Doing Justice, Making Amends

By Timothy Tosta

Last Thursday morning, I received an e-mail from Dan Levine, who reminded me that we had worked an engagement a few years ago. He had remained on my e-mail list since that time, sharing my hospice and other coaching writings with his wife, Leigh, an intellectual property litigator. Dan and Leigh live in North Carolina. Dan wrote me about the circumstance of Lyndsay Murray-Mazany, Leigh's adopted younger sibling.

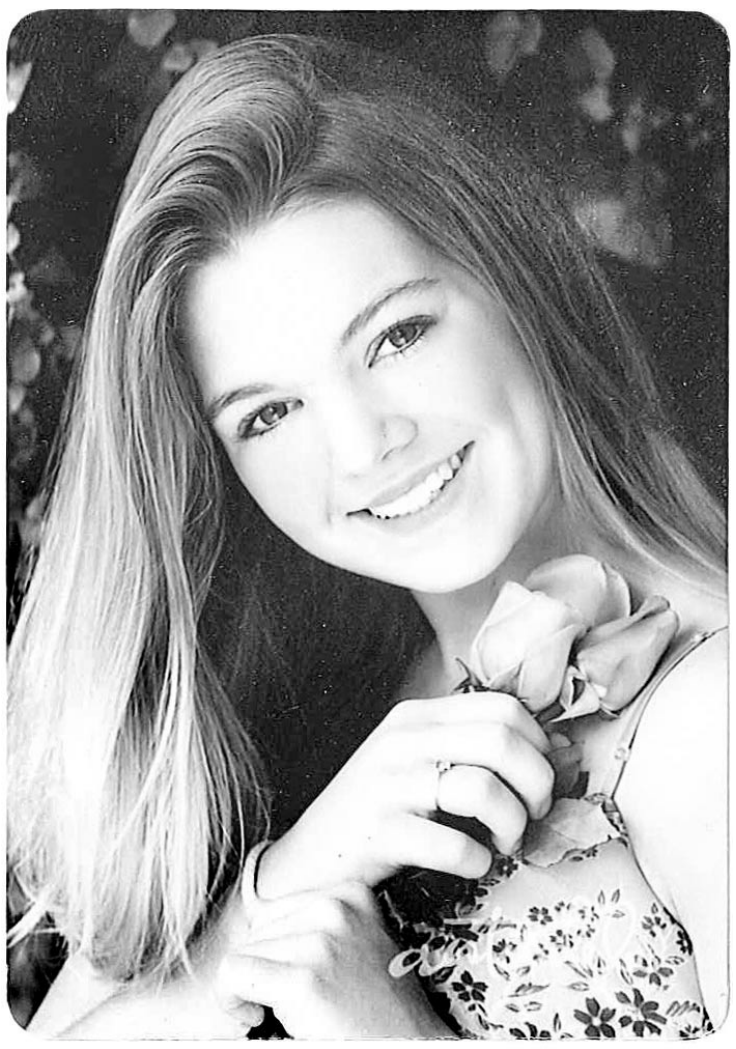
On July 18, 2010, Lyndsay had been involved in a fatal accident outside Geyersville, which resulted in the deaths of two 77-year-old women. Lyndsay had pled guilty to two counts of gross vehicular manslaughter for driving under the influence of alcohol. The maximum penalty on all four felony charges, with added enhancements, to which Lyndsay admitted, is 20 years. There was no plea bargain and no agreement with the district attorney's office. Sonoma County Superior Court Judge Rene Chouteau indicated during a settlement conference that he would sentence her to no more than seven years in prison. Sentencing is set for Dec. 17. 'I don't do criminal work. What little I recall from law school almost 40 years ago, is augmented periodically with information obtained from criminal lawyer friends. I do have two daughters, 22 and 29 and a 26-year-old son, who are good kids, but make mistakes. So, what I write here comes from a person with an amateur's perspective about how I wish justice would work.

