THE BANKING LITIGATION LAW REVIEW

Fifth Edition

Editor
Deborah Finkler

THE LAWREVIEWS

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PREFACE

This year's edition of the *The Banking Litigation Law Review* highlights that litigation involving banks and financial institutions shows little sign of slowing. The legal and procedural issues that arise in banking litigation continue to evolve and develop across the globe, in the context of both domestic and cross-border disputes.

The covid-19 pandemic continued to loom large in 2021, with judicial systems taking part in a forced experiment of embracing new technology to minimise the disruption caused by pandemic restrictions; in some jurisdictions we may see the permanent adoption of measures taken up in response to the restrictions imposed by the pandemic, as well as a general shift towards the greater use of new technology in dispute resolution. This extends to the increased use of virtual hearings (as well as electronic trial bundles and filing systems), although we can expect that physical hearings will continue to play a prominent role, particularly in complex cases. While it is too early to predict the future with any certainty, it seems likely that some form of hybrid approach is here to stay.

Outside the court room, the effects of the pandemic continue to be felt throughout the wider economy. As various restrictions and financial interventions by governments are scaled back, the early signs of the long-term, negative economic effects of the pandemic are now beginning to emerge in many parts of the world. From the perspective of the financial sector, these conditions are likely to translate into an increase in loan arrears and defaults, debt restructurings, bankruptcies and insolvencies affecting banks, their customers and counterparties. These conditions typically presage an uptick in banking litigation and it seems likely that disputes arising from the economic fallout of the pandemic will feature in future editions of this Review.

A continuing trend this year has been the broadening of obligations placed on financial institutions in the name of improving consumer protection. Faced with the challenge of increasing bank fraud and other illicit transactions, governments and courts alike have continued to develop the nature and scope of duties imposed on banks to protect their customers. Claimants will no doubt continue testing the limits of these obligations and duties in the courts.

Last year's preface highlighted the political and economic uncertainty produced by Brexit as the transition period drew to an end. Since then, some welcome clarity has emerged around the foundations of the United Kingdom's new relationship with the European Union, including in the area of jurisdiction and enforcement of judgments. However, the new relationship will take time to bed down, with additional complexities (and potentially disputes) likely to emerge as parties navigate the new reality. That said, there is little evidence that commercial parties, including banks and financial institutions, have been deterred from choosing the United Kingdom as a forum for litigating their disputes.

While 2021 has been another challenging year for many, there has been some cause for optimism: globally stock markets have continued to perform well as economic recoveries gather pace in many parts of the world, while the roll-out of the covid-19 vaccine has allowed many jurisdictions to emerge from a period of seemingly endless lockdowns and suppressed economic activity. Despite these positive signs, however, the global economy is likely to feel the effects of the covid-19 pandemic for some time and in various (and often unexpected) ways, as highlighted by the recent emergence of a crisis in the global supply chain. At the same time, other global challenges, such as climate change, will increasingly dominate the political and economic agenda. Given the various headwinds and challenges ahead, the high volume and broad nature of litigation in the financial sector look set to continue.

Deborah Finkler
Slaughter and May
London
November 2021

Chapter 11

UNITED STATES

Rishi N Zutshi, Jonathan I Blackman, Pascale Bibi and Vishakha S Joshi[1]

I OVERVIEW

The United States continues to be an active forum for banking-related litigation. Financial institutions continue to experience litigation exposure to financial product-related suits, as well as antitrust and other claims arising out of an active litigation landscape.

Litigation derived from international sanctions violations has also been on the rise, though a ruling that claims against foreign corporations, including foreign banks, cannot proceed under the Alien Tort Statute may hinder some future claims of this kind by private civil plaintiffs. Banks must continue to be attuned to privilege laws in multiple jurisdictions to guard against the potential disclosure of confidential information in private litigation in the United States, particularly in light of a 2020 data agreement between the United States and the United Kingdom. In addition, the adoption of the General Data Protection Regulation in the European Union, and its equivalent in the United Kingdom, raises questions regarding the protection of data located abroad in US litigation.

Though much of the litigation arising out of the foreign exchange (FX) market regulatory investigations has settled, including antitrust class actions, new suits have been filed based on investigations in other markets. Courts have heightened the requirements for actions to proceed on a class-wide basis by implying additional requirements into the class certification rule, which curbs class actions and the accompanying settlement pressures. In addition, both Congress and the Supreme Court continue to support the validity and broad scope of arbitration agreements, including by permitting the use of class action waivers in arbitration agreements, which continues to be a method widely used by financial institutions to control dispute resolution arising out of consumer contracts and limit exposure to costly class actions. Recent Supreme Court rulings on the constitutionality of the Consumer Financial Protection Bureau (CFPB) and the Federal Housing Finance Agency (FHFA) may lead to a rise in challenges to the legitimacy of prior regulatory actions.

The covid-19 pandemic has caused significant economic instability since March 2020 and spurred federal legislation geared towards supporting the economy and providing financial relief to businesses. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) removed various regulatory restrictions on financial institutions to allow greater opportunity to distribute credit or loans to borrowers. Given the current volatility of the market and

1 Rishi N Zutshi is a partner, Jonathan I Blackman is a senior counsel, and Pascale Bibi and Vishakha S Joshi are associates at Cleary Gottlieb Steen & Hamilton LLP.

uncertainty as to when the pandemic will end, it remains to be seen whether these changes will result in increased banking litigation after the crisis ends. It also remains to be seen what changes the Biden administration will enact in respect of banking regulations and legislation.

II SIGNIFICANT RECENT CASES

The Supreme Court recently declared unconstitutional the structure of the CFPB, which is a federal agency overseeing banks, among others, to ensure fairness and transparency for mortgages, credit cards and other consumer financial products and services.[2] The Supreme Court held that the structure of the CFPB was unconstitutional and struck down the provision of the statute establishing it, which protects its single director from being removed by the President without cause. This decision has resulted in litigation challenging the legality of prior CFPB actions. While the Ninth Circuit has permitted the CFPB to ratify its prior decisions to remedy any constitutional infirmity,[3] the District of Delaware held that the CFPB may not ratify prior decisions after the statute of limitations has run on relevant claims.[4] In addition, FHFA, which had similar for-cause removal protections for single, independent directors, had its appointment procedures struck down as unconstitutional by the Supreme Court.[5]

In September 2021, the Second Circuit held that international comity and New York's separate entity rule may bar asset freeze orders in respect of foreign institutions.[6] The court found comity concerns to be implicated where a US court ordered a non-party foreign bank to freeze assets held abroad, particularly where foreign law could be read to prohibit such an asset freeze at the request of a US court.[7] The Second Circuit also noted without deciding that New York's separate entity rule also may be implicated.[8] The separate entity rule provides that if a bank with a New York branch is subject to personal jurisdiction in New York, the bank's other branches should be treated as separate entities for certain purposes, such as the enforcement of a judgment.[9]

In March 2021, the Supreme Court held in a suit involving Ford Motor Co that a court can exercise specific personal jurisdiction over claims where the defendant's forum contacts did not give rise to the plaintiffs' claims.[10] Under this ruling, it is likely that courts may be able to exercise jurisdiction over a wider set of entities that sell products, or in the case of financial institutions, make loans or provide other services, in a state, regardless of whether

2 *Seila Law LLC v. Consumer Fin Prot Bureau*, 140 S Ct 2183, 2197 (2020).

