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Securities Class Action Litigation And Trials: *Vivendi* As A Case Study

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Following the enactment of the Private Securities Litigation Reform Act in 1995, 24 securities class actions have proceeded to trial. The most recent is *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571 (S.D.N.Y.). On January 29, 2010, a jury found Vivendi, but not the two individual defendants, liable for securities law violations. The verdict could entitle plaintiffs to damages as high as $9.3 billion, including prejudgment interest, which would make for the largest securities class action payout in history. Post-trial proceedings are continuing and the final outcome of the case, as well as its full impact on securities class action litigation, remain to be seen.

Happy Birthday *Iqbal*: The First Anniversary Of *Ashcroft v. Iqbal* And The Impact Of The Heightened "Plausibility" Standard Under Federal Rule Of Civil Procedure 8

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Critics of *Iqbal* predicted that the new "plausibility" standard to be applied by district courts at the pleadings stage under Fed. R. Civ. P. 8 would have a dramatic effect on the frequency with which federal district courts would grant motions to dismiss under Fed. R. Civ. P. 12(b)(6). However, certain empirical analyses suggest that while the rate of dismissals does appear to have increased, it has not done so in the dramatic fashion that many expected. Surprisingly, and ironically, *Iqbal*'s greatest impact may ultimately be on the rate with which district courts grant plaintiffs' motions to strike defendants' affirmative defenses under Fed. R. Civ. P. 12(f), on the ground that they have not been adequately alleged under the new pleading standard.

Securities Class Action Litigation And Trials: *Vivendi* As A Case Study

BY MEREDITH KOTLER AND KATHERINE COOPER

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Introduction

Conventional wisdom holds that securities class actions are dismissed or settled prior to trial, particularly after the 1995 enactment of the Private Securities Litigation Reform Act ("PSRLA").[1] Yet since 1996, 24 securities class actions have proceeded to trial.[2] Of those, *In re Vivendi Universal, S.A. Securities Litigation*, No. 02 Civ. 5571 (S.D.N.Y.), is the most recent. This article examines the *Vivendi* case and its significance in the post-PSLRA world.

Background

Vivendi Universal, S.A. ("Vivendi") began as a French water utility. Starting in the late 1990s, led by its then-CEO Jean-Marie Messier, the company embarked on a series of aggressive mergers and acquisitions that transformed it into a global media conglomerate. Vivendi used its own stock and borrowed against future earnings to finance these transactions. As a result, the company's debt increased from €3 billion in 2000 to €21 billion in 2002. During this time, Vivendi made various statements reassuring the public of the company's sound financial position. On July 2, 2002, however, amid rumors of hidden liabilities, Messier was forced to resign, and soon thereafter CFO Guillaume Hannezo resigned as well. In a press release dated July 3, 2002, Vivendi acknowledged the severity of its liquidity problem, and announced that it had initiated discussions to put new credit facilities in place.[3] In its 2002 annual report, Vivendi disclosed a loss of €23.3 billion.[4]

On December 24, 2003, the U.S. Securities and Exchange Commission ("SEC") announced that it had settled civil fraud claims against Vivendi, Messier and Hannezo.[5] The SEC had alleged that the defendants "disguised Vivendi's cash flow and liquidity problems, improperly adjusted accounting reserves to meet earnings before income taxes, depreciation, and amortization (EBITDA) targets, and failed to disclose material financial commitments, all in violation of the antifraud provisions of the federal securities laws."[6] As part of the settlement, Vivendi agreed to pay a civil penalty of $50 million and disgorgement of $1. Messier agreed to relinquish his claim to a €21 million severance package that he had negotiated just before his resignation,[7] and pay a civil penalty of $1 million and disgorgement of $1. Hannezo agreed to pay a civil penalty of $120,000 and disgorgement of $148,149.[8] Messier and Hannezo were also prohibited from serving as an officer or director of a public company for, respectively, ten and five years.[9]

The *Vivendi* Lawsuit

Sixteen separate putative securities class actions were filed against Vivendi, Messier and Hannezo in the United States District Courts for the Southern District of New York and the Central District of California. On October 1, 2002, the cases were consolidated in the Southern District of New York.

On January 7, 2003, the co-lead plaintiffs filed a consolidated class action complaint, alleging that Vivendi, Messier and Hannezo had orchestrated a scheme to conceal the extent of the company's liquidity problems resulting from its acquisitions, thereby artificially inflating the company's share price between October 2000 and August 2002. The plaintiffs alleged that the defendants had accomplished this scheme by making false and misleading statements in press releases, during conference calls with investors, at shareholder meetings, and in financial reports. The plaintiffs asserted claims under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, and Sections 11, 12(a)(2) and 14 of the Securities Act of 1933.

The defendants moved to dismiss the complaint. By decision dated November 3, 2003, the district court allowed the majority of the plaintiffs' claims to proceed, and dismissed only the Section 14(a) claim and the Sections 11 and 12(a)(2) claims to the extent they were asserted by plaintiffs who had purchased American Depository Shares ("ADSs") pursuant to a Form F-6.[10] Reconsideration of the decision and a request to certify an interlocutory appeal were subsequently denied.[11]

The plaintiffs then moved to certify a class consisting of all domestic and foreign persons who purchased or otherwise acquired Vivendi common shares on foreign exchanges and

ADSs on the New York Stock Exchange between October 20, 2000 and August 14, 2002. On May 21, 2007, the court certified the class to include persons from the United States, France, England and the Netherlands, on the basis that courts in these countries would enforce a judgment or settlement in the case, and excluded plaintiffs from Germany and Austria on the ground that those countries would not enforce a judgment or settlement.[12] The defendants thereafter moved for summary judgment, arguing that the plaintiffs had failed to prove loss causation. On April 21, 2009, the district court denied the motion.[13]

On October 5, 2009, the case proceeded to trial before a jury. The trial lasted approximately three months. On January 29, 2010, after three weeks of deliberations, the jury found Vivendi liable for *all* 57 false and misleading statements of which it was accused, but did not find Messier or Hennezo liable at all. The jury calculated damages on a per share basis; over the class period, shares fell from €84.70 on October 31, 2000, to €9.30 on August 16, 2002.[14] Plaintiffs' counsel initially stated that liability could reach $4 billion if every shareholder submitted a valid claim, and that the jury verdict would therefore be the largest securities class action verdict in history, measured by the number of people affected and the potential amount of damages.[15] Plaintiffs' counsel later announced that the verdict would entitle investors to recover some $9.3 billion, including prejudgment interest.[16] According to the defendants' counsel, however, typically only 19 to 35 percent of shareholders could be expected to submit claims.[17]

The verdict certainly is not the end, though, of the *Vivendi* case. Post-trial motion practice is ongoing. On March 19, 2010, the plaintiffs moved for entry of final judgment and for an award of prejudgment interest. On March 26, 2010, Vivendi moved for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, or, in the alternative, for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. On March 31, 2010, the plaintiffs moved for approval of a post-verdict class notice and a plan for claims administration. The reply briefs for all of these motions are due to be filed on June 9, 2010.

