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So You Want To Sue A Bank, Or Defend One?

Timothy D. Naegele*

In this litigious world, banks and other financial institutions are sued—and defended—in the United States and globally on a regular basis. The author shares examples of such litigation in this article, and discusses the intricacies of these legal contests. He revisits Wells Fargo's problems that have tarnished America's fourth largest and the world's thirteenth largest bank, with almost $2 trillion in assets—and the staggering litigation that has arisen, which still plagues this financial behemoth. As the world of banking

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This article is the eighth in a series of articles by the author for The Banking Law Journal that examine important and timely subjects, which are of interest to our readers. *See* (1) Timothy D. Naegele, *Are Banks Irrelevant?* 137 Banking L. J. 3 (January 2020) (Naegele January 2020) (https://naegeleblog.files.wordpress.com/2020/01/timothy-d.-naegele.pdf); (2) Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 Banking L. J. 493 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf); (3) Timothy D. Naegele, *The Brooke Amendment And Section 8 Housing: Revisited*, 136 Banking L. J. 245 (May 2019) (Naegele May 2019) (https://naegeleblog.files.wordpress.com/2019/05/timothy-d.-naegele.pdf); (4) Timothy D. Naegele, *Standby Letters Of Credit And Other Bank Guaranties: Revisited*, 136 Banking L. J. 198 (April 2019) (Naegele April 2019) (https://naegeleblog.files.wordpress.com/2019/04/timothy-d.-naegele-standby-letters-of-credit.pdf); (5) Timothy D. Naegele, *The Bank Holding Company Act's Anti-Tying Provision: Almost 50 Years Later—Part I*, 135 Banking L. J. 315 (June 2018) (Naegele 2018, Part I) and Timothy D. Naegele, *The Bank Holding Company Act's Anti-Tying Provision: Almost 50 Years Later—Part II*, 135 Banking L. J. 372 (July/August 2018) (Naegele 2018, Part II) [The combined article, Parts I and II, can be read at https://naegeleblog.files.wordpress.com/2018/08/timothy-d-naegele-banking-law-journal.pdf]; (6) Timothy D. Naegele, *The Bank Holding Company Act's Anti-Tying Provision: 35 Years Later*, 122 Banking L. J. 195 (Naegele 2005) (http://www.naegele.com/documents/antitying_3.pdf); and (7) Timothy D. Naegele, *The Anti-Tying Provision: Its Potential Is Still There*, 100 Banking L. J. 138 (1983) (Naegele 1983) (http://www.naegele.com/articles/antitying.pdf). *See also* Timothy D. Naegele, *Are All Bank Tie-Ins Illegal?* 154 Bankers Magazine 46 (1971) (Naegele 1971) (http://www.naegele.com/articles/banktieins.pdf); Timothy D. Naegele, *Fed Plan Would Simply Gut Enforcement Of Ban on Tying,* American Banker (January 21, 2005) [*see* https://naegeleblog.files.wordpress.com/2018/08/op-1158_56_1.pdf (letter sent by Timothy D. Naegele to each member of the Federal Reserve Board ("Fed") (March 16, 2005), and the American Banker article)]; Timothy D. Naegele Resume (https://naegeleblog.files.wordpress.com/2020/03/timothy-d.-naegele-resume-20-3-10.pdf).

changes radically in the years to come, more litigation may occur, which is addressed as well. Lastly, he asks how will Congress and America's financial institution regulators deal with these critical issues, or can they, as the United States and the rest of the world move toward an era of "bankless" banking?

Banks and their financial institution brethren present wonderful targets for American and foreign lawyers, because they have "deep pockets" from which to recover. After all, Wells Fargo Bank alone has incurred losses of more than $12 billion, *inter alia*, to compensate aggrieved parties and their lawyers for the misconduct and alleged criminality of its management and employees, even though no one has gone to prison yet.[1]

Four lawsuits brought by plaintiffs' counsel against America's banks and other financial institutions begin this substantive discussions of the "do's" and "don'ts" of suing them: (1) *Majestic Building Maintenance, Inc. v. Huntington Bancshares Incorporated*, U.S. District Court for the Southern District of Ohio;[2] (2) *Mitchell, et al. v. Wells Fargo Bank, et al.,* U.S. District Court for the District of Utah, and *Mitchell, et al. v. Wells Fargo Bank, et al.*, U.S. Court of Appeals for the Tenth Circuit;[3] (3) *Ehrenfeld v. Wells Fargo NA*, U.S. District Court for

[1] *See* Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 BANKING L. J. 493 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf); *see also* https://www.bankingdive.com/news/wells-fargo-earnings-legal-charge-Q3/565059/ ("Wells Fargo earnings suffer on $1.6B legal charge") and https://www.americanbanker.com/news/costs-weigh-on-wells-fargo-as-new-ceo-prepares-to-take-reins ("Costs weigh on Wells Fargo as new CEO prepares to take reins") and https://www.marshallnewsmessenger.com/news/wells-fargo-to-pay-usaa-million-in-patent-infringement-case/article_fb847e9a-01ce-11ea-b9d6-8764a1349584.html ("Wells Fargo to pay USAA $200 million in patent infringement case") and https://www.cftc.gov/PressRoom/PressReleases/8077-19 ("CFTC Orders Wells Fargo to Pay Over $14 Million for Violating Swap Dealer Business Conduct Standards").

