ASSOCIATION OF BUSINESS TRIAL LAWYERS

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REPORT

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Q&A with the Honorable Jay C. Gandhi

By Corbett H. Williams

[Editorial Note: For this judicial interview, we met with newly appointed United States District Court Magistrate Judge, the Hon. Jay C. Gandhi. Prior to his appointment, Judge Gandhi was a partner of Paul, Hastings, Janofsky & Walker LLP. He is a member of the ABTL's Board of Governors.]

Q: What drew you to the law?

A: One of the primary culprits was a college class in legal philosophy. I was taken, quite taken, with the inter-disciplinary aspect of the law. I was fascinated by how the law borrows and builds upon teachings, both theoretical and practical, from other many fields, such as economics, history, and psychology, to name just a few. So, a legal career was an ideal refuge for me because I enjoyed, and still enjoy, learning about different subjects.

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Pleading Facts and Arguing Plausibility: Federal Pleading Standards a Year After *Iqbal*

By C. Kevin Marshall and Warren Postman

Few issues are more important in federal litigation than determining whether a case will be dismissed for failure to state a claim or instead slog on into discovery, potential fights over class certification, and beyond. And following the Supreme Court's decisions in *Bell Atlantic v. Twombly* (2007) and *Ashcroft v. Iqbal* (2009), few issues have generated as many questions.

In *Twombly*, a seven-justice majority held that a complaint failed to state a claim of antitrust conspiracy when it alleged only parallel conduct, which was at least as consistent with legitimate business activity as with an antitrust violation. In so holding, the Court put into "retirement" the oft-quoted line from its 1957 decision in *Conley v. Gibson* 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." The *Twombly* Court instead explained that Rule 8 of the Federal Rules of Civil Procedure requires that a complaint include facts (as distinct from legal "labels" and "conclusions") giving rise to a "plausible" (rather than merely "conceivable") entitlement to relief. Two years later in *Iqbal*, the Court confirmed that *Twombly* applies to all civil suits, not just antitrust cases or complex cases, and by a 5–4 vote rejected a complaint under *Bivens* alleging that, following the 9/11 terrorist attacks, former Attorney General John Ashcroft and FBI Director Robert Mueller unconstitutionally ordered restrictive and harsh detention of certain Arab Muslims.

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The President's Message
By Sean P. O'Connor

My first thought was to write about something other than California's funding crisis. "Old news" was my initial reaction. But then I thought that that's not necessarily true, and even if it was, that's not a compelling enough excuse to not address a topic of such importance to lawyers and judges.

The state's funding problems have hit the judicial branch particularly hard. For fiscal year 2009-2010, the judicial branch suffered over $400 million in budget cuts, resulting in furlough days, reduced administrative office hours, staff reductions and other cuts which caused inconvenience and delays in both civil and criminal cases.

To avoid the situation repeating itself for fiscal year 2010-2011, leadership in the judicial and legislative branches worked together to develop funding solutions. One measure taken was to redirect court funds that were previously earmarked for infrastructure improvements, court construction and other court improvements. While this redirection of funds to the judicial branch's operating funds will enable to courts to stay open for the next year (assuming the 2010-2011 budget is passed), these measures must be viewed as a temporary fix. And these temporary fixes will still result in courts functioning at a much lower service level than was the situation a few short years ago. Clearly, a long-term solution that does not involve sacrificing much-needed infrastructure improvements and court construction to keep the courts open is needed.

The adage that "justice delayed is justice denied" is certainly true in business litigation. In business litigation it is also true that delay inevitably means increased litigation expense and business disruption cost. In addition, delayed justice and the resulting economic uncertainty adversely impact overall business activity and resource allocation, causing

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Don't Forget the Notice: Managing Notice Costs in Class Action Suits

By David Jay and Jason H. Kislin

Class Actions are becoming an almost unavoidable cost of doing business for even the most careful and risk-averse companies today. The growing plaintiffs class action bar is vigilant, creative and sophisticated, and sometimes unpredictable. Class action cases are on the rise in various areas, including consumer fraud/false advertising, employment, securities, civil rights and health care, to name just a few. Since the passage in 2005 of the Class Action Fairness Act, 28 U.S.C. §§ 1332 (d), 1453 ("CAFA"), more and more of these cases are landing in federal court because of the relaxed federal diversity requirements. For example, CAFA provided federal courts with jurisdiction over putative class actions consisting of at least 100 proposed class members, in which the citizenship of at least one proposed class member is diverse from that of one defendant, and the amount in controversy, after aggregating the sum or value of each proposed class member's claim, exceeds $5 million, exclusive of interest and costs.

Indeed, in a 2008 report to the Judicial Conference Advisory Committee on Civil Rules, it was noted that the number of diversity class actions filed per month as original proceedings in the federal courts in the post-CAFA period tripled. *See Impact of CAFA on the Federal Courts*: Fourth Interim Report, Federal Judicial Center, April 2008. With the Supreme Court's decision in *Shady Grove Orthopedic Assoc., P.A. v. Allstate Insurance Co.*, No. 08-1008, practitioners can expect this trend to continue. In *Shady Grove*, the Supreme Court held that whether a matter can be maintained as a class action in federal court is purely a question of federal procedure to be resolved pursuant to Fed. R. Civ. P. 23. The decision called into question whether certain state laws specifically prohibiting class actions can be enforced in federal court.

Many companies prefer to litigate class ac-

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The Rapid Expansion of California's Anti-Slapp Law

By James J. Moneer

The California Anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, set forth in Code of Civil Procedure, Section 425.16, is expanding and contracting at a feverish pace. Enacted in 1992 as a deterrent to the filing of meritless lawsuits that seeks to prevent citizens from exercising petition or free speech rights or punish them for doing so, Section 425.16 has since been amended four times, and interpreted by nearly 400 published opinions to date. Along with the anti-SLAPP statute's unique discovery stay and immediate appeal provisions, the unavailability of leave to amend, and the one-sided mandatory attorney-fee provision set forth in subdivision (c) have made the Section 425.16 special motion to strike the most powerful dispositive motion available to California civil litigation attorneys seeking to quickly dismiss an action or cross-action and recover fees and costs. SLAPP motions are a defense lawyers dream, and can be a plaintiff's lawyer's worst nightmare (if you are not properly prepared). This article is written from both the plaintiff and defense perspective as the author has been representing SLAPP litigants on both sides of the fulcrum since 1994, one year after the anti-SLAPP statute became effective.

Section 425.16 sets up a two-step procedure for determining first, whether the challenged cause of action "arises from protected activity." (Code of Civ. Proc., § 425.16(b)(1) and (e).) If it does not, the motion must be denied as a matter of law without inquiry into the merits of the cause of action. If it does, the court must proceed to the second step in the analysis and evaluate whether the cause of action is legally sufficient and substantiated by competent admissible evidence that, if credited by the trier of fact, would entitle plaintiff to judgment as a matter of law. (*Wilcox v. Superior Court*, 27 Cal.App.4th 809, 823-824 (1994).)

This is a much more onerous burden than a plaintiff would face on a motion for summary judgment in that all the defendant has to show is that the claim arises from protected speech or petition activity. Once this threshold is met, the plaintiff has the burden of showing that its complaint is legally sufficient

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Q: Why did you decide to become a United States Magistrate Judge?

A: I felt delinquent on a debt I owed, and it deserved to be repaid through public service. My father immigrated to this country in the 1950s. He originally lived in the California central valley and drove a tractor in a peach farm to raise and support his family. He earned a dollar an hour back then, as he fondly reminds me. I and my entire family benefited from a wealth of opportunities in this country. It was time to give back.

Q: How would you describe the transition from private practice to the bench?

A: Exciting and challenging. For example, I was only a couple weeks in, and I found myself presiding over both a sentencing and an extradition hearing the same week. For a civil lawyer, it was shock and awe, as some might say. I spent the entire week before, and weekend for that matter, studying criminal law, the U.S. Sentencing Guidelines, and international extradition treaties. But the law was alive again and in a powerful and tangible way.

Q: What do you like most about being a federal magistrate?

A: Two aspects come immediately to mind. I am unchained from advocacy now. My only job is to, as trite as it may sound, "do the right thing," wherever that may lead. That is certainly one of the most rewarding changes. Also, the Judges of the Central District are an exceptionally talented and gracious group. Everyone has welcomed me with open arms, and kindly shared their insights and wisdom. It's truly an honor to work alongside them.

