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California Cases To Watch In 2017

By **Melissa Daniels**

Law360, Los Angeles (January 2, 2017, 1:03 PM EST) -- California attorneys in 2017 will be watching how the state Supreme Court rules on a host of hot-button questions, including how state arbitration rules square with the U.S. Supreme Court's Concepcion decision, how far the state's anti-SLAPP protections go, the reach of product liability law when it comes to generic drugs, and how far courts can go in revoking fees because of law firm conflicts and in clawing back fees on behalf of bankrupt firms.

Here's a look at six major cases attorneys in California and elsewhere will be following closely:

Sheppard Mullin Richter & Hampton LLP v. J-M Manufacturing Co. Inc.

The California Supreme Court in April agreed to review a high-profile appellate court ruling that Sheppard Mullin Richter & Hampton LLP was not entitled to $3.8 million in fees after finding the firm failed to disclose a conflict of interest when representing J-M Manufacturing in a false claims suit.

Though Sheppard Mullin gave J-M an advance conflict waiver, an appellate panel found in January that the firm failed to obtain informed consent regarding its simultaneous representation of J-M and South Tahoe Public Utility District in an unrelated matter. The utility had Sheppard Mullin removed from J-M's case, and a fee fight ensued.

The high legal bill isn't the only reason to watch this case, although it does raise the stakes, said Neil J. Wertlieb, a former chair of the California State Bar Ethics Committee. Many other firms may use advanced waivers similar to the one Sheppard Mullin gave to J-M, he said, and the case presents the high court with an opportunity to provide guidance on what kind of specificity the waivers required.

The language Sheppard Mullin used in its advanced waiver was "fairly robust" but generic and relatively common, he said.

"I think it would be very helpful to the attorneys in the state to get some concrete guidance from the California Supreme Court as to when advanced waivers constitute informed written consent, and when they don't," said Wertlieb, who recently retired from Milbank Tweed Hadley & McCloy LLP to launch a legal consulting business.

The matter has drawn intense interest from the California legal community, including more than 50 firms and legal scholars who submitted amici briefs in early December to support Sheppard Mullin. Firms like Cooley LLP, DLA Piper, Latham & Watkins LLP, Seyfarth Shaw LLP as well as smaller shops told the

court that approval of the fee forfeiture would have far-reaching effects for California lawyers and their clients, reducing the dependability of attorney-client arbitration agreements, and possibly resulting in the adoption of "unworkable and unfair" requirements for informed consent.

But the Association of Corporate Counsel and general counsel from companies including Kimberly-Clark Corp., Newegg Inc., Herbalife International and NetGear Inc. have thrown support behind J-M Manufacturing, saying that Sheppard Mullin's "open-ended" advanced conflict waiver should remain invalid.

Holland & Knight's Peter Jarvis, who filed the amicus brief on behalf of more than 50 firms, said one major question is whether, if the court finds there was a conflict that wasn't waived, full fee forfeiture is required. In this case, the lawyers did not act in bad faith and there was no indication of harm to the client, Jarvis said, noting that arbitrators earlier in the case found Sheppard Mullin acted in good faith.

"A total fee forfeiture argument, based on the 'seriousness' of the conflict as judged in the abstract, and without any regard to either the lawyers' state of mind or the presence or extent of client harm, would really go beyond the pale, I think," he said.

Wertlieb said one outstanding question is whether a fee revocation — especially one as high as $3.8 million — is the proper penalty for not complying with advanced waiver rules, if that is what the court finds.

Sheppard Mullin is represented by Kevin S. Rosen, Theane Evangelis and Heather L. Richardson of Gibson Dunn.

J-M is represented by Kent L. Richland, Barbara W. Ravitz and Jeffrey E. Raskin of Greines Martin Stein & Richland LLP.

The case is Sheppard Mullin Richter & Hampton LLP v. J-M Manufacturing Co., case number S232946 in the California Supreme Court.

T.H. v. Novartis Pharmaceuticals Corp.

One case that could have broad implications for product liability law in the Golden State stems from a dispute over whether Novartis can be held liable for negligent misrepresentation and failure to warn about alleged dangers from a generic, third-party-manufactured version of its asthma medication.

