A preview of the 2013-14 term

U.S. Supreme Court Decisions Affecting the Business Community

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To date, the United States Supreme Court has granted certiorari in 54 cases that will be heard during the 2013-2014 Term of Court. Although this Term of Court is unlikely to reach the same blockbuster status as the last two Terms, this is a Term that should be followed even more closely by the business community. Already on the Court’s docket are a wide range of cases that will substantially impact businesses and business litigation. Additionally, the Court is likely to take up several more cases that will impact businesses in areas such as the False Claims Act, patent law and privacy expectations with respect to personal electronic devices (e.g., cell phones). This manuscript is set out in three parts: 1) cases presently on the Court’s docket affecting business and the economy, 2) significant cases in which the Court may grant certiorari later this Term, and 3) non-business cases that are of general interest to all (i.e., the cases you are likely to be discussing at cocktail parties).

CASES PRESENTLY ON THE COURT’S DOCKET AFFECTING BUSINESS AND THE ECONOMY

Affirmative Action

Last Term, the Court considered a case out of Texas involving affirmative action, *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013). In that case, the Court reiterated that strict scrutiny must be applied to any admissions program that uses racial categories or classifications. The Court will take up affirmative action again this Term – in a different context – in *Schuette v. Coalition to Defend Affirmative Action, No. 12-682*, a case arising out of Michigan. The specific issue in *Schuette* is:

Whether a state violates the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public-university admissions decisions.

The case was argued on Tuesday, October 15, 2013.

Before the Court in *Schuette* is a Michigan constitutional amendment that makes it unlawful for any state college or university to “grant preferential treatment to . . . any individual or group on the basis of race, sex, color, ethnicity, or national origin.” Mich. Const. art. I, § 26. Judge Cole, writing for the majority of the Sixth Circuit in an en banc opinion, framed the debate as follows:
A student seeking to have her family’s alumni connections considered in her application to one of Michigan’s esteemed public universities could do one of four things to have the school adopt a legacy-conscious admissions policy: she could lobby the admissions committee, she could petition the leadership of the university, she could seek to influence the school’s governing board, or, as a measure of last resort, she could initiate a statewide campaign to alter the state’s constitution. The same cannot be said for a black student seeking the adoption of a constitutionally permissible race-conscious admissions policy. That student could do only one thing to effect change: she could attempt to amend the Michigan Constitution — a lengthy, expensive, and arduous process . . .

Coalition to Defend Affirmative Action v. Regents of the University of Michigan, 701 F.3d 466 (6th Cir. 2012) (en banc). The Sixth Circuit concluded that the Michigan constitutional amendment deprives minorities of Equal Protection. The court noted: “[E]qual protection of the laws is more than a guarantee of equal treatment under existing law. It is also a guarantee that minority groups may meaningfully participate in the process of creating these laws and the majority may not manipulate the channels of change so as to place unique burdens on issues of importance to them.” Id. at 474.

The dissenters characterize the majority opinion as “an extreme extension” of existing United States Supreme Court precedent. Id. at 492 (Boggs, J., dissenting). Judge Gibbons, in her dissent, argues that the majority opinion creates a constitutional protection for racial and gender preference, thereby depriving Michigan voters from making the policy choice as to whether such preference should be considered in the university admission process. Id. at 493-94 (Gibbons, J., dissenting). Judge Sutton describes the majority’s decision as “mandatory affirmative action” — a concept that “will come as a surprise to all Justices of the United States Supreme Court, past and present, who have labored to determine whether state universities may ever enact such race-conscious programs under the United States Constitution.” Id. at 505 (Sutton, J., dissenting).

Petitioner, the Michigan Attorney General, argues that the Michigan Constitution does not single out groups for differing treatment. Rather, it prohibits public universities from classifying applicants by race or sex and treating them differently. Respondents retort that strict scrutiny must be applied when race is a predominant factor in determining how the political process is structured. The Michigan Constitution, argue the Respondents, requires a distinct and more onerous process for deciding whether to adopt constitutionally permissible race-conscious admission programs than the process that applies to other decisions relating to admissions criteria. As a result, Respondents assert that the Michigan constitutional amendment violates Equal Protection.
Arbitration

In *BG Group PLC v. Argentina*, No. 12-138, the Court will likely clarify under what circumstances issues of arbitrability should be resolved by the courts rather than the arbitration panel. The specific issue before the Court is:

Whether, in disputes involving a multi-staged dispute resolution process, a court or the arbitrator determines whether a precondition to arbitration has been satisfied.

The case is set for oral argument on Monday, December 2, 2013.

In December 2007, an arbitration panel issued an award in favor of Petitioner BG Group and against Respondent Argentina in connection with Argentina’s enactment of an emergency law that impacted Petitioner’s investment in an Argentine gas distribution company – a company that had previously been owned by Argentina prior to privatization in 1993. The arbitration was conducted in the United States.

The authority of the arbitration panel was based on the Bilateral Investment Treaty between the United Kingdom and Argentina. This treaty provides that disputes between an investor, such as Petitioner, and the host State will be resolved in the host State’s courts. If, however, no final court ruling is forthcoming within 18 months or the dispute is unresolved after a court ruling, the Treaty provides that the dispute may then proceed to arbitration.

Following the issuance of the arbitration award, Argentina petitioned the federal district court to vacate or modify the award. The district court denied that petition. The D.C. Circuit reversed, concluding that under the language of the Treaty, an Argentine court must first have the opportunity to resolve the dispute. The D.C. Circuit proceeded to vacate the arbitration award. *Republic of Argentina v. BG Group PLC*, 665 F.3d 1363 (D.C. Cir. 2012).

The D.C. Circuit rejected Petitioner’s argument that the arbitration panel, not the courts, must decide whether the precondition to arbitration has been satisfied. The D.C. Circuit summarized its reasoning as follows: “Because the Treaty provides that a precondition to arbitration of an investor’s claim is an initial resort to a contracting party’s court, and the Treaty is silent on who decides arbitrability when that precondition is disregarded, we hold that the question of arbitrability is an independent question of law for the court to decide.” *Id.* at 1371. The D.C. Circuit noted that because the Treaty provision is explicit, the usual federal policy in favor of arbitration cannot override the intent of the contracting parties. *Id.* at 1373.
Petitioner argues that no provision of the Treaty anticipates any role for the courts of the nation that hosts the arbitration (here, the United States). Rather, the decision of arbitrability should be left in the hands of the arbitration tribunal – a body that is more expert than a United States court in interpreting the Treaty on the basis of controlling principles of international law. Petitioner emphasizes that companies will not risk hundreds of millions of dollars in making an investment in a foreign country unless they are sure that disputes will be resolved by a neutral and expert tribunal.

In its amicus brief, the United States argues that the case should be remanded to the D.C. Circuit to determine whether the Treaty’s litigation requirement is a condition to Argentina’s consent to arbitrate. The Respondent’s merits brief is not yet available.

Bankruptcy – Authority of Bankruptcy Court Judges

In Executive Benefits Insurance Agency v. Arkison, No. 12-1200, the Court will consider the limitations that Article III of the Constitution imposes on the authority that Congress may give to bankruptcy judges. The question presented, as set out in the cert petition, is:

In Stern v. Marshall, 131 S. Ct. 2594 (2011), this Court held that Article III of the United States Constitution precludes Congress from assigning certain “core” bankruptcy proceedings involving private state law rights to adjudication by non-Article III bankruptcy judges. Applying Stern, the court of appeals for the Ninth Circuit held that a fraudulent conveyance action is subject to Article III. The court further held, in conflict with the Sixth Circuit, that the Article III problem had been waived by petitioner’s litigation conduct, which the court of appeals construed as implied consent to entry of final judgment by the bankruptcy court. The court of appeals also held, in conflict with the Seventh Circuit, that a bankruptcy court may issue proposed findings of fact and conclusions of law, subject to a district court’s de novo review, in “core” bankruptcy proceedings where Article III precludes the bankruptcy court from entering final judgment. The court of appeals’ decision presents the following questions, about which there is considerable confusion in the lower courts in the wake of Stern:

1. Whether Article III permits the exercise of the judicial power of the United States by bankruptcy courts on the basis of litigant consent, and, if so, whether “implied consent” based on a
litigant’s conduct, where the statutory scheme provides the litigant no notice that its consent is required, is sufficient to satisfy Article III.

2. Whether a bankruptcy judge may submit proposed findings of fact and conclusions of law for de novo review by a district court in a “core” proceeding under 28 U.S.C. § 157(b).

In *Stern v. Marshall*, 131 S. Ct. 2594 (2011), the Court reiterated that “Congress may not ‘withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.’” *Id.* at 2609 (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)). Congress, however, may assign to “legislative courts,” such as bankruptcy courts, cases involving “public rights” for adjudication. 131 S. Ct. at 2610.

In this case, the Ninth Circuit concluded that the adjudication of a fraudulent conveyance claim against a nonclaimant to a bankruptcy estate is a suit at common law and cannot be characterized as the adjudication of a public right. *In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553 (9th Cir. 2012). Accordingly, the Ninth Circuit held that bankruptcy judges do not have the authority under the Constitution to resolve such claims. The Ninth Circuit, however, proceeded to hold that a hearing before an Article III court is waivable and that Petitioner waived that right by failing to object. The Ninth Circuit summarized its decision as follows:

Fraudulent conveyance claims are quintessentially suits at common law designed to augment the bankruptcy estate. Thus, Article III bars bankruptcy courts from entering final judgments in such actions brought by a noncreditor absent the parties’ consent. But here [Executive Benefits Insurance Agency] consented to the bankruptcy court’s jurisdiction, rendering that court’s entry of summary judgment in favor of the Trustee constitutionally sound.

*Id.* at 572-73 (internal quotations omitted).

