SCOTUS Future Selfie: How Recent and Upcoming Supreme Court Decisions Will Impact Corporate America and Corporate Litigation

AMERICAN BAR ASSOCIATION
SECTION OF LITIGATION
CORPORATE COUNSEL CLE SEMINAR
MIAMI, FLORIDA

FEBRUARY 13, 2015

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INTRODUCTION

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> **selfie** *n.* (2005): A self-portrait photograph, typically taken with a digital camera or camera phone held at arm's length, featuring the photographer in a composed setting meant to appear flattering.[1]

A "selfie" is not just a photograph for posting on social media. The selfie is also a metaphor for what the litigator does with a case. Why? A selfie is not candid. When one takes a selfie, one composes the shot in a very specific way, meant to feature the subject(s) in an attractive light—usually a flattering pose and setting. The litigator does much the same thing: standing squarely in the middle of the frame, arm draped around the client, eyes fixed on the audience, the litigator attempts to compose a flattering picture that the triers of fact will like.

Although a photograph can be composed in seconds, building a winning case takes much longer. From the outset of the case, the forward-thinking litigator must therefore ask: How do I position myself and my client to produce the most favorable picture? In particular, how do I do this against an ever-changing backdrop of legislation and case law, over which I have (at best) limited control? Clearly, one component must be anticipation—the ability to see developing trends in the background law. With that knowledge, you can identify the winning legal theory and compose the rest of your picture to mesh with that background.

The purpose of this paper and the accompanying program is to highlight some of the developments at the U.S. Supreme Court that are the most important for corporate America, and to describe what impact these developments may have on business litigation in 2015 and beyond. We are focused on identifying relevant trends, because these may provide us cues with arguments to develop (or preserve) as we litigate each claim. Because we are focused on trends, each topic begins with a discussion of recent Supreme Court decisions, before proceeding to discussion of the cases of the current Term, and concluding with thoughts about implications for the future. As you consider these trends, ask yourself: "Where does my client fit within this picture?"

[1] From the Wikipedia definition found at http://en.wikipedia.org/wiki/Selfie (last visited Jan. 22, 2015).

CASE LAW

A. Employment Cases.

1. *Prior Terms*

a. *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2013).

- *Facts*. The Sarbanes-Oxley Act of 2002 has a whistleblower provision that makes it illegal for a public company "or any officer, employee, contractor, subcontractor, or agent of such company" to "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee" because of whistleblowing activity. 18 U.S.C. § 1514A(a). Employees of private contractors who advise public-company mutual funds alleged that they blew the whistle on alleged fraud at the mutual funds and were constructively discharged as a result by their private employer. The Court considered whether this whistleblower provision shielded not just employees of the public company themselves but also employees of private contractors—for example, investment advisers, law firms, accounting enterprises—who perform work for the public company.

- *Holding*. The Court held that the anti-retaliation provision applied not just to a public company's employees but also to employees of the company's private contractors and subcontractors. The Court relied on the plain text of the provision as well as the purpose for which it was adopted.

b. *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013).

- *Facts*. Title VII prohibits "hostile work environments" based on a plaintiff's protected status, such as race or gender. To prove such a claim if the alleged harasser is a coworker, a plaintiff must establish that the employer was negligent in preventing the harassment. If the alleged harasser is a supervisor, however, the employer is vicariously liable for the supervisor's conduct. In this case, the plaintiff worked as a server for the catering division of a university. She alleged that another employee constantly harassed her because of her race. The alleged harassing employee could not take any tangible employment decisions against the plaintiff (such as a termination or demotion), but did direct the plaintiff in her day-to-day work. The question was whether this employee qualified as a "supervisor" or a "coworker" for purposes of the plaintiff's hostile-work-environment claim.

- *Holding*. The Court held that an employee is a "supervisor" for purposes of vicarious liability for a plaintiff's Title VII hostile work environment claim only if the employee is empowered by the employer to take tangible employment actions against the plaintiff victim. It believed that such a bright-line rule was superior to allow judges to decide whether a particular employee qualifies as a coworker or supervisor to avoid the need to give conflicting jury instructions.

c. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).

