



# The Commercial Law Connection



The National Bar Association  
Commercial Law Section

VOLUME 5, ISSUE 3

Fall 2008

CONNECTING PEOPLE, IDEAS AND OPPORTUNITIES

## Message from the Chair

Greetings Commercial Law Section Members! I hope that you enjoyed the 83<sup>rd</sup> Annual National Bar Convention in Houston, Texas...a good time was had by all.



Kimberly R. Phillips, Chair

I trust that you are planning to attend the 2009 Corporate Counsel Conference, which will be held February 19-21, 2009, at the Loews Lake Las Vegas Resort in Lake Las Vegas, Nevada. The Executive Committee and other Section members are hard at work planning the upcoming Conference. For 2009, we will be returning to our Attorney Roundtable and In-House Counsel Roundtable to kick off the Conference on Thursday, February 19. We will also have a special joint session with outside and in-house counsel where all attendees will have the opportunity to share their thoughts on what makes a successful in-house/outside counsel working relationship. You will not want to miss these sessions.

Friday and Saturday will feature four concurrent CLE seminars each day, the General Counsel Luncheon and, of course, the golf and spa events. We are looking forward to another successful Conference and the opportunity to showcase our members to leading international and national corporations.

Before the conference, Section members also will have the opportunity to nominate members for the Outstanding In-House Counsel of the Year and Outstanding Outside Counsel of the Year Awards. This will be the first time the Section will bestow such honors, and we are excited about the opportunity to recognize our members in this manner. Nominations will open November, 2008. The nomination criteria is available on the website at [www.nbacls.com](http://www.nbacls.com).

Lastly, I want to encourage you to explore the revitalized National Bar Association website. Log on to [www.nationalbar.org](http://www.nationalbar.org) and take advantage of all that the new website has to offer.

Be well and we'll see you at the 2009 Corporate Counsel Conference.

## Bell Atlantic v. Twombly: The Dawn of a New Pleading Standard?

By: Antoinette Morgan, Esq.<sup>1</sup> and Brian Telfair, Esq.<sup>2</sup>

The Supreme Court's decision in *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007), may very well mark the end of Rule 8(a) of the Federal Rules of Civil Procedure's rigid notice pleading standard. No longer will a complaint containing indistinct allegations survive a Rule 12(b)(6) motion to dismiss for failure to state a claim; instead, a complaint must now contain allegations that "nudge [a plaintiff's] claims across the line from conceivable to plausible." *Id.* at 1974.

Rule 8(a) of the Federal Rules of Civil Procedure provides that a complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a). Under Rule 12(b)(6), a court has the authority to dismiss a complaint if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). However, the liberal pleading standard afforded by Rule 8(a) meant that motions to dismiss were granted sparingly.

The respondents in *Twombly* were subscribers of local telephone and high speed internet services. They sued regional telephone service monopolies, called Incumbent Local Exchange Carriers

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## The NBACLS Mourns the Loss of Oliver W. Hill, Justice Revius Oliver Ortique, Jr., Rapheal M. Prevot, Jr., and Congresswoman Stephanie Tubbs Jones.

As our members look forward to the inspiring possibility of the election of the first African-American President of the United States, the NBACLS laments the passing of several African-Americans who helped make such a feat a reality: Oliver W. Hill; Justice Revius Oliver Ortique, Jr.; Rapheal M. Prevot, Jr.; and Congresswoman Stephanie Tubbs Jones.

### Oliver W. Hill

Born in 1907, in Richmond, Virginia, Oliver W. Hill was one of the leaders in the fight against segregation. A graduate of Howard University Law School and a classmate of United States Supreme Court Justice Thurgood Marshall, Mr. Hill practiced law in Virginia and was one of the founders of the Old Dominion Bar Association. In 1948, he became the first African-American to be elected to the Richmond City Council in 50 years, leading the way for later African-American politicians in Virginia, such as former Virginia Governor and present Richmond Mayor, Douglas Wilder.

Mr. Hill was the lead attorney in *Davis v. County School Board of Prince Edward County, VA.*, which was one of the cases consolidated with the case of *Brown v. Board of Education*, which, in 1954, ended the legal sanction that had been given to segregated schools in the United States. In *Davis*, Mr. Hill represented African-American students who protested the substandard conditions of the segregated high school that they were forced to attend.

Mr. Hill also fought to change discriminatory laws and practices concerning jury selection, voting rights, employment, and redlining in housing sales. In the 1960's, President John F. Kennedy appointed him Assistant Commissioner of the Federal Housing Administration where served for five years. In 1999, President Clinton awarded him the Presidential Medal of Freedom.

### Justice Revius Oliver Ortique, Jr.

Born in 1924, in New Orleans, Louisiana, Justice Revius Oliver Ortique, Jr., a graduate of Southern University Law School, was the 24th President of the NBA, serving from 1965 to 1967, and the first African-American elected to the Supreme Court in Louisiana.

Early in his career, Justice Ortique was President of the Community Relations Council in which capacity he served as chief negotiator for the peaceful desegregation of lunch counters, hotels and other public facilities in New Orleans. During his term as NBA President, then attorney Ortique and other NBA leaders met with President Lyndon Baines Johnson at the White House to discuss civil rights issues. President Johnson named him to the Federal Hospital Council in 1966. He later served on the President Nixon's Commission on Campus Unrest and on the Legal Services Corporation, a private, non-profit corporation established by the U.S. Congress to seek to ensure equal access to the criminal justice system.

