

The Supreme Court 2011: What's At Stake For Americans 50+

A Preview of the 2011 Term

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By

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This Supreme Court Preview is undertaken as part of the education and advocacy efforts of AARP Foundation and discusses cases that will have significant impact on older people. AARP Foundation Litigation attorneys initiate and support litigation protecting the rights of people 50+ and are responsible for carrying out AARP's judicial advocacy activities, including *amicus curiae* (friend of the court) briefs, focusing on age and disability discrimination in employment; employee benefits; health; long-term care; investor protection and consumer rights; and issues affecting low-income persons. AARP Foundation Litigation attorneys have already filed *amicus* briefs in most of the cases discussed herein.

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INTRODUCTION

The 2011 Term of the Supreme Court begins with personnel stability, after a five-year period during which the Court welcomed four new Justices. At this moment, there have been no rumors about any additional retirements.

Last Term the Court issued 82 merits decisions; the last time the Court issued over 80 merits decisions was in the 1997 Term. Consistent with past years, the Court reversed over 70% of circuit courts' decisions. The largest number of cases for the Court's consideration, and consistent with last Term, came from the Ninth Circuit. As of the end of last Term, the Court has granted *certiorari* on 41 cases, which is on pace for the Roberts Court to hear between 70 and 80 cases.

Interestingly, last Term about 45% of the decisions were unanimous, with the percentage of 5-4 decisions staying at 20% (16 decisions). What was not surprising was that Justice Kennedy cast the deciding vote in 87.5% of those 5-4 decisions. He was in the majority, along with Chief Justice Roberts, in over 90% of all decisions last Term. The three female Justices – Elena Kagan, Ruth Bader Ginsburg and Sonia Sotomayor – very often were in agreement. With Justice Breyer, they formed the core of the Court's more progressive wing, and frequently, were on the losing side in the 5-4 split decisions.

Certiorari has not yet been granted on any of the cases regarding the potential blockbuster issue of the Term – the constitutionality of the Patient Protection and Affordable Care Act. Supreme Court experts will attempt to read the tea leaves by the Court's actions: will the Court wait to grant *certiorari* on one of the cases as the other cases wind their way to the Court; will the Court consolidate the cases; will the Court grant only one case and then grant, vacate and remand the others; given that the Court reverses most of the cases upon which it grants *certiorari*, will the choice about which case to take be telling as to the outcome. This issue may precipitate the most important clash between the Court and the Executive Branch since the New Deal. The Court's opinion may impact jurisprudence and direction of this country for decades to come.

This Term the Court has granted *certiorari* on a wide variety of cases which AARP believes may impact people over age 50. Of the six cases discussed in this Preview, AARP either has or is intending to file an *amicus curiae* brief to present AARP's view of the case's impact on older people.

Coleman v. Maryland Court of Appeals presents the question of whether under the Eleventh Amendment state employers have sovereign immunity from money damages for violating the self-care provision of the Family and Medical Leave Act. Some commentators believe that this issue of federal impairment of states' rights may provide some insight into the Court's position on the Patient Protection Act cases in that many of the constitutional arguments are similar.

The Court continues to decide cases surrounding other aspects of the delivery of health care including Medicaid, approval of drugs, and patents. In a consolidated appeal from three lower court decisions, ***Independent Living Center, California Pharmacists Association, and Santa Rosa Memorial Hospital***, the Supreme Court will consider whether Medicaid beneficiaries can enjoin the enforcement of a state law requiring a reduction in Medicaid reimbursement rates to health care providers on the grounds that the cuts are in conflict with and, thus, preempted by Title XIX of the Social Security Act. ***Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*** addresses whether a generic drug manufacturer may sue the company that produces the brand-name version of the drug to require it to correct information filed with the Food and Drug Administration – information that is relevant to the agency's decision whether to approve the generic version of the drug. Given the protection that patents provide businesses on an invention's use, the Court will again wade into that field in ***Mayo Collaborative Services v. Prometheus Laboratories, Inc.***, by deciding whether the correlation between blood test results and patient health are patentable.

Like most Terms, the Court has taken cases dealing with consumer issues, including one of its favorite subjects forced arbitration. The question presented in ***Greenwood v. CompuCredit Corp.*** is whether businesses which provide consumers with a notice that provides "you have a right to sue" pursuant to the requirements of the Credit Repair Organizations Act can compel consumers to arbitrate all disputes. In ***First American Financial Corp. v. Edwards***, the Court will address whether a private homebuyer has standing to sue a settlement services company under anti-kickback provisions of the Real Estate Settlement Procedures Act of 1974 where no overcharge for services occurred.

Several of the cases pending before the Court this year concern the relationship between the three branches of government – be it the constitutionality of Congress' actions, the ability to access the courts to enforce a statutory right, or the interpretation of the breadth of a statute. The interaction of the separate branches of government *vis-à-vis* the others will make for fascinating observations.

CASES - 2011 TERM

EMPLOYMENT

DO STATE EMPLOYERS UNDER THE ELEVENTH AMENDMENT HAVE SOVEREIGN IMMUNITY FROM MONEY DAMAGES FOR VIOLATING THE SELF-CARE PROVISION OF THE FAMILY AND MEDICAL LEAVE ACT?

Coleman v. Maryland Court of Appeals,

626 F.3d 187 (4th Cir. 2010),

cert. granted, 79 U.S.L.W. 3727 (U.S. June 27, 2011)(No. 10-1016).

Oral argument has not yet been scheduled.

In 1993, Congress passed the Family and Medical Leave Act (FMLA), enabling employees working for employers with 50 or more employees to take up to 12 weeks of unpaid protected leave to care for themselves or qualifying relatives in the event of severe illness. An employee's qualifying relatives include the employee's spouse, children, or parents. Since its passage, the FMLA has provided greater flexibility for employees suffering from "serious medical condition[s]," as well as for employees caring for qualifying ill relatives.

In a case that could significantly impact the ability of state employees to take protected leave under the FMLA, *Coleman* presents the question of whether passage of the FMLA's so-called self-care provision constituted a valid use of Congressional power to enact remedial legislation under Section Five of the Fourteenth Amendment. Section Five grants Congress the "power to enforce, by appropriate legislation" Fourteenth Amendment protections, or to enact what is commonly termed as remedial legislation to rectify violations of the Amendment's equal protection clause in Section One. Congress risks infringing state sovereignty protected by the Eleventh Amendment unless such legislation is properly enacted under Congress' Section Five remedial powers and is congruent and proportional to the harm Congress is seeking to rectify. In the FMLA findings and purposes section, Congress stated that one of the purposes of the FMLA was to "minimize[] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis." 29 U.S.C. § 2601(b).

The U.S. Supreme Court explained in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 959 (2003):

State employees may recover money damages in federal court in the event of the State's failure to comply with the FMLA's family-care provision. Congress may abrogate the States' Eleventh Amendment immunity from suit in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment. . . . Congress also acted within its authority under § 5 of the Fourteenth Amendment when it sought to abrogate the States' immunity for purposes of the FMLA's family-leave provision.

Significantly, the 6-3 *Hibbs* ruling, penned by then Chief Justice Rehnquist, looked to the importance of family leave as a measure to combat sex-based stereotypes presuming women, not men, would care for ill family members. *Hibbs* was terminated after taking leave to care for his wife.

Despite the Supreme Court's ruling, six of eleven federal circuit courts have applied pre-*Hibbs* precedent refusing to find appropriate FMLA abrogation of sovereign immunity as applied to any portion of the FMLA, including the self-care provision. Most notably, in *Brockman v. Wyoming Department of Family Services*, 342 F.3d 1159 (10th Cir. 2003), and in *Toeller v. Wisconsin Department of Corrections*, 461 F.3d 871 (7th Cir. 2006), courts held that the self-care provision was not covered by the Supreme Court's reasoning in *Hibbs*. The First, Second, Fifth, Sixth, and Eleventh Circuits all subsequently applied combinations of *Brockman*, *Toeller*, and the FMLA's legislative history to conclude that *Hibbs* does not apply to the FMLA's self-care provision. The remaining circuits had previously applied similar logic prior to *Hibbs*. See Petition for Writ of *Certiorari* at 17-24, *Coleman v. Maryland Court of Appeals*, No. 10-1016, (Feb. 8, 2011).

The Eighth Circuit had gone the farthest prior to *Hibbs* to find the entire FMLA subject to the Eleventh Amendment, and thus, inapplicable to the states. In *Townsel v. Missouri*, 233 F.3d 1094 (8th Cir. 2000), the court held that the entire FMLA violated state sovereignty by imposing money damages on state employers. Not surprisingly, when only dealing with the FMLA's self-care provision in *Miles v. Bellfontaine Habilitation Center*, 481 F.3d 1106 (8th Cir. 2007) (*per curiam*), the court cited Eleventh Amendment sovereign immunity to hold that the self-care provision of the FMLA was invalid.

Prior to *Hibbs*, the strongest advocate for the view that the self-care provision of the FMLA abrogated sovereign immunity was the United States. The

gist of the government's argument was that the text and legislative history of the FMLA made clear Congress' conclusion that the self-care provision served in two ways to erode sex bias in the workplace. First, it guaranteed a right to leave for women with pregnancy-related medical conditions unique to their gender. Second, it avoided a situation in which leave laws, by guaranteeing a right to take off from work for reasons perceived to be primarily the province of women, created an incentive for employers not to hire women in the first place. But just prior to *Hibbs*, the Solicitor General issued a letter announcing the government's decision to refrain from further espousing that view, in light of its repeated rejection by the federal courts. Since *Hibbs*, the United States has not returned to urge its prior views be adopted. Thus, the position of the United States in *Coleman*, whatever it is, and whether or not the United States weighs in at all, may be critical.

In *Coleman*, the Fourth Circuit affirmed a trial court's dismissal of the complaint alleging Title VII and FMLA self-care claims. Daniel Coleman, an African American male, worked at the Maryland Court of Appeals from 2001 to 2007. From 2003 to the end of his employment, Coleman was the executive director of procurement and contract services. Coleman worked for two supervisors, Frank Borccolina, a white male, and Faye Gaskins, an African American female, who had a relative working as part of Coleman's staff.

Coleman's complaint, which the court took as true for purposes of the motion to dismiss, alleged that he "satisfied the performance standards of his position and received all applicable raises and increments." However, Coleman was reprimanded after an incident in 2005 involving Gaskins' relative, Larry Jones, who worked for Coleman. After "Coleman investigated a matter involving Jones and Joyce Shue, a white woman," Coleman suspended Jones for five days. *Coleman v. Maryland Court of Appeals*, 626 F.3d 187, 189 (4th Cir. 2010).

