The Commercial Law Connection

The National Bar Association
Commercial Law Section

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CONNECTING PEOPLE, IDEAS AND OPPORTUNITIES

INSIDE THIS ISSUE:

Message from the Chair

David B. Cade, Esq., Chair

Welcome Back! I trust you are well rested from our 23rd Annual Corporate Counsel Conference in San Diego, California, a few months ago. We donated $25,000 to the San Diego Young Artists Music Academy following their performance during our opening reception, and based upon your comments, the children who performed are destined for great things. We are proud to have had the opportunity to bestow this donation upon them.

Speaking of honors, we recognized several splendid Section members and Section supporters over the course of this year's conference. Taylor Fields, who has been a stalwart of the Section since its inception, received the annual Cora T. Walker Legacy Award. I am very grateful for Taylor's wise counsel over the years and his continued support of the Section. Ben Wilson received our Outstanding Outside Counsel Award, and he accepted the award in his typical style: modest and gracious. Wal-Mart Stores, Inc. received our 2010 Corporation of the Year Award. Wal-Mart General Counsel Jeff Gearhart accepted on behalf of Wal-Mart and reiterated the commitment that Wal-Mart has to reaching out to attorneys of color. Wal-Mart, through Jeff, NBA Past President Dr. Walter Sutton, and former General Counsel and current Chief Administrative Officer Tom Mars, has consistently demonstrated that commitment year after year, and we are grateful for this continued support.

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In the Aftermath of *Ashcroft v. Iqbal:*

How Pre-Dismissal Discovery Can Strike the Right Balance

*By Professor Suzette M. Malveaux**

For over half a century, "notice pleading" largely defined the pleading system in the federal courts. The Supreme Court, in *Conley v. Gibson*, set forth the standard upon which the courts have historically relied.[1] In holding the complaint sufficient, the Court stated, "we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[2]

The notice pleading paradigm, anchored in *Conley v. Gibson*, however, was called into question following the Court's seminal opinion, *Bell Atlantic Corp. v. Twombly*.[3] *Twombly* involved an antitrust putative class action brought by local telephone and high speed internet service subscribers against regional telephone service monopolies. Plaintiffs alleged that, over a seven-year period, defendants conspired to restrain trade in violation of § 1 of the Sherman Antitrust Act. In a seven to two decision written by Justice Souter, the Supreme Court reversed, setting forth a new pleading paradigm.

Twombly maintained *Conley's* standard that a plaintiff must give fair notice of the nature of his claim and the "grounds upon which it rests," and that he need not set out in detail the facts upon which he bases his claim. But *Twombly* concluded that "more than labels and conclusions" were necessary and that a "formulaic recitation of the elements of a cause of action" would not suffice.[4] More specifically, factual allegations must show a plausibility of entitlement to relief, not just a possibility.[5] After over half a century, *Conley's* "no set of facts" standard had been retired – ushering in a wave of confusion and conflict among judges, lawyers, and scholars about its scope and meaning.

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The NBACLS Honors Taylor Fields with Its Cora T. Walker Award

*By Donald O. Johnson, Esq.**

During its 23rd Corporation Counsel Conference in February of this year, the NBA Commercial Law Section (NBACLS) presented its Cora T. Walker Award to Taylor Fields, Esq. The Section established the award in honor of the former Chair of the NBACLS who began her career in an era in which discrimination against African-Americans was common but who worked hard to persuade large corporations to retain African-American law firms as outside counsel. During her term as Section Chair, Ms. Walker and her colleagues' efforts led to the creation of the Section's Annual Corporate Counsel Conference.

Mr. Fields is a native of St. Louis, Missouri and is the managing partner of Fields & Brown, LLC, the largest minority-owned law firm in Missouri. He joined the NBA in 1981 at which time the NBACLS existed but the Corporate Counsel Conference did not. The presentation of the award to Mr. Fields recognizes his contributions to the NBACLS and the outstanding leadership that he has demonstrated through the creation of a viable and skilled African-American owned firm; and his work in various local bar associations and community groups in Missouri and in national bar associations, including the NBA.

Responding to our Section's request for an interview, he was kind enough to share his thoughts about his receipt of the Cory T. Walker Award, his recollections about the development of the Corporate Counsel Conference and its impact on his career, and his advice for younger attorneys.

Fields stated, "Receiving the Cora T. Walker Award meant a great deal to me because I was privileged to know and work with Cora. She was dedicated to opening up opportunities for African-American lawyers in the corporate community. The success of the Section reflects her vision and foresight." He recalled that after he joined the NBA, "Cora Walker and others were discussing how the members of the Section could make inroads into the corporate community and what vehicles could be used to facilitate those inroads. Among the early pioneers of the Section were: Harold Pope, Bobbie Tillmon-Mason, Vera Brown-Curtis, Julius Ray, Thomasina Williams, Nelson Atkins, Irwin Evans, Ken Roberts, Ron Samuels, Mike Fitzhugh, Gary Lafayette, and Robert Archie."

"The early challenges included making sufficient contacts with General Counsels of major corporations, obtaining sufficient financial resources, and overcoming logistical problems associated with coming together to execute a plan of action," Fields recalls. The first Corporate Counsel Conference was in Chicago. Regarding what he remembers most about that conference, Fields stated, "First and foremost, it was successful. Minority-owned firms received business opportunities as a direct result of the conference. Second, the corporations were as enthusiastic about this initiative as the attorneys who planned it. Finally, it was extremely cold. Harold Pope insisted that the Corporate Counsel Conference be held in the month of February in commemoration of Black History Month."

Fields noted that, during the early years of the conference, "Ford Motor Company, E. I. DuPont de Nemours, Prudential Insurance Company, Eastman Kodak, National Railroad Passenger Corporation (Amtrak), Continental Trailways and The Travelers Company stand out in my mind. They gave business to minority-owned firms and offered to underwrite portions of the conference."

"The conference had a very significant impact on my career and my firm," Fields acknowledged. "I don't believe that I would have pursued corporate business but for the Commercial Law Section. Of equal significance to me has been the personal relationships that I have developed over the years. This has opened up a reservoir of knowledge and experience that otherwise I would not have acquired."

With respect to the similarities and differences that he sees between the conference in its early years and the conference in recent years, Fields observed, "During the early conferences, the emphasis was on hiring African-American owned firms and the development of those firms. Today, the emphasis is on hiring diverse counsel, regardless of whether they are in minority-owned firms or majority-owned firms."

He thinks that it would be advantageous to return the conference periodically to cities like Chicago or New York, rather than holding the conference exclusively in warm weather locations as done in recent years, notwithstanding the potential for bad weather in February, stating "because there are a number of corporate headquarters located in such places as Chicago and New York, they provide greater opportunities. I think weather is overstated."

"Attending the conference is a good investment for both Corporations and attorneys seeking to develop business opportunities," Fields emphasized. "Corporations have the opportunity to discover some very talented lawyers. Lawyers have the opportunity to make invaluable contacts."

