



The Orator

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CONGRATULATIONS TO JUDGE TINDER AND MAGISTRATE JUDGE LAWRENCE

The Indianapolis Chapter of the Federal Bar Association would like to congratulate Judge John D. Tinder and Magistrate William Lawrence on their recent achievements. On December 18, 2007, Judge Tinder was confirmed to the U.S. Court of Appeals. On February 14, 2008, President Bush nominated Magistrate Lawrence to serve as an Article III Judge for the Indianapolis Division of the Southern District of Indiana.

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Best Settlement Practices Through the Eyes of a New Magistrate Judge

*By Jane E. Magnus-Stinson
U.S. Magistrate Judge
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On January 29, 2007, I had the good fortune of beginning my new career as a United States Magistrate Judge for the Southern District of Indiana. I followed the beloved and iconic V. Sue Shields, a legend in Indiana legal history, which made the task all the more daunting. I was soon comforted by the warm welcome and constant support of the wonderful judges and staff of the Southern District.

While I had conducted over 100 jury trials and likely over 1000 guilty pleas and sentencing in my state court career, the “settlement conference” was a somewhat unfamiliar proceeding. These conferences constitute the majority of my work, so I was determined to learn as quickly as I could. As it turns out, my best teachers were excellent lawyers, and the lessons learned are worth sharing.

The best lawyers manage client expectations before the conference ever begins. They have prepared their clients as to the strengths and weaknesses of the client’s case. Clients educated to case reality can far more objectively evaluate their options during negotiation. It is neither fun nor productive for a client to hear for the first time in a settlement conference that their claim or defense is weak. The best lawyers know that eking out a fact issue to defeat a summary judgment motion is a far cry from having a winning case, and advise their clients accordingly.

The best lawyers also make sure they have conducted sufficient investigation or discovery in order to evaluate the case. This is a two-way street. The best lawyers not only make sure they **receive** enough information to make an informed evaluation they also **give** enough information to ensure the other side’s evaluation is meaningful. Large dollar claims settle far more readily when counsel has justified a significant demand through well-documented disclosures, special damages statements and discovery responses. Also, if documentation exists that undermines an opponent’s claim, sharing that in advance of the conference can allow counsel time to explain the impact of the evidence to her client.

The best lawyers choose – where possible – client representatives who are not so invested in the case that they lose objectivity. Emotions often run high in litigation, and clients make better decisions during negotiation if they are not emotionally charged.

The best lawyers know that the magistrate judge is not the decision maker, but rather a facilitator there to aid the process. Accordingly, they provide honest case assessments

in their confidential settlement statements, and communicate openly with the magistrate judge. Both practices often result in more effective communication with both clients and opponents.

The best lawyers put a client’s interests ahead of their own. They openly discuss the time and expense of litigation, including future fees, so that the client’s decision on a settlement amount is fully informed.

The best lawyers have laid some groundwork in negotiations prior to the settlement conference so that the process has begun in earnest before the conference ever begins. These pre-negotiations often serve to educate all parties – including the magistrate judge – as to the settlement range of the case.

I have very much enjoyed my participation in settlement conferences over the past 465 days, and am pleased that the majority of cases have settled through the efforts of the parties and their lawyers. I look forward to continuing to improve my skills, as I watch the great lawyers practice theirs. •

Expanded FMLA Leave Protection for Close Relatives of Service Members

Heather L. Wilson and Amy S. Wilson

Employers should take steps to prepare themselves for significant changes to the Family and Medical Leave Act of 1993. On January 28, 2008, President George W. Bush signed the National Defense Authorization Act of 2008 into law, which has provided extended FMLA protection to certain relatives of uniformed service members.

This is the first expansion of the FMLA since its enactment in 1993 and it has been amended in two principal ways. The first provision is a leave to handle “exigencies” and provides up to 12 weeks of FMLA leave for a “qualifying exigency” arising out of a close family member’s call to active duty. The second provision is leave to care for a family member injured during military service and provides up to 26 weeks of leave. Both forms of military family leave may be taken intermittently or on a reduced leave schedule. The FMLA requirements for employee and employer eligibility, notice, certifications, and job protections apply.

