

The Future of Litigation

This month marks the beginning of the second decade of the twenty-first century. Litigation, as we have known it, is undergoing rapid change and will continue to do so. I would like to focus tonight on the areas in which I foresee the greatest changes and assess how these changes have or will affect the bench and the bar. Five topics come readily to mind: (1) jurisdiction, (2) pleading standards and case tracking; (3) vanishing trials and the changing jury culture; (4) alternative dispute resolution; and (5) the impact of electronic communications on civil and criminal litigation.

1. Jurisdiction

I begin with jurisdiction. Long ago, in the twentieth century, we thought that a defendant had to be present in the state in some way in order for the court to exercise jurisdiction. In the electronic age, this is no longer a requirement – now the defendant can be *virtually* present. Anyone engaged in business over an interactive website – one where a New York consumer can order a product, and more importantly, has ordered a product and that product has been shipped into New York, is probably subject to the exercise of jurisdiction by a New York court.¹ For now, neither a passive website that simply provides information but does not

¹ See *Energy Brands Inc. v. Spiritual Brands, Inc.*, 571 F. Supp. 2d 458 (S.D.N.Y.

handle sales, nor negotiations via emails bouncing in and out of New York, is sufficient to support jurisdiction. But, as we sit here tonight, the Second Circuit is considering a case where a defendant operated an interactive website but the only Internet purchase by a New York consumer was from plaintiff's paralegal. The district court found no jurisdiction and plaintiff appealed.² What about websites that post comments from New York residents? What if those comments turn out to be defamatory? In a recent state court case, the court found it could exercise jurisdiction over the website with the eponymous name ripoff.com, which offered to help ripoff victims obtain relief. Complainants post comments on the website and the website owner promises to intervene in some way to right the alleged wrong.³ The short point is that jurisdiction is an expanding concept in a shrinking world. As more entities around the world do business via the Internet, American courts will often exercise jurisdictions over foreign entities. This, in turn, creates difficult issues in discovery – particularly with respect to document production and privilege.

2. Pleading Standards and Case Tracking

I turn now to the revolution in pleading. Everyone is familiar with the

2008).

2 *See Chloe v. Queen Bee*, 571 F. Supp. 2d 518 (S.D.N.Y. 2008).

3 *See Intellect Art Multimedia Inc. v. Milewski*, No. 117024/2008, 2009 WL 2915273 (Sup. Ct. N.Y. Co. Sept. 11, 2009) (denying motion to dismiss for lack of jurisdiction).

holdings in *Twombly*⁴ and *Iqbal*.⁵ Rather than describing the holdings, I turn to two interesting questions: (1) why was the pleading standard changed after fifty years of *Conley v. Gibson*,⁶ and (2) what are the practical effects of these decisions?

I begin by noting that while *Twombly* was decided by a 7-2 majority, *Iqbal* was decided by the usual 5-4 split, and Congress is considering legislation to return to Rule 8 notice pleading. That said, the driving force behind these opinions appears to be, at least in part, the high cost of discovery, as perceived by the justices of the Supreme Court. In *Twombly*, the Court emphasized the costs of discovery and noted that judicial case management had not proven effective in reigning in costs.⁷ In reality, a recent survey conducted by the Federal Judicial Center showed that most lawyers agree that in the average case discovery costs are not excessive and the amount of discovery taken in most cases is “just right.”⁸ Nonetheless, the move toward a heightened pleading standard is based, to a great extent, on the proposition that because discovery is increasingly expensive, due in no small part to the advent of e-discovery, suits that may lack merit should be stopped before those costs are incurred.

4 *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007).

5 *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

6 *Conley v. Gibson*, 355 U.S. 41 (1957).

7 *See Twombly*, 550 U.S. at 557-60.

8 EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER, NATIONAL, CASE-BASED CIVIL RULES SURVEY 28 (2009), *available at*

What is the new test that replaced notice pleading as set forth in Rule 8? In short, there is now a standard of “plausibility” which requires the pleading of “enough fact[s] to raise a reasonable expectation that discovery will reveal evidence” of what is alleged in the complaint.⁹ In deciding what is “plausible” the trial court should not accord the presumption of truthfulness to so-called conclusory allegations, and perhaps more importantly, the *Twombly* Court held that factual allegations that are *merely consistent* with the elements of the claims did not cross “the line between possibility [or conceivability] and plausibility.”¹⁰ The *Twombly* Court explicitly permits a court to consider inferences that favor the plaintiff as well as those that favor the defendant. This likely means that courts are now required to weigh competing inferences and find, at the motion to dismiss stage, that the inferences that can be drawn in plaintiff’s favor are at least as strong, if not stronger, than the inferences that can be drawn in defendant’s favor.¹¹

In *Iqbal*, the Court got very explicit and said a claim is plausible when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged” and to do that a court must “draw on its judicial experience and common sense.”¹² Now that is and should be a frightening thought. When courts are told to draw on experience and

[http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).