Finally, Fields offered some advice for younger attorneys who are starting their careers and are concerned about selecting suitable practice areas, "Work in several areas during the early years of your career until you discover your passion." As for experienced attorneys who are concerned about generating business, he advises "Join the Commercial Law Section."

** Donald O. Johnson, J.D., LL.M., CPCU is a member of the Commercial Law Section's Executive Committee.*

The 2010 Corporate Counsel Conference: Invigorating, Interactive, and Informative

*By Michael Choy, Esq.**

The 23rd Annual Corporate Counsel Conference was held in San Diego, California at the Loews Coronado Bay Resort, February 25 – 27, 2010. The aesthetic surroundings of the resort and the beauty of Southern California gave me a sense of renewed energy. In addition to the conference being held at a beautiful location, the conference was invigorating, interactive, and informative.

On February 25th, Brian Telfair, a member of the NBACLS Executive Committee, moderated the Outside Counsel Roundtable Luncheon. One of the hot topics during the luncheon was how lawyers can create value within law firms, which led to the question of whether the billable hour is dead. The views concerning the billable hour generally varied depending on the participants' status as in-house counsel or outside counsel or as members of small or large firms.

The prevailing view of in-house counsel was that the billable hour may not be dead, but that outside counsel can be more creative when using the billable hour. In-house counsel emphasized that it was more important for in-house counsel and outside counsel to work in a "partnership" than to focus on the billing methods. While one in-house counsel stated that fixed-fee arrangements are sought in certain circumstances, in her opinion, the billable hour is not necessarily dead or a bad concept. It was emphasized, however, that if the billable hour is used, it is important for inside and outside counsel to use the billable hours within a budget and for outside counsel to act as a partner with in-house counsel as opposed to acting as "just another outside lawyer."

A small firm practitioner made one of the most notable statements during the discussion about alternative billing arrangements, noting that value-based billing is not new, but is, and has been, a method of survival for small law firms.

Another highlight of the conference was the General Counsel Luncheon held on February 26th and moderated by Robert R. Simpson, Esq., a Partner at Shipmen & Goodwin and a member of the NBACLS Executive Committee. Featured during this luncheon was Juliette Pryor, Executive Vice President, General Counsel and Chief Ethics Officer, U.S. Foodservice, Inc. of Rosemont, Illinois. Mrs. Pryor presented an informative slide show, which can be summed up in her own words: "change is constant." The takeaway from her presentation was that lawyers need to have the flexibility to make on-the-spot decisions with respect to their careers, because sometimes opportunities only present themselves once.

Mrs. Pryor also emphasized the importance of forming relationships over the course of one's legal career and shared some other insights with the luncheon attendees:

1) Outside counsel who actively see and spot problems and get ahead of the curve and alert her to issues on their own initiative are more valuable to her;
2) She strongly counsels against burning bridges with anyone no matter what their status is, as she believes, for example, that paralegals may have selected her for some work during her career, as opposed to senior partners; and
3) One of her biggest pet-peeves is receiving e-mails, announcements and updates on law from outside counsel on an unsolicited basis.

Another highlight of the General Counsel Luncheon was the presentation of the Section's 2010 Outstanding Outside Counsel Award to Benjamin F. Wilson, Managing Partner, Beveridge and Diamond, P.C., and a long-time member of the NBACLS. Mr. Wilson gave a poignant speech, which borrowed a quote from Denzel Washington in the movie Glory, wherein Mr. Wilson emphasized that the NBA Commercial Law Section was his "family." This sentiment is shared by many long-time participants of the NBACLS Annual Corporate Counsel Conference.

On Saturday, February 27, 2010, I attended an interesting CLE program, titled: "It's Obama Time: The Change in Regulatory Framework in Corporate Securities, Healthcare and Privacy and Environmental Law," which was extremely informative and interactive. The moderator was Kimberly Banks McKay, Director-Pharmaceuticals Counsel, Novartis Pharmaceuticals Corporation. The panelists included: Marcea Bland Lloyd, Senior Vice President, Government and Corporate Affairs and General Counsel of Amylin Pharmaceuticals, Inc.; Cisselon Nichols Hurd, Senior Litigation Counsel, Shell Oil Company; and, Sarah L. Harris, Senior Associate, Baker & McKenzie, LLP.

This was a very timely program given the legislative initiatives in Washington relating to the financial meltdown and proposed financial reform, the recently enacted healthcare reform legislation, the debate relating to cap and trade, and recently proposed Clean Water Act Regulations and Clean Air Act initiatives. The panelists were extremely informative and well prepared. They gave excellent presentations and interacted with the audience during their presentations.

These were but a few highlights of the 23rd Annual Corporate Counsel Conference. I left the conference both invigorated and eagerly awaiting next year's conference. I hope to see all of you there!

** Michael Choy is Counsel to Burr & Forman LLP in Birmingham, Alabama and a member of the NBACLS Executive Committee. He specializes in civil litigation, and jury and non-jury trials on behalf of corporations and businesses across a broad spectrum of industries. He is Chair to the firm's Governmental Affairs and Investigations Committee. Michael can be reached at (205) 251-3000, or mchoy@burr.com.*

Ethics CLE Panel Challenges Conference Attendees to Consider Thorny - But Common - Ethical Issues

*By Benjamin F. Wilson, Esq.**

Attendees at the Commercial Law Section's Corporate Counsel Conference engaged in a lively ethics discussion on February 27, 2010. In "Legal Ethics: Call 911," a panel of experts and a packed audience examined critical questions related to unauthorized contact with employees of a defendant company, attorney-client privilege, and representations to a court-appointment mediator regarding settlement authority.

Panelists

"Legal Ethics: Call 911" featured the following panelists: *Kellye Gordon,* Corporate Counsel at Cummins, Inc. and Functional Excellence Leader for management of the company's outside counsel; *Brian Telfair,* founding partner of Telfair, Pilot, & Drake, LLC and former in-house counsel at Dow Chemical Company; and *Dana Moore,* partner at Venable LLP, where she maintains a practice focused on representing industry and insurance companies in product liability and personal injury claims. I moderated the panel.

The Case

Participants considered a hypothetical case involving an elderly diabetic patient in a nursing home who developed severe pressure sores (bedsores) and sued the nursing home for negligent care. The facts stipulated that risk factors for bedsores include confinement to a bed, inadequate diet, a history of smoking, and diabetes. All of the ethical issues presented were generated from this core set of facts.

Issue 1: Unauthorized Contact

Dana Moore guided a spirited discussion of the first question, which considered whether plaintiff's counsel violated the rules of professional conduct when he spoke with two members of the nursing home's staff without first obtaining permission from the nursing home's in-house or outside counsel. The patient's suit named only the nursing home as a defendant—neither staff member was named in her individual capacity. Plaintiff's counsel received valuable information from his conversations. Upon learning of the communication with its staff, the nursing home moved to disqualify plaintiff's counsel for violation of the rule against *ex parte* contact with a represented party or person.