In 1979, the citizens of New Orleans elected him Judge of the Orleans Parish Civil District Court. His fellow judges later elected him Chief Judge of the Orleans Parish Civil District Court. In 1992, Justice Ortique was elected to the Louisiana Supreme Court. He

retired from the bench in 1994. President Clinton, in 1999, named him an alternate to the United Nations General Assembly.

### Rapheal M. Prevot, Jr.

Rapheal M. Prevot, Jr., a 1984 graduate of Indiana University School of Law, was a passionate supporter of both the National Bar Association and the National Bar Institute. He served on the National Bar Association's Board of Governors for seven terms as Chair of the Labor Law Section and as Region II Director. For two years, he served on the Executive Committee of the Board of Governors. Mr. Prevot also co-chaired the 1999 Gertrude Rush and Mid-Year Conference in New York. He was program coordinator of, and/or speaker at, numerous seminars sponsored by the Labor Law Section and Region II, including the Drug Policy Symposium sponsored by the NBA Judicial Council and the National African-American Drug Policy Coalition.

In addition to his contributions to the NBA's success, Mr. Prevot also served on the National Bar Institute's Board of Directors, chairing the Planning/Fundraising Committee and serving on the Golf Tournament and Endowment 2000 Committees. He also co-chaired the A. Leon Higginbotham Gala, a fund-raiser in New York City for the National Bar Institute.

The National Bar Association recognized and honored Mr. Prevot's dedication and exceptional service by giving him the 1999 *Presidential Award* and the 1999 *Outstanding Region Award* as Region II Director.

### Congresswoman Stephanie Tubbs Jones

Congresswoman Stephanie Tubbs Jones, a Democrat from Cleveland, Ohio, and a graduate of Case Western Reserve University Law School, was the first African-American woman elected to the United States House of Representatives from the state of Ohio. She also was the first African-American woman to sit on the House Ways and Means Committee, which deals with taxes and trade. She was an active member of the Congressional Black Caucus and was a life-long champion for justice and equality for all Americans.

Before serving five terms in the U.S. Congress, Congresswoman Tubbs Jones was the first African-American and the first female prosecutor in Cuyahoga County, Ohio, the first African-American woman to sit on the Common Pleas bench, and a Municipal Court Judge in the City of Cleveland.

After the 2004 Presidential election, Rep. Tubbs drew national attention when she asserted, on the floor of the House of Representatives, that electoral fraud and manipulation has led to President George W. Bush's re-election. It was only the second House election challenge since 1877. After the 2006 election, the Speaker of the House of Representatives, Nancy Pelosi selected Rep. Tubbs Jones to chair the House Ethics Committee.

We extend our sympathies and condolences to the families of each of these exceptional African-American role models.



## NBA Salutes John Crump, NBA Executive Director, For 31 Years of Service to the NBA

*By Robert Alexander, Esq.*

“It is as though there was never another Executive Director of the NBA.” So said former NBA president Warren Hope Dawson, as hundreds of John Crump’s friends, family and admirers gathered at a banquet held during the 83rd annual convention of the National Bar Association to honor retiring Executive Director John Crump for 31 distinguished years of service to the association.



It was an evening in which even the audience members felt personally moved to show their gratitude and respect for John Crump—most men wore bow ties in a nod to Crump’s fashion trademark. It was particularly moving as all surviving past NBA presidents during Crump’s tenure took the stage as his service to the Association was chronicled decade by decade.

This statement rang true and was impressive not only because of the length of John Crump’s tenure, but because he led the NBA in the dramatic growth of its finances, membership, technology and world-wide influence. In an address to the NBA circa 1989, the honorable Justice Thurgood Marshall remarked that during the early years after the founding of the NBA, “You could carry the treasury of the NBA around in your mouth.” When Crump assumed his position 31 years ago, the situation was not vastly improved. Yet through John Crump’s management skills and business insight, he guided the NBA from an annual budget of \$50,000.00 to its present annual budget of \$2,500,000.00.

The gala’s tribute to John Crump included pictures, poetry, prayer and song, as it was concluded by the vocal talents of “The Ice Man” himself, Jerry Butler. The evening was moderated by the honorable Joyce London Alexander and past NBA president Jeanus Williams as they guided the audience through the decades of advancement and achievement upon which John Crump’s service was written. This period included more than a decade of service as chairman of the National Coalition of Black Meeting Planners—a position from which he consistently distinguished the NBA as he was consistently recognized among the Top Most Influential Persons in the Industry and was featured in many national publications.

Crump’s contribution to the future of our profession and the NBA was also embodied in the tribute made by two recent and impressive graduates of the Crump Law Camp, which was conceived and named in John Crump’s honor. The Crump Law Camp provides students between the ages of 14 and 17 with a comprehensive introduction to the American judicial and legal system and has received the American Bar Association Partner Award for exemplary efforts to insure diversity in the legal profession.

A highlight of the evening occurred when Willie Gary and his law firm presented John with a check for \$50,000.00 towards his well deserved retirement. Following a tribute from John’s wife and son, John took the stage to thank all presenters and the National Bar Association. He concluded: “I have had a good run.” Yes, and the NBA had a good run along with him. Thank you, John.



Robert Alexander, Jr., Esq. is the founder of the Law Offices of Robert Alexander, Jr., P.C., in Oklahoma City, Oklahoma. He specializes in handling product liability cases on behalf of numerous Fortune 500 clients. Mr. Alexander can be contacted at [alexattys@productlaw.com](mailto:alexattys@productlaw.com)



### The Commercial Law Section Actively Participated in the NBA's 83rd Annual Convention at Which the Section Was Given the NBA's 2008 Section of the Year Award.

