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Wells Fargo: An American Banking Nightmare

Timothy D. Naegele*

In this article, the author analyzes Wells Fargo's problems that have tarnished the once-storied brand and historically-significant financial institution, which is America's fourth largest bank and the world's 13th largest, with almost $2 trillion in assets. He provides a sense of how Wells' problems arose, their depth and pervasiveness, whether they have been remedied completely, and what might be expected in the years to come as Wells continues to evolve. In the final analysis, he asks and answers the questions: have the problems at Wells been addressed fully? If not, why not? Who has been responsible, and who has benefited from these problems? What can be done by Congress and America's bank regulatory agencies to insure that they never happen again at Wells or to any other U.S. financial institution? And what can be done to assure the American people that the problems have been solved?

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* Timothy D. Naegele served as counsel to the U.S. Senate Committee on Banking, Housing, and Urban Affairs (and as counsel to the late Senator Edward W. Brooke of Massachusetts), 1969–1971, where he authored a series of laws that remain in effect to this day. Mr. Naegele, currently managing partner of Timothy D. Naegele & Associates and a member of the Board of Editors of *The Banking Law Journal*, may be reached at tdnaegele.associates@gmail.com.

This article is the sixth in a series of recent articles by the author for The Banking Law Journal that examine important and timely subjects of interest to our readers. *See* (1) 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); (2) 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); (3) 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]; (4) 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 (5) 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)].

Wells Fargo began in 1852, to provide express and banking services in California. Along with JPMorgan Chase, Bank of America and Citigroup, Wells Fargo is one of the United States' "Big Four Banks." It was launched by Henry Wells and William G. Fargo, the founders of American Express.[1]

Its symbol—for advertising purposes and otherwise—the stagecoach, was known and respected worldwide as synonymous with safety and soundness, security and stability. That is, until a "nightmare" of unfathomable proportions descended on the venerable and storied financial institution, and seemingly rendered it helpless and impotent to shake off its newfound image of being incompetent, criminal and a pariah.[2]

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[1] *See, e.g.*, https://en.wikipedia.org/wiki/Wells_Fargo#History ("Wells Fargo") and https://en.wikipedia.org/wiki/American_Express ("American Express").

[2] Among the multifaceted and multi-dimensional problems of Wells Fargo (or "Wells") are the following: (1) "1981 MAPS Wells Fargo embezzlement scandal," (2) "Higher costs charged to African-American and Hispanic borrowers," (3) "Failure to monitor suspected money laundering," (4) "Overdraft fees," (5) "Settlement and fines regarding mortgage servicing practices," (6) "SEC fine due to inadequate risk disclosures," (7) "Lawsuit by FHA over loan underwriting," (8) "Lawsuit due to premium inflation on forced place insurance," (9) "Lawsuit regarding excessive overdraft fees," (10) "2015 Violation of New York credit card laws," (11) "Executive compensation," (12) "Tax avoidance and lobbying," (13) "Prison industry investment," (14) "SEC settlement for insider trading case,"(15) "Wells Fargo account fraud scandal," (16) "Racketeering lawsuit for mortgage appraisal overcharges," (17) "Dakota Access Pipeline investment," (18) "Failure to comply with document security requirements," (19) "Connections to the gun industry and NRA," and (20) "Discontent among female workers." For purposes of simplicity and convenience, the author has used most of these general category headings in his discussion hereinafter of Wells' misconduct.

See https://en.wikipedia.org/wiki/Wells_Fargo#Lawsuits,_fines_and_controversies ("Wells Fargo: Lawsuits, fines and controversies").

By way of full disclosure, the author worked two summers during college as a relief teller for Citizens National Bank in Southern California, which by reason of mergers became the southern "half" of Wells in California many years later. Also, he served with the Defense Intelligence Agency ("DIA") at the Pentagon, where he received the Joint Service Commendation Medal, before becoming counsel to the U.S. Senate Committee on Banking, Housing, and Urban Affairs. He has been a special consultant to the Federal Deposit Insurance Corporation ("FDIC"), and testified as an expert witness on its behalf in connection with litigation arising from the failure of a national bank, which at the time was the largest bank failure in U.S. history. He rewrote the banking laws of the State of Maine, and served as a special consultant to the State of California on matters pertaining to financial institutions. He has represented upwards of 200 banks, financial institutions and other entities. And he acquired seven failing savings and loans from the Federal Savings and Loan Insurance Corporation ("FSLIC")/FDIC in California, Colorado, Illinois, Kansas, Maryland and Ohio for clients in the United States and abroad. Yet, he has never seen a list of banking misconduct like this one relating to Wells, which is America's fourth largest bank and the world's 4th largest in terms of assets.

This article discusses how and why Wells "fell from grace," its present status, and what can and should be done to prevent this and other banking scandals and crises in the future. Without the ability to dissect problems and analyze their genesis and components, it is impossible to prevent them from afflicting other banks and financial institutions—and the U.S. and foreign economies—in the years ahead.

HOW AND WHY DID WELLS FALL FROM GRACE?

There were a myriad of factors that contributed to Wells' fall; and it is difficult to fit them into nice, neat categories that cover each and every one of them—much less in their order of importance. However, for purposes of this article, an attempt will be made to describe them, as follows.[3]

1. Muhammad Ali Professional Sports, Inc. ("MAPS") Embezzlement Scandal

The Federal Bureau of Investigation ("FBI") and the Los Angeles District Attorney's Office investigated a $20 million-plus embezzlement from Wells. Harold Smith, the MAPS Chairman, reportedly fled to Puerto Rico; and another member of the MAPS hierarchy, Ben Lewis, also dropped out of sight. And the Madison Square Garden boxing card that MAPS was promoting with an outlay of $8 million suddenly was in jeopardy. Also, it was reported that MAPS promoter Sam Marshall had worked for the Beverly Hills branch of Wells that was under investigation.[4]

Lewis was "an operations officer at the Beverly Drive branch" of Wells. In 1981, it was uncovered that he aided Smith in the embezzlement of the money;

See https://www.bankrate.com/banking/americas-top-10-biggest-banks/ ("America's 15 largest banks") and https://en.wikipedia.org/wiki/List_of_largest_banks ("List of largest banks [in the world]"); *see also* https://en.wikipedia.org/wiki/Crocker_National_Bank ("Crocker National Bank"—"In 1963, Crocker-Anglo Bank later merged with Los Angeles' Citizens National Bank, to become Crocker-Citizens Bank. and later, Crocker Bank"—"Crocker National Bank . . . was sold on to Wells Fargo Bank in 1986") and Timothy D. Naegele Resume (https://naegeleblog.files.wordpress.com/2019/05/timothy-d.-naegele-resume-19-4-29.pdf).

[3] *See supra* n.2.

[4] *See* https://www.nytimes.com/1981/02/01/sports/sports-of-the-times-the-maps-boxing-scandal.html ("Sports of The Times; The Maps Boxing Scandal"—"The saving grace of the Maps scandal is that Muhammad Ali himself apparently is not directly involved"—"Two months ago, [the Maps attorney] estimated that Ali had earned nearly $1 mil[l]ion in the previous year for the use of his name"—"Muhammad Ali Amateur Sports was partly financed by Federal funds, one reason that the Ali group was among the first to support President Carter's proposed boycott of the summer Olympics in Moscow last year").

and that by the time of the discovery, Lewis had been an employee of Wells for 10 years. Also, he was on the board of MAPS, which had several accounts with the bank. The scheme involved Lewis' "routinely issuing false credits and debits to those accounts from 1978 to 1981." He took advantage of "the delay involved with updating accounts when transactions occurred across several of the bank's branches, which gave Lewis the opportunity to mask the embezzlement."

Lewis pled guilty to conspiracy and embezzlement, after receiving a reported $300,000 "and other gifts," and he agreed to testify against the others. He was sentenced to five years, while Smith was sentenced to 10 years. It was reported that "Smith and Maps had spent more than $27 million, including revenues from fight promotions, before the bank discovered the embezzlement in January 1981."[5]

2. Higher Costs Charged to African-American and Hispanic Borrowers

On July 24, 2009, the Attorney General of Illinois filed a lawsuit against Wells, accusing the nation's second-largest mortgage lender of steering African-Americans and Latinos into high-cost subprime loans:

> High foreclosure rates resulted from the illegal sales practices, the state's attorney general said.
>
> Meanwhile, white borrowers with similar incomes received lower-cost loans from Wells Fargo, the fifth-largest U.S. bank, according to the lawsuit filed in Cook County Circuit Court.
>
> Two black Chicago homeowners sued Wells Fargo . . . in federal court in the Northern District of California, accusing the San Francisco-based lender of racial discrimination in how it sets rates and fees. Their lawsuit seeks class-action status.[6]

---

[5] *See* https://books.google.com/books?id=vs9wCQAAQBAJ&pg=PT666#v=onepage&q&f=false (Wilbur R. Miller, *The Social History of Crime and Punishment in America: An Encyclopedia*, p. 666) and https://www.nytimes.com/1982/01/14/us/ex-boxing-promoter-guilty-of-embezzling-21-million.html ("EX-BOXING PROMOTER GUILTY OF EMBEZZLING $21 MILLION"—"[A]n investigation by the Government had indicated Mr. Smith and Maps had spent more than $27 million, including revenues from fight promotions, before the bank discovered the embezzlement in January 1981"—"Mr. Lewis further asserted that Maps and Mr. Smith, because they paid extraordinarily high purses to boxers, were well on the way toward gaining a dominant position in professional boxing when the bank official made an error after two years of using the transfer account, and the scheme was uncovered").

[6] *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") and https://money.cnn.com/

Thereafter, Wells agreed to pay:

> [a]bout 1,000 Baltimore-area residents . . . thousands of dollars each under a landmark $175 million settlement between the U.S. Department of Justice and Wells Fargo over accusations of discriminatory lending practices.
>
> Under the terms of the deal announced Thursday, Wells Fargo also will provide $7.5 million to the city of Baltimore, which federal officials credited with first raising issues of discrimination related to bank's subprime mortgages.
>
> . . .
>
> As part of the agreement, Wells Fargo will pay for an independent administrator to find and compensate more than 30,000 residents nationwide affected by the bank's lending practices. . . .
>
> To address concerns about blight, Wells Fargo also will provide $50 million in direct down-payment assistance to borrowers in Baltimore and seven other communities nationwide that were hit hard by the housing crisis and where federal officials identified large numbers of discrimination victims.
>
> . . .
>
> Even though the bank agreed to settle the suit, Wells Fargo spokesman Oscar Suris said it still rejects claims that it engaged in discriminatory practices. "The value in settling to us is to get this behind us," he said.
>
> . . .
>
> The Justice Department's lawsuit alleged the bank discriminated against African-American and Latino borrowers between 2004 and 2009. The federal government said that black and Hispanic residents were more likely to be placed in a subprime loan than their white counterparts even if they qualified for a better loan.

