The Supreme Court 2012: What’s At Stake For Americans 50+
A Preview of the 2012 Term

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AARP Foundation is working to win back opportunity for struggling Americans 50+ by being a force for change on the most serious issues they face today: housing, hunger, income and isolation. By coordinating responses to these issues on all four fronts at once, and supporting them with vigorous legal advocacy, the Foundation serves the unique needs of those 50+ while working with local organizations nationwide to reach more people, work more efficiently and make resources go further.

AARP Foundation Litigation attorneys initiate and support litigation protecting the rights of people 50+ and are responsible for carrying out the judicial advocacy activities of AARP and AARP Foundation, including amicus curiae (friend of the court) briefs, focusing on age and disability discrimination in employment; employee benefits; health; long-term services and supports; investor protection; consumer rights; housing; and issues affecting low-income persons. AARP Foundation Litigation attorneys have already filed or intend to file amicus briefs in most of the cases discussed herein. 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.

News media and others may quote extensively from this publication as long as appropriate attribution is given to AARP. Any media inquiries should be directed to AARP Media Relations at (202) 434-2560.
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INTRODUCTION

When the Supreme Court returns from its recess, it will have only granted 35 petitions for certiorari. Compared with Terms from 2007 to last Term, this is the smallest number of petitions to be granted at the end of a Term. See Scotusblog Statistics at http://www.scotusblog.com/statistics/. This would put the Court on pace to hear around 70 cases for the Term. Of course, there are many pending petitions for certiorari so what may be more telling for the number of cases the Court hears this Term is the number of petitions granted shortly after the Term begins.

This Term the Court has granted certiorari on a wide variety of cases which AARP believes may impact people over age 50. Many of these cases continue the Court’s exploration of certain types of issues. One of the cases returns to the issue of the relationship between the states and federal government, albeit in a substantially different context (FTC). The Court resumes its review of the parameters surrounding class or collective actions, specifically what allegations concerning the merits of the claims, if any, must be alleged or proven at the certification stage (Genesis, Comcast, Amgen). Although seemingly technical, the importance of such decisions cannot be underestimated in that they may determine whether cases are filed at all. The Court again takes up issues surrounding remedies (Sebelius, US Airways, Marx), particularly the scope of equitable remedies. And, of course, there are cases that deal with statutory construction (Vance, Kloeckner).

The What the Future Holds section discusses those pending petitions for certiorari AARP Foundation is following. Many of those petitions concern the broad issues similar to the cases the Court has already granted certiorari so we believe that many of them may also be granted.
WHETHER A CASE BECOMES MOOT AND BEYOND THE JUDICIAL POWER OF ARTICLE III OF THE CONSTITUTION WHEN THE LONE PLAINTIFF, WHO ASSERTED COLLECTIVE ACTION CLAIMS UNDER SECTION 216(B) OF THE FAIR LABOR STANDARDS ACT ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, RECEIVES A SETTLEMENT OFFER SUFFICIENT TO SATISFY ALL OF HER CLAIMS?

*Genesis HealthCare Corp. v. Symczyk*,
656 F.3d 189 (3d Cir. 2011),
Oral argument not yet scheduled.

*Genesis HealthCare Corporation v. Symczyk* raises important issues regarding the proper extent of limits on the right and ability of groups of employees to challenge employer practices in collective actions under section 216(b) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b). In addition to collective actions under the FLSA, § 216(b) also applies to collective actions under the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act (EPA). While the Supreme Court’s decision in *Genesis HealthCare* ultimately may only affect litigants under these three laws, there are strong reasons to believe that the case has broader implications. Significantly, many of the authorities relied on by the courts below concern analogous rights to bring class actions under Federal Rule of Civil Procedure Rule 23. Therefore, in deciding the scope of rights to bring collective actions, the Supreme Court also could limit rights to bring class actions under other statutes.

This case turns on the proper application of Rule 68 of the Federal Rules of Civil Procedure, which governs settlement offers by defendants in litigation. In *Genesis HealthCare*, the Court will consider whether a plaintiff suing on her own behalf and others similarly situated may maintain a collective action even after a defendant proposes a Rule 68 settlement that would fully satisfy the plaintiff’s individual claims, but not the collective claims. The U.S. Court of Appeals for the Third Circuit held that such an offer does not moot or preclude a collective action, because if it did, defendants could easily fend off challenges to widespread violations of the law simply by redressing or picking off the claims of the few individuals brave enough to step forward as named plaintiffs.
In December 2009, Laura Symczyk sued her former employers, Genesis HealthCare Corporation and Elder Resources Corp. (together “Genesis”), claiming they violated the FLSA by requiring employees to automatically deduct a 30-minute meal break from their timesheet, even if they continued to work through their lunch hour. In addition to individual claims to recover her own illegally confiscated wages, Symczyk filed collective claims on behalf of other, similarly situated Genesis employees. Such individuals consisted of “all non-exempt employees of Defendants whose pay is subject to an automatic meal break deduction even when they perform compensable work during their meal breaks.”

Two months after the complaint was filed, before Symczyk had moved to certify the collective action, Genesis offered a settlement of $7,500 that would have satisfied Symczyk’s individual claim for lost wages as well as her attorneys’ fees. Symczyk did not respond to the offer, and, thus, was deemed to have rejected it. The district court entered an order providing for a 90-day discovery period after which Symczyk moved for conditional certification of a collective action. Genesis then moved for dismissal arguing that because Symczyk had been offered and had rejected a complete remedy for the harm on which her suit was premised, she no longer had a claim. The district court granted the motion and dismissed the case. Symczyk appealed to the Third Circuit, which reversed.

The Third Circuit reasoned that it would be a significant and unjustified hindrance to the maintenance of collective actions if a case can be thrown out simply because the named plaintiff was offered an early settlement on her individual claims. If such a result were permissible, the court said, defendants could routinely buy off named plaintiffs to eliminate potential collective action litigation. The court held that if a FLSA collective claim is ultimately certified, regardless of prior individual settlement offers, it would “relate back” to the time of filing of the case by one or more named plaintiffs. The court relied heavily on decisions in several cases presenting very similar facts in class action cases, as well as language in several Supreme Court decisions in analogous class action cases.

FLSA collective actions may be brought under 29 U.S.C. § 216(b), which also is the basis for collective actions under the ADEA. Such actions are very similar to class actions. Both procedures are intended to permit many individuals to join together to combat systemic unlawful behavior, including discrimination, and, in the case of the FLSA, failure to pay required minimum or overtime wages. The legislative histories of the FLSA and ADEA (and the Equal Pay Act which addresses sex discrimination in employee compensation) identify collective
actions as an essential component in Congress’s plan to eradicate unequal treatment of low-wage and older workers (as well as female employees under the EPA). Similarly, the legislative histories of various other laws often relied on by advocates for civil rights, consumer rights, and access to fair housing and health care identify the opportunity for plaintiffs to bring class actions as essential to their effectiveness. The weight of legal authority in lower federal courts recognizes the right of plaintiffs to bring actions on behalf of themselves and others similarly situated – whether in class or collective actions – even if a defendant offers to satisfy the claims of the few plaintiffs named in the complaint at outset of a case, before a motion to certify a class or collective has been filed by the named plaintiffs or such a group action has been certified by the court.

Based on some significant differences between class and collective actions, however, Genesis contends that there is no right to maintain a group action in the face of a settlement offer that satisfies all of the named plaintiffs’ individual claims (though not their group claims). For example, while in a class action individuals must specifically opt-out to avoid being bound by a court’s resolution of the case, in a collective action, individuals must opt-in, i.e., consent in writing, to be part of the collective. Genesis argues that until such personal commitments are received by the court there is no collective action, and therefore, a case can be terminated by a defendant’s tender of an adequate settlement offer to the named plaintiff(s). The Third Circuit rejected that argument, however, explaining that “[a]lthough the opt-in mechanism transforms the manner in which a named plaintiff acquires a personal stake in representing the interests of others, it does not present a compelling justification for limiting the relation back doctrine to the Rule 23 setting.”

AARP is planning to file an amicus brief arguing that the Third Circuit correctly decided this case. The relation back doctrine plays a very important role in collective actions – including ADEA cases – for reasons much the same as it has in Rule 23 class actions. The differences between class and collective actions pale by comparison with their similarities in allowing groups of plaintiffs to vindicate their rights effectively, efficiently and comprehensively.

Collective and class actions are the foundation for efforts to vindicate constitutional and statutory rights, both in state and federal courts. Thus, an adverse decision in Genesis HealthCare could cripple the effectiveness of collective and/or class actions in challenging social injustice such as workplace bias, consumer scams, predatory lending, and denial of access to health care.
Both vehicles are intended to permit large numbers of plaintiffs to accomplish together what they could not accomplish on their own: systemic relief, including, for example, reformation of and damages for illegal employer policies or practices.

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WHETHER EMPLOYERS MAY BE HELD LIABLE, UNDER TITLE VII OF THE 1964 CIVIL RIGHTS ACT, FOR OTHERWISE ACTIONABLE – i.e., SEVERE OR PERVERSIVE – WORKPLACE HARASSMENT BY ANOTHER EMPLOYEE WHO AN EMPLOYER HAS RECOGNIZED AS A SUPERVISOR AND HAS AUTHORITY TO DIRECT AND OVERSEE A HARASSMENT VICTIM’S DAILY WORK, BUT WHO DOES NOT HAVE AUTHORITY TO HIRE, FIRE, DEMOTE, PROMOTE, TRANSFER OR DISCIPLINE THE VICTIM?


Maetta Vance, an African-American food service worker, challenges the Seventh Circuit’s decision affirming dismissal of her racial harassment suit based on a ruling that her employer, Ball State University, is not responsible for the acts of an alleged harasser who “had the authority to tell [Vance] what to do” on the job, but who, nevertheless, was not Vance’s “supervisor.”

The definition of “supervisor” applied in _Vance_ is limited to one with the power to “hire, fire, demote, promote, transfer, or discipline” his or her alleged victim. _Parkins v. Civil Constructors of Illinois, Inc._, 163 F.3d 1027, 1034-35 (7th Cir. 1998). This approach is explicitly followed in the First and Eighth Circuits, with the Third and Sixth Circuits issuing unpublished decisions adopting this reasoning. Under this definition, actionable harassment by a person whom the employer deemed a supervisor and who had authority to direct and oversee the victim’s daily work could not give rise to employer liability unless the harasser also had the power to take formal employment actions against the victim. In contrast, the Second, Fourth, and Ninth Circuits define a supervisor more broadly, as anyone “whom the employer vests with authority to direct and oversee their victim’s daily work,” with the Tenth Circuit adopting a similar rule in an unpublished opinion.