The panel concluded that, absent advance warning from the nursing home's counsel that the staff members were represented or were authorized agents, plaintiff's attorney did not violate the rule of professional conduct that prohibits *ex parte* contact with a represented party.

Issue 2: Email Unchained

Brian Telfair asked attendees to consider whether an email from a supervisor to staff was privileged. At issue was an email that described a meeting between nursing home officials and in-house and outside counsel and asked the staff person to gather documents related to the patient. The communication occurred at the request of outside counsel. Although counsel had asked the supervisor to copy counsel on any emails, the supervisor failed to do so.

The panel concluded that, notwithstanding the supervisor's failure to copy counsel, the supervisor was acting as a conduit for attorney-client privileged communication, and the nursing home was not obligated to produce the email. Communications between company employees that reflect attorney advice are covered by the attorney-client privilege, even if an attorney is not copied on a written communication or present during an oral communication.

Issue 3: What's the Bottom Line?

Kellye Gordon guided a discussion of whether in-house counsel unethically misrepresented his settlement authority. The issue arose in the context of court-ordered mediation before a retired judge. The retired judge asked the nursing home's in-house counsel how high the nursing home would go to settle the matter. In-house counsel responded that the nursing home believed the case was worth no more than $75,000 and would cease negotiations if the plaintiff insisted on more. Plaintiff settled. In-house counsel actually had authority to settle the matter for as much as $100,000.

The panel concluded that counsel's representation was probably unethical given the actual authorized settlement authority ($100,000) and the nursing home's apparent willingness to consider a settlement of greater than $75,000. Giving a false answer to a court-appointed mediator is not ethical. The panel advised that counsel should have politely, but firmly, declined to answer the question.

In addition to the foregoing issues, the panel provided an invaluable list of "best practices" associated with each scenario. For example, the panel emphasized the following principles:

- establishing a formal attorney-client relationship between a company's outside counsel and company witnesses may lead to potential disqualification if the company employee becomes a witness for the opposing side;
- merely copying counsel on a communication does not automatically protect the communication under the attorney-client privilege; and
- while bluffing in settlement discussions—properly framed—is not unethical, if the mediator is a sitting judge, counsel may be subject to disciplinary action for misrepresenting any fact.

In sum, the Ethics CLE seminar was interesting, provided attendees the opportunity to think through complex issues that often arise in commercial law practices, and gave them helpful practice pointers.

**Benjamin F. Wilson is the Managing Principal of Beveridge & Diamond, P.C. and the recipient of the Commercial Law Section's 2010 Outstanding Outside Counsel award. Beveridge & Diamond, P.C. is the largest and one of the oldest firms in the nation that concentrates its practice in all aspects of environmental law and litigation. Mr. Wilson can be reached at bwilson@bdlaw.com.*

Conference Symposium Offered Timely Career Advice

*By Vickie E. Turner, Esq.**

The Commercial Law Section Symposium, held on the first day of the NBA Commercial Law Section Conference, was one of the highlights of the Conference. It tackled the difficult topic, "Lawyers of Color: Navigating Their Careers in the Current Economic Climate."

The panel, which I moderated, included Lisa Levey from Libra Consulting, who has devoted numerous hours to the 2009 Benchmarking Study: A Report to Signatory Law Firms for the New York City Bar Association. The other panelists were Hinton Lucas, Vice President, Assistant General Counsel and Chief Administrative Counsel with DuPont; Paul Williams, Chicago Office Managing Partner and Global Practice Leader - Diversity Search with Major, Lindsey & Africa; and Steven Wright, Executive Partner of Holland & Knight.

This panel of experts presented a very lively and interactive two-hour Symposium that included significant audience participation, highlighted by the use of an electronic voting system that allowed each member of the audience to express his or her opinions about specific questions. After the audience voted on their perceived answer to each topic, a lively debate ensued regarding three primary areas: (1) the impact of the economic downturn on minority attorneys; (2) the impact of convergence on minority and women-owned firms; and (3) the value proposition — how to respond to the adverse impact of the economic downturn.

The conversation was frank and allowed for both the panel and audience participants to share their experiences so that we could learn from each other. The discussions were broad enough to incorporate the experience of attorneys from the early associate years to the more senior partners. They also addressed issues that are significant to attorneys who practice in minority and majority-owned law firms. For example, the Symposium participants discussed strategies that a minority in-house attorney who has been laid off as a result of the economic downturn could use to navigate his or her career. They also discussed strategies that outside counsel could use to seek work from companies that have used a convergence model to develop a preferred counsel list that does not include the attorney's firm.

Some of the interesting pieces of information provided during the Symposium were the results of a survey of the top five issues facing in-house counsel. They were: 1) reducing outside counsel legal spending; 2) Sarbanes-Oxley and other legal compliance issues; 3) reducing legal budgets when there is more work and fewer resources; 4) keeping management apprised of legal developments; and 5) staying apprised of changes in the law.

By the end of the Symposium, it was clear that although there are substantial challenges to navigating our careers in the current economic climate, there is also considerable encouragement to be found in the recommendations and information we shared.

** Vickie E. Turner is the Secretary of the Commercial Law Section and a Partner at Wilson Turner Kosmo LLP in San Diego, California.*

The In-House Counsel Roundtable Focused on Strategies for Success

*By DeMonica D. Gladney, Esq.**

This year's In-House Counsel Roundtable discussion included three key topics facing in-house counsel: 1) "To Tweet or Not to Tweet: Corporate Perspectives on the Effective Use of Social Media in the Workplace"; 2) "Effective Tools and Tips for Getting What You're Worth as In-House Counsel in Tough Economic Times"; and 3) "Strategies for Capitalizing on Best Practices and New Trends in In-House Legal Departments."

The panel featured the following in-house counsel: Reginald A. Greene, General Attorney, AT&T (moderator); Yolanda Seals-Coffield, Vice President & Assistant General Counsel, Diageo North America, Inc.; Raymond R. Ferrell, Vice President Associate General Counsel – Commercial Operation, SuperMedia; Sonya Johnston, Senior Attorney, Microsoft; and Bill Walker, Managing Principal, Ansun Management Partners, LLC.

Before the panelists shared their experiences, LaTanya Langley welcomed the in-house counsel attendees, and I addressed possible strategies for in-house counsel to effectively share best practices and lessons learned outside of the conference. Then the moderator, Mr. Greene, opened up the roundtable by introducing the esteemed panelists and providing an overview of the purpose of the In-House Counsel Roundtable.

Mr. Ferrell kicked off the panel discussion by addressing the corporate perspectives on the use of social media in the workplace. He emphasized the importance of social media in this electronic age and talked about the key challenges and opportunities that companies have with current and former employees using social media. In closing, he recommended that companies should "tweet" and embrace social media because of the many potential benefits.

Ms. Seals-Coffield and Mr. Walker discussed strategies and ways to handle your value proposition and to negotiate executive compensation during tough economic times. When it comes to assessing your worth, the key strategy that they recommended was for in-house counsel to develop their case by understanding their role, productivity and contribution to the company's bottom line. They also suggested that in-house counsel do the necessary investigation and research before they take action.