2009/07/31/news/companies/illinois_wells_fargo.reut/; *see also* https://www.nytimes.com/2009/06/07/us/07baltimore.html ("Bank Accused of Pushing Mortgage Deals on Blacks"—"As she describes it, Beth Jacobson and her fellow loan officers at Wells Fargo Bank 'rode the stagecoach from hell' for a decade, systematically singling out blacks in Baltimore and suburban Maryland for high-interest subprime mortgages. . . . Another loan officer stated in an affidavit filed last week that employees had referred to blacks as 'mud people' and to subprime lending as 'ghetto loans' . . . These practices took a great toll on customers. For a homeowner taking out a $165,000 mortgage, a difference of three percentage points in the loan rate—a typical spread between conventional and subprime loans—adds more than $100,000 in interest payments").

. . .

> Baltimore first filed suit against the bank in 2008 but was forced to refile three times after Wells Fargo won a series of court victories.

. . .

> [T]he settlement of the federal suit, which also includes payouts to Washington, Chicago, Philadelphia, San Francisco, New York, Cleveland and Riverside, Calif.—all hit hard by the foreclosure crisis—recognizes that foreclosures hurt communities as well as individuals.[7]

3. Failure to Monitor Suspected Money Laundering

In 2008, Wells acquired Wachovia, which was America's fourth-largest bank holding company based on total assets. Prior to the acquisition, Wachovia had laundered billions of dollars from Mexico's drug gangs. Indeed, it was reported:

> On 10 April 2006, a DC-9 jet landed in the port city of Ciudad del Carmen, on the Gulf of Mexico, as the sun was setting. Mexican soldiers, waiting to intercept it, found 128 cases packed with 5.7 tons of cocaine, valued at $100m. But something else—more important and far-reaching—was discovered in the paper trail behind the purchase of the plane by the Sinaloa narco-trafficking cartel.
>
> During a 22-month investigation by agents from the US Drug Enforcement Administration, the Internal Revenue Service and others, it emerged that the cocaine smugglers had bought the plane with money they had laundered through one of the biggest banks in the United States: Wachovia, now part of the giant Wells Fargo.
>
> The authorities uncovered billions of dollars in wire transfers, traveller's cheques and cash shipments through Mexican exchanges into Wachovia accounts.

. . .

> In March 2010, Wachovia settled the biggest action brought under the US bank secrecy act, through the US district court in Miami. . . . It paid federal authorities $110m in forfeiture, for allowing transactions later proved to be connected to drug smuggling, and incurred a $50m fine for failing to monitor cash used to ship 22 tons of cocaine.
>
> More shocking, and more important, the bank was sanctioned for

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[7] *See* https://www.baltimoresun.com/news/bs-xpm-2012-07-12-bs-md-ci-wells-fargo-20120712-story.html ("Wells Fargo agrees to pay $175M settlement in pricing discrimination suit").

> failing to apply the proper anti-laundering strictures to the transfer of $378.4bn—a sum equivalent to one-third of Mexico's gross national product—into dollar accounts from so-called *casas de cambio* (CDCs) in Mexico, currency exchange houses with which the bank did business.
>
> . . .
>
> The conclusion to the case was only the tip of an iceberg, demonstrating the role of the "legal" banking sector in swilling hundreds of billions of dollars—the blood money from the murderous drug trade in Mexico and other places in the world—around their global operations, now bailed out by the taxpayer.
>
> At the height of the 2008 banking crisis, Antonio Maria Costa, then head of the United Nations office on drugs and crime, said he had evidence to suggest the proceeds from drugs and crime were "the only liquid investment capital" available to banks on the brink of collapse. "Inter-bank loans were funded by money that originated from the drugs trade," he said. "There were signs that some banks were rescued that way."
>
> Wachovia was acquired by Wells Fargo during the 2008 crash, just as Wells Fargo became a beneficiary of $25bn in taxpayers' money. Wachovia's prosecutors were clear, however, that there was no suggestion Wells Fargo had behaved improperly; it had co-operated fully with the investigation.
>
> . . .
>
> "What happened at Wachovia was symptomatic of the failure of the entire regulatory system to apply the kind of proper governance and adequate risk management which would have prevented not just the laundering of blood money, but the global crisis."[8]

4. Overdraft Fees

It was reported:

[8] *See* https://www.theguardian.com/world/2011/apr/03/us-bank-mexico-drug-gangs ("How a big US bank laundered billions from Mexico's murderous drug gangs"); *see also* https://en.wikipedia.org/wiki/Wells_Fargo#Wachovia_acquisition ("Wachovia acquisition") and https://en.wikipedia.org/wiki/Wachovia ("Wachovia") and https://en.wikipedia.org/wiki/Wells_Fargo#Investment_by_US_Treasury_Department_during_2008_financial_crisis ("On October 28, 2008, Wells Fargo was the recipient of US$25 billion of Emergency Economic Stabilization Act funds in the form of a preferred stock purchase by the US Treasury Department").

> Under new Federal Reserve rules, . . . banks across the country will have to quit doing a key part of what Wells Fargo did to tens of thousands of unwary debit-card users in California.
>
> . . .
>
> Even as Wells Fargo was warning customers that "the money comes right out of your checking account the minute you use your debit card," it was doing something else entirely behind the scenes—something cynically designed to boost revenue through a process it called "Balance Sheet Engineering."
>
> Wells Fargo targeted account-holders it called "ODRI customers"—ODRI, for "overdraft" and "returned item"—and particularly the 4 percent of ODRI customers who "supplied a whopping 40 percent of its total overdraft and returned-item revenue."
>
> . . .
>
> Whatever Wells Fargo claimed about how it wanted to discourage overdrafts, it had engineered a system that would maximize them and grew increasingly reliant on the revenue stream that resulted.
>
> . . .
>
> Each fee may have amounted to no more than $35, but they added up, as did the evidence that small money can corrupt, too.[9]

Also, it has been reported that in May 2013, Wells Fargo paid $203 million to settle class-action litigation accusing the bank of imposing excessive overdraft fees on checking-account customers.[10]

5. Settlement and Fines Regarding Mortgage Servicing Practices

At the time of the settlement, it was reported:

> As state and federal authorities announced the details of their $26 billion mortgage settlement with big banks on Thursday, millions of

[9] *See* https://www.philly.com/philly/columnists/jeff_gelles/20100815_Consumer_10_0__How_Wells_Fargo_held_up_debit-card_customers.html ("Consumer 10.0: How Wells Fargo held up debit-card customers"); *see also* https://www.latimes.com/archives/la-xpm-2010-aug-10-la-fi-wells-20100810-story.html ("Wells Fargo loses consumer case over overdraft fees"—"Wells Fargo & Co. should pay about $203 million to customers who say the bank manipulated debit-card transactions without their knowledge to increase revenue from overdraft fees, a federal judge ruled").

[10] *See* https://en.wikipedia.org/wiki/Wells_Fargo#Lawsuit_regarding_excessive_overdraft_fees ("Lawsuit regarding excessive overdraft fees").

American homeowners were hoping that this time they would finally get relief.

Some, like Jessica Cooper of Toledo, Ohio, will discover the program's limitations.

Since she was laid off in June 2009, Ms. Cooper and her husband have been pressing Bank of America to modify the terms of the $112,000 mortgage on their home. But because the loan is owned by the Federal Housing Administration, it is not covered. Similarly, Carlos Sandoval de Leon has been seeking a break from Wells Fargo on the $662,000 he owes on a Brooklyn brownstone. But because that mortgage is held by a private investor, it too falls outside the scope of the agreement, which mostly covers loans held by the banks themselves.

The bulk of the settlement, about $20 billion, would go to one million American homeowners who would have their mortgage debts reduced or their loans refinanced at a lower interest rate. It also includes $1.5 billion for roughly 750,000 people who lost their homes to foreclosure between 2008 and 2011, with each receiving between $1,500 and $2,000.

. . .

Critics also pointed to the fact that millions of mortgages owned by the government's housing finance agencies, Fannie Mae and Freddie Mac, would not be covered under the deal, excluding about half the nation's mortgages.

. . .

Homeowners in two states—Florida and California—will reap more than half of the $26 billion settlement, a reflection of the disproportionate number of loans that are delinquent or exceed the value of the underlying property there, government regulators said.

The amounts from individual banks were linked to their share of the servicing market. The biggest, Bank of America, would provide $11.8 billion, followed by $5.4 billion from Wells Fargo, $5.3 billion from JPMorgan Chase, $2.2 billion from Citigroup and $310 million from Ally. Bank of America would contribute an additional $1 billion for Federal Housing Administration loans.[11]

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[11] *See* https://www.nytimes.com/2012/02/10/business/states-negotiate-26-billion-agreement-for-homeowners.html ("Mortgage Plan Gives Billions to Homeowners, but With Exceptions"); *see also* http://www.nationalmortgagesettlement.com/faq.html ("Joint State-Federal Mortgage

6. SEC Fine Due to Inadequate Risk Disclosures

In 2012, Wells agreed to pay "more than $6.5 million to settle charges from the Securities and Exchange Commission that the bank's brokerage firm and a former vice president sold investments tied to mortgage-backed securities without fully understanding their complexity or disclosing the risks to investors":

> "The firm's representatives failed to understand the true nature, risks, and volatility behind these products before recommending them to investors with generally conservative investment objectives," the SEC said in a Tuesday statement.
>
> . . .
>
> The $6.5 million will be placed into a fund for the benefit of harmed investors. . . . In addition to the penalty, Wells agreed to pay $65,000 in disgorgement, and $16.57 million in prejudgment interest.[12]

Some were not pleased with this result:

> While millions of Americans lost their homes, mega-bank Wells-Fargo walked away with a pittance of a fine.
>
> Paying $6.5 million to appease the Securities & Exchange Commission, Wells-Fargo turned to the same retort as a 5-year-old when asked, "Why did you do that?" The bank's response was one tiny step away from, "I don't know."
>
> Wells-Fargo dipped into its small change purse and claimed it didn't know the risky mortgage-backed securities were dangerous.
>
> In announcing the settlement, the SEC said WF didn't have enough information to comprehend the high-risk securities it sold to nonprofits, cities and other investors in 2007.[13]

7. Lawsuit by FHA Over Loan Underwriting

It was reported:

> The U.S. government filed a civil mortgage fraud lawsuit on Tuesday

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Servicing Settlement FAQ") and https://www.huffpost.com/entry/elizabeth-magner-new-orleans-wells-fargo_n_1412412 ("Wells Fargo Slapped With $3.1 Million Fine For 'Reprehensible' Handling Of One Mortgage").

[12] *See* https://www.bizjournals.com/philadelphia/news/2012/08/14/wells-fargo-paying-65m-to-settle.html ("Wells Fargo paying $6.5M to settle charges with SEC").

