# THE MIDDLE GROUND

Federal Bar Association - Middle District of North Carolina Chapter Volume 2, Issue 2 – October 2012

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## Chapter Officers:



## President's Message

*By Julie Theall Earp*
*Smith Moore Leatherwood LLP*

It's true what they say. Time really does go by faster the older you get. It seems like yesterday that Kearns Davis and Judge Bullock called me to float the idea of forming the Middle District's Chapter of the Federal Bar Association. Despite my innate trust of the people on the other end of the phone line, I was skeptical about whether *another* bar association would provide enough benefit to the legal community to be worthwhile. What could this new bar association provide that the others do not?

Over the years, though, I have come to realize that federal practitioners are members of a brotherhood. Whether civil or criminal, representing plaintiff or defendant, we all find ourselves working with the same people in the same place week in and week out. It is a place that requires the utmost professionalism and the highest quality of work we can produce. The time we spend on matters pending in the United States District Court for the Middle District of North Carolina will become the source of tales to our grandchildren when we are fortunate enough to retire, sit in rocking chairs and reminisce. If that isn't worthy of its own "association," what is?

I have enjoyed participating in the Fall Banquets and Spring Luncheons the MDNC Chapter has sponsored under the able leadership of Kearns Davis and Adam Charnes. They not only fill the need for CLE hours, but also they give us a chance to come together, see one another and enjoy the brotherhood. Thank you for entrusting me with the important job of President this year. I look forward to continuing the tradition.

Interested in being published in the next issue of *The Middle Ground*?

The editorial staff is currently accepting articles for upcoming issues. Please direct all inquiries to Brian Anderson at: banderson@nexsenpruet.com

# Federal Bar Association Helps Kick Off Master's Program in Judicial Studies at Duke Law School

On May 31, 2012, the Federal Litigation Section of the Federal Bar Association and the Duke Law School Judicial Studies Program welcomed the inaugural class of judges participating in the Judicial Studies LLM program with a reception and dinner in Durham, North Carolina. The event featured esteemed faculty and judges participating in the program including Judge Andre Davis (4th Circuit Court of Appeals), Justice Patricia Timmons-Goodson (North Carolina Supreme Court), Justice Barbara Jackson (North Carolina Supreme Court), Judge Robert Hunter (North Carolina Court of Appeals), Judge Donna Stroud (North Carolina Court of Appeals), and Judge James Hardin (North Carolina Superior Court). At the dinner, participants were greeted by the remarks of Linda Greenhouse, the former Supreme Court reporter for the New York Times and biographer of Justice Blackmun.

The Center for Judicial Studies and a master's degree in judicial studies were established to address a need for advanced educational opportunities for judges and to support scholarly research on judicial institutions and judicial decision-making. Over a two-summer period, judges in the program will examine the history, institutions, and processes that shape the Judiciary and affect judicial decision-making. The curriculum also comprises the writing of a thesis based on original research. Notable faculty at the Center for Judicial Studies include Supreme Court Justice Samuel A. Alito, the Honorable Lee H. Rosenthal, United States District Court, Southern District of Texas, and Dean David F. Levi of Duke Law School. A full list of the faculty and guest lecturers can be found at http://law.duke.edu/judicialstudies/degree/faculty/.

# Magistrate Judge Peake to Present Developments in MDNC Criminal and Civil Procedures

*By Sophia Liao Harvey*
*Carolina Law Partners*

The 2012 Fall Banquet and CLE will feature a presentation by Magistrate Judge Peake regarding current issues in the administration of civil and criminal cases in the Middle District of North Carolina. With respect to the civil docket, Judge Peake will present a chronology and explanation of case management and pre-trial procedures. In addition, she will highlight new Local Rules that were made effective April 2, 2012, including the new Local Rules applicable to patent cases.

Judge Peake's presentation on new developments regarding the criminal docket will examine the far reaching implications of the Fourth Circuit's *en banc* decision in *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011). (For a full discussion of the *Simmons* decision, please see below.) In short, *Simmons* altered the manner in which federal law determines whether violations of North Carolina law satisfy the definition of a crime punishable by imprisonment for a term exceeding one year. Federal courts in North Carolina are now faced with the challenge of ascertaining and managing the impact of this change from the indictment process through post-conviction proceedings.

As illustrated in *Simmons*, prior convictions that had previously been used as enhancements for drug offenses under 21 U.S.C. § 851 may no longer constitute a qualifying prior conviction. The *Simmons* decision also impacts whether defendants can be charged for certain federal crimes where the offense conduct has a status requirement. For example, federal law prohibits the possession of firearms by any person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g). Prior to *Simmons*, any conviction in North Carolina for which a hypothetical defendant could have received a term of imprisonment for more than one year would have

supported conviction under this statute. However, post-*Simmons*, courts are instructed to look to the maximum sentence that could have been imposed on a person with the defendant's actual level of aggravation and criminal history to determine whether the offense is punishable by imprisonment for a term exceeding one year.