Lastly, Ms. Johnston gave her views on strategies for capitalizing on best practices and new trends in corporate legal departments. She shared her experiences on specific strategies for in-house counsel to help their companies with cost reductions in areas such as outside counsel fees and running their legal departments more efficiently. She also provided specific examples of projects that worked to achieve those goals as well as some useful internal tools.

In an effort to continue the dialogue and share information about best practices with the in-house counsel attendees, a summary of the notes and the presentations from the roundtable was given to all of the attendees after the conference.

** In-House Counsel Roundtable Committee was co-chaired by DeMonica D. Gladney, Counsel for Exxon Mobil Corporation, and LaTanya Langley, Sr. Counsel for Diageo North America. Both Ms. Gladney and Ms. Langley are members of the Executive Committee of the NBACLS.*

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The Conference E-Discovery CLE Seminar Addressed E-Discovery Process, Management and Cost Containment

*By Donald O. Johnson, Esq.**

The 2010 Corporate Counsel Conference featured an interesting CLE seminar concerning the increasingly important issue of managing the often costly process of responding to requests for discovery of electronically stored information ("ESI"). The expense of these efforts continues to grow for many companies as they store larger quantities of business information on computer equipment as a result of now essential office technologies, such as word processing, e-mail, and document scanning. Although improved business office technology has led to an explosion in workers' productivity, it also leads to many questions when litigation arises. For example, what discoverable information is stored on the company's computers, where is it stored, and how much will it cost to collect and review it.

The conference seminar was presented by a distinguished group, all of whom have extensive experience with e-discovery issues. The moderator was Craig Smith, Director, Huron Consulting Group. The panelists were: Philip G. Hampton II, Partner, Dickstein Shapiro LLP; Anthony Lowe, Assistant General Counsel, Freddie Mac; Cecil A. Lynn, Of Counsel, Ryley Carlock & Applewhite; and Sheldon Smith, Senior Associate, Nixon Peabody.

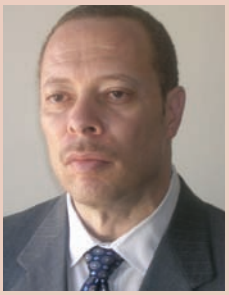
The panelists discussed a range of relevant issues, including, of course, the *Zubulake* decisions, which concern the scope of a party's duty to preserve ESI during the course of litigation, data sampling, and the disclosing party's ability to shift the costs of restoring "inaccessible" back-up tapes to the requesting party.

As a former computer systems analyst and computer programmer, the segment of the discussion that I found most interesting was the discussion of the challenges facing companies attempting to identify potentially discoverable ESI and determine which of it is accessible, non-privileged evidence that must be produced. There appeared to be agreement that one way that businesses can accomplish this mission efficiently is to employ a team approach that combines the knowledge and skills possessed by in-house counsel, retained litigation counsel, IT staff, the business people who use the information at issue, and third-party vendors who can reduce the demands on key employees' time.

Regarding each group's primary contributions to this effort, in-house counsel must authorize cooperation by relevant company personnel, ensure adherence to information preservation obligations, and help define the scope of the discovery. Litigation counsel should assist in-house counsel with the latter two responsibilities and must work with the company's business people to identify potentially discoverable ESI. Litigation counsel also must work with the company's IT staff to collect potentially discoverable ESI and must conduct a substantive and privilege review of it and oversee production.

Effective communication with, and use of, the IT staff is essential. Personnel in the systems and operations departments know where particular ESI is physically located. Programmers know which business information is stored electronically as opposed to being used only temporarily while data is processed. Database department personnel understand how the company's ESI is organized and can identify ESI that can be understood as stored versus ESI that must be reordered to be intelligible to the people who have to review it. Unless all relevant IT departments are consulted, one cannot be sure that the ESI collection effort has been thorough. For their part, third-party vendors can reduce costs and increase efficiency by assisting with the organization, storage, marking and production of discoverable ESI.

As explained during the seminar, using a team approach to e-discovery is an effective way to manage that part of the litigation process and to limit its costs to the extent possible.



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Conference CLE Panel Discussed Key Decisions and Legislation Impacting Your Business in 2010

*By Yvonne Williams, Esq.**

Recently there have been several important legal decisions and legislative developments that likely will alter the manner in which businesses function in the future. A conference CLE panel discussed developments related to bankruptcy, employment, and civil litigation as well as government investigations during a program titled, "Key Decisions and Legislation Impacting Your Business in 2010," which was moderated by Fiona Philip of Howrey LLP in Washington, DC.

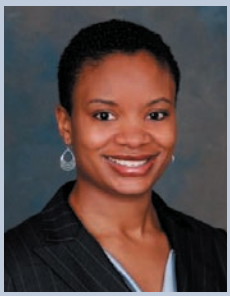
Holly Loiseau of Weil Gotshall & Manges LLP in Washington, DC. began with an analysis of two recent decisions that portend a significant impact not only on litigation, but also on the future conduct of all businesses. The first, *Koehler v. Bank of Bermuda,* expanded the territorial reach of orders to turn over assets to resolve a judgment. The other, *Abu-Ghazaleh v. Chaul*, determined that a third-party litigation financier may be held liable for an opposing parties' legal fees and costs where litigation is unsuccessful. As Ms. Loiseau noted, these decisions certainly expose litigants to a changing litigation dynamic.

The next panelist, Jimmie McMillian of Barnes & Thornburg in Indianapolis, Indiana, addressed the recent Supreme Court decisions in *Bell Atlantic v. Twombley* and *Ashcroft v. Iqbal,* which significantly altered the civil complaint notice pleading standard. These cases held that a plaintiff must make a plausible claim for relief in order to withstand a motion to dismiss. An article by Professor Suzette Malveaux, which begins on the cover page of this issue of the newsletter, provides a detailed examination of the implications of the *Iqbal* decision.

The third panelist, Veronica Merritt of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. in Birmingham, Alabama, spoke about mandatory arbitration of employment disputes, specifically addressing the potential consequences of the "Arbitration Fairness Act," which would prohibit the use of such agreements in employment, consumer, franchise and civil rights disputes.

Finally, the moderator, Ms. Philip, discussed several significant securities litigation issues, including the Supreme Court's consideration of the crime of honest services fraud, the fallout from the financial crisis, corporate governance disclosure, and the impact of increased Foreign Corrupt Practices Act government investigations.

The panelists, who clearly are experts in their respective fields, presented critical and detailed information for businesses and corporations regarding key legislative developments and the best ways to approach litigation in the future. The audience, which included in-house and outside counsel, was fully engaged and interested, providing a robust discussion of each of the issues addressed. All participants left the presentation stocked with a wealth of information that they can use immediately to assist their companies or clients.