Implications of the *Vivendi* Lawsuit

The long-term implications of the *Vivendi* case will depend on the outcome of the post-trial motions and any appeal. Vivendi has stated that it intends to appeal the jury verdict if its post-trial motions are denied.[18]

One of Vivendi's grounds for appeal will be whether foreign investors – according to Vivendi, about two-thirds of the plaintiff class are French citizens – who purchase the securities of foreign companies on foreign exchanges can bring suit in the United States. This argument focuses on the so-called "f-cubed" claims, because the plaintiffs, defendants and relevant securities exchanges are all foreign. The Supreme Court is currently considering this subject in *Morrison v. National Australia Bank Ltd.*, No. 08 Civ. 1191, and a decision in that case is expected by this summer. The *Morrison* decision will most likely affect the viability of Vivendi's appeal on this ground, and it is possible that the *Vivendi* action, as the first "f-cubed" case to proceed to trial, may itself influence the Supreme Court's analysis.

Even before the case reaches its conclusion, however, *Vivendi* is already having a significant impact on securities class action litigation. Most fundamentally, the sheer size of the potential damages at stake will most likely further deter defendants from pursuing class actions through trial. Although there has been significant variation in securities class action settlements over time, the estimated maximum award of $9.3 billion in *Vivendi* dwarfs historical averages. In 2009, the median class action securities settlement was $8.0 million; the average was $37.2 million; and the maximum was $925.5 million.[19] Following the PSLRA's enactment, the median settlement value has ranged between a low of $3.7 million in 1996 and a high of $9.4 million in 2007.[20] Even considering "mega-settlements," the damages against Vivendi do not compare favorably: the highest securities class action settlement on record, against Enron Corp., amounted to $7.242 billion, $6.903 billion of which was paid by financial institution co-defendants.[21] In fact, 47 percent of the aggregate top ten class action securities settlements was paid by financial institution co-defendants.[22] Thus, Vivendi appears potentially to have paid a staggering price for going to trial.

In addition, insurers may argue that a verdict such as the one rendered in *Vivendi* represents an adjudication of fraud sufficient to trigger exclusionary provisions found in many D&O insurance policies, and as a result carriers may refuse to cover legal costs and/or damages stemming from those verdicts. Therefore, the threat of such a verdict will cause defendants to

consider even more carefully whether they will risk denial of insurance coverage by taking a case to trial.

By contrast, individual defendants may be emboldened to proceed to trial by the verdicts absolving Messier and Hannezo. The jury's exoneration of Messier and Hannezo suggests that the individual defendants had, in some way, successfully distinguished themselves from the company and the statements they made on the company's behalf.

Messier and Hannezo may have prevailed at trial because they were able to convince the jury that they were committed to Vivendi and acted in good faith. In his opening statement, Messier's attorney emphasized that Messier helped create Vivendi, was devoted to the company and was optimistic about its future.[23] A major theme of Messier's defense was that he demonstrated his belief in Vivendi through his stock purchases: at the same time that he was alleged to have been making false statements about the company, he used the proceeds of the exercise of his stock options to purchase Vivendi shares, took out a loan to buy shares, used his bonus from the company to purchase shares and purchased shares again four days after his resignation.[24] Meanwhile, Hannezo's attorney offered the view that Hannezo was not found liable because the jury "'viewed the individual defendants as credible …. A large part of our defense was that …. [Hannezo] acted honestly and in good faith throughout. Sometimes that's easier for the jury to translate when it comes to individuals as opposed to a company.'"[25] Although inconsistent with the finding of liability against Vivendi, the jury's verdict absolving Messier and Hannezo marks the success of a common sense defense strategy – showing the jury that the individual defendants may have made poor choices for the company, but they did not act dishonestly.

The *Vivendi* trial was predictably lengthy and complex. The complexity was apparent as early as the opening statements, when attorneys introduced concepts such as EBIDTA, purchase accounting, debt service, noncash earnings, nonoperational accounting entries, free cash flow, liquidity, dividends, negative cash flow, generally accepted accounting principles, market capitalization, options exercises and hedging. And in the course of the first "f-cubed" trial, the case had further complications. Much of the testimony and many of the documents were in French, and the jury was provided with English translations. The attorneys faced problems with currency conversions and pronunciation of foreign names and phrases. The jury had to grapple with foreign accounting systems, practices, standards and conventions. When parties are determining whether to bring an "f-cubed" action to trial in the future, they will certainly reflect on these challenges and their resultant costs. Finally, as an "f-cubed" action that did not include all foreign plaintiffs, the defendants in *Vivendi* face the specter of another action brought by Austrian and German investors who were excluded from the U.S. class.[26]

The *Vivendi* case is a bellwether in securities class action litigation. As it proceeds through post-trial proceedings and appeal, its final outcome remains to be seen, but its effects will in any event remain significant.

* * *

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1 Congress enacted the PSRLA to address perceived abuses in securities class action litigation. The PSLRA sought to reshape securities litigation in three main ways, by (1) heightening the standards to plead securities fraud, while imposing a stay of discovery pending motions to dismiss, (2) empowering members of the class to supervise suits brought in their names and (3) increasing judicial supervision of Plaintiff's counsel. Stephen J. Choi and Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During The First Decade After The PSLRA*, 106 COLUM. L. REV. 1489 (2006).

2 Of the 24 securities class actions that have been tried, 16 went to verdict. *See* Adam T. Savett, *Securities Class Action Trials in the Post-PSLRA Era*, RiskMetrics Group, January 2010, at http://blog.riskmetrics.com/slw/SCAS%20Trials.pdf. Eight resulted in verdicts for the defense, five resulted in verdicts for plaintiffs and three resulted in mixed verdicts. *See id.* Information is available regarding four of the five plaintiffs' verdicts, which ranged from $15.4 million to $280 million. *See id.* Four of these cases then settled after verdict, and in one the verdict was overturned by the judge. *See id.*

3 Vivendi Universal, S.A., Press Release (Form 6-K), at 1 (July 3, 2002).

4 Vivendi Universal, S.A., Annual Report (Form 20-F), at 79 (June 30, 2003).

5 SEC Litigation Release No. 18523, *SEC Files Settled Civil Fraud Action Against Vivendi Universal, S.A., Its Former CEO, Jean-Marie Messier, and Its Former CFO, Guillaume Hannezo*, December 24, 2003.

6 *Id.*

7 Previously, Messier had won a ruling forcing Vivendi to pay him the severance package, but the SEC blocked the payment under the Sarbanes-Oxley Act, which allows the SEC to request a 45-day postponement of any "extraordinary" payment by a company under investigation.

8 SEC Litigation Release No. 18523.

9 *Id.*

10 *In re Vivendi Universal, S.A. Sec. Litig.*, 381 F. Supp. 2d 158 (S.D.N.Y. 2002).

11 *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571 (RJH), 2004 WL 2375830 (S.D.N.Y. Oct. 22, 2004).