Coleman further asserted that Jones "falsely alleged that Coleman had steered contracts to vendors in which Coleman had an interest," Jones encouraged an investigation of the false charges, and "shared the allegations with others despite knowing they were false." *Id.* Coleman also alleged that he was reprimanded improperly for violating "a communications protocol," and was unsuccessful in his attempts to appeal the reprimand. *Id.* Coleman requested sick-leave under the FMLA from his supervisor on August 2, 2007; on the following day, Coleman was promptly told to resign or he would be terminated.

Coleman's complaint alleged that he was terminated for two reasons: because he is black and because he requested leave under the FMLA to care for

his own known illness. The District Court rejected both the Title VII and FMLA claims. The Fourth Circuit affirmed the district court's dismissal of the complaint.

Writing for the majority, Chief Judge Traxler explained that "although Coleman's complaint conclusorily alleges that Coleman was terminated based on his race, it does not assert facts establishing the plausibility of that allegation." *Id.* at 190-191. The court also did not deem the investigation into Jones' background to be a valid protected activity for the purposes of his Title VII retaliation claim.

Coleman also disputed the dismissal of his FMLA claim on sovereign immunity grounds. He claimed that Congress validly abrogated the Eleventh Amendment with the FMLA's self-care provision and properly enacted the self-care provision as a measure to combat sex bias, under its Section Five, Fourteenth Amendment remedial powers. Coleman relied on *Hibbs*' holding that Congress validly abrogated states' sovereign immunity when it enacted the FMLA's family leave provision in seeking to erode gender stereotypes and combat sex bias by ensuring leave is available on a gender-neutral basis.

The Fourth Circuit concluded that since the Supreme Court in *Hibbs* had only discussed the family care provision of the FMLA, rather than the self-care provision at issue in *Coleman*, *Hibbs* does not apply. The Fourth Circuit explained that "since *Hibbs* was decided, each of the four circuit courts to consider the issue has concluded that Congress did not validly abrogate sovereign immunity as to the FMLA's self-care provision." *Id.* at 194. The court held that Coleman's FMLA claim may not proceed because of Eleventh Amendment sovereign immunity.

In Coleman's petition for *certiorari*, at 22-23, he explained that although there is no split in authority concerning the abrogation of sovereign immunity for the self-care provision of the FMLA, the issue nonetheless warrants high court review:

The proper method for analyzing the FMLA's legislative history to determine whether Congress validly abrogated Eleventh Amendment immunity in the self-care provision remains unclear. Specifically, what the legislative history needs to contain to clearly abrogate Eleventh Amendment immunity and whether that history applies to the statute as a whole or in part are important questions that this Court needs to resolve. The answer to these questions affects Congress' ability to legislate effectively, states' Eleventh

Amendment immunity interests, and federal interests in ensuring qualified employees' right to protected leave from work under the FMLA.

Coleman also noted the cursory nature of most courts' analysis of the issues presented in his case, and the conclusions of several courts that plausible arguments exist in favor of abrogation.

In one unsuccessful bid to uphold money damages for state employees for violations of the FMLA's self-care provision, Judge Lipez, in dissent, embraced the case for abrogation of sovereign immunity. He concluded that Congress determined that making medical leave available to both men and women on equal terms is essential to the FMLA's overall objective of eroding sex bias and gender stereotypes. Without the self-care provision, he explained, the FMLA would only guarantee leave benefits historically used primarily by women – pregnancy, adoption, and family leave – and this might very well encourage employers not to employ women so as to avoid having to extend these benefits to women. See *Laro v. New Hampshire*, 259 F.3d 1, 20-21 (1st Cir. 2001) (Lipez, J. dissenting); see also 29 U.S.C. § 2601(a)(6) (“employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender”); 29 U.S.C. § 2601(b)(4) (explaining that the FMLA “minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons on a gender-neutral basis”).

It is Coleman's task to resurrect these pre-*Hibbs* arguments and to persuade the Supreme Court that they have much greater force post-*Hibbs*, even though all federal appeals court since *Hibbs* that have assessed a claim of abrogation of sovereign immunity in regard to the FMLA's self-care provision have acted as if *Hibbs* is irrelevant. The post-*Hibbs* decisions are striking, however, for their failure to seriously engage the views articulated by Judge Lipez in *Laro*. *Coleman* affords one last chance to make this case. AARP will join an *amicus* brief doing so.

The FMLA greatly affects older workers, both by permitting older employees to take up to twelve weeks of protected leave to care for their own ailments and also by enabling employees to take time off to care for their ailing elderly parents or spouses. The outcome of this case is crucial for determining whether the Court will apply reasoning such as it used in *Hibbs* to enable state workers to have FMLA leave protected by the Fourteenth Amendment against

state intrusion. AARP seeks to ensure that the same protections currently afforded to federal and private workers by the FMLA are also available to state workers.

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CONSUMER RIGHTS

DOES A PRIVATE PURCHASER WHO WAS REFERRED TO AN EXCLUSIVE SETTLEMENT SERVICE PROVIDER HAVE STANDING TO SUE BASED ON RESPA'S PRIVATE RIGHT OF ACTION AND THE PURCHASER'S ENTITLEMENT TO STATUTORY DAMAGES?

First American Financial Corp. v. Edwards,
610 F.3d 514 (9th Cir. 2010),
cert. granted, 79 U.S.L.W. 3710 (U.S. June 20, 2011)(No. 10-708).
Oral argument has not yet been scheduled.

This case addresses whether a private homebuyer has standing to sue a settlement services company under anti-kickback provisions of the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. § 2601 *et seq.*, where no overcharge for services occurred.

In 1998, First American paid Tower City Title Agency \$2 million for a 17.5% minority interest in the settlement agency. In return, Tower City entered into a Captive Title Insurance Agreement that required it to refer all future title insurance business exclusively to First American's subsidiary, First American Title.

In 2006, Denise Edwards purchased a home in Cleveland, Ohio. Edwards used Tower City as the settlement agent for her closing. First American Title sold title insurance to Edwards after Tower City's referral. Neither Tower City nor First American Title informed Edwards of the underlying Captive Title Insurance Agreement.

Edwards sued First American alleging that it violated RESPA's anti-kickback provisions by acquiring a minority interest in Tower City in exchange for Tower's agreement to refer all title insurance business to First American Title. The RESPA provision at issue prohibits the payment or receipt of "any fee, kickback, or thing of value" in exchange for a referral of "business incident to or a part of a real estate settlement service." 12 U.S.C. § 2607(a). First American argued that, because title insurance rates are regulated in Ohio – as they are in a vast majority of the states – Edwards had not been overcharged and, thus, suffered no injury. It contended that the RESPA damages provision eliminates a title insurer's liability if the purchaser alleges no economic harm. Following the Third and Sixth Circuit Courts of Appeals, see *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 989 (6th Cir. 2009); *Alston v. Countrywide Financial Corp.*,

585 F.3d 753, 755 (3d Cir. 2009), the district court rejected First American's argument. The court held that the anti-kickback prohibition in RESPA entitled Edwards to damages whether or not an overcharge occurred. Furthermore, the district court held that Edwards had standing to sue because under RESPA Congress gave homebuyers rights, the violation of which conferred standing.

The Ninth Circuit rejected First American's argument on appeal. First, the court examined the statutory text of RESPA which prescribed that violators of § 2607 are "liable to the other person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of *any charge paid* for such settlement service." 12 U.S.C. § 2607(d)(2) (emphasis added). Instead of using the term overcharge, Congress adopted the language "any charge paid" to calculate damages under § 2607(d)(2). The Ninth Circuit found that the "charge paid" was the price of the title insurance policy and that Edwards was entitled to three times that amount.

In addition, the Ninth Circuit determined that the legislative history of RESPA supported this interpretation. Congress specifically contemplated that the proliferation of referrals based on exclusive service agreements increases the costs of settlement services and reduces healthy competition generated by independent settlement service providers. On the issue of standing, the court noted that "[t]he injury required by Article III can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *First American Financial Corp. v. Edwards*, 610 F.3d at 517 (quoting *Fulfillment Servs. Inc. v. UPS*, 528 F.3d 614, 618-619 (9th Cir. 2008)). Based on the statutory language and the legislative history, the Ninth Circuit found that the plaintiff had standing, specifically noting in its decision that it agreed with the Third and Sixth Circuits.

The Supreme Court invited the Solicitor General to file a brief expressing the views of the United States. In recommending a denial of *certiorari*, the Solicitor General stated that the circuit courts were not split on the issue, the Ninth Circuit's interpretation of RESPA was correct, and Edwards' statutory standing under RESPA was sufficient injury-in-fact to sue First American under Article III, § 2 of the United States Constitution.

The Supreme Court granted First American's petition for *certiorari* to determine whether Edwards had standing to sue under Article III of the Constitution.

Petitioner First American argues that the Supreme Court has never allowed a private plaintiff who has no injury-in-fact to sue. In order to sue in court, a plaintiff must meet the three requirements of standing: 1) injury-in-fact; 2) causation; and 3) redressability. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First American argues that because Edwards paid the uniform Ohio state regulated price for title insurance, she suffered no injury-in-fact and thus does not meet the requirements of standing under Article III, § 2 of the United States Constitution.

AARP will join as *amicus* with Public Citizen, the Center for Responsible Lending, and other public interest groups. The brief will argue that, in passing RESPA, Congress created legal rights which are violated when homeowners are made captive to exclusive service agreements and that these violations create Article III standing.

The outcome of this case may have serious consequences for homeowners' rights under RESPA. Although Ohio law establishes title insurance rates, the Ohio Title Insurance Rating Bureau has determined that its rate reflects the market costs set by title insurers. Ohio Rev. Code § 3935.04(B). Since the market cost is presumably inflated by the payments for exclusive service agreements, the statewide price of title insurance, although uniformly regulated by the State, presumably reflects these costs. In 1974, Congress found that private consumers were particularly vulnerable to abusive real estate settlement practices.

The average person . . . is a captive customer in the hands of the lender, the real estate agent or the attorney. He has no basis for judging whether a particular fee or charge is reasonable, particularly when the amount of the fee or charge is small relative to the total purchase price of the house. Once a buyer is committed to a particular purchase, he is in no position to question individual charges which may be tacked on by various partial participants in the settlement process . . . [T]he vast bulk of consumers will go along with whatever charges are imposed as they do today.

