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# OVERDRAFT CLASS ACTION LAWSUITS

What Credit Unions Need to Know

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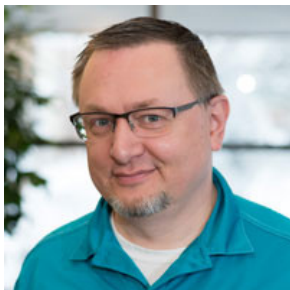
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## About the Authors



**Jim Vilker** has been in the credit union compliance, regulatory, and audit space for over 30 years. Over that time he has served as a regulator, credit union executive, and currently as the leader of AuditLink, a division of cooperative CUSO CU\*Answers. Jim's tenure at CU\*Answers began in 1998 where his knowledge and skills were immediately recognized, becoming resident advisor on regulatory compliance and audit functions. As the leader of AuditLink, Jim has assisted in the development of state of the art core data processing solutions in the areas of compliance, audit, and risk management for CU\*Answers' flagship product, CU\*BASE.



**Patrick Sickels** began his career as an attorney, and quickly branched out into the technological services industry, where he used his legal skills to help companies manage their compliance requirements. Patrick used these skills to develop into a classically trained auditor and risk manager. At CU\*Answers, Patrick's background of law and technology make him uniquely suited to assist credit union clients in managing their risk requirements with a minimum of cost.

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Overdraft class action lawsuits remain one of the most serious risks facing credit unions. Overdraft class action lawsuits are relatively easy to file and can create multimillion dollar payouts for law firms. **Credit unions should not assume a small membership size or remote location is protection against overdraft lawsuits.**

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Because overdraft class actions are so lucrative, law firms advertise to consumers on their websites, touting multimillion dollar settlements and frequently demonizing banks and credit unions alike as engaging in illegal or unfair practices. Here are examples of actual verbiage on law firm websites from attorneys who have filed overdraft class action lawsuits against credit unions.

### Cohen & Malad LLP

“Cohen & Malad, LLP class action attorneys have been busy responding to consumer complaints about improperly charged overdraft and insufficient funds fees. After a thorough investigation, our attorneys found that many of these banks and credit unions did illegally charge fees to checking account customers and brought suit against these financial institutions to return monies back to these consumers.

Our investigations uncovered that banks and credit unions alike, regardless of size, repeatedly charged consumers overdraft or insufficient funds fees for transactions even though funds were available. ***Our team is proud to have litigated claims across the United States and has returned millions of dollars in improper bank fees to thousands of bank and credit union consumers.***

We have brought suit against financial institutions in the states listed below. If you have been charged an overdraft of insufficient funds fees that you believe are improper, contact us. Our attorneys can review your information and advise you of your legal rights.”  
**[emphasis added]**

<https://www.cohenandmalad.com/class-action/bank-overdraft-fees-lawsuits/>

### Kaliel Gold PLLC

“Banks use overdraft fees and insufficient funds fees as a way to unfairly profit in your time of need. Some of these overdraft fees are legitimate, and some of them are not. ***All too often, banks and credit unions play unfair tricks to charge you more in overdraft fees than they should.*** These practices may include charging “extended” or “continuous” overdraft fees, charging overdraft fees on their own service fees, charging overdraft fees on transactions authorized into a positive balance, or charging multiple insufficient funds fee on the same transaction or item. The attorneys at Kaliel Gold PLLC have had success challenging many of these practices at some of the country’s largest banks and credit unions. We’ve secured multimillion dollar settlements against major financial institutions in cases involving a variety of types of overdraft fees and insufficient funds fees.

Contact us today if you have:

- Paid overdraft fees
- Paid insufficient funds fees
- Paid “extended” or “continuous” overdraft fees
- Paid overdraft fees on service fees
- Paid overdraft fees when your account had a positive balance
- Paid multiple insufficient funds fees on the same transaction”  
**[emphasis added]**

<https://www.cohenandmalad.com/class-action/bank-overdraft-fees-lawsuits/>

There are several concepts that law firms use when filing class action lawsuits. Credit unions should understand the types of overdrafts that place a credit union at risk of a class action lawsuit.

