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Hot Issues Alerts – Law Firms

Pending Legislation Threatens E-Discovery Explosion

The Editor interviews Joseph A. Boyle, Partner at Kelley Drye & Warren LLP, Managing Partner of its Parsippany, New Jersey office and Chair of the Litigation Practice Group in that office.

Boyle: The Parsippany office's principal focus is on five disciplines: litigation, corporate, environmental, real estate and bankruptcy. As you can imagine, litigation and bankruptcy have done well throughout the downturn and the slow upturn. Luckily, our real estate folks have been actively involved in refinancings, restructurings, asset management and some litigation, so that has helped. The work of our environmental practice group continues at a steady pace. Although the area is not as hot as it used to be, we are advising on transactions, handling some enforcement actions and ongoing remediation efforts for clients.

We have also represented a key client of ours, Matheson Tri-Gas, in corporate transactions that have been very positive for the office. So, things have already improved. We foresee continued improvement, recognizing that the outlook for the market for legal services as well as the economy will be choppy at best.

Editor: Are your corporate counsel clients concerned about litigation costs?

Boyle: The most significant concern of our clients is with soaring discovery and litigation costs. These issues have received a higher level of attention than in past downturns. We continue to see pressure on rates and greater interest in alternative fee arrangements and budgets. We are working more frequently

with clients on early case assessments because they want to get a better fix on the prognosis for the litigation, its cost and likely outcome.

Concern about e-discovery has been amplified because we are seeing fewer situations where the parties are eager to collaborate with their adversaries and more situations where an adversary will view e-discovery as a tool to put pressure on our clients. That attitude is typical in class actions where plaintiffs' exposure to e-discovery costs is limited. Therefore, there is a great incentive to foist e-discovery costs onto a corporate defendant recognizing that is going to drive up the cost of the case and constitute a factor in the defendant's decision about how to proceed.

Editor: Do you feel that e-discovery costs and disclosures of confidential data as a result of e-discovery intimidate corporations into settlement of otherwise unmeritorious cases?

Boyle: Most clients that we represent are turned off by such behavior because it smacks of blackmail. They rely on outside counsel to be vigorous and to push back on unreasonable e-discovery demands. This can be a problem because it often results in the matter being heard by a Judge or Magistrate. While the judiciary does an excellent job, as a practical matter judges are removed from the details of the case and the significance of e-discovery to the underlying issues. The judiciary will have the least primary knowledge of the potential sources of information. Thus, your recourse is to a judge who may not have enough familiarity with the situation to feel that he or

she should make a call that may cut off an area of inquiry that the plaintiff claims is of value.

Editor: Have the U.S. Supreme Court decisions in *Twombly* and *Iqbal* helped to limit unreasonable demands for e-discovery?

Boyle: In my view, these are the most significant procedural decisions that we have seen in the last 20 years. The reason I say that is they go to the heart of every case. *Twombly*, being an antitrust decision, was originally viewed hopefully by the plaintiffs' bar as being limited to antitrust cases. *Iqbal* demolished that notion and in fact made *Twombly* stronger than simply saying it applied to all cases. Because the teachings of the two cases together are so meaningful, many commentators have used the term *Twiqbal* to describe the doctrine they enunciate.

The Supreme Court has now put a rigorous standard into Rule 8. There should be no backing down from applying the Rule 8 standard as defined in *Twiqbal* to complaints in every federal case. Interestingly, I am not sure that *Twiqbal* can be read to apply that standard to an affirmative defense, but one could argue it should apply to all aspects of pleading.

The standard of "plausibility" as determined by the Court makes it clear that pleadings that are conclusory or just routine recitations of the elements of a cause of action, without supporting facts, will meet with a motion to dismiss under Rule 12(b)(6) that forces the plaintiff to come forward and really lay the case out factually.

The plaintiffs' bar may argue that

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Twiqbal makes them lay the case out evidentially, which is not the purpose of a pleading. However, the Supreme Court has spoken. A corporate defendant can now assess whether or not the case has any merit and, if not, be successful in moving for dismissal on the basis that the complaint does not allege sufficient facts to be plausible. In a pharmaceutical setting it is not sufficient merely to say that the ingestion of a particular drug caused the injury. A scientifically plausible link must be provided between the ingestion of the drug and the injury.

