Consumer Finance Monitor (Season 4, Episode 39): Still in the Crosshairs: An Update on Bank Overdraft Practices

Speakers: Alan Kaplinsky, Marty Bryce, Mark Levin and Amy Schwartz

Alan Kaplinsky:

Welcome to the Consumer Finance Monitor Podcast, where we explore important new developments of interest to the Consumer Financial Services Committee. I'm Alan Kaplinsky, Senior Counsel of Ballard Spahr, and the former chair of the Consumer Financial Services Group at Ballard Spahr. Our podcast today is based largely on a very recent webcast, which we did, called Still in the Crosshairs: An Update on Bank Overdraft Practices. This is a subject that is been of great interest and a lot of concern over the years to banks, because there are a lot of banks that historically have relied very heavily on bank overdraft fees. You can really consider this an update on where we are today, and that is that we're still in a mouse.

Alan Kaplinsky:

There is a lot of concerns still. With that, let's go right to our webcast. I lead it off with a discussion of regulatory concerns, that is what is bothering the CFPB and the bank regulators. Then from there, we'll go to the litigation that is still haunting the banking industry. Then finally, we'll talk about a potential solution at least to private litigation, namely the use of arbitration, which include class action waivers. Good afternoon to those of you on the East Coast and good morning to those of you elsewhere. I'm Alan Kaplinsky, senior counsel and former practice leader of the Consumer Financial Services Group at Ballard Spahr, and I'm very pleased that you joined us today as we present our webinar entitled, Still in the Crosshairs: An Update on Bank Overdraft Practices.

Alan Kaplinsky:

Before turning to our program today, let me refer you, as I usually do, to the various educational resources that we make available to our clients and others. Our blog, Consumer Finance Monitor, which has been ongoing for more than 10 years, our weekly podcast program which celebrated its third anniversary in September, and our mortgage banking update. This slide will describe for you various tracking services that we make available for purchase, either individually or as a package. There's more information on our podcast program. A new one is released each Thursday during the course of a year, except for two weeks in December where we don't produce a podcast. These are the names of some of the more recent podcasts that we've done.

Alan Kaplinsky:

It's available on our website. You can also find it on whatever platform you may use for accessing your favorite podcasts. Here are our upcoming webinars. Not going to repeat them. You can look at them. This covers the remainder of September. We have many more in the pipeline, which will be produced before the end of the year. We're going to be talking about what I would describe as a nagging problem for the banking industry. As I was having a discussion before our program this morning with some of my colleagues, I asked them how long ago they've been living litigating overdraft fee cases, and I think we could go back at least 14 or 15 years. It's the issue related to overdrafts that just won't go away. Why is this such a big issue?

Alan Kaplinsky:

Well, the reason is it's a big money generator for the banking industry. Some may say it's been a boom for certain banks. Rather, just to give you an idea, to put it in some kind of contacts, in 2020, revenue was 31.3 billion, according to a company that trend economic research firm that tracks overdraft revenue. Now, that was down 10% from the 34.6 billion in 2019. I would guess that that's probably a result of the pandemic more than anything else. Overdraft fees actually peaked, revenues peaked in 2009 at 37.1 billion. Then they began to decline after new regs were promulgated in 2010, which required banks to

receive consumers consent to opt in to overdraft services, covering ATM transactions, withdrawals, and one-time debit card transactions.

Alan Kaplinsky:

Recently, there is renewed attention being paid to this area of overdraft fees. I would say things remained relatively quiet during the Trump era when Kathy Kraninger and Bill Mulvaney were in charge of the CFPB. It's fair to say that that agency was more industry-oriented, industry friendly, and more laissez faire. But the things have changed, as we all know, with President Biden being elected, with David Uejio being acting director of the CFPB, with Rohit Chopra still, I think, becoming the director of the CFPB. Although we have not had a final vote in the Senate yet. We can't say for certain that that will happen. But I think it almost doesn't really matter who is going to be director of the CFPB. They are going to renew their attention on overdraft practices, disclosures, and of course, including overdraft fees.