9 *Id.* at 564-65.

10 *Id.* at 557.

common sense that means that predictability will vanish because every judge has had different experiences and has a different definition of common sense. What we will see is that depending on a judge's views of various types of claims, one judge will dismiss a claim where another would have let it survive.

Indeed, there are some early post-*Twombly* statistics. One scholar found that the grant rate of motions to dismiss Title VII cases went from 42% under the *Conley* regime to 54% under *Twombly*.¹³ A different academic found that in the year before *Twombly*, 54.2% of disability cases were dismissed on motion, but in the year after *Twombly*, 64.6% were dismissed.¹⁴ The same holds true for civil rights cases: 41.7% were dismissed under *Conley*, 52.9% under *Twombly*.¹⁵ The point is that the motion to dismiss may be seen as the new summary judgment motion, and we will see a continuing trend toward judges determining outcomes rather than juries.

A corollary to the pleading topic is a recurring proposal for treating some cases differently than others. Over the last decade there have been proposals to track cases as simple, average, and complex and to develop different sets of rules

11 See *Tellabs Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007).

12 *Iqbal*, 129 S. Ct. at 1949-50.

13 See Patricia Hatmayar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically*, AM. U L. REV. (forthcoming), available at <http://ssrn.com/abstract=1487764>.

14 See Joseph A. Steiner, *Pleading Disability*, 51 B.C. L. REV. ___, 30 (forthcoming).

15 See Kendall W. Hannon, *Much Ado About Twombly? A Study of the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008).

for each category. Until now, these proposals have died on the vine, but they are again being proposed, partly in response to the stunning change in pleading requirements. Because the Supreme Court perceived the extraordinary burden of expensive discovery as a reason for raising the pleading bar – the suggestion has been made that fact pleading is particularly appropriate in complex cases but unnecessary in simple or average cases, where the cost of discovery will not be so burdensome and the same vigilance in gatekeeping by judges is not required.

However, the devil is in the details. Who will decide what cases belong in what category? And how will simple, average and complex be defined? The notion that plaintiffs should have access to information which is peculiarly in defendants' control may be jettisoned in complex cases, if fact pleading requires a plaintiff to plead enough to convince a court that the claim is likely to be meritorious. And an ever increasing number of cases are indeed complex – given the complexity of the deals from which many disputes now arise.

3. Vanishing Trials and Changing Jury Culture

Much has been written about the vanishing trial.¹⁶ I will not repeat that scholarship here except to note a well-documented slide in the number of cases disposed of by verdict, on both the civil and criminal sides of the aisle. The usual

¹⁶ See, e.g., Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments*, 78 N.Y.U. L. REV. 982 (2003); Hon. William G. Young, *Vanishing Trials*,

reasons given are the huge expenses incurred in trials and the unpredictability of the outcomes. The other reason is that more cases are being resolved by judges, either by motions, alternative dispute resolution, or by settlement – sometimes as the result of less than gentle urging of the trial court.

Is this a good thing? Well yes and no. Yes, to the extent that settlements result in certainty and judicial decisions (by a court or an arbitrator) may be less subject to outcomes based on the heart not the head. But, no to the extent that we are losing the judgment of the community, transparency, and public participation in the judicial process – all of which are important. Jury verdicts set benchmarks in a way that a legal decision from a single judge cannot. Verdicts tell us what the community will tolerate and what it will not, and the value it places on a wrong or a loss. Something is lost when the legal system fails to provide this public statement of acceptable conduct.

Second, a public airing of an issue is also important in a democratic society. This is why we have public trials, a free press, public access to judicial records, and a long debate about whether settlement should be sealed merely at the request of counsel and the parties. A trial is often the only way in which the public comes to learn about misbehavior or systemic problems. It is not hard to think of trials that changed our society forever. For example, *Griswold v. Connecticut*, in which

the Supreme Court protected the right of married couples to possess contraceptives, began as a widely-watched trial.¹⁷ Similarly, *New York Times v. Sullivan*, in which the Supreme Court held that the First Amendment prohibits public figures from recovering for libel absent “actual malice,” began as a jury trial.¹⁸ And no one can forget two of Clarence Darrow’s greatest trials: *Tennessee v. John Scopes* (which brought great attention to the debate about teaching evolution in public schools),¹⁹ and the trials of Henry Sweet, where an all-white Detroit jury acquitted a black man of attacking a white mob.²⁰

And, finally, jury service really is a wonderful experience. Most people who have served on a jury have found it to be a real eye-opener as to how our judicial system works and what it can achieve. Again, something is lost, when fewer citizens have the opportunity to serve on juries.

