The Exploitation of Bank Charges and Undermining of Consumer Protection: Exploring the Realms of High-to-Low Check Posting

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I. INTRODUCTION

Imagine a consumer has a checking account balance of $126.02. The consumer writes four checks in the amounts of $25.00, $13.00, $50.00, and $198.58.¹ Although these checks are presented to the bank for payment on the same day, the bank debits the account first for the $198.58 check, which creates an overdraft and triggers overdraft fees on all the checks remaining, including three smaller checks.² The consumer is confronted with four dishonored checks and consequently overdraft fees for all four accounts.³ If the checks had been posted from the lowest amount to the highest amount, only the $198.58 check would be dishonored and only one overdraft fee would be charged. This predicament is not a conjecture for Scott Shepard, the plaintiff, in Hill v. St. Paul Fed. Bank for Savings; this is the scenario which allowed him to fully grasp the implications of high-to-low check posting.⁴

Banks have the privilege of processing checks in a number of ways.⁵ For example, some banks process checks on a first-come, first-serve basis, some reorder checks to create a check number sequence, while others sequence checks in ascending amounts (low-to-high).⁶ During the mid-1990s, a consultant introduced computer-processing capability that would allow banks to automatically process checks from high to low, and as a result

². Id.
³. Id.
⁴. See id.
⁶. Id. (First-come-first serve basis entails “the random order in which checks are captured in a check-sorting machine.”).
increase their revenues arising from overdraft fees.\textsuperscript{7} High-to-low posting has become prevalent over the course of the past decade.\textsuperscript{8} The majority of the biggest consumer banks employ high-to-low sequencing policies at their branches.\textsuperscript{9} A study revealed that eight of the ten largest banks operating in the U.S., "including Citigroup, Bank of America, Wachovia, Chase, Wells Fargo, HSBC, U.S. Bank, and SunTrust," process checks according to the high-to-low method.\textsuperscript{10} Over the past decade, numerous consumer class actions have arisen challenging a bank's high-to-low posting order on the premise that this method is not enforceable due to claims such as unconscionable contracts, breaches of good faith and fair dealing, and contracts of adhesion.\textsuperscript{11}

In May of 2008, the Federal Reserve Board proposed rules that would prohibit financial institutions from participating in unfair practices regarding overdraft services for deposit accounts.\textsuperscript{12} This effort included researching effective disclosures that consumers would be attentive to, comprehend, and utilize in their decision making process.\textsuperscript{13} While the proposed rule was not centered on transaction clearing practices, the Agencies (the FDIC, Board, OCC, OTS, and NCUA) requested comments on the effect of imposing a low-to-high posting order that would force institutions to process smaller dollar items before larger dollar amounts. Institutions would still have the option to utilize alternative clearing orders, with the understanding that the institution has disclosed the clearing practice to the consumer and the consumer has assented to opt in.\textsuperscript{14} With the exception of the OCC regulation, the current law and practice falls within the boundaries of state law. Therefore, the possibility of a federal


\textsuperscript{8} Barbara Clark, Storm Clouds on the Horizon for High-to-Low Debit Posting, 17(6) CLARK'S BANK DEPOSITS AND PAYMENTS MONTHLY 1, 2 (2008).

\textsuperscript{9} Apte et al., supra note 5, at 97.


\textsuperscript{11} Clark, supra note 8, at 1.

\textsuperscript{12} Unfair or Deceptive Acts or Practices, 73 Fed. Reg. 28,904 (May 19, 2008).

\textsuperscript{13} Id. at 28,905.

