

Breaking Free: Strategies for Credit Unions to Navigate Vendor Terminations

Credit unions frequently find themselves bound by core contracts and vendor agreements laden with exorbitant early termination fees. These fees – sometimes reaching seven figures – can seem like insurmountable barriers, compelling credit unions to remain tethered to subpar vendors.

Yet there is a way out. Credit unions can – and should – contest excessive early termination fees to unlock value and reclaim operational freedom.

Evaluating the True Cost of Staying Versus Leaving

Credit unions should evaluate terminating any vendor that fails to meet their needs. A cost-benefit analysis is helpful, weighing the immediate costs of early termination against long-term benefits. These benefits include cost savings, enhanced service quality, strengthened security, and improved member and employee satisfaction.

Kevin Brueseke, CEO of the \$165 million Conservation Employees' Credit Union in Jefferson City, Mo., terminated a contract

for one vendor's account processing platform and converted to another vendor's platform earlier this year. Brueseke viewed the early termination fee as a worthwhile investment.



Charles Nerko, cnerko@barclaydamon.com, 212.784.5807

“We issued some sizable checks for the conversion, but the savings will accumulate over time. Our core processing fees have dropped by 45% since the conversion. Ultimately, I expect our credit union will save \$2.5 million over the next decade.”

Credit Union Mergers and Termination Fees: A Double Challenge

Early termination of vendors may also become necessary during credit union mergers. Mergers often involve terminating multiple contracts simultaneously, with fees so high they can undermine the financial benefits of the merger.

According to FedFis.com, 878 credit unions have switched core processors in the last three years. Of those credit unions, 446



credit unions replaced their core processors, while 432 core processors were terminated in the course of credit union mergers.

Understanding Early Termination Fees

Early termination fees are penalties charged by vendors when a contract is ended prematurely. Intended to protect vendors from financial losses, these fees can be prohibitively high, effectively trapping credit unions in unfavorable agreements.

Typically, early termination fees encompass a substantial portion of the contract's remaining value, rendering early termination financially daunting. These fees can vary significantly depending on the vendor. Moreover, credit unions must be vigilant about hidden costs and indirect fees that may accompany early termination. Vendors might retract previously offered incentives and impose additional charges for deconversion and data migration.

The Value in Challenging Excessive Early Termination Fees

Challenging early termination fees is vital for several reasons. Remaining with an unsatisfactory vendor due to an early termination fee can prevent a credit union

from realizing substantial cost savings by switching or obtaining better services elsewhere, undermining member and employee satisfaction.

Excessive early termination fees can also strain a credit union's budget, diverting funds from essential services and technological upgrades. Many of these fees might not withstand legal scrutiny, particularly if they are punitive. Contesting these fees can help credit unions drive value and secure better vendor relationships.

Legal Avenues to Explore

Credit unions have several legal options for challenging early termination fees. One approach is to show that the vendor's breach of contract or regulatory noncompliance justifies termination without penalty. Another approach is to claim unconscionability, asserting that the fee is excessively punitive and therefore unenforceable.

Laws can also be helpful. For instance, a New York State law protects against certain auto-renewing contracts, providing grounds to challenge an early termination fee in an auto-renewed contract. Laws in other states have similar protections.

Strategies for Challenging Early Termination Fees

Negotiation is a practical starting point. Vendors may be willing to reduce or waive fees to maintain a business relationship, especially if the credit union is transitioning to another service offered by the same vendor. Additionally, new vendors might offer sign-on incentives to offset a departing vendor's early termination fees.

Credit unions can gain insights by sharing experiences with their peers. But confidentiality provisions in vendor contracts might limit the extent of information sharing among credit unions.

Engaging outside legal counsel is invaluable. Attorneys with experience in representing multiple credit unions against vendors possess deep knowledge of vendor practices and approaches to termination fees. Skilled attorneys can uncover strong legal grounds for challenging these fees, such as a vendor's data breach or noncompliance with NCUA regulations.

In some cases, litigation may be necessary if a vendor refuses to budge. Credit unions should assess the investment in litigation over an early termination fee similarly to suing to collect a debt. With early termination fees potentially eclipsing six or seven figures, litigation can be a worthwhile option.

Keith Stone, CEO of The Finest Federal Credit Union in New York City (\$29.5 million in assets), successfully employed litigation to achieve significant cost savings for his members. During a merger, rather than paying Fiserv's early termination fee, the credit union sued Fiserv to challenge the early termination fee. Shortly after filing the lawsuit, Fiserv allowed the credit union to exit its core contract without any early termination fees. The

complete waiver of early termination fees provided significant cost savings and culminated in a successful merger.

Taking Charge of Vendor Relationships

Instead of waiting for a vendor contract to conclude, credit unions should regularly evaluate termination options throughout the contract's lifespan. This proactive assessment can unlock potential long-term cost savings and other service enhancements. In the fast-changing tech landscape, having the flexibility to switch vendors can greatly benefit credit unions. By understanding their legal rights and contesting improper early termination fees, credit unions can take charge of their vendor partnerships and better serve their members.

Charles Nerko is the leader of the data security litigation team and a partner in the commercial litigation and financial institutions and lending practice areas of the law firm Barclay Damon LLP. Charles is resident in the firm's New York City office.

