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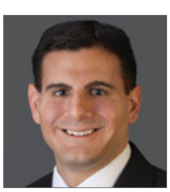
REPRESENTING FINANCIAL SERVICES CLIENTS IN CLASS ACTIONS

Financial services companies are often the targets of high-stakes putative class actions involving complex legal and procedural issues, extensive media attention, and other significant challenges given the unique aspects of the heavily regulated financial services industry. Counsel representing a financial institution should understand the various class action claims their client may face and the key steps and special considerations for litigating and resolving these actions.



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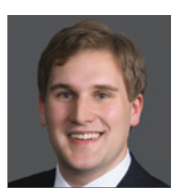

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Financial services companies are frequently sued in class actions in courts throughout the country. These class actions garner significant media attention and often result in multimillion-dollar settlements or judgments. With recent calls for increased regulation and reform from policymakers, longer term impacts from the COVID-19 pandemic starting to manifest in the financial system, and greater convergence between traditional financial services and fintech, financial services companies will continue to face novel and complex class actions in the coming years. For these reasons, they must be prepared with a game plan to defend against any possible class action claims.

In particular, counsel representing financial institutions must be familiar with the nuances of class action practice and special considerations for class action defense in the financial services industry, including:

- Understanding the bank functions typically at issue and claims commonly asserted in class actions.
- Taking certain key steps at the outset of the litigation.
- Responding to the complaint.
- Conducting class and merits discovery.
- Opposing class certification.
- Navigating the settlement process.

UNDERSTANDING CLASS CLAIMS

A critical first step in defending against a class action targeting a financial services company is understanding:

- The bank functions out of which a plaintiff's putative class claims may arise.
- The claims that plaintiffs commonly assert on a class basis against financial institutions.

FUNCTIONS AT ISSUE IN CLASS ACTIONS

Financial services companies perform many different functions. Some companies have numerous business segments, including mortgage lending, credit card issuance, investment banking, and deposit accounts. Other companies are much smaller and may perform a single function, such as mortgage servicing.

There are a wide variety of functions for which plaintiffs may bring putative class claims against financial services defendants. The most common subjects of these class actions are:

- Mortgages and other loans.
- Credit cards.
- Deposit accounts.
- Interest and benchmark rates.
- Investment plan administration.

Lending Practices

Plaintiffs have brought class actions challenging conduct in nearly every capacity in which financial services companies have served in the mortgage industry, including as:

- Originator, which refers to an entity that underwrites a loan for a borrower.
- Servicer, which refers to an entity that collects the monthly payments and interacts with a borrower during a loan's term.
- Trustee, which refers to the holder of legal title under a deed of trust until a borrower pays off a loan.
- Sponsor, depositor, or trustee of a residential mortgage-backed security (RMBS).

The putative class in most mortgage-related class actions consists of consumer borrowers (see, for example, *Munoz v. PHH Mortg. Corp.*, 478 F. Supp. 3d 945 (E.D. Cal. 2020); *Bezek v. First Mariner Bank*, 2020 WL 5877159 (D. Md. Oct. 2, 2020)). However, in the RMBS context, putative classes of investors in the securities frequently bring class action claims (see, for example, *Royal Park Invs. SA/NV v. U.S. Bank Nat'l Ass'n*, 324 F. Supp. 3d 387 (S.D.N.Y. 2018); *Blackrock Balanced Capital Portfolio (FI) v. Deutsche Bank Nat'l Trust Co.*, 2018 WL 3120971 (S.D.N.Y. May 17, 2018)).

Mortgage lending class actions are common because mortgages may not include mandatory arbitration provisions (15 U.S.C. § 1639c(e)(1)). This prohibition, codified in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), distinguishes mortgages from many other consumer banking products which contain arbitration provisions that do not allow for class actions.

Financial services companies that make loans unrelated to mortgages are also often subject to class actions challenging various aspects of their lending practices.

Search Summary of the Dodd-Frank Act: Mortgage Reform and Anti-Predatory Lending for more on mortgage loan restrictions under the Dodd-Frank Act.

Credit Cards

Credit card issuers have faced extensive class action litigation from merchants challenging the processing and interchange fees that issuers charge merchants during credit card transactions. These plaintiffs often assert violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), as well as antitrust and breach of contract claims, against credit card issuers and payment processors (see, for example, *Custom Hair Designs by Sandy v. Cent. Payment Co.*, 984 F.3d 595, 599 (8th Cir. 2020); *Salveson v. JP Morgan Chase & Co.*, 2020 WL 4810704, at *1 (E.D.N.Y. July 16, 2020); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 WL 6875472, at *1 (E.D.N.Y. Dec. 16, 2019)).

Consumer-based class actions against financial services companies related to credit cards are not as common given that many card issuers include mandatory

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arbitration provisions with class action waivers in their customer agreements (see, for example, *Cabrales v. Midland Credit Mgmt., Inc.*, 2020 WL 6145110, at *1-2 (N.D. Tex. Oct. 7, 2020); *Gates v. Northland Grp., Inc.*, 2017 WL 680258, at *3 (D.N.J. Feb. 21, 2017)). Unlike mortgages, the Dodd-Frank Act does not prohibit mandatory arbitration provisions in customer agreements for credit cards and prepaid cards, such as gift cards.

Deposit Accounts

Consumer class actions concerning deposit accounts typically focus on checking accounts. These claims are most prevalent against financial services companies that do not include mandatory arbitration provisions in their customer deposit account agreements. Although the theories of liability vary, plaintiffs often challenge a financial institution's imposition of fees, including:

- Overdraft fees.
- Non-sufficient funds fees.
- Automatic teller machine fees.

