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Litigation

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Justice Against Sponsors of Terrorism Act (JASTA) and Secondary Liability

The Anti-Terrorism Act ("ATA")
18 U.S.C. § 2331, et seq.

- A civil cause of action - 18 U.S.C. § 2333(a)

  Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees

  - For a US national (or his/her estate)
  - Injured "by reason of" an Act of International Terrorism
  - Treble damages and attorney's fees

The Anti-Terrorism Act ("ATA")

- ATA civil liability cases against:
  - ***Direct actors*** (*e.g.*, Hamas, Al Qaeda)
  - ***Donors and sponsors*** to direct actors (*e.g.,* charities, certain governments)
  - ***Service providers*** to direct actors, donors and/or sponsors (*e.g.,* banks, airlines, social media)

ATA – Successful Defenses

- Most jurisprudence has occurred at the MTD phase
- Successful ATA defenses have often focused on the remoteness of the Defendant's acts from the Plaintiff's injury
  - Lack of causation, *e.g.*, *Rothstein v. UBS,* 708 F.3d 82 (2d Cir. 2013)
  - Lack of knowledge, *e.g.*, *Al Jazeera,* 2011 WL 2314783 (S.D.N.Y)
  - Lack of secondary liability under the ATA, *e.g.*, *Rothstein*

ATA Trends – 2017 And Beyond – Venue Battles

- Varying Standards for ATA Causation
  - *Boim III,* 549 F.3d 685 (7th Cir. 2008)
  - *Rothstein,* 708 F.3d 82 (2d Cir. 2013)
- Examples of CA7 filings
  - *Shaffer v. Deutsche Bank AG* (S.D. Ill. 2016)
  - *Martinez v. Deutsche Bank AG* (S.D. Ill. 2016)
- Examples of CA2 filings
  - *McCarthy v. Kingdom of Saudi Arabia* (SDNY, 2016)
  - *Aguilar v. Kingdom of Saudi Arabia* (SDNY, 2016)

ATA Trends – 2017 And Beyond – Key Questions

- Testing the limits of "International Terrorism"?
  - Mexican drug cartels? (*Zapata v. HSBC Holdings plc*, S.D. Tex. 2016)
  - Columbian drug lords? (*Stansell v. FARC*, M.D. Fla. 2009)
- What is "Material Support"?
  - Technology platform? (*Twitter*, N.D. Cal 2016)
  - Media services? (*Al Jazeera*, S.D.N.Y. 2010)

JASTA – Justice Against Sensors of Terrorism Act

- JASTA was first introduced in Congress in 2009-2010
  - Enacted in 2016 over Obama veto
  - Buyer's remorse? Trump Administration?
- JASTA makes two changes to the law:
  - JASTA adds a new Foreign Sovereign Immunities Act ("FSIA") exception
  - JASTA contains less discussed provision that expands the ATA by adding secondary liability to the ATA in some instances

How JASTA Changes the ATA

- JASTA adds conspiracy/aiding and abetting claims to ATA
  - Only if international terrorism was committed, planned or authorized by designated Foreign Terrorist Organization ("FTO")
  - FTO provision is significant limit on secondary liability
- Because JASTA ***adds*** secondary liability, it supports the conclusion that Congress did not think that the pre-JASTA ATA allowed secondary liability

Scope of Secondary Liability under JASTA

- Conspiracy
  - Plaintiffs' lawyers have already taken a broad view
  - However, JASTA requires conspiracy *with* the FTO
  - Common law should require specific intent to advance the terrorist objective of the conspiracy

Scope of Secondary Liability under JASTA

- Aiding and abetting
  - "knowingly providing substantial assistance"
  - Abettor's action not illegal by itself, rather it is unlawful only if it supports primary actor's wrongdoing
  - Good argument that there must be actual knowledge that assistance is going to be used to accomplish terrorism
  - Causation
    - Substantial assistance has proximate cause component
    - Injury "by reason of" an act of international terrorism