12 *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76 (S.D.N.Y. 2007).

13 *In re Vivendi Universal, S.A. Sec. Litig.*, 634 F. Supp. 2d 352 (S.D.N.Y. 2009).

14 David Glovin and Don Jeffrey, *Vivendi Found Liable on All 57 Counts in Class Suit*, BUSINESSWEEK, January 29, 2010, available at http://www.businessweek.com/news/2010-01-29/vivendi-found-liable-on-all-57-counts-in-class-suit-update2-.html.

15 *Id.*

16 Press Release, Abbey Spanier Rodd & Abrams, LLP, *Plaintiffs Win Jury Verdict in Securities Fraud Class Action Against Vivendi* (January 29, 2010), available at http://abbeyspanier.com/press-releases/218-vivendi-verdict; Glovin & Jeffrey, *supra* note 14.

17 Glovin & Jeffrey, *supra* note 14.

18 *Id.*

19 Ellen M. Ryan and Laura E. Simmons, *Securities Class Action Settlements: 2009 Review and Analysis*, Cornerstone Research, available at http://www.cornerstone.com/files/News/5412f893-24de-4de1-8be7-15af788de16a/Presentation/NewsAttachment/fc277c05-a487-42c8-8e4b-76ef2dea0615/Cornerstone_Research_Settlements_2009_Analysis.pdf.

20 Stephanie Plancich, PhD and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2009 Year-End Update*, NERA Economic Consulting, December 2009, available at http://www.nera.com/image/Recent_Trends_Report_1209.pdf.

21 *Id.*

22 *Id.*

23 *See* Trial Transcript at 233, *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02-CV-5571 (S.D.N.Y. Oct. 6, 2009).

24 *Id.* at 249-51.

25 Andrew Longstreth, *Litigator of the Week: Michael Malone of King & Spalding and Martin Perschetz of Schulte, Roth & Zabel*, THE AMLAW DAILY, February 4, 2010.

26 Amanda Andrews, *Vivendi May Face Second Trial From Former Investors*, TELEGRAPH, Oct. 7, 2009.

Happy Birthday *Iqbal*: The First Anniversary Of *Ashcroft v. Iqbal* And The Impact Of The Heightened "Plausibility" Standard Under Federal Rule Of Civil Procedure 8

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May 2010 marked the first anniversary of the landmark Supreme Court decision in *Ashcroft v. Iqbal* ("*Iqbal*"),[2] and the third anniversary of its equally significant precursor, *Bell Atlantic Corp. v. Twombly* ("*Twombly*").[3] Together, these two decisions altered the landscape for dismissal motions in federal district courts, by introducing the now familiar "plausibility" standard to the notice pleading requirements of Federal Rule of Civil Procedure 8(a). This article addresses the extent to which the new "plausibility" standard has actually affected the frequency with which federal district courts have dismissed actions at the pleadings stage in the post-*Iqbal* era. The empirical analyses discussed below suggest that while the rate of dismissals appears to have increased, it has not done so in the dramatic fashion that *Iqbal*'s critics had predicted. Surprisingly, and ironically, *Iqbal*'s greatest impact may ultimately be on the rate with which district courts grant plaintiffs' motions to strike affirmative defenses on the ground that they have not been adequately alleged under the new pleading standard.

Iqbal And The New Plausibility Standard

In order to fully appreciate the significance of *Twombly* and *Iqbal* and to assess their impact, it is necessary to review the state of the law regarding pleading requirements prior to the May 2007 *Twombly* decision. For more than 50 years, Rule 8 has required pleadings to contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[4] Nevertheless, even before *Twombly*, most complaints included more detail than the minimum arguably required under the plain language of Rule 8. How much detail to include beyond that minimum threshold, however, was subject to opinion and circumstance. A plaintiff might exclude details in favor of a speedy filing or, alternatively, provide a thorough description of the defendant's alleged wrongdoing in an effort to persuade the defendant to engage in settlement discussions at the pleadings stage. The level of detail in a complaint was largely at the discretion of lawyers and their clients; federal courts were not permitted to dismiss a complaint for failure to state a claim under Rule 12(b)(6) "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."[5] This pleading standard, which the Supreme Court enunciated in *Conley v. Gibson* in 1957, reconfirmed the endorsement of notice pleading over fact pleading.[6]

The pleading standard changed in 2007 with *Twombly*, an antitrust suit alleging a conspiracy to restrict competition among telecommunications providers, in which the Supreme Court affirmed the district court's dismissal of the complaint. In place of the "no set of facts" standard set forth in *Conley*, the Court emphasized that, to withstand a motion to dismiss, the complaint must include "enough facts to state a claim of relief that is plausible on its face," requiring the plaintiff to provide more than "labels and conclusions."[7] The Court stated that "a formulaic recitation of the elements of a cause of action will not do."[8] Dissenting Justices John Paul Stevens and Ruth Bader Ginsburg lamented, "[i]f Conley's 'no set of facts' language is to be interred, let it not be without a eulogy."[9] The lower courts, however, subsequently differed as to whether the plausibility standard set forth in *Twombly* applied outside the antitrust context.[10]

The Supreme Court's decision in *Iqbal* confirmed that the *Twombly* standard applies to all cases in federal court and that *Conley's* "no set of facts" standard is no longer good law.[11] The Court held that a plaintiff's complaint must instead demonstrate "facial plausibility" and plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[12] Further, the Court in *Iqbal* created a new two-part test for the sufficiency of a complaint.[13] First, a court should identify pleadings that are merely legal conclusions as opposed to factual allegations, and should disregard the legal conclusions, which are not entitled to a presumption of truth.[14] Second, the court should assume the truth of the factual allegations and determine whether they are

plausible,[15] an analysis which the Court explained is a fact-specific task that requires a court to use its "judicial experience" and "common sense."[16]

Iqbal involved claims asserted by Javaid Iqbal, a Muslim citizen of Pakistan, who was arrested shortly after September 11, 2001 and detained in a maximum-security prison in the United States as a person "of high interest."[17] His complaint alleged abusive treatment by prison guards, including severe physical and verbal abuse, extended detention in solitary confinement and denial of his ability to pray.[18] He claimed that he was subjected to these conditions solely because of his race, religion or national origin and that the conditions of his detention were part of a discriminatory policy created by high-level federal officials, including former Attorney General John Ashcroft and FBI Director Robert Mueller.[19] Ashcroft and Mueller moved to dismiss the complaint for failure to adequately plead that they were actually involved in the allegedly unconstitutional conduct. The district court denied the motion to dismiss, reasoning that the complaint alleged facts on which *Iqbal* could be entitled to relief. The Second Circuit Court of Appeals affirmed on the ground that *Iqbal*'s pleading was plausible under the *Twombly* standard.[20]

