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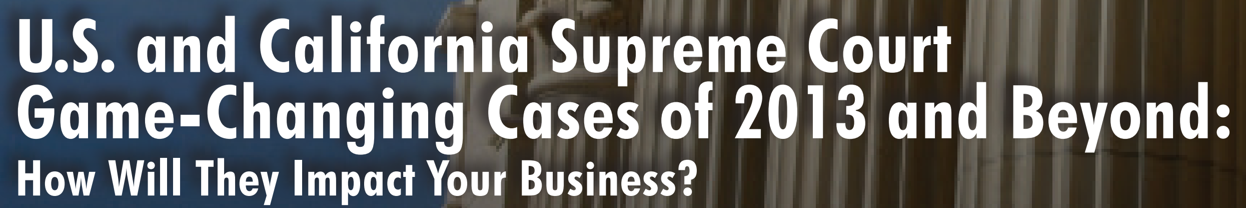


U.S. and California Supreme Court Game-Changing Cases of 2013 and Beyond:

How Will They Impact Your Business?

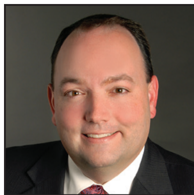
Updated March 2014

Introduction

The U.S. Supreme Court and the California Supreme Court issue decisions and take up cases that impact a broad range of businesses in California and nationwide. Business executives and in-house counsel, however, rarely have time to wade through the Supreme Courts' lengthy opinions or monitor the cases coming up on the Courts' dockets to catch a glimpse of developing issues. With that in mind, we present this executive summary of game-changing decisions by the U.S. and California Supreme Courts over the past year, as well as cases pending before those courts right now that are likely to have a substantial impact on a wide range of businesses. These one to two-page summaries are meant to be read in between meetings, and put potentially relevant issues on your radar screen so you can be proactive in managing litigation and your business. Of course, our experienced trial and appellate litigators, patent and employment lawyers welcome discussing these cases with you.

About Snell & Wilmer

Founded in 1938, Snell & Wilmer is a full-service business law firm with more than 400 attorneys practicing in nine locations throughout the western United States and in Mexico, including Los Angeles and Orange County, California; Phoenix and Tucson, Arizona; Denver, Colorado; Las Vegas and Reno, Nevada; Salt Lake City, Utah; and Los Cabos, Mexico. The firm represents clients ranging from large, publicly traded corporations to small businesses, individuals and entrepreneurs. For more information, visit www.swlaw.com.



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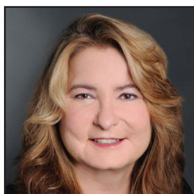

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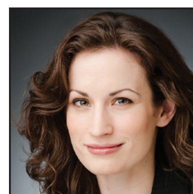

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Arbitration

***American Express v. Italian Colors Restaurant,* 133 S.Ct. 2304 (2013)**

This case presents yet another challenge to the enforceability of a class action waiver in an arbitration clause. The Second Circuit held that such a clause was unenforceable to the extent it precluded any action seeking to vindicate the plaintiffs' federal statutory rights. The U.S. Supreme Court granted review and determined the Federal Arbitration Act (FAA) does not permit courts to invoke the "federal substantive law of arbitrating" to invalidate arbitration agreements that bar class arbitration of a federal law claim.

The plaintiffs brought suit against American Express (Amex) on behalf of a class of merchants who accepted Amex charge cards, alleging that Amex engaged in certain anticompetitive conduct by requiring them to accept both Amex charge cards and credit cards. The standard agreement between the merchants and Amex contained an arbitration agreement with a class action waiver provision. The district court granted Amex's motion to compel arbitration and held that the enforceability of the class action waiver provision was a question for the arbitrator.

The Second Circuit reversed the district court, holding that the enforceability of the class action waiver was a question for the Court, not the arbitrator. It further held that enforcement of the arbitration clause would result in prohibitive costs for the plaintiffs, such that the plaintiffs' federal statutory claims could not be brought as individual actions.

The U.S. Supreme Court vacated and remanded the Second Circuit Court's holding for further consideration in light of two cases, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) and *AT&T Mobility LLC v. Concepcion*, 563 U.S.__ (2011). The Second Circuit reaffirmed its earlier ruling and determined that such waiver provisions are unenforceable where, as here, the Court deems a class action the only economically feasible means for the plaintiff to pursue its federal law claims. After the Second Circuit declined to hear the case en banc, the case, once again, found its way back to the Supreme Court.

In recent years, the U.S. Supreme Court has repeatedly held that arbitration is a matter of contract and that the terms of arbitration agreements will be strictly enforced. Here, it reaffirmed these principles. The Court held that the FAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery. The Court found no congressional command that required rejection of the class-arbitration waiver, and distinguished the costs required to pursue a remedy from the costs required to prove a remedy. In reversing the Second Circuit, the Court noted that to decide otherwise would destroy the prospect of speeding resolution of arbitration claims because the courts and parties would have to preliminarily determine the costs of proving each element of the claims and potential damages that could be recovered.

This decision underscores the Supreme Court's tendency to enforce arbitration agreements. In the absence of federal legislation to the contrary or contractual considerations that undermine the validity of an arbitration agreement, courts are bound to enforce the terms of such agreements.

Full disclosure: Snell & Wilmer Partner Mary-Christine Sungaila served as co-counsel for amicus curiae the International Association of Defense Counsel in support of American Express in this case.

***Kilgore v. Keybank, N.A.*, 718 F.3d 1052 (9th Cir. 2013)**

Kilgore concerns federal preemption of a California state law precluding the arbitration of injunction claims brought under California consumer protection statutes. The Ninth Circuit's en banc decision in the case clarifies some open questions about the intersection of federal and state law in the arbitration arena.

The Kilgore plaintiffs were student borrowers who attended a helicopter training program. The program filed for bankruptcy before the plaintiffs received their diplomas, and the plaintiffs brought suit against the training program and their lending institution, alleging violations of California's consumer protection statutes. Each plaintiff had signed a promissory note containing an arbitration provision, and had expressly waived any right to bring a class or representative action. The arbitration provision provided the students sixty days to reject arbitration from the date they signed the note.

The en banc panel held that the class waiver provisions were enforceable, just as the previous three judge Ninth Circuit panel had held. In light of *AT&T Mobility LLC v. Concepcion*, 563 U.S.__ (2011) and existing California case law, the panel found the arbitration provision to be neither substantively nor procedurally unconscionable. The panel did not reach the broad argument of whether *Concepcion* vitiated the *Broughton-Cruz* rule exempting a public injunction claim from arbitration. Even if the rule survived, the plaintiffs' claims did not fall within the purview of the rule because the plaintiffs sought to resolve a private dispute rather than remedy a public wrong. Thus, the Ninth Circuit vacated the district court's dismissal of the plaintiff's case, reversed the denial of the defendant's motion to compel arbitration, and remanded with instructions to the district court to compel arbitration.

The panel's decision was narrowly tailored to the facts of the case. The decision does not answer the outstanding question of whether public injunction claims remain exempt from arbitration. However, the decision does confirm that, in the view of the Ninth Circuit, a ban on class arbitration is not substantively unconscionable under California law in light of *Concepcion*. Thus, the Kilgore decision must be read together with the California Supreme Court's arbitration decisions in *Iskanian, Sanchez* and *Sonic-Calabasas*.

This decision also provides guidance for companies who want to avoid a claim that their class action waiver provisions are procedurally unconscionable. Such provisions should be clearly labelled in their own section, and in boldface or another format that is easily legible. Companies should also consider providing consumers or employees with a 30-60 day period in which they can opt to reject the arbitration provision.

Iskanian v. CLS Transportation Los Angeles LLC, **Cal. Supreme Ct. Case No. S204032.**

At issue in *Iskanian* is the enforceability of a class waiver provision in an arbitration agreement in light of the U.S. Supreme Court's holding in *AT&T Mobility LLC v. Concepcion*, 563 U.S.__ (2011). This is one of several cases now pending before the California Supreme Court concerning the extent to which the Federal Arbitration Act preempts state law limitations on the enforceability of arbitration agreements.

Iskanian worked as a driver for the defendant. As part of his employment arrangement, he signed an arbitration contract which contained a waiver of the right to bring a class or representative action. Iskanian then filed a suit which included both class and representative claims related to wage disputes. After the class was certified, the U.S. Supreme Court decided *Concepcion*, and the defendant moved to compel arbitration, citing *Concepcion*. The Trial Court agreed with the defendant and ordered arbitration. The plaintiff appealed.

Concepcion recognizes that the savings clause of the Federal Arbitration Act permits certain state law defenses to arbitration agreements, including unconscionability. Provided, however, that these defenses cannot be applied in a way that disfavors arbitration. *Concepcion* expressly overturned a California case refusing to enforce class waivers with the Supreme Court, holding that such a refusal was inconsistent with the policies favoring streamlined arbitration procedures.

Applying the rule of *Concepcion*, the Court of Appeal held that the class action waiver in *Isakanian* was enforceable and confirmed the lower court's ordered arbitration. According to the Court, *Concepcion* invalidated previous California case law holding that class action rights were not waivable where a class action was likely to be a more effective means of vindicating individual rights, as well as case law refusing to enforce waivers of representative actions under California's Private Attorneys General Act. The Court further distinguished a recent decision of the National Labor Relations Board as contrary to the rule of *Concepcion*, and highlighted a split of authority among California's intermediate appellate courts on the issue of class action waivers.

Employers who use class waiver provisions in their employment agreements will want to watch for the outcome of *Iskanian*, which has the potential to clarify a murky area of California arbitration law and the effectiveness of class waivers.

The California Supreme Court granted review in September 2012, and briefing was completed in July 2013. No oral argument has been set.

Sanchez v. Valencia Holding Co., **Cal. Supreme Ct. Case No. S199119.**

Sanchez concerns the enforceability of an arbitration provision in a used-car sales contract, where the purchaser alleged that the specific arbitration procedures themselves were unconscionable. This is one of several cases now pending before the California Supreme Court concerning the extent to which the Federal Arbitration Act preempts state law limitations on the enforceability of arbitration agreements.

The plaintiff in *Sanchez* purchased a certified pre-owned Mercedes-Benz. The purchase contract was a densely printed one-page document, and the arbitration provision appeared on the back. Under the terms of the contract, any arbitration award between $1 and $100,000 was not appealable, while an order for injunctive relief was. The plaintiff filed a class action, alleging that the terms of the purchase itself violated California consumer protection laws. The defendant moved to compel arbitration.

The California Court of Appeal held that the agreement to arbitrate was procedurally and substantively unconscionable. It reasoned that the presentation of a take-it-or-leave-it agreement with the arbitration language printed on the back placed the buyer at a procedural disadvantage, particularly where the only signatures appeared on the front of the document. Substantively, the Court concluded that the terms of the arbitration provision unduly favored the seller. According to the Court, the seller was the party most likely to benefit from an appeal of an award in excess of $100,000, from an appeal of an injunction, from the availability of self-help remedies and from the imposition of appellate costs on the consumer. These provisions were substantively unconscionably at odds with California policy and therefore unenforceable.

The Court of Appeal held that the Federal Arbitration Act (FAA) did not preempt the unconscionability rule at issue, distinguishing *AT&T Mobility LLC v. Concepcion*, 563 U.S.__ (2011). According to the Court, the one-sided elements of the purchase contract, which were adopted "in an effort to ensure that the car dealer will be the prevailing party," undermined, rather than furthered, the strong policies of the FAA in favor of arbitration.

This holding is consistent with the California Supreme Court's holding in the recently decided *Sonic-Calabasas A, Inc. v. Frank Moreno* (2013) 57 Cal.4th 1109, which held that an arbitration agreement may still be unconscionable if it is unreasonably one-sided in favor of the employer. There, the Court remanded the case to the trial court to determine whether the arbitration agreement at issue was unreasonably one-sided, and therefore unconscionable.

On review, the California Supreme Court appears poised to address which specific terms or rules of arbitration may be subject to advance judicial challenge and provide further guidance on what terms may be included in a valid agreement.

The California Supreme Court granted review in March 2012. Briefing in this case concluded in November 2012, and oral argument has not been set.

***Richey v. AutoNation,* Cal. Supreme Ct. Case No. S207536.**

Richey, a sales manager for an AutoNation car dealership, injured his back and took a medical leave of absence under the California Family Rights Act (CFRA). He was terminated four weeks before the expiration of his approved CFRA leave because the dealership learned that during his leave he had been working at a restaurant that he owned, including taking orders and acting as a cashier. AutoNation's policies prohibited employees on a medical leave of absence from working elsewhere. Richey was subsequently terminated for violating this policy. When Richey brought suit for alleged violations of the CFRA, the case was transferred to arbitration pursuant to AutoNation's arbitration agreement.

The arbitrator found in favor of AutoNation, relying on the "honest belief defense," which is recognized by several federal courts as a complete defense against liability where an employer honestly believes it is terminating an employee for abusing protected leave. Thus, the arbitrator found that Richey was terminated for nondiscriminatory reasons because Richey's supervisors honestly believed that he was abusing his CFRA leave by working at his restaurant. Richey petitioned the trial court to vacate the arbitration award, but it denied his request and confirmed the award.

The Court of Appeal reversed, holding that the "honest belief defense" is not recognized under California law. The Court held that employers bear the burden of *proving* that an employee suspected of abusing protected leave actually abused such leave, and would not have been reinstated in any event. The Court further held that the arbitrator committed clear legal error by relying solely on AutoNation's belief that Richey had abused his CFRA leave, rather than making factual findings that Richey did in fact abuse his medical leave. The Court accordingly held that because the arbitrator exceeded his authority, the trial court should have vacated the arbitration award.

While this case has important implications for how employers deal with employees' abuse of medical leave, it is also drawing major attention for its impact on the finality and security of arbitration awards. More and more employers have included binding arbitration terms as a condition of employment. However, if the standards of reviewing arbitration awards are relaxed, many of the benefits of arbitration—cost effectiveness, finality and efficiency—will become increasingly illusory.

The California Supreme Court granted review in February 2013, and briefing was completed in October 2013. Oral argument has not been set.

Full Disclosure: Snell & Wilmer represents petitioner AutoNation in this matter.

Sonic-Calabasas A, Inc. v. Frank Moreno (Sonic II) 57 Cal.4th 1109 (2013)

Sonic II addresses the enforceability of an arbitration provision which includes a waiver of a *Berman* hearing—an administrative hearing before a Labor Commissioner for unpaid wages—under California state law. This is one of several cases concerning the extent to which the Federal Arbitration Act preempts state law limitations on the enforceability of arbitration agreements.