[13] *See* https://www.lvcriminaldefense.com/wells-fargo-pay-6-5-million-settle-sec-charges/ ("Wells Fargo to pay $6.5 million to settle SEC charges").

> against Wells Fargo & Co, the latest legal volley against big banks for their lending during the housing boom.
>
> . . .
>
> The Wells Fargo case is brought under the False Claims Act, which provides penalties for fraud against the government, and under the Financial Institutions Reform, Recovery, and Enforcement Act, or FIRREA for short, a little-used statute that has grown in popularity in the past year.
>
> . . .
>
> At issue [i]n Tuesday's suit are loans Wells Fargo made through a program that allows banks to originate, underwrite and certify mortgages for FHA insurance, according to the complaint. Under the so-called Direct Endorsement Lender program, neither the FHA nor HUD reviews a loan before it is approved for FHA insurance, but lenders are supposed to follow program rules.
>
> Between May 2001 and October 2005, according to the complaint, Wells certified more than 100,000 loans for FHA insurance, even though the bank knew its underwriters had failed to verify information that was directly related to the borrower's ability to make payments.
>
> . . .
>
> During a 7-month stretch in 2002, at least 42 percent of the bank's FHA loans failed to actual qualify for the insurance they were submitted for, even though the bank's internal benchmark for such violations was set at 5 percent.
>
> Wells also kept its defective loans secret from HUD, the complaint said. From January 2002 to December 2010, the bank internally identified more than 6,000 "materially deficient" loans, including 3,000 that had defaulted in the first six months, but did not comply with its self-reporting obligations, the complaint said.[14]

The lawsuit was settled when Wells agreed to pay $1.2 billion.[15]

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[14] *See* https://www.reuters.com/article/us-wellsfargo-lawsuit/u-s-sues-wells-fargo-in-mortgage-fraud-case-idUSBRE8981C820121009 ("U.S. sues Wells Fargo in mortgage fraud case"); *see also* https://www.wsj.com/articles/SB10000872396390444024204578046823657285356 ("U.S. Sues Wells Fargo for Faulty Mortgages") and https://dealbook.nytimes.com/2012/10/24/federal-prosecutors-sue-bank-of-america-over-mortgage-program/ ("U.S. Accuses Bank of America of a 'Brazen' Mortgage Fraud").

[15] *See* https://www.reuters.com/article/us-wellsfargo-housing-idUSKCN0VC1KO ("Wells Fargo

8. Lawsuit Due to Premium Inflation on Forced Place Insurance

QBE Insurance Group Limited ("QBE") is Australia's largest global insurer. It provides insurance services mainly to Australia, America, Europe and the Asia Pacific region. In 2013, Wells and QBE agreed to settle a lawsuit dealing with force-placed insurance policies in Florida involving 24,000 borrowers. The companies agreed to pay $19.3 million as compensation to the borrowers:

> The settlement in federal district court in Miami deals with claims that the bank and QBE overcharged homeowners in Florida for force-placed insurance. The class-action lawsuit is one of three filed in connection with alleged overcharging of homeowners for force-placed insurance, which became a huge business in the wake of the housing bust.
>
> The two others were filed in New York, according to industry officials. Best estimates are that the business has $2.6 billion in annual written premiums.
>
> . . .
>
> In the lawsuit settlement, filed Monday, Wells Fargo and QBE agreed to repay borrowers who paid the premium 25 percent in cash. Those who were charged the premium but didn't pay will get a credit of 25 percent off their bill. In addition, the defendants agreed to pay up to $5.48 million of the plaintiffs' attorney's fees and costs.
>
> The class-action lawsuit was filed in 2011 and certified in Feb. 2012.
>
> The suit alleged that "Wells Fargo and QBE inflated these insurance premiums and profited from kickbacks and commissions from the force-placed insurance scheme."
>
> The lawsuit charged that Wells Fargo and QBE, the second-largest provider of force-placed insurance, had an exclusive agreement in which QBE searched the bank's records for homeowners with lapsed policies.
>
> After the lawsuit was filed, Wells Fargo said it would no longer purchase force-placed insurance from QBE in Florida.[16]

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to pay $1.2 billion in U.S. mortgage fraud settlement"—"The case is U.S. v. Wells Fargo Bank NA, U.S. District Court, Southern District of New York, No. 12-07527").

[16] *See* https://www.propertycasualty360.com/2013/05/17/wells-fargo-qbe-agree-on-19-3m-force-placed-settle/ ("Wells Fargo, QBE Agree on $19.3M Force-Placed Settlement"); *see also* https://en.wikipedia.org/wiki/QBE_Insurance ("QBE Insurance").

9. Violation of New York Credit Card Laws

In 2015, 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." The violations were incurred through Wells' NowLine Visa Platinum Credit Card Account product. Also, it was noted that a 2008 examination produced evidence of altered and falsified income documents that helped borrowers qualify for loans, the consent order said.[17]

10. Executive Compensation

In 2014, a $15-per-hour Wells' employee in Oregon e-mailed its CEO—along with 200,000 of their co-workers—asking for a $10,000 raise for everyone in the company, citing income inequality. He acknowledged that Wells had decent pay and benefits, yet "the gulf between most employees and upper management remains enormous." According to *Bloomberg*, then-CEO John Stumpf made "473 times more than the salary of a median employee," and he was earning $19.3 million in total compensation.

In his letter, the employee wrote:

> This year Wells Fargo in its second quarter alone had a net income of $5.7 billion, and total revenue of $21.1 billion. These are very impressive numbers, and [are] obvious evidence that Wells Fargo is one of, if not the most profitable company in the nation right now. So, why not take some of this and distribute it to the rest of the employees.[18]

One columnist responded to Wells' management:

> What a blown opportunity.
>
> Wells Fargo is in the business of helping people manage their money to live better lives. And it can't think of anything better to say to a plea for fair pay than that it pays market-based wages that exceed [the] federal minimum wage?
>
> . . .
>
> [The employee] didn't write Stumpf to ask for a raise, at least not directly. Instead he was pointing out an opportunity.

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[17] *See* https://www.reuters.com/article/us-wells-credit-settlement/wells-fargo-to-pay-4-million-for-violations-on-credit-card-accounts-new-york-idUSKBN0L92C720150205 ("Wells Fargo to pay $4 million for violations on credit card accounts: New York").

[18] *See* https://www.huffpost.com/entry/wells-fargo-email_n_5960072 ("Wells Fargo Employee Calls Out CEO's Pay, Requests Company-Wide Raise In Brave Email").

> Wells Fargo could both acknowledge the issue of income inequality and break from the pack of other large employers by raising the compensation of its employees across the board—$10,000 per year for everyone.
>
> . . .
>
> The company declined to even say whether Stumpf has responded to [the employee's] e-mail.[19]

It is difficult to escape the implicit conclusion of the writer that Stumpf and Wells' management were tone deaf.

11. Tax Avoidance and Lobbying

In 2011, the *International Business Times* reported that thirty major U.S. corporations paid more to lobby Congress than they paid in income taxes. One of those entities was Wells, which "managed to pay no federal taxes from 2008 to 2010":

> Even while dodging most of their state and federal taxes . . . Wells Fargo . . . also let go of thousands of workers.
>
> . . .
>
> Moreover, as it was laying off employees, . . . Wells Fargo increased executive pay by a whopping 180 percent, upping executive compensation from $17.8 million in 2008 to almost $50 million in 2010.[20]

12. Wells Fargo Account Fraud Scandal

This issue alone—involving claims that Wells imposed sales targets that drove employees to create unauthorized accounts for its customers—put Wells in the "cross hairs," and on the list of historical scammers in much the same league as Bernie Madoff and Charles Ponzi himself. Granted it does not contain the "raw sex appeal" and salacious ingredients of some of the other great debacles in history, but it certainly deserves to rank up there with the best of them.[21]

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[19] *See* http://www.startribune.com/schafer-wells-fargo-missed-mark-after-worker-requested-10-000-raises-for-all/279224582/ ("Wells Fargo missed mark after worker requested $10,000 raises for all").

[20] *See* https://www.ibtimes.com/30-major-us-corporations-paid-more-lobby-congress-income-taxes-2008-2010-380982 ("30 Major U.S. Corporations Paid More to Lobby Congress Than Income Taxes, 2008-2010").

[21] *See* https://en.wikipedia.org/wiki/Ponzi_scheme ("Ponzi scheme") and https://en.wikipedia.org/wiki/Charles_Ponzi ("Charles Ponzi") and https://en.wikipedia.org/wiki/Bernie_Madoff ("Bernie Madoff") and https://www.dailymail.co.uk/news/article-7084369/U-S-judge-approves-Ruth-

For openers, this scandal has been described as "an *ongoing* controversy brought about by the creation of *millions* of fraudulent savings and checking accounts on behalf of Wells Fargo clients without their consent."[22] To refer to it as a "controversy" is tantamount to describing Adolf Hitler, Joseph Stalin and Mao Tse-tung as "government employees." But the description continued:

> News of the fraud became widely known in late 2016 after various regulatory bodies, including the United States Consumer Financial Protection Bureau (CFPB), fined the company a combined US$185 million as a result of the illegal activity. The company has faced and faces additional civil and criminal suits reaching an estimated $2.7 billion by the end of 2018.
>
> . . .
>
> The bank took relatively few risks in the years leading up to the 2008 Financial Crisis, which led to an image of stability on Wall Street and in the financial world. The bank's stable reputation was tarnished by the widespread fraud, the subsequent coverage, and the revelation of other fraudulent practices employed by the company. The controversy resulted in the resignation of CEO John Stumpf, an investigation into the bank . . . , a number of settlements between Wells Fargo and various parties, and pledges from new management to reform the bank.[23]

A. Background

Bethany McLean, contributing editor for *Vanity Fair* magazine, noted:

> Wells Fargo, which was founded in 1852 as a stagecoach express to carry valuable goods to and from the gold mines in the West, had a storied brand . . . . Spearheaded by the company's then C.E.O., Dick Kovacevich, it involved a novel way of thinking about banking.

Madoff-594-000-settlement-court-appointed-trustee.html ("Bernie Madoff's wife Ruth will pay her swindler husband's victims nearly $600,000 after judge approves the settlement with a court-appointed trustee who is liquidating the fraudster's assets"—"[Irving Picard, the trustee liquidating Bernard L. Madoff Investment Securities LLC] estimated that Bernard Madoff's customers lost $17.5 billion"—"[Madoff] is currently serving a 150-year prison sentence for orchestrating the world's largest Ponzi scheme") and https://en.wikipedia.org/wiki/Wells_Fargo_account_fraud_scandal ("Wells Fargo account fraud scandal").

[22] *See* https://en.wikipedia.org/wiki/Wells_Fargo_account_fraud_scandal ("Wells Fargo account fraud scandal") (emphasis added).