(See, for example, *Figueroa v. Capital One, N.A.*, 2021 WL 211551, at *1 (S.D. Cal. Jan. 21, 2021); *Perks v. TD Bank, N.A.*, 444 F. Supp. 3d 635, 638 (S.D.N.Y. 2020); *Smith v. Fifth Third Bank*, 2019 WL 4050946, at *1 (S.D. Ohio Aug. 28, 2019); *Farrell v. Bank of Am., N.A.*, 327 F.R.D. 422, 425 (S.D. Cal. 2018); *In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, 325 F.R.D. 136, 140-41 (D.S.C. 2018); *In re Checking Account Overdraft Litig.*, 626 F. Supp. 2d 1333, 1335 (J.P.M.L. 2009).)

Consumer class actions concerning deposit accounts may also arise from:

- **Wrongful sales practices.** Financial services companies, like other businesses, face class actions challenging alleged wrongful sales practices, such as the unauthorized opening of bank accounts (see, for example, *Jabbari v. Farmer*, 965 F.3d 1001, 1004 (9th Cir. 2020)). Banks may also face shareholder derivative lawsuits alleging claims for related conduct (see, for example, *In re Wells Fargo & Co. S'holder Deriv. Litig.*, 445 F. Supp. 3d 508, 514 (N.D. Cal. 2020); for more information, search Shareholder Derivative Litigation on Practical Law).
- **Account access issues.** Online banks have faced class actions alleging that outages prevented customers from accessing their deposit accounts (see, for example, *Richards v. Chime Fin., Inc.*, 2020 WL 6318713, at *1 (N.D. Cal. Oct. 28, 2020)).
- **Fraudulent schemes.** Following the discovery of a large-scale fraud, such as a Ponzi scheme, fraud victims often bring class actions against financial services companies at which the alleged fraudsters had accounts. The plaintiffs commonly allege that the financial institution somehow enabled or aided and abetted the scheme, or that it had inadequate anti-money laundering controls in place (see, for example, *Heinert v. Bank of Am. N.A.*, 835 F. App'x 627, 629 (2d Cir. 2020); *Evans v. ZB, N.A.*, 2019 WL 6918278, at *1-2 (E.D. Cal. Dec. 19, 2019); *Lawrence v. Bank of Am., N.A.*, 455 F. App'x 904, 905 (11th Cir. 2012)). Additionally, banks may face class action litigation when it is discovered that bank employees were involved in perpetrating fraudulent schemes against customers (see, for example, *Guardian Angel Credit Union v. MetaBank*, 2010 WL 1794713, at *1-2 (D.N.H. May 5, 2010)).

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Interest and Benchmark Rates

Financial services companies that set benchmark interest and foreign exchange rates may be subject to wide-ranging antitrust class action claims. Antitrust claims also often concern complex financial derivative products. (See, for example, *In re GSE Antitrust Litig.*, 414 F. Supp. 3d 686, 691 (S.D.N.Y. 2019); *In re LIBOR-Based*

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Fin. Instruments Antitrust Litig., 327 F.R.D. 483, 488-89 (S.D.N.Y. 2018); *In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 105 (S.D.N.Y. 2010).)

Search Antitrust Class Certification for information on the class certification process in antitrust class actions.

Investment Plan Administration

Financial services companies that administer investment plans, such as pension plans and 401(k) plans, may face class actions alleging mismanagement. These actions include claims brought under the Employee Retirement Income Security Act of 1974 (ERISA) and common law claims for breach of contract and breach of fiduciary duty (see, for example, *Moreno v. Deutsche Bank Americas Holding Corp.*, 2017 WL 3868803, at *1 (S.D.N.Y. Sept. 5, 2017)).

CLAIMS COMMONLY ASSERTED ON A CLASS BASIS

Financial services companies may face a wide range of claims in putative class actions, including claims under federal and state statutes and common law. Plaintiffs often assert both statutory and common law claims in the same class action complaint because:

- The elements of common law claims may be easier to prove.
- Common law claims may have longer statutes of limitations than statutory claims.
- Asserting more claims may expand the size of the putative class and the scope of potential monetary damages.
- Certain common law claims are not hamstrung by statutory language that contains damages caps and narrows the definition of potential plaintiffs.

The specific claims that class action plaintiffs allege generally depend on the capacity in which the financial services company is acting and the nature of the challenged conduct. For example, in a consumer class action involving mortgage lending, depending on the theory of liability, plaintiffs may assert claims under the following federal statutes:

- The Fair Credit Reporting Act (FCRA) (for more information, search FCRA Litigation: Key Issues and Considerations on Practical Law).
- The Fair Debt Collection Practices Act (FDCPA) (for more information, search FDCPA Litigation: Key Issues and Considerations on Practical Law).
- The Real Estate Settlement Procedures Act (RESPA) (for more information, search RESPA Litigation: Key Issues and Considerations on Practical Law).
- The Servicemembers Civil Relief Act (SCRA).
- The Telephone Consumer Protection Act of 1991 (TCPA) (for more information, search TCPA Litigation: Key Issues and Considerations on Practical Law).
- The Truth in Lending Act (TILA) (for more information, search TILA Litigation: Key Issues and Considerations on Practical Law).

In addition to federal statutory claims, consumer plaintiffs in a class action involving mortgage lending also frequently assert:

- Claims under state law statutes, including consumer fraud and deceptive trade practices statutes.
- Common law causes of action, such as unjust enrichment, breach of contract, and quasi-contract claims.

In consumer class actions outside of the mortgage industry, plaintiffs frequently assert claims under the FCRA, the TCPA, and other federal statutes, like the Electronic Fund Transfer Act (EFTA), which applies in some class actions challenging deposit account conduct (for more information, search Electronic Fund Transfer Act: Key Provisions on Practical Law). Plaintiffs may also bring common law claims, such as claims for breach of contract.