The plaintiff is a former employee of an automobile dealership who signed an arbitration agreement. The plaintiff later filed an administrative proceeding for unpaid wages with the Labor Commissioner. The employer moved to compel arbitration, but the trial court denied the motion as premature.

Previously, in *Sonic Calabasas A, Inc. v. Frank Moreno* (2011) 51 Cal.4th 659, the California Supreme Court found the preliminary *Berman* hearing procedure to be compatible with arbitration; arbitration would merely take the place of judicial proceedings within the *Berman* framework. The Court went on to conclude that a standardized employment agreement that included a waiver of the *Berman* hearing was contrary to public policy as well as unconscionable, and therefore unenforceable. However, the Court did not invalidate the arbitration agreement at issue. Rather, if one of the parties was unsatisfied with the result of the *Berman* hearing, it could move to arbitrate. The U.S. Supreme Court summarily reversed and remanded the California Supreme Court's previous determination in this case (that the clause was unenforceable), directing the California Court to consider the case in light of *AT&T Mobility LLC v. Concepcion*, 563 U.S.__ (2011).

In light of *Concepcion*, the California Supreme Court concluded that because compelling the parties to undergo a *Berman* hearing would impose significant delays in the commencement of arbitration, the FAA preempts the rule categorically prohibiting waiver of a *Berman* hearing. At the same time, the Court reaffirmed that state courts could continue to enforce unconscionability rules that do not interfere with the "fundamental attributes of arbitration," and finding that an arbitration agreement may still be unconscionable if it is unreasonably one-sided in favor of the employer. The Court remanded the case to the trial court to determine whether the arbitration agreement at issue was unreasonably one-sided, and therefore unconscionable.

The Court then outlined factors that the trial court should consider, including the value of the benefits of the *Berman* hearing to the particular employee and the accessibility and affordability to that employee of the specific arbitration procedure.

Although the Court held that the waiver of a *Berman* hearing is not unconscionable per se, employers may have to engage in a fact specific inquiry before any arbitration proceeding has begun if they want to keep the waiver. If employers value arbitration, they must carefully draft their arbitration agreements to avoid challenges to both procedural and substantive unconscionability.

Note: A petition for certiorari was filed with the U.S. Supreme Court on January 15, 2014.

Baltazar v. Forever 21, Inc., Cal. Supreme Ct. Case No. S208345.

This case presents the following issue: Is an employment arbitration agreement unconscionable for lack of mutuality if it contains a clause providing that either party may seek provisional injunctive relief in the courts and it is the employer, not the employee, who is more likely to seek such relief?

The plaintiff, an employee, filed an action against her former employer and three employees, alleging that she was constructively discharged and subjected to discrimination and harassment based on race and sex. The employer and two of the employees filed a motion to compel arbitration pursuant to the plaintiff's arbitration agreement. The plaintiff opposed the motion, arguing the agreement was unconscionable. The trial court found the agreement unconscionable and denied the defendants' motion to compel. The defendants appealed and the Court of Appeal reversed.

As a preliminary matter, the Court of Appeal determined that the arbitration contract was governed by the California Arbitration Act (CAA) rather than the Federal Arbitration Act (FAA) because the contract was silent concerning which law governed and there was no evidence that the employment involved interstate commerce. The agreement in question featured several clauses, including one that allowed both parties to seek injunctive relief from the courts. The Court found that the arbitration clause was not substantively unconscionable because it was bilateral and did not lack mutuality. The Court declined to follow precedent from the First District Court of Appeal that held such a carve-out was unconscionable because it favored the employer. The Court noted the plaintiff could seek injunctive relief, too, on seven of the plaintiff's nine claims. In addition, the Court found that injunctive relief would be available for agreements governed by the CAA, whether or not such a term was expressly included.

The Court's decision implicates parties' abilities to seek emergency injunctive relief from a court in a dispute governed by an arbitration clause, and the impact such a provision will have on the enforceability of the agreement to arbitrate.

Baltazar is part of a larger set of cases concerning court's responsibility to take into account the practical effects of the terms of an arbitration agreement in determining whether the agreement lacks mutuality. In *Sonic-Calabasas A, Inc. v. Frank Moreno* (2013) 57 Cal.4th 1109, the California Supreme Court confirmed that a term may be unconscionable if it is one-sided. There, the Court outlined factors that the trial court should consider, including the accessibility and affordability to the employee of the specific arbitration procedure. This suggests that courts will look to the practical effects particular to the parties. A decision in *Sanchez v. Valencia Holding Co.*, Cal.Supreme Ct. No. S199119 will shed further light on the Court's process in determining whether a term is unconscionable.

The Supreme Court granted review in *Baltazar* in March 2013. The case was fully briefed by the parties in November 2013, with amici curiae briefing ongoing. A decision is not expected until late 2014 at the earliest.

Class Actions

***Mississippi ex rel. Hood v AU Optronics*, 134 S.Ct. 736 (2014)**

In *AU Optronics,* the Supreme Court determined that a state sponsored suit for restitution based on injuries suffered by the state's citizens does not constitute a "mass action" that would be removable from state to federal court under the Class Action Fairness Act (CAFA). Under CAFA, "a 'mass action' means any civil action … in which monetary relief claims of 100 or more persons are to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i). A federal court may exercise jurisdiction over a mass action if: (i) any member of the class of plaintiffs is diverse from any defendant, and (ii) the aggregate amount in controversy exceeds $5 million. *Id.* at §§ 1332(d)(11)(A), (d)(2), (d)(6), (d)(11)(A). Federal jurisdiction under CAFA exists only over those plaintiffs whose claims individually satisfy the $75,000 amount in controversy requirement. *Id.* at § 1332(d)(11)(B)(i).

In this case, the State of Mississippi, as the sole plaintiff, sued AU Optronics Corp. (AU), a manufacturer of liquid crystal displays (LCDs), in state court for violation of two Mississippi statutes. The State of Mississippi sought, among other things, restitution for its citizens' purchases of LCDs from AU. AU promptly removed the case to federal court as a mass action under CAFA. The district court held that the case was properly removed under CAFA as a mass action because there were 100 or more "real parties in interest," but remanded the case for public policy reasons. The Fifth Circuit reversed, determining that public policy reasons did not justify remand. The Court granted certiorari.

The Supreme Court determined that a suit filed by a State as the sole plaintiff does not constitute a mass action under CAFA. According to CAFA's plain text, a mass action must be brought by 100 or more persons. Because the State of Mississippi is the only named plaintiff in the action, the Court concluded that CAFA's requirements were not met. The Court held that the term "100 or more persons" and the proposed "plaintiffs" whose claims involve common questions of law and fact are one and the same. Thus, the complaint must actually name 100 or more persons as plaintiffs to qualify for removal under CAFA. In rejecting the argument that the CAFA statute meant "100 or more named or unnamed real parties in interest," the Court relied on the meaning of the statute as a whole. "It is difficult to imagine how the claims of one set of unnamed individuals could be proposed for joint trial on the ground that the claims of some completely different group of named plaintiffs share common questions." Thus, the Court rejected the argument that the statute meant "100 or more named or unnamed real parties in interest." The Court stuck to the plain language of the statute, stating "Congress chose not to use the phrase 'named or unnamed' in CAFA's mass action provision, a decision we understand to be intentional."

The Court's decision is important because it limits the use of CAFA's mass action provision and thereby limits defendants' ability to remove cases to federal court. This decision also enhances the incentive for private contingency-fee counsel to pair with state attorneys general in their capacity as *parens patriae*, in which the state declares itself to be suing on behalf of its people.

***Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S.Ct. 1184 (2013)**

The plaintiff in *Amgen* sought to obtain class certification of securities law claims arising from a biotech company's failure to disclose safety-related information about certain medical products that allegedly had an adverse impact on the company's stock. The plaintiff based its case on a "fraud-on-the-market" theory. Under the "fraud-on-the-market" framework endorsed in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), plaintiffs in a securities class action suit are entitled to a rebuttable presumption that they relied on public information in purchasing the security.

The Ninth Circuit sided with the plaintiffs, adopting a minority position that no actual evidence of materiality is needed at the class certification stage.

On February 27, 2013, the Supreme Court affirmed and held in a 6-3 opinion that securities class action plaintiffs do not need to demonstrate materiality at the class certification stage to invoke the "fraud-on-the-market" presumption of class-wide reliance. The Court reasoned that a failure to prove materiality at the class certification stage would extinguish the claim on the merits. The Supreme Court also held that a district court need not consider a defendant's evidence submitted to rebut the presumption of reliance at the certification stage.

Amgen limits securities fraud defendants' ability to challenge materiality at the class certification stage, leaving them to contest materiality at the dismissal and summary judgment stages instead. This development potentially gives plaintiffs leverage in settlement negotiations even where claims are weak. The majority did not address the validity of the "fraud-on-the-market" theory itself, since *Amgen* did not challenge it, but several justices nonetheless questioned the continued validity of the theory.

***Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013)**

In *Comcast*, the plaintiffs alleged that Comcast violated Sections 1 and 2 of the Sherman Act by engaging in an anticompetitive "clustering" scheme in the Philadelphia area. The plaintiffs sought class certification under Federal Rule of Civil Procedure 23(a) (F.R.C.P.23(a)). The proposed class included all cable television customers who subscribed to Comcast's (or its affiliate's) video programming services in the Philadelphia area at any time since December 1, 1999.

The district court held an evidentiary hearing on the plaintiffs' class certification motion. During the four-day hearing, the court heard live testimony from fact and expert witnesses, considered 32 expert reports, and examined documents and deposition excerpts. However, the Court refused to evaluate the admissibility of the plaintiffs' experts' testimony on the grounds that such an inquiry would go to the merits of the case and would be beyond the permissible scope of an F.R.C.P.23(a) hearing.

Following the hearing, the district court certified the class. Comcast appealed the class certification on a number of grounds, including the inadmissibility of the plaintiffs' experts' testimony at the class certification hearing on the issue of damages. The Third Circuit Court of Appeals affirmed the class certification.

On March 27, 2013, the Supreme Court, in a 5-4 decision, reversed the Third Circuit's class certification, holding that district courts must employ a "rigorous analysis" in determining whether plaintiffs satisfy Rule 23(b)(3)'s predominance requirement. In the instant case, the Supreme Court held that the plaintiffs failed to do so because they failed to demonstrate at the class certification stage that damages could be established on a class-wide basis at trial. The Court noted that the different damages theories offered by the plaintiffs revealed important differences among class members, that the expert witness model failed to account for the damages that allegedly resulted solely from the plaintiffs' "overbuilder theory," and that the Third Circuit had erred in failing to determine whether the plaintiffs' damages methodology was "just and reasonable" for purposes of Rule 23(b)(3).

The Court's ruling clearly demonstrates that damages evidence must be closely scrutinized at the class certification stage and may be sufficiently individualized, as the plaintiffs in *Comcast* discovered, to defeat class certification. However, since the Court's ruling in *Wal-Mart v. Dukes*, federal courts have been grappling with two additional questions: the scope and propriety of *Daubert* challenges to expert testimony supporting class certification and the existence of corresponding due process limitations on state court class actions. Observers of *Comcast* hoped that the Court would address the scope and depth of admissible expert testimony required at the class certification stage–the first of these–but the court stopped short of doing so.

***Genesis Healthcare v. Symczyk*, 133 S.Ct. 1523 (2013)**

In *Genesis Healthcare*, the U.S. Supreme Court determined that a case may become moot when the lone plaintiff in a purported collective action receives an offer from the defendants to satisfy all of the plaintiff's claims.

The complaint in this case alleged that Genesis failed to compensate a large class of employees for time that they worked. The plaintiff, Laura Symczyk, a registered nurse, claimed that Genesis had a policy of automatically deducting pay for meal breaks even if employees worked during the break. The Fair Labor Standards Act (FLSA) is a federal statute that requires employers to pay for all time worked, including breaks, if the employee is on call or expected to engage in work. Symczyk brought the claim as a collective action under the FLSA on behalf of herself and other similarly-situated employees.

A collective action under the FLSA is different from a class action in two distinct ways. First, to join an FLSA collective action, an employee must respond to the notice of the lawsuit and affirmatively opt in, unlike a class action where a class member must affirmatively opt out. Secondly, the statute of limitations in an FLSA collective action is not tolled. Thus, the clock continues to run for putative members of a collective action until they affirmatively join the lawsuit.

Genesis offered Symczyk the full amount she demanded, including her costs and attorneys' fees before trial. Symczyk declined the offer. Symczyk had not yet moved to certify the case as a collective action, and no other potential plaintiff had therefore opted in. The trial court dismissed the case as moot because the offer satisfied all of Symczyk's individual claims. The Third Circuit reversed, relying on cases in which courts have held that Rule 68 offers do not moot a class action. The Third Circuit held that in FLSA collective actions, like class actions, the court's jurisdiction should relate back to the date the case is filed; the decision to dismiss the case as moot deprived the parties and the court of a reasonable opportunity to consider "conditional certification" of the collective action.

The Supreme Court reversed in a 5-4 opinion. The Court refused to decide whether the unaccepted Rule 68 offer mooted the plaintiff's individual FLSA claim, instead focusing on whether the plaintiff's suit remained justiciable based on the collective-action allegations she raised. The Court held that it did not. Because her claims were rendered moot before any other employees had joined, she had no "personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness." The Court noted, however, that although the Rule 68 offer prevented additional claimants from seeking relief in the plaintiff's suit, those claimants "are no less able to have their claims settled or adjudicated following respondent's suit than if her suit had never been filed at all."

***Standard Fire Insurance Co. v. Knowles*, 133 S.Ct. 1345 (2013)**

In this case, the U.S. Supreme Court determined that a plaintiff in a putative class action cannot avoid federal jurisdiction by stipulating to a damages cap that falls below the jurisdictional threshold established by the Class Action Fairness Act of 2005 (CAFA).

The plaintiff filed a putative class action complaint in Arkansas state court against The Standard Fire Insurance Company (Standard Fire) alleging breach of contract due to Standard Fire's alleged underpayment of claims for loss or damage to real property under certain homeowners' insurance policies. The purported class included "hundreds and possibly thousands" of insureds injured by Standard Fire's claimed breaches.

In the complaint, the plaintiff stated that neither the plaintiff nor any other member of the class had claims equal to or greater than $75,000, inclusive of costs and attorneys' fees, and that the total aggregate damages of the plaintiff and all class members, inclusive of costs and attorneys' fees, was less than $5 million. The plaintiff also attached a sworn and signed stipulation to the complaint affirming these allegations and stipulating that he will not at any time during the pendency of the case seek damages for himself or any member of the class in excess of $75,000 per claim or $5 million in the aggregate, inclusive of costs and attorneys' fees.