[23] *See id.*; *see also* https://www.usatoday.com/story/money/business/2018/12/28/wells fargo fake accounts-settlement/2432088002/ ("Wells Fargo agrees to $575 million settlement affecting all 50 states in wake of fake accounts").

As Kovacevich told me in a 1998 profile of him I wrote for *Fortune* magazine, the key question facing banks was "How do you sell money?" His answer was that financial instruments—A.T.M. cards, checking accounts, credit cards, loans—were consumer products, no different from, say, screwdrivers sold by Home Depot. In Kovacevich's lingo, bank branches were "stores," and bankers were "salespeople" whose job was to "cross-sell," which meant getting "customers"—not "clients," but "customers"—to buy as many products as possible. "It was his business model. . . . It was a religion. It very much was the culture."

. . .

That's when [one now-retired Wells' branch manager in the State of Washington] began to see things that shouldn't have been happening: bankers persuading customers to take out large loans and then immediately repay part of them so that the banker could get credit for the bigger loan, for instance. In the summer of 2005, a customer . . . complained . . . about a checking and a savings account—that he had been given but hadn't asked for and didn't want. [The now-retired branch manager] investigated and discovered that the banker who opened them had entered [the customer's fictitious] driver's-license number . . . and the date of issuance as January 1, 2000, a holiday when the Washington State Department of Licensing would have been closed. . . .

. . .

In the ensuing decade, the big banks got even bigger. Wells Fargo swallowed up Wachovia during the financial crisis, to become the country's third-largest bank by assets, and its soaring stock made it worth almost $300 billion. John Stumpf, a native Minnesotan who could have played a modern George Bailey, took over as C.E.O. when Kovacevich retired, at the end of 2007. He, like Kovacevich, repeatedly cited Wells Fargo's success at cross-selling as a reason investors should value the bank's stock—and they believed. "In the eyes of Wall Street, Wells has always been a cut above," says one longtime bank investor. Unlike the other big banks, it positioned itself as "the bank of the real economy," i.e., its major business was retail banking for everyday folks, not trading or investment banking for sophisticated investors. It helped that Warren Buffett's Berkshire Hathaway has long been the bank's biggest shareholder.

But the pretty picture masked a dark reality. On September 8, 2016, Wells Fargo agreed to pay a combined $185 million penalty to the Consumer Financial Protection Bureau (C.F.P.B.), the Office of the Comptroller of the Currency, and the City and County of Los Angeles to settle charges from all three that, as the C.F.P.B. put it, there had been "fraudulent conduct . . . on a massive scale." . . .

Wells Fargo's own analysis found that between 2011 and 2015 its employees had opened more than 1.5 million deposit accounts and more than 565,000 credit-card accounts that may not have been authorized. Some customers were charged fees on accounts they didn't know they had, and some customers had collection agencies calling them due to unpaid fees on accounts they didn't know existed. Gaming was so widespread that it had even spawned related terms, such as "pinning," which meant assigning customers['] personal-identification numbers, or PINs, without their knowledge in order to impersonate them on Wells Fargo computers and enroll them in various products without their knowledge. The fraud was not only big, but blatant, with 193,000 non-employee accounts opened between 2011 and 2015 for which the only e-mail domain name listed was @wellsfargo.com, according to the Los Angeles city attorney's office.

In light of all this, the $185 million fine was a pittance—less than [the head of regional banking at Wells in 2002] and Stumpf had made in the previous five years and a mere 3 percent of second-quarter profits. And Wells, which also announced that it had fired some 1,000 mainly junior employees for gaming, clearly thought it had disposed of a nuisance issue.

But that was hardly the end of it. Suddenly Wells Fargo employees . . . came forward in droves, and America got mad in a way that we hadn't over other financial scandals. . . . "[L]earning that the American checking account has been co-opted has insidious wrinkles. This is supposed to be one of the most trusted things in the world."

. . .

The potential for problems was inherent in the strategy Dick Kovacevich created. Or, as [the now-retired branch manager] says, "I think what Dick Kovacevich implemented was John Stumpf's downfall."[24]

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[24] *See* https://www.vanityfair.com/news/2017/05/wells-fargo-corporate-culture-fraud ("How Wells Fargo's Cutthroat Corporate Culture Allegedly Drove Bankers To Fraud"); *see also* https://www.latimes.com/business/la-fi-wells-fargo-sale-pressure-20131222-story.html ("Wells Fargo's Pressure-Cooker Sales Culture Comes at a Cost") and https://en.wikipedia.org/wiki/

Also, Wells issued unwanted insurance policies, which included life policies by the Prudential and renters' insurance by Assurant. Specifically, Wells' employees signed up its customers for life insurance policies from the Prudential without their permission.[25]

Tragically, the culture of greed, misconduct *and criminality* at Wells—which had been crafted and promulgated by Kovacevich, and perpetuated by his successor Stumpf—permeated Wells, and infected its activities and global reputation. Banks and other financial institutions are federally-regulated for a purpose: to insure the safety and soundness of such entities. Indeed, the American public and the world rely on and trust our banking system because of this fact.

Kovacevich seems to have been nothing more than a macho salesman—like Madoff and Ponzi before him—who "started his career selling consumer products such as toys for General Mills."[26] America's financial institutions are *not* the functional equivalent of either the Home Depot or General Mills. Seemingly, Kovacevich never learned this lesson, or did not understand it.

As a consequence, the number of fraudulent or fake accounts grew to an estimated total of 3.5 million;[27] and billions of dollars were lost and Americans were hurt, which was and is unconscionable—and yes, criminal. The fact that Kovacevich was not "tagged," and Stumpf was, simply underscores the injustices in America's legal and bank regulatory systems.

Stumpf's successor, Timothy Sloan, seemed equally "tone deaf." He was quoted as stating that he was unaware of any "overbearing sales culture."[28] He too stepped down, and was replaced on an interim basis by C. Allen Parker—Wells' General Counsel.[29] If one gets the uneasy sense that the

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Richard_Kovacevich ("Richard Kovacevich") and https://en.wikipedia.org/wiki/John_Stumpf ("John Stumpf") and https://www.bloomberg.com/opinion/articles/2016-09-09/wells-fargo-opened-a-couple-million-fake-accounts ("Wells Fargo Opened a Couple Million Fake Accounts").

[25] *See* https://www.reuters.com/article/us-wellsfargo-accounts-prudential-idUSKBN1411EW ("Prudential stops distribution of policy sold through Wells Fargo").

[26] *See* https://www.vanityfair.com/news/2017/05/wells-fargo-corporate-culture-fraud ("How Wells Fargo's Cutthroat Corporate Culture Allegedly Drove Bankers To Fraud").

[27] *See, e.g.*, https://www.bloomberg.com/news/articles/2017-05-12/wells-fargo-bogus-account-estimate-in-suit-grows-to-3-5-million ("Wells Fargo's Fake Accounts Grow to 3.5 Million in Suit").

[28] *See* https://www.latimes.com/business/la-fi-wells-fargo-sale-pressure-20131222-story.html ("Wells Fargo's Pressure-Cooker Sales Culture Comes at a Cost").

[29] *See* http://fortune.com/2019/03/28/wells-fargo-ceo-tim-sloan-retires-allen-parker/ ("Under Fire, Wells Fargo CEO Tim Sloan Steps Down") and https://www.mpamag.com/news/wells-

deckchairs on the *Titanic* have been "rearranged," in lieu of fundamental changes at Wells, this assessment may not be mistaken.

B. Effects

Perhaps most telling is the following:

> As of result of that behavior, the company said it has fired more than 5,000 employees, or 1 percent of its workforce. As far as we know, none of those fired employees come from the C-suite [or "a corporation's most important senior executives"].
>
> . . .
>
> Even if bank executives did not personally sign up customers for the fraudulent accounts, they bear as much—if not more—responsibility as the low-level employees who got caught holding the bag.[30]

Indeed. In other words, Kovacevich was never "tagged" despite unleashing a chain of events with a magnitude in the billions of dollars, which is a travesty unto itself.

On December 28, 2018, Pennsylvania's Attorney General Josh Shapiro announced that Wells would pay $575 million to resolve claims that the bank violated state consumer protection laws by:

> (1) opening millions of unauthorized accounts and enrolling customers into online banking services without their knowledge or consent, (2) improperly referring customers for enrollment in third-party renters and life insurance policies, (3) improperly force-placing and charging

fargo-may-pick-insider-for-ceo-position-after-all--report-169338.aspx ("Wells Fargo may pick insider for CEO position after all"—"[T]he bank faced an uphill climb; there are simply a limited number of people with the necessary experience to run one of the world's largest banks—and many who have that experience might balk at tying themselves to scandal-plagued Wells Fargo") and https://www.wsj.com/articles/wells-fargo-ceo-search-drags-on-as-two-top-candidates-take-pass-11560260320 ("Wells Fargo CEO Search Drags On as Two Top Candidates Take a Pass") and https://www.wsj.com/articles/wells-fargo-help-wanted-11560379922 ("Wells Fargo: Help Wanted"—"Wells Fargo, the once great bank and favorite of Warren Buffett, is having a hard time attracting a new CEO. The bank has lost two CEOs in three years, and the Journal reported this week that likely candidates are running away from the job").

[30] *See* https://slate.com/business/2016/09/wells-fargo-to-pay-185-million-for-account-opening-scandal-that-s-not-enough.html ("Wells Fargo Must Pay $185 Million After Opening Customer Accounts Without Asking. That's Not Enough"); *see also* https://www.investopedia.com/terms/c/c-suite.asp ("C-suite, or C-level, is widely-used vernacular describing a cluster of a corporation's most important senior executives. C-suite gets its name from the titles of top senior staffers, which tend to start with the letter C, for 'chief,' as in chief executive officer (CEO), chief financial officer (CFO), chief operating officer (COO), and chief information officer (CIO)").

more than 850,000 auto finance customers for unnecessary and duplicative insurance policies, (4) failing to ensure that customers received refunds of unearned premiums on certain optional auto finance products, and (5) incorrectly charging customers for mortgage rate lock extension fees.

. . .

Wells Fargo has identified more than 3.5 million accounts where customer accounts were opened, funds were transferred, credit card applications were filed, or debit cards were issued without the customers' knowledge or consent. The bank has also identified 528,000 online bill pay enrollments nationwide that may have resulted from improper sales practices at the bank. In addition, Wells Fargo improperly submitted more than 6,500 renters insurance and/or simplified term life insurance policy applications and payments from customer accounts without the customers' knowledge or consent.

. . .

Wells and its vendor charged some customers for unnecessary insurance even though these customers had provided Wells Fargo's dealer-partners information about their existing insurance. Wells Fargo has agreed to provide remediation of more than $385 million to approximately 850,000 auto finance customers. The remediation will include payments to over 51,000 customers whose cars were repossessed, and for whom the unnecessary CPI charges could have led to the repossessions. The CFPB and OCC are working to ensure that the auto finance customers are fully remediated by Wells Fargo.