[2] *See Majestic Building Maintenance, Inc. v. Huntington Bancshares Incorporated*, U.S. District Court for the Southern District of Ohio, Case #: 2:15-cv-03023-JLG-KAJ (2015); and *Majestic Building Maintenance, Inc. v. Huntington Bancshares Incorporated*, U.S. District Court for the Southern District of Ohio, Case #: 2:18-cv-01512-JLG-KAJ (2018).

[3] *See Mitchell, et al. v. Wells Fargo Bank, et al.,* U.S. District Court for the District of Utah, Case No. 2:16-cv-00966-CW (2016); and *Mitchell, et al. v. Wells Fargo Bank, et al.*, U.S. Court of Appeals for the Tenth Circuit, Case No. 19-4027 (2019).

the Eastern District of New York;[4] and (4) *First Dakota National Bank v. Ruba*, U.S. District Court for the District of South Dakota.[5]

In *Majestic Building Maintenance,* plaintiff's counsel initially brought a lawsuit against Huntington;[6] and then when it was in "midstream," its lawyers filed a separate and completely new lawsuit alleging violations of the Bank Holding Company Act's Anti-Tying Provision.[7] They might have sought to amend their complaint in the existing lawsuit, but they chose not to do so. The lawsuit was assigned to a new District Judge, who promptly conferred with the existing District Judge; and voilà, the new lawsuit was dismissed by plaintiff's counsel *with prejudice*,[8] which means that the possibly valid claims asserted therein could not be alleged again in any forum. Thereafter, the existing lawsuit was dismissed *with prejudice* as well.[9]

In *Mitchell*, lawyers filed a class action lawsuit against Wells Fargo Bank, alleging multiple causes of action. However, they proceeded to miss deadlines and alienate both the District Judge and the federal court clerk's office. When

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[4] *See Ehrenfeld v. Wells Fargo NA*, U.S. District Court for the Eastern District of New York, Case No. 1:19-cv-02314-BMC (2019).

[5] *See First Dakota National Bank v. Ruba*, U.S. District Court for the District of South Dakota, Case #: 4:16-cv-04007-RAL (2016).

Perhaps the most interesting of all is another lawsuit where "the Plaintiff and his entire family have relocated ostensibly for the long term out of the country and have largely dropped out of any contact," and left the lawyer with the unenviable task of dismissing the lawsuit and hopefully not incurring damages, costs and/or sanctions in the process.

See McCombs v. M&T Bank Corporation, U.S. District Court for the Western District of New York, Case No.: 6:19-cv-06151-DGL-MWP (January 26, 2020) ("MOTION to Dismiss *Voluntarily* by Christopher D. McCombs); *see also infra* n.40.

[6] *See Majestic Building Maintenance, Inc. v. Huntington Bancshares Incorporated*, U.S. District Court for the Southern District of Ohio, Case #: 2:15-cv-03023-JLG-KAJ (2015).

[7] *See Majestic Building Maintenance, Inc. v. Huntington Bancshares Incorporated*, U.S. District Court for the Southern District of Ohio, Case #: 2:18-cv-01512-JLG-KAJ, Document 1 (2018); *see also* Timothy D. Naegele, *The Bank Holding Company Act's Anti-Tying Provision: Almost 50 Years Later—Part I*, 135 Banking L. J. 315 (June 2018) (Naegele 2018, Part I) and Timothy D. Naegele, *The Bank Holding Company Act's Anti-Tying Provision: Almost 50 Years Later—Part II*, 135 Banking L. J. 372 (July/August 2018) (Naegele 2018, Part II) [The combined article, Parts I and II, can be read at https://naegeleblog.files.wordpress.com/2018/08/timothy-d-naegele-banking-law-journal.pdf].

[8] *See Majestic Building Maintenance, Inc. v. Huntington Bancshares Incorporated*, U.S. District Court for the Southern District of Ohio, Case #: 2:18-cv-01512-JLG-KAJ, Document 4 (2018).

[9] *See Majestic Building Maintenance, Inc. v. Huntington Bancshares Incorporated*, U.S. District Court for the Southern District of Ohio, Case #: 2:15-cv-03023-JLG-KAJ, Document 77 (2019).

they lost, they appealed to the U.S. Court of Appeals for the Tenth Circuit, where they lost again. In the final analysis, the plaintiffs' lawyers alienated both federal courts, and they ended up settling on behalf of their clients for a pittance of what they might have obtained if the litigation had been handled differently.[10]

In *Ehrenfeld,* another small law firm filed a class action lawsuit against Wells Fargo Bank, which was dismissed by the District Judge as to each and every federal cause of action. The District Judge's written decision picked apart all of