\textsuperscript{14} Id. at 28,907.
regulatory effort by the federal bank regulators under the unfair and deceptive acts and practices provision of the FTC Act to change the current law and practice in this area would be a monumental progression.\textsuperscript{15}

Part II of this Note discusses the implications of an institution’s business decision to implement a high-to-low posting order.\textsuperscript{16} Part III presents a legal analysis of the posting method, with a discussion of regulations and authoritative sources that courts embrace to uphold a bank’s discretion with regard to sequencing practices.\textsuperscript{17} Part IV discusses deposit account agreements and disclosure of posting practices, including challenges to enforceability of these agreements.\textsuperscript{18} Part V analyzes the agencies’ low-to-high check posting proposal.\textsuperscript{19}

II. HIGH-TO-LOW CHECK POSTING

A. Effect on NSF Charges

The outcome of high-to-low posting strategies is an increase in non-sufficient funds (NSF) and consumer fees.\textsuperscript{20} NSF fees, return items fees, and overdraft protection fees directly affect the sequencing strategy that banks opt to utilize as their scheme for clearing checks.\textsuperscript{21} Studies have shown steady increases in bank revenues due to the fees that banks receive for these charges. In 2002, a study by the Federal Reserve estimated that banks operating in the U.S. annually returned approximately 300 million checks out of a total of approximately 49.6 billion checks.\textsuperscript{22} In the same year, the average NSF fee was $20.73 per returned check, and U.S. banks collected approximately $6.2 billion per year in total NSF fees.\textsuperscript{23} In 2005, a Consumer Federation of America

\textsuperscript{15} See id. (Discussion of statutory authority under the Federal Trade Commission Act to address unfair or deceptive acts or practices).
\textsuperscript{16} See infra Part II.
\textsuperscript{17} See infra Part III.
\textsuperscript{18} See infra Part IV.
\textsuperscript{19} See infra Part V.
\textsuperscript{20} Botti, supra note 10.
\textsuperscript{21} Id.
\textsuperscript{22} Apte et al., supra note 5, at 98.
\textsuperscript{23} Id.
survey estimated that the largest banks charged an average of $28.57 for overdrafts.\textsuperscript{24} In 2007, the fees that banks received from NSF fees, return items fees, and overdraft protection fee charges were projected to constitute as much as eighty-eight percent of the service charges on deposit accounts.\textsuperscript{25} Furthermore, experts estimated that these charges amounted to almost $50 billion for financial establishments in 2007.\textsuperscript{26}

Consumers are faced with inordinately high fees when they overdraw their accounts.\textsuperscript{27} Banks that employ the high-to-low sequencing method typically “bounce from 12 to 24 percent more checks for lack of sufficient funds than other banks.”\textsuperscript{28} Considering the enormity of the opportunity for banks to maximize profits based on high-to-low sequencing, it should come as no surprise that in 1999, NationsBank, which was taken over by Bank of America in a 1998 merger, refused to change its check sequencing strategy in response to a class-action suit, but instead agreed to pay $9 million out of court versus entering the discovery stage of the trial.\textsuperscript{29} Subsequent to the merger, Bank of America continued to process checks from highest to lowest amount.\textsuperscript{30}

\textbf{B. Banks' Justifications}

Banks that use high-to-low check posting offer several arguments in defense. First, banks acknowledge that high-low sequencing offers increased NSF fee revenue and that a change in

\textsuperscript{24} Jean Ann Fox & Patrick Woodall, \textit{Overdrawn: Consumers Face Hidden Overdraft Charges From Nation's Largest Banks}, 28 (Consumer Federation of America) (2005), available at www.consumerfed.org/pdfs/CFAOverdraftStudy June2005.pdf (explaining that Banks are reluctant to disclose their processing order to customers).

\textsuperscript{25} Botti, \textit{supra} note 10.

\textsuperscript{26} Id. (“Keep in mind that some of these checks that turn up NSF would bounce no matter when they were presented for payment, and the order of clearing would provide no help whatsoever. But by controlling the presentment queue, banks know that they can inflate this number. This creative system is pumping record money in fees into banks at the expense of the unsuspecting public.”).

\textsuperscript{27} Fox & Woodall, \textit{supra} note 24, at 4.

\textsuperscript{28} Apte et al., \textit{supra} note 5, at 98.