. . .

Additionally, the states alleged that Wells Fargo failed to ensure that customers received proper refunds of unearned portions of optional Guaranteed Asset/Auto Protection products sold as part of auto finance agreements. As a result, the bank has agreed to refund auto finance customers more than $37 million.

Finally, the states alleged that Wells Fargo improperly charged mortgage loan consumers for rate lock extension fees even when the delay was caused by Wells Fargo, a practice contrary to the bank's policy. Wells Fargo has agreed to refund over $100 million of such fees.

Wells Has Previously Agreed to Pay $2.3 Billion in Related Settlements and Consent Orders

Wells Fargo has previously entered into consent orders with federal

> authorities – including the Office of the Comptroller of the Currency (OCC) and the Consumer Financial Protection Bureau (CFPB) – related to its alleged conduct. Wells Fargo has committed to or already provided restitution to consumers in excess of $600 million through its agreements with the OCC and CFPB as well as through settlement of a related consumer class-action lawsuit and has paid over $1.2 billion in civil penalties to the federal government and to the City and County of Los Angeles. The bank also recently agreed to a $480 million settlement of a related securities class action. Additionally, under an order from the Federal Reserve, the bank is required to strengthen its corporate governance and controls and is currently restricted from exceeding its total asset size. [31]

As if this was not enough, Wells' branch-level bankers found that it was difficult to obtain employment at other banks:

> Banks issue U5 documents to departing employees, a record of any misbehavior or unethical conduct. Wells Fargo issued defamatory U5 documents to bankers who reported branch-level malfeasance, indicating that they had been complicit in the creation of unwanted accounts, a practice that received media attention as early as 2011. There is no regulatory process to appeal a defamatory U5, other than to file a lawsuit against the issuing corporation.[32]

C. Legacy at Wells

As of early 2019, Wells' employees indicated that little had changed in the bank's culture:

> It has been two years since Wells Fargo was embroiled in one of the biggest banking scandals in history. Under pressure to hit sales targets it was revealed that staff had created millions of fake bank accounts in order to hit their goals. Despite huge fines, a congressional mauling and public apologies, employees at the 166-year-old bank claim little has changed.

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[31] *See* https://www.attorneygeneral.gov/taking-action/press-releases/attorney-general-shapiro-announces-575-million-50-state-settlement-with-wells-fargo-bank-for-opening-unauthorized-accounts-and-charging-consumers-for-unnecessary-auto-insurance-mortgage-fees/ ("Attorney General Shapiro Announces $575 Million 50-State Settlement with Wells Fargo Bank for Opening Unauthorized Accounts and Charging Consumers for Unnecessary Auto Insurance, Mortgage Fees").

[32] *See* https://en.wikipedia.org/wiki/Wells_Fargo_account_fraud_scandal#On_non-management_Wells_Fargo_employees ("On non-management Wells Fargo employees") (citations omitted).

. . .

> In December 2017, Wells Fargo announced plans to increase their base minimum wage to $15 an hour, citing last year's $1.5tn tax cuts by the Trump administration, which largely favored corporations, as the incentive.
>
> The [raise] came before Wells Fargo announced plans to cut its workforce of 265,000 employees by 5–10% and reportedly sent hundreds of mortgage and call center jobs overseas.
>
> . . .
>
> Wells Fargo saved an estimated $3.7bn annually from Trump's tax cuts and has authorized $40.6bn in stock buybacks since the tax cut passed. A Wells Fargo representative cited a commitment to generating strong returns and capital to shareholders as the reason for the buybacks.[33]

Also:

> On May 6, 2018, Wells Fargo launched an integrated marketing campaign called "Re-Established" to emphasize the company's commitment to re-establishing trust with existing and potential customers. The television commercial opens with the bank's origins in the Old West, references the scandal and fast-forwards to depict bank employees and customers.
>
> Roughly a year later, in January 2019, the company announced another overhaul of their image, in a campaign called "This is Wells Fargo"[34]

Put succinctly, Kovacevich unleashed a "monster" at Wells—a culture of corruption *and* criminality. Like a cancer, it is difficult to root out, even years after it began. It is insidious, ravishing and all consuming.

13. Racketeering Lawsuit for Mortgage Appraisal Overcharges

In 2016, 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. It dealt with nationwide claims that Wells "charged much more than it paid for third-party appraisals, exploiting borrowers who could least afford it and driving them further into default."

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[33] *See* https://www.theguardian.com/business/2019/jan/04/wells-fargo-fake-accounts-scandal-employees ("Wells Fargo employees say little has changed since fake accounts scandal").

[34] *See* https://en.wikipedia.org/wiki/Wells_Fargo_account_fraud_scandal#Rebranding ("Rebranding").

Wells added large mark-ups to the amounts its third-party vendors charged. For example:

> [It] typically charged $95 to $125 for the type of expedited appraisal at issue, when the actual cost was $50 or less, the complaint said. The charges added hundreds or thousands of dollars to borrower's mortgage loans over time. . . .
>
> Customers did not know they had been victimized because the charges were described on statements with cryptic labels such as "other charges," the lawsuit said.
>
> The plaintiffs had sought triple damages under the U.S. Racketeer Influenced and Corrupt Organizations Act. The lawsuit said sending invoices and statements with the fraudulently concealed fees constituted mail and wire fraud sufficient to allege racketeering.[35]

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."[36]

14. Failure to Comply with Document Security Requirements

In 2016, the Financial Industry Regulatory Authority ("FINRA") fined several Wells' businesses and others a combined $14.4 million for record-keeping problems that may have allowed company and customer documents to be altered. FINRA found that the firms "failed to keep hundreds of millions of electronic documents in a 'write once, read many' format, which would have made it impossible to alter or destroy records after they were written.[37]

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[35] *See* https://www.reuters.com/article/us-wellsfargo-settlement-idUSKBN12V27F ("Wells Fargo agrees to $50 million settlement over homeowner fees"—"The case is: Bias et al v Wells Fargo & Co, U.S. District Court, California Northern District, no 12-cv-664").

[36] *See Bias et al. v Wells Fargo & Co*, U.S. District Court, Northern District of California, Case No. 4:12-cv-00664-YGR, PACER Docket Sheet entry 274, p. 5, paragraphs 7 & 8.

[37] *See* https://www.reuters.com/article/wells-fargo-finra-idUSL1N1EG0UI ("FINRA fines Wells Fargo, others $14 mln for records' changeable format"); *see also* https://en.wikipedia.org/wiki/Financial_Industry_Regulatory_Authority ("Financial Industry Regulatory Authority").

15. Lawsuit Due to Forced National General Auto Insurance

In June of 2019, Wells agreed to settle a class-action lawsuit that had been filed in July of 2017, which was brought by customers who alleged that the bank forced them to buy unnecessary auto insurance:

> The New York Times published the results of an internal report [that] the bank had commissioned on the matter. The report found Wells Fargo had for years been buying a certain kind of auto insurance from National General Insurance and applying it to auto loan customers' accounts without their knowledge.
>
> Those borrowers were charged interest not just on their loans but on the insurance premiums as well, pushing more than 270,000 of them into delinquency.
>
> . . .
>
> National General Insurance, which according to the report paid Wells Fargo unearned commissions on the insurance policies, will pay $7.5 million as part of the settlement, bringing the total settlement amount to just under $400 million.[38]

16. Lawsuits Alleging Violations of the Anti-Tying Provision of the Bank Holding Company Act

In 1970, Congress enacted section 106 of the Bank Holding Company Act Amendments of 1970, the anti-tying provision ("ATP"), which is codified at 12 U.S.C. § 1972. Simply stated, a tying arrangement has been defined as "an agreement by a party to sell one product [the 'tying product'] but only on condition that the buyer also purchases a different (or tied) product, or at least agrees that he [or she] will not purchase that product from any other supplier."[39] Violations of the ATP, if proven, may entitle aggrieved parties to:

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[38] *See* https://www.nytimes.com/2019/06/07/business/wells-fargo-auto-insurance-lawsuit-settlement.html ("Wells Fargo Agrees to Settle Auto Insurance Suit for $386 Million"); *but see infra* n.66.

[39] *Northern P. R. Co. v. United States*, 356 U.S. 1, 5–6 (1958).

By way of full disclosure, the author wrote the Anti-Tying Provision when he was counsel to the U.S. Senate Committee on Banking, Housing, and Urban Affairs (and counsel to the late Senator Edward W. Brooke of Massachusetts); and he has been its champion since the inception of the landmark law. Also, he has written extensively about it.

See, e.g., 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-

(1) Actual damages;

(2) Treble damages;

(3) Punitive damages;

(4) Attorneys' fees; and

(5) Costs.

One of the only ATP cases involving *Wells* has been *Mitchell, et al. v. Wells Fargo Bank, et al.*, a Utah federal court class action lawsuit.[40] In it, the Plaintiffs alleged, *inter alia*, that (1) in the case of one Plaintiff, "in spite of her repeated refusal to obtain a credit card and line of credit on her account, Defendants submitted an application without her authorization or consent"; (2) another Plaintiff had a mortgage with Wells, which issued—without his knowledge or consent—a credit card in his name to an unknown individual who charged $5,000; and (3) another Plaintiff wanted to open a checking account, and Wells "set up multiple other accounts that he did not want so [Wells' employees] could meet quotas."[41]

Also, it was alleged that (4) Wells "required numerous Plaintiffs' and Class Members to purchase additional products, through their cross-sales and employee incentives"; (5) another Plaintiff asserted "that when he attempted to open a checking account, he was told he could not have a checking account unless he also opened a savings account"; (6) Wells' "CEO John Stumpf has acknowledged that Defendants['] actions were fraudulent and that numerous violations of the BHCA [] were committed from 2002 when he first became aware of the cross-selling"; and (7) "the examples provided herein demonstrate that the anti-tying prohibition activities were in fact consummated by

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banking-law-journal.pdf]; 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); 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); 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 Fed) (March 16, 2005), and the AMERICAN BANKER article)].

[40] *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; and *Mitchell, et al. v. Wells Fargo Bank, et al.*, U.S. Court of Appeals for the Tenth Circuit, Case No. 19-4027.

[41] *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, PACER Docket Sheet entry 68 (Third Amended Class Action Complaint), pp. 121–123, paragraphs 700–712.

Defendants['] actions in requiring Plaintiffs and Class Members to sign up for accounts they did not want or need, and had no relation to the purpose of their initial transaction with Defendants, and/or those accounts were entered into by Wells Fargo employees without the knowledge of Plaintiffs and Class Members."

