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Litigation

The Supreme Court 2010: What's At Stake For Americans 50+

A Preview of the 2010 Term

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AARP® FOUNDATION

THE SUPREME COURT 2010:

WHAT'S AT STAKE FOR PEOPLE 50+ IN AMERICA

A Preview of the 2010 Term

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 attorneys initiate and support litigation protecting the rights of people 50+, and are responsible for carrying out AARP's judicial advocacy activities, including direct litigation and AARP *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 has filed or will file *amicus* briefs in most of the cases discussed herein.

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WHAT THE FUTURE HOLDS

INTRODUCTION

This 2010 Term of the Supreme Court begins with significant changes to the Court's building and personnel. The closing of the Supreme Court's front doors limits what is surely one of the most majestic and breath-taking aspects of the Court – the real sense of being in the halls of justice as you enter the building. With the retirement of Justice John Paul Stevens, the Court not only has lost one of its longest serving members, but one skilled at the Court's internal processes and procedures. His replacement, Justice Elena Kagan, will bring a new perspective due to her gender, age, and different legal experience. For the first time, one-third of the Justices will be women, with the Supreme Court composition finally inching towards the percentage of women currently enrolled in law school. And, of course, people will be watching how Justice Ginsburg is doing. How these recent changes, along with the second term of Justice Sotomayor, will affect the Supreme Court's jurisprudence remains to be seen.

Last Term the Court issued 72 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, will come from the Ninth Circuit.

Interestingly, last Term close to half of the decisions were unanimous, with the percentage of 5-4 decisions decreasing to about 20%. This was significantly lower than the previous Term's 5-4 decisions (almost 45%). What was not surprising was that Justice Kennedy cast the deciding vote in about 70% of those 5-4 decisions. And, he was in the majority, along with Chief Justice Roberts, in over 90% of all decisions last Term.

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

Statutes regulating the workplace and benefits are again before the Court. In ***Amara v. Cigna***, the Court will decide whether participants must show that they were likely harmed in order to recover benefits based on a conflict between the terms of the plan document and the summary plan description provided to employees. In ***Staub v. Proctor Hospital***, the Court will decide whether an employer can be held liable for discrimination under the "cat's paw" theory – *i.e.*, can the employer be held liable for the discriminatory bias of a non-decisionmaker employee who influences the person who does make the employment decision. In an interesting twist on retaliation claims in the case of ***Thompson v. North American Stainless, LP***, the Court will decide if an employer may be held liable for third party retaliation claims against persons who have not personally engaged in protected activity, *e.g*., the employer won't retaliate directly against you for giving testimony against it so the employer fires your daughter.

The Court will continue its exploration of the relationship between federal and state governments. This Term, the Court will decide whether independent state agencies may sue state officials in federal court for injunctive relief to remedy a violation of federal law or whether sovereign immunity under the Eleventh Amendment applies in the case of ***Virginia Office of Protection and Advocacy v. Reinhard.***

The Supreme Court's grant of *certiorari* in two investor protection cases continues the Court's recent attention to issues touching investor access to the courts for pursuit of securities fraud claims. In ***Matrixx v. Siracusano***, the stage is set for the Court to define what constitutes "materiality" under the Securities Exchange Act insofar as a corporation's misrepresentations are concerned, at least as pertains to the pharmaceutical industry. This is, then, a threshold issue for securities fraud litigants. And, in ***Janus v. First Derivative Traders*** the Court is called upon to define the reach of its 2008 holding in *Stoneridge Investment Partners* proscribing a private cause of action for investors and limiting accountability of non-principals under the PSLRA. The upcoming decision in *Janus* is practically certain to clarify the boundaries separating primary and secondary players in the securities markets, and the extent of investors' opportunities for recourse in securities fraud claims for years to come.

With the continued softness in the economy, consumer protection issues are of particular importance to older people. Issues directly affecting consumers and their financial security will be dealt with by the Court in the cases of ***McCoy v. Chase Manhattan Bank, N.A****.* (credit cards), ***Ransom v. MBNA, American Bank, N.A***. (bankruptcy), and ***AT&T Nobility LLC v. Concepcion*** (forced arbitration of consumer claims).

Finally, the Court will decide a rather technical case on whether an appeal of a denial of veterans benefits must meet the exact filing deadlines. ***Henderson v. Shinseki***. With the troop drawdown in Iraq and the troop buildup in

Afghanistan, this case may have a significant impact on veterans and their ability to access benefits.

AARP is monitoring a number of pending petitions for *certiorari.* Two cases involve pharmaceutical manufacturers and their rights and obligations. One case is the largest employment discrimination class action ever filed.

The interrelationship of the three branches of government continues to be evident, particularly as Congress reacts to the Supreme Court's decisions and the Court reacts to Congress' legislation. As more fully discussed below in the Employment Section of WHAT THE FUTURE HOLDS, AARP is part of a coalition of advocacy groups for employee rights that is working on legislation to overturn *Gross v. FBL Financial Services, Inc.* The decision in *Gross* seriously undermines and has the potential to eviscerate the rights and remedies Congress prescribed for older workers in the ADEA. Congress' reaction to the *Gross* decision may portend a more active role for Congress in responding to Supreme Court decisions.

CASES - 2010 TERM

EMPLOYEE BENEFITS

WHETHER ERISA PLAN PARTICIPANTS CAN RECOVER UPON A SHOWING OF "LIKELY HARM" WHEN THERE IS AN INCONSISTENCY OR CONFLICT BETWEEN THE SUMMARY PLAN DESCRIPTION AND THE TERMS OF THE PLAN ITSELF?

Amara v. CIGNA Corp.,
348 Fed. Appx. 627 (2nd Cir. 2009),
cert. granted, 78 U.S.L.W. 3762 (June 28, 2010)(No. 09-804).
Oral argument has not yet been scheduled.

In *Amara*, the Court will address the question of whether a showing of "likely harm" is sufficient for a participant in an ERISA plan to recover when there is an inconsistency between the terms of the Summary Plan Description (SPD) and the terms of the plan as expressed in the master plan document.

Under ERISA, an employee benefits plan is required to provide participants with a SPD and summary of material modifications (SMM) that are "sufficiently accurate and comprehensive." 29 U.S.C. §1022(a). Both the SPD and SMM must "be written in a manner calculated to be understood by the average plan participant." 29 U.S.C. §1022(a).

Plaintiffs-respondents are current and former employees who participated in CIGNA's defined benefit plan and cash balance plan. The plaintiffs allege that CIGNA failed to comply with ERISA's statutory and regulatory notice requirements by deliberately concealing "wear away" periods of benefit accruals.[1] While the SPD did not mention a "wear away" period, the SMM gave the impression that employees would continue to accrue new benefits without "wear away." The cash balance plan documents provided that participants would receive benefits as the greater of A (the benefit amount under the traditional defined benefit plan) or B (the amount in the cash balance account). For many participants the balance of their cash balance account was significantly less than

[1] When a traditional plan formula is changed to a cash balance plan formula, the benefit earned under the old formula may exceed the amount determined to be the benefit under the cash balance plan formula. "Wear away" is when a participant does not earn any additional benefits until the benefit under the cash balance plan formula exceeds the benefit earned under the old formula.

their defined benefit amount. As a result, for many employees there were years when they worked without accruing any new benefits. At issue in this case is CIGNA's violation of ERISA's notice and disclosure requirements and whether the participants are entitled to the benefits as described in the SPD and SMM, rather than the undisclosed benefits described by the Plan.

The district court granted judgment for the plaintiffs, finding that CIGNA had known the "wear away" periods would occur, had a duty to inform participants of "wear away" periods, and had provided participants with materially misleading statements about the occurrence of "wear away" periods. The court found that CIGNA intentionally misrepresented the terms of the plan and violated ERISA's SPD and SMM requirements in order to avoid employee backlash over the new cash balance plan. In reaching its decision, the district court rejected CIGNA's argument that the plaintiffs were required to show individualized detrimental reliance on the terms in the SPD in order to recover, finding that CIGNA was trying to shift the burden of proof impermissibly. Instead, the court allowed the plaintiffs to recover based upon the conflict between the SPD and Plan because they had shown that they had experienced "likely harm." The court found that CIGNA's purposeful concealment of the full details of the new benefit plan prevented employees from taking action in response. Because all of the plaintiffs had received the same information and the same terms were applied to their benefits, the court held that they were all equally entitled to relief. The district court granted participants relief by adding the amount earned under the old plan (A) plus any amounts earned under the cash balance plan (B); this is known as the A+B approach and is consistent with the Pension Protection Act which was enacted after CIGNA amended its plan. The Second Circuit summarily affirmed the district court's decision, adopting the lower court's reasoning and findings.

The Circuit Courts of Appeals are split on the appropriate burden of proof plan participants must meet when there is a conflict between the SPD and master plan document. Standards have ranged from requiring no showing of reliance or harm (the easiest) to requiring detrimental reliance (the hardest). The Second Circuit is the only circuit to adopt the "likely harm" standard. The "likely harm" standard allows for a presumption of prejudice if a plan participant can show they were likely to have been harmed as a result of the inconsistencies between the SPD and Plan document. The burden of proof then shifts to the employer to rebut the presumption of prejudice with evidence that the inconsistency was only a harmless error. CIGNA argues that the employees should be held to a detrimental reliance standard, which would require each individual plaintiff to show that he or she read the SPD or SMM and that, but for their reliance on the terms in those documents, they would have acted differently.

AARP will file an *amicus* brief urging the Supreme Court to find that the "likely harm" standard is the most consistent with ERISA's objectives. AARP will argue that the "likely harm" standard is the most workable given the way people actually read and use their SPDs. A detrimental reliance standard ignores the difficulty for participants in an employee benefit plan to recall years after the fact, what documents they read and how they acted in response to those documents. This approach also ignores workplace communication regarding benefits. A detrimental reliance standard decreases the likelihood of consistent recovery based upon SPD violations because it is a subjective test that requires individualized determinations by the court.

The outcome of this case is important because it will determine the burden of proof necessary to recover under an SPD disclosure violation claim. By urging the affirmance of the Second Circuit's decision, AARP seeks to ensure that participants can obtain the benefits outlined in their SPD and that plans produce accurate plan documents. A reliance requirement undercuts the certainty of both retirement and health benefits, diminishing the protection ERISA offers to employees. The "likely harm" requirement gives employees a better chance of recovering the benefits promised to them in their SPD, while also preventing windfalls from harmless errors, thus striking an equitable balance between the plan sponsor and the plan participants.

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EMPLOYMENT

IN WHAT CIRCUMSTANCES MAY AN EMPLOYER BE HELD LIABLE BASED ON THE UNLAWFUL INTENT OF OFFICIALS WHO CAUSED OR INFLUENCED, BUT DID NOT MAKE, THE ULTIMATE EMPLOYMENT DECISION?

Staub v. Proctor Hospital,
560 F.3d 647 (7th Cir. 2009),
cert. granted, 130 S. Ct. 2089 (April 19, 2010)(No. 09-400).
Oral argument has been scheduled for November 2, 2010.

In a case of importance to employees covered by any federal employment discrimination law, *Staub* presents the questions of whether an employer can be held liable under the Uniformed Services Employment and Reemployment Act (USERRA), 38 U.S.C. § 4301 *et seq*., pursuant to the "cat's paw" theory, and if so, what standard of liability must be applied. In the opinion below, the Seventh Circuit described the origin of the cat's paw theory:

> The term derives from the fable "The Monkey and the Cat" penned by Jean de La Fontaine (1621-1695). In the tale, a clever – and rather unscrupulous – monkey persuades an unsuspecting feline to snatch chestnuts from a fire. The cat burns her paw in the process while the monkey profits, gulping down the chestnuts one by one. As understood today, a cat's paw is a "tool" or "one used by another to accomplish his purposes." Webster's Third New International Dictionary (1976).

Like all reservists, Vincent Staub was a part-time soldier, spending the bulk of his time in the civilian world. Balancing work and military duties can be a complicated task, but Staub managed to do so, for a while at least. In late 2000, some ten years after he was hired as an angiography technologist by Proctor Hospital in Peoria, Illinois, things began to slowly unravel. Around that time, Janice Mulally, the second in command of the Diagnostic Imaging Department where Staub worked, began preparing the department work schedules. Before she took over scheduling, Staub had weekends off. After Mulally took over, even though Staub notified her well in advance of his drill and training obligations – one weekend per month and two weeks during the summer – she nevertheless placed him back on the weekend rotation, creating conflicts with his drill schedule. When Staub approached Mulally about this problem, she became agitated and threw him out of her office, declaring that she "didn't want to deal with it." Staub's appeals to the department head sometimes resulted in Mulally changing his schedule. On other occasions, however, Mulally would post a notice on the bulletin board stating that volunteers were needed to cover the drill weekends, portraying Staub as irresponsible. Occasionally, Mulally made him use his vacation time for drill days. Mulally made her reasons plain: she called Staub's military duties "bullshit." The department head manifested a similar attitude, calling Staub's drill weekends "Army Reserve bullshit" and "a bunch of smoking and joking and a waste of taxpayers' money."