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[10] *See* Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 Banking L. J. 493, 516–527 & n.60 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf) ("Unfortunately, the lawyers representing the *Mitchell* plaintiffs made multiple mistakes, and may have alienated both the District Court and the 10th Circuit sufficiently that the courts ignored—or 'slammed the door' on—any legitimate arguments. *See, e.g.,* [*Mitchell, et al. v. Wells Fargo Bank, et al.,* U.S. District Court for the District of Utah, Case No. 2:16-cv-00966-CW,] at Document: 010110154485, April 15, 2019, p. 2 ('Please be advised that the court issued an order today dismissing this case. In addition, please be advised that the mandate for this case has issued today. The clerk of the originating court shall file accordingly'). While the mandate was recalled subsequently and the case was reactivated, the effects may have remained, and been lasting, to the detriment of the plaintiffs. *See also id.* at Document: 010110180928, June 11, 2019 ('[On May 10, 2019], we notified you that you were not a member of the bar of this court. At that time, we directed you to our website to complete the Application and Oath for Admission form. . . . We have checked our records, however, and find that you have not yet been admitted. You must complete and submit the admission application form within ten days of the date of this letter. . . . If you fail to complete these admission procedures, your name will be stricken from the docket of this case and . . . you must notify your client. Failure to do so may result in disciplinary action being taken against you'); and Document 010110190916 (the plaintiffs' attorneys failed to address *any* of the issues dealt with by the district judge in his Memorandum Decision and Order (Document 164), and effectively abandoned them—including but not limited to the Anti-Tying Provision claims—and instead confined their appeal to one issue: 'Did the District Court abuse its discretion by allowing only one party to engage in discovery in preparation for a motion to dismiss?'). In the final analysis, the *Mitchell* lawyers 'threw in the towel' and their clients agreed to 'a low ball settlement' with Wells. By way of contrast, at almost the same time, a federal judge in New Jersey gave preliminary approval to a settlement pursuant to which Wells agreed to pay $35 million to current and former employees who were not paid overtime when working outside normal banking hours. *Compare Mitchell, et al. v. Wells Fargo Bank, et al.,* U.S. District Court for the District of Utah, Case No. 2:16CV00966CW (Document 010110197196, Notice of Settlement, dated July 12, 2019) *with Merino, et al. v. Wells Fargo Bank, N.A., et al.,* U.S. District Court for the District of New Jersey, Case No. 2:16-cv-07840-ES-MAH (Document 135, Order Granting Plaintiffs' Motion For Preliminary Approval Of Settlement Agreement [which was filed with the Court on February 28, 2019], dated July 9, 2019). The Settlement Agreement in *Merino* provided for the payment of 'attorneys' fees in an amount not to exceed Ten Million Five Hundred Thousand Dollars ($10,500,000.00).' *See* paragraph 10.1").

the plaintiffs' allegations. Instead of exploring their other options, the lawyers dropped the litigation altogether.[11]

In *First Dakota National Bank,* the District Judge issued his opinion and order with respect to the defendant Ruba's claim of an illegal tying arrangement, and concluded that First Dakota was entitled to summary judgment regarding the claim.[12] *Ruba*'s law firm had pled the barest of tying allegations—doing little more than reciting the statute[13]—and the District Judge's analysis tore them apart.[14]

What is the single thread that runs through each of these potentially-winnable lawsuits against "deep pocket" financial institutions? Better legal work might have improved the chances of the clients' recoveries. Among the lessons to be learned are that lawyers cannot play "footloose and fancy free" with federal courts, much less ignore their written orders, or thumb their noses at the clerks' offices of such courts. In these situations, defense lawyers can essentially sit back and watch the plaintiffs' complaints implode and "self destruct," and the end of potentially-legitimate claims.

Also, it must be remembered that "outside" bank counsel *react* to litigation that is brought against their clients, based on the directives given to them by the financial institutions' management and/or their general counsels' offices. With few exceptions, they do not act on their own to defend their clients—or to launch counter-measures against the "aggressors." One exception might be where an institution is quite small, and outside counsel effectively functions as its general counsel.

WELLS FARGO BANK

Wells Fargo has been discussed at length in a previous article for THE BANKING LAW JOURNAL,[15] which will not be repeated here—other than to cite various

[11] *See Ehrenfeld v. Wells Fargo NA*, U.S. District Court for the Eastern District of New York, Case No. 1:19-cv-02314-BMC, Documents 18 & 19 (2019).

[12] *See First Dakota National Bank v. Ruba*, U.S. District Court for the District of South Dakota, Case #: 4:16-cv-04007-RAL, Document 155, pp. 20, 28 (2016).

[13] *See First Dakota National Bank v. Ruba*, U.S. District Court for the District of South Dakota, Case #: 4:16-cv-04007-RAL, Document 105, pp. 5–7 (2016).

[14] *See First Dakota National Bank v. Ruba*, U.S. District Court for the District of South Dakota, Case #: 4:16-cv-04007-RAL, Document 155, pp. 2, 15, 17–20, 28 (2016).