3 *Consumer Fin Prot Bureau v. Seila Law LLC*, 997 F3d 837 (9th Circuit 2021).

4 *Consumer Fin Prot Bureau v. Nat Collegiate Master Student Loan Trust, et al.*, 2021 WL 1169029 (D Del 2021).

5 See *Collins v. Yellen*, 141 S Ct 1761, 1787 (2021) (holding the Federal Housing Finance Authority's structure is unconstitutional due to the for-cause removal protection of the agency's single director) (quoting *Seila Law LLC*, 140 S Ct at 2205)).

6 See *Next Investments, LLC v. Bank of China, et al.*, No. 20-602, 2021 WL 3851922 (2d Circuit 30 August 2021).

7 id. at *9.

8 id.

9 id.

10 *Ford Motor Co v. Montana* Eighth Jud Dist Ct, 141 S Ct 1017, 1032 (2021).

the contacts gave rise to claims brought by the plaintiffs. This decision runs counter to the prior trend in the Supreme Court's rulings in the area of personal jurisdiction, which have tended to be restrictive in recent years.

III RECENT LEGISLATIVE DEVELOPMENTS

i The federal and state systems

The US legal system is divided into federal and state jurisdictions. The federal government consists of three branches: legislative, executive and judicial. The majority of regulators that oversee financial matters (e.g., the Department of Justice, the Federal Reserve and the Securities and Exchange Commission (SEC)) are parts of the federal government, broadly defined, although states also have their own bank regulatory regimes. The federal government and the state governments are considered to be separate sovereignties and, accordingly, have concurrent legal regimes. Each of the 50 states has an independent court system and its own body of law. As a result, banks are subject to both federal and state law, which apply with equal force, but may differ in their requirements, with federal law taking precedence where applicable. Some states take a particularly active role in bank regulation; for example, as would be expected, New York and its Department of Financial Services maintain a dynamic presence in US banking regulation, and have done so during the decrease in activity by federal agencies.

ii Recent legislation

The Trump administration in 2018 enacted significant banking legislation via the Economic Growth, Regulatory Relief, and Consumer Protection Act (S.2155), which revises Dodd–Frank and the Consumer Protection Act of 2010 (CPA) in an effort to reduce the burden on small- to medium-sized banks and bank holding companies. It limits the application of Dodd–Frank's enhanced prudential standards to banks with US$250 billion or more in global assets as compared with the previous US$50 billion threshold and exempts holding companies with US$10 billion or less in global assets from certain requirements and rules, including the Volcker Rule that, among other things, prohibits banks from making certain investments with their own funds and from making certain speculative investments. The impact of S.2155 will depend heavily on its implementation by regulators.

Following the passage of S.2155, the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC) in 2019 announced amendments to the Volcker Rule that narrow and simplify the proprietary trading prohibition and significantly reduce compliance burdens, including by limiting significant compliance programme requirements to institutions with the largest trading operations and exempting instruments held for 60 days or longer. Additionally, the final rule expands the exception for trading outside of the United States to limit impact on foreign activity of foreign banks.[11] In 2020, five regulatory agencies announced a rule modifying the Volcker Rule's prohibition on

11 See Dept of Treasury, *Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds*, (20 August 2019), https://www.fdic.gov/news/board/2019/2019-08-20-notice-dis-a-fr.pdf.

banks investing in or sponsoring hedge funds or private equity funds, or 'covered funds'.[12] Banks may now invest in or sponsor certain categories of previously 'covered funds', including venture capital funds and family wealth management vehicles.[13]

Separately, in October and November 2019, the Federal Reserve, Commodity Futures Trading Commission, FDIC, OCC and the SEC released final rules tailoring the application of enhanced prudential standards to large foreign banking organisations by dividing such foreign banking organisations into four separate categories based on the level of risk associated with the organisation, which then permits the United States to regulate the organisations accordingly.[14]

The CARES Act was passed on 27 March 2020 to provide relief due to the covid-19 pandemic, including financial assistance for businesses.[15] The relief accorded by the CARES Act, such as providing the OCC with broader authority to suspend lending limits, acts as an economic stimulus, allowing financial institutions to extend more credit or loans to borrowers than previously permitted. On 27 March 2021, President Biden signed into law the covid-19 Bankruptcy Relief Extension Act of 2021, extending key provisions of the CARES Act until 27 March 2022.[16]

At the state level, little legislative activity has occurred recently, which is generally attributable to the secondary role of the states in banking regulation. The State of New York, however, has implemented new cybersecurity regulations that apply to companies operating under New York banking, insurance or financial services laws.[17] These requirements, as well as the increase in cybersecurity attacks generally, will likely result in increased litigation in this area for banks that experience such attacks. Financial institutions have also filed suit when customer information has been compromised as a result of cybersecurity attacks on third parties. The success of such suits, however, is highly dependent on variations in state law and the existing contracts under which a bank may have a right of action.[18]

12 See Press Release, Board of Governors for the Federal Reserve System, 'Financial regulators modify Volcker rule' (25 June 2020), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200625a.htm.

13 Treas. Reg. § 12 CFR pts. 44, 248, 351, 75, 255 (2020).

14 See Press Release, Board of Governors for the Federal Reserve System, 'Federal Reserve Board finalises rules that tailor its regulations for domestic and foreign banks to more closely match their risk profiles' (10 October 2019), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20191010a.htm; see also 'OCC Issues Final Rule to Change Applicability Thresholds for Regulatory Capital and Liquidity Requirements' (1 November 2019), https://www.occ.gov/news-issuances/news-releases/2019/nr-occ-2019-128.html.

15 H.R. 748, 116th Cong. (2020).

16 See H.R. 1651,117th Cong. (2021).

17 See 23 NYCRR 500 (2019).

18 Compare *Cmty Bank of Trenton v. Schnuk Martkets, Inc*, 887 F3d 803 (7th Circuit 2018) (upholding dismissal of claims by financial institution against store from which data was breached because of economic loss doctrine precluding recovery outside contractual relationships), and *First Choice Fed Credit Union v. Wendy's Co*, No. CV 16-506, 2017 WL 1190500, at *1 (WD Pa 31 March 2017) (upholding decision by Magistrate Judge denying Wendy's motion to dismiss claims brought by banks for breach of customers' credit and debit card information), with *In re Sonic Corp Customer Data Security Breach Litigation*, Case No. 1:17-md-2807, 2021 WL 4060369 (ND Oh 7 September 2021) (denying Sonic Corp.'s summary judgment motion in respect of negligence claim in class action litigation brought by financial institutions over a 2017 data breach).

