2013 CASE LAW UPDATE

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Supreme Court Decisions

Marx v. General Revenue Corp.

- Fair Debt Collection Practices Act:
  - "On a finding by the court that an action under this section was **brought in bad faith and for the purpose of harassment,** the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs."
- Federal Rule of Civil Procedure 54(d)(1):
  - "Unless a federal statute . . . **provides otherwise,** costs—other than attorneys' fees—**should** be allowed to the prevailing party."
- Court may award costs pursuant to FRCP 54(d)(1) despite FDCPA

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Marx, cont'd

- Student loan debtor FDCPA action alleging unlawful debt collection practices dismissed; court awards costs to collection agency
- Use of "should" in FRCP 54(d)(1) provides courts with discretion to decide whether to award costs
- A federal statute does not "provides otherwise" unless it limits the court's discretion
- Takeaway: a statute that allocates costs does not necessarily displace FRCP 54(d)(1)

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Gazelle v. SEC

- SEC enforcement action with civil penalties against two individuals alleged to have aided and abetted investment adviser fraud
- General federal limitations provision requires civil actions to be brought **"within five years from the date when the claim first accrued,"** 28 U.S.C. § 2462
- Because the government was not itself the victim of the fraud, the discovery rule could not be invoked

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Gazelle v. SEC

- SEC brought action in 2008, based on "market timing" fraud perpetrated from 1999-2002
- Discovery rule is based on the assumption that private individuals should not have to "live in a state of constant investigation"
- Contrast: central mission of SEC to "investigat[e] potential violations of the federal securities laws"
- Difficult to determine when SEC, composed of hundreds of individuals, should have discovered fraud

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Hough and *Buffington*

- Arbitration clause not unconscionable:
  - "[E]xcept as expressly provided[,] ... either party [can] elect to resolve by BINDING ARBITRATION any controversy, claim, ... dispute or disagreement"
  - "[N]o Claim [can] be joined with another dispute or lawsuit . . . or resolved on behalf of a class of similarly situated persons . . . ."

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Suits of National Importance

FDIC Trends & Cases

- When FDIC takes over a failed bank, it generally has three years to bring tort liability suits against the directors and officers
- Because the peak of the banking crisis was in 2009, there has been a corresponding peak in FDIC director and officer ("D&O") suits
- As of July 17, 2012:
  - FDIC has filed suits related to **68 institutions**
  - FDIC has filed suits against **576 individuals**

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FDIC: *FDIC v. VanDellen*

- Suit against former IndyMac officers
- Asserting breach of duty of care based on negligent approval of 23 homebuilder loans
- Officers received bonuses based on loan origination volumes
- Officers held personally liable
- Former CEO settled claims against him for $12 million, with $1 million to be paid from personal assets

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FDIC: *FDIC v. Belongia Shapiro & Franklin*

- Legal memoranda prepared by law firm representing two directors protected by attorney-client privilege
- FDIC could not administratively subpoena these documents even though it stands in the shoes of the bank
- Lawyers represented the directors, not the bank

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U.S. v. Bank of America

- National mortgage servicing settlement
  - Wells Fargo agreed to pay $5 billion and set up programs to assist homeowners at risk of foreclosure
  - "[T]he United States **fully and finally releases** [Wells Fargo] from any . . . civil or administrative remedies or penalties . . . it may seek to impose **under FIRREA [or] the False Claims Act** . . . where the **sole basis** for such claim or claims is that **[Wells Fargo] submitted to HUD–FHA . . . a false or fraudulent annual certification** that the mortgagee had 'conform[ed] to all HUD–FHA regulations necessary to maintain its HUD–FHA approval' . . . ."

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U.S. v. Bank of America, cont'd

- In other words, the release only covered claims based on "annual certifications" and false "individual loan certifications"
- The court found that "the Government reserved the right to bring claims against Wells Fargo based on illegal conduct including material violations of HUD–FHA requirements, but did not reserve the right to bring claims based only on false annual certifications."
- Wells Fargo (and the other banks subject to the settlement) remain liable for the underlying activity resulting in annual certifications and false individual loan certifications

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U.S. v. Bank of America (SDNY)

- First suit filed by DOJ arising out of mortgages sold to Fannie Mae and Freddie Mac
- Alleges B of A defrauded Fannie and Freddie through loan origination program, the "Hustle"
- The "Hustle" increased speed at which mortgages were originated and sold to Fannie and Freddie:
  - Allegedly "eliminated every significant checkpoint on loan quality"
  - Compensated employees based on volume, not quality, of loans
- Claims brought under FIRREA

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State Nat'l Bank of Big Spring

- Challenges constitutionality of recess appointment of Consumer Financial Protection Board Director Richard Cordray
- In January 2013, District of D.C. held that three NLRB appointments (made concurrently with Cordray's) were unconstitutional
- The NLRB plans to seek Supreme Court review of the District of D.C. decision, with the petition for cert due on April 25, 2013

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Federal Banking Laws

Preemption: *O'Donnell v. BofA*

- **In issue:** state claims of fraud and unfair competition
- National Bank Act ("NBA") **does preempt** state fraud and unfair competition claims
- "[The] fraud and unfair competition claims would force Bank of America to make additional disclosures, and are thus expressly preempted by the regulation that privileges national banks to make real estate loans 'without regard to state law limitations concerning" the terms of credit or required disclosures.'"

