

The Supreme Court 2009: What's At Stake For Americans 50+

A Preview of the 2009 Term

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By

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

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INTRODUCTION

Last Term's high percentage (almost 45 percent) of 5-4 or 6-3 decisions shows that the Court is extremely divided, and the expectation is that Justice Souter's replacement – Justice Sonia Sotomayor – will not change that divide. As expected, Justice Kennedy's influence has only grown since Justice O'Connor's retirement. Last Term he was in the majority in 92 percent of the Court's decisions.

Supreme Court decisions frequently result in more questions than answers, setting the table for future litigation and issues which will percolate back to the Court or Congress. Many recent decisions also tended to be somewhat narrowly decided – whether to obtain consensus, whether to incrementally chip away at decisions providing a more expansive reading of individual rights, or whether the more liberal wing of the Court is attempting to prevent more sweeping legal pronouncements is hard to say. Most commentators agree that the Court is decidedly more pro-business and less open to expanding individual rights.

This Term the Court has granted *certiorari* on a wide variety of cases which AARP believes may impact people over age 50, although unlike last Term when the Court decided five cases arising under the Age Discrimination in Employment Act, currently there are no age discrimination cases on the docket. Of the nine cases discussed in this Preview, AARP either has or is intending to file an *amicus curiae* brief to present to the Court AARP's view of the case's impact on older people.

Two cases concern access to courts. The issue of whether a lodestar calculation for attorney's fees can ever be enhanced, even if the result and performance were exemplary, is raised in ***Kenny A. ex rel. Winn v. Perdue***. In ***Stolt-Nielsen v. AnimalFeeds Int'l Corp.***, the Court will take up the issue of whether arbitration provisions that bar class wide proceedings – in court and arbitration - are unconscionable and unenforceable under state law. AARP has had this issue on its radar screen for many years.

Due to the fallout from the economy, of particular import this Term are two consumer cases – one concerning debt collection and the other bankruptcy. In ***Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA***, the Court will decide whether the bona fide error defense under the Fair Debt Collection Practices Act is applicable to mistakes of law. Given the steep rise in foreclosures and credit card debt for older people, the answer is critical to prevent abusive debt

collection practices. Whether a prohibition in the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) prevents attorneys from counseling their clients to incur additional debt before filing bankruptcy and the First Amendment implications of that prohibition is the issue in ***Milavetz, Gallop & Milavetz, P.A. v. U.S.***

Frommert v. Conkright raises the issue of whether a plan administrator can get a second bite at the apple in a benefits denial case where a court has already decided that the administrator's initial plan interpretation was wrong. Of particular interest is that Justice Sotomayor had ruled on this same issue in *Layaou v. Xerox Corp.*, 238 F.3d 205 (2d Cir. 2001), and the Solicitor General had recommended that the petition not be granted.

With the recent financial melt-down, two securities cases raise important procedural issues. ***Jones v. Harris Assocs. L.P.*** concerns the appropriate standard for determining allegations of breaches of fiduciary duty against mutual funds. In ***In re Merck & Co, Inc.*** the issue before the Court is what triggers the statute of limitations in a securities fraud case. As defined contribution plans have become many employees' sole retirement plan, securities and mutual funds have become an increasingly important part of individuals' retirement assets. The ability to obtain redress and recoup retirement savings through investor challenges to financial industry practices has become more crucial to individuals' retirement security.

The case with the potential for significant broad impact is ***In re Bilski***. Although specifically a case concerning whether a method of hedging risks in commodities trading can be patented, *Bilski* raises the much broader issue of the patentability of business methods, abstract ideas, and mathematical formulas not tied to machines or physical matter. The decision's impact could be felt in diverse industries such as software manufacturers and Internet companies, investment houses, pharmaceutical companies, financial and tax planners, and retirement plan designers.

In ***Maine Pub. Utilities Comm'n v. F.E.R.C.***, the Court will clarify whether the presumption, established in the *Mobile-Sierra* decisions, that a negotiated settlement is just and reasonable should be extended to rate challenges brought by non-contracting third parties. This decision will not only decide the role of the Federal Energy Regulatory Commission in reviewing electrical rate challenges by third parties but more importantly, will impact the cost of utilities to consumers who ultimately must pay for wholesale electrical contracts.

Finally, two pending petitions for *certiorari* – both related to health care – raise important concerns that bear close attention. Given the uncertainty of the

scope of federal health care reform, whether the federal employee benefits law – ERISA – preempts state health care efforts looms large. The Ninth Circuit held in ***Golden Gate Restaurant Ass’n v. City and County of San Francisco*** that because the City’s requirements do not relate to ERISA plans there was no preemption. Of particular interest is whether the Obama administration, if asked, will change the position previously espoused before the Ninth Circuit that the San Francisco Ordinance established an ERISA plan.

Another patent case up for review will impact the cost of prescription drugs as the ongoing fight between pioneer and generic manufacturers of pharmaceuticals continues unabated. The petition for *certiorari* in ***Sanofi-Synthelabo v. Apotex, Inc.*** revolves around the interpretation of the recent Supreme Court decision of *KSR International Co. v. Teleflex*. Although the Supreme Court’s *KSR* decision declared that results of experiments “obvious to try” were not patentable, the Federal Circuit concluded that a patent claim cannot be proved obvious merely by showing that the combination of elements was “obvious to try.”

Finally, Congress’ enactment of the Lily Ledbetter Fair Pay Act reminds us that there are three branches of government, and they do react to each other. As more fully discussed below in the Employment Section of WHAT THE FUTURE HOLDS, AARP is part of a coalition of advocacy groups for employee rights that is working on legislation to overturn *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009), last Term’s decision that seriously undermines and has the potential to eviscerate the rights and remedies Congress prescribed for older workers in the ADEA. Congress’ reaction to the *Gross* decision may portend a more active role for Congress in responding to Supreme Court decisions.

PENDING CASES - 2009 TERM

ACCESS TO COURTS

WHETHER A REASONABLE ATTORNEY'S FEE AWARD UNDER A FEDERAL FEE-SHIFTING STATUTE MAY EVER BE ENHANCED BASED SOLELY ON QUALITY OF PERFORMANCE AND RESULTS OBTAINED WHEN THESE FACTORS ALREADY ARE INCLUDED IN THE LODESTAR CALCULATION?

Kenny A. ex rel. Winn v. Perdue,

532 F.3d 1209 (11th Cir. 2008),

cert. granted, 129 S.Ct. 1907 (2009) (No. 08-970).

Oral argument has been scheduled for October 14, 2009.

The question before the Court is whether a reasonable attorney's fee award under a federal – fee shifting statute can ever be enhanced based solely on the quality of performance and results obtained when these factors are already included in the lodestar calculation.¹

The dispute over attorney's fees in *Kenny A.* is rooted in a § 1983 lawsuit filed by Children's Rights, Inc. on behalf of abused and neglected foster children. *Kenny A.* and eight other named plaintiffs are foster children in the custody of the Georgia Department of Human Resources (DHR). Children's Rights represented them and a class of 3,000 foster children in Fulton and DeKalb counties. They sued the governor, DHR, Fulton, and DeKalb counties, each county's department of family and children's services, and the director of each of those departments. The lawsuit alleged that systemic deficiencies in the counties' foster care systems violated foster children's First, Ninth, and Fourteenth Amendment and other federal and state statutory rights by, among other things, failing to properly supervise the children; placing children in dangerous, unsanitary, inappropriate, and inadequate placements; and failing to provide necessary and appropriate mental health, medical, and education services.

The district court denied motions to dismiss and for summary judgment from the defendants. It not only certified as a class all of the foster children in Fulton and DeKalb County foster care systems, but also certified a subclass of

¹ The Court denied review of a corollary question of whether enhancement of a fee award could ever be allowed after a judge had reduced the lodestar claim due to vague entries and excessive billing.

African-American children who were seen as particularly at risk due to delayed adoption based on race. The district court approved a settlement between the plaintiff class and both counties in May 2006. As part of that settlement, the parties agreed to an attorney's fee award which was not appealed.

In a separate settlement in October 2005, the plaintiff class and the remaining Defendants agreed to a series of thirty-one outcome measures to improve the lot of foster children, including such commitments as prompt investigation of reports of abuse or neglect, regular visits by caseworkers, licensing of foster homes, limits on each home's capacity, and prompt delivery of medical and dental care that Defendants agreed to meet and sustain for at least three consecutive six-month reporting periods. The parties also agreed that the Plaintiffs were the "prevailing parties" under 42 U.S.C. § 1988, the federal statute authorizing awards of attorney's fees.

After failed attempts at an out-of-court resolution of the amount of attorney's fees, in December 2005, attorneys for the plaintiff class filed a motion for an award of reasonable attorney's fees and expenses pursuant to 42 U.S.C. § 1988. Plaintiffs' attorneys contended that they spent nearly 30,000 hours on the case, resulting in a lodestar of roughly \$7 million, and requested an enhanced fee of more than \$14 million.² Defendants opposed the application, asserting that the lodestar should be reduced due to excessive hours and that the enhancement was not authorized based on existing precedent.

The District Court reduced the lodestar through an across-the-board fifteen percent reduction in hours claimed, resulting in a reduction of the lodestar amount from \$7 million to \$6 million. The District Court noted that the total lodestar fee of the plaintiff-class was, in fact, less than the \$6.1 million in Defendants' own legal expenses. Noting that in his 27 years on the federal bench he had not seen such outstanding commitment, dedication, and professionalism on the part of the attorneys for the children, the trial judge awarded a \$4.5 million (or 75 percent) fee enhancement on top of the \$6 million lodestar fee award for a total of over \$10 million.

On appeal, the Eleventh Circuit Court of Appeals affirmed the decision of the District Court. The Eleventh Circuit made clear that recent Supreme Court cases decidedly leaned against any type of enhancement, and indeed, the

² Lodestar is the amount obtained by multiplying the reasonable amount of hours spent by an attorney working on a case by the reasonable hourly billing rate for purposes of calculating an award of attorney's fees.

“strong presumption” was that “the lodestar figure, without any adjustment, is the reasonable fee award.” *Kenny A. ex rel. Winn v. Perdue*, 532 F.3d 1209, 1220 (11th Cir. 2008). In “the rare and exceptional case” where a district court may award an enhancement, the court’s decision must be “supported by both specific evidence on the record and detailed findings.” *Id.* The appeals court rejected, as inconsistent with Supreme Court precedent, four of the factors the district court relied upon as reasons for the enhancement – quality of service and superior performance, delayed payment, contingent nature of the case, and better results from the negotiated settlement than a trial on the merits. If it were writing on a clean slate, the Eleventh Circuit would have found that the district court’s award of an enhancement to the lodestar amount was an abuse of discretion; however, the court believed it was constrained by Eleventh Circuit precedent which had permitted enhancements to lodestar amounts, and therefore it affirmed the district court’s decision. *Id.* at 1236-1242. Defendants sought a rehearing *en banc*, which was denied.

