GIBSON DUNN
Supreme Court Business Round-Up

July 1, 2013

Theodore B. Olson
202.955.8500
tolson@gibsondunn.com

Theodore J. Boutrous
213.229.7804
tboutrous@gibsondunn.com

Amir C. Tayrani
202.887.3692
atayrani@gibsondunn.com

Porter Wilkinson
202.887.3709
pwilkinson@gibsondunn.com

Overview

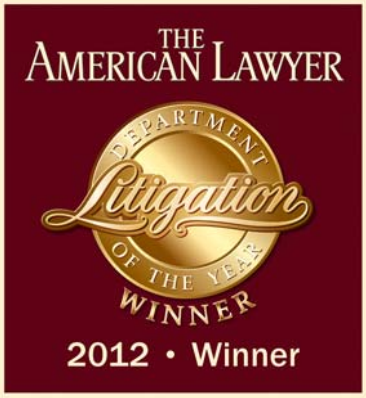
This Term was an important one for business at the Supreme Court. The Court heard thirty-three business-related cases, 44% of its total caseload, and issued major decisions in a wide variety of areas—including class actions, arbitration, transnational torts, intellectual property, employment, and the Takings Clause.

The prevailing themes in the Court's business-related jurisprudence this past Term included a healthy skepticism, on the part of all nine Justices, of any efforts to facilitate class actions or other large litigation by unduly stretching federal statutes and rules. Following in the footsteps of 2011's *Walmart v. Dukes*, 131 S. Ct. 2541 (2011), the Court was unanimous in its opinions in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013), and *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), which rejected efforts by plaintiffs to circumvent Congress's clearly expressed limitations on class actions in the Class Action Fairness Act and on transnational torts in the Alien Tort Statute. Indeed, the Court has repeatedly given effect to Congress's efforts to rein in class-action abuses. This trend was strongly reinforced by *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), which further constrained the acceptable paths to class certification, albeit by a narrower 5-4 margin.

Justice Scalia has provided much of the force behind the Court's recent class-action jurisprudence. As the architect behind the opinions in *Walmart*, *Comcast*, *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), and *American Express Co. v. Italian Colors Restaurant*, No. 12-133 (U.S. June 20, 2013)—and with a strong dissent in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013)—Justice Scalia has staked out a position as an authority in this area, with clear signals as to his intent to narrow access to class actions. As he wrote in *Italian Colors*, "Rule 23 imposes stringent requirements for certification that in practice exclude most claims." Nevertheless, Justice Scalia's view has not gone unchallenged, especially by Justice Kagan, who alleged in her *Italian Colors* dissent that the Court was "bent on diminishing the usefulness of Rule 23" and dismantling class actions.

Another major theme for the Term were questions of jurisdiction and who has the power to decide disputes—for example, state or federal courts (*Standard Fire*; *Gunn v. Minton*, 133 S. Ct. 1059 (2013)); U.S. or foreign courts (*Kiobel*); judges or arbitrators (*Italian Colors*; *Oxford Health Plans LLC v. Sutter*, No. 12-135 (U.S. June 10, 2013)); and federal district court or the Court of Federal Claims (*Horne v. USDA*, No. 12-123 (U.S. June 10, 2013)).

On the intellectual property front, the Court confronted important questions on the appropriate methods of protecting patents (*Already, LLC v. Nike, Inc.*, 133 S. Ct. 721 (2013); *FTC v. Actavis, Inc.*, No. 12-416 (U.S. June 17, 2013)), and on the extent and scope of an intellectual property holder's rights after a product's sale (*Bowman v. Monsanto Co.*, 133 S. Ct. 1761 (2013); *Kirtsaeng v. John Wiley & Sons*, 133 S. Ct. 1351 (2013)). Significantly, for the bio-medical research field, the Court decided in *Myriad* that naturally occurring genetic sequences were not patentable, but methods of analysis or applications of use, along with modified DNA, were potentially patentable.



Gibson Dunn was named the 2012 Litigation Department of the Year by *The American Lawyer* for an unprecedented second time. Appellate Group co-chair Ted Olson was named a finalist in the inaugural "Litigator of the Year" competition.

The National Law Journal named Gibson Dunn to its 2013 Appellate Hot List, which recognized law firms "doing killer appellate work" in the country's appellate courts.

Ted Olson was named to *The National Law Journal*'s 2013 list of the "100 Most Influential Lawyers in America," which recognizes "100 lawyers in the United States who have shaped the legal world through their work in the courtroom, at the negotiating table, in the classroom or in government."

The Court was unanimous in four of the six intellectual property cases, with only *Kirtsaeng* and *Actavis* resulting in split decisions.

The final emerging theme for the Term was that businesses were not afraid to take a stand on social issues that affect them and their employees. Hundreds of major corporations and employers filed briefs as *amici curiae* in support of equal rights for gay men and lesbians to marry in both *Hollingsworth v. Perry*, No. 12-144 (U.S. June 26, 2013), and *United States v. Windsor*, No. 12-307 (U.S. June 26, 2013). Fifty-seven of the Fortune 100 companies filed a brief as *amici* in support of the University of Texas in *Fisher v. University of Texas*, No. 11-345 (U.S. June 24, 2013), arguing that the pursuit of diversity in higher education remains a compelling state interest.

The bulk of these cases generated relatively little controversy among the Justices. Over half of the cases—seventeen out of thirty-three—were decided unanimously. Only ten, less than a third of the total, came down to a 5-4 or 5-3 vote, with one of those divided along non-partisan lines. Of the remainder, the conservative[1] wing of the Court prevailed in seven cases and the liberals in two, with Justice Kennedy on the winning side in each of the close cases.

The U.S. Chamber of Commerce enjoyed great success in the cases in which it participated this Term, with the National Chamber Litigation Center's view prevailing in fourteen of the eighteen cases in which it filed an *amicus* brief, a 78% success rate. The Solicitor General, on the other hand, prevailed in only fourteen of the twenty-seven business-related cases in which his Office either argued as a party or as an *amicus*.

As litigants, businesses had mixed results at the Court this Term, winning twelve of the twenty-two cases in which they were parties; businesses lost seven of the remaining cases, while they faced off against each other in two of the cases and one (*Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, No-12-398 (June 13, 2013)) ended in a mixed result. The Justices were, as noted above, in unanimous agreement on these cases a majority of the time; seven of the wins, three of the losses, one of the face-offs, and *Myriad* were all decided by a unanimous Court. Only four of the cases ended in a 5-4 or 5-3 split, with three of them victories for the business.

Aside from the typical liberal/conservative coalitions on highly controversial cases that implicate political or social issues, there have emerged certain alliances on the Court when it comes to business-related cases. Justice Alito reliably voted with the Chief Justice in every business-related case in which they both participated, while Justices Kagan and Sotomayor stood with each other in every case in which they both participated that involved a business as a litigant.

October Term 2013 is also sure to be interesting and important for business. The Court has already granted certiorari in several noteworthy cases. For example, the Court will hear a challenge to the President's recess appointment authority in *NLRB v. Noel Canning*. That case has important ramifications for businesses as it could call into question several of the NLRB's key decisions in recent years. The effect of that case also could extend to rules promulgated by the Consumer Financial Protection Bureau, as the head of that agency was also appointed under similar

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1 The terms "conservative" and "liberal" are used throughout in the manner popularly used to describe perceived ideological lines on the Court.

circumstances. The Court will also address issues involving whistleblower retaliation under Sarbanes-Oxley, as well as important questions involving the Fair Labor Standards Act, the Class Action Fairness Act, and the personal jurisdiction of the federal courts.

A brief summary of the Supreme Court's business-related cases from this past year is below, followed by an overview of the cases coming up next Term.