Merits briefing in this case is not yet complete. The case has not yet been set for oral argument.
Class Action Fairness Act

In Mississippi v. AU Optronics Corp., No. 12-1036, the Court will address whether claims brought by state attorneys general as parens patriae for injured citizens of the State are subject to restrictions and limitations of the Class Action Fairness Act of 2005 (“CAFA”), Pub. L. No. 109-2, 119 Stat. 4. The issue set out in the petition is:

Whether a State’s parens patriae action is removable as a “mass action” under the Class Action Fairness Act when the State is the sole plaintiff, the claims arise under state law, and the state attorney general possesses statutory and common-law authority to assert all claims in the complaint.

The case will be argued on Wednesday, November 6, 2013.

CAFA provides that class actions and “mass actions” may be removed from state to federal court. In this case, the Petitioner, Mississippi Attorney General Jim Hood, brought a parens patriae action against Respondents AU Optronics and others in state court in connection with Respondents’ alleged price fixing of liquid crystal display panels. Although General Hood’s lawsuit does not stand as a class action, the Fifth Circuit concluded that the action constitutes a “mass action” as that term is used in CAFA and that the action was therefore properly removed from state to federal court. Mississippi v. AU Optronics Corp., 701 F.3d 796 (5th Cir. 2012). CAFA defines a “mass action” as a civil action in which monetary relief of 100 or more persons is to be tried jointly. The Fifth Circuit concluded that in this action, Mississippi is acting, not in a parens patriae capacity, but essentially as a class representative. Id. at 801. The Fifth Circuit found that the real parties in interest in this action are both the State (as a purchaser of LCDs) and individual consumers.

The Fifth Circuit also rejected the State’s reliance on CAFA’s “general public” exception. 28 U.S.C. § 1332(d)(11)(B)(ii)(III). This CAFA provision states that a suit is not a “mass action” if “all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action.” Id. The Fifth Circuit concluded that because individual consumers are real parties in interest, “all of the claims in the action” are not being asserted “on behalf of the general public.” 701 F.3d at 802. The Fifth Circuit acknowledges that its construction of the general public exception would effectively render the exception “a dead letter.” Id. It concluded, however, that such a reading was required by the literal language of the Act.
In its merits brief, Mississippi asserts that “this is a case about federalism and the respect for the institutional sovereignty of the States and their chief legal officers, legislators, and judicial systems.” Pet. Br. at 10. Mississippi further argues that the text and history of CAFA demonstrate that it does not extend to parens patriae actions. Respondents retort that the Fifth Circuit’s decision does not raise federalism concerns and that its decision is squarely based on the plain language of CAFA. Respondents are supported by numerous amici, including DRI and the Pharmaceutical Research and Manufacturers of America.

Commerce – Sale of Firearms

The criminal defendant’s appeal in Abramski v. United States, No. 12-1493, is noteworthy for two reasons. First, the Petitioner in the case is represented by North Carolina counsel. Second, the case will impact the sale of certain goods (i.e., firearms). The issues, as set out in the defendant’s petition, are:

Is a gun buyer’s intent to sell a firearm to another lawful buyer in the future a fact “material to the lawfulness of the sale” of the firearm under 18 U.S.C. § 922(a)(6)?

Is a gun buyer’s intent to sell a firearm to another lawful buyer in the future a piece of information “required . . . to be kept” by a federally licensed firearm dealer under [18 U.S.C.] § 924(a)(1)(A)?

Petitioner Bruce Abramski asserts that the identity of the ultimate recipient of a firearm is material only if that recipient could not legally purchase or possess the firearm. Petitioner also argues that licensed firearm dealers are not required to record whether a firearm purchaser intends to later sell the gun to someone else.

In 2009, Petitioner purchased a handgun for his uncle. During the purchase, he completed Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) Form 4473, which asked, “Are you the actual transferee/buyer of the firearm(s) listed on this form? Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person.” Petitioner responded “Yes” on the form. Four days later, Petitioner transferred the handgun to his uncle.

On November 18, 2010, Petitioner was indicted for making a false statement on ATF Form 4473 and for making a false statement with respect to information required to be kept in the records of a licensed firearms dealer (the identity of the purchaser). Both charges relied on the theory that Petitioner was a “straw purchaser” of the firearm – an individual who “represents himself to be the actual buyer, but is actually the agent of another person who will receive possession of the firearm.” United States v. Abramski, 706 F.3d 307, 312 n.4 (4th Cir. 2013) (citation
omitted). Petitioner moved to dismiss both counts. He argued that the straw purchaser doctrine only applies when the ultimate recipient of the firearm is ineligible to purchase or possess a gun. Here, his uncle was eligible to do both. The district court denied the motion.

The Fourth Circuit affirmed, concluding, “[T]he identity of the actual purchaser of a firearm is a constant that is always material to the lawfulness of a firearm acquisition.” Abramski, 706 F.3d at 316. The Fourth Circuit also held that “the identity of the actual purchaser of the . . . handgun was a fact required to be maintained” by the firearms dealer, so as the “straw purchaser,” Petitioner made a false statement with respect to information required to be kept by a licensed firearm dealer. Id. at 317.

Cert was granted on October 15, 2013 to resolve the five-circuit split as to the proper application of the straw purchaser doctrine. Richard Dietz of Kilpatrick, Townsend & Stockton LLP represents Mr. Abramski. The case has not yet been set for oral argument.

Copyright – Laches

In Petrella v. Metro-Goldwyn-Mayer, Inc., No. 12-1315, the Court will consider whether laches may be asserted as a defense in connection with a civil copyright claim brought within the Copyright Act’s three-year limitation period for such claims. The question presented as set out in the cert petition is:

The Copyright Act expressly prescribes a three-year statute of limitations for civil copyright claims. 17 U.S.C. § 507(b). The three-year period accrues separately for each act of infringement, even if it is one of a continuing series of acts of infringement. The federal courts of appeals have divided 3-2-1 over whether the nonstatutory defense of laches can bar a civil copyright suit brought within the express three-year statute of limitations. Three circuits forbid any application of laches or restrict the remedies to which it can apply. Two other circuits strongly disfavor laches and restrict it to exceptional circumstances. The Ninth Circuit not only does not restrict laches or the remedies to which it can apply, but has also adopted a presumption in favor of applying laches to continuing copyright infringements.

The question presented is:

Whether the nonstatutory defense of laches is available without restriction to bar all remedies for civil copyright claims filed within the

Certiorari was granted on October 1, 2013. The Petitioners have not yet filed their merits brief, and the case has not yet been set for oral argument.

Petitioner Paula Petrella claims that Respondent MGM infringed her purported interest in a book and two screenplays that formed the basis for the 1980 movie Raging Bull. The district court granted summary judgment for MGM based on the equitable defense of laches. The Ninth Circuit affirmed. The cert petition argues that applying laches to bar a copyright action filed within the statutory limitations period violates separation of powers and undermines the Copyright Act’s purposes.

Environmental – Clean Air Act – Greenhouse Gases Rule

On October 15, 2013, six separate cert petitions were granted in which the Petitioners requested that the Court review a decision of the D.C. Circuit upholding the EPA’s regulation of greenhouse gas emission by stationary sources. See Utility Air Regulatory Group v. EPA, No. 12-1146. The Court’s order granting cert limits the question to the following:

Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

The Court’s order consolidates the six petitions and allots a total of one hour for the oral argument.

In this case, the D.C. Circuit held that the EPA had properly adopted greenhouse gas rules. Coalition for Responsible Regulation, Inc. v. EPA, 684 F.3d 102 (D.C. Cir. 2012). Those rules provide that 1) greenhouse gases may reasonably be anticipated to endanger public health or welfare and 2) major stationary sources of greenhouse gases must obtain construction and operating permits. The EPA further provided that only the largest stationary sources would initially be required to obtain construction and operating permits in connection with greenhouse gases.

In Massachusetts v. EPA, 549 U.S. 497 (2007), the Court held that EPA has the statutory authority to regulate the emission of greenhouse gases from new motor vehicles. Following that decision, EPA concluded that its promulgation of motor vehicle greenhouse gas emission standards under Title II of the Clean Air Act, 42 U.S.C. § 7521(a)(1), compelled regulation of greenhouse gases under Title I
(prevention of significant deterioration) and Title V (permitting of stationary sources) of the Clean Air Act. The petitions in the present case challenge whether EPA does in fact have that authority with respect to stationary sources. In its cert petition, the Utility Air Regulatory Group (“UARG”), for example, asserts that regulating greenhouse gases under Titles I and V would vastly expand these programs contrary to Congress’ intent.

Environmental – Clean Air Act – Cross-State Air Pollution Rule

This Term will address interstate air pollution in two consolidated appeals, *EPA v. EME Homer City Generation*, No. 12-1182 and *American Lung Association v. EME Homer City Generation*, No. 12-1183. The issues presented, as articulated by EPA, are as follows:

(1) Whether the court of appeals lacked jurisdiction to consider the challenges to the Clean Air Act on which it granted relief; (2) whether states are excused from adopting state implementation plans prohibiting emissions that “contribute significantly” to air pollution problems in other states until after the EPA has adopted a rule quantifying each state’s inter-state pollution obligations; and (3) whether the EPA permissibly interpreted the statutory term “contribute significantly” so as to define each upwind state’s “significant” interstate air pollution contributions in light of the cost-effective emission reductions it can make to improve air quality in polluted downwind areas, or whether the Act instead unambiguously requires the EPA to consider only each upwind state’s physically proportionate responsibility for each downwind air quality problem.

Oral argument is scheduled for Tuesday, December 10, 2013.

In 2005, the EPA issued the Clean Air Interstate Rule (CAIR), 70 Fed. Reg. 25,171 (May 12, 2005), to address the problem of air pollution emitted in one State that causes harm in another State. North Carolina challenged that rule, asserting that it was not sufficiently protective of downwind States. The D.C. Circuit agreed with North Carolina and remanded. *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008); *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008).