In its merits brief in the Supreme Court, the State of Georgia argued that enhancement above the lodestar amount can never be permitted as reasonable attorney’s fees under 42 U.S.C. §1988(b). It argued that to do so would run counter to both the plain language and the legislative history of the statute. *Amici* supporting the State of Georgia range from the United States to thirty states and the District of Columbia. The United States takes the position that enhancement above the lodestar amount based on the quality of representation or the results obtained is not authorized by federal fee shifting statutes because both factors are already incorporated into the lodestar calculation.

In contrast, plaintiff-Respondents argue that neither the statutory language nor the legislative history supports the bright-line test urged by Georgia. If anything, they argued the legislative history supports enhancements for exceptional work and indicate that Congress did not consider these enhancements to be windfalls. Finally, plaintiff-Respondents argue that the lodestar does not necessarily take into account superior performance and results.

AARP joined a coalition of numerous national organizations devoted to the cause of furthering civil rights to file an *amici* brief, arguing that although the lodestar will generally produce a reasonable fee, both 42 U.S.C. § 1988 and Supreme Court precedent grant discretion to district judges to adjust the lodestar to reflect exceptional performance and results to arrive at a reasonable fee. The brief argued that the district court adequately explained its reasons for awarding an enhancement in this case.

This case may decide whether a multiplier is ever allowed to be used in the calculation of attorney's fees. The outcome could affect the award of fee enhancements under more than 100 federal laws that allow the winners in a wide array of civil cases to recover their attorney's fees.

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WHETHER IMPOSING CLASS ARBITRATION ON PARTIES WHOSE ARBITRATION CLAUSES ARE SILENT ON THAT ISSUE IS CONSISTENT WITH THE FEDERAL ARBITRATION ACT?

Stolt-Nielsen v. AnimalFeeds Int'l Corp.,

548 F.3d 85 (2d Cir. 2008),

cert. granted, 129 S.Ct. 2793 (2009) (No. 08-1198).

Oral argument has not yet been scheduled.

The question before the Court is whether an arbitrator has the discretion to decide, consistent with state law, whether arbitration may proceed on a class basis when the contract itself is silent on the issue. Among the issues before the Court is whether the lack of guidance of the Federal Arbitration Act (FAA), 9 U.S.C. § 1, on contractual silence as to class arbitration nevertheless preempts state law. In *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion), the Court avoided answering the question of whether the FAA preempts state law, and permitted the arbitrator to decide, consistent with state law, whether to enforce class arbitration bans. In this case, the Second Circuit took the same stance by allowing the arbitrator to interpret the contract under state and federal law. *Stolt-Nielsen*, 548 F.3d at 98-99.

Arbitration clauses in contracts either expressly prohibit class arbitration or are silent. When contracts prohibit class arbitration, courts have either enforced the ban or struck down the clause as unconscionable under state law. See, e.g., *Jenkins v. First S. Cash Advance of Ga.*, 400 F.3d 868 (11th Cir. 2005); *Ting v. AT & T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002), *aff'd in relevant part*, 319 F.3d 1126 (9th Cir. 2003). When the contract is silent as to whether class action arbitration is permitted, courts have followed *Bazzle* and allowed arbitrators to decide the issue consistent with state law.

Bans on class-wide relief in arbitration have been highly controversial. Businesses have argued that the arbitration clauses in standard consumer contracts foreclose all class-wide claims both in arbitration and in court. National Consumer Law Center, CONSUMER ARBITRATION AGREEMENTS 223 (5th ed. 2007). But similar to claims in courts, individuals who have small sums of money at stake can only get relief if their claims are consolidated into a class action. As the California Supreme Court has noted, class action ban clauses often have the practical effect of barring all relief for individual consumers. See *Keating v. Super. Ct.*, 645 P.2d 1192, 1207 (Cal. 1982), *rev'd on other grounds sub nom.*, *Southland Corp. v. Keating*, 465 U.S. 1 (1984). Courts are often unaware of the situation, however, and assume such bans to be fair. *Id.*

This action was brought by Stolt-Nielsen and other owners and operators of parcel tankers against two of their customers, AnimalFeeds International Corp. and KP Chemical Corp. Their contract was silent as to whether the parties contemplated the availability of class arbitration. The district court vacated a class arbitration award, holding that the arbitration panel had exhibited a “manifest disregard” for the law in permitting class arbitration because its decision contradicted federal maritime law and state law. Indeed, the court further observed that customary industry practice guided interpretation of the arbitration clauses under both federal and maritime law, and these clauses had never been read to support class arbitration.

The Second Circuit reversed. It set a high bar for the “manifest disregard” standard. There had to have been more than “error or misunderstanding” about the law on the part of the arbitrator. *Stolt-Nielsen v. Animalfeeds Int’l Corp.*, 548 F.3d 85, 92 (2d Cir. 2008). An arguable misapplication of the “custom and usage” convention under federal or maritime law did not rise to that level. *Id.* at 98. The court also held that the arbitration panel did not misapply state law when it decided that silence in the contract allowed class arbitration. No law existed for the panel to “disregard” because New York had not resolved the question of whether silence permitted or barred class arbitration. *Id.* at 98-99. The Second Circuit did not opine whether the panel’s decision was correct, however. It repeatedly emphasized that courts do not engage in judicial review of arbitration awards. *See, e.g., id.* at 95.

State court and arbitrator latitude to hold class action bans in arbitration unenforceable, as well as decisions already holding such bans unenforceable, are directly challenged by *Stolt-Neilson*. The Court’s decision regarding whether the FAA preempts state law will apply across the spectrum of contracts that currently use arbitration clauses. Silence in the contract suggests that the risk of waiver of important statutory rights is hidden from the consumer, who may not be aware of the sweeping import of the arbitration clause that is routinely included in virtually every consumer-executed contract, which is almost never open to negotiation, and about which the consumer has little to no choice but to agree.

The decision in this case will have a significant impact on consumers. Arbitration clauses are now ubiquitous. In fact, it has become unusual to find a consumer contract that does not contain one. Contracts for nursing home admission, home construction, cell phones, employment, banking and lending, credit cards, health care, and a wide variety of other products and services routinely include arbitration clauses. Arbitration clauses in nursing home agreements are particularly troubling because of the high risk of bodily injury and other harms including wrongful death from nursing home deficiencies which are difficult to address on an individual basis.

If the Supreme Court rules that the FAA preempts state law interpretation of the availability of class arbitration, it may severely limit enforcement of laws designed to protect consumers and thus insulate from redress a wide variety of unfair and deceptive practices in the marketplace.

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CONSUMER RIGHTS

WHETHER A DEBT COLLECTOR'S MISTAKE OF LAW — AS OPPOSED TO FACTUAL OR CLERICAL ERROR — QUALIFIES FOR A “BONA FIDE ERROR” DEFENSE UNDER THE FAIR DEBT COLLECTION PRACTICES ACT?

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA,
538 F.3d 469 (6th Cir. 2008),
cert. granted, 129 S.Ct. 2863 (2009) (No. 08-1200).
Oral argument has not yet been scheduled.

The issue upon which the Court granted *certiorari* is whether a debt collector's mistake of law may constitute a bona fide error defense under the Fair Debt Collection Practices Act (FDCPA). 15 U.S.C. § 1692. The lower courts of appeals are split regarding whether the bona fide error defense is available only when a collector makes a clerical or factual error, or whether the defense is also available for mistakes of law.

Current economic conditions, growing debt burdens, and the rising rate of home foreclosures, make the interpretation of the FDCPA particularly important to older people. An AARP report notes that over 684,000 homeowners over the age of 50 were either delinquent or in foreclosure in December 2007. Allison Shelton, AARP PUBLIC POLICY INSTITUTE, A FIRST LOOK AT OLDER AMERICANS AND THE MORTGAGE CRISIS 2 (2009), *available at* http://assets.aarp.org/rgcenter/econ/i9_mortgage.pdf. Moreover, the age group experiencing the sharpest increase in bankruptcy filings in the period between 1991 and 2007 is the 50 and older group. Deborah Thorne, Elizabeth Warren & Teresa A. Sullivan, GENERATIONS OF STRUGGLE 1 (2008), *available at* http://assets.aarp.org/rgcenter/consume/2008_11_debt.pdf. Seven million older adults reported problems with medical debt in 2007, even though most of them were covered by Medicare. MICHELLE M. DOTY ET AL., THE COMMONWEALTH FUND, SEEING RED: THE GROWING BURDEN OF MEDICAL BILLS AND DEBT FACED BY U.S. FAMILIES 2 (2008), *available at* http://www.commonwealthfund.org/usr_doc/Doty_seeingred_1164_ib.pdf?Section=4039. Between 2005 and 2008, the average amount of credit card debt for older adults increased by 26 percent. Jose Garcia & Tamara Draut, DEMOS, THE PLASTIC SAFETY NET 4 (2009), *available at* http://www.demos.org/pubs/psn_7_28_09.pdf.

In 2006, the law firm of Carlisle, McNellie, Rini, Kramer & Ulrich (Carlisle) filed a complaint on behalf of its client, Countrywide Home Loans, to foreclose on Karen Jerman's home. Attached to the complaint was a “Notice Under the Fair

Debt Collection Practices Act” (validation notice), which explained that Carlisle would assume the debt to be valid unless Jerman disputed the debt in writing within thirty days of receipt of the notice. Jerman’s attorney disputed the debt within the 30-day deadline in writing, indicating the mortgage had been paid in full. When Carlisle requested verification of the debt from Countrywide, Countrywide confirmed that the note had been paid in full. The foreclosure complaint was dismissed.

Jerman subsequently filed suit seeking statutory damages on behalf of herself and a class of similarly situated people, alleging that the validation notice sent by Carlisle violated the FDCPA by requiring the dispute of the debt to be made “in writing.” The district court agreed that the “in writing” requirement violated the FDCPA, but concluded that Carlisle was not liable because of the bona fide error defense. Under the FDCPA, a debt collector is not liable for a violation if it shows by a preponderance of the evidence that “the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.” 15 U.S.C. § 1692k(c).

Jerman appealed the district court’s construction of the bona fide error defense to the Sixth Circuit. She argued that the defense applies only to mistakes of fact, not of law. (Both parties agreed that the words “in writing” in the validation notice presented a question of law.) Both the Eighth and Ninth Circuits had limited the application of the bona fide error defense to clerical errors because they concluded provisions in the FDCPA were similar to those in the Truth In Lending Act (TILA), which limits the bona fide error defense to clerical errors. The Sixth Circuit, however, disagreed. Relying on the reasoning of the Tenth Circuit in *Johnson v. Riddle*, 305 F.3d 1107 (10th Cir. 2002), the Sixth Circuit distinguished TILA, finding that Congress did not similarly limit application of the defense under FDCPA. The Sixth Circuit also noted that the Seventh Circuit read the bona fide error defense to include errors of law, even as it acknowledged that the majority view was to limit the defense to clerical and factual error. *Nielsen v. Dickerson*, 307 F.3d 623, 641 (7th Cir. 2002).

