The Supreme Court 2017: What’s at Stake for Older Adults in America

A Preview of the 2017 Term
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Introduction

Following the inauguration of President Donald Trump, a big question for Supreme Court watchers was answered with the nomination and confirmation of Justice Neil Gorsuch. The question looming now is how Justice Gorsuch’s judicial philosophy will develop, particularly as compared to his predecessor, Justice Antonin Scalia.

The pace of grants for this coming term is about the same as last year's — meaning the court will probably hear and decide between 70 and 80 cases. In light of the vacancy on the bench during the last term, the court studiously avoided granting certiorari on difficult or groundbreaking cases, as they were likely to result in a split vote. It appears that such issues may now be addressed.

At the time of this preview’s publication, the court has granted certiorari on only five cases (three of which are consolidated) that AARP Foundation’s attorneys believe may, directly or indirectly, affect people age 50 and older. There are, however, several pending petitions that will have a significant impact if granted. Gazing Into the Crystal Ball discusses these pending petitions and attempts to predict which legal issues affecting the lives of older adults may soon come before the court.

Given the ever-increasing number of adults over the age of 50, impending Supreme Court decisions are likely to affect a growing percentage of the American population. Participation in these cases is an integral part of AARP Foundation’s advocacy. AARP Foundation will continue to advocate on behalf of older adults — not only in the Supreme Court, but in courts across the country.
CASES — 2017 TERM

Maintaining Older Workers’ Ability To Challenge Unlawful Employer Practices

_National Labor Relations Board v. Murphy Oil USA, Inc., _
No. 16-307
808 F.3d 1013 (5th Cir. 2015),
cert. granted, 85 U.S.L.W. 3344

_Epic Systems Corp. v. Lewis, _
No. 16-285
823 F.3d 1147 (7th Cir. 2016),
cert. granted, 85 U.S.L.W. 3343

_Ernst & Young, LLP v. Morris, _
No. 16-300
834 F.3d 975 (9th Cir. 2016),
cert. granted, 85 U.S.L.W. 3344

Oral argument scheduled for October 2, 2017.

**Issue:** Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. § 158(a)(1), because they limit the employees’ right under the National Labor Relations Act to engage in “concerted activities” in pursuit of their “mutual aid or protection,” 29 U.S.C. § 157, and are, therefore, unenforceable under the savings clause of the Federal Arbitration Act, 9 U.S.C. § 2?

These consolidated cases concern a section in the National Labor Relations Act (NLRA) providing that all employees have the right, among other things, “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Interfering with this right is an unlawful “unfair labor practice.” These cases address whether a contract that waives employees’ right to bring a case — any case — together, rather than individually, is an unlawful interference with the right to protected concerted activity. This issue has arisen in the contexts of many different types of employment cases where employees want to proceed as a group rather than individually.

These cases all turn on a National Labor Relations Board (Board) decision that an employer violates the NLRA by requiring employees to sign an arbitration agreement waiving their right to pursue class and collective claims in all forums. _D.R. Horton, Inc., _357 N.L.R.B. 2277 (2012). In _D.R. Horton_, the Board concluded that such agreements restrict employees’ right to engage in protected concerted activity. In _Murphy Oil_, the Fifth Circuit rejected the Board’s decision, finding that employees may waive their right to
proceed as a group and that any contrary conclusion would violate the Federal Arbitration Act (FAA) by invalidating an arbitration clause. The Seventh and Ninth Circuits in *Lewis* and *Morris* followed the Board’s decision, finding that employees’ right to proceed as a group is a critical substantive protection guaranteed by the NLRA.

*Lewis* and *Morris* emphasize that employees’ right to bring cases together is at the heart of the NLRA’s protections: while employees are free to choose to pursue their rights at arbitration rather than in court, employers cannot force them to proceed on an individual basis because that compulsion upsets the employer/employee balance that the NLRA carefully struck. Defendants argue that because arbitration traditionally operates on an individual basis, class and collective actions are inherently incompatible with an arbitral forum, so allowing employees to proceed as a group effectively eliminates arbitration as an option — and, therefore, violates the FAA. While the NLRB continues to enforce its *D.R. Horton* decision forbidding contract clauses that require employees to proceed individually, the Solicitor General has filed an amicus brief on the merits supporting the employers’ contrary view.

**WHAT’S AT STAKE**

This issue is crucial to maintaining older workers’ ability to join together to challenge unlawful employer practices. The decision will affect employment cases of all kinds, including civil rights claims such as those alleging age and disability-based employment discrimination. Additionally, the Supreme Court’s decision has the potential to reach far beyond class and collective actions to encompass any multi-plaintiff actions. These group actions are essential to remedy systemic patterns of discrimination and to make any legal challenges economically and practically feasible for employees that cannot proceed on their own. For many employees, the ability to bring their cases together is not just the most effective way to combat unlawful employment practices — it is the only way.

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Protecting Older Investors From Fraud

Cyan, Inc. v. Beaver County Employees Retirement Fund,
No. 15-1439
cert. granted, 85 U.S.L.W 3602
(U.S. June 27, 2017).
Oral argument not yet scheduled.