IV CHANGES TO COURT PROCEDURE

Financial institutions will frequently encounter litigation in the form of a class action brought on behalf of numerous plaintiffs. Under Federal Rules of Civil Procedure Rule 23, which governs class actions in federal court, plaintiffs must affirmatively demonstrate several requirements: numerosity of parties, commonality of questions of law or fact, typicality of the representative plaintiffs' claims relative to the class, and fair and adequate representation of the class. In addition, certain courts have interpreted Rule 23 to contain an implicit 'ascertainability' requirement, meaning that the members of the proposed class must be readily identifiable based on objective criteria that will not require individual determination.[19] The Supreme Court also recently clarified that only plaintiffs who have been 'concretely harmed' have standing to bring suit and that 'bare procedural violation[s]' will not satisfy the injury requirement.[20] Such requirements provide an additional, useful basis for banks to defeat plaintiffs' use of a class action in instances where the individuals allegedly harmed, or the harm itself, are difficult to define.

In the future, class actions may become increasingly rare in cases between parties with contractual relationships as such contracts often include mandatory arbitration provisions without providing for class actions or class-based arbitration. The Supreme Court has affirmed the enforceability of arbitration agreements that explicitly preclude class claims[21] and has held that class-based arbitration is not permitted where the agreement is silent or ambiguous as to the matter.[22]

V INTERIM MEASURES

Banks will frequently encounter asset-freezing orders – injunctions or attachment orders requiring restraint of assets held by the bank – in connection with litigation to which the bank is not a party. There is variation among US jurisdictions as to the extent of a financial institution's obligation to freeze assets held outside the United States in response to such orders. In New York, for example, and as noted in further detail in Section II, the separate entity rule allows New York courts to freeze only those assets located within the United States.[23]

With regard to post-judgment execution on assets or injunctions in aid of such execution, personal jurisdiction and principles of international comity also serve as defences

19 See, e.g., *In re Petrobras Secs*, 862 F3d 250, 26465 (2d Circuit 2017); *Sandusky Wellness Ctr, LLC v. Medtox Sci, Inc*, 821 F3d 992, 995 (8th Circuit 2016); but see *Mullins v. Direct Digital, LLC*, 795 F3d 654, 658 (7th Circuit 2015) (rejecting ascertainability requirement).

20 *TransUnion LLC v. Ramirez*, 141 S Ct 2190 (2021).

21 See *Epic Sys Corp v. Lewis*, 138 S Ct 1612, 1632 (2018).

22 See *Lamps Plus, Inc v. Varela*, 139 S Ct 1407 (2019).

23 *Motorola Credit Corp v. Standard Chartered Bank*, 24 NY3d 149, 156 (NY 2014).

for foreign banks that do not have contact with the United States or do not expect US law to apply.[24] The comity defence, however, has become increasingly limited as courts have held that it requires compliance with both nations' law be strictly impossible.[25]

VI PRIVILEGE AND PROFESSIONAL SECRECY

i Bank examination privilege

In the United States, banks benefit from a privilege protection for confidential information shared with their bank regulators, known as the bank examination privilege. Banks are heavily regulated by a patchwork of state and federal agencies, which frequently obtain confidential information related to a bank's operations and performance in the exercise of their oversight duties. Such confidential information is often sought in litigation by third parties against banks, and the bank examination privilege may be used to protect this information from disclosure.

The bank examination privilege belongs to the regulatory agency and is largely codified in 12 USC §1828(x). It is up to the bank and its outside counsel to preserve the privilege when responding to subpoenas or discovery requests for documents covered by the privilege. Documents covered by the privilege should not be produced in parallel private litigation or to requests from non-banking agencies, unless the privilege has been waived by the applicable regulator or production has been ordered by a court following its review. In practice, outside counsel should notify the regulator of the request, and typically file under seal documents over which the privilege is being asserted for in camera court review. Outside counsel should be attuned to the bank examination privilege to minimise the risk of unnecessary disclosure, particularly in the current environment where banks are investigated and sued in myriad forums by a multitude of agencies and private litigants.

ii Attorney-client privilege

Privilege over documents prepared during internal investigations

In general, attorney–client privilege applies only to communications made in confidence for the purpose of obtaining legal advice. US courts have conducted fact-intensive analyses to determine whether the privilege applies. In at least one prominent US jurisdiction, the court has made clear that the correct test was whether 'one of the significant purposes' of the investigation was to obtain or provide legal advice.[26] Application of that standard to company responses to data breaches, however, has reached inconsistent results as to whether a

24 See *Daimler AG v. Bauman*, 571 US 117 (2014); *Gucci Am, Inc v. Weixing Li*, 768 F3d 122, 134, 138-42 (2d Circuit 2014).

25 See *In re Bernard L. Madoff Inv Sec LLC*, 917 F3d 85, 102 (2d Circuit 2019), cert. denied in *HSBC Holdings PLC v. Picard*, No. 17-2992 (US 1 June 2020) (reversing dismissal on international comity where conflict between nations' insolvency laws did not render compliance with both nations' laws 'impossible'); see also *B & M Kingstone, LLC v. Mega Int'l Commercial Bank Co*, 15 NYS3d 318, 324 (NY App Div 2015) (refusing to quash subpoena on comity grounds where party failed to show that it would face liability in its home country if required to comply with subpoena).

26 *In re Kellogg Brown & Root, Inc*, 756 F3d 754, 758-59 (DC Circuit 2014).

subsequent investigation by a forensic firm produces privileged information.[27] In this context, a bank's counsel should ensure not only that internal investigations are led by attorneys and have adequate attorney oversight but also that the attorneys are acting solely for the client rather than as an agent of the government.[28]

In addition, care should be taken when disclosing to regulators documents prepared by counsel during an internal investigation. At least one court has held that 'oral downloads' of information given by the law firm to the SEC are not privileged.[29] Furthermore, when documents are disclosed to a regulator (e.g., the Department of Justice) that is not the bank's supervisory regulator, the bank examination privilege does not apply and such disclosure would constitute waiver of privilege for private litigation and other regulatory investigations.

Cross-border considerations

Maintaining attorney-client privilege becomes an even thornier issue when cross-border considerations enter the picture. Given the global nature of most banks, this issue will increasingly be encountered in banking litigation practice. Foreign courts may refuse to apply US privilege law, subjecting documents created during an internal investigation to disclosure to private litigants.[30] Moreover, in litigation in the United States, depending on which country's privilege laws apply following a choice of law analysis, it is possible that attorney-client privilege may not attach at all.[31] Given the global scope of many investigations and litigations, counsel should be attuned to the increased risk of exposure to disclosure of documents created during an investigation, both in litigation proceedings in the United States and abroad.

iii Subpoenas

Traditionally, warrants and subpoenas issued by the US government carry territorial limitations and thus do not extend to information located outside the United States.[32] However, Congress passed the Clarifying Lawful Overseas Use of Data (CLOUD) Act in 2018, which explicitly requires compliance from communication service providers regardless of whether the records are located outside of the United States.[33] The CLOUD Act includes

27 Compare *In re Premera Blue Cross Customer Data Sec Breach Litig*, No. 3:15-md-2633-SI, 2017 WL 4857596 (D Or 27 October 2017) (finding that documents prepared by forensic firm after data breach were not privileged), with *In re Experian Data Breach Litig*, No. 8:15-cv-01592, 2017 WL 4325583 (CD Cal 18 May 2017) (finding similar documents were prepared in anticipation of litigation and therefore protected work product).

