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Federal Appeals Court Finds that Use of CFPB Model Disclosure Does Not Provide Safe Harbor in Overdraft Fee Class Action Lawsuit

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A federal appeals court has held that a financial institution that uses a model disclosure issued by the Consumer Financial Protection Bureau (CFPB) is not entitled to a safe harbor in determining whether the institution properly disclosed how overdraft fees are imposed under the Electronic Fund Transfer Act (EFTA). This ruling presents a concern for financial institutions that are relying on the model disclosure for protection under the EFTA.

There has been a plethora of class action lawsuits against financial institutions recently involving the imposition of overdraft fees on deposit accounts. These cases often allege breach of contract and unjust enrichment based on a claim that the institution did not follow its own account agreements and disclosures when imposing overdraft fees. Some of these class action lawsuits have also alleged that institutions are not complying with the EFTA, the federal law that, among other things, requires institutions to make certain disclosures regarding overdraft fees. Regulation E, which is the CFPB regulation that implements the EFTA, has model disclosures for how to disclose overdraft practices. Institutions generally use these model forms under the belief that such forms provide a safe harbor from violations of the EFTA.

However, the United States Court of Appeals for the 11th Circuit (which includes Alabama, Georgia and Florida) has now held that use of the model disclosure does not necessarily give financial institutions a safe harbor under the EFTA. In *Tims v. LGE Community Credit Union*, 2019 WL 4019847 (11th Cir. Aug. 27, 2019), the court found that the safe harbor under the EFTA applies to a failure to make a disclosure in a "proper form," but does not apply to disclosures that are not adequate from a substantive standpoint. Accordingly, the court reversed a lower court decision to dismiss the EFTA claim against LGE Community Credit Union and allowed such claim to proceed.

A central finding of the court was that Regulation E sets forth the mechanical procedures for providing a required disclosure, including use of the model language, and the safe harbor under the EFTA applies to those mechanical procedures. The court held that the safe harbor does not apply to the substance of the disclosure – whether the disclosure gives a customer enough information to decide whether to allow certain overdrafts on an account. Accordingly, the court allowed the case to proceed to determine whether the disclosure provided by the credit union was adequate to allow the customer to make that determination. Although this case only has direct

precedential effect in the 11th Circuit, other federal circuits may decide to adopt the same position.

A key takeaway from this case for a financial institution is to check its overdraft disclosures to make sure they adequately describe the institution's overdraft policy, including how a customer's balance is determined for purposes of imposing overdraft fees. A major issue in this and other overdraft cases is whether a financial institution adequately describes whether it uses a ledger balance or available balance for determining whether sufficient funds are available to pay a check or other debit item. A ledger balance method only considers settled transactions, while the available balance method considers both settled and "authorized but not yet settled" transactions, as well as deposits placed on hold that have not yet cleared. An example of an "authorized but not yet settled" transaction is a debit card charge that is posted to an account but not yet settled (and as a result not immediately deducted from the account balance).

If you have any questions regarding this case or overdraft issues in general, please feel free to contact Joseph D. Simon at (516) 357-3710 or via email at jsimon@cullenanddykman.com, Kevin Patterson at (516) 296-9196 or via email at kpatterson@cullenanddykman.com, Elizabeth A. Murphy at (516) 296-9154 or via email at emurphy@cullenanddykman.com, or Mandy Xu at (516) 357-3850 or via email at mxu@cullenanddykman.com.

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