



Business Law Section of the State Bar of California

Consumer Financial Services E-Bulletin

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Dear constituency list members of the Consumer Financial Services Committee:

On Remand in Posting Order Case, District Court Reinstates \$203 Million Award Against Wells Fargo

Last Tuesday, in *Gutierrez v. Wells Fargo*, the district court reinstated the \$203 million award that had been previously overturned on appeal.

The California class in that case had asserted that Wells Fargo posted electronic debit transactions drawn on checking accounts from largest to smallest in order to maximize overdraft fees. The class further alleged that the bank's marketing and other materials concerning its debit cards had misled customers into believing that transactions were instead posted chronologically. Judge Alsup, of the United States District Court for the Northern District of California, had previously entered a \$203 million award against Wells Fargo in the case following a bench trial.

As we previously reported in an earlier e-bulletin, late last year, the Ninth Circuit overturned the order on preemption grounds, but held that claims under California Unfair Competition Law for fraudulent conduct survived preemption. The panel further held that there was sufficient evidence to support a finding that Wells Fargo had misled its customers regarding its posting order. The Ninth Circuit therefore vacated the award, but remanded for consideration of whether relief was available based on the fraudulent UCL claim.

On remand, the district court concluded that such relief was indeed available, and that it had not been waived by the class. Relying on the expert evidence presented in the earlier trial, the district court further concluded that the appropriate measure of damages would be the same as it had been under the original order, on the theory that the class could be uniformly treated as having expected transactions to post chronologically. "The harm from Wells Fargo's affirmative misrepresentations came in the form of unexpected overdraft fees — the same harm wreaked by the unfair practice of manipulating the posting method. Restitution for this harm is likewise the same."

A copy of the district court's order is attached.

For more information, please contact [Rita Lin](#) of Morrison & Foerster LLP.

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