[15] *See* Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 BANKING L. J. 493 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf).

causes of action that were alleged against the bank, which served as the basis for losses that have exceeded $12 billion. If the claims had been frivolous, presumably Well Fargo would not have paid out a cent, much less the staggering amounts of money that were actually paid. As stated previously:

> Wells was permitted to become, and did in fact become, an unmitigated disaster—and a rogue and lawless financial institution, the largest in the United States if not the world. This is its legacy, which must not be tolerated ever again.[16]

And "[i]n a very real sense, it is the largest *de facto* bank failure in U.S. history—where the financial institution itself still exists."[17]

What were the causes of action alleged against Wells Fargo, which served as the bases for the unprecedented dollar amounts of the losses; and did some of the lawsuits share elements in common? The causes of action included but are not limited to the following:[18]

1. *Higher Costs Charged to African-American and Hispanic Borrowers*: Violations of (A) the Illinois Human Rights Act; (B) the Illinois Consumer Fraud and Deceptive Practices Act; (C) the Illinois Uniform Deceptive Trade Practices Act; (D) the federal Fair Housing Act ("FHA"); and (E) the Equal Credit Opportunity Act ("ECOA").[19]

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[16] *See supra* pp. 527, 532.

[17] *See* Timothy D. Naegele, *Are Banks Irrelevant?* 137 Banking L. J. 3, 5 n.3 (January 2020) (Naegele January 2020) (https://naegeleblog.files.wordpress.com/2020/01/timothy-d.-naegele.pdf).

[18] It should be noted that Wachovia allegedly had laundered billions of dollars from Mexico's drug gangs, before Wells acquired Wachovia. The precise spillover effects and costs to Wells are unknown. *See* Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 Banking L. J. 493, 498–499, 528 n.62 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf).

[19] *See* https://www.reuters.com/article/us-wellsfargo-illinois-lawsuit/illinois-files-bias-suit-against-wells-fargo-idUSTRE56U6Q920090731 ("Illinois files bias suit against Wells Fargo"—"The case is The People of the State of Illinois v Wells Fargo and Company; Wells Fargo Bank, N.A.; and Wells Fargo Financial Illinois Inc., No. 09CH26434"); *see also* Final Judgment and Consent Decree in *The People of the State of Illinois v. Wells Fargo and Company; Wells Fargo Bank, N.A.; and Wells Fargo Financial Illinois Inc.*, Circuit Court of Cook County, State of Illinois County Department, Chancery Division, No. 09CH26434 (which can be accessed in *County of Cook, IL v. Wells Fargo & Co., et al.,* U.S. District Court for the Northern District of Illinois, Case #: 1:14-cv-09548, Document 36-3 (2014)) and Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 Banking L. J. 493, 496–498 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf).

It should be noted that the cost of these wrongdoings to Wells aggregated $232.5 million,

2. *Overdraft Fees*: Violations of (A) the California Consumer Legal Remedies Act, Civil Code section 1750, *et seq.*; (B) the Unfair Business Practices Act, Business & Professions Code section 17200, *et seq.*; (C) the False Advertising, Business & Professions Code section 17500, *et seq.*; (D) common law fraud; (E) negligent misrepresentation; and (F) conversion.[20]

3. *Settlement and Fines Regarding Mortgage Servicing Practices*: the allegations included (A) Unfair and Deceptive Consumer Practices with respect to loan servicing; (B) Unfair and Deceptive Consumer Practices with respect to foreclosure processing; (C) Unfair and Deceptive Consumer Practices with respect to loan origination; (D) violations of the False Claims Act, 31 U.S.C. § 3729(a)(1)(A), (a)(1)(B), (a)(1)(C) and (a)(1)(G), and 31 U.S.C. § 3729(a)(1), (a)(2), (a)(3) and (a)(7); (E) violations of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1833A ("FIRREA"); (F) violations of the Servicemembers Civil Relief Act, 50 U.S.C. APP. §§ 501, *et seq.*; (G) Declaratory Judgment under 28 U.S.C. §§ 2201 and 2202 regarding the banks' bankruptcy misconduct; and (H) damages under common law related to the banks' bankruptcy misconduct.[21]

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which reflected a $175 million settlement with the U.S. Department of Justice; a $7.5 million payment to the city of Baltimore; and $50 million in direct down-payment assistance to borrowers in Baltimore and seven other communities nationwide. *See* Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 BANKING L. J. 493, 528 n.61 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf).

[20] *See Sanchez et al v. Wells Fargo & Company et al.*, U.S. District Court for the Northern District of California, Case #: 3:07-cv-05923-WHA, Documents 30, 682 (2007). The District Court concluded that class counsel were entitled to $18,526,457.25 in attorneys' fees, and $558,378.92 in expenses. *See id.* at Document 682, pp. 12, 14, 15.

It should be noted that the cost of these wrongdoings to Wells aggregated $203 million. *See* Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 BANKING L. J. 493, 499–500, 528 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf).

[21] *See United States of America et al v. Bank of America Corporation et al*, U.S. District Court for the District of Columbia, Case #: 1:12-cv-00361-RMC, Document 4-1 (2012).