Whether a conviction under North Carolina law is punishable by a term of imprisonment exceeding one year and thereby constitutes a prior felony conviction also impacts whether a defendant qualifies as a career offender for sentencing purposes under § 4B1.1 of the United States Sentencing Guidelines. Finally, the *Simmons* decision also affects defendants seeking post-conviction relief under 28 U.S.C. § 2255. There are a number of substantive and procedural issues relating to the processing of habeas petitions that are impacted by the change in law brought by *Simmons*. The issues noted above provide but a sliver of insight into the host of issues presented by *Simmons*. From a processing standpoint, the Middle District has instituted a number of procedures for handling the challenges that have and will continue to arise under *Simmons*. These procedures will be highlighted by Judge Peake in her presentation to the Federal Bar Association.

*Sophia L. Harvey practices tax law with Carolina Law Partners and is a candidate for the SJD in taxation at the University of Florida Levin College of Law.*

# A Summary of *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011)

*By Sophia Liao Harvey*
*Carolina Law Partners*

To facilitate an understanding of the impact of *Simmons* on federal criminal procedure in North Carolina, a brief history is in order. The defendant in *Simmons* pled guilty to trafficking at least 100 kilograms of marijuana. *Simmons*, 649 F.3d at 239. The statute under which he pled guilty imposed a minimum sentence of five years of imprisonment for first-time offenders. *Id.*; *see* 21 U.S.C. § 841(b)(1)(B)(vii). However, if a defendant commits the violation after a prior conviction for a "felony drug offense," then the minimum term of imprisonment is ten years. 21 U.S.C. § 841(b)(1)(B)(vii). A "felony drug offense" is defined as a drug offense "punishable by imprisonment for more than one year under any law . . . of a State." *Simmons*, 649 F.3d at 241–43; *see* 21 U.S.C. § 802(44).

The district court sentenced Simmons to ten years of imprisonment based on his prior conviction under North Carolina law for possession with intent to distribute marijuana, a conviction which the district court found to fall within the definition of a "felony drug offense" because it could be punishable by imprisonment for more than one year under North Carolina law. *Simmons*, 649 F.3d at 239. Without the prior conviction, Simmons' sentence range under the United States Sentencing Guidelines would have been 63 to 78 months. *Id.*

Simmons challenged the use of his prior conviction to enhance his sentence because the conviction resulted in an actual sentence of six to eight months of community punishment and no imprisonment. *Id.* at 241. The Fourth Circuit originally affirmed his sentence in an unpublished opinion. 340 F. App'x 141 (4th Cir. 2009). However, after deciding *Carachuri–Rosendo v. Holder*, 130 S.Ct. 2577 (2010), the Supreme Court vacated the Fourth Circuit's opinion. On remand, a panel of the Fourth Circuit again affirmed the district court's decision. *United States v. Simmons*, 635 F.3d 140 (4th Cir. 2011). The Fourth Circuit then voted *en banc* to vacate the panel's opinion and ultimately vacated Simmons' sentence. *Simmons*, 649 F.3d at 250.

In its *en banc* opinion, the Fourth Circuit explained that whether a prior conviction is a drug offense "punishable by imprisonment for more than one year under any law . . . of a State" and constitutes a "felony drug offense" is determined on the basis of the actual conviction, not the maximum sentence that could be imposed for that crime under state law. *Id.* at 241-43; *see* 21 U.S.C. § 802(44). The Fourth Circuit emphasized that the starting point of the analysis must be "the conviction itself" which encompasses the offense for which the defendant was convicted as well as the defendant's level of aggression and criminal history. *Simmons*, 649 F.3d at 243 (internal quotation marks and citation omitted). The Court found that under North Carolina's Structured Sentencing Act, as a first-time offender with a prior record level of 1, conviction of a Class I felony could not have resulted

in a sentence for Simmons of more than eight months' community punishment. *Id.* at 243. Therefore, the North Carolina conviction did not constitute a prior felony drug offense that could be used to enhance his sentence based on the possibility that the offense conduct, coupled with facts different from those in Simmons' record of conviction, could have resulted in a crime punishable by more than one year's imprisonment. *Id.* at 244-45. The Fourth Circuit vacated Simmons' sentence grounds and remanded his case to district court.

# Supreme Court and Fourth Circuit Criminal Law Update

*By Laura Dildine*
*Smith Moore Leatherwood LLP*

The United States Supreme Court and the Fourth Circuit have issued numerous substantive opinions in the past year on topics ranging from search and seizure to plea negotiations to internet research by jurors. This article sheds light on just a few of those decisions, with the understanding that Kearns Davis' federal criminal law update at the October 11, 2012 CLE will intrigue and enlighten practitioners by its substance, breadth, and depth.