** Yvonne Williams is Counsel at Miller & Chevalier where she litigates employment and certain health law issues before federal and state courts, as well as administrative agencies. Ms. Williams also conducts and manages internal investigations, in both the criminal and regulatory contexts, for multi-national corporations.*


THE COMMERCIAL LAW CONNECTION

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Messages from the Chair

Turning Conflicts of Interest into Dollars

NBACLS Newsletter News

Articles about substantive legal topics from past issues of The Commercial Law Connection are indexed by subject matter on the NBA Commercial Law Section's website — www.nbacls.com, making it easy to find past articles of particular interest to you. We invite you to contribute to this growing archive of articles by section members and supporters.

The NBA Corporate Law Section, whose purpose, among other things, is to promote participation of in-house counsel in the NBA and the hiring and retention of Black attorneys in corporate in-house legal department, recently launched an attractive and informative publication — The In-House View. This electronic newsletter is available through a Corporate Law Section link on the NBA's website, www.nationalbar.org/nba/boardsections.shtml.

Member Spotlights

Daryl W. Winston - Forms Law Firm on a Mission to Serve and Succeed

Daryl W. Winston established The Winston Law Firm, LLC, which represents businesses and individuals in significant commercial litigation, catastrophic injury, employment matters and defamation cases. The firm has offices in Pennsylvania and New Jersey.

Mr. Winston began his professional career over a decade ago as in-house counsel for State Farm Insurance Company and later represented Wal-Mart Stores, Inc., before joining a seasoned commercial litigation firm where he represented and advised Fortune 500 companies and individuals on matters involving complex commercial litigation, coverage disputes and class actions. Mr. Winston was subsequently recruited by a top-tier catastrophic injury firm where he achieved impressive results and settlements in multi-million dollar catastrophic injury cases. Judges and colleagues have applauded his masterful attention to detail and talents in the legal profession for over seventeen years. The history of handling a blend of complicated cases in personal injury and complex commercial matters uniquely positions the firm to deliver a full array of legal services and to offer fee arrangements unique to the firm. Additional information about the firm can be obtained at www.winslaw.com. Mr. Winston can be reached at dwinston@winslaw.com or (609) 261-5900.

Michael Choy – Joined Burr & Forman LLP

On March 1, 2010, Michael Choy, an NBACLS Executive Committee Member, joined Burr & Forman LLP as Counsel. Michael's practice focuses on civil litigation and jury and non-jury trials. He has extensive jury and non-jury trial experience representing corporate and governmental clients. He is Chair of the firm's Government Affairs and Investigations Committee. Burr & Forman is a century old, full-service law firm with nearly 250 attorneys and offices in Alabama, Florida, Georgia, Mississippi and Tennessee. Michael can be contacted at (205) 251-3000 or michael.choy@burr.com.

Networking Opportunities Abounded in San Diego

*By Jean-Marie Sylla, Jr., Esq.**

The Commercial Law Section's 23rd Annual Corporate Counsel Conference, held on idyllic Cordova Island in San Diego, California, provided numerous networking opportunities for in-house counsel and outside counsel to interact – both formally and informally. On one end, the conference provided in-house conference participants to "formally" interview outside counsel conference participants based on preselected analysis of their corporations' legal needs and outside counsels' expertise, experience and resources. In addition to formal interviews, there were a number of luncheons and receptions for conference participants to interact and continue robust debates initiated during various CLE seminars.

On the opposite end of the formality spectrum, there was something for everyone - including hospitality suite events where participants mingled and played a number of games such as Scrabble, Spades and Jenga. The conference also scheduled spa and golf activities intended to provide participants with recreation and relaxation, as well as additional opportunities to interact with one another in less formal settings.

However, when bad weather threatened to dampen the golf outing, coordinator Robert Simpson, made arrangements to transport all willing participants to downtown San Diego and spend Saturday afternoon at Jolt'n Joe's – a sports and entertainment establishment. While some hardcore golfers elected to play golf despite the threat of rain, Mr. Simpson stated that he was intent on "mak[ing] lemonade out of lemons" for those that were reluctant to brave the elements. Indeed, Mr. Simpson did just that by securing exclusive use of Jolt'n Joe's for conference participants in an afternoon marked with food, drink and various games such as pool, table tennis, and darts.

The downtown event was quite a success and appreciated by those who attended. It is not hard to imagine the level of competitive banter accompanying the games specifically among Commercial Law Section attendees. While there are stories to tell about the event, I am reminded that what happens at Jolt'n Joe's stays at Jolt'n Joes.

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Supreme Court Hands Corporations a Powerful Weapon for Avoiding Plaintiff-Friendly State Courts – the Nerve Center Jurisdictional Test

*By Robert R. Simpson, Esq. and Latonia Williams, Esq.**

For decades, corporate litigants have been forced to defend themselves in many state courts where they simply did not belong. This is because the definition of a corporation's "principal place of business" has been diluted by many federal courts, paving the way for corporations to unjustifiably battle in plaintiff-friendly state courts. Fortunately, the United States Supreme Court has finally provided some clarity and relief on the issue of a company's "principal place of business." This article will focus on the positive impact of the February 23, 2010, Supreme Court decision of *Hertz Corp. v. Friend*. It will also address some unresolved issues for corporate defendants.

In *Hertz*, the Supreme Court took a major leap towards clarifying the test by which a corporation's citizenship is determined for diversity jurisdiction. In a unanimous decision, the Supreme Court held that for the purposes of diversity jurisdiction under 28 U.S.C. § 1332(c)(1) ("Section 1332"), a corporation's "principal place of business" is best interpreted as "the place where a corporation's officers direct, control, and coordinate the corporation's activities. . . the corporation's 'nerve center.'"[1] It is not clear, however, whether *Hertz* ends a half-century jurisdictional quagmire created by Section 1332.

The story begins with a statutory clause. 28 U.S.C. § 1332(c)(1) gives federal courts jurisdiction to hear cases in which a federal question is presented or where there is complete diversity of state citizenship amongst the litigants. The question of diversity is fairly simple when discussing the citizenship of individuals. The challenges arise when trying to identify the citizenship of a national corporation. This became a major concern after Congress's 1958 amendment of Section 1332.

In 1958, Congress amended the federal diversity clause to state that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its *principal place of business*."[2] The 1958 amendment resulted in a corporation having the potential to be deemed a citizen of two states: its state of incorporation and the state of its "principal place of business." This resulted in an influx of confusion in determining what Congress meant by a corporation's "principal place of business."

Prior to *Hertz*, the circuits were split on the appropriate test to determine a corporation's "principal place of business." The circuits generally applied a variation of one (or a combination) of four tests: (1) the nerve center test; (2) the place of the operations test; (3) the center of corporate activities test; and (4) the totality of the circumstances test.[3] The "nerve center" test, used primarily by the Seventh Circuit, focuses on a corporation's brain/headquarters to determine that corporation's "principal place of business." The "place of operations" test, primarily used by the Ninth Circuit, focuses on the location of the majority of a corporation's business operations. Next, the "center of corporate activities" test looks at the day to day activity and management of a corporation, while also considering locations of other business activities. The "totality of the circumstances" test has been employed by various circuits. The test does not focus on any particular corporate activity but instead looks at a corporation as a whole to determine its "principal place of business."