To support its ruling, the Sixth Circuit interpreted *Heintz v. Jenkins*, 514 U.S. 291 (1995), which applied the bona fide error defense to attorneys, to extend to errors of law. The Sixth Circuit also found it plausible that procedures could be maintained to avoid legal as well as clerical or factual errors, even though it is more common to encounter the latter. For example, in this case, Carlisle had designated a senior principal to keep the firm updated on the FDCPA. He attended conferences, subscribed to newsletters, and educated and advised the firm’s employees on the FDCPA. The court found these procedures to support the extension of the bona fide error defense to errors of law.

Jerman petitioned the Supreme Court for *certiorari* to resolve the circuit split as to whether the bona fide error defense under the FDCPA is applicable to mistakes of law.

Congress enacted the FDCPA to protect consumers by prohibiting abusive debt collection practices. Consumer advocates will argue that the bona fide error defense does not excuse legal errors for two reasons. First, the language and structure of the FDCPA demonstrate that Congress did not intend the bona fide error defense to apply to legal errors. Second, a narrow reading of the bona fide error defense is most consistent with the FDCPA's purpose of protecting consumers from abusive debt collection practices.

Moreover, Congress adopted the same language that it had used in the TILA, which courts had declined to extend to legal mistakes at the time the FDCPA was enacted. Thus, interpreting the FDCPA's bona fide error defense as applying to clerical errors is more consistent with the text of the statute itself, which requires debt collectors to demonstrate that the violation was unintentional, made in good faith, and occurred "notwithstanding procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c).

The structure of the FDCPA further confirms that the bona fide error defense applies to clerical errors, but does not excuse legal errors. To address the rare circumstances in which the legal obligations imposed by the FDCPA are genuinely unclear, Congress enacted a separate "safe harbor provision" (not applicable here) to exempt debt collectors from liability. The "safe harbor provision" allows debt collectors to seek and rely upon official advisory opinions issued by the FTC. Applying the bona fide error defense to legal errors would strip the safe harbor defense of any practical effect. If the bona fide defense does not excuse legal errors, debt collectors can avoid liability for violations of the FDCPA only if the FTC has approved the specific practices. If, however, the bona fide error defense excuses legal mistakes, aggressive debt collectors would have no incentive to seek FTC advice if their obligations under the FDCPA are unclear. Instead, they can escape liability simply by showing that there was no clear precedent prohibiting their actions. In effect, aggressive debt collectors can rely on a lack of guidance, rather than on having sought guidance, to immunize themselves.

Not surprisingly, consumer claims arising under the FDCPA for abusive collection practices are widespread, as are consumer complaints to the FTC about FDCPA violations. In 2007 alone, the FTC received more than 70,000 such complaints. Federal Trade Commission, ANNUAL REPORT 2008: FAIR DEBT

COLLECTION PRACTICES ACT 4, *available at <http://www.ftc.gov/os/2008/03/P084802fdcpareport.pdf>*. Congress determined that even consumers who find themselves unable to repay their debts deserve to be treated fairly in accordance with the Fair Debt Collections Practices Act, and the Act should be interpreted to give meaning to that finding.

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WHETHER SECTION 526(a)(4) OF THE BANKRUPTCY CODE PRECLUDES BANKRUPTCY ATTORNEYS FROM ADVISING CLIENTS TO INCUR ADDITIONAL DEBT IN CONTEMPLATION OF BANKRUPTCY?

WHETHER SECTION 526(A)(4) OF THE BANKRUPTCY CODE VIOLATES THE FIRST AMENDMENT?

Milavetz, Gallop & Milavetz, P.A. v. U.S.,
541 F.3d 785 (8th Cir. 2009),
cert. granted, 129 S.Ct. 2766 (2009) (No. 08-1119).
Oral argument has not yet been scheduled.

The question in this case is whether § 526(a)(4) of the Bankruptcy Code prohibits bankruptcy attorneys from advising clients to incur additional debt in contemplation of bankruptcy.³ 11 U.S.C. § 526(a)(4).

A law firm and its attorneys brought a declaratory judgment action, claiming that several provisions of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) violated the First Amendment by both compelling and stifling their speech, specifically in the contexts of advising clients who were considering bankruptcy and advertising their services. 355 B.R. 758, 762, n.1 (D. Minn. 2006). BAPCPA bars “debt relief agencies” from advising a client “to incur more debt in contemplation” of a bankruptcy filing. 11 U.S.C. § 526(a)(4). Such agencies are also required to declare in advertisements: “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code,” or a substantially similar statement. 11 U.S.C. § 528(a)(4), (b)(2). By their terms, these provisions apply to debt relief agencies only. Thus, plaintiffs claimed, under BAPCPA’s definition, debt relief agencies do not include attorneys, and its prohibitions do not apply to attorneys. If these restrictions applied to attorneys, they claimed they would violate the First Amendment. 355 B.R. at 762.

The district court agreed with the plaintiffs and issued an order declaring that: (1) attorneys in the District of Minnesota were excluded from the definition of a “debt relief agency” as defined by BAPCPA; and (2) the challenged provisions were unconstitutional as applied to attorneys in the District of Minnesota. First, relying on the doctrine of constitutional avoidance, it found that Congress could not have included attorneys in the definition of “debt relief agencies” because states were responsible for regulating the practice of law, and thus were relieved of any duties imposed by that statute. 355 B.R. at 768. Second, it concluded

³ An additional issue before the Court in the consolidated appeal is whether attorneys are “debt relief agencies” as defined by § 101(12A) and thus obligated to adhere to the law’s requirements.

that the advice provision impermissibly infringed on the plaintiffs' First Amendment rights because it was not narrowly tailored to the government's interests. 355 B.R. at 765-66. The court noted that attorneys must represent their clients' interests within the bounds of the law, and that the incurrence of additional debt often helped debtors restructure their debt. 355 B.R. at 764-65. However, the court declined to reject the provision itself as "unconstitutionally vague and overbroad," ruling only that it could not be applied to limit the advice attorneys provide to clients. 355 B.R. at 766, n.4.

The Eighth Circuit reversed the district court, holding that the definition of "debt relief agencies" unambiguously included attorneys who provided bankruptcy assistance. Moreover, although there were five exclusions to the definition, attorneys were not among them. However, the Eighth Circuit held that regardless of the standard used to review the government's interest in prohibiting the speech, § 526(a)(4), as written, was unconstitutional because it prohibited all advice to clients to incur additional debt in contemplation of bankruptcy and not just advice given with the intent to abuse or circumvent the bankruptcy system, as the government argued. It further ruled the disclosures required under the advertisement provisions were constitutional.

Both sides cross-petitioned for *certiorari*. The Supreme Court granted *certiorari* and consolidated the petitions.⁴

AARP joined with the Connecticut Bar Association, the National Association of Consumer Bankruptcy Attorneys and the Brennan Center for Justice at New York University School of Law to file an *amici* brief which argued that section 526(a)(4) is unconstitutional generally and as applied to attorneys because it is a content-based restriction. Although the government attempts to provide a saving construction by limiting that provision to abusive practices, that construction is not supported by the text, is duplicative of other provisions, and results in vagueness because the standard of abuse is amorphous. The brief argued that sections 528(a)(4) and (b)(2)(B) were also unconstitutional because they were misleading and in some instances would require affirmatively false disclosures. Finally, the brief argued the simplest method of dealing with the First Amendment challenges would be to interpret the provisions at issue as being inapplicable to attorneys.

⁴ Currently pending before the Court is a petition for *certiorari* in the case of *Hersh v. United States ex rel. Mukasey*, 553 F.3d 743 (5th Cir. 2008), petition for *certiorari* pending, No. 08-1174 (filed Mar. 18, 2009). This case presents an identical challenge to § 526(a)(4). The Fifth Circuit refused to hold the statute unconstitutional and adopted the government's narrow reading.

Bankruptcy is a particular concern for older people; bankruptcy filings for people between the ages of 55 and 64 have risen by more than 150 percent between 1991 and 2007 and have more than quintupled among those 75 and older during that same time. See page 11, *supra*. Not only are older people filing bankruptcy at higher rates, but the ability to climb out of bankruptcy is harder for them since older people have limited job opportunities and many have stagnant incomes and high medical costs. Older people need compete and uncensored advice from attorneys regarding their financial planning (including health and long term care needs) and are at particular risk if those advisors are muzzled.

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EMPLOYEE BENEFITS

WHETHER A DISTRICT COURT HAS AN OBLIGATION TO DEFER TO AN ERISA PLAN ADMINISTRATOR'S REASONABLE INTERPRETATION OF THE TERMS OF THE PLAN IF THE ADMINISTRATOR'S PREVIOUS INTERPRETATION OF THE TERM IN QUESTION HAD BEEN RULED IN VIOLATION OF ERISA?

WHETHER A DISTRICT COURT HAS "ALLOWABLE DISCRETION" TO ADOPT ANY REASONABLE INTERPRETATION OF THE TERMS OF AN ERISA PLAN WHEN THE PLAN INTERPRETATION ISSUE ARISES IN THE COURSE OF CALCULATING ADDITIONAL BENEFITS DUE BECAUSE THE PLAN'S PREVIOUS INTERPRETATION OF THE TERMS WAS RULED IN VIOLATION OF ERISA?

Frommert v. Conkright,

535 F.3d 111 (2d Cir. 2008) (*Frommert II*),
cert. granted, 129 S.Ct. 2860 (2009) (No. 08-810).
Oral argument has not yet been scheduled.

In *Frommert*, the Court will address the question of whether a district court must defer to the Plan's interpretation of a term when determining the appropriate remedy for a violation of ERISA resulting from the Plan's previous erroneous interpretation of the term.

Section 502(a)(1)(B) of the Employment Retirement Income Security Act of 1974 (ERISA) permits an ERISA plan participant to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B).

Plaintiffs-respondents are current or former employees of the Xerox Corporation who asserted claims under ERISA against Xerox, the pension plan administered for the benefit of its employees, and various individuals associated with the administration of the plan. Each of the plaintiffs was a participant in the Xerox Retirement Income Guarantee Plan (RIGP) and each previously left the company and was subsequently rehired by the company. Upon his/her initial departure from Xerox, each of the plaintiffs received a lump-sum distribution of his/her then-accrued pension benefits. At issue in this case is the appropriate remedy to calculate the additional pension benefits due to these rehired employees upon their ultimate retirement from Xerox.