Broad Trends in ATA/JASTA Litigation

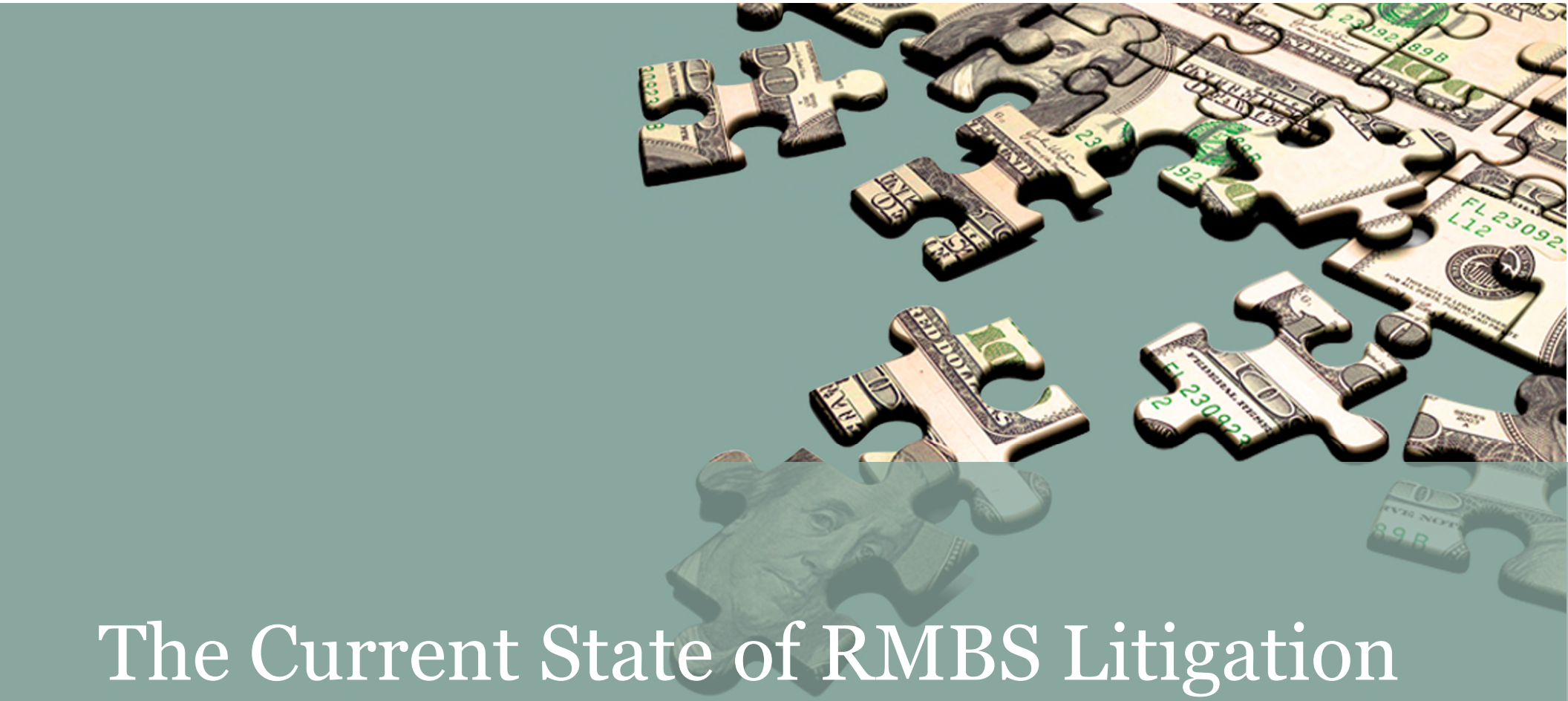
- Plaintiffs' lawyers are aggressive and creative
  - *Twitter* lawsuit
  - *Al Jazeera* lawsuit
- JASTA will exacerbate this trend
- Litigation regarding scope of JASTA

Broad Trends in ATA/JASTA Litigation

- Plaintiffs' lawyers like to follow the news
  - Capitalize on articles about businesses with terror links
  - Create sympathy
- Plaintiffs' lawyers like to follow enforcement actions
  - Banks may be precluded from denying certain facts
  - Road map for allegations

Mitigating ATA Risk – De-Risking

- Charities
- Informal money transmission businesses
- State Sponsors of Terrorism
- Trade finance transactions
- Politically Exposed Person (PEPs)
- Other customers, depending on business



