



# Financial Institutions Sued for Imposing Overdraft Fees

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A wave of class action lawsuits have been filed across the country against financial institutions in recent months with a rather unique claim: that institutions have been improperly imposing overdraft charges on customers when Uber and Lyft charges made by debit cards overdraw customers' accounts.

At least five such class action lawsuits making this allegation have been filed against financial institutions in the past few months, including a lawsuit filed in November in Federal District Court in the Eastern District of New York. The genesis for these claims is Regulation E, the regulation that governs electronic fund transfers, but interestingly almost none of the lawsuits allege a violation of Regulation E.

Regulation E generally prohibits financial institutions from charging a customer an overdraft fee for paying a "one-time" debit card transaction that overdraws an account unless the institution has complied with certain requirements, including obtaining the customer's consent to paying such overdrafts and imposing an overdraft fee. This same consent requirement does not apply to debit card transactions that are deemed "recurring" charges as opposed to "one-time" charges; institutions are permitted to pay "recurring" debit card transactions and to impose overdraft fees on such transactions without customers "opting in" to such overdraft coverage on their account.

The issue at the heart of these lawsuits is whether Uber and Lyft debit card charges are "one-time" or "recurring" charges. When a customer signs up for these ride-hailing services, the customer is required to provide their credit or debit card information, and that card is then charged each time the service is used. The debit card industry generally treats these charges as "recurring," and processes them that way. This means that when a person pays for an Uber or Lyft charge using a debit card, the charge is coded as a "recurring" charge and thus is received and processed as such at the customer's financial institution.

While there might be an argument that these charges are actually "one-time" charges and not "recurring" charges under Regulation E, the commentary to Regulation E provides protection for financial Institutions that rely on how the charge is coded by merchants and other third parties. This protection allows a financial institution to rely on this coding as long as it adapts its systems to identify these transactions based on such coding. Because Uber and Lyft charges are currently being coded by merchants and card networks as "recurring" charges, there would seem to be minimal potential for liability for financial institutions under Regulation E for treating these charges as "recurring."

Perhaps because of this protection under Regulation E, class action attorneys are basing their lawsuits on other claims: such as breach of contract and violation of state consumer protection statutes.

The breach of contract claim is generally based on a financial institution stating in its account agreement that it will not pay “one-time” debit card transactions nor impose an overdraft fee on such transactions unless the customer has “opted in” to such overdraft coverage. The lawsuits claim that Uber and Lyft charges are “one-time” charges, so the institution is violating its own account agreement by imposing overdraft fees on these charges. Interestingly, the reason that institutions have language in their account agreements describing the difference in treatment between “one-time” and “recurring” debit card transactions is because of the Regulation E requirement discussed above; institutions have been properly disclosing to their customers the requirements imposed under Regulation E. These lawsuits are now taking those account agreements and turning them against financial institutions, claiming that institutions are not following the agreements.

To the extent an institution’s account agreement also limits the number of overdraft charges that the institution may impose in a month, the lawsuits also allege that the payment of Uber and Lyft debit card charges results in the institution frequently exceeding the monthly limit of overdraft charges stated in the agreement.

In addition to the breach of contract claim, the lawsuits also generally allege a breach of state consumer protection laws. The lawsuit in New York, for example, alleges a violation of General Business Law Section 349, claiming that the financial institution engaged in a deceptive act or practice under that law by paying Uber and Lyft charges that resulted in overdrafts and charging overdraft fees to customers who did not provide consent. Another lawsuit alleges a violation of the New Jersey Consumer Fraud Act.

We are not aware of any reported decision in any of these cases, but we will monitor the lawsuits and advise of any developments. At this point, it is recommended that financial institutions review their account agreements to determine if any changes are appropriate given the claims in these lawsuits.

If you have any questions regarding these lawsuits or would like assistance in reviewing your institution’s account agreement, please feel free to contact:

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