October Term 2012

Cases With Business Litigants

1. ***Already, LLC v. Nike, Inc.*, No. 11-982 (2d Cir., 663 F.3d 89; cert. granted June 25, 2012; SG as amicus, supporting vacatur and remand; argued on Nov. 7, 2012). Whether a federal district court is divested of Article III jurisdiction over a party's challenge to the validity of a federally registered trademark if the registrant promises not to assert its mark against the party's then-existing commercial activities.**

   Decided Jan. 9, 2013. Second Circuit/Affirmed. Chief Justice Roberts for a 9-0 Court (Kennedy, J., concurring; joined by Thomas, Alito, and Sotomayor, JJ.). The Supreme Court applied the voluntary cessation doctrine and held that Nike's unconditional and irrevocable covenant not to enforce its trademark against Already's existing products and any future "colorable imitations" mooted Already's action to have the trademark declared invalid. The Court held that once Nike demonstrated that the covenant encompassed all of Already's allegedly unlawful conduct, it was incumbent on Already to indicate that it engages in or has sufficiently concrete plans to engage in activities that would arguably infringe Nike's trademark but not be covered by the covenant.

2. ***American Express Co. v. Italian Colors Restaurant*, No. 12-133 (2d Cir., 667 F.3d 204; cert. granted Nov. 9, 2012; SG as amicus, supporting respondents; argued on Feb. 27, 2013). Whether the Federal Arbitration Act permits courts, invoking the "federal substantive law of arbitrability," to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim.**

   Decided June 20, 2013. Second Circuit/Reversed. Justice Scalia for a 5-3 Court (Thomas, J., concurring; Kagan, J., dissenting, joined by Ginsburg and Breyer, J.J.). The Court reversed the Second Circuit, holding that the FAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiffs' costs of individually arbitrating a federal statutory claim exceed the potential recovery. The Court based this on the fundamental principle of the FAA, which is that arbitration is a matter of contract, and concluded that there was no other congressional command that required rejection of the class-arbitration waiver.

3. ***American Trucking Association, Inc. v. Los Angeles*, No. 11-798 (9th Cir., 660 F.3d 384; CVSG Mar. 26, 2012; cert. opposed Nov. 30, 2012; cert. granted Jan. 11, 2013 limited to Questions 1 and 3; SG as amicus, supporting reversal; argued on Apr. 16, 2013). The Questions Presented are: (1) Whether 49 U.S.C. § 14501(c)(1), which provides that "a State [or] political subdivision . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property," contains an unexpressed "market participant" exception and permits a municipal governmental entity to take action that conflicts with the express preemption clause, occurs in a market in which the municipal entity does not participate, and is unconnected with any interest in the efficient procurement of services. (3) Whether permitting a municipal governmental entity to bar federally licensed motor carriers from access to a port operates as a partial suspension of the motor carriers' federal registration, in violation of *Castle v. Hayes Freight Lines Inc*., 348 U.S. 61 (1954).**

   Decided June 13, 2013. Ninth Circuit/Reversed in part and remanded. Justice Kagan for a 9-0 Court (Thomas, J., concurring). The Court held that the Federal Aviation Administration Authorization Act ("FAAAA") expressly preempts two provisions of the mandatory concession agreements imposed by the Port of Los Angeles on short-haul trucking providers. The Court held that the concession agreements at stake here constitute an exercise of "classic regulatory authority," and the parking and placard requirements imposed by the Port have "the force and effect of law," because drayage companies are subject to criminal penalties for violating the terms of the concession agreement. The Court declined to consider a separate question on which it had also granted certiorari, regarding whether the penalty provisions of the concession agreement are barred by *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954).

4. ***Amgen, Inc. v. Connecticut Retirement Plan*, No. 11-1085 (9th Cir., 660 F.3d 1170; cert. granted June 11, 2012; argued on Nov. 5, 2012; SG as amicus, supporting respondent). The Questions Presented are: (1) Whether, in a misrepresentation case under SEC Rule 10b-5, the district court must require proof of materiality before certifying a plaintiff class based on the fraud-on-the-market theory. (2) Whether, in such a case, the district court must allow the defendant to present evidence rebutting the applicability of the fraud-on-the-market theory before certifying a plaintiff class based on that theory.**

   Decided Feb. 27, 2013. Ninth Circuit/Affirmed. Justice Ginsburg for a 6-3 Court (Scalia, J., dissenting and Thomas, J. dissenting; joined by Kennedy, J. and Scalia, J. except for Part 1-B). The Court held that, in securities class actions challenging false or misleading statements, the plaintiff need not prove that the alleged misstatements were material in order to obtain class certification using the so-called fraud-on-the-market presumption of reliance established in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). The Supreme Court held that materiality must only be proven on the merits, not for class certification.

5. ***Association for Molecular Pathology v. Myriad Genetics, Inc.*, No. 12-398 (Fed. Cir., 689 F.3d 1303; cert. granted Nov. 30, 2012; SG as amicus, supporting neither party; argued on Apr. 15, 2013). The Questions Presented are: (1) Are human genes patentable; (2) Did the Federal Circuit err in upholding a method claim by Myriad that is irreconcilable with this Court's ruling in *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289 (2012); and (3) Did the Federal Circuit err in adopting a new and inflexible rule, contrary to normal standing rules, and the Supreme Court's decision in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), that petitioners who have been indisputably deterred by Myriad's "active enforcement" of its patent rights nonetheless lack standing to challenge those patents absent evidence that they have been personally threatened with an infringement action.**

   Decided June 13, 2013. Federal Circuit/Affirmed in part and reversed in part. Justice Thomas for a 9-0 Court (Scalia, J., joined in part; Scalia, J., concurring in part and concurring in the judgment). The Court held that the BRCA1 and BRCA2 genes are not patentable because naturally occurring DNA segments are a product of nature and are not patent eligible merely because they have been isolated, but also held that cDNA—synthetically created complementary DNA—is patent eligible because it is not naturally occurring. The Court also underscored that its opinion did not implicate "method claims," "patents on new *applications* of knowledge about the BRCA1 and BRCA2 genes," or "the patentability of DNA in which the order of the naturally occurring nucleotides has been altered."

6. ***Bowman v. Monsanto Co.*, No. 11-796 (Fed. Cir., 657 F.3d 1341; cert. granted Oct. 5, 2012; SG as amicus, supporting respondents; argued on Feb. 19, 2013). Patent exhaustion delimits rights of patent holders by eliminating the right to control or prohibit use of the invention after an authorized sale. In this case, the Federal Circuit refused to find exhaustion where a farmer used seeds purchased in an authorized sale for their natural and foreseeable purpose-namely, for planting. The Question Presented is: Whether the Federal Circuit erred by (1) refusing to find patent exhaustion in patented seeds even after an authorized sale and by (2) creating an exception to the doctrine of patent exhaustion for self-replicating technologies.**

   Decided May 13, 2013. Federal Circuit/Affirmed. Justice Kagan for a unanimous Court. The Court held that the doctrine of patent exhaustion does not permit a farmer who buys patented seeds to reproduce them through planting and harvesting without the patent holder's permission. Although the doctrine of patent exhaustion provides that "the initial authorized sale of a patented item terminates all patent rights to that item," *Quanta Computer, Inc. v. LG Electronics, Inc.*, 553 U.S. 617, 625 (2008), the doctrine restricts the patentee's rights only as to the "particular article" sold, and thus "leaves untouched the patentee's ability to prevent a buyer from making new copies of the patented item."

7. ***Bullock v. BankChampaign, N.A.*, No. 11-1518 (11th Cir., 670 F.3d 1160; cert. granted Oct. 29, 2012; SG as amicus, supporting respondent; argued on**

Mar. 18, 2013). What degree of misconduct by a trustee constitutes "defalcation" under § 523(a)(4) of the Bankruptcy Code that disqualifies the errant trustee's resulting debt from a bankruptcy discharge—and does it include actions that result in no loss of trust property.

Decided May 13, 2013. Eleventh Circuit/Vacated and remanded. Justice Breyer for a unanimous Court. The Bankruptcy Code, specifically 11 U.S.C. § 523(a)(4), provides that an individual cannot obtain a discharge in bankruptcy of a debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." The Court held that the term "defalcation" includes a culpable state of mind requirement, and that a finding of "defalcation" requires immoral conduct, intentional wrong, or gross recklessness with regards to the improper nature of the fiduciary behavior complained of.

