



SideBAR

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OPENING STATEMENTS

Chair's Message

Richard J. Pocker

As I prepare to hand over the chair position to my successor, Shelline Bennett, I do so with deep gratitude toward the members of the section's board for their advice and support over the past three years. As volunteers from the section's membership, each of them has sacrificed time from their own busy and impressive practices to write articles, weigh in on legislative proposals forwarded to our section for comment, and to otherwise help me stay in touch with the needs and concerns of our section members.

A special thanks is in order for our talented and diligent *SideBAR* editor, Rob Kohn. Aside from his efforts to insure that each issue is consistently outstanding, his collaboration with the editorial staff at *The Federal Lawyer* magazine yielded the recent edition of that publication dedicated to "Trial Practice". This May 2010 edition featured articles authored by John McCarthy, Rob Kohn, and me, as well as other distinguished practitioners on subjects ranging from the cross-examination of experts and "summary exhibits", to the ongoing concern regarding the effect of the *Iqbal* and *Twombly* decisions. It is an informative and timely read, and would not have been possible without Rob's efforts.

As predicted in earlier issues of *SideBAR*, legislative proposals affecting litigation have made their way to Congress as part of the tsunami of bills engulfing Washington in the wake of 2009 economic crisis and accompanying crisis of confidence in the government. The section's board was called upon to comment on one such proposal, H.R. 4113, which in its original form would have significantly altered federal statutes regarding diversity jurisdiction, the process for determining proper venue, and the removal standards and process. In March, our section communicated some of our concerns to the Administrative Offices of the U.S. Courts, and I worked with Bruce Moyer, FBA government relations counsel, to make sure our commentary was taken into consideration. It was, and the legislation, as modified, promises to be a welcome clarification of venue and removal procedure should it become law.

Once again, thank you for your membership in and support of the work of the Federal Litigation Section. By your attention to trends and changes in our profession you have played no small part in the evolution of the adversary process most suitable for the 21st century. It has been a privilege and an honor to serve as your chair.



Editor's Notes

Robert E. Kohn

This issue of *SideBAR* benefits, as always, from the contributions of you: the federal litigation bar. Kent Barnett writes about the expanding and perhaps unexpected impact of the *Twombly* and *Iqbal* pleading standards. James Carroll and Leslie Kilnapp provide practical trial guidance on dealing with the sensitive issue of the illegal immigration status of a party or witness. We learn from Tina Tran and Lauri Damrell about recent developments in equal pay litigation. And Susan Pitchford advises on a new avenue for obtaining insurance coverage on behalf of defendants facing allegations of patent infringement.

We encourage and need you to write the varied and insightful articles that Federal Litigation Section members enjoy each time this newsletter is published. Thank you.



About the Editor

Robert E. Kohn litigates business and intellectual property disputes in the Los Angeles area. He also argues appeals in federal and state courts at all levels. A former clerk to the Hon. Joel F. Dubina of the Eleventh Circuit, Kohn attended Duke Law School. He is a member of the District of Columbia and California bars. Kohn co-chairs the committee on Federal Rules of Procedure and Trial Practice. He is a partner with Enenstein & Associates in Santa Monica, Calif.

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About the Chair

Richard J. Pocker is the administrative partner for the Nevada office of Boies, Schiller & Flexner LLP. A former assistant U.S. attorney and later U.S. attorney for the District of Nevada, he began his legal career in the U.S. Army Judge Advocate General's Corps. Pocker is a graduate of the University of Virginia Law School and is admitted to practice law in Nevada, California, Arizona, Ohio, and New York.

BRIEFING THE CAUSE

Is Patent Infringement an “Advertising Injury” for Insurance Coverage Purposes? The Ninth Circuit Says “Maybe”

Susan D. Pitchford

In a surprising deviation from years of jurisprudence, the Ninth Circuit recently ruled that an insurance company was liable for the defense of a patent infringement lawsuit as an “advertising injury.”

In *Hyundai Motor America v. Nat'l Union Fire Ins. Co.*, 600 F.3d 1092 (9th Cir. 2010), the plaintiff was sued for infringement of patents that allowed customers shopping for automobiles and parts to use computer imagery and text selections to customize their orders on Hyundai's website. Hyundai sought a defense from its liability insurers under the “advertising injury” provision in its policy. When the insurers refused to defend, Hyundai sued in the Central District of California based on diversity to recover its defense costs. The district court granted defendants' motion for summary judgment, ruling that the patent infringement was not an “advertising injury” under Hyundai's policy.

