CARLTON FIELDS

# Recent Developments in Appellate Advocacy Footnotes

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Footnotes for *Recent Developments in Appellate Advocacy* by Julianna Thomas McCabe, Joshua D. Lee, Valerie M. Nannery, Andre M. Mura, and Jennifer B. Anderson.
[1] 133 S. Ct. 2304 (2013). [2] *Id.* at 2307. [3] *Id.* at 2308. [4] *Id.* [5] *Id.* The Second Circuit twice reconsidered American Express's position, but stood by its decision that the arbitration clause was unenforceable. *See id.* [6] *In re* Am. Express Merchants' Litig., 667 F.3d 204, 214 (2d Cir. 2012). [7] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 632 (1985). [8] 133 S. Ct. at 2309. [9] *Id.* at 2310–11. In her dissent, Justice Kagan, joined by Justices Ginsburg and Breyer, posited that the Court should have applied the "effective vindication" rule, which she described as a "mechanism. . . to prevent arbitration clauses from choking off a plaintiff's ability to enforce congressionally created rights." *Id.* at 2313 (Kagan, J., dissenting). Justice Sotomayor rescued herself because she sat on the original Second Circuit panel. *In re* Am. Express Merchants' Litig., 554 F.3d 300, 302 (2d Cir. 2009). [10] 131 S. Ct. 1740 (2011). [11] 133 S. Ct. at 2312 & n.5. The Court also expressed its belief that the Second Circuit's "regime" would require federal courts to adjudicate, prior to enforcing an arbitration clause, the cost of developing a case's proof "claim-by-claim and theory-by-theory." *Id.* at 2312 ("The FAA does not sanction such a judicially created superstructure."). [12] *Id.* at 2309. Similarly, the Court's decision in *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500 (2012) (per curiam), reinforces that states are not free to ignore the mandates of the FAA. *Id.* at 501 (vacating a decision of the Oklahoma Supreme Court that disregarded arbitration agreements in two employment contracts to enforce an Oklahoma statute, holding " [i]t is a matter of great importance . . . that state supreme courts adhere to a correct interpretation of the legislation. Here, the Oklahoma Supreme Court failed to do so."). [13] 133 S. Ct. 2064 (2013). [14] *Id.* at 2071. [15] *Id.* at 2067. [16] *Id.* (quoting arbitrator's decision). The Supreme Court subsequently issued its decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, holding that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 559 U.S. 662, 684 (2010). The arbitrator found *Stolt-Nielsen* had no impact on his finding that" 'the arbitration clause unambiguously evinced an intention to allow class arbitration.'" *Oxford Health Plans*, 133 S. Ct. at 2067 (quoting arbitrator's decision). [17] *Id.* at 2068 & n.1 (collecting authorities). [18] *Id.* at 2068 (quoting E. Associated Coal Corp. v. Mine Workers, 531 U.S. 57, 62 (2000)) (other citations omitted). The Court explained it "would face a different issue if

Oxford had argued below that the availability of class arbitration is a so-called 'question of arbitrability' " to be reviewed, *de novo*, by a court. *Id.* at 2068 n.2. Justice Alito's concurrence, joined by Justice Thomas, stressed that the result was attributable to Oxford's stipulation. *Id.* at 2071 (Alito, J., concurring). [19] *Id.* Although this clause did not address class actions, a clearly drafted arbitration clause may prohibit class arbitration. *See, e.g., AT&T Mobility*, 131 S. Ct. at 1752–53 (arbitration clause expressly barring classwide arbitration in consumer contract is enforceable under the FAA). [20] 133 S. Ct. 1345 (2013). [21] *Id.* at 1347. [22] 28 U.S.C. § 1332(d)(2). [23] *Knowles*, 133 S. Ct. at 1347 (citation omitted). [24] *Id.