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Bank Counsel Roundtable: Banks at the Supreme Court

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The Supreme Court

- The New Court
  - Justice Kavanaugh
  - Chief Justice Roberts
- Some things never change…
  - Justice Ginsburg going strong
  - Still no cameras
- While some things do…
  - Justice Thomas Speaks!

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Frank v. Gaos: Class Action Standing and Cy Pres

Facts:

- Three named plaintiffs sued Google for alleged violations of the Stored Communications Act (SCA).
- The plaintiffs represented a class of approximately 129 million individuals who used Google Search between October 25, 2006, and April 25, 2014.
- The parties' settlement:
  - required certain disclosures on Google webpages
  - Paid more than $5 million to cy pres recipients,
  - Paid more than $2 million to class counsel,
  - No money to absent class members
    - Would have been 4 cents / class member.

Frank v. Gaos: Class Action Standing and Cy Pres

Ninth Circuit Analysis: Focus on Cy Pres

- Ninth Circuit held cy pres only settlements "appropriate where the settlement fund is 'nondistributable' because the proof of individual claims would be burdensome or distribution of damages costly."
- Ninth Circuit did not address named plaintiffs' standing

Supreme Court Analysis: Focus on Standing

- Based on S.G. brief, Court raised issue of standing under *Spokeo*
- Court's opinion did not address cy pres issue for which certiorari was granted
- Remanded to first consider standing

Frank v. Gaos: Class Action Standing and Cy Pres

Supreme Court Takeaways:

- Emphasized courts' independent obligation to ensure standing, including in court approval of proposed class action settlements. Can't assume a rubber stamp.
  - Helpful arrow in defendants' quiver in defeating class actions
  - Could make global settlements more difficult
- Justices remained divided on propriety of cy pres settlements
  - Issue arises when disproportionately large class compared to monetary relief
  - Questions at oral argument shows same concerns also implicate claims made settlements

Obduskey v. McCarthy & Holthus LLP: The FDCPA and Non-Judicial Foreclosure Proceedings

Statutory Provisions:

- The Fair Debt Collection Practices Act (FDCPA) regulates "'debt collector[s].'" 15 U.S.C. §1692a(6).
- Under the FDCPA, a debt collector is defined as "any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts." § 1692a(6).
- The definition also states "[f]or the purpose of section 1692f(6)" (a separate provision of the Act), "[the] term [debt collector] also includes any person . . . in any business the principal purpose of which is the enforcement of security interests."

Issue:

- Does this mean that one principally involved in "the enforcement of security interests" is *not* a debt collector (except "[f]or the purpose of section 1692f(6)")? Or does it simply reinforce the fact that those principally involved in the enforcement of security interests are subject to §1692f(6) in addition to the FDCPA's other provisions?

Obduskey v. McCarthy & Holthus LLP: The FDCPA and Non-Judicial Foreclosure Proceedings

Supreme Court's Unanimous Holding Issued March 20, 2019 (J. Breyer):

A business engaged in no more than nonjudicial foreclosure proceedings is not a "debt collector" under the FDCPA, except for the limited purpose of §1692f(6).

Reasoning:

The court held that there were three reasons why McCarthy was not a "debt collector" under the FDCPA:

1. The text of the FDCPA itself.
2. This interpretation avoids conflicts with state non-judicial foreclosure schemes, which was likely Congress's intent.
3. Legislative history supported this interpretation.

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Kisor v. Wilkie: *Chevron* / *Auer* Deference Revisited

The VA's Interpretation of the Regulations at Issue

- 38 C.F.R. §3.156(c)(1): The VA will "reconsider" a claim if it "receives or associates with the claims file **relevant** official service department records that existed and had not been associated with the claims file when VA first decided the claim."
- Kisor argued that the Board and the VA Court misinterpreted the term "**relevant.**"

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Kisor v. Wilkie: *Chevron* / *Auer* Deference Revisited

Federal Circuit's Holding

- "As a general rule, we defer to an agency's interpretation of its own regulation 'as long as the regulation is ambiguous and the agency's interpretation is neither plainly erroneous nor inconsistent with the regulation.'"
- The Federal Circuit found the term "relevant" ambiguous, and the VA Court's interpretation was not "plainly erroneous or inconsistent with the VA's regulatory framework."

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Kisor v. Wilkie: *Chevron* / *Auer* Deference Revisited

Petition for Writ of Certiorari Granted

- Certiorari granted on "[w]hether the Court should overrule *Auer* and *Seminole Rock*."
- Deeply divided argument on Wednesday, March 27

Takeaways

- Far-Sweeping: "this sounds like the greatest judicial power grab since *Marbury v. Madison*…" (Breyer)
- Precedent: "we take it super-seriously when we do [overrule a precedent] and we need a – I mean, we used to..." (Kagan)
- Chief Justice and Kavanaugh most measured

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Rotkiske v. Klemm, 890 F.3d 422 (3d Cir. 2018): The FDCPA Statute of Limitations

The FDCPA states that "[a]n action to enforce any liability created by this subchapter may be brought in any appropriate United States district court . . . **within one year from the date on which the violation occurs**." 15 U.S.C. § 1692k(d) (emphasis added).

Two Possible Accrual Rules:

- **Occurrence Rule:** Limitations period begins to run the date the injury actually occurred.
- **Discovery Rule**: Limitations period begins to run the date the plaintiff knows of or should know of his injury.