The pension plan stated that “[i]n the event any part or all of a Member’s accrued benefit is distributed to him prior to his Normal Retirement Date, . . . and such member at any time thereafter recommences active participation in the Plan, the accrued benefit of such Member based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution.” 1989 RIGP § 9.6. However, the plan also specified that “Credit for Years of Participation preceding [such a payout] will be reinstated in the event that such an employee returns to Xerox.” *Frommert v. Conkright*, 433 F.3d 254, 260 (2d Cir. 2006) (*Frommert I*). Therefore, as the court accurately summarized, “in determining these employees’ benefits, the plan administrator was required to account, in a manner unspecified to employees, for both an employee’s total years of service at Xerox and the fact that the final benefits must be ‘offset by’ an amount ‘attributable’ to a prior lump sum distribution.” *Frommert v. Conkright*, 535 F.3d 111, 115 (2d Cir. 2008) (*Frommert II*).

Rather than merely subtracting the amount of the prior lump-sum distributions from the total benefit due upon retirement, the Plan had adopted a “phantom accounting” system which adjusted the prior lump-sum distributions by the “hypothetical investment gains and/or losses attributable to the prior distribution, as if the money had been left in [the participant’s] account.” *Frommert I*, 433 F.3d at 259 (quoting 1995 “Benefits Update”). As a result, plaintiffs’ retirement benefits were reduced significantly. For example, Frommert’s projected monthly benefit fell from \$3,125 to \$5.31.

In 2006 the Second Circuit court rejected as arbitrary and capricious the Plan administrator’s “conclusion that the Plan always included the phantom account.” *Frommert I*, 433 F.3d at 265-66. Additionally, the court ruled “as a matter of law, that the “phantom account” was not part of the Plan until 1998 when it was added by amendment of the Plan’s text through its explanation in the 1998 SPD.” *Id.* at 263.

The court noted that “[t]he prolonged absence of any mention of the phantom account from Plan documents, most notably SPDs, likely, and quite reasonably, led plan participants to believe that it was not a component of the Plan.” *Id.* at 267. Moreover, the court determined that the employees likely interpreted the Plan’s language related to the “offset by the accrued benefit attributable to such distribution” as meaning that “past distributions would only be factored into their benefits calculations by taking into account the amounts they had actually received.” *Id.* As the court had previously noted in *Layaou v. Xerox Corp.*, 238 F.3d 205, 206 (2d Cir. 2001), “[n]owhere did the [Xerox] SPD . . . explain that [a re-hired participant’s] benefits would be offset by a hypothetically appreciated value of his prior lump-sum distribution.” *Frommert I*, 433 F.3d at 265. Therefore, the Second Circuit concluded that application of the Plan’s

“phantom account” method of calculating this offset violated ERISA with respect to any employees who left Xerox and subsequently returned prior to 1998 because it constituted a reduction of accrued benefits, 29 U.S.C. § 1054(g), and a “significant reduction” of future benefits absent notice, 29 U.S.C. § 1054(h). *Frommert I*, 433 F.3d at 263.

Because “[e]mployees rehired prior to 1998 worked and accrued benefits under a Plan that did not provide for reduction of their benefits by factoring in the hypothetical value of a phantom account,” the Second Circuit remanded the case to the district court to “utilize an appropriate pre-amendment calculation to determine their benefits.” *Id.* at 268. On remand, the district court ruled that the Plan could only deduct the actual dollar amount of prior distributions without any deemed incremental earnings on those amounts, and directed the plan administrator to pay each plaintiff “a lump sum in the amount of the difference between the amount of benefits that [the participant] has received, and the amount of the recalculated benefit, without any consideration of a ‘phantom account.’” *Frommert v. Conkright*, 472 F. Supp. 2d 452, 459 (W.D.N.Y. 2007). Defendants appealed this decision, claiming the district court imposed an improper remedy.

The Second Circuit reviewed the district court’s chosen remedy “for an excess of allowable discretion,” *Frommert II*, 535 F.3d at 117 (*citing Chao v. Merino*, 452 F.3d 174, 185 (2d Cir. 2006)), and concluded that there was “no problem with the District Court’s selection of one reasonable approach among several reasonable alternatives.” *Frommert II*, 535 F.3d at 119. The Second Circuit rejected the defendants’ position that the district court erred by not deferring to the plan administrator when interpreting the benefits due under the pre-1998 offset provision and noted that defendants provided no authority to support the proposition that “a district court must afford deference to the mere *opinion* of the plan administrator in a case, such as this, where the administrator had previously construed the same terms and we found such a construction to have violated ERISA.” *Id.*

Additionally, the Second Circuit ruled that remand to the plan administrator was not necessary. First, because defendants did not request such relief from the district court, the Second Circuit ruled that they had waived the issue for appeal. *Id.* at 118 (*citing Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005)). Second, the court noted that even if defendants had not waived the issue, “the court did not exceed its allowable discretion.” *Id.* Defendants failed to identify any potential gain that would be achieved by remanding the case. Furthermore, the court noted that it had instructed the district court to apply equitable principles in crafting a remedy, and stated that defendants “identify no equitable principles that a district court might be employing, immediately upon

remand from a circuit court, in merely performing the ministerial function of then remanding a case to an ERISA plan administrator.” *Id.* at 119.

Both sides filed petitions for *certiorari* with numerous questions, but the Court only granted review as to two of the questions presented by Xerox. Should the Supreme Court agree with Petitioners’ answers to the questions presented, plans will have unlimited bites of the apple to determine whether a claimant is entitled to benefits under the plan.

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INVESTOR PROTECTION AND CONSUMER RIGHTS

IN ORDER TO STATE A CLAIM UNDER SECTION 36(B) OF THE INVESTMENT COMPANY AMENDMENTS ACT FOR CHARGING EXCESSIVE FEES TO MUTUAL FUNDS, WHETHER THE SHAREHOLDER MUST SHOW THAT THE MUTUAL FUND INVESTMENT ADVISORS MISLED THE FUND'S DIRECTORS WHO APPROVED THE FEE?

Jones v. Harris Assocs. L.P.,
527 F.3d 627 (7th Cir. 2008),
cert. granted, 129 S.Ct. 1579 (2009) (No. 05-586).
Oral argument has been scheduled for November 2, 2009.

In *Jones*, the Court will address the question of what standard should be applied in determining whether a mutual fund investment advisor has breached its fiduciary duty under § 36(b) of the Investment Company Amendments Act of 1970 in connection with the adviser's compensation. The Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.*, provides legal protection to individuals invested in mutual funds. Section 36(b) specifies that "the investment adviser of a registered investment company shall be deemed to have a *fiduciary duty* with respect to the receipt of compensation for services." 15 U.S.C. § 80a-35(b) (emphasis added).

Plaintiffs are owners of shares in several of the Oakmark family of mutual funds. They filed suit against Harris Associates, which provides investment advice to the Oakmark funds, contending that the fees charged by Harris were excessive and therefore gave rise to a breach of fiduciary duty under § 36(b). The Oakmark funds paid Harris Associates 1 percent (per year) of the first \$2 billion of the fund's assets, 0.9 percent of the next \$1 billion, 0.8 percent of the next \$2 billion, and 0.75 percent of anything over \$5 billion. During the fiscal year ending in September 2004, Oakmark paid \$50,652,178 in advisory fees for Harris's services -- \$13,577,704 more than the previous year.

The district court granted summary judgment for defendants, finding the fees paid to Harris were ordinary under *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 694 F.2d 923 (2d Cir. 1982). That case held in order to violate § 36(b), an adviser "must charge a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining." The Seventh Circuit affirmed, but rather than following the trial court's approach, the appellate court affirmed on the basis of its finding that Harris' fees were not excessive because they were roughly the same as those paid by other funds of similar size and goals.

By rejecting the trial court's use of the reasonableness standard, initially established by the Second Circuit in *Gartenberg* – and which other courts followed for almost thirty years – the Seventh Circuit created a split in the Circuits. Rather than following *Gartenberg's* formulation that “the test is essentially whether the fee schedule represents a charge within the range of what would have been negotiated at arm's length in the light of all surrounding circumstances,” *id.* at 928, the Seventh Circuit held that the fiduciary duty created by § 36(b) means no more than a duty to refrain from “pull[ing] the wool over the eyes” of the fund's board. *Jones*, 527 F.3d at 635.

AARP's *amici* brief, filed along with the Consumer Federation of America, argues that the Seventh Circuit significantly eroded the legal protections Congress created under the Investment Company Act, the consequences of which encroach on the ability of tens of millions of families to provide for their children's future educational needs and to realize security in retirement.

Mutual funds play a central role in savings for retirement and college education. High investment fees ultimately decrease the return on mutual fund investments because the fees are paid with funds that would otherwise remain invested earning compounded interest. The Department of Labor's Employee Benefits Security Administration has found that during the course of a 35 year career, a 1 percent increase in investment fees and expenses would reduce a retiree's account balance by 28 percent.

The Seventh Circuit's decision to narrow the § 36(b) fiduciary duty rests on its assertion that the market for investment fees in the mutual fund industry is perfectly competitive, making additional controls unnecessary to keep fees fair. But there are real questions about the premise relied upon by the Seventh Circuit, as there is evidence pointing to the conclusion that investment advisors in the mutual fund industry do not compete on the basis of price due to a variety of unique characteristics of the industry. Furthermore, the Seventh Circuit's narrow interpretation of the scope of the § 36(b) fiduciary duty is inconsistent with the statutory text, the common law of trusts, and congressional intent to protect mutual fund investors from excessive investment fees.

Additionally, AARP argues that, when assessing the fairness of the fees charged by investment advisors, the court should not limit itself to “comparing the adviser's fee with the fees charged by other mutual fund advisers” as was suggested by the Seventh Circuit. Rather, AARP points to the holding in *Gallus v. Ameriprise Fin. Inc.*, 561 F.3d 816 (8th Cir. 2009), that “reliance on other fees throughout the industry will not satisfy § 36(b) because of the competitive defects of the mutual fund market.” In other words, because the mutual fund marketplace is an imperfect market, directors of a mutual fund need to take a

hard look at the details of what fund investors are getting for the fees they pay in order to determine the reasonableness of those fees – which amounts to more than the simple observation that funds fees are in line with the fees of other mutual funds.

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WHETHER UNDER THE “INQUIRY NOTICE” STANDARD APPLICABLE TO FEDERAL SECURITIES FRAUD CLAIMS, THE STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN UNTIL AN INVESTOR RECEIVES EVIDENCE OF SCIENTER WITHOUT THE BENEFIT OF INVESTIGATING ITS POTENTIAL CLAIMS?

In re Merck & Co., Inc.,

543 F.3d 150 (3d Cir. 2008),

cert. granted, 129 S.Ct. 2432 (2009) (No. 08-905).

Oral argument has not yet been scheduled.

In *Merck & Co. v. Reynolds*, the Court will consider whether, in a federal securities fraud claim, the plaintiff must have evidence that the defendant acted knowingly (in law called acting with *scienter*) when it made the alleged misrepresentations before the statute of limitations can begin to run on the plaintiff’s claim, even if the plaintiff-investor does not first investigate its potential claims.