In 2003, things got worse for Straub. Mulally told one of Staub's coworkers that his military duty had been a strain on the department and asked the coworker "to help her to get rid of him." The coworker refused. The department head told another of Staub's coworkers that Mulally was "out to get" Staub. In January 2004, after Staub received orders to prepare for a lengthy active duty deployment, Mulally gave Staub a written warning for shirking his duties, refusing to credit the explanation of Staub and a coworker about a scheduling mix-up. He was ordered to report to the department head any time he intended to leave the general area of the department. Shortly thereafter, Mulally called the administrator of Staub's reserve unit to see if Staub could be excused from duty. When the administrator told her that Staub's presence was required, she called the administrator an "asshole" and hung up.

On the morning of April 20, 2004, Staub allegedly failed to comply with the prior warning requiring him to report to the department head before he left the department area, he was escorted to the office of Linda Buck, vice-president of Human Resources. Based on his record of unauthorized absences and multiple failures to comply with the warning issued by Mulally, Buck handed Staub his pink slip. Buck, who had no animus against Staub, relied on the reports of Mulally. Buck testified that but for those reports, she would not have fired Staub.

Staub sued Proctor Hospital under the USERRA. Staub alleged that the reasons given for his termination – insubordination, shirking, and attitude problems – were a pretext for discrimination based on his association with the military. Based on the facts described above, a federal district court jury agreed with Staub and awarded him almost $58,000 in damages.

Proctor appealed and the Seventh Circuit reversed, defining the cat's paw theory as "where an employee without formal authority to materially alter the terms and conditions of a plaintiff's employment nonetheless uses her 'singular influence' over an employee who does have such power to harm the plaintiff for [discriminatory] reasons, the actions of the employee without formal authority are imputed to the employer …." *Staub v. Proctor Hospital*, 560 F.3d 647, 656 (7th Cir. 2009). The Seventh Circuit held that in a cat's paw case, before evidence of bias by a nondecisionmaker can be considered by the jury, the trial judge must first determine whether the evidence is sufficient for the jury to find "singular influence" based on the evidence to be presented at trial. "If there is not sufficient evidence to support such a determination, then the court has no business admitting evidence of animus by nondecisionmakers." *Id*. at 658. Since the lower court failed to follow this procedure, the Seventh Circuit concluded that "Staub's abundant evidence" of his supervisor's animosity was erroneously admitted into evidence – and considered by the jury. *Id*.

AARP's *amicus* brief filed with the Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) argues that the Seventh Circuit's strict "singular influence" standard is contrary to the plain language of USERRA and contravenes the prime purpose of Congress for enacting it: to encourage non-career service in the military by eliminating disadvantages of that service to civilian careers. The USERRA provides that the employer has violated the Act "if the person's membership, application for membership, service, application for service or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken" absent those factors. 38 U.S.C. § 4311(c)(1). Thus, an employer can be held liable for the bias of a supervisor if the bias was a motivating factor for an adverse employment practice even when the ultimate decisionmaker harbored no discriminatory motive toward the affected employee. Well-established agency principles impute to an employer the actions of an employee committed within the scope of employment. Accordingly, an employer may be held liable for acts committed by biased supervisors if such actions result in an adverse employment practice against an employee in a protected class. The brief urges the Court to reject the "singular influence" standard and to adopt the "causation" or "influence" standard used by a majority of federal circuits that have considered the issue.

Although the *Staub* case arose under the USERRA, the Court's decision resolving the cat's paw question will be applied broadly to all federal employment discrimination laws, including Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. In keeping with AARP's long record of advocacy for the vigorous enforcement of the rights of older workers under these and other federal and state anti-discrimination laws, AARP filed its brief supporting Staub.

Although both the USERRA and Title VII contain language providing for liability when a protected trait is a “motivating factor” in the employer’s decision being challenged by an adversely affected employee, the Supreme Court’s decision last year in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), stripped the “motivating factor” standard from the ADEA. Since Congress is expected to pass – this year or next – a “*Gross* fix” bill that will restore the motivating factor standard to the ADEA, the Court’s decision in this case will ultimately apply to the ADEA. Additionally, the final section of the brief, arguing that the Seventh Circuit’s “singular influence” standard would allow employers to insulate themselves from liability by conducting an internal investigation – whether robust or not – is directly relevant to the ADEA and ADA as well as ERISA and the FMLA. Rather, USERRA, like Title VII (and other federal antidiscrimination laws) requires actual nondiscrimination, not the mere creation of antidiscrimination policies.

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DOES SECTION 704(A) OF TITLE VII, WHICH FORBIDS AN EMPLOYER FROM RETALIATING AGAINST AN EMPLOYEE BECAUSE HE OR SHE ENGAGED IN CERTAIN PROTECTED ACTIVITY, ALSO FORBID AN EMPLOYER FROM RETALIATING FOR SUCH ACTIVITY BY INFLICTING REPRISALS ON A THIRD PARTY, SUCH AS A SPOUSE, FAMILY MEMBER, OR FIANCÉ, CLOSELY ASSOCIATED WITH THE EMPLOYEE WHO ENGAGED IN SUCH PROTECTED ACTIVITY, AND, IF SO, MAY THAT PROHIBITION BE ENFORCED IN A CIVIL ACTION BROUGHT BY THE THIRD PARTY VICTIM?

Thompson v. North American Stainless, LP,
567 F.3d 804 (6th Cir. 2009) (*en banc*),
cert. granted, 79 U.S.L.W. 3007 (June 29, 2010)(No. 09-291).
Oral argument has been scheduled for December 7, 2010.

The question presented is whether Title VII of the Civil Rights Act of 1964 creates a cause of action for third party retaliation for persons who have not personally engaged in activity protected by the statute.

Both Eric Thompson and his wife, Miriam Regalado (who was his fiancée at the time the facts giving rise to this case occurred), are former employees of North American Stainless, the owner and operator of a stainless steel manufacturing facility in Carroll County, Kentucky. In 2002 Regalado filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that her supervisors discriminated against her based on her gender. It was widely known throughout the facility that Thompson and Regalado were engaged to be married. On February 13, 2003, the EEOC notified North American Stainless of Regalado's charge. On March 7, 2003, North American Stainless terminated Thompson's employment.

Thompson sued North American Stainless under Title VII alleging that he was terminated in retaliation for his then-fiancee's EEOC charge. North American Stainless contends that performance-based reasons supported Thompson's termination.

The district court granted North American Stainless' motion for summary judgment, holding that Thompson failed to state a claim under either the anti-discrimination provision of Title VII set forth in 42 U.S.C. § 2000e-2(a) or the anti-retaliation provision in 42 U.S.C. § 2000e-3(a). Thompson appealed, and in a 2-1 decision the Sixth Circuit Court of Appeals reversed the district court. The panel majority held that the anti-retaliation provision of Title VII applies to a third party related to or closely associated with the employee who engaged in protected activity, since permitting such retaliation would undermine the purposes of Title VII. The full Sixth Circuit granted North American Stainless' petition for rehearing *en banc,* and, reversed the panel decision.

The outcome of the case depends on the Court's interpretation of 42 U.S.C. § 2000e-3(a), the anti-retaliation provision of Title VII, which provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment … because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

The Sixth Circuit *en banc* majority, citing Supreme Court cases establishing rules for statutory construction, concluded that the statutory language is unambiguous and held that under the "plain meaning rule" the anti-retaliation provision protects:

> a limited class of persons who are afforded the right to sue for retaliation. To be included in this class, plaintiff must show that his employer discriminated against him "because *he has opposed* any practice made an unlawful employment practice by this subchapter, or because *he has made a charge, testified, assisted, or participated* in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a) (emphasis added).

Thompson v. North American Stainless, LP, 567 F.3d 804, 807 (6th Cir. 2009). The court found that since Thompson did not personally engage in any of the listed activities "he is not included in the class of persons for whom Congress created a retaliation cause of action …." *Id*. at 808.

Three judges dissented. Judge Martin, citing *Crawford v. Metropolitan Government of Nashville*, 129 S. Ct. 846 (2009), rejected the majority's conclusion that the meaning of the anti-retaliation provision is plain and unambiguous. He argued that the meaning of "oppose," an undefined term, is ambiguous and, therefore, based "on the text, structure, history, and Congressional purpose" of the statute, would find Thompson's claims cognizable. *Id*. at 819. Judge Moore would also find Thompson's claims cognizable under the retaliation provision because of the statutory purpose and recent Supreme Court cases emphasizing that "a broad approach should apply in interpreting statutes meant to protect employees against employer retaliation for protected activity." *Id*. at 820. Like Judge Martin, Judge White rejects "the majority's conclusion that the anti-retaliation provision unambiguously provides that only the person who opposed the violation can maintain the action." *Id*. at 826.

Since the anti-retaliation provision of the Age Discrimination in Employment Act is almost identical to the anti-retaliation provision of Title VII, AARP will file a brief *amicus curiae* that, like the three dissenting Sixth Circuit judges, argues that the majority view contravenes the statutory purpose and Supreme Court's generally broad interpretation of statutes protecting employees. Unfortunately, it appears that this will be an uphill fight because the other three circuits that have addressed the issue have all rejected third party retaliation claims.

Resolution of the issue will affect older workers directly because the Court's decision will be applied to the ADEA, ADA and other employment statutes. If the Court narrowly construes the anti-retaliation provision to exclude third party claims, the decision will maintain the opening provided by the Sixth Circuit and other circuits for unscrupulous employers to retaliate indirectly against older workers. On the other hand, a decision holding that the anti-retaliation provision protects third-parties would further the congressional purpose that Title VII, the ADEA, the ADA, and other federal laws guarantee the work place civil rights of employees.

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HEALTH

WHETHER THE ELEVENTH AMENDMENT CATEGORICALLY PRECLUDES AN INDEPENDENT STATE AGENCY FROM BRINGING AN ACTION IN FEDERAL COURT AGAINST STATE OFFICIALS FOR PROSPECTIVE INJUNCTIVE RELIEF TO REMEDY A VIOLATION OF FEDERAL LAW UNDER THE DOCTRINE OF *EX PARTE YOUNG*?

Virginia Office of Protection and Advocacy v. Reinhard,
568 F.3d 110 (4th Cir. 2009),
cert. granted, 78 U.S.L.W. 3743 (June 21, 2010)(No. 09-529).
Oral argument has been scheduled for December 1, 2010.

In *VOPA v. Reinhard*, the issue before the Court is whether independent state agencies may sue state officials in federal court for injunctive relief to remedy a violation of federal law. The Court will review a Fourth Circuit Court of Appeals ruling that these suits are barred by sovereign immunity under the Eleventh Amendment.

The petitioner, the Virginia Office of Protection and Advocacy (VOPA), is a protection and advocacy program (P&A) housed in the Virginia state government and part of a nationwide system created by Congress to protect the rights of persons with disabilities. Under the P&A system, each state receives federal funds in exchange for establishing a P&A, either as a state agency or as a private non-profit, charged with investigating abuse and neglect in institutions and enforcing civil rights statutes on behalf of persons with disabilities. Virginia, like seven other states, elected to establish its P&A as an independent state agency, while the remaining states have designated private non-profits to be the P&A.

The underlying suit arose from a dispute between VOPA and Virginia state officials over the release of medical records from two state institutions. VOPA requested the records after initiating an investigation of three deaths and injuries to residents in state custody. When state officials refused to release the records, VOPA sued the officials in federal court, requesting an injunction for release of the records and a declaration that the officials' failure to do so violated federal law. The officials argued that they were protected by sovereign immunity under the Eleventh Amendment and moved to dismiss the suit.

Relying on *Ex parte Young*, 209 U.S. 123 (1908), a century old Supreme Court case, the district court denied the motion to dismiss. In *Ex parte Young*, the

Court created an exception to sovereign immunity for suits against state officials requesting prospective injunctive relief for violations of federal law. The underlying fiction is that in violating federal law, the officials are no longer legal representatives of the state, and thus they can no longer be protected by state immunity. The *Ex parte Young* doctrine has traditionally required only three elements: 1) a suit against a state official; 2) for prospective injunctive relief; 3) to remedy a violation of federal law. Applying this test, the district court found that the VOPA suit fell under the *Ex parte Young* exception, and declined to grant the state a dismissal.