S. Rep. No. 93-866, at 18 (1974).

Congress enacted RESPA to ensure that home purchasers are “provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices.” 12 U.S.C. § 2601(a). In addition,

a 1982 House Committee Report found that captive title insurance agreements “effectively reduce the kind of healthy competition generated by independent settlement providers.” H.R. Rep. No. 97-532, at 52 (1982). Older homeowners, who have lost significant equity in their homes in recent years, can ill afford the potential increases in title insurance prices that are the likely result of the exclusive service agreements at issue in this case.

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ARE CLAIMS ARISING UNDER THE CREDIT REPAIR ORGANIZATION ACT SUBJECT TO ARBITRATION PURSUANT TO A VALID ARBITRATION AGREEMENT EVEN THOUGH THE LANGUAGE OF THE ACT EXPRESSLY GIVES CONSUMERS A NOTICE OF A RIGHT TO SUE AND PROHIBITS WAIVER OF SUCH RIGHT?

Greenwood v. CompuCredit Corp.,

615 F.3d 1204 (9th Cir. 2010),

cert. granted, 79 U.S.L.W. 3627 (U.S. May 2, 2011)(No. 10-948).

Oral argument is set for October 11, 2011.

Can a business that is required by statute to provide consumers with a notice that provides “you have a right to sue” be permitted to require the consumer to arbitrate all disputes? That is the question presented in *Greenwood v. CompuCredit Corp.* The Court will decide whether claims arising under the Credit Repair Organizations Act (CROA), 15 U.S.C. § 1679 *et seq.*, may be subject to arbitration. The Ninth Circuit held that the “right to sue” does not include arbitration and that these arbitration clauses amount to waivers of the right to sue, contrary to the prohibition against waiver provided by statute.

CompuCredit marketed a credit card that allegedly would help rebuild a customer’s credit. The marketing materials affirmatively represented that no deposit was required to obtain the card, but consumers were charged fees amounting to \$257 before they received it. The fees were mentioned in the promotional material in small print and not in proximity to the “no-deposit required” representations.

Wanda Greenwood and other plaintiffs filed a class-action lawsuit against CompuCredit Corp. alleging that it violated the CROA. CompuCredit moved to compel arbitration pursuant to the arbitration clause found in the contract. The district court denied the motion to compel arbitration. CompuCredit filed an interlocutory appeal, and the Ninth Circuit affirmed. CompuCredit appealed, and the Supreme Court granted *certiorari*.

The Ninth Circuit focused on the plain meaning of the phrase “right to sue,” finding that it involves the right to bring an action in a court of law. The court held that the CROA gives consumers a “right to sue,” which cannot be replaced with an opportunity to submit a dispute to arbitration. The court also found that an arbitration agreement would act as a waiver of the right to sue and is therefore unenforceable. The statute prohibits waiver of “any right.” To support its finding that the CROA gave consumers a non-waivable right of access to a judicial

forum, the court reasoned that Congress used the word “sue” over a phrase that would grant a general right to dispute resolution.

In so deciding, the Ninth Circuit created a circuit split on this issue with the Third and Eleventh Circuits. The courts in those circuits reasoned that the CROA did not create any substantive rights to a particular forum and held that the arbitration clauses were enforceable. See *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007); *Picard v. Credit Solutions, Inc.*, 564 F.3d 1249 (11th Cir. 2009). The Ninth Circuit acknowledged the split, but reasoned that both cases gave little attention to the “right to sue” language and relied on reasoning supplied in other cases that did not apply to this situation.

A debate has been raging over whether forced arbitration unfairly compels a consumer or employee to waive important rights. Consumers generally have little bargaining power to negotiate language in standard form contracts, which typically include arbitration clauses, for everything from banking and phone services to contracts for medical care and nursing homes. Corporations argue that arbitration is faster and less expensive. Consumer advocates claim that arbitration is stacked against the consumer: the corporation chooses the arbitrator; access to information necessary to prove a claim is very limited; and consumers generally are required to proceed with individual cases rather than obtaining relief for all affected consumers. Moreover, consumer advocates point out, arbitration limits access to remedies and privatizes the law, because arbitration rarely results in a written decision. In addition, the cost of individual arbitration can be prohibitive compared to the limited amount of damages most consumers seek to recover. For example, in this case, the cost to hire an attorney would greatly exceed the possible recovery of a few hundred dollars.

Last Term, the Supreme Court overturned a state law requirement that an arbitration clause would be found unenforceable unless a class action procedure is available either in arbitration or court. See *AT&T v. Concepcion*, 131 S. Ct. 1740 (2011). The Court also ruled that class action arbitration may not be required as a prerequisite to enforce an arbitration clause because the stakes for the corporation are too high and there is no right to appeal. The Court held that such a state law rule is preempted by the Federal Arbitration Act (FAA), a federal law that makes arbitration clauses enforceable.

This case presents a different, but related, question: whether a federal statute - as opposed to a state law contract defense - is preempted by the FAA. The Court will evaluate whether Congress intended to exclude claims arising

under the CROA from the arbitration forum when it required that consumers receive notice of their “right to sue”.

The brief of AARP and National Senior Citizens Law Center explains that the CROA was enacted to protect consumers from credit repair scams and to ensure that consumers understood their rights under the CROA. Many consumers, desperate to improve their credit scores, fall victim to scams of credit repair organizations, which falsely claim they can erase adverse information from a credit report regardless of its accuracy. Vulnerable consumers often are required by such scams to pay upfront fees or deposits, and receive nothing of value in return. Despite targeted enforcement by federal agencies, such scams continue to harm older people. The brief argues that Congress provided consumers a substantive right to sue, contrary to those courts that have found that no substantive right was granted. The statute mandated that consumers receive a very specific, clearly worded disclosure of their right to sue which Congress prevented the credit repair organization from altering or waiving. In doing so, the brief argues, Congress gave consumers a disclosure notice that accurately and meaningfully informs them of their right to sue. In passing the CROA, Congress did not mandate that consumers receive a piece of paper that lies to them about rights they do not actually have.

The ability of consumers and employees to enforce their rights and obtain a remedy when their rights are violated has been steadily eroded under recent Supreme Court decisions favoring arbitration. This decision will shed light on whether consumers and employees can anticipate that courts will protect their rights granted under federal statutes. If corporations are permitted to require arbitration as the only dispute resolution option, corporations will not be deterred from wrongdoing by the threat they will have to pay for it in the end. Less honorable businesses will gain a significant competitive advantage over those that do not cheat their customers. After all, a \$1 per month overcharge amounts to \$12 million a year in ill-gotten gains for a corporation that has 10 million customers. On the other hand, a consumer who is systematically overbilled \$1 per month by an overreaching business is bilked out of only \$12 a year. Even if a consumer notices the relatively small overcharge, it is highly unlikely a consumer will take the time and risk the expense to recover the funds, much less seek to enforce the law. Under such a scenario, enforcement of consumer protections will fall even more heavily on state and federal enforcement agencies, which already lack sufficient resources to protect consumers.

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HEALTH

CAN MEDICAID RECIPIENTS AND PROVIDERS BRING A SUPREMACY CLAUSE ACTION TO CHALLENGE A STATE LAW THAT CONFLICTS WITH THE FEDERAL MEDICAID ACT?

Independent Living Center of So. Cal., Inc. v. Maxwell-Jolly,
572 F.3d 644 (9th Cir. 2009),
cert. granted, 79 U.S.L.W. 3419 (Jan. 18, 2011)(No. 09-958).
Oral argument is set for October 3, 2011.

Cal. Pharmacists Ass'n v. Maxwell-Jolly,
563 F.3d 847 (9th Cir. 2009),
cert. granted, 79 U.S.L.W. 3419 (Jan. 18, 2011)(No. 09-1158).
Oral argument is set for October 3, 2011.

Santa Rosa Memorial Hospital v. Maxwell-Jolly,
380 Fed. App'x 656 (9th Cir. 2010),
cert. granted, 79 U.S.L.W. 3419 (Jan. 18, 2011)(No. 10-283).
Oral argument is set for October 3, 2011.

In a consolidated appeal from three lower court decisions, *Independent Living Center*, *California Pharmacists Association*, and *Santa Rosa Memorial Hospital*, the Supreme Court will consider whether Medicaid beneficiaries can enjoin the enforcement of a state law requiring a reduction in Medicaid reimbursement rates to providers of health care on the grounds that the cuts are in conflict with and, thus, preempted by Title XIX of the Social Security Act. The Ninth Circuit upheld lower court decisions in all three cases enjoining the state from implementing the law. California requested review of these decisions.

In 2008, the California legislature enacted Assembly Bill (AB) X3 5, which added Section 14105.19 to the California Welfare & Inst. Code. The law required a 10% rate reduction for providers in the state Medicaid fee-for-service program. A subsequent bill AB 1183, modified AB X3 5 by setting provider rate reductions between one and ten percent.

In three separate suits, Medicaid beneficiaries and providers, including physicians, pharmacies, a day health care center, and a medical clinic, sought to enjoin the state from implementing the rate cuts. The plaintiffs argued the law was preempted by the equal access and quality of care provisions of Title XIX of

the Social Security Act, 42 U.S.C. § 1396a(a)(30)(A). Under this section, states must ensure that Medicaid “payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.”

In *Independent Living Center*, the Ninth Circuit held that the Supremacy Clause of the Constitution provided a valid basis for Medicaid recipients and providers to challenge provider cuts, particularly when the rates were so low that providers were rejecting Medicaid recipients due to the low rates. Additionally, the court held that under Ninth Circuit precedent, the state had failed to comply with the equal access and quality of care provisions of § 1396a(a)(30)(A). Specifically, the state had violated the statute by enacting the rate cuts solely on the basis of state budgetary concerns, without any study of their impact on the statutory factors of efficiency, economy, quality of care, and access to care.

In *California Pharmacists Association*, the district court awarded a preliminary injunction blocking the implementation of AB 1183 for all plaintiffs except the hospitals. The court reasoned that although the hospitals had demonstrated a likelihood of success on the merits, the hospitals had not shown that the rate reductions would cause irreparable harm to Medicaid beneficiaries.

On appeal, the Ninth Circuit affirmed the preliminary injunction and reversed the district court’s decision to withhold relief from the hospital plaintiffs. Expanding on the reasoning of *Independent Living Center*, the court held that because private parties may maintain a Supremacy Clause cause of action to enforce the relationship between federal and state governments, a showing of harm to individual beneficiaries was unnecessary so long as the plaintiffs demonstrated that the hospitals themselves would suffer irreparable harm. The court then found for the hospital plaintiffs because if the rate changes were implemented, the plaintiffs would lose a substantial portion of their Medicaid funds while their lawsuit continued; however, if the plaintiffs’ challenge to the constitutionality of AB 1183 succeeded, the hospitals would have no way to recover the lost funds because the state enjoys sovereign immunity and cannot be sued for damages. Ultimately, the state was enjoined from enacting the AB 1183 rate cuts for any provider, including the hospitals.