28 See *United States v. Matthew Connolly and Gavin Campbell Black*, No. 16 CR. 0370 (CM), 2019 WL 2120523, at *10 (SDNY 2 May 2019) (denying motion for relief because information obtained in Black's forced interview was not used in obtaining criminal conviction).

29 *United States Sec & Exch Comm'n v. Herrera*, No. 17-20301-CIV, 2017 WL 6041750, at *1 (SD Fla 5 December 2017).

30 See *RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).

31 See, e.g., *Wultz v. Bank of China Ltd*, 979 F Supp 2d 479 (SDNY 2013), on reconsideration in part, No. 11 Civ 1266 (SAS), 2013 WL 6098484 (SDNY 20 November 2013) (applying Chinese privilege law, which essentially leaves materials unprotected, to all communications except those related to US legal matters).

32 See *Matter of Warrant to Search a Certain E-Mail Account Controlled and Maintained By Microsoft Corp*, 829 F3d 197 (2d Circuit 2016).

33 See CLOUD Act §103(a)(1).

provisions that permit a subpoena to be quashed or modified if it would require the provider to violate foreign law, or is otherwise improper based on certain comity principles. Those provisions will likely prove critical in protecting records stored abroad from the reach of subpoenas, particularly in light of the European Union's General Data Protection Regulation, but may have little practical effect in protecting such information from the reach of general party discovery under the Federal Rules.[34]

In addition, a data sharing agreement between the United States and the United Kingdom came into effect in 2020, which requires US companies to respond to UK regulatory requests and produce requested data within seven days. UK companies must likewise respond to direct requests from US authorities.[35] This agreement could possibly trigger litigation in the United States and the United Kingdom, including in respect of jurisdiction and privilege issues.

Foreign banks that merely have US branches with no connection to an underlying action may also defend against subpoenas on personal jurisdiction grounds,[36] though New York state courts have found international branches of a bank to be subject to subpoenas where the bank failed to show that the information sought could not also be accessed from the New York branch.[37] In addition, in New York, the separate entity rule has barred subpoenas seeking information for accounts held outside the United States, though outcomes in the subpoena context have differed from the outcomes in the injunction and attachment context.[38] Recent cases have left open the question of enforcement of information subpoenas on foreign banks with operations in New York,[39] with at least one court refusing to apply the 'arcane rule' to an information subpoena,[40] and thus the issue remains unresolved.

34 See, e.g., *In re LIBOR-Based Fin Instruments Antitrust Litig*, No. 11 CIV 5450 (NRB) (SDNY 8 November 2018) (Dkt No. 495) (ordering banks to produce relevant documents, with limited exception for redacting irrelevant personal data).

35 See Federal Register, *Clarifying Lawful Overseas Use of Data Act; Attorney General Certification and Determination* Daily J. of US Gov't (3 March 2020), online at https://www.federalregister.gov/documents/2020/03/03/2020-04248/clarifying-lawful-overseas-use-of-data-act-attorney-general-certification-and-determination.

36 *Leibovitch v. Islamic Republic of Iran*, 852 F3d 687, 690 (7th Circuit 2017).

37 See *B & M Kingstone, LLC*, 15 NYS3d 318.

38 Compare *Motorola Credit Corp*, 24 NY3d 149 (holding separate entity rule bars attachment of assets in custody at bank's branches outside of New York) with *B & M Kingstone, LLC*, 15 NYS3d 318 (ordering compliance with information subpoena directed at bank branches outside of New York).

39 See *Vera v. Republic of Cuba*, 91 F Supp 3d 561 (SDNY 2015) (holding that neither the separate entity rule nor Daimler restrictions applied and therefore ordering a Spanish bank to comply with a subpoena for information from branches outside New York, reasoning that the bank had consented to general personal jurisdiction by registering as a foreign bank branch in New York in compliance with New York's statutory regime), rev'd on other grounds *Vera v. Republic of Cuba*, 867 F3d 310, 315 (2d Circuit 2017); see also *Nypl v. JPMorgan Chase & Co*, 15-CIV-9300 (LGS), 2018 WL 1472506, at *2-4 (SDNY 2018) (refusing to exercise jurisdiction over banks based on the presence of branch offices).

40 *B & M Kingstone, LLC*, 15 NYS3d at 323-24.

VII JURISDICTION AND CONFLICTS OF LAW

In the United States, personal jurisdiction – or the power of a particular court to hale in an entity to answer for a claim – is either general, meaning that a court can hear any claim against that entity, or specific, meaning that the court can hear only claims 'arising out of or related to the defendant's contacts with the forum'.[41]

i General personal jurisdiction

Traditionally, courts were permitted to exercise general personal jurisdiction over an entity with 'systematic and continuous contacts' to the state where the court was located, which, in practice, meant that foreign banks were routinely subject to suit wherever they had a branch or representative office, subject only to discretionary rules of *forum non conveniens*. In 2014, the Supreme Court substantially limited the power of the US courts over foreign entities in *Daimler*,[42] ruling that general personal jurisdiction could only be exercised over a company if the forum court is within the company's state of incorporation, or the state of the company's principal place of business, absent exceptional circumstances.[43] Since *Daimler*, the majority of US courts now do not have general personal jurisdiction over foreign banks that are not incorporated in the US and do not have their headquarters there.[44]

ii Specific personal jurisdiction

Plaintiffs have also sought to compensate for the loss of general jurisdiction in cases where it would previously have existed as a matter of course by broader assertions of specific jurisdiction, which requires that the claims arise out of the defendants' forum-related contacts, arguing that their suits 'arise out of or relate to' what are sometimes relatively minimal actions by the defendant company within the forum.[45] This strategy was envisioned by *Daimler* itself, which noted that 'specific jurisdiction has become the centrepiece of modern jurisdiction theory'.[46]

Specific jurisdiction can be heavily fact-dependent and, while some courts require that the in-forum conduct be the proximate cause of the injury, other courts only require the in-forum conduct to be a but-for cause.[47] Under either approach, the injury to the plaintiff must have a connection to the defendant's conduct within the forum, thereby providing a causal constraint on the use of specific jurisdiction. As noted in Section II, the Supreme Court's recent decision in *Ford Motor Co v. Montana Eighth Jud. Dist. Ct* has lowered the standard required to establish specific personal jurisdiction over an out-of-state defendant by

41 *Helicopteros Nacionales de Colombia, SA v. Hall*, 466 US 408, 415 (1984).

42 *Daimler AG*, 571 US 117.

43 See *Daimler AG*, 571 US at 136.

44 See, e.g., *Brown v. Lockheed Martin Corp*, 814 F3d 619, 628-29 (2d Circuit 2016) (refusing to find an exceptional case where the defendant maintained a physical presence in the US state for over 30 years, ran operations out of that state and employed 70 workers there, and generated substantial revenue from its operations there); *Nypl*, 2018 WL 1472506, at *4 (refusing to find an 'exceptional case' for general jurisdiction based on foreign banks' participation in criminal proceedings in the United States and advertisements accessible to consumers in the United States).