On appeal, the Fourth Circuit Court of Appeals reversed the district court ruling. Departing from Supreme Court precedent and the decisions of other circuits, the Circuit Court introduced a new requirement for *Ex parte Young* to apply: the plaintiff must be a private party, not a state agency. The court held that to allow otherwise would infringe on the "special sovereignty interests" of the states, and impermissibly allow federal courts to preside over "intramural contests" between state subdivisions. Thus, the court narrowed the scope of *Ex parte Young*, making it unavailable to independent state agencies such as VOPA. As a result, the Court of Appeals ruled that VOPA's suit should be dismissed.

This interpretation of *Ex parte Young* conflicts with the views of other circuit courts and the United States. Earlier this year, the Seventh Circuit Court of Appeals ruled that *Ex parte Young* applies to suits by state P&As, noting that states cannot be allowed to shield their institutions from oversight by designating their P&As as state entities rather than private non-profits. Similarly, the Solicitor General argued in its brief recommending that the Court grant *certiorari* that because Virginia voluntarily designated VOPA as a state entity – and accepts federal funds in exchange for empowering the program to enforce federal rules and policies against its institutions – VOPA's suit does not infringe on any "special sovereignty interests."

AARP, with the National Senior Citizens Law Center, filed an *amici curiae* brief, arguing that the Court should make *Ex parte Young* available to state agency P&As. The brief focused on the importance of P&As to the protection of older persons – in their investigatory and enforcement capacities – and emphasized the crucial role that access to federal courts plays in their work.

This case is of great importance to older people and to vulnerable people in general. Roughly 20% of all people represented or assisted by the P&A network are over 65 years old. In addition, P&A systems frequently partner with public interest organizations such as AARP attorneys by providing valuable investigatory expertise to litigation initiatives that vindicate the rights of older persons. Finally, it is crucial to uphold the *Ex parte Young* exception to state sovereign immunity as the doctrine is essential to litigation that protects the interests of older persons in various safety net programs. Many federal statutes create safety net programs administered by state officials such as Medicaid, food stamps, Older Americans Act programs etc. The *Ex parte Young* doctrine allows citizens of a state to sue their own officials to enforce these and other federal statutes in federal courts which are frequently the ideal forum to pursue violations of federal law.

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INVESTOR PROTECTION AND CONSUMER RIGHTS

WHETHER A SERVICE PROVIDER CAN BE HELD PRIMARILY LIABLE IN A PRIVATE SECURITIES FRAUD ACTION FOR "HELPING" OR "PARTICIPATING IN" ANOTHER COMPANY'S MISSTATEMENTS?

WHETHER A SERVICE PROVIDER CAN BE HELD PRIMARILY LIABLE IN A PRIVATE-SECURITIES FRAUD ACTION FOR STATEMENTS THAT WERE NOT DIRECTLY AND CONTEMPORANEOUSLY ATTRIBUTED TO THE SERVICE PROVIDER?

Janus Capital Group v. First Derivative Traders,
566 F.3d 111 (4th Cir. 2009),
cert. granted, 78 U.S.L.W. 3762 (June 28, 2010)(No. 09-525).
Oral argument has not yet been scheduled.

In *Janus*, the Supreme Court will address the question of whether an investment adviser to a mutual fund made misleading statements by participating in the drafting and dissemination of misleading prospectuses of the mutual fund it managed and whether the misleading statements must be explicitly attributable to the investment adviser at the time of dissemination in order to establish reliance.

Plaintiffs are owners of Janus Capital Group ("JCG") common stock. Plaintiffs filed suit under § 10(b) of the Securities Exchange Act of 1934 against JCG and Janus Capital Management ("JCM"), a subsidiary of JCG and the investment advisor to the Janus funds. Several Janus fund prospectuses explicitly stated that the funds would not engage in market timing. In 2003, however, the New York Attorney General revealed that several of the funds had engaged in market timing. Following this revelation, several JCG and JCM executives resigned, $14 billion was withdrawn from the Janus funds, and the value of JCG common stock dropped approximately 25%.

The plaintiffs allege that the defendants are liable for "'caus[ing] [the] mutual fund prospectuses to be issued for Janus funds and ma[king] them available to the investing public,' through filings with the SEC, and dissemination on a joint website [controlled by JCG, JCM, and the Janus funds]." *In re Mutual Funds Investment Litigation*, 566 F.3d 111, 121 (4th Cir. 2009).

The district court granted the defendant's motion to dismiss holding that the plaintiffs had failed to state a claim under § 10(b) because the plaintiffs failed to allege that either JCG or JCM prepared the prospectuses or made the statements contained within them, and that the alleged dissemination did not rise to the level of making a misstatement for securities fraud purposes. *Id*. at 118.

The Fourth Circuit Court of Appeals reversed, finding that the plaintiffs had properly pled a claim of primary liability against JCM. The Fourth Circuit first concluded that the complaint properly alleged that the defendants had made the statements contained in the prospectuses. The court reasoned the allegations in the complaint, "taken together, allege that JCG and JCM, by participating in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents." *Id*. at 121. The court then concluded that it was unnecessary for the plaintiffs to allege that the statements were contemporaneously attributable to the defendants, but instead required a showing that the interested investors would have attributed the statement to the defendants. *Id*. at 123-24. The court determined that due to JCM's management role and its inherent responsibilities the investors would have reasonably assumed that JCM had control over the content placed in the prospectuses and on the joint website. *Id*. at 127. The court found JCG could be liable under § 20(a) as a "control person." *Id*. at 131. The defendants subsequently petitioned the Supreme Court arguing that a party cannot be liable in a private cause of action for aiding and abetting in a § 10(b) claim, or for statements that are not attributable to them at the time of dissemination.

The Supreme Court eliminated any liability for aiders and abettors under § 10(b) in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994). In 1995, Congress partially overturned *Central Bank* through the Private Securities Litigation Reform Act (PSLRA). The PSLRA permitted the SEC to prosecute aiders and abettors under § 10(b), but did not restore a private cause of action. The Court reaffirmed this prohibition under the PSLRA in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148 (2008).

In *Stoneridge*, the Court also held that "the investors cannot be said to have relied upon any of respondents' deceptive acts in the decision to purchase or sell securities; and as the requisite reliance cannot be shown, respondents have no liability to petitioner under the implied right of action." *Id*. at 166-67. The circuit courts have struggled to determine the degree and manner in which reliance must be shown. In the Second and Eleventh Circuits, the plaintiffs must allege that at the time of dissemination the misrepresentation was directly attributable to the defendant. *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir.1998); *Ziemba v. Cascasda Int'l, Inc.*, 256 F. 3d 1194 (11th Cir. 2001). In contrast, the Ninth Circuit has not required attribution, stating that "substantial participation or intricate involvement in the preparation of fraudulent statements is grounds for primary liability even though that participation might not lead to the actor's actual making of the statements." *Howard v. Everex Sys., Inc*., 228 F.3d 1057, 1061 n.5 (9th Cir. 2000). The Tenth Circuit has held "false and misleading representations in connection with the purchase or sale of any security, if made with the proper state of mind and if relied upon by those purchasing or selling a security, can constitute a primary violation." *Anixter v. Home-Stake Prod.* Co., 77 F.3d 1215, 1226 (10th Cir. 1996).

With respect to whether a defendant is liable for "participating" in the drafting of a misrepresentation, AARP will attempt to differentiate *Janus* from traditional aiding and abetting cases. For instance, in *Stoneridge* the defendants engaged in sham transactions that enabled the primary party to produce false financial statements. In *Janus*, however, the defendants are alleged to have participated in the creation and dissemination of the actual misrepresentation. AARP believes that such involvement raises the significance of the defendants' actions beyond mere aiding and abetting.

With respect to the required degree of attribution, the Supreme Court has stated that reliance upon a misrepresentation must be shown in order to bring a claim. It does not follow, however, that an investor must attribute the misrepresentation to the defendant in order for the investor to rely upon it. AARP will argue in its *amicus* brief that the Court should adopt either the Ninth Circuit's substantial participation analysis or the Fourth Circuit's holding in *Janus*, which allows for liability when it can be shown that investors would have attributed the misrepresentation to the defendant.

AARP will also argue that private liability for "participating in" a § 10(b) violation and not requiring direct attribution is consistent with Congress' intent. A major purpose in enacting the Securities Exchange Act of 1934 was to "insure honest securities markets and thereby promote investor confidence." *United States v. O'Hagan*, 521 U.S. 642, 658 (1997). Since the passage of the Act investment activities have changed greatly and outside parties play a larger role than ever in financial fraud. A private cause of action could prevent future fraud on a massive scale. For example, the alleged auditing and reporting failures that surrounded Enron's catastrophic collapse might have been averted if there was third party exposure to private claims.

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WHETHER A PLAINTIFF CAN STATE A CLAIM UNDER § 10(b) OF THE SECURITIES EXCHANGE ACT AND SEC RULE 10b-5 BASED ON A PHARMACEUTICAL COMPANY'S NONDISCLOSURE OF ADVERSE EVENT REPORTS EVEN THOUGH THE REPORTS ARE NOT ALLEGED TO BE STATISTICALLY SIGNIFICANT?

Matrixx Initiatives, Inc. v. Siracusano,
585 F.3d 1167 (9th Cir. 2009),
cert. granted, 78 U.S.L.W. 3728 (June 14, 2010)(No. 09-1156).
Oral argument has not yet been scheduled.

In *Matrixx*, the Supreme Court will address the question of whether adverse event reports must be alleged to be statistically significant in order to support a claim under § 10(b) of the Securities Exchange Act and SEC rule 10b-5.

Plaintiffs-respondents are NECA-IBEW Pension Fund and James Siracusano, who brought a class action against Defendant-Petitioner Matrixx Initiatives, Inc. and three Matrixx executives. Plaintiffs allege that in 1999 the Smell & Taste Treatment and Research Foundation, Ltd., informed Matrixx's customer service line that it recognized a link between Zicam and anosmia, a condition associated with temporary or complete loss of the ability to smell. In September 2003 and April 2004 a collaborative research effort by the University of Colorado identified anosmia in over 100 Zicam users. In addition, on January 30, 2004, an article published in the *Dow Jones Wire* indicated that three product liability suits had been filed against Matrixx regarding Zicam.

Despite knowledge of these events Matrixx continued to make positive statements regarding Matrixx's growth and Zicam's safety. On October 22, 2003, Matrixx issued a press release stating that "[t]he Zicam brand is poised for growth." In a November 12, 2003, quarterly report Matrixx again predicted positive growth, but added "[w]e may incur significant costs resulting from product liability claims." Matrixx, however, did not disclose that at the time of this statement at least one lawsuit had already been filed claiming a causal connection between Zicam and anosmia. On February 2, 2004, Matrixx stated that reports of Zicam's danger were "completely unfounded and misleading." On February 6, 2004, *Good Morning America* reported the existence of the medical reports and pending lawsuits. The following day Matrixx's stock dropped 23.8%.

Section 10(b) of the Securities Exchange Act of 1934 makes it unlawful for any person "to use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate…" 15 U.S.C. § 78j(b). Rule 10b-5 makes it unlawful to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading[.]" 17 C.F.R. § 240.10b-5(b). To state a securities fraud claim, a plaintiff must allege that the defendant (1) made a misrepresentation or an omission; (2) of a material fact; (3) with scienter, *i.e*. intent to deceive; (4) in connection with the purchase and sale of a security; (5) upon which the plaintiff relied; and (6) that the plaintiff's reliance was the proximate cause of the injury for which plaintiff seeks damages.

The district court found that the plaintiffs failed to appropriately plead materiality and the court granted Matrixx's motion to dismiss. The court concluded that in order to properly allege materiality the plaintiffs needed to allege a statistically significant correlation between the use of Zicam and anosmia. The court stated, "where a company is presented with statistically significant adverse medical reports, adverse clinical data, and a 'consensus emerges that the data' is putting 'the brand at risk' the courts have found a material omission." The court determined that the number of adverse reports was not statistically significant and that there was no reason for Matrixx to believe that the reports were reliable.

The Ninth Circuit Court of Appeals reversed, holding that it was not necessary for the plaintiffs to plead statistical significance. According to the court, the Supreme Court rejected the use of bright-line rules for determining materiality in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). The primary reason for this position stems from the fact that materiality is based on the likelihood that a reasonable shareholder would consider the misrepresentation or omission important. The court then "engage[d] in the fact-specific inquiry required by *Basic*" and found the allegations relating to Matrixx's knowledge of the reports and lawsuits sufficient to plead materiality.

The circuit courts are split on whether statistical significance is necessary in order to plead materiality. The First, Second, and Third Circuits hold that a plaintiff must allege statistical significance, while the Fifth, Seventh, and Ninth Circuits have each indicated a rejection of bright-line materiality tests in favor of a fact-based approach.

