# The Expert's Corner

## Supreme Court Round-Up

William B. Rubenstein*

During the Term that just ended, the Supreme Court did not decide any cases involving class action fees law, or class action law or fee law more generally. However, the Court did decide several important cases involving state law preemption and pleading standards that will have sweeping implications for all cases, including class actions. The plaintiffs' bar won back some ground it lost last year in the preemption cases decided this Term, however the defense bar won a significant victory on the procedural front.

### State Law Preemption

In *Altria Group, Inc. v. Good,* No. 07-562, 555 U.S. ___ (2008), the Court held, 5-4, that the federal Cigarette Labeling and Advertising Act (Labeling Act) did not preempt claims of light cigarette smokers against tobacco companies brought under the Maine Unfair Trade Practices Act (MUTPA). The case was brought as a class action on behalf of smokers of light cigarettes in Maine, but the Court did not address any issues specific to class action law, focusing instead on the broader preemption question. The plaintiffs, longtime smokers of Marlboro Lights and Cambridge Lights cigarettes, alleged that defendants engaged in false advertising by conveying the message that their "light" cigarettes delivered less tar and nicotine than regular brands. Plaintiffs alleged that this advertising was false because the defendant manufacturers knew that smokers would engage in compensatory behavior when smoking lights, such as taking longer puffs or holding air longer in their lungs, resulting in smokers of light cigarettes inhaling just as much tar and nicotine as smokers of regular cigarettes.

The decision revisited the sixteen year old decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). The Court in *Cipollone* drew a distinction between claims that would result in a new duty for cigarette companies to warn users of the health hazards of smoking (which the Labeling Act would preempt) and claims that relate to the general duty of manufacturers not to deceive consumers by misrepresenting key facts about their products (which the Labeling Act would not preempt). Unsurprisingly, the cigarette manufacturers attempted to characterize the plaintiffs' claims in *Altria* as falling into *Cipollone*'s first category, with the plaintiffs characterizing the claims as relating to false statements generally and hence falling in *Cipollone*'s second category.

The Court sided with the plaintiffs, reiterating that federal preemption clauses are to be interpreted narrowly and holding that MUTPA's "duty not to deceive" claims were not related to "smoking and health," under the Court's *Cipollone* test.

In its second state law preemption case of the Term, *Wyeth v. Levine,* No. 06-1249, 555 U.S. ___ (2009), the Court ruled, 6-3, that FDA approval of a drug labeling did not preempt the plaintiff's state law failure-to-warn claims. The plaintiff, Levine, sued Wyeth, the manufacturer of the antinausea drug Phenergan. She had been injected with the drug through the IV-push method and the drug had mistakenly entered her artery, causing her to develop gangrene which resulted in the amputation of her forearm. Levine claimed that Wyeth failed to adequately warn users of the drug about the risks posed by injection of the drug via IV-push method. Wyeth argued that the state law claims should be preempted either because it was impossible for Wyeth to comply with both the state law duties and the federal labeling duties as regulated by the FDA, or because requiring it

(continued on page 260)

*William B. Rubenstein, a law professor at Harvard Law School, specializes in class action law; he has litigated, and regularly writes about, consults, and serves as an expert witness in class action cases, particularly on fee-related issues. Professor Rubenstein's work can be found at www.billrubenstein.com. The opinions expressed in this article are solely those of the author.*

Copyright © 2009 Octagon Publishing, Inc. Reproduction strictly prohibited.

(continued from **EXPERT'S CORNER**, page 259)

to comply with a state law duty to provide a stronger warning would interfere with Congress' decision to entrust the FDA with drug labeling decisions.

The Court rejected each of these arguments in turn. Addressing the defendant's first argument, the majority, speaking through Justice Stevens, stated that although a manufacturer generally needs permission from the FDA to make any changes to a drug's label, a manufacturer is allowed unilaterally to strengthen the warnings on its label without prior FDA approval. There was no evidence here that the FDA would have rejected any stronger warning about the dangers of the IV-push method had Wyeth added these to its label. With regard to Wyeth's second argument, the majority concluded that it has long been the Court's position that Congress, in enacting the Food, Drug, and Cosmetic Act, did not intend to preempt state law causes of action based on a failure to warn.