- *Facts*. Title VII prohibits employers from retaliating against employees because they have filed complaints alleging illegal discrimination. The question in this case concerned the "causation" standard that a plaintiff must meet to show that an employer retaliated against the plaintiff "because of" the employee's complaints about illegal discrimination. The plaintiff, a doctor of Middle Eastern descent, worked at the University of Texas Southwestern Medical Center. The plaintiff alleged that his

supervisor was biased against him because of his national origin and ultimately quit. When he did so, he took an offer from a local hospital. But the university had an affiliation with that hospital under which *only* its doctors would staff the hospital. When the university learned that the plaintiff had been offered a job by the hospital, it protested that the offer violated the university/hospital affiliation agreement. The hospital then withdrew its offer to the plaintiff. The plaintiff brought suit alleging that the university complained to the hospital, in part, because of his discrimination complaints. He asserted that he need not prove that his discrimination complaints were the "but for" cause of the university's decision to protest because Title VII has reduced causation standards.

- *Holding.* The Court held that an employee, to prove a retaliation claim under Title VII, must satisfy traditional principles of but-for causation. It rejected the plaintiff's reliance on the reduced causation standards in Title VII because they only applied to status-based discrimination claims (e.g., discrimination based on race or gender), not to retaliation claims (e.g., discrimination based on filing a complaint).

2. <u>*This Term*</u>

a. *Mach Mining v. EEOC*, No. 13-1019.

- *Issue.* Title VII requires the EEOC to try to negotiate an end to an employer's unlawful employment practices in conciliation efforts before suing for a judicial remedy. This case asks whether and to what extent employers may argue that the EEOC failed to engage in its mandatory duty to conciliate discrimination claims before filing suit as an affirmative defense to that suit. Most circuits had held that the EEOC's conciliation efforts were judicially reviewable—although entitled to judicial deference. The Seventh Circuit disagreed, holding that Title VII did not establish a failure-to-conciliate affirmative defense for employers. The Supreme Court granted review of that decision.

- *Status.* The Court heard argument on January 13, 2015 and will likely issue its decision by July 2015.

b. *Young v. United Parcel Service*, No. 12-1226.

- *Issue.* UPS had a policy of granting light-duty work assignments to individuals who were injured on the job but not to individuals who were injured outside the job. The plaintiff became pregnant and could not lift heavy packages. She requested, but was denied, a light-duty assignment. She then sued under the Pregnancy Discrimination Act. The Fourth Circuit granted summary judgment to UPS, and the Supreme Court granted review of its decision. The case asks whether that Act requires an employer that provides work accommodations to non-pregnant employees from injuries arising on the job to provide the same work accommodations to pregnant employees who "are similar in their ability or inability to work" as those injured on the job.

- *Status.* The Court heard argument on December 3, 2014 and will likely issue its decision by July 2015.

c. *EEOC v. Abercrombie & Fitch Stores*, No. 14-86.

- *Issue.* The plaintiff sought a job with Abercrombie & Fitch as a salesperson in one of its stores. She is a practicing Muslim and says she wears a headscarf because of her religious beliefs (rather than cultural or other beliefs). Abercrombie declined to hire the plaintiff because the headscarf was inconsistent with its policy that sales employees should not wear any type of hats. During the interview, Abercrombie never asked the plaintiff whether she wore the headscarf for religious reasons, and she never said that she did. The Tenth Circuit ruled for Abercrombie, interpreting Title VII's restriction on religious discrimination to require an applicant to inform the employer prior to its hiring decision that the applicant's practice of wearing headgear was based on her religious beliefs and that she would need an accommodation for the practice because of a conflict between it and the employer's clothing policy. The Supreme Court granted review of that decision.

- *Status.* The Court set argument for February 25, 2015 and will likely issue its decision by July 2015.

B. Labor Cases

1. *Prior Terms*

a. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870 (2014).

- *Facts.* Section 203(o) of the Fair Labor Standards Act (29 U.S.C. § 203(o)) provides that the time employees spend "changing clothes" at the beginning and end of the workday is not compensable as long as the union representing the employees and employer agree to that arrangement. U.S. Steel had such an agreement with its union. Its production and maintenance employees nevertheless brought suit alleging that, despite § 203(o), they should have been paid overtime under the FLSA for time they spent "donning and doffing" their work clothes in locker rooms before and after their shifts. They claimed that the items they put on and took off each day—i.e., flame-retardant pants and jacket, work gloves, metatarsal boots, a hard hat, safety glasses, ear plugs, and a hood that covers their head, chin, and neck—did not constitute "clothes."

