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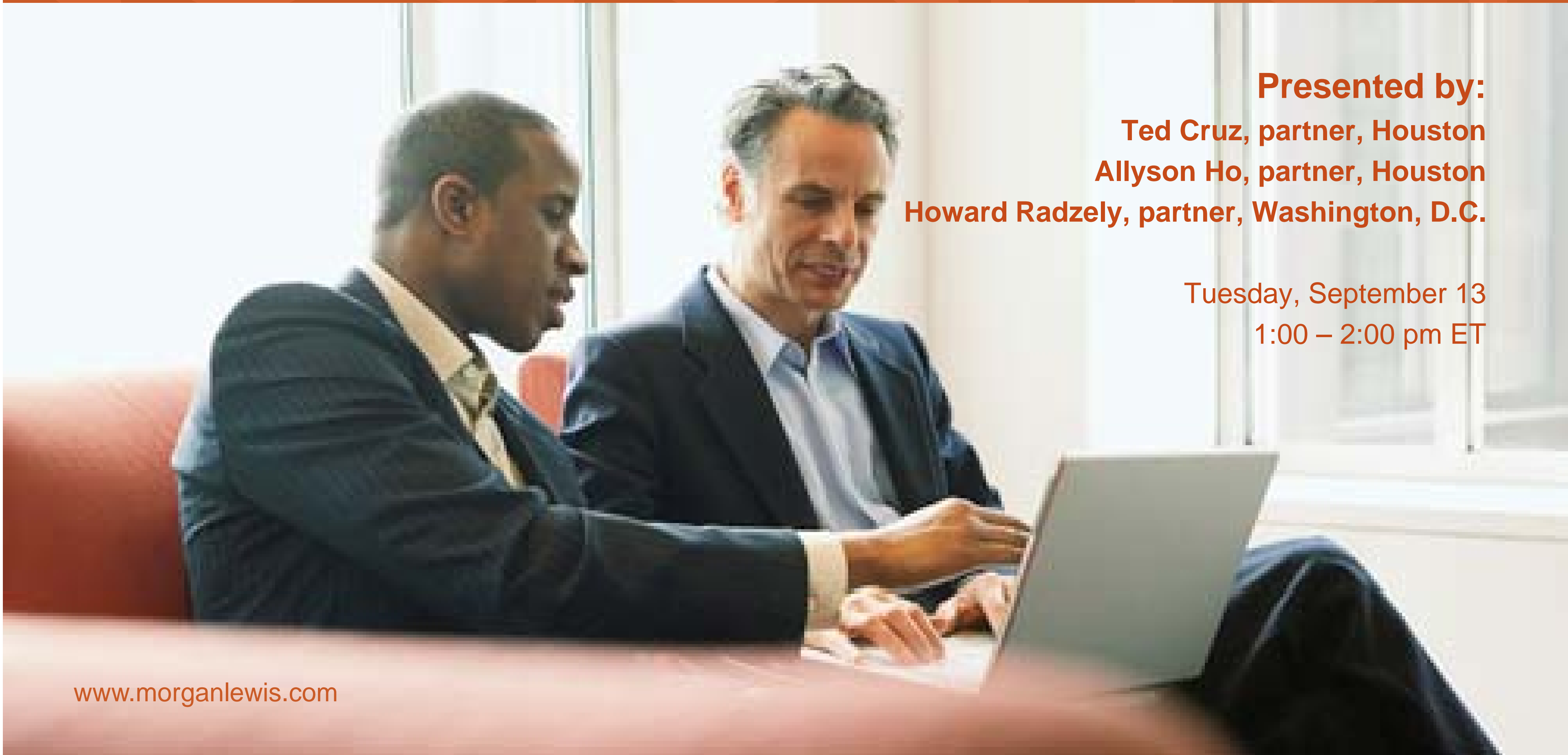
U.S. Supreme Court Preview: Key Cases and Management Issues Before the Court Next Term



Presented by:

Ted Cruz, partner, Houston

Allyson Ho, partner, Houston

Howard Radzely, partner, Washington, D.C.