Alan Kaplinsky:

It is a movie that is definitely coming to a theater near you. The time to prepare for that is now. It's a good time to take a look at your overdraft practices. Are your disclosures accurate? Do they reflect what actually is going on with respect to how your computer is programmed to deal with them? Are some of the practices so egregious and so consumer unfriendly or potentially unfriendly that the agency isn't going to like it, and they will find a hook to regulate it under their so-called UDAP authority, unfair deceptive acts and practices. Let me now introduce our speakers, and tell you a little bit how we're going to proceed today. After I introduce everybody, I'm going to begin with a focus on legislative and regulatory developments.

Alan Kaplinsky:

Then we're going to look at the litigation and what's happened in the litigation area, and then we're finally going to talk about a way potentially to deal at least with class action litigation. Won't help with respect to anything that a government agency may want to do involving you, but it could definitely help defuse and lessen the risk of class action litigation. On your screen is Marty Bryce, and Marty is the litigation partner in our Consumer Financial Services Group. He focuses on all types of litigation, particularly class actions, and Marty, I think has probably defended as many or more cases in the class actions involving overdraft fees as anybody that I know.

Alan Kaplinsky:

Going back a long period of time, Marty was very heavily involved in a multi-district litigation involving high low processing of overdraft fees that began in 2009 in front of Judge King in the Southern District of Florida. Then I'm going to skip and introduce Amy Schwartz. Amy is also a litigator in our Consumer Financial Services Group. She works out of our Minneapolis office. She has a very specific concentration in defending banking institutions in all kinds of retail branch disputes involving deposit accounts and other payment methods. She's got particular experience in defending banks in cases involving Articles 3, 4, and 4A of the Uniform Commercial Code, and also has a lot of experience with respect to the Electronic Fund Transfer Act, and pertinent to today's program has been involved in a lot of cases that relate to overdraft fees.

Alan Kaplinsky:

When we get to Amy, she's going to focus a little more broadly than Marty. Marty is going to focus really on some of the nuts and bolts and the basic claims that have been presented. Amy will talk about that, but also talk about other kinds of fees and charges that the plaintiff's bar is attacking. Then finally, last but certainly not least, my colleague, Mark Levin, who's in the Consumer Financial Services Group. Mark was one of the pioneers who counseled our banking and other Consumer Financial Services clients about using arbitration provisions with class action waivers in their consumer contracts. Mark has been successful in defending a number of banks who have been sued in these overdraft fee cases by invoking arbitration, and we will get to that towards the end of the hour.

Alan Kaplinsky:

I'm going to very quickly run through these slides because they are important, but my ... At least the first few slides that deal with the legislative developments. They're very important, but I don't think when push comes to shove that the Democrats have got the votes to get this through the Senate as long as the filibuster has not been blown up and I don't see that happening. These are really more in the nature of placeholders and things that you should be aware of because these are the things where senators and Congress persons are applying pressure on the CFPB and on the federal banking agencies, the OCC, the FDIC and the Federal Reserve Board. The things that they don't like. But in summary, you can see they're very concerned about limitations, limiting overdraft fees to no more than once a month or six per year.

Alan Kaplinsky:

There is this concept of the fees being reasonable and proportional. That's not a new concept. That was in the Credit CARD Act and the regulations that were promulgated by the Federal Reserve Board and then adopted by the CFPB, and the regulation states that late fees on credit cards must be reasonable and proportional to the costs that the issuer incurs when a customer doesn't pay his or her credit card payment on time. It also appears as a requirement dealing with interchange fees on debit card transactions. It must be reasonable and proportional to the costs incurred by the debit card issuer handling a transaction. Posting order, as you can see, is also a big issue. There's a bill in the Senate and the House. The bills are very similar to one another.

