

WOMEN TRIAL LAWYERS CAUCUS

SPRING 2010

IN THIS ISSUE...

- 3 Why Lawyers Are Uniquely Suited to Give Back
- 4 Don't Ignore the Dangerous Roadway Defendant
- 7 Emerge America: Changing the Face of Power, and the Heart of Politics
- 9 Post-Twombly and Iqbal: A Little Help Surviving Motions to Dismiss

UPCOMING EVENTS

Growing on the Vine: Maximizing Profitability in Changing Times Seminar

April 9-10
Caesars Palace, Las Vegas, NV

Litigating Medical Negligence and Injured Infant Cases Seminar

April 9-10
Caesars Palace, Las Vegas, NV

Toyota Sudden Acceleration Teleseminar

April 13

Mega College: Integrating "Rules of the Road," Overcoming Juror Bias, "Reptile," and Damages from Case Intake to Trial

April 15-19
FireSky Resort and Spa, Scottsdale, AZ

Message from the Chair

By **Melissa R. Smith, Esq.**

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The New Year is supposed to be an exciting time. We ponder resolutions and set goals for both our personal and professional lives, with great expectations in mind. The AAJ Mid-Year Convention was held with this backdrop of excitement, and the Women's Caucus Brunch proved to be a highlight of the convention.

The Caucus hosted Congresswoman Mazie Hirono, who shared her uniquely American story, beginning at age 8 when she and her family fled Japan with a single suitcase to start a new life in Hawaii.

Hirono came from that challenging background, ultimately became a Georgetown Law graduate, and was elected to Congress in 2006.

Since that time Congresswoman Hirono has been a tireless advocate for the people of Hawaii and for women specifically.

Following Congresswoman Hirono's comments, the Caucus' own Roxanne Conlin addressed the group and received overwhelming support for her candidacy in the Iowa Senate.

Finally, the Caucus concluded a successful convention with a business meeting and planning session for a second bi-annual Women's Summit on the Friday prior to the start of the AAJ Annual Convention in Vancouver. The event will feature both dynamic speakers and networking opportunities for all participants.

I hope to see you all in Vancouver! ■



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Why Lawyers Are Uniquely Suited to Give Back

By Jessica Klarer Pride

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There are many reasons to talk oneself out of doing pro bono and community service work—the most obvious one being lack of time.

Attorneys are typically frenetically busy and pressured to bill, bill, bill—so pro bono work can go by the wayside.

Yet doing stellar legal work goes far

beyond what you do in the office. Not everyone has the finances to retain an attorney, but all are entitled to justice, so attorneys owe it to themselves—and the community—to engage in pro bono legal service.

The American Bar Association’s ethical rules recommend that lawyers provide a minimum of 50 hours of pro bono work per year, and many local organizations recommend the same. In fact, the San Diego County Bar Association recently released the “Guide to Giving Back,” a comprehensive resource for San Diego’s legal community. The guide is part of the organization’s year-long “Lawyers Giving Back” community service campaign—launched to promote pro bono work, volunteerism and community service.

The Pros of Pro Bono

A cornerstone of the legal profession, pro bono is a term derived from Latin meaning “for the public good.” Because lawyers are focused on helping people and serving the public, pro bono work is an indispensable—and immensely fulfilling—career building tool.

A forward-thinking law firm will let its attorneys carve out time for pro bono services—not only is it beneficial for the firm, it offers a positive experience for the employee. Indeed, some firms have made pro bono a top priority by requiring that lawyers devote a fixed number of hours to it; others have even hired full-time pro bono partners.

In addition to the thrill of giving to an important cause or helping someone less fortunate, what are the benefits of taking on pro bono work? It’s no secret that law firm work can sometimes be tedious, requiring hours of research, motion writing and deposition summarizing. Pro bono work provides infinite variety and a refreshing and inspiring break from the day-to-day routine. It connects attorneys with meaningful issues and significant organizations and can provide outstanding training—for both senior partners and up

and coming young associates. Indeed, with pro bono work, attorneys can hone and finesse critical skills—such as client communication, strategizing, negotiating, legal writing and even courtroom work.

Associates may fret that too much pro bono work will cut into billable hours and affect their ascent to partner status. Again, firms who allow their attorneys to make time for pro bono are often very successful and reap the benefits of satisfied, productive staff members.

