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California Cases To Watch In 2013

By **Erin Coe**

Law360, San Diego (January 01, 2013, 4:14 PM ET) -- One of the biggest questions California courts are poised to address in 2013 is whether consumer and employment contract disputes should play out in court or arbitration, but they also are set to wade into a business group's attack on California's landmark cap-and-trade program for greenhouse gas emissions, an illegal immigrant's fight to become a lawyer in the state and a host of other legal battles.

Here are a few key cases that California attorneys are sure to keep track of in 2013.

Disputes Over Arbitration Agreements and Class Action Waivers

The California Supreme Court is planning to tackle a cluster of consumer and employee contract disputes with companies over whether court or arbitration is the proper forum.

In September, the high court agreed to consider former CLS Transportation Los Angeles LLC limo driver Arshavir Iskanian's petition for review of a ruling that sent his proposed wage-and-hour class action to individual arbitration because he had signed an arbitration agreement containing a class action waiver.

The court will review whether the U.S. Supreme Court's 2011 decision in AT&T Mobility LLC v. Concepcion — which ruled that arbitration agreements that bar classwide relief and subject consumer complaints to individual arbitration are enforceable under the Federal Arbitration Act — overrules a California decision that held a class waiver shouldn't be enforced if class arbitration would be a significantly more effective way of vindicating employees' rights than individual arbitration.

"Arbitration is a hot-button issue," said Christina Imre, chairwoman of Sedgwick LLP's appellate group. "There is a continuing battle back and forth over whether class action waivers are permissible and under what circumstances."

The California Supreme Court is also going to examine whether the Concepcion decision applies to representative claims under California's Private Attorneys General Act like it does with traditional class actions, according to Paul Cane Jr., a Paul Hastings LLP employment partner.

"This is critical because a lot of employment class actions can easily be restyled as PAGA claims," he said. "If a class action is restyled as PAGA claims and can escape the rule of Concepcion, California will have created a substantial loophole."

The state high court in March also accepted Valencia Holding Co. LLC's bid to review an appeals court's October 2011 ruling that struck down as unconscionable an arbitration clause with a class action ban used in the car dealer's sales contract. In particular, the California Supreme Court will examine whether Concepcion preempts state law rules under Armendariz v. Foundation Health Psychcare Services Inc. that limit how companies can craft mandatory arbitration agreements.

"The U.S. Supreme Court has been consistently slapping down state courts that announce special rules for arbitration contracts that differ from rules that apply to other kinds of contracts," Cane said. "The Armendariz rules show when arbitration agreements are and are not enforceable, and the question is whether any pieces of Armendariz can survive."

In addition, the California Supreme Court will have another opportunity to review a dispute involving automotive dealership owner Sonic-Calabasas A Inc. In October 2011, the U.S. Supreme Court vacated the state high court's ruling that a worker with wage claims against Sonic had a right to a hearing before state labor authorities despite signing an arbitration agreement and remanded for further consideration in light of Concepcion.

Attorneys in the state will be watching the remanded case to see how the court may arrive at a different result this time round, according to Cane.

"This case is important because the California Supreme Court could acknowledge that it decided the case incorrectly before," he said.

All of these disputes are going to be tracked closely by employment, consumer and class action lawyers as well as by companies that have arbitration clauses in their contracts.

"There are a lot of companies who have arbitration agreements that want to make sure they are not subject to class claims through arbitration," said Scott Witlin, a Barnes & Thornburg LLP employment partner.

The cases are Iskanian v. CLS Transportation Los Angeles LLC, case number S204032; Gil Sanchez v. Valencia Holding Co., case number S199119; and Sonic-Calabasas A Inc. v. Frank Moreno, case number S174475, in the California Supreme Court.

California Chamber of Commerce v. California Air Resources Board

Another case of interest is a challenge by the California Chamber of Commerce to the state's cap-and-trade system — a program to cut greenhouse gas emissions that government officials estimate could raise billions of dollars for the state.

The California Air Resources Board's quarterly auctions, the first of which was held on Nov. 14 despite the lawsuit's filing in state court a day earlier, allow for companies to buy and sell carbon pollution credits, and proceeds of the auctions go to the state's general fund. The program was created as part of California's Global Warming Solutions Act of 2006, or A.B. 32, to reduce the state's emissions to 1990 levels by 2020. CARB officials have said about 350 companies and nearly 600 facilities will be affected by the cap-and-trade program.