EPA adopted the Cross-State Air Pollution Rule (“CSAPR” or the “Transport Rule”), 76 Fed. Reg. 48,208 (Aug. 8, 2011), in response to the remand in *North Carolina v. EPA*. The Transport Rule addresses the emission of pollutants in 27 upwind States that hinders the ability of downwind States to attain or maintain air quality standards.
The D.C. Circuit concluded that the Transport Rule violates the Clean Air Act. The court concluded that where multiple upwind States contribute to downwind nonattainment issues in other States, the rule does not ensure that the reductions required in any given upwind State are proportional to that State’s share of the modeled downwind contribution. The D.C. Circuit further concluded that the Transport Rule does not assure that the collective obligations of the upwind States will not exceed the minimum amount necessary to enable affected downwind States to meet air quality standards. The D.C. Circuit also held that EPA should have given upwind States an opportunity to address the problem through their State Implementation Plans.

Although the issues raised in this appeal are complicated and technical, the case has far-reaching implications on both upwind and downwind States – and any company that emits air pollutants pursuant to a Clean Air Act permit or intends to seek such a permit in the future. The many issues raised by this appeal include the extent to which the EPA should be afforded deference under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), issues of waiver/failure-to-preserve in the context of challenges to administrative regulations, and whether the D.C. Circuit had jurisdiction to hold that EPA had issued federal implementation plans prematurely.

Merits briefing in this case is not yet complete.

**ERISA**

In *Heimeshoff v. Hartford Life & Casualty Co.*, No. 12-729, the Court will determine the applicable statute of limitations for reviewing a disability benefit determination under ERISA, 29 U.S.C. §§ 1101 et seq. The question presented on which the Court granted certiorari is:

When should a statute of limitations accrue for judicial review of an ERISA disability adverse benefit determination?

The case was argued on Tuesday, October 15, 2013.

In this case, Petitioner Julie Heimeshoff brought an action under ERISA challenging Respondent’s denial of long term disability benefits. The Second Circuit, in an unpublished opinion, concluded that the action was time-barred because it was not brought within the policy’s requirement that any action must be brought within three years from the time proof of loss was due under the plan. *Heimeshoof v. Hartford Life & Accident Ins. Co.*, 496 Fed. App’x 129 (2d Cir. 2012). The Second Circuit rejected Petitioner’s argument that the limitation period does not begin to run until the final denial of benefits.
In her merits brief, Petitioner notes that she cannot file a claim in federal court for denial of benefits under ERISA until she has first exhausted the internal remedies available under the plan. Petitioner therefore asserts that it would be improper to start the clock running on her claim before she could bring suit. Petitioner argues that starting the clock running before the internal resolution process has been exhausted would thwart the purpose and design of ERISA. The United States, in an amicus brief, argues that an employee benefit plan governed by ERISA may not prescribe a limitations period for seeking review of denial of benefits that commences before the plan has made a final decision. Respondents counter that the limitation provision in the plan is enforceable because nothing in ERISA’s text or implementing regulations prohibits it.

Fair Housing Act – Disparate Impact Claims

In *Mount Holly v. Mt. Holly Gardens Citizens in Action*, No. 11-1507, the Court will consider whether disparate impact claims are cognizable under the Fair Housing Act, 42 U.S.C. §3604(a). The question presented, as set out in the cert petition, is:

The Fair Housing Act makes it unlawful “[t]o refuse to sell or rent after the making of a bona fide offer . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” 42 U.S.C. §3604(a). Reversing the District Court’s decision, the Third Circuit found that the Respondents presented a prima facie case under the Fair Housing Act because Petitioners sought to redevelop a blighted housing development that was disproportionately occupied by low and moderate income minorities and because the redevelopment sought to replace the blighted housing with new market rate housing which was unaffordable to the current residents within the blighted area. The Third Circuit found that a prima facie case had been made despite the fact that there was no evidence of discriminatory intent and no segregative effect.

The following question is presented:

1. Are disparate impact claims cognizable under the Fair Housing Act?

The case is set for oral argument on Wednesday, December 4, 2013.

In 2002, Petitioner, the Town of Mt. Holly, New Jersey, undertook to redevelop a blighted residential area. Respondents seek damages and to enjoin the
plan on the ground that a majority of the residents of the impacted neighborhood are racial minorities. The district court granted summary judgment in favor of Petitioner. The Third Circuit reversed, concluding that the evidence taken in the light most favorable to Respondents was sufficient to support a disparate impact claim against Petitioner.

Petitioner argues that the Fair Housing Act does not permit disparate impact claims. Rather, the text prohibits disparate treatment alone. Petitioner argues that the Third Circuit’s decision requires local governments to account for race in every redevelopment decision and to treat citizens in neighboring communities differently depending on the racial demographics of those communities.

**Fair Labor Standards Act**

In *Sandifer v. U.S. Steel Corporation, No. 12-417*, the Court will once again address the circumstances in which workers must be paid under the Fair Labor Standards Act for donning and doffing work-related clothing. See *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005). The question presented in this case is:

Under the Fair Labor Standards Act, the period of time during which a covered employee must be paid begins when the worker engages in a principal activity. Donning and doffing safety gear (including protective clothing) required by the employer is a principal activity when it is an integral and indispensable part of the activities for which the worker is employed. Such requirements are common in manufacturing firms. However, under section 203(o) of the Act an employer need not compensate a worker for time spent in “changing clothes” (even if it is a principal activity) if that time is expressly excluded from compensable time under a bona fide collective bargaining agreement applicable to that worker.

The question presented is:

(1) What constitutes “changing clothes” within the meaning of section 203(o)?

The case will be heard on Monday, November 4, 2013.
Federal Appellate Jurisdiction – Attorneys’ Fees

In *Ray Haluch Gravel Co. v. Central Pension Fund*, No. 12-992, the Court will consider the final judgment rule in the context of attorneys’ fees. The specific question presented is:

In *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), this Court held that a district court’s decision on the merits that left unresolved a request for statutory attorney’s fees was a “final decision” under 28 U.S.C. § 1291. The question presented in this case, on which there is an acknowledged conflict among nine circuits, is whether a district court’s decision on the merits that leaves unresolved a request for contractual attorney’s fees is a “final decision” under 28 U.S.C. § 1291.

The case is scheduled for oral argument on Monday, December 9, 2013.

The Fourth Circuit is among the many circuits that have previously spoken on this issue. In *Carolina Power & Light Co. v. Dynegy Mktg. & Trade*, 415 F.3d 354 (4th Cir. 2005), the Fourth Circuit held an order that does not resolve a request for contractual attorneys’ fees is not an appealable final decision. Whether *Dynegy* is good law will, of course, be decided by the Supreme Court in this case.

Forum Selection Clauses

In *Atlantic Marine Construction Co. v. United States District Court*, No. 12-929, the Court will take up a Fifth Circuit decision allowing a case to proceed in Texas despite a forum selection provision entered into by the parties that directs that any dispute must be brought in Virginia. The specific question presented is:

(1) Whether the Court’s decision in *Stewart Organization, Inc. v. Ricoh Corp.* changed the standard for enforcement of clauses that designate an alternative federal forum, limiting review of such clauses to a discretionary, balancing-of-conveniences analysis under 28 U.S.C. § 1404(a); and (2) whether district courts should allocate the burdens of proof among parties seeking to enforce or to avoid a forum-selection clause.

The case was argued on Wednesday, October 9, 2013.

Among the amici briefs filed on the merits, two are particularly noteworthy. First, the amicus brief filed by the U.S. Chamber of Commerce forcefully argues
that forum selection clauses must be enforced by the courts. The Chamber asserts that such clauses serve to reduce potential litigation costs and limit forum-shopping by the parties. The Chamber further argues that failure to enforce such provisions will discourage small businesses from expanding into geographic markets beyond their traditional market area. Second, Professor Stephen Sachs of Duke University School of Law filed an amicus brief supporting neither party. Contrary to both the Petitioner and Respondent, Professor Sachs argues that the forum selection clause should be treated as an affirmative defense and that an action should be dismissed if it is filed in violation of a valid and enforceable forum selection clause. Prior to the oral argument, the Court issued an order directing that the parties “should be prepared to address at oral argument the arguments raised in the brief of Professor Stephen E. Sachs.” Such an order can only be described as extraordinary. See Tony Mauro, Justices’ Order: Read This Brief, National Law Journal (Oct. 2, 2013). As expected, Professor Sachs’ amicus brief was discussed extensively at oral argument. Tr. at 12-13, 15-16, 21-22, 48-49, 51, 55-56; Tony Mauro, Duke Law Prof’s Brief Takes Center Stage, National Law Journal (Oct. 9, 2013).

In Atlantic Marine, Petitioner Atlantic Marine Construction and Respondent J-Crew Management Inc. entered into a contractual agreement pursuant to which Respondent was to provide construction labor and materials in connection with a child development center to be built in Texas. The agreement provided that any dispute would be filed in state or federal court in Virginia. Respondent, however, brought a breach of contract action against Petitioner in federal court in Texas. The district court denied Petitioner’s motion, thereby allowing the action to proceed in Texas. Petitioner then filed a writ of mandamus with the Fifth Circuit which was denied.

The starting point for analyzing Atlantic Marine is the Court’s decision 25 years ago in Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988). In Stewart, the Court addressed 28 U.S.C. § 1404 (a federal district court may transfer any civil action to another district or division in the interest of justice and for the convenience of the parties and witnesses). In Stewart, the Court noted that in determining whether a transfer is appropriate, the court should “take account of factors other than those that bear solely on the parties’ private ordering of their affairs.” 487 U.S. at 30.

In Atlantic Marine, Petitioner argues that private parties must be held to the terms of forum selection clauses to which they have agreed. Petitioner asserts that the Court’s decision in Stewart does not control the dispute at hand. In Stewart, the defendant waived any argument that the action should be dismissed under Fed. R. Civ. P. 12(b)(3) for improper venue. Respondents argue that venue is proper under 28 U.S.C. § 1391(b) (venue in a civil action) and that private parties cannot render venue that is proper under the statute improper by agreement.
Perhaps signaling his vote on this case, Chief Justice Roberts, at oral argument, referred to forum selection clauses as “critically important.” Tr. at 49. He further commented that if the parties have included a forum selection clause in their contract, “I would say it seems pretty material.” Tr. at 50.