The Supreme Court reversed and, in a 5-4 decision, held that *Iqbal*'s complaint was insufficient to state a claim for purposeful and unlawful discrimination,[21] concluding that *Iqbal* had failed to establish that the defendants created the allegedly discriminatory policies "not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin."[22] Accordingly, under *Twombly*, *Iqbal*'s allegations had "not 'nudged [his] claims' of invidious discrimination 'across the line from conceivable to plausible.'"[23] The Court also found that there was a nondiscriminatory explanation for the government's policies that were put in place after September 11 that was "more likely" than *Iqbal*'s explanation, and thus *Iqbal* failed to plausibly state a claim of discrimination.[24]

The four dissenting justices, including Justice David Souter, who had written for the majority in *Twombly*, argued that the majority opinion suffered from a "fundamental misunderstanding of the enquiry that *Twombly* demands,"[25] and that "'Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations.'"[26]

Critics Of *Iqbal*

Critics of the plausibility standard articulated by the Court in *Iqbal* have argued that it will result not only in the dismissal of frivolous claims, but may also present an insurmountable obstacle for many plaintiffs with meritorious claims, who for reasons beyond their control do not possess sufficient information to provide detailed factual descriptions of the bases for their claims.[27] The critics also question whether judges are capable of determining whether factual allegations are "plausible" or not. To what extent must a court consider alternative explanations for the alleged misconduct, as the *Iqbal* Court did?[28] If an alternative explanation is "more likely" than that alleged by the plaintiff, must the court dismiss the complaint? Should courts consider whether a plaintiff may be able to state a "plausible" claim if he were first provided with the benefit of limited discovery? Criticisms and questions such as these have prompted Congress to consider the impact of the *Twombly* and *Iqbal* rulings.

In July 2009, Sen. Arlen Specter (D-Pa.) introduced S.1504, the Notice Pleading Restoration Act of 2009, a bill that expressly provides that "Federal courts shall not dismiss complaints under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957)."[29] The bill is currently under consideration by the Senate Committee on the Judiciary. In November 2009, Rep. Jerrold Nadler (D-N.Y.) introduced H.R. 4115, the Open Access to Courts Act of 2009, after a hearing on *Iqbal* before the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, which Nadler chairs.[30] The bill would prohibit a U.S. district court from dismissing a complaint (1) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief, or (2) on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged.[31]

In addition, in December 2009, the full Senate Judiciary Committee held a hearing titled "Has the Supreme Court Limited Americans' Access to Courts?" in order to address the impact of *Twombly* and *Iqbal*. At the hearing, Chairman Patrick Leahy (D-Vt.) asserted that the Supreme Court had "abandoned" 50 years of precedent to enact "judge-made law."

Stephen Burbank, David Berger Professor for the Administration of Justice at the University of Pennsylvania, asserted that *Iqbal* and *Twombly* have contributed to "the degradation of the Seventh Amendment right to a jury trial" and warned that the Court's decisions would result in a "whole new brand of mischief" in which judges dismiss complaints at their own discretion.[32] John Payton, President and Director-Counsel of the NAACP Legal Defense and Educational Fund, also testified in favor of restoring notice pleading.[33] Conversely, Gregory Garre, a former Solicitor General of the United States who argued *Iqbal* before the Supreme Court, testified that a return to notice pleading would "invite further conflict and confusion."[34]

Whether Congress will ultimately take action in an effort to rewind to the pre-*Twombly*/*Iqbal* era by mandating the application of a *Conley*-type pleading standard is unknown. But clearly, many critics (and proponents) of *Iqbal* have predicted that it would result in a dramatic increase in the rate at which complaints would be dismissed by federal district courts at the pleading stage.

Have *Twombly* And *Iqbal* Actually Led To Significant Increases In Dismissals Under Rule 12(b)(6)?

Is the world of federal litigation more dangerous for plaintiffs in the post-*Iqbal* era? At least one empirical analysis suggests that it may be.[35] In her study, Professor Patricia Hatamyar of the Oklahoma City University School of Law "chose, as randomly as possible, 1200 cases (500 from each of the two-year periods before and after *Twombly*)" and then "coded the cases for their rulings and other characteristics in a database."[36] In addition, because *Iqbal* was issued when she was conducting her study, she also "chose (again, as randomly as possible) 200 cases decided on Rule 12(b)(6) motions under *Iqbal* from May-August 2009."[37] From her statistical analysis of these cases, she concludes that:

> a surprisingly large percentage of 12(b)(6) motions [were] being granted (with or without leave to amend) under Conley—46% from May 2005 to May 2007. From May 2007 to May 2009, after *Twombly* was decided, the percentage of 12(b)(6) motions granted grew to 48%—not a remarkable increase. But since *Iqbal* was decided, a higher percentage of 12(b)(6) motions have been granted: 56% of the 12(b)(6) motions from May 2009 to August 2009 were granted.[38]

Perhaps not surprisingly, Professor Hatamyar found that from Conley to *Twombly* to *Iqbal*, the upward trend in granting Rule 12(b)(6) motions was greater in some types of cases. For example, the percentage of Rule 12(b)(6) motions granted in cases that she classified as "Tort" cases increased from *Conley* (40%) to *Twombly* (46%) to *Iqbal* (52%). The percentage of Rule 12(b)(6) motions granted in "Civil Rights Cases" grew from 50% under *Conley* to 53% under *Twombly* to 58% under *Iqbal*. However, about 32% of Rule 12(b)(6) motions to dismiss "Contract" cases were granted under *Conley*, compared with 35% under *Twombly*.[39] But in each of these categories the empirical analysis suggested an upward trend in the overall percentage of cases dismissed by district courts following *Twombly* and *Iqbal*, albeit perhaps not as dramatically as critics of the new plausibility standard initially feared.

Taking inspiration from Professor Hatamyar, we conducted our own informal analysis of rates of Rule 12(b)(6) dismissals in the U.S. District Court for the Southern District of New York during the year prior to *Twombly* and approximately the year after *Iqbal*. We limited the decisions to those considering Rule 12(b)(6) motions to dismiss three types of claims: (1) Section 11 or Section 12(a)(2) claims under the Securities Act of 1933; (2) tortious interference with prospective economic advantage under state law; and (3) tortious interference with contract under state law. Compared to Professor Hatamyar's broader analysis, our empirical analysis addressed a relatively small number of decisions and, accordingly, the picture that it paints may not be entirely complete. That said, the results do point to some interesting trends within that district. For example, dismissals of claims under the Securities Act actually decreased from 83% of such claims being dismissed during the year prior to *Twombly* to 79% during the year after *Iqbal*. Conversely, the percentage of tortious interference with prospective economic advantage claims being dismissed under Rule 12(b)(6) increased from 67% to 83%, and the percentage of tortious interference with contract claims being dismissed increased from 83% to 100%.[40] But what is most striking about the results of our analysis is that the rates of dismissal of complaints for these three categories of cases in this particular district are dramatically higher than the rates reflected in Professor Hatamyar's analysis, and both before and after the Supreme Court enunciated the plausibility standard. Thus, at most, with respect to the three categories of matters we analyzed, our limited analysis suggests that the

pleading standard was a difficult obstacle for plaintiffs to overcome in the Southern District of New York even before *Twombly* and *Iqbal*.[41] Whether rates of dismissal at the pleadings stage will rise to similar levels in other jurisdictions as a result of *Iqbal* remains to be seen.