The Current State of RMBS Litigation

Overview

I. Global Settlements – BofA, JPMorgan and Citigroup

II. Early Trustee Cases – *Policemens' Fund*

III. The *ACE* Decision

IV. Principal Case Theories

V. Recent Decisions

VI. Next Steps

Early Global Settlements

- BNYM/Bank of America
- JPMorgan
- Citigroup

The BNYM-BofA/CW Settlement

- The settlement agreement sought to resolve three trust claims:
  - (i) alleged breaches of representations and warranties;
  - (ii) alleged servicing breaches; and
  - (iii) alleged breaches of repurchase obligations in respect of document defects.
- Objections to BNYM-BofA/CM Settlement
  - Alleged conflicts of interest
  - Objections to the Article 77 procedure
  - Alleged inadequacy of the $8.5 billion payment
  - Objections by homeowners to servicing improvement
  - Some objectors sought the right to “opt out” their own claims or entire trusts

The BNYM-BofA/CW Settlement

- There were two principal components to the Settlement
  - Settlement payment of $8.5 billion
  - Servicing improvements and remedies
- In January 2014, Justice Kapnick issued a 53-page opinion and order approving the Company's conduct as trustee in all respects except one.
- On March 5, 2015, the First Department of the New York Appellate Division ordered that Justice Kapnick's judgment "should be modified, on the law and the facts, to approve the settlement in all respects."
- Final judgment entered in April 2015.

The JPMorgan Settlement

- In November 2013, 21 large institutional investors (including many of the same institutional investors who were involved in the BNYM-BofA/CW settlement) announced that they had entered into a settlement agreement with JPMorgan to settle JPMorgan's mortgage loan repurchase and servicing liability in connection with 330 RMBS trusts issued by JPMorgan, Chase, or Bear Stearns.
- The proposed settlement would require JPMorgan to pay $4.5 billion to the trusts and implement certain servicing enhancements in exchange for releases.

The JPMorgan Settlement

- The proposed settlement was presented to the trustees for the applicable trusts (US Bank, Deutsche Bank, Wells Fargo, HSBC, BNYM, Law Debenture, and Wilmington Trust) to evaluate and to decide whether to accept or reject on behalf of the trusts.
- The Trustees filed an Article 77 proceeding seeking judicial approval of the settlement in August 2014. All but one of the original objectors withdrew their objections prior to the conclusion of a three-day hearing in January 2016. Justice Friedman approved the settlement in all respects in a Final Order and Judgment issued on August 12, 2016. The judgment was not appealed.

The Citigroup Settlement

- On April 7, 2014, 18 institutional investors (including many of the same institutional investors who were involved in the BNYM-BofA/CW settlement) publicly announced that they had reached a $1.125 billion agreement with Citigroup to settle mortgage loan repurchase claims held by 68 RMBS trusts.
- Under the settlement agreement, Citigroup has agreed to pay $1.125 billion into the 68 trusts in exchange for comprehensive releases of repurchase liability.

The Citigroup Settlement

- Citigroup and the institutional investors presented the settlement agreement to the four trustees associated with the deals: US Bank, Deutsche Bank, Wells Fargo, and HSBC. Law Debenture has since replaced Wells Fargo as successor trustee on certain trusts.
- The Trustees accepted the settlement agreement and commenced an Article 77 proceeding for judicial approval of the settlement. In January 2015, the Trustees filed an Amended Petition with the Court.
- There were no objectors to this settlement, which has been completed.

Early Trustee Cases: *Policemens' Fund v. BNY Mellon*

- Trust Indenture Act
  - TIA does not apply to RMBS "certificates"
  - Certificates are interests in two or more underlying securities
  - Did not decide whether certificates are debt
- "Class standing"
  - Read *NECA v. Goldman Sachs* narrowly
  - Class standing requires that proof of representative claim would prove other claims
  - Trustee claims are "loan by loan, trust by trust"
- Case voluntarily dismissed in August 2016

The turning point: *ACE Securities Corp. v. DB Structured Products*

- In June 2015, the New York Court of Appeals affirmed a prior ruling by the Appellate Division, First Department, and held that New York's six-year SoL for alleged breaches of representations and warranties accrues when the representations are made (i.e., at closing) and not when a sponsor refuses to cure or repurchase the underlying mortgages.
- The Court of Appeals rejected the notion that DB's repurchase obligation was a continuing promise of the loans' future performance—separate from the Representations made in the agreements—that could give rise to an independent cause of action. To the contrary, the Court found the repurchase obligation to be a "remedy" that was necessarily "dependent on" and "derivative of" the Representations, which "did not survive the closing date and were breached, if at all, on that date."