Tuesday, September 13

1:00 – 2:00 pm ET

The Presenters

Ted Cruz, partner, Houston

- Former Solicitor General of Texas
- Co-chair of Morgan Lewis's U.S. Supreme Court and Appellate Litigation Practice
- Former Clerk to Chief Justice William Rehnquist

Allyson Ho, partner, Houston

- Former Counselor to the Attorney General and Special Assistant to the President
- Co-chair of Morgan Lewis's U.S. Supreme Court and Appellate Litigation Practice
- Former Clerk to Justice Sandra Day O'Connor

Howard Radzely, partner, Washington, D.C.

- Former Deputy Secretary of Labor and Solicitor of Labor
- Former Clerk to Justice Antonin Scalia

Supreme Court 2010 Term Recap

- Wal-Mart Stores, Inc. v. Dukes (class actions)
- Staub v. Proctor Hospital (Uniformed Services Employment and Reemployment Rights Act)
- Kasten v. Saint-Gobain (Fair Labor Standards Act)
- Thompson v. North American Stainless (Title VII)
- AT&T v. Concepcion (class arbitration)

Wal-Mart Stores, Inc. v. Dukes

Background: The Ninth Circuit affirmed class certification of approximately 1.5 million plaintiffs, consisting of current and former female employees, who claimed that the discretion their local supervisors exercised over employees' pay and promotion violated Title VII because it discriminated against female employees. The plaintiffs sought injunctive and declaratory relief, as well as back pay.

Wal-Mart v. Dukes *(cont'd)*

Question Presented:
Was class certification consistent with Federal Rule of Civil Procedure 23(a) and 23(b)(2)?

Wal-Mart v. Dukes *(cont'd)*

Holding: Class certification was improper under Rule 23(a) because the case did not satisfy the rule's commonality requirement. Commonality requires more than just a common *issue*. It requires that proceeding as a class action will generate a common *answer*—resolving an issue that is central to the validity of each one of the plaintiffs' claims "in one stroke." Under that reading of Rule 23(a), the Supreme Court held that the plaintiffs did not present sufficient evidence that Wal-Mart had centralized policies of discrimination that would cause the plaintiffs to suffer the same injury.

The Court also held that class certification was improper under Rule 23(b) because the plaintiffs sought back pay. Rule 23(b) concerns class claims seeking declaratory and injunctive relief. The Court left open the possibility that a class could be certified under Rule 23(b) where the monetary damages were incidental to the declaratory and injunctive relief sought, but here the back pay was more than incidental.

Staub v. Proctor Hospital

Background: Staub brought suit under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) after his supervisors issued a disciplinary warning based on absences required by his Army Reserve obligations, and the company's vice president ultimately terminated him based on the supervisors' input. A jury found the employer liable, but the Seventh Circuit reversed because the final decision maker had relied on more than the supervisors' input in making her decision.

Question Presented: In what circumstances may an employer be held liable under the "cat's paw" theory, i.e., based on the unlawful intent of officials who caused or influenced but did not make the ultimate employment decision?

Staub v. Proctor Hospital *(cont'd)*

Holding: The Supreme Court held that if a supervisor takes action intended to cause an adverse employment decision, and that act proximately causes the adverse decision, the final decision maker may be held liable even if that decision maker is unbiased.

USERRA's similarities to Title VII make Staub potentially applicable to discrimination claims brought in other contexts.

Kasten v. Saint-Gobain Performance Plastics Corp.

Background: The Seventh Circuit affirmed the district court's decision that oral complaints made by the plaintiff to his supervisors that the company was violating the Fair Labor Standards Act (FLSA) did not trigger the protections of the FLSA's antiretaliation provision because each of his oral complaints did not constitute a "filed complaint" within the meaning of the statute.

Question Presented: Is an oral complaint protected under the FLSA's antiretaliation provision?

Kasten v. Saint-Gobain *(cont'd)*

Holding: After determining that the statutory text was inconclusive, the Supreme Court examined the statute's purpose and concluded that the FLSA protects employees from retaliation when they have made oral, as well as written, complaints. The Court held that a "filed" complaint means that a reasonable, objective person would understand that an employee is putting the employer on notice that the employee is asserting his or her rights under the FLSA.

The majority did not reach the question of whether a complaint must be directed to the government rather than to the employer to trigger protection under the antiretaliation provision.