A Double-Edged Sword: The Application of the Plausibility Standard to Affirmative Defenses

The heightened pleading requirements articulated by the Court in *Twombly* and *Iqbal* may also have unforeseen consequences for many defendants, as a growing number of courts have extended the plausibility standard to the context of motions by plaintiffs under Rule 12(f) to strike defendants' affirmative defenses.

Rule 8(b)(1)(A) of the Federal Rules of Civil Procedure requires a party responding to a pleading to "state in short and plain terms its defenses to each claim asserted against it." Further, Rule 8(c), which governs the pleading of affirmative defenses, requires the party responding to a pleading to "affirmatively state any avoidance or affirmative defense." Historically, affirmative defenses have been "'subject to the general pleading requirements of Rules 8(a) . . . .'"[42] Under Rule 12(f), a court may, on its own or on a motion filed within 20 days of service of a responsive pleading, "strike from a pleading an insufficient defense."[43]

Recently, a judge in the Western District of New York in *Luvata Buffalo, Inc. v. Lombard General Insurance Co. of Canada* observed that, although "'[t]he distinction between the standards set forth in Rule 12(b)(6) and 12(f) are 'semantic[al]' insofar as they are 'mirror image[s] of each other,'"[44] "it is unclear whether *Iqbal*'s 'plausibility' pleading standard applies to affirmative defenses."[45] In *Luvata*, the court concluded that it was not required to answer that question, because defendants had failed to satisfy even the pre-*Iqbal* pleading requirements.[46] Other courts within the Second Circuit, however, have held that defendants' affirmative defenses are in fact subject to the heightened pleading standard set forth in *Iqbal*. In *AET Rail Group, LLC v. Siemens Transportation Systems, Inc.*, when striking certain affirmative defenses, the court simply recited the plausibility standard from *Twombly* and *Iqbal*, replacing "complaint" with "affirmative defenses," stating that "'under Supreme Court precedent, a district court must determine whether the '[f]actual allegations . . . raise a right to relief above the speculative level, on the assumption that all the allegations in the [Answer and affirmative defenses] are true (even if doubtful in fact).'"[47] The court reasoned further that while "*Twombly* does not require that the complaint (or here, the Answer with affirmative defenses) provide 'detailed factual allegations,'"[48] "it must 'amplify a claim with some factual allegations . . . to render the claim plausible.'"[49]

Likewise, in *Aspex Eyewear Inc. v. Clariti Eyewear, Inc.*, the court held that "[t]he standard on a motion to dismiss [articulated in *Twombly*] also applies to a motion to dismiss a counterclaim pursuant to Rule 12(b)(6) and a motion to strike an affirmative defense pursuant to Rule 12(f)."[50] There the court applied the *Twombly* plausibility standard and held that the defendant's "counterclaims and affirmative defenses alleging that [certain] patents are invalid and/or unenforceable, as well as its affirmative defenses of collateral estoppel and/or res judicata, equitable estoppel, and patent misuse and/or unclean hands fail to meet the minimal requirements of notice pleading under Fed. R. Civ. P. 8(a)."[51] The court underscored that the defendant "merely assert[ed] these claims and defenses without alleging even general facts to support them. In fact, [the defendant] asserts no facts, nor does [the defendant] even refer to the elements of the various affirmative defenses."[52] Similarly, in *Tracy v. NVR, Inc.*, the court found that affirmative defenses such as "Plaintiffs' claims are barred by the doctrine of laches" and other defenses "stated in a similarly conclusory fashion" were "plainly deficient under the *Iqbal* standard and should be stricken."[53] Decisions in other districts have reached the same conclusion.[54]

Outside the Second Circuit, district courts are split as to whether the pleading requirements of *Twombly* and *Iqbal* should be extended to affirmative defenses. For example, in *Holdbrook v. SAIA Motor Freight Line, LLC*, the defendant's answer contained a number of boilerplate affirmative defenses to plaintiff's wrongful termination action, including: "Plaintiff has failed to mitigate his damages, if any"; "Plaintiff has been the cause of his own damages, if any"; "[s]ome or all of Plaintiff's claims may be untimely and/or barred in whole or in part by the applicable statute of limitations"; "Plaintiff has failed to exhaust his administrative remedies and/or statutory prerequisites before bringing this lawsuit."[55] Notwithstanding the thinness of these defenses, the court denied plaintiff's motion to strike them, refusing to extend the plausibility standard set forth in *Twombly* and *Iqbal*. The court reasoned that the standard under Rule 8(a)(2) is similar but not identical to that under Rule

8(b)(1)(A), which merely requires "short and plain terms," and that "it is reasonable to impose stricter pleading requirements on a plaintiff who has significantly more time to develop factual support for his claims than a defendant who is only given 20 days to respond to a complaint and assert its affirmative defenses."[56]

Other courts, however, have refused to apply such a bright-line distinction between the standards to be applied to plaintiffs' pleadings on the one hand and defendants' pleadings on the other, and have instead looked to whether the defendant had reasonable access to facts that could support its affirmative defenses and simply failed to include that information in its answer. For example, in *Tran v. Thai*, the court dismissed an affirmative defense that "[t]he complaint is barred, in whole or in part, pursuant to 29 U.S.C. § 260, because Defendants acted in good faith with regard to some or all acts or omissions alleged in the complaint and had reasonable grounds for believing some or all such acts or omissions were not in violation of the FLSA," on the ground that it was insufficiently pled under *Iqbal*, in that the defendants were in possession of factual information to support the defense but failed to plead any supporting factual allegations.[57] However, the court held that the affirmative defense that the plaintiff failed to mitigate damages was adequately pleaded to inform the plaintiff of the basis for the defense, because "[i]nformation necessary to plead more specifically is in the possession of the plaintiffs and others; the defendants can only obtain that information through discovery."[58]

Conclusion

Although many critics and proponents of *Iqbal* predicted a sea change in the rate of dismissals of lawsuits by federal district courts at the pleadings stage, the empirical analyses discussed above suggest that the impact of this new standard, while material, has been far less dramatic than anticipated. Ironically, and much to the dismay of many defendants, the new heightened pleading standard articulated by the Supreme Court in *Iqbal* may ultimately have the greatest impact on the frequency with which district courts grant motions to strike affirmative defenses. Accordingly, while thus far "[t]he majority of cases applying the *Twombly* pleading standard to affirmative defenses and striking those defenses have permitted the defendant leave to amend,"[59] if and to the extent possible, defendants would be well-advised to bolster the affirmative defenses included in their answers with specific factual allegations.

* * *

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1 The authors acknowledge the contribution of paralegal Jeffrey Hughes in conducting the informal empirical study referenced in this article.

2 129 S. Ct. 1937 (2009).

3 550 U.S. 544 (2007).

