



Overdraft Fee Litigation May Follow Renewed Regulatory Interest

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Key Takeaways:

- The Consumer Financial Protection Bureau provided rhetorical fodder for consumer class-action attorneys with its recent announcement about overdraft-fee practices. The legal barriers to those lawsuits remain unchanged, however.
- CFPB Director Chopra directed criticism toward banks that charge overdraft fees, but he offered no concrete reforms or policy initiatives regarding these fees.

On December 1, 2021, Consumer Financial Protection Bureau (CFPB) Director Rohit Chopra took broad aim at overdraft fees, making the sort of remarks that often get quoted in class-action complaints. Chopra claimed that the amount of overdraft fees incurred is a sign of a market failure, but proposed only technological changes to make it easier to switch banks. Further, he criticized banks whose customers overdraft frequently, saying such banks should expect closer supervisory attention. According to Chopra, many overdraft fees result from complexities in the payment-settlement system. Finally, he referred to overdraft fees as “opportunistic” and “exploitative,” and he promised action against any large financial institution that violated the law (albeit without indicating what laws might have been violated or that the CFPB had evidence of any such violations). [Recent editorials](#) call for sweeping policy changes in light of Director Chopra’s remarks.

In keeping with his comments, we anticipate potential regulatory moves by prudential regulators, especially under the Biden administration, as well as an uptick in overdraft fee-related [class actions](#). Previous 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, notwithstanding industrywide changes since that time or the Bureau’s more measured stance just a year later in 2013. Indeed, some lawsuits have impugned overdraft practices that the CFPB previously considered restricting but elected not to take regulatory action on.

Although overdraft fees at national banks are within the exclusive jurisdiction of federal prudential regulators, most overdraft class actions rely on state law causes of action. Indeed, preemption remains a successful defensive hallmark in such cases. Court after court have confirmed that private plaintiffs cannot seek to prohibit non-interest

fees, such as overdraft fees, on general notions of fairness. But federal preemption has not stopped class action attorneys from suing over overdraft fees. And the CFPB's renewed regulatory interest will provide rhetorical fodder, even if nothing in Director Chopra's comments provides additional legal bases for consumer-led class-action claims.

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