In January 1999, Merck conducted a study called VIGOR that compared its drug Vioxx, a COX-2 inhibitor, to naproxen, a COX-1 and COX-2 inhibitor. Participants taking Vioxx had four to five times the rate of cardiovascular events, such as heart attacks, compared to participants taking naproxen. The VIGOR results had two potential explanations – Vioxx increased cardiovascular events, or naproxen reduced them. Merck aggressively advocated the position that naproxen reduced cardiovascular events.

Both possibilities were widely discussed. They were the topic of an August 2001 *JAMA* article warning that available data raised a “cautionary flag” about the cardiovascular risk of drugs like Vioxx; a FDA warning letter dated September 21, 2001, instructing Merck to be more clear that its naproxen explanation was hypothetical and had not been demonstrated by substantial evidence, and that instead Vioxx might increase cardiovascular events; and a *New York Times* article. The *New York Times* article, published October 30, 2003, reported that a Harvard/Brigham and Women’s Hospital study found that Vioxx users had an increased heart attack risk compared to users of Celebrex, also a COX-2 inhibitor. Moreover, law suits filed in September 2001 alleging consumer fraud, product liability, and personal injury due to cardiovascular events.

Merck investors filed suit in the United States District Court for the District of New Jersey on November 6, 2003, alleging securities fraud based on misrepresentations and omissions about Vioxx’s safety and commercial viability. Merck withdrew Vioxx from the market on September 30, 2004. On November 1,

2004, the *Wall Street Journal* published excerpts from internal Merck emails showing that Merck knew years earlier that Vioxx caused cardiovascular events.

The district court granted Merck's motion to dismiss, finding that the VIGOR study, *JAMA* article, FDA warning letter, law suits, and *New York Times* article all constituted "storm warnings" that were sufficient to put the plaintiffs on inquiry notice of their claim. According to the court the investors should have known more than two years prior to filing their lawsuit that they might have had a claim for securities fraud. In the court's view, the various occurrences indicating the possibility of a securities fraud claim – known as "storm warnings" – put the plaintiffs on inquiry notice, meaning that they knew or should have known that they ought to inquire into whether they actually had a claim. Because the investors neither filed suit nor investigated whether they had a claim within two years of being put on inquiry notice, the district court found that their claim was time-barred by the statute of limitations.

The Third Circuit reversed, holding that the plaintiffs were not on inquiry notice until they had storm warnings, *i.e.*, the publication of the *New York Times* article implying that Merck's handling of the matter raised questions. According to the appellate court, the statute of limitations did not begin to run until the *Times* article was published.

Circuit courts are split on whether scienter is a necessary component of storm warnings. The Third and Ninth Circuits hold that storm warnings must indicate that the defendants acted with scienter, while the Tenth and Eleventh Circuits take a contrary position, *i.e.*, that suspicion of scienter is not required to constitute inquiry notice. The First, Second, and Seventh Circuits have not addressed the issue of scienter directly, but their opinions generally support the view that scienter is a necessary component of inquiry notice, because they all discuss the possibility of fraud as being an integral part of inquiry notice. See *BRIEF FOR THE UNITED STATES AS AMICUS CURIAE, Trainer Wortham & Co. v. Betz* (No. 07-1489), available at <http://www.sec.gov/litigation/briefs/2009/trainerwortham0409.pdf>.

The Circuits are also split on when the statute of limitations begins to run. The Fourth and Eleventh Circuits hold that the statute of limitations begins to run when storm warnings would prompt a reasonable investor to investigate whether it had been defrauded. The Fifth and Eighth Circuits are in accord, provided that a reasonably diligent inquiry could have uncovered the facts supporting a fraud claim within the limitations period. The First, Sixth, Seventh, and Tenth Circuits hold that assuming the plaintiff is aware of the possibility that it may have been defrauded, the statute of limitations begins to run when the plaintiff, exercising due diligence, could have discovered the facts underlying the alleged fraud. The

Second Circuit follows either the first or third approach, depending on whether or not the plaintiff actually investigated its suspicions. The Third and Ninth Circuits hold that the statute of limitations does not begin to run until the plaintiff knows of the basis for its claim, including the possibility of scienter, without any duty for investigation.

AARP's brief will urge the Supreme Court to find that the statute of limitations does not run until the plaintiffs have reason to suspect that the defendants acted with scienter. AARP will argue that requiring scienter to trigger the statute of limitations is an issue of fair notice and equity. It is an issue of fair notice because there was no reason for the plaintiffs to believe they had a likely cause of action against Merck more than two years before they filed suit. It is an issue of equity because the investors should not be penalized for Merck's lack of candor. AARP will also argue that scienter was appropriately required in conformity with the heightened pleading standard in securities fraud cases.

This case is important to persons over 50 because as more individuals participate in defined contribution plans as their sole retirement plan, stocks have become an increasingly important part of individuals' retirement assets. Retirees and those planning retirement also rely to a significant extent on savings and investment assets held outside of retirement plans as major sources of retirement security. Requiring evidence of scienter before the statute of limitations begins to run will give investors more time to file a lawsuit. This will in turn give more investors the opportunity to obtain adequate redress and recoup retirement savings that were lost as a result of fraud.

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INTELLECTUAL PROPERTY

WHETHER A “PROCESS” MUST BE TIED TO A PARTICULAR MACHINE OR APPARATUS, OR TRANSFORM A PARTICULAR ARTICLE INTO A DIFFERENT STATE OR THING (MACHINE-OR-TRANSFORMATION TEST), TO BE ELIGIBLE FOR PATENTING UNDER 35 U.S.C. § 101?

WHETHER THE “MACHINE-OR-TRANSFORMATION” TEST FOR PATENT ELIGIBILITY CONTRADICTS CONGRESSIONAL INTENT THAT PATENTS PROTECT “METHOD[S] OF DOING BUSINESS” IN 35 U.S.C. § 273?

In re Bilski, 545 F.3d 943 (Fed. Cir. 2008) (*en banc*),
cert. granted sub. nom.,
Bilski v. Kappos, 129 S.Ct. 2735 (2009) (No. 08-964).
Oral argument has been scheduled for November 9, 2009.

While the specific issue in *Bilski* is whether a method of hedging risks in commodities trading can be patented, *Bilski* raises the much broader issue of the patentability of business methods, abstract ideas, and mathematical formulas not tied to machines or physical matter. The *Bilski* decision will impact such diverse industries as tax planning, retirement plan design, and the health industry. The case is being closely watched by software makers, Internet companies, investment houses, pharmaceutical companies, and other businesses.

Bernard Bilski and Rand Warsaw applied for a patent for a “method of hedging the consumption risk associated with a commodity sold at a fixed price for a given period.” The method could be used, for example, with energy commodities like natural gas, electricity or coal and includes ways to compensate for the risk of abnormal weather conditions. Their patent application entitled “Energy Risk Management Method” describes a business method in which energy consumers, such as businesses and homeowners, are offered a fixed energy bill, for example, during the winter so they can avoid the risk of high heating bills due to abnormally cold weather. An intermediary – a “commodity provider” – sells natural gas, in this example, to a consumer at a fixed price based upon its risk position for a given period of time, thus guaranteeing the consumer a set price during the winter regardless of how much gas the consumer uses. Having assumed the risk of a very cold winter, the commodity provider hedges against that risk by buying the energy commodity at a second fixed price from energy suppliers called “market participants.” These market participants or suppliers have a risk position counter to the consumers, that is, they want to earn the same amount of money even if there is a warm winter and less demand for the gas. A market participant could be someone who holds a

large inventory of gas and wants to guarantee the sale of a portion of it by entering into a contract now. According to the patent application, setting the fixed price involves a complicated mathematical formula, but admittedly does not necessarily have to be performed on a particular machine or invention.

The examiner in the Patent and Trademark Office (PTO) rejected the Bilski application under 35 U.S.C. § 101 which sets forth the types of inventions that can be patented. The examiner concluded that the proposed “invention” was “an abstract idea and solves a purely mathematical problem.” The Bilski applicants appealed the rejection to the PTO Board of Patent Appeals (Board), but the Board affirmed the rejection. According to the Board’s decision, the Bilski claims do not involve any patent-eligible transformation because they only transform “non-physical financial risks and legal liabilities of the commodity provider, the consumer and the market participants.” The Board concluded that the claims merely recite an “abstract idea.”

The Bilski applicants appealed the Board’s decision to the Court of Appeals for the Federal Circuit. The Federal Circuit *sua sponte* ordered that the appeal be heard *en banc*. Nine of the judges held that under 35 U.S.C. § 101 a process is patent-eligible only if “(1) it is tied to a particular machine or apparatus, or (2) it transforms a particular article into a different state or thing.” (This is known as the “machine-or-transformation” test). Three judges dissented, disagreeing with the majority’s machine or transformation test.

The Supreme Court accepted *certiorari* on two questions. The first is whether a “process” must be tied to a particular machine or apparatus, or transform a particular article into a different state or thing to be eligible for patenting under 35 U.S.C. § 101. The second and corollary question is whether the “machine-or-transformation” test for patent eligibility contradicts Congressional intent that patents protect “method[s] of doing business” in 35 U.S.C. § 273.

Both the breadth and the impact of the *Bilski* “machine-or-transformation” test is illustrated by a pending Federal Circuit case – *Prometheus Laboratories v. Mayo Collaborative Services*, 2008 WL 878910, 86 U.S.P.Q.2d 1705 (S.D.Cal. Mar. 28, 2008) (No. CIV. 04CV1200JAHRBB). *Prometheus* concerns whether certain medical tests are patentable. Patents on patient tests could limit patients’ health care options and ultimately hurt the 50+ population.

Moreover, a growing number of retirement plan methods, strategies, and designs are seeking patent protection. There is a concern that classifying business methods such as retirement plan strategies as “patented” or “patent pending” could lead to the misconception that the strategy is both legitimate and

government-approved. Granting patent protection to “abstract ideas” or tax strategies could limit their use and the retirement options available to people. Finally, patenting such strategies could improperly add to their cost.

AARP will argue that the Federal Circuit was correct in rejecting the patent and that abstract ideas and mathematical formulas are not patent eligible. Additionally, AARP will argue that the scope of patentable subject matter under § 101 does not include the “laws of nature, natural phenomena, and abstract ideas.”

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UTILITIES

IS THE FEDERAL ENERGY REGULATORY COMMISSION REQUIRED TO PRESUME THAT A FREELY NEGOTIATED WHOLESALE ENERGY CONTRACT IS “JUST AND REASONABLE” WHEN THE CONTRACT RATE IS CHALLENGED BY A THIRD PARTY WHO DID NOT AGREE TO THE CONTRACT?