Issue: Whether state courts possess concurrent jurisdiction over claims brought by shareholders under the Securities Act of 1933?

The Securities Act of 1933 (‘33 Act) created a variety of obligations for publicly traded organizations to be open and transparent about their businesses so that potential shareholders could make informed decisions about their investments. Specifically, it created causes of action for false statements made in connection with the public offering of stocks. Prior to the 1990s, it allowed for concurrent federal and state jurisdiction for plaintiffs. In other words, shareholders were allowed to sue organizations under the ‘33 Act in either state or federal court.

With an eye towards class action reform, Congress passed two bills in the 1990s — the Private Securities Litigation Reform Act of 1995 (Reform Act) and the Securities Litigation Uniform Standards Act of 1998 (SLUSA) — in an attempt to standardize securities litigation across the country.

Plaintiffs-Respondents are a group of shareholders in Cyan, Inc., who invested in the firm prior to its initial public offering. They filed suit after the firm’s stock produced “weaker-than-expected” results. Alleging several violations of the ‘33 Act, Plaintiffs-Respondents sued in a California state court. Defendants-Petitioners moved to dismiss the pleadings, arguing that the State court did not have jurisdiction over ‘33 Act claims following the enactment of SLUSA. The trial judge denied the motion to dismiss in an unpublished decision, holding that it was bound by the holding in Luther v. Countrywide Fin. Corp., 125 Cal. Rptr. 3d 716, 720 (Cal. Ct. App. 2011), the only appellate-level court decision that has ruled on the issue. In Luther, a California state court held that SLUSA precluded only state court securities class actions to enforce the statutory or common law of any state.

According to Defendants-Petitioners in this case, Congress intended to limit plaintiffs’ ability to sue in state court under the ‘33 Act. Plaintiffs-Respondents retort that Congress only limited the ability to bring state law actions related to securities legislation, not to eliminate concurrent state court jurisdiction for federal claims to enforce the ‘33 Act. The case’s journey to the Supreme Court has been unusual because neither the California Court of Appeals nor the California Supreme Court agreed to review the trial court’s unpublished decision. It is rare for the Supreme Court to grant certiorari on an issue that has only been ruled on at the district court level. Furthermore, there is no apparent federal circuit court split interpreting the jurisdiction of state courts to hear securities class action claims pursuant to SLUSA; instead, Luther is the only appellate decision. Nonetheless,
Defendants-Petitioners argued — and the court appears to have been persuaded — that there is enough confusion over the issue at the trial court level to warrant the court’s review on whether SLUSA prohibits a state court from exercising jurisdiction over lawsuits that only allege violations of the ’33 Act.

In its brief urging the court to grant certiorari, the government agreed with the lower court that SLUSA does not strip state courts of jurisdiction over this lawsuit. Moreover, it noted that, in many class actions, the defendants could still proceed in federal court due to another SLUSA provision allowing defendants to transfer certain class actions to federal courts.

WHAT’S AT STAKE

This case is crucial to AARP and AARP Foundation’s efforts to protect older investors from investment fraud. Market transparency and fairness is increasingly important in light of the decline in defined benefit pension plans and the need for workers to invest in 401(k)s and similarly traded public investment accounts for their retirement. To ensure effective enforcement of laws guaranteeing transparency and investor protection, those investors must have access to courts to stop, deter, and seek remedies for corporate activities that mislead them. For this reason, it is crucial that the Supreme Court uphold the ruling in Luther by holding that SLUSA does not prohibit securities class actions from being filed in state court. This would provide an important procedural mechanism by which older investors can protect their retirement funds from fraudulent corporate behavior.

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Promoting Prescription Drug Affordability

*Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, No.16-712
No. IRP2014-00216, 2015 Pat. App. LEXIS 5328 (P.T.A.B. May 1, 2015),
aff’d, 639 F. App’x 639 (Fed. Cir. 2016),
cert. granted, 85 U.S.L.W. 3578
(U.S. June 12, 2017).
Oral argument not yet scheduled.

**Issue:** Whether inter partes review, an adversarial process used by the U.S. Patent and Trademark Office (PTO) to analyze the validity of existing patents, violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury?

In 2011, Congress enacted the Leahy-Smith America Invents Act, which established a patent agency procedure called “inter partes review” (IPR). IPR allows third parties to challenge patents that they believe should not have been granted in the first place. The purpose of IPR is to improve the patent system by creating an expedited, less expensive alternative to litigation. Increasingly, IPR is being used to challenge blockbuster biopharmaceutical medications, commonly referred to as biologics. Low-quality patents (those that are unclear or overly broad) can have a direct impact on the cost of pharmaceutical drugs, since patent monopolies eliminate competition to the detriment of older adults and the general public.

