

Q&A with the Honorable Charles Margines By Adina Witzling



[Editor's Note: For this judicial interview, we met with the Honorable Charles Margines of the Orange County Superior Court. Judge Margines was originally appointed by Governor Wilson in 1993 and is a new member of the ABTL Board of Governors.]

Q: What drew you to the law?

A: Very simply, my parents told me: You are going to be either a lawyer or a doctor! Since the thought of cutting into people made me queasy, the choice was clear. In all seriousness, since a young age I viewed the law as a noble profession, exemplified by both real people such as Abe Lincoln and literary characters

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Creating the Ideal Law School for the 21st Century By Dean Erwin Chemerinsky

In August 2009, the University of California, Irvine, School of Law will welcome its inaugural class. As the first new public law school in California in over four decades, the school already has received a great deal of media attention. As part of a world class university, expectations are understandably high over what the new law school will be.



When the founding faculty had its first meeting in August 2009, my initial words were to remind them that we had the chance to create the ideal law school for the 21st century and in everything we do we should be guided by that goal. We have the enormous benefit of a blank slate. We have a commitment of resources, by the university and the Orange County legal and business community, that make success possible.

What are our goals? First, to create a top 20 law school. By every measure, from our very first rankings, we want to be among the best law schools in the country. So far we have already succeeded. University of Chicago law professor Brian Leiter does an annual ranking of law schools based on the scholarly impact of their faculty. In his rankings in February 2009, the University of California, Irvine, School of Law was tied for number 10 with the University of Pennsylvania Law School. The goal is that every ranking see us as among the best law schools in the nation.

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The President's Message

By Richard J. Grabowski



We live in remarkable times. The economic and social challenges facing our nation also present new challenges and opportunities for our profession. The newspapers continue to be filled with dire economic headlines and news of financial difficulties at companies, clients and law firms. Our profession will adapt and adjust as we shift our talents to addressing the needs of our clients in the current environment. As lawyers, this is simply what we do. We help clients in crisis. The ABTL will be part of that process. Our organization will continue to bring business litigators timely and relevant programs on topics that matter. The ABTL will also continue to facilitate a bench-bar dialogue, which is of even greater importance now as our court system is feeling the strain of state budget allocations. Now is a more important time than ever to be take full advantage of your ABTL membership.

I am delighted to report that, through the continued support of our members, and the participation of our state and federal bench, our organization entered 2009 on solid footing and is poised for continued growth this year. Our out-going President, Martha K. Gooding, deserves much appreciation for her leadership in 2008. Under her leadership, our ABTL Chapter's membership continued to grow, we made a record contribution to the Public Law Center following our June fundraiser, and we still managed to end 2008 on solid financial footing. Thanks to Martha's leadership and vision, my transition into the role as President has been an exceedingly simple one. Thank you Martha! I also would like to extend a special note of gratitude to our Executive Director, Linda A. Sampson. Without Linda's hard work and unwavering dedication to the organization, our ABTL Chapter would not be where it is today. Thank you, Linda!

I, along with our new officers, Vice President, Sean P. O'Connor, Treasurer, Darren Aitken, and Secretary, Melissa McCormick, are committed to the continued success of our ABTL Chapter. One of our primary objectives this year will be to energize our base of young lawyers — the future leaders of our ABTL Chapter. To that end, I am pleased to an-

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Significant Labor and Employment Initiatives of the Obama Administration and 111th Congress

By Harry I. Johnson III, Mark D. Kemple and Robert A. Naeve

With the decisive victory of President Barack Obama and large Democratic gains in both houses of Congress, American businesses are bracing for significant changes in labor and employment legislation and regulation. Based upon the President's track record in the Senate, his comments during the campaign, and long-pending bills in the House and Senate, it is highly likely that the new administration will seek to implement legislative and regulatory changes related to wages, civil rights, executive compensation and benefits, taxes, union elections and collective bargaining, and immigration, focusing heavily on measures designed to support and strengthen the middle class. Many of these initiatives will, if enacted as proposed in the prior Congress, affect the workplace, both in terms of new regulatory measures and potential liability. And, despite the difficult economic environment, swift passage of the Lilly Ledbetter Fair Pay Act indicates that the economic climate may not deter quick action by the new administration and the 111th Congress on these issues. Accordingly, to successfully navigate the new legal landscape, employers should remain apprised of both recently enacted legislation and also proposed legislation and regulatory measures. (President Obama has also been active in the field of executive orders, signing three on January 30, 2009 that significantly impact government contractors. The most wide-reaching of the three, entitled "Economy In Government Contracting," forbids reimbursement of the union-organizing-related expenses of federal contractors. Because all of these executive orders will become effective only through implementing regulations that have not yet been proposed, we note the orders here but do not discuss them below.)

111th CONGRESS

A. Lilly Ledbetter Fair Pay Act (S. 181; H.R. 11)

On January 29, 2009, President Obama signed into law the Lilly Ledbetter Fair Pay Act. The Ledbetter Act amends Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 ("ADEA"), and modifies the operation of the Americans with Disabilities Act of 1990 ("ADA") and the Rehabilitation Act of 1973, to clarify that a discriminatory compensation decision or practice that is unlawful under such acts occurs each time compensation is paid pursuant to the discriminatory compensation decision

Employers and the Genetic Information Nondiscrimination Act

By Adrienne Marshack

"Laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change in circumstances, institutions must advance also, and keep pace with the times."
- Thomas Jefferson, July 12, 1810.

Your good friend Charlie has worked in the aerospace industry for the last twenty years and was laid off last year due to the economy. After looking for work for the past nine months, he finally found what he thought was the perfect position—the one he had been searching for his entire career. The new company loved him too, and Charlie all but moved into his new office when the company required him to undergo some medical testing prior to employment. The tests revealed that Charlie has a genetic susceptibility to a fatal lung disease caused by inhalation of beryllium, a naturally occurring metal to which he could potentially be exposed in the course of his employment. The company told Charlie that despite his stellar qualifications, they could not hire him because of this susceptibility, even though he may never actually be exposed to beryllium or develop the disease. Charlie was crushed, and came to you asking whether the company could require the genetic tests they subjected him to, or refuse to hire him based upon this hypothetical risk. Under the Genetic Information Nondiscrimination Act ("GINA"), which takes effect against employers in November of this year, your answer is a resounding "no."



Over the past decade, significant advancements in the quest to decode the human genome have revolutionized almost all areas of biomedical research. Genetic testing has improved early detection, diagnosis, and prevention of certain diseases. As with most things, the benefits resulting from our newly developed ability to identify medical predispositions and health conditions based on genes are not without potential risks. After becoming concerned that genetic information could be used against an individual to discriminate in both the health insurance and employment contexts, Congress

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“Plausibility” Pleading Gives Defendants Increased Leverage At The Pleading Stage
By Corbett H. Williams



When it handed down its decision in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), the Supreme Court announced a sharp break with the venerable notice pleading standard applied by the federal courts for over fifty years. The importance of the Court’s holding in *Twombly* cannot be overstated: it redefines the standard by which the

sufficiency of every civil complaint filed in the federal courts is judged. Specifically, *Twombly* abrogated the oft-cited language of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), 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.” In place of the *Conley* “no set of facts” standard, the Court adopted a standard of “plausibility” for assessing the sufficiency of a complaint. In so doing, it erected a barrier to access that did not exist before and signaled a departure from the liberal, open-access model associated with notice pleading under *Conley*. This new standard requires the pleading of enough facts over and above mere notice of the claim to render it “plausible.” For this reason, *Twombly* provides defendants, particularly in complex cases where most of the important facts and evidence are unknown to the plaintiff, with a powerful tool to eliminate claims with insufficient factual support to be “plausible.”