Applying California law in the diversity case, the Ninth Circuit cited state court decisions recognizing insurance policies as contracts between the insurer and the insured, subject to normal legal interpretation of the contract provisions. Under California law, the duty of an insurer to defend for an “advertising injury” required three elements: (1) the insured was engaged in “advertising” during the policy period when the alleged injury occurred; (2) the plaintiff in the underlying suit created a potential for liability under one of the covered offenses; and (3) a causal connection between the alleged injury and the advertising. *Hameid v. Nat'l Fire Ins. of Hartford*, 71 P.3d 761, 764-65 (Cal. 2003).

The Ninth Circuit analyzed the *Hyundai* case using this framework. Hyundai was engaged in “advertising” during the policy because its website that employed the patented technology was a widespread promotional activity directed to the public at large, even if the technology was individually used by consumers. The infringement by Hyundai constituted a “misappropriation of advertising ideas,” an offense listed in the “advertising injury” portion of its policy. Crucially, the plaintiff in the underlying patent infringement case had alleged a “violation of a method patent involving advertising ideas,” and the technology involved was tied to Hyundai's overall marketing strategy.

For the “causal connection” element to be satisfied Hyundai had to “link the advertisement and the alleged advertising injury.” 600 F.3d at 1102. The Ninth Circuit distinguished prior decisions where the insureds had attempted to claim that patent infringement was an “advertising injury” because their advertising had exposed them to the infringement litigation. See, e.g., *Iolab v. Seaboard Sur. Co.*, 15 F.3d 1500, 1506 (9th Cir. 1994); *Simply Fresh Fruit Inc. v. Continental Ins. Co.*, 94 F.3d 1219, 1222-23 (9th Cir. 1996). For coverage to exist, the advertising had to cause the injury:

When the patent infringement occurs independent of the actual advertisement of the underlying product, because the patent concerns the underlying product (either the

product itself of the method of creating the product), then the causal connection typically is not established. When the patent infringement occurs in the course of the advertising, however, the causal connection is established.

Hyundai, 600 F.3d at 1103 (footnote omitted). Since the use of the patented technology by Hyundai in its website—a form of advertising—itself violated the patent, Hyundai satisfied the required causal connection between its advertising and the claimed injury. The Ninth Circuit reversed and remanded the insurers' summary judgment ruling.

The somewhat unusual fact pattern in the *Hyundai* case led the Ninth Circuit to stray from well established case law in this area. For years appellate courts had been virtually unanimous in ruling that patent infringement was not an “advertising injury” under general liability policies. In *U.S. Test Inc. v. N D E Environmental Corp.*, 196 F.3d 1376, 1381 (Fed. Cir. 1999), the Federal Circuit—the primary “patent” appellate court, applying Louisiana law in a diversity case—held that the omission of patent infringement from the of a policy that defined “advertising injury” as “infringement of copyright, title or slogan” “reflect[ed] the parties' clear intent that allegations of that offense are not covered by the policy.” (Footnote omitted.) The court also rejected U.S. Test's attempts to bring patent infringement under the “infringement of title” or the “disparagement of goods” language in the policy. *Id.*, 196 F.3d at 1381-82.

In *United Nat'l Ins. Co. v. SST Fitness Corp.*, 182 F.3d 449 (6th Cir. 1999), the underlying claim alleged that SST “advertises, markets and sells” products that infringed patents. SST argued that the complaint implicated the “advertising injury” portion of its liability policy that, according to SST, was ambiguous and should thus be construed against the insurance company. The Sixth Circuit, sitting in diversity, rejected this position, relying on an Ohio Court of Appeals case holding that “in order for the insurer to be required to defend a patent infringement suit, the injury to the patent holder has to occur as the result of the alleged infringer's advertising.” *Id.*, 182 F.3d at 451, quoting from *Synergystex Int'l Inc. v. Mut. Ins. Co.*, 1994 Ohio App. LEXIS 3354, 1994 WL 95626 (Ohio Ct. App. July 27, 1994). The SST court also cited a Ninth Circuit case holding that for patent infringement to be considered an “advertising injury” “the *advertising activities* must *cause* the injury – not merely expose it.” SST, 182 F.3d at 451, quoting from *Simply Fresh Fruit*, 94 F.3d at 1223 (emphasis in original).

In *Simply Fresh Fruit*, the insureds alleged that the patent infringement claims against them were covered as “advertising injur[ies]” because their uses of the patented devices occurred in connection with the advertising and promotion of fruit products. This position had already been rejected by the Ninth Circuit in several cases, including *Iolab Corp. v. Seaboard Surety Co.*, 15 F.3d 1500, 1505 (9th Cir. 1994). The insureds' claim that they were covered because their product promotion exposed them to patent infringement was rejected because the advertising did not cause the claimed injury.

