



APPELLATE

Locke Lord's Looking Ahead 2011

Upcoming Decisions Impacting State and Federal Litigation

The United States Supreme Court has given us a variety of trial-level issues to consider as we move into 2011: cases decided in the past have left open questions that federal district and circuit courts will address in the coming year, while cases pending this term should yield opinions providing guidance and clarification.

Although some issues, like pleadings standards, are limited to the federal arena, most of the issues we highlight below impact both federal and state litigation, covering areas such as arbitration, class actions, federal preemption of state law, and the rights of corporate entities. Here are some developments we expect to see this year.

Continued Evolution of Federal Pleading Standards After *Iqbal* and *Twombly*

The shift from “notice pleading” to “plausibility pleading” in federal courts has left litigants and district courts grappling with numerous uncertainties. The plausibility standards set forth in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), leave many questions unanswered. Among the issues that federal district and circuit courts will be facing in 2011 are the following:

- Does the plausibility pleading standard apply equally to affirmative defenses? Both *Twombly* and *Iqbal* focused on the Rule 8(a) standards for complaints, but litigants are increasingly filing Rule 12(f) motions to strike affirmative defenses, arguing that the same plausibility standards should apply to all pleadings.
- Despite the Supreme Court’s assertions to the contrary, does the plausibility standard amount to a probability test? In *Iqbal*, for example, the Court weighed plausibility by comparing the likelihood that the plaintiff’s allegations described legally actionable conduct rather than a hypothesized innocent alternative (129 S.Ct. at 1949-51).
- If *Twombly* and *Iqbal* effectively heightened the pleadings standard, should *pro se* pleadings be construed under a lesser, more liberal standard? The Ninth Circuit has stated that it “continue[s] to construe *pro se* filings liberally when evaluating them under *Iqbal*.” *Hebbe v. Pliler*, --- F.3d ---, No. 07-17265 (9th Cir. Nov. 19, 2010).
- Prior to a ruling on a motion to dismiss, might a plaintiff be entitled to “plausibility discovery” in order to gain access to information over which the defendant has exclusive or superior control? In some cases, a plaintiff may assert that the defendant controls information needed to provide more detailed factual allegations that would establish plausibility. Much like limited discovery for jurisdictional or class certification purposes, district courts may allow “plausibility discovery” before ruling on a dismissal motion.
- What sorts of facts, anecdotes, and arguments fall within the “judicial experience” and “common sense” that courts may use to decide whether a plaintiff has shown a plausible claim for relief? These factors may be case determinative and provide room for argument and strategy in moving for or opposing dismissal.

Potential Guidance on Unconscionability Standards for Arbitration Agreements

Unconscionability arguments frequently arise in the context of class action arbitration, particularly with regard to arbitration clauses in consumer contracts. In 2011, the United States Supreme Court is expected to address the interaction of state and federal law regarding unconscionability, and may clarify what constitutes unconscionability in the arbitration context.

On November 19, 2010, the Court heard oral argument in *AT&T Mobility LLC v. Concepcion* (No. 09-893). The plaintiffs challenged AT&T's charge for sales tax on the retail value of "free" telephones by filing a class action in a California federal court. Their contract with AT&T, however, had both an arbitration provision and a class action waiver provision. AT&T moved for the claims to be submitted to arbitration on an individual basis. The plaintiffs countered that the arbitration agreement was unconscionable and should not be enforced. The trial court held that the Federal Arbitration Act does not preempt California unconscionability law, under which the court found the class waiver provision to be unconscionable. The Ninth Circuit affirmed the trial court's denial of arbitration. *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009).

The question presented to the Supreme Court is whether the FAA preempts states from conditioning enforcement of an arbitration agreement on the availability of particular procedures (here, class-wide arbitration) *when those procedures are not necessary to ensure that the parties can vindicate their claims*. Beyond the initial preemption issue, the most significant aspect of this case is its potential to define whether and how parties can draft arbitration agreements to avoid unconscionability and ensure enforceability. AT&T included unique provisions in its arbitration agreement, in an effort to create a framework in which a plaintiff

Possible Clarification of Basic Rule 23(a) Class Certification Requirements

In contrast to the questions left unanswered in *Twombly* and *Iqbal*, the United States Supreme Court is poised to offer needed clarification on the basic building blocks of federal class action law. On December 6, 2010, the Court granted certiorari in *Wal-Mart Stores, Inc. v. Dukes* (No. 10-277). The appeal arose out of a sharply divided (6-5) Ninth Circuit Court of Appeals *en banc* opinion, in which the court affirmed the certification of a gender-discrimination plaintiff class consisting of up to 1.5 million women employed nationwide by Wal-Mart at any time after December 26, 1998. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (*en banc*). Complaining that Wal-Mart's female employees were paid less than men in comparable positions and received fewer promotions, the plaintiffs sued both for injunctive and declaratory relief and back pay.

