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Eileen Kaufman

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## LAWYERING DECISIONS—OCTOBER 2009 TERM

*Eileen Kaufman*\*

### I. INTRODUCTION

Many Supreme Court observers have commented on the unusual number of cases decided last Term that involved some aspect of lawyering.<sup>1</sup> In fact, one commentator described the phenomenon as “‘nothing short of a revolution.’”<sup>2</sup> Whether it qualifies as a revolution or not, it is certainly notable that the Supreme Court’s “incredible shrinking docket” included as many cases as it did that directly impacted the practice of law. These lawyering cases fall roughly into four categories: bad lawyering cases, First Amendment cases, attorney’s fees cases, and timing cases. This discussion focuses on the civil cases in these categories.

### II. BAD LAWYERING CASES

The focus of this first category is *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*.<sup>3</sup> The issue in this case was whether the bona fide error defense to civil liability under the Fair Debt Collection Practices Act<sup>4</sup> (“FDCPA”) applied to good faith mistakes of

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\* Professor of Law, Touro Law Center. LL.M. and J.D., New York University School of Law; B.A., Skidmore College. This Article is based on a presentation given at the Twenty-Second Annual Leon D. Lazer Supreme Court Review Program held in Central Islip, New York on November 5, 2010.

<sup>1</sup> See, e.g., Marcia Coyle, *Lawyering Suits Pile up at High Court*, NAT’L L.J., July 6, 2010, available at <http://www.law.com/jsp/scm/PubArticleSCM.jsp?id=1202463292471> (characterizing the sixteen lawyering cases—“nearly [twenty] percent of the Court’s decision docket”—as “an unusually large number”).

<sup>2</sup> *Id.* (quoting Professor Renee Knake of Michigan State University College of Law).

<sup>3</sup> 130 S. Ct. 1605 (2010). It is not entirely fair to categorize this as a case of “bad lawyering.” Rather, the case involved a good faith but ultimately incorrect interpretation of the law. See *id.* at 1610.

<sup>4</sup> Fair Debt Collection Practices Act, 15 U.S.C.A. §§ 1692-1692p (2010).

law.<sup>5</sup> The law firm, Carlisle, McNellie, Rini, Kramer & Ulrich LPA (“Carlisle”), sought foreclosure of a mortgage and sent a complaint to the homeowner with a notice telling the homeowner that she had to dispute the debt in writing within thirty days or the debt would be assumed.<sup>6</sup> The debt had already been paid in full, however, and Carlisle withdrew the foreclosure action.<sup>7</sup> The homeowner then brought an action against Carlisle alleging that the practice of requiring a debtor to dispute the debt in writing was itself a violation of the FDCPA.<sup>8</sup>

The trial court agreed that Carlisle had violated the statute by requiring the debtor to dispute the debt in writing, although it acknowledged that there was a conflict of authority on that question.<sup>9</sup> Therefore, the issue became whether or not Carlisle was protected from liability by the bona fide error defense.<sup>10</sup> The Supreme Court held that the defense does not apply to a misinterpretation of the law—not even a good faith, reasonable misinterpretation of the law.<sup>11</sup> Therefore, lawyers are subject to liability for violations of the Act, even when they are acting upon a misreading of the requirements of the Act.

What makes the case so important is the effect that it will have on debt-collecting lawyers. The decision puts lawyers in a difficult situation because the threat of personal liability could interfere with the lawyer’s obligation to zealously advocate on behalf of the client. For example, an attorney may be faced with a situation where there is ambiguity as to the Act’s meaning. One way to interpret the ambiguity benefits the client, but if the attorney chooses that interpre-

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<sup>5</sup> *Jerman*, 130 S. Ct. at 1608 (“This case presents the question whether the ‘bona fide error’ defense . . . applies to a violation resulting from a debt collector’s mistaken interpretation of the legal requirements of the FDCPA.”).

<sup>6</sup> *Id.* at 1609.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1609-10 (“While acknowledging a division of authority on the question, the [d]istrict [c]ourt held that Carlisle had violated § 1692(g) by requiring Jerman to dispute the debt in writing.”).

<sup>10</sup> *Jerman*, 130 S. Ct. at 1610. The district court found that the bona fide error defense shielded Carlisle from liability and the Sixth Circuit affirmed. *Id.* Recognizing the existence of a circuit split on this issue, the Supreme Court “granted certiorari to resolve the conflict of authority as to the scope of the FDCPA’s bona fide error defense.” *Id.*

<sup>11</sup> *Id.* at 1611 (“We have long recognized the ‘common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.’” (quoting *Barlow v. United States*, 32 U.S. 404, 411 (1833))).

tation and is wrong, then the attorney faces personal liability. This creates a conflict of interest between the attorney's personal financial liability and the attorney's ethical obligation to zealously advocate on behalf of the client.

That is the concern of the two dissenting justices in the case—Justices Kennedy and Alito—who said:

When statutory provisions have not yet been interpreted in a definitive way, principled advocacy is to be prized, not punished.

An attorney's obligation in the face of uncertainty is to give the client his or her best professional assessment of the law's mandate.

... Henceforth, creditors' attorneys of the highest ethical standing are encouraged to adopt a debtor-friendly interpretation of every question, lest the attorneys themselves incur personal financial risk.<sup>12</sup>

One way out of that dilemma was suggested by Justice Breyer in a concurring opinion.<sup>13</sup> Attorneys who seek an advisory opinion from the Federal Trade Commission ("FTC") and follow the opinion are insulated, by statute, from liability.<sup>14</sup> The dissenting justices, however, believed that was an impractical solution to a serious problem of professional ethics.<sup>15</sup>

### III. FIRST AMENDMENT CASES

#### A. *Holder v. Humanitarian Law Project*

The second category concerns First Amendment cases that have a direct impact on the actual practice of law. One of the most closely watched cases of the Term, *Holder v. Humanitarian Law Pro-*

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<sup>12</sup> *Id.* at 1634 (Kennedy, J., dissenting).

<sup>13</sup> *See id.* at 1625 (Breyer, J., concurring).

<sup>14</sup> *Id.*

<sup>15</sup> *Jerman*, 130 S. Ct. at 1635 (Kennedy, J., dissenting) ("[Justice Breyer's] argument misconceives the practical realities of litigation. Filings and motions are made under pressing time constraints; arguments must be offered quickly in reply; and strategic decisions must be taken in the face of incomplete information. Lawyers in practice would not consider this alternative at all realistic, particularly where the defense is needed most.").

*ject*<sup>16</sup> was the first post-September 11th case to address First Amendment rights in the context of national security. At issue in *Holder* was the Antiterrorism and Effective Death Penalty Act of 1996,<sup>17</sup> which prohibits providing “material support or resources” to foreign organizations designated as terrorist organizations.<sup>18</sup> According to the statute, “material support” includes financial services, training, and expert advice or assistance.<sup>19</sup> But does the statute apply to attorneys who are looking to support the legal, non-violent work of these organizations?

Ralph Fertig, one of the named plaintiffs in the case, spent his early years participating in the civil rights movement.<sup>20</sup> Fifty years later, as president of the Humanitarian Law Project, he wanted to advocate for what he perceived to be another oppressed minority, the Kurds in Turkey. More specifically, the Humanitarian Law Project wanted to support the Kurdistan Workers’ Party (“PKK”)<sup>21</sup> by training members of the organization to use humanitarian and international law to resolve disputes.<sup>22</sup> The proposed support would also include teaching PKK members how to petition bodies, like the United Nations, for relief.<sup>23</sup> The Court ruled against Humanitarian Law Project, six-to-three,<sup>24</sup> rejecting Fertig’s argument that the application of the material support statute to those activities violates the First

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<sup>16</sup> 130 S. Ct. 2705 (2010).

<sup>17</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.A.).

<sup>18</sup> *Holder*, 130 S. Ct. at 2712-13 (quoting 18 U.S.C.A. § 2339B(a)(1) (West 2010)).

<sup>19</sup> 18 U.S.C.A. § 2339A(b)(1) (West 2010) (defining the term “material support or resources”).