## TYPES OF OVERDRAFTS

### OVERDRAFT FEE

Overdraft fees are each time the credit union approves a transaction that exceeds the balance available in the account.

### NSF FEE

Nonsufficient funds fees (NSF Fees) are when the credit union rejects a transaction that overdraws the consumer's balance.

### OVERDRAFT TRANSFER

This fee is charged each time the credit union arranges a transfer from one account to another to cover the overdraft.

### EXTENDED OVERDRAFT

This fee occurs when a consumer leaves the account balance in the negative for a certain number of days.

## AVAILABLE BALANCE VERSUS LEDGER (ACTUAL) BALANCE

Modern banking allows debits and credits to apply to an account before funds are settled between institutions and posting the transaction to the account.

### LEDGER (ACTUAL) BALANCE

Ledger or actual balance is the net sum of all posted credit and debit transactions against an account.

### AVAILABLE BALANCE

Available balance keeps track of outstanding debits that have not been settled and credits that have been posted but not cleared.








Settlement and posting of ATM and debit card transactions can take place one or more days after a credit union authorizes the transaction, and credit union's re obligated to settle (pay the merchant's FI) all ATM and debit card transactions authorized up to the amount authorized. Credit unions are subject to overdraft class action lawsuits when the disclosures and/or account agreement is inaccurate regarding the credit union's methodology for calculating and assessing overdraft fees.

## UNFAIR, DECEPTIVE, AND ABUSIVE PRACTICES (UDAAP)

UDAAP is a broad consumer protection concept that can apply to inaccurate information, omissions or misinterpretations in overdraft program descriptions, disclosures, agreements, or advertising. UDAAP is not limited to overdraft programs; however, UDAAP is often central to overdraft litigation. Mistakes in overdraft program disclosures, even if unintentional, are not a defense to UDAAP allegations.

## LEGAL THEORIES

When filing an overdraft class action lawsuit, law firms have multiple legal theories that can be used against credit unions. Some of the most prominent and successful theories are as follows.

	<b>HIGH TO LOW POSTING</b>	If financial institutions reorder transaction processing from highest amount to lowest amount, consumers can be charged more in fees than in the same transactions are processed in the order received.
	<b>AVAILABLE BALANCE</b>	A theory that the available balance is an artificial calculation that the financial institution uses to assess overdraft fees on transactions when there is still money in the account.
	<b>REG E OPT OUT</b>	A claim that a financial institution has failed to follow Regulation E overdraft opt-in rules, including the form of notice and the methods for obtaining consumers' affirmative consent.
	<b>MULTIPLE FEES ON SAME TRANSACTIONS</b>	A claim challenging the practice of charging overdraft or NSF fees on transactions that were returned unpaid and later resubmitted for payment.
	<b>AUTHORIZE POSITIVE SETTLE NEGATIVE</b>	Where a financial institution has assessed overdraft fees on debit card transactions that are authorized when the customer's balance is positive, but later are paid when the customer's balance is insufficient to cover the transaction.
	<b>REG D BEHAVIOR FEES</b>	Regulation D used to permit financial institutions to charge fees for covered savings transfer/withdrawals that exceeds a monthly limit. On April 24, 2020, the Federal Reserve Board removed this option.
	<b>CONTINUOUS FEES</b>	A theory that continuing to assess fees on an account that remains overdrawn is "interest" and subject to state usury laws.

Items on this list are not necessarily exclusive, and in fact law firms will often include multiple items on this list in a single class action lawsuit. This list is also not necessarily comprehensive of all possible overdraft legal theories or future legal theories, and different firms may use different terms to describe these theories.

## High to Low Debit Card Transaction Processing

If a financial institution reorders transactions from high to low regardless of when the transactions are processed, a consumer can incur significantly more fees. In the example below, the consumer spends the exact same amount of money in the same day and by the end has the exact same negative balance. However, if the transactions are posted in order, the consumer is hit with only a single overdraft fee. If processed high to low, the consumer is subject to three overdraft fees being assessed.