Standard Fire removed the case to federal court under CAFA. The plaintiff moved to remand. In the motion, the plaintiff argued that the amount in controversy did not meet the CAFA jurisdictional threshold of $5 million, as set forth in the stipulation. Standard Fire argued that, but for the stipulation, the amount in controversy exceeded CAFA's jurisdiction threshold. Standard Fire also argued that the stipulation was ineffective because (a) the plaintiff only agreed not to seek damages exceeding $5 million, leaving open the possibility that it could be awarded more than that amount, and (b) allowing the plaintiff to stipulate to lesser damages than the class might otherwise be entitled to raised due process concerns for the class members.

The district court granted the plaintiff's motion for remand concluding that, as a result of the signed stipulation limiting damages, the claims fell under the $5 million threshold necessary under CAFA to invoke federal jurisdiction. Standard Fire sought permission to appeal the remand decision to the Eighth Circuit Court of Appeals, but the Eighth Circuit denied its request. Standard Fire then filed a petition for a writ of certiorari with the U.S. Supreme Court.

The Supreme Court granted review and unanimously reversed, holding that a class action plaintiff's stipulation not to seek damages in excess of the jurisdictional amount does not bind the class and therefore does not preclude federal jurisdiction. The Court reasoned that a "plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified," and thus, a class plaintiff's stipulation "does not bind anyone but himself." Therefore, the Court held that the district court possessed jurisdiction over the case because the aggregated value of the proposed class members' claims exceeded $5 million.

The Supreme Court's opinion in *Standard Fire* thus frustrates plaintiffs' efforts to keep a class action suit in state court by avoiding the jurisdictional threshold set by CAFA, and may even discourage potential class action plaintiffs from bringing suit if they would rather avoid their claims being removed to federal court.

Full disclosure: Snell & Wilmer appellate partner M.C. Sungaila served as co-counsel for amici curiae the International Association of Defense Counsel and Washington Legal Foundation in support of the petitioner in this case.

***Duran v. U.S. Bank National Assn.*, Cal. Supreme Ct. Case No. S200923.**

Duran is a wage and hour class action brought on behalf of 260 current and former banking officers alleging they were misclassified by US Bank as exempt employees and thus unlawfully denied overtime. Following class certification, the trial court proposed a trial plan allowing class-wide liability and damages to be determined on the basis of a sampling of less than 10 percent of the entire class (20 putative class members, selected at random). In supporting the trial court's proposed plan, the plaintiffs relied on a 2004 California Court of Appeals Case, *Bell v. Farmers Insurance Exchange*, in which the appellate court approved of a trial court's use of statistically reliable evidence to ascertain damages. US Bank pointed out that *Bell* involved the use of statistics to calculate class-wide evidence, not merely a statistical sampling. US Bank also argued that the trial court's proposed plan would deprive it of its due process rights because the trial court did not allow US Bank to present any evidence or argument related to class members outside the sampling of 20 officers. In particular, the trial court disallowed US Bank's proffered evidence consisting of sworn statements from 78 absent class members—representing 30 percent of the entire class—who admitted they were not misclassified. Following the trial, US Bank moved again to decertify the class. The trial court declined to decertify the class and entered judgment in the amount of $15 million for the class.

The Court of Appeal reversed, holding that the trial plan was improper, and further determining that the trial court abused its discretion by denying US Bank's motion to decertify the class. In particular, the appellate court determined that the trial court's plan deprived US Bank of its due process rights by preventing it from raising individual challenges to the absent class members' claims. The California Supreme Court granted review. The case has been fully briefed and is scheduled for oral argument on March 4, 2014.

Duran will have important implications not only for class action procedures, but also on employers' defense of wage and hour class actions. One of the main ways that employers defeat class certification of such claims is by demonstrating that individualized inquiries will predominate over common issues. The Court's decision in this case will have far-reaching effects on the type and extent of evidence that employers can use to support their affirmative defenses and argue against class-wide liability.

***Ayala v. Antelope Valley Newspapers, Inc.*, Cal. Supreme Court Case No. S206874.**

In *Ayala*, the plaintiffs worked as newspaper carriers for the defendant, Antelope Valley Newspapers. Although the plaintiffs entered into Independent Contractor Distribution Agreements with the defendant, the plaintiffs alleged in their complaint that the defendant incorrectly classified them as independent contractors, and asserted claims for various Labor Code violations, including claims for unpaid overtime and meal and rest period violations, reimbursement of business expenses, unlawful wage deductions, wage statement and payroll records violations and violation of California's unfair competition law (Section 17200 of the Business and Professions Code), which protects competitors and consumers from illegal and unfair business practices. The plaintiffs also moved for class certification and argued the central issue was whether the carriers were employees or independent contractors and that was amenable to common proof. The trial court denied the request for class certification on all claims, and the plaintiff carriers appealed.

On appeal, the appellate court concluded that the trial court erred in denying class certification because common questions existed regarding the factors considered in determining whether one is an employee or independent contractor, such as whether the defendant exercised sufficient control over the plaintiff carriers' work, when and where they performed the services and how they performed the services. Accordingly, the appellate court determined that the plaintiffs' claims for reimbursement of business expenses, unlawful wage deductions, wage statement and payroll records violations turned on whether the carriers were employees and would be appropriate for class certification. The appellate court ordered the trial court to certify a class on these claims, unless it determined that individual issues predominated, or that class treatment was not appropriate for other reasons.

Ayala addresses whether common issues predominate in a proposed class action relating to claims of members of the putative class being employees rather than independent contractors. On January 30, 2013, the California Supreme Court granted review, and has most recently ordered the parties to submit supplemental briefing to discuss the relevance of *Martinez v. Combs* (2010) 49 Cal.4th 35 and IWC wage order No. 1-2001, subdivision 2(D)-(F) to the issues in this case.

Depending on the outcome in the California Supreme Court, *Ayala* may provide employers with guidance regarding defending against wage-hour class actions. Certain issues, such as payment of overtime or provision of meal or rest periods, are highly individualized and may render class certification inappropriate, while issues like determination of employee or independent contractor status, (where the court is being asked to examine the nature of a particular job and the employer's control), may lend themselves to class certification.

***Halliburton Co. v. Erica P. John Fund,* U.S. Supreme Ct. Case No. 13-317.**

In *Halliburton*, former shareholders of Halliburton Company filed a class action lawsuit against the company, alleging that Halliburton falsified its financial statements and misrepresented projected earnings between 1999 and 2001. In their petition for class certification, the shareholders invoked the "fraud-on-the-market" presumption to demonstrate their class-wide reliance on Halliburton's statements. The district court not only certified the shareholders as a class, but also prevented Halliburton from introducing evidence that the statements did not impact its stock prices in rebuttal of the presumption of reliance. Relying on the presumption of reliance established by the U.S. Supreme Court in *Basic v. Levinson*, 485 U.S. 224 (1988), the Fifth Circuit affirmed on appeal and held that Halliburton could not rebut the *Basic* presumption until a trial on the merits of the plaintiffs' claims.

The U.S. Supreme Court granted review on November 15, 2013, and will consider Halliburton's request to overturn the *Basic* presumption based on the reasoning that the ruling's underlying premise–the market is efficient and corporate misrepresentations are therefore reflected in a company's stock price–has proven to be flawed in the 25 years since *Basic* was decided. Thus, *Halliburton* concerns whether courts must recognize a presumption of classwide reliance derived from the "fraud-on-the-market" theory established in 1988 in *Basic*, and whether defendants may rebut the presumption of reliance to seek class certification by introducing evidence that the alleged misrepresentations did not distort the market price of its stock.

The Court previously granted review in this case on another issue, determining that securities fraud plaintiffs need not prove loss causation in order to obtain class certification. Its holding cleared the way for the class action to proceed against Halliburton.

The case is scheduled for oral argument on March 5, 2014.

Damages & Fees

***Kandy Kiss of California, Inc. v. Tex-Ellent, Inc.*, Cal. Supreme Ct. Case No. S206354.**

Kandy Kiss addresses whether a party, which obtains dismissal of a contract action entirely on procedural grounds (here: lack of jurisdiction), rather than the merits of the case, can recover its attorneys' fees as the prevailing party pursuant to Civil Code section 1717. Section 1717(b)(1) states that "the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract."

Kandy Kiss sued Tex-Ellent, Inc., doing business as Paramount Textiles, for breach of warranty in state court after a federal court found that neither party owned the copyright to a paisley print design. Paramount successfully moved to dismiss the state court action because the federal court had exclusive jurisdiction over copyright disputes. Paramount then successfully moved for an attorneys' fees award as the prevailing party, recovering $129,492.40 in fees. Kandy Kiss appealed the fee award, but rather than appeal the order dismissing its action, Kandy Kiss filed a new action for indemnity in federal court. Paramount moved to dismiss on summary judgment, arguing that it did not have a contract with Kandy Kiss and therefore had no contractual duty to indemnify it. The court agreed and dismissed Kandy Kiss' second lawsuit, but denied Paramount's request for attorneys' fees.

The plaintiff appealed the state court fee award, arguing that, because the state court dismissal was only on a procedural ground, there was no prevailing party in the state court action on the contract pursuant to Section 1717. Kandy Kiss also argued that Paramount was not entitled to attorneys' fees in the state lawsuit because the federal court had determined that there was no contract and that as a result Paramount was not entitled to attorneys' fees for prevailing in the federal lawsuit. After surveying the split in appellate authority on this issue – *Estate of Drummond,* 149 Cal.App.4th 46, 49, 53 (2007) (procedural dismissal of probate petition allowing continued litigation in another civil department meant no prevailing party), *Profit Concepts Management, Inc. v. Griffith,* 162 Cal. App.4th 950, 952-953, 956 (2008) (employee successfully quashing service of state court summons for lack of personal jurisdiction was prevailing party), and *PNEC Corp. v. Meyer,* 190 Cal.App.4th 66, 68-69, 72-73 (2010) (defendant obtaining forum non conveniens dismissal was prevailing party) – the appellate court aligned its holding with those in *Profit Concepts* and *PNEC* due to the similarity of facts. The court also noted that Kandy Kiss raised its argument regarding the federal court's refusal to award Paramount its attorneys' fees by way of a request for judicial notice in its appeal rather than by seeking leave to file supplemental briefing, which deprived Paramount of the opportunity to respond to the argument. Thus, the appellate court affirmed Paramount's fee award and remanded the case so that Paramount could obtain further fees for resisting and prevailing on appeal.

The California Supreme Court granted review on January 16, 2013. Merits briefing has been completed, and the case currently awaits oral argument. If the Supreme Court affirms the lower court's ruling, it will discourage plaintiffs from filing lawsuits with weak jurisdictional bases for fear of not only dismissal, but also having to pay the defendants' attorneys' fees.

***Williams v. Chino Valley Independent Fire Dist.*, Cal. Supreme Court Case No. S213100.**

In *Williams*, the California Supreme Court is anticipated to address whether a prevailing defendant in an action under the California Fair Employment and Housing Act (FEHA) is required to show that the plaintiff's claim was frivolous, unreasonable or groundless in order to recover litigation costs.

In *Williams*, the plaintiff filed suit against the Chino Valley Independent Fire District for employment discrimination in violation of FEHA. The trial court originally denied the District's motion for summary judgment and partially granted the plaintiff's motion for summary adjudication. The Court of Appeal granted the District's writ petition challenging the decision, and ordered the trial court to grant the District's motion for summary judgment. The District was awarded costs and it filed a memorandum of costs on appeal. The plaintiff argued that no costs should be awarded because the plaintiff's FEHA discrimination claim was not frivolous, unreasonable or groundless. The trial court rejected the plaintiff's argument and awarded the District $5,368.88 in costs.

On appeal, the plaintiff argued that the standard for an award of defense attorneys' fees in a FEHA action also should apply to an award of ordinary costs. The appellate court disagreed, distinguishing between awards of ordinary costs and awards of attorneys' fees to prevailing defendants, and noting that a prevailing employer must show the action was frivolous, unreasonable or without foundation in order to recover attorneys' fees because they can be more expensive and unpredictable than ordinary costs. The appellate court rejected the plaintiff's argument that the high standard for an award of defense attorneys' fees should apply to an ordinary costs award because ordinary costs are recoverable as a matter of right under Code of Civil Procedure Section 1032.

The California Supreme Court granted review on October 16, 2013. If the Supreme Court concludes that a finding that the plaintiff's state law employment claim was frivolous, unreasonable or groundless is unnecessary to recover costs, it will likely afford employers with leverage in settling disputes with employees.

Employment

***Paratransit, Inc. v. Unemployment Ins. Appeals Bd. (Madeiros),* Cal. Supreme Court Case No. S204221.**

Under the California Unemployment Insurance Code, former employees are not eligible for unemployment benefits if they were discharged for misconduct. Such misconduct has been interpreted to involve willful or wanton disregard of an employer's interests, or extreme carelessness or negligence, but does not include good faith errors in judgment.

In *Madeiros*, the employee-driver was the subject of a complaint lodged by a passenger of Paratransit, Inc.—a private, non-profit corporation engaged in the business of providing transportation services for the elderly and disabled. The company determined that the complaint was meritorious and supported disciplinary action against the employee. The disciplinary action—suspension for two days without pay—was documented in a written memorandum that was given to the employee. The company asked the employee to sign the memorandum in acknowledgement of its receipt. The employee refused because he disagreed with the allegations against him, and he believed that his signature would be interpreted as admitting to the substance contained in the memorandum. Despite the employer's assurances to the contrary, the employee still refused to sign, claiming that he had been told by his union president not to sign anything without consulting with the union. After the employee left the meeting without signing the memorandum, his employment was terminated. The trial court held that the employee's conduct—deliberately disobeying a lawful and reasonable directive of his employer—amounted to misconduct, thereby disqualifying him from eligibility for unemployment benefits. The Court of Appeals affirmed.

The California Supreme Court granted review to decide whether the trial court was correct in deciding that the employee's conduct—refusing to sign an acknowledgment of receipt—constituted misconduct within the meaning of the Unemployment Insurance Code. When disciplining employees, it is (almost always) advisable that employers document the disciplinary action in writing. If the employee is subsequently terminated and brings an administrative complaint or lawsuit, written documentation of disciplinary action can significantly undercut the employee's argument that the termination was a surprise or that the employer's stated reasons are simply pretext. If the written documentation is left unsigned, however, an employee may argue that the employer never actually gave the document to the employee or that the employer is simply lying and fabricated the document.

If the Court upholds the decision of the trial court, its ruling will provide a certain level of comfort to employers dealing with insubordinate and stubborn employees who refuse to sign acknowledgments of receipt. If the Court reverses, however, employers will be left to balance whether it is worth the risk of paying unemployment benefits to an obstinate employee who refuses to sign acknowledgements of receipt.