Q: Is there anything you miss about private practice?

A: I miss the people. I spent 12 years at Paul Hastings, and I cherish the relationships I forged there. I also miss, what I consider, the essence of the practice. Paul Hastings is a dynamic law firm. There was a joy to working with sharp legal minds on sophisticated litigation matters.

Q: What would you describe your judicial philosophy?

A: I don't fall under any rubric. I approach each matter, each issue, on a case-by-case basis. I diligently study the law, including with my own independent research. I carefully consider all the evidence. I listen to the arguments of counsel and keep two open ears while doing so. And I try to reach the right result. No labels, no preconceived notions.

Q: What advice would you give to lawyers appearing in your court for the first time?

A: Preparation. And then add in more preparation. I view hearings as a shared endeavor to explore the law, explore the facts, and explore the arguments, all of it vigorously. I come prepared for that journey. I expect counsel to do likewise.

Q: Are there any common mistakes that lawyers make when appearing in your court?

A: Not answering the question you are asked. I'm noticing, and it appears prevalent, that many lawyers gloss over the question, provide an obtuse response, or answer the question they wish they had been asked. A prompt, full and candid answer is appreciated.

Q: If you could have dinner with a famous person – living or dead – who would it be and why?

A: I'd probably invite Socrates and, if Plato and Aristotle were available, I'd ask them to join. I suspect the dinner conversation would be a bit heavy, but certainly interesting. Blame my philosophy major.

Q: Is there anything that you have learned on the bench that you wish you would have known as a practicing lawyer?

A: A finer appreciation of the time demands on federal judges. When I clerked more than a decade ago, the federal courts were already overburdened. Since that time, case filings have only increased markedly.

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Last year, the Central District had approximately 14,000 case filings. I can see and feel that supply and demand are out of equilibrium.

Q: What do you enjoy doing in your spare time?

A: I've been working on trying to get my golf game below triple digits. No easy task. I've also been reading, as usual. I have an insatiable appetite for reading.

Q: Why do you choose to be an active member of the ABTL?

A: There exists a strong link between the ABTL and the bench. The turnout of judges at ABTL events is unparalleled. For me, the ABTL was a terrific forum to become more acquainted with the bench.

Thank you Judge Gandhi for your time.

♦ *Corbett H. Williams is an associate in the Trial Practice Group of Jones Day's Irvine office.*

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According to some commentators, *Twombly* and *Iqbal* upended 70 years of federal pleading standards and have dramatically burdened plaintiffs. According to others, the decisions changed little if anything. Academic questions aside, the practical effect of *Twombly* and *Iqbal* is a crucial consideration for litigators drafting complaints or contemplating motions to dismiss. Adding to their uncertainty, practitioners could face another set of questions if Congress acts on deceptively simple bills introduced following *Iqbal* to overturn the decisions.

One year after *Iqbal* apparently solidified the new regime, this commentary examines the real-world effect of *Twombly* and *Iqbal* on dismissals in federal civil cases; analyzes, in light of this effect and indications so far from the lower courts, what factors practitioners should consider at the Rule 12 (b)(6) stage; and explains the proposed congressional responses.

Understanding The Modest Results Of *Iqbal* And *Twombly* So Far

The broadest available statistics indicate that, overall, motions to dismiss are not dramatically more likely to be filed or *succeed* now than before *Twombly* and *Iqbal*. The Judicial Conference of the United States, through the Standing Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules, has compiled detailed statistics showing the prevalence and success rate of motions to dismiss in all federal courts dating back to January 2007. (Those statistics are available at www.uscourts.gov/uscourts.)

During the four months before *Twombly*, litigants each *month* filed an average of 17,980 new cases and 6,180 motions to dismiss, and saw 2,360 motions to dismiss granted. Thus, motions to dismiss were filed in about 34 percent of all cases, and (roughly speaking) courts granted 38 percent of the motions filed. In comparison, during the nine months after *Iqbal*, there was an average of 19,760 new cases filed, 7,340 motions to dismiss filed, and 2,760 motions to dismiss granted each month. Thus, motions to dismiss were filed in about 37 percent of all cases (up 3 percent), and courts granted 37 percent of the motions filed (down 1 percent). Ultimately, defendants won dismissals in about 13 percent of the cases filed during the four months preceding *Twombly* and about 14 percent of the cases filed during the nine months following *Iqbal*, and the slight upward trend for this number has been steady rather than showing a jump immediately after either decision. Another study concludes that *Twombly* and *Iqbal* have had a more robust effect. *See* Patricia W. Hatamyar, "The Tao of Pleading: Do *Twombly* and *Iqbal* Matter Empirically?," 59 Am. U.L. Rev. 553 (2010). The study was based on a smaller subset of cases, however, and the author coded these based on the authority they cited, which may not be a reliable metric. It thus seems unlikely that *Twombly* and *Iqbal* have in practice substantially heightened federal pleading standards across the board. On the other hand, the slight increase in the number of motions to dismiss filed, together with a constant rate of success, appears to result in the dismissal of modestly more cases.

There is room for debate and further analysis as to why the numbers show no dramatic change. Perhaps plaintiffs' counsel have made their complaints more detailed or been more selective in the claims they include, or the decisions have not fully "sunk in." But a likely explanation is that *Twombly* and *Iqbal* largely codified the longstanding practice of the U.S. Courts

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of Appeals.

For example, as *Twombly* itself recognized (quoting, among others, Judge Posner in a 1984 decision of the Seventh Circuit), the Courts of Appeals long refused to take *Conley's* "no set of facts" language "literally." They also commonly required complaints to "'contain either direct or inferential allegations regarding all the material elements,'" and required those allegations to "constitute 'more than bare assertions of legal conclusions.'" Tahfs v. Proctor, 316 F.3d 584, 590 (6th Cir. 2003) (quoting *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988)). And they refused to accept "unwarranted inferences" from those allegations. *E.g.*, *City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 263 & n.13 (3d Cir. 1998). The Supreme Court itself had endorsed such practices to some extent, beginning with *Associated General Contractors v. Carpenters*, 459 U.S. 519, 526-28 (1983), as long as lower courts did not adopt specific requirements of heightened pleading for particular kinds of cases.

Correspondingly, a regularly updated memorandum commissioned by the Judicial Conference, which surveys circuit-by-circuit cases providing analysis since *Iqbal*, both concludes and indicates from the cases themselves that *Twombly* and *Iqbal* worked at most an incremental change in pleading standards. (A copy of that memorandum can be found at www.uscourts.gov/uscourts.)

Moreover, well before *Twombly*, some state courts had read their rules of civil procedure to impose pleading requirements strikingly similar to those the U.S. Supreme Court has set out. *See*, *e.g.*, *Kopelman & Assoc., L.C. v. Collins*, 196 W.Va. 489, 493 (1996) (citing *Conley* but explaining that, "although the plaintiff enjoys the benefit of all inferences that plausibly can be drawn from the pleadings, a party's legal conclusions, opinions, or unwarranted averments of fact will not be deemed admitted"); *Read Drug v. Colwill Constr.*, 243 A.2d 548, 553-54 (Md. 1968) (explaining that a complaint must "have sufficient specificity in its allegations to provide facts … to apprise the opposite party of what is meant to be proved" and that "the necessary allegations of fact … in a simple factual situation vary from those in more complex factual situations") (internal quotation marks omitted). Thus, the key principles animating *Twombly* and *Iqbal* appear hardly novel.

But that does not mean that *Twombly* and *Iqbal* changed nothing. Rather, they have clarified and focused for the lower courts the standard governing motions to dismiss, particularly by emphasizing and providing terms for applying the second half of Rule 8's requirement of "a short and plain statement of the claim showing that the pleader is entitled to relief." As explained below, these changes not only impact litigants' general approach to motions to dismiss, but also may significantly affect particular cases and issues. Thus, the Judicial Conference's statistics for all cases filed and even various broad subcategories of cases may mask a change that, while only partial, is quite real for practitioners who encounter claims that are complex or otherwise at the margins.

