

ARE FINANCIAL INSTITUTIONS ABOUT TO EXPERIENCE AN UPTICK IN CONSUMER CLASS ACTIONS FOR OVERDRAFT FEES?

Consumer Financial Protection Bureau's New Focus

In December 2021, Consumer Financial Protection Bureau Director Rohit Chopra stated that his agency would crack down on heavy account overdraft fees in consumer banking, citing new research showing what he described as an industry addiction to these fees to make money. In particular, the agency will be paying "close supervisory attention" to banks that have a larger percentage of customers frequently incurring overdraft fees or that charge larger overdraft fees.

Although Chopra acknowledged that financial institutions may need to charge extra to recoup the cost of providing an extra service, he said late fees, overdraft fees, and other add-on charges too often function as penalties rather than as "compensation for a legitimate service."

Will This Scrutiny Encourage Litigation?

Previous Consumer Financial Protection Bureau (CFPB) statements regarding overdraft fees have provided fodder to the plaintiff's bar, and financial institutions should expect similar effects here. The Bureau's aggressive comments during its 2012 inquiry into overdraft-fee policy, for example, continue to be quoted by plaintiffs almost a decade later.

There are no sweeping overdraft laws as some advocates push for, but some banks are moving away from these fees. Capital One and Ally completely got rid of overdraft fees while Chase and Wells Fargo made changes to their overdraft policies to make the terms more lenient. Recently, Bank of America announced it will reduce its overdraft fees from \$35 to \$10.

Of course, Bank of America's update to its overdraft fees comes on the heels of the bank's recent \$75M Overdraft Fees Class Action settlement. That case saw the plaintiff firm earning \$25M in fees. A similar case against TD Bank took \$41.5M to resolve. That type of award and the CFPB's activity will certainly attract more plaintiff firms to these types of actions, perhaps causing an expected resurgence in consumer class actions against banks.



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Some Responses To This Scrutiny By U.S. Banks Have Been:

1. Some have relied on arbitration agreements to reduce the threat of class-action exposure.
2. Some have revised their account agreements and related disclosure materials.
3. Some financial institutions have responded by modifying their overdraft practices by providing a grace period to cure an overdraft before a fee is charged.
4. Some have responded by reducing the overdraft fees, or by eliminating them entirely.

Where Can Insurance Coverage Be Found?

Here, at BRP, we have undertaken a review of various Financial Institution (FI) Policy Forms offered to our Banking clients. Almost all FI Insurance policies will exclude coverage for the disgorgement of “improperly collected” fees or fines. That follows a longstanding understanding that disgorgement is not a Loss. But, while the indemnity portion of such suits would be rarely covered when Defense costs coverage are evaluated, we found that there is a spectrum of offerings:

For Instance:

1. Some carriers completely exclude any coverage for suits stemming from allegations surrounding overdraft and INFs from both the D&O and Professional Liability coverage grants.
2. Some carriers exclude disputes involving fees, but potentially allow defense coverage where an individual director or officer is named.
3. Some carriers further extend coverage to the entity but again specific to defense costs and only for claims against the entity from shareholders.

Given the difference in offerings, it behooves Risk Managers and their brokers to revisit their policy wording to make certain that they have negotiated the broadest coverage obtainable.

If you would like more information, contact our team: ManagementLiability@BaldwinRiskPartners.com



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Joanne brings 30 years of experience in the insurance industry. Joanne acts as a client advisor and advocate on coverage and legal matters arising from complex Management Liability risk assessment and claim. She also provides product thought leadership and risk counsel to internal stakeholders. Joanne is a frequent speaker at industry events where she shares her extensive experience in D&O, Employment Liability, Fiduciary and E&O lines.



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Dennis Gustafson leads the Financial Products Practice for BRP. He has extensive expertise in placing management liability, directors and officers liability, professional liability, lenders liability, and fidelity bond/commercial crime. In addition, he assists clients using his widespread knowledge of the risk exposures and coverage available for cyber liability/privacy for all industries. Dennis maintains AHT's relationships with Bank Director and Corporate Board Member publications and previously with the America's Community Bankers Association