<sup>20</sup> *Holder*, 130 S. Ct. at 2714. Fertig is a seventy-nine-year-old lawyer, a retired federal administrative law judge, a professor at the University of Southern California, and the President of a human rights organization called the Humanitarian Law Project. See Adam Liptak, *Right to Free Speech Collides with Fight Against Terror*, N.Y. TIMES, Feb. 10, 2010, at A18. In his earlier days, he participated in the civil rights movement, joined the Freedom Rides, and was arrested and beaten in a Selma, Alabama jail. See *id.*

<sup>21</sup> The PKK was one of thirty groups designated by the Secretary of State as a foreign terrorist organization. See Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650-01 (Oct. 8, 1997).

<sup>22</sup> *Holder*, 130 S. Ct. at 2716.

<sup>23</sup> *Id.* (noting that plaintiffs challenged the statute’s validity on the basis that it prohibited them from engaging in certain specified activities, including training PKK members to use international law to resolve disputes peacefully; teaching PKK members to petition the United Nations and other representative bodies for relief).

<sup>24</sup> See *id.* at 2712.

Amendment.<sup>25</sup> Fertig risks fifteen years in prison if he engages in the activities that he proposed.<sup>26</sup>

This decision will profoundly affect lawyers involved in this type of work. Some have said it puts international peace organizations “in a very odd situation.”<sup>27</sup> Former President Jimmy Carter said the ruling “inhibits the work of human rights and conflict resolution groups” whose work requires them to “interact directly with groups that have engaged in violence.”<sup>28</sup> In fact, some have speculated that lawyers, including President Carter, could be prosecuted for training parties like Hezbollah or Hamas in Lebanon or Gaza in fair election practices.<sup>29</sup> Others have said that organizations like Catholic Relief Services could be prosecuted for conducting programs that “teach terrorist organizations how to demobilize their weapons, enter into an electoral process, or engage antagonistic religious groups in discussion.”<sup>30</sup>

Is filing an amicus brief on behalf of a terrorist organization a violation of the statute that can subject a lawyer to criminal prosecution? At oral argument, former Solicitor General Elena Kagan argued that doing so would violate the statute.<sup>31</sup> Whether she is right is unclear from reading the decision, but it would likely be covered by the Act, at least if it was coordinated in some way with the organization. The Act would certainly be violated if an amicus brief was filed

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<sup>25</sup> See *id.* at 2725-26, 2730-31 (recognizing Congress’s national security concerns in passing the statute and holding that the statute does not violate freedom of speech and freedom of association).

<sup>26</sup> *Id.* at 2713 n.1. After the decision was announced, Fertig said that his organization will “continue its peaceful advocacy work, ‘but [it] do[es] so with great fear.’” Tony Mauro, *‘Material Support’ Ruling May Break 1st Amendment Ground*, THE FIRST AMENDMENT CTR. (June 22, 2010), <http://www.firstamendmentcenter.org/analysis.aspx?id=23079>.

<sup>27</sup> George A. Lopez, a professor at the University of Notre Dame’s Krok Institute for International Peace Studies, said: “‘We’re allowed to work with the Colombian bishops, but we’re not allowed to work with them in the same room when they are working’ (with groups on the terrorist list).” Adeshina Emmanuel, *Supreme Court Ruling Could Obstruct Peace Work*, AMERICANCATHOLIC.ORG (July 20, 2010), <http://www.americancatholic.org/news/report.aspx?id=2867>.

<sup>28</sup> *Supreme Court Rules “Material Support” Law Can Stand*, ACLU (June 21, 2010), <http://www.aclu.org/national-security/supreme-court-rules-material-support-law-can-stand>.

<sup>29</sup> See, e.g., Mauro, *supra* note 26 (speculating that former President Carter could be prosecuted for meeting with Hamas and Hezbollah to encourage fair elections).

<sup>30</sup> See *Current Comment*, AMERICA, July 19, 2010, available at [http://www.americamagazine.org/content/article.cfm?article\\_id=12387](http://www.americamagazine.org/content/article.cfm?article_id=12387).

<sup>31</sup> *Holder*, 130 S. Ct. at 2719 (noting the Government’s statement that the statute “would bar filing an amicus brief in support of a foreign terrorist organization”).

at the direction of the organization.

Although the Court took pains to distinguish providing material support, which is prohibited by the Act, from what it called “independent advocacy,” which is not, the dividing line remains unclear.<sup>32</sup>

### B. *Milavetz, Gallop & Milavetz, P.A. v. United States*

*Milavetz, Gallop & Milavetz, P.A. v. United States*<sup>33</sup> challenged two provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act<sup>34</sup> as applied to lawyers.<sup>35</sup> The threshold issue for the Court was whether the Act applied to lawyers.<sup>36</sup> This question was dependent on whether lawyers constitute “debt relief agencies.”<sup>37</sup> Justice Sotomayor, writing for a unanimous court, had little difficulty concluding that attorneys do qualify as “debt relief agencies” based on a plain reading of the text.<sup>38</sup>

This conclusion leads to the two First Amendment issues in the case. The first was whether a provision of the Act, 11 U.S.C. § 526, which prohibits attorneys from advising clients to incur more debt, violates the First Amendment.<sup>39</sup> The answer depends on how narrowly or broadly the statute is interpreted. The Court upheld the provision by adopting a narrow reading, construing the statute to prohibit only advice to a debtor to incur more debt, because the debtor is filing for bankruptcy rather than for another valid purpose.<sup>40</sup> In other words, the statute precludes advising a debtor to load up on debt because the debt would be discharged in bankruptcy, but it does not prohibit other advice. For example, an attorney can advise a debtor to “refinance a mortgage or purchase a reliable car prior to filing because doing so will reduce the debtor’s interest rates or improve [the

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<sup>32</sup> *Id.* at 2721-22.

<sup>33</sup> 130 S. Ct. 1324 (2010).

<sup>34</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11, 12, 18 and 28 U.S.C.A.).

<sup>35</sup> *Milavetz*, 130 S. Ct. at 1330-31.

<sup>36</sup> *Id.* at 1331 (stating that certiorari was granted to determine the scope of the statute).

<sup>37</sup> *Id.* (“We first consider whether the term ‘debt relief agency’ includes attorneys.”).

<sup>38</sup> *Id.* at 1333.

<sup>39</sup> *Id.* at 1329.

<sup>40</sup> *Milavetz*, 130 S. Ct. at 1336 (concluding that advising a client to “load up” on debt is prohibited “conduct that is abusive per se”).

client's] ability to repay.”<sup>41</sup> That advice is not prohibited by the Act because “the promise of enhanced financial prospects, rather than the anticipated filing, is the impelling cause.”<sup>42</sup> Other permissible advice includes advising the debtor “to incur additional debt to buy groceries, pay medical bills, or make other purchases ‘reasonably necessary for [his or her] support or maintenance.’”<sup>43</sup>

Also, the prohibition does not prevent a lawyer from *discussing* the issue of incurring more debt with his or her client.<sup>44</sup> This, the Court concludes, is consistent with ABA Model Rule of Professional Conduct 1.2, which distinguishes between lawyers counseling a client to engage in criminal or fraudulent conduct and simply discussing the legal consequences of engaging in a particular act.<sup>45</sup>

The second provision of the Act that was challenged was the disclosure requirement.<sup>46</sup> Section 528 requires attorney advertisements to state that the advertiser is a debt relief agency and that the services being offered may include bankruptcy.<sup>47</sup> Whether or not that disclosure requirement is constitutional depends on how the speech is characterized. Normally, restrictions on commercial speech are evaluated pursuant to an intermediate scrutiny test.<sup>48</sup> But that test only applies if the regulated speech is not misleading and does not advocate unlawful conduct.<sup>49</sup> Here, the Court concluded that because the statute is directed at misleading speech, and because it is a disclosure requirement rather than a limitation on speech, the governing

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<sup>41</sup> *Id.* at 1339 n.6.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* (quoting 11 U.S.C.A. § 523(a)(2)(C)(ii)(II) (West 2010)).

<sup>44</sup> *Id.* at 1338.

<sup>45</sup> *Milavetz*, 130 S. Ct. at 1338. “Against this backdrop, it is hard to see how a rule that narrowly prohibits an attorney from affirmatively advising a client to commit this type of abusive prefiling conduct could chill attorney speech or inhibit the attorney-client relationship.” *Id.*

<sup>46</sup> *Id.* at 1339.