Maine Pub. Utilities Comm’n v. F.E.R.C.,

520 F.3d 464 (D.C. Cir. 2008),

cert. granted, 129 S.Ct. 2050 (2009)(No. 08-674).

Oral argument has been scheduled for November 3, 2009.

The Court will decide the role of the Federal Energy Regulatory Commission (FERC) in reviewing electrical rate challenges brought by non-contracting third parties. In 2008, the Supreme Court held that under the *Mobile-Sierra* doctrine,⁵ when the parties to an electricity rate dispute have entered into a contractual agreement, FERC must enforce its terms except if the public interest requires otherwise, that is, unless the negotiated rates might impair the financial ability of the public utility to continue its service or be an excessive burden to the parties or consumers. *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No.1*, 128 S. Ct. 2733, 2737 (2008). In the decision below, the U.S. Court of Appeals for the District of Columbia Circuit held that, "when a rate challenge is brought by a non-contracting third party, the *Mobile-Sierra* doctrine simply does not apply." *Maine Pub. Utilities Comm’n v. F.E.R.C.*, 520 F.3d 464, 478 (D.C. Cir. 2008). This case will determine whether the holding of *Morgan Stanley* applies to non-contracting third parties.

The case concerns New England’s capacity market for electricity which has had several problems in recent years. In a “capacity” market, as opposed to a wholesale electricity market, “the [transmission provider] compensates the generator for the *option* of buying a specified quantity of electrical power irrespective of whether it ultimately buys the electricity.” *Id.* at 260. Under this system, transmission providers generally purchase more electrical capacity than is necessary to meet their customers' demand for electricity.

In the proceeding below, the New England Independent System Operator (ISO-NE) filed a tariff establishing market-wide rates, which FERC suspended and set for hearing. After four months of negotiations involving 115 parties, and

⁵ The *Mobile-Sierra* doctrine stems from two cases -- *United Gas Pipe Line Co. v. Mobile Gas Services Corp.*, 350 U.S. 332 (1956) (*Mobile*) and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

virtually all of New England, ISO-NE and a subset of intervenors reached a settlement purporting to redesign New England's capacity market and to set rates for all market participants, whether or not they agreed to the settlement. Eight litigants, including the Maine Public Utilities Commission and the Attorneys General of Connecticut and Massachusetts, objected because among other things the agreement effectively forced states to acquire a specific level of capacity whether it was wanted or needed. The objectors also maintained that there was insufficient data about the generators' costs.

FERC approved the comprehensive settlement despite the objections. The Court of Appeals held that the *Mobile-Sierra* doctrine, which provides a highly deferential standard to negotiated contracts, did not apply to non-contracting parties who were instead entitled to a review of the contracts under the "just and reasonable" standard of the Federal Power Act (FPA).

The FPA governs the actions of public utilities engaged in interstate commerce. Congress enacted the FPA to protect the public interest by ensuring that consumers do not pay excessive rates. The FPA was passed to curb the abuses of market power that had historically plagued the interstate electrical power market. Two FPA provisions (sections 205 and 206, 16 U.S.C. §§ 824d, 824e) govern FERC's authority and establish its obligation to regulate rates for the interstate sale and transmission of electricity. Through these provisions, FERC is empowered to regulate wholesale electricity rates. By assuring that wholesale purveyors of electric power charge fair rates to retailers, the FPA protects against the need to pass excessive rates on to consumers. Section 206 of FPA, 16 U.S.C. § 824e(a), requires that rates for the transmission and sale of electricity in interstate commerce be "just and reasonable."

AARP's *amici* brief, filed jointly with Public Citizen, will argue that the Court of Appeals for the District of Columbia Circuit concluded correctly that the Commission cannot approve a settlement agreement that applies the highly deferential public interest standard to rate challenges brought by non-contracting third parties. The brief will also argue that if a contract is presumed reasonable as to nonparties, FERC would be stripped of its jurisdiction to assure that electrical contracts are just and reasonable as to consumers. The brief will argue that the core concern of Congress in enacting the "just and reasonable" provisions of the FPA was and is focused on protection of consumers from exploitation and abuse which is the essential consideration involved in identifying and effectuating the "public interest," in the *Mobile-Sierra* context and in the larger context of FERC ratemaking generally. In determining whether a challenged rate affects the public interest, FERC must focus on whether consumers electric bills are higher than they would otherwise have been had the challenged contracts called for rates within the just and reasonable range.

This case is important because of its potential impact on the cost of utilities to consumers who ultimately must pay for wholesale electrical contracts. Many people on fixed incomes cannot afford to pay rapidly increasing utility costs, and unfortunately, nationwide electricity discounts for the poor are being reduced or eliminated due to state budget problems. This double whammy of escalating prices and inadequate funding for energy assistance programs leaves consumers across the country in an impossible situation – one that federal regulation was supposed to help prevent.

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PENDING PETITIONS FOR *CERTIORARI*

HEALTH RIGHTS

WHETHER ERISA PREEMPTS A SAN FRANCISCO ORDINANCE REQUIRING EMPLOYERS TO PAY A THRESHOLD AMOUNT TOWARD HEALTH CARE SPENDING?

Golden Gate Restaurant Ass'n v. City and County of San Francisco, 546 F.3d 639 (9th Cir. 2008), *reh'g en banc denied by*, 558 F.3d 1000 (9th Cir. 2009), *petition for cert. filed*, 77 USLW 3691 (June 5, 2009) (No. 08-1515). Conference has not yet been scheduled.

In *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, the Ninth Circuit considered whether the Employee Retirement Income Security Act (ERISA) – the federal law regulating employer-sponsored benefits – preempts a San Francisco ordinance requiring certain employers to pay a threshold amount toward their employees' health care spending. The Ninth Circuit held that ERISA does not preempt the ordinance.

In 2006, the San Francisco Board of Supervisors passed the San Francisco Health Care Security Ordinance (HCSO), which established the Health Access Plan (HAP) and employer spending requirements. HAP provides medical services to low and moderate income persons. It does not provide services to persons with health insurance and persons who live outside San Francisco, but such persons are eligible for medical reimbursement accounts if they work in San Francisco and their employer contributes to the HAP fund.

The HCSO requires medium and large-sized employers to make health care expenditures for employees at a certain dollar rate per employee per hour, depending on the size of the employer and whether it is a for-profit or nonprofit. Expenditures must be reported quarterly. Employers are free to decide what type of health care expenditures to make, including whether or not to contribute part or all of the required expenditure through the City to HAP. Thus, employers are free to decide whether to begin, continue, or discontinue an ERISA plan. However, if an employer makes no plan expenditures or makes expenditures to a plan in less than the full required amount, the difference must be paid through the City to HAP.

Golden Gate Restaurant Association filed a challenge to the HCSO, arguing that ERISA preempts the employer spending requirements. Several

labor councils and unions intervened as defendants. Both parties filed cross-motions for summary judgment. The district court entered summary judgment for the Association finding ERISA preemption.

The Ninth Circuit granted the City's motion to stay the district court's judgment, and reversed the district court and remanded with instructions to enter summary judgment for the City and Intervenors.

Beginning its analysis with the Supreme Court approved presumption against preemption as the provision of health care services to persons with low or moderate incomes is traditionally a matter of state and local regulation, the Ninth Circuit held that ERISA did not preempt the HCSO. The court held that the option to pay the city does not create an ERISA plan, in part, because an employer's administrative obligations under the city-payment option do not run the risk of mismanagement of funds or other abuse. The court also compared the administrative obligations to income tax withholding, social security, and minimum wage obligations because the employer pays the city directly and is not responsible for ensuring that the payments are used for their specified purpose.

There was disagreement within the Ninth Circuit as to whether *Golden Gate* creates a split with the Fourth Circuit's decision in *Retail Industry Leaders Association v. Fielder*, 475 F.3d 180 (4th Cir. 2007). The panel deciding the case found that their decision did not create a split because, although both laws give employers the option to increase contributions to a plan or give money to the state, the only rational choice for employers in Maryland was to increase plan contributions, because they would gain nothing by paying the state. HCSO, on the other hand, provides a meaningful alternative by providing tangible benefits to employees in the form of enrollment in the HAP or medical reimbursement accounts. Thus, employers are not compelled, in practice, to alter or establish plans instead of making payments to the City.

Eight judges dissented in the Ninth Circuit's denial of rehearing *en banc*, disagreeing with the panel's characterization of the San Francisco ordinance. They argued that the HCSO was similar in substance to the Maryland statute that the Fourth Circuit found was preempted.

AARP filed an *amicus* brief in the Ninth Circuit in support of the City of San Francisco, arguing that the HCSO was not preempted. Both parties have filed their briefs in the Supreme Court. It is unclear what, if any, position the federal government will take, if asked, on whether *certiorari* should be granted in this case, given the change in Administration.

Golden Gate is an important case because of its potential impact on the health care reform debate, particularly on questions of the limits of state and municipal power to address the need for health care reforms.

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WHETHER THE FEDERAL CIRCUIT FAILED TO FOLLOW *KSR INTERNATIONAL CO. V. TELEFLEX INC.*, 550 U.S. 398 (2007), IN WHICH THE SUPREME COURT ADDRESSED THE PATENT ACT'S NON-OBVIOUSNESS REQUIREMENT UNDER 35 U.S.C. § 103?

***Sanofi-Synthelabo v. Apotex, Inc.*,**

550 F.3d 1075 (Fed. Cir. 2008),

reh'g and reh'g en banc denied, (Mar. 26, 2009),

petition for cert. filed, 78 USLW 3065 (July 24, 2009)(No. 09-117).

In the underlying lawsuit, the generic drug manufacturer Apotex sought to market a generic form of Sanofi-Synthelabo's blockbuster anti-clotting drug Plavix (clopidogrel bisulfate) and filed an Abbreviated New Drug Application (ANDA) with the FDA for approval to sell a generic version alleging that Sanofi's patents were invalid. Sanofi then sued Apotex for infringement, and Apotex counterclaimed that the patent was invalid and unenforceable. The U.S. District Court for the Southern District of New York, 492 F.Supp.2d 353 (S.D.N.Y. 2007), held that the patent was valid and enforceable.

Apotex, the generic manufacturer, appealed and contended that Sanofi-Synthelabo's chemical manipulation of its PCR 4099 patented mixture was "obvious to try," and thus its discovery of Plavix was not patentable. Although the Court of Appeals for the Federal Circuit agreed that separating the molecules was "obvious to try," the research leading to Plavix's creation was non-obvious.

Whether or not it may have been "obvious to try" separating the enantiomers of PCR 4099 and, secondarily, preparing its dextrorotatory enantiomer as a bisulfate salt, the wide range of possible outcomes and the relative unlikelihood that the resulting compound would exhibit the maximal increase in antiplatelet aggregation activity and the absence of neurotoxicity makes clopidogrel bisulfate non-obvious.

