

Suit Alleging FDIC Overdraft Overreach May Not Make Waves

By **John Stoker and Kate Wellman** (September 21, 2023)

When following supervisory scrutiny of fees charged to bank customers, the activities of the Consumer Financial Protection Bureau, or CFPB, are often the focus.

The Minnesota Bankers Association and Lake Central Bank of Minnesota, however, have recently filed a lawsuit against the Federal Deposit Insurance Corporation and its chairman, Martin Gruenberg, seeking, among other things, declaratory and injunctive relief from the FDIC's application or enforcement of its recent supervisory guidance on nonsufficient fund fees, or NSFs.[1]

In August of last year, the FDIC issued Financial Institutions Letter 40-2022 titled "Supervisory Guidance on Multiple Re-Presentation NSF Fees"[2] to raise awareness of consumer compliance risks when an institution charges multiple NSFs, in connection with the so-called re-presentation of a previously unpaid transaction.[4]

The FDIC stated that practices involving the charging of such fees heighten risks of violating the prohibition on unfair or deceptive acts and practices in Section 5 of the Federal Trade Commission Act.

The FDIC noted that an institution may violate the prohibition on deceptive acts or practices if it fails to appropriately disclose its re-presentation and NSF fee practices and that, in some cases and even if the practice has been properly disclosed, charging multiple NSF fees on the same transaction may violate the prohibition on unfair acts or practices.

The guidance encouraged institutions to conduct self-reviews.

It noted that some institutions have sought to mitigate risk related to these practices by eliminating NSF fees entirely, declining to charge more than one NSF fee for the same transaction, reviewing policies and procedures, updating customer disclosures regarding re-presentments and NSF fee practices, and ensuring that the institution utilizes alert practices enabling its customers to avoid multiple NSF fees for a re-presented transaction.

FIL 40-2022 also indicated that the FDIC expects institutions that identify re-presentation NSF issues during their self-reviews to take full corrective action, including providing restitution to harmed customers.

The supervisory guidance concluded by noting that the FDIC would focus supervisory activity on identifying re-presentation-related issues and would take appropriate action to address consumer harm, including supervisory or enforcement actions against an institution that has not self-identified and fully corrected re-presentation NSF fee practices prior to a consumer compliance examination.

The FDIC indicated that it would not consider full corrective action to have been taken when an institution fails to make restitution despite having data on re-presentments reasonably available to it.



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In its request for relief filed in the U.S. District Court for the District of Minnesota, the July 20 Minnesota Bankers Association v. Federal Deposit Insurance Corp. complaint alleges that although FIL 40-2022 is styled as supervisory guidance, in practice it functions as a rule that mandates, by the threat of enforcement, new customer remediation standards and customer disclosure and notification practices that exceed requirements of the statutes and regulations governing consumer deposit account and automated clearinghouse transactions.[3]

The complaint also alleges that issuance of FIL 40-2022 violated the Administrative Procedure Act because the functional rule was issued without notice and an opportunity for comment[5] and that the FDIC lacks the statutory authority to issue disclosure rules in these areas[6] or to define specific practices as unfair or deceptive.[7]

Alternatively, the complaint alleges that because FIL 40-2022 was purported to be issued as guidance, the FDIC's rules prohibit it from relying on noncompliance with its provisions as a basis for a potential enforcement proceeding for violations of law.

The complaint was filed almost one month after the FDIC issued a clarifying financial institutions letter, FIL 32-2023,[8] to update FIL 40-2022. The FDIC indicated revised guidance was necessary due to updated information the FDIC had received on the amount of customer harm that results from NSF fees and challenges the industry faces in identifying harmed customers.

FIL 32-2023 retains the FDIC's analysis around the risk of committing unfair or deceptive acts in assessing re-presentment and NSF fees for the same unpaid transaction and the risk-mitigating steps institutions may take related to these practices. It does, however, modify the FDIC's stated supervisory approach to these practices.

The revised guidance now states that the FDIC will take into account, in considering the need for restitution, the likelihood of substantial consumer harm from the institution's practices and challenges the institution may face in obtaining and analyzing data about the frequency and timing of re-presentment fees.