During the NBA's 83rd Annual Convention in Houston, Texas, the Commercial Law Section hosted its Annual Reception, which again was sponsored by Schering-Plough Corporation. The Commercial Law Section sincerely thanks Schering-Plough Corporation for its continuing support and for helping the Section make our Annual Reception so successful.

The Section held its Annual Meeting at the Convention. During the Annual Meeting, the Section members elected the Section's officers for the coming year. The Section also reserved a table at the NBA's Salute for retiring NBA Executive Director John Crump.

The Section also won the 2008 Section of the Year Award for outstanding contributions to the NBA. This is the seventh time in the last eight years that the Section has won this award. The Section hopes to continue contributing to the NBA's success during the coming year.



## NBACLS OUTSTANDING IN-HOUSE COUNSEL AND OUTSTANDING OUTSIDE COUNSEL OF THE YEAR AWARDS

The Commercial Law Section has created two new annual awards to recognize attorneys who the Section considers to be the outstanding in-house counsel of the year and the outstanding outside counsel of the year. The candidates for the outstanding outside counsel award must be Section members. Candidates for the outstanding in-house counsel award do not have to be Section members.

The attorneys who receive these awards must have made significant achievements in his or her practice areas during the ten or more years that he or she has practiced law. They also must have demonstrated a commitment to encourage corporate legal departments to develop professional relationships with African-American attorneys and to retain them as outside counsel.

Nominees for the outstanding in-house counsel award must be nominated by outside counsel. Similarly, nominees for the

outstanding outside counsel award must be nominated by in-house counsel. The members of the Section's Executive Committee may not nominate candidates and may not receive the awards. The nomination form and additional information can be obtained from the Section website, [www.nbacls.com](http://www.nbacls.com).

The awards will be presented to the winners during the Section's 22nd Annual Corporate Counsel Conference in Lake Las Vegas, Nevada, which will be held from February 19th to February 21st 2009.

If you want to nominate someone for either of these awards, please send your completed nomination form via email to [Kimberly.Phillips@shell.com](mailto:Kimberly.Phillips@shell.com) by December 15, 2008 (midnight Pacific Standard Time), or via mail to: NBACLS Outstanding Counsel Award, 16 Uvalde Road, Suite 211D, Houston, TX 77015. The postmark on mailed nominations must be December 15, 2008, or earlier to be considered.



## On The Verge Of Expanding Protections For Disabled Employees

By Warren E. Buliox, Esq.<sup>1</sup>

The Americans with Disabilities Act (“ADA” or the “Act”) prohibits discrimination in employment on the basis of a disability or perceived disability. According to many, the Act, while by its nature noble, has fallen far short of its original promise to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”

Presently, one of the greatest hurdles employees face in bringing an ADA claim is establishing that they have a condition that qualifies for coverage. According to at least one study, over 97% of all claims brought under the ADA result in dismissal. Many have attributed this to narrow Supreme Court interpretations regarding what constitutes a disability, as defined under the ADA.

In light of the Supreme Court’s stance on this issue, Congress has jumped into action. On June 25, 2008, the House of Representatives passed a major civil rights bill (presently coined the “ADA Amendments Act of 2008”) that, if enacted, would significantly expand protections for people with disabilities. The bill, which passed in the House 402 to 17 (and is likely to pass through the Senate in similar fashion), would overturn several Supreme Court decisions and mark a new direction in ADA jurisprudence — a direction which, according to many, captures the original intent of the ADA.<sup>2</sup>

Under the current law, a disability is defined as a physical or mental impairment that *substantially limits* one or more major life activities. (*i.e.*, seeing, walking, carrying, etc.) 42 U.S.C. § 12102(2). According to the Supreme Court, to be substantially limited in a major life activity, an individual must “have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.” *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 198, 122 S. Ct. 681, 691 (U.S. 2002). This means, in part, that the impairment’s impact must be permanent or long term. *Id.* (Citations omitted.) The impairment must also “presently” impact a major life activity. In other words, impairments that might, could or would substantially limit major life activities if mitigating measures are not taken do not count. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482-83, 119 S. Ct. 2139, 2146-47 (U.S. 1999). Accordingly, impair-

ments which can be corrected through medication, devices (*i.e.* eyeglasses, hearing aids, etc.), or other measures do not substantially limit a major life activity. *See id.*

The new bill, which expressly denounces the Supreme Court rulings in *Toyota*, *Sutton* and their companion cases, attempts to reinstate the broad scope of protections the ADA was originally designed to afford. To start, it flatly rejects the Supreme Court’s holding that an impairment must “severely restrict” a major life activity and provides that the term “substantially limits” simply means “materially restricts,” a less demanding standard. It also rejects the idea that an impairment must be permanent or long term by providing that a disability would qualify for coverage even if it is episodic or in remission, so long as it substantially limits a major life activity when active. This means that impairments such as epilepsy, multiple sclerosis and certain types of cancers (which have been traditionally excluded from coverage) would come under the purview of the ADA. In addition, the bill almost entirely eliminates the notion that a disability, for purposes of the Act, dissipates when an individual takes steps to accommodate or ameliorate the effects of an impairment, by providing that the use of corrective measures such as, but not limited to, medications, prosthetics, hearing aids, mobility devices and other medical equipment should **NOT** be considered in an analysis on whether an impairment substantially limits a major life activity.<sup>iii</sup>

Significantly, the new bill also expands on the concept of what constitutes a major life activity. In addition to codifying a non-exhaustive list of major life activities (such as seeing, hearing, concentrating, learning, breathing, etc.), the bill goes as far as including “major bodily functions” (*e.g.*, immune, nervous, respiratory, reproductive and circulatory systems) into the definition of major life activities. This is especially signifi-



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# Member Spotlights

## Paulette Brown – One of 50 Most Influential Minority Lawyers Award



Paulette Brown, who was President of the NBA from 1993 to 1994, was identified as one of the 50 Most Influential Minority Lawyers in America in June 2008 by the National Law Journal. A dinner in honor of the 50 lawyers was held on September 10, 2008, at the Rainbow Room in New York City.