In *Santa Rosa Memorial Hospital*, brought on behalf of several California hospitals opposed to the 10% rate reductions, the district court granted a preliminary injunction blocking the implementation of AB 5. Relying on

Independent Living Center and California Pharmacists Association, the Ninth Circuit affirmed the injunction.

California challenged the outcome of all three cases. In its petitions for *certiorari*, California renewed its argument that federal preemption alone does not provide a valid cause of action for private plaintiffs. The state also argued that the Ninth Circuit improperly interpreted § 1396(a)(30)(A) to require the state to follow certain procedures before enacting rate cuts and to prohibit states from reducing rates to address a budget crisis.

The National Governors Association and Michigan, on behalf of itself and thirty other States, submitted briefs *amici curiae* in support of California. Although opposed to the grant of *certiorari*, the Solicitor General filed a brief in support of California. The Solicitor General argued that where there is no other private right of action, individuals should not be permitted to sue under the Supremacy Clause to enforce spending statutes like Medicaid that represent cooperative agreements between the States and the federal government.

AARP, National Health Law Program and numerous other public interest organizations jointly filed a brief as *amici curiae* in support of the Medicaid recipients in the Supreme Court. The brief pointed out the negative impact that AB X3 5 would have on both the health and welfare of the state's most vulnerable populations and the state's financial condition. By reducing reimbursement rates, the law would force many doctors, pharmacies, Adult Day Health Care programs, and health clinics to either eliminate services or shut down completely. This would have dire effects on the health of Medicaid beneficiaries, increasing wait times for necessary services and depriving them of adequate access to preventive and specialized care. The effect would be particularly severe on the elderly and disabled. Additionally, decreasing the availability of community-based care would lead to more institutionalization, raising state costs overall as the cost of nursing home care far exceeds that of community services. In the long run, the brief pointed out, the state's financial situation would only become worse as result of the cuts.

The *Independent Living Center* consolidated cases are important cases because they will determine if Medicaid recipients can challenge the legality of state budgetary cuts on federal preemption grounds. Although financial crises

may lead states to make budgetary cuts, citizens should have the right to ensure these cuts are not made in violation of federal law at the expense of the health of the state's low-income citizens.

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DOES THE COUNTERCLAIM PROVISION OF THE HATCH-WAXMAN ACT APPLY WHEN THERE IS AN APPROVED METHOD OF USING A DRUG THAT ITS BRAND-NAME MANUFACTURER'S PATENT DOES NOT CLAIM AND THE BRAND-NAME MANUFACTURER SUBMITS PATENT INFORMATION TO THE FDA THAT MISSTATES THE PATENT'S SCOPE, REQUIRING CORRECTION?

Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S, 601 F.3d 1359 (Fed. Cir.), *reh'g en banc denied*, 615 F.3d 1374 (Fed. Cir. 2010), *cert. granted*, 79 U.S.L.W. 3403 (U.S. June 27, 2011)(No. 10-844). Oral argument has not yet been scheduled.

In *Caraco*, the Court will address whether a generic-drug manufacturer can assert a counterclaim under a provision of the Hatch-Waxman Act to correct misstatements in the brand-name drug manufacturer's patent protection listings with the FDA, when there are approved methods of using the drug for which the brand-name drug manufacturer has misstated patent protection with the FDA but at least one method of using the drug listed with the FDA is patent protected.

Under the Food, Drug, and Cosmetic Act, a drug manufacturer must get FDA approval for the sale of any drug in interstate commerce. Approval for new drugs or new uses is obtained by filing a New Drug Application (NDA) with the FDA, which must specify the drug(s) and method(s) of use. The drug cannot be sold until the FDA has approved the drugs and methods listed. The NDA applicant must also list all patents "with respect to which a claim of patent infringement could reasonably be asserted" by patent number and expiration date. The same information must again be provided after approval. This "patent information" is listed in the FDA's Orange Book.

Generic manufacturers can use an Abbreviated New Drug Application (ANDA), using the safety and efficacy data of the original drug manufacturer's NDA, to seek approval for an identical generic with the same methods of use. If a patent is listed in the Orange Book, the generic manufacturer must certify that the patent is invalid, expired, or not infringed by the generic. Under what is called "paragraph IV certification for non-infringement and invalidity," approval is stayed up to thirty months pending infringement litigation. Because NDAs can cover patented and unpatented uses, Congress provided a section viii "carve-out," which allows the ANDA applicant to limit its application and secure approval for only unpatented uses while avoiding the infringement-litigation stay.

Realizing that they could block generics by making misleading claims about patent coverage, some brand-name drug manufacturers began listing in the Orange Book drugs or methods for which their patent did not apply. The FDA declined to police the Orange Book, claiming their role was strictly ministerial. In *Mylan Pharmaceuticals v. Thompson*, the Federal Circuit held the courts were also unable to police the Orange Book via declaratory judgments. 268 F.3d 1323, 1332-33 (Fed. Cir. 2001). Congress responded by enacting the counterclaim provision, which states:

[An ANDA] applicant may assert a counter claim seeking an order requiring the holder to correct or delete the patent information submitted by the holder . . . on the grounds that the patent does not claim either . . . the drug for which the application was approved . . . or . . . an approved method of using the drug.

Novo Nordisk (Novo) owned a patent (“the ‘035 patent”) on the drug repaglinide, sold under the name PRANDIN, which expired in March 2009. Novo also owned a patent (“the ‘924 patent”) covering the use of repaglinide in monotherapy (i.e., by itself) to treat diabetes, which expired in September 2006. In 2004, Novo obtained a patent (“the ‘358 patent”) claiming the chemical combination of repaglinide and another drug, metformin, and a method of treating non-insulin dependent diabetes mellitus using the combination, which does not expire until 2018.

Caraco filed an ANDA seeking approval to market repaglinide for diabetes treatment in anticipation of the expiration of the ‘035 patent. Novo sued Caraco in 2005, claiming that, if Caraco marketed repaglinide, it would infringe the ‘358 patent on the basis that the label would suggest the use of repaglinide with metformin. Caraco sought a section viii carve-out, clarifying it only sought approval for the use of the drug in monotherapy. The FDA let Caraco go forward with its ANDA for the carved-out indication.

Many months later, Novo broadened the use code for PRANDIN under the ‘358 patent, changing the use code for PRANDIN to read: “A METHOD FOR IMPROVING GLYCEMIC CONTROL IN ADULTS WITH TYPE 2 DIABETES MELLITUS.” This change made it appear as though Novo had patent protection until 2018 for repaglinide in monotherapy to treat diabetes, something Novo admits is not the case. Based on this, the FDA reversed its prior decision, rejecting Caraco’s proposed carve-out and requiring Caraco to include the information regarding the patented repaglinide-metformin combination therapy on

it generic label (because, except carve-outs to avoid infringement, the generic label's language must match the original's).

Novo sued Caraco for infringement in the U.S. District Court for the Eastern District of Michigan. Caraco counterclaimed under the counterclaim provision of the Hatch-Waxman Act. The district court enjoined Novo to request the FDA to replace the revised use code with the old one. Novo appealed to the Federal Circuit.

The Federal Circuit reversed, interpreting the phrase “the patent does not claim . . . an approved method of using the drug” language to mean “the patent does not claim *any* approved method of using the drug.” Under this interpretation, so long as the brand-name manufacturer includes a single patent-protected method of using its drug, the manufacturer may also misstate patent protection for non-protected methods of use without the generic ANDA applicant being able to use the counterclaim provision to correct the record.¹

AARP and U.S. PIRG filed an *amicus* brief arguing that the Federal Circuit's interpretation of the counterclaim provision of the Hatch-Waxman Act allows brand-name drug companies to game the system, enabling them to stall FDA approval for and prevent competition from generic alternatives by misstating patent protection for methods of use for their drugs. The brief argues that the Federal Circuit's interpretation is neither necessitated by the language of the statute nor consistent with Congress's clear intent in providing the counterclaim provision. The brief emphasizes the impact of the Federal Circuit's interpretation on the availability of less expensive generic alternatives. This will have a clearly negative and disproportional impact on older Americans who typically require more medications that they often must pay for on a fixed income.

The outcome of this case will affect the affordability of health care, particularly prescription medications. Without the ability for generic manufacturers to counterclaim that brand-name drug companies have misstated their patent protection with the FDA, brand-name manufacturers can delay the

¹ Additionally, the Federal Circuit held that the only “patent information” that could be corrected or deleted by the counterclaim provision was the patent number or expiration date.

availability of the generic alternative for up to 30 months by misstating patent protection. The result will be more expensive medications, increasing the cost of healthcare.

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IS A PATENT CLAIM VALID IF IT COVERS OBSERVED CORRELATIONS BETWEEN BLOOD TEST RESULTS AND PATIENT HEALTH, SO THAT THE CLAIM EFFECTIVELY PREEMPTS ALL USES OF THE NATURALLY OCCURRING CORRELATIONS, SIMPLY BECAUSE WELL-KNOWN METHODS USED TO ADMINISTER PRESCRIPTION DRUGS AND TEST BLOOD MAY INVOLVE “TRANSFORMATIONS” OF BODY CHEMISTRY?

Mayo Collaborative Services v. Prometheus Laboratories, Inc.,
628 F.3d 1347 (Fed. Cir. 2010),
cert. granted, 79 U.S.L.W. 3554 (U.S. June 20, 2011)(No. 10–1150).
Oral argument has not yet been scheduled.

In *Mayo*, the Court again considers whether a patent claim on a method for determining safe, effective dosages of certain autoimmune disease drugs that involves testing for levels of blood metabolites and correlating those tested levels with levels considered safe and effective is unpatentable subject matter.

Thiopurine drugs have been used for decades to treat autoimmune diseases. The drugs are broken down by the body into metabolites that help treat autoimmune disease. Too much of the drugs can create toxicity in the body; too little may be ineffective. Prometheus Laboratories (Prometheus) is the exclusive licensee of two patents that claim as methods the steps of 1) administering thiopurine drugs, 2) determining the level of resultant metabolites in the person’s blood, and 3) being warned that blood-metabolite levels above or below a certain range, may “indicate a need” to change the dosage. A doctor who receives lab results about a person’s thiopurine metabolite levels need not take any actions to infringe Prometheus’s patents; the mere contemplation of the correlation between those levels and the patient’s health is sufficient for infringement.

