI) that are returned unpaid by the credit union.

Under NACHA Rules, an ODFI can resubmit an ACH debit returned unpaid due to NSF or uncollected funds up to two times. Resubmitted items returned by credit unions often result in additional NSF fees being assessed. Plaintiff attorneys argue that the member account agreement allows only one NSF fee to be charged whether or not the credit union returns ACH debits resubmitted by ODFIs.

• Credit unions improperly charged overdraft fees on debit card transactions. Plaintiff attorneys claim these overdraft fees are improper since the credit union previously set aside funds when preauthorization holds were placed on the available funds. Plaintiff attorneys often refer to this as “authorize positive, purportedly settle negative transactions” (or APPSN transactions) to reflect the impact of intervening debits posting to the account reducing the available balance so that when the debit card transaction posts the account is taken negative resulting in an overdraft fee.

• Credit unions improperly charged overdraft fees based on the “available” balance rather than the “actual” (or ledger) balance. Plaintiff attorneys claim that basing overdraft fees on the available balance is improper since the actual balance (or ledger) in many cases was sufficient to cover the debits.

Plaintiff attorneys pursue potential clients through websites and social media. By googling “overdraft fees” you’ll find several law firms soliciting clients who have been assessed overdraft fees - some websites even identify specific financial institutions.
It is believed that plaintiff attorneys also search for member account agreements on credit union websites to review the agreements for disclosure language on how and when overdraft and NSF fees are assessed.

**Risk Mitigation Tips**

It is imperative to work with legal counsel and your forms supplier to ensure the member account agreement, other disclosures, and fee schedule clearly disclose how and when overdraft and NSF fees are charged. Consider these risk mitigation recommendations:

- Remove your member account agreement from your public-facing website.
- Include binding arbitration language with a class action waiver to the member account agreement. Such language can be used to prevent these situations from becoming class action lawsuits. Work with legal counsel to develop this language so it does not impair your ability to initiate collection activity of amounts owed to the credit union through the court system.
- If you assess overdraft/NSF fees based on the available balance rather than the actual (ledger) balance, ensure your member account agreement clearly describes the balance calculation method along with examples of transactions that impact the available balance (e.g., check holds and preauthorization holds) and that overdraft/NSF fees are calculated on the available balance.
- If you charge an NSF fee on resubmitted transactions that you previously returned, ensure your member account agreement clearly discloses multiple NSF fees may be charged on the same transactions. When referring to NSF fees in the member account agreement and disclosures for items presented for payment to the credit union, avoid using terms such as NSF fees will be assessed “per item,” “per transaction,” or “for each transaction.” Instead use a more descriptive term such as “per presentment,” “per submission,” “for each presentment,” or “for each time a check, ACH or debit transfer [and any other type of item] is presented or payment is otherwise requested.” The terms may need to be modified depending on your processes and terminology used.
- For debit card preauthorization holds, ensure your member account agreement clearly explains how intervening debit(s) impact the available balance and that an overdraft fee could be assessed when the debit card transaction posts to the account taking it negative.
- Ensure your member account agreement and other disclosures clearly describe the posting order of transactions – both credits and debits. Avoid resequencing of debits from highest dollar to lowest dollar.

Credit unions using the LOANLINER® Membership and Account Agreement may access Account Agreement Updates (User Id and Password required) to learn more about the most recent account agreement updates and options for including provisions aimed at mitigating potential litigation risks. You can also contact LOANLINER Compliance Solutions with questions about these updates by using this online information request form.

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. You can submit claims online or via email at litigation.team@cunamutual.com.