- *Holding.* The Court held that the time steel workers spent donning and doffing this protective gear is not compensable under the Fair Labor Standards Act. It interpreted "clothes" to cover "items that are both designed and used to cover the body and are commonly regarded as articles of dress." And it interpreted "changing" to cover putting on protective clothing. It also relied on the purpose of § 203(o), which was designed to provide predictability to employer/union negotiations.

2. *This Term*

a. *Integrity Staffing Solutions v. Busk*, 135 S. Ct. 513 (2013).

- *Facts.* Integrity Staffing Solutions, Inc., provided warehouse staffing to Amazon.com. It required its warehouse workers who retrieved inventory and packaged it for shipment for Amazon, to undergo an antitheft security screening before leaving the warehouse each day. The workers argued that they should be paid while they wait in line each day to leave under the Fair Labor Standards Act. The employer asserted that this waiting time was not compensable because the FLSA had an express exception to its compensation requirements for any "activities which are preliminary to or postliminary to [an employee's] principal activity." The Ninth Circuit agreed with the workers, and the Supreme Court granted review of that issue.

- *Holding.* The Court held that the time spent by warehouse workers waiting to undergo and undergoing security screenings is not compensable under the FLSA. It held that the "principal activity" that requires compensation under the FLSA extends to all those activities that are "integral and indispensable" to the principal activity. Under this test, the Court held that the security screenings were not a "principal activity" because they were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment. It also rejected the employees' argument that "principal activity" includes anything the employer requires the employee to do.

C. Securities Cases

1. *Prior Terms*

a. *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014).

- *Facts.* The Securities Litigation Uniform Standards Act of 1998 preempts any class action "based upon the statutory or common law of any State" in which the plaintiffs allege "a misrepresentation or omission of a material fact in connection with the purchase or sale of a" security traded on a national exchange. 15 U.S.C. §78bb(f)(1). In this case, the plaintiffs brought a class action alleging that they purchased *uncovered* securities because of the defendants' alleged misrepresentation that the purchased securities were backed by *covered* securities. The defendants argued that this suit was preempted by the Act because even though the underlying sale involved an uncovered security, the misrepresentation related to a covered one.

- *Holding.* The Court held that the Act did not preempt the plaintiffs' state-law class action. Relying on the Act's text, it said that the "purchase or sale" *itself* has to be of a covered security, and that misrepresentations about a covered security in relation to a purchase or sale of an *uncovered* security do not suffice.

b. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014).

- *Facts.* This case concerned the requirements for certifying a securities class action under the Securities Exchange Act of 1934 and SEC Rule 10b-5. The plaintiff alleged that Halliburton and its CEO made public misstatements concerning the company's liabilities and revenues, purportedly inflating Halliburton's stock price. To certify a class action, the plaintiff relied on the fraud-of-the-market theory established by *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). Generally, a fraud claim is not certifiable as a class because the "reliance" element presents an individual issue. The fraud-on-the-market theory is based on the argument that the price of a security traded in an efficient market will reflect all publicly available information about a company; accordingly, a buyer of the security may be presumed to have relied on that information in purchasing the security. Under this theory, individuals need not show that they personally relied on alleged misrepresentation when making investment decisions because the stock price is presumed to have incorporated that misinformation. *Basic* thus establishes a "presumption of reliance" allowing for class certification. The defendant in this case argued that *Basic*'s presumption of reliance should be overruled.

- *Holding.* Declining the defendant's invitation to overrule *Basic*, the Court held that a securities-fraud claim could be certified as a class action if a plaintiff could prove *Basic*'s presumption of reliance that applies for all material and public misrepresentations so long as the securities are traded on efficient stock markets. Nevertheless, the Court did hold that a defendant may rebut the presumption of reliance at the certification stage with evidence that the alleged misrepresentation did not affect the stock price.

c. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013).

- *Facts.* Connecticut Retirement Plans and Trust Funds filed a class action against Amgen Inc. and several of its officers under Basic's fraud-on-the-market presumption of reliance. Amgen conceded that it stock was traded on an efficient market and that the

alleged misstatements were public. But it said, at the certification stage, the plaintiff must *prove*—and not just *plead*—that the alleged misstatement was *material* because that was necessary to establish that the alleged misrepresentation affected the stock price, and thus that the presumption of reliance from *Basic* applies. The Ninth Circuit disagreed, and the Supreme Court granted review.