\textsuperscript{29} Id.

the existing rule would diminish their revenue stream. Second, banks emphasize that high-to-low check posting facilitates uniform practices within the banks and, therefore, advances more well-organized procedures for a particular bank. Third, Banks have taken into account the “deterrent effect” that a high-to-low posting order will have on consumer habits. In essence, banks argue that customers who habitually overdraw their account will not be enticed to bank with institutions that employ high-to-low check posting methods. This argument may lead one to ask: Do consumers choose banks according to their check processing orders? And if so, how can customers make an informed decision about a bank’s processing order when most banks do not disclose this information? Furthermore, banks routinely allow their consumers to overdraw bank accounts, so how can they justify high fees to deter mishandling by customers? Fourth, banks have speculated that the order of check posting has an effect on the banks’ placement in the market. Banks argue that uniform procedures within the organization will enable staff members to effectively educate consumers on the bank’s polices when they are asked to address overdraft procedures. Banks contend that this consistency leads to efficient operations that will improve the banks position in the market.

Banks argue that consumers want their largest checks posted first to help guarantee that important bills, such as mortgage or insurance payments, are paid first. However, this rationale seems illogical when a depositor has overdraft protection and the bank is paying all overdrafts and charging an overdraft fee

32. Id.
33. Id.
34. Id.
35. Fox & Woodall, supra note 24, at 20.
36. Id. at 18.
37. Williams, supra note 31.
38. Id.
39. Id.
40. Id.; see also Fox & Woodall, supra note 24, at 17.
If all items will eventually be paid, wouldn't the depositor prefer low-to-high check posting so that the fewest number of checks will be overdrafts, subjecting the consumer to the fewest number of overdraft charges? Furthermore, a 1998 public survey indicated that only 13% of respondents wanted banks to process the largest checks since those may be the most significant. Nearly two-thirds of consumers believed that banks should pay checks in the order the bank receives them while 16% felt that banks should pay the smallest checks first to curtail the number of checks that are dishonored. The justification that high-to-low check posting ensures important payments are made is a rationale that "can not justify this practice for banks that routinely honor overdrafts because all debits will get covered." Banks that continue to employ high-to-low sequencing are not aligning their customers' "priorities and preferences" with their order of posting; but, for all intents and purposes, are seeking to maximize the imposition of overdraft fees.

III. LEGAL ANALYSIS

A. Pre-Code

Prior to the adoption of the Uniform Commercial Code (UCC), courts granted banks the discretion to post checks in any order the institution saw fit. This principle can be traced back to the early 1900s. In Reinisch v. Consolidate National Bank, with a balance of roughly $328, the plaintiff simultaneously presented seventeen checks totaling $664 and the account funds were rendered insufficient. The court held that the defendant bank

41. Clark, supra note 8.
42. Id.
43. Fox & Woodall, supra note 24, at 17.
45. Fox & Woodall, supra note 24, at 18.
46. Williams, supra note 3; see also Fox & Woodall, supra note 24.
47. See, e.g., Reinisch v. Consolidated Nat'l Bank, 45 Pa. Super. 236 (1911); see also Castaline v. Nat'l City Bank, 244 Mass. 416 (1923).
48. Id.
had free range with regard to which check the institution could post first. Under similar facts, the court held in *Castaline v. National City Bank* that the "bank [had] the right to make payment in any order it may decide, until the deposit is exhausted." 

**B. UCC 4-303**

After the introduction of the UCC, courts across the nation have cited its section 4-303 as enabling banks to implement high-to-low posting order strategies. Section 4-303 of the UCC states: "items may be accepted, paid, certified, or charged . . . in any order" contingent upon a "notice, stop-payment order, legal process, or set-off." Official Comment 7 to UCC 4-303 reads:

> As between one item and another no priority rule is stated. This is justified because of the impossibility of stating a rule that would be fair in all cases, having in mind the almost infinite number of combinations of large and small checks in relation to the available balance on hand in the drawer's account; the possible methods of receipt; and other variables. Further, the drawer has drawn all the checks, the drawer should have funds available to meet all of them and has no basis for urging one should be paid before another; and the holders have no direct right against the payor bank in any event, unless of course, the bank has accepted, certified or finally paid a particular item, or has become liable...