The appellate case stems from a lawsuit brought on behalf of minor twins alleging they developed autism after their mother was given a generic version of the Novartis asthma drug Brethine, which her doctor prescribed for an off-label purpose. The California Supreme Court agreed to take the case in June after an appellate panel found Novartis could be held liable for negligent misrepresentation and failure to warn, overturning a lower court decision that said Novartis didn't belong in the suit.

The question before California's high court is whether a brand-name manufacturer can be held liable for injuries caused by the generic manufacturer that occurred years after the brand-name manufacturer divested all ownership interest in the drug. Tom Watson of Horvitz & Levy LLP said the case could have "sweeping" effects for product liability law in the state beyond the pharmaceutical industry.

"Any time you have a brand-name manufacturer, there's going to be imitations," he said. "Generic forms

of drugs are not the only types of products that can be imitated. If there's a problem with a generic form of a product, depending on how the Supreme Court decides this case, manufacturers of brand-name products could potentially be brought into litigation."

However, the court could also narrowly decide the issue with respect to drugs, and the particular FDA requirements on generic manufacturers to include the brand-name manufacturer's warning, according to Watson.

Groups like the Chamber of Commerce, the Civil Justice Association of California, the National Association of Manufacturers and the American Tort Reform Association have asked to file amici briefs in support of Novartis, the court docket shows. Briefing is complete and oral arguments have not yet been scheduled.

The plaintiffs are represented by Benjamin I. Siminou and Kevin F. Quinn of Thorsnes Bartolotta McGuire.

Novartis is represented by Eric G. Lasker of Hollingsworth LLP and Erin M. Bosman and Julie Y. Park of Morrison & Foerster LLP.

The case is T.H. (a minor) et al. v. Novartis Pharmaceuticals Corp., case number D067839, in the Court of Appeal for the State of California, Fourth Appellate District.

McGill v. Citibank NA

California attorneys are keeping their eyes peeled for the long-awaited decision in McGill v. Citibank NA, where the California Supreme Court will determine whether the U.S. Supreme Court's Concepcion decision — which found federal laws trumped state laws when deciding if certain class action waivers are enforceable — eclipses the state-established Broughton-Cruz rule, which bars mandatory arbitration in certain instances.

At issue is whether the Federal Arbitration Act, as interpreted after AT&T Mobility LLC v. Concepcion, preempts the Broughton-Cruz rule, which prohibits arbitration for injunctive relief claims brought under the state's unfair competition law, false advertising law and Consumers Legal Remedies Act for the public's benefit. Though the California high court first agreed to review the case in April 2015, a decision is finally right around the corner, as oral arguments were held Dec. 7, triggering the 90-day statutory clock the justices have to hand down a final decision.

Albert Giang, an appellate litigator with Caldwell Leslie & Proctor PC who focuses on class actions and commercial disputes, said the case raises an interesting question of whether a rule like Broughton-Cruz can still be viable in a post-Concepcion landscape.

"[Broughton-Cruz] was a California carve-out that existed before Concepcion," he noted.

In the McGill case, a trial court ordered some claim to arbitration, but stayed portions that sought injunctive relief, citing the Broughton-Cruz rule. An appellate panel, citing Concepcion, reversed the trial court ruling and sent all of McGill's claims to arbitration, finding that Concepcion preempted the Broughton-Cruz rule. McGill then asked the state high court to review the case.

After watching oral arguments on Dec. 7, Giang observed that much of the discussion focused on whether the case implicated preemption rules at all, which could indicate a potential decision that instead focuses on the injunctive relief issues.

“I’m curious to see ultimately if the majority decision sidesteps FAA preemption entirely,” he said.

Felix Shafir of Horvitz & Levy said that since Concepcion, courts have both upheld and thrown out state-level rules that have come in conflict with the decision.

“This case sits in a broader context of what the California Supreme Court plans to signal about where it stands on the interplay between federal arbitration law and state arbitration law,” Shafir said.

The McGill case has taken on added importance in the wake of the death of Justice Antonin Scalia, Shafir said, and a potential new justice on the U.S. Supreme Court.

