

BofA Overdraft Fee Deal Gets Judge's Final Approval

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Law360 (September 4, 2018, 10:21 PM EDT) -- A California federal judge has given final approval to a class action settlement that calls for [Bank of America](#) to stop charging extended overdraft fees through as late as 2022 and provide millions of dollars' worth of other relief to account holders who were assessed the fees during a nearly four-year period starting in February 2014.

In an order on Friday, U.S. District Judge M. James Lorenz found the deal — which resolves a suit alleging that the fees amounted to usurious interest charges — to be “fair, reasonable and adequate” and rejected a challenge to settlement class certification in light of the Ninth Circuit’s [July decision](#) to back a recent \$10 billion settlement related to [Volkswagen AG’s](#) emissions scandal.

[Unveiled last year](#), the deal approved Friday requires Bank of America to stop charging extended overdraft fees through the end of 2022, unless the [U.S. Supreme Court](#) rules before then that such fees don’t count as interest under the National Bank Act.

This injunctive relief, which Bank of America has indicated will cost it up to \$1.2 billion in forgone fee revenue over the cessation period, is joined by provisions requiring the bank to pay \$37.5 million to checking account customers who paid at least one of these fees between Feb. 25, 2014, and Dec. 30, 2017, and to provide \$29.1 million in debt relief for those who saw the bank eventually close their overdrawn accounts while they still had these fees outstanding.

Objector Estafania Osorio Sanchez had argued that these two cash and debt relief benefits are “entirely different and in conflict” and necessitated the creation of separate subclasses and appointment of subclass representatives, a position that the judge viewed as analogous to an objection raised in the Volkswagen deal.

Among other relief included in that settlement, certain Volkswagen owners could receive a cash payment of more than \$5,000 if they bought their vehicles before the

German automaker's September 2015 admission that it had used so-called defeat devices to game U.S. regulators' emissions tests. Some Volkswagen owners who had either purchased or sold their vehicles after that date, meanwhile, could receive half that amount.

An objector had questioned whether these VW sellers had been adequately represented in the negotiations, given that they stood to receive the same amount as VW owners who'd bought vehicles with some level of knowledge about the defeat devices. However, a Ninth Circuit panel said in July that it didn't see a serious enough conflict of interest between these groups to second-guess the adequacy of their representation.

"Far from getting the short end of the stick, the eligible sellers gained enormously from being in the class with vehicle owners," the panel said, adding that the sellers were getting an amount that "generally fairly compensated" for their economic losses.

In his decision Friday, Judge Lorenz said the Bank of America customers who get debt relief from the bank's settlement are likewise "fairly compensated for their actual economic losses stemming from unpaid EOBCs," referring to extended overdrawn balance charges — Bank of America's name for the extended overdraft fees.

"Indeed, debt portion recipients will receive complete EOBC debt forgiveness," the judge said. "It is true that the cash portion recipients, by contrast, will recover less than one hundred percent of their economic loss. But this comparably less favorable treatment of cash portion recipients is not grounds for finding an improper conflict of interest because the named plaintiffs include only cash portion recipients and do not include any debt portion recipients."

Judge Lorenz also granted a pared-back request for \$14.5 million in attorneys' fees for the class counsel from [Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Tycko & Zavareei LLP](#), Creed & Gowdy PA and [Kelley Uustal PLC](#), saying they had achieved a "remarkable" result for the class "through tenacity and great skill."

"We are extremely pleased with the court's order approving our settlement on

behalf of millions of current and former Bank of America customers,” Jeff Ostrow, an attorney for the class, said in an email to Law360. “The settlement provides for over \$66 million in monetary benefits, and we are particularly happy that the court recognized the tremendous benefit associated with the \$1.2 billion in savings from the injunctive relief, with Bank of America agreeing to cease charging extended overdraft fees.”

The settlement ends a putative class action filed in February 2016 over the bank’s practice of charging a \$35 fee on accounts that remained overdrawn for more than five business days. That fee amounted to interest and, when put into annualized terms relative to an account holder’s negative balance, routinely exceeded the maximum interest rate permitted by the [NBA](#), according to the suit.

In April 2016, the bank sought to toss the suit, arguing that the charges don’t constitute interest on an extension of credit and instead are merely authorized deposit account service charges, or flat fees.

But in December 2016, Judge Lorenz veered from several other district court rulings on the issue, finding that the extended fees are connected to an extension of credit — in this case, advancing funds to cover an overdrawn account — that creates a framework for which an extended charge can be considered interest on that extension of credit.

Bank of America appealed Judge Lorenz’s decision to the Ninth Circuit, but in October 2017, the parties notified the court they had reached a settlement.

“The settlement was a tremendous accomplishment given that at least five other courts found that a national bank’s assessment of extended overdraft fees is not an interest charge and thus not subject to the National Bank Act’s usury limit,” Ostrow told Law360 on Tuesday. “Judge Lorenz reached the opposite conclusion in denying the bank’s motion to dismiss, opening to the door for the relief achieved for the class.”

Bank of America declined to comment on the settlement. Counsel for Sanchez did not immediately return a request for comment late Tuesday.

The class is represented by Jeff Ostrow of Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Bryan Gowdy of Creed & Gowdy PA, Hassan A. Zavareei of Tycko & Zavareei LLP, and John Joseph Uustal, Cristina Maria Pierson and John R. Hargrove of Kelley Uustal PC.

Sanchez is represented by Michael D. Luppi of the Law Office of Michael D. Luppi.

Bank of America is represented by Danielle N. Oakley, Brian Boyle, Jonathan D. Hacker and Matthew W. Close of [O'Melveny & Myers LLP](#).

The case is Joanne Farrell et al. v. Bank of America NA, case number [3:16-cv-00492](#), in the U.S. District Court for the Southern District of California.

--Additional reporting by Dorothy Atkins and Linda Chiem. Editing by Alanna Weissman.