Gibson Dunn
Counsel for
Comcast
Corp.

8. ***Comcast Corp. v. Behrend*, No. 11-864 (3d Cir., 655 F.3d 182; cert. granted June 25, 2012; argued on Nov. 5, 2012). Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.**

   Decided Mar. 27, 2013. Third Circuit/Reversed. Justice Scalia for a 5-4 Court (Ginsburg and Breyer, JJ., dissenting, joined by Sotomayor and Kagan, JJ.). The Court held that a class of Comcast subscribers was improperly certified under Federal Rule of Civil Procedure 23(b)(3) because the class's damages model failed to establish that damages could be calculated on a class-wide basis. Specifically, courts *must* evaluate the damages model at the certification stage to determine whether the damages projected are tied to the theory of liability approved and plaintiffs *must* establish, through evidentiary proof, that damages can be measured on a class-wide basis.

9. ***Dan's City Used Cars, Inc. v. Pelkey*, No. 12-52 (N.H., 163 N.H. 483; cert. granted Dec. 7, 2012; SG as amicus, supporting respondent; argued on Mar. 20, 2013). Whether state statutory, common law negligence, and consumer protection act enforcement actions against a tow-motor carrier based on state law regulating the sale and disposal of a towed vehicle are related to a transportation service provided by the carrier and are thus preempted by 49 U.S.C. § 14501-c-1.**

   Decided May 13, 2013. Sup. Ct. N.H./Affirmed. Justice Ginsburg for a unanimous Court. The Court held that the Federal Aviation Administration Authorization Act of 1994, which preempts all state laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property," 49 U.S.C. § 14501(c)(1), does not preempt state-law claims stemming from the storage and disposal of a towed vehicle. The Court held that state-law claims, once towing has ended, are not sufficiently connected to a motor carrier's "service . . . with respect to the transportation of property" to warrant preemption under § 14501(c)(1).

10. ***Decker v. Northwest Envtl. Defense Ctr.*, No. 11-338 (9th Cir., 640 F.3d 1063; cert. granted June 25, 2012, case consolidated with *Georgia-Pacific West v. Northwest Envtl. Defense Ctr.*, No. 11-347; SG as amicus, supporting petitioners; argued on Dec. 3, 2012). The Questions Presented are: (1) Whether the Ninth Circuit erred when, in conflict with other circuits, it held that a citizen may bypass judicial review of a National Pollutant Discharge Elimination System ("NPDES") permitting rule under 33 U.S.C. § 1369, and may instead challenge the validity of the rule in a citizen suit to enforce the Clean Water Act ("CWA"). (2) Whether the Ninth Circuit erred when it held that stormwater from logging roads is industrial stormwater under the CWA and EPA's rules, even though EPA has determined that it is not industrial stormwater.**

    Decided Mar. 20, 2013. Ninth Circuit/Reversed and remanded. Justice Kennedy for a 7-1 Court (Roberts, C.J., concurring in part, joined by Alito, J.; Scalia, J., dissenting and concurring in part). The Court held that the Environmental Protection Agency's interpretation of its Industrial Stormwater Rule—a regulation implementing the Clean Water Act that the EPA has since amended—was reasonable and must be accorded deference under *Auer v. Robbins*, 519 U.S. 452 (1997). Additionally, the Court concluded that even though the EPA had since amended its Rule, the case nonetheless presented "a live controversy … regarding whether petitioners may be held liable for unlawful discharges under the earlier version of the Industrial Stormwater Rule." And the Court determined that because the case was a "citizen suit" designed "not to challenge [a regulation] but to enforce it under a proper interpretation," the suit did not fall under the "exclusive jurisdiction mandate" of 33 U.S.C. § 1369(b), which requires that an application for review be lodged in the court of appeals within 120 days of the EPA administrator's action.

11. ***Federal Trade Commission v. Actavis*, No. 12-416 (11th Cir., 677 F.3d 1298; cert. granted Dec. 7, 2012; argued on Mar. 25, 2013). Whether reverse-payment agreements are per se lawful unless the underlying patent litigation was a sham or the patent was obtained by fraud (as the court below held), or instead are presumptively anticompetitive and unlawful (as the Third Circuit has held).**

    Decided June 17, 2013. Eleventh Circuit/Reversed and remanded. Justice Breyer for a 5-3 Court (Roberts, C.J., dissenting, jointed by Scalia and Thomas, J.J.; Alito, J. took no part in the consideration or decision of the case). The Court held that governments and private parties may bring lawsuits against brand-name drug manufacturers to challenge the drug companies' payments to would-be competitors who make generic substitutes to keep the generic substitutes out of the market, but those payments are not presumptively illegal.

12. ***Genesis Healthcare Corp. v. Symczyk*, No. 11-1059 (3d Cir., 656 F.3d 189; cert. granted June 25, 2012; SG as amicus, supporting affirmance; argued on Dec. 3, 2012). Whether a case becomes moot, and thus beyond the judicial**

power of Article III, when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims.

Decided Apr. 16, 2013. Third Circuit/Reversed. Justice Thomas for a 5-4 Court (Kagan, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor, JJ.). The Court held that an action under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 216(b), brought by a single plaintiff on behalf of herself and "other similarly situated" employees, was no longer justiciable when the lone plaintiff's individual claim became moot. The respondent brought the FLSA claim on behalf of herself and others who were similarly situated, but after she ignored an offer of judgment under Federal Rule of Civil Procedure 68 that would have fully satisfied her claim, and no other individuals had joined her suit, her claim became moot.

13. ***Horne v. Department of Agriculture*, No. 12-123 (9th Cir., 673 F.3d 1071; cert. granted Nov. 20, 2012; argued on Mar. 20, 2013). Under federal regulations, a "handler" of raisins must turn over a percentage of his raisin crop to a federal entity in order to sell the remainder on the open market—often in exchange for no payment or payment below the cost of raisin production. The Questions Presented are: (1) Whether the Ninth Circuit erred in holding, contrary to the decisions of five other circuit courts, that a party may not raise the Takings Clause as a defense to a "direct transfer of funds mandated by the Government," *Eastern Enterprises v. Apfel*, 524 U.S. 498, 521 (1998) (plurality), but instead must pay the money and then bring a separate, later claim requesting reimbursement of the money under the Tucker Act in the Court of Federal Claims; and (2) Whether the Ninth Circuit erred in holding, contrary to a decision of the Federal Circuit, that it lacked jurisdiction over petitioners' takings defense, even though petitioners, as "handlers" of raisins under the Raisin Marketing Order, are statutorily required under 7 U.S.C. § 608c(15) to exhaust all claims and defenses in administrative proceedings before the United States Department of Agriculture, with exclusive jurisdiction for review in federal district court.**

    Decided June 10, 2013. Ninth Circuit/Reversed and remanded. Justice Thomas for a unanimous Court. The Court held that petitioner could raise his takings claim in federal district court as a defense to fines assessed against him for violating an agricultural marketing order. Petitioner did not need to pay the fine and then bring a separate takings claim in the Court of Federal Claims.

14. ***Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (2d Cir., 621 F.3d 111; cert. granted Oct. 17, 2011, argued in tandem with *Mohamad v. Rajoub*, No. 11-88; SG as amicus, supporting petitioners; argued on Feb. 28, 2012; restored to calendar on Mar. 5, 2012; SG supplemental brief as amicus, supporting petitioners; argued on Oct. 1, 2012). The Questions Presented are: (1) Whether the issue of corporate civil tort liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is a merits question or an issue of subject matter jurisdiction. (2) Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide or whether they may be sued in the same manner as any other**

private party defendant under the ATS. (3) Whether and under what circumstances the ATS 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.