Finally, in *Homedics Inc. v. Valley Forge Finance Co.*, 315 F.3d 1135 (9th Cir. 2003), the court was faced with a different patent

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The Twombly/Iqbal Revolution's Effect on Affirmative Defenses

By Kent Barnett

In *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*, the Supreme Court of the United States established that, in all cases, “[f]actual allegations must be enough to raise a right to relief above the speculative level.”¹ After these decisions, defendants or counter-defendants began filing numerous motions to dismiss, arguing that plaintiffs or counterplaintiffs had not provided sufficient factual allegations to support their claims or counterclaims.² But showing that turnabout is fair play, district courts—in increasing numbers and within the Northern District of Texas—have also begun applying these same standards to defendants’ affirmative defenses. Defendants should now consider whether they have pled enough facts to render their affirmative defenses plausible and sufficiently specific. And, in turn, plaintiffs should consider whether filing a motion to dismiss or strike affirmative defenses would help narrow the number of defenses to combat in discovery and at trial.

Federal Rule of Civil Procedure 8(a)(2) requires a “short and plain statement of [a] claim showing that the pleader is entitled to relief.” Prior to *Twombly* and *Iqbal*, when a defendant moved under Rule 12(b)(6) for failure to state a claim, the courts—following *Conley v. Gibson*—typically refused to dismiss based on the sufficiency of a party’s factual pleading. *Conley* stated “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.”³ Nevertheless, numerous courts and commentators determined that applying *Conley*’s standard liberally would permit a plaintiff to avoid Rule 8(a)(2)’s requirements.⁴

In *Twombly*, an antitrust case, the Supreme Court clarified that *Conley*’s language should not be taken literally. Instead, the Court held that pleading must provide factual allegations that “raise a right to relief above the speculative level ... on the assumption that all the allegations in the complaint are true (even if doubtful).”⁵ The Court stated that *Conley*’s “no set of facts” language applied only *after* the pleading party adequately set forth a claim; the pleading party is entitled to support that adequately pleaded claim with “any set of facts consistent with the allegations in the complaint.”⁶ The Court’s decision in *Iqbal* clarified that *Twombly*’s standard applied to “all civil actions,” not merely antitrust claims.⁷ And *Iqbal* reaffirmed that “only a complaint that states a plausible claim for relief survives a motion to dismiss.”⁸

Presaging *Twombly* and *Iqbal*, at least two courts of appeals had ruled that affirmative defenses are subject to the same pleading requirements as a complaint and required defendants to plead affirmative defenses with sufficient factual allegations.⁹ In *Woodfield v. Bowman*, the Fifth Circuit noted that “in some cases, merely pleading the name of the affirmative defense ... may be sufficient. [Yet,] ... baldly ‘naming’ the broad affirmative defenses of ‘accord and satisfaction and ‘waiver and/or release’ falls well short of the minimum particulars needed to identify the affirmative defense in question.”¹⁰ Similarly, the Seventh Circuit has held that “defenses must set forth a ‘short and plain statement’ ... of the defense.”¹¹

Following the Fifth Circuit’s lead, the Northern District of Texas has struck affirmative defenses that provide “no factual allegations

at all” and do not provide “the genesis of these defenses from [the] answer as a whole.”¹² Indeed, U.S. District Judge Joe Fish not only invoked *Woodfield* when dismissing affirmative defenses for lack of specificity, but he also relied upon *Twombly* in doing so, even though *Twombly* and *Iqbal* concerned plaintiffs asserting claims.¹³ His application of *Twombly* to affirmative defenses makes sense because defendants—like plaintiffs when asserting claims—bear the burden of proof and thus should provide plaintiffs fair notice of the defenses. Common casualties of the motion to strike include laches, unclean hands, accord and satisfaction, ratification, and preclusion.

Consistent with the Northern District of Texas, other federal courts have begun applying these pleading standards to affirmative defenses. Indeed, the District of Minnesota recently noted this “developing trend” among district courts to require adequate factual bases for affirmative defenses, “where the basis is not apparent by the defense’s bare assertion.”¹⁴ The Western District of Texas, the Eastern District of Texas, the Southern District of New York, the Western District of New York, the District of Delaware, the Northern District of Ohio, and the Southern District of Florida are all key courts that have required factual bases for affirmative defenses.¹⁵

Nevertheless, some courts have held that affirmative defenses do not require additional factual pleading. For instance, the Eastern District of Michigan held that, while Rule 8(a) requires a “short plain statement” for claims and Rule 8(b) requires “short and plain terms” for general defenses, Rule 8(c) has no similar requirement for affirmative defenses.¹⁶ Indeed, Form 20 provides an exemplar of an affirmative defense that would not appear to satisfy the *Twombly* standard: “The complaint fails to state a claim against defendant upon which relief can be granted.”¹⁷