A Summary of the *Twombly* Decision

Bell Atlantic v. Twombly was decided in the context of a putative class action brought on behalf of telephone and Internet services subscribers alleging violation of section 1 of the Sherman Act, which prohibits “every contract . . . or conspiracy, in restraint of trade or commerce.” 15 U.S.C. § 1. The defendants were several “Baby Bell” regional telecommunications providers, also known as Incumbent Local Exchange Carriers or “ILECs.” A decade prior, in an effort to foster competition for local telephone service, Congress had passed the Telecommunications Act of 1996. As part of that legislation, the ILECs, whose business had been confined to local telephone service, were permitted to

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such as Atticus Finch. I was drawn to the law because I truly wanted to help people who found themselves in difficult legal straits.

Q: Please tell us a little about the type of practice you had before taking the bench.

A: After graduating from law school and passing the bar, I obtained employment with the Orange County Public Defender’s office. In my six years there, I progressed through the ranks, including a stint on the felony panel. I then went into private practice, concentrating on criminal defense, until being appointed to the bench in 1993.

Q: Why did you decide to become a judge?

A: When you leave the Public Defender’s office, you don’t take a book of business with you. After going out on my own, I visited judges I knew and told them that I would be available to accept conflict appointments on criminal cases. One of them, Judge Byron McMillan, was then the Presiding Judge of the Juvenile Court. He encouraged me to join a panel of lawyers who sit as temporary judges (*pro tems*, as they were known then) on juvenile matters, and I did. Over time, I noticed that I began to enjoy the one or two days a month that I was spending on the bench far more than practicing law. It made sense to seek to do so on a full-time basis.

Q: What do you like most and least about being a judge?

A: One of the hallmarks of a civilized society is a mechanism for resolving disputes in a peaceful manner, and I greatly enjoy contributing to this process. I take pleasure in helping litigants settle their differences with fairness and in a calm atmosphere, and I delight in the intellectual challenges of the job. There are two things about being a judge I dislike most, and they are a small price to pay for the privilege of the position: When an inexperienced lawyer is unable to pin down a witness, I can’t jump into the fray and take over cross-examination, tempted as I might be to do so. The other thing I dislike is that I cannot comment publicly about many issues of interest to our community, although of course I have my opinions.

Q: What, if any, trends do you see in business litigation matters?

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A: Not surprisingly, my colleagues on the Civil Panel and I have seen a significant increase in lawsuits over residential real estate loans and foreclosures. In many instances, the litigation is triggered by UD actions, following foreclosure sales, in our limited jurisdiction court. On the eve of those trials, the defendants file complaints in the unlimited jurisdiction court alleging irregularities in everything from the inception of the loans to the conduct of the foreclosure sales. Concomitantly, plaintiffs seek either a TRO and preliminary injunction or a consolidation of the two cases, so as to be able to remain in the homes pending resolution of the unlimited jurisdiction cases.

Q: *When you are in trial, do you employ any strategies to keep the trial flowing?*

A: Certainly. All of us on the civil panel are very busy. Filings are up, and our ranks have been reduced over the last few years. We all risk drowning in work if trials get away from us. I encourage (and, if necessary, order) counsel to meet and confer during the trial to resolve issues without judicial intervention. I order counsel to be in the courtroom every morning 15 minutes before jurors arrive, so that issues can be addressed on our time and not the jurors' time. I direct counsel to go over exhibits before making a motion to admit them into evidence because, as experience has shown, many exhibits are not objected to, and we save time by not addressing them individually and on the record. And the same goes for jury instructions. I also instruct counsel to have witnesses outside the courtroom, available to be called, so that there is no interruption in the flow of the trial. I remind counsel that I would rather inconvenience witnesses than jurors.

Q: *Do you follow any procedures to try to encourage settlement?*

A: Yes. I inform counsel that the Orange County Superior Court offers a number of alternative dispute resolution methods, including the recently-implemented voluntary mediation program. I set my cases for MSCs, although I rely on our excellent panel of volunteer attorneys to conduct them (On rare occasions, I conduct MSCs myself. I don't do so on a regular basis because it would take valuable time

away from my trials). I also tell counsel that we have sitting judges who are willing and able to schedule a mediation with them and their clients. These judges, such as Judge Sundvold and Judge Monarch, enjoy a well-deserved reputation for settling even the difficult cases. I remind counsel that they can engage the services of these judges for free or pay them a lot of money later on, when they become private judges.

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

A: I am glad you asked, as I am in the process of preparing an article on the topic. Here are some pieces of advice I would give to all lawyers and not just those appearing before me for the first time – No one should be surprised to read that the first piece of advice is: Be prepared. You make a bad impression not only on the court but also on your client if you are fumbling with papers, can't answer the obvious questions, etc. More advice: Know your audience. In a jury trial, you have to sell your case to your mother, your neighbor, your child's teacher, etc. They are your jurors. Don't bother running your case by your colleague; run it by your cousin who works as an administrative assistant at an advertising firm. If you can't convince your cousin that you have a good case, settle! Here are a few more pointers: If your case depends on documentary evidence to any significant extent (and, of course, business cases often do), use visual aids such as an Elmo. When an attorney questions a witness by quoting from a document without displaying it for the jury, and the witness responds by reading from another part of the document, jurors often have difficulty following the testimony. Know the Evidence Code and trial objections. Failing to object, where an objection would be sustained, can be devastating to your case. And remember that a trial may be only half the battle, the other half being the appeal. Thus, as you conduct the trial, be sure to make a proper record for appeal. That means, for example, making objections, since a failure to object is almost always deemed a waiver of the point.

Q: *Do you have any pet peeves?*

A: Yes. One is lawyers who argue law and motion matters by repeating what is in their papers. I post fairly lengthy tentative rulings that discuss the pertinent facts and law and which set out my reasoning. If attorney

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neys want to convince me to change the ruling, they need to point out why my reasoning is faulty, what facts I overlooked, etc. Merely repeating their written positions is a waste of time. Another is lawyers who don't get along, who fight over every inconsequential issue. They should realize that they are actually doing a disservice to their clients, both in running up their legal bills and in ticking off jurors and possibly subconsciously the judge. Even worse is lawyers who engage in *ad hominem* attacks on opposing counsel. That is simply a "turn off" not only to judges but also to jurors. I strongly suspect that some jurors are unable to follow an instruction telling them to disregard such inflammatory comments and render their decisions based only on the evidence and the law.

Q: What do you enjoy doing when you're not working?

A: I enjoy spending time with my wife and kids. I have three boys, each of whom has a wonderful sense of humor (Those who know me are convinced that they got it from my wife or that the humor gene skips a generation). I also like to jog and, when my back acts up, to take long walks.

Thank you Judge Margines for your time.