TRANSACTIONS PROCESSED IN ORDER	\$120 STARTING BALANCE	TRANSACTIONS PROCESSED HIGH TO LOW	\$120 STARTING BALANCE
\$20	\$100	\$100	\$20
\$10	\$90	\$50	-\$30
\$50	\$40	\$20	-\$50
\$100	-\$60	\$10	-\$60

Although financial institutions claimed consumers received a benefit in "high-to-low" processing as a customer service that ensured important payments such as mortgages or car payments were handled first, this practice has been consistently held to be a violation of UDAAP.

## Available Balance Litigation

If a financial institution uses available balance to calculate overdraft fees, law firms will allege available balance as an internal calculation used to assess overdraft fees when there still is money in the account.

AS DISCLOSED TO THE CONSUMER	AS ACTUALLY DETERMINED
Credit union discloses that overdraft fees will only be charged when there is not enough money in the account to cover the transaction.	Credit union ignores whether there is money in the account and instead make an automated determination based on the internal calculation of the available balance.

The allegation is that the use of an internal available balance to calculate overdraft fees rather than the money in the account to determine whether a transaction results in an overdraft fee violates the consumers rights if not disclosed.



## Improper Opt-In

By law, credit unions cannot charge consumers overdraft fees on ATM and most debit card transactions unless the consumer has agreed (“opted in”) to these fees. Recently, courts have held that standalone use of Regulation E’s model form A-9 for opt-in overdraft coverage is not a safe harbor from overdraft litigation. The model form does not address which account balance calculation method is used to determine whether a transaction results in an overdraft. Forms provided by consulting firms or trade associations are also not a defense in these cases.

## Multiple Fees on Same Transaction

The theory on these cases starts when a credit union’s account agreements and fee schedules state that only one overdraft or NSF fee will be charged “per item” or “per transaction.” However, the same item is eligible to incur multiple overdraft and NSF fees when that item is returned for insufficient funds and later re-presented one or more times.

Credit union returns a check or ACH transaction for insufficient funds	<b>NSF FEE</b>
<i>Merchant or third party resubmits the returned transaction which again presents against insufficient funds</i>	
Credit union either (a) returns the resubmitted item and charges customer a second NSF fee or (b) pays the resubmitted item and charges the customer an overdraft fee	<b>SECOND NSF FEE OR OVERDRAFT FEE</b>

The argument of the law firms will be that the original and resubmitted transactions are the same “item,” and therefore the assessment of more than one NSF or overdraft fee for that single “item” violates the account agreement or fee schedule if these state fees will be assessed on a “per item” basis.

### CLASS ACTION LAWSUITS

A “class action” lawsuit permits a law firm to file on behalf of a large group or “class.” While many class actions are complex procedurally, class actions are favored by law firms because they can result in much larger settlements. For example, Navy Federal Credit Union settled a non-sufficient funds fee class action lawsuit for \$16 million due to the fact 700,000 current and former members were charged NSF fees that were not authorized by the account agreement.

## Authorize Positive Settle Negative

This claim by law firms argues credit union’s account agreements and disclosures do not permit overdraft fees to be charged on items authorized on a positive account balance.

AUTHORIZE POSITIVE SETTLE NEGATIVE EXAMPLE	PURCHASE	AVAILABLE BALANCE
Customer initiates a debit card purchase at a time when they had a \$100 positive account balance, and the institution authorizes the transaction; hold is placed on the customer’s account	\$70	\$30
Before merchant submits the debit card purchase to the institution for payment, a check for \$50 posts to the customer’s account, reducing the balance available to pay other items	\$50	-\$20
When merchant presents the debit card purchase for payment, the customer’s account balance is no longer sufficient to cover it		
The credit union pays the item and charges the customer an overdraft fee		FEE

Law firms will argue credit unions cannot impose these fees without adequate disclosures.

## Regulation D Behavior Fees

Regulation D was promulgated to ensure financial institutions have sufficient reserves by encouraging consumers to save money. Credit unions were allowed to charge fees if consumers had more than six withdrawals (“convenient transactions”) a month. However, the Federal Reserve relaxed this rule in April 2020 due to concerns about consumers having enough money during the pandemic. Credit unions may be threatened with class action litigation if they continue to charge fees now that the Federal Reserve has relaxed these rules.