ACE Securities Corp. v. DB Structured Products

- Practical Implications of ACE decision:
  - New contractual put-back claims governed by New York law in connection with RMBS sold more than six years ago are time barred.
  - Opened the floodgates to litigation against Trustees brought by large institutional investors like Blackrock and Royal Park.
  - In addition, there have been a flurry of recent cases against Trustees because several have survived past the motion to dismiss stage.

Primary Case Themes

- Limited versus expansive Trustee duties
- Explicit versus implied duties
- Event of Default versus no Event of Default and the resulting consequences
- Investor expectations versus Trustee compensation

Recent NY Decisions

- *Commerce Bank v. The Bank of N.Y. Mellon*, 141 A.D.3d 413, 414 (N.Y. App. Div. 2016)
  - What does it mean and how will it be applied?
- *STS Partners Fund, LP v. Deutsche Bank Secs., Inc.*, 149 A.D. 3d 667 (N.Y. App. Div. 1st Dep't 2017)
  - '[N]o implied covenants or obligations shall be read into this Agreement against the Trustee.'

Next Steps

- RMBS 3.0: The Deal Agent
- Changes to PSA provisions

Fair Lending & Class Action Litigation

Fair Housing Act Cases Brought By Municipalities

- Plaintiffs
  - Birmingham, Baltimore, & Memphis
  - Cobb, DeKalb, & Fulton County, Georgia
  - City of Los Angeles
  - City of Miami & Miami Gardens
  - Cook County, Illinois
  - People of California/City of Los Angeles
  - Philadelphia*

Fair Housing Act Cases Brought By Municipalities

- Defendants
  - Bank of America
  - Wells Fargo
  - HSBC
  - JP Morgan Chase
  - Citigroup Inc.

Fair Housing Act Cases Brought By Municipalities

- Allegations
  - Predatory and discriminatory residential mortgage lending and servicing activities, including reverse redlining, alleged to have caused (or will cause) mortgage loan delinquencies, defaults, foreclosures and/or home vacancies in communities and neighborhoods.
  - Disparate impact on minority borrowers, intentional discrimination, predatory loan terms
  - Purported damages of loss tax revenue and need to provide increased municipal services
  - Unjust enrichment

Fair Housing Act

- Purported violations of Fair Housing Act, 42 U.S.C. § 3601 *et seq.*
- Section 3604(a)-(c) of FHA:
  - It shall be unlawful to: "make unavailable . . . a dwelling to any person because of race [or] color. . . to discriminate against any person in the terms, conditions, or privileges of sale . . . of a dwelling, or in the provision of services or facilities in connection therewith, because of race [or] color . . . or to make . . . or publish . . . any . . . statement . . . with respect to the sale . . . of a dwelling that indicates any preference, limitation, or discrimination based on race [or] color."
- Section 3605 of the FHA:
  - "[i]t shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate … in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin."

Fair Housing Act Cases Brought By Municipalities

- Key Areas Challenged by Complaints/Areas Ripe for Discovery:
  - Compensation policies for loan officers
  - Marketing and product placement, particularly regional
  - Loan pricing and origination data
  - Monitoring and risk management issues

Fair Housing Act Cases Brought By Municipalities

- Challenges to complaints:
  - Article III Standing & Proximate Cause
    - Has municipality adequately alleged Art. III standing and/or that its harm—lost property-tax revenue and increased municipal services—was caused by bank's allegedly discriminatory lending practices?
  - Statutory Standing
    - Did Congress intend to allow the municipality to recover for its alleged harm under the FHA, *i.e.*, Zone of Interests Test?
  - Statute of limitations
    - 2 year limitations period under FHA but municipalities argue continuing violation doctrine
  - Unjust enrichment

Fair Housing Act Cases Brought By Municipalities

- Mixed results on motions to dismiss across the jurisdictions
  - Los Angeles: found standing, causation, no statute of limitations problem
  - Miami: found no statutory standing (claims fell outside "zone of interests"), no proximate causation, statute of limitations barred claims, and failure to plead unjust enrichment
- Some cases moved to summary judgment, some to appeal
  - Los Angeles: Court granted motions for summary judgment, affirmed at 9th Circuit
  - Miami-related cases: appeal to 11th Circuit, US Supreme Court