♦ *Adina L. Witzling is a litigation associate at Manatt, Phelps & Phillips, LLP in Costa Mesa, California.*

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Second, we seek to be as good as any law school in the country, if not the best, at preparing students for the practice of law at the highest levels of the profession. Law schools, and especially elite law schools, generally do a poor job of preparing students for the actual practice of law. The mantra long has been that they are content to teach their students "to think like lawyers." But law school can and must do much better to graduate students capable of preparing students for being lawyers.

Third, we seek to develop areas of specialty within the law school that help meet the needs of our students, of Orange County, and of the country. As a relatively small school, UCI Law School cannot be

great at everything. We need to choose carefully our areas of strength. These should include fields such as intellectual property, environmental law, immigration law, international law, and public interest law given where we are located and the time at which we are coming into existence.

I want to elaborate each of these goals and how we are going about achieving them.

1. Creating a top 20 law school.

It certainly seems audacious to declare that we seek to be a top school from the very beginning. The youngest law school in the top 20 is UCLA and it was created in 1948. The traditional pattern for new law schools is to debut in the fourth tier of U.S. News rankings of law schools – there are only four tiers – and then if they are successful, a decade later to celebrate a move to tier three. Of the last 21 law schools to be created, 19 have begun in tier four and two in tier three. None have been anywhere close to tier one, let alone the top 20.

But nor have any aspired to do so or begun with this as a key objective. When I interviewed with the dean search committee in April 2007, they told me that this was their objective and asked how I would achieve it. I said that the first step would be to hire six to eight faculty from top 20 schools and have them arrive a year before the students to plan the school and its curriculum.

Many told me that it would be impossible to attract top faculty, excellent teachers and scholars at the prime of their career, to a new law school. I disagreed and thought that the lure of getting to be part of creating the ideal law school would bring outstanding faculty to UCI. That is exactly what happened. The founding faculty at UCI all taught previously at top 20 schools and as mentioned earlier, in scholarly impact are among the top ten in the country. The founding faculty is comprised of Dan Burk who came from the University of Minnesota; Catherine Fisk and Trina Jones both from Duke; Carrie Hempel from the University of Southern California Law School; Carrie Menkel-Meadow who spent the last 10 years at Georgetown and almost 20 before that at UCLA Law School; Rachel Moran who taught at the University of California, Boalt Hall School of Law for 25 years and is the pres-

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tigious president of the Association of American Law Schools; Ann Southworth who taught at Harvard and UCLA and Case Western; Grace Tonner from the University of Michigan; and Henry Weinstein who for 30 years was a legal affairs reporter at the Los Angeles Times and taught as an adjunct professor at the University of Southern California.

Additionally, the law school benefits enormously from the strong faculty throughout the university in law-related disciplines. We have begun with joint appointments for four outstanding UCI faculty: Linda Cohen (law and economics); Joseph DiMento (social ecology and environmental law); Elizabeth Loftus (law and psychology); and Kerry Vandell (real estate and land use in the School of Business).

The plan is to hire six more faculty to begin on July 1, 2009, and six a year until there are 50 faculty. Already two offers have been accepted for the coming year: Christopher Leslie, who has taught at schools such as Texas and Stanford and was tenured at Chicago-Kent, and Tony Reese, who was a chaired professor at the University of Texas Law School and declined tenured offers from Stanford and New York University to accept UCI's offer.

Although they are less likely to influence the rankings directly, equally important is the spectacular group of administrators who have come to the new law school. Rebecca Avila, the Assistant Dean for Administration and Finance, came after eight years as the Senior Associate Dean for Administration and Finance at the Annenberg School of Communication at the University of Southern California. Rex Bossert, the Assistant Dean for Communications, came from being the Editor-in-Chief of the National Law Journal. Charles Cannon, the Assistant Dean for External Affairs and Development, came after 19 years at UCLA Law School. Victoria Ortiz, the Assistant Dean for Student Services and Director of Admissions, came after 10 years as Assistant Dean for Students at the University of California, Berkeley School of Law. Beatrice Tice, the Associate Dean for the Library and Information Technology, and also a member of the faculty, received her J.D. from Stanford Law School and her library degree from the University of Washington. After serving as the Associate Director of the University of Michigan Law School's library, she was the director of the library at

the University of Toronto School of Law.

Creating a top law school also, of course, requires attracting top students. This has typically proven difficult for new law schools, which then limits the employers interested in hiring their graduates and the quality of students who want to attend in the future. The goal, therefore, is to change this by attracting outstanding students from the beginning.

One way to achieve this objective is to start small. We will begin with a maximum of 60 students and grow the size of the school as the quality of the students allows. The students will enjoy an unprecedented student-faculty ratio; there will be over 20 faculty for the entering class of 60 students. This will allow a great degree of individualized attention and collaboration with faculty.

Also, a key way of attracting great students has been to raise money to provide a scholarship for every student in the entering class for the three years of law school. Obviously, this cannot be replicated in the future, but the hope is that there will be substantial financial aid for subsequent entering classes.

The effort has been enormously successful. Over 2,000 applications were received for the 60 slots, which is the best ratio of applications to slots of any law school in the country. Also, the quality of the applications, by every measure, are outstanding.

2. Preparing students for the practice of law.

Simply being a top law school is not enough; there is not a need for another law school, even like the great ones where I taught for the last 25 years, the University of Southern California and Duke Law Schools. The key question is what can we do differently and better?

My central vision is that we can and should do a better job of preparing students for the practice of law at the highest levels of the profession. I certainly did not graduate from Harvard Law School ready to practice law. Obviously, the preeminent purpose of law schools must be to prepare students for their careers and the roles they will serve in, whether in private practice or government or public interest, whether as litigators or transactional lawyers or legislators or judges or in business or as academics.

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How can we do this? One key aspect will be to require a clinical experience of all students in order to graduate. A shockingly small percentage of law students are part of legal clinics. It is frightening to imagine medical schools graduating doctors who had never seen patients while in medical school or if medical schools said that their goal was just to teach their students "to think like doctors."

Our goal will be to create clinics that give students sophisticated legal experience under close faculty supervision. Ideally, clinics will be interdisciplinary. For example, I envision that we will create an intellectual property clinic where a law student is paired with an engineering student and a business student and together they work on one of the university's undeveloped patents. The law student can do the legal work, the business student the business plan, and the engineering student the technical work. This will give students the experience of working in teams and communicating with professionals from other disciplines.

Another aspect of preparing students for the practice of law will be an innovative first year course in lawyering skills. This will replace the traditional course in "legal writing," though students will receive intensive writing experience in the course. The focus of the class will be on skills that all lawyers use, such as negotiations, interviewing, and fact investigation. All first year students will do actual in-take interviews at the Legal Aid Society of Orange County and the Public Law Center, making us one of the only (if not the only) law school in the country that provides clinical experience to first year law students.

There also will be an innovative first year course on the legal profession, which will teach ethics and professionalism from the first days of law school. The course also will provide instruction in the economics of the practice of law and the psychology of being a lawyer. Part of the course will be to pair every student with an experienced lawyer mentor. The student will be required to spend a certain number of hours fol-

lowing the lawyer around and seeing what a lawyer actually does on a daily basis.

