I. INTRODUCTION

On February 16, 2010, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") decided *Schuler v. PricewaterhouseCoopers, LLP*.[1] In an opinion written by Judge Douglas Ginsburg, the D.C. Circuit affirmed a grant of summary judgment to PricewaterhouseCoopers ("PwC") on the plaintiffs' claims under the Age Discrimination in Employment Act of 1967 ("ADEA")[2] and District of Columbia Human Rights Law ("DCHRL")[3] and reversed the district court's grant of summary judgment as to claims under the New York State Human Rights Law ("NYSHRL").[4] *Schuler* is significant as it is the first Circuit Court of Appeals decision to construe the scope of the Lilly Ledbetter Fair Pay Act of 2009 ("LLA").[5] In doing so in a narrow fashion, the D.C. Circuit held that an employer's denial of a promotion is not a "discriminatory compensation decision" or "other practice" within the meaning of the LLA.

II. OVERVIEW OF THE LILLY LEDBETTER FAIR PAY ACT OF 2009

A. LEDBETTER V. GOODYEAR TIRE & RUBBER CO.

The LLA was passed in response to the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co*.[6] Lilly Ledbetter was a supervisor at Goodyear's plant in Gadsden, Alabama from 1979 until her retirement in 1998. For most of those years, she worked as an area manager, a position dominated by men. By the end of 1997, Ledbetter was the only woman working as an area manager. Initially, Ledbetter's salary was commensurate with the salaries of men performing substantially similar work. However, over time, her pay slipped in comparison to the pay of male area managers with equal or less seniority. The pay discrepancy between

[1] 595 F.3d 370 (D.C. Cir. 2010).
[2] 29 U.S.C. § 621, *et seq*.
[3] D.C. Code § 2-1401, *et seq.*
[4] N.Y. Executive Law § 290, *et seq*.
[5] Pub.L. No. 111-2, 123 Stat. 5.
[6] 550 U.S. 618 (2007).

Ledbetter and her 15 male counterparts was stark: Ledbetter was paid $3,727 per month while the lowest paid male area manager received $4,286 per month.[7]

In March of 1998, Ledbetter submitted a questionnaire to the U.S. Equal Employment Opportunity Commission ("EEOC") alleging certain acts of sex discrimination, and in July of that year she filed a formal EEOC charge. After taking early retirement in November 1998, Ledbetter filed suit.[8] The United States District Court for the Northern District of Alabama granted summary judgment to Goodyear on Ledbetter's Equal Pay Act[9] claim, but entered judgment on a jury verdict for Ledbetter on her claim under Title VII[10] of the Civil Rights Act of 1964 ("Title VII").[11] The United States Court of Appeals for the Eleventh Circuit reversed the decision[12] and a petition for a writ of certiorari to the U.S. Supreme Court was granted.[13] Ledbetter sought review of the following question:

> Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.[14]

At the Supreme Court, Ledbetter argued that discriminatory acts that occurred prior to the charging period have continuing effects during that period[15] and that discrimination in pay is different from other types of employment discrimination and thus should be governed by a

[7] *Ledbetter*, 550 U.S. at 643 (Ginsburg, J., dissenting).
[8] *Ledbetter*, 550 U.S. at 621-622.
[9] 29 U.S.C. § 206(d).
[10] 42 U.S.C. § 2000e, *et seq.*
[11] *Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, Civil Action No. 99-C-313-E, 2003 WL 25507253 (N.D. Ala., Sept. 24, 2003).
[12] *Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, 421 F.3d 1169 (11th Cir. 2005).
[13] *Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, 548 U.S. 903, 126 S.Ct. 2965 (2006).
[14] *Ledbetter*, 550 U.S. at 623.
[15] *Id.*, at 625.

different rule.[16] The Court ruled that employees subject to pay discrimination must file a claim within 180 days of the employer's original decision to pay them less, even if the employee continued to receive reduced paychecks and even if the employee did not discover the discriminatory reduction in pay until much later.[17]

B. THE LILLY LEDBETTER FAIR PAY ACT OF 2009

The LLA amends the Americans with Disabilities Act of 1990 ("ADA"),[18] the Rehabilitation Act of 1973,[19] Title VII and the ADEA to provide that the charge filing periods (300 days in most states and 180 days in states that do not have a fair employment agency) will commence when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to the decision or practice; or (3) an individual is affected by an application of a discriminatory compensation decision or practice (including each time wages, benefits, or other compensation is paid). Thus, the statute of limitations restarts each time an employee receives a paycheck based on a discriminatory compensation decision.