## Continuous Fees

This is a new theory, alleging sustained overdraft fees constitute interest charged by the financial institution for the use, forbearance, or detention of the money it has loaned to its customer by advancing the funds necessary to pay an overdraft. This theory has not yet been accepted by a court but has received support in some legal circles.

## STATISTICS | OVERDRAFT PROGRAMS

In December 2021, the Consumer Financial Protection Bureau (CFPB) commissioned a study on credit union and bank overdraft programs served by data processors. Below are some of the statistics reported by the CFPB. The report can be found online at the CFPB's website.

"Data Point: Checking Account Overdraft at Financial Institutions Served by Core Processors", Nicole Kelly and Éva Nagypál, Ph.D., CFPB, December 2021.

[https://files.consumerfinance.gov/f/documents/cfpb\\_overdraft-core-processors\\_report\\_2021-12.pdf](https://files.consumerfinance.gov/f/documents/cfpb_overdraft-core-processors_report_2021-12.pdf)



**79.9%**  
**WAIVER PROGRAM**

Credit unions **without** a program to waive assessed fees if the transaction amount is below a certain size



**72.5%**  
**DAILY FEE CAP**

Credit unions **without** a daily fee cap



**19.8%**  
**FORGIVENESS PROGRAM**

Credit unions **without** a forgiveness program to cure an overdraft

**\$151.18**

**AVERAGE FEE CAP**

Average cap for credit unions with a fee cap

**\$27.64**

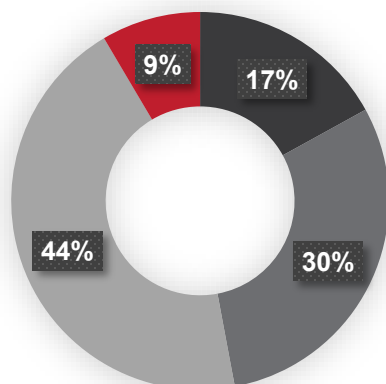
**AVERAGE TRANSACTION FEE**

Per-transaction overdraft fee averaged across credit unions with an overdraft program

**\$42.33**

**AVERAGE FEE PER ACCOUNT**

Annual overdraft revenue per account averaged across accounts at credit unions with an overdraft program



## TYPE OF OVERDRAFT COVERAGES

- Individual Overdraft Limit
- Common Overdraft Limit
- OD Limit Used Type Unknown
- No Overdraft Limit Used

**There is no way for a credit union to prevent litigation around overdraft fees. There are ways for credit unions to reduce the risk of overdraft class action lawsuits, by carefully reviewing disclosures and terms.**

## Disclosures and Terms

The overwhelming common thread in overdraft cases is when the credit union fails to accurately disclose the precise method in which overdraft fees will be charged. All overdraft communications and disclosures need to be consistent, including printed and online materials. Descriptions of overdraft practices should also be as clear and unambiguous as possible, especially with respect to high-risk practices such as transactions authorized on a positive account balance can incur overdraft fees. Note that the law firms are constantly advancing new overdraft claims and theories, and credit unions should ensure they and their counsel are up to date on the latest lawsuits.

SUBJECT MATTER	REVIEW
<b>Understanding Account Balance for Overdrafts</b>	Should ensure that balances are adequately described and how the credit union determines whether a transaction will cause an account to overdraw and be subject to fees.
<b>Actual Balance</b>	Should accurately describe what transactions are included and what are not included in the display of the balance
<b>Available Balance</b>	Needs to describe accurately holds placed on deposits and pending transactions
<b>Example of Overdraft Fee for Insufficient Available Balance</b>	Should describe reasonable scenarios on how overdraft fees can be incurred
<b>How Transactions Are Posted to the Account</b>	Describe clearly how each transaction is handled so a consumer knows how much money the consumer has available to use in the account

Having accurate FAQ's can also help a credit union with a defense against an overdraft class action lawsuit. This FAQ could include answers to the following questions:

Why does the credit union use debit card authorization holds? ♦ Are holds used to increase overdraft fees? ♦ Will the debit card authorization hold equal the final amount of the transaction? ♦ How can I reduce the impact of debit card authorization holds? ♦ What is a gas station or fuel hold? ♦ What is a travel hold? ♦ How are online transactions treated? ♦ When will an authorization hold be removed? ♦ Can I request that a hold be removed?