The first year curriculum thus will be both innovative and traditional. Courses will teach traditional doctrinal subjects like contracts, torts, civil procedure, criminal law, and constitutional law. But the focus also will be on teaching methods of analysis: common law analysis, statutory analysis, constitutional analysis, procedural analysis, and international legal analysis.

The upper-level curriculum similarly will be practical and interdisciplinary. There will be a heavy emphasis on writing. My hope is that each student will be required to do a major writing project with extensive feedback during each semester of law school.

3. Developing areas of strength.

Ultimately, the law school will have 200 students per class, or 600 overall, and 50 faculty. A school of this size cannot be great at everything, so great care must be taken in choosing areas of strength. These should be a product of many factors including the needs of the area and the times, the strength of the university, and the interests of faculty and students.

From the outset, it was clear that certain areas should be emphasized. Intellectual property is enormously important in Orange County and nationally. With Dan Burk and Tony Reese we already are exceptionally strong in this field. Environmental law should be a key priority in light of the serious environmental problems facing the world and the strength of UCI in environmental science and policy. Immigration law is particularly important in Orange County in light of its large Latino and Asian immigrant populations. I expect that our first clinic will be an immigration law clinic to help meet these needs. International and comparative law are essential areas of specialty given the times and our location.

It is important that we emphasize the importance of public service to our students from their first days of law school and throughout their three years of legal education. A commitment to public service is neither liberal nor conservative. I deeply believe that all lawyers, whatever their politics and ideology, have the duty to use some of their time and talent to help meet unmet legal

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needs and improve society.

I do not deny the ambitiousness of these goals; I embrace it. Nor do I deny the difficulty of the tasks, especially in the current economic climate. But we have a unique opportunity. No university of the caliber of the University of California, Irvine is likely to begin a law school in my lifetime. This really is the chance to create the ideal law school and we must not squander it.

♦ *Erwin Chemerinsky is the Dean and Distinguished Professor of Law, University of California, Irvine, School of Law.*

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nounce the formation of our Chapter's Leadership Development Committee. The Committee will be dedicated to serving ABTL member attorneys with ten or fewer years of experience, and will be hosting events tailored to our young lawyers. The Committee is hosting a "Kick-Off Event" on March 19, 2009. Attendees will gather for "March Madness," as well as an opportunity to network with fellow ABTL members. Michael Penn has graciously agreed to chair this committee. Future events will feature substantive programs relevant to the practice of less experienced attorneys, and will provide opportunities for interaction with members of our judiciary. All members with ten or fewer years of experience are strongly encouraged to participate.

As we move ahead with our Leadership Development Committee, Dean Erwin Chemerinsky will begin the task of educating the next generation of future lawyers. In this Edition of the Report, Dean Chemerinsky explains his vision for UCI's new law school, and how the school intends to educate the future members of our ABTL Chapter. Education will be a key for our nation's continued leadership in the world and a catalyst for emerging from these hard economic times. I believe the law school at UCI will serve an important role in training law students for practice in the 21st Century. Under Dean Chemerinsky's leadership, the law school is in great hands, and will play a significant role in educating our next generation of young lawyers.

With a new administration in Washington, D.C. comes new legal challenges and opportunities. This edition of the Report highlights some of the significant labor and employment initiatives of the Obama Administration and the 111th Congress. We hope you enjoy this timely and exciting piece. Under the leadership of our newest Editor of the Report, John A. Vogt, we look forward to continue to provide our members with timely and important articles affecting your clients and practices.

In closing, I would like to extend my thanks to all of our members. Without you, this fine organization would not exist. As Martha has remarked and I echo: This is your organization; it is you whose interests and needs we serve. I thank you for giving me the opportunity to be the President of the ABTL / Orange County, and I look forward to serving each and every one of you.

♦ *Richard J. Grabowski is the Partner-In-Charge of Jones Day's Irvine office, and is a member of the Firm's Trial Practice Group.*

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or other practice. The Act overturns the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, which held that an unlawful employment act occurs only when the discriminatory compensation decision is made and not each time a paycheck is issued. The Act further provides that, under Title VII, if an employer is found to have engaged in pay discrimination, an affected employee would be entitled to back pay dating to two years prior to the filing of the charge, in addition to other damages provided by the statute. The legislation applies to all claims of discrimination in compensation, including disparate impact cases.

The Ledbetter Act vastly broadens the scope of potential damages for pay-related discrimination claims, weakens standing requirements, and increases significantly both the settlement value of such lawsuits and the frequency with which they are filed. It may also cause pension funds to face unanticipated and potentially staggering liability.

B. Paycheck Fairness Act (S. 182; H.R. 11)

The Paycheck Fairness Act amends the Equal Pay Act within the Fair Labor Standards Act of 1938 ("FLSA") to revise remedies for and enforcement of prohibitions against sex discrimination in the payment of

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wages. Among other changes, the bill would permit unlimited punitive and compensatory damages; require employers to demonstrate that any pay inequities are not sex-based, are related to job performance, and are justified by business necessity; and facilitate the filing of class action lawsuits. In addition, the proposed legislation allows the Secretary of labor to make grants to eligible entities to carry out negotiation skills training programs for girls and women. Lastly, the proposed legislation prohibits employers from preventing their employees from disclosing salary information.

If enacted, this bill would significantly escalate potential liability for compensation discrimination due to its elimination of damages caps and its significant narrowing of legitimate employer defenses. The ambiguity of the standards set forth in the bill would likely create significant confusion and result in a further increase in litigation.

110th CONGRESS

A. Arbitration Fairness Act of 2007 (S. 1782; H.R. 3010)

The Arbitration Fairness Act of 2007 rendered predispute arbitration clauses invalid if they required arbitration of (1) an employment dispute or (2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power. The bill would have reversed the Supreme Court decision in *Circuit City v. Adams*, which held that employer policies could lawfully mandate that employees enter into binding predispute arbitration agreements as a condition of employment. The legislation also would have applied to consumer and franchise disputes but did not apply to arbitration provisions in collective bargaining agreements.

If enacted as previously proposed, this legislation will have a significant effect upon employers' employment dispute resolution procedures. Arbitration language in employment applications and employment agreements, covering at least 20 percent of all nonunion employees, will have to be deleted. Employers will be permitted to decide whether to seek arbitration only after a dispute arises, and those with mandatory arbitration programs would want to consider mediation as an alternative to resolving disputes through mandatory arbitration.

B. Bill to Repeal a Limitation in the Labor-Management Relations Act regarding Requirements for Labor Organization Membership as a Condition of Employment (H.R. 6477)

This legislation would have amended Section 14 (b) of the Labor-Management Relations Act that grants states the authority to enact "right to work" laws, which allow employees to continue working at a unionized employer while refusing to pay union dues. If enacted, this legislation would permit agreements between unions and employers making membership or payment of union dues a condition of employment, either before or after hiring.