In addition, the LLA provides that an unlawful employment practice occurs when "a person" is affected by a discriminatory pay decision or other practice. This broad language could sanction pay discrimination charges filed by non-employees, such as independent contractors, so long as those individuals claim they have been affected by the discriminatory practice. The LLA is retroactive to May 28, 2007, the day the *Ledbetter* decision was handed down, and applies to all pay discrimination claims pending on or after that date.

III. SCHULER

A. RELEVANT FACTS

[16] *Id.*, at 621.
[17] *Id.*, at 628-629.
[18] 42 U.S.C. § 12101, *et seq.*
[19] 29 U.S.C. § 791, 794.

PwC hired Harold Schuler in 1988, when he was 44 years old, and C. Westbrook Murphy in 1989, when he was 49, to work in PwC's Regulatory and Advisory Services ("RAS") practice group in Washington, D.C.[20] PwC's partnership agreement provided that each partner shall retire upon reaching age 60 but in extraordinary circumstances a partner may delay retirement until he reaches age 62. Additionally, the structure of the compensation and benefits package provided to a new partner makes it financially undesirable for most employees over the age of 55 to become partners.[21]

In 1998, the RAS proposed Schuler for partner. Only 12 partners submitted "soundings" or comments about Schuler (six favorable, two unfavorable, and four reporting insufficient information), and he was not made a partner in 1999.[22] In 1999, the head of the RAS proposed another employee, then 37 years old, for partner. He also wanted to propose Schuler again but the head of the banking practice was not amenable because, as he later explained, he believed there had been "no significant change in circumstances or views" about Schuler since the previous year.[23] Twenty-two partners submitted soundings about the other candidate (17 favorable, none unfavorable, and five reporting insufficient information) and he became a partner in 2000.[24] In 2001, a year in which the RAS proposed no one for partner, Schuler and Murphy each filed an administrative charge with the District of Columbia Office of Human Rights and cross-filed the charge with the EEOC. Plaintiffs alleged PwC had refused to consider them for promotion to partner because of age - Schuler in 1999, 2000, and 2001 and Murphy in 2000 and

[20] *Schuler*, 595 F.3d at 372.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*

2001.[25] In 2003, the RAS proposed another employee for partner. That candidate received 18 soundings (16 favorable, none unfavorable, and two reporting insufficient information) and became a partner in 2004, when he was 39.[26] In 2005, the plaintiffs filed their lawsuits.

After consolidating the cases, the United States District Court for the District of Columbia dismissed in part the employee's claims under ADEA, dismissed all counts under the NYHRL[27] and subsequently granted summary judgment for PwC on the remaining claims under ADEA and DCHRA.[28] The plaintiffs then appealed.

B. THE D.C. CIRCUIT'S ANALYSIS

The D.C. Circuit framed the issue in the case as follows:

> There can be no dispute that in order to benefit from the LLA Schuler must bring a claim involving "discrimination in compensation" and point to a "discriminatory compensation decision or other practice." The question is whether he did so by claiming PwC did not make him a partner because of his age.[29]

Schuler argued, and common sense would dictate, that the denial of partnership by PwC clearly constituted a "compensation decision" or "other practice" within the scope of the LLA. In stating that Schuler failed to satisfy either prong, the court took a narrow interpretation and said that plaintiffs' claims were actually failure to promote claims and stated that those claims are not within the purview of the LLA. Specifically, the court said:

> [I]n employment law the phrase "discrimination in compensation" means paying different wages or providing different benefits to similarly situated employees, not promoting one employee but not another to a more remunerative position. . . . In context, therefore, we do not understand 'compensation decision or other practice' to

[25] *Id.*
[26] *Id.*, at 373.
[27] *Murphy v. PriceWaterhouseCoopers, LLP*, 357 F.Supp.2d 230 (D.D.C. 2004).
[28] *Murphy v. PriceWaterhouseCoopers, LLP*, 580 F.Supp.2d 4 (D.D.C. 2008) ; *Murphy v. PriceWaterhouseCoopers, LLP*, 580 F.Supp.2d 16 (D.D.C. 2008).
[29] *Schuler*, 595 F.3d at 374.