Prometheus brought a patent infringement suit against Mayo Collaborative Services (Mayo) after Mayo created a test to measure the same blood metabolites but utilizing different metabolite levels. The district court first granted summary judgment for Prometheus on the issue of whether Mayo’s test infringed the patent. The district court then granted summary judgment for Mayo on the issue of whether Prometheus patent claimed unpatentable subject matter under § 101. First, the district court held that, because “the inventors did not ‘create’ the correlations between thiopurine drug metabolite levels and therapeutic efficacy and toxicity,” - “a natural body process . . . pre-existing in the patient population” - “the claimed correlations [we]re ‘the work of nature.’” 2008 U.S. Dist. LEXIS 25062, at *23 (S.D.Cal. 2008). Second, the court found that the

patent had only three steps - administering, determining, and warning of potential necessary adjustment in dosage, *id.*, at *35, and that the third step was merely a mental step that could not be patented. Finally, the court held that, “because the only practical use of the correlation is in drug treatment for . . . autoimmune diseases, and anyone seeking to employ the correlation must conduct the only active steps recited in the claims[,] [to] administer the drug and determine metabolite levels[,]” Prometheus’s patent claims wholly preempted every practical application of the natural phenomenon. *Id.*, at *31. Thus, following the Supreme Court’s decision in *Gottschalk v. Benson*, 409 U.S. 63, 67, 72 (1972), that patents that wholly preempt natural phenomena are invalid, the court invalidated Prometheus’s patents.

Prometheus appealed to the Federal Circuit. In 2009, the Federal Circuit reversed the district court’s decision, applying its own “machine-or-transformation test.” While the Federal Circuit agreed that the third step was an unpatentable mental step, it held that, because administering the drug and determining the metabolite levels involved transformations of matter, Prometheus’s patent constituted a patent on an application of the natural phenomenon rather than the natural phenomenon itself.

Mayo filed a writ of *certiorari* to the Supreme Court. After the Supreme Court’s opinion in *Bilski v. Kappos*, 130 S. Ct. 3218 (2009), reaffirming the court’s preemption analysis in *Diamond v. Diehr*, 450 U.S. 175 (1981), and holding the machine-or-transformation test to be at best a clue about patentability, the Court summarily granted *certiorari* in *Mayo*, vacated the judgment, and remanded to the Federal Circuit for further consideration in light of *Bilski*.

The Federal Circuit then reaffirmed its earlier holding, finding that transformations of matter were sufficient to make a patent involving a natural phenomenon patentable on an application rather than on a principle, even in light of *Bilski*. Mayo again successfully petitioned for *certiorari* to determine whether Prometheus’s patent claims patentable subject matter.

AARP and the Public Patent Foundation filed an *amicus* brief urging the Court to find that, when patents claim methods that wholly preempt all practical applications of a natural phenomenon, they are invalid even if acquiring the information needed to make use of the correlation involves transformations of matter. The brief argues that such patents impede rather than “promote the Progress of Science and useful Arts” that is the patent system’s constitutional mandate because they monopolize the very information that the patent system aims to make available to everyone.

This case is important for maintaining quality, affordable medical care. Patents that allow the monopolization of basic facts of medicine will lead to more expensive medical testing, as the basic medical facts required for those test are monopolized. Doctors, worried about patent infringement simply for conducting standard medical tests and contemplating the results, will be less effective. Innovation will be stymied, as researchers will be inhibited from contemplating the natural phenomena of medicine in conducting research and creating products. The result will be more expensive, less effective health care that will disproportionately affect those fifty and older, who often require more medical testing.

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PENDING PETITIONS FOR *CERTIORARI*

HEALTH

DID CONGRESS EXCEED ITS AUTHORITY UNDER THE COMMERCE CLAUSE WHEN IT INCLUDED IN THE PATIENT PROTECTION AND AFFORDABLE CARE ACT A REQUIREMENT THAT INDIVIDUALS PURCHASE AND MAINTAIN MINIMUM ESSENTIAL HEALTH CARE INSURANCE COVERAGE UNDER PENALTY OF FEDERAL LAW?

Thomas More Law Center v. Obama,

2011 U.S. App. LEXIS 13265 (6th Cir. June 29, 2011),
petition for cert. filed, (July 26, 2011)(No. 11-117).

The Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010), was signed into law on March 23, 2010. When ACA is fully implemented, 95% of Americans will have health insurance coverage, whereas approximately 45 million Americans were uninsured when the law was passed. Within hours of the law's passage, however, several states, organizations, and individuals filed lawsuits in federal courts across the country challenging the constitutionality of the law.

As the cases move rapidly through the district and appellate courts, it is expected that one or more of the pending cases will reach the Supreme Court in the upcoming Term. The first petition for *certiorari* pending is from the Sixth Circuit's decision in *Thomas More Law Center v. Obama*, 2011 U.S. App. LEXIS 13265 (6th Cir. June 29, 2011), where the appellate court upheld the constitutionality of the ACA. In addition to the Sixth Circuit, the Fourth, Eleventh and District of Columbia Circuits are reviewing or have reviewed lower court decisions on the merits. On August 12, 2011, the Eleventh Circuit decided *Florida v. U.S. Dept. of Health and Human Servs*, 2011 U.S. App. LEXIS 16806 (11th Cir. Aug. 12, 2011), holding that the individual minimum coverage requirement is unconstitutional, thereby creating a split in the circuits. *Id.* at *145. The Department of Justice is expected to file a petition for *certiorari* in the case. On September 8, 2011, the Fourth Circuit dismissed the two cases challenging the ACA that were before the court for lack of subject matter jurisdiction and standing respectively, *Liberty University v. Geithner*, 2011 U.S. App. LEXIS 18618 (4th Cir. Sept. 8, 2011), and *Commonwealth of Virginia ex rel. Cuccinelli v. Sebelius*, 2011 U.S. App. LEXIS 18632 (4th Cir. Sept. 8, 2011). Virginia and

Liberty University are expected to file *certiorari* petitions. Oral argument in the D.C. Circuit case, *Mead v. Holder*, 766 F.Supp.2d 16, 35 (D.D.C. 2011), *pending sub nom*, *Seven-Sky v. Holder*, appeal docketed, No. 11-5047 (D.C. Cir. filed May 16, 2011), is scheduled for September 23, 2011.

The constitutional challenges facing the ACA fall generally into two categories. First, plaintiffs contend that the law's individual minimum coverage requirement, also referred to as the "individual mandate," exceeds Congress' powers under the Commerce Clause. *Accord Florida ex rel. Bondi v. U.S. Dept. of Health and Human Servs.*, 2011 U.S. Dist. LEXIS 8822 (N.D. Fla. Jan. 31, 2011). Second, plaintiff states claim that the ACA unconstitutionally regulates them by exacting "fundamental and massive changes" on the nature of the Medicaid program. *Id.* at *14.

The law's individual minimum coverage requirement requires that every legal U.S. resident obtain health coverage by January 1, 2014. With certain exceptions, a person who fails to purchase the requisite coverage must pay a "shared responsibility payment" with their annual federal tax return. The fee's calculation is based on the individual's household income, but cannot exceed \$750. 26 U.S.C. § 5000A(b), (c). In its statutory findings, Congress determined that the cost of providing uncompensated care for the uninsured was over \$43 billion in the year 2008 alone. *Accord* Brief for Appellees at 24, *Seven-Sky v. Holder*, No. 11-5047 (D.C. Cir. filed June 27, 2011). Further, Congress found that these costs were passed on from the providers to private insurers, who in turn would, on average, increase family premiums over \$1,000 a year. *Accord id.* Requiring all qualified individuals to purchase insurance for health care they will inevitably need during their lifetimes would prevent this cost-shifting. Congress also determined that the minimum coverage requirement is necessary for the ACA's community-rating requirements; if individuals did not purchase insurance until an acute need arose, the Act's provisions preventing insurers from increasing premiums or denying coverage based on pre-existing conditions and age would be jeopardized.

Challengers of the mandate contend that it exceeds the federal government's power under the Commerce Clause, which grants Congress the authority to regulate interstate commerce. See U.S. Const. Art. I, § 8, cl. 3. The Supreme Court has explained the contours of this grant of authority as encompassing three broad spheres: 1) the use of the channels of interstate commerce; 2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and 3) those activities that substantially affect interstate commerce. See *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

Challenges and defenses to the ACA center on this third category. Supreme Court jurisprudence reveals that Congress may use this category of its Commerce Power to regulate related classes of activity. *Thomas More Law Ctr. v. Obama*, 2011 U.S. App. LEXIS, at *15. First, Congress may regulate economic activity, even when entirely intrastate, if it substantially affects interstate commerce. *Id.* Second, Congress can also regulate non-economic activity if doing so is essential to a broader scheme that regulates economic activity. *Id.*; *Gonzales v. Raich*, 545 U.S. 1, 25 (2005).

Challengers contend that the decision to forego health insurance is not an economic activity, and Congress thus exceeded its enumerated powers by requiring individuals to purchase insurance. Plaintiffs' claims rely on the argument that the minimum coverage requirement regulates *passive inactivity*, which, plaintiffs claim, Congress does not have the power to touch. The government responds that the choice to self-insure, when an individual can afford to buy insurance, is indeed an economic activity. The decision to not purchase insurance, the government argues, is an economic choice of how to finance the health care one receives, a service that all individuals will inevitably use at some point in their lives. The Northern District of Florida and Eastern District of Virginia have both found the minimum coverage requirement unconstitutional on the grounds that it impermissibly regulates inactivity. See *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F.Supp.2d 768 (E.D. Va. 2010), *overruled on other grounds*, 2011 U.S. App. LEXIS 18632; *Florida*, 2011 U.S. Dist. LEXIS 8822.

In *Florida*, the district court held that the Commerce Clause contains an "activity" requirement; to hold otherwise, the court continues, would allow Congress to "do almost anything it wanted." 2011 U.S. Dist. LEXIS, at *78-79. Further, both the Northern District of Florida and the Eastern District of Virginia courts characterized the act of self-insuring as passive. See *id.* at *82; *Virginia*, 728 F.Supp.2d at 782 (finding that the Commerce Power is triggered by "self-initiated action" and not buying insurance does not qualify). The Eleventh Circuit upheld the Florida district court in part and reversed in part. The court held, among other things, that Congress exceeded its authority to regulate interstate commerce. *Florida v. HHS*, 2011 U.S. App. LEXIS, at *145.