AARP's will file an *amicus* brief urging the Supreme Court to find that the plaintiffs are not required to plead a statistically significant relationship between an adverse effect and a product in order to sustain an action under § 10(b) of the Securities Exchange Act of 1934. AARP will argue that requiring statistical significance will lead to inadequate investor protection by creating an insurmountable barrier to many plaintiffs with legitimate claims. Establishing a statistically significant correlation between a drug, procedure, or medical device and an adverse impact can be extremely difficult. A decade has passed since the first study recognizing a link between Zicam and anosmia, yet no study has been able to conclusively prove a correlation. Despite the failure to allege statistical significance, the plaintiffs have suffered a substantial loss, in the form of significantly reduced stock value. It would be inequitable to allow such a harm to occur without offering investors an opportunity to hold the company and responsible executives accountable for their misleading handling of the issue.

This case is important to persons over 50 because as more individuals participate in defined contribution plans constituting their primary and sometimes exclusive retirement savings plan, stocks have become an increasingly important part of individuals' retirement asset portfolios. Retirees and those planning retirement also rely to a significant extent on savings and investment assets held outside of retirement plans as major sources of retirement security. Requiring that plaintiffs plead statistical significance will lead to the courts dismissing a greater number of cases in which defendants have acted in a fradulent manner. By rejecting the statistical significance standard, the Court will permit more investors to seek adequate redress and recoup retirement savings that were lost as a result of deceptive corporate conduct.

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WHEN A CREDITOR INCREASES THE PERIODIC RATE ON A CREDIT CARD ACCOUNT IN RESPONSE TO A CARDHOLDER DEFAULT, PURSUANT TO A DEFAULT RATE TERM THAT WAS DISCLOSED IN THE CONTRACT GOVERNING THE ACCOUNT, DOES REGULATION Z, 12 C.F.R. § 226.9(C), REQUIRE THE CREDITOR TO PROVIDE THE CARDHOLDER WITH A CHANGE-IN-TERMS NOTICE EVEN THOUGH THE CONTRACTUAL TERMS GOVERNING THE ACCOUNT HAVE NOT CHANGED?

***McCoy v. Chase Manhattan Bank, N.A.*,**
559 F.3d 963 (9th Cir. 2009),
cert. granted, 78 U.S.L.W. 3743 (June 21, 2010)(No. 09-329).
Oral argument has been scheduled for December 8, 2010.

This case presents the issue of whether the Federal Reserve Board regulation promulgated to implement the Truth in Lending Act (“Regulation Z”), 12 C.F.R. §§ 226.1 – 226.58, requires credit card companies to notify consumers prior to raising interest rates due to a consumer default. This case arose before amendments to Regulation Z, which clearly require such notice, went into effect on February 22, 2010. There is a circuit split on whether the law had previously required notice under these circumstances.

In 2006, James A. McCoy filed a class action lawsuit in federal court against Chase Manhattan Bank USA, alleging the bank had violated the Truth in Lending Act, 15 U.S.C. §§ 1601-1660j. McCoy alleged *inter alia* that Chase failed to notify members of the class before it closed their credit card accounts to new transactions and raised the interest rate on their balances based on a late payment on a debt owed either to Chase or to another creditor. Dismissing McCoy’s complaint, the district court held that Chase was not required to notify its card holders of a change in interest rate due to a consumer default so long as the possibility of such a rate increase and the maximum possible rate had previously been disclosed to the consumer. The court adopted the reasoning of a decision in a virtually identical class action filed by McCoy’s counsel on behalf of another plaintiff.

McCoy appealed the district court’s dismissal of his complaint and a divided panel of the Ninth Circuit reversed. Carefully parsing the Federal Reserve Board’s Official Staff Commentary to Regulation Z, the panel majority concluded that banks were required to disclose interest rate increases based on a consumer default at the latest by the day that the rate was increased. The majority determined that statements in an Advanced Notice of Proposed

Rulemaking (ANPR) issued by the Federal Reserve Board were ambiguous and did not lend strong support to Chase's contrary position.

The *McCoy* panel's decision was contrary to that of a different panel of the Ninth Circuit. *Evans v. Chase Bank USA, N.A.*, 267 Fed. App'x 692 (9th Cir. 2008). Moreover, both the First and Seventh Circuits also reached contrary results when confronted with the same issue. *Shaner v. Chase Bank USA, N.A.*, 587 F.3d 488 (1st Cir. 2009); *Swanson v. Bank of America, N.A.*, 559 F.3d 653, *reh'g denied*, 563 F.3d 634 (7th Cir. 2009). Further complicating matters, the First Circuit's decision in *Shaner* relied heavily on an *amicus* brief submitted by the Federal Reserve Board at the behest of the court that supported Chase's interpretation of the regulation. The Supreme Court granted *certiorari* to resolve this split.

There is no question that Regulation Z now prohibits the practice that McCoy is challenging. In early 2009, the Federal Reserve Board finalized an amendment to Regulation Z requiring credit card companies to notify consumers at least 45 days before an interest rate increase based on a consumer default. 74 Fed. Reg. 5244 (Jan. 29, 2009). This amendment was originally scheduled to go into effect on July 1, 2010, but the Board changed the effective date to February 22, 2010, in accordance with the Credit Card Accountability Responsibility and Disclosure Act (Credit CARD Act) of 2009, Pub. L. 111-24, 123 Stat. 1734 (2009). 75 Fed. Reg. 7658 (Feb. 22, 2010). The question is whether class members will have a remedy for such practices that took place prior to February 22, 2010, the effective date of the amendment to Regulation Z.

Although the current interpretation of Regulation Z is not likely to be impacted by the court's decision, this case may nevertheless have future consequences because it provides the Court an opportunity to opine regarding how lower courts should interpret the Truth in Lending Act and Regulation Z and weight to be given the Federal Reserve Board's official staff commentary. While the Supreme Court has already indicated that this commentary should receive weighty deference, *see Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980), there is an open question concerning the amount of deference, if any, where the Board's commentary is arguably ambiguous.

The Court may also take the opportunity to establish the level of deference owed to Federal Reserve Board documents other than the official staff commentary. As noted above, the *McCoy* court found the ANPR issued by the Federal Reserve Board was too ambiguous to support Chase's position but, if the Court disagrees and finds the ANPR was not too ambiguous, it may rule that deference is owed. The Court's ruling regarding the level of deference to give to an ANPR could have significant consequences for interpreting regulations in this context and across the spectrum of federal agencies.

AARP supported the amended Regulation Z required by the CARD Act to improve the rights of consumers by curtailing unfair increases in interest rates, prohibiting exorbitant and unnecessary fees, re-allocating payments so that higher rate balances are paid off first, eliminating double cycle billing, and banning universal default on existing balances.

Older individuals are relying more and more on credit cards to defray financial obligations that previously were paid by other means. As the recession continues, credit card usage among older people remains brisk. According to data compiled by AARP, within the 50+ population, 76% have at least one credit card. And while more than half state they pay the total outstanding monthly balance each month, one-third carry a balance, paying more than the minimum, but less than the total.

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WHETHER, IN CALCULATING THE DEBTOR'S "PROJECTED DISPOSABLE INCOME" DURING THE PLAN PERIOD, THE BANKRUPTCY COURT MAY ALLOW AN OWNERSHIP COST DEDUCTION FOR VEHICLES ONLY IF THE DEBTOR IS ACTUALLY MAKING PAYMENTS ON THE VEHICLES.

***Ransom v. MBNA, America Bank, N.A.*,**
577 F.3d 1026 (9th Cir. 2009),
cert. granted, 130 S. Ct. 2097 (April 19, 2010)(No. 09-907).
Oral argument has been scheduled for October 4, 2010.

This case addresses how to calculate disposable income under the Bankruptcy Abuse Prevention and Consumer Protection Act's (BAPCPA) means test. Specifically, the Supreme Court will decide whether an above-median income debtor who has filed Chapter 13 bankruptcy may claim a vehicle "ownership cost" deduction from the projected disposable income available to pay creditors even though the debtor owns the vehicle free and clear. While seemingly technical, at stake is whether debtors seeking bankruptcy protection may file under either Chapter 7 or Chapter 13 and whether debtors emerging from bankruptcy will have sufficient income to pay their basic living expenses.

In July 2006, Jason Ransom filed a Chapter 13 bankruptcy petition along with a plan to repay his creditors. As part of his repayment plan, Mr. Ransom filed a Statement of Current Monthly Income. Because his total income is above the median income for his household size in his state of residence, the court is required to calculate his disposable income pursuant to a statutory "means" test. *See* 11 U.S.C. § 1326(b)(3) (2006). Under the means test, the debtor's disposable income per month is calculated by taking the debtor's total monthly income and subtracting certain statutorily enumerated amounts for various expenses. 11 U.S.C. § 707(b)(2) (2006). Following the Bankruptcy Court's instructions, he claimed $471 per month in vehicle ownership expenses, the established expense deduction for one vehicle.

One of Ransom's unsecured creditors, MBNA America Bank, objected to Ransom's repayment plan, alleging that he had improperly deducted vehicle ownership expenses from his available income because he owned the car free and clear of any debt.[2] As a result, the court did not approve the repayment plan because the plan did not provide for payment to his unsecured creditors in full or

[2] The United States Trustee and Chase Manhattan Bank USA, NA also filed objections on the same grounds but only MBNA has continued litigating the issue in Ransom's case.

direct all of his projected disposable income toward repaying such creditors. 11 U.S.C. § 1325(b)(1) (2006).

Ransom appealed the court's rejection of his repayment plan to the Bankruptcy Appellate Panel of the Ninth Circuit, arguing that the bankruptcy code permitted him to take a vehicle ownership expense, regardless of whether he owns his car free and clear. The Appellate Panel rejected Ransom's argument, but also authorized an appeal to the Court of Appeals for the Ninth Circuit.

On appeal, the Ninth Circuit also rejected Ransom's view. Adopting the reasoning of the Bankruptcy Appellate Panel, the Ninth Circuit concluded that "the debtor's *applicable* monthly expense amounts specified under the National Standards and Local Standards," 11 U.S.C. § 707(b)(2) (2006) (emphasis added), means only those allowances "capable of being applied." The court rejected Ransom's argument that the difference between the use of the words "applicable" and "actual" in the statute meant that debtors were entitled to deduct the full ownership allowance for a car so long as they owned a car. The Ninth Circuit did not find the difference in language to be dispositive of Congressional intent and held that the ownership expense deduction was not "applicable" to Ransom. Since Ransom did not make any payments on his vehicle, he was not permitted to take the deduction in the calculation of his projected disposable income.

The Ninth Circuit also agreed with the Bankruptcy Appellate Panel in observing that the result in this case was not inequitable because there were other safeguards to protect debtors who own their cars free and clear from having their disposable income overstated. For example, debtors could claim an extra $200 in operating expenses if they owned old or high mileage cars free and clear and that courts can grant additional expenses based on a debtor's special circumstances.

Finally, the court agreed with the Bankruptcy Appellate Panel that rejecting Ransom's deduction was most consistent with one of the main policies that led to the BAPCPA: "to ensure that debtors repay as much of their debt as reasonably possible." *Ransom v. MBNA Am. Bank, N.A.*, 577 F.3d 1026, 1032 (9th Cir. 2009) (quoting *Ransom*, 380 B.R. 799, 807-08 (B.A.P 9th Cir. 2007)). The court found its approach consistent with the purpose underlying the means test because disallowing the deduction would likely result in higher payments to creditors.

Because of a split in the circuits on this issue, the Supreme Court granted the petition for *certiorari*.

The Bankruptcy Code provides that an above median income debtor's living expenses "shall be" a combination of (1) "the debtor's applicable monthly expense amounts specified under the [Internal Revenue Service's] National Standards and Local Standards" and (2) "the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides . . . ." 11 U.S.C. § 707(b)(2)(A)(ii)(I)(2006). In the bankruptcy context the standards are used as deductions from the debtor's total monthly income to determine their projected disposable income. For filers with income above their state median, the result determines how much must be paid to unsecured creditors. At issue in the present case are two allowances for vehicles that are included under the IRS Local Financial Standards which vary by region. The first of these allowances is an allowance for ownership costs (*i.e.*, car loan or lease payments) of up to two cars. The second allowance is for operating costs, which "include maintenance, repairs, insurance, fuel, registrations, licenses, inspections, parking and tolls." *Id.*

Unfortunately, it is not clear how Congress intended courts to apply the IRS Financial Standards when calculating the debtor's disposable income. The Fifth, Seventh, and Eight Circuits treat the reference to the stated allowance as a set amount that debtors may deduct from their total income, considering the correct combination of national and local expenses for their region, family size, and number of cars owned, regardless of their actual expenses. In these courts' view, the statutory language referencing the "applicable monthly expense amounts specified under the . . . Local Standards" meant that vehicle ownership costs were determined by selecting the "applicable" costs relevant to the debtor based on the geographic location of the debtor's residence and the number of cars the debtor owned. This method is also consistent with the different statutory framework applicable to debtors with income above-median compared to below median. For debtors with below median income, courts calculate the income available to pay unsecured creditors based on their actual expenses. *See* 11 U.S.C. § 1325(b)(2)-(3) (2006). This statutory framework suggests that actual expenses are not to be used for above-median debtors subject to the means test. Finally, the Bankruptcy Court forms themselves instruct filers to use this approach.