* at 1348. [25] *Id.* ("Our reason is a simple one: Stipulations must be binding."). [26] *Id.* at 1349. [27] *Id.* at 1350 (citation omitted). [28] 133 S. Ct. 1184 (2013). [29] *Id.* at 1190–91. [30] *Id.* The fraud-on-the-market theory, first endorsed by a four-justice majority of the Court in *Basic Inc. v. Levinson*, 485 U.S. 224, 241–49 (1988), creates a rebuttable presumption that buyers of securities sold in an efficient market have relied on all publicly available information about the securities. *See Amgen*, 133 S. Ct. at 1190 & n.1 (noting that only six justices participated in *Basic*). [31] *Amgen*, 133 S. Ct. at 1191. [32] *Id.* at 1193–94. [33] *Id.* at 1194 (collecting cases). [34] *Id.* at 1194–95 (citing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011)). [35] *Id.* at 1195. Justice Thomas, in dissent, asserted that a securities fraud plaintiff "should be required to prove each of the predicates of [the fraud-on-the-market] theory at certification in order to demonstrate that questions of reliance are common to the class." *Id.* at 1207 (Thomas, J., dissenting). Justices Scalia and Kennedy joined in this construction of the fraud-on-the-market rule. [36] *Id.* The Court supported its conclusion on two grounds. First, because materiality is measured objectively, in a class action, it can be proven classwide. Second, because materiality is an element of the securities fraud claim itself, in the absence of classwide proof, the cause of action will be disproven for all class members. *Id.* at 1195–96. [37] *Id.* at 1196–97. Justice Thomas asserted that the majority's analysis disregarded the temporal sequence in which certification and merits issues should be decided. *Id.* at 1211 n.8 (Thomas, J., dissenting) (stating "the majority unjustifiably puts off a critical part of the Rule 23(b)(3) inquiry until the merits," even though "reliance may be an individualized question that predominates over common questions at certification"). [38] *Id.* at 1202. The Court reached this conclusion despite recognizing that certification of a securities fraud class action "can exert substantial pressure on a defendant" to resolve litigation prior to any ultimate decision on the merits. *Id.* at 1200. [39] *Id.* at 1202. According to Justice Scalia, the fraud-on-the market rule is the *Court's* invention. *Id.* at 1204 (Scalia, J. dissenting) (citing *Basic*, 485 U.S. at 248–49). In his view, " [t]he fraud-on-the-market theory approved by Basic envisions a demonstration of materiality not just for substantive recovery *but for certification*. Today's holding does not merely accept what some consider the regrettable consequences of the four-Justice opinion in *Basic*; it expands those consequences from the arguably regrettable to the unquestionably disastrous." *Amgen*, 133 S. Ct. at 1206 (emphasis added). [40] *Id.* at 1203–04. [41] *Id.* at 1204 (Alito, J., concurring). Fifteen days after the end of the survey period, the Court granted certiorari in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 636 (2013), which presents such a challenge. [42] 133 S. Ct. 1426, 1432 (2103). [43] *Id.* at 1429–30, 1435. [44] *Id.* at 1430–31. [45] *Id.* at 1430–31, 1434. [46] *Id.* at 1431. [47] *Id.* [48] *Id.* [49] *Id.* at 1432 (quoting Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979)). [50] *Id.* at 1432 (quoting *Dukes*,