Yet, given the “developing trend” (already well established in the Fifth Circuit) for amplified pleading of affirmative defenses, plaintiffs should consider whether moving to strike or dismiss affirmative defenses is beneficial to the overall litigation strategy. Having such defenses dismissed or at least more clearly alleged can help to narrow the focus of discovery and the issues in dispute, saving the parties financial and temporal expense. Just as plaintiffs now have a duty to allege sufficient facts to put defendants on notice of claims, defendants should likewise be required to demonstrate that its affirmative defenses are not speculative or simply boilerplate filler.¹⁸

Plaintiffs have long bemoaned what they see as a heightened-pleading standard created by *Twombly* and *Iqbal*. Indeed, the Senate has considered legislation that would largely overrule these decisions.¹⁹ But *Twombly* and *Iqbal*’s amplified pleading standard may have helped plaintiffs narrow the issues and require defendants to consider their defenses more seriously earlier in the litigation process. Ultimately, *Twombly* and *Iqbal*—if applied to all parties—may be the double-edged sword that trims the issues in litigation.

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Endnotes

¹550 U.S. 544, 555, 570 (2007); 129 S. Ct. 1937, 1953 (2009).

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²Each decision has been cited thousands of times despite the fact that *Twombly* was decided in May 2007 and *Iqbal* was decided in May 2009.

³355 U.S. 41, 45–46 (1957).

⁴See *Car Carriers Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (“Conley has never been interpreted literally” and, “[i]n practice, a complaint ... must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory.”); *Ascon Props. Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989) (tension between Conley’s “no set of facts” language and its acknowledgment that a plaintiff must provide the “grounds” on which his claim rests); *O’Brien v. Di Grazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976) (“[W]hen a plaintiff ... supplies facts to support his claim, we do not think that Conley imposes a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim of unconstitutional ... action into a substantial one.”); *McGregor v. Indus. Excess Landfill Inc.*, 856 F.2d 39, 42–43 (6th Cir. 1988) (quoting O’Brien’s analysis); *Hazard, From Whom No Secrets Are Hid*, 76 Tex. L. Rev. 1665, 1685 (1998) (describing Conley as having “turned Rule 8 on its head”); Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 463–65 (1986) (noting tension between Conley and subsequent understandings of Rule 8).

⁵550 U.S. at 555.

⁶*Id.* at 563.

⁷*Iqbal*, 129 S. Ct. at 1953.

⁸*Id.* at 1950.

⁹*Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999); *Heller Fin. Inc. v. Midwhay Powder Co. Inc.*, 883 F.2d 1286, 1294 (7th Cir. 1989).

¹⁰*Woodfield*, 193 F.3d at 362; see also *Rogers v. McDorman*, 521 F.3d 381 (5th Cir. 2008).

¹¹*Heller Fin. Inc.*, 883 F.2d at 1294.

¹²*Mumphrey v. Credit Solutions of Am. Inc.*, No. 3:09-cv-1208, 2010 U.S. Dist. LEXIS 16200, at *3–4 (N.D. Tex. Feb. 24, 2010) (Lynn, J.); *T-Mobile USA Inc. v. Wireless Exclusive USA, LLC*, No. 3:08-cv-0340,

2008 U.S. Dist. LEXIS, at *5–9 (N.D. Tex. July 1, 2008) (Fish, J.).

¹³*T-Mobile USA Inc.*, 2008 U.S. Dist. LEXIS, at *5.

¹⁴*EEOC v. Hibbing Taconite Co.*, No. 09-0729, 2009 U.S. Dist. LEXIS 124991, at *18–19 (D. Minn. Dec. 7, 2009).

¹⁵*Id.* at *19 (citing cases); *Tracy v. NVR Inc.*, No. 04-cv-6541L, 2009 U.S. Dist. LEXIS 90778, at *29 n.13 (W.D.N.Y. Sept. 30, 2009) (citing cases), *rev’d in part on other grounds by*, 667 F. Supp. 2d 244 (W.D.N.Y. 2009).

¹⁶*First Nat. Ins. Co. of Am. v. Camps Servs., Ltd.*, No. 08-cv-12805, 2009 U.S. Dist. LEXIS 149, at *4–5 (E.D. Mich. Jan. 5, 2009); see also *Holdbrook v. Saia Motor Freight Line, LLC*, No. 09-cv-02870, 2010 U.S. Dist. LEXIS 29377 (D. Colo. Mar. 8, 2010), *Romantine v. CH2M Hill Eng’rs Inc.*, No. 09-973, 2009 U.S. Dist. LEXIS 98699 (W.D. Pa. Oct. 23, 2009); *Am. Res. Ins. Co. v. Evoleno Co., LLC*, No. 07-0035, 2007 U.S. Dist. LEXIS 55181 at *5 n.7 (S.D. Ala. July 30, 2007). *But see Shinev v. Wszola*, No. 08-14256, 2009 U.S. Dist. LEXIS 33226, at *11 (E.D. Mich. Apr. 21, 2009) (referring to prior decisions in the Eastern District of Michigan that require more than conclusory allegations).