C. Civil Rights Act of 2008 (S. 2554; H.R. 5129)

This omnibus bill was designed to "restore, reaffirm, and reconcile legal rights and remedies under civil rights statutes." Among other changes, the bill would have eliminated damages caps in Title VII and ADA cases, broadened other employee remedies, including remedies for undocumented workers, limited employer defenses, particularly in Equal Pay Act cases, restricted the use of mandatory predispute arbitration clauses in employment contracts, and overturned the Supreme Court case of *Alexander v. Sandoval* to give individuals a private right of action to sue federally funded programs for actions that have an alleged discriminatory impact under Title VI and Title IX of the Civil Rights Act, as amended, Section 504 of the Rehabilitation Act, and the ADEA. Further, the bill would have required that disparate impact claims under the ADEA be treated the same as those brought under Title VII. It also would have broadened the anti-retaliation provisions of the FLSA and added compensatory and punitive damages as remedies for unintentional and intentional equal pay violations. In addition, the bill would have expanded the definition of "prevailing party" eligible for attorneys' fees under federal civil rights fee-shifting statutes and permitted the recovery of expert fees by such prevailing parties.

As will be discussed elsewhere in this article, the elimination of damages caps and the overall broadening of employee remedies would likely vastly escalate the rate of litigation as well as settlement values, as would the restriction of arbitration as a means of resolving employment disputes.

D. Employee Free Choice Act of 2007 (H.R. 800)

The Employee Free Choice Act (“EFCA”), as initially designed, would make four significant amendments to Section 9(c) of the National Labor Relations Act (“NLRA”). First, EFCA would dramatically alter the current law requiring a secret ballot election before union certification unless the parties agree otherwise, by requiring union certification as soon as a majority of employees in an appropriate collective bargaining unit have “signed valid authorizations.” This would make it much more difficult for employers to oppose union organizing drives as they would no longer have the opportunity to express their views regarding unionism to their employees after authorization cards have been signed but before a secret ballot election takes place. Accordingly, employers who wish to remain union-free will have to spend significant time and resources proactively opposing organization at the earliest stages of union organizing campaigns.

Second, EFCA would provide for mediation and mandatory interest arbitration for first contract disputes. While the current system requires parties to negotiate in good faith without requiring either party to make a concession or reach an agreement, under EFCA, mandatory interest arbitration will give unions an incentive to make unreasonable demands for the purpose of having an arbitrator set favorable terms. This would significantly decrease employers’ bargaining leverage during first contract negotiations.

Third, EFCA would impose significantly harsher penalties on employers who commit violations during union organizing drives and first contract negotiations. For example, EFCA would increase the amount of back pay that could be recovered if an employer discharged or discriminated against an employee during the course of an organizing campaign or initial contract negotiations. Moreover, EFCA would provide for civil fines of up to \$20,000 each time an employer willfully or repeatedly violated employees’ rights during an organizing campaign or first contract drive.

Fourth, EFCA would require the National Labor Relations Board to request an injunction against an employer if there were reasonable cause to believe that it had discharged, threatened, or otherwise discriminated against employees while they were “seeking representation by a labor organization or during the period after a labor organization was recognized . . . until the first collective bargaining agreement” is reached.

E. Employment Non-Discrimination Act of 2007 (H.R. 3685; H.R. 2015)

The Employment Non-Discrimination Act of 2007 would have prohibited employers from discriminating against employees or applicants on the basis of the individual’s actual or perceived sexual orientation (defined as “homosexuality, heterosexuality, and bisexuality”) and gender identity. If enacted as proposed, this legislation will require employers who do not already prohibit discrimination against employees on the basis of sexual orientation to revise their EEO policies accordingly.

F. Equal Remedies Act of 2007 (S. 1928; H.R. 5129)

The Equal Remedies Act of 2007 would have amended 42 U.S.C. § 1981(a) with potentially sweeping changes. As proposed, the legislation removed the caps in Title VII and the ADA, established by the 1991 Civil Rights Act, that limit compensatory and punitive damages based on an employer’s size. (Currently, compensatory and punitive damages for intentional violations are capped based on the size of the employer at \$50,000 to \$300,000).

If caps upon compensatory and punitive damages are removed, potential liability will invariably increase, which will in turn likely encourage more employees to sue and plaintiff’s counsel to accept borderline cases. Settlement values will likely also rise as employers face the possibility of adverse judgments without caps. In an effort to avoid claims of “willful” discrimination giving rise to punitive damages, employers would be well-advised to update company policies and ensure appropriate training of officers, managers, and supervisors.

G. Equality for Workers Under ERISA of 2007 (H.R. 2622)

This bill would have modified the standard of review for certain actions brought under ERISA. The proposed legislation required any civil action brought by a beneficiary or participant of an employee benefit plan to recover benefits be tried as a de novo proceeding without deference to any prior claim determination. Under current Supreme Court precedent, *Firestone Tire & Rubber Co. v. Bruch*, if an employee benefit plan allows an administrator or fiduciary discretion in determining benefits eligibility or to construe the terms of the plan, the beneficiary’s or participant’s lawsuit is tried under an abuse of discretion standard. If this bill

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is enacted as proposed, the determinations of plan administrators will face increased challenge and, likely, reversals under the stricter nondeferential standard of review. ERISA litigation will thus become more expensive as employers/benefit plan administrators are forced to defend their determinations before fact-finders in de novo proceedings, with accordingly higher settlement values.

H. Family Medical Leave Act Amendments and Regulations

On January 28, 2008, President Bush signed into law the National Defense Authorization Act for FY 2008 ("NDAA"). Section 585(a) of the NDAA amended the Family Medical Leave Act ("FMLA") to provide eligible employees working for covered employers two important new leave rights related to military service.

First, the NDAA creates a new qualifying reason for leave. Eligible employees are entitled to up to 12 weeks of leave because of "any qualifying exigency" arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty, or has been notified of an impending call to active duty status, in support of a contingency operation. By the terms of the statute, this provision requires the Secretary of Labor to issue regulations defining "any qualifying exigency." In the interim, employers are encouraged to provide this type of leave to qualifying employees.

Second, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member who is recovering from a serious illness or injury sustained in the line of duty is entitled to up to 26 weeks of leave in a single 12-month period to care for the service member. This provision became effective immediately upon enactment.

Various bills dealing with the FMLA were also proposed in the prior Congress. One bill would have clarified that employees may independently settle FMLA claims without the approval of the Department of Labor ("DOL") or a court, overturning the Fourth Circuit decision in *Taylor v. Progress Energy, Inc.*, which held that DOL regulations preclude both the prospective and retrospective waiver of claims under the FMLA and bar all waivers of any rights under the FMLA without prior DOL or court approval. Another bill proposed to lower the coverage threshold for employers from 50 or more to 25 or more employees. This bill would also have provided

up to 24 hours of unpaid leave during any 12-month period for parents and grandparents to attend parent-teacher conferences or to take a child, grandchild, or other family member to doctor or dental appointments. Other proposed legislation would have eliminated certain laws related to FMLA eligibility and notice.

DOL has also proposed revisions to the FMLA regulations that would, among other changes, amend the medical certification process. The current regulations require the employer to communicate with a health care provider through its own health care provider regarding authentication and clarification of the medical certification. The proposed regulations allow direct contact between the employer and the employee's health care provider. Further, proposed regulations also require that an employer's request for clarification of vague medical certification must be provided within seven calendar days or the employee is not protected under the FMLA, and may require employers to notify employees if medical certification forms have not been returned by the health care provider.

