

## + Law Bars Arbitration in Military Contracts

## + ABA Urges Ban on Gender Identity Discrimination

## + Congress Continues to Debate Pleading Standards

AND MORE . . . By Steven J. Mintz, Litigation News Associate Editor

### Executive Branch

#### Arbitration/Military Contracts

As part of a larger defense spending bill, President Barack Obama signed into law a provision that bars military contractors from enforcing mandatory arbitration clauses in their employment contracts. The restrictions will also apply to subcontractors after six months, but contracts and subcontracts of less than \$1 million are exempt.

#### Court Security

The Office of the Inspector General of the DOJ released a report finding continued deficiencies in the protection of federal judges and prosecutors. As many as 25 percent of all threats against judges and prosecutors were not reported. Even when threats were reported, federal and local law enforcement agencies do not consistently coordinate their responses. The number of threats and inappropriate communications toward judges and prosecutors more than doubled from 2003 to 2008.

### Congress

#### Employment Discrimination

The ABA urged passage of the Employment Non-Discrimination Act of 2009, introduced as S. 1584 and H.R. 3017, that would prohibit employment discrimination on the basis of actual or perceived sexual orientation or gender identity. The legislation would apply to private companies with more than 15 employees and federal, state, and local governments, but not to religious entities or others that are exempt from the religious discrimination provisions of Title VII of the Civil Rights Act of 1964. The ABA first adopted a policy calling for all levels of government to prohibit discrimination on the basis of sexual orientation in 1989; that policy was expanded in 2006 to include actual or perceived general identity or expression.

#### Judicial Recusal

A House Judiciary subcommittee held a hearing on the recusal process for federal judges and potential changes that could take the recusal decision away from the judge who might be disqualified. Representatives complained about judges' refusal to explain their rulings on recusal motions and specific cases that raised an appearance of judicial bias.

#### Pleading Standards

The Senate Judiciary Committee and a House Judiciary subcommittee held hearings to examine the impact on access to justice of

the Supreme Court's recent decisions on federal pleading standards, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Senate Committee Chairman Patrick Leahy (D-Vt.) declared that the decisions have "made it more difficult for victims to proceed in litigation before they get to uncover evidence in discovery. I fear that this is just the latest example of conservative judicial activism." In the House, the "Open Access to Courts Act," H.R. 4115, proposes to restore the notice pleading standard of *Conley v. Gibson*, 355 U.S. 41 (1957).

### U.S. Supreme Court

#### Amended Pleadings

The Court granted certiorari to consider whether Fed. R. Civ. P. 15(c)(1)(C), which permits an amended complaint to "relate back" to an original complaint for limitation purposes when the amendment corrects a "mistake concerning the proper party's identity," applies when the plaintiff had imputed knowledge of the identity of the proper defendant before filing suit. *Krupski v. Costa Crociere S.p.A.*, No. 09-337.

#### Criminal Procedure

The Court held *per curiam* that a Georgia state court violated a criminal defendant's Sixth Amendment right to a public trial, and Supreme Court precedents, by excluding the public from the voir dire of prospective jurors without considering reasonable alternatives to closing the courtroom. *Presley v. Georgia*, No. 09-5270.

#### Securities Litigation

The Court heard argument on whether federal courts have subject matter jurisdiction over fraud on the market claims by a class of foreign investors of stock in a foreign company purchased on a foreign stock exchange. *Morrison v. Nat'l Austl. Bank, Ltd.*, No. 08-1191.

#### Sentencing

The Court granted certiorari to consider whether the federal Sentencing Guidelines are binding in a sentence modification proceeding. *Dillon v. U.S.*, No. 09-6338. *United States v. Booker*, 543 U.S. 220 (2005), held the Guidelines advisory in initial sentencings.

"Keeping Watch" focuses on developments in the federal executive, legislative, and judicial branches.