### *Fourth Circuit Faces the "[C]enturies-Old Principle of Respect for the Privacy of the Home"*

In *United States v. Hill*, 649 F.3d 258 (4th Cir. 2011) (Gregory, J.), the Fourth Circuit reviewed the district court's denial of Hill's motion to suppress evidence obtained from the search of his residence. With an arrest warrant for Hill, members of the Fairfax Police Department arrived at a townhouse where Hill's girlfriend resided. *Id.* at 261. Although the warrant indicated that Hill's residence was unknown, as a result of a 911 call from the residence nearly two weeks earlier, police had information that Hill might also reside at the townhouse. *Id.* Police knocked and heard noises, but there was no response. *Id.* An officer called Hill's girlfriend at work who informed the police that the only person who might be at her home was her sister. *Id.*

Although the police did not seek consent from Hill's girlfriend to enter the house and she did not give it, an officer nonetheless opened the door and discovered Hill and a friend inside. *Id.* An hour later, Hill's girlfriend returned from work and consented to a search of the house. *Id.* at 262. As a result of the evidence obtained from the search, Hill was charged with one count of possession with intent to distribute cocaine base and one count of possession of a firearm in connection with a drug trafficking crime. *Id.* After the district court denied his motion to suppress, Hill entered a conditional guilty plea to count one. *Id.*

The Fourth Circuit first addressed whether the search was justified as a valid execution of the arrest warrant and found that it was not. *Id.* at 262-65. Because Hill conceded, as he must to have standing, that the townhouse was his residence, the court's analysis focused on whether the police had a reasonable belief that Hill was present. *Id.* at 263. The lead officer on the scene testified that he did not believe Hill would be present, while another officer testified that the visit to the home was for information-gathering purposes. *Id.* at 263-64. And, information from a recent traffic citation of Hill indicated another primary residence for Hill. *Id.* at 264. Furthermore, Hill's girlfriend had informed the police that Hill was not present and that the noises were likely from her sister's presence at the house. *Id.* Holding that "police cannot solely rely on an unidentified noise coming from within the home" as reason to believe that the defendant is in the home, the court concluded that the police entry was not justified to execute the arrest warrant. *Id.* at 264-65.

Next, the court found that there were no exigent circumstances justifying the warrantless search. *Id.* at 265. The government alleged that "the degree of urgency involved in the amount of time necessary to obtain a warrant" supported a finding of exigency. *Id.* The government's evidence included a slightly damaged door frame, the abnormal behavior of failing to answer the door, concern for the sister of Hill's girlfriend who may have been home, a 911 call two weeks earlier, and the sound of someone attempting to lock the door. *Id.* at 266. Not persuaded, the court held "that damage to the door, unsupported hunches of the police, and noises from within are not sufficient to suggest that there was an emergency taking place inside the residence." *Id.* at 267.

After finding the initial entry into the house was illegal

and upholding the district court's finding that Hill's girlfriend's consent to search was voluntary, the court analyzed "whether the taint from the initial illegal search was dissipated when [Hill's girlfriend] gave her consent for the search." *Id.* The court found that the district court record was not developed as to (1) the time between the violation and consent, (2) the presence of intervening circumstances, and (3) the flagrancy of the misconduct – factors to be used in this analysis. *Id.* at 267-70. Therefore, the court vacated the district court's denial of Hill's motion and remanded to develop the record and determine whether the consent of Hill's girlfriend dissipated the taint of the initial illegal search. *Id.* at 270.

***Fourth Circuit Affirms Sentence Under ACCA Despite Repeated Mistaken Advice on Maximum Sentence***

In *United States v. Davis*, 689 F.3d 349 (4th Cir. 2012) (per curiam), the court affirmed the fifteen-year mandatory-minimum sentence under the Armed Career Criminal Act ("ACCA") imposed on the defendant despite the government's and district court's repeated failures to advise him properly. Davis was charged in a one-count information for possession of a firearm by a convicted felon. *Id.* at 351. The information included Davis' three prior state-court felony convictions. *Id.* The plea agreement stated that "'[t]he maximum penalty to which the defendant will be exposed by virtue of his plea of guilty . . . [is] imprisonment for a period of *(10) ten years*.'" *Id.* (modification and emphasis in original). At the plea hearing, the government once again told Davis that the maximum term of imprisonment was ten years. *Id.* at 352. The court informed Davis that the maximum sentence under the statute was ten years and asked Davis if he understood that he could not "in any event receive a greater sentence than the statutory maximum" that the court had explained. *Id.*

However, the presentence report did not recommend a sentence of ten years, but, instead, recommended that the court sentence Davis as an armed career criminal for the mandatory statutory sentence of fifteen years. *Id.* Although Davis objected to his classification as an armed career criminal, he did not argue that the government breached the plea agreement or that he was misadvised as to the statutory maximum sentence. *Id.* at 352. On appeal, the Fourth Circuit reviewed his argument that the government breached his plea agreement for plain error and found none. *Id.* at 353. The court found that Davis sought the benefit of a promise that the government never made, the promise of a maximum sentence of ten years. *Id.* In addition to the language quoted above, the plea agreement also included promises from the government that it would make "'*nonbinding* recommendations'." *Id.* (emphasis in original). The government further stated that it made "'no representations'" and that the court would make the final sentencing decision. *Id.*

Even if the government had breached an agreement for a particular sentence, Davis could not receive the ten-year sentence that he was now requesting because the ACCA mandates a fifteen-year sentence. *Id.* at 353-54. "[T]he district court could not have imposed a sentence that contravened the applicable statute." *Id.* at 354. Although the court affirmed Davis' fifteen-year sentence, the court found that Davis did not knowingly and voluntarily waive his right to appeal the sentence within the maximum provided in the statute of conviction, as the plea agreement stated. *Id.* at 355. Because Davis "was misadvised repeatedly regarding the actual applicable statutory maximum sentence," the court "[could not] say that Davis 'knowingly and intelligently' waived appellate review of the fifteen-year sentence imposed by the court." *Id.* Nonetheless, after its subsequent analysis of Davis' argument that he was not an armed career criminal, the court affirmed the district court's finding that Davis qualified for the sentencing enhancement under ACCA. *Id.* at 358, 359.