Oil States Energy Services, LLC (Oil States) owns the patent for a tool and related method for protecting oil and gas wellheads during fracturing. In 2012, Oil States filed a patent infringement suit against Greene’s Energy Grp., LLC (Greene) in the United States District Court for the Eastern District of Texas alleging that Greene was manufacturing and selling similar tools that infringed its patent. Respondent Greene filed a petition with the Patent Appeals Board seeking IPR of two of the claims in Oil States’ patent. The Board determined that the two claims in the original patent were improperly granted and denied Oil States’ motion to amend the claims. The Federal Circuit affirmed the Board’s decision without an opinion or explanation of its decision.

Oil States argues that patents create property rights protected by the Constitution, and, consequently, once a patent has been granted, it cannot be taken away without affording the patent owner a jury trial as guaranteed by the Seventh Amendment. Citing *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), and other cases, Oil States contends that the Seventh Amendment’s guarantee of a jury trial extends to actions to enforce statutory property rights. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989) (“the Seventh Amendment also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century”). Further, Oil States argues that patents are a private property right, so disputes regarding their validity should be afforded the benefit of an Article III court.
In contrast, both Greene and the PTO argue that patents are not private property rights, but, quintessential public rights that can be determined by an administrative agency. Critically, the government argues, citing prior Supreme Court precedent, “what makes a right ‘public’ rather than private is that the right is integrally related to particular Federal Government action.” *Stern v. Marshall*, 564 U.S. 462, 490-91 (2011). Unlike common law rights, patent rights exist only by virtue of statute. For decades, Congress has provided various administrative mechanisms for third parties to ask the PTO to reconsider the patentability of the claims in an issued patent. The government argues that where Congress has acted “for a valid legislative purpose pursuant to its constitutional powers under Article I,” it may delegate even a “seemingly ‘private’ right” to an administrative tribunal if the right “is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution.” *Granfinanciera*, 492 U.S. at 54. Patents fall into this category because they are issued and examined by the PTO, and IPR is the agency’s administrative mechanism and regulatory scheme for evaluating whether the PTO improperly issued the patent. Previously, the Federal Circuit found IPR to be constitutional. *MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F.3d 1284, 1290-93 (Fed. Cir. 2015), cert. denied, 85 U.S.L.W. 3165 (U.S. Oct. 11, 2016). The Supreme Court’s decision will reevaluate that holding.

**WHAT’S AT STAKE**

The Leahy-Smith America Invents Act was passed to enhance patent quality and address the negative implications that high patent litigation costs have on the climate for investment and innovation. The cost of litigating patent claims that result from poor patent quality is exceedingly high to both businesses and consumers. One study found that generic drug companies spent an average of $10 million to challenge a brand’s patent when litigated in court. IPR reduces this cost, which in turn benefits consumers and businesses alike. The relative simplicity and speed of IPR, compared to litigation in court, can result in cheaper drugs entering the market sooner, particularly benefitting older consumers who need life-saving pharmaceuticals.

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Protecting Voting Rights and Combating Electoral Fraud

Husted v. A. Philip Randolph Institute. No. 16-980
838 F.3d 699 (6th Cir. 2016),
cert. granted, 85 U.S.L.W. 3562
Oral argument not yet scheduled.

Issue: Whether § 8 of the National Voter Registration Act of 1993 (52 U.S.C. § 20507) permits Ohio’s Supplemental Process for voter registration list maintenance, which triggers a notice to voters seeking confirmation of their registration to vote, based on the voter’s failure to vote in a single federal election?

The National Voter Registration Act of 1993 (NVRA) is intended to accomplish two related goals: “to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office” and “to ensure that accurate and current voter registration rolls are maintained.” 52 U.S.C. §§ 20501(b)(1), (4).

In pursuit of these twin objectives, the NVRA demands that states — the entities chiefly responsible for conducting federal elections — “conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of . . . the death of the resident or . . . a change in the residence of the registrant.” 52 U.S.C. § 20501(a)(4)(A), (B). The NVRA also declares that such a program must be “uniform” and “nondiscriminatory” and, with some exceptions — the nature of which are at the core of this case — “shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person’s failure to vote . . .” (emphasis supplied). Id. § 20507(b)(1), (2). In enacting the NVRA, Congress explained that “purging voters for infrequent voting ‘has a disparate impact on minority communities’ and particularly burdens ‘poor and illiterate voters’” who may be forced “to needlessly re-register.” See S. Rep. No. 103-6, at 18 (1993).

The parties acknowledge that once a state official inquires into the validity of a registered voter’s current residence, that official may send correspondence to the voter’s address and may strike the voter from the rolls if the voter either confirms a change of address or fails to respond and then also does not cast a ballot in the next two federal election cycles. Id. § 20507(b)(2)(A), (B). What the parties do not agree on, however, is what is enough to trigger a state’s entitlement to initiate a voter registration list maintenance program, i.e., to contact voters about the validity of their residence. There is no question of the legitimacy of Ohio’s reliance on the U.S Postal Service (USPS) “National Change of Address” (NCOA) process, whereby persons volunteer new residence information to the USPS. However, Ohio says it is also enough that a voter failed to vote in a federal election. In their lawsuit, Larry Harmon, a 60-year-old Navy veteran and long-time resident at the
same address in Portage County, Ohio, along with two organizations devoted, respectively, to the rights of African-American workers and homeless persons in Ohio, contend that the State must receive reliable evidence of a move before it may trigger a process leading to removal of registered non-voters from the rolls.