- *Holding.* The Court held that proof of materiality is not a prerequisite to certification of a securities-fraud class action seeking money damages for alleged violations of Rule 10b-5, even if it is a required element necessary to be proved at the merit stages. The Court reasoned that Rule 23(b)(3) requires a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class. And because materiality is judged according to an *objective* standard, the materiality of Amgen's alleged misrepresentations and omissions will be answered the same way for all class members.

2. <u>*This Term*</u>

a. *Omnicare v. Laborers District Council Construction Industry Pension Fund*, No. 13-435.

- *Issue.* This case concerns the proper interpretation of the Securities Act of 1933's cause of action for misstatements in registration statements for public offerings. The Act allows a lawsuit if a registration statement "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). Omnicare provides pharmaceutical care for those in long-term care facilities. Its registration statement said that it believed its contracts with pharmaceutical companies and long-term care facilities were legal. Plaintiffs alleged these statements were false because the company entered into illegal kickback arrangements with manufacturers. The district court dismissed the suit on the ground that the plaintiffs failed to plead that the company's officers subjectively disbelieved that their contracts were legal. The Sixth Circuit reversed, holding that a plaintiff need only show that an opinion in a registration statement was objectively false, not that the defendant did not subjectively believe the opinion. The Supreme Court granted review to determine this state-of-mind issue.

- *Status.* The Court heard argument on November 3, 2014, and will likely issue its decision by July 2015.

D. Arbitration Cases

1. *Prior Terms*

a. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

- *Facts.* Italian Colors Restaurant and other merchants that accept American Express cards filed a class action against American Express asserting federal antitrust claims. The merchants' contract with American Express required all disputes between the parties to be resolved in arbitration, and said there should be no class arbitration. While the district court granted American Express's motion to arbitrate, the Second Circuit reversed. Relying on a declaration from the plaintiffs about the substantial expense required to prove their antitrust claims, the appellate court found the class arbitration waiver unenforceable because individual arbitrations would impose costs on each merchant that far exceeded their potential recoveries.

- *Holding.* The Court held that the Federal Arbitration Act does not permit courts to invalidate a contractual waiver of class arbitration on the ground that a plaintiff's cost of individually arbitrating a federal statutory claim likely would exceed the maximum potential recovery for that plaintiff. It rejected the plaintiffs' argument that the FAA should not apply when an arbitration agreement would prevent the plaintiff from "effectively vindicating its statutory rights." The Court found that this effective-vindication exception applied only when the arbitration agreement substantively prohibited a plaintiff from asserting a particular statutory claim, not when it merely restricted the plaintiff from procedurally asserting a class claim. The Court said that "the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy."

b. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013).

- *Facts.* The plaintiff, a doctor, signed a contract with the defendant, an insurance company, giving the doctor preferred access to the company's members. Their contract required arbitration but was silent on whether class arbitration was acceptable. The doctor eventually filed suit claiming that the insurer was underpaying for his services in violation of the contract. The trial court compelled arbitration. The arbitrator interpreted the arbitration agreement as allowing for class-wide arbitration on behalf of all similarly situated doctors. The company challenged that ruling in the courts, and the Third Circuit affirmed the arbitrator's decision.

- *Holding.* The Court held that when an arbitrator determines that the parties' arbitration contract permits class-wide arbitration, that determination cannot be overturned by a court under the Federal Arbitration Act as long as the arbitrator was arguably construing the contract rather than imposing the arbitrator's own views of good public policy. Here, whether or not the arbitrator's reading of the contract was reasonable, the arbitrator was interpreting the contract and so its decision could not be disturbed. The Court also left for another day the question whether the "class arbitration" decision should be for the courts or the arbitrator because the employer had agreed that it should be for the arbitrator.

E. Class-Action, Jurisdictional, And Other Procedural Cases

1. *Prior Terms*

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

- *Facts.* The Attorney General of Mississippi brought state antitrust and consumer claims against manufacturers of liquid crystal displays for LCD televisions. The defendants removed the suit to federal court on the basis of the Class Action Fairness Act's removal provisions for so-called "mass actions." The Fifth Circuit held that federal jurisdiction existed, and the Supreme Court granted review.