<sup>47</sup> 11 U.S.C.A. § 528 (West 2010). Subsection (b) governs “advertisement[s] of bankruptcy assistance services.” *Id.*

<sup>48</sup> *See, e.g., Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) (stating that “[the Court] engages in ‘intermediate’ scrutiny of restrictions on commercial speech”); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980) (stating that restrictions on non-misleading commercial speech regarding lawful activity must “directly advanc[e] a substantial governmental interest and be ‘n[o] more extensive than is necessary to serve that interest’”).

<sup>49</sup> *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566 n.9.



test is mere rational basis review.<sup>50</sup>

The Court analogized the issue to that in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,<sup>51</sup> where the Court upheld a professional responsibility rule that requires lawyers who advertise contingency fee services to disclose that a losing client could be responsible for litigation costs and fees.<sup>52</sup> Using parallel rationale, the Court reasoned in *Milavetz* that the disclosure requirements were simply aimed at combating inherently misleading commercial advertisements.<sup>53</sup> Applying the rational basis test, the Court easily concluded that the challenged disclosure requirements were reasonably related to the government's interest in preventing deception of consumers.<sup>54</sup>

Interestingly, Justice Scalia wrote separately to voice his disagreement with footnote three of the majority opinion, which cited to legislative history consisting of a report of the House Committee on the Judiciary.<sup>55</sup> The report was cited to support the majority's conclusion that the Act's purpose was to address abusive practices of lawyers and other bankruptcy professionals.<sup>56</sup> Justice Scalia refused to indulge "the extravagant assumption that Members of the House other than members of its Committee on the Judiciary read the Report (and the further extravagant assumption that they agreed with it.)"<sup>57</sup> And as for the President, he "surely had more important things to

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<sup>50</sup> *Milavetz*, 130 S. Ct. at 1339-40 (stating that "[u]njustified or unduly burdensome disclosure requirements offend the First Amendment by chilling protected speech, but 'an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers' " (emphasis added) (quoting *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985))).

<sup>51</sup> 471 U.S. 626.

<sup>52</sup> *Id.* at 651.

<sup>53</sup> *Milavetz*, 130 S. Ct. at 1344.

<sup>54</sup> *Id.* at 1341. The Court also distinguished the case from *In re R.M.J.* See *id.* at 1344. That case concerned ethical rules prohibiting lawyers from advertising their practice areas in any other terms than those prescribed by the state supreme court and from advertising the courts in which they were admitted to practice. *In re R.M.J.*, 455 U.S. 191, 193 (1982). Intermediate scrutiny was applied to strike down the rules at issue in *In re R.M.J.* because the restricted statements were not inherently misleading. See *id.* at 205-06.

<sup>55</sup> *Milavetz*, 130 S. Ct. at 1332 n.3.

<sup>56</sup> *Id.* ("Statements in a Report of the House Committee on the Judiciary regarding the Act's purpose indicate concern with abusive practices undertaken by attorneys as well as other bankruptcy professionals.").

<sup>57</sup> *Id.* at 1342 (Scalia, J., concurring).

do.”<sup>58</sup> Justice Scalia chastised the Court for relying on legislative history to support a completely unambiguous statute, a practice he feared conscientious lawyers may mimic and repeat.<sup>59</sup>

Justice Thomas also wrote separately to express his view that the test for evaluating commercial speech should not turn on whether the regulation compels speech or restricts speech.<sup>60</sup> Thus, Justice Thomas calls for a reexamination of *Zauderer* to determine whether it provides sufficient protection against government mandated disclosures of commercial speech.<sup>61</sup>

The Second Circuit decided a similar case several months after *Milavetz*. In *Connecticut Bar Association v. United States*,<sup>62</sup> the Second Circuit held that attorneys are subject to other disclosure requirements contained in the Bankruptcy Abuse Prevention and Consumer Protection Act, in addition to those upheld in *Milavetz*.<sup>63</sup> The additional disclosure requirements mandate that attorneys provide certain notices and disclosures about bankruptcy<sup>64</sup> and require a written contract that clearly explains the services the attorney would provide, as well as the fees.<sup>65</sup>

#### IV. ATTORNEY’S FEES CASES

There were three pertinent attorney’s fees cases this past Term, each arising under a different fee-shifting statute: the Equal Access to Justice Act (“EAJA”), the Employee Retirement Security Act (“ERISA”), and the Civil Rights Attorney’s Fees Award Act.<sup>66</sup> This discussion focuses on the cases concerning the first two statutes,

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* (“Our cases have said that legislative history is irrelevant when the statutory text is clear. . . . [footnote three] advises conscientious attorneys that this is not true, and that they must spend time and their clients’ treasure combing the annals of legislative history in *all* cases . . .”).

<sup>60</sup> *Milavetz*, 130 S. Ct. at 1343 (Thomas, J., concurring).

<sup>61</sup> *Id.* (“Accordingly, I would be willing to reexamine *Zauderer* and its progeny in an appropriate case to determine whether these precedents provide sufficient First Amendment protection against government-mandated disclosures.”).

<sup>62</sup> 620 F.3d 81 (2d Cir. 2010).

<sup>63</sup> *Id.* at 95-96.

<sup>64</sup> *Id.* at 96.

<sup>65</sup> *Id.* at 100.

<sup>66</sup> See 28 U.S.C.A. § 2412(d) (West 2010); 29 U.S.C.A. § 1132(g)(1) (West 2010); 42 U.S.C.A. § 1988 (West 2010).

but *Perdue v. Kenny A. ex rel. Winn*,<sup>67</sup> which concerns 42 U.S.C. § 1988, is discussed elsewhere.

### A. *Astrue v. Ratliff*

In *Astrue v. Ratliff*,<sup>68</sup> the Court considered whether the fees awarded under EAJA are payable to the party-litigant or to the attorney.<sup>69</sup> This is significant because if the fees are payable to the party, then a pre-existing debt that the party owes to the government can be offset against the fee award. Unfortunately for lawyers, the statute clearly states that the fees are payable to the party, and that is what a unanimous Supreme Court concluded.<sup>70</sup>

Justice Sotomayor, joined by Justices Stevens and Ginsburg, authored a concurring opinion.<sup>71</sup> They wrote separately to point out that offsetting the fee against pre-existing debts of the party undercuts the effectiveness of EAJA.<sup>72</sup> The purpose of this fee-shifting statute is to enable individuals who have been wronged by the government to find a lawyer to challenge unreasonable governmental conduct.<sup>73</sup> It is designed, as its name suggests, to enhance access to justice by providing a mechanism for people of limited means to find a lawyer.<sup>74</sup> While the concurring justices agreed with the majority's textual analysis,<sup>75</sup> their concurrence is an explicit invitation to Congress to reconsider applying the offset rules to EAJA fee awards.

But until Congress accepts that invitation, those most likely to be affected by this decision are lawyers who represent clients in so-

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<sup>67</sup> 130 S. Ct. 1662 (2010).

<sup>68</sup> 130 S. Ct. 2521 (2010).

<sup>69</sup> *Id.* at 2524 (“We consider whether an award of ‘fees and other expenses’ to a ‘prevailing party’ under § 2412(d) is payable to the litigant or to his attorney.”).

<sup>70</sup> *Id.* (“We hold that a § 2412(d) fees award is payable to the litigants and is therefore subject to a Government offset to satisfy a pre-existing debt that the litigant owes the United States.”). In this case, the attorney attempted to avoid this result by relying on the government’s longstanding practice of paying EAJA awards directly to the lawyer of a case. *See id.* at 2524-25. However, that practice existed prior to 2005, at which time the Treasury Department decided that fees awarded under the EAJA are payable to the client, and subject to offset if the client owes money to the government. *See id.* Since then, the government only makes direct payment of fees to attorneys after checking that the party does not have any outstanding debts to the government. *Astrue*, 130 S. Ct. at 2524-25.

<sup>71</sup> *See id.* at 2529-33 (Sotomayor, J., concurring).

<sup>72</sup> *Id.* at 2530 (opining that “such offsets undercut the effectiveness of the EAJA”).

<sup>73</sup> *Id.*

<sup>74</sup> *See id.* at 2531.