Lessons From A Year Under *Iqbal* And *Twombly*

A. Understanding and Using *Iqbal's* Formal Framework.

Iqbal articulates a clear framework for analyzing a motion to dismiss that begins with a threshold inquiry and is followed by a two-step analysis. Lower courts have begun to flesh out the details of this approach.

1. Confirm or Argue the Elements of the Cause of Action. As a threshold matter, where there is any doubt regarding the scope of an underlying cause of action, *Iqbal* indicates that it is important to "begin by taking note of the elements a plaintiff must plead to state a claim." 129 S. Ct. at 1947. In some cases, a motion to dismiss will focus on the elements, making this point obvious; but where the motion focuses on the facts alleged and their adequacy, parties should not be so distracted by these disputes that they overlook the importance of advocacy regarding the cause of action.

Iqbal's procedural history illustrates this. In its petition for certiorari, the government had conceded that Ashcroft and Mueller "would be liable if they had 'actual knowledge' of discrimination by their subordinates and exhibited 'deliberate indifference' to that discrimination." *Id.* at 1956 (Souter J., dissenting). The Court, however, disregarded this concession, deciding that Ashcroft and Mueller would be liable only if they themselves had "adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin." *Id.* at 1949 (opinion of the Court). It was under this more stringent standard that the Court held Iqbal's complaint to be inadequate. The Court could well have accepted the government's concession—as the four

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dissenting justices would have—and disposed of the case without deciding the underlying elements of the *Bivens* cause of action at issue. Had it done so, Iqbal's complaint could well have survived.

2. Determine the Facts that Warrant an Assumption of Truth. After establishing the legal baseline against which to measure the complaint, a defendant should identify all allegations that it can argue are not "entitled to the assumption of truth." *Id*. at 1950. Two types of allegations will not warrant such an assumption.

First, courts will sometimes encounter allegations that are simply too unbelievable to be accepted. In such instances, for example where the plaintiff's allegations involve "little green men," *id*. at 1959 (dissent), the defendant may ask the court to disregard the implausible factual allegation. Such cases, usually *pro se*, are not unheard of since *Iqbal*. *E.g.*, *Deyerberg v. Holder*, 2010 WL 2131834 (D. D.C.). (The principle that a court may disregard patently implausible factual claims is distinct from the principle that a complaint will be inadequate if, accepting well-pleaded factual allegations as true, it fails to give rise to a plausible inference of liability.)

More commonly, and as *Iqbal* emphasized, courts should not accept the truth of factual allegations that are "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." 129 S. Ct. at 1949. Thus, at the very least, a motion to dismiss should note the areas in which a complaint relies on legal labels instead of subsidiary facts. The first step should be to highlight all allegations containing any legalese (for example, "negligently"), employing or paraphrasing the elements of the cause of action, or otherwise by their terms alleging points of law. Beyond that, the courts have not developed any mechanical analysis to distinguish between well-pleaded factual allegations and "mere conclusory statements." To allege that a defendant "drove negligently" may be a legal label, and to allege that he "drove without looking at the road" may be a well-pleaded fact, but—in between—courts may differ on the status of an allegation that the defendant "drove without paying due attention to the road." Ultimately, however, the task for a defendant at this first stage is to convince the court that as much of the complaint as possible is parroting legal standards rather than referring to case-specific acts or omissions within the plaintiff's knowledge.

A particular issue that arises is how to treat facts alleged based upon "information and belief." The Second Circuit has set out what appears to be the developing consensus: "The *Twombly* plausibility standard … does not prevent a plaintiff from pleading facts alleged 'upon information and belief' (1) where the facts are peculiarly within the possession and control of the defendant, or (2) where the belief is based on factual information that makes the inference of culpability plausible." *Arista Records, LLC v. Doe 3*, __ F.3d __, 2010 WL 1729107, *8 (2d Cir.). Thus, the "information and belief" label is a signal to consider whether the plaintiff has met one of these requirements. A paradigm for the first is when a case turns on the content of records of the defendant. Where a fact is truly within the defendant's exclusive possession, a court may be less likely to find a claim implausible for not alleging that fact. When the second requirement is at issue, it is worthwhile to consider whether the plaintiff has pleaded any of the factual information on which it purports to base its "information and belief" allegation. In either case, plaintiffs still must allege enough underlying facts to allow a plausible inference of liability in the context of their particular claim. *Twombly* itself confirms this, given that the complaint alleged an antitrust conspiracy based on information and belief, but failed because it did not support that allegation with sufficient subsidiary factual allegations.

3. Assess Plausibility. After identifying the allegations not entitled to an assumption of truth, a defendant must show that the real factual allegations that remain have not "nudged [the] claims … across the line from conceivable to plausible." *Iqbal*, 129 S. Ct. at 1951. *Iqbal*, following *Twombly*, adds that assessing the plausibility of a claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id*.

Although the phrase "judicial experience and common sense" has provoked much speculation and criticism, it so far has not proven elusive for the lower courts. They have understandably rejected claims that this phrase authorizes them to recognize additional case-specific facts in ways they could not on a motion to dismiss before *Twombly* and *Iqbal*. *See*, *e.g.*, *Barkes v. First Correctional Medical*, 2010 WL 1418347, *3 (D. Del.) ("[T]he court may only consider matters incorporated by reference or relied upon in the claims, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits of unquestioned authenticity attached to the complaint."). *Twombly* and *Iqbal* do not suspend Rule 12(d)'s requirement that motions to dismiss relying on facts outside the pleadings be treated as motions

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for summary judgment.

On the other hand, courts do rely on *Twombly* and *Iqbal* to draw on more general understandings in assessing the plausibility of liability. For example, one district court opined that "common sense and judicial experience … suggest that in ordinary business circumstances, when a service is performed, it is typically accompanied by an itemized bill, particularly when one is requested." *Shinn v. Champion Mortg. Co., Inc.*, 2010 WL 500410, *3 (D. N.J.). Another reasoned that "common sense counsels against inferring that a substantial international bank, bearing an historic name and presumably wishing to maintain a global reputation for integrity and honorable dealing, would, with no stake in the criminal securities fraud itself, and no financial incentive other than to maintain the patronage of a fee-generating client, enter into a conspiracy with two … depositors to defraud investors in the United States." *U.S. v. Lloyds TSB Bank PLC*, 639 F. Supp. 2d 326, 342 (S.D.N.Y. 2009).

One particularly common use of "judicial experience and common sense" is to justify courts' imagining obvious, alternative, lawful explanations for the alleged conduct that it considers at least as plausible as an explanation involving illegality. Where such alternative explanations exist, it is less likely that the complaint "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1950. *Twombly* directly endorsed this practice by discounting the likelihood of an antitrust conspiracy because, in light of industry history and "the considered view of leading commentators," the parallel conduct alleged had an "obvious alternative explanation." The Supreme Court reasoned that the parallel conduct was "consistent with … a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Iqbal* employed a similar approach (without reliance on commentators) with regard to the nature of the 9/11 attacks. Thus, while a defendant in opposing a motion to dismiss still may not introduce its own facts to support its theory of the case, it may challenge the plaintiff's theory by invoking "obvious" alternative explanations for the alleged facts that rest on broader background knowledge and understandings.

B. Informal Considerations Under *Iqbal* and *Twombly*

Beneath the formal analysis described above are a set of informal considerations, which after *Twombly* and *Iqbal* have become increasingly important in litigating a motion to dismiss. While *Twombly* and *Iqbal* have formalized the analysis of 12(b)(6) motions significantly, they have by no means eliminated the discretion inherent in deciding one. To the contrary, a court will rely on substantial judgment and intuition in distinguishing between facts and conclusions as well as in determining whether the facts alleged create a plausible inference of liability.

Most generally, and as already suggested, lower courts applying *Twombly* and *Iqbal* exercise this discretion differently depending on the circumstances, dismissing as conclusory a greater number of factual allegations or taking a more stringent view of the facts required to create plausibility where the case raises special concerns. The Seventh Circuit, for example, has said so explicitly since *Iqbal*: "This case is not a complex litigation, and the two remaining defendants do not claim any immunity. But it may be paranoid *pro se* litigation, … and before defendants in such a case become entangled in discovery proceedings, the plaintiff must meet a high standard of plausibility." *Cooney v. Rossiter*, 583 F.3d 967, 971 (2009) (Posner, J.). The Third Circuit similarly has observed that "[c]ontext matters in notice pleading. Fair notice under Rule 8(a)(2) depends on the type of case…." *Phillips v. County of Allegheny*, 515 F.3d 224, 232 (2008).