The Western District of Virginia, the District of Columbia, and the Eastern District of Michigan, however, ruled otherwise, finding that Congress did not exceed its powers. See *Liberty Univ. v. Geithner*, 753 F.Supp.2d 611, 634 (W.D. Va. 2010); *Mead v. Holder*, 766 F.Supp.2d 16, 35 (D.D.C. 2011), *pending sub nom*, *Seven-Sky v. Holder*, *appeal docketed*, No. 11-5047 (D.C. Cir. filed May 16, 2011); *Thomas More Law Ctr. v. Obama*, 720 F.Supp.2d 882, 894 (E.D. Mich.

2010). The Michigan district court described plaintiffs' decision to not purchase insurance as "plainly economic," and noted that these actions would shift "billions of dollars" onto other market participants. *Thomas More Law Ctr.*, 720 F.Supp.2d at 894. In *Mead*, the D.C. District Court recognized the individual mandate as a "clear-cut example" of an "essential part of a larger regulation of economic activity." 766 F.Supp.2d at 35 (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)). Significantly, the court found that Congress' efforts at reforming the health care system by eliminating discrimination in insurance practices would be "financially untenable" without the individual mandate. *Id.* The Western District of Virginia similarly found that the individual mandate was necessary to the broader regulatory scheme of the ACA. See *Liberty Univ.*, 753 F.Supp.2d at 634-35. Without the mandate, the very goals Congress sought to meet by enacting the ACA would be undercut. *Id.*

The Sixth Circuit, the first appellate court to decide one of the cases on the merits, rejected the active/inactive distinction, finding that the language and history of the Commerce Clause makes clear that there is no such constitutional distinction. *Thomas More Law Ctr.*, 2011 U.S. App. LEXIS, at *23, *43.

The United States' second defense to the suits against the individual mandate relies on the Necessary and Proper Clause to supplement Congress' Commerce Power. This argument is articulated in *Raich*, the Court's most recent elaboration of the Commerce Power relevant to this case. *Liberty Univ.*, 753 F.Supp.2d at 632. *Raich* held that Congress may regulate non-economic activity if it rationally believes that, in the aggregate, the failure to do so would undermine the effectiveness of the overlying regulatory scheme. 545 U.S. at 19-22. Because the majority in the Sixth Circuit was divided in its reasoning of why the ACA is constitutional, there is no plurality on whether the minimum coverage requirement is valid as part of a broader regulatory scheme.

As an alternative to the Commerce Power argument, the United States defends the individual mandate under Congress' power to "lay and collect taxes." U.S. Const. art I, § 8, cl. 1. The argument is that the payment fee, required when a non-exempt individual does not purchase insurance, is a tax valid under the Constitution. The government states that the taxing power is "comprehensive," "plenary," and construed broadly by the courts. *Accord* Brief for Appellant at 58, *Commonwealth of Virginia ex rel. Cuccinelli v. Sebelius*, No. 11-1057 (4th Cir. filed Feb. 28, 2011). Further, the government argues that when reviewing the constitutionality of a tax law, "the court is 'concerned only with its practical operation, not its definition. . . .'" *Id.* (quoting *United States v. Sotelo*, 436 U.S. 268, 275 (1978)).

Challengers argue that the “shared responsibility payment” is a regulatory penalty, not a tax. Plaintiffs in the D.C. district court contend that the “character of a statute itself is determinative” of what congressional power a statute was enacted under, and not the government’s “characterization of the statute during litigation.” *Accord* Brief for Plaintiff at 27, *Mead v. Holder*, 766 F.Supp.2d 16 (D.D.C. 2011) (No. 1:10-cv-00950-GK). Every court, with the exception of the Fourth Circuit in the *Liberty University* case, has found that the penalty is not a tax.

The language of the ACA calls the payment a “penalty,” and the legislative findings reveal that Congress specifically invoked its Commerce Power, not its taxing authority, when it drafted the minimum coverage requirement. Significantly, the text of the ACA calls other revenue-raising provisions in the law “taxes” while explicitly referring to the shared responsibility payment as a “penalty.” *Thomas More Law Center*, 2011 U.S. App. LEXIS, at *29. (Judge Sutton found in his concurring opinion that “[w]ords matter” “and it is fair to assume that Congress knows the difference between a tax and a penalty.”). The Eleventh Circuit similarly held that the law does not fall within Congress’ powers under the Taxing and Spending Clause. *Florida*, 2011 U.S. App. LEXIS, at *243.

In *Liberty University*, the Fourth Circuit, however, held that the payment that will be charged individuals beginning in 2014 who do not carry minimum health insurance is a tax under the Anti-Injunction Act. As such, the court dismissed the lawsuit because the Anti-Injunction Act prohibits legal challenges of taxes before the tax is collected. The court found that the federal courts hearing the case lack subject matter jurisdiction since no taxes have been paid to date. 2011 U.S. App. LEXIS 18618, at *42.

If the Court finds the minimum coverage provision unconstitutional, it must also rule on whether it is severable from the rest of the ACA. After finding the provision unconstitutional, the district court in *Florida* struck down the entire ACA. 2011 U.S. Dist. LEXIS 8822, at *135-36. The court viewed the coverage requirement as “essential and indispensable” to Congress’ broader efforts of enacting health care reform through the Act, and thus found that the Act must “stand or fall” with the mandate provision. *Id.* The Eleventh Circuit, however, reversed the district court and found that the minimum coverage provision can be severed from the rest of the ACA, and that therefore only the individual coverage requirement is invalidated. *Florida*, 2011 U.S. App. LEXIS, at *267.

The second category of constitutional challenges to the ACA, the state sovereignty claim, was brought by Florida and joined by 25 additional states in

the Northern District of Florida. Beginning in 2014, the ACA expands the scope of Medicaid by directing that it cover all citizens under the age of 65 with incomes under 133% of the federal poverty level. State plaintiffs contend that this expansion violates the Spending Clause and spending principles set forth in *South Dakota v. Dole*, 483 U.S. 203 (1987). *Dole* recognized that in certain instances, “the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’” *Id.* at 211. Plaintiffs’ state sovereignty claim rests on the contention that the ACA is coercive. Essentially, the claim is that because Medicaid is the largest federal grant program to the states, and because the state and its citizenry have come to rely upon it, participation is in fact mandatory, and the vast expansion of the program is coercive. See *Florida*, 2011 U.S. Dist. LEXIS, at *17.

The argument was rejected by both the district court and the Eleventh Circuit. 2011 U.S. App. LEXIS, at *83. Though the district court sympathized with the states’ budget constraints, it found that participation in the Medicaid program is, and always has been, voluntary. 2011 U.S. Dist. LEXIS, at *19-20. The Eleventh Circuit found that states were warned that Congress reserved the right to make changes to the program. 2011 U.S. App. LEXIS, at *94, and that the federal government will bear nearly all costs for the expansion until 2016. *Id.* at *98.

Courts have also dismissed a number of the challenges for lack of subject matter jurisdiction without reaching the merits. In *Commonwealth of Virginia v. Sebelius*, notwithstanding that the district court ruled on the constitutionality of the ACA, i.e., finding the individual responsibility requirement is unconstitutional, the Fourth Circuit unanimously held that Virginia lacks standing to challenge the law since the state did not suffer any injury in fact. 2011 U.S. App. LEXIS 18618, *19-*20.

In *Baldwin v. Sebelius*, 2011 U.S. App. LEXIS 16617 (9th Cir. Aug. 12, 2011), the Ninth Circuit affirmed the lower court’s dismissal. Currently, the Third and Eighth Circuits are hearing appeals of the lower courts’ dismissals for plaintiffs’ failure to establish Article III standing.

AARP filed *amicus* briefs in the ACA cases before the Fourth, Eleventh, and DC Circuits offering critical information regarding the harm currently suffered by the millions of people 50 to 64 who do not have job-based coverage and are not eligible for Medicaid or Medicare. Older people need more health services and are more likely to suffer from chronic conditions than their younger counterparts. Yet, they face extreme obstacles to buying insurance on the

private market due to industry-wide insurance underwriting and rating practices that discriminate based on health status and age. The consequences have been dire. Not only have too many become laden with a tremendous amount of debt at a time in their lives when they should be saving for retirement, but they have also suffered worse health outcomes, including premature death, than their insured counterparts. Because they often forego or receive inadequate health care, the uninsured and underinsured enter Medicare sicker and in greater need of services than their insured counterparts. Medicare, therefore, shoulders the burden of paying the costs for the services needed to care for those uninsured people once they enter Medicare.

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WHAT THE FUTURE HOLDS

Several important decisions from previous Supreme Court terms left unresolved legal issues of critical importance to older people. And, of course, as lower courts issue decisions and legislatures make laws, new issues inevitably arise. This section discusses some of the issues which AARP Foundation Litigation attorneys see on their radar screens. We expect that some of these issues will eventually make it to the Court.

Employment

Like last year's Term, there are no cases involving the Age Discrimination in Employment Act on the Court's docket for the upcoming 2011 Term, probably because employee advocates are still reeling from the Court's 2009 decision in *Gross v. FBL Financial Servs., Inc.*, 129 S.Ct. 2343 (2009), which will continue to severely undermine the ability of older workers to vindicate their rights. Until the Court agrees to decide another ADEA case, AARP's efforts will be concentrated on persuading Congress to pass the Protecting Older Workers Against Discrimination Act (POWADA). This legislation, which has been introduced in both houses of Congress, specifically repeals the *Gross* decision in order to restore the ADEA to its pre-*Gross*, congressionally intended purpose of acting as bulwark against work place age discrimination. The POWADA also amends Title VII, GINA (Genetic Information Nondiscrimination Act), ADA (Americans with Disabilities Act), and the Rehabilitation Act of 1973 to prevent *Gross* from spreading to these statutes and weakening their congressionally-mandated employee protections.

Unfortunately, the *Gross* decision is bleeding over into other areas of proof for different types of claims. For instance, *Gross* has led a number of courts to interpret the ADEA and other civil rights statutes to require proof that a protected characteristic is the "sole cause" of alleged discrimination – a tall order, if not an impossible burden to meet. Courts continue to describe a duty to prove bias as a "single motive" as the only alternative to the "mixed motive" theory of discrimination, which exists under Title VII, but which the Court rejected under the ADEA in *Gross*. An example of this problem that soon may bubble up to the Supreme Court is provided by *Ponce v. Billington*, 652 F.Supp.2d 71 (D.D.C. 2009), a Title VII sex, race, and national origin discrimination case pending before the U.S. Court of Appeals for the District of Columbia Circuit. The issue in *Ponce* is whether the trial judge improperly instructed the jury that in order to find for Jorge Ponce it had to determine that illegal discrimination was "the sole

reason” for his not being hired into a senior position with the Library of Congress. Based on this instruction, the jury found against Ponce on each of his discrimination claims. Ponce moved for a new trial arguing that the court should have instead given a “mixed-motives” instruction. The court denied his motion for a new trial, and he subsequently appealed. The government has filed a motion for summary affirmance of the trial court judgment based on *Ginger v. District of Columbia*, 527 F.3d 1340 (D.C. Cir. 2008), in which the appeals court identified a “single motive” theory of discrimination as the only alternative to a “mixed-motive” theory. The *Ginger* court also required plaintiffs to state at the very outset of litigation which theory they embraced, or forfeit reliance on it thereafter.