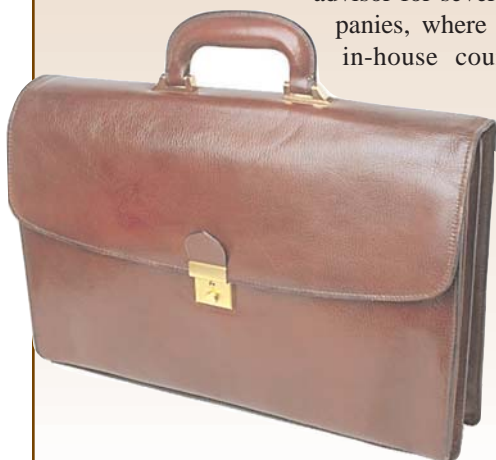
Ms. Brown is a Partner and the Chief Diversity Officer at Edwards Angell Palmer & Dodge. Her practice area is litigation, primarily labor and employment and secondarily commercial litigation. As Chief Diversity Officer, she is Co-Chair of the firm’s Diversity Committee and is responsible for all of the firm’s diversity initiatives, including ensuring the hiring and retention of a diverse legal staff.

In addition to being active in the NBA, Ms. Brown served as the NBA’s representative in the ABA House of Delegates for 10 years and currently serves on the Board of Governors of the ABA. Ms. Brown also co-authored the report: Visible Invisibility: Women of Color in Law Firms.

## Steven H. Wright – Promotion to Executive Partner



Steven H. Wright recently was promoted to Executive Partner at Holland & Knight’s Boston office, overseeing the management of the office. He also chairs the Boston office’s New England Executive Steering Committee and Compensation Committee. Mr. Wright serves as lead counsel and strategic advisor for several Fortune 500 companies, where he represents senior in-house counsel and corporate executives in complex commercial, corporate, intellectual property, litigation and regulatory matters.



## Dawn R. Tezino – Promotion to Partner



Dawn R. Tezino, a graduate of Loyola University Law School, was recently named a shareholder at MehaffyWeber. She works in the firm’s Beaumont, Texas office and currently serves as Treasurer of the NBA Commercial Law

Section. She concentrates her practice in general civil litigation with an emphasis in product liability, premise liability, employment law, toxic torts (including the defense of chemical and particulate exposures), insurance defense and complex civil litigation.

Ms. Tezino serves on the board of the State Bar of Texas African-American Lawyer’s Section, and she also was appointed recently to the State Bar of Texas’s Standing Committee on Racial Diversity in the Profession. Ms. Tezino previously served on the board of the Jefferson County Young Lawyers Association and in 2005 was selected to chair the “Katrina/Rita Legal Assistance Task Force.”

## Theodore A. Wood – Elected a Director



Theodore A. Wood was elected a director at Sterne, Kessler, Goldstein & Fox in Washington, D.C. in January 2008. Mr. Wood, a registered patent attorney, is a member of the firm’s Electronics Group. He earned a B.S. in electrical engineering from North Carolina A&T State University, an M.S. degree in electrical engineering from Northrop University, and a J.D. degree from the University of Dayton.

Mr. Wood counsels clients in various areas of patent law including due diligence investigations and pre-litigation analysis. His work before the United States Patent and Trademark Office includes patent application preparation and prosecution, reissue, and reexamination involving several areas of technology, including electronics, digital communications, computer graphics, and computer networks.

Mr. Wood is an adjunct professor teaching Intellectual Property Law at Northern Virginia Community College and is a retired Lieutenant Colonel in the United States Air Force Reserves.



## Member Spotlights

### DeMonica Gladney – Received the NBA’s Presidential Award



During this year’s NBA 83rd Annual Convention, NBA Past President Vanita Banks presented DeMonica D. Gladney with the prestigious Presidential Award for her outstanding service to the NBA. DeMonica is the Secretary of the Commercial Law Section’s Executive Committee and served as the Co-Chair of the

Planning Committee for this year’s NBA Convention, which was held in her hometown, Houston, Texas.

### Ghilliane Reed – New Jersey’s 40 Under 40 List



Ghilliane Reed, a partner at Gibbons PC, was named in the New Jersey Law Journal’s “40 Under 40” list for 2008. In the past two years, only three African-American attorneys have been named to the list.

Ms. Reid has extensive experience in commercial litigation, securities enforcement and litigation, and corporate compliance matters. She also has significant experience representing corporations and individuals in investigations conducted by the United States Attorney’s office, the Securities and Exchange Commission (SEC), the Financial Industry Regulatory Authority and other government agencies and self-regulatory organizations. She has handled several high profile SEC investigations and enforcement actions

involving insider trading, accounting fraud and sales practice violations. She also has successfully defended clients in securities arbitration proceedings involving claims of unsuitability, churning, misrepresentation and fraud.