On February 11, 2008, the Department of Labor published a Notice of Proposed Rulemaking in the Federal Register, which provides some guidance on these new types of leaves. The proposed rules are open for public comment until April 11, 2008, and final rulemaking likely will not be concluded until the end of this year.

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“Qualifying Exigency” Leave

Employees are now entitled to 12 weeks of leave due to a “qualifying exigency” which arises “out of the fact that the spouse, [child] or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces to support a contingency operation.” The 12 week “exigency” leave is part of the combined total of 12 weeks of FMLA leave available to employees in any 12 month period. The DOL, on January 30, 2008, posted a notice on its website stating that the requirements to provide leave to deal with exigencies when a family member is called to active duty will not go into effect until final regulations are issued defining “qualifying exigency.” However, DOL’s proposed regulations issued on February 11, 2008 did not propose a definition of “qualifying exigency.” Instead, it solicited comments on whether the following types of exigencies, as well as any others, should qualify: (1) making arrangements for child care; (2) making financial and legal arrangements to address the service member’s absence; (3) attending counseling related to the active duty of the service member; (4) attending official ceremonies or programs where the participation of the family member is requested by the military; (5) attending to farewell or arrival arrangements for a service member; and (6) attending to affairs caused by the missing status or death of a service member. The DOL also suggested in its proposed rulemaking that qualifying exigencies should be limited to non-medical exigencies and also that there must be a nexus between the eligible employee’s need for leave and the servicemember’s active duty status.

If leave is due to a “qualifying exigency”, the employer may require that the request be supported by certification issued in the manner as the DOL may prescribe in its regulations. The February 11th proposed regulations seek comment on various questions relating to certification, and include: (1) Who may issue a certification related to active duty or call to active duty status? Should anyone other than the Department of Defense provide a certification of the covered service member’s active duty or call to active duty status?; (2) Should an employee seeking FMLA leave due to a qualifying exigency provide certification of the qualifying exigency by statement or affidavit? Who else might certify that a particular request for FMLA leave is because of a qualifying exigency?; (3) Should an employer be permitted to clarify, authenticate or validate an active duty or call to active duty certification? Likewise, should an employer be permitted to clarify, authenticate, or validate a certification that a particular event is a qualifying exigency? If so, what limitations, if any, should be imposed on an employer’s ability to seek such clarification, authentication, or validation for both types of certifications?

Although this type of leave is not yet effective because there is no definition of “qualifying exigency,” the DOL is encouraging employers to utilize their best efforts to implement this type of leave.

Servicemember Family Leave

The leave providing up to 26 weeks to care for an injured family member is entitled “Servicemember Family Leave.” This type of leave became effective immediately and should now be included in all FMLA policies. Under this new provision, an eligible employee who is the spouse, child, parent, or “next of kin” of a “covered” service member may take up to 26 weeks of job-protected leave in “a single 12-month” period” to care for the service member. “Next of kin” is defined as the “nearest blood relative of that individual. A “serious injury or illness” is limited to “an injury or illness incurred by the member in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating.” “Servicemember family leave” is combined with all other FMLA leaves, which allows an employee a combined total of 26 weeks of leave during a single 12 month period. Employers may require medical certification of requests for leave pertaining to the care of a service member’s injury.

Questions still exist regarding the provision for 26 weeks of leave in a single 12 month period, such as: (1) Should the 12 month period be calculated from the date of the service member’s injury, the date of the determination that the service member has a serious injury, or the date on which an eligible employee is needed to care for a seriously injured service member?; (2) What is the meaning of “a single 12 month period”? Is it a one-time entitlement or do the 26 work weeks of leave renew each 12 month period? The February 11th proposed rulemaking has not answered these questions, which will cause some difficulties for employers when implementing these new policies.

