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A Guide to the Supreme Court’s Notable Decisions this Term—and Cases to Watch Next Term

The Supreme Court’s 2015–2016 Term will be remembered for the unexpected death of Justice Antonin Scalia on February 13, 2016. Justice Scalia’s passing and the delayed confirmation process for Judge Merrick Garland have impacted the Court in a number of ways, including a drop in certiorari grants and affirmances by an equally divided Court, including in the closely watched case *United States v. Texas*. The Court has nevertheless produced a number of notable decisions, from cases involving topics of broad social interest, such as affirmative action, reproductive rights, and public corruption, to cases relevant to business litigation in a number of areas, including class actions, standing, the False Claims Act, copyright, and employment discrimination. Below, we survey fifteen of these decisions and preview four cases scheduled to be argued next Term.

Notable Decisions from the 2015-2016 Term

**Affirmative Action**

*Fisher v. University of Texas at Austin*—Decided June 23, 2016. In a 4–3 decision authored by Justice Kennedy, the Court held that the University of Texas’s race-conscious admissions program does not violate the Fourteenth Amendment’s Equal Protection Clause. When the case was before the Court in 2013, the Court vacated the Fifth Circuit’s decision in favor of the University and remanded with instructions to correctly evaluate the admissions program under strict scrutiny. The Fifth Circuit again affirmed summary judgment for the University. This time, the Supreme Court affirmed, holding that the educational benefits that flow from a racially diverse student body constitute a compelling interest and that the University’s program was narrowly tailored to achieving that interest. The Court determined that none of Fisher’s proposed race-neutral alternatives were a workable means to attaining the educational benefits of diversity. The Court noted, however, that the University has an ongoing obligation to continually evaluate its admissions policy in light of changing circumstances. (Justice Kagan did not participate in the decision.)

**Bankruptcy**

*Puerto Rico v. Franklin California Tax-Free Trust*—Decided June 13, 2016. In a 5–2 decision authored by Justice Thomas, the Court upheld the First Circuit’s determination that Puerto Rico’s municipal debt restructuring law is preempted by the U.S. Bankruptcy Code. The Bankruptcy Code excludes Puerto Rico from the definition of a “State” for purposes of determining which States may

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1 Paul, Weiss represented a client in submitting an *amicus curiae* brief in this case.
authorize their municipalities to utilize Chapter 9. As a result, Puerto Rico, responding to an ongoing fiscal crisis, passed a law authorizing its public utilities to restructure their debts. Finding the “plain text” of the Bankruptcy Code to determine the issue, the Supreme Court held that the Code’s definition of “State” excludes Puerto Rico only for purposes of defining who may be a Chapter 9 debtor. However, Puerto Rico is not excluded from Chapter 9’s preemption provision, section 903(1), which broadly prohibits States from enacting their own municipal restructuring regimes. (Justice Alito did not participate in the decision.)

Class Actions

Campbell-Ewald Co. v. Gomez—Decided January 20, 2016. In a 6–3 opinion authored by Justice Ginsburg, the Court held that a case does not become moot when a defendant in a putative class action makes a Rule 68 offer for full judgment to a named plaintiff and the plaintiff rejects the offer. The Court held that rejecting the offer did not moot the case because, “[u]nder basic principles of contract law,” a “Rule 68 offer of judgment, once rejected, has no continuing efficacy.” Accordingly, the Court concluded that the district court retained jurisdiction to adjudicate the complaint. The Court did not decide, however, “whether the result would be different if a defendant deposits the full amount of the plaintiff’s individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount.”

Tyson Foods, Inc. v. Bouaphakeo—Decided March 22, 2016. In a 6–2 decision authored by Justice Kennedy, the Court upheld the use of statistical evidence and representative sampling to maintain a Fair Labor Standards Act (FLSA) collective action and a Rule 23(b)(3) class. The case involved a class of workers seeking overtime pay for time spent donning and doffing protective equipment, where their employer, Tyson Foods, did not keep records of the time spent. At trial, the plaintiffs presented an expert study analyzing how long various donning and doffing activities took, and the jury returned a verdict for the class. Tyson Foods argued that variations in time spent between class members precluded class certification. The Supreme Court rejected that argument, holding that, at times, representative evidence is the only practicable means to present relevant data establishing liability, and, where representative evidence would be relevant to prove a plaintiff’s individual claim, that evidence should not be deemed improper merely because the claim is on behalf of a class. The Court distinguished Wal-Mart Stores, Inc. v. Dukes, where plaintiffs impermissibly used representative evidence to overcome the absence of a common policy. This decision and its potential limitations are discussed in a Paul, Weiss client memorandum available here.