### Wil Campbell – New Jersey’s 40 Under 40 List



Wil Campbell, a senior litigation associate in the New Jersey office of Sedgwick, Detert, Moran & Arnold LLP, (like Ghilliane Reed) was named in the New Jersey Law Journal’s “40 Under 40” list for 2008. Mr. Campbell has tried more than 20 jury trials. His practice focuses on defending corporations in product liability, employment discrimination, and commercial cases in federal and state court. He has represented clients in New York, New Jersey, Pennsylvania and Maryland. He is a Master in the American Inns of Court, faculty for the National Institute for Trial Advocacy (NITA), a former prosecutor, a part-time municipal court judge, and he holds a Master of Laws degree with *Honors* in Trial Advocacy from Temple University.

### Sharon Bridges - NBA President Rodney Moore’s Deputy Chief of Staff



Sharon Bridges, J.D., RN, BSN was selected to be NBA President Rodney Moore’s Deputy of Staff. Ms. Bridges also is a member of the NBA Board of Governors, the Chair of the NBA’s Technology Committee, and a member of the NBA Commercial Law Section’s Executive Committee Ms. Bridges is a partner at Brunini, Grantham, Grower & Hewes in Jackson, Mississippi. Her practice areas include product liability, asbestos, toxic torts, medical malpractice, and commercial litigation.



## YOUR VOICE

*If you have comments concerning the NBACLS newsletter, or if you are a NBACLS member who wants to submit an article to us for publication consideration, please contact Donald O. Johnson at [doj\\_acj@comcast.net](mailto:doj_acj@comcast.net).*



## Minority-Owned Law Firm Provides a Bridge for United States Companies Doing Business in Sub-Saharan Africa



**A**s an emerging market, Africa offers many opportunities for companies looking to extend their business in an area with twenty percent (20%) of the world's total land mass, a population of 900 million people (14% of the world total), and a plethora of mineral resources. The continent appropriately has been called a "gentle giant" and a "sleeping beauty" in recent times.

Herbert Igbanugo, Esq., the founder of Igbanugo Partners Int'l Law Firm, PLLC (Igbanugo Partners), has expanded the services that his law firm provides to companies that do business in Sub-Saharan Africa. Igbanugo Partners is the largest and most diverse minority-controlled law firm in the United States practicing international trade law with a narrow focus on Sub-Saharan Africa. It serves U.S. corporate clients that do business with companies and governments in Sub-Saharan Africa and institutional clients with U.S. investments and/or operations.

In February 2009, Mr. Igbanugo and his colleagues plan to open Igbanugo, Udenze, and Co in Abuja, the capital city of Nigeria. They chose Nigeria as their first operating base in

Sub-Saharan Africa because it has a population of over 140 million eager consumers.

Igbanugo Partners, however, understands that, in today's global economic environment, no law firm can establish offices in every jurisdiction in which its clients do business in Sub-Saharan Africa. The firm has addressed this limitation by establishing strategic professional relationships with experienced Sub-Saharan Africa law firms and consulting firms that have members who have held high-ranking positions and who are well versed in the trade laws of the member nations of the African Union, the New Partnership for Africa's Development, the Economic Community of West African States, the Common Market for Eastern and Southern Africa, the Southern African Development Community, the Economic Community of Central African States and the East African Community. The firm believes that its attorneys' ability to quickly assemble a competent legal team in the major commercial centers of Sub-Saharan Africa is unsurpassed.

Among others, Igbanugo Partners' practice areas also include: (1) the U.S. Foreign Corrupt Practices Act and most of the unilateral anti-bribery conventions or initiatives applicable to U.S.-based multinational corporations operating overseas; (2) management of local counsel in Sub-Saharan Africa; (3) lobbying Sub-Saharan Africa government and agencies; (4) infrastructure development; (5) financial brokerage services; (6) consulting services; (7) site security training; and (8) United States and Sub-Saharan Africa immigration services.



The following internet link provides access to Igbanugo Partners' Sub-Saharan Africa brochure: <http://www.igbanugolaw.com/news/docs/SubSaharanAfrica.pdf>. Mr. Igbanugo can be contacted by telephone at 612-746-0360 or by email at [igbanugo@igbanugolaw.com](mailto:igbanugo@igbanugolaw.com).



February 19-21, 2009



*2009 Corporate Counsel Conference*



Loews Lake Las Vegas Resort  
Lake Las Vegas, Nevada



**National Bar Association  
Commercial Law Section**

[www.nbacls.com](http://www.nbacls.com)





## Hurricane Damage: Ensuring Expected Business Profits

By Donald O. Johnson, J.D., LL.M., CPCU



Hurricane Ike recently caused extensive property damage in Galveston and Houston, Texas and other areas on the Gulf Coast. The damage to commercial properties and utility service providers interrupted business for many large and small companies, causing a loss of expected profits and an increase in business expenses. Some companies will be able to recover some or all of these lost profits and extra expenses because they purchased insurance coverage that

protects their expected profits and reimburses them for extra expenses. Other companies that had not obtained the appropriate coverage, unfortunately, have to bear the losses themselves, which sometimes will result in business closings.

This article briefly identifies some of the relevant insurance coverage products that risk adverse companies can purchase to protect their profits and to ensure the recovery of extra expenses incurred to mitigate damage to their property and, if necessary, to continue their business operations in other locations until their damaged property is repaired or replaced.