131 S. Ct. at 2551–52). The Court has "emphasized that it 'may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.'" *Id.* (quoting Dukes, 131 S. Ct. at 2551–52). [51] *Id.* at 1432 (quoting *Dukes*, 131 S. Ct. at 2551). The predominance requirement of Rule 23(b)(3), under which the district court certified the damages class, is " [i]f anything... even more demanding than Rule 23(a)." *Id.* at 1432. [52] *Id.* at 1433. While exact damage calculations are not required at the certification stage, the Court held that any damages model must be consistent with the plaintiff's theory of liability to be relevant to the certification analysis. *Id.* at 1433, 1435. [53] *Id.* at 1433 (citing *Dukes*, 131 S. Ct. at 2551–52 & n.6). Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, authored a dissent, in which she described the Court's opinion as "infected by our misguided reformulation of the question presented." *Id.* at 1435 (Ginsburg, J., dissenting). She took issue with the Court's departure from the factual findings of two lower courts about the functionality of the subscribers' damage model. *Id.* at 1440. She also cautioned that the opinion "should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable on a classwide basis," *Id.* at 1436, describing the case as an "oddity" because the alleged "need to prove damages on a classwide basis through a common methodology was never challenged by respondents." *Id.* at 1437 ("Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal."). [54] 133 S. Ct 1523 (2013). [55] *Id.* at 1532. [56] *Id.* at 1527. [57] *Id.* [58] *Id.* [59] *Id.* at 1528 (citations omitted). [60] *Id.* [61] *Id.* at 1529–30 (distinguishing Sosna v. Iowa, 419 U.S. 393, 399–402 (1975)). [62] *Id.* at 1532 (distinguishing Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 336 (1980)). [63] *Id.* at 1530–31. [64] *Id.* at 1531–32 (distinguishing *Roper*, 445 U.S. at 339). [65] *Id.* at 1532. [66] 133 S. Ct. 721 (2013). [67] *Id.* at 725. [68] *Id.* [69] *Id.* [70] *Id.* at 726. [71] *Id.* at 725. [72] *Id.* at 727 (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190 (2000)). [73] *Id.* at 728. [74] *Id.* [75] *Id.* at 729–30. [76] 133 S. Ct. 1138 (2013). [77] *Id.* at 1143. [78] 50 U.S.C. § 1881a. [79] *Clapper*, 133 S. Ct. at 1145–46. [80] *Id.* at 1146. [81] *Id.* at 1148. [82] *Id.* at 1152–53. [83] 133 S. Ct. 2652 (2013). [84] *Id.* at 2662–63. [85] *Id.* at 2667. [86] *Id.* at 2668. [87] 133 S. Ct. 2675 (2013). [88] *Id.* at 2683. [89] *Id.*; *see* 1 U.S.C. § 7. [90] *Windsor*, 133 S. Ct. at 2683. [91] *Id.* at 2683–84. [92] *Id.* at 2684. [93] *Id.* [94] *Id.* [95] *Id.* at 2684–89. [96] *Id.* at 2685–86. [97] *Id.* at 2687. [98] *Id.* (quoting Ashwander v. TVA, 297 U.S. 288, 346 (1936)). [99] *Id.* (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). [100] *Id.* at 2688. [101] *Id.* (citing Zivitofsky v. Clinton, 132 S. Ct. 1421, 1427–28 (2012)). [102] *Id.* at 2689. [103] *Clapper*, 133 S. Ct. at 1147. [104] 133 S. Ct. 1391 (2013). [105] 547 U.S. 268 (2006). [106] *Id.* at 284. [107] *Id.* at 274, 280 ($35,581 out of $550,000). [108] *Id.* at 292. [109] *Id.* at 285. [110] *Id.* at 288 n.18. [111] 133 S. Ct. at 1396–97. [112] 133 S. Ct. at 1398. [113] *Id.* at 1399. [114] *Id.* [115] *Id.* [116] See *Id.* at 1400–02. [117] *Id.* at 1401–02. [118] *Id.* at 1401. In states that do not yet have such procedures, parties to tort disputes where the plaintiff is a Medicaid beneficiary may wish to specifically allocate settlement amounts to show what percentage is fairly attributable to medical expenses or may wish to ask for special verdicts showing how much of a tort judgment is attributable to medical expenses. The parties should inform the state's Medicaid agency about the tort claims and any settlement negotiations so that the state may intervene to protect its interest. Settling parties may ask courts for special hearings to allocate damages to the various causes of action and types of damages. State