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50. Id. at 243.
51. *Castaline*, 244 Mass. at 416.
52. See, e.g., Security Trust Co. v. First Nat'l Bank, 358 N.Y.S.2d 943, 947 (N.Y. Sup. Ct. 1974) (holding "the defendant's decision [regarding process of posting] was proper procedure and at the convenience of the defendant bank and in compliance with subdivision (2) of section 4-303 of the Uniform Commercial Code"); see also, New Jersey Bank v. Palladino, 368 A.2d 943, 951 (N.J. Super. Ct. App. Div. 1976) (holding "The Uniform Commercial Code . . . vests broad discretion in a bank to allocate funds received to a customer's account in any order convenient to the bank.").
for it under Section 4-302. Under subsection (b) the bank has the right to pay items for which it is itself liable ahead of those for which it is not.\textsuperscript{54}

Courts have cited UCC 4-303 as the basis for rejecting plaintiff arguments for breach of covenant of good faith and fair dealing in response to posting policies.\textsuperscript{55} For example, in Hill v. St. Paul Fed. Bank for Savings, the plaintiff challenged the defendant bank’s posting order sequence on the premise that high-to-low posting simply accomplished the goal of maximizing bank fees while illustrating an “improper motive” and infringing upon the duty of good faith and fair dealing.\textsuperscript{56} The plaintiff argued that the account agreement gave the bank the sole authority to choose a posting order most beneficial to the institution and the arrangement failed to align with the consumer’s “reasonable expectations.”\textsuperscript{57} The court dismissed the claim of breach of covenant of good faith and fair dealing and explained that although disclosures were not made to consumers regarding specific posting order methods, activities pursuant to UCC section 4-303(b) could not be deemed to lack good faith.\textsuperscript{58} The court reasoned that the legislature contemplated the possibility that banks could utilize high-to-low methods and consequently subjecting consumers to an increased number of overdraft fees.\textsuperscript{59}

Many states have adopted state provisions that parallel UCC 4-303.\textsuperscript{60} The Texas State Bar Committee suggests that it is unlawful for a bank to implement a posting order strategy exclusively for the purpose of gaining revenues from escalating consumer fees.\textsuperscript{61} The State Bar Committee requires a showing of good faith during this decision making process.\textsuperscript{62} Moreover, the Office of the Comptroller of the Currency (OCC), regulator of

\textsuperscript{54} Id.
\textsuperscript{56} Id. at 325.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 328.
\textsuperscript{59} Id.
\textsuperscript{60} See, e.g, TEX. BUS. & COM. CODE ANN. § 4.303 (2007).
\textsuperscript{61} Id.
\textsuperscript{62} Id.
national banks, notes that an essential element in accessing good faith is a comparative analysis of the bank’s presentation to consumers versus the actual practices the institution has implemented. In addition to section 4-303, the OCC listed 12 U.S.C. § 24 (Seventh) and 12 C.F.R. § 7.4002 as controlling authority that grants nationally chartered banks expansive discretion with regard to posting order. According to the OCC, “Section 24(Seventh) authorizes a national bank to engage in activities that are part of, or incidental to, the business of banking as well as to engage in certain specified activities listed in the statute.” Section 7.4002 establishes that “method[s] of calculating” are organizational determinations that resides within the judgment of the bank: “A national bank may charge its customers non-interest charges and fees . . . The establishment of non-interest charges and fees, their amounts, and the method of calculating them are business decisions to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles.”

Thus, as long as the standards of “safe and sound banking principles” are met, the bank is allowed to follow a posting order most beneficial to the institution. Additionally, the regulation sets forth essential elements that the institution should consider in order to meet this standard including, but not limited to: prevention of mishandling by consumers of services provided by the bank, expenditures sustained by making the service available to consumers, the enrichment of the “competitive position of the bank in accordance with the bank’s business plan and marketing strategy; and [t]he maintenance of the safety and soundness of the institution.” Moreover, in the preliminary statements of the amended provisions, the OCC declared that the discretion for posting order methods was pursuant to 12 C.F.R. § 7.4002.