Fair Housing Act Cases Brought By Los Angeles

- Summary judgment granted in cases brought by City of Los Angeles
  - LA tried to allege discriminatory "high-cost" and FHA loans within the limitations period; evidence did not support allegation.
  - Insufficiently significant disparity to maintain a disparate-impact claim.
  - Alternatively, LA failed to identify a policy that caused the asserted disparity.
- 9th Circuit affirmed (May 26, 2017)
  - Focused on the policies that LA challenged: (1) compensation schemes that allegedly "provided incentives for their loan officers to issue higher-amount loans," (2) marketing materials that supposedly "targeted low-income borrowers," and (3) a purported failure "to monitor their loans for disparities."
  - LA failed to show that the first two policies caused the alleged racial disparities, and that the third "policy" is not a policy at all.
  - Affirmed on unjust enrichment claim because LA's alleged lost tax revenue and increased municipal spending did not benefit the banks.

Fair Housing Act Cases Brought By Miami

- In Miami, cases moved to appeal in the 11th Circuit.
  - Affirmed dismissal as to unjust enrichment
  - Reversed FHA dismissal
    - Held Miami's claim fell within the FHA's zone of interests, relying on three older Supreme Court cases (*Gladstone*, *Havens*, and *Trafficante*) suggesting that anyone with Article III standing has statutory standing to sue for FHA violations.
    - Ruled that Miami adequately pled proximate cause under a "foreseeability" standard.
    - Held that Miami may amend its complaint in an attempt to make it timely under the continuing-violations doctrine.

Fair Housing Act Cases Brought By Miami

- Supreme Court Considered 11th Circuit's Rulings – Decision May 1, 2017 (*Bank of America Corp. et al. v. City of Miami*)
  - Affirmed the Eleventh Circuit's zone-of-interests ruling by a 5-3 vote.
  - Vacated the decision, however, because the Eleventh Circuit applied an incorrect proximate-cause standard.
- Zone of Interest/Statutory Standing:
  - Statutory standing exists if plaintiff's claims are "'arguably within the zone of interests' that the FHA protects."
  - The FHA authorizes "aggrieved" persons to sue. 42 U.S.C. § 3613.
  - The Court found that Miami is "aggrieved" within the meaning of the statute – Congressional intent to define "aggrieved" as broadly as permitted by Art. III.

Fair Housing Act Cases Brought By Miami

- Proximate Cause:
  - The Eleventh Circuit applied an overly lax "foreseeability" standard in finding proximate cause. "[F]oreseeability alone does not ensure the close connection that proximate cause requires." Foreseeability is too low of a bar.
  - "[P]roximate cause under the FHA requires 'some direct relation between the injury asserted and the injuri-ous conduct alleged.'"
  - "'The general tendency' in these cases, 'in regard to damages at least, is not to go beyond the first step.'" "What falls within that 'first step' depends in part on the 'nature of the statutory cause of action,' and an assessment 'of what is administratively possible and convenient.'" *Id.* (citation omitted)
  - Remanded: "[t]he lower courts should define, in the first instance," how the new proximate-cause "standard applies to the City's claims."

Fair Housing Act Cases Brought By Miami

- Effect of Supreme Court Decision – Proximate Cause is a Big Hurdle:
  - Dissent: "[T]he majority opinion leaves little doubt that neither Miami nor any similarly situated plaintiff can satisfy the rigorous standard for proximate cause that the Court adopts."
  - The first step in the causation chain is the origination of the allegedly discriminatory loan.
  - There are several other steps before the municipality is affected: the borrower defaults due to the allegedly discriminatory loan terms, the servicer forecloses, the foreclosure leads to a vacant property, and the vacant property causes decreased property values.
  - It is hard to see how municipality can plead a direct relationship between origination of a loan and the reduction of its property-tax revenue/increase in its expenses.