While I’m on the subject of juries, I would be remiss if I did not mention a growing twenty-first century problem – and that is the easy access to extra-judicial information through the Internet. In a spate of recent cases, jurors have used the Internet to “google” information about the case, the lawyers, and, yes, even the

17 See 381 U.S. 479 (1965).

18 See 376 U.S. 254 (1964).

19 See 154 Tenn. 105 (1927) (upholding statute barring the teaching of evolution but reversing conviction). In 1968, the Supreme Court held in *Epperson v. Arkansas*, 393 U.S. 97 (1968), that bans on the teaching of evolution contravene the Establishment Clause of the First Amendment because their primary purpose is religious.

20 See Doug Linder, *Melting Hearts of Stone: Clarence Darrow and the Sweet Trials*, at <http://www.law.umkc.edu/faculty/projects/ftrials/>

judge. In a number of these cases, the court was required to set aside the verdict and declare a mistrial because of the taint caused by the introduction of this information into the jury room. Just last month the ABA Journal reported that a Maryland appeals court overturned a murder conviction because jurors had consulted Wikipedia for explanations of scientific terms. Specifically, the Wikipedia information discussed how the settling of blood after death can help determine the time and place of death – both of which were issues in the trial. The problem, of course, is that the defendant could not confront the “witness” and there was no opportunity to “cross-examine” the declarant.²¹

This happened to me recently in a lengthy and complex civil jury trial. One of the jurors reported that another juror had been doing Internet research about the issues and during deliberations told the other jurors, in words or substance, “you don’t know the half of it (!)” But after an intensive voir dire of that juror and all of the other jurors individually, I dismissed that juror but determined that the other jurors had not been tainted. This will surely be Point One on appeal.

In the twentieth century, jurors were told not to read the newspapers or listen to the radio, and most cases don’t have any press coverage anyway. But jurors were unlikely to go to a library, consult a card catalog, and spend an afternoon doing research. Today, it takes less than a minute to type a search term into

trialheroes/Darrowmelting.html (last visited Jan. 13, 2010).

Google and virtually everyone knows how to do it. And information is now quickly available on almost any topic. How can we prevent this? Maybe we can't! If we can't, can the jury system survive or will we become a civil law country that abandons jury trials altogether?

4. ADR

Which brings me to ADR. This will be the shortest of my topics because this ground is so well trodden. Many litigants take their disputes to alternative venues because they affirmatively do not want to be in court. Their reasons are the expense of litigation (primarily discovery), the random selection of the presiding judge, the unpredictability of the process and therefore the outcome, and the long delays that are often experienced in the judicial system.

I have two thoughts in response. *First*, the costs of arbitration are increasing as more discovery and more motions are tolerated. Nor are the dispositions necessarily speedy. We often hear horror stories of a day of arbitration here, a long hiatus, another two days, another hiatus, and then finally the hearing is complete but the decision is not made until after a third delay. Also, the absence of appeal has always been a concern in terms of an arbitrary and unpredictable result. Indeed, a recent survey conducted by the ABA Section on Litigation found that 40% of defense lawyers, 46% of mixed practice lawyers, and 62% of plaintiffs'

lawyers believe that the outcomes in arbitration were *less fair* than in litigation.²²

My second thought is a reprise of what I noted earlier. The absence of a public hearing – a transparent process – is detrimental to society.²³ I am concerned that the courts will hear only criminal cases, family court cases, and pro se cases, while most commercial cases will be heard by private quasi-judicial actors behind closed doors. This is not a good thing.

5. Impact of Electronic Communications on Civil and Criminal Law

My final topic is the effect of electronic communications on civil and criminal law. Because time is short, I will mention only a few of the interesting issues in this area. Are any communications private any longer? Can an employer review an employee's email? How about an employee's or a job applicant's Facebook or MySpace page or Twitter comments? What about a search warrant

22 ABA SECTION OF LITIGATION, MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT 10 (2009), available at <http://www.abanet.org/litigation/survey/docs/report-aba-report.pdf>.

