RECENT DEVELOPMENTS IN EMPLOYMENT LAW AND LITIGATION

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The past year has been notable for a number of actions by the U.S. Supreme Court that both directly and indirectly affect employment law. Addressing Title VII, the Court held that retaliation claims must be proven under the traditional principles of "but-for" causation and not the lessened

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"motivating factor" standard and clarified the definition of "supervisor" for purposes of vicarious liability. In June 2013, the Court overturned the Defense of Marriage Act (DOMA), whose definitions of "marriage" and "spouse" were applicable to more than 1,000 federal statutes, regulations, orders, and rulings, including provisions of the U.S. Tax Code and those that regulate employee benefit plans. Turning to class actions, the Court held that a collective action brought under the Federal Labor Standards Act is fundamentally different than a class action brought under Federal Rule of Civil Procedure 23. An antitrust action brought by a group of merchants against American Express may affect employees' ability to pursue class action litigation when they have signed an employment contract containing an arbitration agreement. And finally, a decision by the D.C. Court of Appeals that President Obama's three recess appointments to the National Labor Relations Board were unconstitutional set the stage for a political battle that ultimately changed the composition of the Board and gave rise to a Supreme Court challenge that places hundreds of Board decisions and actions at issue.

I. TITLE VII REVIEW

A. University of Texas Southwestern Medical Center v. Nassar

On June 24, 2013, in *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court held that Title VII retaliation claims must be proven under the traditional principles of but-for causation and not the lessened "motivating factor" standard provided under 42 U.S.C. § 2000e-2(m).[1]

Plaintiff Naiel Nassar, a physician of Middle Eastern descent, was employed by defendant University of Texas Southwestern Medical Center as both a university faculty member and a staff physician for Parkland Memorial Hospital.[2] Nassar believed that one of his supervisors at the university was biased against him because of his religion and ethnicity.[3] As a result, Nassar attempted to continue working as the hospital staff physician but resign from his university position.[4] After Nassar commenced preliminary negotiations to keep working at the hospital, he submitted a letter of resignation, which stated that he was resigning because of harassment from his accused colleague.[5] The university's chair of internal medicine, Gregory Fitz, believing that the letter "publicly humiliated" the accused colleague, sought exoneration for her.[6] Accordingly, Fitz ob-

1. 133 S. Ct. 2517 (2013).
2. *Id.* at 2523.
3. *Id.*
4. *Id.*
5. *Id.* at 2523–24.
6. *Id.*

jected to Nassar's proposal to work only at the hospital on the basis that the hospital and the university had an arrangement requiring all hospital staff physicians to be members of the university faculty.[7] The hospital subsequently withdrew the job offer.[8]

Plaintiff filed suit in the U.S. District Court for the Northern District of Texas under Title VII, alleging two violations. First, he alleged status-based discrimination on the basis that his colleague's "racially and religiously motivated harassment . . . resulted in . . . constructive discharge from the University," in violation of 42 U.S.C. § 2000e-2(a).[9] Second, he alleged that his supervisor's "efforts to prevent the Hospital from [employ]ing him were in retaliation for [his] complaining about [his colleague]'s harassment" and violated 42 U.S.C. § 2000e-3(a).[10] The district court found for plaintiff on both claims.[11]

On appeal, the Fifth Circuit held that insufficient evidence existed to support the constructive discharge claim.[12] The court, however, affirmed the retaliation claim on the basis that Title VII retaliation claims, like status-based claims of discrimination under Title VII, only "require . . . a showing that retaliation was a motivating factor," not the but-for cause of the retaliation.[13]

The question before the Supreme Court was what standard of causation applies to Title VII retaliation cases.[14] Initially, the Court noted that the default causation standard for a tort claim, including federal statutory claims of workplace discrimination, is but-for causation, which requires a plaintiff to show " 'that the harm would not have occurred' in the absence of . . . the defendant's conduct."[15] The Court then determined that because the but-for causation standard was the default burden of proof when Title VII was enacted, it is presumed to have been incorporated into Title VII and should apply "absent an indication to the contrary in the statute itself."[16]

Against this background, the Court addressed the impact of the Civil Rights Act of 1991 on Title VII. The 1991 Act amended the status-based discrimination provision of Title VII to specifically provide that unlawful employment practices based on race, color, religion, sex, and national origin

7. *Id.* at 2524.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 2525 (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27 cmt. b (2010)).
16. *Id.*

could be proved based on the "motivating factor" standard, meaning that a Title VII status-based discrimination claim could succeed if the plaintiff proved that race, color, religion, sex, or national original was a motivating factor for any unlawful employment practice.[17]

Next, the Court reviewed Title VII's anti-retaliation provision, § 2000e-3(a). Before turning to the text of the provision, however, the Court revisited its 2009 decision, *Gross v. FBL Financial Services, Inc.*,[18] which held that it is unlawful for an employer to take adverse employment action "because of . . . age"[19] under the Age Discrimination in Employment Act of 1967 (ADEA).[20] When considering the "because" language contained in the ADEA, the Court determined that the *Gross* opinion held that the "requirement that an employer took adverse action 'because of' age" meant that a plaintiff-employee could not bring a successful claim under the ADEA unless he could prove that "age was the 'but-for' cause of the employer's adverse decision."[21]

When addressing the text of Title VII's anti-retaliation provision, the Court stated that, unlike the status-based discrimination section of Title VII, it does not include the motivating factor standard but, rather, states in pertinent part that

> [i]t shall be unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[22]

The Court observed that "[t]his enactment, like the statue at issue in *Gross*, makes it unlawful for an employer to take adverse employment action against an employee 'because' of certain criteria."[23] In addition, the Court noted that although the 1991 Act amended Title VII's status-based discrimination provision, it deliberately did not amend Title VII's anti-retaliation provision.[24] The Court determined that Congress's decision not to include the motivating factor standard inferred that Congress intended the but-for causation standard to apply to Title VII retaliation claims.[25] Thus, considering Congress's intent and finding that no textual difference existed between Title VII's anti-retaliation provision and the