Fair Housing Act Cases Brought By Municipalities

- What have groups said about Supreme Court opinion?
  - ACLU: “With this decision, the Supreme Court has acknowledged the crucial role of municipal governments in protecting residents’ rights. In housing and lending as in other areas, cities can and should serve as a bulwark against discrimination.” Dennis Parker, director of ACLU Racial Justice Program
  - Lawyers’ Committee: “Today’s Supreme Court decision reinforces the critical role that states and cities must play in holding banks and other actors accountable for actions that continue to harm communities, particularly minority communities that have bone the brunt of the crisis.” Kristen Clarke
- At least one new lawsuit filed following the ruling: *City of Philadelphia*

Class Actions – Art. III Standing

- Article III of the Constitution defines jurisdiction in federal courts
- Extends jurisdiction only to "cases" and "controversies"
- Plaintiff must have standing to sue – 3 elements:
  - Injury in Fact
  - Fairly traceable to challenged conduct by defendant
  - Likely to be redressed by a favorable decision
- *Compare*: Statutory standing (*e.g.*, scope of persons protected by a statute) and contractual standing (*e.g.*, parties to a contract and intended third-party beneficiaries)

Spokeo, Inc. v. Robins (136 Sup. Ct. 1540 (2016))

- Fair Credit Reporting Act (FCRA)
  - Requires "reasonable procedures to assure maximum accuracy of" consumer reports
  - Authorizes lawsuit for either actual or statutory damages
- Spokeo allegedly created a consumer report that contained inaccurate information about Robins (*e.g.*, incorrect marital status, age, education)
- Robins brought a class action under FCRA against Spokeo as a "consumer reporting agency" seeking statutory damages ($100-$1,000 per violation)
  - District court dismissed for lack of standing; Ninth Circuit reversed

Spokeo, Inc. v. Robins (136 Sup. Ct. 1540 (2016))

- At issue was the "concrete" element of the "injury in fact" prong
- The Supreme Court clarified that a "concrete" injury can be either "tangible" or "intangible."
- However, a plaintiff does **not** "automatically satisf[y] the injury-in-fact requirement whenever a statute grants" the right to bring a lawsuit
- A "**bare procedural violation**, divorced from any concrete harm" will not suffice. The Supreme Court's examples in the FCRA context:
  - Failure to provide a required notice to user of consumer information may not create a concrete harm if the consumer information is "entirely accurate"
  - "[A]n incorrect zip code" would not create a concrete harm
- The Supreme Court remanded to the Ninth Circuit

Class Actions: After *Spokeo*

- After *Spokeo*, key question is whether a statutory violation creates a real risk of harm to a concrete interest that the statute was designed to protect.
- If a statutory violation creates injury or a real risk of injury to a concrete interest—such as the interest in receiving required information—courts are likely to find standing under *Spokeo.*
  - *Church*, *Syed, Horizon Healthcare*, *Strubel* (Claims 1 & 2)
- If a statutory violation, standing alone, does not create a risk of harm or injury to a protected interest, courts are less likely to find standing under *Spokeo*.
  - *Hancock, Meyers, Nicklaw, Lee, Braitberg, Gubala, Strubel* (Claims 3 & 4)

Class Actions – Appellate Jurisdiction

- *Microsoft Corp. v. Baker*, No. 15-457, New Decision by the US Supreme Court (6/12/17)
  - On motion for class certification, Rule 23(f) allows losing party to ask the court of appeals for permission to appeal immediately.
  - 9th Circuit exception: allowed dismissal of individual claims by plaintiff to appeal from self-generated judgment.
  - June 12, 2017: US Supreme Court: this "voluntary dismissal" cannot create appellate jurisdiction because dismissal does not result in final judgment – which is what 28 USC § 1291 requires for an appeal as of right.
  - "Plaintiffs in putative class actions cannot transform a tentative interlocutory order…into a final judgment within the meaning of § 1291 simply by dismissing their claims with prejudice – subject, no less, to the right to 'revive' those claims if the denial of class certification is reversed on appeal."

Fair Debt Collection Practices Act

- *Henson v. Santander Consumer USA Inc.*, No. 16-349, New Decision by US Supreme Court (6/12/17)
  - The Fair Debt Collections Practices Act governs the conduct of "debt collectors," a term that includes any person who "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."
  - Resolving a division among the lower courts, the Supreme Court ruled that the FDCPA covers only those persons who collect debts owed to third parties.
  - Individuals or entities who *purchase* another's debt and then try to collect are not subject to the FDCPA.

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