63. Williams, supra note 31.
64. Id.
65. Id.
67. Williams, supra note 31.
68. 12 C.F.R. § 7.4002.
69. Williams, supra note 31.
C. OCC Regulation and Interpretive Order

The Office of the Comptroller of the Currency (OCC) regulates national banks.\textsuperscript{70} State banks are regulated by the state’s banking regulator and receive federal oversight by the Federal Reserve if the state bank is a member of the Federal Reserve System and by the FDIC if the state bank is not a Federal Reserve Board member.\textsuperscript{71} Pursuant to the National Banking Act, the OCC has issued a regulation that authorizes national bank discretion in the “method of calculating” bank fees, including overdraft fees.\textsuperscript{72} Furthermore, the preamble to the regulation when it was first proposed, provided that “fees resulting from the method the bank employs to post checks presented for payment are included within the authorization provided by” the regulation.\textsuperscript{73} An OCC interpretive letter confirms that in the OCC’s view a high-to-low check posting order is consistent with the OCC regulation and the National Bank Act.\textsuperscript{74} Moreover, since the OCC view and the state law view under the UCC are consistent, there is no issue with whether the OCC view preempts the state law on this issue.

IV. DEPOSIT ACCOUNT AGREEMENTS AND DISCLOSURE OF POSTING PRACTICES

A. Deposit Account Agreements

Since many consumers are uninformed of their bank’s processing order, the Federal Reserve noted in adopting Truth in Savings regulations that consumers are unlikely to know the quantity of items that will bounce, and consequently will be unknowingly encumbered with fees.\textsuperscript{75} A Consumer Federation of America (CFA) survey points out that depository institutions by and large do not divulge the order they process debits and many

\textsuperscript{73} 66 Fed. Reg. 34,784, 34,787 (Jul. 2, 2001).
\textsuperscript{74} Williams, supra note 31.
indicate that they can change their processing order without giving notice to consumers. For instance, Wachovia’s “Deposit Agreement and Disclosures for Personal Accounts” reserves the right to process debit items, namely checks or ATM withdrawals, in the order determined by the bank and at any time may exercise the right to change the processing order. Similarly, KeyBank processes debit items in any order that it sees fit and also retains the right to change the processing order without prior notice to the depositor. “CFA found that nearly one fourth (24.2%) of banks refuse to disclose any debit processing order beyond ‘any order,’ one seventh (15.2%) of banks reserve the right to process debits in any order but disclose they generally process debits from largest to smallest; and one third (33.3%) disclose they process debits largest to smallest.”

The American Bankers Association (ABA) asserts that processing orders are multifarious and intricate, making it impracticable to explain the process in terms that consumers can understand. The ABA contends that an effort to inform consumers of processing orders would call for several pages of explanations. This sentiment that disclosure of posting orders would call for convoluted contractual terms was argued in Shelley v. AmSouth Bank: “providing overly complicated or technical disclosures to consumers provides little value in shopping for accounts and may diminish the value of the information given . . . regardless of how simple it would be to identify and explain a posting order policy, it does not constitute information so fundamental that Congress could not have sanctioned its non-disclosure.”

76. Fox & Woodall, supra note 24, at 17.
79. Fox & Woodall, supra note 24, at 17.
81. Id.
release their processing order, some banks include as text in their consumer account agreement disclosures that processing orders can have an effect on total fees for consumers. For example, Bank of America informs their consumers that select processing orders can produce additional insufficient funds fees. Similarly, Citizen’s Bank “Personal Deposit Account Agreement” cautions consumers that the bank’s choice in how it processes checks may increase the overdraft fees the consumer may have to pay.

B. Challenges to Enforceability of Deposit Account Agreements

Plaintiffs have presented various theories in a quest to challenge banks’ high-to-low posting order policies, contract terms, and disclosures. Consumers have looked to state consumer protection acts to fortify challenges against high-to-low posting orders. The plaintiff in Smith v. First Union National Bank asserted that high-to-low check posting was a transgression of consumer rights and pointed to the Tennessee Consumer Protection Act to support this contention. The purpose of that act is “to protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within [Tennessee].” Additionally, it seeks to “simplify, clarify, and modernize state law governing the protection of the consuming public and to conform these [respective] laws with existing consumer protection policies.” The Act also includes an exemption clause that states that the Tennessee act does not apply to activities falling within the boundaries of the laws in Tennessee

83. Fox & Woodall, supra note 24, at 17.
87. Id. at 114.
89. Id.
or the United States. The court held that the exemption clause was applicable to the plaintiff's case and therefore, the Bank's practice of high-to-low check posting was a legitimate strategy.