- *Holding.* The Court held that, under the Class Action Fairness Act, a suit brought only by Mississippi seeking to recover on behalf of its citizens against several businesses did not qualify as a "mass action" and so was not removable to federal court under that Act. The Court relied on the plain text, which required the suit to be brought by 100 or more persons. This language did not encompass a suit by a state attorney general even if it was on behalf of those individuals.

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

- *Facts.* The Class Action Fairness Act grants jurisdiction to federal courts over a civil "class action" if, among other things, the "matter in controversy" exceeds $5 million. In this case, the named plaintiff stipulated prior to class certification that the claims did not exceed $5 million and argued that the stipulation prevented removal to federal court under the Act. The district court remanded, and the Eighth Circuit refused to hear the appeal. The Supreme Court granted review.

- *Holding.* The Court held that the stipulation that the class would seek less than $5 million in damages, which was intended to establish the amount of damages in controversy, did not defeat federal jurisdiction because the stipulation was not binding on the many unnamed class members in the event of certification.

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

- *Facts.* Plaintiffs brought suit against Comcast on behalf of a class of more than 2 million current and former Comcast subscribers alleging that Comcast violated the federal antitrust laws by attempting to monopolize cable services in the Philadelphia area. The plaintiffs asserted four distinct theories of antitrust impact. But the district court accepted only one of those theories as provable on a classwide basis. It nevertheless relied on the plaintiffs' damages expert to show that damages could be calculated on a class-wide basis, even though the damages model incorporated *all* four theories into its calculations. The Third Circuit affirmed, and the Supreme Court granted review.

- *Holding.* The Court held that the class-action antitrust suit was improperly certified under Rule 23(b)(3) because the plaintiffs' damages model did not match up with the plaintiffs' liability theory. Accordingly, the Court held that the damages model could not be used to show that a class action was a superior method of litigation under Rule 23(b)(3).

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

- *Facts.* Plaintiffs, Argentinian residents, filed suit in California federal court against DaimlerChrysler Aktiengesellschaft, 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 forces to murder some of its workers. The plaintiffs alleged that personal jurisdiction existed over the German company because its American subsidiary, Mercedes-Benz USA, distributes many Daimler-manufactured vehicles to dealerships in California. The Ninth Circuit agreed with the plaintiffs that "general" personal jurisdiction existed given the amount of business the American subsidiary conducted in California.

- *Holding.* The Court held that California does not have "general" or "all-purpose" personal jurisdiction over the German company with respect to a suit for injuries allegedly caused by conduct of Daimler's Argentinian subsidiary in Argentina merely because Daimler's American subsidiary does substantial business in California.

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

- *Facts.* The plaintiffs, Nigerian nationals residing in the United States, filed suit in federal court against Dutch, British, and Nigerian corporations under the Alien Tort Statute, 28 U.S.C. § 1350, alleging that the corporations aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria. The Second Circuit dismissed the suit.

- *Holding.* The Court held that the usual presumption against the extraterritorial application of U.S. laws applied to claims under the Alien Tort Statute, such that claims involving an out-of-state company and out-of-state plaintiffs involving out-of-state activity were not covered by the statute.

2. <u>*This Term*</u>

a. *Dart Cherokee Basin Operating Company, LLC v. Owens*, 135 S. Ct. 547 (2014).

- *Facts.* This case concerned the requirements for a defendant to remove a lawsuit from state court to federal court. Under 28 U.S.C. § 1446(a), the defendant must file in the federal forum a notice of removal "containing a short and plain statement of the grounds for removal." In this case, the defendant removed on the basis of diversity jurisdiction under the Class Action Fairness Act, which requires the amount in controversy to exceed $5 million. The defendant pleaded that the amount in controversy was more than that amount, but failed to include evidence with the notice of removal. The district court remanded to state court because of this failure, and the Tenth Circuit affirmed. The Court granted review.

- *Holding.* The Court held that a defendant's notice of removal of a case from state to federal court need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold; it does not need to contain evidentiary submissions. It thus equated a notice of removal with a complaint—neither of which requires evidence with the filing.