Additionally, financial services companies are frequent targets of:

- **Securities class actions.** These actions usually challenge the adequacy of representations made in financial statements and other regulatory filings (see, for example, *Veal v. LendingClub Corp.*, 423 F. Supp. 3d 785, 793, 795-99 (N.D. Cal. 2019)). Over the past decade, many financial services companies have faced securities class actions from investors seeking to recover losses on subprime investments, alleging fraud under Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and its implementing regulation, Rule 10b-5 (see, for example, *Ark. Teacher Ret. Sys. v. Goldman Sachs Grp., Inc.*, 955 F.3d 254, 258-59 (2d Cir. 2020)). Securities class actions also often include claims under Exchange Act Section 20(a) brought against controlling persons. (For a collection of resources to assist counsel with the class certification process in securities litigation, search Securities Litigation: Class Certification Toolkit on Practical Law.)
- **Antitrust class actions.** In these cases, it is common for the core causes of action to focus on federal antitrust statutes, such as the Sherman Antitrust Act and the Clayton Antitrust Act. These cases also often have follow-on causes of action under state antitrust statutes and common law.

Search Class Action Toolkit: Causes of Action for a collection of resources addressing causes of action that are particularly suitable to class action litigation.

TAKING PRELIMINARY STEPS

The initial considerations for counsel defending a financial services company in a putative class action can vary depending on the facts and claims alleged. However, in virtually every class action brought against a financial services defendant, defense counsel should:

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- Advise the client to issue a sufficient litigation hold.
- Identify the client's entities and departments that are relevant to the dispute.
- Consider any previous related regulatory investigations or proceedings.
- Identify any similar cases against the client or its affiliates and develop a uniform defense strategy.
- Identify any relevant joint defense groups.
- Consider potential witnesses and relevant documents.

ISSUE A LITIGATION HOLD

After being retained to defend a financial services company in a class action, counsel should promptly ensure that the client implements an appropriate litigation hold to preserve potentially relevant documents and evidence. Financial institutions must implement litigation hold procedures when they reasonably anticipate litigation, even though they are likely already required to retain records as regulated entities. The hold should cover all forms of potentially relevant evidence, including paper documents and files and electronically stored information in the form of emails, text messages, instant messaging and chatroom data, and other electronic files.

Financial services clients often have numerous custodians and many different systems, software, and programs for transmitting and maintaining electronic files. It is therefore crucial for counsel to ensure that:

- The litigation hold is broad enough to cover all relevant electronic systems.
- The client provides a litigation hold notice to all custodians of potentially relevant documents informing them of their preservation obligations (for a sample notice, with explanatory notes and drafting tips, search Litigation Hold Notice on Practical Law).

Counsel should confer with the client's information technology and document preservation specialists to confirm that the litigation hold is sufficient to cover all potentially relevant evidence and that all custodians understand the importance of the litigation hold.

Search Litigation Hold Toolkit for a collection of resources to help counsel prepare and administer a defensible litigation hold.

IDENTIFY RELEVANT ENTITIES AND DEPARTMENTS

When representing a financial services client, defense counsel must identify the appropriate corporate entity involved in the alleged activity. For example, a plaintiff might improperly name both a holding company and an operating bank as defendants. Defense counsel must identify the correct entity early in the case and take steps to ensure that only correctly named parties are part of the lawsuit. The plaintiff's counsel may stipulate to voluntarily dismiss uninvolved entities (see, for example, *Henderson v. Bank of N.Y. Mellon, N.A.*, 332 F. Supp. 3d 419, 422 n.2 (D. Mass. 2018) (noting the voluntary dismissal of the parent bank)). If they decline to do so, defense counsel should consider filing a motion to dismiss any improperly named defendant from the case (see, for example, *Sharp v. Bank of Am., N.A.*, 2020 WL 1543544, at *7-8 (N.D. Ill. Mar. 31, 2020) (dismissing claims against a parent company that had no involvement in the alleged wrongdoing)).

It is also important for defense counsel to identify the relevant departments and individuals within the company that are involved in the alleged activity. Financial services companies are often large entities with complex organizational structures. Ascertaining all relevant departments and individuals will enable counsel to appropriately tailor the litigation hold, identify potential witnesses, and effectively collect and review documents and other evidence to develop arguments and defenses.

CONSIDER PREVIOUS REGULATORY INVESTIGATIONS OR PROCEEDINGS

Financial services companies are heavily regulated and frequently subjected to thorough and extensive examinations. On a federal level, many agencies regulate financial institutions, including the Office of the Comptroller of the Currency (OCC), the Consumer Financial Protection Bureau (CFPB), the Federal Deposit Insurance Corporation (FDIC), and the Federal Reserve. State agencies and attorneys general also regulate financial institutions.

Search US Banking Law: Overview for more on banking regulation.

Class action plaintiffs may allege claims pertaining to issues regulators have identified through examinations and investigations, and the plaintiff's counsel may want to use regulatory information and materials in the class action litigation. For example, the plaintiff's counsel might seek to use information regarding a consent order or regulatory settlement and may request discovery related to the regulatory investigation and the financial institution's decision to agree to the consent order or settlement.

However, information related to regulatory examinations and investigations is likely to be privileged and protected from discovery. Each regulatory agency has separate rules governing the disclosure or use of confidential supervisory information, which generally consists of non-public information prepared by, on behalf of, or for the use of a federal or state regulator, such as examination and inspection reports, supervisory ratings, non-public enforcement actions, and related communications with the regulator, as well as materials that a financial services company itself prepares to respond to a regulator.

Regulators generally assert that all confidential supervisory information is their property and may

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be disclosed only with their prior written approval. However, federal regulators have adopted procedures for requesting the disclosure of confidential supervisory information (see 12 C.F.R. § 261.23 (Federal Reserve Board); 12 C.F.R. § 4.33 (OCC); 12 C.F.R. § 1070.47 (CFPB); 12 C.F.R. § 309.6 (FDIC)).

Defense counsel should be prepared to object to discovery requests seeking privileged information and should not disclose any confidential supervisory information without written authorization from the appropriate agency.