The Title VII definition of supervisor largely governs the meaning of that term in lower federal court decisions under other federal employment discrimination statutes, such as the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Rehabilitation Act of 1974, and the Genetic Information Nondiscrimination Act. Further, most courts interpreting state and local employment discrimination statutes follow Title VII precedent in defining the concept of a supervisor for purposes of establishing the scope of vicarious liability of an employer for the discriminatory acts of its employees.
Vance, the only African–American in the banquet and catering department at Ball State, sued the University for creating a racially “hostile work environment.” In 2005 Vance a 16 year employee at Ball State complained about her coworkers' offensive conduct, which she said consisted of racial epithets, references to the Ku Klux Klan, veiled threats of physical harm, and other unpleasantries. The latter, she asserted, included altercations with Saundra Davis, a white catering specialist whom Vance considered a supervisor – at least some of the time – and whom Ball State also described as such. Vance testified that she did not actually know whether Davis was one of her managers because her supervisory authority was inconsistent, changing from day to day. Also, Davis's job description stated that she supervised kitchen assistants, such as Vance, and exercised leadership of up to 20 part-time, substitute, and student employees. The trial court found that even assuming “Davis periodically had authority to direct the work of other[s],” that was “not sufficient to establish a supervisory relationship for purposes of Title VII.” Vance v. Ball State Univ., 2008 U.S. Dist. LEXIS 69288, *37-39 (S.D. Ind. Sept. 10, 2008). The court granted Ball State’s motion for summary judgment based on, among other things, the Seventh Circuit’s definition of supervisor.

On appeal, the Seventh Circuit affirmed. Vance v. Ball State Univ., 646 F.3d 461, 470 (7th Cir. 2011) (“We conclude that Vance has not revealed a factual dispute regarding Davis's status by asserting that Davis had the authority to tell her what to do or that she did not clock-in like other hourly employees.”).

The Supreme Court agreed to grant certiorari to resolve the split in circuit court authority regarding the proper definition of supervisor under Title VII.

Vance claims that the Seventh Circuit flouted Supreme Court precedent, EEOC guidelines, and workplace reality in deciding that authority “to tell [a subordinate] what to do” does not even raise a fact issue whether a superior also is a supervisor. In two cases decided on the same day, Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and Burlington Indus., v. Ellerth, 524 U.S. 742 (1998), the Supreme Court held that employers are vicariously liable under Title VII for “severe or pervasive workplace harassment by a supervisor of the victim.” Since then the Court has not provided additional guidance on who is a supervisor under Title VII. Thus, the question remains whether the logic behind Faragher and Ellerth supports one of the lines of circuit court authority addressing the issue, or another formula altogether. The Court is likely to wrestle over the degree to which the text and structure of Title VII, as well as its historical context and legislative history, inform the issue of the proper statutory definition of a supervisor.
In *Parkins*, the Seventh Circuit emphasized both its and the Supreme Court’s prior caution in establishing employer liability on the basis of employee misconduct: “Before the rule of employer liability was established in *Ellerth* and *Faragher*, this and other circuits made an effort to maintain a line between low-level supervisors who were the equivalent of coworkers and supervisors whose authority and power was sufficient to make consequential employment decisions affecting the subordinate, such that the supervisor was effectively acting on the employer's behalf.” 163 F.3d at 1033.

However, *Faragher* stressed agency principles. A harassing supervisor is aided in his/her efforts to assert improper influence over a subordinate by the victim’s presumption that the superior is an agent of the employer. Indeed, this logic might well cause a victimized employee to be reluctant to expose the harasser. Recognition of this workplace reality arguably caused the Court to extend vicarious liability to an employer when a supervisor harasses a subordinate. See, *e.g.*, *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765 (ruling that an employer may be held vicariously liable “for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.”) (emphasis supplied).

Vance argues that the Seventh Circuit’s limited definition of supervisor is inconsistent with *Faragher* and *Ellerth* because the coercion the Court meant to prevent and correct in those decisions can come just as easily from those who control daily work duties as it can from those who have the power to hire or fire. However, neither the Court of Appeals nor the District Court discussed *Faragher* or *Ellerth* at any length, and did not delve into either decision in construing the proper scope of the definition of a supervisor under Title VII.

Vance also has argued that the Seventh Circuit’s decision runs counter to EEOC’s longstanding enforcement guidance defining a supervisor as “[an] individual [who] has authority to undertake or recommend tangible employment decisions affecting the employee” or an “individual [who] has authority to direct the employee’s daily work activities.” These guidelines, Vance says, are entitled to deference as they come from the agency charged with enforcing Title VII, and further, because they were drafted in response to *Faragher* and *Ellerth*.

Ball State, in contrast, contends that under EEOC enforcement guidelines, someone such as Davis, “who directs only a limited number of tasks or assignments,” plainly is not a supervisor for Title VII purposes. In other words, EEOC maintains that a supervisor’s authority “must be of a sufficient magnitude
so as to assist the harasser explicitly or implicitly in carrying out the harassment,” and Davis’ limited duties as a Ball State employee do not rise to this level.

Common sense, however, suggests the Seventh Circuit’s approach may be inadequate to address the problem of workplace harassment. Employees are not only intimidated by those who have hiring or firing authority over them. In fact, many employees may not know who has those powers. Thus, any person with significant actual authority over an employee may be seen as a supervisor. That perception, whether accurate or not, may discourage employees from reporting an authority figure’s improper actions.

It follows that a broad definition of supervisor gives employers stronger incentives to take responsibility for persons they designate or allow to direct employee actions at work. Thus, to the extent that the Court determines Faragher and Ellerth are intended to prevent and deter harassment, not just remedy it, the Court may embrace a broader view of what constitutes a supervisor, as such an approach is far more likely to encourage employers to oversee the actions of those they place in charge.

AARP joined with the National Employment Lawyers’ Association (NELA) in filing an amicus brief supporting the broader definition of “supervisor” that has been endorsed in EEOC guidance and by the Second, Fourth and Ninth Circuits. This brief argues that the narrow formulation favored by the Seventh, First and Eighth Circuits is inconsistent with the reasoning of Faragher and Ellerth, as well as the realities of workplace harassment. Supervisors responsible for managing workers’ day-to-day activities are likely to be able to carry out acts of harassment by virtue of their authority, the brief argues, and thus, a rule that ignores this fact is unlikely to check this serious form of employment discrimination.

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IF THE MERIT SYSTEMS PROTECTION BOARD DECIDES A MIXED CASE WITHOUT DETERMINING THE MERITS OF THE DISCRIMINATION CLAIM, IS THE COURT WITH JURISDICTION OVER THAT CLAIM THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT OR A DISTRICT COURT?

Kloeckner v. Solis,
639 F.3d 834 (8th Cir. 2011),

The Merit Systems Protection Board (MSPB) is authorized to hear appeals of federal employees regarding certain adverse actions, such as involuntary termination of employment. If in such an appeal the employee asserts that the challenged action was the result of unlawful discrimination, that claim is referred to as a "mixed case." The question before the Supreme Court is for mixed cases in which the MSPB decision did not reach the merits of the discrimination claim, which court has jurisdiction to hear an appeal – the Court of Appeals for the Federal Circuit or a federal district court. Resolution of the issue is of utmost importance to federal employees because if the employee files his/her appeal in the wrong court and that court rules that it does not have jurisdiction, it may then be too late to file an appeal in the proper court. In that situation the employee will be left without any remedy, which is precisely what happened to Carolyn Kloeckner.

The jurisdictional question arises because in the Civil Service Reform Act of 1978 (CSRA) Congress bifurcated review of MSPB decisions. Pursuant to 5 U.S.C. § 7703(b)(1), most petitions for review of final MSPB decisions must be filed in the Federal Circuit, whose jurisdiction is exclusive. Actions seeking review in "cases of discrimination," however, are filed in an appropriate district court, as provided in federal antidiscrimination statutes. See 5 U.S.C. § 7703(b)(2).

In mid-2005, Kloeckner, an employee of the Department of Labor (DOL) in St. Louis, Missouri, filed an equal employment opportunity (EEO) administrative complaint alleging hostile work environment and discrimination on account of her age and sex. When DOL subsequently charged her with being absent without leave from her job for over a month, she amended her complaint to include a charge of retaliation. She never returned to work and was eventually terminated in July 2006 with her EEO complaint still pending. In October 2007, the Secretary of Labor issued a final agency decision (FAD) rejecting Kloeckner’s claims of unlawful discrimination and upholding her Termination. The FAD advised Kloeckner that since her claims presented a “mixed case,” under the CSRA she
could appeal to the MSPB or file a civil action in federal court, but she could not do both. She appealed to the MSPB, which dismissed her appeal as untimely. She then filed suit in federal court, which dismissed her case on the ground that the Federal Circuit had exclusive subject matter jurisdiction. She appealed that decision to the Eighth Circuit, which affirmed the district court’s dismissal of her claim. The Supreme Court granted her request to resolve the jurisdictional issue.

For many years, every U.S. Court of Appeals that had considered the issue had followed the Federal Circuit’s jurisdictional decision in Ballentine v. MSPB, 738 F.2d 1244, 1246-47 (Fed. Cir. 1984), holding that “until the merits of a ‘mixed’ discrimination case are reached by the MSPB, procedural or threshold matters, not related to the merits of a discrimination claim before the MSPB, may properly be appealed to this court.” In 1998, however, that unanimity ended with the Second Circuit’s decision in Downey v. Runyon, which expressly disagreed with the Federal Circuit’s construction of 5 U.S.C. § 7703(b) in Ballentine, holding that “the proper construction is that when the MSPB issues an adverse ‘final decision’ or ‘final order’ concerning a ‘case’ under section 7702(a)(1), the ‘case of discrimination shall be filed’ in district court, as required by Title VII.” 160 F.3d 139, 145 (2d Cir. 1998). The Tenth Circuit agrees with the Second Circuit’s reasoning. These two courts construe § 7703(b)(2) as meaning that “when the MSPB has jurisdiction over an appeal [in a case of discrimination] under § 7702(a)(1), but dismisses the appeal on procedural grounds, the federal district court has jurisdiction to review de novo the decision of the MSPB;” not the Federal Circuit.