¹⁷Fed. R. Civ. P. App. Form 20; see also *N.H. Ins. Co. v. Marine-Max of Ohio Inc.*, 408 F. Supp. 2d 526, 529–30 (N.D. Ohio 2006).

¹⁸*HCRI TRS Acquirer, LLC v. Iwer*, No. , 2010 U.S. Dist. LEXIS 41552, at *9–10 (N.D. Ohio Apr. 28, 2010) (striking certain affirmative defenses, rejecting view that language of Rule 8 indicates that conclusory affirmative defenses are permissible, and stating that “the holdings of *Twombly* and *Iqbal* were designed to eliminate the potential high costs of discovery associated with meritless claims. Boilerplate affirmative defenses that provide little or no factual support can have the same detrimental effect on the cost of litigation as poorly worded complaints.”) (internal citations omitted).

¹⁹Sen. Arlen Specter of Pennsylvania proposed the “Notice Pleading Restoration Act of 2009” in the First Session of the 111th Congress. Interestingly, however, that act would only apply to a “complaint.” Therefore, it may not alter *Twombly* and *Iqbal*’s effect on a defendant’s affirmative defenses.

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infringement issue. Nikken Inc. sued Homedics for infringement of its design patents on magnetic devices used in alternative health care. The Patent Act was amended in 1994 to add “offers to sell” to the acts constituting infringement, 35 U.S.C. § 271(a), and Nikken’s complaint appeared to allege that Homedics infringed Nikken’s patents by offering to sell goods through advertising. The Ninth Circuit recognized that “With the addition of ‘offers to sell’ to the patent statute, it is no longer clear that advertising can never lead to a direct patent infringement claim.” 315 F.3d at 1139 (citations omitted). This created a more complex issue when Homedics sought infringement coverage under the “advertising injury” section of its policy.

The Ninth Circuit ruled, however, that Nikken could not have reasonably believed that its patent infringement constituted “misappropriation of advertising ideas or style of doing business” (part of the “advertising injury” section of the insurance policy). *Id.* at 1140. The court also ruled that the infringement did not constitute a “dis-

paragement” of Nikken’s goods sufficient to bring the tort under the “personal injury” section of Nikken’s policy. *Id.* at 1142.

The *Hyundai* case is especially significant since many businesses are likely to use the type of “high tech” patent that was infringed. Practitioners should recognize that certain types of patent infringement may come under the “advertising injury” section of a business’ general liability policy thereby requiring coverage. The Ninth Circuit has breathed new life into what most intellectual property lawyers considered a dead issue for well over a decade.

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FEDERALLY SPEAKING

Illegal Alien Status: Admissible or Not?

By James E. Carroll and Leslie A. Kilnapp

Immigration is certainly a hot topic that pervades today's news headlines. For a litigator dealing with a plaintiff, defendant, or even a witness that he or she discovers is an illegal alien, the question remains the same: is his or her immigration status admissible as evidence at trial? As it is so often with legal issues, the answer is: well, it depends.

There are at least two ways in which a party's or witness's illegal alien status may be admissible: (1) as evidence relevant to a plaintiff's claims for future wages, or (2) as evidence probative of a witness's credibility. Different courts in different jurisdictions have arrived at opposite conclusions regarding the admissibility of immigration status. Regardless of the outcome, almost all judges base the reasoning behind their decision on the Rule 403 balancing test of the probative nature of the evidence versus the potential prejudice to the party it is being offered against.

Evidence of Immigration Status Offered to Rebut Claims for Lost or Future Wages

Consider the case of a plaintiff who claims that he was injured on the job due to the defendant's alleged negligence. He is no doubt seeking future earnings as part of his damages. Consider further that through the discovery process the defendant learns that the plaintiff is an illegal alien. As trial draws near, it is likely that both parties have retained expert economists to opine on the amount of the plaintiff's loss of reasonably expected income. Plaintiff's expert has based his calculations on what the plaintiff would have earned (but for his injury) had he continued working in the United States. However, defendant's expert has based his calculations on two scenarios; what the plaintiff would have earned both in the United States, and what he would have earned if he had been deported to his native country. Plaintiff will almost certainly object to this evidence as overly prejudicial and at first glance it would seem that he is correct. However, given a set of similar facts, some courts have ruled that the plaintiff's immigration status is admissible and some have held that it is simply too prejudicial.