An example of pro bono work at its best—and the largest pro bono project in the history of American jurisprudence—was Trial Lawyer’s Care (TLC), orchestrated by the American Association for Justice (when it was known as ATLA). More than 1,000 lawyers from across the country participated in TLC, which provided free legal services to the families of the victims of 9/11. This project offers great evidence of how lawyers can effectively pool their efforts and make a significant difference.

Giving Back to the Community

Attorneys have many unique skills that can pave the way for change. From helping homeowners in foreclosure to working in homeless shelters, there are dozens of opportunities to give back. This year, San Diego County Bar Association members participated in multiple service projects, among them serving as coaches and judges for the annual High School Mock Trial Competition and acting as VIP mentors to children reentering the community as juvenile parolees.

Lawyers can also take on their own personal causes. For a little over two years, I have been involved with Big Brothers Big Sisters, and by doing so have made a marked difference in a little girl’s life. When I first met my “little sister” she was just seven and was at a subpar reading level, causing her to fail first grade—now she is one of the top readers in her class. Other projects which have been especially gratifying for me include helping to rebuild homes devastated by Hurricane Katrina with fellow AAJ members, working with Wills for Heroes to draft wills for Police Officers and coaching kids at a local high school for a mock trial.

Whether it’s an individual, a small group of lawyers or a nationwide effort such as Trial Lawyers Care, we as attorneys need to get out there and make a difference—hopefully it’s contagious. ■

Don't Ignore the Dangerous Roadway Defendant

By K. Lindsay Rakers

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When a client calls needing representation for injuries suffered in an automobile accident, most of us immediately think about suing the other driver. But what if there isn't enough insurance coverage given the extensive injuries? What if it was a single car accident? What if the client was to blame? There might

be another defendant you have not considered. Did the roadway itself play a part in the accident? If so, you may have a case against the state agency responsible for designing and maintaining that roadway. The state's Department of Transportation has control over the major highways and some roads and streets. You will want to check ownership of the road in question to determine if the proper defendant is the Department of Transportation or the specific city or county.

There are essentially two types of defective roadway cases—road design and functional maintenance. Road design cases are those in which an interstate is missing a shoulder, the lanes are too narrow or where a curve is too sharp. Defective maintenance cases involve roads that have potholes or debris, malfunctioning signals, missing stop signs, missing guardrails or missing warning signs. Use caution in selecting the type of case you will file as varying state laws can propose huge hurdles.

Sovereign Immunity

The Missouri Department of Transportation (also known as Missouri Highway Transportation Commission) has immunity from liability unless plaintiff can meet the "dangerous condition" exception. To meet this exception, plaintiff must provide evidence that: (1) the property was in a dangerous condition at the time of the injury; (2) the injury directly resulted from the dangerous condition; (3) the dangerous condition created a reasonably foreseeable risk of harm for this type of injury to occur; (4) the public entity had actual or constructive notice of the dangerous condition. RSMo §537.600; *Linton v. MHTC*, 980 S.W.2d 4 (E.D. 1998).

It is possible to overcome immunity in Missouri with diligent discovery. In a recent case we handled against MoDot, a 28 year-old young lady was stopped in traffic on one of Missouri's busiest interstates during rush hour. The exit ramp was so backed up that our client's vehicle was actually stopped on the interstate itself, not the exit ramp. This had been happening for almost two years. She was struck and killed by an out-of-state tractor trailer. I used expert testimony to illustrate how the traffic backup created a dangerous condition that could easily result in tragedy. Luckily, there was an abundance of records that revealed MHTC knew of this backup for almost two years and had been actively trying to correct the problem with measures that simply were not working.

State of the Art Defense

The family of the decedent was ultimately awarded \$1.3 million against MHTC in arbitration. The case provided an additional recovery avenue aside from the typical driver negligence case. But we were not without our battles. In addition to immunity, Missouri provides a state of the art defense for roadways constructed prior to 1977 which reasonably complied with the standards at that time. The way around this ridiculous roadblock, no pun intended, is to not argue road design at all. *Martin v. MHTC*, 981 S.W.2d 577 (W.D. 1998). Facing the state of the art defense in our case, I took a different approach and argued MHTC did not need a different road design but simply failed to perform functional maintenance. In other words, it failed to do the simple things that could have kept the roadway safe. I argued that had MHTC warned motorists, via permanent or temporary signing, of the traffic backup, this accident would not have occurred.