In Kloeckner, the Eighth Circuit, citing the circuit courts’ conflicting decisions, found that “the meaning of ‘cases of discrimination’ in § 7703(b)(2), when read together with the provisions of § 7702(a), is far from clear.” 639 F.3d at 838. Nevertheless, in concluding that “the Federal Circuit is the court with the greatest experience when determining the intent of Congress as reflected in the CSRA,” the Eighth Circuit followed Ballentine, holding that “because in this case the MSPB did not reach the merits of Kloeckner’s discrimination claims in dismissing her mixed case appeal as untimely, the district court properly ruled that the Federal Circuit had exclusive jurisdiction to review the MSPB’s dismissal.” Thus, the Eighth Circuit affirmed the district court’s dismissal of Kloeckner’s claims, setting the stage for the Supreme Court to resolve the issue.
AARP did not file a brief in this case because the question to be resolved is purely jurisdictional and does not provide an opportunity for expert analysis of substantive employment discrimination issues.

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EMPLOYEE BENEFITS
AND INVESTOR PROTECTION

WHETHER THE THIRD CIRCUIT CORRECTLY HELD – IN CONFLICT WITH THE FIFTH, SEVENTH, EIGHTH, ELEVENTH, AND D.C. CIRCUITS – THAT SECTION 502(a)(3) OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) AUTHORIZES COURTS TO USE EQUITABLE PRINCIPLES TO REWRITE CONTRACTUAL LANGUAGE AND REFUSE TO ORDER PARTICIPANTS TO REIMBURSE THEIR PLAN FOR BENEFITS PAID, EVEN WHERE THE PLAN’S TERMS GIVE IT AN ABSOLUTE RIGHT TO FULL REIMBURSEMENT?

US Airways v. McCutchen,
663 F.3d 671 (3d Cir. 2011),
Oral argument not yet scheduled

In McCutchen, the Court will address the question of whether the language of Section 502(a)(3) of the Employee Retirement Income Security Act (ERISA) allows a court to use limiting principles of equity when evaluating a fiduciary’s claim for “appropriate equitable relief” under that section. 29 U.S.C. § 1132(a)(3).

McCutchen is a beneficiary of an ERISA-covered health benefit plan (the “Plan”) administered and self-insured by US Airways. McCutcheon was in a car accident in which he was grievously injured. He survived only as a result of emergency surgery; even after months of physical therapy and a complete hip replacement, he was left functionally disabled. The Plan paid $66,866 in medical expenses on his behalf.

Following the accident, McCutchen sued the driver of the car who had caused the action, and recovered the maximum of $110,000 from two policy amounts including under-insured motorist coverage. After paying 40 percent in attorney’s fees, his net recovery came out to less than $66,000.

US Airways demanded reimbursement for the entire amount it had paid for McCutchen’s medical bills and filed suit in federal district court when reimbursement was not made. When suit was filed, McCutchen’s attorneys placed their fees totaling $41,500 in a trust account.
The Plan’s summary plan description (SPD) includes language which specifically states that “[i]f the plan pays benefits for any claim you incur as the result of . . . actions of a third party . . . [y]ou will be required to reimburse the plan for amounts paid for claims out of any monies recovered from a third party . . . .” Under ERISA, a fiduciary may bring a suit “to enjoin any act or practice which violates any provision of this title or Terms of the plan, or . . . to obtain other appropriate equitable relief.” 29 U.S.C. § 1132(a)(3).

The trial court granted summary judgment for US Airways in the full amount of $66,866. The court found that the language of the SPD was “clear and unambiguous” in requiring McCutchen to reimburse the Plan out of any money he received from third parties. Further, the court rejected arguments based upon limiting principles in equity including arguments based upon the “make whole doctrine” and the principle of “unjust enrichment.” The court held that, “Third Circuit precedent does not permit federal common law to override a subrogation provision in an ERISA-regulated plan.” US Airways v. McCutchen, 2010 U.S. Dist. LEXIS 89377, *18 (W.D. Pa. 2010). The court’s conclusion relied almost exclusively on case law preceding the Supreme Court’s decision in Sereboff v. Mid-Atlantic Medical Services, 547 U.S. 356 (2006).

The Third Circuit vacated the district court’s judgment and remanded the case for further proceedings. In doing so, the court relied heavily upon Sereboff. The court specifically saw McCutchen as presenting “the question that Sereboff left open.” The court sought to determine whether equitable relief under § 502(a)(3) could be appropriately limited by “equitable defenses and principles that were typically available in equity.” US Airways v. McCutchen, 663 F.3d 671, 676 (3d Cir. 2011) (internal quotations omitted).

The Third Circuit concluded that where claims of equitable relief are applicable, the equitable defense of unjust enrichment is also generally applicable. The Third Circuit argued that while other circuits cite ERISA’s requirement of “appropriate equitable relief,” these circuits generally treat this requirement as satisfied so long as the suit is one for equitable relief; the Third Circuit suggested that these other circuits did not give sufficient meaning to the word “appropriate.” The Third Circuit’s conclusion was in conflict with other Circuit Courts of Appeals including the Fifth, Seventh, Eighth, and Eleventh Circuits. Subsequent to the Third Circuit’s decision, the Ninth Circuit issued a decision similar to the Third Circuit’s decision.

In addition, citing to CIGNA Corp. v. Amara, 131 S. Ct. 1866, 1879 (2011), the Third Circuit found that the written plan document did not need to be treated
as sacrosanct by a court applying equitable remedies. The Third Circuit concluded saying that “requiring McCutchen to provide full reimbursement to US Airways constitutes inappropriate and inequitable relief. Because the amount of the judgment exceeds the net amount of McCutchen’s third-party recovery, it leaves him with less than full payment for his emergency medical bills, thus undermining the entire purpose of the Plan.” *McCutchen*, 663 F.3d at 679.

AARP is considering filing an amicus curiae brief in support of respondents discussing the relationship between Supreme Court precedents including *Amara* and *Sereboff*, on the issue of remedies as well as the practical implications for participants concerning whether they will file suit against a third-party at all if they do not receive any recovery.

The outcome of this case is important because it will determine whether ERISA’s requirement of appropriate equitable relief will simply work to the benefit of plan fiduciaries or whether it will work to promote the larger objective of ERISA of protecting employee pensions and benefits. The standard set out by the Third Circuit strikes a balance to ensure that neither fiduciaries nor beneficiaries see a windfall.

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WHETHER IN A MISREPRESENTATION CASE UNDER SEC RULE 10b-5 THE DISTRICT COURT MUST REQUIRE PROOF OF MATERIALITY BEFORE CERTIFYING A PLAINTIFF CLASS BASED ON THE FRAUD-ON-THE-MARKET THEORY?

WHETHER IN SUCH A CASE THE DISTRICT COURT MUST ALLOW THE DEFENDANT TO PRESENT EVIDENCE REBUTTING THE APPLICABILITY OF THE FRAUD-ON-THE-MARKET THEORY BEFORE CERTIFYING A PLAINTIFF CLASS BASED ON THAT THEORY?


In Amgen, the Court will determine whether putative class plaintiffs, relying on the fraud-on-the-market presumption, must demonstrate at the class certification stage that misrepresentations materially affected the stock price.

The fraud-on-the-market presumption of reliance is the principle that the market price of any stock or bond will reflect all available public information if that security is traded on an efficient market. The result is that anyone who buys that stock or bond is presumed to have relied on the truthfulness of all available public information when they purchased that stock.

Fundamentally, Amgen focuses on what elements must be shown to invoke the fraud-on-the-market presumption for the purposes of class certification under Federal Rule of Civil Procedure 23(b)(3). The courts of appeals are in agreement on two of the elements of the fraud-on-the-market presumption. In order to avail itself of the presumption a “plaintiff must (1) show that the security in question was traded in an efficient market . . . , and (2) show that the alleged misrepresentations were public.” Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 660 F.3d 1170, 1172 (9th Cir. 2011). Where the courts of appeals diverge is on the element of materiality, that is, whether the misrepresentations had a substantial impact on the price of the security.

The Second and Fifth Circuits have held that a plaintiff must prove materiality at the class certification phase. The Fifth Circuit specified that a court “must engage in thorough analysis, weigh the relevant factors, require both parties to justify their allegations, and base its ruling on admissible evidence.” Unger v. Amedisys Inc., 401 F.3d 316, 322 (5th Cir. 2005).
The Ninth Circuit has joined the Third and Seventh Circuits in holding that, while the issue of materiality must be alleged, it need not be proven at the class certification phase but should be fully evaluated at summary judgment or at trial. The Ninth Circuit, in agreement with the Seventh Circuit, has theorized that the Second and Fifth Circuits have arrived at their position based upon an erroneous reading of a footnote in the Supreme Court’s decision in *Basic Inc. v. Levinson*. 485 U.S. 224, 248 n.27 (1988). The Court now has an opportunity to clarify the principles applicable to the timing for determination of the materiality issue in securities fraud class actions.

The second issue before the Court is whether a defendant can rebut the fraud-on-the-market presumption at the class certification stage or whether the rebuttal must be deferred for a summary judgment motion or trial.

The Ninth Circuit has joined the Seventh Circuit in holding the issue of materiality is entirely a merits consideration and may only be used to rebut the fraud-on-the-market presumption when considering the evidence. As the Ninth Circuit points out, if materiality is present, that makes reliance common to the class, but if materiality is not present, then none of the individuals will be able to show reliance. *Amgen*, 660 F.3d at 1175. The fact that the claim of each of the plaintiffs will rise and fall on this issue is precisely what makes class certification appropriate. *Id.* As the Supreme Court held in *Wal-Mart Stores v. Dukes*, the class must illustrate that “[t]heir claims . . . depend upon a common contention . . . capable of classwide resolution.” 131 S. Ct. 2541, 2551 (2011).

The Third Circuit took an intermediate approach on the issue and joined the Second and Fifth Circuits in holding that the defendant may rebut the fraud-on-the-market presumption at the class certification stage. The Third Circuit reasoned that a successful rebuttal “defeats the presumption of reliance for the entire class, thereby defeating the Rule 23(b) predominance requirement.” *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 638 (3d Cir. 2011).