4 The form complaints in the Appendix of Forms to the Federal Rules bear out the meaning of "short and plain." For example, the Complaint for Negligence, Form 11, states in its entirety: "1. Statement of Jurisdiction—See Form 7. 2. On ***date***, at ***place***, the defendant negligently drove a motor vehicle against the plaintiff. 3. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of $____. Therefore, the plaintiff demands judgment against the defendant for $_____, plus costs. (Date and sign)."

5 *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957*), abrogated by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

6 *Id.* at 48 ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome.").

7 *Twombly*, 550 U.S. at 570.

8 *Id.* at 555.

9 *Id.* at 577 (Stevens, J., dissenting).

10 Indeed, in a decision issued after *Twombly*, the Supreme Court muddied the waters further by reiterating that Rule 8(a)(2) required only a "short and plain statement," and noting that "specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Twombly*, 550 U.S. at 555).

11 129 S. Ct. at 1953.

12 *Id.* at 1949.

13 *Id.* at 1950.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.* at 1942-43.

18 *Id.* at 1944.

19 *Id.* at 1942.

20 *Id.*; *see Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1937 (2009).

21 129 S. Ct. at 1954.

22 *Id.* at 1948-49.

23 *Id.* at 1950-51 (quoting *Twombly*, 550 U.S. at 570).

24 *Id.* at 1951.

25 *Id.* at 1959 (Souter, J., dissenting).

26 *Id.* (quoting *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)).

27 *See, e.g.*, Helen Gunnarsson, *Iqbal*: *A "Dangerous" Tightening of Federal Pleading Standards? Critics of This Game-Changing Supreme Court Ruling Argue That It Will Deny A Day in Court to Large Numbers of Deserving Litigants*, 97 Ill. Bar J. 602 (Dec. 2009).

28 129 S. Ct. at 1951.

29 Notice Pleading Restoration Act of 2009 (Introduced in Senate), 111th Cong., 1st Sess., s. 1504, *available at* http://thomas.loc.gov/cgi-bin/query/z?c111:S.1504:.

30 *Inside the American Associate for Justice Capital Report: Congress Considers Impact of Iqbal and Twombly*, 46 Trial 10 (Feb. 2010).

31 H.R. 4115, Open Access to Courts Act of 2009, *available at* http://www.opencongress.org/bill/111-h4115/show. On January 4, 2010, the bill was referred to the House Subcommittee on Courts and Competition Policy.

32 *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the Senate Judiciary Comm.*, 111th Cong. (2009) (statement of Professor Stephen Burbank).

33 *Id.* (statement of John Payton).

34 *Id.* (statement of Gregory Garre).

35 Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 Am. U. L. Rev. 553 (Feb. 2010).

36 *Id.* at 555-56.

37 *Id.* at 557.

38 *Id.* (observing that "the short time span and smaller number of *Iqbal* cases counsel caution in interpreting the data").

39 *Id.* at 607.

40 In the U.S. District Court for the Southern District of New York there were only 12 decisions on claims under the Securities Act pre-*Twombly* and 19 post-*Iqbal*; 15 tortious interference with prospective economic advantage decisions pre-*Twombly* and six post-*Iqbal*; and six tortious interference with contract decisions pre-*Twombly* and 11 post-*Iqbal*.

41 Only a few of the decisions we analyzed expressly commented on the impact of *Twombly* and *Iqbal*. For example, *in Bayer Schera Pharma AG v. Sandoz, Inc.*, Nos. 08 Civ. 3710(PGG), 08 Civ. 8112(PGG), 2010 WL 1222012, at *8 (S.D.N.Y. Mar. 29, 2010), Judge Gardephe observed that "[p]rior to *Iqbal*, New York district courts disagreed as to whether a plaintiff was required to identify specific business relationships in order to make out a claim for tortious interference with prospective economic advantage," but that "[a]fter *Iqbal*, it is clear that a claim such as this," which did not identify specific business relationships, "will not survive a motion to dismiss."

42 *See, e.g.*, *Saratoga Harness Racing, Inc. v. Veneglia*, No. 94-CV-1400, 1997 WL 135946, at *6 (N.D.N.Y. Mar. 18, 1997) (citation omitted*); Instituto Nacional De Comercializacion Agricola (Indeca) v. Continental Illinois Nat'l Bank & Trust Co.*, 576 F. Supp. 985, 988 (N.D. Ill.1983).

43 *But see, e.g.*, *Quanta Specialty Lines Ins. Co. v. Investors Capital Corp.*, No. 06 Civ. 4624 (PKL), 2008 WL 1910503, at *4 (S.D.N.Y. Apr. 30, 2008) (motions to strike affirmative defenses are "generally disfavored").

44 No. 08-CV-00034(A)(M), 2010 WL 826583, at *8 (W.D.N.Y. Mar. 4, 2010) (citation omitted).

45 *Id.* (citing *Del-Nat Tire Corp. v. A to Z Tire & Battery, Inc.*, No. 2:09-cv-02457-JPM-tmp, 2009 WL 4884435, at **1-2 (W.D. Tenn. Dec. 8, 2009) (citing conflicting authorities)). *See also Reid v. Supershuttle Int'l, Inc.*, No. 08 Civ. 4854 (JG), 2010 WL 1049613, at *7 (E.D.N.Y. Mar. 22, 2010) (observing that "[t]he plausibility requirement of *Twombly* and *Iqbal* has not yet been applied to an affirmative defense").

46 *Luvata Buffalo*, 2010 WL 826583, at *8 (quoting *Shechter v. Comptroller of City of New York*, 79 F.3d 265, 270 (2d Cir.1996)); *see also id.* ("long before *Iqbal*" "affirmative defenses which amount to nothing more than mere conclusions of law and are not warranted by any asserted facts have no efficacy").

47 *AET Rail Group, LLC v. Siemens Transp. Sys., Inc.*, No. 08-CV-6442, 2009 WL 5216960, at *4 (W.D.N.Y. Dec. 30, 2009) (alteration in original) (quoting *Twombly*, 550 U.S. at 555).

48 *Id.* (quoting *Twombly*, 550 U.S. at 555).

49 *Id.* (quoting *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007*)). See also Tracy v. NVR, Inc.*, No. 04-CV-6541L, 2009 WL 3153150, at *7 (W.D.N.Y. Sept. 30, 2009) (stating unequivocally that "the *Twombly* plausibility standard applies with equal force to a motion to strike an affirmative defense under Rule 12(f)").

50 531 F. Supp. 2d 620, 622 (S.D.N.Y. 2008); *see also id*. at 623 ("'[A]ffirmative defenses are pleadings, and therefore, are subject to all pleading requirements of the Federal Rules of Civil Procedure.'") (citation omitted). *See also FSP, Inc. v. Societe Generale*, No. 02 Civ. 4786(GBD), 2005 WL 475986, at *8 (S.D.N.Y. Feb. 28, 2005) ("A motion to strike an affirmative defense, pursuant to Fed. R. Civ. P. 12(f), is also governed by the same standard applicable to a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).").