Again, the Courts of Appeals are credibly drawing on the Supreme Court's decisions. In *Twombly*, the Court explicitly noted the difficulty of inferring a conspiracy based on mere allegations of parallel conduct and also pointed to the costs and risk of abuse associated with antitrust discovery. Similarly, in *Iqbal*, the Court emphasized the hazards of subjecting high-ranking governmental officials to the distraction and invasiveness of civil litigation based on minimal allegations.

This "sliding scale" phenomenon helps explain the apparent contradiction some have noted between the pleading requirements described in *Twombly* and *Iqbal*, on the one hand, and the pleading forms adopted pursuant to Federal Rule of Civil Procedure 84, on the other. Treating *Twombly* and *Iqbal* as imposing a uniform requirement of heightened factual pleading, some courts have suggested that the decisions are inconsistent with the standardized forms. *See*, *e.g.*, *Elan Microelectronics Corp. v. Apple, Inc.*,

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2009 WL 2972374, *2 (N.D. Cal.) ("It is not easy to reconcile Form 18 [for patent infringement] with the guidance of the Supreme Court in *Twombly* and *Iqbal*; while the form undoubtedly provides a "short and plain statement,' it offers little to 'show' that the pleader is entitled to relief.").

The forms, however, address relatively straightforward allegations such as claims for money owed, the routine negligence of a car crash, or direct patent infringement. *See*, *e.g.*, Fed. R. Civ. P., Appx., Form 10 ("The defendant owes plaintiff $___ according to the account set out in Exhibit A"); Form 11 ("On date at place defendant negligently drove a motor vehicle against plaintiff"); Form 18 (alleging that plaintiff owned a particular patent and that defendant infringed the patent by making, selling, and using a particular product). Because such claims lack the attributes that would call for a more stringent plausibility analysis, the minimal factual allegations included in a genuinely applicable form would likely suffice under the context-specific approach of *Twombly* and *Iqbal*.

Indeed, *Twombly* itself suggested that pleadings based on what is now Model Form 11 would be adequate because the form "alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time." 550 U.S. at 565 n.10. Likewise, courts continue to hold that a complaint of direct patent infringement properly alleged on Form 18 states a claim, while also concluding that more complex claims of indirect patent infringement fall outside the scope of Form 18 and require additional factual allegations. *See*, *e.g.*, *Eolas Tech., Inc. v. Adobe Systems, Inc.*, 2010 WL 2026627, *2-3 (E.D. Tex.) (holding that a patent infringement properly alleged on Form 18 will state a claim); *Halton Co. v. Streivor, Inc.*, 2010 WL 2077203, *3 (N.D. Cal.) (suggesting that claims for direct patent infringement may be brought under Form 18, but that claims for indirect patent infringement, which require intent, may not). Thus, the level of factual support required increases as proof of the claim grows more difficult and complex.

Under this view, a key task for a defendant, in addition to marshaling complaint-specific arguments under *Iqbal's* formal framework, will be to emphasize every facet of the case that would warrant a more stringent application of the plausibility standard. A defendant could accomplish this task in several ways.

First, a defendant might suggest, where appropriate given the nature of the case, that the plaintiff's claim is meritless or abusive. *Cf. Cooney*, 583 F.3d at 971 ("This case is not a complex litigation, and the two remaining defendants do not claim any immunity. But it may be paranoid *pro se* litigation, arising out of a bitter custody fight….").

Second, *Twombly and Iqbal* invite defendants to support their motions to dismiss by highlighting the difficulty of inferring liability in the type of case at issue, the costs of discovery, and the risks of abusive lawsuits associated with the type of case. Such arguments may be particularly promising in antitrust, employment discrimination, securities litigation, and indirect patent infringement cases, as well as in cases involving class actions and allegations of conspiracy or, under RICO, of an "enterprise-in-fact," a predicate act that requires a mental state and does not involve fraud, or a "pattern." *See*, *e.g.*, *Edwards v. Prime, Inc.*, 602 F.3d 1276 (11th Cir. 2010) (in RICO case, holding two types of predicate acts adequately pleaded and two others—one requiring knowledge, and another involving a conspiracy—not); *McCullough v. Zimmer, Inc.*, 2010 WL 2178554, *4 n.8 (3d Cir.) (questioning viability of pre-*Twombly* circuit precedent allowing plaintiff merely to allege existence of enterprise, rather than pleading its essential attributes); *Logan v. SecTek, Inc.*, 632 F. Supp. 2d 179, 183-84 (D. Conn. 2009) (dismissing disability-discrimination complaint because the facts alleged made it "possible, but not plausible" that the employer knew the plaintiff was disabled as opposed to merely injured).

Finally, while many of the above arguments can be made indirectly by carefully crafting the factual section of a motion to dismiss, parties in certain jurisdictions may consider arguing explicitly that the relevant context should call for a heightened degree of factual specificity. *See*, *e.g.*, *Cooney*, 583 F.3d at 971 ("In other words, the height of the pleading requirement is relative to circumstances").

C. Secondary Implications of *Twombly* and *Iqbal*

While commentators have understandably focused on the implications of *Twombly* and *Iqbal* for motions to dismiss, the cases and early indications from lower courts also support two related arguments.

First, defendants should have greater success in obtaining a stay (or at least a limitation) of discovery pending adjudication of a motion to dismiss, given that a central rationale of *Twombly and Iqbal* is that dismissal, rather than a mere "careful-case-management approach," *Iqbal*, 129 S. Ct. at 1953, is the proper ap-

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proach to containing the cost of discovery on implausible claims. This should be particularly true in complex cases. *See*, *e.g.*, *Wagner v. Mastiffs*, 2009 WL 5195862, *1 (S.D. Ohio) ("[G]iven the nature of antitrust allegations as noted by *Twombly* and numerous other decisions, the Court cannot find that the burden faced by the defendants in proceeding with discovery on the antitrust claims set forth in the amended complaint would be insignificant"); *Coss v. Playtex Prods., LLC*, 2009 WL 1455358, *2 (N.D. Ill.) (citing *Twombly* and *Iqbal*, allowing only two interrogatories that defendant admitted it could answer without much difficulty, and noting that "the policy against burdensome discovery in complex cases during the pendency of a motion to dismiss holds fast").

Some courts may be reluctant to stay discovery where they believe a case will inevitably proceed beyond the 12(b)(6) stage, whether because of an amended complaint (which courts are more likely to allow) or a mere partial dismissal. Even in this situation, however, a defendant may argue that a stay would avoid the wasteful discovery described in *Twombly* and *Iqbal* by delaying factual development until it is governed by a more focused and particularized complaint. Such arguments will necessarily depend on the defendant's promptness in bringing its 12(b)(6) motion, notwithstanding that Rule 12(h) allows a defendant to do so even at trial.

Second, while *Twombly* and *Iqbal* both noted that cautious case management was not sufficient to justify discovery on implausible claims, they hardly discouraged such management for claims that were adequately pleaded. To the contrary, the costs of discovery remain at least as relevant as before those decisions, if not more so. These costs can be cited as support for narrower discovery rulings, and the more specific complaints that *Twombly* and *Iqbal* should encourage may assist in such arguments.

Looking Ahead: Rumblings From Congress

In response to objections that *Twombly* and especially *Iqbal* have closed the federal courts to worthy plaintiffs, legislators have introduced bills in both the House of Representatives and the Senate with the stated goal of reinstating the pleading standards in effect before the decisions. Although the bills purport merely to undo *Twombly* and *Iqbal*, whether they would simply do this is a serious question, one that highlights the extent to which, as discussed above, *Twombly* and *Iqbal* built on existing judicial practice.