The California Supreme Court granted review in September 2012, and briefing was completed in August 2013. Oral argument has not been set.

***Peabody v. Time Warner Cable, Inc.*, Cal. Supreme Ct. Case No. S204804.**

In *Peabody*, the Ninth Circuit asked the California Supreme Court for guidance on the following question: may an employer, consistent with California's compensation requirements, allocate an employee's commission payments to the pay periods for which they were earned?

Employers with commissioned sales employees who are exempt from overtime will be paying particularly close attention to this case. California law generally provides that employees are entitled to overtime compensation for time worked beyond eight hours in a day and/or 40 hours in a week. California law further provides that employees must be paid no less than the applicable minimum wage for all hours worked in a payroll period. However, the overtime provisions do not apply to any employee whose earnings exceed 1.5 times the minimum wage if more than half of that employee's compensation represents commissions.

The plaintiff in *Peabody* was a commissioned salesperson who was responsible for selling advertising on Time Warner Cable's (TWC) various cable channels. Peabody's commissions were based on the revenue generated by advertising aired every broadcast month, which lasted four or five weeks. Peabody also received a base salary of $20,000 per year. Peabody generally worked 45 hours per week and received biweekly payments from TWC. She only worked for TWC for 10 months, and was paid nearly $75,000 in total compensation. She contends that her earnings did not exceed the required minimum wage at all times ($8 per hour), and that she needed to earn more than $12 per hour in order to qualify for the commissioned sales exemption.

Whether TWC will be liable for failure to pay minimum wage, overtime and other derivative claims rests upon how Peabody's commissions are calculated and allocated over pay periods. Peabody was paid a commission check approximately every other period, and she concedes that, during those pay periods, she was properly paid. However, she argues that because she only earned about $8.55 per hour in the pay periods in which she did not receive a commission check, TWC cannot claim the exemption for the workweeks contained in those pay periods. TWC argues, on the other hand, that the commission payments should be spread over the entire period in which they were earned. Under TWC's approach, Peabody was properly paid for all hours worked during her entire employment, because her earnings were sufficient to claim the exemption during every workweek.

The California Supreme Court's interpretation of the commissioned sales exemption from overtime will hopefully provide some much needed clarity in this area of law. Many employers with commission sales employees do not pay commissions every pay period, and the Court's decision may require such employers to reevaluate their commission plans and payroll methods.

The California Supreme Court granted the request for certification in October 2012, and briefing was completed in August 2013. Oral argument has not been set.

Salas v. Sierra Chemical Co., Cal. Supreme Ct. Case No. S196568.

Employers, particularly in the industrial and seasonal sectors, are eagerly awaiting the California Supreme Court's decision in *Salas*, which may substantially affect their exposure to liability for certain claims by undocumented employees.

Sierra Chemical manufactures chemicals for use in commercial and residential swimming pools, and has very predictable fluctuations in demand for its products in accordance with the warmer months of the year. In light of this, Sierra Chemical hires employees for a period of 4-5 months, then lays them off, then re-hires most of the same employees the following year. Each time the plaintiff, Salas, was re-hired, he produced a resident alien card and a completed I-9 form with his Social Security Number. When Sierra failed to rehire Salas after he took time off following a workplace injury, Salas asserted claims against Sierra for failure to hire based upon his disability and in retaliation for Salas' filing a workers' compensation claim. Sierra sought dismissal of Salas' lawsuit based upon its discovery that Salas falsified his Social Security Number to obtain employment. The trial court agreed with Sierra and dismissed Salas' lawsuit on the basis that Salas was not eligible to work in the United States.

The Court of Appeal affirmed the trial court's ruling based upon both the "after-acquired evidence" and "unclean hands" doctrines. The after-acquired evidence doctrine operates as a defense to termination and refusal to hire cases where an employer discovers wrongdoing that would have resulted in the challenged termination or refusal to hire. Salas' misrepresentation of a federal job requirement (a valid Social Security Number) resulted in him being unqualified for the position. Accordingly, the Court of Appeal concluded that Salas had no recourse for Sierra's failure to hire him. The "unclean hands" doctrine requires a plaintiff to act in good faith and fairly in the controverted matter. The Court of Appeal determined that Salas had acted in bad faith by knowingly using a third party's Social Security Number. Salas, therefore, was barred pursuant to the "unclean hands" doctrine. Salas argued that California Senate Bill 1818 made immigration status irrelevant to his rights under California employment laws, but the Court of Appeal rejected that argument, finding that SB 1818 did not provide undocumented workers with greater rights by exempting them from the after-acquired evidence and unclean hands doctrines.

If the Court reverses, it would result in an odd contradiction whereby employers could face liability for failing to hire workers who could not have been legally hired in the first place.

The California Supreme Court granted review in November 2011. The first round of briefing was completed in November 2012. The Court ordered supplemental briefing on the question of whether "federal immigration law preempt[s] state law and thereby preclude[s] an undocumented worker from obtaining, as a remedy for a violation of 'state labor and employment laws'. . . an award of compensatory remedies, including backpay?" Supplemental briefing concluded in June 2013. Oral argument has not been set.

***People ex rel. Harris v. Pac Anchor Transportation, Inc.*, Cal. Supreme Ct. Case No. S194388.**

This case is another in the long line of cases interpreting the scope and application of Business and Professions Code § 17200, the Unfair Competition Law. Specifically, the California Supreme Court will address whether an action under California's Unfair Competition Law (UCL) that is based on a trucking company's alleged violation of state labor and insurance laws is preempted by the Federal Aviation Administration Authorization Act (FAAAA), which precludes the application of state law if it has "the force and effect of law related to a price, route, or service of any motor carrier … with respect to the transportation of property." 49 U.S.C. § 14501(c).

Pac Anchor is a trucking company in Long Beach, California. Barajas is an owner of Pac Anchor, where he worked as a manager and truck dispatcher. Barajas owned trucks and would recruit drivers, then lease his trucks and the drivers to Pac Anchor. The drivers were classified as independent contractors. As a result, Barajas and Pac Anchor did not obtain workers' compensation insurance, withhold disability insurance or income taxes, pay unemployment insurance or employment training, fund taxes on behalf of the drivers, reimburse business expenses, ensure payment of the state minimum wage or provide itemized written statements of hours and pay to the drivers. The State of California filed suit, alleging that Pac Anchor and Barajas violated the UCL by misclassifying employees as independent contractors.

The trial court granted judgment on the pleadings for Pac Anchor and Barajas. The court held that state labor laws were preempted by the FAAAA in this context. The court reasoned that California labor law requirements would increase Pac Anchor's operational costs, which related to its prices, routes and services, thus triggering FAAAA preemption. It also held that FAAAA preemption was necessary because the action threatened to interfere with the forces of competition by discouraging independent contractors from competing in the trucking market. The appellate court reversed, holding that, although the preemption provisions of the FAAAA are interpreted broadly, the state's enforcement action was not related to the prices, routes or services of Pac Anchor, even though they might be remotely affected.

This case has important implications concerning the scope and application of California's Unfair Competition Law. The ruling of the California Supreme Court should provide guidance as to whether unfair competition claims are always preempted against transportation businesses or whether a more nuanced approach is required.

The case is fully briefed and awaiting argument.

Health Care

***Sebelius v. Hobby Lobby Stores, Inc.*, U.S. Supreme Ct. Case No. 13-354.**

This case asks the Supreme Court to consider whether a closely held, for-profit corporation may be exempt under the Religious Freedom Restoration Act (RFRA) from providing its employees with health coverage for contraceptives because of the corporate owner's religious objections. This is one of two controversial cases pending before the Supreme Court addressing the "contraception mandate" and its applicability to employers or corporate owners who have religious objections to the mandate.

The Patient Protection and Affordable Care Act (the Act) requires employers to provide their employees with insurance that covers certain preventative-health services. In particular, the Act requires insurance coverage for contraceptive drugs and devices, and related educational counseling. RFRA provides that the government "shall not substantially burden a person's exercise of religion," unless that burden is the least restrictive means to further a compelling government interest. The plaintiffs are a Christian family and their two closely held, for-profit corporations: Hobby Lobby Stores, Inc. and Mardel, Inc. The plaintiffs believe that "life begins at conception," and contend that RFRA entitles them to an exemption from the contraceptive mandate in the Act because of their religious beliefs. The plaintiffs challenged the Act, and sought a preliminary injunction arguing that the Act was unconstitutional because it substantially burdened their religious beliefs under both RFRA and the Free Exercise Clause of the First Amendment.

The district court denied the plaintiffs' motion for a preliminary injunction, reasoning that a corporation did not have protected rights under RFRA or the Free Exercise Clause of the First Amendment. On appeal, a two-judge panel in Tenth Circuit affirmed the district court's order. Considering the issue en banc, the Tenth Circuit reversed the two-judge panel's decision. The Tenth Circuit held that for-profit corporations are entitled to bring RFRA claims, reasoning that Congress intended a corporation to be statutorily protected under RFRA. The Tenth Circuit also explained that the plaintiffs showed a likelihood of success on the merits of their RFRA claim, because the plaintiffs' sincere religious belief would be substantially burdened since the plaintiffs' non-compliance with the Act would impose $475 million in more tax liability every year, and because the government failed to show that the burden imposed on the plaintiffs was the least restrictive means to achieve a compelling government interest. Irreparable harm was shown because the establishment of a likely RFRA violation satisfies irreparable harm. Although the Tenth Circuit resolved these issues, it remanded the case back to the district court for further proceedings to determine two unresolved factors governing the grant of a preliminary injunction. On remand, the district court entered a preliminary injunction shielding Hobby Lobby and Mardel from complying with the Act. The government appealed and the Supreme Court granted review.

Like the *Conestoga Wood Specialties* case, this case provides an opportunity for the Court to decide the scope and reach of the Act, and its interplay with the religious convictions of corporate owners.

This case has been consolidated with *Conestoga Wood Specialties Corp. v. Sebelius* and both will be argued on March 25, 2014. A decision is expected by June 2014.

***Conestoga Wood Specialties Corp. v. Sebelius,* U.S. Supreme Ct. Case No. 13-356.**

The Patient Protection and Affordable Care Act (the Act) requires employers to provide their employees with health insurance, including coverage for approved contraceptives.

In this case, a Mennonite family who owns and runs a closely held, for-profit corporation, Conestoga Wood Specialties, objected to including contraceptive coverage in their employer health insurance as required by the Act, arguing that to do so would run contrary to the family's religious beliefs concerning the sanctity of human life. The petitioners, the family and Conestoga Wood Specialties, challenged the Act, and sought a preliminary injunction arguing that the Act was unconstitutional because it substantially burdened their religious beliefs under both the Religious Freedom Restoration Act (RFRA) and the Free Exercise Clause of the First Amendment.

The district court denied the petitioners' motion for a preliminary injunction. On appeal, the Third Circuit affirmed the district court's order. The Third Circuit held that neither the corporation nor its corporate owners had free exercise rights in their business activities and were not entitled to protection under the First Amendment or RFRA. The Third Circuit explained "that the law has long recognized the distinction between the owners of a corporation and the corporation itself." First, the Third Circuit explained that corporations were not entitled to free exercise rights, such as the practice of religion, because the Free Exercise Clause in the First Amendment historically never protected corporations. Second, the Third Circuit explained that corporate owners cannot bring free exercise claims on behalf of their corporation, by acting through the corporation, because the corporation itself is a distinct legal entity with limited rights. The petitioners appealed and the Supreme Court granted review.

The Third Circuit's decision on this issue was at odds with the Tenth Circuit's decision in *Hobby Lobby*, as well as decisions by the Ninth Circuit, the Second Circuit and the Minnesota Supreme Court, all of which have allowed closely-held, for-profit corporations to raise free exercise claims.

Together with *Hobby Lobby*, this case will provide an opportunity for the Court to decide the scope and reach of the Act, and its interplay with the religious convictions of corporate owners.

This case has been consolidated with *Hobby Lobby* and both will be argued on March 25, 2014. A decision is expected by June 2014.

Intellectual Property

***POM Wonderful LLC v. The Coca-Cola Company,* U.S. Supreme Ct. Case No. 12-761.**

In *POM*, the Supreme Court will address whether the Court of Appeals erred in holding that a private party cannot bring a Lanham Act claim challenging a product label regulated under the Food, Drug, and Cosmetic Act (FDCA).

Coca-Cola sells a "Pomegranate Blueberry" juice product that contains 0.3% pomegranate juice and 0.2% blueberry juice. POM brought suit under the Lanham Act. The district court rejected POM's Lanham claim on the ground that it was implicitly barred by the FDCA.

The Court of Appeals affirmed, also concluding that the Lanham Act was implicitly barred. Although Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), authorizes actions for use of a false or misleading description or representation "in connection with any goods," the Court of Appeals noted that the FDCA comprehensively regulates food and beverage labeling. The FDA, in particular, has promulgated regulations that address how a manufacturer may name and label its juice beverages.

The Court reasoned that FDA regulations authorize a manufacturer to give beverages a name that refers to juices that provide the characterizing flavor. Those juices need not be predominant by volume if the manufacturer states that the juices are not predominant. The Court concluded that it must preclude POM's claim under the Lanham Act to prevent private parties from undermining, through private litigation, the FDA's determination that so naming the product is not misleading.

In the Supreme Court, POM argues the Ninth Circuit erred because courts must give full effect to allegedly competing federal statutes unless they are in irreconcilable conflict or where the latter Act covers the whole subject of a preceding act, and is clearly intended as a substitute. POM also argues the decision is in conflict with the Supreme Court's guidance on resolving preemption in the FDA context in *Wyeth v. Levine*, 555 U.S. 555 (2009), and that the decision creates a conflict between the Circuits.

This case is important to companies in the food and beverage industry, as the Ninth Circuit's decision may hinder the ability of private parties to challenge food and beverage labeling.

***Petrella v. Metro-Goldwyn-Mayer, Inc., et al.*, U.S. Supreme Ct. Case No. 12-1315.**

This case provides the Court with the opportunity to decide whether the nonstatutory defense of laches is available without restriction to bar all remedies for civil copyright claims filed within the three-year statute of limitations period prescribed by Congress.

In 1978, MGM acquired the rights to the screenplay for *Raging Bull*, which was written by Petitioner Paula Petrella's father, Frank. When Frank Petrella died in 1981, the renewal rights passed to his heirs. His daughter, Paula Petrella, renewed the copyright in 1991. Over the next two decades, Petrella and MGM engaged in a series of communications, during which Petrella accused MGM of infringing her copyright. In 2009, Petrella filed an action for copyright infringement, unjust enrichment and accounting against MGM and other defendants. Pursuant to the three-year statute of limitations of the Copyright Act, the suit only involved claims arising from 2006 on. The district court granted summary judgment in favor of the defendants, holding that Petrella's claims were barred by the equitable defense of laches.

