

Tennessee banks face uptick in fee class actions



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There has recently been an increase in class action lawsuits against banks challenging the assessment of overdraft and non-sufficient funds (NSF) fees. This article highlights the types of claims that plaintiffs are asserting and what financial institutions can do to protect themselves.

Theories Claimed by Plaintiffs

The recent wave of lawsuits includes one or more of the following claims:

- **Authorize Positive, Settle Negative**

In one line of cases, plaintiffs have asserted claims based on banks' assessment of overdraft fees authorized at a time when customers had sufficient funds in their accounts to cover the transactions, even though the customers later had insufficient funds at the time of posting and settlement. The plaintiffs in these cases typically argue that their account agreements promised that the bank would set aside funds in accounts at the time of authorization to cover payments for the authorized transactions, or otherwise prohibited the fees from being charged.

- **Available Balance/Ledger Balance**

In a separate line of cases, plaintiffs have asserted claims based on banks' calculations of account balances at the time of posting and settling. In most of these cases, the plaintiffs allege that banks used customers' available balance—including pending debit holds—and therefore charged overdraft fees when the customers had a sufficient ledger balance to cover the transactions. As in the "authorize positive, settle negative" cases, the plaintiffs in these cases have not challenged this practice as illegal per se—they have instead argued that the financial institutions failed adequately to disclose the practice in their account agreements.

- **Multiple NSF Fees on Single Transaction**

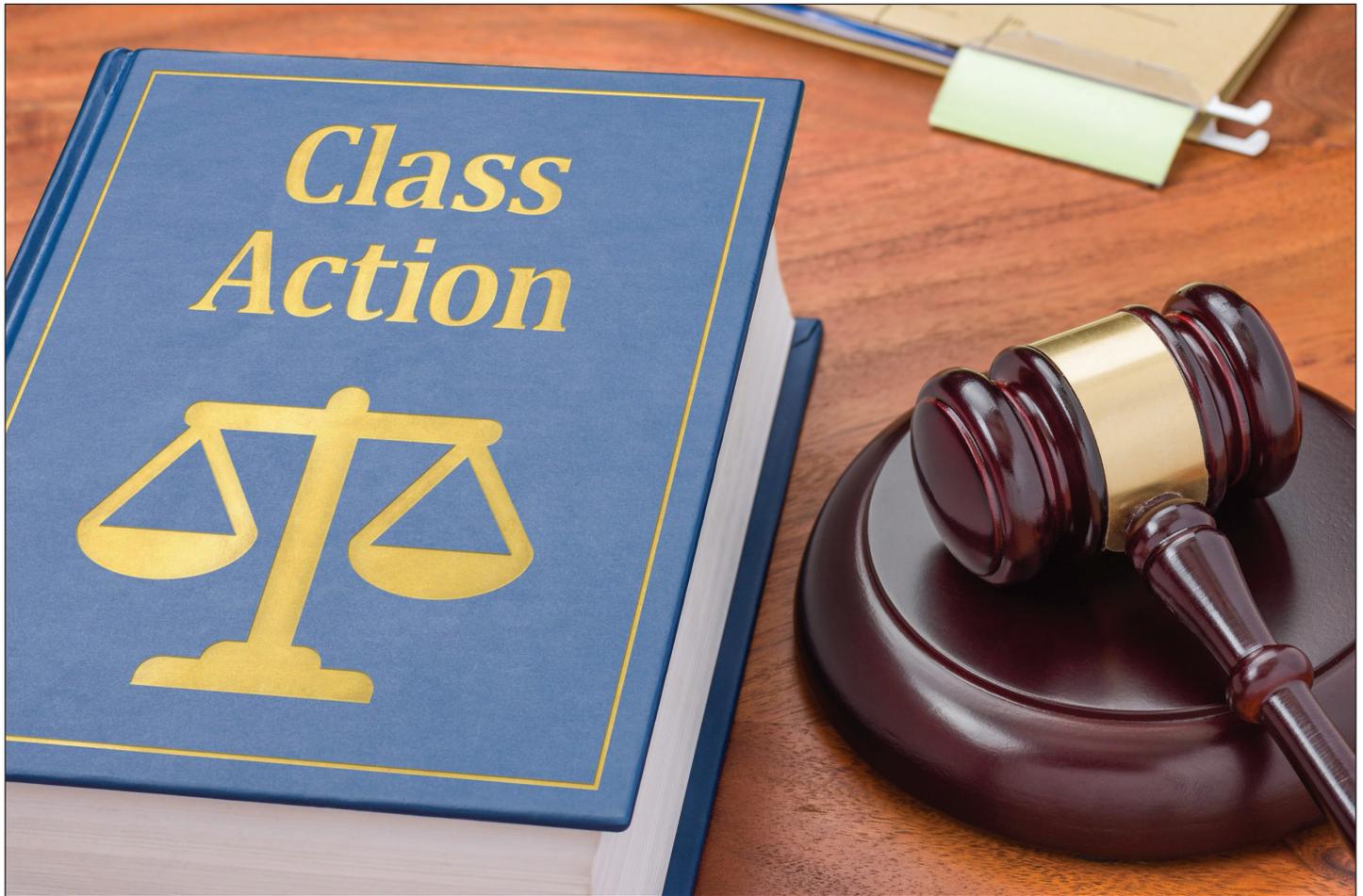
More recently, plaintiffs—including some also asserting one of the overdraft fee-based theories above—have asserted contract-based claims relating to non-sufficient funds and return item fees. The plaintiffs typically allege that banks have breached their account agreements by charging more than one return item fee on check and ACH transactions that are presented to, and returned by, banks more than one time.

Defending Claims in Litigation

Many courts around the country, including some in Tennessee, have allowed these types of claims to proceed to discovery on the grounds that the applicable language in account agreements is ambiguous on the ability to charge the challenged fees. Tennessee banks have some helpful precedent on the new line of NSF cases, however. In November 2020, the Tennessee Court of Appeals affirmed a trial court's dismissal of a complaint against a credit union for failure to state a claim on this theory, finding that the account agreement clearly disclosed that the credit union would charge a fee each time an overdraft occurred.

Mitigating Risk

The common thread in each of the three types of claims is the alleged failure to disclose the precise manner in which a financial institution charged fees. Unlike the wave of high-to-low posting cases from the last decade, in which plaintiffs claimed that institutions' practices were designed to increase fees, these newer cases seek to capitalize on ambiguities in contract language that many banks (and their customers) are simply unaware of. Many financial institutions have nevertheless chosen to settle such claims to avoid the burden and expense of litigation.



In order to mitigate against the risk of costly litigation, financial institutions should:

- Compare actual fee practices to language in account agreements, disclosures, and banking/online platforms to identify potential ambiguities;
- If a vendor provides account agreement templates, consider whether the vendor has addressed these issues and will allow customized language if not;
- If a vendor provides transaction processing software, review your vendor relationship to understand what your agreement says, what discretion the system provides in deciding when to charge fees, and how the vendor otherwise plans to address these issues;
- Review insurance policies and exclusions to understand whether the policies cover these types of claims or, at the very least, provide defense coverage;
- Monitor customer complaints regarding overdraft and non-sufficient funds fees to avoid disgruntled customers turning into plaintiffs; and
- Consider adding an arbitration agreement and class action waiver to account agreements. 