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Preemption: *Parks v. MBNA*

- **In issue:** State disclosure requirements for preprinted checks
- State requirements exceed disclosures under NBA, and therefore NBA **does preempt** state law
- NBA enacted to protect national banks from having to comply with varying local requirements:
  - Otherwise, banks would have to continually "monitor requirements as to the content, language, manner, and format of disclosures for each of the 50 states (and possibly municipalities as well), and continually adjust their convenience check offers to comply with the prescriptions of each local jurisdiction.

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Preemption: *Epps v. JP Morgan*

- **In issue:** Maryland's Credit Grantor Closed End Credit ("CLEC") law procedures governing notice of vehicle repossession
- NBA **does <u>not</u> preempt** CLEC
- CLEC only applies to repossession, and not to extensions of credit, and therefore NBA not applicable

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Preemption: *Silverstein v. ING Bank*

- **In issue:** Mass. law preventing lenders from requiring borrowers to purchase property insurance covering more than replacement cost
- Federal Homeowners Loan Act ("HOLA") **does preempt** Massachusetts law
- HOLA lists illustrative examples of state laws preempted by HOLA, including laws regulating:
  - "The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements." 12 C.F.R. 560.2(b)(2)

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RESPA: *Freeman v. Quicken Loans*

- Supreme Court rejected HUD interpretation of RESPA provision
- HUD argued that provision applied even where a single person caused the violation of the provision
- Court held that under a plain meaning interpretation of the provision, the provision was only violated when more than one person collected unearned fees

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"No person shall give and no person shall accept ***any portion, split, or percentage*** *of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed."*

12 U.S.C. § 2607

RESPA: *Medrano v. Flagstar*

- RESPA private right of action for failure to respond to a "qualified written request"
- What constitutes a "qualified written request"?
  1. reasonably identifies borrower's name & account
  2. states the borrower's reasons for believing the account is in error, with sufficient detail
  3. seeks information related to servicing of the loan
- A challenge to the **actual terms of the loan** fails the third prong

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RESPA: *First Am. v. Edwards*

- RESPA anti-kickback provision
- Defendant title insurance company purchased a minority interest in title agency in exchange for exclusive referral arrangement
- Even though the title insurance rate charged was approved by the Ohio Title Insurance Rating Bureau, meaning that the plaintiff was not damaged, RESPA still prohibited the arrangement
- The Supreme Court heard arguments but dismissed the case as improvidently granted

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TILA: Notice of Intent to Rescind

- Truth in Lending Act ("TILA") provides three-year window to rescind mortgage agreement if certain disclosures not made
- Circuit split regarding action that needs to be taken:
  - 3rd Circuit (*Sherzer v. Homestar*), 4th Circuit (*Gilbert v. Residential Funding*, 2012 WL 1548580) have held that **written notice is sufficient**
  - 9th Circuit (*McOmie-Gray v. Bank of America*) and 10th Circuit (*Rosenfield v. HSBC Bank, USA*) require purchaser **to file suit** within three-year window
  - 8th Circuit currently reviewing, *Sobieniak v. BAC Home Loans Servicing*, No. 12-1053

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TILA: Miscellaneous Decisions

- 10th Circuit held that a borrower does not need to state his/her ability to repay the mortgage in the initial complaint seeking rescission
- Southern District of Florida held that a creditor may be vicariously liable for a servicer's TILA violations

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Discrimination Suits

Wells Fargo consent decree

- Alleged practice of discrimination against qualified African-American and Hispanic borrowers
- Wells Fargo agreed to pay:
  - $125 million to wholesale borrowers who were allegedly steered into subprime mortgages or required to pay higher fees and rates
  - $50 million to assist borrowers with down payments in communities impacted by Wells Fargo practices
  - Individual borrowers, through an internal review process

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Michigan and Texas settlements

- Texas bank accused of routinely charging Hispanic borrowers higher interest rates on unsecured consumer loans
- Michigan bank alleged to have engaged in redlining practices by serving credit needs of white neighborhoods to a greater extent than predominantly African-American neighborhoods