17. *Id.* at 2526.
18. *Id.* at 2526–27 (citing Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343 (2009)).
19. *Id.* (quoting *Gross*, 129 S. Ct. at 2343).
20. 29 U.S.C. § 623(a)(1).
21. *Nassar*, 133 S. Ct. at 2527 (quoting *Gross*, 129 S. Ct. at 2343).
22. *Id.* at 2528 (citing 42 U.S.C. § 2000e-3(a).
23. *Id.*
24. *Id.* at 2532–33.
25. *Id.*

statue in *Gross*, the Court held that "Title VII retaliation claims must be proved according to traditional principles of but-for causation."[26]

The *Nassar* decision is significant because it creates a new and heightened standard of proof for Title VII retaliation claims. Importantly, the new standard may result in more employers defeating retaliation claims on summary judgment, as an employee may have more difficulty producing evidence to satisfy the but-for standard as opposed to the "motivating factor" standard. *Nassar* may also have implications beyond Title VII, as it suggests that the but-for standard is the default causation standard for employment claims, absent explicit statutory language to the contrary.

B. Vance v. Ball State University

On June 24, 2013, the U.S. Supreme Court in *Vance v. Ball State University*[27] clarified the definition of "supervisor" for purposes of vicarious liability under Title VII. Before *Vance*, there had been a circuit split regarding the definition of supervisor. The First, Seventh, and Eighth Circuits defined supervisor as an individual with "the power to hire, fire, demote, promote, transfer or discipline the victim."[28] The Second, Fourth, and Ninth Circuits held that an individual was a supervisor only if he or she had the "ability to exercise significant discretion over another's daily work."[29] The Supreme Court resolved the split, defining a supervisor as an individual who is "empowered by the employer to take tangible employment actions," such as "hiring, firing, promoting, demoting, and reassigning . . . employee[s]" to significantly different responsibilities.[30]

Plaintiff Maetta Vance was the only African-American employee in the catering department at Ball State University (BSU). Over the course of her employment, Vance complained that several of her co-workers, including Saundra Davis, discriminated against her, used racial epithets, and threatened her.[31] In late 2005 and early 2006, Vance "filed internal complaints with BSU, [as well as] charges with the Equal Employment Opportunity Commission (EEOC), alleging racial harassment and discrimination."[32] Despite BSU's investigation and attempts to address her complaints, she filed suit in the U.S. District Court for the Southern District of Indiana, alleging "that she had been subjected to [retaliation and] a racially hostile work environment in violation of Title VII."[33] Vance asserted that

26. *Id.* at 2533.
27. 133 S. Ct. 2434 (2013).
28. *Id.* at 2443.
29. *Id.*
30. *Id.* at 2439, 2455.
31. *Id.*
32. *Id.*
33. *Id.* at 2440.

"Davis was her supervisor" and, therefore, "BSU was [vicariously] liable for Davis' creation of a racially hostile work environment."[34]

"[T]he District Court entered summary judgment in favor of BSU," holding "that BSU [was] not . . . vicariously liable for Davis' alleged racial harassment" because Davis was not Vance's supervisor. According to the court, Davis "could not 'hire, fire, demote, promote, transfer, or discipline' Vance."[35] The Seventh Circuit affirmed, rejecting other circuits' findings that a supervisor is an individual who merely directs an employee's daily activities.[36]

The Supreme Court noted that "[u]nder Title VII, an employer's liability for . . . harassment . . . depend[s] on the status of the harasser."[37] For example, "[i]f the harassing employee is the victim's co-worker, [an] employer [will only be] liable [for such conduct] . . . if it was negligent in controlling [the] working conditions."[38] In contrast, if the harassing employee is a supervisor and the "harassment culminates in a tangible employment action, the employer is [generally] strictly liable" for such conduct.[39] Thus, the Court held that an employer

> may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, *i.e.*, to effect a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[40]

In reaching this decision, the Court relied heavily on its prior decisions in *Burlington Industries, Inc. v. Ellerth*[41] and *Faragher v. City of Boca Raton*.[42] In both of these cases, the Court tied the definition of supervisor to the authority of an individual "to cause 'direct economic harm' " and take "tangible employment action."[43] Although the Court recognized that the term often "varies from one legal context to another," it noted that "the law often contemplates that the ability to supervise includes the ability to take tangible employment actions."[44]

The Court concluded that such a definition is easily workable and, unlike the definition adopted by the Second, Fourth, and Ninth Circuits, "can be applied without undue difficulty at both the summary judgment

34. *Id.*
35. *Id.* (quoting Hall v. Bodine Elec. Co., 276 F.3d 345, 355 (7th Cir. 2002)).
36. *Id.* at 2440.
37. *Id.* at 2439.
38. *Id.*
39. *Id.*
40. *Id.* at 2443 (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998)).
41. 524 U.S. 742.
42. 524 U.S. 775 (1998).
43. *Id.* at 2444, 2448 (quoting *Ellerth*, 524 U.S. at 762).
44. *Id.* at 2445.

stage and at trial."[45] The Court specified that under this definition of supervisor, parties will know "even before litigation is commenced whether an alleged harasser was a supervisor, and in others, the alleged harasser's status will become clear to both sides after discovery."[46]

The dissent asserted that the Court's definition of supervisor was "blind to the realities of the workplace."[47] As an example, the dissent argued that an employee could punish a victim with long hours and control all aspects of the victim's working environment, yet not be a "supervisor" under the majority's definition.[48] Thus, the dissent predicted that the Court's decision would "relieve[] scores of employers of responsibility for the behavior of the supervisors they employ" and "shut from sight the 'robust protection against workplace discrimination Congress intended Title VII to secure.' "[49]

Vance is significant because it narrows the instances when an employer will be liable for its employees' actions. Under the Supreme Court's definition of a supervisor, more plaintiffs will be required to prove negligence by the employer because many of the alleged harassers likely will not meet the definition of "supervisor."