Lastly, the Plaintiffs alleged that (8) Wells "profited from the illegal tying actions of Defendants in increased fees, charges, opening accounts, and increase in stock price"; (9) Wells' "actions were coercive, and/or carried out behind the backs of Plaintiffs and Class Members without their consent or knowledge"; and (10) Wells' actions "resulted in anticompetitive effects, in that [the] Plaintiffs and Class Members were unable to obtain additional credit, or services when they became aware of Defendants['] actions."[42]

As proof, the Plaintiffs provided the following representative facts (or examples) to the district court:

> (1) "Defendants have admitted through employee declaration testimony [] that they have sold unneeded services[,] and employees have indicated that one service could not be rendered without the other. *See* Exhibits D, E and F; *see also* Exhibit J at pp. 2–5 (Wells Fargo CEO admitting to the unlawful practices that generally occurred within the bank)."[43]
>
> (2) *A Wells' employee*: "I worked for Wachovia/Wells Fargo from 2005 until 2013. . . . As a banker, I was required by upper management to meet daily account and 'solution' quotas. A 'solution' is one of Wells Fargo's 'Gr-eight' products, including a new checking account, new savings account, online banking, bill pay, overdraft protection, a credit card, etc. In short, a 'solution' was a new account whether in the name of a current or new Wells Fargo customer. . . . The branch managers were constantly surveilling me during my time as a banker and prioritized getting more accounts over all else. For example, a family came in to complain about charges they had incurred from accounts that they did not open. The couple asked me to reverse the charges. I asked my manager if that was possible, and my manager told me the charges could be reversed only if I was able to upsell new solutions to the family. I was uncomfortable doing this because the family had been victimized and the new solutions were unnecessary and unwarranted.

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[42] *See id.*

[43] *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, PACER Docket Sheet entry 132, pp. 13–14; *see also id.* at PACER Docket Sheet entry 132-10 (Exhibit J, "Statement of Tim Sloan" before the U.S. Senate Committee on Banking, Housing and Urban Affairs, October 3, 2017).

The only reasons branch managers were constantly pushing bankers to reach quotas was because regional and corporate management were constantly pushing the branch managers to make sure sales quotas were met. . . . As a result of the extreme pressure applied by branch managers and upper management, I employed various techniques and upsells to meet daily quotas. For example, I would convince customers to open separate checking and savings accounts for big ticket items like vacations or high price consumer products. I also would persuade customers to open separate checking and savings accounts for each family member. These practices were recommended to me by management. . . . In March of 2010, I was promoted from a banker in Allentown, Pennsylvania to a store manager for the Macungie branch. . . . As a branch manager, I was contacted at 8 a.m. most days of the week by a district manager. The purpose of this call was to establish account and solutions quotas for the day. A district manager would then contact me again at 11 a.m., 1 p.m., 3 p.m. and 5 p.m. on 'Focus Days' to ensure that the quotas were being met. If my branch failed to meet its goals, another call was scheduled for 7 p.m. The 7 p.m. call was specifically scheduled after closing as a punishment for failing to achieve goals. As a branch manager, I was told by my superiors to work our employees 'like dogs' to meet our sales goals. I was not allowed to pay my employees overtime if their quotas were not met and they had to stay late to meet their sales objectives. I was personally forced to stay late and cold call customers until the sales goals established by upper management were met. . . . During a period when my branch experienced sales difficulty, upper management instituted a program called 'Hit the Streets Thursday.' This program involved district managers and corporate management selecting bankers and tellers of Latino/Latina descent and instructing them to patrol the streets and local social security offices for potential new clients. The bankers and tellers were instructed to force random people off the streets or from social security offices to get them into local branches and pressure them into opening new accounts. . . . District and regional management once instructed me to 'get rid' of employees that were not meeting their sales goals. At that time, there were four people on that list. I refused to fire them because they had [] been long-time employee[s] of Wells Fargo, and I felt that all four were exemplary employees. I believe that the decision regarding these employees demonstrated that Wells Fargo prioritized sales over service. . . . When the pressure on managers and employees kept increasing, I began to have wine on Friday nights with my district manager. She told me that some of the branches were 'doing stuff unethically and getting rewarded.' I expressed my frustration that certain branches were getting rewarded for unethical behavior and that other branches, including my own [] that were honest[,] received nothing and were struggling. This is how I learned that branch, regional, and executive management knew about the unethical conduct that was occurring, but chose to ignore it for profit. . . . The constant stress to meet unattainable sales targets and my refusal to engage in and employ unethical conduct in meeting the unattainable goals of upper management eventually cost me my job. I was terminated from my position as branch manager in 2013."[44]

(3) *Another Wells' employee*: "I was a teller for Wells Fargo Bank from May 2013 to August 2014 at the Draper branch, assisting walk-up customers. While working as a teller, I was also training and preparing to become a Wells Fargo personal banker. During my time at Wells Fargo, I personally witnessed and was subjected to Wells Fargo's sales practices that caused me to find another job away from the bank. . . . It was standard operating procedure at Wells Fargo that one of my main duties as a teller was to get walk-up customers to sit down with a Wells Fargo personal banker at all costs. The bank made it very clear to tellers like myself that we were being judged by how many of our customers we successfully referred to the personal bankers. One banker [] said to me that not all sales have to be true, and that I should say 'whatever you need to say' to achieve the goal of getting a customer to sit down with a banker. One tactic that I was taught to use was to convince customers, even those who came in for something like cashing or depositing a check, that they needed to do an address update with a banker, who would later sign them up for products like credit cards without their knowledge or consent. . . . Frequently, customers I had referred to bankers would come up to my teller line to tell me that they were upset that I had referred them to a banker, trusting that I know what I was talking about when I said that they needed to talk to one. One customer complained to me[,] and the banker that person had been referred to[,] of being coerced to open new accounts. The customer further complained that even after saying 'no' to some of the banker's recommendations, he or she received a notice a few days later that the refused account had nonetheless been opened. . . . Before long, [our branch manager] approached me, saying that he had noticed

[44] *See id.*, PACER Docket Sheet entry 132–4 (Exhibit D, "Declaration of Julia L. Miller"), pp. 3–5, paragraphs 3–12.

that my sales numbers were now much lower than before. I explained that I did not feel comfortable steering all my customers to bankers just so they could be signed up for unwanted or unauthorized products. [His] response was that I did not need to worry because I was just referring them, and that I was not personally the one lying or signing them up for something they did not ask for. . . . The pressure to hit sales goals was palpable through the entire branch. Every employee and the branch itself had regular sales targets that were expected to be met. These quotas were measured in 'points,' 'solutions,' or 'credit' which would be issued for each successful sale. In order to receive a full point of credit, a new product or account had to remain open for at least 60 days. . . . All tellers and bankers were required to check in and submit their daily numbers. For tellers like myself, these numbers consisted of the number of customers assisted in an hour, how many were successfully referred to a banker, and how many of those had opened new accounts. We were required to fill out books daily and all throughout the day with these numbers. For each customer that did not sit down with a banker, I was required to have a written description of our interaction and a description of the attempts made to get them to sit down with a banker. Our branch manager inspected these books at least daily and often multiple times per day.[45]

(4) *An additional Wells' employee*: "For fifteen years, I worked at a bank that was eventually to become the Petaluma location of Wells Fargo & Company (Wells Fargo). . . . In 2008, I was a Supervisor Loan Officer at the Petaluma branch of World Savings when Wells Fargo acquired World Savings. I then became an employee of Wells Fargo, working at the same branch where I had worked as a Supervisor Loan Officer for several years. . . . I was reassigned to the position of a Supervisor or Senior Bank Teller at a different Petaluma branch. . . . I worked for Wells Fargo at that Petaluma branch until 2011 when I voluntarily resigned from Wells Fargo. . . . Within a couple of months of the acquisition by Wells Fargo, former World Savings customers began to approach me with complaints about the Wells Fargo banking practices. . . . Former World Savings customers told me that Wells Fargo bankers had instructed them to close their old World Savings accounts and open new Wells Fargo accounts. Several of the older, former World Savings customers complained to me that they

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[45] *See id.*, PACER Docket Sheet entry 132–5 (Exhibit E, "Declaration of Kelsey Hess"), pp. 3–5, paragraphs 3–10.

> were receiving multiple Wells Fargo debit and credit cards without ever having requested them. When I investigated these complaints, I learned that Wells Fargo management had established an aggressive 'SOLUTIONS' program that placed extreme pressure on bankers to open new accounts. I was informed that this was widespread within Wells Fargo by senior and regional employees[,] and was insisted on by Wells Fargo management in the Bay Area. . . . Wells Fargo corporate management and executives created a 'pressure cooker' environment, where employees were constantly pressured to accrue 'solutions/points.' . . . Elderly customers of mine, with whom I had worked during the World Savings years, frequently approached me to ask why accounts had been opened in their names without their permission. Several such elderly customers complained to me that every time they met with a local banker at Wells Fargo for any reason, upwards of 9–10 new debit cards would be issued in their names without their authorization.[46]

Nonetheless, the district judge dismissed the ATP claims against Wells as follows:

> First, the court agrees with Defendants that Plaintiffs' first argument cannot satisfy the first element necessary to demonstrate a violation of § 1972. The first element requires Plaintiffs to demonstrate that Wells Fargo "conditioned the extension of credit upon the borrower's obtaining or offering additional credit, property, or services to or from the bank." *Morales*, 2016 WL 3746527, at *3. The court agrees with the reasoning of the Sixth Circuit authority cited by Defendants that the first element requires evidence that the "bank conveyed an intention" to withhold extending credit or furnishing a service "unless the" customer "fulfilled a 'prerequisite' of purchasing or furnishing some other product or service" offered by the bank. *See Highland Capital, Inc. v. Franklin Nat. Bank*, 350 F.3d 558, 567 (6th Cir. 2003). The court also agrees with Defendants that if they were opening accounts without Plaintiffs' authorization and consent, then Wells Fargo never conveyed any intention to withhold any service, meaning there was no "condition," and therefore, no "tying arrangement." *See Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384, 395 (6th Cir. 1996) ("If the Bank did breach, then the plaintiffs never agreed to purchase the additional insurance and therefore its purchase simply was not a

[46] *See id.*, PACER Docket Sheet entry 132–6 (Exhibit F, "Declaration of Denny Russo"), pp. 3–5, paragraphs 3–12.

'condition or requirement' of purchasing the authorized loss or damage insurance or receiving the automobile loan.") (abrogated on other grounds by *Riverview Health Inst. LLC v. Med. Mut. of Ohio*, 601 F.3d 505, 520 (6th Cir. 2010)). If there was no tying arrangement, Plaintiffs' argument that Wells Fargo violated the BCHA by opening fraudulent accounts fails.