“The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated.” *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006). Investor confidence in the integrity of the securities markets is crucial to helping businesses raise the capital they need to expand and keep the lights on. See *Basic*, 485 U.S. at 235 n.12 (1988). If investors are prevented from holding corporate actors accountable for their frauds, investors will be far less willing to participate in our securities markets. *Private Litigation of the Federal Securities
AARP intends to file an amicus brief that will advocate for the view that the materiality requirement of the fraud-on-the-market presumption of reliance is a merits issue and it should not be considered at the class certification stage. Fundamentally, a holding to the contrary will effectively eliminate the distinction between summary judgment and class certification decisions. In AARP’s view, the Court should not erect yet another barrier to the courthouse for securities fraud plaintiffs and give publicly owned companies another procedural tool to defeat class action lawsuits before the summary judgment stage. This case follows a recent sequence of public corporations’ defensive initiatives intended to limit the recourse of investors who seek to police the integrity of the public securities markets and to hold violators accountable for failures on the part of securities issuers to play by the rules concerning full and timely disclosure of information of significance to the investing public.

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CONSUMER RIGHTS

WHETHER A PREVAILING DEFENDANT IN A FAIR DEBT COLLECTION PRACTICES ACT (FDCPA) CASE MAY BE AWARDED COSTS FOR A LAWSUIT THAT WAS NOT “BROUGHT IN BAD FAITH AND FOR THE PURPOSE OF HARASSMENT,” WHEN THE FDCPA PROVIDES THAT “[O]N A FINDING BY THE COURT THAT AN ACTION UNDER THIS SECTION WAS BROUGHT IN BAD FAITH AND FOR THE PURPOSE OF HARASSMENT, THE COURT MAY AWARD TO THE DEFENDANT ATTORNEY’S FEES REASONABLE IN RELATION TO THE WORK EXPENDED AND COSTS” AND FEDERAL RULE OF CIVIL PROCEDURE 54(D) PROVIDES THAT “[U]NLESS A FEDERAL STATUTE, THESE RULES, OR A COURT ORDER PROVIDES OTHERWISE, COSTS – OTHER THAN ATTORNEY’S FEES – SHOULD BE ALLOWED TO THE PREVAILING PARTY”?

Marx v. Gen. Revenue Corp.,
668 F.3d 1174 (10th Cir. 2011),

In October 2008, Olivea Marx filed a federal Fair Debt Collection Practices Act (FDCPA) lawsuit against General Revenue Corp., (GRC), a debt collector seeking to collect a student loan debt. Marx alleged that GRC had made repeated threatening phone calls and sent a fax seeking information about her employment status to her place of employment. The federal district court ruled against Marx at trial, concluding that GRC had not violated the FDCPA prohibition against communication with third parties about a debt when it sent the fax to her employer. Pursuant to Federal Rule of Civil Procedure 54(d), which requires that costs be awarded to the losing party, the district court awarded costs to GRC.

Marx appealed, arguing that the district court erred in finding that the fax was not a communication and that an award of costs pursuant to Rule 54(d) is not permitted. The FDCPA has a separate fee and cost shifting provision that provides for an award against a plaintiff seeking to enforce the FDCPA only if the lawsuit was brought in “bad faith or for the purposes of harassment.” 15 U.S.C. § 1692k(a)(3). The district court erred, argued Marx, in finding that the FDCPA “bad-faith-and-harassment” limitation applies only to the award of fees, and that costs may be awarded as a “matter of course” pursuant to Rule 54(d).
The Tenth Circuit disagreed with Marx. In affirming the district court judgment, it found that the fax to Marx’s workplace was not a “communication” under the FDCPA since it did not reference the debt. In addition, the Tenth Circuit held that the FDCPA’s fee and cost shifting provision does not supersede Rule 54(d), which includes a presumption that costs will be awarded unless a federal statute provides otherwise. It found that a “more clear and specific” statement is needed to displace Rule 54(d) than the FDCPA provides in its fees and cost provision. Pet. App. 8a, 14a. Marx appealed to the U.S. Supreme Court, which limited the grant of certiorari to resolve whether costs may be awarded pursuant to Rule 54(d) when a plaintiff brings an unsuccessful FDCPA lawsuit.

Marx argues that contrary to the argument of GRC and the Tenth Circuit, the clear language of the FDCPA provides the necessary showing that Congress intended to supersede the Rule 54(d) cost provision, by providing for an award of fees and costs to the prevailing defendant only if the suit is brought in bad faith and for the purpose of harassment. No clear and specific statement explicitly addressing Rule 54(d) is needed.

AARP, joined by the National Consumer Law Center, Consumer Federation of America, National Association of Consumer Advocates, and the Bay Area Community Law Center, filed a brief amici curiae, urging the Court to reverse the Tenth Circuit decision and to hold that costs may be shifted to the unsuccessful FDCPA plaintiff only if the lawsuit was filed in “bad faith and for the purpose of harassment.” 15 U.S.C. § 1692k(a)(3).

Amici argue that the FDCPA, 15 U.S.C. § 1692 et seq., is a carefully designed statute, enacted to protect a particularly vulnerable set of consumers from the practices of a necessary but abuse-ridden industry. The Act’s cost and fee shifting provision is tailored to encourage enforcement by consumers through private lawsuits while discouraging lawsuits filed in bad faith. The Tenth Circuit’s holding that FDCPA plaintiffs must pay costs whenever they do not prevail interferes with this careful statutory structure. The decision ignores two key features in the design of the FDCPA: the primacy of the private enforcement regime that the statute creates and the financial vulnerability of the population that the statute is designed to protect.

The amici brief notes the need for robust enforcement of the FDCPA. Abuses by debt collectors were widespread when the FDCPA was enacted. See 15 U.S.C. § 1692(a) (citing “abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors”). Abuses continue to plague consumers today. Indeed, the debt collection industry

The scarcity of public FDCPA enforcement actions confirms the continuing importance of private lawsuits to curb collection abuses. In 2011, though the FTC received more than 117,000 complaints, it brought or resolved only seven actions against debt collectors – and that total constituted “the highest number of debt collection cases that it has brought or resolved in any single year.” **ANNUAL REPORT 2012,** Consumer Financial Protection Bureau, at 14. In contrast, over 12,000 private lawsuits were filed in 2011 to enforce the FDCPA.


As explained by amici, the enforcement regime Congress enacted struck a careful balance. On the one hand, the Act encourages private enforcement by providing fees and costs to prevailing plaintiffs and denying them to prevailing defendants in routine cases. See 15 U.S.C. § 1692k(a)(3). On the other hand, the Act protects scrupulous debt collectors from liability for bona fide errors, see 15 U.S.C. § 1692k(c), and provides fees and costs for defending suits brought in bad faith. See 15 U.S.C. § 1692k(a)(3). The provision limiting plaintiffs’ liability for costs makes particular sense in light of the FDCPA’s bona fide error defense: were the statute interpreted otherwise, plaintiffs could be responsible for defendants’ costs in cases where the debt collector had in fact violated the FDCPA. A plaintiff typically will not know the facts about whether a collector has implemented adequate procedures to prevent violations until well after a lawsuit is filed.

The amici brief further argues that limiting defendants’ cost recovery to suits brought in bad faith is consistent with the Act’s concern for the particular population it was designed to protect: debtors. By definition, debtors do not have the money to pay defendants’ costs if they do not prevail – costs which can

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amount, as they did in this case, to thousands of dollars. See Pet. App. 29a (showing $4,543 in costs awarded). The FDCPA’s limitation on awards to prevailing defendants avoids the painful irony of vulnerable debtors routinely being saddled with additional debt through the operation of a statute designed to protect them. Without that limitation, it is unlikely that many consumers would risk bringing suit – an outcome directly at odds with the structure and design of the FDCPA. The Tenth Circuit’s interpretation of the Act’s cost provision interferes with that carefully designed enforcement regime.

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MAY A DISTRICT COURT CERTIFY A CLASS ACTION WITHOUT RESOLVING WHETHER THE PLAINTIFF CLASS HAS INTRODUCED ADMISSIBLE EVIDENCE, INCLUDING EXPERT TESTIMONY, TO SHOW THAT THE CASE IS SUSCEPTIBLE TO AWARDING DAMAGES ON A CLASS-WIDE BASIS?

Comcast Corp. v. Behrend,
655 F.3d 182 (3d Cir. 2011),
Oral argument scheduled for Nov. 5, 2012.

The Supreme Court continues its exploration of class action issues. In Comcast, the general question before the Court is whether a district court may certify a class action without resolving “merits arguments,” i.e., factual disputes, that bear upon the prerequisites for class certification under Rule 23 of the Federal Rules of Civil Procedure, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3). More specifically in this case, the question is whether the court may certify a class in an antitrust case pursuant to Rule 23 (b)(3) without first determining if the damages are capable of being awarded on a class-wide basis.

Beginning in 1998, Comcast allegedly engaged in a series of transactions with other cable companies and media providers to increase its share of the multichannel video programming distribution services offered in the Philadelphia, Pennsylvania area. As a result of these transactions, Comcast’s share of subscribers in the Philadelphia area allegedly increased from 23.9 percent in 1998 to a high of 77.8 percent in 2002, leveling at 69.5 percent in 2007.

Plaintiffs, six Comcast customers of non-basic cable television programming services, brought a class-action antitrust suit against Comcast in 2003, alleging anti-competitive conduct in violation of the Sherman Act, 15 U.S.C. § 2, on theories of monopolization and attempted monopolization. The complaint defines the proposed class as Comcast customers in Philadelphia and surrounding counties in Pennsylvania, Delaware, and New Jersey who currently subscribe or subscribed at any time since December 1, 1999. The complaint alleges that Comcast harmed the class by eliminating competition, raising entry barriers to potential competition, maintaining increased prices for cable services at supra-competitive levels, and depriving subscribers of lower prices that would result from effective competition. At bottom, the Comcast subscribers alleged they paid too much for their non-basic video programming cable service.
In 2007, the district court certified the class and denied Comcast’s petition seeking interlocutory review of that decision by the U.S. Court of Appeals for the Third Circuit. Subsequently, In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305 (3d Cir. 2008), the Third Circuit outlined the standards a district court should apply in deciding whether to certify a class. In light of Hydrogen Peroxide, the district court granted Comcast’s request to reconsider its class certification decision. After a four-day hearing in 2009, the district court recertified the Comcast class. Comcast again asked for permission to appeal the class certification decision. This time the district court allowed the appeal.