The business group claims that A.B. 32 does not authorize CARB to raise funds other than those needed to cover the administrative costs of the regulatory program. It also argues that because A.B. 32 was not passed by a two-thirds majority vote, the program is an unconstitutional tax.

"Environmentalists, business advocates and politicians of all stripes are going to be watching this case closely to see whether the cap-and-trade program can succeed in California and spread," said Jon Welner, a Jeffer Mangels Butler & Mitchell LLP environmental partner.

If the Chamber prevails in its suit, it could force CARB to issue all or a vast majority of the credits for free, which would profoundly change the program and shrink the funds available for greenhouse gas mitigation programs by as much as billions of dollars, according to Welner.

"Billions of dollars will be raised annually by the auctions that presumably will be used for a host of greenhouse gas reducing measures, and those measures are critical to the success of A.B. 32," he said. "If the suit succeeds, the state and CARB will need to look elsewhere for funding to

achieve the goals of A.B. 32."

But even if the court rejects the suit, CARB may still face suits challenging how the auction revenue is used, he said.

"This lawsuit makes a general claim that the mere raising of these funds exceeds the mandate of A.B. 32 and is unconstitutional, but if it fails, future lawsuits could claim that the specific way the funds are being spent are unrelated to the purposes of A.B. 32 and constitute an unconstitutional tax," he said.

The fact that the Chamber brought the case signals that businesses beyond those participating in the auctions are concerned that the program will drive up energy costs and make it tougher for companies to expand in the state, according to Ann Grimaldi, a McKenna Long & Aldridge LLP environmental partner.

"California is the only state implementing something of this scope," she said. "It tends to be the bellwether state for environmental regulations. But if this approach doesn't pan out, then other states are not likely to follow California's lead."

The next cap-and-trade auction is set for Feb. 19.

The Chamber is represented by Steven A. Merksamer, Richard D. Martland, Kurt R. Oneto and James R. Parrinello of Nielsen Merksamer Parrinello Gross & Leoni LLP.

The case is California Chamber of Commerce et al. v. California Air Resources Board et al., case number 34-2012-80001313, in the Superior Court of the State of California, County of Sacramento.

Wynona Harris v. City of Santa Monica

After hearing oral arguments in December in a case that presents a fundamental employment law question, the California Supreme Court is set to rule on whether employers in discrimination disputes can use a "mixed-motive" defense claiming they would have fired or disciplined a worker regardless of an alleged discriminatory reason.

A former bus driver in 2005 sued the city of Santa Monica, Calif., alleging it violated the state's Fair Employment and Housing Act by firing her because she was pregnant.

A jury and trial court initially found in her favor, but the Second District Court of Appeal in 2010 held that the trial court erred by failing to instruct the jury on the mixed-motive defense. As a result, the appeals court said, the jury was able to find pregnancy was one motivating factor behind the decision to lay off the plaintiff without taking into account the city's defense that it would have fired her regardless of her pregnancy because of her allegedly poor job performance.

"The California Supreme Court will decide what the plaintiff has to prove and how the jury decides the case if there are multiple motives," said Cane, who filed an amicus brief in the case in support of the city.

A ruling in the Santa Monica suit will affect trials in every discrimination case moving forward because every plaintiff challenging an adverse employment action claims a discriminatory motive, while every defendant asserts legitimate reasons for the move, he said.

"Juries have to be given guidance on what they have to look at," Witlin said. "The burden of proof is frequently the deciding factor."

A decision in the case is expected in February or March.

Harris is represented by Michael Nourmand of the Nourmand Law Firm APC, David deRubertis and Michael Leb of the deRubertis Law Firm, and Norman Pine and Beverly Pine of Pine & Pine.

The case is Wynona Harris v. City of Santa Monica, case number S181004, in the California Supreme Court.

Center for Biological Diversity v. California Department of Conservation

California attorneys are also going to be following an environmental suit that seeks to block any new approvals of natural gas projects that use hydraulic fracturing in California until state energy regulators step up their scrutiny of such wells — a case that experts say could significantly disrupt oil production in the state.

The Sierra Club and other environmental groups sued in state court in October, claiming that the Department of Conservation's Division of Oil, Gas and Geothermal Resources improperly exempted developments that use the contested extraction process from review under the California Environmental Quality Act or conducted only a superficial analysis.