The House Bill, the Open Access to Courts Act (H.R. 4115), would impose a literal reading of *Conley* by providing that "[a] court shall not dismiss a complaint under [Rules 12(b)(6), 12(c), or 12(e)] unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief." The bill would also bar dismissal based on implausibility or lack of facts sufficient "to warrant a reasonable inference that the defendant is liable for the misconduct alleged." By its terms, the bill would allow a plaintiff to proceed to discovery simply by naming a cause of action and alleging that a defendant is liable under it. Moreover, a court would be prohibited from dismissing even the most incredible and unsubstantiated claims under Rule 12—including those involving "little green men" or conspiracies among high-ranking government officials. Given that lower courts never took *Conley* literally, H.R. 4115 could relax pleading standards to a level not previously seen. Moreover, its broad terms apply unless "otherwise expressly provided" by subsequent statute or amendment of the Federal Rules of Civil Procedure, which calls into question such specialized pleading standards as Rule 9(b)'s requirement of particularized pleading for fraud, the Private Securities Litigation Reform Act, and the Prisoner Litigation Reform Act.

The House bill was introduced in November 2009, and had 33 cosponsors as of the end of May 2010. But the subcommittee to which it was referred has taken no action on it, apart from holding hearings in late 2009.

While more ambiguous than the text of H.R. 4115, the language of the Senate Bill, the Notice Pleading Restoration Act (S. 1504), could have a similar effect. It provides more simply that "the Federal Courts shall not dismiss complaints under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957)." Courts might interpret S. 1504 against the reality that *Conley's* "no set of facts" language has never been taken "literally," and thus continue to dismiss claims lacking sufficient factual allegations to create a plausible inference of liability. But given that that is precisely the approach of *Twombly* and *Iqbal*, and that S. 1504, if read as allowing for the approach of those cases, would have no obvious purpose, courts might interpret S. 1504 as equivalent to H.R. 4115. Thus, the Senate bill too might produce a pleading standard not previously known in practice. And it too could well repeal longstanding specialized pleading requirements.

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The Senate bill was introduced in July 2009 by outgoing Senator Specter. It has only two cosponsors, and the Senate Judiciary Committee has taken no action on it.

Conclusion

Despite the common impression of *Twombly* and *Iqbal* as revolutionizing federal pleading standards, the evidence one year after *Iqbal* suggests that the cases are best seen as codifying and focusing longstanding practice. Based on indications so far from the lower courts, many motions to dismiss in routine cases will continue to fail. But where the context of a case suggests a particular burden on the courts or defendants, or particular reasons to doubt a claim, *Twombly* and *Iqbal* provide a clear framework and litany of concerns that should assist a defendant in obtaining dismissal.

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further harm to the California economy. One recent independent economic analysis quantified the potential adverse impact of court funding reductions at billions of dollars in Los Angeles County alone.

This time of economic challenge results in difficult decisions in Sacramento. However, as the Chief Justice of the California Supreme Court said in his State of the Judiciary speech in February: "Courts are not a luxury to be funded in good times and ignored in hard times." Indeed, a fully functioning judiciary is fundamental to our legal system and to our economic system as well, as the courts are where California's citizens and businesses go to resolve their disputes and enforce their legal rights.

As lawyers, we have the ability if not the responsibility to do something about this situation. So what can we do? A simple phone call or letter to members of the State Legislature could help. An even easier way to help is to exclusively use e-filing. In Orange County Superior Court, e-filing is required in complcx departments, but available and encouraged in all other departments. Something as simple as using e-filing saves the courts time and money and can go a long way in restoring funding to the judicial branch so it will have the resources necessary to properly carry out its constitutional responsibility to assure that every Californian and the businesses of this state have access to timely, effective justice in our courts.

While the state's funding crisis is not exactly "breaking news," a solution to this problem is vitally important to our state's system of justice as well as its economy.

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tions and other complex cases in federal court for a variety of reasons, including streamlined discovery procedures and more developed class certification jurisprudence. Indeed, potential removal is an important threshold decision in every class action, and many other complex cases, filed in state court today. That said, federal courts can present their own hurdles in class actions, particularly if a case becomes ripe for settlement. When dealing with settlements in federal courts, practitioners often face added scrutiny, overall distrust of coupons or similar relief, and more rigorous notice requirements.

This article focuses on the more onerous notice requirements in federal court, and specifically the due process requirement of direct notice to settlement class members in actions certified pursuant to Fed. R. Civ. P. 23(b)(3) where the primary relief to the class is monetary compensation. The article concludes with suggestions for formulating a notice program and avoiding some of the pitfalls that can derail your settlement. With federal judges paying increased attention to notice plans, examples of settlements being rejected for insufficient notice are not hard to find. *See Karvaly v. Ebay, Inc.*, 245 F.R.D. 71 (E.D. N.Y. 2007) (disapproving notice plan where e-mail notice and

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website link were only forms of notice); *Larson v. Sprint Nextel Corp.*, 2009 WL 1228443 (D. N.J. April 30, 2009) (disapproving of notice plan where proposed direct notice did not provide information required by Rule 23(c)(2)). Failure to understand federal court notice requirements and plan effectively can be extremely costly, if not fatal to the settlement process. If mishandled, notice requirements can result in costs that dwarf the actual relief to the settlement class, and can make an otherwise favorable settlement unpalatable.

1. Notice Requirements Under The Federal Rules

There are several notice provisions in the Federal Rules of Civil Procedure regarding notice to absent class members of the pendency of a certified class action or settlement. The notice requirements vary depending upon the type of class action at issue. For those class actions seeking primarily injunctive relief under Rule 23(b)(1) or (b)(2), "the court may direct appropriate notice… ." Where a class action seeks money damages and alleges that common issues of fact and law predominate under Rule 23(b)(3), the court must "direct to class members the best notice that is practicable under the circumstances, *including individual notice to all members who can be identified through reasonable effort*… ." For both types of class action settlements, the court is required to "direct notice in a reasonable manner to all class members who would be bound by the proposal." Rule 23(e)(1).

In *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974), the seminal case on adequate notice for Rule 23(b)(3) class actions, the Supreme Court interpreted Rule 23(c)(2) and the constitutional requirement of due process to require individual direct mail notice for each class member "whose names and addresses may be ascertained through reasonable effort." *Id*. at 173. In *Eisen*, the certified class consisted of over six million members, of which 2,225,000 could be identified through reasonable effort. Despite the extraordinary cost of direct mail notice, and the plaintiff's insistence that the case would likely be unable to proceed as a class action in the face of such costly notice, the Court found that "***individual notice…is not a discretionary consideration to be waived in a particular case***." *Id*. at 176. Indeed, the Court found that such notice was "an unambiguous requirement of Rule 23" and necessary to afford absent class members the right to opt out of the class and pursue separate claims, or remain in the class, but actively participate in the management of the case. *Id*.

While *Eisen* did not involve the certification of a settlement class, the requirements set forth in *Eisen* routinely have been applied to settlement classes where certification of the class and approval of the settlement are sought simultaneously. *See Grunewald v. Kasperbauer*, 235 F.R.D. 599, 609 ("In this case, where the parties seek to simultaneously certify a settlement class and settle a class action, the elements of Rule 23(c) notice (for class certification) are combined with the elements of Rule 23(e) notice (for settlement)"); *see also Zimmer Paper Products, Inc. v. Berger & Montague, P.C.,* 758 F.2d 86, 90-91 (3d Cir. 1985) (holding that Third Circuit courts favor maximum notice in class action contexts and that first-class mail and publication satisfy notice requirements). Indeed, in *Molski v. Gleich*, 318 F. 3d 937 (9th Cir. 2003), the Circuit Court reversed an order granting approval of a class settlement and certifying a settlement class where settlement class members could be identified through a reasonable search but notice was only provided through publication. *Id*. at 951-2. Citing Rule 23(c)(2) and *Eisen*, the *Molski* Court held that "[b]ecause no individualized efforts were undertaken…the notice provided to the class was inadequate and failed to comport with the requirements of due process."

2. *Eisen* Meets the 21st Century: Direct Notice Requirements Coming of Age

While federal courts have not lost sight of *Eisen's* direct notice requirement, they have loosened the reigns on the form of such notice. Specifically, electronic mail ("e-mail") and the Internet have gained popularity in recent years as forms of notice. The Courts remain reluctant, however, to approve e-mail notice as the only form of individual notice. In cases where e-mail notice has been approved, it typically has been a part of a more comprehensive notice plan that also includes direct mail.