Plaintiffs have alleged contracts of adhesion with regard to terms between banks and consumers. A bank's discretion with regard to posting orders may be outlined in standardized forms that consumers may accept or decline, with no opportunity to negotiate. For example, in response to disproportionate fees charged to consumers for insufficient funds in checking accounts, plaintiffs in Wallace v. National Bank of Commerce alleged that deposit agreement terms presented to consumers were essentially contracts of adhesion. The court framed this issue by suggesting that if the arrangement between the banks and the consumers created a contract of adhesion, the terms of the contract would not be enforced if it was "unduly oppressive or unconscionable." Adhesion contracts have been defined as "standardized contract form[s] offered to consumers of goods and services on essentially a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain." Although the court found that the use of a standardized form and the "take-it-or-leave-it" predicament that the consumer was placed in were elements of an adhesion contract, these isolated components were not adequate to mount a cause of action for contract adhesion.

Theories of unconscionable conduct have been raised in connection to high-to-low check posting. The plaintiff in Daniels v. PNC Bank, N.A., asserted that the bank's efforts to maximize profits by utilizing a high-to-low check sequencing amounted to unconscionable actions. In response to this allegation, the court held that since high-to-low posting is authorized pursuant to 12

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91. Smith, 958 S.W.2d at 116-17.
94. Id.
96. Wallace, 938 S.W.2d at 687.
98. Id. at 451.
C.F.R. § 7.40002(b), it cannot be deemed unconscionable. Moreover, the court suggested that the plaintiffs had the power to conduct their financial affairs in a manner that would not render their account funds as insufficient by merely refraining from endorsing bad checks. The court also addressed the consequences that may materialize from having insufficient funds in your checking account and the preclusion of equitable reprieve: “[A] person who chronically writes bad checks does not have clean hands to seek equitable relief from the resulting fees, since such a person is engaged in bad banking practices and is merely experiencing the intended deterrent effect of those fees.” Since customers will not be charged fees once they incorporate financial habits that will enable them to maintain sufficient funds, the court ruled that the power of self-discipline leads to a conclusion that there is no achievable cause of action for unconscionability.

Plaintiffs have also argued that contractual terms defining posting orders that are “convenient to the bank” can be misleading and misinterpreted. In Daniels v. PNC Bank, N.A., the agreement between the bank and the plaintiff read: “If there are sufficient funds to cover some but not all of your withdrawal orders, we will allow those withdrawals that can be paid, in any order convenient to us.” The plaintiff asserted that the court should declare the phrase “in any order convenient to us” as imprecise or interpret the language to mean “an outright promise to pay all withdrawals in an ascending rather than descending order.” In response to the plaintiff’s argument that the language was vague, the court held:

First, we do not perceive any ambiguity in the language “we will allow those withdrawals that can

99. Id. at 452.
100. Id.
101. Id.
102. Id.
104. Daniels, 738 N.E.2d at 449 (emphasis added).
105. Id.
be paid, in any order convenient to us.” According to [the plaintiff], the last clause, “in any order convenient to us,” is “nonsensical and renders the majority of the statement a nullity.” This is true, however, only if one chooses to ignore the plain meaning of the words and obvious construction of the sentence. The words “in any order convenient to us” are clearly intended to modify “withdrawals that can be paid.” As for the argument that these words somehow constitute an “outright promise” to pay the checks in an ascending order, we find this to be the “nonsensical” construction.¹⁰⁶

Under similar facts, the court in *Smith v. First Union National Bank* held that the judicial branch was not in the position to delineate bank practices that were opportune for a particular institution.¹⁰⁷ The court employed judicial deference in connection to the bank’s internal operational judgments and found the terms “convenient to the bank” to be explicitly clear.¹⁰⁸