The Third Circuit issued its decision in which it concluded that class certification is proper only after a district court has conducted a “rigorous analysis” in which it “may delve beyond the pleadings” to determine if the prerequisites of Rule 23 have been satisfied. Comcast Corp. v. Behrend, 655 F.3d 182, 190 (3d Cir. 2011), quoting Hydrogen Peroxide, 552 F.3d at 316-317. The court specifically approved formulaic relief for damages in antitrust class actions based on expert calculations, holding that plaintiffs “must establish that the alleged damages are capable of measurement on a class-wide basis using common proof.” 655 F.3d at 203 & n.12. Further, an “overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met.” 655 F.3d at 190, quoting Hydrogen Peroxide, 552 F.3d at 316-317. Thus, the Third Circuit found that the district court did not exceed its discretion in determining that the plaintiffs established that they would be able to prove through common evidence class-wide antitrust impact (higher cost on non-basic cable programming) and a common methodology to quantify damages on a class-wide basis.

Comcast argued that the Supreme Court’s decision last year in Wal-Mart Stores v. Dukes, 131 S. Ct. 2541 (2011), which rejected the use of class-wide calculations of back-pay damages in a Title VII class action, precluded the district court approach of measuring damages on a class-wide basis in this antitrust case. The Third Circuit rejected that argument, declaring that Wal-Mart “neither guides nor governs the dispute before us.” 655 F.3d at 203 n.12. The court then specifically approved formulaic relief for damages in antitrust class actions based on expert calculations, holding that plaintiffs “must establish that the alleged damages are capable of measurement on a class-wide basis using common proof.” 655 F.3d at 203.

The parties reached a global settlement in this case (in which class certification was granted) and several other cases pending in various courts
across the country, including some in which class certification had not yet been granted. After Comcast signed the global settlement agreement, but before the federal district court held a fairness hearing, as it is required to do to approve a class action settlement, the Supreme Court granted certiorari in this case. While none of the other cases had been appealed to the Supreme Court, Comcast seeks to avoid the settlement agreement pending the Supreme Court decision in this case. Plaintiffs have moved the federal district court to enforce the signed settlement agreement on contractual grounds. If plaintiffs’ motion is granted, *Comcast v. Behrend* will likely be dismissed by the Court.

Consequently, AARP is considering whether to participate as amicus curiae in this case. The Supreme Court’s decision on the question presented in *Comcast* may have significant impact on the rights of consumers to seek class wide remedies. There is a trend for courts to adjudicate more of the merits issues in the class certification stage of the case. This places a heavy burden on plaintiffs seeking to enforce consumer protection statutes to prove their case before a judge at the class certification stage and then to prove the case again at the trial stage before a jury. If the Court finds that the Third Circuit approach to class certification is problematic, plaintiffs may be forced to prove their damages more definitely at the class certification stage, making such cases much more difficult to bring. Concerns over avoiding formulaic damages calculations need not interfere with class certification. There are many creative approaches that courts may utilize to both preserve the rights of defendants to challenge damages claims while permitting class actions to proceed, such as bifurcating trials, or instituting claims procedures where appropriate.

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HEALTH

WHETHER THE GEORGIA LEGISLATURE, BY VESTING A LOCAL GOVERNMENT ENTITY WITH GENERAL CORPORATE POWERS TO ACQUIRE AND LEASE OUT HOSPITALS AND OTHER PROPERTY, HAS "CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED" A "STATE POLICY TO DISPLACE COMPETITION" IN THE MARKET FOR HOSPITAL SERVICES, THUS RENDERING FEDERAL ANTITRUST LAWS INAPPLICABLE UNDER THE "STATE ACTION DOCTRINE"?

WHETHER SUCH A STATE POLICY, EVEN IF CLEARLY ARTICULATED, WOULD BE SUFFICIENT TO VALIDATE THE ANTICOMPETITIVE CONDUCT IN THIS CASE, GIVEN THAT THE LOCAL GOVERNMENT ENTITY – WHICH ACQUIRED THE ONLY COMPETITOR OF A PRIVATE ACTOR AT THE PRIVATE ACTOR’S BEHEST – NEITHER ACTIVELY PARTICIPATED IN NEGOTIATING THE TERMS OF THE HOSPITAL SALE NOR HAS ANY PRACTICAL MEANS OF OVERSEEING THE HOSPITAL’S OPERATION?

F.T.C. v. Phoebe Putney Health Sys., Inc.,
663 F.3d 1369 (11th Cir. 2011),
Oral argument not yet scheduled.

In Phoebe Putney, the Supreme Court will address whether an anticompetitive hospital merger is exempt from federal antitrust law by the doctrine of state action immunity. The Court will first consider whether the Georgia legislature "clearly articulated and affirmatively expressed" a "state policy to displace competition" in the market for hospital services. See Town of Hallie v. City of Eau Claire, 471 U.S. 34, 39 (1985). If the Court finds that there is such a policy, it will decide whether the merger can be exempted by state action immunity even though there is no active state supervision because a private party was significantly involved. See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

In order for a state law or regulatory scheme to be entitled to state action immunity, the state must have clearly articulated and affirmatively expressed a policy that foresaw anticompetitive effects. See FTC v. Ticor Title Ins. Co., 504 U.S. 621, 631 (1992). If the entity engaged in anticompetitive conduct is a private actor, then the anticompetitive conduct is protected by state action immunity only if the state provides active supervision. See Midcal, 445 U.S. at 100.
In this case, the Phoebe Putney Health System (PPHS), which leased a hospital from the local hospital authority, negotiated and supplied the money to the hospital authority to acquire the competitor hospital in the county, Palmyra Park Hospital. PPHS immediately leased the newly acquired Palmyra hospital from the hospital authority for $1 per year. The Federal Trade Commission (FTC) argues that the merger is anticompetitive, with the merged hospital having between 75-86 percent of inpatient general acute care hospital services in Dougherty and the six surrounding counties in Georgia. The question is whether this action, which would otherwise violate federal antitrust law, is protected by state action immunity.

The FTC and the State of Georgia sought to enjoin the acquisition and hospital merger by bringing suit against the hospital authority, PPHS, and its hospitals under the Federal Trade Commission Act and Clayton Act. The district court granted defendants' motion to dismiss holding the cause of action was barred by the doctrine of state action immunity. *FTC v. Phoebe Putney Health Sys. Inc.*, 793 F.Supp.2d 1356 (M.D. Ga. 2011). The FTC appealed. The Eleventh Circuit affirmed the holding that the Georgia legislature clearly articulated its intent to authorize hospital authorities to engage in anticompetitive activity; thus state action immunity exempted the planned merger from federal antitrust laws. *FTC v. Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369 (11th Cir. 2011). The FTC’s petition for certiorari was granted.

AARP did not file an *amicus curiae* brief in this case since the issue before the Court is limited to reviewing the applicability of state immunity from federal antitrust laws. The Court’s ruling, however, could have implications for the cost and quality of hospital care because hospital mergers that decrease competition have been shown to increase prices and reduce quality of care, resulting in negative health outcomes. These negative consequences affect all patients, but particularly people over 50, who have higher rates of chronic and serious health conditions, leading to greater rates of hospitalization, longer hospital stays, and greater health care costs. See National Center for Health Statistics, *Health, United States, 2011: With Special Feature on Socioeconomic Status and Health* 327-31, 338-43, 381-83 (2012). States, as sovereigns, can determine that it is in the best interest of the public to displace free market competition with a regulatory scheme. But, it is essential for patients that the state has truly made this decision, as demonstrated by a clearly articulated and affirmatively expressed state policy. If anticompetitive conduct involves private parties, it
is vital that the state provides active state supervision to ensure the action is taken in furtherance of the state policy, or there is the real risk that the private party will act in its own interest.

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Whether the 180-day statutory time limit for filing an appeal with the Provider Reimbursement Review Board from a final Medicare payment determination made by a fiscal intermediary is subject to equitable tolling?

Sebelius v. Auburn Reg'l Med. Ctr.,
642 F.3d 1145 (D.C. Cir. 2011),
Oral argument not yet scheduled.

In Auburn, the Court will address whether equitable tolling can allow providers to bring claims contesting their prior disproportionate share hospital (DSH) payment determination outside of the statute of limitations. 42 U.S.C. §1395oo(a)(3).

Plaintiff hospitals filed claims with the Provider Reimbursement Review Board (PRRB) seeking full payments for the fiscal years 1987-1994, based on the discovery in Baystate Med. Ctr. v. Leavitt, 545 F. Supp. 2d 20 (D.D.C. 2008), that CMS had paid hospitals less than they were due because CMS had miscalculated the DSH percentage. 545 F.Supp. 2d 20 (D.D.C. 2008). However, the hospitals' claims were now over a decade outside the statutory and regulatory time limits for appealing the reimbursement calculation. See 42 U.S.C. §1395oo(a); 42 C.F.R. § 405.1885(a), (d); 42 C.F.R. § 405.1885. The hospitals claim that CMS knowingly and unlawfully refused to “inform hospitals that the … percentage was incorrectly stated for the fiscal years under appeal.” UHS 87-94 DSH/SSI Equitable Tolling Grp, PRRB Case No. 06-2359G 53a (2007). The hospitals contend that therefore the limitations period can, and should, be equitably tolled.

The PRRB held that the plaintiffs' claim was untimely and beyond the jurisdiction of the PRRB which could not toll the limitations period and does not have general equitable powers. UHS 87-94 DSH/SSI Equitable Tolling Grp, PRRB Case No. 06-2359G 53a (2007). Plaintiffs filed suit in the district court which held that (a) the court lacked jurisdiction because the PRRB’s determination was not a final decision, (b) the statute does not allow for equitable tolling, and (c) the plaintiffs did not have a claim for mandamus or relief directly under the federal question statute 28 U.S.C. § 1331. Auburn Reg'l Med. Ctr. v. Sebelius, 686 F.Supp. 2d 55 (D.D.C. 2010), as amended (Mar. 11, 2010).