Copyright—Attorney’s Fees

Kirtsaeng v. John Wiley & Sons, Inc.—Decided June 16, 2016. In a unanimous decision authored by Justice Kagan, the Court held that district courts considering whether to award attorney’s fees to successful copyright litigants should put substantial weight on whether the losing party’s position is “objectively reasonable,” while also considering other factors. The Court reasoned that placing
substantial weight on “objective reasonableness” is easily administrable, treats both plaintiffs and defendants evenhandedly, and best serves the purposes of the Copyright Act by encouraging litigation of strong legal positions and deterring parties from standing on weaker positions. However, the Court also stated that “objective reasonableness” is not a controlling factor and does not alone create a presumption against awarding attorney’s fees. Because the Court was concerned that a finding of reasonableness in the Second Circuit may, in practice, raise a presumption against granting fees, the Court vacated the decision below and remanded to the District Court to ensure that other factors were also considered. A more in-depth decision of this decision, and its potential applicability to the award of attorney’s fees in patent cases, is available in a Paul, Weiss client memorandum available here.

Employment Discrimination
Green v. Brennan—Decided May 23, 2016. In an opinion written by Justice Sotomayor and joined by five justices, the Court held that, in a constructive-discharge case brought by a federal employee under Title VII of the Civil Rights Act of 1964, the limitations period for the time within which the employee must contact an Equal Employment Opportunity counselor prior to bringing suit begins to run only after—not before—the employee provides notice of resignation. The Court reasoned that an essential element of a constructive-discharge claim is that the employee must have actually resigned. Because the claim can only be brought after resignation, the resignation is the triggering event for the limitations period to commence. The Court also ruled that the date of an employee’s resignation, for the purpose of the limitations period, is the date on which the employee provides notice to his employer of his resignation. The language in the opinion strongly suggests that this new rule would also apply in the private sector context. Further discussion of the decision and its potential implications can be found in a Paul, Weiss client memorandum available here.

False Claims Act
Universal Health Services v. United States ex rel. Escobar—Decided June 16, 2016. In a unanimous decision authored by Justice Thomas, the Court held that the “implied certification theory” can give rise to liability under the False Claims Act; at the same time, the Court held that the materiality requirement was “demanding” and provided guidance as to how it should be applied. Under the “implied certification theory,” when a company submits a claim to the government, it impliedly certifies compliance with all conditions of payment. The Court held that this theory can be viable at least where two conditions are satisfied: (1) the claim does not merely request payment, but also makes specific representations about goods or services provided; and (2) the defendant’s failure to disclose noncompliance with material, statutory, regulatory, or contractual requirements makes those representations misleading half-truths. The Court also rejected the notion that these requirements must have been expressly designated as conditions of payment. The Court, however, cautioned that “materiality” is a “rigorous” and “demanding” standard. The Court disagreed with the United States’ view that any statutory, regulatory, or contractual violation is material so long as the defendant knows that the government would be entitled to refuse payment were it aware of the violations. As guidance, the Court
noted that proof of materiality can include evidence that the defendant knows that the government consistently refuses to pay claims in the mine rule of cases based on noncompliance with the requirement in question. And if the government pays a particular claim in full despite actual knowledge of certain violations of these requirements, that would be “strong evidence” that the requirements are not material. The Court remanded for the lower court to consider how to apply this standard in the first instance. The Court’s decision is significant in both resolving doubts about the viability of the implied certification theory and establishing a high standard for materiality.