The FDIC also removed the statement from the original guidance stating that it would not consider full corrective action to have been taken absent restitution. In a footnote, the FDIC indicated that it has generally accepted a two-year restitution lookback period where institutions have been unable to reasonably access accurate data for automated clearinghouse re-presented transactions and that it does not intend to request a lookback review absent a likelihood of substantial consumer harm.

The complaint acknowledges the issuance of FIL 32-2023 but indicates that the revised guidance does not change the new legal obligations it alleges the FDIC is seeking to impose on its supervised institutions.

The complaint also cites the language in FIL 32-2023 addressing the FDIC's revised supervisory approach to re-presentment and NSF fee practices but alleges that it is still possible the FDIC will require a lookback and that institutions lack clarity in understanding what the FDIC will consider to be fully corrective actions.

The complaint further alleges that the FDIC is departing from well-established positions taken by other bank regulatory agencies, which the plaintiffs claim focus on the activities of merchants, not banks. In doing so, the complaint cites more dated rules issued by the

Board of Governors of the Federal Reserve System, which no longer has rulemaking authority under the Electronic Funds Transfer Act, in 2004 and by the CFPB in 2017.

However, banking regulators other than the FDIC also have recently focused on multiple NSF fees for the same transaction. Specifically, in March, the CFPB released a special edition of its Supervisory Highlights[9] including such NSF fees among its examples of fees that could violate relevant law, including the prohibition against unfair, deceptive, or abusive acts or practices under the Consumer Financial Protection Act of 2010.

The CFPB noted findings by its supervision division that multiple NSF fees assessed for the same transaction presented multiple times for payment constitute an unfair act or practice. The CFPB cited FIL 40-2022, as well as an industry letter[10] from the New York Department of Financial Services, in noting that other regulators have spoken about the same practice.

The Office of the Comptroller of the Currency then released a bulletin[11] in April 2023 on risk management practices associated with overdraft protection programs, which described findings by OCC supervision that assessment of an additional fee on a re-presentment transaction is an unfair and deceptive practice under Section 5 of the FTC Act.

Even if the plaintiffs here were to be successful in challenging the FDIC's supervisory guidance, the lawsuit is not likely to alleviate continued pressure from other banking regulators for their supervised institutions to take corrective actions related to NSF fees. Indeed, in the Supervisory Highlights, the CFPB noted that nearly all the institutions with which it has engaged on the issues reported planning to stop charging NSF fees altogether.

Developments in this proceeding will be followed.

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[1] Minn. Bankers Ass'n and Lake Central Bank v. Federal Deposit Insurance Corporation and Martin Gruenberg, in his official capacity as Chairman of the Federal Deposit Insurance Corporation, Case 0:23-cv-02177-PAM-ECW (D. Minn. Filed July 20, 2023).

[2] <https://www.fdic.gov/news/financial-institution-letters/2022/fil22040a.pdf>.

[3] Re-presentment may occur when a merchant resubmits a transaction for payment after it has been previously declined due to inadequate funds in the customer's account.

[4] The Complaint alleges that neither Regulation DD nor Regulation E impose specific disclosures for re-presentment NSF fee practices envisioned by FIL 40-2022.

[5] One element of the Complaint's allegations is that FIL 40-2022 does not account for the challenges institutions face in determining whether a transaction has been previously presented, the obligations of institutions to process transactions for payment, and, more generally, the respective role of merchants – which are subject to their own legal and

regulatory requirements in re-presenting a transaction for payment and have different practices for determining whether and how to do so – and banks in processing transactions.

[6] The Complaint notes that while the FDIC may have enforcement authority under Regulations DD and E over the institutions it supervises, it lacks rulemaking authority under these provisions, which the Complaint notes resides with the CFPB.

[7] The Complaint notes that authority to define specific acts or practices as unfair or deceptive under the FTC Act resides with the FTC.

[8] <https://www.fdic.gov/news/financial-institution-letters/2023/fil23032a.pdf>.

[9] https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights-junk-fees-special-edition_2023-03.pdf.

[10] https://www.dfs.ny.gov/industry_guidance/industry_letters/il20220712_overdraft_nsf_fees.

[11] <https://occ.gov/news-issuances/bulletins/2023/bulletin-2023-12.html>.