II. DEFENSE OF MARRIAGE ACT

On June 24, 2013, the Supreme Court held in *United States v. Windsor* that the definitions of "marriage" and "spouse" in the Defense of Marriage Act (DOMA) were unconstitutional in violation of the Fifth Amendment.[50] Enacted in 1996, DOMA's definition of the terms "marriage" and "spouse" excluded same-sex marriages.[51] Such definitions were applicable to more than 1,000 federal statutes, regulations, orders, and rulings, including provisions of the U.S. Tax Code and those that regulate employee benefit plans.[52]

Edith Windsor and Thea Spyer were New York residents who began a long-term relationship in 1963.[53] They registered as domestic partners in 1993, when New York law permitted them to do so.[54] After Windsor and Spyer were lawfully married in Canada, they continued to live together in New York until Spyer's death in 2009.[55]

45. *Id.* at 2444.
46. *Id.* at 2449.
47. *Id.* at 2457 (Ginsburg, J., dissenting).
48. *Id.* at 2460.
49. *Id.* at 2462 (quoting Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 660 (2007) (Ginsburg, J., dissenting)).
50. 133 S. Ct. 2675 (2013).
51. 1 U.S.C. § 7; 28 U.S.C. § 1738C.
52. Richard Wolf & Brad Health, *Supreme Court Strikes Down Defense of Marriage Act*, USA TODAY, June 26, 2013.
53. *Windsor*, 133 S. Ct. at 2683.
54. *Id.*
55. *Id.*

Although Spyer bequeathed her estate to Windsor, "Windsor did not qualify for the marital [federal estate tax] exemption . . . , which excludes from taxation 'any interest in property which passes or has passed from the decedent to his surviving spouse.' "[56] Windsor did not qualify because DOMA excluded same-sex partners from the definition of the term "spouse" and denied federal recognition to same-sex couples.[57] After paying more than $360,000 in federal estate taxes, Windsor sought a refund.[58]

After the Internal Revenue Service denied the refund because Windsor was not a "surviving spouse," she filed a lawsuit against the federal government in the U.S. District Court for the Southern District of New York.[59] Windsor asserted that DOMA violated the Fifth Amendment's guarantee of equal protection by the federal government.[60]

"While . . . suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives . . . that the Department of Justice would no[t] . . . defend the constitutionality" of section 3 of DOMA, which contained the definitions at issue.[61] The attorney general also informed Congress that President Obama had concluded that "classifications based on sexual orientation should be subject to a heightened standard of scrutiny" and that the Department of Justice should cease defending DOMA against challenges by legally married same-sex couples.[62] In *Windsor*, both the U.S. district court and the Second Circuit ruled against the United States. The Second Circuit "applied heightened scrutiny to classifications based on sexual orientation" and held that section 3 of DOMA was unconstitutional.[63]

When analyzing the constitutionality of DOMA, the Supreme Court noted that although the regulation of marriage was historically "within the authority and realm" of the individual states,[64] Congress by enacting certain laws retained the power to make determinations that affect marital rights and privileges.[65] Despite "the constitutionality of limited federal laws that regulate the meaning of marriage," the Court observed that DOMA "has a far greater reach" because it "enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations."[66]

56. *Id.* (citing 26 U.S.C. § 2056(a)).
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 2684.
64. *Id.* at 2689–90.
65. *Id.* at 2690.
66. *Id.*

The Court determined that "DOMA's principal effect was to identify a subset of state-sanctioned marriages and make them unequal" for no other purpose than to impose inequality.[67] In describing the effect of DOMA, the Court explained that it "forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect."[68] Accordingly, the Court determined that because DOMA treats "those persons as living in marriages less respected than others" and "singles out a class of persons deemed *by a State* entitled to recognition and protection," it "violates basic due process and equal protection principles applicable to the Federal Government."[69]

The dissent viewed the Court as lacking jurisdiction.[70] Citing Article III of the Constitution, which provides that federal courts may only hear cases in which there is an actual case or controversy, the dissent asserted that the Court lacked jurisdiction, as the parties in interest agreed with each other.[71] Pointing to the President and Attorney General's agreement with the trial court's conclusion that DOMA's application to Windsor was unconstitutional, the dissent argued that there was no case or controversy to appeal.[72]

Under *Windsor*, the federal government must look at the laws of individual states in determining whether same-sex couples are married. Although the federal government must recognize marriages in states that authorize same-sex marriages, it does not require state governments to recognize them. Importantly, any employer plan that defines the terms "married," "marriage," and "spouse" with reference to DOMA should be reviewed and amended.

III. NATIONAL LABOR RELATIONS BOARD DEVELOPMENTS

The past year brought significant developments for the National Labor Relations Board with respect to the scope of its power. The discussion below highlights some of the key decisions and addresses the impact of these rulings on employers and employees.

A. *New Composition of the Board*

The U.S. Court of Appeals for the District of Columbia's determination in *Noel Canning v. NLRB*,[73] which held that President Obama's three recess appointments to the Board were unconstitutional, set the stage for a

67. *Id.* at 2694.
68. *Id.*
69. *Id.* at 2693, 2695–96, 2720 (emphasis added).
70. *Id.* at 2698 (Scalia, J., dissenting).
71. *Id.*
72. *Id.*
73. 705 F.3d 490 (D.C. Cir. 2013).

political battle that ultimately changed the composition of the Board and gave rise to a Supreme Court challenge that places hundreds of Board decisions and actions at issue.

The Board must have a quorum to be able to fully operate.[74] Faced with the prospect of losing its quorum, President Obama seated Sharon Block (D), Richard Griffin Jr. (D), and Terrence Flynn (R) to the Board via recess appointments on January 4, 2012.[75] The recess appointees joined Board Chairman Mark Gaston Pearce (D) and former member Brian Hayes (R). Almost immediately, this move prompted several court actions contesting the legality of the appointments.[76]

The appointments took place when the Senate was operating under a unanimous consent agreement that it would meet in pro forma sessions, during which "no business [would be] conducted," every three business days from December 20, 2011, until January 23, 2012.[77] During this period, however, on December 23, 2011, the Senate reconvened to pass a temporary payroll tax extension measure.[78]

Because the Senate would not act on the nominations of Block, Griffin and Flynn before the Board was set to lose its operational capacity, the Department of Justice's Office of Legal Counsel (OLC) issued a memorandum opinion concluding that the President was within his right to make the recess appointments because the Senate was unavailable to provide the necessary advice and consent.[79]

74. *Id*. at 493 (citing New Process Steel v. NLRB, 130 S. Ct. 2635 (2010) (holding that the Board must have at least three sitting members to constitute a valid quorum)).