Thompson v. North American Stainless

Background: After Thompson's fiancée filed a sex discrimination charge with the Equal Employment Opportunity Commission against Thompson and his fiancée's mutual employer, the employer fired Thompson. Thompson then brought suit under Title VII of the Civil Rights Act, alleging that the employer fired him to retaliate against his fiancée for filing her charge. The district court granted summary judgment for the employer on the basis that Title VII did not allow third-party retaliation claims. The Sixth Circuit affirmed en banc.

Thompson v. North American Stainless *(cont'd)*

Questions Presented: (1) Does section 704(a) of Title VII forbid an employer from retaliating against a third party, such as a spouse, family member, or fiancée, closely associated with an employee who engaged in protected activity? (2) If so, may that prohibition be enforced in a civil action brought by the third-party victim?

Holding: If the facts Thompson alleged are true, his firing constituted unlawful retaliation. Title VII provides him a cause of action.

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AT&T Mobility LLC v. Concepcion

Background: The Concepcions entered into a sales and servicing agreement with AT&T for cellular telephones. The agreement provided that all disputes between the parties would be subject to arbitration, and that any claims must be brought in the parties' individual capacity and not as class members.

The Concepcions filed a lawsuit that was consolidated with a putative class action. AT&T moved to compel arbitration, but the motion was denied on the ground that the arbitration provision was unconscionable under state law, as AT&T had not shown that arbitration was an adequate substitute for a class action. The Ninth Circuit affirmed, holding that the FAA did not preempt the state law at issue.

AT&T v. Concepcion *(cont'd)*

Question Presented: Does the FAA prohibit states from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures?

Holding: When a state law rule stands as an obstacle to the accomplishment of the FAA's purposes and objectives, the FAA preempts that state law rule, because state law rules cannot interfere with the accomplishment and execution of Congress's full purposes and objectives in enacting the FAA.

Looking Ahead to the 2011 Term

- CompuCredit Corp. v. Greenwood (arbitration and the Credit Repair Organizations Act)
- Knox v. Service Employees International Union, Local 1000 (union political activity)
- Coleman v. Maryland Court of Appeals (Family and Medical Leave Act)
- Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC (Americans with Disabilities Act)
- Pacific Operations Offshore, LLP v. Valladolid (Outer Continental Shelf Lands Act)

CompuCredit Corp. v. Greenwood, 615 F. 3d 1204 (9th Cir. 2010), petition for cert. granted, No. 10-948

Background: The plaintiffs signed up for credit cards marketed by CompuCredit to consumers with low credit scores. They later sued CompuCredit and the bank that issued the cards, alleging that promotional material accompanying the credit card applications violated the Credit Repair Organizations Act (CROA) and California's Unfair Competition Law. The defendants moved to compel arbitration under an the arbitration clause in the credit card agreements.

The Ninth Circuit affirmed the district court's decision that the arbitration clause was invalid under the CROA's prohibition of the waiver of consumers' right to sue in court.

CompuCredit Corp. v. Greenwood *(cont'd)*

Question Presented: Are claims arising under the Credit Repair Organizations Act, 15 U.S.C. § 1679 et seq., subject to arbitration pursuant to a valid arbitration agreement?

Implications: The case provides the Supreme Court an opportunity to resolve a conflict between the Ninth Circuit, which held here that the CROA precludes enforcement of an agreement to arbitrate claims brought under that statute, and the Third and Eleventh Circuits, which have reached the opposite conclusion.

Knox v. Service Employees International Union, Local 1000, 628 F. 3d 115 (9th Cir. 2010), cert. granted, No. 10-1121