***Supreme Court Finds Duty to Communicate Formal Offers from Prosecution***

Unbeknownst to him that the prosecution had offered to reduce his charge of driving with a revoked license for the fourth time to a misdemeanor for which it would recommend a 90-day sentence, Galin Frye pled guilty without a plea agreement and was sentenced to three years in prison. In *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399, 1404 (2012) (Kennedy, J.), the Supreme Court faced two questions: (1) does the constitutional right to counsel extend to the negotiation and consideration of plea offers that lapse or are rejected?, and (2) if so, what does a defendant have to demonstrate to show that he was prejudiced from his counsel's deficient representation?. The answers: (1) yes, and (2) a reasonable probability that he not only would have accepted the more favorable plea offer, but also that the prosecution and the trial

court would have allowed the plea to become final. *Id.* at 1407-08, 1409.

After Frye was charged with the aforementioned crime, the prosecutor sent Frye's counsel a letter with two plea bargain options, both with an expiration date. *Id.* at 1404. Frye's counsel did not advise Frye of the offers, and they expired. *Id.* Prior to his preliminary hearing for that charge, Frye was arrested again for driving with a revoked license. *Id.* Subsequently, he pled guilty and received a three-year sentence. *Id.* at 1404-05. Seeking post-conviction relief, Frye argued that his counsel's failure to inform him of the plea offer denied him effective assistance of counsel. *Id.* at 1405.

In response, the State argued that there is no constitutional right to a plea offer or a plea bargain. *Id.* at 1406. However, the Court explained that "[t]he reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Id.* at 1407. Therefore, "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Id.* at 1408. Because Frye's counsel failed to do so, he did not render effective assistance of counsel. *Id.*

To show prejudice from this ineffective assistance, Frye had to show a "reasonable probability" that he would have accepted the prosecutor's offer, a "reasonable probability" that the prosecution or the trial court would not have cancelled the plea if they had such discretion, and a "reasonable probability" that the end result would have been more favorable due to the plea. *Id.* at 1409. After finding a reasonable probability that Frye would have accepted the offer because he pleaded guilty to the more serious charge with no plea agreement, the court remanded for the Missouri Court of Appeals to determine if the prosecutor or the trial court could have refused to accept the plea agreement and, if so, whether there was a reasonable probability that the prosecutor or the trial court would have accepted the plea nonetheless. *Id.* at 1411.

*Laura Dildine is an associate at Smith Moore Leatherwood, LLP in Greensboro, North Carolina and a former law clerk to the Honorable N. Carlton Tilley, Jr., Senior United States District Judge.*

## Clerk's Corner: An Update from the Clerk of Court for the United States District Court for the Middle District of North Carolina

*By John S. Brubaker*

**Sealed Documents.** CM/ECF filers can now view their newly filed sealed documents as well as grant access to other parties in the case. All sealed CM/ECF events now provide filers the ability to designate who should get access to sealed documents, and, for each party selected, CM/ECF will send a Notice of Electronic Filing with a link to the sealed document. An extra screen allows the filer to select the parties who will have access to the sealed document. Select the appropriate parties and click next. PLEASE USE CAUTION when selecting the parties who will have access to a sealed document. For example, accidentally selecting a wrong party or granting all parties access could defeat the purpose of filing an ex parte motion under seal.

**Mediation Suggestions.** First, please call mediators before designating them. This will help to minimize scheduling and other conflicts. Second, respond promptly to scheduling requests from the mediators so that the mediation will not be scheduled at the last-minute. Third, to help the Clerk's Office monitor cases, if you have a pending case where the mediation deadline has expired and no mediation has taken place, please e-mail Cheryl Gammon at cheryl_gammon@ncmd.uscourts.gov to give her an update on the status of mediation.

**Out-of-State Attorneys.** If you are local counsel for an attorney making a special appearance, please help the out-

of-state attorney understand the importance of being registered as a CM/ECF filer in our District. The registration process is simple and prevents other parties and the Court from having to send out paper notifications.

**Laptop Request Forms.** If you would like to bring a laptop into the courthouse, please ensure that you have a laptop permission card with you upon entering the courthouse. The permission forms are available on the Court's website and should be submitted at least three business days prior to being needed.

**CM/ECF Electronic Filing Tips:** Here are some tips that will help the docket sheet appear proper and keep the Clerk's Office and/or your office from making corrections:

- File motions and supporting briefs as separate documents.
- Ensure your electronic signature ("/s/ *Attorney Name*") appears in the space where a signature would appear.
- Identify attachments and exhibits with a clear and complete description of the document. "Exhibit A" is insufficient. "Affidavit of James Johnson" is sufficient.
- When filing a civil case, enter the parties' names with every letter capitalized.
- Do not forget to file certificates of service.