75. *Id*. at 498. Member Craig Becker's term expired on January 3, 2012. Becker was also seated via recess appointment on March 28, 2010, and sworn in on April 5, 2010. *Id*.

76. Article II, § 2, clause 2 of the U.S. Constitution gives the President the authority to make high-level appointments to the federal government with the "advice and consent" of the Senate. The Constitution provides an exception to the Senate confirmation process when the Senate is in recess. Specifically, Article II, § 2, clause 3 states that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." *Noel Canning*, 705 F.3d at 499. Whether the Senate was in fact "in recess" at the time that the NLRB appointments in question occurred has been the subject of heated debate and scholarly analysis.

77. *Noel Canning*, 705 F.3d at 498–99 (alteration by court); *see also* 157 CONG. REC. S8, 783–84 (daily ed. Dec. 17, 2011).

78. *Noel Canning*, 705 F.3d at 499; *see also* 157 CONG. REC. S8, 789 (daily ed. Dec. 23, 2011).

79. *Noel Canning*, 705 F.3d at 504; *see also* U.S. Dep't of Justice, Office of Legal Counsel, Memorandum Opinion for the Counsel to the President, Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions (Jan. 6, 2012), *available at* http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf (". . . the text of the Constitution and precedent and practice thereunder support the conclusion that the convening of periodic pro forma sessions in which no business is to be conducted does not have the legal effect of interrupting an intrasession recess otherwise long enough to qualify as a 'Recess of the Senate' under the Recess Appointments Clause. In this context, the President therefore has discretion to conclude that the Senate is unavailable to perform its advise-and-consent function and to exercise his power to make recess appointments.").

Shortly after the recess appointees were sworn in, a three-member panel of the Board, consisting of members Hayes, Flynn, and Block, determined that Noel Canning, a bottler and distributor of Pepsi-Cola products, violated the National Labor Relations Act (NLRA)[80] by refusing to enter into a collective bargaining agreement with the Teamsters Union.[81] Noel Canning appealed this decision to the D.C. Circuit on the grounds that the recess appointments were invalid, and the Board therefore lacked a quorum when it issued its decision.

On appeal, Canning advanced two constitutional arguments. First, it stated that three of the five members were never validly appointed because the recess appointments were made when the Senate was not in recess. Second, the company argued that the vacancies filled did not "happen during the Recess of the Senate," as the Constitution requires.[82]

The D.C. Circuit agreed, finding that, given "the text, history, and structure of the Constitution, these appointments were invalid from their inception. Because the Board lacked a quorum of three members when it issued its decision in this case on February 8, 2012, its decision must be vacated."[83] The court further found that the President's authority to make recess appointments is limited to the intersession recess of the Senate, which "refers to the period between sessions that would end with the ensuing session of the Senate."[84] In addition, the Court held that "the President may only make recess appointments to fill vacancies that arise during the recess"[85] and, in this case, the three recess appointments "did not occur during [this period]."[86]

Since this landmark decision, two other federal courts have arrived at the same conclusion.[87] More importantly, the Supreme Court will review *Noel Canning* during its 2013–14 Term.[88]

At issue are more than 1,000 cases that the Board has issued since January 4, 2012. Following the Supreme Court's 2010 decision in *New Process Steel v. NLRB*,[89] more than 600 Board decisions issued prior to 2010, while the Board also lacked a valid quorum, were invalidated and thus had to be revisited. Should the Supreme Court uphold *Noel Canning*, the D.C. Cir-

80. 29 U.S.C. §§ 151–169.
81. Noel Canning, A Div. of the Noel Corp., 358 N.L.R.B. 4, 2012 WL 402322 (Feb. 8, 2012).
82. *Noel Canning*, 705 F.3d at 493 (quoting U.S. CONST. art. II, § 2, cl. 3).
83. *Id.* at 507.
84. *Id.* at 501.
85. *Id.* at 512.
86. *Id.* at 507.
87. *See* NLRB v. New Vista Nursing & Rehab. LLC, 719 F.3d 203 (3d Cir. 2013); *see also* NLRB v. Enter. Leasing Co. Se. LLC, 722 F.3d 609 (4th Cir. 2013).
88. NLRB v. Noel Canning, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 81 U.S.L.W. 3702 (U.S. June 24, 2013) (No. 12-1281).
89. 130 S. Ct. 2635 (2010).

cuit, the Board, or both will likely remand Board cases pending before federal appellate courts for reconsideration. The precedential value of final Board decisions that were not appealed is unclear until this issue is resolved.

The uncertainty created by *Noel Canning* was compounded in the summer of 2013. Member Hayes' term had expired on December 16, 2012, and member Flynn resigned from the Board on May 27, 2012,[90] leaving Chairman Pearce as the only remaining Senate-confirmed Board member. Pearce's term, however, was set to expire on August 27, 2013. Unless the Senate confirmed additional Board members, which it did not appear inclined to do, the Board would have been left with only two sitting members, both of whom were recess appointees.

In an effort to ensure that the Board would be able to function, on July 11, 2013, Senate Majority Leader Harry Reid announced that he would set up a series of votes on the pending Board nominees. If the Senate did not allow these votes to proceed, Reid proposed to change Senate rules to avoid procedural filibusters and allow the executive nominations to be approved by a simple majority (fifty-one votes), known as the so-called nuclear option. To avoid this situation, the nominations of recess appointees Sharon Block and Richard Griffin were withdrawn. President Obama proposed two alternate Democratic nominees, Nancy Schiffer and Kent Hirozawa, both of whom had been vetted by the AFL-CIO.[91] The Senate also agreed to vote on Pearce's nomination to serve another term, as well as the nomination of Schiffer, Hirozawa, and proposed Republican Board nominees Harry I. Johnson III and Philip A. Miscimarra.