Decided Apr. 17, 2013. Second Circuit/Affirmed. Chief Justice Roberts for a 9-0 Court (Kennedy, J., concurring; Alito, J., concurring, joined by Thomas, J.; Breyer, J., concurring, joined by Ginsburg, Sotomayor, and Kagan, JJ.). The Court held that the presumption against the extraterritorial application of U.S. law applies to claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and nothing in the text, history, or purposes of the statute rebuts that presumption. The ATS cannot be invoked against a foreign corporation to reach conduct occurring in the territory of a foreign sovereign.

Gibson Dunn
Counsel for
John Wiley
& Sons, Inc.

15. ***Kirtsaeng, dba Bluechristine99 v. John Wiley & Sons, Inc.*, No. 11-697 (2d Cir., 654 F.3d 210; cert. granted Apr. 16, 2012; SG as amicus, supporting respondent; argued on Oct. 29, 2012). How do Section 602(a)(1) of the Copyright Act, which makes it impermissible to import a work "without the authority of the owner" of the copyright, and Section 109(a), which allows the owner of a copy "lawfully made under this title" to sell or otherwise dispose of the copy without the copyright owner's permission, apply to a copy that was made and legally acquired abroad and then imported into the United States? Can such a foreign-made product never be resold in the United States without the copyright owner's permission; sometimes be resold within the United States without permission, but only after the owner approves an earlier sale in the United States; or always be resold without permission within the United States, so long as the copyright owner authorized the first sale abroad?**

    Decided Mar. 19, 2013. Second Circuit/Reversed and remanded. Justice Breyer for a 6-3 Court (Kagan, J., concurring, joined by Alito, J.; Ginsburg, J., dissenting, joined by Kennedy, J. and joined in part by Scalia, J.). The Court held that the "first sale" doctrine applies to copies of copyrighted work legally produced and sold outside of the United States. The "first sale" doctrine allows the owner of a particular copy of copyrighted work—"lawfully made under this title"—to resell the copy as he wishes. Therefore, a buyer can legally purchase a copy in another country and then resell it in the United States without the copyright owner's permission.

16. ***Marx v. General Revenue Corp.*, No. 11-1175 (10th Cir., 668 F.3d 1174; cert. granted May 29, 2012; SG as amicus, supporting petitioner; argued on Nov. 7, 2012). Whether a prevailing defendant in a case under the Fair Debt Collection Practices Act may be awarded costs where the lawsuit was not "brought in bad faith and for the purpose of harassment" under 15 U.S.C. § 1692k(a)(3).**

    Decided Feb. 26, 2013. Tenth Circuit/Affirmed. Justice Thomas for a 7-2 Court (Sotomayor, J., dissenting; joined by Kagan, J.). The Court held that under Federal Rule of Civil Procedure 54(d)(1), a prevailing defendant in a Fair Debt

Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, suit may be awarded costs even where the lawsuit was not brought in bad faith and for the purpose of harassment. The Court held that FDCPA Section 1629k(a)(3) did not displace Federal Rule of Civil Procedure 54(d)(1) and "the venerable presumption that prevailing parties are entitled to costs," and therefore the district court had discretion to award costs to a prevailing defendant in an FDCPA case without finding that the plaintiff brought the case in bad faith and for the purpose of harassment.

17. ***Mutual Pharmaceutical Co. v. Bartlett*, No. 12-142 (1st Cir., 678 F.3d 30; cert. granted Nov. 30, 2012; SG as amicus, supporting petitioner; argued on Mar. 19, 2013). Whether the First Circuit erred when it created a circuit split and held—in clear conflict with the Court's decision in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008); and *Cipolline v. Liggett Group, Inc.*, 505 U.S. 504 (1992)—that federal law does not preempt state law design-defect claims targeting generic pharmaceutical products because the conceded conflict between such claims and the federal laws governing generic pharmaceutical design allegedly can be avoided if the makers of generic pharmaceuticals simply stop making their products.**

    Decided June 24, 2013. First Circuit/Reversed. Justice Alito for a 5-4 Court (Breyer, J., dissenting, joined by Kagan, J.; Sotomayor, J., dissenting, joined by Ginsburg, J.). The Court held that state-law design defect claims that turn on the adequacy of a drug's warnings are preempted by federal law under *PLIVA*. In this case, in order to avoid liability under New Hampshire law, Mutual Pharmaceutical would have had to change either the composition of its drug or the label it used, both of which were prohibited by federal law, thus the state-law must be preempted. The "stop-selling" rationale was rejected as incompatible with preemption jurisprudence.

18. ***Oxford Health Plans, LLC v. Sutter*, No. 12-135 (3d Cir., 675 F.3d 215; cert. granted Dec. 7, 2012; argued on Mar. 25, 2013). Whether an arbitrator acts within his powers under the Federal Arbitration Act (as the Second and Third Circuits have held) or exceeds those powers (as the Fifth Circuit has held) by determining that parties affirmatively "agreed to authorize class arbitration," *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1776 (2010), based solely on their use of broad contractual language precluding litigation and requiring arbitration of any dispute arising under their contract.**

    Decided June 10, 2013. Third Circuit/Affirmed. Justice Kagan for a 9-0 Court (Alito, J., joined by Thomas, J., concurring). The Court held that an arbitrator does not exceed his powers under § 10(a)(4) of the Federal Arbitration Act by concluding that an arbitration clause authorizes class arbitration, even if that conclusion is probably wrong. The Court emphasized the narrow scope of judicial review under § 10(a)(4), which requires a reviewing court to uphold an arbitral award so long as it even arguably interprets the contract on which the award is

based. The Court distinguished its prior decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l*—which held that a party may not be compelled to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so—on the ground that in *Stolt-Nielsen* the parties had stipulated that they had not agreed to class arbitration. In the present case, the parties had agreed that the arbitrator should determine whether their arbitration provision authorized class arbitration (the Court suggested in a footnote that the case might have come out differently had the Petitioner argued that the availability of class arbitration is a question of arbitrability to be decided by a court).

19. ***PPL Corp. v. Commissioner of Internal Revenue*, No. 12-43 (3d Cir., 665 F.3d 60; cert. granted Oct. 29, 2012; argued on Feb. 20, 2013). Whether, in determining the creditability of a foreign tax, courts should employ a formalistic approach that looks solely at the form of the foreign tax statute and ignores how the tax actually operates, or should employ a substance-based approach that considers factors such as the practical operation and intended effect of the foreign tax.**

    Decided May 20, 2013. Third Circuit/Reversed. Justice Thomas for a 9-0 Court (Sotomayor, J., concurring). The Court held that a one-time "windfall tax" imposed by the United Kingdom (U.K.) on 32 U.K. companies privatized between 1984 and 1996 is creditable for U.S. tax purposes. The Court explained that under Treasury Regulation § 1.901-2(a)(1), the test is whether the "predominant character" of a foreign tax is "that of an income tax in the U.S. sense" and noted that the foreign government's characterization of the tax is not dispositive. The "crucial inquiry," according to the Court, is the tax's economic effect. The Court concluded the predominant character of the tax is "nothing more than a tax on actual profits above a threshold," or an excess profits tax, a category of income tax in the U.S. sense, and so the tax is creditable under § 901.

20. ***Sebelius v. Auburn Regional Medical Center*, No. 11-1231 (D.C. Cir., 642 F.3d 1145; cert. granted June 25, 2012; argued on Dec. 4, 2012). Whether the 180-day statutory time limit under 42 U.S.C. § 1395oo(a)(3), for filing an appeal with the Provider Reimbursement Review Board from a final Medicare payment determination made by a fiscal intermediary is subject to equitable tolling.**

    Decided Jan. 22, 2013. D.C. Circuit/Reversed and remanded. Justice Ginsburg for a 9-0 Court (Sotomayor, J., concurring). The Court held that (1) Section 1395oo(a)(3)'s 180-day statutory time limit for filing an appeal of Medicare reimbursements with the Provider Reimbursement Review Board (PRRB) is not jurisdictional, (2) the HHS Secretary's regulation extending Section 1395oo(a)(3)'s 180-day window to three years after notice of the reimbursement amount upon a showing of "good cause" is a permissible interpretation of Section 1395oo(a)(3), and (3) the Secretary's regulatory requirement is not subject to equitable tolling. The Court noted that it had never applied the presumption of equitable tolling to an agency's internal appeal deadline, and explained that the imposition of tolling would "essentially gut the Secretary's [time] requirement."