Search Bank Examiner Privilege and Bank Examiner Privilege: 50 State Survey for more on the availability and extent of the bank examiner privilege.

IDENTIFY SIMILAR CASES AND DEVELOP A UNIFORM DEFENSE STRATEGY

At the outset of the litigation, defense counsel should investigate whether any other cases that raise similar issues as the class action have been filed against the financial services company or similar institutions. Class action lawsuits against financial institutions often generate significant publicity, which can give rise to copycat filings. If there are other pending cases against the company, counsel must decide how to coordinate the defense strategy among the various cases. Counsel should ask the client to put them in contact with attorneys representing the client in similar cases, including cases that have already concluded.

One option for addressing duplicative lawsuits, particularly if there are numerous suits, may be a multidistrict litigation (MDL). When many civil actions involving common questions of fact are pending in different federal district courts, the cases may be transferred to a single court for centralized pretrial proceedings (28 U.S.C. § 1407). Requests for transfer must be filed with the US Judicial Panel on Multidistrict Litigation, which will determine whether the cases are appropriate for centralization. If the number of cases is not large enough to warrant an MDL, counsel should consider seeking to transfer cases to the same district or to consolidate cases within a district (28 U.S.C. § 1404; Federal Rule of Civil Procedure (FRCP) 42(a)).

Search Motion for a Multidistrict Litigation (MDL) Transfer for a sample motion requesting an MDL transfer, with explanatory notes and drafting tips.

Search Motion to Transfer Venue (Federal) and Motion to Consolidate Under FRCP 42(a) for more on the considerations surrounding transfers of venue and consolidation.

If overlapping class action lawsuits are pending in different federal courts, counsel may seek to stay or dismiss the later-filed lawsuits under the first-to-file rule. The first-to-file rule provides that a court can exercise its discretion to dismiss, transfer, or stay later-filed cases if the parties, claims, and available relief in the later-filed cases are sufficiently duplicative of the first case. (See, for example, *McReynolds v. Merrill Lynch & Co.*, 694 F.3d 873, 888-89 (7th Cir. 2012); *Sporn v. TransUnion Interactive, Inc.*, 2019 WL 151575, at *4 (N.D. Cal. Jan. 10, 2019).)

IDENTIFY RELEVANT JOINT DEFENSE GROUPS

Plaintiffs' attorneys will often file class action lawsuits against multiple financial services companies challenging practices or policies that are common in the industry. It is not unusual for different institutions to face lawsuits alleging the same or similar legal claims (see, for example, *Royal Park Invs. SA/NV v. Bank of N.Y. Mellon*, 2019 WL 652841, at *1 (S.D.N.Y. Feb. 15, 2019) (discussing similar cases the plaintiff brought against other RMBS trustees)). In these cases, it often makes sense for defense counsel to coordinate with the attorneys representing the other banks in a joint defense group. This coordination can prevent defendants from taking inconsistent or conflicting positions and create efficiency to the extent the defendants can share legal arguments and theories. Defense counsel frequently form joint defense groups where:

- There are multiple lawsuits against similarly situated defendants.
- There is a single lawsuit brought against multiple defendants.

Defense counsel should search court dockets to identify other cases that the plaintiff's counsel filed against similar defendants. Contact information for defense counsel will be available on the dockets once they appear in a case. Counsel may also be able to learn about similar cases through media outlets that cover litigation in the financial services industry.

It is crucial that the attorneys in a joint defense group do not waive any privilege in discussing the lawsuits. Attorneys generally rely on the common interest privilege, also known as the joint defense privilege, to avoid such a waiver (see, for example, *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815-16 (7th Cir. 2007)). A written joint defense agreement can be used to demonstrate the parties' intention to invoke the common interest privilege and define the scope of the joint defense efforts, but courts generally do not require attorneys to sign a written agreement for the privilege to apply (see *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 363 (3d Cir. 2007)).

Search Joint Defense and Confidentiality Agreement (Federal) for a sample agreement that allows parties with similar legal interests to share information with each other without waiving any applicable privilege or protection, with explanatory notes and drafting tips.

Search Working with Joint Defense Groups Checklist for an outline of key steps and considerations for counsel representing a potential or an actual member of a joint defense group under a joint defense agreement in civil litigation.

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CONSIDER POTENTIAL WITNESSES AND DOCUMENTS

Defense counsel should work with their client to identify potential witnesses and sources of relevant documents. In doing so, counsel should:

- **Consider in-house counsel's experience with handling litigation involving the relevant business unit.** An important first step for defense counsel is to determine whether the in-house attorney overseeing the case for the client has significant experience handling litigation involving the business unit whose conduct is at issue. Larger financial services companies often have in-house attorneys who handle cases involving specific business units. For example, a large bank may have in-house attorneys whose sole responsibility is to manage consumer class actions. In-house attorneys who focus on specific business units usually have a strong sense of the relevant document management systems and which employees will make the best witnesses to address the claims. Smaller companies, on the other hand, typically have fewer in-house attorneys who are responsible for handling litigation across the company involving many different business units. These attorneys may not have as much pre-existing knowledge about the document systems and personnel involved in the alleged conduct. In these situations, defense counsel should work with the in-house attorney and guide them through the necessary considerations.
- **Consult with the client to learn whether there are any employees who have experience testifying in previous cases on similar issues.** If so, defense counsel should consider designating those same employees to testify in the current action, particularly if they were good witnesses. For example, the client may have employees with a strong knowledge of the pertinent computer systems and understand how best to describe the systems in testimony. Additionally, working with employees with previous deposition experience may improve efficiency by reducing the time needed to prepare for depositions.
- **Review documents and discuss the relevant issues with potential witnesses.** Defense counsel should review any documents that the client provides to learn more about the alleged conduct and discuss the relevant issues with potential witnesses. This will enable counsel to analyze the claims and allegations in the complaint, formulate a defense strategy, and prepare an answer or a motion in response to the complaint. When speaking with potential witnesses, including current and former employees of the client, counsel should provide an *Upjohn* warning explaining that they represent the company and not the witnesses themselves. Counsel should confirm that the employee understands that any information revealed during the interview is privileged only between counsel and the employer, and the witness cannot control whether their employer waives the attorney-client privilege.