Cert. Granted on February 25, 2019:

Issue: Whether the "discovery rule" applies to toll the one-year statute of limitations under the FDCPA, et seq., as the Fourth and Ninth Circuits have held or whether the "occurrence rule" applies as held by the Third Circuit in *Rotkiske* (*sua sponte en banc*).

SFR Investments Pool 1, LLC v. Federal Home Loan Mortgage Corp.: The FHFA and Foreclosures

Facts:

- After liens for unpaid HOA dues were foreclosed, Nevada HOAs sold five properties to defendant SFR Investments Pool 1, Inc. Fannie and Freddie had purchased and securitized mortgage loans on the properties. Fannie and Freddie were subsequently placed under conservatorship of FHFA pursuant to the Housing and Economic Recovery Act of 2008 ("HERA"). FHFA did not consent to the HOA sales of the properties to SFR. FHFA, Fannie, and Freddie sued SFR for quiet title.
- Nevada's Foreclosure Act, § 116.3116, provides that foreclosure of an HOA super-priority lien quashes all other liens or interests recorded after the recordation of the HOA covenants, conditions, and restrictions.

Ninth Circuit Holding:

- Under HERA, FHFA succeeded to Fannie and Freddie's securitized mortgage loans, which were held in trust, upon inception of conservatorship. Accordingly, FHFA, as conservator, possessed enforceable interests in the properties at the time of the HOA foreclosure sales. The Federal Foreclosure Bar, 12 U.S.C. § 4617(j)(3), therefore applied. The Federal Foreclosure Bar, a part of HERA, provides that the property of an entity in FHFA conservatorship is not subject to foreclosure without the consent of FHFA.

SFR Investments Pool 1, LLC v. Federal Home Loan Mortgage Corp.: The FHFA and Foreclosures

Petition for Writ of Cert. filed in November 2018; reply in opposition filed March 25, 2019.

Questions presented:

1. Whether 12 U.S.C. § 4617(j)(3) applies to the "millions of mortgages" nationwide held by the FHFA as a securitization trustee for security holders or is instead limited to the relatively small number of mortgages not held by FHFA in a securitization trustee capacity.
2. Whether a foreclosure sale in violation of 12 U.S.C. § 4617(j)(3) is void in its entirety, such that an unknowing purchaser can seek to unwind the deal, or whether the statute only prevents extinguishment of Fannie Mae and Freddie Mac's liens.

Lusnak v. Bank of America: Preemption and the National Bank Act

Dispute:

Class action filed on behalf of Bank of America customers, alleging that Bank of America violated both California state law and federal law by failing to pay interest on customers' escrow account funds.

Ninth Circuit Holding:

The National Bank Act ("NBA") does not preempt a California law requiring lenders to pay a minimum 2% interest rate on mortgage escrow accounts. The California law was not preempted under the NBA because the law did not "significantly interfere" with Bank of America's exercise of its banking powers. The court rejected the contrary position of the Office of the Comptroller of the Currency ("OCC"), holding that the OCC's position was entitled to little, if any, weight.

Lusnak v. Bank of America: Preemption and the National Bank Act

Bank of America petitioned the Supreme Court for a writ of certiorari, presenting the following questions:

1. Whether the National Bank Act preempts state laws regulating national bank loan terms, such as California's law requiring payment of interest on mortgage loan escrow accounts.
2. Whether the Ninth Circuit erred in disregarding OCC regulations concerning the applicability of state real estate lending laws to national banks.

Petition for Writ of Cert. denied on November 19, 2018.

Thompson v. JPMorgan Chase Bank, N.A.: Default and Foreclosure Notices

The Thompsons obtained a loan for the purchase of their home by granting Washington Mutual Bank (which the FDIC later sold to Chase) a mortgage. Two standard mortgage provisions at issue:

Paragraph 19: Describes a right to reinstate after acceleration, including the conditions and time limitations related to that right. This provision only allowed a reinstatement payment 5 days before the sale of the property.

Paragraph 22: Prior to accelerating payment, the bank had to provide the Thompsons with "[accurate] notice" specifying:

> (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property.

Thompson v. JPMorgan Chase Bank, N.A.: Default and Foreclosure Notices

First Circuit Analysis

Massachusetts courts require mortgagees to comply strictly with two types of mortgage terms (effectively conditions to the power of sale):

1. Terms "directly concerned with the foreclosure sale authorized by the power of sale in the mortgage" and
2. Terms "prescribing actions the mortgagee must take in connection with the foreclosure sale– whether before or after the sale takes place."

Chase had to strictly comply with Paragraph 22 but the notice did not inform the mortgagors that they had to cure at least five days before the sale. It said, "you can still avoid foreclosure by paying the total past-due amount before a foreclosure sale takes place."

Reversed and remanded for further proceedings.

SCOTUS and the FAA

- ***New Prime, Inc. v. Oliveira***
  - **Holding**: A court should determine whether the FAA's § 1 exclusion for disputes involving the "contracts of employment" of certain transportation workers applies before ordering arbitration, and "contracts of employment" refers to any agreement to perform work, including for the driver in this case operating under an "independent contractor" agreement. (Gorsuch, unanimous; Kavanaugh not participating)
- ***Henry Schein, Inc. v. Archer & White Sales, Inc.***
  - **Holding**: The "wholly groundless" exception to the general rule that courts must enforce contracts that delegate threshold arbitrability questions to an arbitrator rather than a court, is inconsistent with the FAA and Supreme Court precedent. (Kavanaugh, unanimous)
- ***Lamps Plus, Inc. v. Varela***
  - **Issue**: Whether the FAA forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.


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Questions?
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