Other Highlights from the DOL’s February 11, 2008 Proposed Rulemaking

The DOL’s proposed rules are the first significant update to the FMLA since the federal regulations were implemented in 1994. The DOL issued a “Request for Information” in December 2006, and received numerous comments. The comments included concerns regarding unscheduled intermittent leave, employee notice, interaction between the FMLA and the Americans with Disabilities Act, the definition of serious health condition, and medical certification. The proposed rules address some of these concerns.

The proposed rules include changes involving the medical certification process. Under the proposed rules, employers would now be allowed to contact medical providers directly for purposes of authenticating or clarifying a certification form. Currently, an employer may not contact the employee’s physician directly and employers are required to hire their own medical providers to ask questions about medical certifications. The rules would also permit employers to request annual recertification for conditions lasting more than a year and a semi-annual recertification

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for conditions described as “lifetime,” “indefinite,” or “unknown.”

The current regulations prevent employers from denying a bonus or award to employees simply because they took an FMLA leave of absence. The DOL has proposed a change that would now allow employers to disqualify an employee from a bonus or award that is predicated on the achievement of a goal, where the goal is not reached as a result of an FMLA leave of absence.

The DOL’s proposed rules also clarify that an employer and employee may voluntarily agree to the settlement of past FMLA claims without the permission of the DOL or a court. However, the prohibition of waivers on prospective FMLA claims remains intact.

Another area of proposed rulemaking includes the definition of serious health condition. The proposed rules would require employees who suffer from a chronic health condition to demonstrate that they have seen a doctor at least twice a year rather than on a “periodic” basis. In addition, a serious health condition involving three consecutive days of incapacity must include two separate visits to a medical provider within 30 days of the incapacity.

While awaiting final regulations, employers should familiarize themselves with the new military family leave options available to their employees under the NDAA amendment, notify employees of the new types of leave, and revise leave policies to reflect the changes in the FMLA. ●

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Navigating the Green Maze: How America’s Environmental Laws are Generating Uncertainty in the Business World

Timothy L. Karns

A growing recognition of the effects of climate change and an ever increasing concern over the depletion of the world’s fossil fuel reserves has pushed ecological issues to the forefront of American politics. Accordingly, policymakers at both the federal and state level have enacted a complex scheme of environmental rules and regulations aimed at alleviating society’s impact on the environment. Unfortunately, however, many, if not all, of these provisions utilize broad and oftentimes ambiguous language to implement their edicts. As a result, businesses in a variety of industries face uncertainty when determining whether their operations conform to these regulations. This dilemma becomes readily apparent when a business attempts to

determine if its facility complies with the Best Available Control Technology (“BACT”) provision of the Clean Air Act (“CAA”).

The Prevention of Significant Deterioration Provisions of the Clean Air Act

In 1977, Congress enacted the Prevention of Significant Deterioration (“PSD”) provisions of the CAA.¹ The PSD program regulates air pollution in “attainment” areas, where air quality meets or is cleaner than the national ambient air quality standards (“NAAQS”), and “unclassifiable” areas, where air quality cannot be classified as “attainment” or “non-attainment.”² Such regulation is achieved by requiring preconstruction approval, in the form of a PSD permit, before anyone may build a new major stationary source of air pollutants or make a major modification to an existing source if such a source is located in either an attainment or unclassifiable area.³ In order to obtain such a permit, the PSD regulations require that the party seeking a permit employ the BACT to control emissions of regulated pollutants that the source would have the potential to emit in significant amounts.⁴ However, as one might expect, what constitutes BACT is often disputed.

The Seventh Circuit Weighs in on the Best Available Control Technology Determination

In *Sierra Club v. U.S. E.P.A.*, the Environmental Protection Agency (“EPA”) issued Prairie State Generating Company (“Prairie State”) a PSD permit for the construction of a coal-fired electrical generating plant in Southern Illinois.⁵ Per Prairie State’s plans, the proposed facility was to be constructed at the mouth of a new coal mine.⁶ By constructing the plant at this location, coal could be transported directly from the mine to the plant via a conveyor belt.⁷ Unfortunately, coal harvested from this mine possesses a high sulfur content.⁸ In order for the proposed facility to burn low-sulfur coal, Prairie State would have to make changes in the design of the plant’s coal receiving facilities and would have to arrange for such coal to be transported from mines more than a thousand miles away from the proposed facility.⁹

