

## Insights

### **Indiana Financial Institutions Continue to be Targeted in Class Action Overdraft and NSF Lawsuits**

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February 3, 2021

By: Brett J. Ashton, Libby Yin Goodknight, Mark J.R. Merkle, Kay Dee Baird, and Scott S. Morrisson

Over the past two years, no fewer than seventeen Indiana banks and credit unions have been targeted with class action lawsuits based on their overdraft fee practices ("Overdraft Cases"), their non-sufficient funds ("NSF") fee practices ("NSF Cases"), or in many instances, both. While many of these cases are ongoing, some financial institutions have paid substantial amounts to settle the litigation on a classwide basis in order to achieve certainty and avoid the risk of incurring even greater liability in the event of an adverse judgment. Some of these matters have been settled on a pre-suit basis, based on a demand from plaintiffs' counsel and the threat of litigation.

While there is nothing to prevent someone filing a lawsuit, taking simple, proactive steps may help you avoid, or at the very least minimize, the potential for becoming the next financial institution to be targeted with a class action lawsuit challenging your assessment of overdraft fees and/or NSF fees. First, review your deposit account agreements, including all fee disclosures and Regulation E opt-in forms, to ensure they accurately reflect your current practices with respect to overdraft fees and NSF fees.

Pay particular attention to language discussing when an overdraft fee is charged, and whether you are using the customer's actual or available balance to determine and assess fees. Plaintiffs in OD Cases typically assert that the customer should never receive an overdraft fee if their balance (whether that is their available balance or their actual balance - whichever is most advantageous to the particular plaintiff's claim) is positive at the time a debit card transaction is approved. These plaintiffs allege that financial institutions "sequester" funds approved in connection with a debit card transaction from the customer's other account funds, so as to use those purportedly "sequestered" funds to pay the transaction when it is ultimately presented for payment by the merchant. While this is simply not how the debit transaction process works in the real world, plaintiffs are able to survive motions to dismiss such baseless theories given the deferential procedural rules that apply to pleading a complaint. Therefore, adding clear language to your deposit account agreements and related disclosures, describing at which point of the posting process an overdraft fee is triggered and on which balance the institution bases its determination of a negative balance, is critical.

NSF Cases typically assert that the financial institution engages in an improper assessment of NSF fees when it fails to adequately disclose the potential for more than one NSF fee to be assessed on the customer's overall transaction with a merchant, if an ACH item is declined for a negative account balance and then later re-presented

for payment a second time. For example, a plaintiff in one of these NSF Cases alleged as follows:

*"[BANK] promises its customers that if their account balance drops too low to cover a particular "item" or "transaction" such as a check, withdrawal, or electronic transaction, [BANK] will charge the customer a single \$35 Return Items Fee ("NSF Fee") per item. But as Plaintiff and [BANK's] other customers have discovered, [BANK] doesn't abide by this promise. Instead, [BANK] routinely charges its customers multiple NSF Fees for the same item, driving its customers' account balances deeper into negative territory."*

Again, these types of allegations can be overcome with clear language in the deposit account agreements and related disclosures.

Finally, perhaps the best protection against having to defend against Overdraft Cases and NSF Cases is to add arbitration and class action waiver language to your deposit account agreements. While this may not prevent someone from suing your financial institution, it typically does help avoid the claim being converted into a class action, and as a result significantly reduce the exposure to the financial institution.

**Krieg DeVault's financial institutions litigation team** is closely monitoring developments in this area of the law, and can provide assistance with updating your deposit account agreement and disclosures, or if necessary, with defending against overdraft and NSF class action litigation.

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