Sanofi-Synthelabo v. Apotex, Inc., 550 F.3d 1075, 1089 (Fed. Cir. 2008) (quoting *Sanofi-Synthelabo v. Apotex, Inc.*, 492 F.Supp.2d 353, 392 (S.D.N.Y.2007)).

Apotex argued that "the correct inquiry is not whether the results obtained with the separated enantiomer were unexpected, but whether it would have been obvious to separate and test the enantiomers, based on the general knowledge that enantiomers can exhibit different properties." Pet. App. at 27a-28a. The Federal Circuit rejected this argument in favor of finding that the result of this "separation of enantiomers was unpredictable." *Id.* at 30a. Thus, the Federal Circuit ruled that the Plavix patents were not invalid because regardless of

whether an experiment was “obvious to try,” if results are non-obvious, they are patentable.

Apotex filed a petition seeking review in the Supreme Court, arguing that the Federal Circuit’s judgment stems from the application of an “obvious to try” approach that is inconsistent with the Supreme Court’s approach to obviousness in *KSR International Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007), and patent policy.

The Supreme Court’s recent *KSR* decision declared that results of experiments “obvious to try” were not patentable. The Supreme Court stated that an invention may be found obvious if it would have been obvious to a person having ordinary skill to try a course of conduct. When there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product is not of innovation but of ordinary skill and common sense. In that instance, the fact that a combination was obvious to try might show that it was obvious under § 103. *KSR*, 550 U.S. at 421.

The non-obviousness requirement is intended to ensure that “the results of ordinary innovation are not the subject of exclusive rights under the patent laws.” 550 U.S. at 427. Patents are awarded as “an inducement, to bring forth new knowledge.” *Graham v. John Deere Co.*, 383 U.S. 1, 9 (1966). Thus, patents granted on “advances that would occur in the ordinary course without real innovation retard progress,” *KSR*, 550 U.S. at 419, and impose the costs of exclusivity on the public needlessly.

When unnecessary patent protection delays the introduction of generic drugs, the burden on the public is not only financial; there are dire implications for those suffering from disease and other health problems. Thus, it is particularly important that the lower courts consistently and correctly apply the patentability standard set out in the statute and in the Court’s precedents.

For this reason, AARP filed an *amici* brief with Public Patent Foundation and Patients Not Patents urging the Court to grant review. Among other things, the brief argued that the Federal Circuit’s rule on obviousness sets a low standard for patentability and leads inevitably to the granting of patent rights to the results of “obvious to try” experiments meant to extend patent life.

The “obvious to try” doctrine at issue in this case is particularly important because pharmaceutical companies have increasingly used patents on incremental modifications or reformulations of existing drugs to extend their market exclusivity beyond the generous protections already available to them via

patent protection on the basic drug, patent term extensions under the Hatch-Waxman Act, and data exclusivity periods provided by the FDA. For example, more than one-third of products launched from 2002 to 2005 by the top fifty pharmaceutical manufacturers were reformulations of drugs already under patent, for which the “obvious to try” issue has particular salience.

When such a large fraction of “new” drugs hitting the market are reformulations of previously launched drugs, the Federal Circuit’s dismissal of the “obvious to try” standard is crucial in the context of pharmaceuticals and consumer access to life-saving drugs. Relying on the unpredictability of the results to award patents for the fruit of obvious research paths will lead to unwarranted patent protection for obvious pharmaceutical advances, sacrificing access to important medicines without a compensating increase in innovation. Because results that can be characterized as unpredictable in some way are so common in the pharmaceutical field, such a hindsight-driven analysis vastly and unnecessarily expands the scope of patentability, directly harming consumers through reduced access, higher prices, and restrained competition. This excessive patenting also leads to patients foregoing needed medical care to save money, damaging the public health of the nation.

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WHAT THE FUTURE HOLDS

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

Employment

In what at first blush appeared to be a long-overdue acknowledgement of the importance of the rights of older workers, four of the five ADEA cases decided during the 2007-2008 Term [*Gomez-Perez v. Potter*, 128 S.Ct. 1931 (2008), *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S.Ct. 1140 (2008), *Federal Exp. Corp. v. Holowecki*, 128 S.Ct. 1147 (2008), and *Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395 (2008)] were favorable to the employee-plaintiffs. An even more hopeful sign that going forward the Court was prepared to embrace a more expansive view of the ADEA was that in *Gomez-Perez* the Court extended the statutory protection against retaliation specifically applicable to privately-employed workers to federal employees even though neither the ADEA, nor Title VII from which the ADEA was derived, contains language conferring such a right on employees of the U.S.

However, in the fifth decision, *Kentucky Retirement Systems v. EEOC*, 128 S.Ct. 2361 (2008), the Court once again restrictively construed the overall purpose and intent of the ADEA and parsed its text to hold that the disability retirement plan at issue was not facially discriminatory even though age was an explicit factor that determined the amount of benefits available to a participant and in some cases denied them entirely. The *Kentucky Retirement Systems* decision, which, according to the dissent “undercuts ... the basic framework” of the ADEA by effectively sanctioning blatant age discrimination in employee benefits, requires that older employees who are denied benefits must produce additional evidence of age bias by the employer as the motive for the denial of benefits – an almost impossible task. Additionally, in *Kentucky Retirement System* the Court created another significant interpretive distinction between the ADEA and Title VII, which the Court has repeatedly construed to prohibit facially discriminatory plans without additional evidence of bias. *Kentucky Retirement System*, thus foreshadowed the Court’s 2009 decision in *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009), which has potential to be its most harmful blow to the rights of older workers yet.

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

Currently, there are no ADEA cases on the Court’s docket for the 2009-2010 Term. If the Court does agree to hear an ADEA case this Term, AARP will be watching to see if it will pull back from the brink of relegating freedom from age discrimination to the status of second class civil right. In the meantime, AARP is working with a coalition of civil rights groups to support legislation that will overturn the most egregious aspects of the *Gross* decision.

Health Care

The issue of whether reverse, or exclusion, payments made by brand name drug manufacturers to would-be generic competitors is an alleged antitrust violation has been litigated in the courts for a number of years. A payment from a brand name drug manufacturer to a generic is called a reverse payment because the usual practice would be for a generic to pay the brand under a license to manufacturer the drug if it was still protected by a patent. The issue is

important for individual consumers and public authorities alike because the payments extend patent protection for the brand name drug and delay entry into the marketplace of less expensive generic drugs.

Beginning in 2005 with *Schering Plough Corp. v. FTC*, 403 F.3d 1056 (11th Cir. 2005), several courts of appeal have concluded that such payments do not constitute antitrust violations. In *Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187 (2d Cir. 2006), the Second Circuit decided that a drug patent holder could make a payment to a generic manufacturer to stay out of the market unless the patent was so weak as to constitute a sham. Although petitions for *certiorari* have been filed in several cases, the Supreme Court has not yet taken a case on this issue. Now at the request of the U.S. Court of Appeals for the Second Circuit, the Department of Justice has entered as *amicus curiae*, in the case of *In re Ciprofloxacin Hydrochloride Antitrust Litigation*, Nos. 05-2581, 05-2852 (2d Cir.). There, direct purchasers of Cipro, the blockbuster antibiotic, challenged the reverse payment settlement agreement between the brand (Bayer) and generic (Barr) makers of the drug. Barr agreed not to challenge the validity of the Cipro patent and not to manufacture a generic version of the drug until six months before the patent expired. In exchange, Bayer agreed to make reverse payments to Barr that totaled \$398 million. In its brief the government stated that "reverse payment agreements that delay entry by a potential generic competitor in exchange for a payment from a branded drug manufacturer with market power presumptively violate the Sherman Act [antitrust laws]." This is a marked change from the position the government took in earlier reverse payment litigation. Meanwhile, there are several legislative proposals to amend Hatch-Waxman to make reverse payments specifically illegal under the statute.

Several states have passed laws that criminalize the sale of prescriber-identifiable data for commercial use. This is information data that data mining companies use to identify the prescribing habits of individual physicians. The data is sold to drug companies which use the information to aim its detailers (drug representatives) at specific physicians in order to influence their prescribing patterns, such as switching from a generic drug to brand name. The first law, passed in New Hampshire, drew a lawsuit from two data-mining companies and ended in a First Circuit decision, *IMS Health Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2864 (2009), upholding the law on two grounds: (1) the Court determined that the information exchanged was not speech entitled to First Amendment protection; and (2) that even if the speech was "commercial speech," the state had sufficient justification for the restriction under the test of *Central Hudson Gas & Elec. Corp. v. Pub Serv. Comm'n*, 447 U.S. 557 (1980), because of the state's interest in curtailing rising state expenditures on Rx drugs. Vermont passed a similar law which was also challenged in the courts, and the trial judge's decision upholding that law on commercial speech grounds is now

on appeal to the Second Circuit. *IMS Health Inc., et al. v. Sorrell*, No. 09-1913-cv(L).

States have also attempted to regulate pharmacy benefit managers (PBMs) which are fiscal intermediaries that specialize in the administration and management of prescription benefit programs. The original idea of PBMs was to better manage drug use through formularies and other means and thus lower drug costs to the plans. There are disputes whether this actually occurs. Maine passed a new law which requires PBMs to disclose the amount of rebates they receive from negotiated agreements with drug makers. The idea behind disclosure requirements is to ensure that discounts get passed along to insurers and ultimately consumers. The Pharmaceutical Care Management Association (PCMA), the trade association for the PBMs, filed suit against Maine seeking to block implementation of the law, arguing that ERISA preempts the state law and that the state law violates the Constitution's Commerce clause. The First Circuit rejected these arguments. *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294 (1st Cir. 2005). The District of Columbia passed a law similar to Maine's law which requires PBMs to disclose the amount of rebates they receive from negotiated agreements with drug makers. PCMA filed suit against D.C., seeking to strike down the provisions which deal with disclosure requirements, making arguments similar to those asserted in the First Circuit in *PCMA v. Rowe*. *Pharm. Care Mgmt Ass'n v. District Columbia*, 173 Fed. Appx. 3 (D.C. Cir. 2006). This case was remanded to the district court, where the district court upheld the law based on the theory of collateral estoppel. 477 F. Supp.2d 86 (D.D.C. 2007). PCMA appealed and the case was again remanded to the district court for a decision on the issue of ERISA preemption. 522 F.3d 443 (D.C.Cir. 2008). The district court held that ERISA preempted D.C.'s statute. 605 F.Supp.2d 77 (D.D.C. 2009). This case is now on appeal to the United States Court of Appeals for the District of Columbia Circuit. Case No. 09-7042. If the D.C. Circuit affirms the district court's decision, there will be a split in the circuits. AARP filed *amicus* briefs in support of both state laws.