Alan Kaplinsky:

You'll note that the Senate bill is authored by Elizabeth Warren and Senator Booker. Elizabeth Warren, if you don't know, has got the ear of President Biden and whoever is going to be the director of the CFPB. I'm going to go to this slide that talks about a brand new New York statute that we blogged about on Consumer Finance Monitor. It becomes effective January 1 for consumer checking accounts, and it applies to any banking institution, whatever that means. I'll get to that in a moment. Interestingly enough, this piece of legislation or the statute that was enacted, it doesn't deal with debit card transactions or ATM transactions. It focuses very much on checks, and it says that checks must be processed either in the order received or from the smallest dollar amount to the largest dollar amount.

Alan Kaplinsky:

It requires a bank to honor smaller checks. If a larger check is dishonored for insufficient funds, and then smaller checks are subsequently received and could be paid. The vital and really important point here is who does this apply to? The legislative history I think makes it clear that it only applies to banks that are chartered under New York law. However, there are many definitions of the term banking institution in the New York banking code. Until the Department of Financial Services in New York issues regulations, which is supposed to do, we won't know for sure whether at least DFS is going to take the position that it applies more broadly to not just state chartered banks in New York, but state chartered banks that are dealing with New York customers.

Alan Kaplinsky:

I don't think it should apply to national banks, either in New York or elsewhere, because I think there would be preemption of state law. Okay. Regulatory developments. In July of 2020, the CFPB completed its review under Section 610 of the Regulatory Flexibility Act, which requires every agency to take a fresh look at rules that it has adopted periodically. I already refer to that rule during my introduction. The basic thing that it does is it prohibits overdraft fees on ATM and one-time debit card transactions, unless the consumer has affirmatively consented or opted in to the institution's payment of such overdrafts. The CFPB rejected calls that were made back then from state attorney generals to expand the rule to cover other transactions, such as checks and ACH transactions and to require that all overdraft fees be proportional to the amount paid by a bank to cover the overdraft.

Alan Kaplinsky:

During the Cordray era, overdrafts were constantly on the regulatory agenda of Director Cordray. In June of 2013, he issued a white paper, and then later on there was several reports regarding overdraft services. But there was so much on his agenda that he just didn't have the time to do anything on overdrafts. It remained on the agenda until Rick Mulvaney came into office, and then he inactivated that item on the spring 2018 rulemaking agenda. In December of 2020, the new administration in office, Maxine Waters, wrote to then President Elect Joe Biden recommending various actions that the Biden administration should take in the consumer finance area, and one of the key areas that she mentioned were overdraft rules.

Alan Kaplinsky:

So far, the CFPB has focused just on the provision that I already mentioned. It's not been focusing on so much on disclosures or on various practices other than the practice of how people signed up for overdraft programs and how they can revoke and opt in to an overdraft service. There have been several enforcement matters involving that. The federal banking agencies also, at least up till now, had not really done very much with respect to how people opt in and how they can opt out. However, that's about to change. Acting Comptroller Hsu, I hope I pronounced his name correctly, indicated that the comptroller is currently looking very closely at overdrafts and would use its full supervisory toolkit to address problematic overdraft practices.

Alan Kaplinsky:

He indicated there's an ongoing inter-agency effort to address the $35 coffee concern. He's encouraging large banks that have not yet reformed their overdraft practices to make them fairer and more flexible. Indeed, a number of the very largest banks have done exactly that. There has been quite a bit of activity recently with the larger banks. Here are the enforcement matters that I mentioned, at least two of them, dealing again with the opt in and opt out. Now I'm going to turn the program over to Marty, who's going to talk about the litigation.

Marty Bryce:

Good morning, everyone. Hopefully everyone can hear me. Again, my name is Marty Bryce. I first started handling overdraft related litigation back in 2008, which in more ways than one seems like it was a million years ago. Notwithstanding that, the basic framework of these cases has changed very little. They're typically brought asserting a claim for breach of contract or breach of the duty of good faith and/or unjust enrichment. Now, under most states laws, I think it's probably safe to say under every state law I've ever looked at, really breaching the duty of good faith and unjust enrichment are in surplus, simply because under most state laws, the express provisions of a contract expressly permits the overdraft charge in question.