One case in which e-mail was allowed as the sole form of individual notice was *Todd v. Retail Concepts*, 2008 WL 3981593 (M.D. Tenn. Aug. 22, 2008). There, without any analysis, the court approved notice through e-mail, a posting on the defendant's website and postings in the defendants retail locations. In overruling an objection to the adequacy of the settlement, which was entirely coupon based, the Court noted that because of a change in the relevant law during the pendency of the action, it was likely that the plaintiffs would have had no claim but for the defendant's willingness to comply with the settlement

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agreement. This may have factored into the Court's lenient approach to the notice program.

A well known class action treatise, McLaughlin on Class Actions, found ten cases from 2001 through 2005 approving internet or e-mail notice as part of a more comprehensive notice plan that included some direct mail. 1 McLaughlin on Class Actions § 5:78 at n. 9 (6th Ed.). Although no more current empirical data was located, the use of e-mail and the Internet as components of notice programs has increased exponentially since 2005 and is becoming commonplace.

In *Browning v. Yahoo! Inc.*, 2006 WL 3826714 (N.D. Cal. Dec. 27, 2006), a California District Court approved e-mail notice as the initial form of direct notice for those class members for whom the defendant had an e-mail address. The notice plan, however, required direct mail notice for those class members for whom defendant had no e-mail address or for whom the e-mail notice was returned as undeliverable. The Court noted that the case was particularly suited for e-mail notification because, as *Yahoo!* users, the class members were "familiar and comfortable with e-mail and the Internet." *Id*. at *8; *see also In re Sony SXRD Rear Projection Television Class Action Litigation*, 2008 WL 1956267, *4 (S.D. N.Y., May 1, 2008)(approving notice program consisting of publication in USA Today, establishment of settlement website, and initial direct notice through e-mail referring class members to settlement website followed by standard mail where e-mail returned as undeliverable or no e-mail address available).

In another case, the Eastern District of New York refused to allow e-mail notification as the only method of individual notice. *Karvaly v. Ebay, Inc.*, 245 F.R.D. 71 (E.D. N.Y. 2007). The Court found that "while…there are remarkably few cases addressing this issue, the Court is not persuaded that notice…by electronic mail, though clearly more convenient and less expensive for the parties, is an adequate substitute for the traditional method of…first-class mail." *Id*. at 91. The Court pointed out several flaws in e-mail notice, including the possibility of class members simply deleting e-mails, or spam filters rejecting e-mails because of the common practice of e-mail spoofing. Ultimately, the Court directed the parties to come up with an alternative notice plan, suggesting that e-mail might be effective individual notice if it required the class members to take some affirmative step to acknowledge receipt and waive formal, first-class mail notice. *Id*. at 93.

More recently, in *Larson v. Sprint Nextel Corp.*, 2009 WL 1228443 (D. N.J. April 30, 2009), the District of New Jersey upheld an objection to a notice plan because it failed to provide individual notice to class members who were readily identifiable. The Court determined that direct notice to such individuals was required, but invited the parties to explore alternative means of contacting individual class members, including e-mail or text-messaging. *Id*. at *15. The Court found that "[t]his case presents the interplay between a large class, stringent individual notice requirements, and different forms of available technology." The Court continued to suggest that "Sprint and Class Counsel are free to devise a notice plan that meets Rule 23(c)(2) standards while at the same time utilizing the cost and efficiency savings that come from features such as electronic mail or text messaging." *Id*. The underlying issue in that class action related to the propriety of early termination fees for wireless service contracts, which explains, in part, the Court's suggestion of using text messaging to provide individual notice.

3. Developing an Effective Notice Plan

Because federal courts still require direct notice in 23(b)(3) actions under *Eisen*, companies need to carefully plan their notice programs and account for the attendant costs. One option available in some situations to avoid the costs associated with direct notice is to structure a settlement to include primarily injunctive relief under Rule 23(b)(1) or (b)(2), as direct notice is not mandatory for such class settlements. In many cases, however, plaintiff's counsel may insist on monetary relief for the class and certification under this part of Rule 23 may not be an option.

To the extent that certification under 23(b)(1) and (b)(2) is unavailable, the parties may consider whether state court is a better venue for the class settlement, particularly if meaningful settlement discussions occur early in a case when a venue change is still viable. Certain states have somewhat more relaxed notice requirements than the federal courts, and there may be less scrutiny of the notice program, if not the settlement itself. For example, neither New Jersey, Pennsylvania, nor New York expressly require direct notice to individuals. New Jersey R. 4:32-2(b)(2), the equivalent of Fed. R. Civ. P. 23(c)(2), provides that "the court shall direct to the members of the class the best notice practicable under the circumstances, consistent with the due process of law." The Pennsylvania class notice requirements, set forth in Pa. R. Civ. P. 1712, provide that, "[i]n determining the type and content of notice to be used and the members to be

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notified, the court shall consider the extent and nature of the class, the relief requested, ***the cost of notifying the members*** and the possible prejudice to be suffered by members of the class or by other parties if notice is not received." New York's CPLR 908 requires a class to receive "reasonable notice…in such manner as the court directs" and allows the court to consider the costs involved, the resources of the parties and the likelihood that class members would seek to be excluded from the class when determining appropriate notice. Other states may also relax the specific direct notice requirement and/or allow its courts to consider the cost-benefit calculation of providing direct notice to every class member.

For classes certified in federal court pursuant to Fed. R. Civ. P. 23(b)(3), however, *Eisen* still requires individual notice to all class members for whom an address is reasonably accessible, regardless of the costs involved in disseminating such notice. Although first-class mail may still be the most common, and the presumptive, way to satisfy this requirement, the cases cited above indicate a willingness by federal courts to approve notice plans that do not rely solely on first-class mail. Because every case is different, there is no magic formula for a cost effective, yet legally sufficient, notice program, but the best practice is to package some form of direct notice with other less expensive types of notice to create an overall program that effectively and efficiently gets the message out to the class members. In doing so, companies should consider the following:

- Plan Ahead: Go into settlement negotiations with a notice plan in mind. Study the options available to your company, inquire about pricing in advance of any settlement discussion, and understand your company's capabilities and options. Planning ahead for the notice discussion allows you to direct the negotiation where you want it to go and avoid surprises regarding costs after-the-fact that can derail your settlement.

- Raise Notice Early*:* Many attorneys tend to avoid discussion of the notice issues until other terms have been fully negotiated. Raising notice early may give you a significant advantage because a plaintiff may show more flexibility with respect to notice terms before all other aspects of the settlement are resolved.

- Acknowledge Common Ground*:* When it comes to developing notice programs plaintiffs and defendants have a common goal. Both sides must structure a notice program that effectively gets word out to the class and therefore passes muster with the court. At the same time, plaintiffs have every incentive to keep notice costs in check, leaving more funds available to pay the class members and their counsel.

- E-mail!!! E-mail is coming of age in the courts. Although there is still some resistance, it is hard to dispute that most people are tied to their email even more so than their mailboxes. E-mail is a fraction of the cost of first-class mail, particularly if your company can send the communications itself. To the extent a company has email addresses for some or all of the putative class members, using this method of communication can significantly reduce the overall cost of the notice program.

- Be creative*:* Make sure to consider a wide variety of options when putting together your notice package. While traditional first-class mail and publication methods still may have a place, e-mail, website postings, dedicated websites, Internet banners, store signs, and bulk or postcard mailings may all be appropriate for your needs. Consider whether a specific trade publication effectively reaches your putative class at a lower cost than national newspapers or magazines. In some situations, it may also be appropriate to incorporate your notice into mailings already being sent to your customers in the ordinary course, such as monthly bills or advertisements.

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(would survive a demurrer) and must produce competent admissible evidence to support each and every essential allegation of the claim, including causation and damages. (*Averill v. Superior Court*, 42 Cal.App.4th 1170 (1996.) Unlike a motion for summary judgment, the defendant does not have the burden of showing that plaintiff cannot prevail on one or more elements of the claim. The defendant has the burden of establishing that affirmative defenses, like the litigation privilege of Civil Code, Section 47(b), bar the claim. The plaintiff must then rebut this showing. (*Mann v. Quality Old Time Service*, 120 Cal.App.4th 90, 104 (2004).)