> refer to the decision to promote one employee but not another to a more remunerative position.[30]

C. DOES THE DECISION RUN COUNTER TO CONGRESSIONAL INTENT?

The portion of the LLA applicable to the *Schuler* case reads as follows:

> (3) For purposes of this section, an unlawful practice occurs, with respect to discrimination in compensation in violation of this Act, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[31]

By stating "[t]hat the Congress drafted and passed the LLA specifically in order to overturn *Ledbetter* strongly suggests the statute is directed at the specific type of discrimination involved in that case and not to other unspecified types of discrimination in employment."[32], the D.C. Circuit has taken to define that which was left intentionally undefined by the LLA i.e. what exactly is a "discriminatory compensation decision." The 3rd Circuit took a somewhat broader approach in a case entitled *Mikula v. Allegheny Ct. of Pa*.[33] The court stated:

> [W]e now hold that the failure to answer a request for a raise qualifies as a compensation decision because the result is the same as if the request had been explicitly denied. We reaffirm, however, our earlier conclusion that the August 2006 investigation report does not constitute a compensation decision or other practice. While, in the abstract, the result of the investigation affected Mikula's compensation, finding that an employer can be liable under Title VII for investigating an internal discrimination complaint and communicating its findings to the employee would have the unfortunate effect of encouraging employers to ignore such complaints.[34]

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[30] *Id.*, at 374-375.
[31] Pub.L. No. 111-2, 123 Stat. 5.
[32] *Schuler*, 595 F.3d at 375.
[33] 583 F.3d 181 (3d. Cir. 2009).
[34] *Id.*, at 186.

The D.C. Circuit had at least some previous support from other lower courts for the proposition that a failure to promote is not a "discriminatory compensation decision."[35] However, it is dubious at best to suggest that a failure to promote does not constitute an "other practice," especially in light of the fact that the term was left undefined by Congress.

D. THE RAY OF LIGHT – THE DECISION'S DISCUSSION OF NYSHRL

The plaintiffs also pled claims under the NYSHRL, alleging that since PwC was headquartered in New York, that the discriminatory policy and the effects of that policy were felt in New York, thus triggering the NYSHRL's protections. The court responded as follows:

> [T]he appellants argue they are entitled to the reasonable inference the discrimination alleged in this case occurred in New York. PwC says *Schuler* "does not control" because it addressed only PwC's adoption and maintenance of a discriminatory policy, not the "discrete decision [] not to admit [Schuler] to partnership." To which we say: Pettifoggery and piffle! Because the appellants in this case allege PwC is headquartered in New York, both appellants are entitled to the reasonable inference the decisions not to promote them occurred in New York.[36]

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[35] *See e.g. Powell v. Duval Cty. Sch. Bd.*, No. 3:07-cv-361-J-32MCR, 2009 WL 3157588 at *7 fn. 12 (M.D. Fla. Sept. 28, 2009)("Inasmuch as Powell is not alleging a 'discriminatory compensation decision,' but rather is alleging sexual discrimination and retaliation by failure to promote or pay an allegedly promised wage increase, both discrete acts, this case does not appear to implicate the recently enacted legislation called the 'Lily [sic] Ledbetter Fair Pay Act of 2009'"…); *Harris v. Auxilium Pharmaceuticals*, 664 F.Supp.2d. 711, 745 (S.D. Tex. 2009)("After reviewing the decisions of other district courts which have considered the issue, the Court finds that, in the instant case, Harris's failure to promote claims do not challenge a 'compensation decision' as contemplated by the FPA."); *Moore v. Napolitano*, Civil Action No. 07-26666, 2009 WL 4723169 at *10 fn. 6 (E.D.La. December 3, 2009)("The Fair Pay Act does not apply to Moore's failure to promote claim because a failure to promote claim is not a 'discriminatory compensation' claim."); *Vuong v. New York Life Ins. Co.*, Civ. A. No. 03-1075, 2009 WL 306391, at *8 (S.D.N.Y. Feb. 6, 2009) (finding discrete failure to promote claim timebarred but allowing discriminatory compensation claim under the Fair Pay Act); *Gentry v. Jackson State Univ.*, 610 F.Supp.2d 564, 566-67 (S.D.Miss.2009)(finding discrete denial of tenure claim timebarred but allowing denial of salary increase claim under Fair Pay Act); *Rowland v. Certainteed Corp.*, Civil Action No. 08-3671, 2009 WL 1444413 at *6 (E.D.Pa. May 21, 2009)("However, the Ledbetter Act does not help Plaintiff here because she pressed no discriminatory compensation claim with respect to her failure to promote."); *Leach v. Baylor College of Medicine*, Civil Action No. H-07-0921, 2009 WL 385450, at *17 (S.D. Tex. Feb. 17, 2009)("The rule set out in *Ledbetter* and prior cases—that 'current effects alone cannot breathe new life into prior uncharged discrimination'—is still binding law for Title VII disparate treatment cases involving discrete acts other than pay.").

[36] *Schuler*, 595 F.3d at 378.