The later decision of *Ford v. Mabus*, 629 F.3d 198 (D.C. Cir. 2010), in which AARP filed an *amicus* brief, distinguished *Ginger* by holding that the *Gross* decision does not apply to discrimination claims of federal employees because the breadth of the provisions of the ADEA (and Title VII) protected such workers, demanding that “all [federal government] personnel actions . . . shall be made free from any discrimination based on age” (and race). Based on this language, the *Ford* court ruled that a “mixed-motives” instruction is proper in a federal-sector age bias case if there is evidence to support this theory. The *Ford* court also declared that *Gross* does not require the plaintiff to prove sole cause.

The Court may agree to decide this Term whether *Gross* applies to the ADEA claims of federal employees. On March 22, 2011 the U.S. Court of Appeals for the Tenth Circuit in an unpublished opinion in *Harley v. Potter*, 416 Fed. App’x 748 (10th Cir. 2011), an ADEA case brought by a former employee of the U.S. Postal Service, held that *Gross* is “the controlling legal standard” and affirmed the district court’s decision that the plaintiff failed to prove that her age was the but-for cause of her termination. On August 5, 2011, Harley filed a petition for a writ of *certiorari* stating that this decision has created an “irreconcilable conflict” with the decision of the D.C. Circuit in *Ford v. Mabus*.

Although *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), was a unique case due to the size of the potential class, its outcome was not surprising given the Court’s recent jurisprudence limiting class actions. The effect of *Dukes* on class action lawsuits in general is still being developed. In *Dukes*, the Court reversed the lower court’s decision allowing the case to proceed as a class action. The Court held that the class of approximately 1.5 million current and former female employees of Wal-Mart did not and could not satisfy the “commonality” requirement of Rule 23(a) and that the claims for back pay require individual adjudication and, thus, are not susceptible of class treatment.

We expect defense counsel to argue that *Dukes* is applicable to group claims under the ADEA, which must be filed as “collective actions” under the Fair Labor Standards Act. But, collective actions are not subject to any of the stringent requirements of Rule 23. To certify a collective action, the court must determine only that the named plaintiffs and those who propose to participate in the collective action are “similarly situated,” a term that the FLSA does not define, but which courts have construed to be a much less exacting standard than that applicable to Rule 23 class actions. Constant vigilance by employee advocates like AARP Foundation Litigation will be required to keep employers from persuading courts to impose concepts and language unfavorable to employees found in *Dukes* making it easier to deny certification of ADEA collective actions.

Health Care

The Supreme Court continues to grant *certiorari* in a significant number of patent cases from the Federal Circuit that directly affect the cost of health care for the 50+ population. In past years, a number of patents reached the Court concerning prescription drugs and, contrary to the Court's tendency to reverse cases, the Court last Term affirmed several patent rulings from the Federal Circuit. In addition to patent cases concerning pharmaceutical drugs, it is expected that in the future the Court will continue to review patent cases and specifically issue a decision on the validity of patents that concern diagnostic testing including testing on isolated human genetic sequences.

Patents on genetic sequences (“gene patents”) can significantly limit the ability of scientists to conduct research, the ability of physicians to provide genetic testing, and the ability of patients to get second opinions. The issue of whether gene patents are valid is expected to end up in the Supreme Court in the near future. The Federal Circuit recently ruled in *Association for Molecular Pathology v. U.S. Patent and Trademark Office*, 2011 U.S. App. LEXIS 15649 (Fed. Cir. 2011) (*Myriad Genetics*) that isolated human DNA molecules can be patented. Myriad Genetics holds an exclusive patent license for the BRCA1 and BRCA2 genes, DNA fragments related to a person’s predisposition to develop breast and ovarian cancer. Myriad Genetics is thus the sole provider of BRCA genetic testing in the United States. Because of Myriad Genetics exclusive license, BRCA test cost upwards of \$3,000, limiting access to the tests. Additionally, because no other company can offer a BRCA tests, patients are unable to get a second opinion.

Several scientists, professors, counselors, and individuals at high risk for hereditary breast or ovarian cancer filed suit against Myriad Genetics claiming

the BRCA patents violated 35 U.S.C. § 101, as well as Article I, Section 8, Clause 8 and the First Amendment of the U.S. Constitution. The district court granted the summary judgment, invalidating Myriad Genetics' gene patents because the genes, as products of nature, constituted unpatentable subject matter under § 101. *Association for Molecular Pathology v. U.S. Patent and Trademark Office*, 702 F.Supp.2d 181 (S.D.N.Y. 2010). Myriad Genetics appealed to the Federal Circuit, which reversed with respect to the patentability of isolated human DNA molecules. 2011 U.S. App. LEXIS 15649. The Federal Circuit held that, because the isolated DNA molecules were not found in their isolated form in nature and required human intervention by cleaving or synthesizing to isolate, they were not a product of nature, but rather a man-made invention patentable under § 101. The plaintiffs have filed a petition for rehearing. Regardless of the Federal Circuit's decision, we expect that one of the parties will seek *certiorari*, which the Court will likely grant.

Along with the consolidated cases of *Independent Living Center v. Maxwell-Jolley* currently pending before the Court (*see supra*, at 15), concerning whether Medicaid providers and beneficiaries have standing to challenge state cuts of Medicaid services under the Supremacy Clause, another set of challenges has been raised to cuts in Medicaid-funded home care services. Pursuant to the community integration mandate of the Americans with Disabilities Act (ADA), states providing Medicaid services are required to provide care for persons with disabilities in the most integrated setting appropriate to their needs to avoid institutionalization and unnecessary segregation of persons with disabilities. Home care services facilitate community integration by providing in-home assistance with activities of daily living that allows disabled individuals to continue living at home.

Plaintiffs in *M.R. v. Dreyfus*, No. C10-2052Z, 2011 U.S. Dist. LEXIS 18819 (W.D. Wash.) challenged home care service cuts, arguing that the cuts violate federal Medicaid law and the ADA because the reduced hours of personal care services are insufficient to allow individuals to continue living at home and create a serious risk of institutionalization. Plaintiffs' motion for a preliminary injunction to prevent the implementation of these changes to Washington's home care services program was denied. Plaintiffs in *Cota v. Maxwell-Jolly*, 688 F.Supp.2d 980 (N.D. Cal. 2010), on the other hand, used similar arguments to successfully enjoin the state of California from implementing funding cuts to home care services. Appeals from both decisions are pending in the Ninth Circuit. Similar suits have been filed in two other circuits: *Pitts v. Greenstein*, No. 10-635-JJB-SR, 2011 U.S. Dist. LEXIS 53335 (M.D. La.), is ongoing in a district court of the Fifth Circuit, and *Peter B. v. Sanford*, No. 6:10-cv-00767-JMC, 2011 U.S. Dist.

LEXIS 22790 (D.S.C.), in a Fourth Circuit district court. Neither has progressed to the appellate stage. AARP Foundation Litigation attorneys are serving as co-counsel in both *Cota* and *Pitts*.

Finally, in an appeal from *West Virginia ex rel. McGraw v. CVS Pharm., Inc.*, 2011 U.S. App. LEXIS 10171 (4th Cir.), the Supreme Court could be addressing a state's ability to sue on behalf of its citizens in state court. The defendants have petitioned the Court for review of whether the Class Action Fairness Act of 2005 (CAFA) can be used to limit access of Attorneys General to their own state courts when they file *parens patriae* actions seeking to vindicate citizens' rights and recover money damages on behalf of the state's citizens.

West Virginia, through its Attorney General, brought a state court action against CVS and five other pharmacies under the state code and state consumer laws protecting individuals against deceptive acts in trade and commerce. The state alleges that the pharmacies sold generic drugs without passing on to consumers the cost savings of generic drugs over the brand name equivalents. *CVS*, 2011 U.S. App., at *2. CVS removed the action from state court to the Southern District of West Virginia, arguing that the action is actually a "disguised class action" and is thus subject to removal under CAFA. *Id.* at *3. The federal district court rejected CVS's claim and held that West Virginia's claim was not a class action under CAFA, but rather, a "classic *parens patriae* action" where the state seeks to protect the interests of its residents. *See id.* The Fourth Circuit affirmed, finding that the claim was not subject to CAFA. The Fourth Circuit concluded that the Attorney General's claim was dissimilar to a claim that would be brought as a class action under Fed. R. Civ. P. 23 or a similar state class action statute and determined that the case was not removable. *Id.* at *4-5.

Defendants in *McGraw* sought and obtained a stay pending a petition for review to the Court. They contend that there is a split in the circuit courts, pointing primarily to *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008). In *Louisiana ex rel. Caldwell*, the Louisiana Attorney General brought claims seeking treble damages for citizen insurance policy holders allegedly subject to a scheme by insurance companies and underwriters to undervalue and underpay claims made in the wake of damage caused by Hurricanes Katrina and Rita. The Fifth Circuit concluded that the policyholders were the real parties in interest and that the case was removable under CAFA as a mass action, defined as a civil action in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the grounds that there are common questions of law or fact.

ERISA & Employee Benefits

Although none are currently docketed for hearing, several issues are likely to surface in upcoming terms as outgrowths of recent Supreme Court decisions, particularly in the realms of ERISA plan interpretation, remedies for fiduciary breach, and the overall reach of ERISA's anti-retaliation provision.

In the Court's decision in *Conkright v. Frommert*, 130 S. Ct. 1640 (2010), the Court endorsed a rule of deference to the plan administrator's interpretation of plan terms where the plan grants discretion to the administrator, even in the wake of a court finding that a previous plan interpretation by the administrator at an earlier stage in the controversy was erroneous. In *Conkright* the Court sent the case back to the plan administrator for another go at the plan's meaning. The courts below have been struggling with the limits of this holding, and so it seems likely that an upcoming case in the Court will test the limits of this holding.