The D.C. Circuit Court of Appeals reversed the district court, holding that the court has jurisdiction because PRRB’s determination was a final decision and

AARP will not file an amicus curiae brief in this case, which will primarily have an impact on the plaintiff hospitals, although there may be indirect impacts on patients and Medicare. Secretary of Health and Human Services Sebelius argues that equitable tolling would expose the Medicare program to “claims of enormous amounts in the aggregate” and make it difficult to accurately gauge the financial status of Medicare, reducing accuracy and increasing uncertainty. Petition for Writ of Certiorari at 30. In response, the hospitals argue that having to pay a sum that is owed cannot be an equitable reason for not requiring payment, and further, it is only appropriate to consider this concern after a final judgment, not on this interlocutory record. Brief in Opposition to Petition for Writ of Certiorari at 5. The Affordable Care Act set out a new formula for calculating the DSH adjustment beginning in fiscal year 2014, and provides that there is no administrative or judicial review for this new calculation, so in the future hospitals will likely not be able to appeal DSH payments.

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WHAT THE FUTURE HOLDS

This section discusses not only pending petitions for certiorari that AARP Foundation Litigation is following (those case names are bolded), but also issues that that may eventually make it to the Court’s attention. We note that 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.

Employment

Like last Term, there are no cases involving the Age Discrimination in Employment Act on the Court’s docket for the upcoming 2012 Term, probably because employee advocates are still reeling from the Court’s 2009 decision in Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009), which will continue to undermine the ability of older workers to vindicate their rights. Besides those employment-related cases upon which the Court has already granted certiorari, AARP is also tracking Ketterer v. Yellow Transp., Inc., 670 F.3d 644 (5th Cir. 2012), petition for cert. filed, – U.S.L.W. – (U.S. May 9, 2012) (No. 11-1361), which concerns Title VII’s anti-retaliation provision, workplace harassment and the appropriate standard for determining employer liability.

One ADEA case that has potential for eventual Supreme Court review is the decision of the U.S. Court of Appeals for the Seventh Circuit in Levin v. Madigan, No. 11-2820, 2012 U.S. App. LEXIS 17291 (7th Cir. Aug. 17, 2012). Acknowledging that every other circuit that has considered the issue has reached the opposite conclusion, the unanimous panel held that the ADEA does not preclude a constitutional equal protection claim brought under 42 U.S.C. § 1983. Relying on several Supreme Court cases, the panel declared that the most important consideration in determining whether a § 1983 equal protection claim is precluded by a statutory scheme is congressional intent. That determination properly is based on the statutory language and legislative history, the statute’s context, the nature and extent of the remedial scheme, and a comparison of the rights and protections afforded by the statutory scheme versus a § 1983 claim. Analyzing the ADEA in light of these factors, the court held that “[a]lthough the ADEA enacts a comprehensive statutory scheme for enforcement of its own statutory rights…, it does not preclude a § 1983 claim for constitutional rights.” Id. at 26. This holding was based on “the ADEA’s lack of legislative history or statutory language precluding constitutional claims, and the divergent rights and protections afforded by the ADEA as compared to a § 1983 equal protection
claim.” *Id.* Given that the decision was “admittedly a close call,” *id.*, it is likely that the Attorney General of Illinois will seek en banc review. If the result of that request is that the circuit split remains, this case may be ripe for Supreme Court review.

AARP’s efforts on behalf of older workers will be concentrated on persuading Congress to pass the Protecting Older Workers Against Discrimination Act (POWADA), S. 2189, 112th Cong. (2012). This legislation, which has been introduced in both houses of Congress, specifically repeals the Gross decision in order to restore the ADEA to its pre-Gross, congressionally intended purpose of acting as bulwark against workplace age discrimination.

Unfortunately, the Gross decision is bleeding over into other areas of proof for different types of claims. For instance, Gross has led a number of courts to interpret the ADEA and other civil rights statutes to require proof that a protected characteristic is the “sole cause” of alleged discrimination – a tall order, if not an impossible burden to meet. This has not been the majority view, however, and most courts that have considered the question appear to have rejected the “sole cause” interpretation.

Equally disturbing as the effect of the Gross decision on age discrimination law has been the application of its rejection of “mixed-motives” claims to other civil rights statutes. For example, Gross has been consistently applied to the ADA and ADA retaliation claims in federal cases. With less uniformity, Gross has also been applied to retaliation claims under Title VII. This, despite the fact that Title VII was expressly amended by the 1991 Civil Rights Act, and the lack of an express amendment to the ADEA was one of the grounds on which the Gross decision rested. In extending Gross to Title VII retaliation claims, at least some courts have based such a decision on the fact that the retaliation provision itself was not amended. In addition to overturning Gross, both of these damaging extensions are addressed by the POWADA.

**Health**

There are a number of cases with petitions for certiorari pending before the Court that may impact both the healthcare industry and the lives of older Americans. One of these pending petitions concerns the issue of whether the government is entitled to full reimbursement under the Medicare Secondary Payer Act, 42 U.S.C. §1395y(b), when a beneficiary settles a tort or other action, thus recovering a reduced amount. (*Compare with US Airways, Inc. v. McCutchen*, 663 F.3d at 677, *supra*.). In *Hadden v. United States*, 661 F.3d 298
(6th Cir. 2011), reh’g denied, 2012 U.S. App. LEXIS 486 (6th Cir. 2011), petition for cert. filed, 80 U.S.L.W. 3573 (U.S. Mar. 30, 2012) (No. 11-1197), the Sixth Circuit relied heavily on textual analysis in holding that the Medicare statute does require beneficiaries to reimburse Medicare for the full extent of the payment, regardless of the adequacy of the settlement received by the beneficiary. This is in contrast to the Eleventh Circuit’s position that the government is entitled to only a proportionate recovery. Bradley v. Sebelius, 621 F.3d 1330 (11th Cir. 2010).

The Court invited the Solicitor General to file a brief expressing the government’s views in two cases in which petitions are pending. The first is Classen Immunotherapies, Inc. v. Biogen, Idec, 659 F.3d 1057 (Fed. Cir. 2011), petition for cert. filed sub nom. GlaxoSmithKline v. Classen Immunotherapies Inc., 80 U.S.L.W. 3079 (U.S. Feb. 28, 2012) (No. 11-1078), which involves the scope of the Hatch-Waxman Act’s safe harbor provision that would exempt otherwise infringing acts of pharmaceutical producers if the acts are “solely for uses reasonably related to the development and submission of information under a Federal law which regulates the manufacture, use, or sale of drugs or veterinary biological products.” Classen sued GlaxoSmithKline (GSK) and several other companies for infringing on three Classen-owned patents pertaining to methods for evaluating the safety of vaccine administration schedules. GSK argued, and the district court agreed, that the otherwise infringing use of these patents by GSK was sufficiently related to post-approval market surveillance required by the FDA, thus was permissible under the safe harbor. The Federal Circuit subsequently reversed this decision, holding that the statutory safe harbor only applies to pre-approval research and development and thus the post-approval research constituted infringement. The question presented to the Court is whether the Federal Circuit’s restrictive interpretation of the safe harbor is faithful to the statutory text and prior Supreme Court precedent. An affirmation by the Supreme Court that the safe harbor is limited to pre-approval procedures would require pharmaceutical companies to pay royalties for tests conducted regarding safety and dosage of approved therapeutics, which petitioner argues will restrict important research and development that improves safety and efficacy of drugs and vaccines.

The second health case in which the Court asked for the Solicitor General’s opinion is Harris v. Quinn, 656 F.3d 692 (7th Cir. 2011), petition for cert. filed, – U.S.L.W. – (U.S. Nov 29, 2011) (No. 11-681). The issue pending before the Court is whether, consistent with the First and Fourteenth Amendments, a state may compel Medicaid homecare personal assistants to accept and financially support a private organization as their exclusive collective
bargaining representative. Plaintiffs provide in-home care through the Illinois Department of Human Services Medicaid-waiver program. Although these individuals opted not to unionize, they were required through a “fair share” provision of a collective bargaining agreement between the State and the Illinois chapter of the Service Employees International Union (SEIU) to pay a proportionate share of the costs of the collective bargaining process. On appeal to the Seventh Circuit, plaintiffs argued that their case did not fall within the scope of Supreme Court precedent permitting this type of mandatory union fees because in-home care providers are employed by individual Medicaid patients, not the state. The Circuit Court looked to both the plain meaning of “employee” and labor law concepts of employment in holding that although providers are, in some senses, employed by the individual patients, the State employs these assistants within the meaning of the Supreme Court precedent.

In addition to the pending petitions for certiorari, there are a few cases that may end up before the Supreme Court next Term or in upcoming Terms that concern unresolved issues of critical importance to older people. For example, a case likely to return to the Supreme Court is the closely watched Ass’n for Molecular Pathology v. United States PTO, 2012 U.S. App. LEXIS 17679 (Fed. Cir. Aug. 16, 2012). In a split decision the federal appeals court once again partially reversed a lower court’s ruling in a case challenging patents on two human genes associated with hereditary breast and ovarian cancer. The federal appeals court ruled that companies may patent breast cancer genes. The court invalidated the patents directed to “comparing” or “analyzing” DNA sequences since those claims include no transformative steps and cover only patent-ineligible abstract, mental steps, however, the method patents directed to “screening potential cancer therapeutics via in vitro changes in cell growth rates of transformed cells” was upheld as patent eligible. The specific patents the lawsuit challenge are on the BRCA1 and BRCA2 genes. Mutations on those genes can determine the likelihood of developing hereditary breast and/or ovarian cancer. Many women with a history of these cancers in their families opt to undergo genetic testing to determine if they have the mutations on their BRCA genes that put them at increased risk for these diseases. Genetic testing helps women genetically predisposed towards breast or ovarian cancer to decide on a plan of treatment or prevention, including increased surveillance, preventive mastectomies or ovary removal. Myriad's monopoly on the isolated BRCA genes allows it to set the terms and cost of testing and makes it impossible for women to access alternate tests or obtain a comprehensive second opinion about their results. The monopoly also prevents doctors and scientists from exchanging their ideas and research freely. AARP filed amicus briefs in both the Federal Circuit and the Supreme Court arguing that patents on genetic sequences interfere with
the practice of medicine and human genetic sequences are natural phenomena that when discovered are not the kind of discovery that is eligible for a patent.

The Supreme Court previously remanded the case to determine the effect of *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289 (2012). Each of the three judges wrote separate opinions, with one judge dissenting in part. The majority held that *Mayo* was not controlling and it is likely that one of the parties will seek review of that decision in the Supreme Court.