**Federal Arbitration Act**

*DIRECTV, Inc. v. Imburgia—Decided December 14, 2015.* In a 6-3 decision authored by Justice Breyer, the Court held that the interpretation of a contract by the California Court of Appeals, which would have applied state law, was pre-empted by the Federal Arbitration Act. The contract at issue contained an arbitration provision, governed by the FAA, and further stated that neither party “shall be entitled to join or consolidate claims in arbitration.” However, the contract also provided that the entire arbitration provision would be rendered unenforceable if the “law of your state”—here, California—prohibited such waiver of class arbitration. At the time of the contract, class-arbitration waivers were unconscionable under California law. However, the Supreme Court’s subsequent 2011 decision in *AT&T Mobility LLC v. Concepcion* held that California’s prohibition on class-arbitration waivers was itself pre-empted by the Federal Arbitration Act. While the lower court concluded that the parties had intended to refer to California law as it would have been prior to *AT&T Mobility*, the Supreme Court ruled that such an approach was itself preempted by the FAA. The Court rejected the notion that “state law retains independent force even after it has been authoritatively invalidated by this Court.” The Court also reasoned that there was nothing to suggest that “law of your state” should be interpreted to mean “invalid law of your state,” even if the provision at issue was valid under state law at the time that the contract was entered into by the parties. For further discussion, please refer to a Paul, Weiss client memorandum available [here](#).

**Immigration**

*United States v. Texas—Decided June 23, 2016.* In a 4-4 summary affirmation, the Court upheld the Fifth Circuit’s affirmance of the district court’s preliminary injunction against implementation of the Obama Administration’s Deferred Action for Parents of Americans (DAPA) program. Under DAPA, the Department of Homeland Security would have granted temporary relief from removal (and work authorization) to certain undocumented immigrants with a child who is a U.S. citizen or permanent resident. Texas and 25 other States sued to enjoin implementation, arguing, among other things, that the new legally present immigrants resulting from DAPA would generate large costs for the States (some states provide certain benefits to legally present immigrants) and that DAPA violated the Administrative Procedure Act because of the lack of a notice-and-comment rulemaking process. The United States had argued, among other things, that the States lacked standing because DAPA itself would not require States to do or refrain from doing anything.
Public Corruption

**McDonnell v. United States—Decided June 27, 2016.** In a unanimous decision authored by Chief Justice Roberts, the Court held that under the federal bribery statute, “[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit [the] definition of ‘official act.’” In 2014, former Virginia Governor Bob McDonnell was convicted on honest services fraud and Hobbs Act extortion charges stemming from more than $175,000 in loans, gifts, and other benefits he received from Jonnie Williams, the CEO of Virginia-based company Star Scientific. The parties had agreed to define these crimes with reference to the federal bribery statute’s definition of “official act,” which is any “decision or action” made by a public official on any “question, matter, cause, suit, proceeding or controversy” in that official’s official capacity. At trial, the government sought to prove that McDonnell committed or agreed to commit various “official acts,” such as arranging meetings, hosting and attending events, and contacting other government officials on Williams’ behalf in exchange for the loans and gifts from Williams. The Supreme Court rejected the government’s position that “official act” encompasses “nearly any activity by a public official” including “workaday functions such as the typical call, meeting, or event.” Rather, the Court concluded that the relevant statute covers a narrower set of more “formal exercise[s] of governmental power, such as a lawsuit, hearing, or administrative determination.” The Court also noted that the government’s broad interpretation would raise significant constitutional concerns, citing an *amici curiae* brief filed by former federal officials arguing that the government’s broad definition would chill federal officials’ interactions with the people they represent and damage their ability effectively to perform their duties. The Court remanded the case to the Fourth Circuit to determine whether there is sufficient evidence against the former governor for a new trial.