<sup>75</sup> *Astrue*, 130 S. Ct. at 2533 (Sotomayor, J., concurring).

cial security cases and veterans cases—including law school clinics, which often engage in this representation. Twelve thousand civil actions are filed each year to challenge denials of social security benefits, a figure that represents five percent of all civil filings in federal court.<sup>76</sup> That figure does not include the number of veterans cases filed each year. Clients who have been denied social security or veterans benefits are often unable to afford private counsel, and the amount of money at issue is often too small for a contingency fee arrangement. The EAJA enables these individuals to find lawyers to challenge the government's determination. *Astrue* will remove the incentive for lawyers to take these cases because, even if successful, the fee may be completely swallowed up by the offset. The attorney representing Ratliff observed that “these cases generally are handled by solo practitioners, and ‘far from getting rich handling them, the awards barely pay overhead, considering that EAJA rates are capped at what are typically below market rates.’”<sup>77</sup>

Section 1988 uses comparable language to EAJA.<sup>78</sup> If this result is applied to § 1988, it will significantly undercut the concept of the Civil Rights Attorney's Fees Award Act, which is intended to enable private lawyers to act as private attorney generals and make possible the vindication of important federal rights.<sup>79</sup>

Another important aspect of this case relates to how often the government is wrong in social security and veterans cases. At oral argument, the Court learned that the government's position was found to be unjustified in seventy percent of veterans appeals and forty-two percent of social security appeals.<sup>80</sup> These statistics led Chief Justice Roberts to remark, “Well, that's really startling, isn't it? In litigating with veterans, the government more often than not takes a position that is substantially unjustified?”<sup>81</sup> Chief Justice Roberts was right to be startled. But, perversely, by permitting the offset

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<sup>76</sup> Brief for National Organization of Social Security Claimants' Representatives et al. as Amici Curiae Supporting Respondent at 22, *Astrue*, 130 S. Ct. 2521 (No. 08-1322), 2010 WL 197356.

<sup>77</sup> Marcia Coyle, *High Court Lets Government Take Fee Awards for Clients' Debts*, NAT'L L.J., June 14, 2010, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202462695027&slreturn=1&hblogin=1>.

<sup>78</sup> Compare 28 U.S.C.A. § 2412(d), with 42 U.S.C.A. § 1988(b).

<sup>79</sup> See 42 U.S.C.A. § 1988(a).

<sup>80</sup> Transcript of Oral Argument at 42, *Astrue*, 130 S. Ct. 2521 (No. 08-1322), 2010 WL 603696.

<sup>81</sup> *Id.* at 52.

rules to be applied to EAJA fees, the *Astrue* decision makes it harder to challenge these erroneous and substantially unjustified determinations.

### B. *Hardt v. Reliance Standard Life Insurance Company*

*Hardt v. Reliance Standard Life Insurance Co.*<sup>82</sup> answered the question of whether the fees in an ERISA action are only payable to a prevailing party.<sup>83</sup> Justice Thomas, writing for a unanimous court, rejected the view that only prevailing parties are eligible for fees, and instead held that a court has the discretion to award fees “as long as the fee claimant has achieved ‘some degree of success of the merits.’”<sup>84</sup> While this “case may not captivate the media and public[,] . . . plaintiffs file about 10,000 lawsuits for ERISA benefits annually and they are expensive cases to litigate,” thus, the decision has tremendous significance.<sup>85</sup>

Bridget Hardt worked for a textile manufacturer and applied for disability benefits when she developed carpal tunnel syndrome.<sup>86</sup> Reliance, the insurance company, administered the employer’s long-term disability plan.<sup>87</sup> Reliance initially denied Ms. Hardt’s claim,<sup>88</sup> but subsequently reversed itself and awarded temporary disability benefits for twenty-four months.<sup>89</sup> Meanwhile, Ms. Hardt developed new symptoms and was diagnosed with small-fiber neuropathy.<sup>90</sup> She applied for and received social security disability benefits,<sup>91</sup> but Ms. Hardt was unable to convince Reliance that she was totally disabled and entitled to long-term disability benefits. She sued Reliance under ERISA.<sup>92</sup>

Both parties moved for summary judgment, and both motions

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<sup>82</sup> 130 S. Ct. 2149 (2010).

<sup>83</sup> *Id.* at 2152 (analyzing 29 U.S.C.A. § 1132(g)(1), which governs fee-shifting in an ERISA action).

<sup>84</sup> *Id.* (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983)).

<sup>85</sup> Marcia Coyle, *High Court Faces Blockbuster Cases as Stevens’ Retirement Nears*, NAT’L L.J., Apr. 26, 2010, available at <http://www.law.com/jsp/article.jsp?id=1202453173828>.

<sup>86</sup> *Hardt*, 130 S. Ct. at 2152.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 2153.

<sup>91</sup> *Hardt*, 130 S. Ct. at 2153.

<sup>92</sup> *Id.*

were denied by the district court.<sup>93</sup> But, notably, the district court found “ ‘compelling evidence’ . . . that ‘Ms. Hardt [wa]s totally disabled due to her neuropathy.’ ”<sup>94</sup> The district court “was ‘inclined to rule in Ms. Hardt’s favor,’ ” but chose to give Reliance the opportunity “ ‘to address the deficiencies in its approach.’ ”<sup>95</sup> The district court believed a remand was appropriate because “ ‘[t]his case presents one of those scenarios where the plan administrator has failed to comply with the ERISA guidelines,’ meaning ‘Ms. Hardt did not get the kind of review to which she was entitled under applicable law.’ ”<sup>96</sup> Therefore, the court instructed Reliance to act on Ms. Hardt’s application within thirty days, “[o]therwise . . . judgment [would] be issued in favor of Ms. Hardt.”<sup>97</sup> Reliance did as instructed and determined Ms. Hardt was eligible for long-term disability benefits.<sup>98</sup>

Ms. Hardt then sought and obtained attorney’s fees, but the Fourth Circuit reversed the fee award because Ms. Hardt was not a prevailing party.<sup>99</sup> In reaching that result, the Fourth Circuit relied on the Supreme Court’s definition of prevailing party, “under which a fee claimant qualifies as a ‘prevailing party’ only if he has obtained an ‘enforceable judgment[t] on the merits’ or a ‘court-ordered consent decre[e].’ ”<sup>100</sup> The Fourth Circuit held that the district court’s remand order did not qualify as an enforceable judgment on the merits because it “ ‘did not require Reliance to award benefits . . . .’ ”<sup>101</sup> Therefore, Ms. Hardt was not a prevailing party and was not eligible for fees.<sup>102</sup>

The Supreme Court reversed, finding that unlike so many other fee-shifting statutes, the ERISA provision does not utilize the term “prevailing party,” and it is therefore error to restrict fees to those

<sup>93</sup> *Id.* at 2154 (“The parties filed cross-motions for summary judgment, both of which the [d]istrict [c]ourt denied.”).

<sup>94</sup> *Id.* (alteration in original).

<sup>95</sup> *Id.* (citations omitted).

<sup>96</sup> *Hardt*, 130 S. Ct. at 2154 (alteration in original).

<sup>97</sup> *Id.* (first alteration in original) (internal quotation marks omitted).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 2155 (noting that the “[d]istrict [c]ourt granted Hardt’s motion . . . . and the [c]ourt of [a]ppeals vacated the [d]istrict [c]ourt’s order . . . . [because Ms. Hardt] failed to establish that she was a ‘prevailing party’ ”).

<sup>100</sup> *Id.* (alteration in original) (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 604 (2001)).

<sup>101</sup> *Hardt*, 130 S. Ct. at 2155.