45 Much of the increase in specific personal jurisdiction litigation has centred on products liability and non-bank commercial activity-based jurisdictional fact patterns. See, e.g., *Bristol-Myers Squibb Co v. Super Ct of Cal*, 137 S Ct 1773 (2017).

46 *Daimler AG*, 571 US at 128 (citation omitted) (internal quotation marks omitted).

47 *SPV Osus v. UBS AG*, 882 F3d 333, 334 (2d Circuit 2018).

allowing a court to exercise specific personal jurisdiction over claims where the defendant's forum contacts did not give rise to the plaintiffs' claims.[48] Because of this ruling, it is likely that courts may be able to exercise jurisdiction over a wider set of entities that sell products, or in the case of financial institutions, make loans or provide other services, in a state, regardless of whether the contacts gave rise to claims brought by the plaintiffs.

Specific personal jurisdiction often exists where the injury to the plaintiff arises out of conduct taken in, or purposefully directed to, the forum.[49] Because such conduct was not purposefully directed at a particular forum merely because it caused an injury there, one court recently declined to exercise specific personal jurisdiction over foreign banks that allegedly caused injuries in the United States where the alleged conduct involved manipulation of the Canadian Dollar Offered Rate in Canada.[50] While the relevant forum is most often the particular state in which the action is brought, certain types of claims aggregate all of a defendant's contacts with the United States as a whole in determining whether the exercise of personal jurisdiction is permissible, including claims brought under the Securities and Exchange Act of 1934 (SEA) and the Commodities Exchange Act, the Racketeer Influenced and Corrupt Organizations Act (RICO), the Sherman Act and certain bankruptcy-related claims.[51]

One area that has spurred particularly interesting litigation is banks' use of correspondent bank accounts in New York to clear dollar transactions within the state. In New York, those accounts can provide a basis for specific personal jurisdiction; for example, where clearing transactions form part of the plaintiff's claim and the bank knowingly made use of the correspondent account (i.e., the bank acted with knowledge of the nature of the underlying transaction for which the correspondent account is used to move US dollars as payment).[52] In addition, correspondent accounts have been held to provide a basis for personal jurisdiction under New York law when the foreign bank is not a party to the US litigation but is served with a third-party subpoena at least where there are a significant

48 *Ford Motor Co*, 141 S Ct at 1032.

49 See *Charles Schwab Corp v. Bank of Am Corp*, 883 F3d 68, 81-88 (2d Circuit 2018) (finding that personal jurisdiction exists for claims arising out of transactions in the United States, but not for claims arising out of conduct undertaken abroad); see also *Nypl*, 2018 WL 1472506, at *5-6 (finding specific personal jurisdiction where the alleged injuries arose out of conduct for which the banks entered guilty pleas with the US Department of Justice admitting to actions directed at or occurring in US states, but refusing to extend that jurisdiction to foreign parent holding companies).

50 See *Fire & Police Pension Ass'n of Colo v. Bank of Montreal*, No. 18 CIV 342 (AT), 2019 WL 1344412, at *10 (SDNY 14 March 2019) (refusing to exercise specific personal jurisdiction over foreign banks that allegedly caused injuries in the United States where the alleged conduct causing the injuries involved manipulation of the Canadian Dollar Offered Rate in Canada).

51 See 15 USC §78aa (providing for nationwide service of process for suits brought under the SEA); *Fire & Police Pension Ass'n of Colo v. Bank of Montreal*, No. 18 CIV 342 (AT), 2019 WL 1344412, at *10 (SDNY 14 March 2019) (recognising courts 'have applied nationwide contacts to determine personal jurisdiction for CEA and Sherman Act claims'); *PT United Can Co Ltd v. Crown Cork & Seal Co*, 138 F3d 65, 71 (2d Circuit 1998) (recognising RICO, 18 USC §1965, permits nationwide service of process for additional defendants alleged to have participated in a conspiracy where the court has personal jurisdiction over at least one defendant and the ends of justice so require); Federal Rule of Bankruptcy Procedure 7004(b) (establishing that service is sufficient to confer personal jurisdiction over any defendant in any proceeding related to a case under the Bankruptcy Code so long as it is consistent with the laws of the United States).

52 See *Rushaid v. Pictet & Cie*, 28 NY3d 316, 338 (NY 2016), reh'g denied, 28 NY3d 1161 (NY 2017); see also *Licci ex rel Licci v. Lebanese Canadian Bank, SAL*, 732 F3d 161, 171 (2d Circuit 2013).

number of US correspondent accounts that it uses frequently.[53] This area of law continues to evolve, as courts grapple with the extent to which routine banking contacts, such as use of New York correspondent accounts, are sufficient to create specific jurisdiction over otherwise non-US-related claims.

iii Conflicts of law

Choosing the applicable law in cases in which a conflict of laws arises can be particularly complex within the United States, and even more so in cases involving global banks, as courts must decide whether to use foreign, federal or state law – and if state law is applicable, which of the 50 states' laws will apply. Different US jurisdictions apply different tests to resolve choice of law questions, in some instances looking to which body of law bears the most 'significant relationship' to the suit, while in other instances rigidly applying formulas that require, for example, a contract dispute to be adjudicated under the law of the place where the contract was formed.

Conflicts of law issues, along with comity and extraterritoriality considerations, often arise in cross-border insolvency cases. The Second Circuit has ruled that the US Bankruptcy Code can be used to recover alleged fraudulent transfers made from a US debtor entity to foreign subsequent transferees, including dozens of foreign financial institutions, through foreign feeder funds, despite the fact that those transfers may be at issue in pending foreign litigation.[54] Under the Second Circuit's ruling, foreign financial institutions may face more litigation from US bankruptcy trustees seeking to unwind transfers in US bankruptcy courts if the institutions indirectly invest in, or otherwise indirectly receive, funds from US entities that subsequently enter liquidation proceedings.

VIII SOURCES OF LITIGATION

i Sanction violation suits

Recent years have seen a notable uptick in the number of civil suits brought in the wake of international sanctions violations. Thus, a US government finding, or admission by a bank, typically of a guilty plea, deferred prosecution agreement or civil settlement with bank regulators, that a company has violated a prohibition on commerce with Iran, for example, may well lead to private litigation.

Plaintiffs have primarily brought such claims under the Anti-Terrorism Act (ATA), but have also pursued those claims pursuant to common law or the Alien Tort Statute (ATS).[55] Under the Alien Tort Statute, courts imply a private right of action by persons who are not US citizens for torts that violate 'the law of nations or a treaty of the United States'.[56] The Supreme Court has held that such actions cannot proceed against foreign corporations, including foreign financial institutions,[57] and recently made clear in *Nestle USA Inc v. Doe*

53 See *NIKE, Inc v. Wu*, 349 F Supp 3d 346 (SDNY 2018); see also *Gucci Am, Inc v. Weixing Li*, 135 F Supp 3d 87, 93 (SDNY 2015).

54 See *In re Bernard L. Madoff Inv Sec LLC*, 917 F3d 85 (2d Circuit 2019), cert. denied in *HSBC Holdings PLC v. Picard*, No. 17-2992 (US 1 June 2020).