This was a civil action brought by the United States, and the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South

4. *SEC Fine Due to Inadequate Risk Disclosures*: (A) Violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; (B) violations of Section 17(a) of the Securities Act; (C) Aiding and Abetting Violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; and (D) Aiding and Abetting Violations of Section 17(a) of the Securities Act.[22]

5. *Lawsuit by FHA Over Loan Underwriting*: (A) Violations of the False Claims Act (31 U.S.C. § 3729(a)(1), and, as amended, 31 U.S.C. § 3729(a)(1)(A)) Presenting or Causing False Claims to Be Presented (Reckless Underwriting); (B) violations of the False Claims Act (31 U.S.C. § 3729(a)(2), and, as amended, 31 U.S.C. § 3729(a)(1)(B)) Use of False Statements in Support of False Claims (Reckless Underwriting); (C) violations of the False Claims Act (31 U.S.C. § 3729(a)(1), and, as amended, 31 U.S.C. § 3729(a)(1)(A)) Presenting or Causing False Claims to Be Presented (Self-Reporting); (D) violations of the False Claims Act (31 U.S.C. § 3729(a)(2), and, as amended, 31 U.S.C. § 3729(a)(1)(B)) Use of False Statements in Support of False Claims (Self-Reporting); (E) Violations of the False Claims Act (31 U.S.C. § 3729(a)(7), and, as amended, 31 U.S.C. § 3729(a)(1)(G)) Reverse

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Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming, the Commonwealths of Kentucky, Massachusetts, Pennsylvania and Virginia; and the District of Columbia against Residential Capital, LLC, Ally Financial, Inc., and GMAC Mortgage, LLC; Bank of America Corporation, Bank of America, N.A., BAC Home Loans Servicing, LP, Countrywide Financial Corporation, Countrywide Home Loans, Inc., Countrywide Mortgage Ventures, LLC, and Countrywide Bank FSB; Citigroup Inc., Citibank, N.A., and CitiMortgage, Inc.; J.P. Morgan Chase & Company and J.P. Morgan Chase Bank, N.A.; and Wells Fargo & Company and Wells Fargo Bank, N.A., for misconduct related to their origination and servicing of single family residential mortgages.

In the final analysis, Wells was required to pay $5.4 billion; Bank of America, $11.8 billion; JPMorgan Chase, $5.3 billion; Citigroup, $2.2 billion; and $310 million from Ally. Bank of America would contribute an additional $1 billion for Federal Housing Administration loans. *See, e.g.*, Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 Banking L. J. 493, 500–502 & n.11, 528 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf).

[22] *See Securities and Exchange Commission v. The Leonard Vincent Group et al*, U.S. District Court for the Eastern District of New York, Case #: 2:17-cv-05723, Document 1 (2017); *see also* Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 Banking L. J. 493, 502, 528 n.63 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf).

As stated in the footnote cited, Wells' fine of $23.135 million reflected $6.5 million involving a fund for the benefit of harmed investors; $65,000 in disgorgement; and $16.57 million in prejudgment interest.

False Claims (Self-Reporting); (F) violations of FIRREA (12 U.S.C. § 1833a) False Certifications to HUD; (G) Breach of Fiduciary Duty; (H) Gross Negligence; (I) Negligence; (J) Unjust Enrichment; and (K) Payment Under Mistake of Fact.[23]

6. *Lawsuit Due to Premium Inflation on Forced Place Insurance*: (A) Breach of Implied Covenant of Good Faith and Fair Dealing as to all class members (against Wells Fargo); (B) violation of the Real Estate Settlement and Procedure Act ("RESPA") 12 U.S.C. § 2601 *et seq*. (against Wells Fargo); (C) Unconscionability (against Wells Fargo); (D) Unjust Enrichment; and (E) Tortious Interference with a business relationship (against QBE).[24]

7. *Violation of New York Credit Card Laws*: Specific causes of action are unknown.[25]

8. *Wells Fargo Account Fraud Scandal*: Wells' actions/inactions that gave rise to its multi-state settlement are spelled out in the 82-page Settlement Agreement.[26]

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[23] The lawsuit was settled when Wells agreed to pay $1.2 billion. *See U.S. v. Wells Fargo Bank NA*, U.S. District Court for the Southern District of New York, Case #: 1:12-cv-07527-JMF, Document 22 (2012); *see also* Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 Banking L. J. 493, 502–503 & n.15, 528 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf).

[24] *See Williams et al v. Wells Fargo Financial, Inc. et al*, U.S. District Court for the Southern District of Florida, Case #: 1:11-cv-21233-RNS, Document 44 (2011).

Wells and QBE agreed to pay $19.3 million as compensation to the borrowers; and up to $5.48 million of the plaintiffs' attorneys' fees and costs. Wells' share of these costs is unknown. *See* Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 Banking L. J. 493, 504 & n.16, 528 n.64 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf).

[25] *See* https://www.dfs.ny.gov/docs/about/ea/ea150205.pdf (Consent Order).

Wells agreed to pay "a $2 million penalty and $2 million in restitution to consumers after [an] affiliate illegally took interests in borrowers' homes, in exchange for extending credit for routine credit card purchases." *See* Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 Banking L. J. 493, 505 & n.17, 528 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf).