“If the [California Supreme] Court were to side with McGill, that would really set up review for the U.S. Supreme Court,” by entering into open conflict with the Ninth Circuit, Shafir said.

The plaintiffs are represented by Glenn A. Danas and Liana Carol Carter of Capstone Law APC.

Citibank is represented by Marcos D. Sasso of Stroock & Stroock & Lavan LLP.

The case is Sharon McGill v. Citibank NA, case number S224086, in the California Supreme Court.

Rand Resources v. City of Carson

California’s anti-Strategic Lawsuit Against Public Participation laws are designed to protect free speech and petition rights concerning matters of "public interest," but what constitutes a "matter of public interest" isn't entirely clear. The state Supreme Court has a chance to better define the term in Rand Resource v. City of Carson, a case dealing with whether a municipality's communications over a planned NFL stadium in Carson fall within the "public interest" limits of the anti-SLAPP law.

The case stems from an agreement Rand Resources entered with Carson to be its sole and exclusive agent for development of an NFL football stadium. Rand Resources sued, saying that the city breached its agreement by allowing other parties to begin dealing with plans and negotiations. But defendants filed anti-SLAPP motions and the trial court ruled grantingthem, finding that the communications about the proposed development fell into the “matter of public interest” protection in the anti-SLAPP law.

An appellate panel reversed the trial court decision, however, finding that the city and other defendants’ actions fell out of the scope of anti-SLAPP protections. The state Supreme Court granted review in September.

Though the state’s anti-SLAPP statute does say that activity can be protected if the activity “concerns a matter of public interest,” it stops short of giving a clear definition of the term, said business litigation attorney Melinda Eades LeMoine of Munger Tolles & Olson LLP. Rand has the potential to be a big decision because it gives the high court a chance to clear up differences that have arisen in the definition of "public interest" by speaking directly to the state statute, LeMoine continued.

“Predictability is an important goal in the law,” she said. “As it stands now, results can vary based on the test the court adopts, across both state and federal courts.”

Jeremy B. Rosen of Horvitz & Levy said that the case could be one of the most important anti-SLAPP

opinions of all time, should the high court provide guidance as to what constitutes an issue of public interest.

“The intermediate appellate courts have been hopelessly divided on that question, which only serves to add uncertainty to nearly every anti-SLAPP motion and appeal,” he said.

Rand Resources is represented by Joseph J. Ybarra, Carlos A. Singer and Aaron Michael May of Huang Ybarra Singer and May LLP.

The city of Carson and James Dear are represented by Anthony Robert Taylor and Christina Michelle Burrows of Aleshire and Wynder LLP. Leonard Bloom and U.S. Capital LLC are represented by John V. Tamborelli of Tamborelli Law Group.

The case is Rand Resources LLC v. City of Carson, case number S235735 in the California Supreme Court.

Alvarado v. Dart Container Corp. of California

With its pending decision in Alvarado v. Dart Container Corp. of California, the state Supreme Court has the chance to send a clear message to employers about whether they should be using a state or federal formula in calculating flat-rate bonuses into overtime pay.

Hector Alvarado alleges Dart committed state wage law violations through the way it calculated overtime after issuing a $15 attendance bonus for weekend shifts, arguing that the state method of calculation is more favorable than the method laid out in federal law. A trial court found that Dart's formula was lawful, and an appellate panel agreed, finding that overtime calculation guidelines from California's Division of Labor Standards Enforcement did not have the force of law.

The January panel decision came down on the side of California employers by holding that they can calculate overtime on flat sum bonuses using federal rules, as opposed to the state’s suggested method.

Andrew Livingston, the deputy practice group leader of the global employment law group at Orrick Herrington & Sutcliffe LLP, said the question of whether to use federal or state formulas for overtime calculations has plagued employers, and Alvarado offers a chance for clarity.

“Clients who have their operations throughout the U.S. have struggled for a long time to understand whether they can use the federal method of calculation in California,” he said. “There was nothing that said you couldn’t, but there was nothing that specifically said you could, and the stage agency used a different approach in their manual.”