The courts of New York, including the Court of Appeals (New York's highest court), have addressed the issue of immigration status admissibility in several cases. In the recent case of *Balbuena v. IDR Realty LLC*, 812 N.Y.S.2d 416 (N.Y. 2006), the court held that the jury may consider the immigration status of an illegal alien as one factor in its determination of damages. The court stated, "a jury's analysis of a future wage claim proffered by an undocumented alien is similar to a claim asserted by any other injured person in that the determination must be based on all of the relevant facts and circumstances presented in the case." *Balbuena*, 812 N.Y.S.2d at **12. Similarly, in *Majlinger v. Cassino Contracting Corp.*, 802 N.Y.S.2d 56 (N.Y. App. Div. 2005), the court held that a plaintiff's immigration status is relevant to a determination of damages for lost wages. The court stated in pertinent part:

The jury may take the plaintiff's status into account, along with the myriad of other factors relevant to a calculation of lost earnings, in determining, as a practical matter, whether the plaintiff would have continued working in the United States

throughout the relevant period, or whether his or her status would have resulted in, e.g., deportation or voluntary departure from the United States. *Majlinger*, 802 N.Y.S.2d at 68-69.

Another argument is that a plaintiff who makes a claim for lost wages is voluntarily putting his immigration status at issue. In *Barahona v. Tr. of Columbia Univ.*, 816 N.Y.S.2d 851 (N.Y. Sup. Ct. 2006), the court held that "defendants are clearly entitled to present evidence to a jury concerning the amount of plaintiff's future lost earnings. In calculating the amount of future lost earnings, a jury may consider the likelihood that plaintiff will remain in this country." *Barahona*, 816 N.Y.S.2d at 853. Moreover, the court also noted that, "plaintiff's characterization of the immigration related documents as personal information that could be prejudicial is without merit." *Id.*

Similarly, the New Hampshire Supreme Court has held that evidence of a plaintiff's illegal status is more probative than prejudicial when the plaintiff is making a claim for damages based on lost wages. In *Rosa v. Partners in Progress Inc.*, 868 A.2d 994 (N.H. 2005), the plaintiff was a Brazilian citizen who was injured on the job and filed suit against the defendants for lost wages. The defendants sought to introduce his immigration status as relative to his damage claims, which was a question of first impression in New Hampshire. *Rosa*, 868 A.2d at 1002. The court held that the plaintiff's illegal status was relevant to the issue of his lost earnings. "Though evidence of his status may well be prejudicial, such evidence... is essential should an illegal alien wish to pursue a claim for lost earning capacity measured at United States wage levels." *Id.*

Of course, not all courts are in agreement with those in New York and New Hampshire. The Appeals Court of Washington has held that illegal immigration status is admissible only in very limited circumstances. In *Salas v. Hi-Tech Executors*, 177 P.3d 769, 774 (Wash. App. 2008), the court concluded that "evidence of a party's illegal immigration should generally be allowed only when the defendant is prepared to show relevant evidence that the plaintiff, because of that status, is unlikely to remain in this country throughout the period of claimed lost future income." In other words, plaintiff's deportation must be imminent. Going even further, the Supreme Court of Texas decided in a recent case that, "even assuming the immigration evidence ha[s] some relevance, its prejudicial potential substantially outweigh[s] any probative value. Even in instances where immigration status may have limited probative value as to credibility, courts have held that such evidence is properly excluded for undue prejudice under Rule 403." *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 244 (Tex. 2010).

Evidence of Immigration Status Offered to Impeach Credibility

Most state courts adhere to some form of Fed. R. Evid. 608(b), which "authorizes the use of specific instances of conduct of a witness for the purpose of attacking the witness's character for truthfulness." *United States v. Almeida-Perez*, 549 F.3d 1162, 1174 (8th Cir. 2008). But is the fact that a witness has entered the country illegally in and of itself a lie? Not necessarily, and it's unlikely that a court would allow such evidence in standing on its own.

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APPROACHING THE BENCH

Sweeping Changes in Equal Pay Law: A Perfect Storm Likely to Result in a Flood of Equal Pay Claims

By Tina Tran and Lauri Damrell

On May 17, 2010, a federal jury awarded \$250 million in punitive damages to a class of nearly 5,600 female employees of Novartis Pharmaceuticals Corporation, making it the largest-ever jury verdict in an employment discrimination case. A few weeks earlier, a closely-divided Ninth Circuit *en banc* panel affirmed certification of a class of 500,000 women in *Dukes v. Wal-Mart* — the largest sex discrimination class action in U.S. history. The timing could not be more striking. President Obama made eliminating pay bias a theme of his campaign and his presidency, starting with the passage of the Lilly Ledbetter Fair Pay Act (the Ledbetter Act) in January 2009. Yet the Ledbetter Act was only the first step of the vigorous effort to close the gender wage gap. On March 11, 2010, the Senate Committee on Health, Education, Labor and Pensions (HELP) held a hearing to reignite the push for new equal pay legislation that they hope to pass this Congress. If employers have not yet taken notice, they should. The recent developments in equal pay class action litigation, coupled with new legislation on the horizon, are brewing into a perfect storm which will likely result in a flood of equal pay claims.