[26] *See* https://www.attorneygeneral.gov/wp-content/uploads/2018/12/Wells-Fargo-Multistate-Settlement-Agreement-12-28-18.pdf (Settlement Agreement, dated December 28, 2018, between the Attorneys General of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon,

9. *Racketeering Lawsuit for Mortgage Appraisal Overcharges*: (A) Violations of California's Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200 *et seq.*); (B) violations of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1962(c)) ("RICO"); (C) violations of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1962(d)); (D) Unjust Enrichment; and (E) Fraud.[27]

10. *Failure to Comply with Document Security Requirements*: Wells' actions/inactions that gave rise to the settlement are spelled out in a Financial Industry Regulatory Authority ("FINRA") News Release.[28]

Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming, and Wells Fargo & Company, acting for Wells Fargo Bank, N.A., and their current and former parents).

This reflects $575 million to resolve claims that Wells violated Pennsylvania's consumer protection laws, as well as additional unknown amounts. *See* Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 Banking L. J. 493, 506–514 & n.21–34, 528 & n.65 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf).

[27] *See Bias et al. v Wells Fargo & Co*, U.S. District Court for the Northern District of California, Case # 4:12-cv-00664-YGR, PACER Docket Sheet entry 61 (2012).

Wells agreed to pay $50 million to settle a racketeering lawsuit that accused it of overcharging approximately 250,000 homeowners for appraisals ordered after they defaulted on their mortgage loans. As stated previously:

> The court's "Final Approval Order And Judgment Of Dismissal With Prejudice" provided, *inter alia*, that (1) "Class Counsel are hereby awarded attorneys' fees of $12.5 million ($12,500,000) out of the Settlement Fund, which sum the Court finds to be fair and reasonable, and $1.5 million ($1,500,000) in reimbursement of expenses out of the Settlement Fund," (2) "[t]he Settlement has resulted in the payment of $50,000,000 in cash, on which interest has accrued," and (3) "[o]ver 288,000 copies of the Notice of Settlement were disseminated to Settlement Class Members."

See Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 Banking L. J. 493, 515 & n.36 (*citing Bias et al. v Wells Fargo & Co*, U.S. District Court for the Northern District of California, Case No. 4:12-cv-00664-YGR, PACER Docket Sheet entry 274, p. 5, paragraphs 7 & 8 (2012)) (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf); *see also id.* at 514–515, 528.

[28] FINRA imposed the following sanctions: (1) Wells Fargo Securities, LLC and Wells Fargo Prime Services, LLC were jointly fined $4 million; and (2) Wells Fargo Advisors, LLC, Wells Fargo Advisors Financial Network, LLC and First Clearing, LLC were jointly fined $1.5 million. *See* https://www.finra.org/media-center/news-releases/2016/finra-fines-12-firms-total-144-million-failing-protect-records ("FINRA Fines 12 Firms a Total of $14.4 Million for Failing to Protect Records From Alteration").

See also Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 Banking L. J. 493, 515 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf).

11. *Lawsuit Due to Forced National General Auto Insurance*: (A) Violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c), against all Defendants; (B) violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq*., against all Defendants; (C) Fraud by Concealment, against all Defendants; and (D) Unjust Enrichment.[29]

12. *Lawsuits Alleging Violations of the Anti-Tying Provision of the Bank Holding Company Act*: Recoveries with respect to Wells, unknown.[30]

13. *USAA Patent Fight*: The bases for patent infringements are set forth in Document 54.[31]

14. *$1.6 billion legal charge for litigation connected to its retail scandals*: It has been described by Wells as "a $1.6 billion, or $(0.35) per share, discrete litigation accrual (not tax deductible) for previously disclosed retail sales practices matters."[32]

15. *U.S. Commodity Futures Trading Commission ("CFTC") Orders Wells Fargo to Pay Over $14 Million for violating Swap Dealer Business Conduct Standards*: (1) Wells failed to deal with a counterparty in a fair and balanced manner based on principles of fair dealing and good faith; and (2) Wells failed to implement and monitor systems to ensure compliance with policies and procedures regarding commu-

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[29] *See In Re Wells Fargo Collateral Protection Insurance Litigation*, U.S. District Court for the Central District of California, Case # 8:17-ml-02797-AG-KES, PACER Docket Sheet entries 239-1 and 338 (2017). The class settlement in this lawsuit resulted in the payment of $432.4 million to the class members, $36 million in attorney fees to class counsel, and another $483.489.04 to class counsel in litigation costs.

See also https://www.autofinancenews.net/allposts/operations/comp-reg/wells-fargo-agrees-to-settle-auto-insurance-suit-for-432-million/ ("Wells Fargo settles auto insurance suit for $432M"); and Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 BANKING L. J. 493, 516 & n.38, 528–529 & n.66 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf).

[30] *See* Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 BANKING L. J. 493, 516–527 & n.39-60, 529 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf).

[31] Wells Fargo was ordered to pay $200 million to USAA for infringement of its patents on mobile deposit capture technology. *See United Services Automobile Association v. Wells Fargo Bank, N.A.*, U.S. District Court for the Eastern District of Texas, Case # Case 2:18-cv-00245-JRG, PACER Docket Sheet entries 54, 239-1 and 338 (2018).