These divergent approaches created quite a bit of confusion and uncertainty for corporations because their "principal place of business" varied by circuit. Plaintiffs' attorneys used these different tests to forum shop, placing the corporations in a major disadvantage in several litigations. The Supreme Court's decision in *Hertz* resolved this ambiguity. *Hertz* adopted the Seventh Circuit's "nerve center" test for determining a corporation's principal place of business for purposes of federal diversity jurisdiction. Thus, federal courts must now look to the state in which a corporation's officers direct, control, and coordinate the corporation's activities.

Facts of Hertz

The plaintiffs in *Hertz* brought a class action in California state court, alleging that the Hertz Corporation had violated California state employment law. Hertz removed the action to federal court, invoking federal diversity jurisdiction under the Class Action Fairness Act, and asserted that diversity existed because the plaintiffs were citizens of California and Hertz was a citizen of New Jersey or Oklahoma, but not California. The Northern District of California applied the Ninth Circuit's "place of the operations" test, which "identified a corporation's principal place of business by first determining the amount of a corporation's business activity State by State. "If the amount of activity is significantly larger or substantially predominates in one State, then that State is the corporation's principal place of business."[4] If there is no such State, then the corporation's principal place of business would be its nerve center, the place where the majority of the corporation's executive and administrative functions are performed.[5] Using this test, the district court determined that Hertz's "principal place of business" was California because the majority of its business took place there. As a result, the district court concluded that there was no diversity of citizenship and remanded the action back to state court. The Ninth Circuit affirmed the district court's decision.[6]

Hertz appealed and the Supreme Court granted Hertz's petition for certiorari. The Supreme Court vacated the remand order and found that the "nerve center" test should have been applied to determine Hertz's principal place of business. In the opinion, authored by Justice Breyer, the Court notes that "'principal place of business' is best read as referring to the

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place where a corporation's officers direct, control, and coordinate the corporation's activities. . . the corporation's 'nerve center.'"

The Court's rationale in selecting the "nerve center" test focuses on three main points. First, the Court opined that the test is the most consistent with the plain language of Section 1332. Justice Breyer, speaking for the Court, reasoned that "the word 'place' is in the singular, not the plural [and] [t]he word 'principal' requires us to pick out the 'main, prominent' or 'leading' place."[7] He went on to say that "[a] corporation's 'nerve center,' usually its main headquarters, is a single place."[8] Justice Breyer also discussed the legislative history of Section 1332. The Court looked at suggestions made by the Judicial Conference on interpreting what is meant by "principal place of business." In particular, the Court looked at the "half of gross income" test, a numerical test suggesting that a corporation is a citizen of the state that accounts for more than half of the corporation's gross income. Justice Breyer noted that "history suggests that the words 'principal place of business' should be interpreted to be no more complex than the initial 'half of gross income' test. . . . A 'nerve center' test offers such a possibility."[9]

In addition to discussing the plain language and legislative history of Section 1332, the Court placed significant emphasis on the administrative simplicity of the "nerve center" approach. The Court reasoned that the "nerve center" test is the only rule that is simple, predictable and administrable. In acknowledging the administrative simplicity in having a jurisdictional statute, the Court noted that "[c]omplex jurisdictional tests complicate a case. . . produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits."[10]

Significance of Hertz

The *Hertz* decision is a significant victory for corporations. First, many corporations that were previously considered citizens of more populous states in which the "nerve center" test was not employed will now have the opportunity to remove to federal court. For example, because California is the largest economy in the United States, many corporations have larger business activity in the state. When this is coupled with the Ninth Circuit's use of the "place of the operations" test to determine diversity for federal jurisdiction, plaintiffs suing in California state court were at a considerable advantage. Corporations had a hard time removing a case to federal court, which can sometimes be a more advantageous playing ground for corporate litigants.[11] The *Hertz* decision evens the playing field. By endorsing a single test that is predictable and simple, the Supreme Court has likely afforded corporate litigants, who previously could not normally establish diversity of citizenship, access to federal courts.

Not only has the *Hertz* decision provided corporations with greater access to federal courts, it also has provided corporations with greater clarity concerning their citizenship. As noted by the Court, "[p]redictability is valuable to corporations making business and investment decisions."[12] As a strategic matter, the "nerve center" test allows corporations to take an active role in preparing for possible future litigation. Corporations will be able to receive calculated advice regarding "corporation-friendly" jurisdictions to locate their corporate headquarters. The Supreme Court made it clear, however, that courts should not tolerate jurisdictional manipulation. The burden of persuasion still remains on the party asserting diversity jurisdiction. Thus, corporations asserting nerve centers/corporate headquarters that are "nothing more than a mail drop box, a bare office with a computer, or the location of an annual executive retreat" will not meet their burden for establishing diversity jurisdiction.[13]

Moreover, notwithstanding the significant impact this holding will have on future federal litigation, corporate litigants should be wary that the Supreme Court's decision does not bring disputes regarding the "principal place of business" to a grinding halt. The battle over the principal place of business will continue.

As Justice Breyer noted, there will be hard cases under the "nerve center" test.[14] This era of highly adaptive technology and telecommuting has resulted in some corporations dividing "their command and coordinating functions among officers who work at several different locations, perhaps communicating over the Internet."[15] In such instances, one defined corporate headquarter may not be as apparent. For example, courts have grappled with determining what constitutes a corporation's headquarters where the corporation's chief executive officer maintains an office in one state while the other officers work out of a separate location.[16] Courts have also had to tackle cases where a corporation has multiple division and/or product headquarters, making it unclear where the ultimate headquarters is located.[17]

These and other ambiguities will continue to arise as courts apply the "nerve center" test to determine a corporation's headquarters. As jurisprudence develops in jurisdictions that did not previously employ the "nerve center" test, these complicated questions will become less difficult. Likewise, Seventh Circuit precedent may serve as a good sounding board as other jurisdictions develop their own case law regarding these difficult issues. All the same, the added clarity that the *Hertz* decision affords will take attorneys and their corporate clients a long way in making decisions to impact future litigation. *Hertz* has brought relief to corporations but no final resolution.

[1] *Hertz Corp. v. Friend,* No. 08-1107, 2010 U.S. LEXIS 1897, *28 (U.S. 2010).
[2] 28 U.S.C. § 1332(c)(1) (emphasis added).
[3] Brief of Petitioner-Appellant at 3, *Hertz Corp. v. Friend*, No. 08-1107, (U.S. March, 2, 2009).