Reproductive Rights

**Whole Woman’s Health v. Hellerstedt—Decided June 27, 2016.** In a 5-3 decision authored by Justice Breyer, the Court held that two provisions of a 2013 Texas law regulating abortion violate the “undue burden” standard established in *Planned Parenthood v. Casey* and thus are unconstitutional. One provision requires doctors performing abortions to have privileges to admit patients to a nearby hospital, and the other requires abortion clinics to have facilities comparable to outpatient surgical centers. The State argued these provisions are constitutional because they are intended to protect women’s health. The Court held that neither provision provides medical benefits sufficient to justify the burdens imposed upon abortion access, noting the provisions offered few, if any, health benefits and constituted a substantial obstacle to women seeking previability abortions.²

² Paul, Weiss represented clients in submitting an *amici curiae* brief in this case.
Search and Seizure

Utah v. Strieff—Decided June 20, 2016. In a 5–3 decision authored by Justice Thomas, the Court held that the exclusionary rule does not apply when an officer makes an unconstitutional investigatory stop, learns during that stop that the suspect is subject to a valid arrest warrant, and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest. The attenuation doctrine allows courts to admit otherwise excludable evidence when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance. Based on the three factors articulated in the Court’s 1975 decision in Brown v. Illinois, the Court held that the discovery of a warrant effectively attenuates the connection between the unconstitutional stop and the seizure of evidence. The Court rejected the defendant’s argument that its holding would lead to “dragnet searches,” noting that such conduct would expose police to civil liability.

Securities

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning—Decided May 16, 2016. In a decision authored by Justice Kagan and joined by five other Justices, the Court held that section 27 of the Securities Exchange Act of 1934, which provides for exclusive federal jurisdiction, does not generally extend to claims brought under state law even if the complaint refers to purported Exchange Act violations. Plaintiffs filed suit against the defendant financial institutions in state court, asserting state-law claims based on “naked” short selling. The complaint also suggested that the defendants had violated Regulation SHO, which regulates naked short-selling. The defendants removed the case to federal court, citing both section 27 of the Exchange Act and the general federal question statute. The Court held that section 27 of the Exchange Act (“brought to enforce any liability or duty created by” the Exchange Act) and the general federal question statute (“arising under federal law”) have the same meaning and that the four-part Grable test applies to both. The Court found that because the defendants did not challenge the ruling below that the case could conceivably be resolved without determining Exchange Act issues, a federal issue was not “necessarily raised” and thus the test for federal jurisdiction was not satisfied. Two Justices concurred in the judgment on other grounds. The Court’s decision is discussed in further depth in a Paul, Weiss client memorandum available here.

Standing and Federal Statutory Violations

Spokeo, Inc. v. Robins—Decided May 16, 2016. In a 6–2 opinion authored by Justice Alito, the Court held that a plaintiff cannot satisfy the injury-in-fact requirement for Article III standing solely by alleging a “procedural violation” of the Fair Credit Reporting Act (FCRA). The case involved a putative class action by a plaintiff alleging that the defendant’s search engine service, an alleged consumer reporting agency, contained inaccurate information about him and that the defendant failed to comply with various FCRA requirements. The Court vacated and remanded the Ninth Circuit’s decision, holding that although the Ninth Circuit considered whether the plaintiff’s alleged injury was “particularized,” it “overlooked” whether it was also “concrete.” Rejecting the United States’ position (joined by the Consumer Financial Protection Bureau), the Court made clear that Article III requires a concrete injury
even in the context of a statutory violation; Congress’s provision of a statutory right and a cause of action is not sufficient. The Court noted that injury-in-fact must involve real harm, whether tangible or intangible, or a sufficient risk of real harm. A violation of one of FCRA’s procedural requirements, the Court held, may result in no harm. Although the guideposts established by the decision leave much for further elaboration in the lower courts, this decision is significant in imposing a new hurdle—potentially relevant both at the pleading and class certification stages—for plaintiffs bringing claims under the FCRA and similar statutes such as the Truth in Lending Act and the Fair Debt Collection Practices Act; the decision could also be applied to privacy-related litigation. A discussion of *Spokeo* and other significant developments in the consumer financial protection space can be found here.