# Notable Decisions from the Supreme Court's 2011 Term

*By Thurston H. Webb*
*Kilpatrick Townsend & Stockton LLP*

***National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012)**

In probably the most highly anticipated case of the year, the Supreme Court upheld as constitutional the majority of the Patient Protection and Affordable Care Act (the "Act"). Petitioners, a mix of twenty-six states, as well as private individuals and an organization of independent businesses, contested the constitutionality of the Act on several grounds. The primary focus of the petitioners' challenge rested on the constitutionality of the Act's individual mandate provision, which required most Americans to maintain "minimum essential" health insurance coverage. 26 U.S.C. § 5000A. Beginning in 2014, if an individual fails to comply with the mandate, he or she is required to pay a "penalty" to the Internal Revenue Service with the individual's taxes. *Id.* § 5000A(b)(1), (c).

In an opinion written by Chief Justice Roberts, the Court found that the Constitution authorized Congress to issue the individual mandate. After holding that the penalty imposed by the mandate is not a "tax" for purposes of the Anti-Injunction Act, the Court upheld the mandate under the Constitution's Taxing Clause because the "financial penalty for not obtaining health insurance may reasonably be characterized as a tax." 132 S. Ct. at 2600.

Chief Justice Robert's opinion rejected the government's primary argument that the individual mandate is constitutional under the Commerce Clause. He concluded that while the Constitution grants Congress the power to "regulate Commerce," an individual's decision not to purchase health insurance does not regulate existing commercial activity but instead impermissibly compels individuals to become active in commerce. He found that a contrary interpretation would "authorize[] Congress to use its commerce power to compel citizens to act as the Government would have them act . . . [which] is not the country the Framers of our Constitution envisioned." *Id.* at 2589.

Interestingly, the section of Chief Justice Robert's opinion discussing the Commerce Clause was not joined by a single other justice. Justices Scalia, Thomas, Alito and Kennedy, in a per curiam "dissent," also found the Commerce Clause does not permit the individual mandate, using the same reasoning as the Chief Justice. In fact, the per curiam dissent agreed with Chief Justice Robert's opinion on all points except his holding that the individual mandate is constitutional under the Taxing Clause. This has led to significant speculation as to why these Justices did not merely join those sections of Chief Justice Robert's opinion in which they agreed, but instead choice to write a per curiam

"dissent," even though they reached many of the same conclusions as Chief Justice Roberts.

Often overlooked, the Court also found that the Act's expansion of Medicaid, which requires states to expand Medicaid coverage or risk losing all federal Medicaid funds, violates the Spending Clause of the Constitution. The Court found that the "inducement" Congress chose is equivalent to a "gun to the head" of the States. Because Medicaid spending accounts for over 20 percent of the average state's total budget and federal funds generally cover 50 to 83 percent of those costs, the Court held that the threatened loss of over 10 percent of a state's overall budget is "unduly coercive" and beyond Congress's power under the Spending Clause. *Id.* at 2601-07. Justices Breyer and Kagan joined Chief Justice Robert's Medicaid ruling, and the per curiam "dissent" likewise found the expansion unconstitutional.

***United States v. Alvarez*, 132 S. Ct. 2537 (2012)**

The Stolen Valor Act of 2005, 18 U.S.C. § 704, made it a crime to lie about having received military decorations or medals, and included an enhanced penalty if the lie involved the Congressional Medal of Honor. In *United States v. Alvarez*, the Court considered whether the Act was an impermissible restriction on free speech in violation of the First Amendment.

Respondent Xavier Alvarez, a perpetual liar who also falsely claimed to have played hockey for the Detroit Red Wings and to have married a Mexican starlet, was charged under the Act for falsely telling his local Water District Board that he was a former Marine who had won the Medal of Honor in 1987. The district court rejected Alvarez's claim that the Act violated the First Amendment, but the Ninth Circuit reversed the conviction, holding the Act was an impermissible restriction on speech under the First Amendment.

In an opinion written by Justice Kennedy, joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor, the Court held that the Act was an impermissible content-based speech regulation. Applying strict scrutiny, the Court found that the Act's sweeping reach, which applied to false statements made at any time, in any place, and to any person, impermissibly conflicted with the First Amendment. 132 S. Ct. at 2547. Analyzing the First Amendment's protection of false statements, the Court concluded that false statements do not fall into the few categories where the First Amendment permits content-based regulation of speech. The Court found that the First Amendment protects false statements as "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." *Id.* at 2544.

Justice Breyer, joined by Justice Kagan, concurred that the Act violates the First Amendment, but disagreed that strict scrutiny applied. Rather, Breyer contended the Court should have applied intermediate scrutiny because false statements are less likely "to make a valuable contribution to the marketplace of ideas." *Id.* at 1552.

In dissent, Justice Alito, joined by Justices Scalia and Thomas, concluded the Act was constitutional because the Medal of Honor is diluted through false claims. He argued this undermines the country's system of military honors and inflicts real harm on actual medal recipients and their families. *Id.* at 2446. Unlike the plurality, the dissent determined that false statements possess no First Amendment value and therefore fall outside the First Amendment's protection unless their prohibition would chill other protected speech. *Id.* at 2562-63.