51 *Aspex Eyewear*, 531 F. Supp. 2d at 623.

52 *Id.* (emphasis in original).

53 2009 WL 3153150, at *8; *but see id.* (granting defendant leave to replead).

54 *Tracy*, 2009 WL 3153150, at *7 n.13 (*citing Sun Microsystems, Inc. v. Versata Enters., Inc.*, 630 F. Supp. 2d 395, 404 (D. Del. 2009) (applying *Twombly* standard to strike affirmative defenses and granting leave to defendant to replead); *Greenheck Fan Corp. v. Loren Cook Co.*, No. 08-cv-335-jps, 2008 WL 4443805, at **1-2 (W.D. Wis. Sept. 25, 2008*), report and recommendation adopted by* 2008 WL 4756484 (W.D. Wis. 2008) (same); *Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc'ns, Inc.*, Civ. A. No. 05-CV-0233-WWJ, 2008 WL 4391396, at **1-2 (W.D. Tex. Sept. 22, 2008) (same); *United States v. Quadrini*, No. 2:07-CV-13227, 2007 WL 4303213, at **4-6 (E.D. Mich. Dec. 6, 2007) (same); *Home Mgmt. Solutions, Inc. v. Prescient, Inc.*, No. 07-20608-CIV, 2007 WL 2412834, at *3 (S.D. Fla. Aug. 21, 2007) (same)).

55 *Holdbrook v. SAIA Motor Freight Line, LLC*, No. 09 Civ. 2870 (LTB)(BNB), 2010 WL 865380, at *1 (D. Colo. Mar. 8, 2010).

56 *Id.* at *2. *See also id*. (concluding that while some district courts have extended the pleading requirements of *Twombly* and *Iqbal* to affirmative defenses, "the better-reasoned approach is that taken by other district courts that have declined to do so") (citations omitted).

57 No. H-08-3650, 2010 WL 723633, at *2 (S.D. Tex. Mar. 1, 2010).

58 *Id.* at *2.

59 *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 656 (D. Kan. 2009).

Cleary Gottlieb Wins Dismissal For Citigroup And Others In Securities Act Class Action

Cleary Gottlieb won the dismissal for Citigroup and related defendants of a Securities Act class action involving offerings by 18 mortgage pass-through certificate trusts. U.S. District Judge Leonard Wexler agreed with the defendants that because the named plaintiffs had not purchased securities issued by 16 of the 18 trusts, they lacked standing to sue in relation to those 16 trusts and therefore cannot prosecute claims against them. He thereby joined a growing roster of judges who have dismissed claims against multi-tranche MBS offerings to the extent the named plaintiffs did not buy securities from a challenged tranche. This should have the effect of limiting the scope of these suits. The court postponed addressing the defendants' argument that claims against the two remaining trusts are precluded by robust risk factor disclosures, pending plaintiffs' compliance with his order that they replead those claims with greater particularity, while noting that, based on the original pleading, "[t]he strong nature of the cautionary language contained in the disclosure materials brings this case very close to the dismissal line …."

Cleary Gottlieb Wins Dismissal Of ERISA Class Action For ING

Cleary Gottlieb won the dismissal of an ERISA class action complaint filed in Georgia federal court against certain subsidiaries, officers, directors and employees of ING Groep and its affiliates. Plaintiffs had accused defendants of breaching fiduciary duties owed under ERISA to participants in two pension plans by, among other things, imprudently maintaining ING stock as an investment option under the plans, misrepresenting ING's financial condition and acting with conflicts of interest. The court dismissed the five-count complaint in its entirety, agreeing with defendants that plaintiffs lacked standing to assert claims relating to one of the two pension plans at issue, and had otherwise failed to adequately plead that certain of the defendants were ERISA fiduciaries, or in any event that any of the defendants had failed to prudently and loyally manage the pension plans or their assets.

Cleary Gottlieb Wins Denial Of Motion To Dismiss Declaratory Judgment Action For J. Aron

Cleary Gottlieb won for J. Aron & Company (the commodities trading affiliate of Goldman Sachs), in the SemGroup bankruptcy proceeding in the U.S. Bankruptcy Court for the District of Delaware, the denial of various motions to dismiss the declaratory judgment action J. Aron brought against SemGroup and 60 of its oil suppliers. J. Aron filed suit so that it could defend in a single action against multiple competing claims to a $430 million receivable arising from J. Aron's trading relationship with SemGroup. The suppliers claimed in their dismissal motions that the court lacked subject matter jurisdiction to hear the case, or in any event should abstain in favor of multiple local state courts because SemGroup had confirmed its reorganization plan and had emerged from Chapter 11. The Delaware court – which had previously ruled in favor of J. Aron with respect to certain initial threshold questions of law relating to the novel statutory trust and lien claims asserted by the suppliers – will now continue to preside over the ultimate resolution of this dispute.

Cleary Gottlieb Wins $20,000 Jury Award, Vindicating Fourth And Eighth Amendment Rights Of Prisoner

Cleary Gottlieb prevailed in a three-day jury trial in the U.S. District Court for the Southern District of New York on behalf of *pro bono* client C.B., who had filed a *pro se* claim in 2001 after three prison guards at Green Haven Correctional Facility conducted an invasive strip-frisk for the purpose of harassing and intimidating C.B. and coercing him into becoming a confidential informant. A jury found the conduct of the prison guards so objectionable that, despite the fact that C.B. suffered no lasting physical injuries, it awarded C.B. $20,000 in punitive damages, in addition to $3 in nominal damages.

Cleary Gottlieb Wins Final Award For Agfa-Gevaert Before ICC Arbitration Panel

Cleary Gottlieb successfully defended Agfa-Gevaert and its affiliated companies against a payment and indemnification claim amounting to over €34 million, brought before an ICC arbitration panel by the insolvency receiver of AgfaPhoto GmbH. In 2004, Agfa-Gevaert sold its former consumer imaging division, which became the AgfaPhoto group, to a group of investors. Approximately seven months after the purchase was completed, AgfaPhoto GmbH, the main operating company of the group, became insolvent. In December 2007, AgfaPhoto GmbH's insolvency receiver initiated a series of ICC arbitration proceedings against Agfa-Gevaert in connection with the insolvency. In the first of these cases now decided by the arbitral tribunal, the receiver sought to enforce a claim for the reimbursement of potential costs related to the future demolition of buildings at AgfaPhoto GmbH's production sites in Cologne and Leverkusen, Germany.

In its final award, the arbitral tribunal rejected all of the receiver's claims. The tribunal also ordered the receiver to pay all of Agfa-Gevaert's legal fees and expenses.

This is the third significant arbitration victory won by the firm on behalf of Agfa-Gevaert in recent months. In December 2009, an arbitral tribunal dismissed in its entirety a fraud related damage claim by AgfaPhoto Holding, AgfaPhoto GmbH's parent company. In September 2009, in a dispute over the termination of a trademark license agreement, the same arbitral tribunal essentially rejected a claim by AgfaPhoto Holding.