> Second, the court agrees with Defendants that the products that Plaintiffs allege were tied are traditional bank products and therefore exempt from § 1972. "A bank account is the quintessence of a deposit service." *Batten v. Bank One, N.A.*, No. 00 C 1837, 2000 WL 1364408, at *2 (N.D. Ill. Sept. 15, 2000). "[T]he requirement of opening an account with [a bank] [cannot] be a 'tying' product for purposes of section 1972, because the statute expressly exempts 'deposit services' from the statute's purview." *Id.* (citing 12 U.S.C. § 1972(1)(A)). In their response to Defendants' arguments, Plaintiffs do not dispute that the accounts at issue constituted "loan" or "deposit services." (*See* ECF No. 149 at 33.) Instead, they argue that "any claim that Defendants are protected by the 'traditional bank product exemption' fails because fraudulent accounts are not a traditional bank product." (ECF No. 149 at 33.) But as explained above with regard to fraudulent accounts, if Wells Fargo was opening accounts without Plaintiffs' authorization and consent, then Wells Fargo never conveyed any intention to withhold any service, meaning there was no "condition," and therefore, no "tying arrangement." *See Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384, 395 (6th Cir. 1996). For these reasons, the Defendants' Motion to Dismiss Plaintiffs' eleventh claim is GRANTED.[47]

The district judge was mistaken. Indeed, the author discussed *Morales* previously:[48]

> In *Morales v. UBS Bank USA*,[49] the Plaintiffs alleged that UBS Bank violated the anti-tying provision by conditioning Plaintiffs' receipt of

[47] *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, PACER Docket Sheet entry 164, paragraph J, pp. 38–40.

[48] *See* Timothy D. Naegele, *The Bank Holding Company Act's Anti-Tying Provision: Almost 50 Years Later—Part I*, 135 Banking L. J. 315, 344–345 (June 2018) (Naegele 2018, Part I) [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].

[49] *See Morales v. UBS Bank USA*, 2016 U.S. Dist. WL 3746527, *3-6 (D. Utah July 8, 2016).

loans on Plaintiffs' agreement to use the loan proceeds to purchase shares in a closed-end mutual fund (CEF). UBS Bank advanced four arguments in support of its claim that the Plaintiffs failed to satisfy the pleading requirements for an anticompetitive tying condition: (A) evidence of a tying condition was barred by the parol evidence rule; (B) the existence of a tying condition was implausible because it was contrary to the parties' contractual agreements and description of the transaction; (C) Plaintiffs failed to allege coercion; and (D) Plaintiffs lacked standing.[50]

With respect to the parol evidence rule, the Court concluded that the suit did "not involve interpretation of the Credit Line Agreements. Rather, Plaintiffs' BHCA claim was for a statutory violation, a cause of action that depended on the parties' conduct surrounding their transaction, not on the meaning of the Credit Line Agreements."[51] Regarding the implausibility of Plaintiffs' BHCA allegations—namely, that the Plaintiffs' BHCA claim must be dismissed because Plaintiffs' allegations of an illegal tying condition were "wholly conclusory, containing no detail whatsoever"—the Court ruled the Plaintiffs alleged sufficient facts showing "that the purchase of the tied product or service was a mandatory condition or requirement of obtaining a loan from the lender."[52]

Next, with regard to the element of coercion, the Court decided correctly that UBS Bank relied on the proposed interpretation of the BHCA issued by the Federal Reserve System,[53] but the interpretation had not been adopted by the courts. Indeed, the Court added: "[S]ince the proposed interpretation was issued, no circuit court has held that a BHCA claim requires proof of coercion."[54] With respect to standing,

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[50] *See id.* at *3.

[51] *See id.* at *3.

[52] *See id.* at *4-5.

[53] *See* Naegele 2018, Part I, n.3.

[54] *See Morales v. UBS Bank USA*, 2016 U.S. Dist. WL 3746527, *5 & n.4 (citing, *inter alia*, *Akiki v. Bank of America, N.A.,* 632 Fed.Appx. 965, 968–970 (11th Cir. 2015) ("[T]he Eleventh Circuit did not require evidence of force or coercion in the BHCA context in a subsequent case, *Akiki v. Bank of America, N.A.*, 632 Fed.Appx. 965 (11th Cir. 2015)"); *see also* Naegele 2018, Part I, n.47; Naegele 2005 at 204.

As stated previously:

> To restrict the scope of those words ["condition or requirement"] to tying arrangements in which a customer is literally forced to buy or provide a tied product or service in order to

> the Court ruled correctly that "a customer of a bank has standing to sue for BHCA violations."[55]

Thus, *Morales* was supportive of the Plaintiffs' allegations in *Mitchell*, *not* at odds with them.

Next, the district judge cited *Highland Capital*,[56] and again was mistaken. The opinion in that case states:

> [W]e conclude that a statutory violation is established by proof that a bank conveyed an intention to withhold credit unless the borrower fulfilled a "prerequisite" of purchasing or furnishing some other product or service. The borrower may readily agree with the tying condition demanded by the bank; that is, the whole notion of force or involuntary submission may be absent. Nonetheless, proof of a statutory violation will be made out by evidence that taking or furnishing another service or product is a condition that must be fulfilled before the bank will agree to extend credit.
>
> . . .
>
> According to the plain language of the statute, a claimant must prove that the purchase of the tied product or service was a mandatory condition or requirement of obtaining a loan from the lender. The borrower must be prevailed upon to agree to the additional product or service, lest credit be denied.[57]

Nowhere in the ATP statute or its legislative history is there any requirement that "a bank conveyed an intention"—or that evidence must be produced that the "bank conveyed an intention to withhold extending credit or furnishing a service unless the customer fulfilled a prerequisite of purchasing or furnishing some other product or service offered by the bank." This is utter nonsense.

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get credit would vitiate that section's intended role for, as Congress recognized, a tying arrangement may squelch competition whether coercive or not:

> Tie-ins may result from actual coercion by a seller or from a customer's realization that he stands a better chance of securing a scarce and important commodity (such as credit) by "volunteering" to accept [or provide] other products or services rather than seeking them in the competitive market place. *In either case, competition is adversely affected, as customers no longer purchase a product or service on its own economic merit.*

See Naegele 2005 at 234, n.77 (emphasis in original; citation omitted).

[55] *See Morales v. UBS Bank USA*, 2016 U.S. Dist. WL 3746527, *6; *see also* Naegele 2005 at 200–202.

[56] *See Highland Capital, Inc. v. Franklin Nat. Bank*, 350 F.3d 558 (6th Cir. 2003); *see also Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384 (6th Cir. 1996).

[57] *See Highland Capital, Inc.*, 350 F.3d at 567.

Second, with respect to the assertion by the district judge in *Mitchell* that "there was no 'condition,' and therefore, no 'tying arrangement,' " the condition can and must be *implied* (or inferred) from the totality of the circumstances. From a public policy standpoint, it would be wrong to decide otherwise; and it would exalt form over substance. At no time did the plaintiffs in *Mitchell* "consent." That is crystal clear.

Third, tainted by the most egregious bank misconduct imaginable, Wells' employees opened "non-traditional" accounts in *Mitchell* and the other cases cited herein. Indeed, as stated previously:

> Wells Fargo has identified more than 3.5 million accounts where customer accounts were opened, funds were transferred, credit card applications were filed, or debit cards were issued without the customers' knowledge or consent.[58]

These were not minor infractions. They constitute the greatest abuses of customer relationships in U.S. banking history. Clearly, the ATP was meant to reach such flagrant and massive misuse of customer relationships and breaches of trust by Wells. To decide otherwise would make the ATP meaningless.

Fourth, the district judge did not cite the record of the case with respect to the ATP claims, *inter alia*, because the record does not support his conclusions. This alone may have constituted reversible error.

Lastly, the district judge stated:

> In their response to Defendants' arguments, Plaintiffs . . . argue that "any claim that Defendants are protected by the 'traditional bank product exemption' fails because fraudulent accounts are not a traditional bank product." (ECF No. 149 at 33.) But as explained above with regard to fraudulent accounts, if Wells Fargo was opening accounts without Plaintiffs' authorization and consent, then Wells Fargo never conveyed any intention to withhold any service, meaning there was no "condition," and therefore, no "tying arrangement."[59]

Again, the district judge was mistaken, *inter alia*, because nowhere in the ATP statute or its legislative history is there any requirement that a bank "convey an intention." Any suggestion to that effect is unfounded and inconsistent with the statute.

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[58] *See supra* n.31; *see also* https://www.bloomberg.com/news/articles/2017-05-12/wells-fargo-bogus-account-estimate-in-suit-grows-to-3-5-million ("Wells Fargo's Fake Accounts Grow to 3.5 Million in Suit").

[59] *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, PACER Docket Sheet entry 164, paragraph J, p. 40.

Also, there is nothing "traditional" about fraudulently opening more than 3.5 million customer accounts, transferring funds, filing credit card applications, issuing debit cards without the knowledge or consent of Wells' customers, or engaging in similar abusive practices.[60]

WELLS' PRESENT STATUS

One isolated incident of wrongdoing is insufficient to condemn a bank or other financial institution. However, a pattern of misconduct stretching over many years is damning—and yes, criminal. This was and is the case with Wells. The facts are overwhelming and indisputable.

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[60] 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., id.* 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. 2:16 CV-00966 CW (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.

To recap, the minimum costs of this series of wrongdoings include but are not limited to the following:

1. MAPS embezzlement scandal—$27 million;
2. African-American and Hispanic discriminatory lending—$232.5 million;[61]
3. Failure to Monitor Suspected Money Laundering—unknown;[62]
4. Overdraft Fees—$203 million;
5. Settlement and Fines Regarding Mortgage Servicing Practices—$5.4 billion;
6. SEC Fine Due to Inadequate Risk Disclosures—$23.135 million;[63]
7. Lawsuit by FHA Over Loan Underwriting—$1.2 billion;
8. Lawsuit Due to Premium Inflation on Forced Place Insurance—unknown;[64]
9. Violation of New York Credit Card Laws—$4 million;
10. Executive Compensation—unknown;
11. Tax Avoidance and Lobbying—unknown;
12. Wells Fargo Account Fraud Scandal—unknown with precision;[65]
13. Racketeering Lawsuit for Mortgage Appraisal Overcharges—$50 million;
14. Failure to Comply with Document Security Requirements—$14.4 million;
15. Lawsuit Due to Forced National General Auto Insurance—

[61] This total reflects the $175 million settlement with the U.S. Department of Justice; the $7.5 million payment to the city of Baltimore; and the $50 million in direct down-payment assistance to borrowers in Baltimore and seven other communities nationwide.

[62] Wachovia had laundered billions of dollars from Mexico's drug gangs, before Wells acquired Wachovia. The spillover effects and costs to Wells are unknown.

[63] This total reflects $6.5 million involving a fund for the benefit of harmed investors; $65,000 in disgorgement; and $16.57 million in prejudgment interest.

[64] Wells and QBE agreed to pay $19.3 million as compensation to the borrowers; and up to $5.48 million of the plaintiffs' attorney's fees and costs. Wells' share of these costs is unknown.