**Labor and Employment – Collective Bargaining Agreements**

Under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), non-union employees may be compelled to pay their “fair share” of the costs of a union’s collective bargaining activities. In *Harris v. Quinn*, No. 11-681, the Court will consider the application of that principle to personal assistants who provide in-home care to Medicaid recipients. The questions presented, as articulated by the United States in its amicus brief, are:

A “fair-share” provision of a collective-bargaining agreement between the State of Illinois and a union representing certain personal assistants providing in-home care requires personal assistants who are not members of the union “to pay their proportionate share of the costs of the collective-bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment.” Pet. App. 5a (quoting collective-bargaining agreement).

The questions presented are:

1. Whether the fair-share provision is consistent with the requirements of the First Amendment because the personal assistants subjected to it are employees of the State of Illinois.

2. Whether a First Amendment challenge brought by other personal assistants to the possible inclusion of a similar fair-share provision in a future collective-bargaining agreement is ripe even though those personal assistants voted against union representation, no collective-bargaining agreement exists, and the personal assistants are not subjected to any fair-share requirement.

Certiorarri was granted on October 1, 2013. The Petitioners have not yet filed their merits brief, and the case has not yet been set for oral argument.

**Labor and Employment – Labor Management Relations Act**

In *Unite Here Local v. Mulhall*, No. 12-99, the Court faces the question of whether employers and unions may set ground rules for union organizing
campaigns without violating Section 302 of the Labor Management Relations Act (“LMRA”), 28 U.S.C. § 186. The question presented, as articulated by the United States, is:

Whether an employer’s compliance with a voluntary recognition agreement between the employer and a labor union, in which the employer agrees to remain neutral on the question of unionization and provide the union with access to its employees and facilities, violates Section 302 of the Labor Management Relations Act, 28 U.S.C. § 186.

The case is scheduled for oral argument on Wednesday, November 13, 2013.

Section 302 of the LMRA makes it unlawful for any employer to give anything of value to any labor organization that represents or seeks to represent any employees of that employer. 29 U.S.C. § 186(a)(2). Respondent’s employer (Mardi Gras Gaming) entered into an understanding with a local union that would establish the ground rules for unionization efforts relating to employees of Mardi Gras Gaming. Specifically, Mardi Gras Gaming agreed to: (1) provide union representatives with non-public work premises to organize employees during non-work hours; (2) provide the union with a list of employees; and (3) remain neutral to the unionization of its employees. In return, the local union agreed to support a ballot initiative regarding casino gaming and, in fact, spent $100,000 in support of that ballot initiative.

Respondent Martin Mulhall opposed being unionized and brought the present action seeking to enjoin the enforcement of the agreement between his employer, Mardi Gras Gaming, and Unite Here Local 355. Specifically, Respondent asserts that the items provided by Mardi Gras Gaming constitute a “thing of value” within the meaning of Section 302 of the LMRA.

The Eleventh Circuit concluded that providing organizing assistance can be a thing of value. Mulhall v. Unite Here, 667 F.3d 1211, 1215 (11th Cir. 2012). Moreover, in this case, the value of what the union is being provided is highlighted by the fact that the union, consistent with the terms of the agreement, spent $100,000 to help the employer’s efforts to pass the ballot initiative. The Eleventh Circuit therefore held that Respondent’s complaint stated a claim for relief.

Petitioner argues that an employer’s decisions concerning how to exercise its free speech rights (including remaining silent), whom it lets on its premises, and whether to share information about its employees do not constitute a “thing of value” within the meaning of Section 302. The United States, in an amicus brief supporting Petitioner, argues that an employer and union may agree on ground rules for an organizing campaign, including an employer’s provision of access, employee lists and neutrality, without violating the LMRA.
Respondent, represented by the National Right to Work Legal Defense Foundation, argues that the information provided by Petitioner to the local union – especially employee lists and employee information – are of great value to the union. Respondent asserts, “The experience of the last two decades demonstrates that unions have been willing to sacrifice employee interests – such as agreeing in advance to make wage and other concessions at the expense of employees they seek to unionize – to obtain the organizing assistance they covet.” Br. of Resp. at 11. According to Respondent, a rigid construction of Section 302 protects employees from union self-dealing in collective bargaining.

Lanham Act – Standing

In *Lexmark International v. Static Control Components*, No. 12-873, the Court will address standing under the Lanham Act, 15 U.S.C. § 1051 et seq. The question presented is:

Whether the appropriate analytic framework for determining a party’s standing to maintain an action for false advertising under the Lanham Act is (1) the factors set forth in *Associated General Contractors of California, Inc. v. California State Council of Carpenters* as adopted by the Third, Fifth, Eighth, and Eleventh Circuits; (2) the categorical test, permitting suits only by an actual competitor, employed by the Seventh, Ninth, and Tenth Circuits; or (3) a version of the more expansive “reasonable interest” test, either as applied by the Sixth Circuit in this case or as applied by the Second Circuit in prior cases.

The case is scheduled for oral argument on Tuesday, December 3, 2013.

Petitioner Lexmark produces laser printers and printing cartridges for its printers. In order to prevent other companies from acquiring used Lexmark cartridges, refilling those cartridges and then selling those recycled cartridges to Lexmark customers, Lexmark developed microchips for its cartridges that effectively prevent others from recycling used Lexmark cartridges. Respondent Static Control Components, a North Carolina company, developed cartridge microchips that allow recycled cartridges to be used in Lexmark printers without being rejected by those printers. Respondent sells the microchips to remanufacturers to facilitate the repair and resale of Lexmark toner cartridges.

Lexmark sued Static Control for violations of federal copyright laws in connection with the computer programs on Lexmark’s printer chips. Static Control filed a counterclaim asserting antitrust and Lanham Act violations. Static Control’s Lanham Act claim asserts that Lexmark falsely informed customers that Static
Control’s microchips infringe Lexmark’s intellectual property. The district court dismissed Static Control’s counterclaim for lack of Lanham Act standing. The Sixth Circuit reversed and remanded with instructions to reinstate Static Control’s Lanham Act claims.

Lexmark asserts that standing to bring a Lanham Act claim should be limited to an actual competitor making an unfair competition claim. In its brief in opposition to the cert petition, Static Control asserted that Lexmark specifically targeted Static Control with false commercial statements attacking the lawfulness of Static Control’s products and the company’s reputation for honesty and integrity. Static Control asserts that Lexmark’s intentional effort to harm Static Control’s commercial sales and goodwill is precisely the type of unfair competition that the Lanham Act was enacted to address.

Merits briefing in this case is not yet complete.

**Patents – Attorneys’ Fees**

The Court will hear two cases this Term relating to an award of attorneys’ fees under the Patent Act. *Highmark, Inc. v. Allcare Health Management Systems, No. 12-1163; Octane Fitness, LLC v. Icon Health & Fitness, Inc., No. 12-1184.* Certiorari in both of these cases was granted on October 1, 2013. Accordingly, neither of these cases has been set for oral argument. Additionally, no merits briefs have been filed in either case.

In *Highmark, Inc. v. Allcare Health Management Systems, No. 12-1163*, the Court will consider the deference that should be given to a district court’s decision in granting attorneys’ fees under the Patent Act, 35 U.S.C. § 285. The specific question presented, as set out in the cert petition, is:

The Patent Act provides that a “court in exceptional cases may award reasonable attorney fees to the prevailing party.” 35 U.S.C. § 285. A case is “exceptional” if it is objectively baseless and brought in bad faith. After living with this case for more than six years, the District Court found that it was objectively baseless and brought in bad faith, and it awarded fees. Over a strong dissent, a Federal Circuit panel reversed, holding that a district court’s objective baselessness determination is reviewed “without deference.” Pet. App. 9a. The Federal Circuit denied rehearing en banc by a vote of six to five. One of the two pointed dissents from that denial accurately observed that the decision below “deviates from precedent * * * and establishes a review standard for exceptional case findings in patent cases that is squarely
at odds with the highly deferential review adopted by every regional circuit and the Supreme Court in other areas of law.” Pet. App. 191a.

The question presented is:

Whether a district court’s exceptional-case finding under 35 U.S.C. § 285, based on its judgment that a suit is objectively baseless, is entitled to deference.

In Octane Fitness, LLC v. Icon Health & Fitness, Inc., No. 12-1184, the Petitioner attacks the specific test employed by the Federal Circuit in determining whether to award attorneys’ fees under the Patent Act. The specific question presented is:

Does the Federal Circuit’s promulgation of a rigid and exclusive two-part test for determining whether a case is “exceptional” under 35 U.S.C. § 285 improperly appropriate a district court’s discretionary authority to award attorney fees to prevailing accused infringers in contravention of statutory intent and this Court’s precedent, thereby raising the standard for accused infringers (but not patentees) to recoup fees and encouraging patent plaintiffs to bring spurious patent cases to cause competitive harm or coerce unwarranted settlements from defendants?

Patents – Burden of Proof in Declaratory Judgment Actions

In Medtronic v. Boston Scientific Group, No. 12-1128, the Court will consider the burden of proof with respect to declaratory judgment actions brought by a licensee as to the validity of a patent. The specific question presented is:

Whether, in a declaratory judgment action brought by a licensee under MedImmune, Inc. v. Genentech, Inc., the licensee has the burden to prove that its products do not infringe the patent, or whether (as is the case in all other patent litigation, including other declaratory judgment actions), the patentee must prove infringement.

Oral argument in this case is scheduled for Tuesday, November 5, 2013.