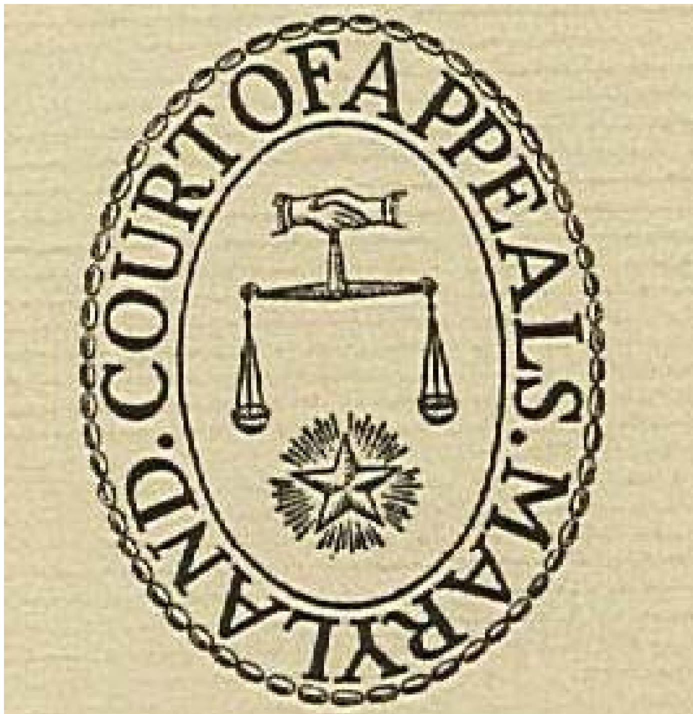
Background: In Knox, the Service Employees International Union (SEIU) issued its annual Hudson notice, which is required to be sent to nonmember employees to inform them as to what percentage of their dues and fees will be allocated to functions associated with union representation and how much will be associated with nonrepresentation functions like political activity. After receiving the Hudson notice, nonmember employees may opt out of paying amounts associated with nonrepresentation functions. After issuing the annual notice, the SEIU imposed a fee increase and did not issue a second Hudson notice. In a class action brought by nonmember state employees challenging this practice, the Ninth Circuit held that a second notice was not required.

Knox v. Service Employees International Union Local 1000 *(cont'd)*

Question Presented: Does the First Amendment give state employees the right to decline to pay union dues used for political advocacy by the union?

Coleman v. Maryland Court of Appeals, 626 F. 3d (4th Cir. 2010), *petition for cert. granted*, No. 10-1016

Background: The Eleventh Amendment bars suit in federal court against unconsenting states unless Congress has abrogated that immunity. Congress must unequivocally declare its intent to abrogate the immunity and must act pursuant to a valid exercise of its power.



The Family and Medical Leave Act (FMLA) authorizes a qualified employee to take up to 12 weeks of unpaid leave when serious health conditions make the employee unable to perform the functions of his or her position ("the self-care provision").

Coleman v. Maryland Court of Appeals

(cont'd)

Background (cont'd): Coleman requested sick leave and was told by his supervisor that he would be terminated if he did not resign. Coleman filed suit, alleging that his employer violated the FMLA when it fired him in part for requesting sick leave.

The Fourth Circuit affirmed the dismissal of the complaint for failure to state a claim, holding that Congress had not abrogated the states' immunity with respect to the self-care provision of the FMLA because Congress did not act pursuant to a valid exercise of its power. More specifically, the Fourth Circuit determined that the self-care provision is not congruent and proportional to a Fourteenth Amendment injury that Congress enacted the provision to remedy.

Coleman v. Maryland Court of Appeals
(cont'd)

Question Presented: Did Congress constitutionally abrogate the states' Eleventh Amendment immunity when it passed the self-care provision of the FMLA?

Implications: The courts of appeal have uniformly held that Congress did not abrogate Eleventh Amendment immunity when it enacted the FMLA's self-care provision. In Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003), however, the Supreme Court held that Congress *did* abrogate the FMLA's family care provisions, which the Court held were enacted to address the states' past practice of sex discrimination in granting family care leave. This case thus gives the Court an opportunity to decide whether Hibbs should be extended to the FMLA's self-care provision.

Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 597 F. 3d 769 (6th Cir. 2010), petition for cert. granted, No. 10-553

Background: The plaintiff filed suit against a religious school for allegedly violating the Americans with Disabilities Act (ADA) by firing her after she developed narcolepsy.

The Sixth Circuit reversed the grant of summary judgment in the school's favor, holding that the plaintiff's role at the school was not religious in nature and that the ministerial exception, a First Amendment doctrine that bars most employment lawsuits against religious organizations, did not apply.

Hosanna-Tabor Church v. EEOC *(cont'd)*

Question Presented: Does the ministerial exception apply to a teacher at a religious elementary school who teaches the full secular curriculum but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship?

Implications: Although the courts of appeals all agree about the ministerial exception's application to religious leaders such as pastors, priests, and rabbis, they are evenly divided over its application to other employees. This case provides the Supreme Court with an opportunity to define the boundaries of the ministerial exception in these other contexts.