Search Internal Investigations: Giving Upjohn Warnings for more on key issues in-house and outside counsel should consider when providing *Upjohn* warnings.

Search Internal Investigations: Example of an Upjohn Warning for a sample *Upjohn* warning, with explanatory notes.

RESPONDING TO THE COMPLAINT

When responding to a class action complaint against a financial services company, defense counsel should:

- Seek an extension of time to respond, if needed.
- Consider removal if the action was filed in state court.
- Determine whether there are any applicable arbitration clauses or class action waivers that could affect the claims at issue.
- Evaluate whether the claims are subject to dismissal for lack of standing.
- Assess potential preemption of any state law claims.

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SEEK AN EXTENSION OF TIME

Defense counsel should confirm the date on which the client received service of the summons and complaint to determine the client's deadline to respond to the complaint (FRCP 12(a)(1)(A)(i) and (ii)). Counsel defending a financial services company in a class action will typically want to obtain an extension of time to respond to the complaint because class actions are often factually complex. Counsel will likely need additional time to:

- Analyze the allegations.
- Examine relevant documents and other evidence.
- Discuss the case with potential witnesses who are generally busy with their routine job responsibilities.
- Identify related cases.
- Research the law.
- Determine the strength of the claims and defenses.

Defense counsel should ask the plaintiff's counsel to consent to seeking an extension of time to respond to the complaint. However, defense counsel should be aware that some plaintiffs' attorneys may attempt to condition their consent on waiving certain defenses, such as challenges to jurisdiction or service. If the client has meritorious defenses, defense counsel should not agree to waive them in exchange for an extension and should instead seek an extension from the court, even though the plaintiff may oppose the request.

Search Stipulation to Extend Time to Respond to a Complaint (Federal) for a sample stipulation to extend the time to respond to a complaint, with explanatory notes and drafting tips.

CONSIDER REMOVAL OF CASES FILED IN STATE COURT

Counsel representing financial services defendants in class actions generally prefer to litigate in federal court over state court because of the perception that federal court judges will apply class certification standards more stringently than state court judges. Moreover, federal court decisions on class certification orders are, on a discretionary basis, immediately appealable (for more information, search Appealing a Class Certification Decision Under FRCP 23(f) and Petition for Permission to Appeal a Class Certification Decision Under FRCP 23(f) on Practical Law).

Search Removal: Why Remove? for more on the differences between state and federal litigation practice that may affect a defendant's decision to remove.

A state court case may be removed to federal court based on either:

- Federal question jurisdiction, which is available where state court plaintiffs assert claims for violation of federal laws, such as TILA, RESPA, or the FDCPA.
- Diversity jurisdiction.

Under the Class Action Fairness Act of 2005 (CAFA), diversity jurisdiction is available in class actions where:

- The amount in controversy exceeds $5 million.
- Any plaintiff is a resident of a state that is different from the state of residence of any defendant.
- The proposed class contains 100 or more plaintiffs.

(28 U.S.C. § 1332(d).)

Counsel representing federally regulated financial institutions in cases where the plaintiffs allege state law claims should consider whether they may make viable arguments to dismiss the claims based on preemption.

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However, the following exceptions to CAFA diversity jurisdiction may preclude removal in cases involving financial services defendants:

- **The local controversy exception.** This exception precludes the exercise of federal diversity jurisdiction where:
  - more than two-thirds of all putative class members are citizens of the state in which the action was filed;
  - at least one defendant from whom the class seeks significant relief and whose conduct forms the basis for the claims asserted is also a citizen of that state;
  - the principal injuries resulting from the alleged conduct or any related conduct of each defendant occurred in that state; and
  - no other class action asserting the same or similar facts was filed in the previous three years.

  (28 U.S.C. § 1332(d)(4)(A); see, for example, *Haynes v. EMC Mortg. Corp.*, 2010 WL 1445650, at *3-6 (N.D. Cal. Apr. 12, 2010).)
- **The home-state controversy exception.** This exception precludes federal diversity jurisdiction where:
  - more than two-thirds of all putative class members are citizens of the state in which the action was filed; and
  - the primary defendants are all citizens of that state.

  (28 U.S.C. § 1332(d)(4)(B); see *Brinkley v. Monterey Fin. Servs., Inc.*, 873 F.3d 1118, 1121-23 (9th Cir. 2017); *Hirschbach v. NVE Bank*, 496 F. Supp. 2d 451, 458-61 (D.N.J. 2007).)

When considering removal, defense counsel must determine the citizenship of the defendants to confirm whether one of these exceptions will preclude removal. A federally chartered national bank is deemed a citizen of the state listed in its articles of association as its main office (28 U.S.C. § 1348; see *Wachovia Bank v. Schmidt*, 546 U.S. 303, 307, 313, 318 (2006)). Therefore, the location of a national bank's main office can be critical to determining federal jurisdiction in a class action (see, for example, *Anderjaska v. Bank of Am., N.A.*, 2020 WL 1503418, at *4 (S.D.N.Y. Mar. 30, 2020)).

Search Class Action Fairness Act of 2005 (CAFA): Overview and CAFA Jurisdiction Comparison Chart for more on how CAFA rules differ from traditional diversity jurisdiction analyses.