Harmon voted in his home county in the 2008 presidential election. Then, like many voters, he decided not to vote in the 2010 mid-term elections. This triggered Ohio’s “Supplemental Process,” pursuant to Ohio Directive 2011-15, which instructed county election officials to send notices to voters like Harmon who last voted in 2008. Harmon swears he never received the 2011 notice requesting verification of his voter registration. Harmon felt “disillusioned” with the presidential candidates in 2012 and stayed home, then also took a pass on the mid-term elections in 2014. In 2015, however, allegedly “motivated by issues that appeared on the ballot, [he] went to the polls on election day only to be told that his name did not appear in the poll book.” Along with Harmon, Ohio purged many thousands of voters in 2015. State officials also allegedly carried out such efforts in prior years.

The district court denied Plaintiffs’ motion for a preliminary injunction and entered judgment for the State. The Sixth Circuit reversed, rejecting the Ohio Secretary of State’s contention that, under the Help American Vote Act (HAVA), “the Supplemental . . . Process’ incorporation of [a] failure-to-respond requirement insures that voters are never removed ‘solely’ for failure to vote.” The Court of Appeals explained that, even if HAVA’s “solely” language is deemed to be determinative, it applies to Ohio’s Supplemental Process because that process’s “trigger is ultimately based ‘solely’ on a person’s failure to vote.”

A significant feature of the Husted case is the United States’ change in its legal position since it participated as amicus curiae in the Court of Appeals. In the Sixth Circuit, the United States filed a brief supporting Larry Harmon and the other plaintiffs, while in the Supreme Court, it has submitted a brief favoring the State of Ohio.

**WHAT’S AT STAKE**

AARP supports measures to enhance voter participation consistent with proportional efforts to combat electoral fraud, i.e., based on actual evidence, not just speculation, that accurate balloting results are at risk. The NVRA strikes that balance, yet the policy at issue in Husted — Ohio’s Supplemental Process for purging voter registration lists — does not. AARP is concerned that many older voters, including older voters with disabilities and low-income older voters will face unfair impediments to voting due to Ohio’s Supplemental Process. That is, they will be purged from the rolls and forced to jump through multiple hoops to re-register, based on arbitrary and inaccurate assumptions by the State that their intermittent voting behavior (i.e., their mere failure to vote in several federal elections) means they have changed where they live and should vote.

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Looking Forward: Gazing Into the Crystal Ball

This section discusses not only pending petitions for certiorari that AARP and AARP Foundation are following, but also significant cases in the lower courts and issues on which the court may grant certiorari within the next few years. These cases and issues are important to people over the age of 50, and, if the court eventually grants a petition, may have a significant impact on their lives. We note that several important decisions from past Supreme Court terms left unresolved legal issues of critical importance to older people. Of course, as lower courts issue decisions and legislatures enact laws, new issues inevitably arise.

Cross-Cutting Regulatory Issue

If the Supreme Court grants certiorari in *Oregon Restaurant and Lodging Ass’n v. Perez*, 816 F.3d 1080 (9th Cir. 2016), pet. for cert. filed sub nom., *National Restaurant Ass’n v. Dep’t of Labor*, No. 16-920 (U.S. Jan. 19, 2017), it may revisit the longstanding *Chevron* deference standard that requires judges to defer to agency interpretations of ambiguities in the laws that they enforce unless their rules are deemed unreasonable. This decision would have ramifications far beyond labor and employment — it would fundamentally change the weight provided to agency interpretations.

The current case stems from a 2011 U.S. Department of Labor (DOL) “tip pool” regulation that prohibited employers from forcing employees to share their tips with non-tipped employees. Prior to this regulation, the Fair Labor Standards Act (FLSA) prohibited businesses that took a tip credit to engage in tip pooling, but the law did not address tip pooling in businesses that did not take the tip credit. The 2011 regulation forbids tip pooling, regardless of a business’s tip credit status.

The Ninth Circuit upheld the regulation, affirming DOL’s plenary authority to regulate tip pooling, despite the FLSA’s silence on employers that do not take the tip credit. In its petition for certiorari, the Restaurant Law Center, representing the National Restaurant Association, is asking the Supreme Court to address: (1) whether the FLSA restricts tip pooling by employers who pay full minimum wage and declined the tip credit; and (2) whether a federal agency can create rights and obligations through regulations by purporting to implement a statute that does not expressly prohibit the agency’s regulation. Free market advocates interested in the latter two issues have filed amicus briefs encouraging the court to limit agency authority and revisit *Chevron*. The court has granted DOL three extensions to file its response, clearly indicating that the Trump administration is contemplating its position. If the court grants certiorari, this decision could transform the balance of power, tipping it away from federal agencies to Congress and the courts.
Employment Discrimination Based on Age

As the Age Discrimination in Employment Act (ADEA) celebrates its 50th anniversary this year, a surprising number of statutory interpretation issues have percolated in the Courts of Appeals and are making their way to the Supreme Court.

