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BofA Cuts \$66.6M Deal To End Suit Over Overdraft Fees

By Dorothy Atkins

Law360, New York (November 1, 2017, 6:14 PM EDT) -- Bank of America NA has agreed to pay \$66.6 million to end a putative class action claiming it violated usury laws by charging account holders an additional \$35 fee for failing to replenish their overdrawn accounts within five days, according to documents filed in California federal court Tuesday.

Under the deal, the bank also agreed to stop hitting customers with additional \$35 charges — on top of the initial \$35 that it charges accounts with insufficient funds — for five years, saving class members approximately \$1.2 billion over that period, according to the motion for preliminary settlement approval filed Tuesday. The customers' attorneys argued that the deal is fair and offers substantial value for customers, considering the risks associated with litigating claims in the case, which they say are "untested and novel."

"Plaintiffs and class counsel are confident in the strength of their case, but are also pragmatic in their awareness of the various defenses available to the bank, and the risks inherent to litigation of this magnitude — which challenges engrained banking industry practice," the motion said.

If approved, the deal would resolve a putative class action lead plaintiff Joanne Farrell filed in **February 2016** that alleges the bank's follow-up \$35 charge, as a percentage of an account holder's negative balance, exceeds the interest rate permitted by the National Banking Act.

Farrell claimed the bank's extra \$35 fee was "egregiously high, usurious and illegal," and she sought to represent all Bank of America checking or money market account holders who incurred one or more extended charges within the last two years.

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**, U.S. Judge M. James Lorenz veered from three 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 Lorenzo's decision to the Ninth Circuit, but in October, the parties notified the court they had reached a settlement.

The deal is a nonreversionary opt-out settlement, under which the bank has agreed to

automatically pay out \$37.5 million to customers charged the fees, without class members having to submit claims. The bank also agreed to set aside \$29.1 million to cover charges assessed against customers whose accounts have been closed, and it agreed to update account reports sent to credit bureaus. The parties estimate there are more than 5 million potential class members.

Counsel for the customers also plan to request up to 25 percent of the total settlement, or \$16.65 million, for attorneys' fees, as well as reimbursement for litigation costs and expenses they incurred.

Farrell's attorney Jeffrey Kaliel of Tycko & Zavareei LLP said in a statement Wednesday that the deal saves Bank of America account holders more than a billion dollars in overdraft charges and provides meaningful payments to customers who incurred fees.

Kaliel said that while the settlement ensures Bank of America customers won't have to endure "abusive and extremely high interest charges," millions of account holders at other banks across the country are still subject to them.

"I hope this settlement is the beginning of a growing awareness in the industry that usury is not an acceptable business practice," Kaliel said.

Representatives for Bank of America didn't immediately respond to requests for comment Wednesday.

Farrell is represented by Bryan Gowdy of Creed & Gowdy PA, Jeffrey Kaliel of Tycko & Zavareei LLP, Jeff Ostrow of Kopelowitz Ostrow Ferguson Weiselberg Gilbert, John J. Uustal, Cristina Maria Pierson and John R. Hargrove of Kelley Uustal PC, and Walter W. Noss of Scott & Scott LLP.

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 v. Bank of America NA, case number 3:16-cv-00492, in the U.S. District Court for the Southern District of California.

--Editing by Alyssa Miller.