

9th Circ. Overdraft Ruling Bolsters Banks' Coverage Claims

By **Bibeka Shrestha**

Law360, New York (January 08, 2013, 7:38 PM ET) -- When the Ninth Circuit ruled recently that debit transactions can be ordered in a way that maximizes overdraft fees, it potentially handed banks a new weapon to win insurance coverage for the hundreds of millions of dollars they've paid out to settle class actions over the practice, experts say.

Customers have accused more than 30 banks of improperly processing the biggest debit transactions from a business day first to make overdrafts more likely and to rake in more overdraft fees from each of the transactions that follow. Vacating a \$203 million judgment against Wells Fargo Bank NA, the Ninth Circuit ruled Dec. 26 that high-to-low posting of debit transactions is a business decision generally allowed by federal regulators.

Attorneys say the appeals court ruling could undercut widespread arguments by insurers that settlements of overdraft litigation aren't covered because they count as disgorgement of ill-gotten gains.

"There's nothing ill-gotten about the gains if the methodology is appropriate," Kirk Pasich, who leads Dickstein Shapiro LLP's insurance coverage group, told Law360.

Banks that are struggling to get insurance coverage for settlements of overdraft litigation should pay attention to the ruling, which speaks directly to the conduct at issue in the underlying suits, according to Marshall Gilinsky, a shareholder at Anderson Kill & Olick PC.

"[The practice] might make you feel bad [and] it might make a jury angry at you, but [the banks] were allowed to do it," Gilinsky said. "How could the settlement of those cases be considered disgorgement? There's really no difference between the settlement of those cases and the settlement of any case without admission of liability."

But John McCarrick, chair of the directors and officers group at White and Williams LLP, stressed that the Ninth Circuit's recent decision also established that banks could still be ordered to pay restitution if it's shown that they misled customers into believing that debit transactions would be posted chronologically.

"When you're being asked to give up something you weren't entitled to in the first place, you can't get insurance for that," McCarrick said. "The only thing plaintiffs could have recovered would be uninsurable."

A slew of banks have paid heavily to exit multidistrict litigation attacking their sequencing of debit transactions. Giants like Bank of America NA, JPMorgan Chase Bank NA and PNC Bank NA have opted to settle overdraft fee litigation for \$410 million, \$110 million and \$90 million, respectively.

In the Wells Fargo ruling, the Ninth Circuit said federal regulators let banks set their own methods for calculating overdraft fees. The Office of the Comptroller of the Currency has specifically said that high-to-low posting of debit transactions is a pricing decision allowed under federal law, as long as these decisions are based on sound banking principles, according to the decision.

Negotiations between banks and insurers over a broad variety of claims brought between 2007 and 2011 have been ongoing, according to McCarrick.

Banks have found it especially challenging to get insurance for cases akin to the overdraft fee litigation after insurers were emboldened by the Seventh Circuit's ruling in *Level 3 Communications Inc. v. Federal Insurance Co.* The landmark 2001 ruling said that insurance isn't intended to cover companies that are forced to return profits that were improper.

Matthew Jacobs, a Jenner & Block LLP partner who represents policyholders, said the Ninth Circuit's latest ruling would help banks argue that the Level 3 decision and its progeny don't apply to coverage of overdraft fee litigation.

"It certainly strengthens the banks' requests for insurance coverage of the fees they have to pay," Jacobs said.

Gilinsky added that generally liberal courts like the Ninth Circuit tend to clamp down on banks, but here, the appeals court had staked out a fairly conservative position. Still, it is unclear how insurers will respond, he said.

"I don't know if insurers are going to change positions," Gilinsky said. "But it certainly screams out that they should."

Judges Sidney R. Thomas, M. Margaret McKeown and William A. Fletcher sat on the panel for the Ninth Circuit.

The plaintiffs are represented by Mitchell Breit of Hanly Conroy Bierstein Sheridan Fisher & Hayes LLP; Richard M. Heimann, Michael Sobol and Roger N. Heller of Lieff Cabraser Heimann & Bernstein LLP; Richard Dale McCune Jr. and Eddie Jae Kim of McCuneWright LLP; and Brian J. Panish and Adam K. Shea of Panish Shea & Boyle LLP.

Wells Fargo is represented by Emily Johnson Henn, David M. Jolley, Robert Allen Long Jr., Mark William Mosier and Sonya D. Winner of Covington & Burling LLP.

The case is *Veronica Gutierrez et al. v. Wells Fargo & Co. et al.*, case number 10-16959, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Elizabeth Bowen and Katherine Rautenberg.