The Ninth Circuit affirmed. Laches is an equitable defense that arises when a plaintiff sleeps on his rights. A defendant asserting laches must prove that (1) the plaintiff delayed in initiating the lawsuit; (2) the delay was unreasonable; and (3) the delay resulted in prejudice.

The Ninth Circuit concluded that the district court did not err in finding that Petrella's delays in notification and filing suit–19 years, combined–were unreasonable. The Court also found that the defendants were prejudiced due to the significant investments made in promoting *Raging Bull* and the agreements to distribute the film entered into during Petrella's period of delay.

Petrella successfully petitioned for writ of certiorari. Petrella argues that the federal courts are divided over whether, and in what circumstances, laches can bar civil copyright claims filed within the statute of limitations. Further, Petrella argues, laches should not be used to further limit the Copyright Act's express statutory limitations period.

This decision will be very important to entities working with film, television, books or any other material that is publicly broadcast or reproduced over an extended period of time.

***Bowman v. Monsanto*, U.S. Supreme Ct. Case No. 11-796.**

Monsanto invented and developed technology for genetically modified "Roundup Ready®" soybeans that exhibit resistance to certain herbicides. Monsanto patented different aspects of this technology.

Monsanto markets and sells Roundup Ready® soybean seed and licenses the technology to seed producers, who insert the Roundup Ready® genetic trait into their own seed varieties. All sales to growers, whether from Monsanto or its licensed producers, are subject to a standard form limited use license, which restricts the grower's use of the licensed Roundup Ready® seed to a single commercial crop season. Monsanto also authorizes growers to sell seed to grain elevators as a commodity.

Bowman purchased seeds containing the Roundup Ready® technology. He also purchased seed from a local grain elevator for second-crop planting. Bowman found the second crop was herbicide resistant. He saved seeds from this crop for future planting.

Monsanto sued Bowman for patent infringement. Monsanto investigated eight of Bowman's fields, and confirmed that Bowman's second-crop soybean seeds (the progeny of the commodity seeds) contained the patented Roundup Ready® technology. The district court granted summary judgment for Monsanto and Bowman appealed.

Bowman argued that Monsanto's patent rights were exhausted with respect to all Roundup Ready® soybean seeds that were sold as an undifferentiated commodity through the grain elevators. The Federal Circuit determined that, even if Monsanto's patent rights in the commodity seeds were exhausted, the grower had created a newly infringing article once the commodity seeds were planted and the next generation of seeds developed. The Federal Circuit noted that the fact that a patented technology can replicate itself does not give a purchaser the right to use replicated copies of the technology. The Court concluded that while farmers may have the right to use commodity seeds as feed, or for any other conceivable use, they cannot replicate Monsanto's patented technology by planting it in the ground to create newly infringing genetic material.

The U.S. Supreme Court granted certiorari. The Court upheld the Federal Circuit's decision and made clear that the well-settled doctrine of patent exhaustion does not extend to the right to make a new product. Under that doctrine, Bowman could resell the patented soybeans he purchased from the grain elevator, he could consume the beans or he could feed them to his animals. But he could not make additional patented soybeans without Monsanto's permission.

The Court did not address how the doctrine of patent exhaustion would apply to other self-replicating technologies or to circumstances where the replication occurred outside of the purchaser's control. The Supreme Court's ruling is a victory for agricultural biotechnology companies who make substantial investments in developing pesticide-resistant seeds.

***Association for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S.Ct. 2107 (2013)**

Myriad obtained patents on the composition of two genes known as BRCA1 and BRCA2, as well as the synthetic creation of the BRCA cDNA (synthetically created complementary DNA). Mutations of BRCA1 and BRCA2 are correlated with an increased risk of hereditary breast and ovarian cancer. Isolation, however, is necessary to conduct genetic testing, and Myriad was not the only entity to offer BRCA testing after it discovered the genes.

Various medical associations challenged the patents, seeking a judgment that the claims of Myriad's patents covered non-patentable subject matter under Section 101 of the Patent Act. They asserted the patents were invalid because they cover products of nature.

The district court granted summary judgment on grounds of lack of patentability, determining that the claims were invalid because they covered products of nature. The Federal Circuit reversed. The Supreme Court granted review and remanded in light of *Mayo Collaborative Services v. Prometheus Laboratories, Inc*., 566 U.S. -----, 132 S.Ct. 1289, 182 L.Ed.2d 321 (2012). On remand, the Federal Circuit found the claims directed to isolated DNA molecules could be patented because "isolated" DNA have chemical structures distinct from DNA found in the human body. The Federal Circuit determined that the U.S. Supreme Court's decision in *Prometheus* did not compel a different result. A second petition for certiorari was filed, which the Supreme Court granted.

In a unanimous opinion, the Supreme Court held that a naturally occurring DNA segment is a product of nature and not patent eligible merely because it had been isolated. The Supreme Court began by noting that it was undisputed that Myriad did not create or alter any of the genetic information encoded in the BRCA1 and BRCA2 genes, nor did Myriad create or alter the genetic structure of DNA. Instead, Myriad's principal contribution was uncovering the precise location and genetic sequence of the BRCA1 and BRCA2 genes within their chromosomes. The Court held that a naturally occurring DNA segment is a product of nature and is not patent eligible merely because it has been isolated.

With respect to cDNA, the outcome was different, however. The creation of synthetic cDNA results in a molecule that is not naturally occurring. Thus, the Court held that composition claims directed toward cDNA are patent eligible.

The decision impacts a host of industries, from biotechnology to agriculture, industrial microbiology and pharmaceuticals, all of which have been awarded human gene patents for decades. The decision also creates uncertainty about the circumstances under which isolated parts of natural products may be patent eligible.

***In re Cipro Cases I & II*, Cal. Supreme Ct. Case No. S198616.**

The Cartwright Act (Cal. Bus. & Prof. Code §§ 16720 et seq.), is the primary California state antitrust law prohibiting anti-competitive activity. *In re Cipro Cases I & II* is focused on whether a suit under the Cartwright Act may be brought to challenge "reverse exclusionary payments" made by pharmaceutical manufacturers to settle patent litigation with generic drug producers and prolong the life of the patents in question. In nine coordinated class action cases, state residents and nonprofit entities brought suit against the original and generic manufacturers of an antibiotic drug, alleging violations of state and common antitrust laws. The California Supreme Court granted a petition for review in February 2012, but in September 2012, the Court stayed further briefing in the case pending action by the U.S. Supreme Court in *Merck & Co. v. Louisiana Drug Co.*, No. 12-245, and *Upsher-Smith Laboratories, Inc. v. Louisiana Wholesale Drug Co.*, No. 12-265.

In *In re Cipro*, the defendant-appellees Bayer AG and Bayer Corporation (collectively, "Bayer") held the patent to the highly successful anti-infection drug ciprofloxacin hydrochloride, the active ingredient in Cipro. In 1996, Bayer internally projected profit earnings of at least $1.614 billion through December 2003. The same year, however, Bayer faced trial in a patent infringement action against generic drug manufacturer and competitor, the defendant-appellee Barr Laboratories, Inc. (Barr), which challenged the validity of Bayer's Cipro patent. Barr internally projected earnings ranging between $148 million and $177 million from the sale of its generic equivalent of Cipro through 2003.

Bayer agreed to pay Barr $398.1 million in return for which Barr agreed to drop its patent lawsuit and halt its efforts to compete with Bayer in the market for Cipro until at least six months before Bayer's patent expired. Following its "pay-for-delay" agreement, as this type of settlement is widely known, Bayer gained profits of $4.859 billion from sales of Cipro between 1997 and 2003, including sales to California residents making up the class of plaintiff-petitioners who contend that the approximately $400 million settlement represented a bribe or payoff by Bayer to prevent competition for the world's best-selling antibiotic.

In a parallel proceeding, the Eastern District of New York held that Bayer had not committed fraud and that the Cipro settlement with Barr did not violate antitrust laws because it did not preclude competition outside the narrow confines of the patent.

The Superior Court of San Diego similarly held that "an agreement is not unlawful under California and federal antitrust law if it restrains competition only within the exclusionary scope of a patent."

While the matter, comprised of nine coordinated cases, was fully briefed by the parties and awaiting review at the California Supreme Court, the U.S. Supreme Court addressed the issue of "reverse payment" settlements in *F.T.C. v. Actavis, Inc.*, 133 S. Ct. 2223 (2013). In a 5-3 decision (Justice Alito took no part in the consideration or decision of the case), the Supreme Court held that such settlements *may* violate the federal antitrust laws, but that a court will have to balance patent and antitrust considerations, and all other relevant facts and circumstances, in determining whether the agreement is "reasonable." Pharmaceutical companies that wish to offer "pay-for-delay" agreements will now have to do so under the Court-adopted "rule of reason."

News reports have indicated that Bayer is in the process of settling the coordinated class action disputes for $74 million. Until the settlement is finalized, the case remains pending before the California Supreme Court.

***Octane Fitness, LLC v. Icon Health and Fitness, Inc.*, U.S. Supreme Ct. Case No. 12-1184.**

In *Octane*, the Supreme Court will address what standard a district court should use in exercising its discretion to award attorney fees to prevailing accused patent infringers; should it use traditional equitable factors in determining whether "exceptional circumstances" warranting a fee award exist, or should it continue to use the Federal Circuit's prevailing test that requires both objective baselessness and subjective bad faith.

A court may award reasonable attorney fees to the prevailing party in exceptional patent cases, both to compensate the prevailing party for its litigation expenses, and also to deter the filing of baseless infringement suits. A two-step analysis is required: First, the prevailing party must establish by clear and convincing evidence that the case is exceptional; if so, the court may still decline to award fees as a matter of discretion. Courts traditionally award attorney fees to prevailing infringers only when necessary to prevent a gross injustice to the accused infringer.

Absent misconduct during patent prosecution or litigation, a case is currently deemed exceptional where the accused infringer establishes by clear and convincing evidence that (1) the litigation was brought in subjective bad faith, and (2) the litigation was objectively baseless.

Here, Octane Fitness, LLC sought attorney fees after the district court judge granted summary judgment of noninfringement. Octane argued that Icon's infringement action was objectively baseless because the Court had rejected Icon's arguments concerning claim construction and infringement. The district court declined to award fees because Icon's proposed constructions were not frivolous and its infringement positions were not unreasonable.

On appeal to the Federal Circuit, Octane argued that the district court relied on an overly restrictive standard in refusing to find the case exceptional. Octane further sought to lower the standard for exceptionality to "objectively reasonable," in an effort to rebalance the power differential between large companies and smaller companies in patent infringement litigation. The Federal Circuit summarily affirmed, declining to revisit the standard for exceptionality.

Octane successfully petitioned for certiorari arguing that the Federal Circuit's current test strays from the original intent of preventing "gross injustice" to the accused infringer. Octane argues that the exceptional case standard should allow district court's discretion to award fees in any case in which a patentee unreasonably pursues a case having an objectively low likelihood of success, without requiring proof of bad faith.

If Octane is successful in persuading the Court, it may become significantly easier for parties accused of infringement to obtain fee awards.

***Limelight Networks, Inc. v. Akamai Technologies, Inc.*, U.S. Supreme Ct. Case No. 12-786.**

When a single actor commits all of the elements of infringement, that actor is liable for direct infringement under 35 U.S.C. § 271(a). When a single actor induces another actor to commit all of the elements of infringement, the first actor is liable for induced infringement under 35 U.S.C. § 271(b). But when the acts giving rise to liability for direct infringement are shared between two or more actors, the situation is more complex. Prior to its en banc decision in *Akamai Technologies, Inc. v. Limelight Networks, Inc.*, 692 F.3d 1301 (Fed. Cir. 2012), the Federal Circuit required that before a party could be held liable for induced infringement, some other entity must be found liable for direct infringement. *See BMC Resources, Inc. v. Paymentech, L.P.*, 498 F.3d 1373 (Fed. Cir. 2007). *Akamai* explicitly overruled *BMC*, instead holding that while all the steps of a claimed method must be performed in order to find induced infringement, it is not necessary to prove that all the steps were performed by a single entity. The question presented to the Supreme Court in *Limelight* is whether the Federal Circuit erred in so holding.

The *Akamai* en banc decision arose out of two cases, *Akamai Technologies, Inc. v. Limelight Networks, Inc.*, 614 F.Supp.2d 90 (D. Mass 2009) (Akamai district court case) and *Limelight Networks, Inc. v. McKesson Technologies, Inc.*, 2009 WL 2915778 (N.D. Ga. Sept. 8, 2009) (McKesson) . In the *Akamai* district court case, the defendant performed some of the steps of the claimed method and induced other parties to commit the remaining steps. In the *McKesson* case, the defendant induced other parties to collectively perform all of the steps of the claimed method, but no single party performed all of the steps itself. The Court held that it was not necessary to prove that all the steps of the claimed method be performed by a single entity and reversed and remanded both cases for further proceedings.

Limelight petitioned the Supreme Court to review the en banc decision. Limelight argues that the decision is irreconcilable with the fundamental concept that there can be no indirect infringement in the absence of direct infringement. Limelight also argued that the decision creates unacceptable doctrinal uncertainty, inviting costly litigation over interactive method patents.

The Supreme Court granted review. The Supreme Court's ruling in this case will determine when companies may be found liable for inducing infringement. This is of particular importance in the software and telecommunications fields, where patents often claim methods, the steps of which are only fully performed by two or more entities. Numerous companies in these fields have urged the Supreme Court to reverse the en banc decision and end the expansive approach to induced infringement liability.

The parties' briefs to the Supreme Court are expected over the next several months.

Nautilus, Inc. v. Biosig Instruments, Inc., **U.S. Supreme Ct. Case No. 13-369.**

The Patent Act requires every patent to "conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention." 35 U.S.C. § 112 ¶ 2. This is known as the definiteness requirement. The question presented in *Nautilus* is whether the Federal Circuit's acceptance of patent claims with multiple reasonable interpretations—so long as their ambiguity is not "insoluble" by a court—defeat the statutory requirement of particular and distinct patent claiming.