Gibson Dunn
Counsel for
Standard
Fire Ins. Co.

Because the Secretary's administrative regime survived *Chevron* review, it was entitled to deference, and the respondents' complaint was lawfully time-barred.

21. ***Standard Fire Insurance Company v. Knowles*, No. 11-1450 (8th Cir., No. 11-8030, unreported; cert. granted Aug. 31, 2012; argued on Jan. 7, 2013). Whether, after *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), when a named plaintiff attempts to defeat a defendant's right of removal under the Class Action Fairness Act of 2005 by filing with a class action complaint a "stipulation" that attempts to limit the damages he "seeks" for the absent putative class members to less than the $5 million threshold for federal jurisdiction, and the defendant establishes that the actual amount in controversy, *absent* the "stipulation," exceeds $5 million, is the "stipulation" binding on absent class members so as to destroy federal jurisdiction?**

    Decided Mar. 19, 2013. Eighth Circuit/Vacated and remanded. Justice Breyer for a unanimous Court. The Court held that a plaintiff cannot stipulate to class damages below $5 million in order to evade the Class Action Fairness Act of 2005 (CAFA) $5 million amount-in-controversy requirement. It explained that "stipulations must be binding," and a plaintiff "who files a proposed class action cannot legally bind members of the proposed class before the class is certified."

22. ***US Airways, Inc. v. McCutchen*, No. 11-1285 (3d Cir., 663 F.3d 671; cert. granted June 25, 2012; SG as amicus, supporting neither party; argued on Nov. 27, 2012). Whether the Third Circuit correctly held—in conflict with the Fifth, Seventh, Eighth, Eleventh, and D.C. Circuits—that Section 502(a)(3) of the Employee Retirement Income Security Act authorizes courts to use equitable principles to rewrite contractual language and refuse to order participants to reimburse their plan for benefits paid, even where the plan's terms give it an absolute right to full reimbursement.**

    Decided Apr. 16, 2013. Third Circuit/Vacated and remanded. Justice Kagan for a 5-4 Court (Scalia, J., dissenting, joined by Roberts, C.J., and Thomas and Alito, JJ.). The Court held that the express terms of the plan govern in an action brought under Section 502(a)(3) of the Employee Retirement Income Security Act ("ERISA") and neither general unjust enrichment principles nor specific doctrines reflecting those principles—such as the double-recovery or common-fund rules—can override the express terms of the contract. However, because the plan at issue was silent on the allocation of attorney's fees, the common fund doctrine could be used to fill the gap.

Other Cases Of Interest to Businesses

1. ***Arkansas Game & Fish Commission v. United States*, No. 11-597 (Fed. Cir., 637 F.3d 1366; cert. granted Apr. 2, 2012; argued on Oct. 3, 2012). Whether government actions that impose recurring flood invasions must continue permanently to take property within the meaning of the Takings Clause of the Fifth Amendment.**

Decided Dec. 4, 2012. Federal Circuit/Reversed and remanded. Justice Ginsburg for an 8-0 Court (Kagan, J. did not participate). The Court held that the Government's recurrent flooding of an owner's land may constitute a taking under the Fifth Amendment, even where the flooding is temporary. The Court also held that contrary dicta from *Sanguinetti* was meant to summarize the Court's flooding cases to that point, all of which had involved permanent flooding, rather than to set forth a fixed rule of Takings jurisprudence. The Court declined to address the Government's other justification for the Federal Circuit's judgment, because that argument was not raised to the court below.

2. ***Arlington, Texas v. FCC*, No. 11-1545; *Cable, Telecommunications & Tech. v. FCC*, No. 11-1547 (5th Cir., 668 F.3d 229; cert. granted Oct. 5, 2012 limited to Question One and cases consolidated; argued on Jan. 16, 2013). Whether a court should apply *Chevron* deference to review an agency's determination of its own statutory jurisdiction.**

   Decided May 20, 2013. Fifth Circuit/Affirmed. Justice Scalia for a 6-3 Court (Breyer, J., concurring in part and concurring in the judgment; Roberts, C.J. dissenting, joined by Kennedy and Alito, JJ.). The Court held that courts must apply the framework established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority (that is, its jurisdiction). Thus, the Court rejected the "false dichotomy" between "jurisdictional" and "non-jurisdictional" agency interpretations, holding that in either case, *Chevron* deference applies.

3. ***FTC v. Phoebe Putney Health*, No. 11-1160 (11th Cir., 663 F.3d 1369; cert. granted June 25, 2012; argued on Nov. 26, 2012). The Questions Presented are: (1) Whether the Georgia legislature, by vesting the local government entity with general corporate powers to acquire and lease out hospitals and other property, has "clearly articulated and affirmatively expressed" a "state policy to displace competition" under the "state action doctrine" in the market for hospital services. (2) Whether such a state policy, even if clearly articulated, would be sufficient to validate the anticompetitive conduct in this case, given that the local government entity neither actively participated in negotiating the terms of the hospital sale nor has any practical means of overseeing the hospital's operation.**

   Decided February 19, 2013. Eleventh Circuit/Reversed and remanded. Justice Sotomayor for a unanimous Court. The Court held that the state-action immunity doctrine, which exempts certain acts of local governmental entities from federal antitrust scrutiny, does not apply to special-purpose "hospital authorities" created by state law and granted general corporate powers. The Court held that a Georgia law that created public hospital authorities to serve the state's indigent population, and then granted those authorities general corporate powers such as the ability to acquire hospitals, was not a clear articulation of state policy to displace competition.

4. ***Gabelli v. SEC*, No. 11-1274 (2d Cir., 653 F.3d 49; cert. granted Sept. 25, 2012; argued on Jan. 8, 2013). Whether for purposes of applying the five-year limitations period under 28 U.S.C. § 2462—which provides that "except as otherwise provided by Act of Congress" any penalty action brought by the Government must be "commenced within five years from the date when the claims first accrued"—the Government's claim first accrues when the Government can first bring an action for a penalty, where Congress has not enacted a separate controlling provision.**

   Decided Feb. 27, 2013. Second Circuit/Reversed and remanded. Chief Justice Roberts for a unanimous Court. The Court held the statute of limitations applicable to the Investment Advisers Act and many other penalty provisions of the U.S. Code, 28 U.S.C. § 2462, begins to run when the alleged fraud occurs, not when it is discovered. The Court held that the discovery rule exception to statutes of limitation, which was created to protect individuals who had been unknowingly defrauded, does not apply to the Government when it brings an enforcement action for penalties.

5. ***Gunn v. Minton*, No. 11-1118 (Tex., 355 S.W.3d 634; cert. granted Oct. 5, 2012; argued on Jan. 16, 2013). Did the Federal Circuit depart from the standard this Court articulated in *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), for "arising under" jurisdiction of the federal courts under 28 U.S.C. § 1338, when it held that state law legal malpractice claims against trial lawyers for their handling of underlying patent matters come within the exclusive jurisdiction of the federal courts? Because the Federal Circuit has exclusive jurisdiction over appeals involving patents, are state courts and federal courts strictly following the Federal Circuit's mistaken standard, thereby magnifying its jurisdictional error and sweeping broad swaths of state law claims—which involve no actual patents and have no impact on actual patent rights—into the federal courts?**

   Decided Feb. 20, 2013. Texas Supreme Court/Reversed and remanded. Chief Justice Roberts for a unanimous Court. The Court held that 28 U.S.C. § 1338(a), which vests jurisdiction over cases "arising under" federal patent law exclusively in the Federal Circuit, does not deprive state courts of subject matter jurisdiction over a legal malpractice claim that relates to a question of patent law. The Court decided that, under *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005), allowing a state court to hear the plaintiff's malpractice claim would not undermine the development of a uniform body of patent law and would not deprive the Federal Circuit of its authority to resolve novel patent issues itself. The Court further held that states have a special interest in maintaining standards of practice for attorneys, and there was no reason to suppose Congress intended to require that malpractice cases be heard in federal court simply because they involve a tangential question of patent law.

