A number of cases have considered various practices in connection with overdraft and nonsufficient funds (NSF) fees. Challenges to the amount of overdraft or NSF fees imposed by national banks have generally failed. Courts have held these claims to be preempted by the OCC regulation permitting national banks to set the price of fees at their discretion. These decisions usually do not include a close analysis of the OCC regulation’s limited scope.

Arguably, a bank’s practice of debiting overdraft fees from depositors’ accounts could be viewed as an exercise of the “right to collect debts,” which is protected from preemption by the savings clause in the OCC deposit-taking regulation. In 2007, however, the OCC issued an opinion letter to the contrary. Whether the Dodd-Frank Act’s repudiation of the OCC’s practice of preemption-by-letter impacts this ruling has not yet been addressed by the courts.

Another issue is whether an overdraft fee is interest. The OCC’s preemption regulations apply only to banks’ non-interest fees, not to interest. If a charge is interest, then it is governed instead by section 85 of the National Bank Act, which allows national banks the choice of exporting their home state’s interest rate or abiding by a federal rate. A 2016 decision holds that an initial fee that a bank imposes whenever a depositor overdraws an account, whether or not the bank covers the overdraft, is not interest, but a charge that is imposed if the depositor does not remedy the account’s negative balance within five days is interest. The court reasoned that a transaction in which the bank covers an overdraft and then charges the depositor for doing so amounts to an extension of credit, and a charge that is imposed after five days is a charge for the use of money. The consumer would therefore have a usury claim if the amount of the charge exceeded that allowed by section 85.

Footnotes


192 [182] 12 C.F.R. § 7.4002. See § 1.5.6 [1], supra.

193 [183] See § 1.5.6 [1], supra.


196 [186] See § 1.5.4 [5], supra.

197 [187] 12 C.F.R. § 7.4002. See also 12 C.F.R. §§ 7.4001 (defining interest for purposes of National Bank Act § 85 and...
noting that a national bank can charge its home state’s interest rate), 7.4008 n.6 (stating that limitations on interest are
determined by National Bank Act § 85).

198 [188] See National Consumer Law Center, Consumer Credit Regulation § 3.4.1 [6] (2d ed. 2015), updated at
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