Livingston said the federal method is more straightforward and simple, making it more convenient for employers especially if they operate in other states. If they use the California method, their calculations must be made manually — and they cost the employer more, Livingston said.

“The federal approach has been in effect for 60 years,” he said. “We would very much like to have the comfort that we can take advantage of it in California."

The California Employment Law Counsel and Employers Group filed a brief supporting Dart in late October. The National Association of Manufacturers is also supporting Dart, arguing that a reversal of the appellate court decision would discourage employers from offering flat rate and attendance bonuses.

The California Employment Lawyers Association will file a brief in support of Alvarado, per the docket.

Alvarado is represented by Joseph Lavi of Lavi & Ebrahimian LLP and Dennis F. Moss.

Dart Container Corp. is represented by Howard B. Golds of Best Best & Krieger LLP.

The case is Alvarado v. Dart Container Corp. of California, case number S232607 in the California Supreme Court.

Heller Ehrman LLP v. Davis Wright Tremaine LLP

Legal industry pros and law firm managers will be on alert for the California Supreme Court's ruling on a certified question in the clawback saga of the bankrupt firm Heller Ehrman LLP, whose trustee is pushing to obtain the fees from hourly work by former partners who began to leave the firm for competitors in early 2008.

After an adverse 2012 bankruptcy court ruling, 12 of the original 16 firms in the case chose to settle, and only four remain: Davis Wright Tremaine LLP, Foley & Lardner LLP, Jones Day and Orrick Herrington & Sutcliffe. The question in front of the high court concerns what interest, if any, a dissolved law firm has over hourly work in legal matters that aren't completed when the firm is dissolved.

Ron Minkoff of Frankfurt Kurnit Klein & Selz PC said courts nationwide have differing opinions on how payments from hourly fee matters should be handled when a law firm dissolves. A decision in which the California Supreme Court rules in step with a court in another state could therefore carry significant weight in the face of uncertainty, he said.

"Right now, if lawyers are in a firm that dissolves, there's a lot of uncertainty among firms that hire them as to whether or not they're going to find themselves enmeshed in litigation with the bankruptcy estate of the former firm," he said. "I'm sure it gives some law firms pause about hiring people up in that circumstance."

The Heller Erhman matter found its way to the state high court after a federal bankruptcy court granted Heller's motion for summary judgment on liability issues, followed by a federal district court reversal and an appeal to the Ninth Circuit, which in July certified the question about a dissolved firm's interest to the California Supreme Court.

Heller Ehrman's trustee filed a brief at the start of December arguing that the California Uniform Partnership Act entitles dissolved law firms to collect profits generated by ex-partners who are completing hourly fee matters, citing the "unfinished business rule." When it comes to dissolving a partnership, law firm partners have important fiduciary duties and obligations to other employees including non-lawyers and non-partners, the Heller trustee argued.

Groups like the American Bar Association, the Los Angeles County Bar Association and the Bar Association of San Francisco have also weighed in, arguing that entitling a dissolved firm to unearned fees would violate fee-splitting prohibitions, and would encourage lawyers to leave firms and take clients with them at the first sign of financial trouble.

Heller Erhman's trustee is represented by Christopher D. Sullivan of Diamond McCarthy LLP, Jeffrey T. Makoff of Valle Makoff LLP and Kevin W. Coleman of Schnader Harrison Segal & Lewis LLP.

Davis Wright Tremaine LLP is represented by Steven A. Hirsch of Keker & Van Nest LLP and Peter P. Meringolo and Luther Orton of PMRK Law LLP, which also represents Foley & Lardner LLP. Jones Day is represented in-house by Shay Dvoretzky. Orrick is represented by in-house counsel Eric A. Shumsky, Rachel Wainer Apter and Christopher J. Cariello, and Pamela Phillips and Jonathan W. Hughes of Arnold & Porter LLP.

The case is Heller Ehrman LLP v. Davis Wright Tremaine LLP, case number S236208 in the California Supreme Court.

--Additional reporting by Kali Hays, Steven Trader, Y. Peter Kang and Andrew Strickler. Editing by Kelly Duncan.