In states with laws similar to Missouri, it is possible to maintain a case for defects unrelated to the road design itself as long as you can show a dangerous condition existed at the time of the injury. Were the traffic signals not providing enough time for traffic to clear the highway? Was a guard-rail not long enough to protect the motorist from off-road danger? Was the road striping not in accordance with the

Continued on page 5

DANGEROUS DEFENDANT *continued*

national traffic manual, The Manual on Uniform Traffic Control Devices for Streets and Highways? The case law in Missouri makes it clear that such cases are not road design cases at all and as such, the state of the art defense does not apply.

As lawyers, one of our responsibilities is to investigate all avenues of recovery for our client. Our roadways are supposed

to provide safe means of travel. If a roadway fails to do just that, it is worth looking into whether a viable defective roadway case exists. It is disappointing when a law protects an entity over the safety and rights of the citizens. You can assume that the defense will be creative in its application of the state of the art defense. This only means you need to be even more creative to carve out an exception for your client. ■

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AAJ Section

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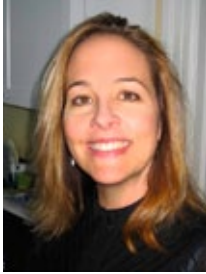
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Emerge America: Changing the Face of Power, and the Heart of Politics

By Andrea Dew Steele

Founder and President of *Emerge America*, San Francisco, California



Eighty-fourth in the world: that's where the United States ranks for women in elected office, behind Mexico, China and Pakistan. In fact, women make up just 17% of the U.S. Congress.

Emerge America is changing that. EmERGE America is the essential step for Democratic women who want to run for public office. It is the only in-depth, seven-month training program that inspires candidates to run and gives them the tools to win. By providing women across America with a top-notch training and a powerful political network, we are getting more Democrats into office and changing the leadership—and politics—of America.

Our program graduates are women who generally come from backgrounds in law, policy, education, and business. We accept women who have demonstrated a commitment to their communities and tend to engage on both the local and national level. We have structured the EmERGE curriculum to help facilitate their future candidacies with full-day training sessions, every Saturday for seven months. The exclusive and time-consuming nature of the EmERGE program guarantees that we are training women who are serious about a future run for office.

EmerGE America has made substantial contributions to women's political leadership across the country in its four short years of existence. What started as a political training program in California has grown into a nine-state, sophisticated training organization with a national presence and continued opportunity for expansion. We currently train women in Arizona, California, Kentucky, Maine, Massachusetts, Nevada, New Mexico, Oregon, and Wisconsin. In these nine states, we have trained 512 women to run for office through our extensive 7-month training and 41% of our graduates have either run for office or have

gained appointments to boards and commissions. We are also proud of our win rate of 60% for all of our candidates across the country. This aggressive number confirms what we already know—if you invest in women, they will take the information and “run” with it.

We are also enormously proud of our proven record of diversity. In this year's EmERGE California class, 60% of the class participants are women of color. Similarly, New Mexico (51%), Nevada (47%) and Massachusetts (48%) are training women of color at comparable levels to California.

Here is a snapshot of some of our elected women and current candidates:

- Charlotte Warren, Mayor of the Town of Hallowell in Maine, served on the city council for six years and currently teaches at Kennebec

Valley Community College (KVCC), working to increase the success of first-generation and low-income students and students with disabilities. As a teacher, she is “very sensitive to the way things are taught or presented,” and refers to the EmERGE approach as

“interactive community education.” She learned so much throughout the training, and “all the information provided was enriched by experienced women.” On the campaign trail, she found herself pulling out her EmERGE binder for tips “at least once a week.”

- Jackie Doherty, re-elected to her fourth term of Lowell's School Committee, graduated from our first EmERGE Massachusetts class in 2008. Although she already held an elected position when she started EmERGE, Jackie said she joined because “I was so frustrated by the negative energy in the political system here in the city, I wasn't feeling a lot of support in my efforts and it was starting to make me feel somewhat isolat-

EmerGE America has made substantial contributions to women's political leadership across the country in its four short years of existence.

EMERGE AMERICA *continued*

ed and worn down.” As she had hoped, Emerge provided Jackie with access to local politicians who similarly prioritized education in their various positions. “Meeting others who shared my political goals gave me the impetus to continue my work,” she said.