55 See, e.g., *Ofisi v. BNP Paribas, SA*, 278 F Supp 3d 84, 92-93 (DDC 2017), vacated in part on other grounds, 285 F Supp 3d 240 (DDC 2018).

56 28 USCA §1350.

57 See *Jesner v. Arab Bank, PLC*, 138 S Ct 1386, 1407 (2018).

that allegations of 'general corporate activity' in the United States are not sufficient to establish a domestic application of the ATS.[58] While the *Nestle* holding was limited, plaintiffs suing under the ATS must allege domestic conduct in ATS suits that goes beyond the 'mere corporate presence' of defendants in the United States.

Primary liability

The ATA, as amended in 2016, provides a civil cause of action for treble damages and attorneys' fees for private US persons injured by a terrorist act.[59] Plaintiffs have used this provision to assert claims against banks for effecting wire transfers that either directly provided funds to terrorist groups or transferred funds to intermediaries who allegedly eventually provided funding to terrorist groups.[60] Considerable litigation related to these claims is ongoing. ATA primary liability claims require three elements: (1) injury to a national of the United States (2) caused by reason of (3) an act of international terrorism. An act of international terrorism in turn requires both violation of an underlying criminal statute, which for financial institutions typically involves a claim of knowing or wilfully blind support to a foreign terrorist organisation by transferring funds to it, and conduct by the bank involving violence or danger to human life and apparent intent to influence or coerce a government or population. In *Linde v. Arab Bank*,[61] the Second Circuit held that, in applying these requirements, a financial institution's provision of routine banking services to a foreign terrorist organisation or its members will not create civil liability unless the financial institution also knows that the funds it transfers will be used for terrorist activities.[62] Following that decision, one district court has held that allegations of defendants removing information on payment messages that could alert authorities to involvement of Iranian agents and concealing the involvement of Iranian banks in letters of credit did not state an actionable claim for primary liability under the ATA, even though Iran was designated a state sponsor and supporter of foreign terrorist organisations.[63] Additionally, where the discovery process does not uncover factual development sufficient to show terroristic intent, which requires that the defendant's activities 'appeared to be intended to intimidate or coerce a civilian population, influence government policy by intimidation or coercion, or affect government conduct by mass destruction, assassination, or kidnapping', defendants have

58 See *Nestle USA, Inc v. Doe*, 141 S Ct 1931, 1935 (2021).

59 18 USCA §2333.

60 See, e.g., *Wultz v. Bank of China Ltd*, 32 F Supp 3d 486 (SDNY 2014); *Lelchook v. Islamic Republic of Iran*, Civil Action No. 15-13715-PBS, 2016 WL 7381686 (D Mass 20 December 2016).

61 *Linde v. Arab Bank, PLC*, 882 F3d 314, 329-27 (2d Circuit 2018) (explaining that 'providing financial services to a known terrorist organisation may afford material support to the organisation' but that such support does not equate to an 'act of international terrorism').

62 See id. at 327.

63 See *Freeman v. HSBC Holdings PLC*, No. 14CV6601 (DLI) (CLP), 2018 WL 3616845, at *63 (EDNY 27 July 2018).

successfully obtained judgment as a matter of law at the close of discovery and before trial.[64] Moreover, other courts have dismissed such claims even at the pleading stage for failure to allege the requisite terroristic intent.[65]

Claims brought pursuant to the ATA have also been successfully defended on grounds of lack of causation. In 2018, the Ninth Circuit Court of Appeals interpreted primary liability under the ATA to adopt the traditional element of proximate causation, which requires that the services provided by the financial institution were a substantial factor in causing the terrorist act, and that the terrorist act should have been reasonably foreseeable to the financial institution.[66] At least one other court, however, has interpreted the causation requirement less stringently, finding the requirement satisfied where a knowing contribution to a terrorist organisation was made, even if specifically designated for a non-violent wing of the organisation.[67] Nevertheless, even that jurisdiction has subsequently dismissed ATA claims where the bank merely provided services to a country, Iran, which is a state sponsor of terror, as opposed to participating in direct donations to a known terrorist organisation.[68]

Secondary liability

As the Second Circuit addressed in its *Linde* decision, the 2016 amendments to the ATA create secondary liability for aiding and abetting such terrorist acts, which does not require proof that the banking services directly caused the terrorism-related injuries.[69] Instead, the causation requirement focuses on the link between the injury and the party whom the financial institution aids, as opposed to the injury caused by the financial institution itself. The other two requirements for secondary liability are that the financial institution was generally aware of its role in the terrorist act at the time the services were provided, and that it knowingly and substantially assisted the act. As more cases arise to which those amendments creating secondary liability are applicable,[70] the legal landscape for these types of claims will likely become clearer. Recently, the text of the statute, which requires that the injury arise out of an act of 'an organization that had been designated as a foreign terrorist organization', has been interpreted strictly by its terms to not apply to an attack committed by a state sponsor of terrorism because such a sponsor is not itself a foreign terrorist organisation.[71]

64 *Weiss*, 2019 WL 1441118, at *9; see also *Strauss v. Credit Lyonnais, SA*, No. 06CV702DLIRML, 2019 WL 1492902, at *7 (EDNY 31 March 2019).

65 See *Kemper v. Deutsche Bank AG*, 911 F3d 383, 390 (7th Circuit 2018); see also *O'Sullivan v. Deutsche Bank AG*, No. 17 CV 8709-LTS-GWG, 2019 WL 1409446, at *8 (SDNY 28 March 2019) (dismissing ATA claims where defendants provided banking and other services to Iranian entities, which were not plausibly alleged to have provided support for the terrorist attacks at issue).

66 See, e.g., *Fields v. Twitter, Inc*, 881 F3d 739, 744-46 (9th Circuit 2018); *Rothstein v. UBS AG*, 708 F3d 82, 97 (2d Circuit 2013).

67 See *Boim v. Holy Land Found for Relief and Dev*, 549 F3d 685, 697-99 (7th Circuit 2008).

68 See *Kemper v. Deutsche Bank AG*, 911 F3d 383, 390 (7th Circuit 2018); see also *O'Sullivan v. Deutsche Bank AG*, No. 17 CV 8709-LTS-GWG, 2019 WL 1409446, at *8 (SDNY 28 March 2019) (dismissing ATA claims where defendants provided banking and other services to Iranian entities, which were not plausibly alleged to have provided support for the terrorist attacks at issue).

69 See *Linde*, 882 F3d, 328-29.

70 The 2016 Amendments implemented by the Justice Against Sponsors of Terrorism Act apply to any civil action pending on or commenced after 28 September 2016 that arises out of an injury caused on or after 11 September 2001.

71 *Shaffer v. Deutsche Bank AG*, No. 16-CR-497-MJR-SCW, 2017 WL 8786497, at *1 n1 (SD Ill 7 Dec 2017), aff'd sub nom. *Kemper v. Deutsche Bank AG*, 911 F3d 383 (7th Circuit 2018).