In a series of votes stretching into the early evening, the Senate on July 30, 2013, confirmed all five Board nominations, restoring the agency to full operational capacity.[92] By August 12, 2013, all five members of the Board were sworn in.[93]

Meanwhile, former recess appointee Richard Griffin was nominated to be the Board's general counsel. Lafe Solomon had been serving in an act-

90. Member Terence Flynn announced his resignation from the Board on May 27, 2012, following allegations cited in an NLRB Inspector General report that he committed ethics violations while employed by the Board, but before he assumed his Board member position.

91. Prior to joining the Board, Schiffer had served as counsel for the AFL-CIO, and Hirozawa has served as Chairman Pearce's chief counsel.

92. Restored to full capacity, the Board is expected to revisit a number of decisions and rules that have remained dormant, including the controversial proposed and final rules amending representation election procedures (the so-called quickie election rules) (76 Fed. Reg. 36,811–47 (N.L.R.B. June 22, 2011); 76 Fed. Reg. 80,137-80,189 (N.L.R.B. Dec. 22, 2011).

93. Chairman Pearce's term was set to expire on August 27, 2013, but he was confirmed for another five-year term on July 30, 2013; Nancy Schiffer was sworn in on August 2, 2013, for a term expiring on December 16, 2013; Kent Hirozawa was sworn in on August 5, 2013, for a term expiring on August 27, 2016; Philip Miscimarra was sworn in on August 7, 2013, for a term expiring on December 16, 2017; and Harry Johnson III was sworn in on August 12, 2013, for a term expiring on August 27, 2015.

ing capacity since he was appointed on June 21, 2010, but he withdrew his candidacy around the same time the five Board members were sworn in. Independent from the Board, the general counsel's office investigates and prosecutes charges of unfair labor practice cases and supervises Board field offices, deciding which cases to pursue and implementing the policies and procedures that field agents should follow.

To complicate matters within the Board, on August 15, 2013, a federal district court held Solomon's prior appointment as general counsel invalid. In *Hooks v. Kitsap Tenant Support Services, Inc.*,[94] the court granted an employer's motion to dismiss a lawsuit in which the Board sought to enjoin the employer from allegedly terminating employees on account of their protected union activities. The employer argued that (1) only the Board has the authority, after issuing an unfair labor practice complaint, to petition a federal court for injunctive relief and, at the time it filed its petition, the Board did not have a valid quorum because the recess appointments were unconstitutional and (2) the Board could not lawfully delegate its authority to the acting general counsel because his own appointment was also invalid.[95]

As to the first argument, the court agreed that absent a valid quorum, the Board did not have the authority to issue the complaint that served as the basis for the petition for injunctive relief.[96] In addition, the court found that although President Obama purported to appoint Solomon to the acting position under the Federal Vacancies Reform Act (FVRA),[97] this appointment was invalid because the FVRA only authorizes the appointment of an acting general counsel if, within the last 365 days, the appointee served as the "first assistant" or deputy general counsel.[98] Because Solomon did not serve in this capacity, the court explained, his appointment was unlawful and, therefore, he could not have delegated authority to a regional director to file a petition for injunction against the company.[99]

Although this is just one federal court case, the arguments regarding Solomon set forth in *Hooks* may likely be used as an affirmative defense by employers in similar cases, unless and until the Supreme Court issues a definitive ruling on this matter. *Hooks* also injects additional uncertainty into a significant number of Board cases, decisions, and policies issued during 2013 and earlier.

94. No. C13-5470 BHS, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013).
95. *Id.* at *1.
96. *Id.*
97. Federal Vacancies Reform Act, 5 U.S.C. § 3345 (1998); *Hooks*, 2013 WL 4094344, at *2.
98. *Hooks*, 2013 WL 4094344, at *2; *see also* 5 U.S.C. § 3345 (1998).
99. *Hooks*, 2013 WL 4094344, at *2.

B. *Notification of Employee Rights*

After repeated court challenges, the U.S. Court of Appeals for the D.C. Circuit invalidated the Board's rule requiring private-sector employers that are subject to the NLRA to post a notice informing employees of their rights under federal labor law in a "conspicuous place" that is readily seen by employees and penalizing employers for noncompliance.[100] In *National Association of Manufacturers v. NLRB*,[101] the court found that the rule at issue, Notification of Employee Rights Under the National Labor Relations Act,[102] was improper because it exceeded the Board's rulemaking authority and contained unlawful enforcement mechanisms. Failure to post the required notice would have allowed the Board to extend the usual six-month statute of limitations period in unfair labor practice cases and consider the refusal to post evidence of an employer's anti-union animus in unfair labor practice cases.[103]

The court referenced section 8(c) of the NLRA, which states: "The expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice" (so long as the views are not coercive, protecting the right to speak, as well as the right *not* to express views, about unions in the workplace.[104] In essence, the court found that the Board could not force an employer to disseminate a particular message at the worksite.[105]

The following month, the Fourth Circuit arrived at the same conclusion in *Chamber of Commerce of the United States v. NLRB*.[106] The Fourth Circuit went one step beyond the D.C. Circuit, however, finding that the NLRA clearly and unambiguously does not grant the Board the authority to promulgate the notice-posting rule.[107]

C. *Bargaining Unit Determination*

On August 15, 2013, the Sixth Circuit, in *Kindred Nursing Centers East v. NLRB*,[108] affirmed a 2011 Board decision that dramatically changed the criteria for how bargaining unit determinations are made. In *Specialty Healthcare and Rehabilitation Center of Mobile*,[109] the Board overruled its

100. Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947 (D.C. Cir. 2013). Maury Baskin from Littler Mendelson represented the National Association of Manufacturers in this case.
101. *Id.*
102. Notification of Employee Rights Under the National Labor Relations Act, Final Rule, 76 Fed. Reg. 54,005, 54,005–50 (N.L.R.B. Aug. 30, 2011).
103. *Nat'l Ass'n of Mfrs.*, 717 F.3d at 950–51.
104. *Id.* at 954, 959–60.
105. *Id.* at 960.
106. 721 F.3d 152 (4th Cir. 2013).
107. *Id.* at 154.
108. 727 F.3d 552 (6th Cir. 2013).
109. 357 N.L.R.B. No. 83, 2011 WL 3916077 (2011).