- Loretta Naranjo Lopez, 2010 candidate for Bernalillo County Commissioner, District 1, New Mexico - In 2006, Loretta ran a grass-roots campaign for the Bernalillo County Commissioner seat in District 1. Although she lost by a small margin, she has since completed the Emerge New Mexico program and feels confident in her ability to win in 2010. “Running for office is totally different now that I’ve gone through Emerge,” Loretta states, “I have a much

more detailed campaign plan than I did in my previous campaign.” She loves that she now knows how to analyze voter statistics and deliver a strong message. “With my Emerge experience and my organizing background, I’ve learned that running for office is a science, and you need to start with an understanding and carefully follow each step.”

These women are having a tremendous impact in their communities. Research shows that women in office pursue a more progressive, family friendly agenda. The bottom line is that electing more women is good for the country. Have you ever considered running for office? If not, why not? If yes, now is the time! For more information about our work and how to get involved by running for office or supporting our movement, please go to www.emergeamerica.org. ■

The AAJ Women Trial Lawyers Caucus is delighted to announce that it is currently accepting applications for the 2010 Mike Eidson Scholarship.

The **AAJ Women for Justice Education Fund** was established by the Women’s Caucus in 2008 in honor of AAJ Past President Mike Eidson, whose vision and generosity inspired it. The Scholarship is awarded annually to a rising 3L (or rising 4L in a night program) female student who has demonstrated a commitment to a career as a trial lawyer, along with dedication to upholding and defending the principles of the Constitution, and to the concept of a fair trial, the adversary system, and a just result for the injured, the accused, and those whose rights are jeopardized.

Applications for the 2010 Mike Eidson Scholarship are due by May 31, 2010. To download an application, visit: www.justice.org/women.



Post-*Twombly* and *Iqbal*: A Little Help Surviving Motions to Dismiss

By Kristine K. Meredith

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Many fear that *Twombly* and *Iqbal* sound the death knell of Notice Pleading. And indeed, many federal court judges are strictly enforcing the heightened requirements. But others are not. For example, Judge Shadur of the Eastern District of Illinois, upon denying defendant's

motion to dismiss, stated that *Twombly* and *Iqbal* “don’t operate as some kind of universal ‘get out of jail free card’ for defendants.”¹ And Judge Ishii of the Eastern District of California, though dismissing the complaint at issue, granted leave to amend, outlining “hypothetically” the product liability allegations that would be sufficient to pass muster under the new rubric.²

How the courts apply *Twombly* and *Iqbal* is relevant to all litigators, even those who practice in state court. Federal court may be just a removal petition away.

Twombly establishes that federal court complaints will no longer stand if they contain threadbare recitals of a cause of action’s elements, supported by mere conclusory statements.³ Upon finding well-pleaded factual allegations, a court should assume the allegations’ veracity and may then determine whether they plausibly give rise to an entitlement to relief.⁴ If not it may dismiss the case. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”⁵ Determining whether a complaint states a plausible claim is a context-specific exercise, and requires the court to draw on its experience and common sense.⁶

Relying upon Seventh Circuit decisions, Judge Shadur declined to apply the feared heightened standard in an employment discrimination/retaliation case. He quotes *EEOC v. Concentra Health Services, Inc.*:⁷

Most details are more efficiently learned through the flexible discovery process.

(Citation omitted). “Instead of lavishing attention on the complaint until the plaintiff gets it just right, a district court should keep the case moving.” (Citation omitted); see also *Dioguardi*

v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) (describing the attempts to force all facts into the complaint as “**judicial haste which in the long run makes waste**”). Second, a plaintiff might sometimes have a right to relief without knowing every factual detail supporting its right; **requiring the plaintiff to plead those unknown details before discovery would improperly deny** the plaintiff the opportunity to prove its claim. (Citations omitted) (Emphasis added).

Judge Shadur continues his defense of “notice pleading” by quoting from *Tamayo v. Blagojevich*:⁸

Since Bell Atlantic [*Twombly*], we cautiously have **attempted neither to over-read nor to under-read its holding**. We have stated that the Supreme Court in Bell Atlantic “retooled federal pleading standards,” and retired “the oft-quoted Conley formulation.” (Citation omitted). We also have cautioned, however, that Bell Atlantic “must not be overread.” (Citation omitted). Although the opinion contains some language that could be read to suggest otherwise, the Court in Bell Atlantic made clear that it did not, in fact, supplant the basic notice-pleading standard. (Citation omitted). (expressly disclaiming the establishment of any “heightened pleading standard”); see also *Lang v. TCF Nat’l Bank*, 249 Fed. Appx. 464, (7th Cir. 2007) (noting that notice-pleading is still all that is required).