ACLU class action

- Putative class action against Morgan Stanley
- Morgan Stanley allegedly implemented policies to support the market for subprime loans so that it could purchase, pool and securitize loans
- These policies allegedly disproportionately impacted minority borrowers in the Detroit area

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Other Notable Decisions

Security & Fraud: *Cummings*

- Does the Annunzio-Wylie Anti-Money Laundering Act provide absolute or qualified immunity to individuals who submit suspicious activity reports?
- Presently a circuit split on this question, which the Supreme Court declined to resolve
- In *Cummings*, bank president claimed that suspicious activity report submitted by petitioners were not submitted in good faith
- Petitioners denied immunity

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Security & Fraud: *HSBC*

- HSBC agreed to pay $1.256 billion to settle alleged criminal violation of the Bank Secrecy Act, International Emergency Economic Powers Act, and Trading with the Enemy Act
- HSBC allegedly:
  - Failed to maintain anti-money laundering procedures
  - Failed to conduct necessary due diligence of foreign account holders
  - Conducted transactions with countries subject to sanctions

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Security & Fraud: *Patco Constr.*

- Bank could be held liable for losses resulting from reach of bank's cyber security
- Bank was subject to a cyber attack, resulting in unauthorized withdrawals from client accounts
- Bank changed security procedures so that practically any transaction required security challenge questions, which greatly increased likelihood of security breach
  - These procedures not "commercially reasonable"

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Security & Fraud: *Chavez*

- May a bank be held liable for breach in security measures where consumer elected to use the security measure in question?
- Yes. The 11th Circuit held that if the security measure is not commercially reasonable, even if the consumer chose that security measure, the bank is still liable for resulting breaches.
- Court held that written authorization of in-person wire transfer, when the only security measure employed, was commercially unreasonable

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Security & Fraud: *Boggio*

- Fair Credit Reporting Act ("FRCA") permits private cause of action when bank fails to adequately investigate consumer reporting agency notice of disputed car loan
- Bank improperly required either a police report or fraud affidavit to initiate investigation
- FRCA does not require bank to obtain independent confirmation of reporting agency's notices of possible fraud

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Security & Fraud: *Drew v. Equifax*

- FRCA permitted private cause of action where bank allegedly reported account as lost or stolen, but failed to list consumer's address and instead maintained the address of the individual who fraudulently opened the account
- Court also permitted the plaintiff to maintain an emotional distress claim

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Overdraft Fees: class action

- Nationwide class action certified based on allegedly illegal overdraft practices, asserting:
  - breach of contract, breach of duty of good faith and fair dealing, unconscionability, unjust enrichment, violations of state consumer protection statutes
- Bank of America allegedly reordered daily debit card transactions from highest to lowest dollar amount so as to incur highest possible amount of overdraft fees
- Settled in November 2012

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Overdraft Fees: *Gutierrez*

- Wells Fargo also accused of reordering daily debit card transactions from highest to lowest dollar amount to incur highest possible amount of overdraft fees
- 9th Circuit held that this practice implicated federal, not state, law, but upheld state affirmative misrepresentation claims

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Notice: *Schnabel* & *Prater*

- Electronic notice of arbitration clause provided **after** plaintiffs enrolled in discount club was "temporally and spatially decoupled from the plaintiffs' enrollment" and therefore ineffective
  Schnabel v. Trilegiant, 697 F.3d 110 (2d Cir. 2012)
- Notice of sheriff's sale posted only on the sheriff's website constitutes a due process violation
  PHH Mortg. Corp. v. Prater, 975 N.E.2d 1008 (Ohio 2012)

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Minnesota Cases of Note

Attorney General Settlements

- Sure Advance, LLC
  - Payday lender allegedly charging unlawful interest rates of up to 1,564%
  - Required to pay $760,000 and cease lending operations in Minnesota until complies with state laws
- Midland Funding, LLC
  - Company purchased debts from banks and credit card companies and allegedly undertook illegal robo-signing practices in collection lawsuits
  - Required to undertake processes to ensure affidavits sufficiently verified, pay State $500,000, and resolve outstanding consumer complaints

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8th Circuit: *Butler v. BofA*

- Dismissal of putative class action affirmed
- Foreclosure not valid simply because mortgage servicer only holds the mortgage and not the note
- Theory characterized as "flawed" and unsupported by Minnesota law

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8th Circuit: *Brisbin v. Aurora*

- Minnesota Credit Agreement Statute
  - A debtor may not "maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor."
- Oral promise to postpone foreclosure sale unenforceable because the promise constituted a forbearance agreement and therefore a credit agreement

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Brown v. Wells Fargo

- Under Electronic Funds Transfer Act, ATM fee notices must be "prominent and conspicuous"
- ATM fee notice on inside of a hooded ATM not "prominent and conspicuous" even though consumer conceded he knew he would be charged the fee and received electronic notification of the fee

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