F. Business-Tort And Trademark Cases

1. *Prior Terms*

a. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

- The Court held that the plaintiff, Static Control, had adequately pleaded the elements of a false-advertising claim under the Lanham Act by asserting an injury to a commercial interest in sales or reputation that was proximately caused by the defendant's alleged misrepresentations.

b. *Pom Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014).

- The Court held that the federal Food, Drug and Cosmetic Act, which regulates labels on food and beverages, did not impliedly repeal a Lanham Act claim brought by the plaintiff competitor alleging false or misleading product descriptions on the beverage labels of the defendant competitor.

2. *This Term*

a. *Hana Financial v. Hana Bank*, No. 13-1211.

- This case asks whether the jury or the court determines whether use of an older trademark may be tacked on to a newer one under federal trademark law to show that the newer one has been in use for longer. This case was decided on January 21, 2015. The Court held that the trademark tacking issue is a jury issue, not an issue for the Court.

G. Patent and Copyright Cases

1. *Prior Terms*

a. *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843 (2014) (patent infringement).

- The Court held that when a plaintiff seeks a declaratory judgment against a patentee to establish that the plaintiff's products do not infringe the defendant's patent, the patentee (defendant) bears the burden of persuasion on the issue of infringement.

b. *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014) (patent indefiniteness).

- The Court held that a patent is invalid for "indefiniteness" in what the patent actually covers if its listed claims, read in light of the patent's specification and prosecution history, fail to reasonably inform those skilled in the art about the scope of the invention (in this case a heart-rate monitor with exercise equipment).

c. *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014) (patent eligibility).

- Interpreting the reach of what is "patent eligible," the Court held that Alice Corporation's patent claims for a computer-implemented scheme to mitigate "settlement risk" (the risk that only one party to an exchange of financial obligations will perform) qualified as an "abstract idea" that was ineligible for patent protection.

d. *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014) (meritless suits).

- The Court rejected the Federal Circuit's rigid standard for awarding attorney's fees to prevailing defendants in patent-infringement suits, opting for a flexible case-by-case approaching depending on the strength of the plaintiff's claim.

e. *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (copyright).

- The Court held that Aereo publicly performs copyrighted works, in violation of the Copyright Act's Transmit Clause, when it sells its subscribers a service allowing them to watch television programs streaming over the Internet at about the same time as the programs are broadcast over the air.

2. *This Term*

a. *Teva Pharmaceuticals USA v. Sandoz*, No. 13-854 (patent procedure).

- This case asks whether a district court's factual finding in support of its construction of a patent claim may be reviewed on appeal de novo, or only for clear error. This case was decided on January 20, 2015. The Court held that the standard of review is for clear error.

H. Other Potentially Significant Cases For Corporations Pending This Term

1. *King v. Burwell*, No. 14-114.

- *Issue.* The Patient Protection and Affordable Care Act directs the States (and if a State refuses, the federal government) to establish "exchanges" where individuals within the State can buy health insurance. It grants subsidies to low-income individuals who purchase coverage on an "Exchange established by the State." This case asks whether the IRS may permissibly promulgate regulations extending these tax-credit subsidies to coverage purchased through exchanges established by the *federal government*. This issue could be relevant for "large employers" (those with more than 50 employees) because the availability of the subsidies in a State is what triggers a large employer's duty to provide minimum essential health coverage to employees or pay the $2,000/employee penalty.

- *Status.* The Court scheduled argument for March 4, 2015, and will likely issue its decision by July 2015.

2. *Tex. Dep't of Hous. and Cmty. Affairs v. Inclusive Communities Project*, No. 13-1371.

- *Issue.* This case asks whether "disparate-impact" claims—those permitting liability not just for intentional racial discrimination but also for business decisions that have a disparate effect on certain racial groups—are cognizable under the federal Fair Housing Act. Those types of claims are often brought against mortgage lenders, homeowners' insurance companies, and other businesses based on allegations that their objective lending or other criteria have a "disparate impact" on particular groups.

- *Status.* The Court heard argument on January 21, 2015, and will likely issue its decision by July 2015.

I. Administrative Law

1. *Prior Terms*

a. *Talk America, Inc. v. Mich Bell Tel. Co.*, 131 S.Ct. 2254 (2011): deference to agency interpretation of its own regulations.