**CU\*BASE has several tools credit unions can use to review their current overdraft and NSF fee configurations and compare to account agreements and disclosures.**

## CU\*BASE Tools for Risk Reduction and Mitigation

SUBJECT MATTER	DESCRIPTION	TOOL OPTION
<b>CU*Answers does Debit Card Processing in Order Received</b>	Credit unions on the CU*BASE platform have debit card transactions processed in the order they are received. It is not possible for a credit union to modify this processing, and therefore credit unions cannot be sued for high to low debit card transaction processing.	n/a
<b>Check Processing is determined by the Credit Union</b>	While high to low check processing is legal in most jurisdictions, credit unions can confirm if they wish to continue the practice by going into <b>CU*BASE Tool 510 Member SD/Checking Configuration</b> . Credit unions can review the order of share draft clearing (ascending/descending amount)	Tool 510
<b>Review Overdraft Protection Configurations</b>	An important item to review is <b>Tool 558 NSF/OD Configuration</b> . A credit union can review fees charged, which balance the fee is based upon, fee tolerances, the fee itself relative to safe harbor amount, and all overdraft protection configurations. Recommend the credit union consider setting the daily limit and daily caps.	Tool 558
<b>Review Share Product Configurations</b>	ANR (Courtesy Pay) settings can be reviewed on <b>Tool 777 Share Product Configuration</b> . A credit union should review ANR settings on conditions for granting activation of ANR limit.	Tool 778
<b>Review Opt In/Opt Out Configurations</b>	Credit unions need to be careful of Opt Out preferences, which can be found in <b>Tool 1004 Define Workflow Controls</b> . Recommend that the default is that opt-in enrollment is required.	Tool 1004
<b>Review Fee Disclosures</b>	Ensure all marketing with respect to overdraft fees is consistent and accurate with credit union practices. From a disclosure perspective the credit union can add either information or a link to a separate URL using the <b>Internet Member Services Configuration Tool 569</b> . Choose the first option from the list and update the instructions next to the Regulation E section. The credit union needs to understand the disclosure requirements for both an in-person request and a remote request.	Tool 569
<b>Review Frequent Users</b>	Credit unions can review the members using overdraft/NSF protection the most by reviewing <b>Tool 774 Sample Checking Account Activity</b> and clicking on "NSF > Profit and Loss."	Tool 774

**In addition to the other mitigation options, there are some further considerations for overdraft class action risk mitigation.**

- ✓ Does your information clearly explain when an overdraft transfer will occur?
- ✓ Are members informed of the priority of options if their checking account does not contain sufficient available funds? For example, will a transfer of available funds in a savings account occur prior to overdraft protection?
- ✓ Does a member need to specifically identify a priority or does the credit union have a default option (and, if so, is this option known)?
- ✓ If a member has opted in for overdrafts of ATM and one time debit card transactions, is the member informed of the ability to revoke that consent?
- ✓ Can a member opt out of overdraft protection completely? If so, is the process for doing so clearly communicated?
- ✓ Does the credit union have clearly communicated special rules for ATM and one-time debit card transactions?
- ✓ Has the credit union ensured that there is an opt in from members (meaning no opt in = no fee)? Note that the credit union can pay the transactions, just not assess the fees?
- ✓ Are members informed of alternatives to overdraft?
- ✓ Has the credit union explained the overdraft priority (and whether members can request an alternative process)?
- ✓ Does the credit union have a process to review those members who are charged the most fees, and have an option to reach out to discuss alternatives?
- ✓ Does the credit union have fee caps, *de minimis*, or a forgiveness program?

## Why AuditLink?

AuditLink is very proud of our CUSO model. Our cooperative principals drive us as leaders with a vested interest in the success of our clients but maintaining higher levels of cooperation and trust that you will not find in other vendors.

AuditLink is a suite of services whose leaders focus on addressing business, technology, shared execution and consulting value to your business. By aligning our objectives with your strategic plan and operational needs we define what it means to have an active partnership invested in mutual success. We hope you will tap into the many talents and skills of our talented consultants and team members each dedicated to the principals that drive our CUSO.