<sup>102</sup> *Id.*

who would qualify only as prevailing parties.<sup>103</sup>

The Court then attempted to determine under what circumstances a party is entitled to fees.<sup>104</sup> In answering that question, the Court rejected the five-factor test used by the district court and many circuit courts.<sup>105</sup> Instead, the Supreme Court relied on cases that interpreted other fee-shifting statutes, such as ERISA, that are not limited to prevailing parties.<sup>106</sup> The standard adopted by the Court required that the plaintiff “show ‘some degree of success on the merits’ before a court may award attorney’s fees.”<sup>107</sup> This standard, however, cannot be met if the claimant only received some “‘trivial success on the merits’ or a ‘purely procedural victor[y].’”<sup>108</sup> The claimant does satisfy the standard “if the court can fairly call the outcome of the litigation some success on the merits without conducting a ‘lengthy inquir[y] into the question whether a particular party’s success was ‘substantial’ or occurred on a ‘central issue.’”<sup>109</sup>

In applying that standard to the facts here, the Court concluded that the plaintiff was entitled to fees.<sup>110</sup> After all, the plaintiff persuaded the district court that Reliance had failed to comply with

<sup>103</sup> *Id.* The Court elaborated:

Because Congress failed to include in § 1132(g)(1) an express ‘prevailing party’ limit on the availability of attorney’s fees, the Court of Appeals’ decision adding that term of art to a fee-shifting statute from which it is conspicuously absent more closely resembles ‘invent[ing] a statute rather than interpret[ing] one.’

*Id.* (alteration in original) (quoting *Pasquantino v. United States*, 544 U.S. 349, 359 (2005)).

<sup>104</sup> *Id.* at 2156.

<sup>105</sup> *Hardt*, 130 S. Ct. at 2158. These five factors used by several district courts included:

“(1) the degree of opposing parties’ culpability or bad faith; (2) ability of opposing parties to satisfy an award of attorneys’ fees; (3) whether an award of attorneys’ fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys’ fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties’ positions.”

*Id.* at 2154 n.1 (quoting *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1029 (4th Cir. 1993)). The Court, however, found that the five factors bore “no obvious relation” to the text of the statute and were therefore “not required for channeling a court’s discretion when awarding fees under this section.” *Id.* at 2158.

<sup>106</sup> *Id.* at 2157. The Court chose to rely upon *Ruckelshaus* in interpreting the meaning of § 1132(g)(1). *Id.*

<sup>107</sup> *Hardt*, 130 S. Ct. at 2158 (quoting *Ruckelshaus*, 463 U.S. at 694).

<sup>108</sup> *Id.* (alteration in original) (quoting *Ruckelshaus*, 463 U.S. at 688 n.9).

<sup>109</sup> *Id.* (alteration in original) (quoting *Ruckelshaus*, 463 U.S. at 688 n.9).

<sup>110</sup> *Id.* at 2159.

ERISA. Although the district court did not grant her motion for summary judgment, it nevertheless found compelling evidence that she was totally disabled and stated that it was inclined to rule in her favor,<sup>111</sup> but would give Reliance another opportunity to get it right. This clearly amounted to success on the merits entitling her to attorney's fees.<sup>112</sup>

This decision unquestionably makes it easier to obtain attorney's fees—at least in the First, Fourth, Seventh, and Tenth Circuits, which have all required prevailing party status.<sup>113</sup> Making it easier to obtain attorney's fees is consistent with the twin goals of the ERISA fee shifting statute—discouraging frivolous claim denials and enabling claimants to secure legal representation, even when their claims are small.<sup>114</sup>

The decision, however, leaves open several questions, including: (1) whether a remand order without more constitutes some success on the merits; (2) what actually constitutes “some degree of success on the merits”; and (3) under what circumstances can the five-part test actually be used? The Court maintained that the five-part test is not required because it “bear[s] no obvious relation to [the statutory] text or to [the Court’s] fee-shifting jurisprudence.”<sup>115</sup> But, in a pesky footnote, the Court said: “We do not foreclose the possibility that once a claimant has satisfied this requirement [of some degree of success on the merits], and thus becomes eligible for a fees award . . . a court *may* consider the five factors . . . in deciding whether to award attorney’s fees.”<sup>116</sup> This statement muddies the waters. The five-factor test is not required, yet the possibility remains that a court *can* use the test in exercising its discretion to award fees under the Act. It is fairly certain that there is going to be more litigation regarding this issue. Many commentators have expressed concern that “after a sig-

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<sup>111</sup> *Hardt v. Reliance Standard Ins. Co.*, 540 F. Supp. 2d 656, 664 (E.D. Va. 2008).

<sup>112</sup> *See id.*

<sup>113</sup> *See, e.g., Tate v. Long Term Disability Plan for Salaried Emps. of Champion Int’l Corp.*, 545 F.3d 555, 564 (7th Cir. 2008); *Graham v. Hartford Life & Accident Ins. Co.*, 501 F.3d 1153, 1162 (10th Cir. 2007); *Martin v. Blue Cross & Blue Shield of Va., Inc.*, 115 F.3d 1201, 1210 (4th Cir. 1997); *Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220, 226 (1st Cir. 1996).

<sup>114</sup> The fee award in *Hardt* (\$58,920) was larger than the benefits awarded (\$55,250). Marcia Coyle, *High Court Smooths Path to Plaintiff Fees in Disability Cases*, LAW.COM (May 25, 2010), <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202458721510>.

<sup>115</sup> *Hardt*, 130 S. Ct. at 2158.

<sup>116</sup> *Id.* at 2158 n.8 (emphasis added).



nificant battle over benefits, the new rule may result in a second round of litigation over attorney's fees."<sup>117</sup>

## V. CASES INVOLVING ISSUES OF TIMING

### A. *Mohawk v. Carpenter*

The first case in this category was *Mohawk Industries, Inc. v. Carpenter*,<sup>118</sup> a case that provided the occasion for Justice Sotomayor's first decision—and a unanimous one.<sup>119</sup> The question before the Court was whether a disclosure order adverse to the attorney-client privilege is immediately appealable.<sup>120</sup> The Court's answer was a resounding no.<sup>121</sup>

Norman Carpenter worked at a carpet mill and supervised approximately one hundred carpet factory workers.<sup>122</sup> His path to the Supreme Court began after he sent a series of e-mails to the company's human resources department complaining that Mohawk, his employer, was hiring "undocumented immigrants."<sup>123</sup> Unbeknownst to Carpenter, Mohawk was already the defendant in a racketeering class action alleging that Mohawk knowingly hired undocumented workers in order to drive down the wages of its legal employees.<sup>124</sup> Carpenter was then summoned to speak with Mohawk's RICO lawyer.<sup>125</sup> Carpenter alleged that during this conversation, he was pressured to re-

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<sup>117</sup> See, e.g., Andrew O. Bunn & Stephanie J. Cohen, *New Fee-Shifting Regime Under ERISA in Wake of "Hardt,"* N.Y. L.J., July 22, 2010 (stating that there is a likely result of "a second round of litigation over attorney's fees" because the some degree of success "standard is ambiguous and will require additional litigation to specify the point at which the degree of success is so insignificant that an award of attorney's fees would be an abuse of discretion").

<sup>118</sup> 130 S. Ct. 599 (2009).

<sup>119</sup> See *id.* at 602.

<sup>120</sup> *Id.* at 603.

<sup>121</sup> See *id.* at 609 (holding that "the collateral order doctrine does not extend to disclosure orders adverse to the attorney-client privilege" because "[e]ffective appellate review can be had by other means").

<sup>122</sup> *Id.* at 603.

<sup>123</sup> *Mohawk*, 130 S. Ct. at 603. Justice Sotomayor's use of the term "undocumented immigrants," as opposed to "illegal aliens," prompted considerable attention from the press due to the fact that this was the first time that the term appeared in a Supreme Court decision. See, e.g., Adam Liptak, *Sotomayor Draws Retort From a Fellow Justice*, N.Y. TIMES, Dec. 9, 2009, at A24.

<sup>124</sup> *Mohawk*, 130 S. Ct. at 603. See also *Williams v. Mohawk Indus., Inc.*, 314 F. Supp. 2d 1333 (N.D. Ga. 2004).