CONSIDER APPLICABLE ARBITRATION CLAUSES AND CLASS ACTION WAIVERS

Defense counsel should review all account agreements involving the named plaintiff to determine whether the plaintiff agreed to arbitrate disputes and to waive any rights to participate in a class action. While these provisions will not be available for post-Dodd-Frank mortgage disputes, arbitration clauses and class action waivers may apply to claims concerning credit cards and deposit accounts (see above *Functions at Issue in Class Actions*). The US Supreme Court has upheld the validity of arbitration clauses and class action waivers and ruled that the Federal Arbitration Act (FAA) preempts state laws that discriminate against such provisions (see *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233-39 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341, 343-44, 346-47, 352 (2011)).

Notably, in July 2017, the CFPB issued a rule that would have prohibited many financial services companies from requiring consumers to arbitrate any disputes (82 Fed. Reg. 33210 (July 19, 2017)). However, President Trump signed a joint congressional resolution that overturned the CFPB's rule (PL 115-74 (Nov. 1, 2017)). It remains important for counsel to determine whether the claims in a particular class action are subject to any arbitration clauses or class action waivers.

Search Class Arbitration Waivers in the US: Case Tracker for a chart that tracks court decisions on the enforceability of class arbitration waivers.

EVALUATE STANDING

Some class actions against financial services companies are subject to dismissal for lack of standing because plaintiffs asserting statutory violations failed to allege that they suffered an actual injury. In *Spokeo, Inc. v. Robins*, the Supreme Court held that an action based on an alleged statutory violation, without a showing of concrete harm, does not satisfy the injury-in-fact requirement to establish standing (136 S. Ct. 1540, 1549 (2016)). Defense counsel should assess whether the plaintiff has adequately alleged an actual injury that satisfies *Spokeo* and bring a motion to dismiss if the plaintiff has not done so.

In addition to *Spokeo* issues, defense counsel should consider whether the named plaintiffs have standing to allege all claims on behalf of the putative class. For example, where the complaint alleges common law claims on behalf of a national class, the claims of absentee class members from states other than where the named plaintiffs reside are often subject to dismissal because the named plaintiffs did not suffer an injury in those other states (see, for example, *Schertzer v. Bank of Am., N.A.*, 445 F. Supp. 3d 1058, 1071 (S.D. Cal. 2020)).

On March 30, 2021, the Supreme Court heard oral argument in *TransUnion LLC v. Ramirez* (141 S. Ct. 972 (2020) (granting *certiorari*)). The Supreme Court is expected to decide in that case whether a class action may proceed where the vast majority of the class did not suffer an actual injury.

Search Non-Statutory Grounds for Challenging Class Actions: Standing and Ascertainability for more on challenging standing in a class action.

Search Standing to Allege Violations of Federal Banking Laws by US Circuit Court Chart for more on how each circuit applies *Spokeo* in determining standing to sue under significant federal banking statutes.

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ASSESS POTENTIAL PREEMPTION OF STATE LAW CLAIMS

Many financial services companies, such as national banks, are federally regulated. Federal law may preempt certain state statutory and common law claims against them. Counsel representing federally regulated financial institutions in cases where the plaintiffs allege state law claims should consider whether they may make viable arguments to dismiss the claims based on preemption.

Search Preemption Defense in Financial Services Litigation for more on the potential for financial institutions to assert preemption as a defense to state law statutory claims in civil litigation.

CONDUCTING DISCOVERY

If a class action survives past the pleading stage, the parties will engage in discovery. Discovery, which typically encompasses both class discovery and merits discovery, can be the most lengthy and costly period in a putative class action.

To limit the costs of discovery, particularly in putative class actions that defense counsel believe are unlikely to be certified, defense counsel often seek to bifurcate discovery. This means that the parties:

- Conduct discovery on class certification issues first.
- Separately take discovery on the merits of the claims.

Although it may be advantageous to bifurcate discovery, trial courts sometimes reject bifurcation requests, holding that bifurcation is contrary to the requirement that the court undertake a rigorous analysis of class certification requirements (see, for example, *Ahmed v. HSBC Bank USA, Nat'l Ass'n*, 2018 WL 501413, at *2-4 (C.D. Cal. Jan. 5, 2018); *Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 299-300 (S.D.N.Y. 2012)). Counsel should consider seeking to bifurcate discovery only when they can plausibly argue that the class certification decision will not require an analysis of the merits.

Defense counsel may also want to request bifurcation to take discovery on the plaintiff's individual claims before delving into class discovery. This may occur in cases where the named plaintiff's claims are particularly weak and likely subject to summary judgment dismissal. However, the court may deny this form of bifurcation on grounds that initial merits discovery should be confined to issues bearing on class certification (see, for example, *Quinn v. Specialized Loan Servicing, LLC*, 321 F.R.D. 324, 327 (N.D. Ill. 2017)).

CLASS DISCOVERY

Class discovery should focus on whether the requirements for certification under FRCP 23 are met. Typically, for financial services defendants, class discovery centers on whether:

- The named plaintiff's claims are typical of the putative class members' claims.
- There are common questions of law and fact among the class members.
- Common questions predominate over individual matters.

This inquiry often involves discovery into how a financial services defendant's practices and policies affected individual consumers and whether the institution treated members of the putative class similarly.

In conducting class discovery, defense counsel should remember that federal law often restricts financial services companies from disclosing customers' nonpublic financial information. For example, the Gramm-Leach-Bliley Act contains this restriction but generally allows disclosure to opposing counsel in response to a proper discovery request (15 U.S.C. § 6802(a), (e)(8)). Before producing any customer records, defense counsel should ensure there is an appropriate confidentiality or protective order in place to prevent the public disclosure of private financial information.

Search Confidentiality Agreement (Order) (Federal) for a sample protective order, with explanatory notes and drafting tips.

Defense counsel should also consider how to reduce the costs of class discovery. For example, instead of reviewing and producing voluminous files for thousands of individual bank customers, defense counsel should negotiate with the plaintiff's counsel to produce a random sample of files, which will provide sufficient information for a class certification decision. If the plaintiff's counsel will not agree to reasonable discovery limits, defense counsel should file a motion asking the court to manage the scope of class discovery.