The only currently pending cert petition directly affecting age discrimination in employment is in *Vaughan v. Anderson Regional Med. Ctr.*, 849 F.3d 588 (5th Cir. 2017), *pet. for cert. filed*, No. 16-1386 (May 16, 2017), which asks whether an ADEA plaintiff may seek compensatory and punitive damages for retaliation claims. Courts have long held that the ADEA does not allow plaintiffs to seek damages other than lost wages in age discrimination cases. But, the ADEA expressly incorporates the FLSA damages provision, which permits very broad relief in retaliation cases. The vast majority of courts have allowed plaintiffs to seek compensatory damages in FLSA retaliation cases, but courts disagree on whether ADEA retaliation plaintiffs may also ask for those damages. In *Vaughan*, the U.S. Court of Appeals for the Fifth Circuit held that ADEA retaliation plaintiffs may only ask for lost wages, even though the same court held days later that FLSA retaliation plaintiffs could seek compensatory damages. *Compare Vaughan v. Anderson Regional Med. Ctr.*, 849 F.3d 588 (5th Cir. 2017), with *Pineda v. JTCH Apartment, L.L.C.*, 843 F.3d 1062 (5th Cir. 2016). AARP and AARP Foundation have filed an amicus brief supporting Vaughan’s cert petition, arguing that the court should treat ADEA and FLSA retaliation cases the same by permitting damages beyond lost wages for both.

Another emerging statutory interpretation battle concerns whether or not ADEA section 4(a)(2), 29 U.S.C. § 623(a)(2), protects prospective employees — and not just current employees — from employer policies or practices that have a discriminatory impact on older workers. The full U.S. Court of Appeals for the Eleventh Circuit recently ruled that section 4(a)(2) does not protect job applicants. *Villarreal v. R. J. Reynolds Tobacco Co.*, 806 F.3d 1288 (11th Cir. 2015). The Supreme Court denied certiorari in *Villarreal*, but it is likely that the court will address the issue soon, depending on the issue’s resolution in other circuits.

AARP Foundation is co-counsel in two cases that squarely present this issue. In *Kleber v. CareFusion, Inc.*, No. 15-cv-1994, 2015 U.S. Dist. LEXIS 157645 (N.D. Ill. Nov. 23, 2015), appeal docketed, No. 17-1206 (7th Cir. Feb. 1, 2017). Plaintiff, an attorney, is challenging a maximum-years-of-experience hiring criterion. He alleges that the “no more than seven years of experience” requirement disproportionately screens out older applicants. The district court dismissed his disparate impact claim, ruling that section 4(a)(2) does not allow claims by applicants. The case is fully briefed and awaiting oral argument in the U.S. Court of Appeals for the Seventh Circuit.

The case, *Rabin v. PriceWaterhouseCoopers, LLP*, No. 3:16-cv-02276 (N.D. Cal. filed Apr. 27, 2016), challenges the defendant accounting firm’s practices of recruiting exclusively on college campuses and requiring applicants to be affiliated with a university for certain classes of jobs under the disparate impact theory. The defendant challenged the scope of section

A second issue concerning ADEA disparate impact claims is whether plaintiffs can prove that an employer’s policy or practice has an adverse disparate impact on a sub-group of workers over the age of 40, or whether plaintiffs may only compare impact on workers over age 40 with impact on workers under age 40 as a whole. This “subgroup” question arose in *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61 (3d Cir. 2017), where the plaintiffs alleged that a layoff had a disproportionate impact on workers over age 50. Breaking with three other circuits, *Karlo* held that plaintiffs may bring “subgroup” claims. The court relied on *O’Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), which held that age discrimination plaintiffs may show that they were treated unfavorably compared to individuals who are “significantly younger” than they are, regardless of whether the comparator is over or under age 40. Under *O’Connor*, the Third Circuit concluded, there is no logical reason to require plaintiffs to make a strict over/under-40 comparison in a disparate impact case. The court pointed out that “[m]andating a forty-and-older comparison group would allow an employer to adopt facially neutral policies which had a profoundly disparate impact on individuals over age 50 or 55, so long as younger individuals within the protected class received sufficiently favorable treatment.” *Karlo*, 849 F.3d at 74. While no cert petition was filed in this case, the clear circuit split will likely make its way to the Supreme Court in the near future.