### Commercial Property Insurance

The primary and most frequently purchased coverage that insured businesses will look to for compensation after a hurricane has damaged their property is their commercial property insurance coverage. It typically covers damage to covered property caused by wind, rain that enters an insured's property as a result of wind damage, and mold that ensues from that rain damage. Basic commercial property coverage will pay the lesser of either the cost to repair the damaged property or the actual value of the damaged property as of the date of the loss. Because of inflation and other factors, this recovery may not be sufficient to replace property that is a total loss. To ensure that a business recovers enough money to replace property that is a total loss, businesses can purchase replacement cost coverage, which pays the insured the amount necessary to replace the damaged property.

Commercial property policies do not cover flood damage, which is damage caused by high tides and rising water levels. To cover flood damage, businesses have to look to flood insurance policies if they have purchased such policies. Commercial property policies also do not cover a business's lost profits unless the policies contain additional business interruption coverage.

### Business Interruption Insurance

Business interruption insurance protects an insured from the loss of profits if the loss resulted from damage to covered property caused by a covered peril. In the case of a hurricane, the covered perils include wind, rain that enters an insured's property as a result of wind damage, and mold that ensues from said rain damage. This coverage pays a business for profits loss from the date of the hurricane loss or some other specified waiting period until the date on which the business could resume business if the insured exercised due diligence in repairing or replacing the damage that caused the interruption of business. Business interruption insurance and the other additional coverages addressed in this article often are added to a commercial property policy with a policy endorsement.

### Contingent Business Interruption Insurance

Contingent business interruption insurance is similar to business interruption coverage with the exception that it protects an insured against the loss of its expected profits resulting from an interruption of its business caused by damage to the property of one of its suppliers (*e.g.*, electricity supplier) if the damage to the supplier's property was caused by a covered peril (*e.g.*, wind).

### Rental Income Insurance

Rental income insurance is tailored to businesses that own rental property. It covers lost rental income caused by damage to the insured's rental property by a covered peril.

### Extra Expense Insurance

Extra expense coverage reimburses an insured for the extra expense that the insured incurs to continue its business operations during the period that it takes to restore its business operations to normal after a covered interruption of the insured's business operations. For example, extra expense coverage would cover the cost of leasing a building in which the insured can conduct business operations during the period of restoration.

### Increased Cost of Code Compliance

In some jurisdictions, a property owner who is repairing property that has been damaged beyond a specified extent must repair the property so that it complies with the jurisdiction's current building code even if the property did not comply with that code before it was damaged. Increased cost of code compliance coverage pays the extra cost to the insured to meet the current building code. Without this coverage, the insurer is obligated to pay only the amount required to return the covered property to the condition it was in when it was damaged by a covered peril.

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## Expanding Protection For Disabled Employees ... *continued from page 5*

cant because conditions like cancer, which in some circumstances has been excluded from ADA coverage in light of the fact that it affects bodily functions (*i.e.*, normal cell growth) more than traditional life activities such as seeing, walking, working, breathing, etc., would be guaranteed coverage under the Act.

So what does all of this mean for employers? Very simply, this translates into more litigation and headaches for employers who are not careful in their dealings with individuals with impairments. Employers should take steps to ensure that managers and other decision-makers are fully aware of the breadth of this new bill, should it be enacted into law. The bottom line is that the significantly expanded definition of what constitutes a disability for purposes of the Act will result in: (i) more plaintiff lawyers bringing ADA claims; and (ii) more cases surviving summary judgment. The focus will turn from whether an employee has a disability (which in the past has proved to be a significant hurdle for plaintiffs) to whether an employee was actually subjected to discriminatory treatment. Outside of litigation, the new bill, if enacted, would also likely result in more employees making accommodation requests, which, on occasion, may serve as a precursor for failure to accommodate claims.<sup>4</sup>



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<sup>2</sup>The author first published this article in a Gonzalez, Saggio & Harlan client advisory. Since then, the bill was signed into law. It will become effective January 1, 2009.

<sup>3</sup>Notably, contact lens and eye glasses may still be taken into consideration when doing a substantial limitations analysis.

<sup>4</sup>The definition of discrimination under the ADA includes failures to reasonably accommodate qualifying disabilities. Reasonable accommodations could range from the assignment of different or modified duties to permitting use of accrued paid leave or unpaid leave for treatment.

## Hurricane Damage ... *continued from page 10*

### Event Cancellation Insurance

Businesses that have scheduled a profit-generating event, such as a conference or an entertainment event, can purchase event cancellation insurance, which will pay the insured's lost profits if the event is cancelled because of a covered peril (*e.g.*, hurricane, earthquake, etc.).

### Exclusions, Conditions and Potential Coverage Disputes

To recover under any of the foregoing commercial property coverages or other similar coverages, the policy must cover the property at issue, the damage must be caused by a covered peril, none of the coverage exclusions can apply, and the insured must comply with all of the material policy conditions. Policy conditions include providing timely notice of claim, submitting a sworn proof of loss, cooperating with the insurer's requests for documentation of the cause and amount of the loss, and submitting to an examination under oath if the insurer requests one.

### Potential Valuation Disputes

Beyond potential coverage disputes, sometimes insureds and insurers cannot agree about the valuation of the claimed losses. Valuation disputes sometimes are determined by an

appraisal conducted by two independent appraisers and an umpire if the policy contains an appraisal clause and if the insured or the insurer demands an appraisal. Other times, valuation disputes, along with causation and other coverage disputes, are resolved in court through declaratory judgment actions and breach of contract actions.