Alternatively, if Congress is deemed to have incorporated the IRS Financial Standards into the Bankruptcy Code by reference, debtors would be entitled to deduct only actual expenses, or the maximum allowance, whichever is less, just as the IRS does when it is calculating income to recover delinquent taxes. This was the method followed by the bankruptcy court in determining Ransom's disposable income.

Although there are arguments in favor of both possible statutory interpretations, the Supreme Court's recent decision in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324 (2009), may prove instructive. There, despite noting flaws in the statute, the Court found it should be interpreted to achieve sensible results.

The outcome of this case may have serious consequences for consumers struggling to make ends meet, including older people who are still working and are more likely to earn an above-median income. Bankruptcy filings for people over age 50 are increasing at a faster rate than for any other age group, with unaffordable medical expenses often cited as a precipitating cause. Deborah Thorne, Elizabeth Warren & Teresa A. Sullivan, AARP Public Policy Institute, *Generations of Struggle* 4 (2008), *available at* http://assets.aarp.org/rgcenter /consume/2008_11_debt.pdf (discussing increase in bankruptcy petitions filed by people 55 or older from 1991 to 2007). Given the combined effects of the recession and the increasingly unaffordable debt burdens facing older people, having sufficient disposable income to meet their basic living expenses is vital to their wellbeing and their ability to meet their ongoing financial obligations.

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WHETHER THE FEDERAL ARBITRATION ACT PREEMPTS STATES FROM CONDITIONING THE ENFORCEABILITY OF AN ARBITRATION AGREEMENT ON THE AVAILABILITY OF PARTICULAR PROCEDURES – HERE, CLASSWIDE ARBITRATION – WHEN THOSE PROCEDURES ARE NOT NECESSARY TO ENSURE THAT THE PARTIES TO THE ARBITRATION AGREEMENT ARE ABLE TO VINDICATE THEIR CLAIMS?

AT&T Mobility LLC v. Concepcion,
584 F.3d 849 (9th Cir. 2009),
cert. granted, 130 S. Ct. 3322 (May 24, 2010)(No. 09-893).
Oral argument has been scheduled for November 9, 2010.

The question presented in *AT&T v. Concepcion* is whether the Federal Arbitration Act of 1925 precludes courts from declining to enforce class-action bans when they are embedded in arbitration agreements. Class-action bans are contract provisions that purport to deny consumers and workers the right to seek relief as a class. Many courts have deemed these provisions unconscionable under state law where precluding class actions would have the effect of exculpating companies from widespread wrongdoing, particularly where damages would be too small to justify pursuing individual claims. It is also clear from the briefing that AT&T and its *amici* are seeking a sweeping ruling from the Court with the goal of ending all class actions by using contracts of adhesion.

In March 2006 Vincent and Liza Concepcion filed a class-action lawsuit against AT&T Mobility (then known as Cingular Wireless) alleging that it violated state consumer protection laws by advertising “free” cell phones with the signing of a service contract while charging purchasers $30.22 for sales tax. AT&T later moved to consolidate the case with that of *Laster v. T-MobileUSA, Inc.,* 252 Fed. Appx. 777 (9th Cir. 2007), a case challenging the same practice of charging sales tax for a “free” phone. The Ninth Circuit had already found the arbitration clause with a class action ban used by T-Mobile and AT&T in *Laster* to be unenforceable because the class action ban prevents consumers with small dollar value claims from vindicating their rights. T-Mobile appealed to the Supreme Court seeking a ruling that the FAA preempts the state rule of refusing to enforce the arbitration provision absent availability of a class procedure, but *certiorari* was denied.

After the Ninth Circuit refused to enforce the *Laster* arbitration clause, and nine months after the Concepcions filed suit, AT&T sent the Concepcions a change in terms of the arbitration provision. The revised terms provided that AT&T would pay double the amount of a California customer’s attorneys’ fees and $7,500 if the arbitrator issued a consumer an award exceeding AT&T's written settlement offer made before the selection of the arbitrator. In doing so, AT&T attempted to show that the arbitration forum would always provide an incentive for people to seek a remedy, in an attempt to defeat the contention that the class action is necessary to vindicate rights in cases involving small claims.

AT&T then sought to compel arbitration in March 2008, which the district court denied. The Ninth Circuit affirmed, and AT&T filed an interlocutory appeal of that decision. The Supreme Court granted *certiorari*.

In affirming denial of the motion to compel arbitration, the Ninth Circuit found that an individual's claim would still be worth only $30.22, despite the appearance of the availability of up to $7,500 through arbitration. The court reasoned that AT&T would always settle such small claims, and arbitration claims would never be filed. Thus, the arbitration procedures did not encourage individuals to file claims in arbitration. The Ninth Circuit observed that a person "will not find it worth the time or the hassle to try to recover such a small amount, even if that person spends no money to hire an attorney or to invoke the arbitration process."

Additionally, the Ninth Circuit reaffirmed that the FAA does not preempt state law holding an arbitration clause is unenforceable where it does not permit class actions in cases involving small dollar value claims. Every federal circuit and state supreme court which has decided the question has held that the FAA does not preclude courts from striking down particular class-action bans as unconscionable pursuant to state law contract interpretation principles generally applicable to all contracts. These courts include the First, Third, Ninth, and Eleventh Circuits, and the highest state courts of Alabama, California, Illinois, Massachusetts, New Jersey, New Mexico, North Carolina, Washington, and West Virginia.

The debate over class action bans, regardless of their venue, has been raging in the courts for years. While corporations argue that arbitration is faster and less expensive, consumer advocates point out that arbitration limits access to remedies, privatizes the law, and provides corporations with a "get out of jail free card" for their illegal actions. Class action bans, as well as other remedy-stripping provisions imbedded in arbitration clauses, make it difficult, if not impossible, for consumers to vindicate their rights. For the small amounts of money typically involved in such disputes, few would invest the time and effort necessary to recover their money. A small amount of money illegally charged to millions of customers equates to enormous profits, especially if a corporation is never forced to return such charges after they are determined to have been illegally charged. Moreover, there is a deterrent effect from the possibility of the filing of a class action lawsuit.

AARP will argue in its *amicus* brief, as it has in numerous briefs filed in state and federal courts, that the availability of class actions procedures, either in the courts or the arbitration forum, is essential to vindicate rights, provide an adequate remedy and deter marketplace abuses. The ubiquitous presence of class action bans and other remedy stripping provisions imbedded in arbitration clauses make it difficult, if not impossible for individuals with small claims effectively to pursue remedies. Moreover, unlawful practices that impact large numbers of people must be subject to class treatment adequately to protect consumers in the marketplace and vindicate statutory and constitutional rights. AARP will also urge the Court to hold that the FAA does not preempt the state courts from refusing to enforce an arbitration clause that fails to provide a class action procedure.

If the Supreme Court limits its analysis to the question as presented, this case will not necessarily have a broad impact because a challenge to a particular arbitration clause must be evaluated on its own merits to determine whether it exculpates a corporation from liability. On the other hand, it is also possible that the Supreme Court will not limit itself to the question as presented and will take the opportunity to strike down important state law principles of contract interpretation. Indeed, proponents of arbitration have argued, unsuccessfully to date, that class actions should be preempted in all arbitration forums as being inherently inconsistent with the FAA.

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VETERANS BENEFITS

WHETHER THE 120-DAY TIME LIMIT SET FORTH IN 38 U.S.C. § 7266(a) CONSTITUTES A STATUTE OF LIMITATIONS SUBJECT TO THE DOCTRINE OF EQUITABLE TOLLING, OR WHETHER THE TIME LIMIT IS JURISDICTIONAL AND THEREFORE BARS APPLICATION OF THE DOCTRINE?

***Henderson v. Shinseki*,**
589 F.3d 1201 (Fed. Cir. 2009),
cert. granted, 78 U.S.L.W. 3762 (June 28, 2010)(No. 09-1036).
Oral argument has been scheduled for December 6, 2010.

In *Henderson v. Shinseki*, the Supreme Court will consider whether the 120-day time limit set forth in 38 U.S.C. § 7266(a) to file an appeal from an adverse decision of the Board of Veterans' Appeals is subject to the doctrine of equitable tolling or whether the time limit is jurisdictional and not subject to the doctrine.

David Henderson was on active military duty during the Korean War from 1950–1952. He was discharged on the basis of a service-connected mental disability. In an effort to obtain in-home care, Mr. Henderson filed for monthly aid at the Regional Office of the Department of Veterans Affairs in 2001. After the Department of Veterans Affairs denied his claim, he appealed to the Board of Veterans' Appeals ("Board"), which denied his appeal on August 30, 2004. He then filed a notice of appeal with the Court of Appeals for Veterans Claims ("Veterans Court") on January 12, 2005, fifteen days following the expiration of the 120-day time limit set forth in Section 7266(a). Pursuant to Section 7266(a), a person adversely affected by a Board decision must file a notice of appeal with the Veterans Court within 120 days after the date on which the notice of decision was mailed.

Mr. Henderson argued that his failure to file the appeal in a timely manner was a direct result of his disability. He asked the court to apply the doctrine of equitable tolling to § 7266(a), which would suspend the 120-day time limit, thus allowing the appeal to proceed. Instead, the Veterans Court relied heavily on the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), which declared that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement," and cannot be waived. In that case, the Supreme Court also determined that it had "no authority to create equitable exceptions to jurisdictional requirements." *Id.* On the basis of *Bowles v. Russell*, the Veterans

Court refused to apply the doctrine of equitable tolling to § 7266(a) and dismissed Mr. Henderson's appeal for lack of jurisdiction. Mr. Henderson then appealed to the Federal Circuit Court of Appeals, which affirmed the decision of the Veterans Court.

Despite the decision of the Federal Circuit, other circuits have recognized that equitable tolling applies to many different filing deadlines. *See e.g.*, *Rouse v. U.S. Dep't of State*, 567 F.3d 408, 414-17 (9th Cir. 2009) (applying the equitable tolling doctrine to the limitations period for claims alleging violations of the Privacy Act).

AARP's *amicus* brief, filed jointly with the Paralyzed Veterans of America, will argue that the doctrine of equitable tolling applies to Section 7266(a). The brief will note that proceedings before the Veterans Court should be non-adversarial, pro-claimant, and protective of veterans, so the Supreme Court should not import rigid jurisdictional rules into such a system. The brief will also highlight the unfairness that may result if equitable tolling is held inapplicable to § 7266(a). Over half of veterans who file claims with the Department of Veterans' Affairs are not represented by counsel. For veterans with a mental disability or without counsel, it is difficult to navigate the appeals process, and may be even more difficult to meet such a strict statutory filing deadline.

There are approximately 17 million veterans age fifty and older in the United States and over half of the veterans with service-related disabilities are older than fifty-five. Between 2004 and 2006, the Department of Veterans Affairs issued 1,994,176 disability compensation decisions involving veterans ages 50 to 59 and 60% of those cases were denied. Apart from the large number of disabled veterans over 50 who will be affected by this case, the outcome of this case could influence decisions regarding the application of equitable tolling in other benefit systems, where benefits are also critical for survival.

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PENDING PETITIONS FOR *CERTIORARI*

HEALTH

WHETHER INDIVIDUALS INJURED BY A STATE LAW MAY MAINTAIN AN ACTION IN FEDERAL COURT TO ENJOIN A STATE OFFICIAL FROM ENACTING THAT LAW ON THE GROUND THAT IT IS PREEMPTED BY FEDERAL LAW?

WHETHER A STATE LAW REDUCING MEDICAID REIMBURSEMENT RATES IS PREEMPTED BY 42 U.S.C. § 1396a(a)(30)(A)?

Independent Living Center of Southern California, Inc. v. Maxwell-Jolly,
572 F.3d 644 (9th Cir. 2009),
motion to vacate denied, 590 F.3d 725 (9th Cir. 2009),
petition for cert. filed, 78 U.S.L.W. 3500 (Feb 16, 2010)(No. 09-958).