This combination of injunctive relief and a very large damages request was the focus of Wal-Mart's cert petition. The Supreme Court granted the petition based on Wal-Mart's first question presented, which asked whether, and under what circumstances, claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2), which is limited to injunctive or corresponding declaratory relief. To that question, the Supreme Court added another: "Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)." The Court's formulation of its own question injecting Rule 23(a) into the mix signals a desire to address some class certification basics. Courts frequently have focused on the Rule 23(b) criteria, as opposed to the fundamental requirements of Rule 23(a). The Rule 23(a) requirements include whether there are questions common to the class, whether the representative plaintiffs' claims and defenses are typical of the class, and whether the representative plaintiffs will fairly and adequately protect the class's interests. By raising the additional question, the Court signals that it may be ready to speak to one or more of these foundational class certification requirements.

Potential Guidance on Unconscionability Standards for Arbitration Agreements (cont'd.)

would not need to pursue a class action in order to obtain a fair resolution of his/her dispute. For example, AT&T agreed in its contract that: (1) AT&T would pay all filing, administration, and arbitrator fees unless the arbitrator found the claim to be frivolous; (2) the customer would recover a minimum of \$7,500 and double attorneys' fees if the arbitration award exceeded AT&T's last settlement offer; (3) AT&T would not recover attorneys' fees if it prevailed; and (4) the customer could seek in arbitration any available remedy, including punitive damages and injunctions. AT&T has argued that these provisions in its consumer contract preclude a finding that the class action waiver is unconscionable. If the Court takes the opportunity to address this issue, as well, its opinion will provide valuable guidance for lawyers and in-house counsel in crafting enforceable arbitration agreements nationwide.

Decision on Corporations' Privacy Rights

Last year, the United States Supreme Court held that corporations have a First Amendment right to spend money in federal election campaigns. *Citizens United v. Federal Election Comm'n*, 130 S.Ct.676 (2010).

In 2011, the Court will decide whether corporations have "personal privacy" rights under the Freedom of Information Act ("FOIA"). *Federal Commc'ns Comm'n v. AT&T, Inc.*, No. 09-1279. AT&T provided documents to the FCC during the agency's investigation into claims of overcharging. The documents were later sought from the FCC under FOIA. The requestor is a trade association representing some of AT&T's competitors. AT&T sought to block the documents' release based on a FOIA exemption that allows a government agency to withhold law enforcement records whose disclosure could "constitute an unwarranted invasion of personal privacy." The term "personal" is not defined in FOIA, but FOIA does define "person" to include corporations. On appeal from the FCC's decision that a corporation has no "personal privacy" rights, the Third Circuit "corrected" (i.e., reversed) the FCC's interpretation. *AT&T, Inc. v. Federal Commc'ns Comm'n*, 582 F.3d 490, 500 (3d Cir. 2009). The court held that FOIA unambiguously indicates that a corporation may have a "personal privacy" interest worthy of protection. In addition to relying on FOIA's plain language, the Third Circuit noted that corporations are analogous to humans in terms of the risk of public embarrassment, harassment, and stigma that can result from law enforcement investigations. *Id.* at 498 & n.5.

In the FCC's cert petition to the United States Supreme Court, then-Solicitor General Kagan urged the Court to review the case and reject the argument that FOIA "protects the so-called 'privacy' of inanimate corporate entities." On the other hand, AT&T argues that the inquiry in this case is circumscribed by FOIA's plain language, which expressly includes corporations in its definition of "person." The Court granted review on the question of whether FOIA's "personal privacy" exemption extends to the "privacy" of corporate entities. Justice Kagan's recusal from the case creates the possibility of a 4-4 decision, which would uphold the Third Circuit's decision in this case but would not be considered a precedent for future litigation. Argument was scheduled for January 19, 2011.

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