<sup>125</sup> *Mohawk*, 130 S. Ct. at 603.

tract his charge, and as a result of his refusal to retract, he was fired.<sup>126</sup> Carpenter then sued Mohawk, claiming that his firing was unlawful under both state and federal law.<sup>127</sup>

In discovery, Carpenter sought information about his firing, including information regarding his interview with Mohawk's counsel.<sup>128</sup> Mohawk resisted, claiming that this information was protected under the attorney-client privilege.<sup>129</sup> The district court agreed but found that the privilege had been waived when Mohawk revealed certain information in the RICO litigation.<sup>130</sup> Mohawk appealed to the Eleventh Circuit, which dismissed the appeal, holding that discovery orders relating to attorney-client privilege are not collateral orders subject to immediate appeal.<sup>131</sup>

One interesting aspect of this case is the way different constituencies lined up before the Supreme Court. The groups supporting immediate appealability were business interests and the American Bar Association.<sup>132</sup> These groups argued that district court judges often decide privilege questions improperly and maintained that once privileged material is produced in discovery, the consequences can never be undone.<sup>133</sup> Indeed, Mohawk's attorney stated that waiting until final judgment to appeal the discovery order would, in effect, make the appeal unreviewable because there is " 'no way to unscramble the egg scrambled by the disclosure.' " <sup>134</sup>

The opposing briefs included one from former federal judges and a group of law professors.<sup>135</sup> This group argued that permitting

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 604.

<sup>129</sup> *Id.*

<sup>130</sup> *Mohawk*, 130 S. Ct. at 604.

<sup>131</sup> *Id.*

<sup>132</sup> See Brief for American Bar Association as Amicus Curiae Supporting Petitioner, *Mohawk*, 130 S. Ct. 599 (No. 08-678), 2009 WL 1245114; Brief for The Voice of the Defense Bar as Amicus Curiae in Support of Petitioner, *Mohawk*, 130 S. Ct. 599 (No. 08-678), 2009 WL 1206221; Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner, *Mohawk*, 130 S. Ct. 599 (No. 08-678), 2009 WL 1263621.

<sup>133</sup> See Brief for American Bar Association, *supra* note 132, at 20 (maintaining that judges have profound differences of opinion on this subject and thus, "questions of waiver must be answered correctly if the privilege is to retain its vitality").

<sup>134</sup> Brief for Petitioner at 25, *Mohawk*, 130 S. Ct. 599 (No. 08-678), 2009 WL 1155404 (quoting *In re Ford*, 110 F.3d 954, 963 (3d Cir. 1997)).

<sup>135</sup> Former United States Court of Appeals Judge Kenneth Starr and Dean and Professor of Law Erwin Chemerinsky submitted an opposing brief. See Brief for Former Article III

interlocutory appeals would undermine the ability of district court judges to control discovery and would also overwhelm already overburdened circuit courts.<sup>136</sup> While then Solicitor General Kagan argued against immediate appeals of adverse attorney-client rulings, she took pains to distinguish certain governmental privileges, such as the presidential communications privilege and the state's secrets privilege.<sup>137</sup> These privileges, she asserted, are so fundamental to the operation of government as to require immediate appeal.<sup>138</sup>

At oral argument, Mohawk's attorney, Randall L. Allen, Esq., emphasized the importance of the attorney-client privilege, characterizing it as a "central element of the administration of justice."<sup>139</sup> This argument, however, was met with considerable skepticism from the Court.<sup>140</sup> Justice Scalia said: "Mr. Allen, except for the fact that you and I are lawyers, do you really think that the . . . confidentiality right is any more important to the proper functioning of society than, let's say, the protection of trade secrets[,] such as a judge ordering the release of the formula for Coca-Cola?"<sup>141</sup> On the other hand, Chief Justice Roberts pointed to the brief submitted by the American Bar Association, which he characterized as a representation of "how the people affected . . . , the lawyers, view the value of the privilege and what will happen to it."<sup>142</sup> Professor Judith Resnick, arguing for Carpenter, replied by citing the brief submitted by lawyers, judges, and law professors.<sup>143</sup> Chief Justice Roberts dismissively replied: "Oh, but . . . the law professors aren't the ones who deal with this question on a day-to-day basis and have to worry about going to jail . . . ."<sup>144</sup>

Despite the disagreements reflected in the oral argument, the Court unanimously ruled against immediate appeals of adverse attor-

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Judges and Law Professors as Amici Curiae Supporting Respondent, *Mohawk*, 130 S. Ct. 599 (No. 08-678), 2009 WL 2040423.

<sup>136</sup> *Id.* at 3.

<sup>137</sup> Brief for the United States as Amicus Curiae Supporting Respondent at 7, *Mohawk*, 130 S. Ct. 599 (No. 08-678), 2009 WL 2028902.

<sup>138</sup> *See id.*

<sup>139</sup> Transcript of Oral Argument at 4, *Mohawk*, 130 S. Ct. 599 (No. 08-678), 2009 WL 3169419.

<sup>140</sup> *See id.* at 3-4.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 38-39.

<sup>143</sup> *Id.* at 39 (stating that judges and law professors "are committed to understanding that the privilege is important instrumentally").

<sup>144</sup> Transcript of Oral Argument, *supra* note 139, at 39.

ney-client privilege rulings.<sup>145</sup> In its reasoning, the Court emphasized the importance of keeping the number of collateral rulings that are immediately appealable small.<sup>146</sup> Justice Sotomayor stated that “[p]ermitting parties to undertake successive, piecemeal appeals of all adverse attorney-client rulings would unduly delay the resolution of district court litigation and needlessly burden the [c]ourts of [a]ppeals.”<sup>147</sup> She acknowledged the importance of the attorney-client privilege, but said the question does not turn on the importance of the interest in the abstract.<sup>148</sup> Rather, “[t]he crucial question . . . is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders.”<sup>149</sup>

Justice Sotomayor concluded that post-judgment appeals suffice to assure the vitality of the attorney-client privilege.<sup>150</sup> “Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.”<sup>151</sup> Other ways of securing appellate review also exist: a party can seek a discretionary appeal, petition the court of appeals for a writ of mandamus, or the party can simply defy the disclosure order and be held in contempt, which, if characterized as criminal punishment, would itself be directly appealable.<sup>152</sup>

Although the *New York Times* dubbed *Mohawk* a minor decision,<sup>153</sup> it is anything but minor as it relates to lawyering issues. Much has been written since the decision about the importance of thinking about the way in which internal investigations are conducted, what communications between counsel and company em-

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<sup>145</sup> *Mohawk*, 130 S. Ct. at 609.

<sup>146</sup> *Id.* at 605-06.

<sup>147</sup> *Id.* at 608.

<sup>148</sup> *Id.* at 606.

<sup>149</sup> *Id.*

<sup>150</sup> *Mohawk*, 130 S. Ct. at 607-08.

<sup>151</sup> *Id.* at 606-07.

<sup>152</sup> *Id.* at 607-08. This last option, incurring court-imposed sanctions by being held in contempt, prompted one critic of the decision to admonish lawyers litigating this issue to “carry a toothbrush” to court. Editorial, *Pack a Toothbrush*, 198 N.J. L.J. 974 (Dec. 21, 2009).

<sup>153</sup> Liptak, *supra* note 123, at A24 (noting that the only interesting aspect of *Mohawk* was Justice Sotomayor’s use of the term “undocumented immigrant”).

ployees will be privileged, and even when privileged, what will constitute a waiver.<sup>154</sup> One lawyer stated the decision could be viewed “as creating a new *Miranda* warning, but this time for . . . attorneys who conduct internal investigations and handle litigation: anything you write, say or learn in an interview could, and might, be revealed to your opposing counsel and be used against your client.”<sup>155</sup> Any appeal of an adverse ruling on the privilege will have to await final judgment.<sup>156</sup> But by then, can the toothpaste be squeezed back into the tube? One litigation specialist suggested that the decision is likely to lead to more settlements, at least where the information ordered disclosed amounts to something of a smoking gun.<sup>157</sup> If, for example, the information revealed that Carpenter was indeed fired for complaining about his employer hiring undocumented workers, the adverse ruling on the attorney-client privilege would likely motivate the employer to settle the case.<sup>158</sup>

Three days after *Mohawk* was decided, the Ninth Circuit considered whether *Mohawk* should be extended to a First Amendment privilege ruling. In *Perry v. Schwarzenegger*,<sup>159</sup> the case challenging California’s Proposition 8 barring gay marriage, the court assumed “without deciding that discovery orders denying claims of First Amendment privilege are not reviewable under the collateral doctrine.”<sup>160</sup> Instead, the court relied on mandamus jurisdiction to hear the case. This decision serves as a reminder that there are many open questions about whether *Mohawk* will preclude collateral appeals of other discovery rulings.

