

RISK Alert

ACTIONABLE INSIGHTS FOR BOND POLICYHOLDERS.



Alert Type

Awareness

Watch

Warning

Overdraft / NSF Fee Lawsuits Continue

Several law firms continue to send demand letters threatening a lawsuit and/or file a lawsuit against credit unions alleging members were improperly assessed overdraft and/or NSF fees. These cases surged in 2019 and show no signs of slowing down as plaintiff attorneys continue to aggressively seek potential clients. It is believed plaintiff attorneys continue to troll credit union websites searching for account agreements that do not adequately disclose how and when overdraft and/or NSF fees are assessed.

Details

The recent demand letters and lawsuits from plaintiff attorneys continue to allege credit unions improperly assessed overdraft and/or NSF fees. Recent allegations include:

- Credit unions improperly charged overdraft fees on signature-based 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. This is often referred to as "authorize positive, purportedly settle negative transactions" (or APPSN transactions) which reflects 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.
Note: In describing debit card preauthorization holds, the account agreements fail to disclose the impact an intervening debit (e.g., an ATM withdrawal or check clearing the account) has on the available balance and that an overdraft fee could be assessed when the debit card transaction posts to the account taking it negative.
- 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.

Prior lawsuits alleged credit unions improperly charged overdraft fees based on the "available" balance rather than the "actual" (or ledger) balance. Plaintiff attorneys claimed 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.

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Risk Category: Compliance; Litigation; Legal; Overdrafts; NSF Fees; Demand Letters

States: All

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Facing risk challenges?

[Schedule](#) a free personalized discussion with a Risk Consultant to learn more about managing risk.

Risk Mitigation Tips

It is imperative that you work with legal counsel and your forms supplier to ensure the member account agreement (consumer and business), other disclosures, and fee schedule clearly disclose how and when overdraft and NSF fees are charged. You should consider adopting these risk mitigation tips:

- Ensure the member account agreement discloses the mechanics of a signature-based debit card transaction. When describing debit card preauthorization holds, the account agreement should clearly explain how an intervening debit impacts the available balance and that an overdraft fee could be assessed when the debit card transaction posts to the account taking it negative.
- 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.
- 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.
- Remove your account agreement from your public-facing website.
- Consider including 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. The “class action waiver” should also be added to the governing law section of the member account agreement. Work with legal counsel to develop this language so that it is enforceable and so that it does not impair your ability to initiate collection activity of amounts owed to the credit union through the court system.

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.

Risk Prevention Resources

Access CUNA Mutual Group's [Protection Resource Center](#) at cunamutual.com for exclusive risk resources (User ID and Password required).

- For related RISK Alerts, access the [RISK Alert Library](#) and enter “compliance” in the search feature
- [Overdraft/NSF Fee Litigation Risk Overview](#)



Access the Protection Resource Center for exclusive resources:

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