These two decisions are victories for the plaintiffs' bar, even more so in that they staunch the bloodbath that could have been triggered when the Court ruled last Term, in *Riegel v. Medtronic Inc.,* 128 S.Ct. 999 (2008), that FDA approval of a medical device preempts state common law causes of action related to the safety or effectiveness of that device. By allowing the Maine class action to survive a motion to dismiss in *Altria* and the state law failure to warn claim to proceed in *Levine*, the Court has opened the door to the similar class actions brought in other states against cigarette manufacturers and to yet-to-be-filed cases against drug manufacturers alleging a failure to warn despite compliance with FDA labeling standards. Both cases were decided with the four more liberal justices (Breyer, Souter, Ginsburg, and Stevens) in the majorities, twice joined by Justice Kennedy and once by Justice Thomas.

***Bottom line:***
*significant plaintiff victories.*

## Pleading Standard

The Court's 5-4 decision in *Ashcroft v. Iqbal,* No. 07-1015, 556 U.S. ___ (2009) represented a victory for defense attorneys and has widespread implications for acceptable pleadings in all cases, including class actions. The Court found that the plaintiff's complaint failed to plead sufficient facts to support a case for purposeful and unlawful discrimination and thus it remanded the case to the Second Circuit for further consideration of whether Iqbal should be given leave to amend his complaint.

Iqbal, a Pakistani Muslim, was arrested on criminal charges in the aftermath of the events of September 11, 2001. He alleged that several important federal officials, including the former attorney general and the director of the FBI, had personal involvement in creating the harsh conditions in which he was held, and he argued that those conditions were imposed on account of his race, religion, or national origin, in violation of his Constitutional rights. Specifically, the complaint alleged that former attorney general John D. Ashcroft and FBI director Robert Mueller "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions on account of his race, religion, or national origin. He further alleged that Ashcroft was the "principal architect" of this invidious policy, with Mueller "instrumental" in its execution.

The Court found these "bare assertions" to fail the pleading standard it had established last Term in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007). In *Twombly*, an antitrust case, the Court required that, in order to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." Id. at 570. Therefore, a complaint which merely recites the elements of a cause of action, relying solely on conclusory statements for support, would not survive a motion to dismiss; the complaint must contain well-pleaded factual allegations to allow the Court to conclude that the allegations reach the level of plausibility, *Twombly* held.

(continued on page 261)

COPYRIGHT © 2009 OCTAGON PUBLISHING, INC. REPRODUCTION STRICTLY PROHIBITED.

(continued from **Expert's Corner**, page 260)

In *Iqbal*, the Court deemed that the plaintiff's allegations of invidious discrimination failed to meet this standard. The Court found that the plaintiff's allegations were too conclusory – they did not allow the Court to determine whether the defendants had unlawfully discriminated against Iqbal in his arrest and detention, or whether the defendants had taken such actions with the nondiscriminatory intent of detaining illegal aliens present in the United States who had suspected ties with terrorists. Specifically, the Court held that Iqbal failed to plead facts sufficient to establish that Ashcroft and Mueller possessed a discriminatory state of mind, and thus failed to meet the Rule 8 standard.

*Twombly* touched off a revolution in district court review of pleadings at the motion to dismiss stage; *Iqbal* will surely throw fuel on that fire. It is likely that far more plaintiffs will be tossed out at the pleading stage in the coming years than have been for decades. Plaintiffs will argue that *Twombly* and *Iqbal* are not meant to apply widely – *Twombly* involved a complex antitrust case and the Court expressed fears of extensive discovery that would result were the case to go forward; *Iqbal* similarly involved a complex situation concerning high ranking government officials and their qualified immunity, a setting that again encouraged intense focus on the pleadings before permitting discovery. The thing to watch for in the courts will be whether *Twombly* and *Iqbal* are seen as cases at the margin or at the core of Fed. R. Civ. P. Rule 12 going forward. *Iqbal* itself addresses this question, identifying *Twombly* as being an interpretation of Fed. R. Civ. P. Rule 8's pleading standard generally, not in antitrust cases specifically, and hence suggesting that the higher bar of *Twombly* and *Iqbal* will apply across the board. Nonetheless, lower courts may well develop distinctions and nuances in applying both cases in the myriad circumstances in which they will be cited.