Finally, the Supreme Court may be called upon to resolve emerging issues surrounding waivers of rights and claims under the ADEA, including the contours of the Older Workers Benefit Protection Act’s (OWBPA) otherwise clear statutory requirements that defendants must strictly satisfy to enforce such waivers. One such issue is whether or not employers can require employees to bring challenges to the validity of waivers in arbitration as opposed to in court. This issue arose in *Mcleod v. Gen. Mills, Inc.*, 140 F. Supp. 3d 843 (D. Minn. 2015), where workers terminated in a reduction-in-force challenged their terminations in a “collective action” under the ADEA. They also challenged the severance agreements that they signed, alleging that they violated the OWBPA. McLeod and the other plaintiffs claimed that the agreements are confusing and otherwise non-compliant with the OWBPA and, thus, void. The class asked the district court to decide their OWBPA claims, and if they succeeded in voiding the severance agreement, to proceed to consider their ADEA claims — on behalf of themselves and all others “similarly situated.” General Mills argued that a unilateral mandatory arbitration clause in the workers’ severance agreement required that the case be dismissed and asked the district court to enter an order compelling Plaintiffs to resolve the validity of the waiver in arbitration. The district court declined to compel arbitration based on the OWBPA’s express congressional command that employers “shall” bear the burden of proving the validity of a waiver of “any” claims or rights “in a court of competent
jurisdiction.” 29 U.S.C. § 623(f)(3). General Mills filed an interlocutory appeal, and the U.S. Court of Appeals for the Eighth Circuit affirmed the district court’s decision to uphold the arbitration clause, but declined to decide whether the waiver of the underlying ADEA claims must be proved in court. McLeod v. Gen. Mills, Inc., 856 F.3d 1160 (8th Cir. 2017). The issue has been presented again in the District Court of Minnesota in the related case of Shields v. Gen. Mills, Inc., No. 16-cv-954 (D. Minn.).

ERISA and Employee Benefits

The issue of whether a pension plan’s limiting venue-selection clause can nullify ERISA’s broad venue provision is still a matter before the district and circuit courts. The Supreme Court denied a petition for certiorari on this issue, but, at the time, there was no split in the circuits. See Smith v. AEGON Cos. Pension Plan, 769 F.3d 922 (6th Cir. 2014), cert. denied, 84 U.S.L.W. 3878 (U.S. Jan. 11, 2016). Many practitioners think that the issue will eventually reach the court. See, e.g., In re Mathias, No. 16-3808, 2017 U.S. App. LEXIS 14803 (7th Cir. Aug. 10, 2017) (ERISA’s venue provision did not invalidate a forum-selection clause contained in plan documents).

The scope of appropriate equitable relief in employee benefits cases is still a contentiously litigated question. CIGNA Corp. v. Amara, 563 U.S. 421 (2011), explicitly approved the concept that equitable relief authorized under ERISA refers to categories of relief that were “typically available” in equity courts before the merger of law and equity. In that vein, the court stated that a district court had the authority to grant traditional equitable remedies, such as reformation, estoppel, and surcharge. Id. at 440-42. The boundaries of equitable relief will continue to be litigated. We expect these issues to come before the court again.

Excessive fee litigation has moved into new territory with lawsuits against 403(b) plans. In addition to allegations of self-dealing including the use of funds affiliated with the employer, investment manager, or record-keeper, new allegations include (1) fees of actively managed funds chosen as investment options not justified by their performance, when compared to lower cost passively managed funds; (2) the availability of too many investment options preventing participants from investing in lower-cost funds and share classes; (3) plan fiduciaries failing to negotiate waivers of minimum investment requirements with fund providers allowing participants to invest in the same funds for lower fees; and (4) overpayment to plan record keepers by failing to monitor revenue sharing payments by mutual fund providers. Some of these allegations are novel, and we expect them to be presented to the court for resolution.

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1 Mutual fund share classes determine the amount of money (in fees, marketing costs and surcharges) that an investor pays to the fund company and to the broker at the time of purchase.

Finally, there have been five challenges under numerous theories to the Department of Labor’s revised definition of fiduciary/conflict of interest regulation, which requires investment advisers, brokers and insurance agents, among others, to provide advice in the best interest of the client. The government prevailed in all of these cases, and the decisions have been appealed to the circuit courts. It is clear that these litigants have taken a page from the Affordable Care Act litigation and are attempting to generate a split in the circuit courts to obtain certiorari. As the litigation continues, the Trump administration has reopened rulemaking, so it is unclear what posture these cases will be in if petitions for certiorari are filed.

### Affordable Care Act Challenges

Although the Supreme Court has upheld challenged portions of the Affordable Care Act (ACA) in two high-profile cases, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 563-64 (2012) (finding the individual mandate constitutional), and *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) (holding that the law allowed for tax credits to individuals in states operating under federal health exchanges), legal challenges to the ACA continue. Another case may be headed for a decision in the Supreme Court in the near future.

In *United States House of Representatives v. Burwell*, 185 F. Supp. 3d 165 (D.D.C. 2016), the U.S. House of Representatives sued the Secretaries of Health and Human Services and Treasury, alleging that the Secretaries spent funds for cost-sharing subsidies under the ACA that were not appropriated by Congress, as required by the Appropriations Clause of the Constitution. The district court dismissed the lawsuit, and the U.S. Court of Appeals for the District of Columbia Circuit affirmed. The Supreme Court granted certiorari.

Constitution. After holding that the House had standing to sue on the appropriations issue, the district court also held that it was unconstitutional for the Treasury to pay cost-sharing subsidies directly to insurers because the funds were not appropriated by Congress.