### Conclusion

It is not yet clear to what extent businesses whose property was damaged and whose business operations were interrupted by hurricane Ike had the extended property coverages discussed in this article, but it is safe to say that those that did have the best chance of being profitable in 2008 and 2009.



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(“ILECs”) alleging violations of Section 1 of the Sherman Act, which prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.” 15 U.S.C. § 1. The respondents alleged that the ILECs: (1) engaged in parallel conduct in their respective service areas in an attempt to restrain any competitors, and (2) agreed to refrain from competing with one another, as indicated by their refusal to pursue attractive business areas in contiguous markets. *Twombly*, at 1955. The U.S. Supreme Court overruled the decision of the Court of Appeals for the Second Circuit, which denied the petitioners’ motion to dismiss, and the High Court upset a pleading standard that was over 50 years old.

*Conley’s “No Set of Facts” Standard*

*Conley v. Gibson*, 355 U.S. 41 (1957), was the foremost decision interpreting Rule 8(a) of the Federal Rules of Civil Procedure and the proper standard for dismissing a complaint for failure to state a claim upon which relief may be granted. In *Conley*, the Court articulated the now well-known standard for a complaint to survive a Rule 12(b)(6) motion to dismiss: “a complaint should not be dismissed for failure to state a claim unless<sup>3</sup> it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* at 45-46.

In *Conley*, African-American railroad workers brought a class action suit against their union seeking to compel the union to represent them fairly in protection of their employment rights under a contract entered into by the union and the railroad. This contract gave the workers protection from discharge and loss of seniority. *Id.* at 43. The defendants sought dismissal of the complaint on the ground that it failed to state a claim upon which relief could be granted. *Id.* Specifically, the defendants argued that the complaint did not allege specific facts in support of plaintiffs’ allegation that the defendants discriminated against the workers. *Id.* at 47. The Court rejected this argument, holding that the Federal Rules require only that the plaintiff give the defendant “fair notice” of

plaintiff’s claim and the grounds for the claim. *Id.* The Court went on to hold 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.” *Id.* at 44-45. This standard meant that motions to dismiss under Rule 12(b)(6) were rarely granted, even in the face of poorly drafted complaints having little merit.

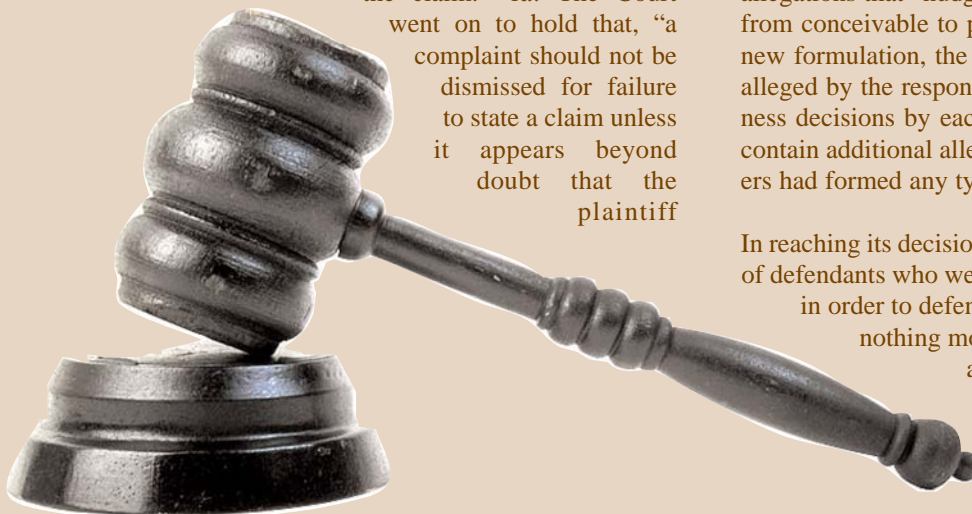
*Conley Revisited*

In one sense, the *Twombly* Court criticized *Conley*’s “no set of facts” standard. In another it seemingly qualified the standard. For instance, the Court’s analysis of *Conley* began by citing numerous federal court cases which have criticized *Conley*’s standard. *See, e.g., Twombly* at 1969. The Court went on to hold that *Conley*’s “no set of facts” formulation is “best forgotten as an incomplete, negative gloss on an accepted pleading standard.” *Id.* at 1969.

The Court cautioned that its decision in *Conley* is often misread. The Court noted that the *Conley* decision should not have been read literally, because a literal meaning would lead to the conclusion that “a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery.” *Id.* at 1968. Instead, *Conley*’s “no set of facts” language should be read to mean that “once a claim is adequately stated, it may be supported by showing any set of facts consistent with the allegations in the complaint.” *Id.* at 1969 (emphasis added). In other words, the Court stated that the “no set of facts” standard “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.*

In *Twombly*, the High Court retired the long-standing “no set of facts” standard and set forth what some would consider a heightened pleading standard. The Court held that, in order to survive a motion to dismiss, a plaintiff must plead sufficient facts to state a claim for relief that is plausible on its face. *Twombly*’s decision means that a plaintiff’s complaint will be scrutinized more closely in the face of a motion to dismiss in order to determine whether the complaint contains allegations that “nudge [the plaintiff’s] claims across the line from conceivable to plausible.” *Id.* at 1974. Applying this new formulation, the Court held that the petitioners’ acts, as alleged by the respondents, could have been individual business decisions by each petitioner, and the complaint did not contain additional allegations demonstrating that the petitioners had formed any type of agreement or conspiracy.