Plaintiffs have mounted causes of actions against banks for failure to disclose high-to-low check posting guidelines. The plaintiff in *Shelley v. AmSouth Bank* argued that a Bank’s disclosure of posting orders to consumers is imperative in order to fulfill the standards set forth in the Truth in Savings Act.¹⁰⁹ The Truth in Savings Act requires “each depository institution . . . [to] maintain a schedule of fees, charges, interest rates and terms and conditions applicable to each class of accounts offered by the depository institution.”¹¹⁰ The Board of Governors of the Federal Reserve System is charged with detailing what items should be disclosed.¹¹¹ The Truth in Savings Act states that the schedule should include a “description of all fees, periodic service charges, and penalties which may be charged or assessed against the account . . . the amount of any such fees, charge, or penalty (or the

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¹⁰⁶. Id.
¹⁰⁷. *Smith*, 958 S.W.2d at 116.
¹⁰⁸. Id.
method by which such amount will be calculated), and the conditions under which any such amount will be assessed. Since the meaning of "conditions" is not stated in the statute, the plaintiff attempted to fill in the gap by suggesting that "conditions" should be construed to mean "a state of being" or "attendant circumstances. The plaintiff argued that the bank's high-to-low posting sequence is a "condition" which will be assessed, and in order to align with the principles set forth in the Truth in Savings Act, the Bank is forced to disclose this policy. The court held that in order to uphold the requirements of the Truth in Savings Act, the bank was not required to disclose its posting order strategy. The court's rationale for this conclusion is based on the premise that the Board has "publish[ed] several model forms and clauses for common disclosures" which meet the standards of the Truth in Savings Act. Since none of these standardized forms include posting order disclosures, the court reasoned that the defendant bank is not obligated to disclose this information to consumers.

In addition to the allegation of a Truth in Savings Act violation, the plaintiff asserted a claim for fraudulent suppression in connection to posting order policies. To successfully bring a claim of fraudulent suppression, an obligation to unveil the suppressed information must be present. The court dismissed the fraudulent suppression claim based on the rationale that the defendant bank was not required to divulge the institution's posting order sequence.

V. ANALYSIS OF AGENCIES' LOW-TO-HIGH CHECK POSTING

114. Id.
115. Id. at *12.
116. Id. at *8-9. ("[T]he Board is directed to publish model forms and clauses for common disclosures, and a depository institution that uses such forms or clauses, either unchanged or with changes that do not affect the substance, clarity, or meaningful sequence of the disclosures, shall be deemed to be in compliance with the disclosure provisions of [the] chapter, 12 U.S.C. § 4308(2).”).
117. Id. at *9-10.
118. Id. at *21.
119. See General Motors Corp. v. Bell, 714 So. 2d 268, 280 (Ala. 1996).
The Agencies' request for comments treats high-to-low check posting as an unfair and deceptive act or practice. This treatment is significant because courts have consistently rejected the claim that high-to-low posting methods is a violation under state unfair and deceptive trade practice statutes. For instance, the plaintiff in *Hill v. St. Paul Fed. Bank for Savings* contended that "the failure of [banks] to disclose their posting method was an omission of a material fact in violation of the Consumer Fraud and Deceptive Business Practices Act . . . [and] the failure to disclose was deceptive under the Act." The Consumer Fraud and Deceptive Business Practices Act protects business transactions and activities against parties engaging in deceptive conduct with the intention of inducing others to rely on this deceptive behavior.

The court held that the bank was not under an obligation to disclose the institution's posting order strategy and therefore, no omission or deceptive practice was found that constituted a violation of the Consumer Fraud and Deceptive Business Practice Act. However, a federal agency attempt to specify a particular posting order, or failure to give the consumer notice and opportunity to opt-in, as an unfair and deceptive practice would probably be found to be a reasonable agency interpretation of the federal statute.