IV. CONCLUSION

A. THE REACH OF THE SCHULER DECISION THUS FAR

While no other circuit court of appeals has weighed in on the applicability of the LLA and as the D.C. Circuit refused to re-hear the case *en banc* on April 12, 2010,[37] *Schuler*'s impact has been felt in at least two cases in the District of Columbia. The first case, *Lipscomb v. Mabus*,[38] involved an African-American male who alleged that the Navy discriminated against him based on race by refusing to promote him on several occasions. The question in the case was whether or not the Navy's decision not to promote Lipscomb was a "discriminatory compensation decision or other practice" under the LLA. The district court answered that question in the negative, stating:

> The D.C. Circuit recently held, however, that a decision not to promote an employee is not a "discriminatory compensation decision or other practice" under the Lilly Ledbetter Act…So too here. *Schuler* establishes that the Navy's failure to promote Lipscomb to a GS-11 position was not a "discriminatory compensation decision or other practice." Hence, the Lilly Ledbetter Act does not render timely Lipscomb's allegations of nonpromotion.[39]

The other case is *Barnabas v. Bd. of Trustees of UDC*.[40] Essica Barnabas was a professor with the University of the District of Columbia who alleged that the university discriminated and retaliated against her based on her age in violation of ADEA. Here again, the court rejected claims similar to those brought by Schuler, stating:

> According to Barnabas, the University's decision not to grant her the 2004 position was a "discriminatory compensation decision or other practice" that still affected her salary at the time she filed her

[37] There is no citation available for the denial of re-hearing on April 12, 2010. Please see the direct history for the Schuler case in Westlaw.
[38] Civil Action No. 07-0103 (JDB), 2010 WL 1198891 (D.D.C. March 30, 2010).
[39] *Id.* at *3.
[40] Civil Action No. 07-02207 (JDB), 2010 WL 692785 (D.D.C., March 1, 2010).

> 2006 EEOC complaint. Thus, she argues, her EEOC charge was timely filed. Barnabas's argument is foreclosed by the D.C. Circuit's recent decision in *Schuler v. PricewaterhouseCoopers, LLP* (D.C.Cir.2010)…Hence, UDC's failure to promote Barnabas to a full-time professor position was not a discriminatory compensation decision or other practice. The Lilly Ledbetter Act does not revive Barnabas's late-filed allegations concerning the 2004 vacancy, and she has thus failed to timely exhaust her administrative remedies with respect to this allegation.[41]

B. WHAT SHOULD EMPLOYERS AND EMPLOYEES DO?

As stated in a recent employment law bulletin:

> We are inclined to agree with the Morgan Lewis labor team, who opine, "The *Schuler* decision confirms that discrete employment actions like promotions are not subject to the FPA [aka LLA]--but it also confirms, as we suspected..., that plaintiffs nonetheless would attempt to bootstrap promotion and other discrete claims to the FPA's 'other practice' prong to revive what would otherwise be untimely discrimination claims." These attorneys add that, until more appellate courts weigh in on the issue, employers can anticipate similar court cases.[42]

Indeed, the reach of the LLA may not end up being what the drafters of the act had originally intended. Practitioners should expect courts to continue stating what "discriminatory compensation decisions or other practices" are not rather than stating what they are, and in doing so, courts will continue to hold that discrete acts are time-barred under the LLA.

The knowledgeable employee advocate would do well to marshal up all the relevant facts and find a way to frame the major issue in the case as one of a hostile work environment. Of course, that particular theory of liability has the inherent difficulties of: (1) rising up to the level of "severe or pervasive" as defined by *Meritor*;[43] (2) being able to prove both the subjective and

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[41] *Id.* at *4.
[42] James O. Castagnera, Patrick J. Cihon, Andrew M. Morriss, *Termination of Employment Bulletin*, April 2010, 26 No. 4 Term. of Employment Bulletin 2.
[43] *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

objective components of the *prima facie* case; and (3) rebutting the evidence offered by the employer for the *Faragher*[44]/*Ellerth*[45] affirmative defense. Even armed with a strong hostile work environment claim, advocates on both sides should be aware of a footnote in the *Ledbetter* decision, which refers back to the decision in *National R.R. Passenger Co. v. Morgan*,[46] holding that the 180-day time period for filing a charge of employment discrimination applies to any "discrete act" of discrimination:

> *Morgan* still require[s] at least some of the discriminatorily-motivated acts predicate to a hostile work environment claim to occur within the charging period. 536 U.S., at 117, 122 S.Ct. 2061 ("Provided that *an act contributing to the claim occurs within the filing period*, the entire time period of the hostile environment may be considered by a court" (emphasis added)).[47]

[44] *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).
[45] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).
[46] 536 U.S. 101 (2002).
[47] *Ledbetter*, 550 U.S. at 638. fn.7.