The ACA provides for two types of subsidies to persons who qualify based on their income. Section 1401 provides tax credits to individuals to reduce the cost of insurance premiums. Section 1402 provides low-income eligible insureds reimbursement for out-of-pocket expenses, such as deductibles and co-pays. Premium tax credits are funded through a permanent appropriation and are statutorily codified in the Internal Revenue Code as an official tax credit. The cost-sharing subsidies, however, did not have a permanent appropriation.

The Secretaries argued that section 1402 could be funded through the 1401 permanent appropriation because the cost-sharing provisions were programatically integrated. The district court held that the spending for cost-sharing subsidies was unconstitutional because Congress failed to appropriate funds for that particular program, and an appropriation could not be inferred from a related program.

The Secretaries filed a notice of appeal, and after the Circuit Court held the case in abeyance for some time after the presidential election, United States House of Representatives v. Burwell, 676 F. App’x 1 (D.C. Cir. 2016), it was unclear whether the new Secretaries in the Trump administration would continue to prosecute the appeal. On August 1, 2017, the Circuit Court permitted 16 states to intervene in the appeal to defend the expenditure of funds to pay the cost-sharing subsidies. United States House of Representatives v. Price, No. 16-5202, 2017 U.S. App. LEXIS 14178 (D.C. Cir. Aug. 1, 2017). Unless these issues are resolved through the legislative process, it is likely that the matter will reach the Supreme Court. The cost-sharing subsidies are an important tool to implement the ACA’s objectives of making health insurance affordable and achieving near-universal coverage—objectives that are critically important to people 50 and older, as explained in AARP’s amicus brief filed in King v. Burwell.

Medicare and Medicaid

Older people rely on Medicare and Medicaid to help them gain access to quality and affordable healthcare. In particular, these programs help seniors offset the high costs of long-term care, including stays at nursing facilities. Federal law requires nursing facility residents to pay a portion of the costs associated with their stays, even if Medicaid is also financing their care. The specific amount that residents must contribute to their long-term care is set by the individual states but must comply with federal statutory guidelines.

In Goodwin v. Fla. Dept of Child. and Fams., 194 So. 3d 1042, 1044 (Fla. Dist. Ct. App. 2016), pet. for cert. filed, No. 16-1083 (U.S. Mar. 9, 2017), a nursing facility resident challenged a Florida state agency’s interpretation of how it will calculate cost-sharing obligations under Medicaid. Ms. Goodwin had incurred over $70,000 worth of medical debt related to an accident that
occurred prior to her Medicaid eligibility. Although medical debt on its own can have a corrosive impact on individuals, Florida’s Department of Children and Families (DCF) made the situation worse for Ms. Goodwin by refusing to include that medical debt as part of its calculation in determining her personal contribution requirement.

The Florida Court of Appeals ruled in favor of the DCF — which favored Florida’s interpretation of federal regulations rather than the federal government’s own interpretation. The Florida Supreme Court declined to review this decision, and Ms. Goodwin now appeals to the Supreme Court of the United States. She hopes the state court’s ruling is overturned. Her claim is that the DCF’s interpretation of the Medicaid statute runs contrary to Congress’s intent to ensure that low-income individuals have access to the healthcare services that they need, which includes long-term care in nursing facilities.

This case is important to people over age 50 because when nursing facility residents use most of their income to pay for their nursing facility care, they become unable to afford moving back to their community. Thus, they can remain unnecessarily institutionalized in a nursing facility.

**Americans with Disabilities (ADA)**

**Title III Public Accommodations**

Many older people depend on Title III of the ADA to protect them from discrimination on the basis of their disabilities to ensure that they have “the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation,” 42 U.S.C. § 12182. Included, but not defined, in the twelve categories of places of public accommodation are “other sales or rental establishments.” 42 U.S.C. § 12181(7)(E).

If the Supreme Court grants the certiorari petition in *Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530 (5th Cir. 2016), pet. for cert. filed, No. 16-668 (U.S. Nov. 21, 2016), it will decide whether a “public accommodation” under Title III refers exclusively to physical spaces where people can enter or whether it also includes systems of commerce like vending machines, automated kiosks, and websites that fall outside of brick-and-mortar establishments.

In this case, the petitioner, who is blind, filed suit against Coca Cola because he was unable to utilize its Glass Front Vendor (“GFV”) machines. The GVF machines have a variety of features, including smart phone payment options, wireless internet ability, motion sensing, and onboard computer systems. *Id.* at 531. Petitioner alleges that Coca Cola’s failure to make these machines accessible to the visually impaired violates Title III’s places of public accommodation provision. The petitioner recommends three ways the GVF machines could be made accessible to the visually impaired: (1) an audio interface system and tactile alphanumeric keypad; (2) a smartphone application that displays non-visual representation of the products and their
prices for each vending machine; and (3) a toll-free hotline to call for assistance. The petitioner asserts that the federal circuits are split on the issue of whether “public accommodation,” as used within the ADA, is limited to physical structures or has broader meaning.