In *Independent Living Center*, the Ninth Circuit Court of Appeals considered whether a California law requiring a ten percent reduction in Medicaid reimbursement rates for certain services was in conflict with and, thus, preempted by Title XIX of the Social Security Act. The Ninth Circuit ruled that it was, and upheld a preliminary injunction enjoining the state from implementing the law. California has requested review of that decision.

In 2008, the California legislature enacted Assembly Bill (AB) X3 5, requiring a ten percent rate reduction for providers in the state Medicaid fee-for-service program. A group of Medicaid beneficiaries and providers, including physicians, pharmacies, a day health care center, and a medical clinic, sought to enjoin the state from implementing the law. 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."

The district court initially refused to grant a preliminary injunction, finding that the plaintiffs had no private right of action to enforce § 1396(a)(30)(A) against the state. The Ninth Circuit reversed, holding that no private right of action was necessary because the plaintiffs' suit was based on a federal preemption claim. Although California requested review of that decision, the Supreme Court denied the Petition for *Certiorari*.

On remand, the district court granted a preliminary injunction enjoining the state from implementing the rate cuts. The Ninth Circuit affirmed, agreeing with the district court that the plaintiffs had demonstrated a likelihood of prevailing on the merits.

In its decision, the Ninth Circuit again rejected the argument that a private right of action under § 1396(a)(30)(A) was necessary for the plaintiffs to challenge AB X3 5. Instead, the court held that the Supremacy Clause of the Constitution provided a valid basis for the plaintiffs' suit. 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 § 1396(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.

AARP filed *amicus* briefs in support of the plaintiffs in the district court and the Ninth Circuit. The briefs pointed out the negative impact that AB X3 5 would have on the health and welfare of the state's most vulnerable populations, as well as 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, AARP pointed out, the state's financial situation would only become worse as result of the cuts.

In its Petition 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 plaintiffs submitted a brief in opposition to the Petition. Twenty-two state Attorneys General filed a brief *amici curiae* supporting *certiorari*. On May 24, 2010, the Supreme Court requested that the Solicitor General file a brief expressing the views of the United States. The Solicitor General has not yet submitted a brief.

Independent Living Center is an important case because it implicates the ability of private individuals to prevent states from infringing on the quality and access to health care guarantees of federal Medicaid law. 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 most vulnerable citizens.

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WHETHER STATE FAILURE-TO-WARN CLAIMS BROUGHT BY INJURED PATIENTS AGAINST MANUFACTURERS OF GENERIC DRUGS ARE IMPLIEDLY PREEMPTED BY THE FOOD, DRUG, AND COSMETIC ACT?

PLIVA, Inc. v. Mensing; Actavis v. Mensing,
588 F.3d 603 (9th Cir. 2009**),**
petition for cert. filed, 78 U.S.L.W. 3522 (Feb. 19, 2010)(No. 09-993); 78 U.S.L.W. 3523 (Feb 25, 2010)(No. 09-1039).
Conference has not yet been scheduled.

In *PLIVA, Inc. v. Mensing*, the Eighth Circuit Court of Appeals considered whether federal law preempts state failure-to-warn suits against generic prescription drug manufacturers. Applying the reasoning of the Supreme Court in *Wyeth v. Levine*, the Eighth Circuit unanimously ruled that such claims are not preempted. The defendant manufacturers have petitioned for review of that decision.

In the underlying suit, the plaintiff sued the generic manufacturers of metoclopramide, an anti-nausea medication, after she developed tardive dyskinesia, a motion disorder, from using the drug for several years. The plaintiff alleged that the generic manufacturers failed to enhance the warnings on the drug label despite mounting evidence of a high risk of developing the disorder from long-term use. The FDA now requires that all metoclopramide labels include a boxed warning about that risk.

The defendants argued that federal law barred them from independently strengthening the warnings on the metoclopramide label. They pointed to the Hatch-Waxman Amendments to the Food, Drug, and Cosmetic Act (FDCA), which require generic labels to be the same as their brand-name counterparts. They also relied on FDA regulations that provide for recall of generic drugs whose labels differ from the brand-name equivalent. Agreeing with the defendants, the district court held that the plaintiff's claims were preempted by federal law and dismissed the suit.

On appeal, the Eighth Circuit reversed the dismissal. The court relied on *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), a Supreme Court preemption case involving a brand-name drug manufacturer decided after the district court decision. In *Wyeth*, the Court ruled that Congress intended the FDCA to complement, not supplant, state tort duties that help ensure the safety of prescription drugs. Additionally, it found that FDA regulations allow brand-name drug manufacturers to independently strengthen warnings when new evidence shows a higher risk. The Court held that prescription drug manufacturers bear ultimate responsibility for the adequacy of their labels and can be subject to failure-to-warn suits. However, it did not clarify whether its holding applied only to brand-name manufacturers or to generic manufacturers as well.

The Eighth Circuit interpreted *Wyeth* to apply to generic manufacturers. It held that federal law requires all drug manufacturers, not just brand-name manufacturers, to bear responsibility for the adequacy of their labels. Although the court did not rule on whether generic manufacturers may independently strengthen their warnings through the mechanism available to brand-name manufacturers, it held that, at a minimum, generic manufacturers can propose a label change to the FDA when they learn of new evidence demonstrating a higher risk. The Fourth and Fifth Circuits have agreed with this interpretation of *Wyeth.* In the Sixth and Ninth Circuits, appeals on the issue are pending.

In their petition for *certiorari*, the defendants argue that the Eighth Circuit erred in its interpretation of *Wyeth*. They argue that its holding must be limited to brand-name manufacturers because generic manufacturers are subject to a different set of federal regulations. Under these regulations, they claim generic producers must only ensure that the warnings on their labels reflect those of their brand-name counterpart, not the actual risk of taking the drug. The defendants argue that to allow otherwise would force manufacturers to raise drug prices or withdraw from the generic market. The Generic Pharmaceutical Association filed an *amicus* brief supporting these arguments.

AARP filed an *amicus* brief in *Wyeth* arguing in favor of allowing tort liability against the brand-name manufacturer. Although AARP has not yet filed a brief in this case, it supports the position of the plaintiffs that the *Wyeth* ruling applies to generic manufacturers. Contrary to the defendants' claim, AARP believes that generic manufacturers can take responsibility for the adequacy of their labels without increasing the cost of generic drugs, and they must do so under federal law.

The Supreme Court has not yet ruled on the petition for *certiorari*, but has requested that the Solicitor General express the views of the United States. The Solicitor General has not yet submitted its brief.

This is an important case for people over fifty and for anyone who has taken a prescription drug. Seventy percent of the prescriptions in the country are filled with generic drugs. Given the size of this market, generic manufacturers are in the best position to monitor the risks associated with prescription drugs and ensure that labels adequately warn of those risks. However, granting generic manufacturers immunity from failure-to-warn products liability suits would relieve them of this responsibility. In the long run, this could jeopardize the safety and effectiveness of all prescription drugs.

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WHETHER FEDERALLY FUNDED MEDICAL CLINICS MAY SUE DRUG MANUFACTURERS AS THIRD PARTY BENEFICIARIES FOR ALLEGEDLY OVERCHARGING FOR DRUGS IN VIOLATION OF THE MANUFACTURERS' PHARMACEUTICAL PRICING AGREEMENTS WITH THE SECRETARY OF HEALTH AND HUMAN SERVICES UNDER 42 U.S.C.S. §§ 256B, 1396R-8?

***County of Santa Clara v. ASTRA USA, Inc*.,**
588 F.3d 1237 (9th Cir. 2009),
reh'g and reh'g en banc denied, Pacer Docket No. 586 (Feb. 11, 2010),
petition for cert. filed, 2010 WL 1626438 (Apr. 21, 2010)(No. 09-1273).
Conference is scheduled for September 27, 2010.

In *County of Santa Clara v. ASTRA USA, Inc*., the Ninth Circuit Court of Appeals considered whether an intended beneficiary of a government contract has a right to sue for breach of a federal contract. Applying federal common law, the Court held that the intended beneficiaries did have standing to sue. The defendant pharmaceutical manufacturers have petitioned the Supreme Court for review.

In the lawsuit, the County of Santa Clara medical clinics sued multiple pharmaceutical companies for breach of contract claiming that the companies had overcharged Medicaid funded clinics, known as "Section 340B covered entities," for prescription drugs. In order for pharmaceutical manufacturers to participate in the Medicaid program the Public Health Service Act of 1992 requires that the manufacturers enter into Pharmaceutical Pricing Agreements (PPAs) with the Secretary of Health and Human Services. These PPAs bind the pharmaceutical manufacturers to charge covered entities no more than average manufacturer price (AMP) for prescription drugs. To calculate the AMP, a formula is used that includes the discounts and rebates manufacturers give to other customers. The AMP is also known as the "ceiling price" that pharmaceuticals can charge Medicaid providers.

The district court found that the clinics, or covered entities, were intended beneficiaries under the contracts, but dismissed the complaint because the contract itself did not state that third party beneficiaries had a right to sue.

On appeal, the Ninth Circuit reversed the district court's decision holding that that the covered entities are intended direct beneficiaries of these agreements and thus have the right to enforce the agreements' discount provisions against the manufacturers and sue them for reimbursement of excess payments. The Ninth Circuit recognized that the Public Health Service Act does not create a federal private cause of action, but that the contract claims were proper and separate from the statute.

The defendants filed a petition seeking review in the Supreme Court stressing that the issue should be framed around whether Santa Clara has a private cause of action under the statute. The petition rejects the existence of federal common law, which the Ninth Circuit applied in its examination of the contract claims. The defendants also claim that a split exists among the Circuit Courts as to whether a third party beneficiary can sue to enforce a government contract without an express intent in the contract.

The plaintiff's opposition to the petition for *certiorari* focuses on the law of contracts, emphasizing that the contract claim is distinct from a cause of action arising out of the federal statute. Santa Clara rejects that there is a circuit split, and explains that the defendants incorrectly frame the issue. In defending its ability to bring a contract claim, Santa Clara refutes the defendants' position that federal common law does not exist by pointing out an exception for government contracts created by statute.

The outcome of this case could have a significant impact upon prescription drug affordability. Allowing county run medical facilities to challenge pharmaceutical manufacturers' systematic overcharging of pharmaceuticals will aid in ensuring fair prescription drug pricing. As the Office of the Inspector General has reported, covered entities overpaid an estimated $3.9 million for prescription drugs in a single month. Overpricing results in the depleting of Medicaid funds that provide essential healthcare coverage for vulnerable and needy persons.

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EMPLOYMENT

WHETHER CLAIMS FOR MONETARY RELIEF CAN BE CERTIFIED UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(B)(2) – WHICH BY ITS TERMS IS LIMITED TO INJUNCTIVE OR CORRESPONDING DECLARATORY RELIEF – AND, IF SO, UNDER WHAT CIRCUMSTANCES.

WHETHER THE CERTIFICATION ORDER CONFORMS TO THE REQUIREMENTS OF TITLE VII, THE DUE PROCESS CLAUSE, THE SEVENTH AMENDMENT, THE RULES ENABLING ACT, AND FEDERAL RULE OF CIVIL PROCEDURE 23.

Wal-Mart Stores, Inc. v. Dukes,
603 F.3d 571 (9th Cir. 2010) (*en banc*),
petition for cert. filed, www.scotusblog.com (August 25, 2010)(No. 10-277).
Conference has not yet been scheduled.

In a sharply divided 94-page ruling, the *en banc* Ninth Circuit upheld, 6-5, the order of the U.S. District Court for the Northern District of California certifying a class under Rule 23(b)(2) of the Federal Rules of Civil Procedure in the largest-ever employment discrimination class action. The Title VII sex discrimination lawsuit, which was filed almost ten years ago, alleges that Wal-Mart, the world's largest private employer with more than 3,400 U.S. stores, pays women less than men in comparable positions and promotes women much less frequently than men. According to the lawsuit, the discrimination is effective in keeping women from top roles. The suit alleges that women comprise more than 70% of Wal-Mart's sales workforce, but account for fewer than 10% of store manager positions and fewer than one-third of store management overall, and that there is only one woman among Wal-Mart's twenty top executives. The class is estimated to include more than 1.5 million current and former Wal-Mart female employees.