[32] *See* https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/earnings/third-quarter-2019-earnings.pdf, pp. 1–4, 8; *see also* https://www.bankingdive.com/news/wells-fargo-earnings-legal-charge-Q3/565059/ ("Wells Fargo earnings suffer on $1.6B legal charge").

nicating with counterparties in a fair and balanced manner.[33]

These causes of action are important for litigators because they were pled with sufficient specificity and factual support that they served as the basis for substantial recoveries from Wells. Indeed, seldom are litigators given a "roadmap" to pleading potential recoveries of this magnitude. Lastly, and perhaps most importantly, is the following settlement, which mirrors the multi-state "Wells Fargo Account Fraud Scandal" settlement described above, involving the states' attorneys general:[34]

> **U.S. Government Fines Wells Fargo $3 Billion For Its Staggering Fake-Accounts Scandal:** The settlement with the Justice Department and the SEC resolves Wells Fargo's criminal and civil liabilities for the fake-accounts scandal, but it does not remove the threat of prosecution against current and former Wells Fargo employees.[35]

Volumes of other litigation with respect to banks and financial institutions could be surveyed and discussed, stretching over many decades; and similar causes of action and threads that provide the bases for such lawsuits would be found. However, Wells is important because of the breadth of the wrongdoing and the issues that have been addressed in its litigation and settlements, all of which are recent and instructive. The bottom line for plaintiff's counsel is to allege anything and everything, albeit without being frivolous and insulting the courts. Seek actual damages, punitive damages, treble damages—which are permitted under some statutes, such as the Anti-Tying Provision—attorneys'

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[33] *See* https://www.cftc.gov/PressRoom/PressReleases/8077-19 ("CFTC Orders Wells Fargo to Pay Over $14 Million for Violating Swap Dealer Business Conduct Standards").

The CFTC's order requires Wells Fargo to pay a civil monetary penalty of $10 million, restitution of $4.475 million, and to cease and desist from violating the CFTC's business conduct standards. *See id.*

[34] *See supra* n.26. *See also* Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 Banking L. J. 493, 506-514 & n.21-34, 528 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf).

[35] *See* https://www.cnn.com/2020/02/21/business/wells-fargo-settlement-doj-sec/index.html ("US government fines Wells Fargo $3 billion for its 'staggering' fake-accounts scandal"—"The deal does not, however, remove the threat of prosecution against current and former Wells Fargo employees"); *see also* https://www.justice.gov/usao-wdnc/pr/wells-fargo-agrees-pay-3-billion-resolve-criminal-and-civil-investigations-sales ("Wells Fargo Agrees To Pay $3 Billion To Resolve Criminal And Civil Investigations Into Sales Practices Involving The Opening Of Millions Of Accounts Without Customer Authorization") and https://naegeleblog.files.wordpress.com/2020/02/wells-fargo-civil-settlement-agreement.pdf (Wells Fargo-Civil Settlement Agreement) and https://naegeleblog.files.wordpress.com/2020/02/wells-fargo-deferred-prosecution-agreement.pdf (Wells Fargo-Deferred Prosecution Agreement).

fees, costs and interest. If you don't plead it, you won't get it, except in rare cases.

Because bank or other financial institution counsels' basic role is to *react*, it is worthwhile mentioning briefly some of the ways in which Wells' counsel reacted to the claims against the bank. As expected, once the litigation began in earnest, such counsel responded vigorously; and in some instances, this dragged the litigation out for many years. For example, with respect to the "Overdraft Fees," the litigation was commenced on November 21, 2007, and the final entry on the PACER Docket Sheet was dated October 11, 2017, almost 10 years later. In the interim, the litigation included consideration of the issues by the U.S. Court of Appeals for the Ninth Circuit.

Massive legal research is undertaken except in rare cases, rebutting literally everything. Motions galore are filed, centered on the all-important motions to dismiss. "Bury the plaintiffs, with no limits regarding time or costs" is often the first reaction or mantra of the bank or other financial institution's management, although it may not be articulated in exactly those words or with such niceties. In a sense, it is lawyer's dream come true, and his or her retirement "nest egg" guaranteed. But then, on reflection, a more sobering approach is generally taken by the institution's management and its general counsel, whose job it is to make the troublesome litigation go away at the earliest possible date, and *at the least cost*.

THE FUTURE

Banking is in a state of dramatic flux in the United States and globally, to say the least. Looking years and decades ahead, will there be *any* banks at all? The world is moving toward an era of "bankless" banking, and doing so rapidly, which is discussed at length in a recent BANKING LAW JOURNAL article.[36] Indeed, it is worth repeating:

> Banking is changing radically. Branches and checks are disappearing. Soon, America and the world may have a "branchless" and "checkless" financial system. Also, "non-banks" and "shadow banks" are competing with America's federally-regulated banks on a global scale. What will the Wells of the future look like, or will there even be a Wells? Perhaps what happened at Wells will be beneficial after all. Rather than attempt to rebuild a corrupt culture, why not begin again without the need for

[36] *See* Timothy D. Naegele, *Are Banks Irrelevant?* 137 BANKING L. J. 3 (January 2020) (Naegele January 2020) (https://naegeleblog.files.wordpress.com/2020/01/timothy-d.-naegele.pdf).