The primary benefits of filing a Section 425.16 motion as a means of defending a civil action are derived from its celerity and compensatory power. The motion is essentially the equivalent of a "super summary judgment motion" with a nuclear warhead attached and a far more sophisticated delivery system.

PLAINTIFFS CANNOT EVADE FEES BY AMENDMENT OR DISMISSAL

Once a special motion to strike is filed, a plaintiff cannot evade fees by amending or withdrawing the complaint in lieu of opposition, and no meet and confer effort or other warning is required before fees may be awarded under the Section 425.16(c). (*Liu v. Moore*, 69 Cal.App.4th 745, 749-751 (1999); *Simmons v. Allstate*, 92 Cal.App.4th 1068, 1072-1073 (2001).) Our High Court recently held that the SLAPP filer can evade fees only if the complaint or cross-complaint is voluntarily dismissed with prejudice *before* the defendant files the anti-SLAPP motion. (*S.B. Beach Properties v. Berti*, 39 Cal.4th 374 (2006).) A plaintiff can also amend at any time before the SLAPP motion is filed. But once the SLAPP motion is filed, the plaintiff is stuck in a vice grip, and must pay fees incurred up to the point of dismissal and for any time spent on a subsequent fee motion. (*Ketchum v. Moses*, 24 Cal.4th 1122, 1141-1142 (2001).) A significant, but limited, exception to the no amendment rule, however, was recently expounded by our own Fourth District, Division Three Court of Appeal in *Nguyem-Lam v. Cao*, 171 Cal.App.4th 858, 870-874 (2009) (distinguishing *Simmons*). Here, a slander per se plaintiff sought leave to amend not to evade application of the anti-SLAPP statute on the first prong as plaintiff attempted in *Simmons*, but sought leave to amend solely to conform the pleadings to the proof of falsity and actual malice she adduced, but failed to plead as to the second prong only. (*Id.*) The Court carved out a limited right for plaintiffs to amend their complaints when the admissible evidence adduced demonstrates a plaintiff has otherwise established a probability of prevailing and the action is not meritless. (*Id.*)

THE NUCLEAR WARHEAD: SLAPP FEES

Under subdivision (c), a prevailing defendant is entitled to a mandatory award of reasonable attorney's fees and costs, broadly construed to the end of deterring "abuse of the judicial process" and "encouraging participation in matters of public significance." (Code of Civ. Proc., § 425.16(a)); *Ketchum*, 24 Cal.4th at 1131-1138; *Robertson v. Rodriguez*, 36 Cal.App.4th 347, 360-362 (1995).) If successful, a SLAPP defendant enjoys the same preference for attorney's fees as the civil rights plaintiff. (*Computer Xpress v. Jackson* 93 Cal.App.4th 993, 1018 (2001).) But a prevailing plaintiff who defeats a special motion to strike may recover fees only through a Code of Civil Procedure, Section 128.5 motion pertaining to frivolous or delaying actions. (Code of Civ. Proc., § 425.16(c); *Carpenter v. Jack In The Box 151 Cal.App.4th 454 (2007)*. *The SLAPP defendant who ultimately prevails on appeal is entitled to recover fees for all work performed at both the trial and appellate levels in connection with the motion. (Dowling v. Zimmerman*, 85 Cal.App.4th 1400, 1425-1426 (2001).) A defendant who prevails on less than all causes of action is entitled to recover fees for each cause of action stricken. (*Shekhter v. Financial Indemnity Co.*, 89 Cal.App.4th 140, 149-151 (2001).)

Compensable time includes all time necessarily spent in connection with succeeding on the SLAPP motion. This includes time spent on the anti-SLAPP motion, SLAPP discovery motions and specified SLAPP discovery ordered pursuant to subd. (g), SLAPP appeals and related writs, and SLAPP fee motion time. (*Lafayette Morehouse v. Chronicle Publishing*, 39 Cal.App.4th 1379 (1995).) More recently, the *Wanland* court held that all time spent in connection with enforcement of the judgment for SLAPP fees is compensable time—allowing for prevailing SLAPP defendants to hire collections counsel on a contingent or deferred hourly fee. (*Wanland v. Mastagani, Holstedt & Chuirazzi*, 141 Cal.App.4th 15, 20-21 (2006).) If a plaintiff appeals from an order granting an anti-SLAPP motion or SLAPP fee motion, the SLAPP plaintiff must put up a bond or undertaking as secu-

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rity in order to stay enforcement of a judgment for attorneys fees and costs pending plaintiff's SLAPP appeal. (*Dowling v. Zimmerman*, 85 Cal.App.4th 1400, 1426-1434.

CLAIMS ARISING FROM PRIOR LITIGATION OR OTHER OFFICIAL PROCEEDINGS

In light of the foregoing, it easy to see how attorneys can get into malpractice and malicious prosecution quick sand by unwittingly filing SLAPP complaints or by filing demurrers and motions for summary judgment when a SLAPP motion is the best means of quickly defending the action and recovering costs and fees. This section focuses on those areas most likely to get lawyers into malpractice trouble and how to avoid them.

While subdivision (e) identifies four areas of conduct that fall within the protected activity of the statute, the statute is really aimed at two basic categories of protected activity: petitioning activity and free speech in connection with a public issue or an issue of public interest. No showing of a public issue is required for the first two official proceeding prongs in subdivisions (e)(1) and (e)(2). (*Briggs v. Eden Council for Hope & Opportunity*, 19 Cal.4th 1106, 1115-1119 (1999).) No public forum is required for public issue speech under subdivision (e)(3) in light the 1997 amendment adding subdivision (e)(4) to the statute. (*Averill*, 42 Cal.App.4th 1170.)

A. Defamation, Intentional Interference, and Other Torts

Our Court's landmark decision in *Briggs* is an excellent place to start. *Briggs* involved defamation, intentional interference, and negligent infliction of emotional distress claims filed by a landlord against a former tenant. The gravamen of the complaint alleges that the Eden Counsel counseled an African-American woman who rented an apartment from Briggs. After the tenant complained that Briggs giving her a less favorable electricity offset than that given to a Caucasian tenant, the Eden Council assisted the former tenant in filing a complaint with HUD and in prosecuting a small claims action against Briggs. The complaint alleges that "during the HUD investigation, Eden Council employees referred to Briggs as a 'male chauvinist' and a 'racist redneck.'" First, no public interest showing is required for the first two categories of protected activity—the petition prongs. Any cause of action arising from an oral or written statement or writing made "before" or in connection with an issue under consideration or review by a Legislative, executive, or judicial body or any other official proceeding authorized by law is subject to the anti-SLAPP burden shifting procedure. In *Briggs*, the cause of action arose from Eden Council's oral and written statements to the tenant made "during the HUD investigation" and while assisting the tenant with the filing of a small claims action. The First Amendment right to petition involves the act of lobbying, testifying, suing, or otherwise seeking administrative action. (*Id.*, at 1115.) Any communication designed to prompt government action is also protected by the statute. Held: The statements were not only held to fall within the anti-SLAPP statute, they also constitute activity protected by the absolute litigation privilege of Civil Code, Section 47(b), which is an absolute bar to the claim.

Medical peer review proceedings are official proceedings that come under the protection of the anti-SLAPP statute and litigation privilege. (*Kibler v. Northern Inyo County Hospital*, 39 Cal.4th 192 (2006).) More recently, in *Navellier v. Sletten*, 29 Cal.4th 82 (2002), our High Court held that fraud and breach of contract actions arising from the filing of a cross-complaint in violation of a settlement agreement fell within the ambit of the anti-SLAPP statute. "Any cause of action arising from the defendant's prior litigation activity may appropriately be the subject of a special motion to strike." The Court then remanded for a second prong determination. *Navellier* was a 4/3 decision. On remand in *Navellier II*, 106 Cal.App.4th 763 (2003), the court found that the fraud action was barred by the litigation privilege, and the contract action was meritless because no damages could be shown.