While the Court struck down the Act, it is possible Congress could still outlaw lying about having won the Medal of Honor. Justice Breyer's concurrence agreed with the dissent that the statute has substantial justification. He rather explicitly signaled to Congress that should it draft a new statute that is more narrowly tailored to a subset of lies where specific harm is likely to occur or could be shown, it likely would survive intermediate scrutiny. *Id.* at 2555-56.

*Thurston Webb is a litigation associate with Kilpatrick Townsend. He clerked for Judge Thomas D. Schroeder of the U.S. District Court for the Middle District of North Carolina and Judge Susan H. Black of the U.S. Court of Appeals for the Eleventh Circuit. Before clerking, he spent time working for the General Counsel's office of the Liberian Ministry of Public Works. He earned his bachelor's degree in history and economics in 2005 from the University of North Carolina at Chapel Hill, and his law degree from Wake Forest University School of Law in 2009.*

# Update on Class Actions Following *Dukes v. Wal-Mart*

*By R. Scott Adams*
*Stilman Thomas & Battle, PLLC*

At the Federal Bar Association's Fall 2012 Banquet and CLE, Robin Shea of Constangy, Brooks & Smith in Winston-Salem will present to attendees on developments in class action litigation in the wake of *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). In addition to its high profile due to Wal-Mart's status as one of the largest private employers in the nation and the putative class size of 1.5 million people, *Dukes* garnered national attention because the Supreme Court clarified certain important issues for class action practitioners. This summary is adapted from Robin Shea's manuscript and provides a preview of the valuable content that her presentation will provide.

In the context of a sex discrimination case, the majority in *Dukes* explained that not every aggregation of individual claims can proceed as a class action: rather, would-be class representatives must identify a question of law or fact that is common to all members of the putative class, and the resolution of this issue must dispose of the case. The Court also clarified the certification of individualized monetary claims, requiring such claims to proceed under Federal Rule of Civil Procedure 23(b)(3).

The Court explained that plaintiffs must still satisfy the Rule 23(a) requirements, i.e., numerosity, commonality, typicality, and adequacy of representation. Importantly, the Court conveyed that commonality required "glue" to bind together the claims in a manner capable of class-wide resolution. This concept altered prior decisions that held a disparate impact theory could "conceivably" be used to establish class claims if there was significant proof that an employer "operated under a general policy of discrimination" and that the discrimination manifested itself in hiring and promotion practices in the same general fashion. The Court found that this theory could not determine with any specificity how often discrimination played a part in employment decisions. Also, the Court stated that plaintiffs needed to identify a "specific employment practice" as the "glue" to hold their 1.5 million claims together.

With respect to monetary claims, the Court held that applying Rule 23(b)(2) to individualized claims was unfair to plaintiffs and defendants. The Court held that monetary claims could be certified under Rule 23(b)(2), which provides for a "mandatory class," only when they were "incidental" to the injunctive and declaratory relief granted to the entire class. This same reasoning informed the Court's rejection of calculating damages based on a random sampling of plaintiffs and their recoveries.

Since *Dukes*, several federal courts throughout the country have applied the newly clarified standards applicable to commonality. For example, in *Stockwell v. City & County of San Francisco*, No. C-08-5180, 2011 WL 4803505 (N.D. Cal. Oct. 11, 2011), the district court found that plaintiffs did not make the necessary showing of commonality and stated that "statistical evidence of disproportionate impact, standing alone, is insufficient to establish that plaintiffs' age discrimination claims can be proved on a classwide basis." On the other hand, the same court held in *Delagarza v. Tesoro Refining & Marketing Co.*, No. C-09-5803, 2011 WL 4017967 (N.D. Cal. Sept. 8, 2011), that class certification was proper where the plaintiff alleged a common set of practices that applied to all members of the class throughout the facility with only exceptional variations. The court looked for the "glue" and distinguished cases based on the lack of a binding thread for plaintiffs' cases.

As an alternative for avoiding the effect of *Dukes*, plaintiffs and courts may be able to rely on "issue certification" under Rule 23(c)(4), which allows an action to be "brought or maintained as a class action with respect to particular issues." Several decisions have highlighted that *Dukes* did not preclude issue certification and that courts may certify a single cause of action as an alternative to denying certification. *See, e.g.*, *Kalow & Springut v. Commence Corp.*, No. 07-3442, 2011 WL 3625853 (D.N.J. Aug. 15, 2011).

*Dukes* also explained that Rule 23 does not set forth a mere pleading standard, thus bringing into play consideration of the merits of class action claims. The Court hinted that expert testimony in support of a motion for class certification (and in opposition) could be subjected to analysis applying the principles in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Two class cases to be heard in the next term

will touch on these issues, but in the meantime, plaintiffs and defendants should assert and defend against any applicable *Daubert* issues and preserve them for appeal.

Finally, Shea's presentation will explore the application of *Dukes* to collective actions under the Fair Labor Standards Act ("FLSA"), which vary from Rule 23 class actions in important ways. Several cases since *Dukes* have examined whether collective actions should be subjected to the more rigorous analysis of *Dukes*. These cases have generally rejected such a position, but at least one court explained that *Dukes* could become relevant at the close of class-related discovery, at which point the court could conduct a specific analysis of each claim to ensure each plaintiff is an appropriate party. *Spellman v. Am. Eagle Express*, No. 10-1764, 2011 WL 4014351 (E.D. Pa. July 21, 2011).