Writing for the majority, Judge Hawkins found that "the district court acted within its broad discretion in concluding that it would be better to handle some parts of this case as a class action instead of clogging the federal courts with innumerable individual suits litigating the same issues repeatedly." 603 F.3d at 628. The majority found that the district court had fulfilled its obligation under judicial precedent to conduct a "rigorous analysis" to insure that the requirements of Rule 23 have been satisfied before certifying a class. Thus, "[t]he district court did not abuse its discretion in finding the requirements of Rule 23 satisfied … with respect to claims for injunctive and declaratory relief and back pay." *Id.*

In her concurring opinion, Judge Graber complimented both the majority and the dissent for their "scholarly and complete explanations of their positions," but also pointed out:

> the simplicity of the majority's unremarkable holding: Current female employees may maintain a Rule 23(b)(2) class action against their employer, seeking injunctive and declaratory relief and back pay on behalf of all the current female employees, when they challenge as discriminatory the effects of their employer's company-wide policies.
>
> If the employer had 500 female employees, I doubt that any of my colleagues would question the certification of such a class. *Certification does not become an abuse of discretion merely because the class has 500,000 members*.

603 F.3d at 628-29 [emphasis supplied].

Judge Ikuta's dissenting opinion began by stating that "[n]o court has ever certified a class action like this one, until now." *Id*. He pointed out that while the six named plaintiffs alleged that they were discriminated against by several individual store managers, "they fail to present '[s]ignificant proof' of a discriminatory policy or practice of Wal-Mart that would make it possible to conclude that 1.5 million members of the proposed class suffered similar discrimination. Without evidence of a company-wide discriminatory policy implemented by managers through their discretionary decisions, or other evidence of a discriminatory company-wide practice, there is nothing to bind these purported 1.5 million claims together in a single action." 603 F.3d at 628-29.

In a separate dissenting opinion, Chief Judge Kozinski stated that the members of the class certified by the district court "have little in common but their sex and this lawsuit." 603 F.3d at 652.

In its Petition, Wal-Mart states that the *en banc* Ninth Circuit decision "adopts standards that violate the rights of both defendants and absent class members and contradicts decisions" of the Supreme Court. *Cert*. Petition at 1. Moreover, the "Ninth Circuit created an acknowledged three-way circuit split on the standard for determining when claims for monetary relief can be certified as a class action under Federal Rule of Civil Procedure 23(b)(2), which on its face applies only to claims for injunctive or corresponding declaratory relief." *Id*. at 2.

Since this case is the largest employment discrimination class action ever filed, it is impossible to overstate the importance of the Supreme Court's upcoming decision whether to hear the case. If the Court agrees to hear it, the resulting decision is certain to be applied to every subsequently filed class action in any context because the Court will not be construing employment law, but rather will be establishing the minimum standards for class certification under Rule 23.

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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 and AARP Foundation Litigation attorneys see on their radar screens.

Forced Arbitration: A Cross-Cutting Issue

As more and more contracts include arbitration clauses for every type of service and product, a debate has been raging in the courts over whether arbitration clauses are enforceable. While state and federal courts applying state contract law have been seeking to protect people who are unfairly forced to arbitrate using boilerplate contracts, the Supreme Court has been narrowing consumer access to courts.

For many years, AARP has taken very strong positions in courts across the country supporting the rights of people to have their day in court despite arbitration clauses tucked away in the small print of contracts. The presence of forced arbitration can threaten the financial security and even the personal safety of people. For example, arbitration clauses have been inserted into nursing home admission contracts that relieve the nursing homes of liability for negligence. Patients have suffered and died without any recourse as a result. Nursing homes that know they will not face the consequences of their negligence have no incentive to improve.

The same problem exists in many consumer contracts, drafted by cell phone companies, credit card providers, payday lenders, or cruise line operators, which authorize firms to impose many millions of dollars of hidden charges that deceive unsuspecting customers. Forced arbitration clauses that deny consumers effective means of pursuing their claims in court permit bad practices in the marketplace to go unchallenged.

And finally, growing numbers of employers are including forced arbitration requirements in employment "contracts." For most workers these arbitration requirements consists of terms and conditions of employment set out in a workplace "handbook" and none of which are subject to negotiation – either take the terms or lose the job. Such arbitration rules usually cover many potential claims alleging unfair working conditions, including most common grounds for challenging unlawful discrimination on the job based on a worker's age, disability, race, sex, national origin or religion.

Courts that are currently considering forced arbitration questions discussed herein include the Third Circuit (*King v. Advance America*), the Eleventh Circuit (*Cruz v. Cingular Wireless* and *Maughon v. Carnival Cruise Lines*), and the Supreme Courts of Kentucky (*Schneurle v. Insight Communications*) and Florida (*Betts v. McKenzie* and *Pendergast v. Sprint*). AARP is litigating or has filed *amicus* briefs in each of these cases, and we expect that some of these issues will reach the Supreme Court.

In addition to these disputes over forced arbitration in the courts, there are also pending legislative proposals to limit forced arbitration. These include the Arbitration Fairness Act (addressing employment and consumer contract forced arbitration clauses) and the Fairness in Nursing Home Arbitration Act. The Dodd-Frank consumer protection bill also limits the use of arbitration in certain contracts.

Employment

Given the attention the Supreme Court has given to age discrimination issues in recent years, as the October 2010 Term approaches, perhaps the most remarkable development has been the absence of any Age Discrimination in Employment Act (ADEA) cases on the Court's docket. But several of the Court's recent ADEA rulings have left important unfinished business, and hence, such issues may return soon to demand the Court's attention.

In what at first seemed a long-overdue acknowledgement of the importance of the rights of older workers, four of five ADEA cases decided during the 2007 Term [*Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008); *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008); *Federal Exp. Corp*. *v*. *Holowecki*, 128 S. Ct. 1147 (2008); and *Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395 (2008)] were favorable to the employee-plaintiffs. However, in the fifth decision, *Kentucky Retirement Systems v. EEOC*, 128 S. Ct. 2361 (2008), the Court upheld, under the ADEA, a facially discriminatory disability retirement plan in which age was an explicit factor that reduced benefits available to some participants and in other instances denied them entirely. The *Kentucky Retirement Systems* decision, according to the dissent "undercuts …. the basic framework" of the ADEA by effectively sanctioning blatant age discrimination in employee benefits. However, the *Kentucky Retirement Systems* majority required older employees denied disability benefits based on their age, allegedly for benign reasons – in this instance, a preference for younger employees in risk-prone professions whose disability precluded larger regular retirement benefits – to produce additional evidence of intentional employer age bias – actual intent to harm older workers – an almost impossible task. *Kentucky Retirement System* created another significant interpretive distinction between the ADEA and Title VII, which the Court has repeatedly construed to prohibit facially discriminatory plans without additional evidence of bias. *Kentucky Retirement System* thus foreshadowed the Court's 2009 decision in *Gross v. FBL Financial Services, Inc.*, 129 S.Ct 2343 (2009), which has the potential to be its most harmful blow to the rights of older workers yet.

In *Gross* the Court expressly widened the gulf between Title VII and the ADEA by holding that unlike Title VII, the ADEA does not permit "mixed-motives" claims. Instead, an ADEA plaintiff must show that age is the "but-for" cause of the employer's adverse decision – even though the prohibition in both statutes ("because of" age in the ADEA; "because of" race, color, religion, sex, or national origin in Title VII) is identical. Perhaps more importantly for age discrimination victims and their advocates, the Court further emphasized that it perceives the ADEA's protections as more limited than those of Title VII by pointing out that it has never "definitively decided" whether the inferential proof framework for analyzing circumstantial evidence adopted by the Court 36 years ago in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and utilized ever since in cases arising under all federal employment discrimination cases, including Title VII and ADEA cases, is applicable to the ADEA. This language, even though it appears in a footnote, will undoubtedly encourage some lower courts to reject the *McDonnell Douglas* framework for ADEA cases, thus making it harder for victims of age discrimination to prove their claims. This situation is reminiscent of the Court's questioning in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), an ADEA disparate treatment case, whether the ADEA permitted disparate impact claims. The resulting turmoil in the lower courts – several circuits held that the ADEA does not permit disparate impact claims and several more questioned whether such claims were justifiable – was only resolved twelve years later by the Court's holding in *Smith v. City of Jackson, Mississippi*, 544 U.S. 228 (2005), that the ADEA does, in fact, permit such claims. Since disparate treatment claims far outnumber disparate impact claims brought under the ADEA, the consequences of the Court's gratuitous musing in *Gross* regarding the applicability of *McDonnell Douglas* to the ADEA is likely to be much more widespread and harmful to age discrimination victims than its *Hazen Paper dicta*.

Perhaps worst of all, a number of lower federal courts have interpreted *Gross* to require proof that age was the "sole cause" of an employer's challenged discriminatory conduct in order for an aggrieved employee to prevail. Such a standard is extremely difficult to meet, as in many instances employers arguably have multiple motives for their personnel actions. In some cases, courts have dismissed ADEA claims asserted by employees also asserting Title VII or other discrimination claims on grounds that in such circumstances age bias could not have been the "sole cause." This trend in the law is very troubling, particularly as proof of "sole cause" never has been required in Title VII cases, In addition, lower federal courts have applied the reasoning of *Gross* well beyond the ADEA to the Americans with Disabilities Act (ADA), ERISA, and other anti-discrimination statutes.

As a result of *Gross*, considerable effort is underway in Congress, enthusiastically supported by AARP in coordination with a coalition of other civil rights organizations, to enact legislation to repudiate the Court's decision. Specifically, work is underway on a bill to disavow Congress' intent to embrace a "sole cause" standard of proof in age (and other) discrimination cases, and to refute the notion that Congress intended the ADEA (and other anti-discrimination laws employing language the same as or similar to Title VII) to be interpreted in a manner so different from that of Title VII. Such a bill would likely restore a worker's right – under the ADEA and other laws – to bring "mixed motives" antidiscrimination claims, as is permitted now under Title VII. It might also address the specific issue presented to the Court – but not decided by the Court – in *Gross*: whether the rule in *Desert Palace v. Costa*, 539 U.S. 90 (2003), should apply not only to Title VII "mixed motives" cases but also to similar claims brought under the ADEA (or other antidiscrimination laws, such as the ADA). In *Desert Palace*, a Title VII case, the Court rejected limits on the kinds of proof required to be presented by a plaintiff in order to assert a "mixed motive" claims. The Court said not only "direct evidence" but also any other sort of evidence might support such a claim – in which an employee need only show race or sex was "a motivating factor" for challenged adverse conduct and the employer may respond by proving – as an affirmative defense that it would have made the same adverse employment decision regardless of the employee's race or sex.

If legislation is not enacted in response to *Gross*, litigation concerning the scope of the *Gross* decision – under the ADEA and perhaps other anti-discrimination laws – is likely to head for the Supreme Court. Employers are likely to seek, and employee advocates to oppose, an expansive reading of *Gross*.

If the Court does agree to hear an ADEA case this Term, AARP will be actively engaged in urging the Court to pull back from its tendency in *Gross* and

Kentucky Retirement Systems to treat freedom from age discrimination as a second class civil right.

Health Care

The issue of whether reverse or exclusion payments made by brand name drug manufacturers to would-be generic competitors is an alleged antitrust violation has been litigated in the courts for a number of years. A payment from a brand name drug manufacturer to a generic is called a reverse payment because the usual practice would be for a generic to pay the brand under a license to manufacture the drug if it was still protected by a patent. The issue is important for individual consumers and public authorities alike because the payments extend patent protection for the brand name drug and delay entry into the marketplace of less expensive generic drugs.

Beginning in 2005 with *Schering Plough Corp. v. FTC*, 403 F.3d 1056 (11th Cir. 2005), several courts of appeal have concluded that such payments do not constitute antitrust violations. In *Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187 (2d Cir. 2006), the Second Circuit decided that a drug patent holder could make a payment to a generic manufacturer to stay out of the market unless the patent was so weak as to constitute a sham. Although petitions for *certiorari* have been filed in several cases, the Supreme Court has not yet taken a case on this issue. The issue has new life now that a panel of the Second Circuit issued an opinion in *Arkansas Carpenters Health & Welfare Fund v. Bayer*, 604 F.3d 98 (2d Cir. 2010)(commonly referred to as the Cipro case), following the holding of *Tamoxifen* but casting doubt on its soundness, and inviting a petition for *en banc* review (which is now pending). In that case, direct purchasers of Cipro, the blockbuster antibiotic, challenged the reverse payment settlement agreement between the brand (Bayer) and generic (Barr) makers of the drug. Barr agreed both not to challenge the validity of the Cipro patent and not to manufacture a generic version of the drug until six months before the patent expired. In exchange, Bayer agreed to make reverse payments to Barr that totaled $398 million. The Department of Justice filed a brief in *Cipro* stating that "reverse payment agreements that delay entry by a potential generic competitor in exchange for a payment from a branded drug manufacturer with market power presumptively violate the Sherman Act [antitrust laws]." This is a marked change from the position the government took in earlier reverse payment litigation. Meanwhile, a legislative proposal to amend Hatch-Waxman to make reverse payments specifically illegal under the statute has passed the U.S. House of Representatives and cleared a Senate panel.