The federal Declaratory Judgment Act, 28 U.S.C. § 2201, is frequently used by a party who has been charged with the infringement of a patent to determine the validity of an issued patent. Respondents hold two patents relating to a medical device that stimulates portions of a patient’s heart to ensure that the heart’s
chambers are synchronized. After Respondents notified Petitioner Medtronic that seven Medtronic products infringe Respondents’ patents, Medtronic responded by filing a declaratory judgment action. The federal district court issued a declaratory judgment in favor of Medtronic. The district court concluded that the party asserting infringement (Respondents) bore the burden of proof by a preponderance of the evidence. The Federal Circuit reversed, holding that when a declaratory-judgment plaintiff is a licensee (as is the case here), the burden of proof regarding infringement should shift from the patent holder to the licensee.

In its merits brief, Petitioner argues that the Declaratory Judgment Act is a purely procedural statute that neither enlarges the jurisdiction of the federal courts nor alters substantive rights. Petitioner asserts that the burden of proof is a matter of substance reflecting a legislative policy judgment. Petitioner therefore argues that the burden of proof in a Declaratory Judgment Act must not be based on the nominal status of the parties in the declaratory judgment action, but should be based on where the burden would lie if the action were to be brought as a direct action rather than as a declaratory judgment proceeding. The United States, as amicus curiae, supports the Petitioner’s view of the Declaratory Judgment Act.

Merits briefing in this case is not yet complete.

Personal Jurisdiction – Parent Corporations

In DaimlerChrysler AG v. Bauman, No. 11-965, the Court will address when a parent corporation may be subject to personal jurisdiction based on the activities of a subsidiary corporation. The question presented is whether:

[I]t violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State.

This case, which was argued on Tuesday, October 15, 2013, has generated substantial interest in the press and among the business community. See 66 Vanderbilt L. Rev. En Banc 63 (2013) (available at www.vanderbiltlawreview.org). Twelve amicus briefs on the merits were filed in this case – 9 for Petitioner DaimlerChrysler and 3 for the plaintiffs. The amicus briefs supporting DaimlerChrysler include briefs by the United States and by the U.S. Chamber of Commerce. The American Association for Justice filed a brief supporting Respondent Bauman.

The plaintiffs brought suit in federal district court in California against DaimlerChrysler AG, a German corporation, in connection with the company’s
alleged involvement in Argentina’s Dirty War when a military coup ousted President Isabel Peron in 1976. Specifically, plaintiffs assert that Mercedes-Benz Argentina (“MAB”), a wholly owned-subsidiary of DaimlerChrysler AG, collaborated with the military to help end a strike at an MAB plant in Argentina, thereby resulting in the murder and torture of plant workers involved with the strike.

DaimlerChrysler moved to dismiss the action for lack of personal jurisdiction, asserting that it could not be sued in the United States based on the presence of its subsidiaries here. The federal district court granted that motion. On appeal, the Ninth Circuit reversed. *Bauman v. Daimler Corp.*, 644 F.3d 909 (9th Cir. 2010). The Ninth Circuit concluded that in determining whether personal jurisdiction may be asserted over a parent corporation based on acts of a subsidiary, the court should employ two separate and independent tests: 1) an alter ego test and 2) an agency test. Under the agency test, according to the Ninth Circuit, the court must determine whether the services provided by the subsidiary to the parent are sufficiently important that if the subsidiary went out of business, the parent corporation would sell its product into the subsidiary’s market directly or would sell to that market through a new representative. 644 F.3d at 920. The Ninth Circuit concluded that it was consistent with Due Process to assert jurisdiction over DaimlerChrysler in the United States given the importance of the functions performed by its U.S. subsidiaries, the control that it exercised over these subsidiaries and its “right to control nearly all aspects of [the subsidiaries’] operations.” *Id.* at 924. The Ninth Circuit further concluded that the assertion of jurisdiction over DaimlerChrysler was reasonable, noting that “American federal courts, be they in California or any other state, have a strong interest in adjudicating and redressing international human rights abuses.” *Id.* at 927.

DaimlerChrysler argues that personal jurisdiction may only be established over a parent corporation based on the acts of the subsidiary when the parent and subsidiary are alter egos. It further argues that even if the federal courts had personal jurisdiction over DaimlerChrysler, allowing the action to proceed in the United States would not be reasonable given that all of the alleged conduct occurred in Argentina over 30 years ago.

The plaintiffs argue that the alter ego test does not define the constitutional outer bounds of a State’s authority to disregard corporate formalities for purposes of personal jurisdiction. Plaintiffs further argue that the Ninth Circuit appropriately concluded that DaimlerChrysler’s U.S. subsidiaries properly stand as an agent of DaimlerChrysler.

The amicus brief of the U.S. Chamber of Commerce makes two principal arguments: (1) corporations are subject to general jurisdiction only in their States of incorporation and principal place of business and (2) a parent corporation’s right to
control a subsidiary is not a sufficient basis for asserting jurisdiction over the parent.


**Personal Jurisdiction – Intentional Torts**

The factual background concerning Walden v. Fiore, No. 12-574, makes for interesting reading. Only time will tell whether the personal jurisdiction issue raised by this case will one day become mandatory reading for first year law students in Civil Procedure classes.

The two issues presented by this appeal are:

(1) Whether due process permits a court to exercise personal jurisdiction over a defendant whose sole “contact” with the forum state is his knowledge that the plaintiff has connections to that state; and (2) whether the judicial district where the plaintiff suffered injury is a district “in which a substantial part of the events or omissions giving rise to the claim occurred” for purposes of establishing venue under 28 U.S.C. § 1391(b)(2) even if the defendant’s alleged acts and omissions all occurred in another district.

The case is scheduled for oral argument on Monday, November 4, 2013. Amici supporting the Petitioner (a DEA agent based in Atlanta who is contesting personal jurisdiction in Nevada) include the U.S. Chamber of Commerce, the United States and 18 States and the District of Columbia.

Respondents Gina Fiore and Keith Gipson are professional gamblers. While returning from a successful trip to San Juan, Puerto Rico, they were stopped while changing planes at the Atlanta airport by DEA agents. Fiore and Gipson were carrying a combined total of $97,000 in cash. As the two were being interrogated by the agents, a drug-detecting dog alerted to Gipson’s carry-on bag. Based on the alert, the agents seized all of the Respondents’ funds but allowed them to continue on to their final destination, Las Vegas. Adding insult to injury, Fiore and Gipson boarded the second leg of their flight home without even taxi fare for their arrival in Las Vegas.

Upon reaching Las Vegas, Respondents submitted various documents to DEA in an effort to demonstrate that the money was a result of legal gambling activity.
Petitioner Anthony Walden, one of the DEA agents involved in the interrogation of Respondents, submitted a probable cause affidavit in support of a forfeiture of the funds. The Assistant United States Attorney assigned to the matter concluded that Walden’s affidavit was misleading and directed the return of the $97,000 to the Respondents. The money was eventually returned to Respondents seven months after being seized.

Respondents then brought an action against the DEA agents, including Walden, under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). Respondents alleged in their complaint that Walden’s probable cause affidavit was false and that it delayed the return of their money. Respondents filed the action in federal court in Nevada, even though Walden has never been to Nevada. The district court dismissed the action for lack of personal jurisdiction. The Ninth Circuit reversed. Fiore v. Walden, 688 F.3d 558 (9th Cir. 2012). The Ninth Circuit noted that an intentional tort can support personal jurisdiction over a non-resident defendant who has no other contacts with the forum, provided the intentional act is expressly aimed at the forum State or causes harm that the defendant knows is likely to be suffered in the forum State. Id. at 576-77. The Ninth Circuit concluded that Respondents’ assertion in the complaint that Walden had filed a false affidavit, that the $97,000 was destined for Nevada and that a substantial amount of the funds (Respondents’ original “seed” money) had originated in Nevada was sufficient to subject Walden, at this stage of the proceeding, to jurisdiction in Nevada. The Ninth Circuit further held that venue was appropriate in Nevada pursuant to 28 U.S.C. § 1391(b)(2), which allows an action based on a federal question to be brought in “a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.”

In his merits brief, Walden emphasizes that his alleged wrongful acts occurred entirely in Georgia, and he has no connections to Nevada. Walden argues that Due Process requires that the defendant must have contacts with the forum State itself – not merely with a plaintiff who has contacts with the forum State. He further argues that the Ninth Circuit’s decision will impose serious and unfair burdens by forcing defendants to defend claims in distant forums in which they have no real contacts.

The United States Solicitor General, in an amicus brief, faults the Ninth Circuit for basing its decision on the Respondents’ assertion that they experienced economic harm in Nevada when they returned to that State without the seized cash. The Solicitor General asserts that the Ninth Circuit’s decision will have grave ramifications for federal employees who regularly interact with residents of many different States.

Respondents emphasize in their merits brief that under Supreme Court precedent, Calder v. Jones, 465 U.S. 783 (1984) (defamation action), when a plaintiff
asserts that the defendant committed an intentional tort, personal jurisdiction is appropriate in the forum State if the defendant's acts outside of that State were calculated to cause injury in the forum State. Respondents argue that the Court should not unduly restrict this precedent, particularly in light of changes in modern technology. As an example, Respondents note that a defendant passing through the Atlanta airport can order items online using stolen credit card information from a victim in Vermont.

Recess Appointments

In *NLRB v. Noel Corp.*, No. 12-1281, the Court will consider whether the President's appointment of Commissioners to the National Labor Relations Board during a time period that the President contends that Congress was in recess violates the Constitution. The specific issues raised by the petition are:

(1) Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate; (2) whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess; and (3) whether the President's recess-appointment power may be exercised when the Senate is convening every three days in *pro forma* sessions.

Merits briefing in this case is not yet complete, and the case has not yet been set for oral argument.

Article II, § 2, cl. 3 of the Constitution (the Recess Appointments Clause) provides: "The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session."

