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Justice Watch: Ruling helps plaintiffs in bank-fees class action

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Fort Lauderdale attorney Bruce Rogow boils down the thrust of litigation against 30 banks targeting overdraft fees this way:

A customer goes into a fast-food restaurant to order off the dollar menu. But instead of paying a dollar for a hamburger, it ends up costing $36 — because of the way the bank and dozens like it throughout the nation posted checks and debits.

Customers took a big step toward getting some of that money back earlier this month when Senior U.S. District Judge James Lawrence King in Miami verbally declared he is granting class certification in one of about 60 lawsuits challenging overdraft fees in multidistrict litigation. All the lawsuits allege the banks don't post purchases in chronological order but instead resequence transactions to maximize the number of overdrafts, which usually incur fees of about $36 each.

King granted certification in the case against San Francisco-based Union Bank but still must sign a proposed order. He has said he would give the bank a chance to file objections

"This is a precedent that can apply to all of the banks. All of the banks use similar processes in the charges," Rogow said. "It acts like a restraint on pernicious, malicious conduct that is designed to maximize bank profits. The banks figured out a way across the board how to maximize their profits on the backs of people who could least afford it."

How lucrative were overdraft fees? A California federal judge in a separate case found in 2008 that they were the second-largest source of revenue for Wells Fargo's consumer deposit groups.

In California alone, Wells Fargo assessed more than $1.4 billion in overdraft penalties from 2005 to 2007.

U.S. District Judge William Alsup, following a bench trial, ordered Wells Fargo to stop resequencing transactions in high-to-low order and reverse overdraft fees charged to customers over nearly four years. Wells Fargo is appealing.

"Judge Alsup's opinion on class certification and then on the merits and damages is very good and very helpful as a road map for our cases here," Rogow said.

Rogow said King's class certification could encourage settlement talks by other banks. So far, only Bank of America has agreed to settle, offering $410 million. King gave his preliminary approval in May.

The MDL has grown from five defendants to almost three dozen and includes the nation's top banks such as Wells Fargo, Citibank and JPMorgan Chase.

Miami attorney Jeremy Alters targeted Bank of America, said Rogow, who serves as special counsel at Alters' Miami firm, an appellate specialist and law professor. Rogow now serves as co-lead counsel for plaintiffs along with Aaron Podhurst, a founding partner at Podhurst Orseck in Miami.

Class Action Law

The banks have ammunition to fight back. They have cited recent juggernaut decisions on class action law by the U.S. Supreme Court in an effort to thwart certification efforts, Rogow said.

In a highly anticipated decision in June, the high court rejected a discrimination lawsuit brought by 1.6 million female employees of Wal-Mart, saying the company is entitled to individual determinations of each worker's claim. The court found the claims were too different from each other to justify a class approach. Justice Ruth Bader Ginsberg, writing in dissent, bemoaned the majority's decision. She said the decision gives the plaintiffs no options to band together for common goals, and the court "disqualifies the class from the starting gate."

Rogow said the Wal-Mart case is not applicable in the overdraft cases. "In Wal-Mart, there was one headquarters nondiscriminatory policy but thousands of store managers were left to their own devices to carry it out," he said. "Here there was one 'take-advantage-of-the-customer policy' and thousand of branches of the banks applied it."

A less-publicized class action ruling — but just as far-reaching — was won by AT&T Mobility in April. The high court ruled arbitration clauses in contracts are binding. Some of these fine-print clauses have consumers surrender their rights to join class actions.

Rogow argues the AT&T Mobility decision was specific to one contract, which he said was actually very consumer friendly. Some bank arbitration agreements force consumers to pay to

file a complaint. Plaintiffs plan to show that out of millions of overdraft charges less than three dozen customers have felt they could fight it through arbitration.

"We can make a record to show that it's absurd," Rogow said.

He called it a "joke" that banks' are arguing the AT&T Mobility decision should negate class certification in the overdraft cases.

Comeuppance

Miami attorney Alan Greer, a partner at Richmond Greer Weil Brumbaugh Mirabito & Christensen who is representing Union, said he could not comment on the case. He referred an inquiry to an attorney in Union's home base of San Francisco who could not be reached.

Union is one of the few banks in the litigation that did not have an arbitration clause in its checking account contracts. But Robert Mayer, managing partner of Gordon & Rees in Miami who is not involved in the overdraft cases, said he thinks the AT&T Mobility decision could prove troublesome for plaintiffs. He said the Supreme Court ruled an arbitration clause is on equal footing with any other binding portion if a contract.

"I would be surprised if the banks wouldn't raise it," Mayer said.

King has set an Aug. 12 hearing on the matter. The banks are expected to argue that AT&T Mobility does have an application.

Peter Prieto, a partner at Podhurst Orseck who spoke for co-lead counsel Podhurst, compared the overdraft cases with other major MDLs in the country on the BP oil spill, Toyota cars and tainted Chinese drywall.

"If these kinds of cases can't be certified, then what can be certified?" Prieto asked. "We think these are classic cases that should be certified class actions. You have uniform contracts which were used by the banks and a resequencing scheme used by all the banks."

The plaintiffs, though, have had trouble getting racketeering allegations to stick, arguing there was a conspiracy within the bank to defraud customers. King dismissed that claim against Union Bank in June.

Union Bank argued certification was inappropriate because the class definition renders it unascertainable, according to a proposed order granting class certification filed by plaintiffs Monday. But plaintiffs say they have employed a mathematics whiz who developed a method of determining customers who have been gouged by overdraft using bank records.

Rogow said the overdraft cases also are ripe for class certification because they go to the heart of such litigation: to send a message to big business that it can't abuse consumers.

"The comeuppance that comes from lawsuits like these is that it gives notice for banks to act in good faith and respect their customers and not just respect their bottom line," he said.

Rogow said it wouldn't have been hard for banks to notify customers at the point of purchase that they faced a $36 overdraft fee. Then customers could have pulled a dollar from their wallets or go to a fancy restaurant and get beef worth that fee.

Maybe one made with Kobe beef.

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