Cleary Gottlieb Wins Victory For Henkel Italia SpA In Italian Product Safety Litigation

Cleary Gottlieb successfully defended Henkel Italia SpA in two interim proceedings brought separately before the Administrative Tribunal of Lazio, Italy, obtaining a stay of execution of two decisions, issued by the Italian Ministry of Health in November 2009, which banned the sale of two Henkel products (a manual dishwashing detergent, Nelsenino and a liquid WC cleaning agent, Bref) during the administrative proceedings to assess the safety of the products under a European Community directive on general product safety. Henkel Italia is the Italian subsidiary of the Henkel group, which operates on a worldwide scale in the laundry care and household cleaner segments.

The case was commenced in Portugal when the Portuguese Consumer Authority found that the two Henkel products posed a serious risk to consumers because their appearance, shape, color and packaging could potentially lead children to misperceive them as toys. The Portuguese Consumer Authority ordered the withdrawal of the two products from the Portuguese market, and notified its decision to the European Commission, which in turn forwarded the notification to all consumer agencies throughout the European Union.

Agreeing with Cleary Gottlieb's arguments, the court granted Henkel Italia's appeals, and suspended the Ministry's orders. As a consequence of the interim measures granted by the court, Henkel Italia is authorized to market the two products in Italy. Moreover, after the court decisions, the Italian Ministry of Health permanently revoked its temporary ban on the sale of Nelsenino, agreeing that it is not a dangerous product.

Cleary Gottlieb Wins Italian Antitrust Authority Appeal For Italgas

Cleary Gottlieb successfully defended Italgas, Italy's largest natural gas distributor as part of the SNAM Rete Gas/ENI Group, in the appeal brought by the Italian Antitrust Authority (IAA) before the Council of State, Italian Supreme Administrative Court. On March 8, 2010, the Council of State affirmed the ruling delivered by the lower court in 2005 and held that, in proceedings for alleged breaches of unbundling obligations by entities providing services of general economic interest or operating on the market in a monopoly situation, the IAA must guarantee the entities' rights of defense in the same manner and to the same extent as is required by Italian antitrust law in proceedings involving restrictive agreements and abuses of dominant position. In particular, this entails the obligation to extend the duration of the investigation, to issue a statement of objections and to ensure that the parties have the right to be heard in a final hearing before the commissioners of the IAA. Until the recent decision of the Italian Supreme Administrative Court, the IAA's practice did not guarantee such rights in connection with breaches of unbundling obligations. As a result of this recent decision, the IAA must adapt its practice and grant the parties enhanced procedural rights.

Cleary Gottlieb Wins Disability Compensation For Vietnam Veteran

Cleary Gottlieb won disability benefits for a Vietnam veteran following a successful appeal to the Board of Veterans' Appeals. During his tour in Vietnam as a light weapons infantryman, the veteran was exposed repeatedly to loud noises, including a mortar blast inches from his head. Although he sought medical treatment for his injury at the time, neither the treatment nor his injury was documented. Beginning in 1974, the veteran sought disability benefits for hearing loss but his claim was denied because his separation physical included a partial hearing test that did not indicate a hearing disability.

Working with The American Legion and the National Veterans Legal Services Program, Cleary Gottlieb began assisting the veteran in 2008 in an appeal from a 2005 Department of Veterans Affairs decision that again denied benefits for the veteran's hearing loss and tinnitus. Cleary Gottlieb's brief to the Board of Veterans' Appeals cited lay evidence from family members and soldiers who served with the veteran, an expert medical opinion, medical evidence and recent caselaw that supported linking the veteran's hearing disability to service. The Board held that the weight of the evidence supported the veteran's claim for service connection for his hearing loss and tinnitus. Based on his successful appeal, the Department of Veterans Affairs later notified the veteran that he would receive increased VA disability compensation benefits.

Cleary Gottlieb Wins Third Circuit Appeal For A Russian Steelmaker

Cleary Gottlieb successfully represented Evraz Holding, a Russian steelmaking corporation, in a Third Circuit appeal arising from a dispute over ownership and control of Kachkanarsky GOK ("GOK"), the largest vanadium ore processing plant in Russia. The Third Circuit's decision in favor of Evraz and the other defendants rejected the plaintiffs' attempt to bring a lawsuit in the United States concerning events that took place in Russia and have been litigated in the Russian courts.

Evraz was named as one of several defendants in a civil RICO action filed in the Delaware Court of Chancery by parties who alleged that they were former shareholders of GOK and that they had lost their ownership as a consequence of fraud, extortion, bribery and false bankruptcy proceedings in Russia – all of which allegedly took place prior to Evraz's acquisition of GOK. After Evraz and the other defendants removed the case to federal court, plaintiffs refiled their state law claims in the Court of Chancery. The Delaware federal court dismissed the action based on direct estoppel, agreeing with Evraz and the other defendants that the plaintiffs' claims were essentially the same as those asserted in an earlier action that had been dismissed. The Delaware court, however, initially denied defendants' motion to enjoin the plaintiffs from pursuing the same claims in other courts, citing uncertainty over its jurisdiction to grant such an injunction.

On appeal, the Third Circuit affirmed the district court's dismissal of the action based on direct estoppel. It also granted defendants' cross-appeal, holding that the district court did have a sufficient jurisdictional basis to entertain defendants' injunction motion, and remanded the case to the district court for consideration of the injunction motion on its merits.

On remand, the district court found in favor of Evraz and the other defendants, ruling that plaintiffs' refiling in the Court of Chancery following removal had constituted an improper attempt to subvert the removal statute. As a result, the district court issued an injunction permanently barring plaintiffs from pursuing the same claims in any other court in the United States, including the Court of Chancery.

The plaintiffs again appealed to the Third Circuit, which ruled that the district court had both the legal authority to enjoin the plaintiffs under the applicable exception codified in the Anti-Injunction Act and the factual basis to do so, in light of plaintiffs' "abusive tactic that courts have condemned as an attempt to subvert the removal statute."

Cleary Gottlieb Wins Discrimination Suit For HIV Positive Child Denied Admission To Summer Camp

Cleary Gottlieb won a key summary judgment ruling for a ten year old boy and his mother, who brought suit against a summer camp that denied him admission after learning of his HIV status. The case was filed under the Americans with Disabilities Act and the New York Human Rights Laws in federal court in New York.

The camp's principal defense was that, under the ADA, places of public accommodation may refuse admission to a disabled applicant whom they establish poses a "direct threat" to the safety of others. The camp argued that the firm's client posed a direct threat because he could transmit HIV to others when using the camp's swimming pool or toilets.

The court rejected the camp's contention and accepted in full that a place of public accommodation must establish its direct threat defense based on reasonably available objective medical evidence, and not on irrational fears or stereotypes about persons with disabilities. In an important victory for HIV-related rights, the court also rejected the notion that a camp could be excused from making an informed determination simply because it had a short window of time within which to establish this "direct threat" defense. The court ruled that the camp had violated the ADA and the New York Human Rights Laws.

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