The NLRB is composed of five members and must have a quorum in order to take action. See *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). Faced with three vacancies on the Board, President Obama appointed new members to the Board on January 4, 2012 purportedly pursuant to the Recess Appointments Clause.

Noel Canning, a division of the Noel Corporation, received an adverse decision from the NLRB on February 8, 2012. On appeal to the D.C. Circuit, the corporation asserted that the NLRB's decision was invalid because the purported recess appointments of Commissioners Sharon Block, Terence Flynn and Richard Griffin did not comply with the Constitution and that the NLRB did not have a
quorum that would authorize it to act. At the time of the President’s purported recess appointments of these Commissioners, the Senate was operating pursuant to a unanimous consent agreement, which provided that the Senate would meet in pro forma sessions every three business days from December 20, 2011 through January 23, 2012. The agreement further provided that no business would be conducted during these sessions.

The D.C. Circuit, in an opinion authored by Judge Sentelle, rejected the NLRB’s argument that the Constitution allows the President to make recess appointments during intrasession recesses or breaks in the Senate’s business when it is otherwise in a continuing session. *Noel Corp. v. NLRB*, 705 F.3d 490, 499-507 (D.C. Cir. 2013). The D.C. Circuit concluded that the Framers’ use of the words “the recess” must have meaning – essentially, the time period after Congress has adjourned sine die and before a new Session of Congress commences (which typically occurs two to three times per Congress). Interestingly, in making this point, Judge Sentelle, who is originally from North Carolina, discusses at length the North Carolina Constitution of 1776 in asserting that the Recess Appointments Clause “describes a singular recess and does not use the word ‘adjournment.’” Id. at 501. The opinion further relies on historical practice in support of its conclusions, noting that “no President attempted to make an intrasession recess appointment for 80 years after the Constitution was ratified.” Id. According to the D.C. Circuit, the Framers believed “that the recess appointment power served only as a stopgap for times when the Senate was unable to provide advice and consent.” Id. at 502. As an alternative basis for its holding, the D.C. Circuit concluded that the use of the word “happen” in the Recess Appointments Clause (“vacancies that may happen during the recess of the senate”) requires “that the relevant vacancy arise during the recess.” Id. at 508. Here, the vacancies arose prior to the Senate’s purported recess.

The practical implications of the issue raised by the petition have been tempered somewhat by the fact that on July 30, 2013, the Senate confirmed the appointments of three new members of the NLRB in a compromise that eliminated Block, Flynn and Griffin as Commission members. Thus, regardless of the outcome of this appeal, the NLRB may take action from July 30, 2013 on. The Supreme Court’s decision, however, will resolve the validity of actions taken by the NLRB from January 4, 2012 through July 30, 2013. Additionally, the petition allows the Court the opportunity to establish precedent that will guide the legitimacy of future recess appointments.

**Sarbanes-Oxley – Retaliatory Discharge**

In *Lawson v. FMR LLC*, No. 12-3, the Court will consider whether the whistleblower protections afforded by the Sarbanes-Oxley Act, 18 U.S.C. § 1514A,
Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, forbids a publicly traded company, a mutual fund, or “any ... contractor [or] subcontractor ... of such company [to] ... discriminate against an employee in the terms and conditions of employment because of” certain protected activity. (Emphasis added). The First Circuit held that under section 1514A such contractors and subcontractors, if privately-held, may retaliate against their own employees, and are prohibited only from retaliating against employees of the public companies with which they work.

The question presented is:

Is an employee of a privately-held contractor or subcontractor of a public company protected from retaliation by section 1514A?

The case will be argued on Tuesday, November 12, 2013.

Petitioners, two former employees of Respondents, allege that Respondents retaliated against them for reporting fraud affecting Fidelity mutual funds. Respondents are privately held companies that provide investment advice and management services to the Fidelity mutual funds.

Petitioners brought a whistleblower action in federal court under 18 U.S.C. § 1514A. The district court denied Respondents' motions to dismiss. The First Circuit reversed, concluding that only the employees of the defined public companies are covered by Sarbanes-Oxley's whistleblower protection provisions. In an amicus brief, the United States argues that employees of contractors and subcontractors of public companies are protected from retaliation under 18 U.S.C. § 1514A.

Securities Litigation

In Chadbourne & Parke LLP v. Troice, No. 12-79, the Court will address whether state class action fraud litigation relating to a Ponzi scheme is barred by the Securities Litigation Uniform Standards Act, 15 U.S.C. § 78bb(f). The case is consolidated with Proskauer Rose, LLP v. Troice, No. 12-88 and Willis of Colorado, Inc. v. Troice, No. 12-86. The specific question presented by the petition is:
The Securities Litigation Uniform Standards Act ("SLUSA") precludes most state-law class actions involving "a misrepresentation" made "in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1)(A). The circuits, however, are divided over the standard for determining whether an alleged misrepresentation is sufficiently related to the purchase or sale of a covered security to satisfy the "in connection with" requirement. The Fifth Circuit in this case adopted the Ninth Circuit standard and held that the complaint here was not precluded by SLUSA, expressly rejecting conflicting Second, Sixth, and Eleventh Circuit standards for construing the "in connection with" requirement, all of which would result in SLUSA preclusion here.

Additionally, and also in conflict with several other circuits, the Fifth Circuit held that SLUSA does not preclude actions alleging aiding and abetting of fraud in connection with SLUSA-covered security transactions when the aiders and abettors themselves did not make any representations concerning a SLUSA-covered security.

The question presented is:

1. Whether SLUSA precludes a state-law class action alleging a scheme of fraud that involves misrepresentations about transactions in SLUSA-covered securities. . . .

The case was argued on Monday, October 7, 2013.

**Taxation (FICA) – Severance Payments**

In *United States v. Quality Stores, Inc.*, No. 12-1408, the Court will address whether severance payments made to an employee who was involuntarily terminated are taxable under the Federal Insurance Contributions Act ("FICA"), 26 U.S.C. 3101 et seq. The question set out in the petition is:

Whether severance payments made to employees whose employment was involuntarily terminated are taxable under the Federal Insurance Contributions Act, 26 U.S.C. 3101 et seq.

Certiorari was granted on October 1, 2013. The Petitioners have not yet filed their merits brief, and the case has not yet been set for oral argument. Justice Kagan has recused herself from participating in this case.
The Sixth Circuit concluded that Congress has provided that supplemental unemployment compensation benefits should not be treated as “wages” under FICA. In its cert petition, the United States argues that the broad definition of “wages” easily encompasses the severance payments at issue in this case.

White Collar Criminal Defense

A criminal case to be heard this Term may substantially impact criminal defendants, particularly white collar criminal defendants. The issue before the Court in *Kaley v. United States, No. 12-464*, concerns the type of hearing that must be afforded to a criminal defendant when the government seeks to seize a defendant’s assets prior to trial – potentially impinging the defendant’s ability to retain the attorneys, investigators and experts of his choosing in preparing a defense. The issue, as set out in the petition, is:

Whether, when a post-indictment, ex parte restraining order freezes assets needed by a criminal defendant to retain counsel of choice, the Fifth and Sixth Amendments require a pre-trial, adversarial hearing at which the defendant may challenge the evidentiary support and legal theory of the underlying charges.

Oral argument was heard on Wednesday, October 16, 2013.

In *Kaley*, the Petitioners assert that before their assets may be seized, they must be afforded a hearing which would allow them to challenge the evidence supporting the charges against them. In 2005, Petitioner Kerri Kaley was informed that she was the target of a grand jury investigation into whether she had been stealing medical devices from hospitals and re-selling those devices. Kerri Kaley’s husband, Petitioner Brian Kaley, also became a target of the grand jury investigation. On February 6, 2007, the grand jury indicted Petitioners. The indictment sought criminal forfeiture of all property traceable to offenses set out in the indictment. The district court proceeded to issue an ex parte order restraining Petitioners from transferring or disposing of the property listed in the forfeiture count.

Following its ex parte order, the district court ultimately afforded Petitioners a pre-trial evidentiary hearing to challenge the seizure of their assets. The district court, however, limited the hearing to whether the restrained assets were traceable to or involved in the conduct charged in the indictment. The district court then denied Petitioners’ request to modify the pre-trial restraint on disposition of their assets.
The Eleventh Circuit affirmed the district court’s decision, concluding that “a defendant who is entitled to a pretrial due process hearing with respect to restrained assets may challenge the nexus between those assets and the charged crime, but not the sufficiency of the evidence supporting the underlying charge.” United States v. Kaley, 677 F.3d 1316, 1327 (11th Cir. 2012). The Eleventh Circuit concluded that allowing a defendant to attack the grand jury’s probable cause determination at such a pre-trial hearing would undermine the grand jury system. Id. at 1326. The Eleventh Circuit emphasized that the defendant will ultimately receive a thorough hearing where the evidence underlying the indictment can be attacked – the trial itself. Permitting the defendant to challenge the basis for the prosecution’s case in advance of trial “would effectively require the district court to try the case twice.” Id. at 1327.

The American Bar Association has filed an amicus brief supporting Petitioners. The ABA argues that Due Process requires a meaningful opportunity to oppose a pre-trial restraint on the disposition of assets when that order impedes the exercise of a defendant’s Sixth Amendment right to retain counsel of choice.

**Significant Cases in Which the Court May Grant Certiorari Later this Term**

Before this Term of Court comes to a close, the Court is likely to add to its docket a number of additional cases that could impact the business community. Additionally, several non-business cases arising from within the Fourth Circuit may be added to the docket.

**False Claims Act, 31 U.S.C. §§ 3729-3733.** The cert petition before the Court in United States ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc., No. 12-1349, allows the Court to resolve the split among the circuits as to whether Fed. R. Civ. P. 9(b) requires qui tam plaintiffs in False Claims Act cases to allege with particularity that specific false claims actually were presented to the government for payment. The Takeda Pharmaceuticals case arises out of the Fourth Circuit. On October 7, 2013, the United States Supreme Court called for the views of the United States Solicitor General as to whether cert should be granted in this case.

In Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter, No. 12-1497, a second False Claims Act case arising out of the Fourth Circuit, the issue raised by the petition is whether the Wartime Suspension of Limitations Act, which tolls the statute of limitations for “any offense” involving fraud against the
government “[w]hen the United States is at war,” 18 U.S.C. § 3287, applies to qui tam actions brought by private relators under the False Claims Act. The Fourth Circuit held that the Act does. On October 7, 2013, as in Takeda Pharmaceuticals, the United States Supreme Court called for the views of the United States Solicitor General as to whether cert should be granted in this case.

**Confrontation Clause Cases.** On June 27, 2013, the North Carolina Supreme Court issued six opinions relating to the Confrontation Clause of the United States Constitution, U.S. Const. amend. VI. In a seventh case that same day, the North Carolina Supreme Court affirmed the decision below by an equally divided court. The justices were highly divided in those cases in large part due to the uncertainty created by the United States Supreme Court’s plurality opinion in Williams v. Illinois, 132 S. Ct. 2221 (2012) (involving expert testimony with respect to DNA evidence when the expert did not perform the analysis at issue).

Applications for extension of time to file a cert petition have been granted in two of these cases, State v. Brewington, 743 S.E.2d 626 (N.C. 2013) and State v. Ortiz-Zape, 743 S.E.2d 156 (N.C. 2013). See Brewington v. North Carolina, No. 13A268; Ortiz-Zape v. North Carolina, No. 13A258. The cert petition in Brewington is now due on or before October 25, 2013. Mr. Brewington is represented by Jeff Fisher, a professor at Stanford University School of Law. The cert petition in Ortiz-Zape is now due on or before November 22, 2013. Mr. Ortiz-Zape is represented by Williams Mullen.

**CERCLA – Statutes of Repose.** In CTS Corp. v. Waldburger, No. 13-339, the Court will be presented with an opportunity to resolve the split among the circuits as to whether CERCLA’s tolling provision preempts state statutes of repose or whether the tolling provision only preempts state statutes of limitations. Under CERCLA’s tolling provision, 42 U.S.C. § 9658, in “any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility,” CERCLA provides that the state limitations period cannot commence running until “the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant.” Id. This Fourth Circuit case arises out of contamination of property located in Asheville, North Carolina. Waldburger v. CTS Corp., 723 F.3d 434 (4th Cir. 2013). The brief of the Respondent, who is represented by John Korzen of the Wake Forest University School of Law, is due November 18, 2013.

Regardless of whether the United States Supreme Court grants cert in *Waldburger*, the split that has developed among the circuits will likely result in this issue eventually being on the Supreme Court’s docket. See *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 362 (5th Cir. 2005) (42 U.S.C. § 9658 does not preempt state statutes of repose).

**Privacy Interests in Personal Electronic Devices.** In *United States v. Wurie*, No. 12-212, the Court could address whether the Fourth Amendment precludes police officers, without a warrant, from reviewing electronic data (such as a call log and contact information) contained on a cell phone when a defendant is lawfully arrested and the cell phone is on the defendant’s person at the time of his arrest. Briefing with respect to this cert petition, which arises from the First Circuit, is not yet complete.

**Affordable Care Act – Religious Objections to Employer Funding of Contraception and Abortions.** In *Liberty University v. Lew*, No. 13-306, a case arising out of the Fourth Circuit, the Court could potentially take up the issue of whether the Affordable Care Act, Pub. L. 111-148, 124 Stat. 119, violates the free exercise of religion by forcing employers to buy or provide contraceptives and abortion-inducing drugs to their employees in cases in which an employer holds a religious belief that prevents it from doing so.

**Patent Infringement.** In *Maersk Drilling USA, Inc. v. Transocean Offshore Deepwater Drilling, Inc.*, No. 13-43, the Court is being asked to review a decision from the Federal Circuit which presents the issue of whether offering, negotiating, and entering into a contract in Scandinavia to provide services using a potentially patented device constitutes an “offer to sell” or “sale” of an actually patented device “within the United States,” under 35 U.S.C. § 271(a). On October 7,
2013, the United States Supreme Court called for the views of the United States Solicitor General as to whether cert should be granted in this case.

The pending cert petition in *Limelight Networks v. Akamai Technologies*, No. 12-786, presents the Supreme Court with an opportunity to decide whether a defendant may be held liable for inducing patent infringement under 35 U.S.C. § 271(b) even though no one has committed direct infringement under § 271(a). This case comes out of the Federal Circuit. The United States Supreme Court issued an order on June 24, 2013 calling for the views of the United States Solicitor General as to whether cert should be granted in this case.

**Medical Device Litigation.** The cert petition in *Medtronic v. Stengel*, No. 12-1351, presents the Court with an opportunity to resolve whether the Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., preempts a state-law claim alleging that a medical device manufacturer violated a duty under federal law to report adverse-event information to the Food and Drug Administration. This case arises out of the Ninth Circuit. On October 7, 2013, the United States Supreme Court called for the views of the United States Solicitor General as to whether cert should be granted in this case.

**Food, Drug and Cosmetic Act.** The cert petition in *POM Wonderful LLC v. The Coca Cola Co.*, No. 12-761, raises the question of whether a private party can bring a Lanham Act claim challenging a product label regulated under the Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq. On March 25, 2013, the Supreme Court called for the views of the United States Solicitor General with respect to this cert petition arising out of the Ninth Circuit.

**Pregnancy Discrimination Act.** In *Young v. United Parcel Service*, No. 12-1226, the Court has the opportunity to decide whether the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), requires an employer that provides work accommodations to nonpregnant employees with work limitations to provide work accommodations to pregnant employees who are similar in their ability or inability to work. This case arises out of the Fourth Circuit. On October 7, 2013, the United States Supreme Court called for the views of the United States Solicitor General as to whether cert should be granted in this case.
In *McCutcheon v. FEC*, No. 12-536, the Court will consider whether campaign contribution limits violate the First Amendment. Oral argument occurred on Tuesday, October 8, 2013. During the oral argument, Justice Alito noted that he was “troubled” by the United States Solicitor General’s use of “wild hypotheticals that are not obviously plausible.” Tr. at 35.

In *Cline v. Oklahoma Coalition for Reproductive Justice*, No. 12-1094, the Court is likely to consider an Oklahoma statute that precludes the off-label use of the drug RU-486 to perform an abortion. The Oklahoma statute states: “No physician who provides RU-486 (mifepristone) or any abortion-inducing drug shall knowingly or recklessly fail to provide or prescribe the RU-486 (mifepristone) or any abortion-inducing drug according to the protocol tested and authorized by the U.S. Food and Drug Administration and as authorized in the drug label for the RU-486 (mifepristone) or any abortion-inducing drug.” Okla. Stat. tit. 63, § 1-729a(C) (as amended). The Court granted cert on June 27, 2013 and certified two questions to the Oklahoma Supreme Court.

Briefing before the Oklahoma Supreme Court is now complete. The reply brief of Terry Cline was filed with the Oklahoma Supreme Court on October 2, 2013. This case will likely end up back on the United States Supreme Court’s docket after the Oklahoma Supreme Court responds to the certified question.

In *McCullen v. Coakley*, No. 12-1168, another case that touches on abortion, the Court will consider an attack, based on the First and Fourteenth Amendments, on a Massachusetts statute that makes it a crime for speakers other than clinic “employees or agents . . . acting within the scope of their employment” to “enter or remain on a public way or sidewalk” within 35 feet of an entrance or driveway to a clinic that performs abortions.

The criminal case of *Fernandez v. California*, No. 12-7822, makes for interesting reading and will likely produce cocktail party conversation – if any law students are attending the cocktail party. In connection with their investigation of
a gang-related assault, police went to the apartment of Petitioner Walter Fernandez. When Petitioner came to the door, he informed the police, “You don’t have any right to come in. I know my rights.” When Petitioner stepped outside of the house, he was taken into custody. The police later went back to the apartment and obtained the consent of Petitioner’s girlfriend, who lived in the apartment with Petitioner, to search the apartment. The question presented is when a co-tenant expressly informs police that they may not enter his home, can the police remove the co-tenant from the scene and then obtain the consent of another co-tenant to search the home consistent with the Fourth Amendment.

In *Town of Greece v. Galloway, No. 12-696*, the Court will consider whether the Town of Greece, New York violates the First Amendment by holding an opening prayer at each Town Board meeting. The Town implemented the practice of inviting local clergy to give the opening prayer in 1999.
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Practice Areas
> Appellate Practice
> Litigation
> Attorneys General and State Agencies Practice

Chris Browning is a highly experienced litigator with a strong background in appellate practice, complex commercial litigation, business torts and governmental relations. He leads the firm’s Appellate team.

Mr. Browning joined Williams Mullen after serving seven years as the first Solicitor General for the State of North Carolina. He has argued five times before the United States Supreme Court and has had multiple arguments before the United States Court of Appeals for the Fourth Circuit, the North Carolina Supreme Court and the North Carolina Court of Appeals.

As North Carolina’s first Solicitor General, Mr. Browning established the policies and procedures for that office and the process for the Solicitor General’s review and management of all civil appeals involving the State of North Carolina. In addition, he served as an adviser to the North Carolina Attorney General with respect to appellate issues and other policy matters. As Solicitor General, Mr. Browning worked closely with virtually every Division and Section within the North Carolina Department of Justice, as well as numerous general counsel and agency heads within the executive branch of North Carolina state government. In recognition of his service as Solicitor General, then-Governor Beverly Perdue awarded Mr. Browning the Order of the Long Leaf Pine (the highest honor that the State of North Carolina can bestow on a civilian).

Prior to working for the State, Mr. Browning was a partner at Hunton & Williams where his practice focused on complex litigation matters. While at that firm, he was part of a trial team handling one of the longest war crimes proceedings in history – a case tried in the Hague, Netherlands before the International Criminal Tribunal for the former Yugoslavia.