Additionally, proposed regulations amend the 12-month employment requirement for FMLA eligibility. The requirement may be satisfied based on the preceding five years, regardless of breaks in service, allowing for the aggregation of past service with present service to meet the requirement. Proposed regulations also extend the deadline for employers to send eligibility and designation notices to employees to five business days.

If enacted as previously proposed, many of the bills will assist employers in navigating what currently is a poorly written, and consequently confusing, set of legal requirements. Amendments to the certification process, particularly the allowance of direct communication between the employer and the health care provider, should facilitate the making of more accurate eligibility determinations. Revised "designation notice" and "medical certification" forms may also provide employers with improved guidance in carrying out related FMLA obligations.

I. Forewarn Act of 2007 (S. 1792; H.R. 3662)

The Forewarn Act of 2007 would have amended the Worker Adjustment and Retraining Notification ("WARN") Act to redefine the terms "employer," "plant closing," and "mass layoff" for purposes of the Act. Among other changes, the Forewarn Act would have reduced the coverage threshold, applying its re-

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quirements to employers of 50 or more employees as opposed to the current threshold of 100 or more employees. The threshold numbers to qualify for plant closing and mass layoffs would also have been lowered from 50 employees to 25 employees for a plant closing, and from 500 employees to 100 employees for a mass lay off. Another change would have increased the aggregation period for plant closings or mass layoffs from a 90-day period to 180 days.

The Forewarn Act also would have modified the written notice requirement with regard to plant closings and mass layoffs. The proposed amendment would have required 90 days' written notice, as opposed to the current 60-day requirement, to employees and government officials before ordering a plant closing or mass layoff, with notification to be sent to the Secretary of Labor within 60 days, as well as notice to the United States, the state senators and representatives who represent the area in which the plant is located, the governor, and the chief elected local official of the area.

Employer liability was also modified under the proposed Forewarn Act. WARN currently imposes back-pay liability for 60 days and varies by jurisdiction with regard to whether back pay is based on calendar or work days within the violation period. The Forewarn Act would have made employers who violate the notice requirements liable for double back pay for each calendar day of the violation period for up to 90 days. The proposed legislation also would have granted the Secretary of Labor or the state attorney general the authority to bring a civil action on behalf of employees for relief.

If enacted as proposed, more reductions-in-force will qualify for WARN analysis and require notice and/or pay in lieu of notice. Given the increased penalties for failure to provide the requisite notice, employers would be well-advised to initiate a WARN analysis at the outset of any major transaction or personnel action.

J. Healthy Families Act (S. 910; H.R. 1542)

The Healthy Families Act would have required employers to provide seven days of paid sick leave annually for those who work at least 30 hours per week to their own medical care or that of their family, as well as a prorated annual amount of paid sick leave for those who work less than 30 hours but at least 20 hours a week, or less than 1,500 but at least 1,000 hours per year. The Healthy Families Act would have applied to employers who employ 15 or more

employees for each working day during 20 or more workweeks a year. If enacted as proposed, the bill would require the majority of employers in the United States to assume the increased expense of providing such additional paid leave.

K. Private Sector Whistleblower Protection Streamlining Act of 2007 (H.R. 4047)

The Private Sector Whistleblower Protection Streamlining Act of 2007 would have expanded whistleblower protections for private-sector employees who report violations of federal laws, rules, or regulations, or the state or local implementation of a federal law governing working conditions and benefits. In addition, the legislation would have reinstated employees who were fired for reporting violations on a preliminary basis. The bill did not set a limit on compensatory and punitive damages. It also made conforming whistleblower amendments to the OSH Act.

If enacted, given that the bill prohibits restrictions on whistleblowing and provides virtually unlimited relief, it will likely encourage such complaints and suits against private sector employers. The establishment of the Whistleblower Protection Office within the Employment Standards Administration of DOL suggests that investigations and enforcement will escalate as well.

L. RESPECT Act (S. 969; H.R. 1644)

The Re-empowerment of Skilled and Professional Employees and Construction Tradesworkers ("RESPECT") Act would have amended the NLRA to narrow how the Act defined the term "supervisor." As proposed, individuals would only have been considered "supervisors" if they (1) had authority over their employees for a majority of the workday and (2) had the authority to responsibly direct employees.

If enacted as proposed, this legislation would limit significantly which workers the NLRA classifies as supervisors. In its current form, the RESPECT Act would make most employees nonsupervisors for NLRA purposes and thus eligible for union organizing. This would allow unions to collect compulsory dues from workers with supervisory authority and could potentially affect employer efficiency and productivity, as supervisors who are expected to assist in running the business are faced with divided loyalties due to their union membership.

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**M. Safe Nursing and Patient Care Act of 2007
(S. 1842; H.R. 2122)**

The Safe Nursing and Patient Care Act of 2007 would have prevented health care facilities that receive payments under the Medicare programs from requiring nurses to work overtime except during declared emergencies. In addition, the proposed legislation would have allowed the Department of Health and Human Services to investigate complaints and impose penalties of up to \$10,000 per violation with higher penalties for patterns of violations. If enacted, health care facilities will likely be faced with the decision whether to increase hiring of nursing staff or to decrease capacity and/or the provision of services.

N. Save America Comprehensive Immigration Act of 2007 (H.R. 750)

The Save America Comprehensive Immigration Act ("SACIA") would have prohibited employment discrimination and retaliation against immigrants. Under SACIA, employers could not threaten an individual with removal from the United States or with any immigration-related or employment benefit-related adverse consequence so as to intimidate, pressure, or coerce the individual into not exercising a state or federal labor/employment right. Further, employers could not retaliate against an individual for having actually exercised or stating an intention to exercise any such right. The legislation also prohibited employment discrimination on the basis of "immigration status." Lastly, the proposed legislation required employer-petitioners for nonimmigrant labor to describe their efforts to recruit aliens lawfully admitted for permanent residence or U.S. citizens, which must include substantial recruitment in "minority communities."

President Obama has voiced support for this bill and has indicated that immigration reform is high on his agenda. If enacted as proposed, this legislation would dramatically expand family-based immigration to the United States, with little in the way of annual caps or limits. It also contains significant amnesty provisions for illegal aliens and decreases incentives for worksite enforcement, as it neither mandates use of the E-Verify program nor increases employer sanctions for illegal employment practices.

**O. Workplace Religious Freedom Act of 2007
(H.R. 1431; S.3628)**

The Workplace Religious Freedom Act of 2007 would have amended Title VII to clarify the definition of "undue hardship," which currently is not defined in

the statute. Under the Supreme Court decision in *TWA v. Hardison*, however, an employer does not have to accommodate a person's religious practice if doing so would bring a de minimis expense upon the employer. The proposed legislation would have redefined the concept of "undue hardship" to require significant difficulty or expense, and set forth factors to determine whether an accommodation causes such hardship.

If enacted, this bill would potentially increase employers' exposure to liability, as the new law provides no clear definition of "undue hardship" and employers will no longer be excused from providing accommodations by proving only a de minimis expense. Employers would be required to modify their policies and training relating to accommodation of employees' religious observations.

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passed GINA (H.R. 493) last year.* Senator Ted Kennedy called GINA the "first major new civil rights bill of the new century," and on May 21, 2008, President Bush signed the Act into law. It will take effect with respect to insurance companies on May 21 of this year, and on November 21, 2009 for employers.