Search Class Actions: Class Certification Discovery for more on discovery in connection with class certification.

MERITS DISCOVERY

Merits discovery should focus on the individual claims of the named plaintiffs. Defense counsel will likely need to serve written discovery requests and take depositions of the named plaintiffs and any relevant third parties. Likewise, defense counsel must respond to the plaintiffs' written discovery requests, prepare witnesses for depositions, and defend the depositions. The plaintiffs may seek to depose high-ranking bank executives, but defense counsel should resist these efforts and designate witnesses who are most familiar with the procedures and processes at issue in the case (see above *Consider Potential Witnesses and Documents*).

At the close of merits discovery, defense counsel should analyze whether to move for summary judgment regarding

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some or all of the plaintiffs' claims. Summary judgment is appropriate where there is no genuine dispute as to any material fact (for more information, search Summary Judgment: Overview (Federal) on Practical Law).

Search Document Requests and Subpoenas in Federal Court Toolkit for a collection of resources to assist counsel with drafting, serving, and responding to document requests and subpoenas under FRCP 34 and 35.

Search Taking a Deposition Toolkit (Federal) and Defending a Deposition Toolkit (Federal) for collections of resources to assist counsel with taking and defending depositions.

OPPOSING CLASS CERTIFICATION

To obtain class certification in federal court, a plaintiff must satisfy FRCP 23(a), which requires the plaintiff to demonstrate that:

- The class is so numerous that joinder of all members is impracticable.
- There are questions of law or fact common to the class.
- The claims or defenses of the representative parties are typical of the claims or defenses of the class.
- The representative parties will fairly and adequately protect the interests of the class.

A plaintiff seeking class certification also must satisfy the requirements of at least one of the subdivisions of FRCP 23(b). Class actions against financial services companies are often filed under FRCP 23(b)(3), which requires the plaintiff to show that:

- Questions of law or fact common to class members predominate over any questions affecting only individual members.
- A class action is superior to other methods for fairly and efficiently adjudicating the controversy.

To satisfy the predominance prerequisite in FRCP 23(b)(3), a plaintiff typically must demonstrate that essential factual issues can be determined on a class-wide basis without the need for individualized case-by-case review of each potential class member. The predominance requirement is not satisfied when a finder of fact would need to review the circumstances of each individual putative class member to determine if they were affected by the conduct at issue.

Financial services companies have successfully opposed class certification where they have shown that determining liability would require a file-by-file review for each proposed class member (see, for example, *McDonald v. Wells Fargo Bank, N.A.*, 374 F. Supp. 3d 462, 510-13 (W.D. Pa. 2019) (holding that the need for individualized factual inquiries prohibited class certification); *Christie v. Bank of Am., N.A.*, 2016 WL 654818, at *8 (M.D. Fla. Jan. 7, 2016), adopted by 2016 WL 633796 (M.D. Fla. Feb. 17, 2016); but see *Kivett v. Flagstar Bank, FSB*, 333 F.R.D. 500, 506 (N.D. Cal. 2019); *Grubb v. Green Tree Servicing, LLC*, 2017 WL 3191521, at *17-18 (D.N.J. July 27, 2017); *Bias v. Wells Fargo & Co.*, 312 F.R.D. 528, 539 (N.D. Cal. 2015) (stating that the class is ascertainable even if file-by-file review is required)). Similarly, where consent is a critical element of a claim, financial services defendants may argue that individual issues predominate over common issues to defeat class certification (see, for example, *Tomeo v. CitiGroup, Inc.*, 2018 WL 4627386, at *8 (N.D. Ill. Sept. 27, 2018)).

Where membership in a class turns on a factor that a financial services defendant does not track in a database, it may argue that the class is not ascertainable to defeat class certification (see, for example, *Loughlin v. Amerisave Mortg. Corp.*, 2018 WL 1887292, at *2 (N.D. Ga. Mar. 19, 2018)).

Search Class Action Toolkit: Certification for a collection of resources to assist counsel with class certification in federal court.

Search Non-Statutory Grounds for Challenging Class Actions: Standing and Ascertainability for more on the implied ascertainability requirement for class actions.

NAVIGATING THE SETTLEMENT PROCESS

Few class actions against financial services companies ever reach trial. While some actions might be disposed of through dispositive motion practice or the denial of a class certification motion, many are resolved through settlement in which the parties negotiate, and the court approves, a settlement class. Class settlements require both preliminary and final approval from the court (for sample motion papers counsel can use when filing a motion for final approval of a class action settlement under FRCP 23, with explanatory notes and drafting tips, search Motion for Final Approval of Class Action Settlement: Notice of Motion or Motion (Federal) on Practical Law).

A class settlement is advantageous for both sides in that the plaintiffs often obtain key portions of the practice changes, injunctive relief, or damages that they are seeking through the lawsuit, while the defendants can achieve releases from class members and finality given that the court's final approval order almost always precludes copycat suits, unless a putative class member opts out of the settlement.

Counsel seeking to settle class actions on behalf of financial services companies should:

- Consider whether to engage in mediation.
- Determine the most optimal settlement terms.
- Identify a suitable claims administrator.
- Provide the requisite notice to class members and regulators.

Search Class Action Toolkit: Settlement for a collection of resources to assist counsel with settling class actions in federal court.

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Many courts view mediation as a positive factor in evaluating whether to approve a proposed settlement because they know that a third-party neutral worked diligently to bring the parties together to reach a fair deal.

MEDIATION

Federal district judges often encourage parties to mediate large disputes, and class actions against financial services companies rarely settle without assistance from a mediator. Parties typically choose to engage a private third-party neutral, such as a retired judge, to serve as the mediator. In some cases, however, the parties will attempt to resolve the case through court-affiliated mediation, such as before a magistrate judge. Not only is mediation an effective tool in helping the parties reach a settlement, but many courts also view mediation as a positive factor in evaluating whether to approve a proposed settlement because they know that a third-party neutral worked diligently to bring the parties together to reach a fair deal.