prior decision in *Park Manor Care Center*[110] and adopted a new standard for determining appropriate bargaining units that could lead to the creation of so-called micro bargaining units. Under the new standard articulated in *Specialty Healthcare*, as long as a union's petitioned-for unit consists of a clearly identifiable group of employees, the Board will presume that the unit is appropriate. An employer would need to demonstrate that any additional employees it feels should join the unit share an "overwhelming" community of interest with those in the petitioned-for unit.[111]

The Sixth Circuit upheld this method in *Kindred Nursing*.[112] In that case, a nursing home operator appealed the Board's order certifying a petitioned-for bargaining unit that consisted only of certified nursing assistants.[113] The employer sought to include other employees who shared common benefits, personnel policies, training, and break areas, and attended the same work-related meetings and holiday functions, among other similarities.[114] The Board, however, denied their inclusion on the grounds that they did not share an overwhelming community of interest with the nursing assistants.[115]

In affirming the Board's unit determination, the Sixth Circuit accorded the agency deference: "If the Board believes that it can best fulfill its statutory duty by adopting a test from one of its precedents over another, then the Board does not abuse its discretion."[116] Provided that the Board can explain its reasoning in abandoning established precedent and choosing another to follow, the appellate court stated, it does not abuse its discretion.[117]

The affirmance of *Specialty Healthcare* is expected to result in smaller, more specialized bargaining units that are considered easier to organize but more challenging for an employer to administratively manage. For employers affected by a micro unit, other related union campaigns may follow. Employers should anticipate that the new Board, bolstered by this decision, may deviate from past precedent in other areas, as long as it can provide some rationale for doing so.

110. 305 N.L.R.B. 872 (1991).
111. *Kindred Nursing Ctrs. E.*, 727 F.3d at 561 (citing *Specialty Healthcare & Rehab. Ctr.*, 2011 WL 3916077, at *1).
112. *Id.* at 554.
113. *Id.*
114. *Id.*
115. *Id.* at 558.
116. *Id.* at 561.
117. *Id.*

D. *Section 7 Rights*

Through a number of decisions, the Board has broadened the scope of what constitutes protected concerted activity under section 7 of the NLRA.[118] The Board paid particular attention to employer policies governing social media, confidentiality, and workplace access.[119]

The Board's Office of General Counsel issued a series of advice memos in 2011 and early 2012, expressing the acting general counsel's views on the application of the NLRA to social media policies. Although the volume of memos on this topic has receded in 2013, the Board's interest in protecting an employee's use of social media remained.

For example, in *Hispanics United of Buffalo*,[120] the Board found that an employer violated section 8(a)(1)[121] of the NLRA by firing five employees for Facebook comments made in response to a fellow employee's criticism of their work. Upon learning of this impending performance disapproval, an employee posted comments on her Facebook wall about the complaining co-worker and asked how others felt.[122] Four colleagues posted comments in response.[123] The first workday following these postings, the employer fired all employees involved on the grounds "that their remarks constituted 'bullying and harassment' . . . and violated the [employer]'s 'zero tolerance' policy prohibiting such conduct."[124]

The case wound its way to the Board, which ultimately found that

> there should be no question that the activity engaged in by the five employees was concerted for the "purpose of mutual aid or protection" as required by Section 7. As set forth in her initial Facebook post, [the complaining employee] alerted fellow employees of another employee's complaint that they "don't help our clients enough," stated that she "about had it" with the complaints, and solicited her coworkers' views about this criticism. By responding to this solicitation with comments of protest, [the] four coworkers made common cause with her, and, together, their actions were concerted.[125]

118. 29 U.S.C. § 157 (employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . .").

119. *See*, *e.g.*, Remington Lodging & Hospitality, LLC, 359 N.L.R.B. No. 95, 2013 WL 1771714 (2013) (finding five employee handbook rules governing workplace access, solicitation, and employee behavior unlawful under Section 7).

120. 359 N.L.R.B. No. 37, 2012 WL 6800769 (2012).

121. 29 U.S.C. § 158. This section makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

122. *Hispanics United*, 2012 WL 6800769, at *2.

123. *Id.*

124. *Id.*

125. *Id.*

Thus, because the Board "found that the Facebook postings were concerted and protected [activity]" and because the employees were discharged based solely on the postings, the Board "conclude[d] that the discharges violated Section 8(a)(1)."[126]

In *DirecTV U.S. DirecTV Holdings, LLC*,[127] the Board found three confidentiality policies among nonunionized employers invalid on the grounds they were overly broad and/or ambiguous and therefore infringed upon employee's section 7 rights to discuss wages, hours, and terms and conditions of employment with individuals outside of the company.

The first policy was set forth in the company's employee handbook, which expressly instructed employees: "Do not contact the media."[128] The Board found this rule overly broad and thus invalid because it could be construed to prohibit *all* communication with the media, including comments regarding a labor dispute.[129] Similarly, the Board found the company's public relations policy—which stated, in relevant part: "Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations"—to be overbroad and thus in violation of section 7.[130]

The Board also found that the company's intranet policy on "Company Information" to be similarly unlawful.[131] Under this policy, the company stated that "[e]mployees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record."[132] The employee handbook's confidentiality rule defined "company information" as including "employee records," which, the Board claimed, could include information about employee wages, discipline, and performance reviews, discussion of which is protected under section 7.[133]

This and similar Board cases issued throughout the year present the question of how an employer can ensure that confidential business information remains so without running afoul of the NLRA. Although *DirecTV* has been appealed, the D.C. Circuit is holding it in abeyance in light of the *Noel Canning* decision.

IV. CLASS ACTION DECISIONS IMPACTING EMPLOYMENT LAW

During the past year, the Supreme Court issued three decisions that may impact class action and collective litigation involving employees and employers in the future. A discussion of these cases follows.

126. *Id.* at *4.
127. 359 N.L.R.B. 54, 2013 WL 314390 (2013).
128. *Id.* at *1.
129. *Id.*
130. *Id.* at *2.
131. *Id.* at *4.
132. *Id.*
133. *Id.* at *3.