• *Facts.* The issue for decision was whether an incumbent provider of local telephone service must make certain transmission facilities available to competitors at cost-based rates. The Federal Communications Commission (FCC), participating as *amicus curiae*, filed a brief arguing that its regulations required the incumbent provider to do so if the facilities are to be used for interconnection.

• *Holding.* Citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997), the Court deferred to the FCC's regulatory interpretation, advanced for the first time in its *amicus* brief. "[T]he Commission's interpretation of its regulations is neither plainly erroneous nor inconsistent with the regulatory text." 131 S.Ct. at 2263. Moreover, there is no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter. *Id*. (citing *Auer*).

• *Scalia.* In a concurring opinion, Justice Scalia expressed strong reservations about *Auer* deference and noted that although the Court had not been invited to reconsider *Auer* in that case, he would be "receptive to doing so" if the issue were to be raised before the Court. Judicial deference to agency interpretations raises separation of powers concerns, and encourages agencies "to enact vague rules which give it the power, in future adjudications, to do what it pleases." 131 S.Ct. at 2266.

b. *Sackett v. EPA*, 132 S.Ct. 1367 (2012): judicial review of agency action.

• *Facts.* In 2005, Mr. and Mrs. Sackett bought a small plot of land in a residential area in Priest Lake, Idaho for the purpose of building a new home. The Sacketts obtained the necessary local building permits, and construction began in 2007 with the placement of rock and gravel on the property (in preparation for the home's foundation). In November of that year, the Environmental Protection Agency (EPA) issued an administrative compliance order to the Sacketts under the Clean Water Act. The order stated that the Sacketts had unlawfully filled in wetlands and ordered them to remove the dirt and gravel and return the property to its prior condition. The order also stated that failure to comply would subject the Sacketts to fines of up to $32,500 per day. Believing the order invalid, the Sackets requested an administrative hearing—a request EPA denied. The Sacketts then filed a lawsuit in federal district court, challenging the compliance order. Their complaint alleged that the EPA's order was arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, and violated the due process clause of the U.S. Constitution. The district court dismissed the complaint, agreeing with the EPA that the Clean Water Act precluded pre-enforcement review of an administrative compliance order. The Ninth Circuit affirmed.

• *Holding.* The Administrative Procedure Act allows interested parties to challenge the EPA's administrative compliance order, because it had all the hallmarks of finality under 5 U.S.C. § 704. The Court rejected the EPA's argument that judicial review at a subsequent enforcement proceeding would suffice.

c. *Christopher v. SmithKline Beechum*, 132 S.Ct. 2156 (2012): deference to agency interpretation of its own regulations.

• *Facts.* Under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, employers are required to pay employees overtime wages, but this requirement does not apply with respect to workers employed "in the capacity of outside salesman," 29 U.S.C. § 213(a)(1). Petitioners, employed by SmithKline Beechum as pharmaceutical sales representatives, filed a class action lawsuit seeking overtime wages. The district court granted summary judgment to SmithKline Beechum, finding the salesman exemption applicable. The Ninth Circuit affirmed. In briefing before the Supreme Court, the Department of Labor (DOL) filed an amicus brief supporting plaintiffs' entitlement to relief, based on a different interpretation of its regulations than it had previously asserted. DOL had never published its interpretation, and despite the fact that interpretation was inconsistent with longstanding industry practice, had never taken enforcement action based on that interpretation.

• *Holding.* Petitioners qualify as outside salesmen under the most reasonable interpretation of the DOL regulations. DOL's Department's interpretation to the contrary is not worthy of deference, because there is "reason to suspect that the interpretation 'does not reflect the agency's fair and considered judgment on the matter[.]'" First, the profferd interpretation "plainly lacks the hallmarks of thorough consideration," given the lack of opportunity for public comment and the inconsistent positions taken on the question by the agency over time. In addition, deferring to the agency's new interpretation would impose "potentially massive liability … for conduct that occurred well before the interpretation was announced," resulting in "unfair surprise" to the regulatory community and "seriously undermin[ing] the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" 132 S. Ct. at 2167 (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986).)

d. *UARG v. EPA*, 134 S. Ct. 2427 (2014): review of agency interpretation of a statute.