Pacific Operations Offshore, LLP v. Valladolid, 604 F. 3d 1126 (9th Cir. 2010), petition for cert. granted, No. 10-507

Background: Juan Valladolid was killed while working onshore for an oil extraction company, although he spent the vast majority of his working hours on an oil platform three miles from the California coast. His widow argues that she is entitled to benefits under the Outer Continental Shelf Lands Act (OCSLA), which covers "any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources . . . of the outer Continental Shelf[.]"

Pacific Operations v. Valladolid *(cont'd)*

Question Presented: When an outer Continental Shelf worker is injured on land, is he (or his heir):

(1) always eligible for compensation because his employer's operations on the Shelf are the cause of his injury;

(2) never eligible for compensation because the act applies only to injuries occurring on the Shelf; or

(3) sometimes eligible for compensation because eligibility for benefits depends on the nature and extent of the factual relationship between the injury and the operations on the Shelf?

Pacific Operations v. Valladolid *(cont'd)*

Implications: Although the Ninth Circuit held in this case that the OCSLA does not have a "situs-of-injury" requirement, the Third and Fifth Circuits have reached conflicting results. The case provides the Court an opportunity to resolve the conflict and provide a definitive construction of the statute.

Petitions to Watch

- Carder v. Continental Airlines (Uniformed Services Employment and Reemployment Rights Act)
- Challenges to the Patient Protection and Affordable Care Act

Carder v. Continental Airlines, Inc., 636 F. 3d 172 (5th Cir. 2011), petition for cert. filed, No. 10-1546

Background: Carder and other members of the armed forces alleged that their employer, Continental Airlines, created a hostile work environment by putting restrictions on their military leave and making derisive and derogatory comments about their military service. They filed a class action lawsuit, claiming that Continental's actions violated USERRA.

The Fifth Circuit affirmed the district court's grant of Continental's motion to dismiss, holding that USERRA's express purpose and language is different from other antidiscrimination statutes and does not permit employees to bring hostile work environment claims.

Carder v. Continental Airlines *(cont'd)*

Question Presented: Does USERRA provide a service member with a cause of action against his or her employer for a hostile work environment?

Implications: The Fifth Circuit is the only court of appeals to have squarely decided this issue, although other circuits have assumed the issue without deciding that USERRA creates a cause of action for a hostile work environment. The case provides the Supreme Court an opportunity to resolve the issue and perhaps shed light on what Congress must do to provide such a cause of action.

Thomas More Law Center v. Obama, 2011 U.S. App LEXIS 13265 (6th Cir. June 29, 2011), petition for cert. filed, No. 11-117

The circuit courts have begun to address the Patient Protection and Affordable Care Act (PPACA).

In Thomas More Law Center v. Obama, the Sixth Circuit rejected a facial challenge to PPACA, holding that the health insurance mandate was a valid exercise of Congress's power under the Commerce Clause. The controlling opinion, authored by George W. Bush appointee Judge Jeffrey Sutton, reasoned that while a facial challenge to the law must fail, this does not preclude future as-applied challenges. A petition for certiorari was filed at the Supreme Court on July 26, 2011.

Florida v. Department of Health and Human Services, Nos. 11- 11021 & 11-11067 (11th Cir. Aug. 12, 2011)

In Florida v. Department of Health and Human Services, the Eleventh Circuit struck down the individual mandate on the basis that the decision to forgo purchasing health insurance is noneconomic and therefore beyond Congress's power to regulate under the Commerce Clause.

Liberty University v. Geithner, No. 10-2347 (4th Cir, Sept. 8, 2011)

The Fourth Circuit recently rejected two challenges to PPACA on procedural grounds.

In Liberty University v. Geithner, the Fourth Circuit rejected the appeal on the ground that the health insurance mandate is enforced with a penalty that constitutes a form of federal tax and the Anti-Injunction Act stripped it of jurisdiction to hear the case because the tax had not yet gone into effect.

Virginia v. Sebelius, No. 11-1057 (4th Cir. Sept. 8, 2011)

In Virginia v. Sebelius, the Fourth Circuit found that the Commonwealth of Virginia, which had challenged the law, lacked standing to sue because PPACA only imposes a mandate to purchase insurance on individuals, not states.