***Bottom line:***
*significant victory for the defense bar.*

## Mass Torts

In a technical procedural ruling in *Travelers Indemnity Co. v. Bailey,* No. 08-295, 557 U.S. ___ (2009), the Court revisited a 1986 bankruptcy court settlement agreement that emerged from reorganization of asbestos supplier and manufacturer the Johns-Manville Corporation and one of its insurers, Travelers. The original 1986 settlement provided that Travelers would contribute substantially to a personal injury trust, and in return, would be released from any policy claims channeled to the trust, with policy claims including "claims" and "allegations" against the insurers "based upon, arising out of or relating to" the Manville insurance policies. Ten years after the ink on the settlement agreement had dried, plaintiffs began filing direct actions against Travelers, often seeking to recover from Travelers for its own violations of state consumer-protection statues or violations of the common law for not disclosing its knowledge about the dangers of asbestos to consumers.

In its defense, Travelers returned to the Bankruptcy Court seeking an injunction barring these direct actions. As a result, Travelers settled with these plaintiffs, but in return, asked the judge to issue a clarifying order that the 1986 Order prohibited all such actions against Travelers. The Bankruptcy Court issued such a clarifying order, finding that the suits were barred by the 1986 injunction. On appeal, the Second Circuit held that the Bankruptcy Court lacked jurisdiction to have entered its 1986 final injunction. Reversing, the Supreme Court held, 7-2, that:

> [T]he 1986 Orders became final on direct review over two decades ago[. . . .] [W]hether the Bankruptcy Court had jurisdiction and authority to enter the injunction in 1986 was not properly before the Court of Appeals in 2008 and is not properly before us . . . . [O]nce the 1986 Orders became final on direct review (whether or not proper exercises of bankruptcy court jurisdiction and power), they became *res judicata* to the parties and those in privy

(continued on page 262)

Copyright © 2009 Octagon Publishing, Inc. Reproduction strictly prohibited.

(continued from **EXPERT'S CORNER**, page 261)

> with them. . . . Those orders are not any the less preclusive because the attack is on the Bankruptcy Court's conformity with its subject-matter jurisdiction, for even subject matter jurisdiction may not be attacked collaterally.

*Id*. at 2203, 2205 (internal quotations omitted).

*Travelers* reaffirms two longstanding principles of preclusion: that a party may not attack an earlier final judgment during proceedings to enforce that judgment and that *res judicata* bars challenges to jurisdictional determinations embodied in an earlier final judgment. That said, the Court limited its holding in *Travelers* to interpreting the injunction before it, refusing to decide the question of whether a bankruptcy court has the power to enjoin claims against an insurer that do not derive from the debtor's wrongdoing. The Court also delegated the task of determining whether any individual is bound by the 1986 Orders to the Second Circuit.

***Bottom line:***

*in re-affirming an earlier judgment against collateral attack, Travelers is a limited victory for the general class action bar, as class action settlements are often attacked collaterally and, the more room there is to do so, the less likely such a settlement will occur in the first instance.*

## Conclusion

The 2008-2009 Supreme Court Term involved no cases directly addressing class action or attorneys fees issues. However, the Court did decide several cases that have the potential to affect class action law and the filing of class action suits. On the pro-plaintiff side, the Court proved more willing than it was last Term to permit state law claims to proceed in the face of arguments that they were preempted by federal law. On the pro-defendant side, the Court strengthened the heightened pleading standard it had previously established. As a result of these decisions, class action attorneys may find more opportunities to bring consumer warning and fraud suits under state law instead of being confined to federal causes of action, but they may also face a heightened pleading standard when bringing *any* cases.

COPYRIGHT © 2009 OCTAGON PUBLISHING, INC. REPRODUCTION STRICTLY PROHIBITED.