Marty Bryce:

Neither the duty of good faith nor unjust enrichment can trump that. The charge will be permitted. The cases turn on the language of the account agreement. From the perspective of the plaintiff's bar, whether or not they can get a judge to at least conclude that the operative language is ambiguous. These issues present very basic questions of contract law that differ very little from state to state, court to court, federal versus state court. If there are competing reasonable interpretations, in other words, one where the overdraft at the question was permitted, another where was not, the account agreement in question is ambiguous. The motion to dismiss where this is most often raised will be denied, and that issue then ultimately presents a question of fact.

Marty Bryce:

From again the point of view of the plaintiff's bar, this kind of a case presents very few obstacles to class certification. You're dealing with a standard form agreements. I'm not aware of any bank that, other than changes over time to account agreements, provides differing account agreements to differing account holders. For a period of years often the account agreement is the same. The charge is the same. It may have increased over time, but the basic parameters of the case are very similar, really identical from class member to class member. That's why the plaintiff's bar likes these cases. Mark Levin, a little bit later, will

talk about what can be a panacea for these. But if a court concludes that the account agreement is ambiguous, as soon the plaintiff, the plaintiff's attorney I should say, has a good plaintiff, it can be a difficult case to be on class certification.

Marty Bryce:

I'll add here, based on a very recent experience, it always does make sense to take a look at your plaintiff and to take a very close look at him or her. Obviously, were they in fact charged the overdraft fee under the circumstances they are now challenging? If they weren't, they don't have standing. Was that fee refunded to them? Often we find that people will complain about the fee in question and the bank in question, as a courtesy, will waive that. If that happens, they don't have standing. I have a very recent case where the plaintiff had declared bankruptcy and neglected to schedule his potential claim against his bank, and on that basis, under very well settled bankruptcy law, he lacked standing and the state court dismissed the action.

Marty Bryce:

Those things are all worth taking a look at. The big battle on the merits terms on the language of the account agreement and whether or not it permitted the overdraft charge in question. Certainly, our advice and we've in the past helped clients revise their account agreements to cover all sorts of eventualities where overdraft charges are concerned. You need to take a very careful look at what that language provides. Is it clear enough? Is it certain enough? Does it cover all the bases? Because if it does, that's the easiest way to defeat one of these cases. Now, plaintiffs will sometimes assert claims under state consumer protection statutes, for a variety of reasons.

Marty Bryce:

They often have a longer statute of limitations. They will very often allow for the separate award of counsel fees and they will very often also allow for some kind of enhanced damages, either some kind of damages multiplier or outright punitive damages. The plaintiff's counsel really likes to also assert that kind of a claim for its dramatic, if I can put it that way, effect on a defendant. The truth of the matter, though, is that kind of a claim presents some and can present some very significant hurdles for a plaintiff to get around, simply because in many states, there is an element of justifiable reliance or at least causation, which would among other things mean that a plaintiff, if you stop and think about it, would have to plead or say that he or she read the account agreement which, frankly in my experience, is implausible, we can stop there.

Marty Bryce:

But they would have to assert or allege they've read the account agreement, understood that it permitted or rather did not permit the overdraft fee questions. You'll be speaking about retries. They would have to say, "I read it and understood that if I had insufficient funds and an ACH was declined once based on my understanding of the agreement, it wouldn't be represented a second time. If it was, I wouldn't be subjected to another overdraft charge." Very, very implausible. I've yet to meet any plaintiff in any kind of case, frankly, who can say that they read or believed any such thing. In any event, even if there was that rare plaintiff, that kind of a claim presents very, very difficult class certification. The questions come highly individualized.

Marty Bryce:

How can anyone possibly say every member of the class did the same thing and believe the same thing? You'll often see cases where a defendant moves to dismiss, the court denies the motion on the breach of contract claim, finding the account agreement ambiguous, but dismisses the consumer protection claim for failure to add a complete justifiable reliance and causation. Overall, I have to say my sense is these cases have more often received a hostile reception in state court rather than federal. It's very rare I find myself saying that about any kind of a class action. But I've seen quite a few state court decisions where a judge in effect recognizes that the account holder shouldn't have been in an overdraft situation in the first place.