After learning of EPA’s decision to grant the PSD permit, certain environmental groups petitioned the U.S. E.P.A.’s Environmental Appeals Board (the “Board”) to reverse EPA’s permitting decision.¹⁰ To support their position, petitioners argued that the EPA, by failing to determine whether hauling low-sulfur coal from afar would be the best available means of controlling air pollution from the plant, had violated the provisions of the CAA.¹¹ Despite their best efforts, the petitioners were unable to persuade the Board and their request was denied.¹² As a result, petitioners renewed their quarrel in the Seventh Circuit Court of Appeals.¹³

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Upon review, the Court began its analysis by examining the provisions of the CAA. The Court determined that the CAA requires a major emitting facility, such as the Prairie State facility, to utilize BACT for each pollutant subject to regulation.¹⁴ Since the CAA defines BACT as “the ‘emission limitation’ achievable by ‘application of production processes and available methods, systems, and techniques, including ... *clean fuels*,” the Court concluded that the CAA explicitly requires a permitting authority, such as EPA, to consider “clean fuels” as a potential control method.¹⁵ However, the Court also recognized that BACT does not require “redesigning the plant proposed by the permit applicant unless the applicant intentionally designs the plant in a way calculated to make measures for limiting the emission of pollutant ineffectual.”¹⁶

Utilizing the aforementioned rules, the Court held the Board’s ruling on the BACT issue must be upheld.¹⁷ In a rather scathing opinion, the Court surmised that under Petitioners’ argument, EPA could order “Prairie State to redesign its plant as a nuclear plant rather than a coal-fired one, or could order it to explore the possibility of damming the Mississippi to generate hydroelectric power, or to replace coal-fired boilers with wind turbines.”¹⁸ However, the Court noted that such an approach “would invite a litigation strategy that would make seeking a permit for a new power plant a Sisyphean labor, for there would always be one more option to consider.”¹⁹ Instead, the Court believed that they should defer to the permitting authority’s decision regarding BACT where the record indicates that the permitting authority found that the contested BACT would redefine the fundamental purpose of or basic design of a proposed facility.²⁰ Since the record in the case revealed that EPA had specifically determined that requiring Prairie State to accommodate shipments of low-sulfur coal from a distant mine would amount to requiring Prairie State to reconfigure the plant as one that is not co-located with a mine, and that such a reconfiguration would constitute a redesign, the Court held that EPA did not violate the CAA when it issued the PSD permit to Prairie State.²¹

Conclusion

While many scholars disagree on the effectiveness of America’s current scheme of environmental policies, one thing is certain; these laws have a profound effect on the way that Americans do business. Everyday, more and more industries are being forced to determine if their facilities are in compliance with a variety of environmental regulations. As a result, these industries are turning to their attorneys for guidance. However, as the preceding article demonstrates, answering these questions is no small task. It is therefore of the utmost importance that attorneys, in a variety of practices, become familiar with the environmental regulations that effect their clients. After all, a careful and thorough examination of these regulations today will ensure that you are adequately prepared for any challenges that may arise tomorrow. ●

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1. 42 U.S.C. §§ 7470 to 7492
2. 42 U.S.C. §§ 7407, 7470 to 7492
3. *Id.*
4. 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j)(2).
5. 499 F.3d 653, 654 (7th Cir., 2007)
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 654-655.
16. *Id.* at 654.
17. *Id.* at 657.
18. *Id.* at 655.
19. *Id.*
20. *Id.* at 656-657.
21. *Id.* at 657.

Supreme Court Clarifies Timeliness of Appeals Issue

Craig W. Wiley

Civil practitioners should be on notice regarding a Supreme Court decision from last term addressing the timeliness of appeals. In *Keith Bowles v. Harry Russell*, 127 S.Ct. 2360 (2007), the Court held that the time limits for filing a notice of appeal in a civil case are jurisdictional and are not subject to judicially created equitable exceptions.