Similarly, the Court in *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011), held that the ERISA section under which benefit claim denials are challenged does not authorize relief for misrepresentations made in a pension summary plan description (SPD). The *Amara* Court rejected the argument that the terms of the SPD are themselves part of the plan so a claim for relief may not be grounded on SPD language; however, the Court did explicitly approve the notion that equitable relief authorized under ERISA does refer to categories of relief that were "typically available" in equity courts before the merger of law and equity. In that vein, the Court appeared to lay down a premise that the district court had the authority to grant traditional equitable remedies such as reformation of contract, estoppel, and surcharge. *Amara* raised as many questions as it answered; we expect cases concerning the burden of proof and causation will be among those issues that may eventually reach the Court.

In the last few years, the Court has decided many cases concerning the scope of the anti-retaliation provision under various statutes, resulting in employee-friendly decisions. Currently, there is a split in the circuits concerning whether ERISA's anti-retaliation provision permits an employer to discharge an employee for making unsolicited internal complaints regarding violations of the statute. The Court ducked this question during the 2010 Term, denying *certiorari* in *Edwards v. A. H. Cornell and Son, Inc.*, 131 S. Ct. 1604 (2011), but we believe that the issue will arise in the foreseeable future.

Investor Protection

Many issues remain on the horizon as to the development, abridgment or stunting of investors' opportunities to seek recourse for securities fraud. The lower courts are grappling with the extent to which the credit rating agencies (Moody's, Standard & Poor's, etc.) can be held liable for their false and misleading ratings that helped propel the financial meltdown. Much of the junk securities could not have been sold without the agencies' high ratings which were seemingly indiscriminately awarded. Depending on the outcome of these cases, the Supreme Court may end up addressing the culpability of the credit rating agencies.

Another open issue is what a plaintiff class must show at the class certification stage. The Fifth Circuit issued a controversial certification opinion a few years ago, holding that plaintiffs needed to prove loss causation – clearly, a merits issue better left for trial – at the class certification stage. No other circuit had contested the rationale of this decision, although the district courts were making mixed comments about it. But last year, Judge Easterbrook of the Seventh Circuit wrote an opinion rejecting the Fifth Circuit's position in the case of *Schleicher v. Wendt*, 618 F.3d 679 (7th Cir. 2010). We expect to see many district and circuit courts weighing in on this circuit split, and the question is likely to be ultimately decided by the Supreme Court.

Another trend to watch is the developing practice of excluding securities fraud settlements, which have historically been primarily comprised of cash settlements, from errors and omissions insurance coverage. Some recent settlements include mandated corporate governance changes at the company, and even contributions or disgorgement by individual officers and directors paid into the settlement pot. Issues of indemnification and other remedies may find their way before the Court due to the tremendous impact on the corporate (and individual) bottom line.

Disability

In response to numerous ADA employment decisions issued by the Court, Congress in 2008 enacted the Americans with Disabilities Act Amendments Act (ADAAA), specifically repudiating the Court's rulings in these cases in regard to the definition of "disability."² Overwhelming bipartisan majorities in the House

² A circuit split was also resolved by the ADAAA which provides accommodation is not a form of relief that may be awarded on the basis of a "regarded as" claim.

and Senate declared the Court had taken a serious wrong turn by construing the ADA too narrowly, and thus, had cut off the opportunity of many employees to prove discrimination by their employers. Congress identified January 1, 2009, as the day after which claims of disability bias had to focus on issues concerning defendants' conduct, not plaintiffs' medical condition. The ADAAA is expected to have a dramatic effect in restoring access to legal relief to people with disabling impairments of all kinds – a great many of which disproportionately impact older workers.

The ADAAA's provisions are a model of clarity and specificity in comparison with the sweeping, if often opaque, terms of the original ADA. Thus, the ADAAA is not likely to give rise to a new generation of legal disputes in the Supreme Court regarding the term "disability," and its definitional sub-parts. Rather, the ADAAA probably means that a different set of ADA terms – such as "reasonable accommodation," "qualified," "essential job functions," "business necessity" and "direct threat" – are more likely to be the focus of disputes heading to the Court. Indeed, the fixation of many ADA cases for many years on aspects of the definition of disability guaranteed that courts did not reach many issues of statutory construction presented by other language in the ADA.

In the past decade or so, the Court has decided a number of other important cases under the ADA and its predecessor statute, the Rehabilitation Act of 1973, which applies to federal, state and local government entities, and other recipients of federal funds. The critical subjects addressed have included discrimination in institutional care and other public services, state sovereign immunity from damages liability, and access to private facilities constituting "public accommodations." And unlike the Court's decisions in the disability employment arena, many of these decisions advanced the rights of people with disabilities. But in recent years the Court's docket has not included any significant non-employment disability rights matters. Thus, whether – and if so, when – the Court may return its focus to disability issues is uncertain.

Lonberg v. City of Riverside, 571 F.3d 846 (9th Cir. 2009), petition for *certiorari* filed, 78 U.S.L.W. 1003 (Apr. 15, 2010) (No. 09-1259), presents the question of whether a person with a disability has a private right of action to enforce the regulatory requirement of public entities covered by the ADA to conduct a self evaluation and develop a transition plan to remove architectural barriers in their facilities. The case seeks to improve access to sidewalks for people with disabilities. AARP Foundation Litigation represented a class of people with disabilities seeking similar relief in *Californians For Disability Rights v. California Department of Transportation*, No. C-06-5128 SBA, 2010 U.S. Dist.

LEXIS 62837 (June 2, 2010) (order granting final approval of settlement agreement). The settlement obligates California to spend \$1.1 billion over 30 years to make sidewalks safe and useable for all people.

Housing Rights

Congress' dual goals of ending residential discrimination and maximizing integration resulted in drafting the Fair Housing Act (FHA) with the broadest possible scope of standing, effective measures of enforcement, and meaningful remedies. The FHA has become an essential tool enabling older homeowners and tenants to live in their communities throughout their life span, on their own or with family members, in traditional housing or residential care. As cases on behalf of older people seeking reasonable accommodations and freedom from disability discrimination in assisted living facilities and continuing care retirement communities continue to be brought and appealed, new and developing theories will eventually come before the Court.

As in other areas of the law, the intent of Congress can be thwarted by narrow interpretations of jurisprudential and procedural matters that chip away at access to the courthouse door, for instance by limiting who can bring a lawsuit or when it can commence. The lower courts are currently divided on the question of how to calculate the statute of limitations in cases where the FHA's design and construction standards were not met. One FHA standing case decided this year appears to be limited to the facts of the case. *Equal Rights Ctr. v. Post Props.*, 633 F.3d 1136 (D.C. Cir. 2011), addressed the role of fair housing agencies in the context of design and construction cases, where violations are best corrected before they are needed by actual residents, as soon as possible after construction. This is especially pressing as more courts have strictly construed the statute of limitation in the FHA design and construction context, and the chances of the Supreme Court taking the next such statute of limitations case becomes more likely.

The special role played by fair housing testing agencies in enforcing the FHA, and the importance of their careful reading of cases like *Post Properties*, takes on added meaning in the context of the judicial barriers placed on other group's ability to challenge unlawful housing discrimination. Where a broad coalition of groups brought a lawsuit challenging a municipal zoning ordinance that prohibited any housing except single family masonry finished homes as having a discriminatory impact on minorities, the Fifth Circuit found that the groups like the NAACP did not have membership standing and the groups like the Association of Homebuilders did not have associational standing. *NAACP v.*

City of Kyle, 626 F.3d 233 (5th Cir 2010). If none of the plaintiff groups in *NAACP v. City of Kyle* have standing, it is hard to imagine what entities could have standing to bring such a lawsuit challenging a broad, facially neutral, municipality wide law or policy that has an adverse discriminatory impact. Moreover, an individual plaintiff would be unlikely to have the resources adequate to litigate a disparate impact lawsuit successfully.

While housing practices that produce an adverse discriminatory impact have long been held to be unlawful under the FHA, a pending petition for *certiorari* challenges the disparate impact doctrine under the FHA. Because there is no split in the circuits on this issue, housing advocates believe there is no need for the Court to address the issue. However, if *certiorari* is granted, then housing advocates believe that the case should be limited to its specific facts. *Magner v. Gallagher*, 636 F.3d 380 (5th Cir. 2010) (landlord alleged overly zealous code enforcement had disparate impact). At the same time, and in marked contrast, in a disparate impact case pending in the Third Circuit, in which AARP Foundation Litigation attorneys are co-counsel, defendants have not challenged the disparate impact theory and the Department of Justice has submitted an *amicus* supporting the FHA's inclusion of a disparate impact theory and specifying the proper standard to be used in establishing its prima facie case. *Mt. Holly Gardens Citizens in Action v. Mt. Holly Township*, 2011 U.S. Dist. LEXIS 91 (D. N.J. 2011), *appeal docketed*, No. 11-1159 (3d Cir. Jan. 20, 2011).

Consumer Protection and Preemption

In addition to *Edwards v. First American Title*, upon which the Court has already accepted *certiorari*, *see supra*, at 8, the Court is considering accepting a second RESPA case. While it is clear that the statute prohibits kickbacks and referral fees between two or more providers of settlement services, the circuits are split about whether RESPA is violated when the consumer is simply charged a fee for which no correlative service is performed. The Court has invited the views of the Solicitor General on this petition for *certiorari*, which arises out of the Fifth Circuit. *Freeman v. Quicken Loans, Inc.*, 626 F.3d 799 (5th Cir. 2010).

Many of the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act became effective on July 21, 2011. The Act created a new Consumer Financial Protection Bureau, to which rulemaking authority over a broad spectrum of federal consumer protection laws has been delegated. However, the ability of the Bureau to issue certain regulations is on hold pending Congressional approval of its Director. There are rumblings among some in Congress that it will not confirm any director until certain "fixes" are made to the

Act, including its funding mechanism and the expansion of the governance of the agency to a commission, rather than a single director.

Once the confirmation process is completed, the CFPB is likely to issue a range of new regulations and to play an active role in the long battle over federal preemption of state consumer protection laws, in which the Supreme Court has taken an active role. Even prior to July 21, 2011, disputes likely to end in the Supreme Court were being foreshadowed. The Office of the Comptroller of the Currency issued new preemption regulations that did not comply with the specific standards set out in the Dodd-Frank Act in several important respects. The laws state attorneys general will be permitted to enforce is likely to be a subject of controversy and litigation. In addition, there are currently cases working their way through the courts challenging state foreclosure and servicing laws that seek to expand the scope of pre- and post-Dodd-Frank preemption.

CONCLUSION

As baby boomers age, Supreme Court decisions are likely to influence a larger percentage of the American population and will increase in significance. AARP Foundation Litigation, through its active *amicus* participation in the Supreme Court, has and will continue to ensure that the Court is made aware of the concerns of older people. Participation in these cases is an integral part of AARP Foundation Litigation's advocacy and it will continue to apprise the Court of its views.



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