23 *Compare Hollingsworth v. Perry*, ___ U.S. ___, 2010 WL 105264, at *4-*9 (Jan. 13, 2010) (per curiam) (staying the broadcasting of a federal trial on the constitutionality of California's Proposition 8, which barred same-sex marriages in the state, on the conclusion that the courts below did not follow the appropriate procedures for changing their rules to allow such broadcasting) *with id.* at *14 (Breyer, J., dissenting with JJ. Stevens, Ginsburg, and Sotomayor) ("The majority's action today is unusual. It grants a stay in order to consider a mandamus petition, with a view to intervening in a matter of local court administration that it would not (and should not) consider. It cites no precedent for doing so. It identifies no real harm, let alone 'irreparable harm,' to justify its issuance of this stay. And the public interest weighs in favor of providing access to the courts.").

directed at the contents of a personal computer? The Ninth Circuit recently held, sitting *en banc*, that the plain view doctrine cannot apply when agents are searching a computer because the plain view exception would swallow the rule of particularity.²⁴ But how can law enforcement search a computer for one type of information without inevitably reviewing other communications maintained on that computer? While acknowledging the point, the Ninth Circuit nonetheless directed the Government to waive reliance on the plain view doctrine in the future when searching a computer. To hold otherwise, the court noted, would eliminate the concept of privacy in the digital age.

Along similar lines, a month ago the Ohio Supreme Court held that the warrantless search of data within a cell phone seized incident to a lawful arrest is prohibited by the Fourth Amendment when the search is unnecessary for the safety of law-enforcement officers and there are no exigent circumstances.²⁵ The court concluded that a cell phone is not just another closed container but rather is a repository of much private information.

In December, the Supreme Court granted certiorari in a different Ninth

²⁴ See *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989 (9th Cir. 2009) (en banc).

²⁵ See *State v. Smith*, ___ N.E.2d ___, No. 2009-Ohio-6426, 2009 WL 4826991 (Ohio Dec. 15, 2009).

Circuit case, *City of Ontario v. Quon*,²⁶ on the following issue, among others:

“Whether individuals who send text messages to a SWAT team member’s SWAT pager have a reasonable expectation that their messages will be free from review by the recipient’s government employer.”²⁷ According to the City of Ontario’s petition for certiorari: “While individuals do not lose Fourth Amendment rights merely because they work for the government, some expectations of privacy held by government employees may be unreasonable due to the ‘operational realities of the workplace.’”²⁸

Another problem is what privacy laws, and for that matter what privilege laws, will govern discovery in a civil case involving foreign parties (*i.e.* cross-border discovery). In the era of globalization and multinational companies, relevant documents will be created and maintained in foreign jurisdictions, many of which have privacy laws that forbid the production of documents without consent of the author, the recipient, or any person mentioned in the document. Some countries have recently put teeth in their privacy laws, by imposing stiff fines or jail terms for anyone who produces such documents in violation of their laws – even when such production is ordered by a U.S. court. Until now, our courts have held that U.S. laws will govern the production of documents in a U.S.

26 529 F.3d 892 (9th Cir. 2008), *cert. granted*, 2009 WL 1146443 (Dec. 14, 2009).

27 *City of Ontario v. Quon*, Petition for Certiorari, ___ U.S. ___, 2009 WL 1155423, at *I (Apr. 27, 2009).

litigation, even when those documents are created and stored abroad and our courts have not been particularly respectful of the limitations imposed by foreign laws.²⁹ This may be changing. And where are documents stored and created anyway in the era of cloud computing?

Privilege is another fascinating area. Our laws of privilege may not be the same as those in foreign jurisdictions. For example, the EU's legal professional privilege (their equivalent of our attorney client privilege) does not protect communications between in-house counsel and employees. Which law will govern assertions of privilege?

I close with the recent theme of cooperation as the latest concept in the management of discovery. For those steeped in the adversary system, as we all are, this word will sound strange but it is on everyone's lips. The Sedona Conference has recently issued its Cooperation Proclamation – endorsed by nearly one hundred judges – that states, in essence, that we can no longer afford the luxury of fighting over discovery and spending years hiding the ball. Lawyers are urged to cooperate in understanding each other's computer systems, and in agreeing on a list of search terms, the search techniques to be used, the form of

28 *Id.* (quoting *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987)).

29 *See Société Nationale Industrielle Aérospatiale v. United States Dist. Court for the S. Dist. of Ia.*, 482 U.S. 522, 544 (1987). *See also Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L.*, No. Civ. 04-3109, 2005 WL 6246195 (N.D. Ill. Sept. 12, 2005).

production, whether metadata will be required, and, if so, for what records, and stipulating to the authenticity of electronic records through hashing techniques – the twenty-first century equivalent of Bates stamping. Those who continue to practice with a twentieth century mind set and refuse to engage in cooperative discovery efforts may find themselves on the wrong end of a sanctions motion. We may also see a move toward more cost shifting.

These and many other issues are at the top of everyone's concerns about the future of litigation. I know I have raised more questions than I have answered. I ask that we all think about these issues and work to develop solutions that will preserve our unique system of justice even as we face the challenges wrought by the new and continually-evolving world in which we now live.