Biosig brought a patent infringement action against Nautilus. Nautilus filed a motion for summary judgment seeking, in relevant part, to have the asserted claim held invalid for indefiniteness. The claimed heart rate monitor includes "a first live electrode and a first common electrode mounted…in spaced relationship with each other." Nautilus argued that the term "spaced relationship" was not distinctly and particularly claimed in violation of Section 112 ¶ 2. The district court agreed and granted summary judgment. The Federal Circuit reversed. The Court determined that indefiniteness would require a showing that a person of ordinary skill would find the term "spaced relationship" to be insolubly ambiguous – *i.e.*, that the term fails to provide sufficient clarity delineating the bounds of the claim to one skilled in the art. The Court found "spaced relationship" was not so ambiguous, as the patent's claim language, specification and figures provided sufficient clarity to skilled artisans as to the bounds of the disputed term.

Nautilus sought and obtained Supreme Court review, arguing that the Federal Circuit's test—hat an ambiguous claim with multiple reasonable meanings is definite so long as a skilled artisan can understand the claim's bounds—retreats from the statutory definiteness requirement. Nautilus argued that the Federal Circuit's holding improperly allows vague claims to be cured by claim construction. The Federal Circuit view, Nautilus argued, is inconsistent with Supreme Court jurisprudence that states that the patent statute leaves no excuse for ambiguous language or vague descriptions.

The current Federal Circuit standard makes it extremely difficult to invalidate a claim based on indefiniteness. Accused infringers, including those often targeted by non-practicing entities and those that operate in the software arena, filed amicus briefs supporting Nautilus's position, urging the Court to resurrect the definiteness requirement. Other, more traditional, established companies are expected to weigh in on the other side of the issue, urging some flexibility in the definiteness standard consistent with that embraced by the Federal Circuit.

***American Broadcasting Companies, Inc. v. Aereo, Inc.*, U.S. Supreme Ct. Case No. 13-461.**

The question presented in *American Broadcasting* is whether a company "publicly performs" a copyrighted television program when it retransmits a broadcast of that program to paid subscribers over the Internet.

Third parties, such as cable and satellite operators, must obtain authorization to retransmit over-the-air broadcasts of television programs to the public. The policy underlying this issue is that the broadcast television industry has invested billions of dollars producing and assembling high-quality and creative entertainment and news programming; allowing retransmission services to rebroadcast without a fee would permit free-loading off of broadcasters' investments and disincentivize broadcasters' further investments.

Aereo transmits to its subscribers broadcast television programs over the Internet for a monthly subscription fee. Aereo does not have a license from copyright holders to record or transmit their programs. Aereo contends that it does not need a license, and that it merely hosts equipment that allows a consumer to (1) tune a small, individual, remotely located antenna to a publicly accessible, over-the-air broadcast television signal; (2) use a remote digital video recorder to make a personal recording from that signal; and then (3) watch that recording.

Two groups of plaintiffs, holders of copyrights in programs broadcast on television, filed copyright infringement actions against Aereo and moved for a preliminary injunction barring Aereo from transmitting programs to its subscribers while the programs are still airing, claiming that those transmissions infringe their exclusive right to publicly perform their works. The district court denied the motion, concluding that the plaintiffs were unlikely to prevail based on the Second Circuit's prior decision in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (Cablevision). In that case, the Second Circuit held that programs recorded with a DVR system were not public performances because the DVR created unique copies of every program a customer wished to record and because only the customer who made the copy, as opposed to the public, could view the copy. The Second Circuit affirmed the district court, finding that the same two features were present in Aereo's system: when an Aereo customer elects to watch or record a program, Aereo's system creates a unique copy of that program on a portion of a hard drive assigned only to that customer. When that customer chooses to watch the program, he watches the copy he created; no other Aereo user can see the customer's copy. Therefore, the Court concluded, Aereo does not stream to the public.

In the Supreme Court, ABC argues that the Second Circuit's decision cannot be reconciled with the statutory text, Congress' manifest intent or the decisions of other courts. Instead, ABC advocates that, by its plain terms, 17 U.S.C. § 101 asks whether "members of the public" are capable of receiving the performance of a copyrighted work.

The Supreme Court's resolution of the case may have far-reaching consequences for the broadcast television industry, as well as for burgeoning online services like Aereo. Broadcasters obtain billions in fees from satellite and cable companies each year. A victory for Aereo could lead the satellite and cable companies to utilize similar technology and obtain the broadcasts for free.

Medtronic, Inc. v. Mirowski Family Ventures, LLC, __S.Ct.__ (2014)

Medtronic, Inc. (Medtronic) is a company that designs, makes and sells medical devices. Mirowski Family Ventures, LLC (Mirowski) is a firm that owns patents relating to implantable heart stimulators. In 1991, Medtronic and Mirowski entered into a license agreement permitting Medtronic to practice certain Mirowski patents in exchange for royalty payments. The agreement further provided for a procedure by which infringement claims would be resolved. In 2007, the parties found themselves in the midst of an infringement dispute. Mirowski gave Medtronic notice that it believed seven new products infringed various claims of its patents.

Medtronic brought a declaratory judgment action seeking a declaration that its products did not infringe Mirowski's patents and that the patents were invalid. The district court recognized that Mirowski was the defendant in the action, but nonetheless held that Mirowski bore the burden of proving infringement as it was the party asserting infringement. After a bench trial, the Court found that Mirowski had not proved infringement.

On appeal, the Federal Circuit held that Medtronic, the declaratory judgment plaintiff, bore the burden of proof. It acknowledged that normally the patentee, not the accused infringer, bears the burden, and that the burden normally will not shift, even where the patentee is a counterclaiming defendant in a declaratory judgment action. Nonetheless, the Federal Circuit held that a different rule applies where (1) the patentee is a declaratory judgment defendant and (2) the defendant patentee is foreclosed from asserting an infringement counterclaim by the continued existence of a license. In that case, the Federal Circuit held, the party seeking a declaratory judgment of noninfringement bears the burden of proof.

The Supreme Court disagreed, holding that the patentee bears the burden of persuasion, just as it would had the patentee brought an infringement suit. The Court found that it was well established that the burden of proving infringement generally rests upon the patentee. The Court further noted that it had long considered the Declaratory Judgment Act to leave substantive rights unchanged and the burden of proof is a substantive aspect of the claim. Taken together, these principles supported the conclusion that the burden of proving infringement should remain with the patentee. To rule otherwise, the Court determined, would risk post litigation uncertainty about the scope of the patent and would undermine the Declaratory Judgment Act's purpose of ameliorating the dilemma posed by putting one who challenges the scope of a patent to the Hobson's choice of abandoning his rights or risking suit.

The Supreme Court's ruling will likely make it more difficult to guarantee license-based revenue streams. Existing licensees might attempt to renegotiate agreements and receive more favorable terms under the threat of a declaratory judgment action. In all likelihood, the ruling will increase the number of declaratory judgment actions attempting to repudiate licenses.

Alice Corp. Pty. Ltd. v. CLS Bank Intern. and CLS Services Ltd., U.S. Supreme Ct. Case No. 13-298.

Alice concerns whether claims to computer-implemented inventions—including claims to systems and machines, processes and items of manufacture—are directed to patent-eligible subject matter within the meaning of 35 U.S.C. 101.

Alice involves patents relating to a computerized trading platform used for conducting financial transactions in which a third party settles obligations between a first and a second party so as to eliminate "counterparty" or "settlement" risk. Settlement risk refers to the risk to each party in an exchange that only one of the two parties will actually pay its obligation, leaving the paying party without its principal or the benefit of the counterparty's performance. Alice's patents address that risk by relying on a trusted third party to ensure the exchange of either both parties' obligations or neither obligation.

Following limited discovery, CLS moved for summary judgment on the basis that Alice's asserted claims were drawn to ineligible subject matter and were therefore invalid under Section 101. For the purposes of the motion, the parties agreed that Alice's claims should all be interpreted to require a computer including at least "a processor and memory." The district court granted summary judgment in favor of CLS, concluding that Alice's method claims were directed toward an abstract idea of employing an intermediary to facilitate simultaneous exchange of obligations in order to minimize risk. The district court held the asserted system claims similarly ineligible, as those claims would preempt the use of the abstract concept of employing a neutral intermediary to facilitate simultaneous exchange of obligations in order to minimize risk on any computer. The asserted media claims failed on the same ground.

The Federal Circuit, sitting en banc, affirmed the ruling in a one paragraph per curiam divided opinion. Seven of the ten judges voted to affirm the district court's decision that the method and media claims were not directed to eligible subject matter, but there was no majority as to the reasoning. As for the system claims, there was no majority as to the reasoning or result, and an equally divided court affirmed the judgment.

Writing for the plurality, Judge Lourie set forth a multi-step test for assessing whether a computer-implemented claim recites patent-eligible subject matter under Section 101. Section 101 permits patents for any new or useful process, machine, manufacture or composition of matter, or any new and useful improvement thereof, but forbids patenting a law of nature, natural phenomena or abstract idea. The plurality suggested that the appropriate test for determining this distinction in each case is first to identify and define the abstract idea represented in the claim. With the pertinent abstract idea identified, the balance of the claim can be evaluated to determine whether it contains additional substantive limitations that narrow, confine or otherwise tie down the claim so that, in practical terms, it does not cover the full abstract idea itself. These limitations must reflect human ingenuity and must represent more than a trivial appendix to the underlying abstract idea. Further, limitations that represent a human contribution but are merely tangential, routine, well understood or conventional, or in practice fail to narrow the claim relative to the fundamental principle therein, cannot confer patent eligibility.

Applying this test to the facts at hand, the plurality found the claims were drawn to the abstract idea of reducing settlement risk by effecting trades through a third-party intermediary empowered to verify that both parties can fulfill their obligations before allowing the exchange. The

claims' remaining limitations failed to add any additional substance. The fact that a computer performed the steps, in the Federal Circuit's view, did not evince significant human contribution, and was insufficient to confer patent eligibility.

Chief Judge Rader wrote a partial concurrence, which was joined by Judges Linn, Moore and O'Malley. The partially concurring Judges reasoned that computer implemented claims are patent eligible if (1) the claim is tied to a computer in such a way that the computer plays a meaningful role in the performance of the claimed invention, and (2) the claim does not pre-empt virtually all uses of an underlying abstract idea. There were multiple additional partially concurring and dissenting opinions as well.

Alice successfully petitioned for certiorari, arguing that no clear standard exists to apply Section 101 to a computer-implemented invention, and that the en banc opinion of the Federal Circuit reflects a hopelessly fractured court.

In *Alice*, the Supreme Court is poised to provide much-needed guidance on the proper framework for analyzing the abstract idea exception to patent eligibility under Section 101. This standard is especially important to software patent holders and business method patent holders, as both face substantial challenges to validity under the Federal Circuit's en banc standard.

Jurisdiction

***Daimler AG v. Superior Court*, Cal. Supreme Ct. Case No. S210847.**

This lawsuit alleges products liability claims arising from an accident in a 2000 Jeep Grand Cherokee designed, manufactured and distributed by Chrysler Corporation. Daimler AG did not design, manufacture or distribute the subject Jeep. The plaintiffs nevertheless sued Daimler AG, a German public company, which for a time indirectly owned Chrysler, the Jeep's manufacturer.

Daimler AG moved to quash service of summons for lack of personal jurisdiction on the basis that Daimler AG is a German company that has no significant contacts with California. Although Daimler AG manufactures Mercedes-Benz (but not Chrysler) automobiles, those vehicles are imported into and distributed throughout the United States by a separate and distinct U.S. subsidiary, Mercedes-Benz USA, LLC (MBUSA).

In opposition to the motion, the plaintiffs argued that a "Distributor Agreement" between Daimler AG and MBUSA established an "agency" relationship that permitted the Court to exercise general personal jurisdiction over Daimler AG under the representative services doctrine. In support, the plaintiffs relied on *Bauman*.

In denying Daimler AG's motion to quash, the Superior Court relied on the plaintiffs' arguments regarding the Distributor Agreement and the Court's interpretation of the Second District's opinion in *Paneno v. Centres for Academic Programmes Abroad, Ltd.* (2004) 118 Cal.App.4th 1. The Superior Court's analysis mirrored that of *Bauman.*

Daimler AG filed a petition for writ of mandate to the Third District Court of Appeal arguing that *Bauman* is inconsistent with prior Ninth Circuit authority, and the weight of authority from other federal circuits. Daimler AG further argued that the record did not support application of the representative services doctrine under the tests mandated by the weight of California authority. The Court of Appeal summarily denied Daimler AG's writ petition.

Daimler AG petitioned for review. The Court ordered briefing deferred pending decision of the U.S. Supreme Court in Bauman v. DaimlerChrysler Corp., No. 11-965, cert. granted Apr. 22, 2013, __ U.S. __ [133 S.Ct. 1995, 185 L.Ed.2d 865], which raises issues concerning a state court's exercise of personal jurisdiction over a foreign corporation based on services performed in the forum state by a wholly-owned subsidiary on behalf of the foreign corporation. The U.S. Supreme Court just issued its decision in that case, concluding that general jurisdiction will generally be limited to the places where a corporation is incorporated or has its principal place of business.

***Atlantic Marine Construction Co. v. U.S. District Court*, 134 S.Ct. 568 (2013)**

Atlantic Marine provides clarity concerning the proper procedure for a civil defendant to enforce a forum-selection clause in federal court.

Atlantic Marine entered into a contract with the U.S. Army Corps of Engineers to construct a child-development center. Atlantic Marine then entered into a subcontract with J-Crew Management, Inc., for work on the project. This subcontract included a forum-selection clause which stated that all disputes between the parties "shall be litigated in the Circuit Court for the City of Norfolk, Virginia or the U.S. district court for the Eastern District of Virginia, Norfolk Division."

A dispute arose and J-Crew sued Atlantic Marine in the Western District of Texas, invoking diversity jurisdiction. Atlantic Marine moved to dismiss the suit, arguing that the forum-selection clause rendered venue in the Western District of Texas "wrong" under § 1406(a) and "improper" under Federal Rule of Civil Procedure 12(b)(3). In the alternative, Atlantic Marine moved to transfer the case to the Eastern District of Virginia under § 1404(a). The district court denied both motions. Atlantic Marine petitioned the Court of Appeals for a writ of mandamus directing the district court to dismiss the case under § 1406(a) or transfer the case under § 1404(a). The Court of Appeals denied the petition reasoning that Atlantic Marine had not established a clear and indisputable right to relief. The Court of Appeals concluded that the district court had not clearly abused its discretion in refusing to transfer the case after conducting the balance-of-interests analysis required by § 1404(a).