A. Genesis Healthcare Corp. v. Symczyk

In *Genesis Healthcare Corp. v. Symczyk*,[134] Laura Symczyk alleged that for three years, her employer, Genesis Health Care Corp., violated the Fair Labor Standards Act (FLSA) by "automatically deduct[ing] 30 minutes of time worked per shift for meal breaks for certain employees, even when the employees performed compensable work during those breaks."[135] She then filed a complaint on behalf of herself and similarly situated co-workers.[136]

The FLSA "gives employees the right to bring a private cause of action on their own behalf and on behalf of 'other employees similarly situated' [known as a collective action] for specified violations."[137] Symczyk was the sole plaintiff throughout the proceedings, seeking statutory damages for the alleged violations.[138] When Genesis answered the complaint, it tendered an offer of judgment of $7,500 under Federal Rule of Civil Procedure 68 for alleged unpaid wages, attorney fees, and court costs; the offer was to be withdrawn if Symczyk did not accept it within ten days.[139]

After Symczyk failed to respond by the deadline, Genesis filed a motion to dismiss, arguing that she no longer had a "personal stake" after the offer was made, rendering the action moot.[140] Symczyk objected, arguing that her employer was attempting to " 'pick off' the named plaintiff before the collective action process could unfold."[141] The district court granted the motion, noting that Symczyk conceded that she no longer had an interest in the action, no other individuals had joined the suit, and she had not filed for class action certification.[142]

The Third Circuit reversed,[143] holding that "the case must be remanded in order to allow [Symczyk] to seek 'conditional certification.' "[144] If Symczyk was successful, the certification motion would relate back to the date on which Symczyk filed her complaint.[145] The Supreme Court granted certiorari in order to determine "whether . . . a case is justiciable when the lone plaintiff's individual claim becomes moot."[146]

The Supreme Court briefly addressed whether an unaccepted Rule 68 offer rendered Symczyk's claim moot.[147] The Court noted that both the

134. 133 S. Ct. 1523 (2013).
135. *Id.*
136. *Id.*
137. *Id.* at 1527 (citing 29 U.S.C. § 216(b)).
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 1527–28.
146. *Id.* at 1526.
147. *Id.* at 1528.

district court and the Third Circuit "concluded that [Genesis's] Rule 68 offer afforded [Symczyk] complete relief" and thus mooted her FLSA claim.[148] Additionally, the Court determined that Symczyk waived the question by conceding that she "retain[ed] no personal interest in the outcome of the litigation."[149] Accordingly, the Court noted, "we, therefore, assume, without deciding, that [Genesis's] Rule 68 offer mooted [Symczyk]'s individual claim."[150]

With the mootness question resolved, the Court then determined that an individual whose claim was rendered moot cannot bring an FLSA collective action on behalf of other individuals.[151] The Court noted that a collective action brought under the FLSA is fundamentally different than a class action brought under Rule 23.[152] Under the FLSA, unlike Rule 23, a conditionally certified class does not acquire independent legal status, and no individual is automatically added to the lawsuit.[153] The Court reasoned that "[i]n the absence of any claimant[ ]s opting in," Symczyk's suit was no longer justiciable "when her individual claim became moot."[154] Although "the FLSA authorizes an . . . employee to bring an action on behalf of himself and 'other employees similarly situated,' "[155] the Court determined that "the mere presence of collective-action allegations . . . cannot save [a] suit . . . once the individual claim is satisfied."[156]

Although the Court's decision may appear beneficial for employers, it should not be read as a universal remedy for collective action litigation. Federal courts disagree as to whether an offer of judgment for complete relief in an FLSA case moots an individual's claim, and the Supreme Court did not address that conflict because of the plaintiff's concessions in the lower courts. In addition, an offer of judgment may not have the same effect on employment law class actions filed under Rule 23, which is an important distinction, as such claims are frequently filed concurrently with FLSA collective actions.[157]

B. American Express Co. v. Italian Colors Restaurant

In *American Express Co. v. Italian Colors Restaurant*,[158] the Supreme Court held that economic considerations cannot circumvent the Federal Arbitra-

148. *Id.*
149. *Id.*
150. *Id.* at 1529.
151. *Id.* at 1529–32.
152. *Id.* at 1529.
153. *Id.*
154. *Id.* at 1529–32.
155. 29 U.S.C. § 216(b).
156. *Id.*
157. *See* Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, LLC, 2013 WL 5476979 (D. Md. Oct. 2, 2013) (noting that, unlike *Genesis*, "this case presents a Rule 23 class action," which is "fundamentally different from collective actions under the FLSA").
158. 133 S. Ct. 2304 (2013).

tion Act (FAA).[159] American Express entered into agreements with individual merchants that allowed the merchants to accept American Express credit cards.[160] The agreements "require[d] all disputes between the parties to be resolved [through binding] arbitration. The agreement[s] also provide[d] that '[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis.' "[161] A group of the merchants brought a class action lawsuit against American Express for allegedly violating federal antitrust laws.[162]

American Express "moved to compel . . . arbitration under the [FAA]."[163] In opposition, the merchants "submitted a [statement] from an economist who estimated that the cost of expert analysis necessary to prove the antitrust claims would be 'at least several hundred thousand dollars, and might exceed $1 million,' while the maximum recovery for an individual plaintiff would be" less than $40,000.[164]

The district court granted the merchants' motion, but the Second Circuit reversed, holding that because the merchants "established that 'they would incur prohibitive costs if compelled to arbitrate under the class action waiver,' the waiver was unenforceable and the arbitration could not proceed."[165] The Supreme Court granted certiorari to determine whether the FAA permits the invalidation of arbitration agreements if they prohibit class action arbitration of federal law claims.[166]

The Court noted that Congress passed the FAA in response to widespread judicial hostility toward arbitration agreements and to clarify that arbitration is a matter of contract.[167] Therefore, the Court stated that arbitration agreements should be "rigorously enforce[d] . . . according to their terms,"[168] including terms that "specify *with whom* [the parties] choose to arbitrate their disputes"[169] and "the rules under which that arbitration will be conducted."[170]

The merchants argued that individual litigation of their claims, as required by contract, would "contravene the policies of [federal] antitrust law."[171] The Court, however, stated that "the antitrust laws do not guar-

