

---

**Don't Be Next: Bank Hit for \$203 Million in Overdraft Suit**

---



**John T. Brooks**

*Partner*

619.699.2401

[jtbrooks@luce.com](mailto:jtbrooks@luce.com)

[www.luce.com/johntbrooks](http://www.luce.com/johntbrooks)



**Phenix Q. Kiamilev**

*Associate*

619.699.2506

[pkiamilev@luce.com](mailto:pkiamilev@luce.com)

[www.luce.com/phenixkiamilev](http://www.luce.com/phenixkiamilev)

In June, we reported on the recent spate of class actions targeting overdraft fees, including one pending action seeking \$300 million against Wells Fargo. That suit alleged that the bank's practice of "high-to-low resequencing" of debit card charges had the effect of unfairly and deceptively multiplying overdraft charges assessed against customers.

Just this week, the court ruled in the plaintiffs' favor in that case, awarding \$203 million in restitution. In a 90-page opinion, the court ruled that the practice of "high-to-low resequencing" - along with a variety of related disclosure deficiencies - unfairly "blind-sided" customers with multiple overdraft fees.

There is little doubt that, in light of this large verdict, numerous copycat suits will follow. Any financial institution that imposes overdraft charges should carefully audit its practices - checking not only for the specific practices at issue in the Wells Fargo case, but also for compliance with the related revisions to Regulation E recently promulgated by the Federal Reserve.

*More details on the underlying class action allegations and the revisions to Regulation E: **Overdraft Fees: Barbarians (and Regulations) at the Gate**  
*Luce Forward Legal e-Update - June 29, 2010 (article on next page).**

---

## Overdraft Fees: Barbarians (and Regulations) at the Gate

---



**John T. Brooks**  
*Partner*  
619.699.2401  
jtbrooks@luce.com  
[www.luce.com/johntbrooks](http://www.luce.com/johntbrooks)



**Phenix Q. Kiamilev**  
*Associate*  
619.699.2506  
pkiamilev@luce.com  
[www.luce.com/phenixkiamilev](http://www.luce.com/phenixkiamilev)

You can almost hear them now, rattling their spears outside every bank in the state. They are the class action barbarians, and they're here to sue you. About what? Overdraft fees.

Several class action suits have been filed alleging unfair practices concerning overdraft fees. One such suit - a \$300 million action against Wells Fargo - is already in trial and closing arguments have been scheduled for July 9. If the plaintiffs succeed against Wells Fargo, financial institutions can expect a flood of "me too" class actions targeting other players in the industry. Indeed, just in the last few months, several other banks have been sued in copycat suits.

So, what's the dispute? The most controversial practice is resequencing - that is, the practice of deducting same-day debit card transactions from account balances starting with the largest transaction first (rather than deducting the debits in the order they were made). The result of resequencing is that a customer may be charged several overdraft fees on the same day, rather than being charged a single fee (as might be the result if the debits were deducted in the order they were made).

Other allegedly unfair practices challenged by the overdraft fee class actions include (i) failing to provide customers adequate notice of their right to opt out of overdraft protection plans, (ii) failing to provide customers notice - at the ATM or point of sale - that a specific transaction would result in an overdraft (thus giving the customer a chance to avoid the overdraft fee), and (iii) misleading advertising of overdraft protection plans.

What can financial institutions do to protect themselves? Here are a few tips:

1. Ensure compliance with the impending revisions to Regulation E concerning customer consent and "opt in" protections for overdraft protection plans. These new regulations go into effect on July 1 (see below for more details).
2. Check your overdraft practices against the Treasury Department's "best practices" guidelines for overdraft protection plans. Deviations from these best practices will only provide fodder for class action suits.
3. Consider revising or abandoning overdraft protection practices that create liability risk. For example, Chase announced last September that it would begin processing debit transactions in the order received, rather than resequencing them by size. And in March of this year, Bank of America announced that it would discontinue overdraft fees on debit transactions.

---

## Overdraft Fees: Barbarians (and Regulations) at the Gate

---

### Regulation E Update.

In response to public demand for more consumer protection regarding overdraft fees, on November 17, 2009, the Federal Reserve System (the "Board") adopted final rules amending Regulation E (12 C.F.R. § 205.1., *et seq.*) The amended Regulation E helps consumers understand how overdraft services operate and ensures that consumers have the opportunity to limit the overdraft costs associated with ATM and one-time debit card transactions. The amendments - which go into effect on July 1, 2010 - only apply to overdraft fees imposed on ATM and one-time debit card transactions; they do not apply to checking, ACH, and recurring debit card transactions.

Here are the high points of the new rules:

1. Financial institutions may not charge consumers fees for paying overdrafts on ATM and one-time debit card transactions that overdraw on the account, unless a consumer affirmatively consents, or opts in, to the overdraft services for those types of transactions. The opt-in requirements applies to *all* consumers, including existing and new account holders.
2. Financial institutions must provide consumers a written notice that explains the financial institution's overdraft services, including fees associated with the service, and the consumer's choices.
3. The consumer must opt in, or affirmatively consent, to the financial institution's overdraft services *before* overdraft fees may be assessed on the consumer's account for the financial institution's honoring overdrafts. A copy of a model opt-in notice provided by the Board can be accessed following this e-Update.
4. Financial institutions may not tie or condition the payment of overdrafts for checks and other transactions to the consumer opting into the overdraft service for ATM and one-time debit card transactions.
5. Financial institutions cannot discriminate against consumers who do not opt in. Financial institutions must provide consumers who do not opt in with the same account terms, conditions, and features (including pricing) that they provide to consumers who do opt in.

## What You Need to Know about Overdrafts and Overdraft Fees

An overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway. We can cover your overdrafts in two different ways:

1. We have standard overdraft practices that come with your account.
2. We also offer overdraft protection plans, such as a link to a savings account, which may be less expensive than our standard overdraft practices. To learn more, ask us about these plans.

This notice explains our standard overdraft practices.

### ➤ What are the standard overdraft practices that come with my account?

We do authorize and pay overdrafts for the following types of transactions:

- Checks and other transactions made using your checking account number
- Automatic bill payments

We do not authorize and pay overdrafts for the following types of transactions unless you ask us to (see below):

- ATM transactions
- Everyday debit card transactions

We pay overdrafts at our discretion, which means we do not guarantee that we will always authorize and pay any type of transaction.

If we do not authorize and pay an overdraft, your transaction will be declined.

### ➤ What fees will I be charged if [Institution Name] pays my overdraft?

Under our standard overdraft practices:

- We will charge you a fee of up to **\$30** each time we pay an overdraft.
- Also, if your account is overdrawn for 5 or more consecutive business days, we will charge an additional \$5 per day.
- There is no limit on the total fees we can charge you for overdrawing your account.

### ➤ What if I want [Institution Name] to authorize and pay overdrafts on my ATM and everyday debit card transactions?

If you also want us to authorize and pay overdrafts on ATM and everyday debit card transactions, call [telephone number], visit [Web site], or complete the form below and [present it at a branch][mail it to:

-----  
 I do not want [Institution Name] to authorize and pay overdrafts on my ATM and everyday debit card transactions.

I want [Institution Name] to authorize and pay overdrafts on my ATM and everyday debit card transactions.

Printed Name: \_\_\_\_\_

Date: \_\_\_\_\_

[Account Number]: \_\_\_\_\_ ]