The Supreme Court granted certiorari. The Court rejected petitioner's argument that a forum-selection clause may be enforced by a motion to dismiss under § 1406(a) or Rule 12(b)(3) of the Federal Rules of Civil Procedure. The Court reasoned that § 1406(a) and Rule 12(b)(3) allow dismissal only when venue is "wrong" or "improper." Whether venue is "wrong" or "improper," the Court held, depends exclusively on whether the court in which the case was brought satisfies the requirements of federal venue laws, which say nothing about a forum-selection clause. Instead, the Court determined that a forum-selection clause may be enforced by a motion to transfer under § 1404(a), which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." When a defendant files such a motion, the Court concluded, a district court should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer.

***Daimler AG v. Bauman, et al.*, 134 S.Ct. 746 (2014)**

Daimler addresses the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States.

Twenty-two Argentinian residents filed a complaint in the Northern District of California against DaimlerChrysler Aktiengesellschaft (Daimler), a German company that manufactures Mercedes-Benz vehicles in Germany. The complaint alleged that during Argentina's 1976-1983 "Dirty War," Daimler's Argentinian subsidiary collaborated with state security forces to kidnap, detain, torture and kill certain Mercedes Benz Argentina workers, among them the plaintiffs or persons closely related to the plaintiffs. Jurisdiction over the lawsuit was predicated on the California contacts of a Daimler subsidiary in the United States that distributes automobiles in California.

Daimler moved to dismiss the action for want of personal jurisdiction. The plaintiffs argued that under the Court's general or all-purpose jurisdiction, California was a place where Daimler may be sued on any and all claims against it, wherever in the world the claims might arise. The plaintiffs further argued that jurisdiction over Daimler could be founded on California contacts made by Mercedes Benz USA (MBUSA), an entity, the plaintiffs asserted, that should be treated as Daimler's agent for jurisdictional purposes. The district court granted Daimler's motion to dismiss; the Court declined to attribute MBUSA's California contacts to Daimler on an agency theory, concluding that the plaintiff failed to demonstrate that MBUSA acted as Daimler's agent.

The Ninth Circuit affirmed, reasoning that plaintiffs had not shown the existence of an agency relationship of the kind that might warrant attribution of MBUSA's contacts to Daimler. The plaintiffs petitioned for rehearing; the panel then withdrew its initial opinion and instead ruled that the agency test was satisfied and considerations of "reasonableness" did not bar the exercise of jurisdiction. Daimler petitioned for certiorari.

The Supreme Court granted certiorari and held that exercises of personal jurisdiction, like the one asserted in this case, are barred by due process constraints on the assertion of adjudicatory authority. The Court distinguished between general or all-purpose jurisdiction, and specific or conduct-linked jurisdiction. Only general jurisdiction was at issue in this case. The Court previously held in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. ----, 131 S.Ct. 2846 (2011) that a court may assert jurisdiction over a foreign corporation "to hear any and all claims against [it]" only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive "as to render [it] essentially at home in the forum State." Examples of such affiliations are the corporation's place of incorporation and principal place of business. Applying *Goodyear*, the Court concluded that Daimler is not "at home" in California, and cannot be sued there for injuries the plaintiffs attribute to Mercedes Benz Argentina's conduct in Argentina. Neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there. As the Court noted, "[i]f Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other state in which MBUSA's sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."

This case provides large corporate entities assurance that a lawsuit based on entirely foreign activities will not be permitted in a state other than the corporation's principal place of business or place of incorporation.

Walden v. Fiore, __S.Ct.__ (2014)

The Supreme Court addressed two questions in *Walden*: First, whether due process permits a court to exercise personal jurisdiction over a defendant whose sole "contact" with the forum state is his knowledge that the plaintiff has connections to that state. Second, whether the judicial district where the plaintiff suffered injury is a district "in which a substantial part of the events or omissions giving rise to the claim occurred" for purposes of establishing venue even though the defendant's alleged acts and omissions all occurred in another district.

Federal law enforcement officers seized funds from Fiore and Gipson, while they were temporarily in the Atlanta airport changing planes. The two contended that the funds were legal gambling proceeds, not evidence of drug transactions. Fiore and Gipson filed suit against Walden, the federal law enforcement officer, in Las Vegas, their destination and where they lived at least part time, claiming the seizure and later efforts to institute forfeiture proceedings violated their Fourth Amendment Rights. The defendant moved to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2), and for improper venue, under Fed. R. Civ. P. 12(b)(3). The district court determined that his search of Fiore's and Gipson's bags and initial seizure of their funds occurred in, and was expressly aimed at, Georgia. Therefore, the district court concluded, there was not personal jurisdiction over defendant Walden in Nevada.

The Ninth Circuit reversed, reasoning the district court had erred in its analysis of the express-aiming, which was satisfied by the allegations that at the time the allegedly false affidavit was composed and filed, Walden recognized that the plaintiffs had significant connections to Nevada, particularly with respect to the funds for which forfeiture was sought. Having concluded that the district court properly had jurisdiction over at least one of the plaintiffs' claims, the Ninth Circuit directed the district court to determine whether to exercise pendant personal jurisdiction over the remaining claims. The Court also held that venue was proper in the District of Nevada.

Walden successfully petitioned for certiorari. He argued that the Ninth Circuit erred in finding the express-aiming requirement satisfied and that Nevada was a proper venue, and pointed out circuit splits on the proper test for both of these legal principles. In a unanimous opinion, the Supreme Court reversed. For a state to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum state. The minimum contacts analysis, the Court determined, hinges on the defendant's contacts with the forum state itself, and not the defendant's contacts with those who reside there or contacts the plaintiff creates with the forum state. Applying these principles, the Supreme Court concluded that the defendant law enforcement officer lacked the relevant minimum contacts with Nevada: it was undisputed that no part of his conduct towards Fiore and Gipson occurred in Nevada. He approached, questioned and searched Fiore and Gipson, and seized the cash at issue, in the Atlanta airport. He allegedly helped draft a false probable cause affidavit in Georgia. He never traveled to, conducted activities within, contacted anyone in or sent anything to anyone in Nevada.

This case reinforces a point critical to selecting a proper forum for litigation: the defendant must have contacts with the jurisdiction in order to comply with due process; if the defendant's contacts with the forum are only through that of the plaintiff, the contacts are insufficient to maintain jurisdiction. This has already formed the basis for a Motion for Summary Reversal in the Ninth Circuit as a basis to reverse a district court's finding of jurisdiction in Oregon over actions and events occurring solely in Iraq. Rocky Bixby, et al. v. KBR, Inc., et al. Ninth Circuit Case No. 13-34413 and 13-35518.

***Executive Benefits Insurance Agency v. Arkison*, U.S. Supreme Ct. Case No. 12-1200.**

In *Executive Benefits*, the Supreme Court will consider (1) whether Article III permits the exercise of judicial power of the bankruptcy courts on the basis of litigant consent in a "core" proceeding under 28 U.S.C. § 157(b). The case has broad implications for the federal courts, including whether magistrate judges can adjudicate matters for district judges.

Nicholas Paleveda and his wife, Marjorie Ewing, operated several companies, including Aegis Retirement Income Services, Inc. (ARIS) and the Bellingham Insurance Agency, Inc. (BIA). ARIS designed and administered defined-benefit pension plans, and BIA sold insurance and annuity products that funded those plans. By early 2006, BIA was insolvent and had ceased operations. The company assigned all commissions from one of its largest clients to Peter Pearce, a longtime BIA and ARIS employee. The day after BIA stopped operating, Paleveda used BIA funds to incorporate the Executive Benefits Insurance Agency, Inc. (EBIA). Pearce and EBIA deposited commission income into an account held jointly by ARIS and EBIA. At the end of the year, all of the deposits were credited to EBIA via "intercompany transfer." Meanwhile, BIA filed a voluntary Chapter 7 bankruptcy petition. The Trustee filed a complaint, alleging fraudulent transfer claims, against EBIA and ARIS, and seeking to recover the commissions deposited into the EBIA/ARIS account. The bankruptcy court granted summary judgment in favor of the Trustee, concluding the deposits were fraudulent conveyances of BIA assets and that EBIA was a mere successor of BIA.

EBIA appealed to the district court. The district court affirmed. EBIA then appealed to the Ninth Circuit. In a motion to dismiss submitted prior to oral argument, EBIA objected for the first time to the bankruptcy judge's entry of final judgment on the Trustee's fraudulent conveyance claims. Styled as a motion to vacate the judgment for lack of subject-matter jurisdiction, the motion argued that the bankruptcy judge was constitutionally proscribed from entering final judgment on the Trustee's claims. In *Stern v. Marshall*, 131 S. Ct. 2594 (2011), the Supreme Court held that Article III of the U.S. Constitution precludes Congress from assigning certain "core" bankruptcy proceedings involving private state law rights to adjudication by non-Article III bankruptcy judges.

Applying *Stern*, the Ninth Circuit held that a fraudulent conveyance action is subject to Article III and cannot constitutionally be assigned by Congress to a bankruptcy court for final adjudication. The Ninth Circuit acknowledged that this holding, though required by *Stern*, created a gap in the Bankruptcy Code's statutory framework because the statute does not explicitly authorize bankruptcy judges to submit proposed findings of fact and conclusions of law in a core proceeding. The Court determined that the gap should be filled by reading "the power to 'hear and determine' a proceeding" under Section 157(b)(1) to encompass the "more modest power to submit findings of fact and recommendations of law to the district courts." Nonetheless, the Court held that EBIA waived the Article III issue through its failure to object to the bankruptcy court's adjudication of the trustee's summary judgment motion.

In the Supreme Court, EBIA argues that entry of final judgment on a private right of action by a non-Article III bankruptcy judge violates the separation of powers regardless of litigant consent. Furthermore, EBIA argues that it is for Congress, not the courts, to determine how to address the statutory "gap" created by *Stern*.

Oral argument was held January 14, 2014 and a decision is expected by June.

Preemption

***Mutual Pharmaceutical Company, Inc. v. Bartlett*, 133 S.Ct. 2466 (2013)**

In 2009, the U.S. Supreme Court in *Wyeth v. Levine* held that approval by the Food and Drug Administration (FDA) of a brand name drug did not preempt state law failure to warn cases. Two years later, the Court revisited *Wyeth* and held in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011), that FDA regulations *do* preempt state law tort claims targeting *generic* pharmaceutical products because federal law imposes "an ongoing duty of sameness" that precludes generic drugs from deviating in any material respect from their brand name equivalents.

Against this backdrop, Mutual Pharmaceutical Company, Inc. (Mutual) sought review of the First Circuit Court of Appeals' decision rejecting *PLIVA*'s application to state law design-defect claims and upholding a jury award for the plaintiff of $21.6 million. In a close 5-4 decision, the Supreme Court reversed the First Circuit and held that a state law design-defect claim that turned on the adequacy of a drug's warnings are pre-empted by federal law.

The plaintiff in *Bartlett* filed a products liability action following severe and permanent injuries she sustained after taking sulindac, a generic non-steroidal anti-inflammatory drug (NSAID) manufactured by Mutual, among others. In rare cases, sulindac is known to cause toxic epidermal necrolysis (SJS/TEN). Bartlett developed SJS/TEN in 2005. She filed suit alleging a bevy of claims, but by the time of trial only the strict liability design defect claim was at issue. The district court denied Mutual's post-trial motions for relief from the jury verdict in favor of Bartlett, and Mutual appealed.

The First Circuit rejected the application of *PLIVA* to Bartlett's design defect claim, narrowly construing *PLIVA* to apply only to failure to warn claims, even though the Court acknowledged that federal law grants generic drug manufacturers no more power to alter the design of their products than it does to alter the labeling of their products. Ultimately, the First Circuit "conclude[d] that the [Supreme] Court adopted a general no-preemption rule in *Wyeth* and that it is up to the Supreme Court to decide whether *PLIVA*'s exception is to be enlarged to include design defect claims."

The Supreme Court, voting along the same lines as it did in *PLIVA*, once again, rejected the argument that it was not "impossible" for the manufacturer to comply with both state and federal law by ceasing to sell the product. The actor is not required to cease acting altogether in order to avoid liability. Otherwise, the impossibility preemption doctrine would be "all but meaningless." Manufacturers will not face liability under state law if they must violate federal law in order to comply with such state law. Those, such as brand name drug manufacturers, who are able to comply with both state and federal law by altering their product, remain liable under state law. Thus, manufacturers of products that are highly regulated by the federal government may receive some protection from liability by complying with the federal regulations.

Punitive Damages

***Nickerson v. Stonebridge Life Ins. Co.*, Cal. Supreme Court Case No. S213873.**

In *Nickerson*, a California appellate court affirmed the trial court's reduction of the jury's punitive damage award from $19 million (543 times the compensatory tort damages awarded) to $350,000—the constitutional maximum at ten times the tort damages. The two-justice majority of the appellate court agreed with the trial court that a 10-to-1 ratio was the maximum permissible under the due process rules set forth by the U.S. and California Supreme Courts, and rejected the plaintiff's attempt to inflate the denominator of the ratio by including attorneys' fees awarded by the court after the jury verdict, or to inflate the punitive damage award based on the defendant company's wealth.

The plaintiff in *Nickerson*, a disabled veteran who had purchased a hospital indemnity policy providing a daily benefit for medically necessary hospital stays, was hospitalized for a broken leg. The defendant insurer paid benefits for the 19 days during which his hospital stay was medically necessary in the opinion of an independent medical reviewer retained by the insurer, but the insurer denied benefits for the remaining 90 days of his hospitalization, during which time his doctor conceded he did not need hospitalization. After the plaintiff sued, the trial court entered a directed verdict in his favor on his claim for breach of the policy, finding that the clause limiting coverage to only medically necessary hospital stays was not clear and conspicuous, and awarded him the benefits for the remainder of his hospital stay.

The case went to the jury only on the question of bad faith, for which the jury awarded him $35,000 for emotional distress. On the special verdict form, the jury answered that the insurer did not act with malice or oppression, but did act with fraud. As a result, the jury awarded the plaintiff $19 million in punitive damages in addition to attorneys' fees pursuant to *Brandt v. Superior Court* (1985) 37 Cal.3d 813 (awarding attorneys' fees incurred in obtaining policy benefits in the course of a bad faith lawsuit). In response, the trial court conditionally granted a new trial unless the plaintiff accepted a reduction in the punitive award to $350,000 – which, at ten times the bad faith damages, was the maximum that met constitutional boundaries. The plaintiff rejected the offer and appealed. The appellate court agreed with the trial court.

On December 11, 2013, the Supreme Court of California granted the plaintiff's petition for review to consider whether attorneys' fees awarded under *Brandt* can be included as compensatory damages for purposes of calculating the ratio between compensatory and punitive damages, as well as whether wealth can be used to enhance a punitive damage award on grounds that a lower award would not sufficiently punish and deter a wealthy corporation. The Court subsequently limited the grant of review to exclude the wealth issue.