Marty Bryce:

If they were, they had every opportunity to correct that before the overdraft charge being challenged was incurred. As one state court judge put it, there's a certain lack of both self-awareness and responsibility on behalf of the plaintiff. But overall, these cases have gotten a better, I would say, reception in federal court, and I think in part because over the years, well, I've had a number of these cases in state courts around the country. I think I and most of us have had more in federal court. I think the federal courts are more familiar with them, and there's a little bit of a lingering hostility towards this type of charge. particularly in the manner in which it's often incurred. Now, when this litigation started and when I first started handling them now, nearly 15 years ago, it was the high order posting.

Marty Bryce:

The claim was that the defendant bank was manipulating the posting order, posting higher denominated tracks, what have you first, in order to maximize overdraft fees. Those cases have largely waned. But as Alan had mentioned, the plaintiff's class is certainly not given up the ship. They've moved on to newer and they hope better theories, one of which is sometimes referred to is APSN or APPSN litigation. APSN short for authorized positive subtle negative. APPSN, which is the way plaintiffs more often describe it shorthand for authorized positive purportedly settle negative. This litigation, instead of posting order, revolves around debit card transactions. I think we all know how they work. You take your debit card, you make the purchase at Costco or whatever merchant is authorized, and several days later it settles.

Marty Bryce:

The issue becomes at what point is the sufficiency of the funds in the account judged and an overdraft assessed? At the point of authorization, at the point of settlement, or both potentially? There are a lot of variations on this kind of claim. There are cases, for instance, where the plaintiff alleges the account agreement was ambiguous because it didn't indicate clearly enough that after authorization the funds in question would be sequestered, and because of that, there was an intervening transaction and the account holder was hit with an overpayment. It's a claim, but that is wrong. There are cases complaining that because the transaction was authorized and there were sufficient funds in the account at that time, there shouldn't later be an overdraft assessed because of an intervening transaction that by the time the debit card transaction settles, there weren't sufficient funds.

Marty Bryce:

There are cases complaining that because a transaction was authorized, as I said, there can't be at settlement any overdraft fee asserted, and likewise, because a transaction was authorized at that point in time, since there was a sufficient what's often referred to as ledger balance, there can't be any overdraft fee asserted. In short, what the plaintiff's bar is doing is they're looking at the language of your account agreement and they're trying to find a whole. A circumstance and a plaintiff where there's a hole in the language where the charge in question, because it was assessed at authorization, was assessed at settlement, was arguably not permitted. What the courts will do in that situation is very simply take a look at the language and assess whether or not the language is clear and ambiguous and allow to charge.

Marty Bryce:

If it does, motion to dismiss granted. If it doesn't, denied. These are but two examples of two cases where the court reached opposite results based on the language of the account agreement. The language of the account agreement is literally the entire ballgame. I fully expect that these cases will in relatively short order wane simply because banks are revising their account agreements to again cover every eventuality under which they might assess an overdraft charge. The plaintiff's bar though is always looking for the next type of case to bring. This is an example I think of their creativity. There are often what are sometimes referred to as verification transactions. You sign up for Square, for instance, and it will deposit a penny and then immediately withdraw a penny to verify that your account information as you input it is correct.

Marty Bryce:

If in fact, I sign up for Square and it does that, and my account is overdrawn, when it then goes to withdraw that penny, I may get hit with an overdraft charge. There have been a few reported decisions on that which have concluded, believe it or not, that a plaintiff states a claim under those circumstances, because as both these decisions Townsley and Kelly held, there in fact was no overdraft because the penny had immediately been deposited before the withdraw. Now frankly, I would hold these two cases off as a pretty good example of why I again counterintuitively see a greater hostility towards these charges and sympathy towards the plaintiffs in federal courts. Because I think both of these courts engaged in a very strange reading of the account agreements that are in front of them, as well as failed to recognize that money is fungible.