Bowles was convicted of murder in Ohio and sentenced to 15 years to life. On September 9, 2003, the district court

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denied his federal habeas petition. Under 28 U.S.C. 2107(a) and Fed. R. App. Proc. 4(a)(1)(A), Bowles had 30 days to file a notice of appeal, but he missed the deadline. Section 2107(c) allows the district court to extend the time for filing a notice of appeal upon a showing of excusable neglect, but only if that motion is filed within 30 days after the expiration of the initial deadline. Bowles also missed that deadline. Section 2107(c) also provides that, when a party did not receive notice of the judgment, a district court may “reopen the time for appeal for a period of 14 days” upon “a motion filed within 180 days after entry of the judgment or order [from which the appeal is taken] or within 7 days after receipt of” notice that the judgment or order was entered, “whichever is earlier.”

On December 12, Bowles moved to reopen his appeal period and the district court granted that motion. Its order gave Bowles 17 days - not the 14-day maximum under section 2107(c) - to file a notice of appeal. Bowles filed his notice of appeal 16 days later. The Sixth Circuit held that it lacked jurisdiction over Bowles’ appeal because the time limits of section 2107 are “mandatory and jurisdictional.”

The Supreme Court affirmed in a 5-4 decision by Justice Thomas. He wrote: “This Court has long held that the taking of an appeal within the prescribed time is “mandatory and jurisdictional.” “Reflecting the consistency of this Court’s holdings, the courts of appeals routinely and uniformly dismiss untimely appeals for lack of jurisdiction.”

The Court also acknowledged that “several of our recent decisions” have held that other time-limit provisions are “claims-processing rules,” not “jurisdictional rules.” It held, however, that none of those decisions “calls into question our longstanding treatment of statutory time limits for taking an appeal as jurisdictional.” It also wrote: “Critical to our analysis was the fact that” those cases did not involve statutory deadlines.

The Court relied upon the “treatment of its certiorari jurisdiction” to “demonstrate[] the jurisdictional distinction between court-promulgated rules and limits enacted by Congress.” For example, Supreme Court Rule 13.1 provides that a petition for certiorari in either a civil or a criminal case must be filed within 90 days of the judgment below or the denial of rehearing, but the 90-day deadline for civil cases derives from 28 U.S.C. 2101(c), while the deadline for criminal cases is mandated only by the Court’s rule. The Court stated that it has “repeatedly held that this statute-based filing period for civil cases is jurisdictional.” The Court also noted that its clerk had recently refused to accept a civil petition submitted one day late even though the petitioner was challenging his death sentence and was subsequently executed. By contrast, the Court stated, “the rule-based time limit for criminal cases * * * may be waived * * * and can be relaxed by the Court in the exercise of its discretion.”

The Court also rejected an argument that untimeliness should be excused under the “unique circumstances” doctrine, specifically that Bowles had relied upon the district court’s order that stated he had 17 days to file his notice. See *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (establishing doctrine in case where appellant had relied upon the district court’s finding of excusable neglect). The Court expressly overruled *Harris Truck Lines*, stating, “[t]his Court has no authority to create equitable exceptions to jurisdictional requirements.”

Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, dissented.

The Seventh Circuit has already applied *Bowles*, most recently in *Nocula v. UGS Corp.*, 520 F.3d 719 (7th Cir., March 24, 2008), in which it held that a second notice of appeal, which was filed outside of 30-day appeal period, was untimely, even though first defective notice of appeal was timely, since a motion to extend time was not filed. ●

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Supreme Court Creates New Standard on 12(B)(6) Motions

Amanda Maxwell

The United States Supreme Court recently modified the standard for a Federal Rule 12(b)(6) dismissal for failure to state a claim. In *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007), the Court retired the previous *Conley* standard 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 claims which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Court then held that complaints must state enough facts to make the claim “plausible on its face” and provide something more than notice pleading. *Bell Atlantic*, 127 S.Ct. at 1974.