Another patent-related case that likely will become the subject of a petition for certiorari concerns the legality of so called “reverse payment” or “pay for delay” pharmaceutical patent settlements. In *In re K-Dur Antitrust Litig.*, 686 F.3d 197 (3d Cir. 2012), the Third Circuit reviewed a patent settlement agreement in which a brand-name Rx patent holder paid the would-be generic Rx manufacturers to refrain from releasing their generic product into the market for a specified duration. The court rejected the test adopted by three other circuits as being contrary to the policies of the Hatch-Waxman Act and inconsistent with Supreme Court precedent. Instead, the court remanded the case with an instruction to employ an alternate test, which shifts the burden to the patent holder to demonstrate that a reverse payment was offered for a noncompetitive purpose. Although the application of this test remains to be seen, this alternate test should, in theory, be friendlier to wholesalers and retailers challenging reverse payment settlements. If patent holders cannot demonstrate that the reverse payment settlement was not offered for a noncompetitive purpose, these agreements will likely be prohibited for violating antitrust laws. The Court has previously declined to review this issue, most recently denying a petition filed in *Arkansas Carpenters Health & Welfare Fund v. Bayer*, 604 F.3d 98 (2d Cir. 2010) (involving the blockbuster drug ciprofloxacin) after the Second Circuit held that reverse payment settlements are permissible, unless the patent is so weak as to constitute a sham. A circuit court split created by *K-Dur* regarding the standard under which reverse payment settlement agreements are to be reviewed may finally sway the Court to review the issue.

Last Term, the Supreme Court deflected a critical issue relating to the rights of Medicaid beneficiaries and providers. In *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012), the Court was asked to decide whether Medicaid providers and beneficiaries could bring suit under the Supremacy Clause to enjoin state laws or policies that conflict with the federal Medicaid statute. In a 5-4 decision, the Court declined to answer the question because after certiorari was granted, intervening administrative agency action left the case in a different posture. Thus, the question of whether the Supremacy Clause
provides a viable right of action is likely to arise again since *Douglas* and other similar cases are pending in the Ninth Circuit.

In *Douglas*, Medicaid providers and recipients sued California challenging a state law that cut Medicaid providers’ rates by 10 percent. California had sought approval for the cuts from the Centers for Medicare and Medicaid Services (CMS) when the suit was filed. *Douglas*, 132 S. Ct. at 1208. The plaintiffs claimed that planned provider rate reductions violated 42 U.S.C. § 1396(a)(30)(A) of the Medicaid statute because the cuts would result in reduced access to care, a guarantee provided by section 30(A) (requiring states “to assure that payments are consistent with efficiency, economy, and quality of care”). *Douglas* was the consolidation of five suits, each holding the state policy is preempted by section 30(A) and granting or affirming preliminary injunctions preventing the state from implementing its planned Medicaid reductions. *Id.* at 1209.

After the Supreme Court granted certiorari, CMS approved California’s plan amendments. The Court said CMS’s action did not make these cases moot, but it put them “in a different posture.” *Id.* at 1210. The Court, therefore, remanded the case to the Ninth Circuit to determine whether the claims may proceed considering the changed circumstances. *Id.* at 1211. The Court noted that CMS’s approval may deserve a degree of deference, and the Ninth Circuit should consider whether the claim may be more properly brought under the Administrative Procedure Act now that there has been an agency determination. *Id.* Writing for the dissent, Chief Justice Roberts said the Court should have held the Supremacy Clause does not itself supply a private right of action. *Id.* at 1215.

A similar case, *M.R. v. Dreyfus*, No. 11-35026, 2012 U.S. App. LEXIS 12427 (June 18, 2012), could be before the Court. Plaintiffs challenged Washington’s 10 percent cut to community-based Medicaid-funded personal care services contending that the cuts would place them at risk of institutionalization and sought a preliminary injunction to prevent the state from implementing the cuts. The trial court denied the motion finding, among other things, that Plaintiffs had not demonstrated that they would certainly suffer harm without an injunction. The Ninth Circuit reversed finding that irreparable harm is likely to occur without an injunction and that certainty is not necessary. The Ninth Circuit’s decision in *M.R.* is consistent with the cases throughout the country that have looked at whether a preliminary injunction is necessary to protect the rights of people seeking protection under the Americans with Disabilities Act (ADA) and the Supreme Court’s landmark decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999). Specifically, state actions that place individuals with disabilities at serious risk of
unjustified institutionalization satisfy the “irreparable harm” standard for granting a preliminary injunction in cases where individuals are seeking to enforce their rights under the integration mandate contained in Title II of the ADA and the Rehabilitation Act.

ERISA & Employee Benefits

There are two pending petitions for certiorari before the Supreme Court which AARP has been following due to their potential impact on participants. The first is Blue Cross & Blue Shield of Mont. v. Fossen, 660 F.3d 1102 (9th Cir. 2011), petition for cert. filed, 80 U.S.L.W. 3690 (U.S. Mar. 21, 2012) (No. 11-1155), where the Court has asked the government to provide its views on the issue of whether a substantive state law insurance standard that is saved from preemption under ERISA’s insurance savings clause can be enforced through state law remedies or solely through ERISA’s enforcement scheme. However, the Court denied certiorari on a related issue in the case of whether a state can create a claim for group health insurance premium discrimination that is not preempted by ERISA. The second case is Gray v. Citigroup, Inc. (In re: Citigroup ERISA Litig.), 662 F.3d 128 (2d Cir. 2011), petition for cert. filed, – U.S.L.W. – (U.S. June 22, 2012) (No. 11-1531). Since the collapse of Enron and WorldCom, there has been substantial litigation over employer securities as investments in 401(k) plans. In particular, litigation has focused on the appropriate standards when reviewing the decision to include and keep employer securities as an investment option in these plans and at what stage of litigation those standards should be applied. The question presented in Citigroup is whether the presumption of prudence (or compliance) originated in Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995), should be utilized when reviewing the decision to include and keep employer securities as an investment option in 401(k) plans. The Second Circuit found that the presumption of prudence could only be overcome by showing that the defendants knew or should have known that the employers were in a dire financial situation or approaching bankruptcy at the pleading stage. There is currently a split within the circuits concerning when the presumption should be applied and there have been strong dissenting opinions concerning whether such a presumption is consistent with ERISA’s statutory language. Compare Pfeil v. State St. Bank & Trust Co., 671 F.3d 585 (6th Cir. 2012).

Several other issues are likely to surface in upcoming Terms as outgrowths of recent Supreme Court decisions, particularly in the realms of ERISA plan interpretation, remedies for fiduciary breach, and the overall reach of ERISA’s anti-retaliation provision.
In the Court’s decision in Conkright v. Frommert, 130 S. Ct. 1640 (2010), the Court endorsed a rule of deference to the plan administrator’s interpretation of plan terms where the plan grants discretion to the administrator, even in the wake of a court finding that a previous plan interpretation by the administrator at an earlier stage in the controversy was erroneous. In Conkright the Court sent the case back to the plan administrator for another look at the plan’s meaning. The courts below have been struggling with the limits of this holding, and so it seems likely that an upcoming case in the Court will resolve these limits.

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

Recent cases indicate that Amara has raised as many questions as it answered. In Skinner v. Northrop Grumman Ret. Plan B, 673 F.3d 1162 (9th Cir. 2012), the court found that although the administrative committee for the plan did not ensure that participants received accurate SPDs that explained the circumstances that could result in the benefit offset, the employees were not entitled to either reformation or surcharge as remedies because the participants did not prove that they were intentionally mislead. In contrast is the case of McCravy v. Metro. Life Ins. Co., No. 10-1074, 2012 U.S. App. LEXIS 13683 (4th Cir. July 5, 2012). McCravy’s daughter, who had been a covered dependent under the plan, was murdered in 2007. At that time, she was too old to be a covered dependent, but McCravy allegedly did not learn of her daughter's ineligibility until MetLife denied her claim for benefits. McCravy claimed that MetLife had continued to collect insurance premiums from McCravy and had never told her that her daughter was ineligible for coverage. She requested in her ERISA lawsuit that MetLife be ordered to pay her the benefits as a remedy for MetLife’s fiduciary breaches. The Fourth Circuit held that Amara was a “striking development” and this was exactly the type of case in which monetary relief should be available. Accord, Guerra-Delgado v. Popular, Inc., No. 11-1535, 2012 U.S. Dist. LEXIS 44432 (D.P.R. Mar. 29, 2012) (fraudulent misrepresentations as
to amount of benefit on benefit statements give rise to breach of duty). There have also been a number of cases where the SPD includes a discretionary clause, but the plan document does not; the courts have refused to apply the clause. See e.g., Eugene S. v. Horizon Blue Cross Blue Shield of N.J., 663 F.3d 1124 (10th Cir. 2011); Kaufmann v. Prudential Ins. Co. of Am., 840 F.Supp.2d 495 (D.N.H. 2012); but see Langlois v. Metro. Life Ins. Co., 833 F.Supp.2d 1182 (N.D. Cal. 2011) (suggesting that the court can look to SPD to ascertain whether discretionary authority was conferred). Similarly, where exclusions are not in the SPD but in the plan document they will not be enforced. See e.g., Younger v. Zurich Am. Ins. Co., No. 11-cv-1173, 2012 U.S. Dist. LEXIS 42190 (S.D.N.Y. Mar. 26, 2012). We also expect cases concerning the burden of proof and causation will be among those issues that may eventually reach the Court.

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

Finally, there also is not a consensus among the circuits concerning who may be sued as a defendant under ERISA § 502(a)(1). In Cyr v. Reliance Std. Life Ins. Co., 642 F.3d 1202 (9th Cir. 2011), the court held that entities other than an ERISA plan or plan administrator may be sued in ERISA benefit actions under the law’s civil enforcement provision because there was no limitation in the statute. The Seventh Circuit acknowledged, but did not decide, the issue. Schultz v. Aviall, Inc., 670 F.3d 834 (7th Cir. 2012).

**Disability**

In response to a series of restrictive ADA employment decisions issued by the Court, Congress in 2008 enacted the Americans with Disabilities Act Amendments Act (ADAAA), specifically repudiating the Court’s rulings in these cases in regard to the definition of “disability.”\(^2\) Overwhelming bipartisan majorities in the House and Senate declared the Court had taken a serious wrong turn by construing the ADA too narrowly, and thus, had cut off the

\(^2\) A circuit split also was 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.
opportunity of many employees to prove discrimination by their employers. Congress identified Jan. 1, 2009 as the day on which claims of disability bias had to focus on issues concerning defendants’ conduct, not plaintiffs’ medical condition. The ADAAA is expected to have a dramatic effect in restoring access to legal relief to people with disabling impairments of all kinds – a great many of which disproportionately impact older workers.