Judge Shadur relied upon Seventh Circuit interpretation of *Twombly* to reject the City of Chicago’s motion to dismiss. According to Judge Shadur, the complaint sufficiently describes defendant’s retaliatory and discriminatory conduct.

And then in the Eastern District of California, Judge Anthony Ishii tossed plaintiff a lifeline. In ruling on a motion to dismiss a product liability complaint in, Judge Ishii followed *Twombly/Iqbal* more strictly; but he also instructed the plaintiff on how to plead the case so as to avoid losing the case at the pleading stage.⁹

Continued on page 11

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POST-TWOMBLY AND IQBAL *continued*

With respect to the consumer expectation test, Judge Ishii stated that plaintiff should describe how the product, wakeboard bindings, fails to meet the minimum safety expectations of an ordinary consumer:

For example, the following **hypothetical allegation** would be sufficient: the Atlas Bindings do not meet consumer expectations because their metal strips will unsafely break loose and then pierce the ankle of its wearer during a typical crash, as happened to Altman.¹⁰ (Emphasis added).

A sufficient factual allegation under the risk/benefit test should explain how the particular design of the bindings caused plaintiff harm. Judge Ishii provides:

For example, the following **hypothetical allegation** would be sufficient: the angle at which the Atlas Bindings and the wakeboard meet is too acute and does not/did not allow for a safe separation during Altman's crash, which caused Altman to suffer a broken ankle.¹¹ (Emphasis added).

Judge Ishii explains that such an allegation identifies the particular aspect of the design that is at issue (an improper joining angle) and how that design caused Altman harm (did not allow for safe separation during the crash).

Turning to the failure to warn claim, Judge Ishii does not offer a hypothetical allegation. But he states:

To state a plausible claim for failure to warn, a complaint should **at least identify which danger was not warned against**, that the danger was substantial, that the danger was not readily recognizable to an ordinary consumer, that the manufacturer knew or should have reasonably known of the danger, and causation.¹² (Emphasis added).

In December 2009 the defendant answered plaintiff's amended complaint that contained the following failure to warn allegation:

Defendants did not warn the user that due to the design of the subject boot the user's foot would not release from the boot as is expected

with other wake boarding bindings. Defendants did not warn consumers that the boot would lock the foot in place while allowing the ankle to move thereby causing severe injury like that suffered by Plaintiff. Defendants did not warn the consumer, like Plaintiff, that the risk of injury to the foot and ankle using the Atlas binding actually increases versus Defendant's other bindings.

As litigators face an increasing number of motions to dismiss, more guidance from the courts about the new pleading standard would be helpful and, even better, legislation returning Rule 8 to the *Conley v. Gibson* standard. But for now, litigators can gather insights from judges such as Shadur and Ishii to effectively plead cases to withstand the judicial scrutiny after *Twombly/Iqbal*. ■

1. See *August Madison v. City of Chicago*, E.D. Illinois, Dkt # 09-3629, August 10, 2009 transcript from hearing on motion to dismiss an employment discrimination claim.
2. *Altman v. Ho Sports Company* 2009 U.S. Dist LEXIS 108971 (E.D. Cal. Nov. 19, 2009).
3. *Bell Atlantic Corp. v. Twombly*, 550 U. S. 544, 555 (2008).
4. *Ashcroft v. Iqbal* 129 S. Ct. at 1949.
5. *Id.*
6. *Bell Atlantic Corp. v. Twombly*, *supra*. 550 U. S. at 556.
7. 496 F.3d 773, 780 (7th Cir. Ill. 2007).
8. 526 F.3d 1074, 1082-1083 (7th Cir. Ill. 2008).
9. *Altman v. HO Sports Co.*, 2009 U.S. Dist LEXIS 108971 *supra*.
10. *Id.* at 23.
11. *Id.* at 24.
12. *Ibid.*
13. See *Altman v. HO Sports Co.*, E.D. Cal. Dkt # 1:09-CV-01000-AWI-SMS Second Amended Complaint filed Dec. 9, 2009.
14. 355 U.S. 41 (1957).

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