Medicaid agencies may wish to participate in any such hearings and should be put on notice about them. [119] 133 S. Ct. 2466 (2013). [120] 131 S. Ct. 2567 (2011). [121] *Id.* at 2581. [122] 133 S. Ct. at 2477. [123] *Id.* at 2472. [124] *Id.* [125] *Id.* [126] *Id.* at 2473. [127] *Id.* at 2477 (quoting *PLIVA*, 131 S. Ct. at 2579). [128] *Id.* at 2477 n.4. [129] 133 S. Ct. 1943 (2013). [130] *Id.* at 1947. [131] *Id.* at 1949. [132] *Id.* [133] 5 U.S.C. §§ 8701–8716. [134] *Hillman*, 133 S. Ct. at 1949 (citing Va. Code Ann. § 20-111.1(D) (2012)). [135] *Id.* at 1947. [136] *Id.* [137] *Id.* at 1947–48 (citing 5 U.S.C. § 8705(a)). [138] *Id.* at 1948 (citing 5 U.S.C. § 8705(e)(1)–(2)). [139] *Id.* [140] *Id.* at 1955. [141] 133 S. Ct. 1659 (2013). [142] *Id.* at 1662. [143] *Id.* at 1662–63; *see id.* at 1671 (Breyer, J., concurring in the judgment). [144] *Id.* at 1665. [145] *Id.* at 1669 (Kennedy, J., concurring). [146] *Id.* at 1670 (Alito, J., concurring). [147] *Id.* at 1671 (Breyer, J., concurring in the judgment). [148] *Id.* [149] 133 S. Ct. 1224 (2013). [150] 133 S. Ct. at 1227–28 (citing 10 U.S.C. § 1089). [151] *Id.* at 1228 (citing 28 U.S.C. § 2680(h)). [152] *Id.* at 1229 (quoting 10 U.S.C. § 1089(e)). [153] *Id.* at 1235. [154] 133 S. Ct. 2191 (2013). [155] *Id.* at 2196–97. [156] *Id.* at 2198; see 18 U.S.C. §§ 2721–2725. [157] *Maracich*, 133 S. Ct. at 2198. [158] *Id.* at 2199. [159] *Id.* (quoting 18 U.S.C. § 2721(b)(4)). [160] *Id.* (quoting 18 U.S.C. § 2721(b)(12)). [161] *Id.* at 2209 (quoting 18 U.S.C. § 2721(b)(4)). [162] *Id.* at 2213 (Ginsburg, J., dissenting). [163] 133 S. Ct. 1537 (2013). [164] 29 U.S.C. § 1001–1191c. [165] *U.S. Airways*, 133 S. Ct. at 1542–43. [166] *Id.* at 1549; *see id.* at 1551 (Scalia, J., dissenting) ("I agree with Parts I and II of the Court's opinion, which conclude that equity cannot override the plain terms of the contract."). [167] *Id.* at 1548. [168] *Id.* at 1549–50. [169] *Id.* at 1551 (Scalia, J., dissenting). [170] April 16, 2013, Order of the Supreme Court of the United States amending the Federal Rules of Appellate Procedure, *reprinted* in H.R. Doc. No. 113-27, at 2 (2013), *available at* http://www.gpo.gov/fdsys/pkg/CDOC-113hdoc27/pdf/CDOC-113hdoc27.pdf. [171] *Id.* [172] Fed. R. App. P. 28(a)(6) (2012). [173] Fed. R. App. P. 28(a)(7) (2012). [174] Fed. R. App. P. 28(a)(6) (2013). [175] Supreme Court Rule 24.1(g) requires " [a] concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix." [176] Excerpt from the Report of the Judicial Conference, Committee on Rules of Practice and Procedure (Sept. 2012), *reprinted* in H.R. Doc. No. 113-27, *supra* note 170, at 27. [177] *Id.* at 26. Conforming amendments also revised Rule 28(b)'s list of requirements for the appellee's brief and Rule 28.1(c)'s discussion of briefs in cross-appeals. FED. R. APP. P. 28(b), 28.1(c) (2013). [178] FED. R. APP. P. 28 advisory committee's note, 2013 amendments. [179] Report of Advisory Committee on Appellate Rules (May 8, 2012) (Advisory Committee Report), *reprinted* in H.R. Doc. No. 113-27, *supra* note 170, at 30. [180] *Id.* at 31. [181] *Id.* ; *see* Fed. R. App. P. 28 advisory committee's note, 2013 amendments. [182] As one commentator has noted, " [t]he indiscriminate use of dates is another Linus blanket for the writer, but cruel and unusual punishment for the reader." John C. Godbold, *Twenty Pages and Twenty Minutes*, in The Litigation Manual 115 (John G. Koeltl & John Kiernan eds., 1999). [183] Advisory Committee Report, *reprinted* in H.R. Doc. No. 113-27, *supra* note 170, at 31.