In 2019 and 2021, the Second Circuit reaffirmed that secondary liability requires defendants be at least 'generally aware' that by providing banking services to foreign terrorist organisations, the bank itself was playing a role in the organisation's terrorist activities, thereby firmly establishing this defence to secondary liability.[72] Moreover, the Ninth Circuit held that the alleged assistance must be substantial to establish secondary liability.[73] Several trial courts have found that banks are not liable for conspiracy claims or aiding and abetting claims under the ATA, clarifying that claims that banks conducted routine transactions with entities with ties to terrorist organisations would be insufficient.[74] Many of these cases are currently pending before the Second Circuit and may be further resolved in the near future. Courts have likewise found allegations that a defendant provided services to a country, or its business, subject to sanctions for sponsoring terrorism, insufficient where the defendant's activities did not demonstrate a common purpose or plan with foreign terrorist organisations.[75]

Additionally, there has been an effort by plaintiffs to pursue common law-based claims, rather than statutory-based claims, against banks for aiding and abetting human rights violations by foreign states, by violating US sanctions prohibiting transfers of funds to those states.[76] A court recently reversed the dismissal of such a claim under the 'act of state' doctrine, which bars a US court from sitting in judgment over the acts of a foreign government, but it remains to be seen whether those claims will survive further motion practice.[77]

ii Financial product-related suits

Banks have traditionally faced lawsuits related to the complex financial products they offer. Although those related to mortgage-backed securities are on the decline as many of these cases have settled in recent years, the litigation in this sphere has grown as banks create increasingly sophisticated financial products and derivative instruments. Litigation usually involves allegations of various forms of fraud, misrepresentation, breach of contract or breach of fiduciary duty and, in particular, raising claims as to the suitability of the financial product. While such litigation often includes sophisticated parties, a court has denied a motion to dismiss a proposed class action complaint against a large US bank based on a change in terms regarding the purchase of cryptocurrencies online using the bank's credit cards by consumers.[78] The complaint alleges that the bank changed its policies without notice to treat such purchases as 'cash advances', which include fees and high interest rates, in violation of

72 *Siegel v. HSBC N Am Holdings, Inc*, No. 18-2540-CV, 2019 WL 3719976, at *6 (2d Circuit 8 August 2019); *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F3d 842 (2d Circuit 2021).

73 See *Gonzalez v. Google LLC*, 2 F4th 871 (9th Circuit 2021) (holding that video platform's alleged allowance of terrorist organisation to monetise videos was not substantial assistance).

74 See *Freeman v. HSBC Holdings PLC*, 413 F Supp 3d 67 (EDNY 2019); *Averbach v. Cairo Amman Bank*, No. 19-cv-004, 2020 WL 486860 (SDNY 21 January 2020).

75 See *O'Sullivan v. Deutsche Bank AG*, No. 17 CV 8709-LTS-GWG, 2019 WL 1409446, at *9 (SDNY 28 March 2019); but see *Miller v. Arab Bank, PLC*, No. 18-CV-2192 (BMC), 2019 WL 1115027, at *9 (EDNY 11 March 2019) (refusing to dismiss claims against bank that provided services directly to terrorist organisations, including by providing payments to the families of terrorists through a scheme the bank administered).

76 See *Ofisi v. BNP Paribas, SA*, 278 F Supp 3d 84, 92-93 (DDC 2017).

77 See *Kashef v. BNP Paribas SA*, 925 F3d 53 (2d Circuit 2019) (reversing *Kashef v. BNP Paribas, SA*, 16-CV-3228, 2018 WL 1627261, at *2 (SDNY 30 March 2018)).

78 See *Tucker v. Chase Bank USA, NA*, 399 F Supp 3d 105 (SDNY 2019).

the Truth in Lending Act (TILA).[79] On 1 August 2019, the court permitted the breach of contract and TILA's clear and conspicuous disclosure claims to proceed.[80] Other courts have similarly permitted federal law- and state law-based contract claims to proceed against banks regarding banking, and particularly online banking, practices.[81] These cases demonstrate a growing trend of consumer claims against banks for fees and charges of which banks must be aware.

iii Antitrust violation suits: civil suits brought in the wake of antitrust investigations

There was a wave of private litigation borne out of regulatory investigation into financial markets, including alleged London Interbank Offered Rate (LIBOR) fixing and FX manipulation. While an increasing number of these cases have settled, litigation continues against the non-settling banks. In addition, significant litigation has been brought by plaintiffs that opted out of prior class settlements[82] and on behalf of classes of customers alleging that certain banks used 'last look', a trading practice using complex algorithms that allegedly cancel or delay the processing of FX orders to ensure the bank receives a more favourable transaction.[83]

In the LIBOR sphere, federal antitrust claims that had previously been dismissed by a lower court for failure to plead antitrust injury were revived in 2016, following a reversal by the Second Circuit, which held that antitrust law did not require plaintiffs to show an injury causing harm to competition to allege a conspiracy among market participants when the conduct alleged constitutes a per se antitrust violation, as in the context of rate-setting.[84] In 2017, the Supreme Court denied a petition from the banks requesting it to review the Second Circuit opinion, so the case will proceed, focusing on whether plaintiffs are efficient enforcers of the antitrust laws – a requirement for antitrust standing. In 2018, the district court certified only a limited class of over-the-counter purchasers of LIBOR-based instruments, but refused to do the same for other proposed classes, in part due to concerns of standing.[85] To the extent the court certified classes, numerous defendants subsequently settled after being unable to obtain dismissal based on lack of personal jurisdiction.[86]

In addition, reports of regulatory investigations, prior to any settlements, have spawned private litigation. For example, in the wake of reports of investigations into the potential manipulation of prices in the supranational, sub-sovereign and agency (SSA) bond market, various class actions were filed against several large financial institutions and individual

79 See id., No.18 CV 3155 (SDNY 10 April 2018) (Dkt. No. 1).

80 See id., 399 F Supp 3d at 108.

81 See, e.g., *Tims v. LGE Cmty Credit Union*, No. 17-14968, 2019 WL 4019847 (11th Circuit 27 August 2019) (reversing dismissal of breach of contract claims under state and the federal Electronic Fund Transfer Act).

82 See *Allianz Global Investors GMBH, et al., v. Bank of America Corp., et al.*, No. 18 Civ. 10364 (LGS), 2021 WL 3192814 (SDNY 28 July 2021).

83 See, e.g., *Alpari (US), LLC v. Credit Suisse Group AG*, 17 CIV 5282 (LGS) (SDNY 12 June 2018) (granting motion to compel arbitration); *Edmar Fin Co, et al., v. Currenex Inc, et al.*, No. 21-cv-6598 (SDNY 4 August 2021) (Dkt. No. 1).

84 See *Gelboim v. Bank of Am Corp*, 823 F3d 759 (2d Circuit 2016), cert. denied, 137 S Ct 814 (2017).

85 See *In re LIBOR-Based Fin Instruments Antitrust Litig*, No. 11 CIV 5450 (NRB), 2018 WL 1229761 (SDNY 28 February 2018).