6. ***Koontz v. St. Johns River Water Management*, No. 11-1447 (Fl., 77 So.3d 1220; cert. granted Oct. 5, 2012; SG as amicus, supporting respondent; argued on Jan. 15, 2013). The Questions Presented are: (1) Whether the Government**

can be held liable for a taking when it refuses to issue a land-use permit on the sole basis that the permit applicant did not accede to a permit condition that, if applied, would violate the essential nexus and rough proportionality tests set out in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). (2) Whether the nexus and proportionality tests set out in *Nollan* and *Dolan* apply to a land-use exaction that takes the form of a government demand that a permit applicant dedicate money, services, labor, or any other type of personal property to a public use.

Decided June 25, 2013. Florida Supreme Court/Reversed. Alito, J., for a 5-4 Court (Kagan, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor, J.J.). The Court held that the government's demand for property from a land-use permit applicant must satisfy the *Nollan*/*Dolan* requirements even when it denies the permit and even when its demand is for money. The *Nollan*/*Dolan* standard reflects the danger of governmental coercion in the land-use permit context while accommodating the government's legitimate need to offset the public costs of development through land use exactions, and allowing the government to evade these requirements just because it denies a permit or demands money undermines these principles.

7. ***Los Angeles County Flood Control v. Natural Resources*, No. 11-460 (9th Cir., 673 F.3d 880; cert. granted June 25, 2012; limited to Question 2; SG as amicus, supporting neither party; argued on Dec. 4, 2012). In *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), the Supreme Court held that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Clean Water Act. The question presented is whether when water flows from one portion of a river that is navigable water of the United States into a lower portion of the same river, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, there can be a "discharge" from an "outfall" under the Clean Water Act.**

   Decided Jan. 8, 2013. Ninth Circuit/Reversed and remanded. Justice Ginsburg for a 9-0 Court (Alito, J., concurring in the judgment only). The Court held that the flow of water from an improved portion of a navigable waterway into an unimproved portion of the same waterway does not qualify as a "discharge of a pollutant" under the Clean Water Act. In keeping with the Court's holding in *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95, 109-112 (2004), where it held that the transfer of polluted water between "two parts of the same water body" is not a discharge, the Court reversed the Ninth Circuit.

8. ***Lozman v. Riviera Beach*, No. 11-626 (11th Cir., 649 F.3d 1259; cert. granted Feb. 21, 2012; SG as amicus, supporting petitioner; supplemental briefing on mootness ordered Aug. 14, 2012; argued on Oct. 1, 2012). Whether a floating structure that is indefinitely moored, receives power and other utilities from shore, and is not intended to be used in maritime transportation or commerce**

constitutes a "vessel" under 1 U.S.C. § 3, thus triggering federal maritime jurisdiction.

Decided Jan. 15, 2013. Eleventh Circuit/Reversed. Justice Breyer for a 7-2 Court. Sotomayor, J., dissenting; joined by Kennedy, J.). The Supreme Court held that Lozman's floating, non-mobile (aside from towing) home was not a "vessel" for purposes of 1 U.S.C. § 3, and therefore federal maritime jurisdiction was not triggered.

9. ***Maracich v. Spears*, No. 12-25 (4th Cir., 675 F.3d 281; cert. granted Sept. 25, 2012; argued on Jan. 9, 2013). The Questions Presented are: (1) Whether the Fourth Circuit erred in holding, contrary to every other court heretofore to have considered the issue, that lawyers who obtain, disclose, or use personal information solely to find clients to represent in an incipient lawsuit—as opposed to evidence for use in existing or potential litigation—may seek solace under the litigation exception of the Driver's Privacy Protection Act of 1994 ("DPPA"), 18 U.S.C. §§ 2721-2725. (2) Whether the Fourth Circuit erred in reaching the conclusion (in conflict with prior precedent) that a lawyer who files an action that effectively amounts to a "place holder" lawsuit may thereafter use DPPA-protected personal information to solicit plaintiffs for that action through a direct mail advertising campaign on the grounds that such use is "inextricably intertwined" with "use in litigation."**

   Decided June 17, 2013. Fourth Circuit/Vacated and remanded. Justice Kennedy for a 5-4 Court (Ginsburg, J., dissenting, joined by Scalia, Sotomayor, and Kagan, JJ.). The Court held that an attorney's sending of communications for the predominant purpose of soliciting clients is not a use of information excepted from the Driver's Privacy Protection Act ("DPPA") under the statute's "litigation exception." Recognizing that "[c]lose cases may arise," the Court determined that "[w]here a reasonable observer could discern that the predominant purpose of obtaining, using, or disclosing protected personal information was to initiate or propose a business transactions with a prospective client, [the litigation exception] does not exempt the solicitation."

10. ***University of Texas Southwestern Medical Center v. Nassar*, No. 12-484 (5th Cir., 674 F.3d 448; cert. granted Jan. 18, 2013; SG as amicus, supporting respondent; argued on Apr. 24, 2013). Whether Title VII's retaliation provision and similarly worded statutes require a plaintiff to prove but-for causation (i.e., that an employer would not have taken an adverse employment action but for an improper motive), or instead require only proof that the employer had a mixed motive (i.e., that an improper motive was one of multiple reasons for the employment action).**

    Decided June 24, 2013. Fifth Circuit/Vacated and remanded. Kennedy, J., for a 5-4 Court (Ginsburg, J., dissenting, joined by Breyer, Sotomayor, and Kagan, JJ.). The Court held that Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test for discrimination stated in § 2000e-2(m). This ruling restricts the "motivating factor"

test to only those claims of discrimination based on issues such as race, sex, and religion.

11. ***Vance v. Ball State University*, No. 11-556 (7th Cir., 646 F.3d 461; cert. granted June 25, 2012; SG as amicus, supporting neither party; argued on Nov. 26, 2012). Whether, as the Second, Fourth, and Ninth Circuits have held, the Faragher and Ellerth "supervisor" liability rule (i) applies to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work, or, as the First, Seventh, and Eighth Circuits have held (ii) is limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline" their victim.**

    Decided June 24, 2013. Seventh Circuit/Affirmed. Alito, J., for a 5-4 Court (Thomas, J., concurring; Ginsburg, J., dissenting, joined by Breyer, Sotomayor, and Kagan, JJ.). The Court held that an employee is a "supervisor" for purposes of vicarious liability under Title VII only if he or she is empowered by the employer to take tangible employment actions against the victim, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or causing a significant change in benefits. Merely controlling another employee's day-to-day work activities or evaluating their performance is not enough.

October 2013 Term

Granted Cases of Interest to Businesses

1. ***Air Wisconsin Airlines Corp. v. Hoeper*, No. 12-315 (Colo. Sup. Ct., 2012 CO 19; CVSG Jan. 7, 2013). Whether immunity under the Aviation and Transportation Security Act may be denied without a determination that the air carrier's disclosure was materially false.**

2. ***Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*, No. 12-929 (5th Cir., 701 F.3d 736; cert. granted Apr. 1, 2013). Whether the Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), changed the standard for enforcement of forum-selection clauses that designate an alternative federal forum, limiting review of such clauses to a discretionary, balancing-of-conveniences analysis under 28 U.S.C. § 1404(a), and (2) If so, whether district courts should allocate the burdens of proof among parties seeking to enforce or to avoid a forum-selection clause.**

3. ***BG Group PLC v. Argentina*, No. 12-138 (D.C. Cir., 665 F.3d 1363; CVSG Nov. 5, 2012; cert. granted June 10, 2013). Whether, in disputes involving a multi-staged dispute resolution process, a court or the arbitrator determines whether a precondition to arbitration has been satisfied.**

4. ***Chadbourne & Parke LLP v. Troice*, No. 12-79; *Willis of Colorado Inc. v. Troice*, No. 12-86; *Proskauer Rose LLP v. Troice*, No. 12-88 (5th Cir., 675 F.3d**

Gibson Dunn
Counsel for
Daimler AG

503; CVSG Oct. 1, 2012; cert. opposed Dec. 14, 2012; cert. granted Jan. 18, 2013; SG as amicus, supporting petitioners). The Questions Presented are: (1) Whether the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. §§ 77p(b), 78bb(f)(1), prohibits private class actions based on state law only where the alleged purchase or sale of a covered security is "more than tangentially related" to the "heart, crux or gravamen" of the alleged fraud. (2) Whether the SLUSA precludes a class action in which the defendant is sued for aiding and abetting fraud, but a non-party, rather than the defendant, made the only alleged misrepresentation in connection with a covered securities transaction.

