FDIC Requiring NSF Fee Refunds in Examinations

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Last month, the latest class action regarding bank-charged returned payment fees passed a motion to dismiss in *Mawyer v. Atl. Union Bank*. This comes on the heels of the Federal Deposit Insurance Corporation (FDIC)'s recent supervisory highlights about such fees, calling them into question as deceptive and unfair, and the FDIC's reconsolidation of the supervisory appeals process.

In *Mawyer*, the court permitted the plaintiff's claim for breach of contract to proceed to the costly litigation stage of discovery. As with the other banks (and credit unions) that have been sued across the country, the bank in *Mawyer* had a practice of charging a returned payment fee (or returned item fee, insufficient funds fee, or NSF fee) for each return, regardless of whether it was the same check or other payment method being presented or initiated for the second or third time. The court ruled that the deposit agreement and related documents governing the deposit account were ambiguous regarding whether the bank could charge one returned payment fee for a single check or other payment method, or whether the bank could charge a returned payment fee each time a check or other payment method was presented or initiated by a merchant or other payee.

The court's decision in *Mawyer* focused on the definition of "item" in the deposit account agreement. In the agreement, the bank's right to charge the returned payment fee was triggered by a return on a "per item" basis. The parties disagreed about whether an item is the check that was written or the other payment method that was given to the merchant or payee for a single payment (in which case one fee is permitted), or whether an item is an attempt by the merchant or payee to obtain payment using the check or other payment method (in which case a fee is permitted for each attempt).

INCREASED CLASS ACTIONS

These class actions have concentrated in the New York federal courts, but they are spreading across the country, with the most recent decisions issued in Virginia, South Carolina and Michigan federal district courts. Courts generally are permitting plaintiffs' breach of contract claims (based on charging fees not agreed to in the deposit agreement and related documents) to pass motion to dismiss and proceed to discovery and, of course, potential settlement with a purported class of plaintiffs. The courts are holding that both the banks (or credit unions) and the plaintiffs' interpretations of the language in the deposit agreement are reasonable regarding the meaning of "per item" or "each item," and therefore the language regarding the circumstances under which a fee will be charged is ambiguous, creating a question of fact that requires the case to proceed to trial.

These class actions have merely passed the motion-to-dismiss stage. There are no trial-court decisions at the summary judgment stage or after a trial. There also is no appellate case law on the issue. Nevertheless, the FDIC is giving the legal theory the full force of the law by using its supervisory power to compel banks into making restitution for such fees. In its March 2022 "Consumer Compliance Supervisory Highlights," the FDIC shared that it has required an institution to make restitution of returned payment fees based on the FDIC's allegation during an examination that charging the fees constituted an unfair or deceptive act or practice (UDAP) under Section 5 of the Federal Trade Commission Act. The FDIC stated that "some financial institutions charged additional NSF fees for the same transaction when a merchant re-presented an automated clearinghouse (ACH) payment or check on more than one occasion after the transaction was declined." The FDIC stated there may be a violation of UDAP in such cases regarding both business and consumer accounts. The FDIC is requiring refunds of the fees.

UDAP VIOLATIONS

The FDIC has recast the class plaintiffs' breach of contract claims as UDAP violations. According to the FDIC, and depending on the language of each deposit agreement and its related documents and disclosures, the practice of charging a returned payment fee for each return of a check or other payment method may be deceptive and unfair. Notably, the FDIC believes the practice is unfair "if multiple fees are assessed for the same transaction in a short period of time without sufficient notice or opportunity for consumers to bring their account to a positive balance." Presumably, depositors are generally unable to track their own account balances using a checkbook or electronic banking. Despite the UDAP allegation, the FDIC made no mention in the Supervisory Highlights about any trend in complaints regarding returned payment fees. On the contrary, the Supervisory Highlights stated that deposit-related fees and service charges constituted 2% of the complaints the FDIC received in the recent period (second-to-last on the list of 15 types of complaints) and also made no mention of such fees in the list of common types of complaints for checking accounts.

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Many clients have reported that in recent exams the FDIC has noted potential UDAP violations for inadequate notice in deposit agreements regarding re-presentment fees or re-initiation fees and are suggesting the clients go back five years to determine amounts of re-presentment fees or re-initiation fees charged clients without proper notice of such fees. Please contact us about this important issue.

WHAT STEPS BANKS CAN TAKE

The FDIC suggested various measures banks can take to fix the perceived issue, including limitations on fees, better disclosures, servicing notices regarding such fees, review of policies and procedures and working with service providers to properly identify re-presentments of checks or re-initiations of other payment methods. The banks and their service providers are left with the mess of sifting through the data to see how they can identify which incoming payments are part of a single merchant "transaction."

The FDIC's piggy-backing on class action claims and enforcing them as law in the supervisory context is concerning. As discussed by the courts, the banks (and credit unions) have made reasonable arguments that the language in their deposit agreement permits charging a fee for each return, depending ultimately on the meaning of "item." The federal Truth in Savings Act and Regulation DD already require disclosure of any fee that may be imposed in connection with the account and the conditions under which the fee may be imposed. Presumably, the banks have been doing this correctly for years until the FDIC took notice of the recent spate of class actions on the topic. Generally, though, when a federal agency perceives an ambiguity in the law or a regulation, it will proceed with a rulemaking or other procedure that gives notice of a new interpretation or policy before it is enforced. But in this case, the FDIC is enforcing its definition of "item" in the supervisory context.

Of additional note, on May 17, 2022, the FDIC restored its appeals process that gives ultimate decision-making authority regarding FDIC supervisory determinations back to a group that is essentially controlled by the FDIC Board of Directors. Previously, on January 19, 2021, the FDIC had adopted a new appeals process that gave that authority to a separate office within the FDIC that was independent of the FDIC Board of Directors and other divisions within the FDIC that had authority to issue supervisory determinations. This change will reinforce the FDIC's ability to obtain concessions from banks in the supervisory context.

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