• *Facts.* In 2007, the Supreme Court in *Massachusetts v. EPA* held that the EPA had the authority under Title II of the Clean Air Act (CAA), 42 U.S.C. § 7401 *et seq.*, to regulate greenhouse gases (GHGs) from new motor vehicles if the agency formed a judgment that emissions of GHGs contribute to air pollution that may endanger public health or welfare. Two years later, EPA issued an "Endangerment Finding," determining that GHGs endanger public health and welfare by contributing to climate change. That Endangerment Finding then triggered EPA's obligation to regulate emissions of GHGs from new motor vehicles, which it did in a 2010 rule. Under EPA's interpretation of the CAA, regulation of GHG emissions from new motor vehicles triggers the broader regulation of GHG emissions from stationary sources under the CAA's Prevention of Significant Deterioration (PSD) program and Title V program. These programs apply to any "major emitting facility," which is one that emits (or has the potential to emit) statutorily defined quantities of "any air pollutant." Because GHGs are emitted in far greater quantities than other pollutants, straightforward application of the PSD program to sources based on their emissions of GHGs would have produced overwhelming permitting burdens for both EPA and regulated sources. EPA therefore "tailored" its application of the PSD program, first applying the PSD requirements only to sources already regulated by that program (on the basis of other pollutants) and then to sources with the potential to emit 100,000 tons of CO2 per year. Several states and

industry groups petitioned for review of EPA's actions in the DC Circuit. The DC Circuit upheld the agency determinations.

• *Holding.* EPA violated the CAA when it expanded the statute's Title V and PSD programs to include sources of greenhouse gas emissions that were not already regulated under those programs. The CAA neither compelled nor permitted the EPA's interpretation of the scope of the PSD program and Title V. EPA argued that "air pollutant" in the Act-wide definition includes GHGs, and the PSD program required permits for emitters of "any air pollutant," therefore the PSD program must require permits for emitters of GHGs. Justice Scalia, writing for the Court, rejected that contention, holding that "air pollutant" must be read in context, and the PSD and Title V provisions were designed to apply to, and cannot rationally be extended beyond, a relative handful of large sources capable of shouldering heavy substantive and procedural burdens. EPA's interpretation would have brought about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. Moreover, EPA cannot "tailor" the Act's unambiguous numerical thresholds of 100 or 250 tons per year to accommodate its GHG-inclusive interpretation of the permitting triggers. However, the agency reasonably interpreted the Act to require sources that would need permits based on their emission of conventional pollutants to comply with emissions-control requirements for GHGs.

2. <u>*This Term*</u>

a. *Perez v. Mortgage Bankers Association*, No. 13-1041: review of agency departure from prior interpretation.

• Issue: Whether federal agencies have to engage in notice-and-comment rulemaking before they significantly alter a rule interpreting an agency regulation.

• *Facts.* In 2013, the DC Circuit vacated a 2010 "administrator interpretation" in which the U.S. Department of Labor reclassified mortgage loan officers as overtime-eligible under the Fair Labor Standards Act. That 2010 determination departed from a previous position established by the Bush administration in a 2006 opinion letter. The Mortgage Bankers Association challenged that 2010 interpretation, claiming that the Administrative Procedure Act (APA) required notice and public comment in order to change the rule. Although the APA states that an agency's amendment or repeal of an interpretive rule is exempt from formal rulemaking, the DC Circuit in *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579 (D.C. Cir. 1997) had held that once an agency issues a definitive interpretation of a rule, it cannot significantly modify that interpretation without going through notice-and-comment rulemaking.

• *Status.* The case was argued December 1, 2014. Questions by the Court included whether deference was appropriate, and which interpretation deserved deference, and the continued vitality of the *Paralyzed Veterans* doctrine.

b. *Michigan v. EPA*, No. 14-46: review of agency interpretation of the statute.

- *Issue.* Whether the EPA should weigh costs to companies and consumers in drafting air quality regulations under the Clean Air Act, 42 U.S.C. § 7401 *et seq*. In April 2014, a divided panel of the DC Circuit upheld EPA's 2012 Mercury and Air Toxics Standards (MATS). Petitioners (23 states and two industry groups) argue that the regulations are too costly compared to the projected benefits, and that the DC Circuit failed to consider adequately the projected costs associated with implementing the rule

- *Status.* An argument date has not been set. A reversal by the Supreme Court would have implications beyond the rule in question. Limiting EPA's discretion under the CAA could apply to everything that the EPA does under the statute: mobile sources, power plants, manufacturing facilities, etc.