The United States Solicitor General filed a brief siding with the lower courts’ statutory interpretation of “sales establishment” to exclude vending machines. The Solicitor General argued that Petitioner should seek relief from the locations that installed the vending machines, but not from Coca Cola. Further, the United States agreed with Coca Cola’s assertions that there is no split in the circuits — the circuits have only addressed public accommodation concerns in regard to disabled persons’ access to insurance coverage and retirement benefits, not “sales establishments” and physical spaces.

AARP and AARP Foundation are interested in this case because of the number of people over 50 who rely on ADA Title III accommodations to enjoy access to all goods, services, and establishments, including those systems of commerce beyond brick-and-mortar stores. As technology develops, the frequency and importance of daily commercial activity outside of traditional brick-and-mortar establishments will increase. If the court denies certiorari, disabled Americans would be excluded from this activity and would have to rely solely on amendments to existing legislation or DOJ regulations to reconcile their needs with innovative commercial activities that are not specifically identified under the ADA.

**Consumer**

We expect the Supreme Court to take up a variety of challenges to consumer protection-related actions by administrative agencies and regulators, including the promulgation or repeal of regulations and the propriety of enforcement orders. Lawsuits challenging the constitutionality of the Consumer Financial Protection Bureau (CFPB) are also winding their way through the appellate courts and likely will be appealed to the court during the coming term.

In *PHH Corp. v. Consumer Fin. Protection Bureau*, 839 F.3d 1 (D.C. Cir. 2016), vacated and pet. for reh’g granted, No. 15-1177, 2017 U.S. App. LEXIS 2733 (Feb. 16, 2017), the en banc U.S. Court of Appeals for the District of Columbia Circuit is reviewing a mortgage lender’s appeal of a $108 million disgorgement order imposed upon it by the CFPB for receiving kickbacks for referrals, in violation of the Real Estate Settlement Procedures Act (RESPA). PHH required companies that provided private mortgage insurance to borrowers that it referred to them to obtain reinsurance from PHH’s wholly owned reinsurance subsidiary. The CFPB found that, if the companies refused, PHH would stop referring business to them.

PHH asserts three main challenges to the CFPB’s order. First, it claims that the structure of the CFPB violates the Appointments Clause of the U.S. Constitution because the President is only permitted to dismiss the agency’s Director for cause. Second, PHH disputes the CFPB’s argument that no
statute of limitations applied to its administrative enforcement action. Finally, PHH claims that the CFPB’s interpretation of RESPA is contrary to law and the previous interpretations given to it by the Department of Housing and Urban Development.

AARP filed a brief in support of the CFPB before a three-judge panel of the Court of Appeals for the D.C. Circuit, arguing that the agency’s structure is constitutional and that the CFPB correctly applied RESPA. AARP also argued that the RESPA violation harms consumers, who pay higher private mortgage insurance each month because of the monthly reinsurance charge. The panel held that the statutory limitation on the CFPB is unconstitutional because the President may dismiss the Director of the agency only for cause. It upheld the regulatory validity of the agency actions, but held that the enforcement action against PHH incorrectly construed RESPA. Therefore, it vacated the CFPB’s enforcement order.

The Court of Appeals for the D.C. Circuit agreed to rehear the case en banc. It also vacated the panel decision holding that the structure of the CFPB is unconstitutional. Briefing and oral argument have been completed, and a decision is expected soon. Regardless of the outcome, undoubtedly, a petition for certiorari will be filed. This case is one of several cases in which CFPB-regulated entities are challenging the constitutionality, authority, and regulatory interpretations governing their actions. Given the importance of the issue, it would not be surprising if the court agrees to hear this case.

In addition, the CFPB is proposing other regulations that are likely to draw court challenges. Among the proposals are a prohibition against class action bans in arbitration agreements,\(^4\) regulation of payday loans,\(^5\) and implementation of the Fair Debt Collection Practices Act.\(^6\) If these regulations are challenged, they are likely to make their way to the Supreme Court over the next two years.

The Federal Communication Commission (FCC) is also facing numerous challenges by the communications industry. In \textit{ACA Int’l v. FCC}, No. 15-1211, 2015 U.S. App. LEXIS 18554 (D.C. Cir. July 13, 2015), debt collectors and others are challenging the FCC’s omnibus order implementing the Telephone Consumer Protection Act (TCPA). The industry claims that the FCC exceeded its authority under the TCPA by restricting the use of automated dialers to make prerecorded calls and texts to cell phones. The FCC broadened the definition of an automated dialer to include any system


that is capable of making automated calls, even if it is not actually being used as such. Additionally, the FCC provided that consumers have a right to revoke consent to receive robocalls at any time. It is possible that whatever ruling the D.C. Circuit issues, the FCC’s omnibus order also will be appealed to the Supreme Court soon.
ABOUT AARP FOUNDATION
AARP Foundation works to ensure that low-income vulnerable older adults have nutritious food, affordable housing, a steady income, and strong and sustaining social bonds. We collaborate with individuals and organizations who share our commitment to innovation and our passion for problem-solving. Supported by vigorous legal advocacy, we create and advance effective solutions that help struggling older adults transform their lives. AARP Foundation is the charitable affiliate of AARP.

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