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<sup>154</sup> See, e.g., Checklists for Corporate Counsel, CKLCORPC § 10.1, Corporate internal investigations: A checklist for compliance (May 2010); Renee Newman Knake, *The Supreme Court’s Increased Attention to the Law of Lawyering: Mere Coincidence or Something More?*, 59 AM. U. L. REV. 1499 (2010).

<sup>155</sup> Marcia Coyle, *Supreme Court Rejects Early Appeals of Attorney-Client Privilege Determinations*, NAT’L L.J., Dec. 9, 2009, available at <http://www.law.com/jsp/article.jsp?id=1202436175573> (quoting Michael Lackey, Co-Chairman of Mayer Brown’s Electronic-Discovery and Records-Management Practice).

<sup>156</sup> *Id.*

<sup>157</sup> Neal R. Troum, *Mohawk Industries: A Pragmatic Decision*, THE LEGAL INTELLIGENCER (Mar. 9, 2010), available at 2010 WLNR 4911378.

<sup>158</sup> *Id.*

<sup>159</sup> 591 F.3d 1147 (9th Cir. 2010).

<sup>160</sup> *Id.* at 1152, 1156.

### B. *Lewis v. City of Chicago*

In order to properly analyze *Lewis v. City of Chicago*,<sup>161</sup> two earlier and extremely controversial cases must first be discussed: *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*<sup>162</sup> and *Ricci v. DeStefano*.<sup>163</sup>

In *Ledbetter*, the Court dismissed as untimely Lilly Ledbetter's claim that her employer violated Title VII<sup>164</sup> by paying her significantly less than its male employees.<sup>165</sup> The Court held that her claim was untimely because it was not brought promptly after the employer initially made the discriminatory pay decision.<sup>166</sup> The fact that Ledbetter had no conceivable way of knowing that she was being paid less than her male colleagues at the time did not seem to matter to the Court.<sup>167</sup> The Court refused to treat each discriminatory paycheck that she received as a present violation.<sup>168</sup> Instead, the Court maintained that each paycheck was merely the result of a past act of discrimination.<sup>169</sup> The Court said the current effects of prior discrimination have " 'no present legal consequences.' "<sup>170</sup>

The second case that requires referencing was the 2009, five-to-four decision, *Ricci*.<sup>171</sup> In *Ricci*, the Court ruled in favor of Cauca-

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<sup>161</sup> 130 S. Ct. 2191 (2010).

<sup>162</sup> 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, *as recognized in* *Darensburg v. Metro. Transp. Comm'n*, 611 F. Supp. 2d 994 (N.D. Cal. 2009).

<sup>163</sup> 129 S. Ct. 2658 (2009).

<sup>164</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2 (West 2010) (prohibiting employment discrimination on the basis of race, color, religion, gender, and national origin).

<sup>165</sup> *Ledbetter*, 550 U.S. at 621-22, 632.

<sup>166</sup> *Id.* at 632.

<sup>167</sup> *See id.* at 649-50 (Ginsburg, J., dissenting) (emphasizing that the plaintiff was unable to know of the pay disparities at the time of the pay decision because of their concealment).

<sup>168</sup> *Id.* at 637 (majority opinion).

<sup>169</sup> *Id.*

<sup>170</sup> *Ledbetter*, 550 U.S. at 628 (quoting *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977)) (stating that "current effects alone cannot breathe life into prior, uncharged discrimination"). This decision was highly controversial, so much so that it played a role in the 2008 presidential election. Lilly Ledbetter appeared onstage at the Democratic National Convention and appeared at Obama's side as he signed the Lilly Ledbetter Fair Pay Act of 2009 into law. *See* Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES, Jan. 30, 2009, available at 2009 WLNR 1783967. This Act legislatively overruled the *Ledbetter* decision and restored the paycheck accrual rule for pay discrimination claims. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

<sup>171</sup> *See Ricci*, 129 S. Ct. at 2663 (dissenting in this case were Justices Ginsburg, Stevens, Souter, and Breyer).

sian firefighters who sued the City of New Haven for discarding the results of a promotion exam because it had a disparate impact on minority firefighters.<sup>172</sup> The Court held that before the employer may take such a step, “the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability.”<sup>173</sup>

*Lewis*, one of last Term’s decisions, is another firefighter case involving the use of an exam.<sup>174</sup> In 1995, the City of Chicago Fire Department used a written test to hire new firefighters.<sup>175</sup> After administering the exam to 26,000 applicants, the City announced that it would hire from those who fell into the “well-qualified range,” scoring an eighty-nine or above, and it would not hire those who fell within the “unqualified” range, scoring below a sixty-five.<sup>176</sup> Those who scored between sixty-five and eighty-eight were notified that they passed the exam and were qualified for the position, but based on projected hiring needs and the number of applicants who scored higher, it was likely they would not be hired.<sup>177</sup> This practice remained consistent through the next ten rounds of hiring, with the City hiring exclusively from the “well-qualified” category, which was disproportionately white.<sup>178</sup>

The policy was challenged by a certified class consisting of 6,000 African Americans who scored in the “qualified” range but had not been hired.<sup>179</sup> They claimed that the City’s practice of selecting only from applicants scoring an eighty-nine or above caused a disparate impact on African Americans.<sup>180</sup> Just as in *Ledbetter*, the statute requires that a claim be filed with the Equal Employment Opportunity Commission (“EEOC”) within 300 days of the discriminatory act.<sup>181</sup> The plaintiffs, however, did not challenge the adoption of the

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<sup>172</sup> *Id.* at 2664.

<sup>173</sup> *Id.* at 2677.

<sup>174</sup> *Lewis*, 130 S. Ct. at 2195.

<sup>175</sup> *Id.* at 2195.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 2195-96.

<sup>178</sup> *Id.* at 2196. On the eleventh round of hiring, the City had exhausted the “well-qualified” category and began hiring those falling within the “qualified” category. *Lewis*, 130 S. Ct. at 2196. However, the original plaintiff, an African-American in the “qualified category,” did not receive an offer during that, or any other, round of hiring and filed suit. *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* The City of Chicago conceded the disparate impact, but argued that its policy was “justified by business necessity.” *Id.*

<sup>181</sup> *Lewis*, 130 S. Ct. at 2196 (citing 42 U.S.C.A. § 2000e-5(e)(1) (West 2010)).

test nor the determination to hire only those who scored eighty-nine or above until well after 300 days of those acts.<sup>182</sup> The question then became, “whether a plaintiff who does not file a timely charge challenging the *adoption* of a practice . . . may assert a disparate-impact claim in a timely charge challenging the employer’s later *application* of that practice.”<sup>183</sup>

The plaintiffs won in district court, with the court finding “the cutoff score of eighty-nine [to be] statistically meaningless” and rejecting the City’s defense of business-necessity.<sup>184</sup> The City stipulated that the test results had a disparate impact on African Americans.<sup>185</sup> The district court also found that the City’s ongoing reliance on the test constituted a continuing violation, therefore allowing the plaintiffs’ claims to be timely.<sup>186</sup> The Seventh Circuit reversed, finding that the only discriminatory act was sorting the applicants into the categories marking the degrees of qualification.<sup>187</sup> As a result, the court found that the plaintiffs had not filed their claim within 300 days of the discriminatory act, as required by the statute.<sup>188</sup> The circuit court maintained that the hiring decisions down the line were immaterial because they were essentially “the automatic consequence of the test scores rather than the product of a fresh act of discrimination.”<sup>189</sup>

In a unanimous decision, the Supreme Court reversed and remanded, finding the plaintiffs’ claim timely.<sup>190</sup> The Court concluded that the failure to file a claim after the adoption of the discriminatory policy does not preclude new claims whenever the City implements the decision down the road.<sup>191</sup> Furthermore, the Court distinguished *Ledbetter*, saying that *Ledbetter* does not stand for the proposition that present effects of prior actions cannot lead to Title VII liabili-

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 2195.

<sup>184</sup> *Lewis v. City of Chicago*, No. 98 C 5596, 2005 WL 693618, at \*9 (N.D. Ill. Mar. 22, 2005) *rev’d*, 528 F.3d 488 (7th Cir. 2008) *rev’d sub nom.* *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010).

<sup>185</sup> *Id.* at \*8.

<sup>186</sup> *Id.* at \*8 n.5.