As part of the 1984 divestiture of the American Telephone & Telegraph Company (AT&T), several regional monopolies formed, known as Incumbent Local Exchange Carriers (ILECs). The Telecommunications Act of 1996 broke up these monopolies and encouraged competition amongst telephone and internet service providers in local and long- distance markets. Twombly is one of several telephone and internet service customers who accused the ILECs of violating §1 of the Sherman Act. The complaint

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alleged that the ILECs conspired to restrain trade by engaging in parallel conduct to inhibit the growth of upstart competitive companies and agreeing to refrain from competing in one another's service areas. Plaintiffs supported their claim by pointing out the failure of all ILECs to take advantage of profitable opportunities in service areas outside their own and a statement by a ILEC chief executive officer that it did not seem right to compete in another ILEC's service area.

The district court dismissed the complaint under Federal Rule 12(b)(6) for failure to state a claim. The district court determined that parallel conduct alone did not sufficiently support a §1 claim. The district court required additional facts, or "plus factors," tending to exclude the possibility that these actions may have been motivated by individual self-interest to be pleaded in the complaint. The Second Circuit reversed stating that "plus factors" were not required to adequately state an antitrust claim and that the defendants "failed to show that there is no set of facts that would permit a plaintiff to demonstrate" that the seemingly parallel conduct was "the product of collusion rather than coincidence." *Id.* at 1963.

The Supreme Court reversed in a 7-2 decision by Justice Souter. He wrote: "*Conley's* 'no set of facts' language has been questioned, criticized, and explained away long enough. . . . *Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival." *Id.* at 1969.

The Court held that to survive a dismissal for failure to state a claim, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974. Although there is no probability requirement, the Court explained that factual allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Id.* at 1965. The Court held that a §1 claim should plead enough facts to "raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* The Court stressed the importance of preserving scarce judicial resources. The Court rejected arguments that judicial supervision of claims during discovery will weed out groundless or frivolous lawsuits. *Id.* at 1967.

Some scholars and academics argue that the "plausibility" standard announced in *Twombly* should be limited to the confines of §1 antitrust claims. However, federal circuits have been applying the plausibility standard to federal pleadings outside the antitrust context. The Seventh Circuit has applied the plausibility standard to claims under the Fair Credit Reporting Act (FCRA). *Killingsworth v. HSBC Bank Nev., N.A.*, 507 F.3d 614,619 (7th Cir. 2007).

In *Killingsworth*, the Seventh Circuit allowed a FCRA claim that could not precisely plead the specific date of the FCRA violation to survive a 12 (b)(6) dismissal. The complaint only pleaded an approximate date of the violation. The date of violation was imperative to the case because if the violation

occurred after the enactment of a FCRA amendment that eliminated private causes of action under the FCRA, the plaintiff would be barred from bringing the suit and the case would be dismissed. The Seventh Circuit interpreted *Bell Atlantic* and noted that "we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8." *Killingsworth*, 507 F.3d at 619 (quoting *Airborne Beepers & Video, Inc., v. AT&T Mobility, LLC*, 499 F.3d 663, 667 (7th Cir. 2007)). The court held that the plaintiff's complaint was not "wholly insufficient," and "discovery may or may not" reveal the date of the FCRA violation. *Killingsworth*, 507 F.3d at 623.

While *Twombly* seems to soften the high burden defendants must meet to dismiss a claim at the pleadings stage and may encourage more 12(b)(6) motions, pleading as a whole will continue as before. Federal Rule 8 has always required enough factual detail in the pleading to provide notice of the claim to the defendants. *Twombly* does require more specific pleading in matters that involve complex, costly, and lengthy litigation like antitrust claims out of concern for drains on the resources of the court and the parties. It is unclear whether *Twombly* will result in more Rule 11 motions. A complaint based on circumstantial evidence, like many complaints in antitrust matters, may be legitimate even though these claims do not meet the plausibility standard. Sometimes discovery is the only method to uncover such additional facts that bring actual conspiracy agreements to light. However, the threat of Rule 11 sanctions and the increased burden on pleading may discourage plaintiffs with insufficient evidence from filing. •

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