The practice, known as fracking, captures oil and gas by blasting water and chemicals deep into underground shale. The plaintiffs claim fracking does not qualify for exemptions to the state's requirement for environmental impact reports because the process is allegedly linked to groundwater contamination as well as an increase in air pollution and earthquakes.

If the court agrees with the plaintiffs and orders the DOGGR to stop exempting these projects, the effect could be devastating for the oil industry, according to Welner.

“Environmental impact reports take time and money, and if an EIR is required for every oil well permit in the state, that could bring oil production to a screeching halt,” he said. “It would bring the issuance of new permits to a standstill.”

A decision requiring companies to go through a full environmental review under CEQA could also hit consumers' pocketbooks hard, according to Grimaldi.

“To the extent that hydraulic fracking has led to increased oil being available to consumers at a lower cost, a ruling in the plaintiffs' favor could drive up costs because of the work necessary to conduct the environmental analyses,” she said.

The environmental groups are represented by George Torgun and William Rostov of Earthjustice.

The case is Center for Biological Diversity et al. v. California Department of Conservation, Division of Oil, Gas and Geothermal Resources, case number RG12652054, in the Superior Court of the State of California, County of Alameda.

Sam Duran v. U.S. Bank NA

In one of the most significant class action cases in California, the state high court in May accepted a U.S. Bank NA overtime dispute to consider whether to clarify and perhaps limit workers' use of statistical samples to establish classwide liability.

The suit was brought under California's unfair competition law on behalf of current and former business banking officers who said they were wrongfully classified as exempt from state overtime laws, and U.S. Bank was slapped with a $15 million judgment after a bench trial that turned on evidence from a 21-person group that was applied to the entire 260-person class.

However, an appeals court ruled in February that there was no statistical foundation for the assumption that such a small sample of class members was sufficient to extrapolate the liability or damages the bank owed to the class as a whole.

The California Supreme Court is going to review whether plaintiffs can use sampling, averages and other techniques to show an entire class is similarly situated, according to Cane. Defendants tend to argue that these techniques are used to paper over individual differences, he said.

"Plaintiffs contend that they can use techniques of sampling and estimation in order to effectuate rough justice, but the question is whether California class action law requires more uniformity than that," Cane said.

Employment, commercial and class action lawyers are going to be keeping a close eye on this case, according to Cane.

"Person-by-person differences come up in most putative class actions," he said. "This could be the most important class action decision of the decade in California."

The plaintiffs are represented by Ellen Lake of the Law Offices of Ellen Lake, Edward Wynne of Wynne Law Firm and Brad Seligman of Lewis Feinberg Lee Renaker and Jackson PC.

U.S. Bank is represented by Alison Tsao, Timothy Freudenberger and Kent Joseph Sprinkle of Carothers DiSante & Freudenberger LLP.

The case is Sam Duran v. U.S. Bank NA, case number S200923, in the California Supreme Court.

In re: Sergio C. Garcia on Admission

In addition, the California Supreme Court is on deck to decide whether Sergio Garcia, an illegal immigrant who came to the U.S. from Mexico when he was a minor, can be admitted to the state bar as a licensed attorney, and a decision in favor of Garcia has the potential to ease restrictions for entry to other professions.

The law school graduate, who passed the bar exam, was recommended by the Committee of Bar Examiners to be admitted as a licensed lawyer in October after a two-year investigation as part of his moral character application.

The state high court agreed to weigh in on the case in May, and while the California attorney general, a coalition of law professors and other groups have come out in support of Garcia, the U.S. Department of Justice has contested that federal law prevents illegal immigrants from being given certain public benefits, such as professional licenses.

The California Supreme Court is planning to consider several questions, including whether any state legislation provides that undocumented immigrants are eligible for licenses in fields of law, medicine or other professions, and a ruling in favor of Garcia could have a broad application on undocumented immigrants seeking to become lawyers and other types of professionals, according to Imre.

"It could apply to medicine or anything else that requires a license," she said. "Conceivably, it could also apply to contractors, not just professional licenses."

Depending on how the opinion is written, a decision allowing an undocumented immigrant to practice as an attorney in the state might create friction between state and federal laws, she said.

"Attorneys are subject to a lot of discipline under state bar rules," she said. "There is an interesting tension in the argument that you are practicing law as an officer of the court subject to discipline and at the same time you are in violation of federal law because you are an undocumented alien."

Garcia is represented by Jerome Fishkin of Fishkin & Slatter LLP.

The case is In re: Sergio C. Garcia on Admission, case number S202512, in the California Supreme Court.

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