

RISK Alert

ACTIONABLE INSIGHTS FOR BOND POLICYHOLDERS.



Alert Type

Awareness

Watch

Warning

Overdraft / NSF Fee Class Action Litigation Not Slowing Down for CUs

In 2021, the CUNA Mutual Group third-party litigation team has handled on average two new overdraft / NSF Fee class action matters a week. If your credit union hasn't been hit with one of these class actions yet, there is a good chance you'll be hit with one. And, if you've already been hit, there's still a chance you could be impacted by another. The monetary exposure can be significant with a seven-figure exposure not being unusual with the impact of the statute of limitations for each state.

Details

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. The allegations include:

- Improperly charged multiple NSF fees on the same transactions (refers to incoming debits to member accounts that are returned multiple times by credit unions)
- Improperly assessed overdraft fees on debit card transactions posting to member accounts when funds were previously set aside when preauthorization holds were placed
- Overdraft fees were improperly assessed using the "available" balance rather than the "actual" or ledger balance and that credit union failed to accurately describe this in agreements / disclosures

The monetary exposure / damages are based on:

- The statute of limitations
- Whether the allegations are for overdrafts / NSF fees or both
 - account holders assessed multiple NSF Fees on an item
 - account holders assessed bank fees on transactions that did not overdraw their checking accounts
 - Write off uncollected fees
- Settling in the demand stage vs. going to litigation
- Settling on an individual vs class settlement
- Plaintiff attorney fees

A simplistic calculation example (shown on the next page) highlights how the monetary exposure could easily reach seven-figures. This example does not consider the number of valid fees or fees that the credit union may have refunded or returned.

Date: November 16, 2021

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

States: All

Share with:

- Compliance
- Executive Management
- Legal
- Marketing
- Risk Manager



Facing risk challenges?

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

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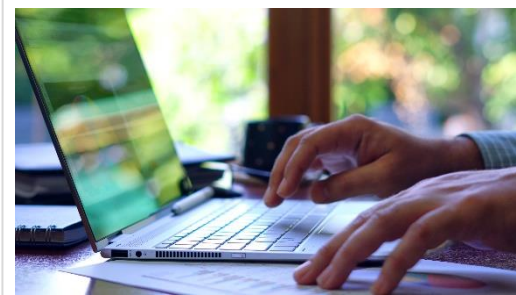
| Simple Calculation | Example |
|------------------------------------|---------------------------------|
| Total overdraft fees in a year | 140,788 overdraft fees in 2012 |
| X Total \$s paid per overdraft fee | X \$30/ overdraft fee charge |
| X Statute of limitations | \$4,223,640 for one year |
| | X six years |
| | \$25,341,840 for six years |

Risk Mitigation

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.



Access CUNA Mutual Group's **Protection Resource Center** at cunamutual.com/prc 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.

Check out these additional resources:

- [Overdraft / NSF Fee Litigation Risk Overview](#)
- On-Demand Webinar – [Key Trends in Class Action Litigation](#)

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. Submit claims via email at litigation.team@cunamutual.com.

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This resource was created by CUNA Mutual Group based on our experience in the credit union, insurance, and risk management marketplace. It is intended to be used only as a guide, not as legal advice. Any examples provided have been simplified to give you an overview of the importance of selecting appropriate coverage limits, insuring-to-value, and implementing loss prevention techniques. No coverage is provided by this resource, nor does it replace any provisions of any insurance policy or bond. Please read the actual policy for specific coverage, terms, conditions, and exclusions.