There are potential advantages and disadvantages to requiring a low-to-high posting. Low-to-high posting would enable the fewest number of checks to be overdrafted and subject the consumer to the fewest number of overdraft charges. Additionally, as a matter of public policy, NSF fees may be a

121. See supra notes 12-15 and accompanying text.
123. Id. at 711.
125. *Hill*, 768 N.E.2d at 331.
126. See supra notes 12-15 and accompanying text.
significant reason why many people who do not have checking accounts rather pay an equivalent fee to check cashers.\textsuperscript{128} A low-to-high posting may encourage people to enter the banking system and presumably, this would entice consumers to save and reduce crime (by reducing the number of people carrying around cashed paychecks). While many advantages may surface, it is important to acknowledge that potential loss of significant fee income to banks could be disastrous, especially in our current challenging economic climate.\textsuperscript{129}

As it currently stands, many banks have deposit account agreements with customers where they give various levels of disclosures regarding their check-posting policies.\textsuperscript{130} While disclosure remains a problem, the most beneficial disclosure appears to be banks that reveal to consumers that posting order strategies can have an adverse effect on their accounts.\textsuperscript{131} It is important to consider that disclosure may become difficult if banks adopt different orders in different circumstances.\textsuperscript{132} It may be desirable to allow a bank to sometimes post high-to-low, and sometimes post low-to-high.\textsuperscript{133} For example, the bank may normally utilize low-to-high sequencing in order to minimize NSF fees for the consumer; however, if the consumer is repeatedly bouncing checks, the bank may switch to the high-to-low method to deter this habit.

The Agencies' request for comments suggests that an alternative posting order (presumably high-to-low) would be possible if the depositor "opts-in."\textsuperscript{134} However, it would not be beneficial for a depositor to be required to agree to a high-to-low method in order to open an account.\textsuperscript{135} Thus, the logical interpretation would be that the default option will be low-to-high and that this posting order can be reversed only if the customer

\textsuperscript{128} See id.
\textsuperscript{129} See generally Williams, supra note 31.
\textsuperscript{130} See supra Part IV.
\textsuperscript{131} See, e.g., Bank of America, supra note 84; Wachovia, supra note 77.
\textsuperscript{132} See Clark, supra note 8.
\textsuperscript{133} See id.
\textsuperscript{134} See supra notes 12-15 and accompanying text.
\textsuperscript{135} See supra notes 20-30 (explaining the effect that high-to-low posting order has on deposit accounts).
specifically agrees.\textsuperscript{136} The Agencies’ proposal to ask for an “opt-in” by the consumer to any policy other than low-to-high may undermine the accomplishment of the rule since most banks are likely to require an opt-in to a different posting order regime.\textsuperscript{137}

VI. CONCLUSION

High-to-low posting only accomplishes the goal of maximizing the bank’s fee income.\textsuperscript{138} The nature of high-to-low posting is seemingly an unfair and deceptive trade practice that aims to only capitalize on mistakes by consumers.\textsuperscript{139} Analysis of the claims presented in consumer class actions challenging a bank’s high-to-low posting of checks and electronic debits reveal that customers feel they are being wrongfully deceived.\textsuperscript{140} The established nature of high-to-low posting orders accomplishes the goal of maximizing bank fee income at the expense of safeguarding consumer protection.\textsuperscript{141} Regulators have analyzed the recommendations presented by the Office of Thrift Supervision (OTS), the primary regulator of federal thrifts, and have presented proposals surrounding the bank’s high-to-low check posting practices.\textsuperscript{142} The proposal presents inquiries into implementing a new strategy for institutions: “Agencies solicit comment on the impact of requiring institutions to pay smaller dollar items before larger dollar items when received on the same day for purposes of assessing overdraft fees on a consumer’s account.”\textsuperscript{143} It is unlikely that a dramatic shift from high-to-low sequencing will surface soon. Comments regarding the established practice will most likely be considered first, and then a formal rulemaking on this issue may be presented. Enacting a mandatory “low-to-high” posting order would discontinue the practice of

\textsuperscript{136} See supra notes 12-15 and accompanying text.
\textsuperscript{137} Id.
\textsuperscript{138} See Clark, supra note 8, at 1.
\textsuperscript{139} See supra notes 86-91 and accompanying text.
\textsuperscript{140} See supra notes 86-120 and accompanying text.
\textsuperscript{141} See Clark, supra note 8, at 1.
\textsuperscript{142} Unfair or Deceptive Acts and Practices, 73 Fed. Reg. at 28,933.
\textsuperscript{143} Id. (emphasis added).
undermining consumer protection by reducing the amount of overdraft fees that are incurred by consumers.144

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144. See supra notes 127-128 and accompanying text.