<sup>187</sup> *Lewis v. City of Chicago*, 528 F.3d 488, 491, 494 (7th Cir. 2008) *rev’d sub nom.* *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010).

<sup>188</sup> *Id.* at 493.

<sup>189</sup> *Id.* at 491.

<sup>190</sup> *See Lewis*, 130 S. Ct. at 2197.

<sup>191</sup> *Id.* at 2199. In light of *Ledbetter*, this is a bit surprising.



ty.<sup>192</sup> *Ledbetter* “establish[es] only that a Title VII plaintiff must show a ‘present violation’ within the limitations period [and] [w]hat that requires depends on the claim asserted.”<sup>193</sup> Because *Ledbetter* was a disparate treatment claim requiring proof of intentional discrimination, in order to be timely, plaintiffs were required to establish “deliberate discrimination within the limitations period.”<sup>194</sup> However, the Court said that this reasoning does not apply to disparate impact claims because such claims do not require proof of discriminatory intent.<sup>195</sup>

The Court recognized the practical difficulties created by its decision by acknowledging that employers can face disparate impact claims for practices that have been in use for years, with evidence as to whether the practice is justified as a business necessity potentially no longer available.<sup>196</sup> However, not permitting the suit also produces problematic results because an employer could adopt a discriminatory policy, and if no one filed an immediate claim, the employer could then use that policy indefinitely with impunity, because no one would be able to challenge even a clearly discriminatory policy.<sup>197</sup> Or, equally problematic, a contrary ruling could result in plaintiffs filing “charges upon the announcement of a hiring practice, before they have any basis for believing it will produce a disparate impact.”<sup>198</sup>

Ultimately, the Court concluded, it is not the task of the Court to decide which interpretation “produces the least mischief.”<sup>199</sup> If Congress does not like the effects of the statute as written, it can correct the problem.<sup>200</sup> Perhaps this was a veiled reference to the fact that Congress had indeed known how to undo the damage wrought by the Court in *Ledbetter*.<sup>201</sup> Indeed, some commentators believe that

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.* (quoting *Evans*, 431 U.S. at 558).

<sup>194</sup> *Id.*

<sup>195</sup> *Lewis*, 130 S. Ct. at 2199.

<sup>196</sup> *Id.* at 2200 (referencing the briefs from “[t]he City and its *amici* warn[ing] that [the Court’s] reading will result in a host of practical problems for employers and employees alike”).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Lewis*, 130 S. Ct. at 2200.

<sup>201</sup> A footnote in the decision bears on another important lawyering consideration. Remember, *Lewis* was brought as a class action. *Id.* at 2196. Footnote four points out that the petitioners asserted, and the City did not dispute, that the date of the earliest EEOC

the unanimity of the decision, as opposed to the five-to-four decisions in *Ledbetter* and *Ricci*, reflects the Court's recognition of Congress lurking in the wings.<sup>202</sup>

It is difficult to overstate the significance of this decision. Firstly, as to the local effects, Chicago's firefighter applicant test is now pass-fail.<sup>203</sup> About 112 of the African-American applicants will be hired, and estimates for the damages that Chicago will pay range from \$45 million to \$100 million.<sup>204</sup> Secondly, the decision applies not just to public employers, but also to private employers, exposing them to more claims and larger rewards because disparate impact claims, unlike disparate treatment claims, typically involve larger classes of plaintiffs. Thirdly, this decision was written by Justice Scalia, who also wrote a concurring opinion in *Ricci* just eleven months earlier.<sup>205</sup> In his concurrence in *Ricci*, Justice Scalia questioned the very viability of disparate impact claims, raising the question whether disparate impact claims violate the Equal Protection Clause of the Fourteenth Amendment.<sup>206</sup> However, there is no hint of this question in the *Lewis* decision.

*Lewis* will also have a profound impact on lawyers. Attorneys will need to explain to their employer-clients how they can avoid liability under both *Ricci* and *Lewis*, since they seem to create something of a catch-22. *Ricci* states that an employer can be sued for discarding the results of an exam that produces a disparate impact, whereas *Lewis* subjects the employer to liability for using that exam.<sup>207</sup> Timing seems to be key, with problems arising when employ-

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charge filed by a named plaintiff controls the timeliness of the class' claims. *Id.* at 2197 n.4. As to that, the Court said, "We assume without deciding that this is correct." *Id.*

<sup>202</sup> See, e.g., Marcia Coyle, *Unanimous Court Allows Firefighter Suit*, NAT'L L.J., May 25, 2010, available at 2010 WLNR 10750605 (mentioning the close watch upon the *Lewis* decision because of previous actions Congress had taken after *Ledbetter* as a result of a 5-4 decision).

<sup>203</sup> See David G. Savage, *Firefighter Case to High Court*, CHI. TRIB., Feb. 21, 2010, available at 2010 WLNR 3646336 (reporting that the new pass-fail test was adopted in 2006).

<sup>204</sup> Cynthia Dizikes, *Blacks in Fire Exam Hail Ruling, Applicants Didn't Wait Too Long to Sue City, Jurists Say*, CHI. TRIB., May 24, 2010, available at 2010 WLNR 10744991.

<sup>205</sup> See *Lewis*, 130 S. Ct. at 2191; *Ricci*, 129 S. Ct. at 2681.

<sup>206</sup> *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

<sup>207</sup> Compare *Ricci*, 130 S. Ct. at 2701 ("As a result of today's decision, an employer who discards a dubious selection process can anticipate costly disparate-treatment litigation . . . .), with *Lewis*, 129 S. Ct. at 2191.

ers revisit employment practices already in place.<sup>208</sup> However, under *Lewis*, prudent employers must review practices adopted earlier to determine whether they create a disparate impact.<sup>209</sup> Employers may find themselves negotiating something of a minefield.

One headline announced, "U.S. Supreme Court Effectively Eliminates Statute of Limitations for Disparate Impact Cases."<sup>210</sup> While this may be an exaggeration, the decision clearly means that employers can be sued for employment decisions made years earlier. Lawyers will need to counsel clients that all employment practices, both new practices and those that have been in place for years, must be carefully analyzed in order to consider whether the practice causes a disparate impact to a protected category, and if so, whether it can be justified as a business necessity. And this applies not only to the use of employment examinations for hiring, but to all hiring, screening, and promotional practices.<sup>211</sup> One employment law specialist advised that as employers assess their employment practices to determine whether they are producing a disparate impact, they need to be mindful that those assessments may not be protected from disclosure in subsequent litigation challenging the legality for those practices.<sup>212</sup> This case, together with *Mohawk*, means lawyers should advise clients to review employment selection processes in an attorney-client privileged manner, being mindful that in doing so, they do not conduct themselves in a way that would amount to a waiver of that privilege.

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<sup>208</sup> See *Ricci*, 129 S. Ct. at 2679.

<sup>209</sup> *Lewis*, 130 S. Ct. at 2200.

<sup>210</sup> Mr. Employment, Benefits and Labor Practice Group, *U.S. Supreme Court Effectively Eliminates Statute of Limitations for Disparate-Impact Cases*, MONDAQ, June 15, 2010, available at 2010 WLNR 12144709.

<sup>211</sup> For example, lawyers need to counsel employers that their use of social media to conduct background checks could potentially expose them to a disparate impact claim. See *U.S. Supreme Court Finds Disparate Impact Claims Timely Years After City Adopts Original Employment Practice*, DORSEY & WHITNEY, LLP (June 10, 2010), [http://www.dorsey.com/eu\\_laboremployment\\_socialmedia\\_060310](http://www.dorsey.com/eu_laboremployment_socialmedia_060310). Some argue that, "racial minorities, whose presence on social media is disproportionate to their numbers in the general population, will be more negatively impacted by [employers'] use of social media . . . in recruiting and hiring." *Id.*

<sup>212</sup> Dionysia Johnson-Massie, *Supreme Court Gives Plaintiffs Multiple Opportunities (Potentially) to File Timely EEOC Charges Alleging Disparate Impact Discrimination*, MONDAQ, June 11, 2010, available at 2010 WLNR 11951119.

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*LAWYERING DECISIONS*

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## **VI. CONCLUSION**

Collectively, these cases raise profound questions about lawyering. The commentators were right—this was indeed the lawyering Term of the Supreme Court.