159. 9 U.S.C. § 1.
160. *Am. Express*, 133 S. Ct. at 2308.
161. *Id.* (quoting *In re* Am. Express Merch. Litig., 667 F.3d 204, 209 (2d Cir. 2012)).
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* (citing *In re* Am. Express Merch. Litig., 554 F.3d 300, 315–16 (2d Cir. 2009)).
166. *Id.*
167. *Id.* at 2309 (citing Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010)).
168. *Id.* (quoting Dean Witter Reynolds Inc. v. Bryd, 105 S. Ct. 1238 (1985)).
169. *Id.* (citing Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 683 (2010)) (emphasis in original).
170. *Id.* (citing *Stolt-Nielsen*, 559 U.S. at 683; Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).
171. *Id.*

antee an affordable procedural path to the vindication of every claim" and "no legislation pursues its purposes at all costs."[172] The Court further noted that "[t]he antitrust laws do not 'evinc[e] an intention to preclude a waiver' of class-action procedure[s]."[173] Therefore, absent a contrary congressional directive, the Court found that no reason existed to ignore the general principle of enforcing a contract according to its terms.[174]

The merchants also argued that the "effective vindication" exception created in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[175] applied. The effective vindication exception allows for an arbitration clause to be invalidated if it would operate as a potential waiver of a party's right to pursue statutory remedies.[176] The Court concluded that the arbitration agreement did not operate as a waiver of the merchants' rights[177] because, although it may not be economically viable or practical, the merchants could still enforce their rights.[178] Accordingly, the Court found that an arbitration agreement containing a class action waiver cannot be invalidated on the basis that pursuit of an individual claim is more difficult or costly.

Under *American Express*, arbitration clauses cannot be invalidated simply because pursuing individual claims will be difficult or costly. Going forward, in instances where an employee signs an employment contract containing an arbitration agreement provision, this decision may affect an employee's ability to pursue class action litigation. Although *American Express* has the potential to effect significant change in the context of employment arbitration agreements with class action waivers, the full scope of its impact is still in flux and should be monitored for further developments.

C. Comcast Corp. v. Behrend

In *Comcast Corp. v. Behrend*,[179] the Supreme Court held that the necessary class certification requirements must be established before a class action is accepted, even if such a determination requires inquiry into the merits of a claim.

In *Comcast*, the U.S. District Court for the Eastern District of Pennsylvania approved certification for a class of two million current and former subscribers who alleged violations of federal antitrust laws through Comcast's so-called clustering strategy, which allegedly "eliminat[ed] competition and [held prices] for cable services above competitive levels."[180]

172. *Id.* (quoting Rodriguez v. United States, 480 U.S. 522, 525–26 (1987)).
173. *Id.* (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 437 U.S. 614 (1985)).
174. *Id.* at 2309–10.
175. 437 U.S. 614.
176. *Am. Express*, 133 S. Ct. at 2308.
177. *Id.* at 2310–11.
178. *Id.*
179. 133 S. Ct. 1426, 1430 (2013).
180. *Id.*

To obtain class certification, the subscribers needed to use a "common methodology" to show that damages on a classwide basis were "measurable."[181] Although the subscribers "proposed four theories of antitrust impact," the district court approved only their offered "overbuilders" theory,[182] in which the subscribers alleged that Comcast's clustering strategy was intended to "deter the entry of overbuilders in the Philadelphia [area]."[183]

The subscribers relied upon a regression model, comparing actual cable charges with hypothetical prices absent Comcast's alleged anticompetitive activities.[184] The model calculated the class damages at more than $875 million but "did not isolate damages resulting from any one theory of antitrust impact. The District Court [nonetheless] certified the class."[185]

On appeal, Comcast argued that "the class was improperly certified because the model . . . failed to attribute damages resulting from overbuilder deterrence, the only theory of injury remaining in the case."[186] However, the Third Circuit, finding that "an attack on the merits of the methodology" had "no place in a class certification inquiry," declined to consider Comcast's argument.[187] At the class certification stage, the subscribers should not be required to link an "exact calculation of damages" to each theory of antitrust impact: "[r]ather, . . . [the subscribers] must 'assure [the Court] that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations.' "[188]

The Supreme Court found that the Third Circuit erred "when it refused to [consider] arguments [opposing the subscribers'] damages model that bore on the propriety of class certification."[189] The Court noted that if the subscribers prevailed on their claims, they "would be entitled . . . to damages resulting from reduced overbuilder competition" because that was the only theory of antitrust impact remaining.[190] Accordingly, the "model purporting to serve as evidence of damages in th[e] class action must measure only those damages attributed to [such] theory. If the model does not . . . , it cannot . . . establish that [the alleged] damages are susceptible of measurement across the entire class for purposes of [class certification]."[191] The Court noted that although calculations at the

181. *Id.*
182. *Id.* at 1430–31.
183. *Id.* (quoting App. to Petition for Cert. 192a–193a).
184. *Id.*
185. *Id.*
186. *Id.* at 1431.
187. *Id.* (quoting Behrend v. Comcast, 655 F.3d 182, 207 (3d Cir. 2011)).
188. *Id.* (quoting *Behrend*, 655 F.3d at 207).
189. *Id.* at 1433.
190. *Id.*
191. *Id.*

class certification stage do not require complete accuracy, "any model supporting a 'plaintiff's damages case must be consistent with its liability case.' "[192] Accordingly, the Court determined that for class certification purposes, a court must conduct a "rigorous analysis" to determine whether consistency exists.[193] Because the subscribers' model measured damages " 'as a whole' and did not attribute damages to any one particular theory of anticompetitive impact," the Court held that the model was improper.[194]

Comcast arguably makes class certification more difficult. In an employment context, *Comcast* may allow employers to oppose class methodologies as a basis to prevent class certification. Conversely, before pursuing a class action, employees should verify that their methods for proving classwide damages are reliable or risk failing to obtain class certification.

192. *Id.* (quoting ABA Section of Antitrust Law, Proving Antitrust Damages: Legal and Economic Issues 57, 62 (2d ed. 2010)).

193. *Id.* (citing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011)).

194. *Id.* at 1433–34.