What Does GINA do?

GINA prohibits discrimination based upon genes. It touches on or amends many existing laws, including the Employee Retirement Income Security Act of 1974 (ERISA), the Public Health Service Act, the Internal Revenue Code of 1986, Title XVIII (Medicare) of the Social Security Act, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and Title VII. (See Sections 101-104 of GINA.)

For example, GINA mandates that all genetic information is to be treated as health information under HIPAA, making it subject to HIPAA's privacy regulations, and forbids a health insurer from establishing eligibility rules based on genetic information. (Section 105 subdivision 1180.) It also prohibits health insurers from discriminating against individuals on the basis of genetic information. Further, the Act makes it illegal for an insurer to require genetic testing, consider family history of genetic disorders when making underwriting or premium determinations, or tie premiums to genetic infor-

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mation. (Section 102.)

For employers, GINA makes it unlawful to fail to hire an individual, discharge an employee, or otherwise discriminate against an employee with respect to the compensation, terms, conditions, or privileges of employment based upon genetic information. GINA also prohibits an employer from limiting, segregating, or classifying employees because of genetic information in any way that would deprive or tend to deprive them of employment opportunities or adversely affect their status as employees. (See Section 202 of GINA.)

The Act also prohibits an employer from requesting or requiring an employee's or her family members' (to the fourth degree) genetic information, except in limited circumstances, discussed below. (Section 202.) This prohibition includes information relating to a pregnant woman's unborn fetus, and fertilized embryos resulting from reproductive assistance. (Section 209.)

As examples of GINA in action, the Act would prevent an employer who knows that an employee's mother died of breast cancer at age 40 from using this information in making decisions regarding promotions or compensation out of fear that the employee might eventually develop the disease and need to take a prolonged medical leave or become prematurely unable to work. GINA will also prohibit an employer from using genetic testing as a screening mechanism to identify employees or potential employees who may be susceptible to sustaining injury from workplace chemicals, as the example with Charlie above illustrated.

If an employer does possess genetic information about an employee, GINA requires the employer to maintain the information in separate files and treat such information as a confidential medical record. The Act also prohibits an employer from disclosing an employee's genetic information, except in narrow circumstances, described below. (Section 206.)

The remedies available under GINA are similar to those provided under Title VII and other nondiscrimination laws, i.e. compensatory and punitive damages. The Act also proscribes retaliation against an individual for opposing an act or practice made unlawful under GINA.

The Limits of GINA

Under GINA, an employer *can* acquire an employee's genetic information in certain instances, including where: (1) such information is requested or re-

quired to comply with certification requirements of family and medical leave laws; (2) an employer purchases documents that are commercially and publicly available and include family medical history, such as newspapers or magazines (but not medical databases or court records); (3) the employer conducts DNA analysis for law enforcement purposes as a forensic laboratory or for purposes of human remains identification; (4) the employer offers health or genetic services as part of a wellness program; and (5) the information is to be used for genetic monitoring of the biological effects of toxic substances in the workplace. (Section 202.)

For the last two exceptions, the employee must almost always provide knowing and voluntary *written* authorization. As part of the wellness program, only the employee and the medical professional providing services may receive the genetic information. If Federal or State law requires monitoring of the biological effects of the toxic workplace substances, employee authorization is not required, but the employee must be informed of his results. Under both of these exceptions, an employer may only receive the genetic information in aggregate terms that do not disclose the identity of specific employees. (Section 202.)

An employer also does not violate GINA where it "inadvertently" requests or requires an employee's family medical history. (Section 202.) What constitutes "inadvertent" acquisition of an employee's genetic information is unclear. Perhaps this exception is intended to cover circumstances where an employee requests a personal day to care for an aged parent or young child, or an employer visits an employee in the hospital. This "inadvertent" exception to GINA is certainly the most ambiguous in the Act and will likely be a source of future litigation.

GINA allows an employer to disclose an employee's genetic information only (1) to the employee upon request; (2) to an occupational or other health researcher; (3) in response to a court order; (4) to a government official investigating compliance with GINA if the information is relevant; (5) in connection with the employee's compliance with the certification provisions of the Family and Medical Leave Act of 1993 ("FMLA"); or (6) to a public health agency. (Section 206.)

The Act does *not* prohibit discrimination once someone already has a disease. It also does *not* provide a cause of action based on disparate impact. (Section 208.) GINA does, however, establish a commission that will meet in 2015—six years after the Act is enacted—to review the developing science of genetics

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and to make recommendations to Congress regarding whether to provide a disparate cause of action under the Act at that point.

What Qualifies as “Genetic Information?”

GINA defines “genetic information” as information about: (1) an individual’s genetic tests; (2) genetic tests of an individual’s family members (to the fourth degree); and (3) the manifestation of a disease or disorder in an individual’s family members. It includes any request for or receipt of genetic services, such as testing, counseling, or education, by an individual or his family members. A genetic test means “analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes.” (Section 201.) “Genetic information” does *not* include information about an individual’s sex or age. It also does not include the actual manifestation of a disease in the individual himself, even if that disease has a genetic basis. (Section 201.)

Employee Protection in California

Although employees are not protected from employment discrimination under GINA until November 21, 2009, California state law currently protects employees from discrimination based upon “genetic characteristics.” California’s Fair Employment and Housing Act (“FEHA”) makes it unlawful to discriminate against an employee or job applicant because of an actual or perceived physical or mental disability or medical condition. A “medical condition” includes genetic characteristics, such as genes, chromosomes, or inherited characteristics, that are a known cause of a disease or disorder or are associated with an increased risk of developing a disease or disorder. (See Government Code § 12926.) FEHA also prohibits employers from requiring applicants or employees to undergo genetic tests.

Even after GINA goes into effect later this year, some employees who may not be protected under the Act—those who work for an employer with under 15 employees—will be protected under FEHA, provided their employer is covered under the California law (by having at least five employees).

Is GINA Necessary to Prevent Employment Discrimination?

Putting aside GINA’s provisions governing health insurers, how necessary is a federal law prohibiting employment discrimination based on genetic information? Have many employers actually required genetic tests as a prerequisite to employment? How many employees have actually been fired because of a family history of disease?

Like California, several states have laws making discrimination based on genes illegal. However, these state laws were not enacted as reactive measures to a systemic problem of genetic discrimination, as was the case with laws proscribing discrimination based on race and gender. Rather, these laws seem to be proactively aimed at protecting an individual’s privacy and encouraging people to take advantage of the potential benefits of genetic testing. Since these state laws have been in effect, very little litigation has resulted from their prohibitions.

The scarcity of genetic discrimination cases nationwide could mean that this type of discrimination simply is not a significant issue. But it could also mean that, despite our scientific advancements, our understanding of the potential uses of genetic testing and the information resulting therefrom are only in their infancy. As significant achievements are made in the area of genetics, testing becomes more common, and employers identify more and more uses for information about their employees’ genetic make-up, GINA will likely become more important. As it stands, at least in the employment context, GINA is an enviably forward-thinking piece of legislation, perhaps doing more than just “keep[ing] pace with the times,” as Thomas Jefferson suggested. It is possible that GINA’s protections will actually *encourage* “the progress of the human mind,” making people more comfortable utilizing genetic testing for its medical benefits by eliminating fear that employers (and health insurers) will use their immutable genetic information against them.