This presentation is not to be missed, as it will provide greater substance and detail on these cases, trends in class action litigation, and practice points for those who prosecute and defend these cases regularly.

*R. Scott Adams is a senior attorney in the Winston-Salem office of Spilman, Thomas & Battle, PLLC. His primary area of practice is consumer financial services litigation, including significant experience with class action matters.*


**Federal Bar Association**
**Middle District of North Carolina Chapter**

cordially invites you to attend its

**2012 Fall Banquet and CLE Program**

**with keynote remarks by the Honorable William L. Osteen, Jr.,**
**United States District Judge**

Thursday, October 11, 2012

**CLE: 1:30 pm**
**Reception: 5:30 pm**
**Banquet: 6:30 pm**

Embassy Suites
204 Centreport Drive
Greensboro

To register for the CLE and/or the banquet, please visit:
FBA_Fall_2012_Registration_Form_Oct3Deadline.pdf

For more information about the FBA, or to join, please visit www.fedbar.org or complete the application on pages 12-13.

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# connect

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## FEDERAL BAR ASSOCIATION APPLICATION FOR MEMBERSHIP (CONTINUES ON REVERSE)

### Applicant Information

First Name | M.I. | Last Name | Suffix (e.g. Jr.) | Title (e.g. Attorney At Law, Partner, Assistant U.S. Attorney)

❍ Male ❍ Female  Have you been an FBA member in the past? ❍ yes ❍ no  Which do you prefer as your primary address? ❍ business ❍ home

**Business**

Firm/Company/Agency | Number of Attorneys

Address | Suite/Floor

City | State | Zip | Country

( ) Phone | ( ) Fax | E-mail

**Home**

Address | Apt. #

City | State | Zip | Country

( ) Phone | ( ) Fax

/ / Date of Birth | E-mail

### Bar Admission and Law School Information (required)

**U.S.**

Court of Record: _____

State/District: _____ Original Admission: / /

**Tribal**

Court of Record: _____

State: _____ Original Admission: / /

**Foreign**

Court/Tribunal of Record: _____

Country: _____ Original Admission: / /

**Students**

Law School: _____

State/District: _____ Expected Graduation: / /

### Practice Information

**PRACTICE TYPE**

Private Sector: ❍ Private Practice ❍ Corporate/In-House

Public Sector: ❍ Government ❍ Association Counsel ❍ Nonprofit ❍ University/College ❍ Military ❍ Judiciary

**PRIMARY PRACTICE AREAS**

❍ Administrative
❍ Admiralty/Maritime
❍ ADR/Arbitration
❍ Antitrust/Trade
❍ Bankruptcy
❍ Communications
❍ Criminal
❍ Environment/Energy
❍ Federal Litigation
❍ Financial Institutions
❍ General Counsel
❍ Government Contracts
❍ Health
❍ Immigration
❍ Indian
❍ Intellectual Property
❍ International
❍ Labor/Employment
❍ Military
❍ Social Security
❍ State/Local Government
❍ Taxation
❍ Transportation
❍ Veterans

❍ Other: _____

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## Membership Categories and Optional Section, Division, and Chapter Affiliations

### Membership Levels

**Sustaining Membership**

Members of the association distinguish themselves when becoming sustaining members of the FBA. Sixty dollars of the sustaining dues are used to support educational programs and publications of the FBA. Sustaining members receive a 5% discount on the registration fees for all national meetings and national CLE events.

| | Private Sector | Public Sector |
|---|---|---|
| *Member Admitted to Practice 0-5 Years* | ❍ $155 | ❍ $135 |
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| *Retired (Fully Retired from the Practice of Law)* | ❍ $155 | ❍ $155 |

**Active Membership**

Open to any person admitted to the practice of law before a federal court or a court of record in any of the several states, commonwealths, territories, or possessions of the United States or in the District of Columbia.

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|---|---|---|
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| *Retired (Fully Retired from the Practice of Law)* | ❍ $95 | ❍ $95 |

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Dues Total: $ _____

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❍ *Bankruptcy Law* $10
❍ *Civil Rights Law* $10
❍ *Criminal Law* $10
❍ *Environment, Energy, and Natural Resources* $15
❍ *Federal Litigation* $10
❍ *Government Contracts* $20
❍ *Health Law* $10
❍ *Immigration Law* $10
❍ *Indian Law* $15
❍ *Intellectual Property Law* $10
❍ *International Law* $10
❍ *Labor and Employment Law* $15
❍ *Securities Law Section* $0
❍ *Social Security* $10
❍ *State and Local Government Relations* $5
❍ *Taxation* $15
❍ *Transportation and Transportation Security Law* $20
❍ *Veterans Law* $10

### Career Divisions

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❍ *Judiciary* (past/present member or staff of a judiciary) N/C
❍ *Corporate & Association Counsels* (past/present member of corporate/association counsel's staff) $10
❍ *Senior Lawyers** (age 55 or over) $10
❍ *Younger Lawyers** (age 36 or younger or admitted less than 3 years) N/C

***For eligibility, date of birth must be provided.***

Sections and Divisions Total: $ _____

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Your FBA membership entitles you to a chapter membership. Local chapter dues are indicated next to the chapter name (if applicable). If no chapter is selected, you will be assigned a chapter based on geographic location. *No chapter currently located in this state or location.