5. ***DaimlerChrysler AG v. Bauman*, No. 11-965 (9th Cir., 644 F.3d 909; cert. granted Apr. 22, 2013). Whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State.**

6. ***Environmental Protection Agency v. EME Homer City Generation*, No. 12-1182; *American Lung Association v. EME Homer City Generation*, No. 12-1183 (D.C. Cir. 696 F.3d 7). The Questions Presented are: (1) Whether the court of appeals lacked jurisdiction to consider the challenges to the Clean Air Act on which it granted relief; (2) whether states are excused from adopting state implementation plans prohibiting emissions that "contribute significantly" to air pollution problems in other states until after the EPA has adopted a rule quantifying each state's inter-state pollution obligations; and (3) whether the EPA permissibly interpreted the statutory term "contribute significantly" so as to define each upwind state's "significant" interstate air pollution contributions in light of the cost-effective emission reductions it can make to improve air quality in polluted downwind areas, or whether the Act instead unambiguously requires the EPA to consider only each upwind state's physically proportionate responsibility for each downwind air quality problem.**

7. ***Executive Benefits Insurance Agency v. Arkison*, No. 12-1200 (9th Cir., 702 F.3d 553). The Questions Presented are: (1) Whether Article III permits the exercise of the judicial power of the United States by bankruptcy courts on the basis of litigant consent, and, if so, whether "implied consent" based on a litigant's conduct, where the statutory scheme provides the litigant no notice that its consent is required, is sufficient to satisfy Article III; and (2) whether a bankruptcy judge may submit proposed findings of fact and conclusions of law for de novo review by a district court in a "core" proceeding under 28 U.S.C. 157(b).**

8. ***Heimeshoff v. Hartford Life Insurance*, No. 12-729 (2d Cir., 496 F. App'x 129; cert. granted Apr. 15, 2013). The Question Presented is when a statute of limitations should accrue for judicial review of a disability adverse benefit determination under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002 *et seq*.**

Gibson Dunn
Counsel for
FMR, LLC

9. ***Law v. Siegel*, No. 12-5196 (9th Cir., 435 Fed. Appx. 697; CVSG Dec. 3, 2012). Whether the Ninth Circuit erred in allowing the bankruptcy trustee to surcharge the debtor's constitutionally protected homestead property.**

10. ***Lawson v. FMR, LLC*, No. 12-3 (1st Cir., 670 F.3d 61; CVSG Oct. 9, 2012; cert. opposed Apr. 9, 2013; cert. granted May 20, 2013). Whether an employee of a privately held contractor or subcontractor of a public company is protected from retaliation by Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A.**

11. ***Lexmark International, Inc. v. Static Control Components, Inc.*, No. 12-873 (6th Cir., 697 F.3d 387; cert. granted June 3, 2013). Whether the appropriate analytic framework for determining a party's standing to maintain an action for false advertising under the Lanham Act is (1) the factors set forth in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537-45 (1983), as adopted by the Third, Fifth, Eighth, and Eleventh Circuits; (2) the categorical test, permitting suits only by an actual competitor, employed by the Seventh, Ninth, and Tenth Circuits; or (3) a version of the more expansive "reasonable interest" test, either as applied by the Sixth Circuit in this case or as applied by the Second Circuit in prior cases.**

12. ***Medtronic Inc. v. Boston Scientific Corp.*, No. 12-1128 (Fed. Cir., 695 F.3d 1266; cert. granted May 20, 2013). Whether, in a declaratory judgment action brought by a licensee under *MedImmune, Inc. v. Genentech, Inc.*, the licensee has the burden to prove that its products do not infringe the patent, or whether (as is the case in all other patent litigation, including other declaratory judgment actions), the patentee must prove infringement.**

13. ***Mississippi ex rel. Hood v. AU Optronics Corp.*, No. 12-1036 (5th Cir., 701 F.3d 796; cert. granted May 28, 2013). Whether a state's *parens patriae* action is removable as a "mass action" under the Class Action Fairness Act when the state is the sole plaintiff, the claims arise under state law, and the state attorney general possesses statutory and common-law authority to assert all claims in the complaint.**

Gibson Dunn
Counsel for
Amicus Curiae
Senator Mitch
McConnell,
et al.

14. ***NLRB v. Noel Canning*, No. 12-1281 (D.C. Cir., 705 F.3d 490; cert. granted June 24, 2013). The Questions Presented are: (1)Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate, and (2) whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess. (3) Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro-forma sessions.**

15. ***Northwest, Inc. v. Ginsberg*, No. 12-462 (9th Cir., 695 F.3d 873; cert. granted May 20, 2013). Whether the Ninth Circuit erred in holding that respondent's**

implied covenant of good faith and fair dealing was not preempted under the Airline Deregulation Act because such claims are categorically unrelated to a price, route, or service, notwithstanding that respondent's claim arises out of a frequent-flyer program and manifestly enlarged the terms of the parties' undertakings, which allowed termination in Northwest's sole discretion.

16. ***Sandifer v. United States Steel Corp.*, No. 12-417 (7th Cir., 678 F.3d 590; cert. granted Feb. 19, 2013; limited to Question 1). Under the Fair Labor Standards Act, the period of time during which a covered employee must be paid begins when the worker engages in a principal activity. Under 29 U.S.C. § 203(o) of the Act, however, an employer need not compensate worker for**

17. **time spent "changing clothes" if that time is expressly excluded from compensable time under a bona fide collective bargaining agreement applicable to that worker. Does donning and doffing safety gear constitute "changing clothes" within the meaning of § 203(o)?**

18. ***Sprint Communications Co. v. Jacobs*, No. 12-815 (8th Cir., 690 F.3d 864; cert. granted Apr. 15, 2013). Whether the Eight Circuit erred by concluding, in conflict with decisions of nine other circuits and this Court, that *Younger* abstention is warranted not only when there is a related state proceeding that is "coercive" but also when there is a related state proceeding that is "remedial."**

19. ***United States v. Woods*, No. 12-562 (5th Cir., 471 Fed. Appx. 320 ; cert granted ar. 25, 2013). Questions Presented are: (1) Whether Section 6662 of the Internal Revenue Code, which prescribes a penalty for an underpayment of federal income tax that is "attributable to" an overstatement of basis in property, applies to an underpayment resulting from a determination that a transaction lacks economic substance because the sole purpose of the transaction was to generate a tax loss by artificially inflating the taxpayer's basis in property; and (2) whether the district court had jurisdiction in this case under 26 U.S.C. §6226 to consider the substantial valuation misstatement penalty.**

20. ***Walden v. Fiore*, No. 12-574 (9th Cir., 688 F.3d 558; cert. granted Mar. 4, 2013; SG as amicus, supporting petitioner). The Questions Presented are: (1) Whether due process permits a court to exercise personal jurisdiction over a defendant whose sole "contact" with the forum State is his knowledge that the plaintiff has connections to that State. (2) Whether the judicial district where the plaintiff suffered injury is a district "in which a substantial part of the events or omissions giving rise to the claim occurred" for purposes of establishing venue under 28 U.S.C. § 1391(b)(2) even if the defendant's alleged acts and omissions all occurred in another district.**

Pending Petitions for Certiorari of Interest to Businesses

1. ***Akamai Technologies v. Limelight Networks,*** **No. 12-960; *Limelight Networks, Inc. v. Akamai Technologies, Inc.*, No. 12-786 (Fed. Cir., 692 F.3d 1301; CVSG June 24, 2013). Questions presented: (1) Whether a party may be liable for infringement under either section of the patent infringement statute, 35 U.S.C. §271(a) or § 271(b), where two or more entities join together to perform all of the steps of a process claim. (2) Whether the Federal Circuit erred in holding that a defendant may be held liable for inducing patent infringement under 35 U.S.C. § 271(b) even though no one has committed direct infringement under § 271(a).**

Gibson Dunn
Counsel for
NML
Capital, Ltd.