In *Sarah Grammer v. John J. Kane Regional Centers-Glen Hazel*, 570 F.3d 520 (3d Cir. 2009), the court held that a private right of action exists to enforce the Nursing Home Reform Act, potentially opening doors for new causes of action for nursing home residents subjected to abuse and neglect. Appellant's mother, Melviteen Daniels, was a resident of the John J. Kane Regional Center, a publicly-operated residential skilled nursing care and rehabilitation center for short-term and/or long-term needs. As a result of the Kane Center's failure to provide proper care, Daniels alleged that her mother developed decubitus ulcers, became malnourished and eventually developed sepsis, from which she died. Appellant sued the nursing facility bringing claims under 42 U.S.C. § 1983, alleging that the Kane Center deprived Mrs. Daniels of her civil rights by

breaching a duty to ensure quality care under the Omnibus Budget Reconciliation Act of 1987 (OBRA) and, more specifically, the Federal Nursing Home Reform Amendments (FNHRA). The Kane Center argued that neither OBRA nor FNHRA provide a right that is enforceable through § 1983, and that instead the statutes merely set forth requirements a nursing facility must comply with to receive federal Medicaid funds. The Third Circuit found that the language of the FNHRA is sufficient to create rights that are neither “vague and amorphous” nor impose upon states a mere precatory obligation. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002) (citing *Alexander v. Sandoval*, 532 U.S. 275, 288-89 (2001)). The court detailed how the Nursing Home Reform Act confers federal, substantive rights on nursing home residents to quality of care that are enforceable under civil rights statutes. The Third Circuit denied Kane Center’s request for rehearing. It is anticipated that Defendants will seek *certiorari* from the Supreme Court.

ERISA & Employee Benefits

In *MetLife v. Glenn*, 128 S.Ct. 2343 (2008), the Court confirmed that a benefit plan administrator who both determines claimants’ eligibility for benefits under the plan and is the funding source for plan benefits operates under a *per se* conflict of interest that must be weighed by the trial court upon a claimant’s challenge of an adverse benefit determination by the plan administrator. Because a divided court expressed several different views on just how the conflict factor weighs into the analysis, it would not be surprising if litigants continue to push the Court toward further clarification in this subtle and perplexing area.

The extent of available remedies under ERISA continues to be an area of controversy in the federal courts, and there are many related issues concerning the distinction between legal and equitable remedies. In *LaRue v. DeWolff, Boberg & Associates, Inc.*, 128 S.Ct. 1020 (2008), the Court opened the door to 401(k) participants seeking relief under ERISA Section 502 (a)(2) for losses to their individual accounts allegedly caused by fiduciary breaches. It now appears that economic losses may be recovered from plan fiduciaries in such circumstances. The Court had before it, but did not decide, the issue of whether a participant may sue a breaching fiduciary for monetary relief under section 502(a)(3) of ERISA. Although the Solicitor General recommended that the Court grant *certiorari* in the case of *Amschwand v. Spherion Corp.*, 505 F.3d 342 (5th Cir. 2007), *cert. denied*, 2008 WL 2547370 (June 27, 2008), the Court rejected that case. *Amschwand* is a particularly troubling case. There, the employer switched life insurance providers, with the new provider making coverage effective upon the completion of one full work day for the covered employees. Although Mr. Amschwand repeatedly called his employer to see if there were any

actions he needed to take and he was assured by his employer that he was fully covered, he was still unable to verify the new terms because his employer failed to provide requested policy documents. There was no question that he maintained the premium payments. Following his death, his wife filed a claim for her deceased husband's life insurance proceeds; her claim was denied because he had not fulfilled the one-day "Active Work Rule" requirement. The Fifth Circuit held that under Supreme Court precedent Mrs. Amschwand had no remedy.

The Supreme Court has not granted *certiorari* on the breadth of the insurance savings clause since its decision in *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003). In two of the circuit courts of appeals, there are cases concerning the authority of state insurance commissioners to outlaw discretionary clauses in group insurance policies administered within their states. These cases are being litigated in Montana and Michigan, and insurance commissioners in nine other states (California, Colorado, Hawaii, Illinois, Indiana, New Jersey, New York, Maine, Oregon, Washington) have advanced initiatives to limit the use of discretionary clauses.

Disability

In September 2008, just prior to the opening of the Court's 2008-09 Term, President George W. Bush signed into law the Americans with Disabilities Act Amendments Act (ADAAA) of 2008, which passed by overwhelming majorities in both houses of Congress. The ADAAA resolved one controversial legal issue on which U.S. Courts of Appeals had split – whether a person not actually having a "disability" but who is "regarded as" having a disability can claim discrimination in the form of failure to secure "reasonable accommodation." Such claims are foreclosed by the ADAAA. Congress' adoption of a revised definition of "disability" under the ADA explicitly rejected rulings in *Sutton v. United Air Lines, Inc.* (1999), and *Toyota Motor Manufacturing of Kentucky, Inc. v. Williams* (2002). The Court is unlikely to revisit such issues for a while until lower federal courts have a chance to interpret the ADAAA.

Instead, to the extent the Court decides to address disability discrimination issues at all, it is likely to consider other matters, such as the scope of the ADA's requirement that employers, government officials, and private entrepreneurs afford persons with disabilities "reasonable accommodation" in regard to employment opportunities, public services, and private sector services open to the public at large (i.e., public accommodations). One such issue that may find its way onto the Court's docket before long is the question posed in *Huber v. Wal-Mart Stores, Inc.* (No. 07-480), which the Court agreed to hear in December 2007, then dismissed from its argument calendar when the parties settled the case. That issue is: If a disability prevents an employee from performing the

essential functions of his or her current position, does the ADA require: (a) that the employer reassign the employee to a vacant, equivalent position for which he or she is qualified, as the Tenth and District of Columbia Circuits have held; or (b) that the employer merely permit the employee to apply and compete with other applicants for the vacant, equivalent position for which he or she is qualified, as the Seventh and Eighth Circuits have held? The split in federal appeals court rulings obviously makes this issue a very plausible subject for Court review. In addition, it raises the question whether the statutory option of reassignment, a form of “reasonable accommodation” specifically identified in the ADA, has any value whatsoever, if all an employer must do is allow an applicant with disabilities to “compete” with other applicants on equal terms. That is, does the ADA’s guarantee of “reasonable accommodation” give persons with disability a leg up, or does it merely prohibit discrimination on grounds of disability?

Another major issue not addressed by the ADA has been left open by several recent Court rulings: how extensively has Congress abrogated state officials’ “sovereign immunity” from monetary relief for their discriminatory acts violating the ADA? In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Court held the Eleventh Amendment bars damage award against state employers under Title I of the ADA. But in *Tennessee v. Lane*, 541 U.S. 509 (2004), the Court ruled 5-4 that state officials may be sued for damages under Title II of the ADA for discriminating against persons with disabilities by unfairly limiting their access to state courts. And in *United States v. Georgia*, 546 U.S. 151 (2006), the Court said disabled state prisoners may seek damages for violation of their constitutional right to be free of cruel and unusual punishment. This leaves unresolved questions surrounding what other state operations implicate rights so “fundamental” that state agencies risk money damages for limiting access to them for people with disabilities? What about the right to cast a ballot in person at local polling places? Or the opportunity to receive treatment for mental disorders in community settings? Or the right to marry and raise children? Under *Garrett*, *Lane*, and *Georgia*, context matters, and so it falls to the Supreme Court to say whether specific state activities (and the agencies/officials who administer them) are entitled to sovereign immunity. Thus far, federal appeal courts have ruled that damages are an option in Title II ADA suits against state colleges and universities. However, a number of federal trial courts have disagreed. Compare *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005), and *Ass’n for Disabled Ams., Inc. v. Florida Int’l Univ.*, 405 F.3d 954 (11th Cir. 2005), with *Doe v. Board of Trustees of University of Illinois*, 429 F. Supp. 2d 930 (E.D. Ill. 2006), and *Press v. State University of New York at Stony Brook*, 388 F. Supp. 2d 127 (E.D. N.Y. 2005). Thus, the Court’s next ADA immunity ruling may arise in the education context.

Housing Rights

In *State ex rel. North Dakota Dep't of Labor v Matrix Properties*, 2009 N.D. 137 (2009), the North Dakota Supreme Court held that the statute of limitations in a Fair Housing Act (FHA) design and construction case runs two years following the completion of construction, which is contrary to HUD's interpretation of the statute of limitations for such claims. Determining when the statute of limitations is triggered is crucial especially when dealing with construction problems because it is not unusual for problems to remain undiscovered for many years. FHA includes requirements for design and construction of multifamily housing to ensure it is accessible to people with disabilities. Under this decision, a builder whose construction fails to conform according to the regulations plainly laid out in the FHA is completely immune from suit if the violation goes undetected for two years. Under such a rule, builders would enjoy immunity even if no one – much less a disabled person who would be affected by the missing required accommodations – inspected the property within that two year timeframe. AARP expects that the State of North Dakota will file a petition for *certiorari*.

Voting Rights

This past Term, in *Northwest Austin Municipal Utility District No. 1 v. Holder*, 129 S.Ct. 2504 (2009) the Supreme Court considered, but did not resolve, the issue of the constitutionality of a critical remedial provision of the 1965 Voting Rights Act (VRA). Section 5 of the VRA requires all covered jurisdictions – consisting of all governments in most states of the former Confederacy and portions of other states where minority voting rights have faced serious historical challenges, such as New York, California and South Dakota – to seek "pre-clearance" from the U.S. Department of Justice of any proposed changes in voting procedures. A small utility district with no history of racially polarized voting sought to "bail out" of coverage by the "pre-clearance" requirement. In the alternative, the district argued that if it was ineligible to avoid coverage then the VRA was unconstitutional as applied to it. By a 5-4 vote, the Court determined that all "political subdivisions" may apply to bail out from section 5 requirements and therefore, there was no present need to address whether section 5 of the VRA remains "congruent and proportional" legislation to enforce the "equal protection" guarantee in the Fourteenth Amendment to the U.S. Constitution. A widely-held view is that this critical provision of the Voting Rights Act had a "near-death" experience, and that further constitutional challenges to the VRA will follow. However, because of the Court's approach in *Holder*, it appears less likely that such constitutional challenges will succeed and reach the Supreme Court, at least in the near term. Instead of follow-on constitutional challenges to the "pre-clearance" provisions of VRA, courts are more likely to see a flow of lawsuits by other jurisdictions seeking to bail out of

VRA coverage. And the fact that this remedy is available means that the VRA now is less of a "burden" on the independence of covered jurisdictions. Thus, future constitutional challenges to section 5 of the VRA may be more difficult.

CONCLUSION

It is no exaggeration to state that as baby boomers age, Supreme Court decisions will influence a larger percentage of the American population and will increase in significance. AARP, through its active *amicus* participation in the Supreme Court, has and will continue to ensure that the Court is made aware of the concerns of its 40 million members. Because AARP considers itself the voice of older people, participation in these cases is an integral part of AARP's advocacy. It will continue letting the Court know its views in this Term.



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