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*The full text of GINA is available at: <http://www.govtrack.us/congress/billtext.xpd?bill=h110-493>.

provide long distance and Internet services, if in exchange, they opened their markets to competition by companies called competitive local exchange carriers, or "CLECs." This competition was to be accomplished through network sharing arrangements whereby the CLECs could purchase local telephone services from ILECs at wholesale prices and resell them, or even link into the ILECs' local networks directly. As might be expected however, the ILECs were resistant to the erosion of their monopolies by competition from the CLECs.

The *Twombly* complaint alleged that the ILECs had engaged "in parallel conduct" to inhibit the growth of the burgeoning CLECs and had illegally agreed among themselves to avoid competition with one another. However, besides conclusory statements, the complaint contained no factual allegations respecting an agreement. *Id.* at 1970. Instead, plaintiffs relied upon an inference of an agreement based upon the ILECs' parallel conduct and their failure to pursue "attractive business opportunities." *Id.* at 1962. The trial court dismissed the complaint for failure to state a claim. The Second Circuit reversed, and relying on *Conley's* "no set of facts" standard, held that dismissal was inappropriate unless there were "no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 114 (2d Cir. 2005). As the Second Circuit found, under the *Conley* standard, because the ILECs' conduct was consistent with an unlawful agreement to restrain trade, a conceivable set of facts did exist that would permit plaintiffs to prevail, and dismissal was therefore improper.

In an opinion by Justice Souter, the Supreme Court reversed and took aim squarely at the *Conley* standard, expressly disapproving its use. According to the Court, *Conley's* familiar language had been "questioned, criticized, and explained away long enough" and "after puzzling the profession for 50 years," had "earned its retirement." 127 S. Ct. 1969. The Court concluded that the complaint had been properly dismissed because the conduct alleged was not supported by "enough factual matter . . . to suggest that an agreement was made." *Id.* at 1965. Although consistent with the existence of an unlawful agreement, the ILECs' resistance to competition was equally consistent with lawful, independent action by companies seeking to maintain dominance in their respective markets. Absent facts "suggest[ing] that an actual agreement was made," the claim was doomed. *Id.*

"Plausibility" Pleading Under *Twombly*

While the Supreme Court did not provide a specific definition of its new "plausibility standard," it did provide some fairly concise guidance for the lower courts. Importantly, *Twombly* makes clear that Rule 8 (a)(2), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief" so as to "give the defendant fair notice of what . . . the claim is and the grounds upon which it rests," remains intact. Nevertheless, the Court declared that Rule 8 requires more than just notice of a claim and the legal theory upon which it rests. While "detailed factual allegations" remain generally unnecessary, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 127 S. Ct. at 1965-66 (alteration in original). Specific facts must be alleged, and those "[f] actual allegations must be enough to raise a right to relief above the speculative level." *Id.*

In applying this standard to plaintiffs' Sherman Act claim, the Court concluded that such a claim must contain "enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 1965. While requiring "plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage," it does "call[] for enough facts to raise the reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* The *Twombly* plaintiffs "rest [ed] their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs." *Id.* at 1970. Although a "few stray statements" did "speak directly of agreement," they were "merely legal conclusions resting on the prior allegations." *Id.* Nothing suggested that the ILECs' conduct "was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance." *Id.* at 1971. As such, the complaint did not contain sufficient factual allegations to rise to the level of "plausible" and thus could not survive a motion to dismiss.

It is this need for specific factual allegations that makes the *Twombly* decision so important for defendants challenging pleadings in federal court. As the Second Circuit held, the *Twombly* complaint did meet *Conley's* "no set of facts" standard, and discovery would have afforded plaintiffs an opportunity to determine whether there was an illegal agreement. No more. While the agreement might have existed, plaintiffs' lack of knowledge concerning that agreement resulted in dismissal of their claim. Inevitably, plaintiffs like those in *Twombly* will file claims without access

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key facts necessary to render their claim “plausible.” Those claims will not survive the pleading stage and defendants will reap the benefits.

The Court’s shift away from notice pleading, as understood through application of the *Conley* standard, is a fundamental one apparently born of an increased concern for the heavy burdens of discovery carried by defendants. In the past, the Court has spoken in terms of a “liberal system of ‘notice pleading’” in which the “courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.” *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). See also *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (“This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.”). The concerns articulated in *Twombly* are quite different. There, the Court writes that “[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management.” *Twombly*, 127 S. Ct. at 1967 (quotation omitted). The Court also recognized that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.” *Id.* Gone is any reliance on control of discovery or motions for summary judgment to screen out dubious claims. As never before, the Court is looking to motions to dismiss under Rule 12(b)(6) to serve that function.

Twombly Is Not Limited To The Antitrust Context

While there has been speculation that the Supreme Court intended to limit *Twombly* to antitrust claims, see e.g., *Iqbal v. Hasty*, 490 F.3d 143, 156 (2d Cir. 2007), nothing in the opinion expressly indicates that is the case. Moreover, the Court’s analysis stems from a more expansive interpretation of Rule 8’s dictate that a complaint “show that the pleader is entitled to relief.” *Twombly*, 127 S. Ct. at 1966. Rule 8’s application is, of course, universal (except to the extent Rule 9(b) applies), and is not limited to antitrust claims. Further, a simple electronic search reveals that since it was decided, *Twombly* has been cited and applied in hundreds of lower court decisions involving claims of all types.

While *Twombly* applies to all claims, it is probably best understood as establishing a flexible standard, which requires the pleading of greater factual detail in cases where facts are necessary to make the claim plausible. Embracing this approach, the Second Circuit remarked that “the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexi-

ble ‘plausibility standard,’ which obligates a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.” *Iqbal*, 490 F.3d at 157-158. While claims like battery, assault or negligence are easily alleged with facts suggestive of liability, and are thus easily rendered plausible, more complex claims and those requiring allegations of intent or state of mind will generally demand more facts be pled. See A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. Rev. 431, 459 (2008). Because of its “flexible,” sliding-scale application, plausibility pleading tends to place the greatest burden on plaintiffs least likely to have access to direct evidence at the pleading stage. See *id.* Defendants in these cases benefit the most from plausibility pleading.

Conclusion

It will be impossible to measure *Twombly*’s full impact on pleading practice in the federal courts for years to come. Yet, with its adoption of plausibility pleading, the Supreme Court appears to have made a decisive break with notice pleading as understood for over half a century. Defendants will, in more than a few circumstances, be able to eliminate or dramatically narrow claims that, in the past, would have survived to summary judgment, settlement, or even trial.

One note of caution: *Twombly* may soon be joined by a second major decision effecting pleading in the federal courts. On June 16, 2008, the Supreme Court granted certiorari in *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007). The question before the Court is whether a Bivens claim for violation of constitutional rights by a federal prison official is sufficiently pled by generalized and conclusory allegations of the official’s personal involvement. While the question presented by the *Iqbal* case is narrow, the Court will have the opportunity to comment upon, clarify or perhaps even modify its holding in *Twombly*. As of this writing, the Court has yet to issue an opinion in *Iqbal*.

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