Marty Bryce:

I don't care if it's a penny that's deposited in my account or $1,000 that's deposited in my account. When I or anybody else goes to withdraw that, you are not receiving that same penny or the same $1,000. If your account is overdrawn, your account is overdrawn when that transaction hits. But these two courts concluded differently. Once again, they counseled for very careful and scrupulous drafting of your account agreements. If they are drafted to be bullet proof, they should be bullet proof, at least until the plaintiff's bar comes up with the next theory. With that, I will turn it over to Amy. Thank you.

Amy Schwartz:

Thanks, Marty. Good morning, everybody. I wanted to spend a bit of time today addressing two theories I'm seeing a lot of these days. The first is ACH retry litigation. This is a newer theory of liability that plaintiffs' class action lawyers are very excited about. We're seeing a number of these claims. Retry claims arise when a customer is assessed a second or a third NSF fee after an ACH that has already been rejected for insufficient funds has been retried by the merchant and rejected a second or a third time by the financial institution. I want to talk through how it happens because sometimes it's not intuitive for folks. It starts by a bank customer who goes to a merchant and authorizes an ACH transaction.

Amy Schwartz:

The merchant request payment from the customer's financial institution and the financial institution declines the transaction for insufficient funds. Then in accordance with the account agreement, the financial institution will charge the customers account an NSF fee. Well, that first initial NSF fee is never an issue in retry cases. But under the Nacha rules, when a merchant's ACH debit is returned for insufficient or uncollected funds, the merchant can reinitiate that debit entry a maximum of two times after the original attempt. Merchants will do this by submitting a new entry with a new transaction code days after the original entry has been returned, and that new entry is coded retry payment, which is why these cases are called retry cases.

Amy Schwartz:

When the financial institution receives their retry entry, it will attempt a new debit of the one that had previously been tried and denied. If there are insufficient funds in the customer's account a second time, then the financial institution can charge the customer a second NSF fee. If the merchant makes a third attempt, because it's authorized to do under the Nacha rules, the financial institution can charge a third NSF fee, all for a single underlying transaction with the merchant. Retry lawsuits claim that the financial institution has wrongly reprocessed a single ACH debit in order to maximize overdraft fees. Similar to APSN and the types of litigation Marty was talking about, there are two primary legal theories, breach of contract and breach of the covenant of good faith and fair dealing.

Amy Schwartz:

For breach of contract claims, plaintiffs argue that the account agreement allows a single NSF fee for each underlying transaction, and they claim that multiple retry charges exceed that single NSF fee per transaction. These breach of contract claims are frequently withstanding motions to dismiss. In the last year, there've been at least 30 denials of motions to dismiss retry claims in federal court, and here's why. Almost all fee disclosures make clear that a consumer will be charged an NSF fee

for each "item" on the customer's account that is returned for insufficient funds. The problem that financial institutions are running into is that there's no clear definition of what an item is.

Amy Schwartz:

Courts have been finding that there's ambiguity as to whether the item means the ACH entry, including each retry entry, or whether the item is based on the underlying transaction with the merchant such that only a single NSF fee can be charged for an underlying transaction no matter how many times the transaction is retried. As Marty was describing, courts use this ambiguity in account agreements to deny motions to dismiss. They say essentially that you need extrinsic evidence to determine the party's intended meaning of an item. You can see these in a number of cases, particularly out of the Second Circuit, but also in the Fourth Circuit, the Sixth Circuit and the Ninth Circuit.

Amy Schwartz:

In these cases, courts are closely analyzing the language of the agreement to determine whether the account agreement makes clear that the customer can be charged multiple NSF fees for the same transaction. Although I think the majority of these cases are finding that they withstand motions to dismiss, there are some cases which have held that the account or the fee disclosure is sufficiently clear and unambiguous, and it makes plain that financial institutions can charge multiple NSF fees for representments. You can see the lead case on that is in Lambert versus Navy Federal Credit Union. That's a case out of the Eastern District of Virginia. In that case, the court closely analyzed the account agreement and determined that there is, in fact ... That the agreement was unambiguous.