[65] This reflects $575 million to resolve claims that Wells violated Pennsylvania's consumer protection laws, as well as additional unknown amounts.

unknown;[66] and

16. Lawsuits Alleging Violations of the Anti-Tying Provision of the Bank Holding Company Act—unknown.

Estimated total: *at least* $7.154 billion.

The impact on Wells' reputation is incalculable, both domestically and globally. Also, as indicated previously, the dollar payouts by Wells were and remain a *pittance*, and merely a slap on the wrist, if that much. For example, in one quarter alone, Wells had net income of $5.7 billion.[67]

WHAT CAN AND SHOULD BE DONE TO PREVENT BANKING DEBACLES LIKE WELLS IN THE FUTURE?

It is worth repeating a conclusion cited earlier in this article:

> "What happened . . . was symptomatic of the failure of the entire regulatory system to apply the kind of proper governance and adequate risk management which would have prevented [it]."[68]

It is inescapable that Wells' board of directors and its financial institutions regulators were "asleep at the switch." They "fiddled" while Rome, or in this case Wells, "burned."[69] Yet—of those in management who set this tragic chain of events in motion, and of those who failed to stop them (e.g., board members)—*no one* has gone to prison. Why not? Also, there are reasons to believe that management and regulatory ineptitude continue, unabated.[70]

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[66] Because the proposed $386 million settlement requires court approval, it has not been added into these calculations.

See https://www.nytimes.com/2019/06/07/business/wells-fargo-auto-insurance-lawsuit-settlement.html ("The proposed settlement must still be approved by a judge. A hearing on the matter is scheduled for July 8 in federal court in Santa Ana, Calif.") and https://trofire.com/2019/07/16/wells-fargo-to-pay-out-millions-for-scamming-consumers-on-car-loans/ ("Wells Fargo To Pay Out Millions For Scamming Consumers On Car Loans"— "Customers accusing Wells Fargo and National General Insurance of tacking on unnecessary auto insurance to boost car loan bills are requesting approval of a $393.5 million settlement. Negotiations with the companies began in May 2018, and last Thursday the plaintiffs submitted their motion for preliminary approval of the class action settlement").

[67] *See supra* n.18; *see also infra* n.70.

[68] *See supra* n.8.

[69] *See* https://en.wiktionary.org/wiki/fiddle_while_Rome_burns ("fiddle while Rome burns").

[70] See https://www.washingtonexaminer.com/business/wells-fargo-scandals-spur-doubts-about-33b-payday-for-investors ("Wells Fargo scandals spur doubts about $33B payday for investors"); *but see* https://www.businesswire.com/news/home/20190627005908/en/ ("Wells Fargo Receives No Objection to its 2019 Capital Plan") and https://finance.yahoo.com/news/

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wells-fargo-receives-no-objection-203900271.html ("Wells Fargo Receives No Objection to its 2019 Capital Plan") and https://newsroom.wf.com/press-release/corporate-and-financial/wells-fargo-company-increases-common-stock-dividend-and ("Wells Fargo & Company Increases Common Stock Dividend and Increases Common Stock Repurchase Authority").

Why should there be *any* "payday for investors," much less one of the magnitude of this one: an estimated $33 billion? What about Wells' employees, customers and others who have been hurt by Wells? This is a tragedy that seems to keep getting worse with each day that passes.

See, e.g., https://www.thejournal.ie/wells-fargo-fined-central-bank-of-ireland-4712049-Jul2019/ ("Wells Fargo fined €5.8m by Central Bank over failures in regulatory reporting") and https://kbzk.com/cnn-business-consumer/2019/07/09/jamie-dimon-on-wells-fargo-this-is-not-the-way-to-run-the-railroad/ ("[JPMorgan Chase CEO] Jamie Dimon on Wells Fargo: This is 'not the way to run the railroad'"—"Wells Fargo, like a rudderless ship lost at sea, must navigate one of the most difficult periods in its 167-year history without a clearly defined leader"—"'It's not responsible for a company — this is my own view — to have a CEO leave with no plan in place,' JPMorgan Chase CEO Jamie Dimon said on Tuesday at an industry conference. 'I don't personally understand that. And I'd be surprised if regulators wanted that to happen, because it's irresponsible'") and https://www.jdsupra.com/legalnews/doing-business-with-wells-fargo-watch-49658/ ("Doing Business with Wells Fargo – Watch Your Wallet"—"Wells Fargo has found a way to actually make money from its ethics and compliance function. . . . I refer of course to Wells Fargo['s] recently announced initiative to require outside consultants who worked to help remediate the company out of its fraudulent accounts scandal. . . . [T]he bank which has stumbled from one crisis to another is now mandating that those same vendors who helped them get out of their own squalidness are now being asked to compensate the bank for doing so. . . . [T]he bank 'recently asked outside technology consultants to refund some of the money the bank has spent with them in the past year. . . . The bank told the vendors, who in many cases supply the bank with contract tech employees, that this was because they had benefited from increased business due to Wells Fargo's regulatory woes.' So, let's be clear here. Wells Fargo got itself into such a regulatory mess that the Federal Reserve Bank set a growth limit on the bank until it cleaned up its house; now Wells Fargo wants to make money from those same vendors who helped them clean up that mess. . . . Wells Fargo has been unable to recruit a new Chief Executive Officer (CEO) since the most recent person to hold that job, Timothy Sloan, resigned in March after being skewered by both parties at a Congressional hearing. I wonder why that could be? What about all those ads Wells Fargo has been running . . . that it has turned a new leaf and is now the ethical banking institution? It seemed for some time that Wells Fargo was unearthing more scandals where it abused customer trust. I guess they have run out of customers to abuse and now are moving on to vendors") and https://finance.yahoo.com/news/elizabeth-warren-calls-wells-fargo-183506484.html ("Elizabeth Warren Calls Out Wells Fargo"—"Wells Fargo has had a rough couple of years in the public eye, and things don't seem to be looking up anytime soon, as [U.S. Senate Banking Committee member] Elizabeth Warren is again publicly taking them to task. . . . Last week The New York Times reported that, for the past five years, the banking giant was charging overdraft fees on empty accounts, even after customers thought the accounts were supposedly closed. Wells Fargo has a policy that closed accounts can be reopened if they incur a positive or negative balance, while most banks stop transactions after the accounts have been closed. Many former customers were unaware their account had been reopened until they were sent to Wells Fargo's collections department. . . . This latest scandal is being seen as a sign that Wells Fargo needs to work much harder to regain customers' trust, as

CONCLUSION

Any discussion of complicated issues such as those addressed above must, of necessity, be an image captured at a moment in time like a photograph, which can change in an instant—for better or worse. Domestic and global events can overtake any assessments, and send them reeling and scrambling for cover.

What is clear from the totality of the circumstances, however, is that Wells ran amok and engaged in massive misconduct *and criminality*. One single example might be enough to raise "red flags" about the culture of corruption

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Warren called it 'still fundamentally broken'") and https://www.rollcall.com/news/congress/elizabeth-warren-blasting-wells-fargo-fees ("Elizabeth Warren is blasting Wells Fargo over fees, again"—"[T]he Massachusetts Democrat and 2020 presidential candidate is taking issue with the bank allegedly charging fees on accounts that customers had believed to be closed. Warren has long criticized Wells Fargo [] for deceptive practices, as well as the leadership of former CEO Tim Sloan. In her latest letter, directed to interim CEO and President C. Allen Parker, Warren wants statistics on closed accounts, as well as whether the bank had, 'any mechanism to catch fraudulent charges to these accounts' in order to avoid overdrafts being charged to accounts that were not supposed to exist. 'These new revelations raise grave concerns that despite these assurances, Wells Fargo is still fundamentally broken and has not only continued to scam customers out of thousands of dollars with impunity, but has even targeted customers who were attempting to leave the bank — and may have been victims of previous scams — to unfairly collect one final set of lucrative fees,' Warren wrote in the letter []. The bank previously engaged in the practice of setting up fake accounts") and https://www.daily-times.com/story/news/local/navajo-nation/2019/08/22/navajo-nation-wells-fargo-lawsuit-settlement-customer-accounts/2083880001/ ("Navajo Nation, Wells Fargo reach settlement in customer accounts case"—"The $6.5 million settlement was announced on Aug. 22 in a press release from the Navajo Nation Office of the President and Vice President. The tribe sued Wells Fargo in December 2017 for allegedly using deceptive banking practices to prey upon and pressure tribal members into opening additional banking accounts at its locations on and near the reservation. 'Wells Fargo's predatory actions defrauded and harmed the nation,' Navajo Nation President Jonathan Nez said in the release. Wells Fargo did not immediately respond to a request for comment on Aug. 22") and https://www.nhonews.com/news/2019/aug/27/navajo-nation-settles-lawsuit-against-wells-fargo-/ ("Navajo Nation settles lawsuit against Wells Fargo Bank for $6.5 million") and https://www.bankingdive.com/news/wells-fargo-image-name-fake-account-scandal-stock-drop-ceo-search/561423/ ("Wells Fargo may want to consider changing name, image adviser says"—"Consumers gave the bank a 91% negative rating long after its fake-accounts scandal. Plummeting stocks, a lengthy CEO search and a 'mea culpa' campaign aren't helping. . . . The bank's stock has lost almost $24 billion since the March departure of former CEO Tim Sloan, according to Bloomberg") and https://www.oregonlive.com/crime/2019/09/jury-awards-101000-to-portland-man-who-sued-wells-fargo-for-not-fixing-credit-report-due-to-id-theft.html ("Jury awards $101,000 to Portland man who sued Wells Fargo for not fixing credit report due to ID theft"); *but see* https://seekingalpha.com/article/4287676-wells-fargo-u-s-banking-giant-final-stages-completing-transformation-get-4_6-percent-wait ("Wells Fargo: U.S. Banking Giant In Final Stages Of Completing Transformation - Get 4.6% While You Wait").

and criminality at Wells, but this pattern or mosaic of misconduct is compelling and overwhelming. Indeed, the scope and depths of the wrongdoing have been incomprehensible.

It must be rooted out, once and for all, and never allowed to fester or rear its ugly head again, at Wells or any other American financial institution—even if this means that Wells' management and overseers are jettisoned again and again, to get things right. The cost of the Wells' debacle to its shareholders, account holders and other customers, to the integrity of the U.S. and global banking systems, and to the American public at large has been staggering. Trust has been destroyed. Wells has been described aptly as "a rudderless ship lost at sea," and a name change has been suggested.[71]

It warrants repeating that Wells' symbol, the stagecoach, was known and respected worldwide as synonymous with safety and soundness, security and stability. Indeed, these critical elements undergird America's banking system, which is the envy of the world. Yet, 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.[72]

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[71] *See id.*

[72] In the American "court of public opinion" and globally, Wells may be tried over and over again—as the classic example of bank misconduct and criminality. This constitutes a stinging indictment of the criminality that Richard Kovacevich unleashed at Wells.