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

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

Housing

While housing practices that produce an adverse discriminatory impact have long been held to be unlawful under the Fair Housing Act (“FHA”), an upsurge in cases have challenged the use of disparate impact analysis in FHA cases. Last Term, the Supreme Court granted certiorari in Magner v Gallagher, 132 S. Ct. 1306 (2012), in which several landlords challenged code enforcement practices of the City of St. Paul, Minnesota. The landlords alleged that the practices, while neutral on their face, were eliminating affordable housing, which was having a disparate impact of African American residents. After full briefing,
the petitioner, St. Paul, dismissed its appeal, ending the Supreme Court’s review of the case.

Only months later, Mt. Holly Township, New Jersey filed a pending petition for certiorari challenging the use of the disparate impact doctrine under the FHA to prove that discriminatory impact. In that case, AARP Foundation Litigation attorneys are continuing to represent residents of an integrated, mostly African-American and Latino community that has been fighting an alleged discriminatory redevelopment plan that calls for demolishing their homes and replacing them with ones the residents cannot afford. The Third Circuit Court of Appeals ruled that the residents had proved their prima facie case – the first step of their legal case – by demonstrating through statistical evidence that the Township’s redevelopment plan would have an adverse discriminatory effect. The case was remanded back to the trial court. See Mt. Holly Twp. v. Mt. Holly Citizens in Action, 658 F.3d 375 (3d Cir. 2011), petition for cert. filed, – U.S.L.W. – (U.S. June 11, 2012) (No. 11-1507). In its petition, Mt. Holly Township, like the city of St. Paul did in Magner, argues that slight differences in the ways the circuits address disparate impact are significant enough conflicts that the Supreme Court should resolve them by granting certiorari. Mt Holly Township contends that the Court should hold that proof of discriminatory impact by using the disparate impact doctrine is not permitted under the FHA, and, instead, discriminatory intent is required for all FHA claims. The residents will argue, among other reasons, that the Court should not grant certiorari because the Department of Housing and Urban Development (HUD) has issued proposed regulations, formalizing its long standing agency interpretation of the FHA disparate impact theory, that are about to be released in final form, and the Court should allow the lower courts to apply and interpret the regulations before considering whether to take the case. Cases using the disparate impact doctrine have been successfully brought to challenge barriers to development of housing for older people and people with disabilities, and for lower-income people and families with children. Without the use of this doctrine, such challenges will be more difficult.

Consumer Protection

A pending petition for certiorari in Knowles v. Standard Fire Ins. Co., No. 4:11-cv-04044, 2011 U.S. Dist. LEXIS 139077 (W.D. Ark. Dec. 02, 2011), petition for cert. filed, – U.S.L.W. – (U.S. May 30, 2012) (No. 11-1450), could affect the rights of consumers. It questions a named plaintiff’s right to request limited recovery in a class action in order to defeat the defendant’s right of removal under the Class Action Fairness Act of 2005. If a plaintiff requests less than the $5 million threshold for removal, absent class members may be bound by the
stipulation and limited in damages. The case also relates to the fiduciary duty owed by class action attorneys to class members.

More generally, the use of class actions to obtain remedies and stop unfair, deceptive and illegal practices that endanger consumers or cost them money is increasingly coming under attack, through the proliferation of arbitration clauses or the tightening of class certification requirements. Access to consumer remedies is becoming ever more difficult at the same time that it is becoming increasingly important, as government enforcement agencies have fewer resources to protect consumers.

The Consumer Financial Protection Bureau (CFPB) now has primary authority to implement the Fair Debt Collection Practices Act (FDCPA). In one of its first assertions of supervisory authority over non bank entities, the CFPB has proposed to regulate debt collectors. It has also sought public comment on numerous issues important to older consumers, including the arbitration clauses, overdraft fees, payday lending, and debit cards. Finally, the CFPB seeks to learn more to protect older consumers from financial exploitation. When regulations ultimately are promulgated, they may be subject to challenge.

Voting Rights and Government Integrity

Some states have enacted laws requiring proof of identification to vote and the requirements are varied. The case of Gonzalez v. Arizona, 677 F.3d 383 (9th Cir. 2012) (en banc), petition for cert. filed sub nom. State of Arizona v. Inter Tribal Council of Arizona, Inc., – U.S.L.W. – (U.S. July 16, 2012) (No. 12-71), concerns the validity of Arizona’s legislation requiring proof of U.S. citizenship in order to register to vote. The National Voter Registration Act of 1993 (NVRA) declares that states “shall use” the federal voter registration form created and approved by the Federal Election Assistance Commission. That form requires registrants to swear under penalty of perjury that they are U.S. citizens, but does not require other proof of citizenship. Proposition 200 and the Arizona state voter registration form requires registrants to provide documentary proof of citizenship. The Inter Tribal Council of Arizona, an organization of Native American tribes, as well as other civil rights groups, represented by various voting rights legal advocacy groups, including AARP Foundation Litigation, challenged the registration provision on various grounds, including that it violates the "shall use" provision of the NVRA. A panel of the Ninth Circuit Court of Appeals, including former Justice O’Connor, upheld this claim (while rejecting various other challenges to Proposition 200, including its photo ID for voting requirements), as did the en banc Court of Appeals. If certiorari is denied (or if
the Supreme Court grants certiorari and affirms), other states are unlikely to enact proof of citizenship voter registration provisions, either by statute or referendum. A certiorari grant and subsequent decision to overrule the en banc Court of Appeals could set off another round of similar enactments in other states.

Another group of voter ID cases has been initiated by states – Texas and South Carolina – subject to Section 5 of the Voting Rights Act, which subjects jurisdictions with a history of electoral patterns polarized by the race or language-minority status of voters. The legislatures of both states enacted photo ID voting laws, but have been unable to implement them. They submitted the laws for analysis by the U.S. Department of Justice, Civil Rights Division, seeking “ preclearance” under Section 5 of the VRA. Under the VRA, Texas and South Carolina have the burden to show that new voting laws neither have the purpose nor will have the effect of “denying or abridging the right to vote” on account of race (in the case of South Carolina) or language minority status (in the case of Texas). The Department denied both states’ requests, determining that photo ID requirements were likely to have a “retrogressive effect” on voting rights for their respective racial and language-minority populations. Both states sued and their cases are pending before three judge courts in the U.S. District Court for the District of Columbia.

The three judge court in Texas v. Holder, denied the state’s request for a declaration that it had carried its burden to show that its photo ID voting law complied with the NVRA. No. 12-0128, (D.D.C. Aug. 30, 2012). The court now is considering a constitutional challenge to the validity of Section 5, an issue that the Supreme Court largely dodged in Northwest Austin Municipal Utility District No. One v. Holder, 557 U.S. 193 (2009). Another three-judge federal district court currently is considering South Carolina v. Holder, No. 12-203, (D.D.C. July 3, 2012), and a ruling is expected soon. One or both cases is likely to come before the Supreme Court on issues regarding the validity of photo ID voting laws under the NVRA, and possibly the constitutionality of Section 5 itself.

Two other important cases to watch involve issues of campaign finance following on the Supreme Court’s blockbuster Citizen’s decision. Citizens United v. FEC, 130 S. Ct. 876 (2010). Either or both of these cases may be the subject of petitions for review by the Court urging further exploration of issues left open in Citizen’s United.

In Minn. Citizens Concerned for Life, Inc. v. Swanson, No. 10-3126, 2012 U.S. App. LEXIS 18621 (8th Cir. Sep. 5, 2012) (en banc), the full Court of
Appeals voted to uphold Minnesota’s state law ban on corporate contributions, but narrowly – by a 6-5 vote – overturned state legislative limits on corporate expenditures. Proponents of the challenged expenditure regulations, including the dissent, characterized these rules as mere “disclosure requirements” of the sort endorsed in *Citizen’s United*. The en banc majority disagreed, criticizing the rules as onerous disincentives to corporate speech inconsistent with *Citizen’s United*. As an example, the majority cited requirements that independent expenditures of $100 or more demanded corporate spenders to form a committee and provide reports to the state until the committee was formally terminated. See *id.* at 21. (even “two . . . farmers owning adjoining property near a highway [who favor] a candidate for state office [and who ] decide to erect a large sign in support of the candidate and spend over $100 in supplies and labor”).

Major issues of campaign finance disclosure also are raised by *Van Hollen v. FEC*, No. 11-0766, 2012 U.S. Dist. LEXIS 44342 (D.D.C. Mar. 30, 2012), appeal docketed, Nos. 12-5117, 12-5118 (D.C. Cir. May 14, 2012), in which Congressional supporters of campaign finance reform have challenged Federal Election Commission (FEC) rules governing disclosure of “independent” expenditures for “electioneering communications” – i.e., political expenditures not explicitly related to the campaigns of particular candidates – by corporations (including non-profit advocacy groups) and labor unions. The Bi-Partisan Campaign Reform Act of 2002 (“BCRA” or “McCain-Feingold”) in section 201 requires disclosure of “all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement” for electioneering communications (emphasis supplied). However, the FEC allowed persons or entities contributing to non-profit advocacy corporations to disclose the sources of funds received only if contributors give funds “for the purpose of furthering electioneering communications” (emphasis supplied). Most contributors do not explain their donations: thus, no disclosure. The U.S. District Court for the District of Columbia struck down this rule as contrary to the intent of BCRA section 201. *Van Hollen v. FEC*, No. 11-0766, 2012 U.S. Dist. LEXIS 44342 (D.D.C. Mar. 30, 2012), stay pending appeal denied, 2012 U.S. App. LEXIS 10333 (D.C. Cir. May 14, 2012). The trial court declared that Congress meant what it said in the BCRA: disclosure of “all contributors” to entities disbursing funds for electioneering communications is required, regardless of evidence of the contributors’ intent. The FEC declined to appeal, but two conservative non-profit advocacy groups intervened to defend the rule. AARP joined an amicus brief, urging affirmance of the trial court’s ruling.
CONCLUSION

Supreme Court decisions will impact a larger percentage of the American population as the number of 50+ increases. AARP Foundation Litigation, through its active amicus participation in the Supreme Court, has and will continue to ensure that the Court is made aware of the concerns of this population. Participation in these cases is an integral part of AARP Foundation Litigation’s advocacy and it will continue to apprise the Court of the views of AARP.