Amy Schwartz:

In Lambert, the court dismissed the action on the motion to dismiss. But that is an outlier. In the vast majority of cases, courts are finding ambiguity at least at the motion to dismiss stage. There haven't been many determinations of these cases on summary judgment. We don't really have a clear sense of how courts would decide them at a later stage. As a practical matter, what's been happening is that many of these breach of contract claims are settling after a motion to dismiss is denied and before summary judgment, which is of course fairly costly for financial institutions, but I think there's a lot of hesitancy to be the first one to handle these on summary judgment.

Amy Schwartz:

The second main cause of action and retry claims is the breach of the covenant of good faith and fair dealing. Covenant of good faith and fair dealing is a creature of state law. It varies based on the jurisdictions. Some states recognize the separate cause of action for breach of the covenant. Other states don't. There's really mixed results on these claims. But generally speaking, as Marty mentioned, the claims are surplusage. Essentially, they argue that financial institutions have acted in bad faith when they charge multiple NSF fees for the same underlying transaction. While the legal damages are much different than for your run-of-the-mill, breach of contract claims there is a heightened risk of reputational injury for financial institutions.

Amy Schwartz:

The long and the short of it is that these claims are prolific, and they're frequently surviving motions to dismiss. But it's not all bad news. There is good news, and that's that account agreements can easily be modified to eliminate these cases. Remember, they all turn on the clarity of the account agreement. Everybody should be reviewing their account agreements, making sure that disclosures are clear and that they call out that consumers or customers will be charged multiple NSF fees and it can be true for multiple presentments whether or not it's a retry. The second major category of cases that we're seeing increase our Reg E Litigation. I wanted to briefly touch on some of the violations because there is an uptick in these claims.

Amy Schwartz:

Reg E requires financial institutions to describe their overdraft service in a clear and readily understandable manner. When overdraft disclosures are deemed ambiguous, there can be a violation of Reg E which can lead to claims for actual damages, attorneys fees, statutory damages, and the like. As you can imagine, we're seeing Reg E claims arising under APSN and retry theories, but we're also seeing them connected to funds availability policies. In these cases, plaintiffs claim that funds availability policies are not readily understandable. There are a number of different theories, but popular ones include that the policy doesn't describe the method for calculating the available balance, whether that's ledger balance or funds availability balance, that there are ambiguous opt in agreements for charging overdrafts based on ATM or one-time debit transactions, and that type of thing.

Amy Schwartz:

These cases are a bit of a mixed bag. Although there are many claims that are surviving motion to dismiss, financial institutions are tending to come up on top on summary judgment. The key focus of these cases is whether the language of the applicable account disclosures is unambiguous as to how and when customers will be charged. Like retry litigation, there is good news. Financial institutions are in the driver's seat. They can nip this type of litigation in the bud by having really clear disclosures. Again, it's important to review of the disclosures to make sure that they're compliant with Reg E. I'll turn it over to Mark.

Mark Levin:

Thanks, Amy. Well, you've heard Marty and Amy describe all sorts of different overdraft fees class actions that the plaintiff's bar is bringing. The question is, is there a panacea, some sort of silver bullet that will eliminate the exposure to class liability in these cases? Well, one thing that you can do, and a very important thing, is to make sure that your deposit agreement has an arbitration provision with a class action waiver. We've been drafting these provisions for banks since around 1997, 1998, and have done dozens and dozens and dozens of them. But they're not cookie cutter, and it's got to be done the right way. There are two aspects to the arbitration provision that I want to call to your attention.

Mark Levin:

The first is the content. These provisions tend to be somewhat lengthy and there are a lot of substantive terms involved. But the most important thing is including a properly drafted class action waiver and making sure that the Federal Arbitration Act, the FAA, governs the agreement. The class action waiver provides the claims must be arbitrated on an individual basis, not as a class action or a private attorney general action, or any other kind of representative action, either in court or in arbitration. Also, it should provide that the parties cannot join or consolidate other arbitrations unless they expressly agree in writing. These waivers are enforceable because the Federal Arbitration Act, the FAA, preempts state laws that would hold them to be unenforceable or unconscionable or against public policy.