2. ***Argentina v. NML Capital, Ltd.,*** **No. 12-842 (2d Cir., 695 F.3d 201; CVSG Apr. 15, 2013). Whether post-judgment discovery in aid of enforcing a judgment against a foreign state can be ordered with respect to all assets of a foreign state regardless of their location or use, as held by the Second Circuit, or is limited to assets located in the United States that are potentially subject to execution under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1602 *et seq*., as held by the Seventh, Fifth, and Ninth Circuits.**

3. ***Fifth Third Bancorp v. Dudenhoeffer,*** **No. 12-751 (6th Cir., 692 F.3d 410; CVSG Mar. 25, 2013). The Questions Presented are: (1) Whether the Sixth Circuit erred by holding that respondents were not required to plausibly allege in their complaint that the fiduciaries of an employee stock ownership plan abused their discretion by remaining invested in employer stock, in order to overcome the presumption that their decision to invest in employer stock was reasonable, as required by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1101 *et seq*. ("ERISA"), and every other circuit to address the issue; and (2) whether the Sixth Circuit erred by refusing to follow precedent of this Court (and the holdings of every other circuit to address the issue) by holding that filings with the Securities and Exchange Commission become actionable ERISA fiduciary communications merely by virtue of their incorporation by reference into plan documents.**

4. ***Harris v. Quinn,*** **No. 11-681 (7th Cir., 656 F.3d 692; CVSG June 29, 2012). 1) Questions Presented are: (1) Whether a state may, consistent with the First and Fourteenth Amendments to the United States Constitution, compel personal care providers to accept and financially support a private organization as their exclusive representative to petition the state for greater reimbursements from its Medicaid programs; and (2) whether the lower court erred in holding that the claims of providers in the Home Based Support Services Program are not ripe for judicial review.**

5. ***Marvin M. Brandt Irrevocable Trust v. United States,*** **No. 12-1173 (Fed. Cir., 710 F.3d 1369). Whether the United States retained an implied reversionary interest in rights-of-way created by the General Railroad Right-of-Way Act of**

1875 rights-of-way after the underlying lands were patented into private ownership.

6. ***Pom Wonderful LLC v. The Coca-Cola Co.*, No. 12-761 (9th Cir., 679 F.3d 1170; CVSG Mar. 25, 2013). Whether the court of appeals erred in holding that a private party cannot bring a Lanham Act claim, 15 U.S.C. §§ 1051 *et seq*., challenging a product label regulated under the Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq*.**

7. ***Sony Computer Entertainment v. 1st Media, LLC*, No. 12-1086 (Fed. Cir., 694 F.3d 1367; CVSG May 13, 2013). Whether the Court of Appeals for the Federal Circuit erred in restricting district courts' equitable discretion in evaluating patent unenforceability, contrary to this Court's precedent in *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240 (1933), *Hazel Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), and *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945), by applying a rigid test that (a) forecloses district courts from considering the entire circumstantial record; and (b) precludes district courts from granting equitable remedies where a patent applicant has violated the Patent and Trademark Office's duty of candor.**

8. ***Toyota Motor Corp. v. Choi*, No. 12-1230 (9th Cir.). The parties to a contract agreed to arbitrate any claim or dispute arising out of the contract, including disputes over the arbitrability of the claim itself. Plaintiffs sued a non-signatory to the contract, and that non-signatory defendant sought to compel arbitration to determine whether the plaintiffs' claims are arbitrable. The question presented in this case is whether the non-signatory defendant can compel arbitration of the arbitrability of the plaintiffs' claims.**

9. ***Unite Here Local 355 v. Mulhall*, No. 12-99; *Mulhall v. Unite Here Local 355*, No. 12-312 (11th Cir., 668 F.3d 1211; CVSG Jan. 14, 2013). Whether organizing assistance offered by an employer to a union violates Section 302 of the Labor-Management Relations Act, 29 U.S.C. § 186(a)(2), which makes it unlawful for employers "to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value . . . to any labor organization.**

Key Statistics from October 2012 Term Business Cases

- 33 of the 75 cases argued this Term involved businesses as litigants or were of interest to business
  - Businesses were litigants in 22 of these cases

- Of the 33 business-related cases:
  - 17 decisions were unanimous
  - 10 decisions were 5-4 or 5-3
    - Justice Kennedy voted with the conservatives 7 times to form a majority (*Comcast*, *Genesis*, *Italian Colors*, *Vance*, *Nassar*, *Mutual Pharmaceutical*, *Koontz*)
    - Justice Kennedy voted with the liberals twice to form a majority (*U.S. Airways* and *Actavis*)
    - *Maracich* was decided in an opinion by Justice Kennedy, joined by the Chief Justice, and Justices Thomas, Breyer, and Alito
  - 4 out of the 6 intellectual property cases were unanimous (*Kirtsaeng* being the exception)
  - The Chief Justice and Justice Alito voted together in every case in which they both participated

- Of the 22 cases in which businesses were litigants:
  - 12 decisions were unanimous
  - 4 decisions were 5-4 or 5-3
  - The businesses won 12 times and lost 7 times; 2 decisions involved businesses on both sides of the case (*Already v. Nike*, *American Express v. Italian Colors Restaurant*) and one was a mixed result (*Myriad Genetics*)
    - Of the 12 wins, 7 were unanimous
    - 3 of the wins were 5-4 decisions with Justice Kennedy joining the conservative Justices (*Comcast*, *Genesis*, and *Mutual Pharmaceutical*)
    - Of the 7 losses, 3 were unanimous
  - The Chief Justice and Justice Alito voted together in every case in which they both participated
  - Justices Kagan and Sotomayor voted together in every case in which they both participated

- Of the 27 business cases in which the Solicitor General participated, either as a party or as amicus, 14 were victories for the United States (51.8%)

- Of the 18 cases in which the U.S. Chamber of Commerce was a participant:
  - 14 were victories for business (77.8%)
  - 7 of the victories were unanimous (31.8% of total, 50% of victories)

Supreme Court Statistics:

Gibson Dunn has a strong and high-profile presence before the Supreme Court of the United States, appearing numerous times in the past decade in a variety of cases on behalf of the nation's leading corporations, U.S. states, presidential candidates, and others. Gibson Dunn has had more than 100 Supreme Court arguments among the firm's active lawyers. Moreover, while the grant rate for certiorari petitions is below 1%, Gibson Dunn's certiorari petitions have captured the Court's attention: Gibson Dunn has persuaded the Court to grant its certiorari petitions more than thirty percent of the time since 2005.

Appellate and Constitutional Law Group Co-Chairs:

Theodore B. Olson - Washington, D.C. (202.955.8500, tolson@gibsondunn.com)
Theodore J. Boutrous, Jr. - Los Angeles (213.229.7000, tboutrous@gibsondunn.com)
Daniel M. Kolkey - San Francisco (415.393.8200, dkolkey@gibsondunn.com)
Thomas G. Hungar - Washington, D.C. (202.955.8500, thungar@gibsondunn.com)
Miguel A. Estrada - Washington, D.C. (202.955.8500, mestrada@gibsondunn.com)