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[4] *Hertz, supra* note 1, at 3.
[5] *Id.*
[6] *See Friend v. Hertz Corp.*, 297 Fed. Appx. 690 (9th Cir. Cal. 2008).
[7] *Hertz, supra* note 1, at 29. (citing Commissioner v. Soliman, 506 U.S. 168, 174, 113 S. Ct. 701, 121 L. Ed. 2d 634 (1993) (interpreting "principal place of business" for tax purposes to require an assessment of "whether any one business location is the 'most important, consequential, or influential' one")).
[8] *Id.*
[9] *Id.* at 33.
[10] *Id.* at 31.
[11] *See* Transcript of Oral Argument at 40, Hertz, 2010 U.S. LEXIS 1897 (No. 08-1107) (noting that "there is a perception that State courts in certain States are not good for corporations."); *see also* The Class Action Fairness Act of 2005, Pub. L. No.109-2, 119 Stat. 4 ("Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that *State and local courts are. . . sometimes acting in ways that demonstrate bias against out-of-State defendants. . . .")* (emphasis added).
[12] *Hertz, supra* note 1, at 32.
[13] *Id.* at 35-36.
[14] *Id.* at 33.
[15] *Id.*
[16] *See Kanzelberger v. Kanzelberger,* 782 F.2d 774, 777-78 (7th Cir. 1986) (finding that the corporate headquarters was where the remaining officers worked and designated as headquarters); *R.G. Barry Corp. v. Mushroom Makers, Inc.,* 612 F.2d 651, 655 (2d Cir. 1979) (finding corporate headquarters are where the chief executive officers are located); *Kelly v. U.S. Steel Corp.,* 284 F.2d 850, 852 (3d Cir. 1960) (finding the corporate headquarters is not where the board of directors may meet).
[17] *See Int'l Bhd. of Elec. Workers v. Interstate Commerce Comm'n,* 832 F.2d 91 (7th Cir. 1987).

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Coming Events

June 2 – 15, 2010
NBA International Meeting
Ghana & Senegal

August 9 – 13, 2010
NBA 85th Annual Convention & Exhibits
New Orleans, LA

Date: TBD
NBA Executive Committee Meeting
4th Annual Congressional Black Caucus Reception
Washington, DC

Date: TBD
22nd Annual Wiley A. Branton Issues Symposium
Washington, DC

Message from the Chair... *continued from page 1*

Our Commercial Law Section Annual Meeting is scheduled for Tuesday, August 10, 2010, in New Orleans, Louisiana at 3:00 p.m. during the NBA's Annual Meeting. At the meeting, we will hold elections for our Executive Committee and provide our members with our traditional year-in-review update. Immediately following the meeting, we will hold our annual reception. Please join us as we renew old and establish new acquaintances. We also will present our Outstanding In-House Counsel Award to Avis Russell. Avis could not attend our Annual Conference to receive her award, but we plan to make up for that in resounding form in New Orleans.

It is hard to believe, but planning is already under way for our 24th Annual Corporate Counsel Conference. I am pleased to announce that it will be in Orlando, Florida, at the JW Marriott Grande Lakes Resort February 24-26, 2011. Our Executive Committee is hard at work already, coordinating cutting-edge CLE programming, confirming highly-sought-after speakers, and looking for the best format for presenting an annual event that you, like me, have looked forward to every year. We listened to the excellent feedback we received, and, as a result, we are advancing our planning process to accommodate additional content and networking opportunities.

We continue to solicit your input on ways to improve our Section. We also want to know about important news that you wish to share with other members of our Section as well as the broader National Bar Association. Please feel free to contact me. On behalf of the NBACLS Executive Committee, we look forward to seeing you in New Orleans.

Ashcroft v. Iqbal... *continued from page 1*

In May 2009, Justice Kennedy authored *Ashcroft v. Iqbal*,[6] a five to four opinion that made clear the applicability of the new plausibility standard to *all* civil actions.[7] Recognizing the transubstantive nature of the Rules, the Court clarified that *Twombly* was based on the Court's interpretation and application of Rule 8; thus, the Court's analysis would apply outside of the antitrust context. Having resolved this initial matter, the Court used *Iqbal* to flesh out the pleading standard enunciated in *Twombly*, this time in the context of a civil rights case brought against high ranking government officials seeking qualified immunity.

Immediately following the September 11th terrorist attack, Javaid Iqbal and a number of Arab Muslim men suspected of involvement in the attack were detained and held on various charges at a New York detention center. Iqbal and others designated as persons "of high interest" by the FBI and the Department of Justice were segregated in a maximum security unit, where they were kept on lockdown twenty-three hours a day. Iqbal—a Pakistani who ultimately pled guilty to criminal charges, served his sentence and was returned to Pakistan—alleged that he was mistreated by federal officials while in the special maximum security unit, in violation of his constitutional rights. In particular, Iqbal contended that former Attorney General John Ashcroft and FBI Director Robert Mueller designated Iqbal a person "of high interest" and subjected him to harsh conditions of confinement on account of his race, religion, or national origin, in violation of the First and Fifth Amendments. His complaint alleged that these constitutional violations were a matter of policy, one for which Ashcroft and Mueller were personally responsible.

Ashcroft and Mueller sought qualified immunity and filed a motion to dismiss the complaint on the grounds that it failed to allege that they were personally involved in clearly established unconstitutional conduct. Based on *Conley's* "no set of facts" language, the district court denied the motion. *Twombly* was then decided, giving the Second Circuit an opportunity to discern whether Iqbal's complaint needed to be enhanced with factual allegations so as to render his claim "plausible." The Second Circuit concluded no such enhancement was necessary and that the complaint sufficed. The Supreme Court, however, disagreed.

Iqbal gave the Court the opportunity to clarify *Twombly* and to demonstrate how the new plausibility paradigm should be understood and applied. Using this new standard, the Court conducted a two-step analysis to determine whether Iqbal properly stated a claim against defendants.

First, the Court explained that "legal conclusions" or "mere conclusory" allegations did not enjoy the presumption of truth afforded factual allegations.[8] As such, the Court culled out those allegations in Iqbal's complaint that it deemed conclusory and extracted them from the analysis.

Second, the Court explained that "only a complaint that states a plausible claim for relief survives a motion to dismiss"; this determination is "context-specific," requiring the district court "to draw on its judicial experience and common sense" to come to an answer.[9] At the second step, the Court assumed the veracity of the remaining factual allegations and concluded that they failed to plausibly show Iqbal was entitled to relief. While the Court concluded that the factual allegations, taken as true, were *consistent* with intentional illegal discrimination, they failed to establish a plausible claim for relief because of "more likely explanations" for defendants' conduct.

More specifically, the Court considered the alternative innocuous explanation that Iqbal was arrested and detained as part of a neutral anti-terrorism policy that had a disparate impact on Arab Muslim men because the September 11th attack was orchestrated and led by a group of Arab Muslim men. The Court concluded, *"As between that* 'obvious alternative explanation' for the arrests . . . and the purposeful, invidious discrimination respondent [Iqbal] asks us to infer, discrimination is not a plausible conclusion."[10] However, even if the facts suggested that Iqbal's *arrest* could be plausibly explained by intentional discrimination, they did not suggest that there was a *policy* that could do the same. Finding no factual allegation in the complaint that plausibly suggested a discriminatory motive by Ashcroft and Mueller, the Court concluded that Iqbal's complaint failed to satisfy Rule 8's requirements.