B. Malicious Prosecution

From these precepts it logically follows that any malicious prosecution and abuse of process claim would also be automatically subject to anti-SLAPP treatment by virtue of the petition/litigation activity at which these torts are aimed. Indeed, a line of cases, culminating with our High Court decision in *Jarrow Formulas v. La Marche*, 31 Cal.4th 728 (2003), held that all malicious prosecution actions are subject to anti-SLAPP treatment because they necessarily arise from the alleged improper filing and maintenance of a prior lawsuit or administrative proceeding. A complaint is a writing made "before" a judicial body and frames the legal and factual issues to be considered and reviewed in a judicial proceeding. This meets the official proceeding prongs of subdivisions (e)(1) and (e)(2). The only advantage of filing a malicious prosecution action is that it is the only tort exempt

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from the absolute bar of the litigation privilege of Civil Code, Section 47(b).

While malicious prosecution action are easily plead and difficult to prove, malicious prosecution plaintiffs do not have to contend with the litigation privilege defense. Instead, malicious prosecution plaintiffs have to contend with another deadly defense—the advice of counsel. Where the defendant produces evidence showing that the defendant consulted a lawyer, disclosed all material facts to the attorney, and relied in good faith on the attorney's advice that the action was tenable, this constitutes an absolute defense to a malicious prosecution claim. (*Sosinsky v. Grant*, 6 Cal.App.4th 1558 (1992).)

C. Abuse of Process (Civil Code, Section 47(b)

The other malpractice booby trap for lawyers is abuse of process claims. Our High Court, in *Rusheen v. Cohen*, 37 Cal.4th 1048, held that an abuse of process claim arising from both communicative and noncommunicative conduct of the defendant is subject to anti-SLAPP treatment, and is barred by the absolute litigation privilege of Civil Code, Section 47(b). Also, many attorneys who file malicious prosecution claims and other torts also unwittingly throw in an abuse of process claim or mistakenly file an abuse of process claim when they should file a malicious prosecution claim. This is a deadly mistake. (*See Ramona Unified School Dist. v. Tsiknas*, 135 Cal.App.4th 510.)

In *Tsiknas*, the Court of Appeal first noted that the school district conceded that SLAPP applied. The abuse of process claim arises from statements made in the public CEQA hearings, the complaints made to various government agencies, and the filing of the writ petitions are oral or written statements made before a executive, judicial, or other official proceedings authorized by law under subdivision (e)(1), and were made in connection with issues under consideration by executive, judicial, or official bodies under subdivision (e)(2). The barratry claim, based on the alleged excitement of three groundless proceedings, falls into subdivision (e)(2) as well. Because the statements concerned traffic, access, child safety, and environmental issues, they were made in connection with issues of vital public interest to the Ramona Community under subdivision (e)(4).

The *Ramona* court pointed out in footnote 7 that all of the above petition activity was immunized from liability under the absolute litigation privilege of Civil Code, Section 47(b). (*See Hagberg v. California Federal Bank*, 32 Cal.4th 350 (2004) (defamation action arising from false police report is absolutely barred under the litigation privilege); *see also Rusheen*, *supra*.) Under *Rusheen*, our High Court recently clarified that where an abuse of process or any other derivative tort cause of action, save malicious prosecution, arises from communicative conduct, the litigation privilege extends to those noncommunicative acts which are necessarily related to the communicative act. In footnote 8, the *Tsiknas* court cited *Rubin v. Green*, 4 Cal.4th 1187 1994 for the proposition that the litigation privilege also applies to bar the barratry claim against Hamilton.

Notwithstanding the privilege, the gravamen of school district's abuse of process claim in *Tsiknas* was that defendants initiated and continued pursuit of meritless litigation for malicious purposes. While these allegations, if proven, would support a malicious prosecution claim, no abuse of process has been stated. Accordingly, the Court disregarded school district's labeling and concluded that the claim, although styled as abuse of process, was really an malicious prosecution claim. "We ignore the 'label' and look to the 'substance' of the claim." *Tsiknas* acknowledged High Court authority holding that government entities like the school district are barred from suing citizens for malicious prosecution under the First Amendment Petition Clause. In addition, both the trial and appellate courts found that the school district had no evidence to establish any of the elements of the claims alleged, including causation and damages.

D. *Booker v. Rountree*

Justice Bedsworth's decision in *Booker v. Rountree*, 155 Cal.App.4th 1366 (2007) contains an excellent discussion distinguishing the first prong SLAPP threshold from the second prong litigation privilege defense.

Booker responded to the Rountree action with a cross-complaint for abuse of process, which alleged essentially that Rountree declined to join as a co-plaintiff in the Gunther case, and delayed in serving his complaint until after the first case settled. The gravamen of Booker's cross-complaint is misconduct in the underlying Gunther action. Indeed, that is the essence of the tort of abuse of process—some misuse of process in a prior action—after it is issued. (*See Tsiknas*, *supra*.) It is hard to imagine an abuse of process claim that would not fall under the protection of the anti-SLAPP statute.

Booker argued the anti-SLAPP statute is inap-

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plicable because the essence of the cross-complaint if fraud in concealing Rountree's action during settlement negotiations in the Gunther case. But Justice Bedsworth held Booker to his pleading. "The cause of action is 'labeled' abuse of process not fraud." (*Booker*, 155 Cal.App.4th at 1370-1371.) This directly conflicts with *Tsiknas*. There, Justice McDonald treated an abuse of process claim as a malicious prosecution claim holding "we disregard the label and look to substance." (*Tsiknas*, at 522.) Rountree filed a separate action, delayed serving the complaint, and concealed the action from Booker to exact a higher settlement (or multiple settlements for the same violation). The essence of the claim is that the underlying litigation was conducted in an improper manner. Subdivision (e)(4) covers not only speech but also "conduct in furtherance of the right of petition ...." Hence, the cross-defendant, Rountree, met the SLAPP threshold.

Justice Bedsworth, with a laser beam focus, identified the gravamen of the claim as failure to serve the underlying action until the prior related suit settled. Unlike a malicious prosecution, the complaint does not seek damages for the filing of the underlying action but for the "failure to serve" the action in a timely fashion.

Unlike SLAPP, the litigation privilege protects only communicative conduct. (*Rusheen, supra*.) But Booker also asserted the federal Noerr-Pennington doctrine as a defense because it protects both communicative and noncommunicative conduct in furtherance of the right of petition. Justice Bedsworth held that because Rountree's claim is based not on Rountree's conduct in connection with the filing of the underlying action but rather on Rountree's conduct during the action. The failure to serve a complaint and concealing the fact of its filing does not implicate the right of petition under the federal Noerr-Pennington doctrine. In other words, failure to serve a complaint is not conduct in furtherance of the truth-seeking objectives of Booker's litigation. Hence, the Noerr-Pennington Doctrine does not immunize Booker's claims. Finally, the court found that Booker had presented admissible evidence that, if credited, would establish the abuse of process and ulterior motive elements of the tort. Hence, the SLAPP motion was denied.

E. Other Areas Where SLAPP May Apply

Other areas to watch out for include HOA disputes or disputes between homeowners in a residential community. These disputes are rife with potential SLAPP issues. (*Ruiz v. Newport Harbor Community Assoc.*, 134 Cal.App.4th 1356 (2006).) Defamation and other actions against media defendants for statements published are also hot areas for SLAPP motions. Also, the 1996 Communications Decency Act sets up a privilege for third publishers of defamatory material on the internet. (*Barrett v. Rosenthal*, 40 Cal.4th 33 (2006).) So while the same libelous per se statement might be actionable against a media defendant who publishes it in the newspaper, radio or TV if malice can be shown, that same statement when republished on a third party website is not actionable as against an ISP. The statement is, however, actionable against the original publisher There are many exceptions to the application of the anti-SLAPP statute including those set forth in Code of Civil Procedure, Section 425.17 (public interest suit and commercial speech exemption) and illegality as a matter of law. (*Flately v. Mauro*, 39 Cal.4th 299 (2006).)

CONCLUSION

Remember there is ample room for defeating a SLAPP motion on the second prong if you plan and prepare your opposition properly. In fact, a plaintiff need only be able to show that they can prevail on any part of their claim to defeat a SLAPP motion. (*Mann v. Quality Old Time Service*, 120 Cal.App.4th 90, 106 (2004).) SLAPP motions can be beat. But they are expensive to oppose. The best way to avoid problems is to screen your complaints before they are filed. Secondly, consult an expert to assist you with obtaining necessary discovery and opposing the motion. If a plaintiff loses the SLAPP motion, an expert declaration is the best way to decimate the defendant's SLAPP fee request or boost it if you represent the defendant.

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