In reaching its decision, the Court recognized the predicament of defendants who were forced to incur the costs of discovery in order to defend a claim where the complaint contains nothing more than naked allegations; and not until after incurring such costs was a defendant given a reasonable opportunity to move for dismissal of the claim by way of summary judgment or

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by other means. The Court stated, “[w]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, ‘this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.’” *Id.* (citing 5 Wright & Miller § 1216, at 233-34). The Court further noted that defendants may be forced to settle even “anemic” claims to forego the rising costs of discovery. *Id.* This concern becomes especially relevant in the age of electronic discovery, where expenses may rise exponentially by the close of discovery.

Undoubtedly, the Court ushered in a stricter standard by which courts must judge the sufficiency of a complaint. No longer will it suffice to argue that a groundless claim should be spared in the face of a motion to dismiss because the basis of the claim will be revealed through discovery. Instead, a plaintiff’s complaint must show an entitlement to relief at the outset. *Id.* at 1967. However, the Court was careful to caution that it is not holding plaintiffs to a “heightened fact pleading of specifics.” *Id.* at 1974. Instead, the Court was merely holding plaintiffs to the same standard required by Rule 8(a)—that a plaintiff plead “enough facts to state a claim for relief that is plausible on its face.” *Id.*

The dissent disagreed with this characterization. Dissenting Justices Stevens and Ginsburg argued that the majority’s opinion in fact impermissibly held a plaintiff to a higher pleading standard than is required by the Federal Rules’ liberal notice pleading standard. Specifically, the dissent argued that the majority took issue with the respondent’s complaint not because it failed to put the petitioners on notice as to their claims, but because the majority was not satisfied that the petitioners collectively formed an agreement in violation of the Sherman Act. *Id.* at 1984. The dissent cautioned that such a standard goes to the issue of proof, not to the issue of notice. *Id.* In turn, the majority criticized the dissent for what it called the dissent’s oversimplification of the Federal Rules. The majority cautioned that while the Federal Rules eliminated the need for plaintiff to set forth the specific facts upon which he bases his claims, “Rule 8(a)(2) still requires a “showing,” rather than a blanket assertion, of entitlement to relief.” *Id.* at 1965 n.3.

### *Applying Twombly*

Immediately after the *Twombly* decision, the lower courts began scrambling to apply the new standard in ruling on Rule 12(b)(6) motions to dismiss. One of the most perplexing issues for the courts is the scope of *Twombly*’s decision. For instance, courts have been forced to consider the argument that *Twombly*’s pleading standard is limited to antitrust cases. *See, e.g., Phillips v. County of Allegheny*, 2008 U.S. App. LEXIS 2513 (3d Cir. 2008); *Barber v. Allied Oil & Supply, Inc.*, 2008 U.S. Dist. LEXIS 7227 (W.D. Mo. 2008); *IFAST v. Alliance for Telecommunications Industry Solutions, Inc.*, 2007 U.S. Dist. LEXIS 80080 (D. Md. 2007); *Brown v. Sweeney*, 526 F. Supp. 2d 126 (D. Mass. 2007). Although an antitrust claim was the backdrop of the Court’s decision in

*Twombly*, the Court did not expressly limit its holding to antitrust cases. The most obvious evidence of this is its complete abrogation of the “no set of facts” standard. The Court did not announce that *Conley*’s formulation was no longer a proper standard by which to rule on motions to dismiss in antitrust cases, but instead ruled that ‘no set of facts’ is no longer a proper standard at all. *See Twombly* at 1969. A number of courts have reached this conclusion, *see Phillips*, 2008 U.S. App. LEXIS 2513; *Barber*, 2008 U.S. Dist. LEXIS 7227, while others have refused to decide the issue. *See, e.g., IFAST* at \*10 (incorporating *Twombly*’s language, but cautioning that it was not making any comment as to whether *Twombly*’s pleading standard applies generally to all civil litigation).

Unless the Supreme Court provides guidance as to the scope of its decision in *Twombly*, federal courts in each circuit will undoubtedly reach their own decision about *Twombly*’s impact. As applied to all civil cases, the implications of *Twombly* are far-reaching. A plaintiff will no longer be permitted to rely on naked allegations with the hope that discovery will reveal relevant facts to that demonstrate that plaintiff is entitled to relief. Instead, a plaintiff must plead enough facts in the complaint to safely nudge his claims across that newly-drawn line from conceivable to plausible. One thing is clear, based on over 1,000 cases that cited *Twombly* in the six months after the opinion was issued, the impact of *Twombly* will be the subject of litigation for many years to come.



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<sup>3</sup>Justice Stevens anticipated this confusion, stating “[w]hether the Court’s actions will benefit only defendants in antitrust treble-damages cases, or whether its test for sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer.”

*Twombly* at 1988 (Stevens, J., dissenting).



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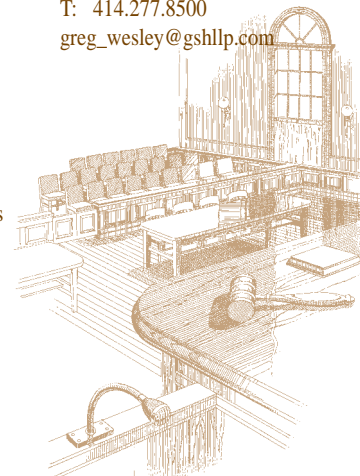
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