To prepare to mediate a class action dispute, financial services companies should:

- Confirm their settlement authority.
- Determine the size of the putative class to calculate the total potential exposure if the plaintiffs obtain a judgment.
- Consider whether to offer all class members the same settlement proceeds or whether there should be subclasses that receive different amounts.
- Assess the scope of the release to be obtained from class members.

Some class actions assert claims against multiple financial services companies (for example, a mortgage originator and servicer). In these cases, in addition to brokering an agreement between the plaintiffs and defendants, the mediator may need to devote time to negotiating between the defendants themselves, if the defendants disagree as to their allocated share or percentage.

Search Mediation Toolkit for a collection of resources to help counsel navigate the mediation process.

SETTLEMENT PROCEEDS

When structuring a class settlement, financial services defendants often:

- Provide for an "opt out" settlement, meaning that potential class members are included in the settlement class that releases claims unless they affirmatively opt out of the settlement. This structure will bring the greatest benefit to the defendant.
- Require class members to submit a claim to receive proceeds from the settlement. The recovery for each class member generally depends on the number of class members that submit claims.

Defense counsel should consider the most optimal settlement terms to provide complete relief and avoid future litigation over related issues. Financial services companies will generally negotiate an agreement to create a settlement pool of an amount certain. This settlement pool will often be divided into:

- Settlement proceeds for class members.
- Attorneys' fees.
- Class administration fees.
- Incentive payments to named plaintiffs.

(See, for example, *Pemberton v. Nationstar Mortg., LLC*, 2020 WL 230015, at *1-2 (S.D. Cal. Jan. 15, 2020).)

However, some courts have recently refused to approve incentive payments for named plaintiffs (see *Johnson v. NPAS Solution, LLC*, 975 F.3d 1244, 1260 (11th Cir. 2020)).

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Search Class Action Settlement Agreement (Federal) for a sample class settlement agreement, with explanatory notes and drafting tips.

Search Class Action Settlement Agreements in the What's Market database on Practical Law and filter the results for summaries in the Banking and Financial Services Industry Sector for examples of court-approved class action settlements involving financial services defendants.

CLAIMS ADMINISTRATOR

In large class actions, a neutral claims administrator will provide notice to class members and, following final approval of the settlement, distribute the settlement proceeds to class members (see, for example, *Huyer v. Wells Fargo & Co.*, 314 F.R.D. 621, 625 (S.D. Iowa 2016)). Financial services defendants that frequently settle class actions likely have preferred claims administrators with whom they work. Defense counsel should consult with the client's in-house attorney to select a claims administrator that the client prefers.

NOTICE REQUIREMENTS

When settling a class action, defense counsel should comply with applicable requirements for providing notice of the proposed settlement to class members and government officials.

Class Members

Settlement classes involving financial services companies are often certified as FRCP 23(b)(3) classes, which requires that individualized notice be provided to absent class members. Where the settlement class is comprised of customers of a financial institution, providing individualized notice is not as challenging as it might be in other industries given that a financial institution typically has the customer's contact information on file. However, difficulties can sometimes arise with former customers for whom the defendant may not have current contact information.

Search Class Actions: Notice Requirements for more on class notice requirements in the context of class certification, a proposed settlement, and attorneys' fees requests.

Regulators

CAFA requires defendants to provide notice of a proposed class action settlement to certain federal and state government officials (28 U.S.C. § 1715). Under CAFA, certain financial services defendants must give notice to the person who has the primary federal regulatory or supervisory responsibility over the defendant, if some or all of the matters alleged in the class action are subject to that person's regulation or supervision. The financial services defendants subject to this provision include:

- Federal and state depository institutions.
- Depository institution holding companies.
- Foreign banks.
- Nondepository institution subsidiaries of depository institutions, depository institution holding companies, or foreign banks.

(28 U.S.C. § 1715(c)(1).)

Counsel representing multiple defendants, such as a financial services company and its holding company, should provide notice to each client's primary regulator, keeping in mind that different government entities may regulate corporate affiliates.

Where the defendant is a state depository institution, notice must be served on the state bank supervisor of the state in which the defendant is incorporated or chartered, if any of the matters alleged in the class action are subject to regulation or supervision by that person, and the appropriate federal official (28 U.S.C. § 1715(c)(2)). For example, to comply with CAFA notice requirements, a national bank that the OCC regulates should provide notice to:

- The OCC.
- The state attorney general in each state in which a class member resides.

Additionally, to remove any potential challenges concerning the sufficency of CAFA notice, financial services defendants should consider also providing notice to:

- The US Attorney General.
- The state banking regulator in each state in which a class member resides.

Although it may not be necessary to serve these additional regulators, the minimal cost of additional service greatly outweighs the potential risk that the court may decline to approve a settlement due to insufficient CAFA service. Financial services defendants that have a dedicated Examiner-in-Charge (EIC) on-site from a regulatory body should also consider providing a courtesy notice of a settlement to the EIC.

Bank counsel should prepare their client for the possibility that government regulators will file an *amicus* brief opposing the terms of a settlement. For example, 33 state attorneys general recently opposed the settlement of a class action concerning mortgage servicing fees, arguing that the settlement should be rejected because it is not fair, reasonable, or adequate (see Brief of *Amicus Curiae* filed in *Morris v. PHH Mortg. Corp.*, 2021 WL 386524 (S.D. Fla. Feb. 1, 2021); see also *Pantelyat v. Bank of Am., N.A.*, 2019 WL 402854, at *4 (S.D.N.Y. Jan. 31, 2019)).

Search Class Action Fairness Act of 2005 (CAFA): Overview for more on CAFA notice requirements.

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