Tort Liability

***Kiobel v. Royal Dutch Petroleum Company,* 133 S.Ct. 1659 (2013)**

At issue in *Kiobel* is the scope of the Alien Tort Statute, 28 U.S.C. § 1350 (ATS). It reads "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Here, the plaintiffs were residents of Nigeria during the early 1990s when the Nigerian military police forces attacked the plaintiffs' villages, beating, raping and attacking the villages' residents. After the plaintiffs obtained political asylum in the United States, they sued Dutch and British corporations under the ATS for allegedly aiding and abetting the Nigerian military police forces in committing these crimes against humanity. But, none of the corporations' alleged acts took place in the United States. Thus, at issue was "whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."

The government of the United States filed an amicus curiae brief arguing that under federal common law, corporations may, under some circumstances, be sued under the ATS; however, the government urged, no private right of action should be recognized in this case, primarily due to the fact that defendants are foreign corporations. The United States further urged that in ATS cases a plaintiff should be required to exhaust his or her remedies in the country where the events in question took place, and possibly in other fora where a remedy might be available. Many other amicus briefs were filed, with the American Bar Association weighing in to argue that federal courts do have jurisdiction over such claims, and the U.S. Chamber of Commerce arguing in support of respondent corporations.

The Court issued its opinion on April 17, 2013. Relying on a canon of statutory interpretation known as the presumption against extraterritorial application (which states that when a statute gives no clear indication of an extraterritorial application, it has none), the Court held that claims under the ATS do not reach conduct occurring in a foreign sovereign's territory. "This presumption 'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'" Because the ATS does not evince "a clear indication of extraterritoriality," none exists. Thus, the Court affirmed the Second Circuit's dismissal of the complaint.

Given the increasingly multi-national corporate landscape, the Court's decision is an important one, because it limits the reach of the ATS and corporations' liability in the United States for acts on foreign soil.

***Patterson v. Domino's Pizza, LLC, et al.*, Cal. Supreme Court Case No. S204543.**

Patterson asks whether a franchisor can be held vicariously liable for tortious conduct committed by a supervising employee of a franchisee. The case involves claims of sexual harassment under California's Fair Employment and Housing Act (FEHA), failure to prevent discrimination and retaliation, among others. Patterson was a sixteen-year old employee of Sui Juris, LLC, a Domino's Pizza franchisee. She alleged that the assistant manager of Sui Juris sexually harassed and assaulted her at work, and that Sui Juris and Domino's were liable for the assistant manager's actions under the doctrine of respondeat superior.

The Court of Appeal reversed the trial court's grant of summary judgment in favor of Domino's. It concluded that despite a specific provision in the franchise agreement designating Sui Juris as an independent contractor of Domino's, other provisions of the franchise agreement demonstrated that Domino's exercised substantial control over aspects of Sui Juris's business that extended well beyond food preparation standards. The court also considered the deposition testimony of Sui Juris's owner, who testified that he was forced to comply with directives from Domino's—including food supply purchases, hiring guidelines and termination decisions—or risk losing his franchise rights.

In light of this evidence, the court held that there were reasonable inferences supporting Patterson's claim that Sui Juris was not an independent contractor and that Patterson had met her burden of showing that triable issues of fact existed regarding the extent of Domino's control over Sui Juris.

Patterson, if affirmed, will provide a benchmark against which corporate franchisors should measure the extent of their oversight and control of franchisees. Franchise agreements which designate franchisees as independent contractors, but which also reveal some level of control over aspects of the franchisee's operation, may not shield franchisors from potential liability for the tortious acts of a franchisee's employee.

The *Patterson* case has been fully briefed, and is awaiting oral argument, which will likely take place this year.

The California Supreme Court recently granted review in another case, *Monarraz v. Automobile Club of Southern California*, Case No. 207726, and deferred briefing pending the decision in *Patterson*. The issues in *Monarraz* include whether a business or organization forms an independent contractor or agency relationship by directing its customers or members to the second business, but does not control the means or manner by which the second business does its work. The defendant in *Monarraz* submitted an amicus curiae brief in support of Domino's position in the *Patterson* case.

Full disclosure: Snell & Wilmer appellate partner M.C. Sungaila is lead counsel for Domino's in the California Supreme Court.

Gregory v. Cott, Cal. Supreme Court, Case No. S209125.

At issue in *Gregory* is whether the primary assumption of risk doctrine bars the complaint for damages of an in-home caregiver against an Alzheimer's patient and her husband for injuries the caregiver received when the Alzheimer's patient lunged at the caregiver. The primary assumption of risk doctrine bars recovery by a plaintiff when, because of the nature of the activity involved and the parties' relationship to the activity, the defendant did not owe the plaintiff any duty of care.

In the majority opinion, the appellate court affirmed summary judgment for the defendants on the ground that the primary assumption of risk doctrine barred the plaintiff's claims. The defendants, a husband and his elderly wife who suffered from Alzheimer's disease, hired the plaintiff to provide in-home care for the wife. The plaintiff was not a licensed or certified health care professional and was aware that the wife could become physically combative. Three years into her employment, after being previously injured by the wife, the plaintiff suffered severe injuries when the wife charged the plaintiff while the plaintiff was washing a knife. The majority relied on *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761, in which the claims of the plaintiff—a nurse's aide and an employee of a convalescent hospital, who regularly worked with combative patients suffering from Alzheimer's disease—were barred by the primary assumption of risk doctrine because the plaintiff assumed the risk of the very dangers of which she now complained. The majority in *Gregory* held that "a contracted in-home caregiver, as plaintiff, is in the same position as a facility caregiver in undertaking the risks in caring for an Alzheimer's patient." Thus, summary judgment for the defendants was affirmed.

One Court of Appeal justice dissented on the grounds that *Herrle* was distinguishable in that the plaintiff in *Gregory* was not a licensed or certified health care professional and was not employed in an institutional setting. The dissent reasoned that medical professionals, due to their education, training and access to specialized facilities, equipment and resources, are in a better position to address the inherent risks posed by a patient's dangerous proclivities. The plaintiff in *Gregory* was without the requisite training and education or access to specialized facilities, and therefore was not in a position to accept the inherent risks posed by the wife. Accordingly, the dissent concluded that the usual laws of negligence should apply.

Review by the California Supreme Court offers to clarify not only the scope of the primary assumption of risk doctrine with respect to caregivers of patients suffering from Alzheimer's disease, but also to clarify and further explain the important factors and policy considerations for determining when and how the primary assumption of risk doctrine should be applied. The Court last visited the assumption of risk doctrine in *Nalwa v. Cedar Fair, L.P.*, 55 Cal.4th 1148 (2012), in which it concluded the doctrine barred recovery for injuries an amusement park patron suffered on a bumper-car ride.

This case has been fully briefed and is awaiting oral argument.

***Verdugo v. Target Corp.*, Cal. Supreme Court Case No. S207313.**

At issue in *Verdugo* is a request from the U.S. Court of Appeals for the Ninth Circuit to the California Supreme Court to answer the question: under what circumstances, if any, does the common law duty of a commercial property owner to provide emergency first aid to invitees require the availability of an Automatic External Defibrillator (AED) for cases of sudden cardiac arrest? In 2008, Mary Ann Verdugo was shopping at Target when she suffered sudden cardiac arrest and collapsed. It took the paramedics several minutes to reach the store and several more to reach Ms. Verdugo. By the time the paramedics arrived, Ms. Verdugo was dead. Ms. Verdugo's mother and brother filed a wrongful death action against Target. The district court dismissed the complaint, holding that Target owed no duty to acquire and install an AED. The plaintiffs appealed arguing that a duty does exist and requested that the question be certified to the California Supreme Court. The Court granted the request.

Both parties agree that no statutory duty exists in California requiring Target to obtain an AED. Moreover, both parties agree that California common law recognizes a "special relationship" between business owners and their invitees, which creates a duty to provide assistance to customers who need medical attention. Target argues that the statutory scheme governing AEDs that are maintained by building owners (providing immunity for those who acquire the AED and follow all requirements) occupies the field and preempts the imposition of a common law duty. The plaintiffs argue that imposing a common law duty would reinforce the statutory framework and the legislature's intent to promote the acquisition of AEDs.

Not surprisingly, numerous amicus parties have participated in this case, reflecting recognition that the California Supreme Court's decision could have a major impact on businesses. The Consumer Attorneys of California have filed an amicus brief on the side of the plaintiffs focusing on Target's status as a "big box" retailer. The Pacific Legal Foundation, National Federation of Independent Business and Small Business Legal Center filed an amicus brief on the side of Target, arguing that courts should not use the common law to dictate the specific kind of equipment that each business must purchase and maintain.

The case is fully briefed and awaiting oral argument.

***Webb v. Special Electric Co., Inc.*, Cal. Supreme Court, Case No. S209927.**

Webb addresses the application of the sophisticated user and superseding cause doctrine and whether an asbestos-broker may be liable to a consumer on a failure to warn or general negligence theory for supplying raw asbestos to a manufacturer, who then sells its products to the consumer. The sophisticated user doctrine states that users of dangerous products do not need to be warned of dangers about which they are already aware. The Court previously addressed the application of the sophisticated user doctrine to product liability claims in *Johnson v. American Standard, Inc.*, 43 Cal.4th 56 (2008).

In *Webb*, Special Electric Company, Inc. (Special Electric) was a broker who sold raw asbestos to Johns-Manville, who in turn used the raw asbestos in its piping. The plaintiff eventually handled the piping products. The plaintiff alleged that as a result of the asbestos supplied by Special Electric and Special Electric's failure to warn the plaintiff of the risk of injury and disease from handling asbestos, the plaintiff suffered damages. After the plaintiff put on his case, Special Electric moved for nonsuit on the grounds that its asbestos packaging contained printed warnings fulfilling its duty to warn and its only relevant customer was Johns-Manville, who was sophisticated about the dangers of asbestos, which absolved Special Electric of any duty to warn. The plaintiff opposed the motion for nonsuit, but the trial court did not immediately hear the motion. After the close of evidence, Special Electric filed a motion for directed verdict as to any strict liability on the ground that Special Electric was only a broker, and thus was outside the chain of distribution of the asbestos supplied to Johns-Manville. Again, the plaintiff opposed the motion and the trial court did not immediately hear the motion. After the jury came back with a verdict in favor of the plaintiff, Special Electric renewed its motions for nonsuit and directed verdict. On April 18, 2011, after several hearings, the trial court entered judgment consistent with the verdict and then, on its own motion, construed the motions for nonsuit and directed verdict as motions for a new trial and JNOV, and granted them.

The appellate court reversed, determining that the motions were procedurally defective because notice of the trial court's intention to convert the motions for nonsuit and directed verdict to motions for new trial and JNOV was not served and the motion for JNOV was granted before the time within which a motion for a new trial must be served and filed. The appellate court also proceeded to consider the merits of the motion, determining that there was evidence that showed that at least some of the asbestos packaging from Special Electric did not have a warning, the warnings may have been inadequate and Special Electric did not take reasonable efforts to warn downstream users of the potential harmful effects of asbestos. The appellate court reasoned that although the intermediary may have been a sophisticated user, the plaintiff end user was not.

The appellate court further observed that the jury was properly instructed regarding the superseding cause doctrine and thus, it was reasonable to conclude that the jury found that Special Electric did not establish a superseding cause. A third party's superseding conduct may absolve a defendant from legal responsibility where the defendant can show: (1) the third party's conduct occurred after the defendant's conduct; (2) a reasonable person would consider the third party's conduct as highly unusual or an extraordinary response to the situation; (3) the defendant did not know or had no reason to expect that the third party would act in a negligent or wrongful manner; and (4) that the kind of harm resulting from the third party's conduct was different from the kind of harm that could have been reasonably expected from the defendant's conduct.

The California Supreme Court granted review. The Court is anticipated to address several issues, including the procedural standards for a motion for nonsuit, directed verdict, and a motion for JNOV, and the scope and application of the sophisticated user doctrine.

With respect to the sophisticated user doctrine, the Court will consider whether an asbestos-broker can be liable for negligent failure to warn when it is outside the supply chain of the asbestos and it does not have any contact with the end consumer. Further, the Court may determine whether that liability, if any, is excused on the basis of the intermediary manufacturer's intimate knowledge of the harm caused by asbestos and its own duty to warn the end user of that potential harm.

This case may have a potentially major impact on product liability cases. The Court may take this opportunity to extend the sophisticated user doctrine to situations in which an intermediary stands between the manufacturer or distributor and the end user. Thus, a manufacturer, supplier, or distributor would have no duty to warn the ultimate end user of any alleged harm, so long as it is reasonable to rely upon the intervening intermediary to communicate the necessary warnings. Thus, the pool of potential defendants for a product's alleged defects may shrink.

The case has not yet been fully briefed.

Wills

***Estate of Duke*, Cal. Supreme Court Case No. S199435.**

This case considers whether the "four corners" rule applied in *Estate v. Barnes* (1965) 63 Cal. 2d 580 should be abandoned in favor of permitting a will to be reformed in light of extrinsic evidence of the decedent's intent, even when no ambiguity in the will's language exists.

In *Estate of Duke*, the decedent prepared a holographic will that provided for his estate first to pass in full to his wife, and second, should he and his wife "die at the same moment," to be equally divided between two charitable organizations, the City of Hope and the Jewish National Fund. However, the decedent's wife predeceased him by several years and the will remained unchanged. The decedent's closest living relatives (nephews) sought a judicial determination of entitlement to the estate, arguing that because the condition under which the City of Hope and Jewish National Fund were to take under the will—the decedent's and his wife's simultaneous death—had not been satisfied, the estate should pass to them.

Finding the language of the decedent's will clear and unambiguous, the Court of Appeal concluded that *Barnes* controlled the determination of this case notwithstanding both a disinheritance clause in the decedent's will and extrinsic evidence that the decedent's testamentary intent was to leave his estate to both the City of Hope and the Jewish National Fund. The extrinsic evidence at issue included several instances in which the decedent, after his wife's death, donated money to the City of Hope and told the City of Hope representative to whom he gave these checks that he was "leaving his estate to City of Hope and to Jewish National Fund."

In *Estate of Barnes*, the Supreme Court held that extrinsic evidence is inadmissible for purposes of construing a will when the meaning of the will is clear. The existence of a disinheritance clause did not alter the court's conclusion. Although bound by the *Barnes* decision, the Court of Appeal signaled that it was time for the Supreme Court to reexamine the rule in *Estate of Barnes*. The Court granted review. The matter is fully briefed and awaiting argument.

Full disclosure: Snell & Wilmer appellate partner M.C. Sungaila serves as co-counsel for the nephews in this case.

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