Mr. Browning is among the first attorneys certified as a specialist in appellate law by the North Carolina State Bar Board of Legal Specialization. He is a past-chair of the Appellate Rules Committee for the North Carolina Bar Association and serves on the Section Council of the North Carolina Bar Association’s Appellate Practice Section. He currently serves on the Appellate Practice Specialization Committee of the North Carolina State Bar and also serves as North Carolina’s representative to the Fourth Circuit’s Advisory Committee on Rules and Procedures. He is an officer for the American Bar Association’s Judicial Division (Lawyers Conference).

Mr. Browning is a Senior Lecturing Fellow at Duke University School of Law where he teaches appellate practice. He is a frequent speaker before bar associations and other organizations on issues relating to appellate practice, complex litigation and original actions before the United States Supreme Court.

Mr. Browning earned his bachelor of arts degree in political science from the University of North Carolina and his juris doctor degree, with honors, from the University of North Carolina School of Law. While in law school, Mr. Browning was research editor for the North Carolina Law Review. Mr. Browning served as a judicial law clerk for the Honorable James C. Hill of the United States Court of Appeals for the Eleventh Circuit. He is licensed to practice in North Carolina and Georgia.
Sean E. Andrussier
Senior Lecturing Fellow
Co-director, Appellate Litigation Clinic
Duke University School of Law

Sean Andrussier co-directs Duke’s Appellate Litigation Clinic, which handles federal appeals through briefing and argument. He also teaches Appellate Practice, as well as Legal Analysis, Research and Writing.

Before joining Duke’s faculty, Andrussier was co-chair of the appellate practice group of Womble Carlyle Sandridge & Rice, LLP, a 500-lawyer law firm operating in six states and the Washington, D.C. His practice concentrated on constitutional law, appellate practice and procedure, and complex civil litigation. Before joining that firm, Andrussier was an appellate lawyer in Washington, D.C., where he worked with Theodore B. Olson (42nd Solicitor General of the United States) in the Appellate and Constitutional Law practice group of Gibson Dunn and Crutcher LLP. Before that, Andrussier practiced with Hogan & Hartson LLP (now Hogan Lovells), also in Washington. He has also served as a law clerk to Judge Karen LeCraft Henderson of the U.S. Court of Appeals for the D.C. Circuit, and to Judge M. Blane Michael of the U.S. Court of Appeals for the Fourth Circuit.

Andrussier serves on the Appellate Rules Committee of the North Carolina Bar Association, which crafts proposed amendments to the state’s rules of appellate procedure. He is also a member of the Council of Appellate Lawyers and of the Appellate Judges Conference of the American Bar Association.

Andrussier received his J. D. from Duke Law School in 1992, where he served on the editorial staff of the Duke Law Journal and was awarded membership in the Order of the Coif.
Ray A. Starling grew up on a diversified family farm in southeastern North Carolina. Ray received a B.S. in Agricultural Education from North Carolina State University in May of 1999, magna cum laude. During high school and college, he was very active in FFA, serving as a National Officer in that organization in 1996-97.

After graduating with honors from the UNC-Chapel Hill School of Law in 2002, he served as a law clerk to a NC Supreme Court Justice, and then as an associate at Hunton & Williams, LLP. From February of 2007 until late 2012, Ray was the General Counsel and a legislative liaison at the NC Department of Agriculture and Consumer Services. He is now General Counsel and Senior Agricultural Policy Adviser to the North Carolina Speaker of the House, Mr. Thom Tillis.

Ray also teaches agricultural and food law at the UNC-Chapel Hill School of Law and at Campbell University School of Law. He has received numerous awards and honors, including recently being named a “50 To Watch in Business” in the Raleigh-Durham, North Carolina area. He was voted as a “rising star” by his fellow members of the bar, was named a 2011 Marshall Memorial Fellow, and received the 2011 Honor Award from the National Association of State Departments of Agriculture (NASDA). He was recognized by NC State’s College of Agriculture and Life Sciences as its Outstanding Young Alumnus in 2010. Active in AALA for many years, Ray has taught and organized numerous courses at the annual meeting, served on the conference planning committee, and received the 2012 American Agricultural Law Leadership Award. During the summer of 2013, Ray was elected to serve on the National Board of Directors of AALA. He also annually teaches a CLE on agricultural law at the NC Festival of Legal Learning.
Since his return to Williams Mullen after nearly three years as Chief Deputy Attorney General of Virginia, Chuck has assisted a diverse group of clients with matters before state and federal investigative bodies. Building on his previous White Collar & Investigations practice, Chuck has expanded his advocacy to include an Attorneys General and State Agency practice.

Chuck is aware of the nuances of each attorney general’s office – those with elected AGs and those with appointed AGs. The protocol for dealing with each such office comes naturally to him, and business owners can depend on him to deftly navigate those issues for them. He has represented clients before multiple US attorneys’ offices, the State Corporation Commission and the Federal Trade Commission, and in various multi-state attorney general investigations.

Chuck has extensive litigation experience, having argued numerous cases dealing with constitutional issues stemming from white collar, immigration, violent crime and narcotics cases before the U.S. Court of Appeals for the Fourth Circuit. He also assists our government advocacy group with special projects of concern to our clients. He previously served as a federal prosecutor in the U.S. Attorney’s Office for the Eastern District of Virginia’s Richmond and Alexandria Divisions and the Department of Justice’s Criminal Division, Washington, D.C.

Having handled hundreds of federal cases as lead trial counsel, Chuck has extensive courtroom experience, as well as experience investigating and prosecuting cases including conspiracy, embezzlement, public corruption, violent crime, money laundering and fraud. In private practice Chuck represents individuals and corporations in state and federal investigations, including grand jury and trial matters.

Chuck has been recognized as a “Rising Star” by Virginia Super Lawyers magazine and as one of the “Legal Elite” by Virginia Business magazine, and is a sought after speaker and writer on a variety of topics.

Chuck is a graduate of the University of Virginia and received his law degree from Washington and Lee University.
Garrick Sevilla is a member of the firm’s Appellate team and also focuses his practice in the area of complex business litigation.

Mr. Sevilla offers extensive appellate experience having served as a law clerk for the Honorable Samuel A. Alito, Jr., Associate Justice of the U.S. Supreme Court from 2010-2011. In addition, he served as a law clerk to the Honorable Janice Rogers Brown of the United States Court of Appeals for the District of Columbia Circuit from 2007-2008. Mr. Sevilla was also previously an associate at Ellis & Winters LLP, where he focused on commercial litigation.

Mr. Sevilla is licensed to practice in North Carolina and Virginia. He is admitted to practice in the U.S. District Courts for the Eastern, Middle and Western Districts of North Carolina, the U.S. Courts of Appeals for the Second, Fourth, District of Columbia, and Federal Circuits, and the U.S. Court of Appeals for the District of Columbia and the U.S. Court of Appeals for the Federal Circuit.

Mr. Sevilla earned his bachelor of science degree from Duke University, magna cum laude, and his juris doctor degree from Duke University School of Law, summa cum laude. While in law school, he was an editor for the Duke Law Journal and a member of the Order of the Coif. Prior to attending law school, Mr. Sevilla was an officer in the United States Marine Corps and is a veteran of Operation Iraqi Freedom.
About Us

“About Us” may not be the right name for this section, because at Williams Mullen, it is about you.

At Williams Mullen, our goal is to help your business thrive in today’s economy. Success is based on finding workable solutions for you. Representing more than 75 practices and industries, Williams Mullen focuses on finding answers and solutions for your business and legal issues. Whether you are the general counsel for a Fortune 500 company, the owner of a private business, CEO of a non-profit organization or head of a government entity, we have the right attorney or team of attorneys to help you meet your goals.

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Forty-eight Attorneys Named 2012 “Legal Elite” by Virginia Business magazine
Practice Profile

Williams Mullen’s appellate practice team has extensive experience in appellate courts throughout the country, including the United States Supreme Court, federal circuit courts, state appellate courts and various international tribunals. The firm’s appellate practice group includes lawyers who have served as judicial clerks on the United States Supreme Court and the Fourth, Eleventh, District of Columbia and Federal Circuits, as well as the Courts of Appeals and Supreme Courts of North Carolina and Virginia.

Williams Mullen’s Appellate Practice group is led by Chris Browning, who served as the first Solicitor General for the State of North Carolina from 2004-11. Mr. Browning has argued five times before the United States Supreme Court. His most recent argument before the Court was earlier this year in *Wos v. E.M.A.*, 133 S. Ct. 1391 (2013). In the 6-3 decision in favor of our clients (E.M.A. and the Armstrong family), the Court held that a North Carolina statute that allowed the State to place a lien on a Medicaid beneficiary’s tort settlement is preempted by federal law. That decision substantially impacts tort settlements throughout the country. In fact, both the defense bar (Federation of Defense and Corporate Counsel) and plaintiffs’ bar (American Advocates for Justice) filed amicus briefs supporting our firm’s clients in that case. Additionally, the New York Times published an editorial praising the Supreme Court’s decision.

In addition to representing litigants on appeal, our Appellate Practice group has filed numerous amicus briefs on behalf of clients and trade associations in a variety of appellate courts, including the United States Supreme Court. Many of those briefs have substantially impacted the opinions and outcomes of those cases. *See, e.g., Kentucky Dep’t of Revenue v. Davis*, 553 U.S. 328, 342 (2008).

The attorneys within Williams Mullen’s Appellate Practice group have spoken on appellate advocacy at seminars and law schools throughout the country. Moreover, our attorneys regularly participate in moot courts of United States Supreme Court arguments conducted by the Georgetown Supreme Court Institute, the United States Chamber of Commerce and the National Association of Attorneys General. Many of our attorneys have also served on select bar committees with responsibility for studying and revising the rules of appellate procedure.
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To receive credit outside of North Carolina and Virginia, please contact your State Bar directly.

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