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Ashcroft v. Iqbal... *continued from page 14*

Following *Iqbal*, courts, practitioners, and scholars have been grappling with its impact. After over half a century, the pleadings paradigm has undergone a transformation that may fundamentally change the way in which civil actions are initiated, litigated and resolved. Whether this transformation is desirable or not is an important question.

On the one hand, by making the pleading standard more rigorous, the Supreme Court sought to spare litigants from costly and complex discovery in *Twombly's* antitrust class action, and to spare national security government officials from distracting and time consuming discovery in *Iqbal*. In the face of expensive and time consuming merits discovery, the Supreme Court should be commended for its efforts to explore ways in which cases can be evaluated more efficiently, without a gross expenditure of resources and time.

On the other hand, *Iqbal* has ushered in a new pleading paradigm that threatens the viability of a variety of potentially meritorious claims in three ways. First, certain claims – such as civil rights, antitrust, conspiracy, products liability, and environmental claims -- may be adversely impacted by the plausibility standard because of their greater reliance on discovery to unearth evidence necessary to show plausibility. Information related to intent/motive or company practices is often in the defendant's exclusive possession, making it more difficult for plaintiffs to overcome the plausibility standard because of informational inequity between the parties.

For example, complaints alleging civil rights violations – where plaintiffs may need evidence of discriminatory intent or institutional practices – have suffered under the new pleading regime. As a result of the new pleading standard, several courts have recently dismissed civil rights claims that would have admittedly survived *Conley's* notice pleading standard.[11] A preliminary study of civil rights cases post-*Twombly* suggests that the more rigorous pleading standard has resulted in a greater dismissal rate for such cases.[12] Examples are starting to appear across the country.

Second, the plausibility standard's highly subjective nature fails to provide courts sufficient guidance when ruling on Rule 12(b)(6) motions, thereby increasing the risk of courts' relying on extrajudicial factors when determining plausibility. Where a judge has only his "judicial experience and common sense" to guide him or her when determining the plausibility of a claim pre-discovery, there is the risk of unpredictability, lack of uniformity and confusion. Based on differences among judges, one complaint may be dismissed while another survives, solely because of the way a judge applies his or her "judicial experience and common sense." For example, skepticism over whether intentional discrimination continues to exist – a particularly acute controversy in an alleged "post-racial" Obama society – may impermissibly come into play at this early stage of the litigation. Comparable pleadings may result in multiple outcomes. Without a clear standard, the parties are unable to accurately assess the sufficient amount or type of facts necessary under Rule 12(b)(6).

Third, when determining plausibility, a court may risk usurping the jury's fact-finding role. In *Iqbal*, although the Court asserted that the "plausibility standard is not akin to a 'probability requirement,'" the Court's conduct belies this assertion. In practice, *Iqbal* applied a probability test, by comparing plaintiff's theory of the case (intentional discrimination) to more benign alternatives, and then rejecting plaintiff's as implausible because of the relative unlikelihood of its occurrence.[13] Concluding that one theory is more likely to have occurred than another at the pleading stage is an inappropriate judicial exercise, which can hurt either party.

To overcome some of the drawbacks of the new pleading standard, parties should consider seeking some limited, preliminary discovery related to plausibility at the pleading stage. Such discovery would be very narrow, focused exclusively on unearthing facts necessary for demonstrating plausibility. A court should defer ruling on a motion to dismiss if there is informational inequity between the parties and it is clear that some discovery could tip the complaint over the viability line. This would *protect plaintiffs'* court access, enhance enforcement of various laws and promote deterrence objectives. Although courts must guard against "fishing expeditions," they should also be open, upon receipt of Rule 12(b)(6) motions, to allowing parties some initial discovery focused on those discrete facts necessary to determine plausibility.

Pre-dismissal plausibility discovery would also further the Supreme Court's goal of protecting defendants from being forced to engage in burdensome merits discovery and expending significant time, resources, and attention on meritless litigation. By permitting the parties plausibility discovery, courts can more easily resolve those cases that are close calls—resulting in early dismissals, when appropriate. This would *protect defendants* from burdensome merits discovery occurring later at summary judgment or trial. Using targeted, pre-merits discovery to resolve threshold issues is already used for determining jurisdiction, class certification and qualified immunity.

While plausibility discovery does not alter the overly subjective "judicial experience and common sense" standard used for determining plausibility, such discovery would at least provide greater factual support for the court's determination. The court would be able to make its plausibility decision, informed by facts unearthed at the pleading stage. These facts, however, should merely inform the plausibility decision and no more. Courts must still be mindful not to apply a probability standard at the pleading stage, and not to balance the likelihood of plaintiff's theory over others. This job still belongs to the jury.

In sum, the new plausibility pleading standard following *Twombly*, and now *Iqbal*, has led parties, counsel and judges into unchartered waters. As a result, it is important to consider how targeted, pre-merits plausibility discovery can help lead the way.

[1] 355 U.S. 41 (1957).
[2] *Id*. at 45-46.
[3] 127 S. Ct. 1955 (2007).

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[4] *Id*. at 1964–65.
[5] *Id*. at 1966.
[6] 129 S. Ct. 1937 (2009).
[7] *Id*. at 1953.
[8] *Id*. at 1949–50.
[9] *Id*. at 1950.
[10] *Id*. at 1951-52 (emphasis added).
[11] *See Moss v. U.S. Secret Serv.,* 572 F.3d 962, 972 (9th Cir. 2009); *Ocasio-Hernandez v. Fortuno-Burset,* 639 F. Supp. 2d 217, 226 n.4 (D.P.R. 2009); *Young v. City of Visalia,* No. 1:09-CV-115 AWI GSA, 2009 WL 2567847, at *6–7 (E.D. Cal. Aug. 18, 2009); *Coleman v. Tulsa County Bd. of County Comm'rs,* No. 08-CV-0081-CVE-FHM, 2009 WL 2513520, at *3 (N.D. Okla. Aug. 11, 2009); *Ansley v. Florida Dep't of Revenue,* No. 4:09CV161-RH/WCS, 2009 WL 1973548, at *2 (N.D. Fla. July 8, 2009); *Kyle v. Holinka,* No. 09-cv-90-slc, 2009 WL 1867671, at *1 (W.D. Wis. June 29, 2009); see, e.g., *Argeropoulos v. Exide Techs*., No. 08-CV-3760 (JS), 2009 WL 2132443, at *6 (E.D.N.Y. July 8, 2009).
[12] *See* Kendall W. Hannon, *Much Ado About* Twombly? *A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions,* 83 NOTRE DAME L. REV. 1811, 1838 (2008); Joseph A. Seiner, *The Trouble with* Twombly: *A Proposed Pleading Standard for Employment Discrimination Cases,* 2009 UNIV. ILL. L. REV. 1011, 1030, 1041–42.
[13] *Iqbal,* 129 S. Ct. at 1951.

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