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❍ Birmingham
❍ Mobile
❍ Montgomery
❍ North Alabama

**Alaska**
❍ Alaska

**Arizona**
❍ Phoenix
❍ William D. Browning/ Tucson–$10

**Arkansas***
❍ At Large

**California**
❍ Central Coast
❍ Inland Empire
❍ Los Angeles
❍ Northern District of California
❍ Orange County
❍ Sacramento
❍ San Diego
❍ San Joaquin Valley

**Colorado**
❍ Colorado

**Connecticut**
❍ District of Connecticut

**Delaware**
❍ Delaware

**District of Columbia**
❍ Capitol Hill
❍ D.C.
❍ Pentagon

**Florida**
❍ Broward County
❍ Jacksonville
❍ North Central Florida–$25
❍ Orlando
❍ Palm Beach County
❍ South Florida
❍ Southwest Florida
❍ Tallahassee –$25
❍ Tampa Bay

**Georgia**
❍ Atlanta–$10

**Hawaii**
❍ Hawaii

**Idaho**
❍ Idaho

**Illinois**
❍ Chicago

**Indiana**
❍ Indianapolis

**Iowa**
❍ Iowa–$10

**Kansas***
❍ At Large

**Kentucky**
❍ Kentucky

**Louisiana**
❍ Baton Rouge
❍ Lafayette/ Acadiana
❍ New Orleans
❍ North Louisiana

**Maine***
❍ At Large

**Maryland**
❍ Maryland

**Massachusetts**
❍ Massachusetts –$10

**Michigan**
❍ Eastern District of Michigan
❍ Western District of Michigan

**Minnesota**
❍ Minnesota

**Mississippi**
❍ Mississippi

**Missouri***
❍ At Large

**Montana**
❍ Montana

**Nebraska***
❍ At Large

**Nevada**
❍ Nevada

**New Hampshire***
❍ At Large

**New Jersey**
❍ New Jersey

**New Mexico***
❍ At Large

**New York**
❍ Eastern District of New York
❍ Southern District of New York

**North Carolina**
❍ Eastern District of North Carolina
❍ Middle District of North Carolina
❍ Western District of North Carolina

**North Dakota***
❍ At Large

**Ohio**
❍ John W. Peck/ Cincinnati/ Northern Kentucky
❍ Columbus
❍ Dayton
❍ Northern District of Ohio–$10

**Oklahoma**
❍ Oklahoma City
❍ Northern/ Eastern Oklahoma

**Oregon**
❍ Oregon

**Pennsylvania**
❍ Eastern District of Pennsylvania
❍ Middle District of Pennsylvania
❍ Western District of Pennsylvania

**Puerto Rico**
❍ Hon. Raymond L. Acosta/ Puerto Rico–$10

**Rhode Island**
❍ Rhode Island

**South Carolina**
❍ South Carolina

**South Dakota***
❍ At Large

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❍ Chattanooga
❍ Memphis Mid-South
❍ Nashville
❍ Northeast Tennessee

**Texas**
❍ Austin
❍ Dallas–$10
❍ Del Rio–$25
❍ El Paso
❍ Fort Worth
❍ San Antonio
❍ Southern District of Texas–$25
❍ Waco

**Utah**
❍ Utah

**Vermont***
❍ At Large

**Virgin Islands**
❍ Virgin Islands

**Virginia**
❍ Northern Virginia
❍ Richmond
❍ Roanoke
❍ Tidewater

**Washington***
❍ At Large

**West Virginia***
❍ At Large

**Wisconsin***
❍ At Large

**Wyoming**
❍ Wyoming

Chapter Total: $ _____

## Payment Information and Authorization Statement

**TOTAL DUES TO BE CHARGED**
**(membership, section/division, and chapter dues): $ _____**

❍ Check enclosed, payable to Federal Bar Association
Credit: ❍ American Express ❍ MasterCard ❍ Visa

Name on card (*please print*)

Card No. Exp. Date

Signature Date

*By signing this application, I hereby apply for membership in the Federal Bar Association and agree to conform to its Constitution and Bylaws and to the rules and regulations prescribed by its Board of Directors. I declare that the information contained herein is true and complete. I understand that any false statements made on this application will lead to rejection of my application and/or the immediate termination of my membership. I also understand that by providing my fax number and e-mail address, I hereby consent to receive faxes and e-mail messages sent by or on behalf of the Federal Bar Association, the Foundation of the Federal Bar Association, and the Federal Bar Building Corporation.*

***Signature of Applicant*** ***Date***
**(Signature must be included for membership to be activated)**

*Contributions and dues to the FBA may be deductible by members under provisions of the IRS Code, such as an ordinary and necessary business expense, except 4.5% which is used for congressional lobbying and is not deductible. Your FBA dues include $14 for a yearly subscription to the FBA's professional magazine.