Historic \$250 Million Punitive Damages Award in Velez v. Novartis Pharmaceuticals Corporation

For the last 10 years, Novartis ranked as a Top 100 company in Working Mother Magazine. Yet this had little value to the jury who found that Novartis violated Title VII of the Civil Rights Act of 1964 (Title VII) by engaging in three patterns or practices of intentional discrimination, including: (1) paying women less than men; (2) failing to promote women to manager positions as often as men; and (3) treating pregnant women unfavorably in the terms and conditions of their employment. *Velez v. Novartis Pharmaceuticals Corp.*, No. 04 Civ. 09194 (GEL) (S.D.N.Y. filed Nov. 19, 2004).

Plaintiffs' theme throughout the trial was that Novartis "tolerated a culture of sexism, a boy's club atmosphere." They pointed to statistical evidence and anecdotal testimony, including some of the company's own managers that suggested women were negatively affected by an overly-subjective evaluation and management selection system. They argued this led to lower performance reviews and more negative assessments of their management potential. Plaintiffs introduced statistical evidence to show that, among other things: (1) women were paid approximately \$105 per month less than similarly-situated men, despite starting with the same pay; (2) men were 4.9 times more likely than women to be promoted from sales employee to first-line manager; (3) 15.2% of eligible males and 9.1% of eligible women were selected for the Management Development Program (a prerequisite for promotion); and (4) women were overrepresented at lower-level positions, but underrepresented at successively higher levels.

Novartis characterized the women's testimony as anecdotal and insufficient evidence of a pattern or practice of gender

discrimination. Novartis further attempted to discredit the underlying logic of plaintiffs' statistical evidence. For instance, as to promotions, Novartis argued that many factors impact whether an employee is promoted, not all of which are under Novartis's control (e.g., a woman may be "not interested or available" because the higher-level job is more demanding and may be "disruptive of her home life.") But the jury was ultimately unconvinced, leading to a devastating result for Novartis. While the \$250 million punitive damages award captured the media's attention, Novartis faced liability for a total of up to \$1 billion, including potential class-wide claims for front and back pay and compensatory damages. Two months after the groundbreaking verdict, the parties ultimately settled the case for \$175 million. In addition to the cash payment, the parties agreed to specific and extensive programmatic relief that effectively requires Novartis to overhaul its human resources policies and practices. The detailed plan of action outlined in the settlement agreement should be instructive to employers seeking to improve their own practices and mitigate potential future liability.

The Ninth Circuit Paves the Way for a 500,000+ Woman Class in Dukes v. Wal-Mart

In *Dukes*, plaintiffs sued under Title VII on behalf of roughly 1.5 million women, including both salaried and hourly employees in various positions who are or were employed at one or more of Wal-Mart's 3,400 stores across the country. They allege that Wal-Mart's centralized structure facilitates gender discrimination throughout Wal-Mart stores in a way that impacts all women who work or have worked at Wal-Mart. The district court found that adjudicating the case as a class action (rather than through individual suits) is appropriate because, as in *Velez*, plaintiffs presented: (1) facts reflecting a common practice of decentralized, subjective decision-making; (2) expert opinions suggesting a culture of gender stereotyping; (3) statistical evidence of universal pay disparities attributable to gender discrimination; and (4) anecdotal evidence from putative class members of management's discriminatory attitudes. Despite Wal-Mart's vigorous challenge to such a massive class, the district court held that the employees' equal pay claims could be manageable on a class-wide basis because individuals who were paid less for comparable work could be identified by objective criteria through the use of computer software and would not require an individualized inquiry.

Noting that "mere size does not render a case unmanageable," a slim 6-judge majority of the 11-member Ninth Circuit *en banc* panel affirmed certification. *Dukes v. Wal-Mart*, Nos. 04-16688, 04-16720, 2010 WL 1644259 (9th Cir. April 26, 2010). While the panel limited the class to current employees' claims for injunctive relief, declaratory relief, and back pay, the class is still about 500,000 women strong. Further, it remanded to the district court to determine whether to certify an additional class or classes involving punitive damages or claims of former employees.