86 See *In re LIBOR-Based Fin Instruments Antitrust Litig*, No. 11 CIV 5450 (NRB) (SDNY 25 October 2018) (Dkt No. 494).

traders alleging manipulation of prices in the SSA bond market in violation of the Sherman Act, 15 USC §1.[87] Those types of claims, however, have struggled to satisfactorily plead the requirements of antitrust standing, including that the plaintiff suffered an injury-in-fact as a participant in the market that was directly restrained because of an antitrust violation, and that the injury is the type contemplated by the antitrust statute.[88]

More uniquely, one court has permitted claims based on allegations of spoofing, which is defined in Dodd–Frank as 'bidding or offering with the intent to cancel the bid or offer before execution'[89] (at least when supported by collusive messages among traders) to move forward as an improper restraint of trade in violation of antitrust laws, namely the Sherman Act.[90] That same decision, however, likewise recognised the eventual difficulty in proving damages in such actions given uncertainty regarding the exact impact on foreign exchange rates. Courts have similarly recognised that such allegations may also fail substantively once past the pleading stage when the court no longer must accept all allegations as true.[91] Accordingly, at the time of writing, it is uncertain whether the spoofing claims will ultimately succeed.

IX EXCLUSION OF LIABILITY

i Pleading requirements

In the securities fraud context, to survive a motion to dismiss, plaintiffs must plead the circumstances of fraud with particularity under Federal Rules of Civil Procedure Rule 9(b). The Second Circuit recently raised the standards for plaintiffs bringing Section 10(b) claims based on undisclosed wrongdoing.[92] In addition to pleading fraudulent disclosure, plaintiffs must now allege with particularity facts of the underlying wrongdoing that was the subject of the disclosure. In this case, the plaintiffs adequately plead the defendant made misleading statements relating to an antitrust conspiracy, but failed to allege sufficient details regarding the antitrust conspiracy itself.[93]

ii Causation

To hold a defendant civilly liable, plaintiffs must show that the defendant caused their injuries. This causal connection requirement frequently limits a defendant's exposure to damages. Recently, however, in the securities fraud context, the Second Circuit has been more lenient with regard to allegations of causation at the initial motion to dismiss stage, including by

87 See *In re SSA Bonds Antitrust Litig*, No. 16 CIV 3711 (ER), 2018 WL 4118979, at *6 (SDNY 28 August 2018) (Dkt No. 495); *Alaska Dept of Revenue, Treas Div v. Manku*, No. 20-1759-cv, 2021 WL 3027170 (2d Circuit 19 July 2021).

88 See id.

89 7 USC §6c(a)(5)(C); see also *Sullivan v. Barclays PLC*, 13-CV-2811, 2017 WL 685570, at *12-13 (SDNY 21 February 2017).

90 See *Sullivan*, 2017 WL 685570, at *12-13.

91 See *Dennis v. JPMorgan Chase & Co*, 343 F Supp 3d 122, 156 & n110 (SDNY 2018), adhered to on denial of reconsideration, No. 16-CV-6496 (LAK), 2018 WL 6985207 (SDNY 20 December 2018); see also *Sonterra Capital Master Fund, Ltd v. Barclays Bank PLC*, No. 15-CV-3538 (VSB), 2018 WL 6725387, at *17 (SDNY 21 Dec 2018) (permitting antitrust claim to proceed only to the extent that one plaintiff could point to specific transactions on specific dates with one particular defendant).

92 See *Gramm v. Sanderson Farms, Inc*, 944 F3d 455 (2d Circuit 2019).

93 See id. at 457.

not requiring plaintiffs to rule out other causes of loss.[94] As a result, the plaintiffs must only give 'some indication' of a 'plausible causal link' between the loss suffered and the alleged fraud.[95] In the sanctions violation context, however, a greater causal connection between the provision of banking services and the sanction violation, or terrorist act, is necessary for primary liability, as discussed in Section VI.

iii Arbitration agreements

As discussed in Section IV, arbitration clauses are increasingly included in contracts, and recent holdings of the Supreme Court are likely to affect the number of class actions against large financial service providers, which often rely upon class action waiver provisions in contractual terms for credit cards, bank accounts, student loans, and other financial products and services.

X REGULATORY IMPACT

Agencies under the Trump administration proposed and finalised numerous changes to and rollbacks of regulations, including banking regulations and guidance. In addition to the changes to the Volcker Rule discussed above, the SEC adopted new rules on security-based swaps, and the Federal Reserve has proposed expanding bilateral netting provisions under the Federal Deposit Insurance Corporation Improvement Act of 1991 to include more entities as 'financial institutions'.[96] Additionally, on 5 June 2019, the SEC finalised the Regulation Best Interest Rule, which more closely aligns the standards applicable to broker-dealers and investment advisers while recognising the fundamental differences between the two.[97] On 2 May 2019, the US Department of the Treasury's Office of Foreign Assets Control released 'A Framework for OFAC Compliance Commitments' providing general guidance on effective sanctions compliance programmes, which is based on recent settlements with two international banks.[98]

The Biden administration will likely apply more scrutiny to banks and financial institutions. However, it remains to be seen how and when the Biden administration's policies will be implemented.

94 See, e.g., *Charles Schwab Corp*, 883 F3d 68, 93-95; *Loreley Fin (Jersey) No. 3 Ltd v. Wells Fargo Sec, LLC*, 797 F3d 160, 188 (2d Circuit 2015).

95 *Charles Schwab*, 883 F3d, 93 (quoting *Loreley*, 797 F3d, 187).

96 Cross-Border Application of Certain Security-Based Swap Requirements, 85 FR 6270 (4 February 2020), online at https://www.federalregister.gov/documents/2020/02/04/2019-27760/cross-border-application-of-certain-security-based-swap-requirements; Board of Governors of the Federal Reserve System, Notice of Proposed Rulemaking: Netting Eligibility for Financial Institutions, 84 Fed Reg 18741, 12 CFR 231 (2 May 2019), online at https://www.federalregister.gov/documents/2019/05/02/2019-08898/netting-eligibility-for-financial-institutions.

97 See EC Release No. 34-86031, at 34 (5 June 2019) (to be codified at 17 CFR pt 240).

98 See US Department of The Treasury, Office of Foreign Assets Control – Sanctions Programs and Information, https://www.treasury.gov/resource-center/sanctions/Documents/framework_ofac_cc.pdf (last visited 18 September 2020).

XI OUTLOOK AND CONCLUSIONS

The United States continues to experience a period of great economic uncertainty, and it is unclear what the implications will be for financial institutions. The covid-19 pandemic led to the enactment of regulatory relief to financial institutions in order to support the economy. It remains to be seen what the impact of these temporary measures will be on future banking litigation. With the election of President Biden, many of the changes made over the past four years will likely be rolled back. The Biden administration is more likely to impose new restrictions on financial institutions, which could potentially lead to an increase in banking litigation.

The Trump administration, however, appointed conservative and pro-business judges to the US Supreme Court and lower federal courts, and how such appointments will translate into judicial decisions in particular cases remains to be seen regardless of the type of administration to come in 2020. In addition, state attorneys general in places like New York and California continue to proactively pursue investigatory activity that they undertook during the Trump administration.

Appendix 1

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