**Voting Rights**

*Evenwel v. Abbott*—Decided April 4, 2016. In an opinion authored by Justice Ginsburg and joined by six Justices, the Court held that, in accordance with the one-person, one-vote principle, a State or locality may draw its legislative districts based on total population. The plaintiffs, a group of Texas voters, alleged that equal apportionment of the voter-eligible population, rather than total population, was the proper way to equalize districts. The Court determined that “voter-eligible apportionment as constitutional command would upset a well-functioning approach to districting that all 50 states and countless local jurisdictions have followed for decades, even centuries.” The Court also noted that the Framers of the Constitution and Fourteenth Amendment understood that “representatives serve all residents, not just those eligible or registered to vote,” and that “children, their parents, and even grandparents” have a stake in a strong public-education system and in receiving constituent services. The Court did not decide, however, whether States may draw districts to equalize voter-eligible population rather than total population. Justices Thomas and Alito each wrote separately, concurring in the judgment.3

**II. Cases to Watch in the 2016-2017 Term**

**Copyright**

*Star Athletica, LLC v. Varsity Brands, Inc.*—Petition Granted on May 2, 2016. The Court granted certiorari to address whether aesthetic features embodied in a useful article of clothing—here, stripes, chevrons, and color blocks on a cheerleading uniform—are protectable under the Copyright Act and to clarify existing law for evaluating the separability of copyrightable features from the nonprotectable, utilitarian aspects of useful articles. Because current copyright law offers minimal protection to clothing design, the Court’s decision will be of great interest to the fashion industry and others seeking copyright protection for designs.

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3 Paul, Weiss represented a client in submitting an *amicus curiae* brief in this case.
False Claims Act

*State Farm Fire & Casualty Co. v. United States ex rel. Rigsby—Petition Granted on May 31, 2016.* The Court will consider the appropriate consequences when a relator violates the False Claims Act’s seal requirement, which requires complaints to “be filed in camera,” “remain under seal for at least 60 days,” and “not be served on the defendant until the court so orders.” The petition describes a circuit split in which some courts order dismissal of a relator’s claims only where the violation caused actual harm to the government, other courts assess whether the violation incurably frustrates the congressional goals served by the seal requirement, and at least one court views dismissal as mandatory upon finding a violation.

Patent—Damages

*Samsung Electronics Co. v. Apple Inc.—Petition Granted on March 21, 2016.* This case presents the question whether, where a design patent covers only an element of a product, the profits awarded after a finding of infringement should be limited to only those profits attributable to the patented element. The Federal Circuit below affirmed a jury verdict that awarded Samsung’s entire profits from the sale of smartphones that infringed Apple’s patents for certain features of the exterior design of its iPhone.

Securities—Insider Trading

*Salman v. United States—Petition Granted on January 19, 2016.* The Court will consider whether the personal benefit necessary to establish insider trading under *Dirks v. SEC* requires proof of “an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature.” Distinguishing the Second Circuit’s decision in *United States v. Newman*, the Ninth Circuit (Judge Rakoff, sitting by designation) held in the decision below that it is enough that the insider and the tippee shared a close family relationship. For a discussion of the Second Circuit’s landmark ruling in *Newman* and related case law developments, see the Paul, Weiss client memorandum available [here](#).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Lynn B. Bayard  
212-373-3054  
lbayard@paulweiss.com

Susanna M. Buergel  
212-373-3553  
sbuergel@paulweiss.com

Jay Cohen  
212-373-3163  
jaycohen@paulweiss.com

Michael E. Gertzman  
212-373-3281  
mgertzman@paulweiss.com

Roberto J. Gonzalez  
202-223-7316  
rgonzalez@paulweiss.com

Nicholas P. Groombridge  
212-373-3212  
ngroombridge@paulweiss.com

Jaren Janghorbani  
212-373-3211  
jjanghorbani@paulweiss.com

Roberta A. Kaplan  
212-373-3086  
rrkaplan@paulweiss.com

Brad S. Karp  
212-373-3316  
bkarp@paulweiss.com

Daniel J. Kramer  
212-373-3020  
dkramer@paulweiss.com

Richard A. Rosen  
212-373-3305  
rrosen@paulweiss.com

Liza Velazquez  
212-373-3096  
lvelazquez@paulweiss.com

Theodore V. Wells Jr.  
212-373-3089  
twells@paulweiss.com

Associates Damon Andrews, Ling Ting Li, Erin Morgan, law clerk Kristina Bunting, and summer associates Cameron Brown, Ryan Burningham, Laura Cox and Paul Gross contributed to this client alert.