New Equal Pay Legislation Magnifies Impact of Wal-Mart and Novartis Cases

The Wal-Mart and Novartis cases foreshadow the types of class actions that are likely to appear more frequently, particularly given

the Ledbetter Act and pending legislation. The Ledbetter Act paved the way for employees to sue based on alleged discriminatory decisions, practices or events that may have occurred decades ago. Specifically, it: (1) reset the statute of limitations for filing a wage claim each time an employee receives a paycheck, benefits, or "other compensation," allowing employees to bring wage claims years after the alleged discrimination initially occurred; and (2) expanded the definition of an unlawful employment practice to not only include discreet "decisions" regarding compensation, but to include any "other practice" that affects an employee's compensation. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2. These changes create greater burdens for employers to defend against or mitigate liability.

Compounding the risk for employers, Congress is now pushing two bills that would modify the Equal Pay Act (EPA), including S. 182, the Paycheck Fairness Act (PFA) and S. 904, the Fair Pay Act of 2009 (FPA), both of which the Senate HELP Committee discussed at its hearing on March 11, 2010.

The PFA would materially alter the EPA by: (1) limiting the affirmative defenses currently available to employers; (2) enhancing employees' ability to seek uncapped compensatory and punitive damages; and (3) making it easier to pursue class actions for equal pay claims. Changes to the affirmative defenses are especially noteworthy. Under the current EPA, employers can defeat a pay discrimination claim by proving the pay decision was based on "any factor other than sex." The pending legislation would shift the burden to employers to prove that the factor other than sex: (1) is not based upon or derived from a sex-based differential in compensation; (2) is job-related with respect to the position in question; and (3) is consistent with business necessity. Furthermore, the new law would allow employees to rebut the defense by showing that the employer would have been able, but refused to, adopt an alternative practice that would serve the same purpose without producing the same result. The new law would create huge obstacles for employers in establishing a "factor other than sex" defense.

The proposed legislation would create even greater risk for employers in the class action context, as it would change the EPA to mirror Title VII and allow for "opt-out" class actions. In other words, class members would be included in the class unless they specifically excluded themselves. The current EPA allows for collective actions only where class members affirmatively opt in through written consent. This would greatly increase the number of

employees participating in equal pay class actions and would likely embolden plaintiffs' attorneys to file more cases.

The FPA would go further than the PFA by requiring employers to provide equal pay for men and women not only in the same jobs, but also "comparable" jobs – i.e., those that "may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions." This change in the degree of similarity required by courts would make it dramatically easier for women to sue their employers for gender pay discrimination and could potentially make class sizes even larger.

A Perfect Storm Likely to Impact Employers Dramatically

The confluence of the recent litigation and legislation efforts will almost certainly lead to a flurry of lawsuits which, in some cases, may be based on decades-old discriminatory compensation decisions. Even innocent employers are vulnerable, since many of those faced with gender discrimination suits may feel pressured to settle after weighing the possibility of a massive certified class and excessive, uncapped damage awards against their slimmer chance of success under the new statutory framework. In anticipation of the storm ahead, employers should carefully assess their compensation policies and current pay decisions and take reasonable steps to identify any areas of potential disparity.

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However, if a witness has put his or her own credibility at issue in the case, the odds are decidedly more favorable. For example, in criminal cases credibility plays a more prominent role than in civil cases. In *United States v. Cardales*, 168 F.3d 548 (1st Cir. 1999), the defendant, who was prosecuted for aiding and abetting in the distribution of marijuana, filed a motion *in limine* to exclude evidence of his unlawful entry and subsequent deportation from Puerto Rico, which the trial judge denied. On appeal, the First Circuit held that the defendant's immigration status "was relevant to show [his] character for truthfulness, and was therefore admissible to impeach [him] on cross-examination." *Cardales*, 168 F.3d at 557. Similarly, in *United States v. Cambindo Valencia*, 609 F.2d 603 (2d Cir. 1979), in which the defendant was alleged to have participated in a conspiracy to distribute cocaine, counsel was allowed to cross-examine the defendant on whether he had a green card, which he did not. The judge instructed the jury that the questions "were to bear only on the credibility of the witness..." *Cambindo Valencia*, 609 F.2d at 634. The Second Circuit held that this instruction was proper. *Id.* Similarly, in *United States v. Almeida-Perez*, 549 F.3d 1162 (8th Cir. 2008), a recent case that relied on both *Cardales* and *Cambindo-Valencia*, the Court held that the witnesses were properly questioned on their illegal entry into the United States. However, the Court also cautioned that:

We must say that the use of such evidence is fraught with the danger of prejudice to a defendant by introducing the possibility

of invidious discrimination on the basis of alienage. Moreover, the relevance of an immigration violation to character for truthfulness is at the least debatable and would depend on the facts of the particular violation since many immigration violations do not involve a false statement. *Id.* at 1174.

Immigration is indeed a sensitive topic. Before seeking to introduce a party or witness's illegal alien status, attorneys should be mindful that such evidence is considered highly prejudicial and a compelling reason for its introduction will be needed in order to overcome this hurdle.

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