Twiqbal offers benefits for plaintiffs as well as defendants. If facts are pled that defendants can investigate, they will be much more inclined to settle cases which plaintiffs are likely to win based on the facts in the complaint. This is a positive for both parties.

Editor: In your experience, have cases been dismissed because a plausible chain of facts has not been pleaded?

Boyle: Yes, we have certainly used it to gain dismissals. We examine every federal complaint that comes in for scepticality to such a dismissal motion.

Editor: I gather that you are of the view that a scientifically valid chain of causation is required by *Twiqbal*?

Boyle: Yes. When it comes to straight science how much would have to be pled probably still remains a little bit of a question, I think you would certainly need to allege sufficient facts that, if proven, would establish causation.

The logical application of *Twiqbal* is that a complaint cannot just allege the defendant manufactured a product that caused the injury. There must be a statement of facts that shows a logical chain of causation linking the product to the injury. In cases involving pharmaceuticals, chemicals, or similar complex products, motions for summary judgment may frequently include a scientific analysis that points out breaks in the chain of causation described in the complaint. Now a motion to dismiss may be made in a *Twiqbal* motion at the outset of the case. This saves the judicial system time and resources. At least until *Twiqbal*

gains ubiquity, amicus briefs from non-profit organizations with input from scientists can also play a useful role in such cases by urging the judiciary to broadly apply *Twiqbal* and foster quick and less expensive judicial resolution of matters.

Editor: Have New Jersey state courts tended to follow federal precedent interpreting the federal rules?

Boyle: As a general matter they do, although the New Jersey state court rules are not a mirror image of the federal court rules as in the case of some states. I have not yet seen a reported case that applies *Twiqbal* in New Jersey. However, the evolution of the summary judgment standard in New Jersey could provide a lead for New Jersey state courts to also follow *Twiqbal*.

For many years the summary judgment standard in New Jersey was based on a 1954 case (*Judson v. Peoples Bank Trust Company*). It was considered that the *Judson* standard was very hard to meet and thus summary judgment was considered difficult to obtain.

In 1995, the New Jersey Supreme Court decided *Brill v. Guardian Life Ins. Co. of America* in which it said it is time to follow the federal standard and that summary judgment should be granted in all appropriate cases. It was an outstanding decision because our Supreme Court expressly adopted the federal Rule 56 standard and followed the triumvirate of three landmark federal cases that are cited in federal summary judgment cases.

My hope would be that the New Jersey Supreme Court will now accept the bright line standard articulated in *Twiqbal* based on logic consistent with the *Brill* case.

Editor: How do you feel about the quality of New Jersey courts?

Boyle: Our state court system is outstanding. Although our Supreme Court issues relatively few cases affecting business, the *Brill* case is a good example of the high quality of their decisions when they do. The Appellate Division is where a lot of the heavy lifting gets done because it issues many reported decisions affecting business. You typically

get oral argument, a very well-informed bench, and the judges are eager to pose questions to counsel. I have never detected any bias in its decisions. They are straight down the middle. There is a very good adherence to precedent and the courts do not go outside the record. They are not looking for a way to make somebody a winner who does not have the record to support it. I view the state court system in New Jersey as very strong and New Jersey has one of the country's best federal benches.

Editor: Do you believe that New Jersey would be a more attractive place to do business or litigate if *Twiqbal* were consistently followed by its state courts?

Boyle: One way for New Jersey to shed its image of a state with an unfavorable legal climate for business would be for our state courts to adopt the teachings of *Twiqbal*. This will enable companies sued in New Jersey courts to escape non-meritorious suits early and avoid the horrendous costs associated with broad e-discovery.

Editor: I understand that bills have been introduced in both Houses of Congress that would overturn *Twiqbal*. Of most immediate concern is H.R. 4115, which is pending in the House Judiciary Committee. This bill would prohibit a federal judge from dismissing a case 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." How would the passage of the House bill affect e-discovery costs?

Boyle: The language that you quoted opens the door to unlimited discovery, which quite frankly is nightmarish from the standpoint of corporate defendants. Corporations across America would become even more vulnerable than they were before *Twiqbal* to unmeritorious litigation designed solely to blackmail them into large settlements. It would also probably bring an end to the efforts currently being made to amend the federal rules to require fact-based pleading.