> financial institutions like Wells? Presumably its stagecoach will go the way of the Pony Express and Ford's Model T: into the lore and dustbin of history.
>
> Years from now, generations of Americans and those of other countries may be told what the bank of today looked like, and shake their heads in disbelief that such a creature ever existed. Again, the Internet and smartphones have changed the world, in a relatively short span of time. Ask small retailers what Amazon and Walmart have done to them—if they still exist. Will we live in a world of "bankless" banking? The hockey great Wayne Gretzky has been quoted as saying: "To be successful, you must skate to where the puck is going not where it is."[37]

The fundamental question becomes: how will these developments affect the litigation landscape that has existed for decades if not centuries vis-à-vis financial institutions? Also, given the fact that America's financial institution regulators were "asleep at the switch" in the case of Wells' staggering abuses, is it realistic to expect them to be any more adroit in addressing the complexities of the future? Similarly, Congress may not grasp what is happening, nor be able to do much of anything until *after* calamities occur.[38]

CONCLUSION

Put succinctly, financial institution litigation is a lucrative field for lawyers. However, if they bring class action lawsuits, they may wait for many years to recover. And it is a crapshoot whether they will recover anything in the final analysis. Simply put, it is not for the faint-hearted. In the interim, massive hours will have been expended and significant costs will have been incurred. Can there be big "paydays"? Of course. The class settlement in one of the lawsuits cited above resulted in the payment of $432.4 million to the class members, $36 million in attorneys' fees to class counsel, and another $483,489.04 to class counsel in litigation costs.[39] This is not a pittance—nor

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[37] *See id.* at 9–11.

[38] *See* Timothy D. Naegele, *Are Banks Irrelevant?* 137 Banking L. J. 3, 28 (January 2020) (Naegele January 2020) (https://naegeleblog.files.wordpress.com/2020/01/timothy-d.-naegele.pdf).

[39] *See In Re Wells Fargo Collateral Protection Insurance Litigation*, U.S. District Court for the Central District of California, Case # 8:17-ml-02797-AG-KES, PACER Docket Sheet entries 239-1 and 338 (2017); and n.29 *supra*.

were the substantial revenues generated on the other side of the ledger, for the bank's counsel.[40]

[40] An earlier article by the author—which was written eight years ago and published in Europe—is relevant today. In part, it warned:

> Harsh economic times produce demands on lawyers and courts, and bring citizens in contact with the system who otherwise might not be there except for their economic plight and hardships. Whether the issues involve housing foreclosures or evictions, or the loss of jobs or dissolution of marriages, the American legal system is taxed like seldom before. Budgetary constraints dictate shorter court hours and over-burdened judges, and closed courthouses and furloughed prisoners to ease overcrowding. What is certain is that the situation will become worse between now and the end of this decade, at least in the United States.

See http://www.naegele.com/documents/Twill-Naegele-JusticeAndTheLawDoNotMix.pdf ("Justice And The Law Do Not Mix"), p. 11.

As predicted, the situation has become decidedly worse for litigants in at least one federal court. The following order was issued by the U.S. District Court for the Western District of Washington:

> NOTICE OF ASSIGNMENT TO A US MAGISTRATE JUDGE AND DECLINATION OF CONSENT FORM. Each party will be deemed to have knowingly and voluntarily consented to proceed before a Magistrate Judge if this form is not returned by 2/4/2020. **Please Note: Forms must not be electronically filed with the Court**. (TF) (Entered: 01/28/2020)

See Sherlock Investments-Duvall LLC v. John Does and Jane Does 1-10 et al, No.: 2:20-cv-00129, dated January 28, 2020 (emphasis in original).

Accordingly, Plaintiffs' counsel executed the form and his assistant sought to file it with the court before the February 4th deadline, but was told not to file it by the Clerk's office. Such "opt-outs" are standard in U.S. District Courts around the country. For example, the Federal Rules of Civil Procedure state explicitly:

> *Reminding the Parties About Consenting.* A district judge, magistrate judge, or other court official may remind the parties of the magistrate judge's availability, but must also advise them that they are free to withhold consent without adverse substantive consequences.

See FRCP 73(b)(2).

Procedural issues such as discovery matters are handled by Magistrate Judges, but the principal legal issues in federal lawsuits are decided by District Judges—certainly if such an "opt-out" is filed with the court in a timely fashion, which was attempted in this lawsuit. The court has five vacancies, so they are trying to force litigants to use Magistrate Judges, which is an abuse of power.

See also Peretz v. United States, 501 U.S. 923 (1991) (https://supreme.justia.com/cases/federal/us/501/923/) ("The [Federal Magistrates Act] allows courts, *with the litigants' consent*, to continue innovative experiments in the use of magistrates to improve the efficient administration of the courts' dockets, thus relieving the courts of certain subordinate duties that often distract them from more important matters") (emphasis added).