Mark Levin:

The Supreme Court so held in 2011 in the landmark decision AT&T Mobility versus Concepcion. It held that the FAA preempted California law which refused to enforce class action waivers as against public policy. That ruling is enforceable on both federal and state courts. If you're in state court, that law should apply just as equally as if you were in federal court. In terms of the process for implementing an arbitration provision, again, getting the language right is just the first part of what needs to be done. You need to roll out the arbitration clause if you don't already have one in the correct way. Banks normally have the arbitration agreement apply not just to new customers or to new accounts opened by existing customers, but also to accounts of existing customers through a change of terms procedure.

Mark Levin:

Most deposit agreements contain a provision called amendments or changes that give the bank the right to change terms from time to time upon giving notice to the account holder, and they say that the account holder is deemed to have agreed to these changes by continuing to use the account. The goal is to make sure you have an enforceable written "contract" to arbitrate

because that's what the FAA requires. You have to be sure to follow whatever provisions are in your account agreement, and there are also some state laws that govern changes and terms. But it's tricky because some courts, particularly state courts, remain hostile to the use of arbitration, and they try to impose heightened requirements for being able to add an arbitration provision to the account agreement requirements that you don't have to fulfill if you try to change an interest rate or a disclosure item or just about anything else that is in the deposit agreement.

Mark Levin:

In theory, these heightened requirements should be preempted by the FAA, but the law is murky. On that, interestingly, just a week ago, a petition for certiorari was filed with the US Supreme Court that might help clarify what the FAA requires in terms of change in terms of procedures. Anyway, this all has to be done very carefully. It's not a do-it-yourself project. Ballard Spahr has been in the thick of overdraft fee litigation for the past dozen years. We've defended banks in the high to low types of class actions that you've heard Marty describe, as well as cases alleging unfair or deceptive or misleading disclosures. We've had great success in enforcing arbitration clauses in deposit agreements that require individual non-class arbitration.

Mark Levin:

I think one of my favorite war stories is years ago we were giving a seminar on arbitration. Some people came up, they later end up being clients, and they said, "We think we're going to be sued in an overdraft fee class action pretty soon. What can we do?" Well, the next day we started drafting an arbitration agreement for them. We got it quickly rolled out through a change of terms. A couple of weeks after that, the client did get sued in several overdraft fee class actions. However, as soon as the plaintiff's lawyers found out that they were going to have to confront an arbitration provision and it had a class action waiver in it, they dropped those cases like a hot potato. Not all these cases turn out the same way, but the majority of them do succeed after you go through a motion to compel arbitration procedure.

Mark Levin:

It is a very, very effective tool at preventing exposure to class liability. The bottom line is if you already have an arbitration provision and haven't looked at it for a while, dust it off and have it updated, because the law in this area is constantly changing and the provisions do need to be updated from time to time. Also, if you don't have an arbitration clause, my best advice is get one now before it's too late. You need to act promptly and proactively to mitigate the risks of class action exposure. Thank you for attending, and of course, let us know if you have any questions or would like any additional information.

Alan Kaplinsky:

That concludes our podcast for today, Still in the Crosshairs: An Update on Bank Overdraft Practices. Make sure to visit our website, ballardspahr.com, where you can subscribe to our podcast show or you can also subscribe on essentially any other platform you use, Apple Podcasts, Google, Spotify, whatever. Don't forget to check out our blog, also going by the name of Consumer Finance Monitor. There is a lot of content on the blog. We have been doing it for in excess of 10 years. The topic that we covered today, over the years, we've had a lot to say about bank overdraft practices. If you have any questions or suggestions for a podcast show, please email podcast@ballardspahr.com, and make sure you stay tuned for new episodes every Thursday. Thank you.