Several states have passed laws that criminalize the sale of prescriber-identifiable data for commercial use. This is information that data mining companies use to identify the prescribing habits of individual physicians. The data is sold to drug companies which use the information to aim its detailers (drug representatives) at specific physicians in order to influence their prescribing patterns, such as switching from a generic drug to brand name. The first law, passed in New Hampshire, drew a lawsuit from two data mining companies and ended in a First Circuit decision, *IMS Health Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2864 (2009), upholding the law on two grounds: (1) the Court determined that the information exchanged was not speech entitled to First Amendment protection; and (2) that even if the speech was "commercial speech," the state had sufficient justification for the restriction under the test of *Central Hudson Gas & Elec. Corp. v. Pub Serv. Comm'n*, 447 U.S. 557 (1980), because of the state's interest in curtailing rising state expenditures on Rx drugs. The First Circuit has also upheld a similar, but not identical Maine law, in *IMS Health Inc. v. Mills*, 2010 WL 3025496 (1st Cir. 2010) on the same grounds as in *IMS v. Ayotte*, and also based on Maine's interest in protecting prescribers' confidentiality. Vermont also passed a law restricting data mining of prescriber identifiable information which was also challenged in the courts, and the trial judge's decision upholding that law on commercial speech grounds is now on appeal to the Second Circuit. *IMS Health Inc. v. Sorrell*, No. 09-1913-cv(L). Argument was held in 2009 but there has not yet been a decision, leaving open the possibility of a Circuit split.

States also attempted to regulate pharmacy benefit managers (PBMs) which are fiscal intermediaries that specialize in the administration and management of prescription benefit programs. The original idea of PBMs was to better manage drug use through formularies and other means and thus lower drug costs to the plans. Both Maine and the District of Columbia passed laws which required PBMs to disclose the amount of rebates they receive from negotiated agreements with drug makers. The idea behind disclosure requirements is to ensure that discounts get passed along to insurers and ultimately consumers. The Pharmaceutical Care Management Association (PCMA), the trade association for the PBMs, challenged both state laws, seeking to block implementation of the laws, arguing among other things that ERISA preempts the state law. The First Circuit and the District of Columbia reached different conclusions. *Compare Pharm. Care Mgmt. Ass'n v. Rowe,* 429 F.3d 294 (1st Cir. 2005) (finding Maine law not preempted) *with Pharm. Care Mgmt. Ass'n v. D.C.*, 2010 U.S. App. LEXIS 13991 (D.C. Cir. 2010) (finding DC law preempted). Although there is a split in the circuits, this issue may not reach the Supreme Court because no other jurisdictions other than Maine and DC have regulated PBMs. Certain provisions in the Patient Protection and Affordable Care Act regulate PBMs, and the Department of Labor has indicated that it may regulate health care service providers.

The legal issues surrounding the growth of gene patents (patents on genetic sequences) is expected to end up in the Supreme Court in the next few years. Central to gene patents concerns their impact on the ability of scientists to conduct research, the ability of physicians to provide clinical genetic testing services, and the ability of patients to obtain second opinions. One case currently pending in the Federal Circuit likely to seek Supreme Court review is *Association for Molecular Pathology v. U.S. Patent and Trademark Office, Myriad Genetics, (Myriad)*. The suit was brought by various, scientists, professors, counselors, and individuals potentially at high risk for hereditary breast and/or ovarian cancer. The lawsuit alleges that seven patents on the BRCA1 and BRCA2 genes violate 35 U.S.C. § 101; the First Amendment; and Article 1, Section 8, Clause 8 of the U.S. Constitution. Myriad Genetics currently holds an exclusive license on the BRCA1 and BRCA2 genes, which are fragments of DNA that relate to a person's predisposition to develop breast and ovarian cancer. Because of its exclusive license, Myriad is the only provider of BRCA genetic testing in the United States. On March 29, 2010, the United States District Court for the Southern District of New York, granted the Plaintiff's Motion for Summary Judgment, thus invalidating the patents on the BRCA genes. On June 15, 2010, the Defendants filed a Notice of Appeal to the Federal Circuit. Myriad also charges upwards of $3,000 for its BRCA genetic test, limiting many people's access to the test. The outcome of this case may also impact patents on genes relating to other illnesses that affect a considerable number of older people including genes affiliated with hearing loss and Alzheimer's disease.

Passage of the Patient Protection and Affordable Care Act has resulted in a number of lawsuits raising constitutional challenges to the law as a whole, reminiscent of the numerous challenges to the Social Security Act brought after it was first enacted. None of the lawsuits have yet resulted in a decision on the merits, although a federal judge in Virginia recently denied the federal government's motion to dismiss one of the cases. The so-called individual mandate is a particular target of the lawsuits, which allege that neither the Commerce Clause nor the taxing power authorize the government to require individuals to purchase health insurance or risk incurring a tax penalty. Another set of challenges allege that the law violates the Tenth Amendment by forcing states to expand their Medicaid programs and commandeering the states to carry out the expanded program. It seems likely that some of these issues will find their way to the US Supreme Court in the next year or two.

ERISA & Employee Benefits

There appears to be tension on the Court with respect to the extent to which ERISA plan administrators should have the legal power to regulate their own plans, and at what point it is appropriate for courts to step in to resolve issues between plan participants and plan administrators. In the most recent Term, the Court ruled, in a divided, opinion that so long as the plan administrator appears to be working in good faith to address challenges by plan participants to benefit determinations, the plan administrator should be given every opportunity to resolve issues. *Conkright v. Frommert,* 130 S. Ct. 1640 (2010). Some recent district courts have held that if there is a pattern and practice of benefit denials then *Conkright* does not apply and a remand is not required. We expect that litigants in the upcoming and subsequent terms will call upon the Court to further clarify where the boundaries lie in the realm of plan administrator discretion.

Relating to the extent of discretion allowed to plan administrators is the Court's decision in *MetLife v. Glenn,* 128 S. Ct. 2343 (2008), confirming that a benefit plan administrator who both determines claimants' eligibility for benefits under the plan and is the funding source for plan benefits operates under a *per se* conflict of interest that must be weighed by the trial court upon a claimant's challenge of an adverse benefit determination by the plan administrator. Because a divided court expressed several different views on just how the conflict factor weighs into the analysis, it would not be surprising if litigants continue to push the Court toward further clarification in this subtle and perplexing area, especially the extent of permissible discovery where conflict is alleged. More specifically, there is now a split in the circuits concerning whether Taft-Hartley plans operate under a *per se* conflict of interest.

Last Term's decision in *Hardt v. Reliance Std. Life Ins. Co*., 130 S. Ct. 2149 (2010), did not answer the seminal question for plaintiff's attorneys – can attorneys' fees be awarded if the benefit claim is remanded to the plan administrator. During the *Hardt* argument, Chief Justice Roberts did indicate that because most cases will be remanded under *Conkright* that this should be considered some success on the merits. However, the issue is still unresolved, and we expect that eventually it will find its way back to the Court.

Recently, the Supreme Court denied *certiorari* in a case concerning the breadth of the insurance savings clause where a state insurance commissioner prohibited the use of discretionary clauses in insurance contracts. *See Standard Ins. Co v. Morrison,* 584 F.3d 837 (9th Cir. 2009), *cert.denied*, 130 S. Ct. 3275

(2010). There are a dozen or more states in which the state's insurance commissioner and/or the legislature have taken initiatives to outlaw discretionary clauses in group insurance policies administered within their states. Currently, Texas and New York are considering the prohibition of these clauses. The insurance industry has made it clear that they will challenge such prohibitions on various grounds including ERISA preemption. If a split in the circuits develops, the Court is sure to take up this issue. Although the Supreme Court has not taken a case in the recent past on the issue of ERISA preemption and state health laws (*see* the denial of *certiorari* in *Golden Gate Restaurant Ass'n v. San Francisco*, 130 S. Ct. 3497 (2010)), the Patient Protection and Affordable Care Act may raise some new issues concerning this interrelationship.

Finally, in contrast to every circuit deciding this issue, the Third Circuit has held that companies that have filed for Chapter 11 seeking to shed retiree benefits in bankruptcy must go through the procedures set out in Bankruptcy Code section 1114, even if they have reserved the right to terminate or modify retiree health benefits. *IUE-CWA v. Visteon Corp*., 2010 U.S. App. LEXIS 14307 (3rd Cir. 2010). This is an important issue concerning the intersection of bankruptcy and retiree health benefits.

Investor Protection

Many issues remain on the horizon as to the development, abridgment or stunting of investors' opportunities to seek recourse for securities fraud. We expect the Supreme Court to address 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. The lower courts are grappling with their culpability now.

Another open issue is how much a plaintiff class has to show at the class certification stage. The Fifth Circuit issued a notorious 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 taken on this decision, although the district courts were making mixed comments about it. On August 20, 2010, Judge Easterbrook of the Seventh Circuit wrote an opinion rejecting the Fifth Circuit's position (in the case of *Schleicher v. Wendt*). We expect to see many of the district courts around the country 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 comprised of primarily cash settlements, from errors and omissions insurance coverage. Moreover, some recent settlements include 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.

Disability

In response to ADA employment decisions issued by the Court in 2002 (*Toyota Motor Mfg. v. Williams*, 534 U.S. 184 (2002)) and 1999 (*Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*; 527 U.S. 516 (1999) and *Albertson's, Inc. v. Kirkingburg*, 119 S. Ct. 1354 (1999)), 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."[3] Overwhelming bipartisan majorities in the House 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. In the fullness of time, if not immediately, 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 disproportionally impact older workers.

The ADAAA's provisions are a model of clarity and specificity by comparison with the sweeping, if often opaque, terms of the original ADA. Thus, the Amendments Act 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 Supreme Court. Indeed, the fixation of so many ADA cases for so 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 Act.

[3] 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.

Thus, the Court decided a steady stream of ADA employment cases between 1998 and 2003 – an average of roughly two per year. But then the Court took only one ADA employment case in the next five years – in 2007, in *Huber v. Wal-Mart Stores*, 486 F. 3d 480 (8th Cir. 2007). (The petitioner in *Huber* ultimately withdrew the case from consideration.) The conflicts resolved and underbrush cleared by the ADAAA may portend greater attention by the Court to a different set of ADA issues at some future time. But it is difficult to say how soon that may be.

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, *see Olmstead v. L.C.*, 527 U.S. 581 (1999), state sovereign immunity from damages liability, *see, e.g., Tennessee v. Lane*, 541 U.S. 509 (2004), and access to private facilities constituting "public accommodations," *see, e.g., Spector v. Norwegian Cruise Lines*, 545 U.S. 119 (2005). 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 highly uncertain.

We note that a petition for *certiorari* is currently pending in *Lonberg v. City of Riverside*, 571 F.3d 846 (9th Cir. 2009), *petition for cert.* filed, 78 U.S.L.W. 1003 (Apr. 15, 2010)(No. 09-1259). The question is 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's broad dual goals of ending residential discrimination and maximizing integration resulting in drafting the Fair Housing Act (FHA) and its amendments with the broadest possible scope of standing, effective means 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. The lower courts are currently divided on the question of how the statute of limitations is to be calculated in cases where the FHA's design and construction standards were not met. Although the Ninth Circuit ruled against the plaintiffs in a case, it left open the possibility for equitable tolling of the statute when the plaintiff could not have discovered the information bearing on the existence of the claim. *Garcia v. Brockway,* 526 F.2d 456, 465-66 (9th 2008), *cert. denied*, 129 S. Ct. 724 (2008). Without the appropriate application of a continuing violation or discovery rule, a condo buyer who found an otherwise desirable unit that turned out to be inaccessible, but was ready for first occupancy more than two years ago, would be barred from bringing suit to enforce the law. Likewise, a current or original occupant who only later developed the need for the basic accessibility feature would be barred. It is expected that this issue will reach the Court in the near future.

One FHA issue well settled in most circumstances that may reach the Court sooner than others is the standing of a fair housing testing agency to bring a case under the FHA. The outcome of *ERC v. Post Properties*, 657 F. Supp. 2d 197 (D.D.C. 2009), currently on appeal to the D.C. Circuit (No. 09-5359), is particularly important because it addresses the role of fair housing agencies in the context of design and construction cases. Such violations are best corrected before they are needed by actual residents, and the need to find, contest and remedy such violations as soon as possible after construction has become especially more pressing as more circuits 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.

CONCLUSION

It is no exaggeration to state that as baby boomers age, Supreme Court decisions will influence a larger percentage of the American population and will increase in significance. AARP, 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. Because AARP considers itself the voice of older people, participation in these cases is an integral part of AARP's advocacy. It will continue letting the Court know its views.

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