Nancy "Sue" McBride was on an outing with her friend, Beverly Jones, and three others on the evening of July 16. Sue and Beverly were Cloverdale residents. Sue had been a long time Spanish teacher, formerly at Cloverdale High School and thereafter at the local senior center. There, she had met Beverly. And they had become friends. Sue was active in her community, a member of the Friends of the Library, an active member of the Episcopal Church, a founder of the Cloverdale Community Outreach Committee, which provides housing assistance to her community's homeless population.

Her friend, Beverly, also was active in the Cloverdale community, belonging to the charitable sorority Beta Sigma Phi. But she preferred world travel. In fact Beverly and Sue had just returned from a tour of South America.

At 5:30 pm, on July 16, Sue, Beverly, their bridge club members and friends, Alice, Barbara and Katherine were driving east on Geyersville Avenue, when their car was struck by Lyndsay. Sue and Beverly were killed. Alice, Barbara and Katherine were hospitalized. Lyndsay and her boyfriend Joaquin were returning from a wine tasting tour in the Geyersville area. They were accompanied by Emilio, Joaquin's father, and Bernardo, Joaquin's best friend.

Lyndsay's vehicle was proceeding south on Geyersville Avenue as it parallels Highway 101, proceeding through a landscape of uninterrupted grapevines and farmhouses. Geyersville Avenue makes a sharp 90 degree turn, proceeds west under Highway 101 and then turns south on the highway's west side. South 101 access is available after that 90 degree turn. If you weren't familiar with the area, you might believe that Geyersville Avenue continues south on the east side of the freeway, through what is known as Banti Lane. However, the right turn is marked because it has proven to be hazardous.



Lyndsay Murray-Mazany

Lyndsay, who was considered almost a teetotaler by her friends, had had some wine on the tour. Her alcohol level at the accident site was just over the .08 intoxication level. It appears, however, that it was less the alcohol than an argument taking place in the vehicle, which led to the fatal distraction.

This weekend, I reviewed letters sent to Judge Chouteau concerning Lyndsay's character. They tell the tale of a remarkably kind and generous individual who had a lapse of judgment and made a serious error. One friend explained that Lyndsay's nickname is "the Sherpa" because she carries other people's loads for them. He described how, in many circumstances, she is the one that makes things work — the person who gets things done. Lyndsay has never had a problem with the law. Her friends uniformly speak to how she goes out of her way to follow the rules and respect authority. But the characteristic that most struck me concerned her capacity for caring; how she listens attentively; how she makes you feel seen when she is with you; and how she cares for others and brings outliers into the fold. Letter after letter spoke to her selflessness, her inclusiveness and her generosity. One writer told of how Lyndsay made her car available to virtual strangers who experienced a medical emergency while at a social event. Another spoke to how, when he moved to England, Lyndsay welcomed him and introduced him to all her classmates. Letter after letter speak to her energy, enthusiasm and good humor.

So what is the right thing under the circumstance? Sonoma County, with its wine and tourism industry has a strong interest in strictly enforcing DUI statutes. I understand that. Lyndsay violated the law and people died as a consequence. I understand that no sentence can recoup such a loss. Do I think, for a moment, that prison will act as a deterrent to Lyndsay? I can't imagine. Her guilty plea speaks to her guilt and sorrow. If you were to send a signal to the community that Lyndsay is paying an appropriate price for her actions, what would that price be? What acts could leverage the teaching of this tragedy? How could we create value from this, rather than fritter away scarce state resources in an overcrowded prison system?

Interestingly, I found some direction in Sue McBride's background. Sue's father was a captain at Folsom State Prison. He then became a warden at San Quentin. Ironically, Sue grew up on the prison grounds, where she also was subject to various restrictions, including, for example, a prohibition on wearing blue jeans. Her son commented that "she didn't have a lot of freedom as a child." She and Beverly were engaged in their communities. They were generous. They were compassionate. What do we think that Sue and Beverly, with their big hearts and open minds, would ask of Judge Chouteau?

I see an extraordinary opportunity for Lyndsay to embody Sue and Beverly in a legacy of community service. From the letters I have read, Sue, Beverly and Lyndsay are connected, not only by this tragedy but by their generous and outgoing natures. It would seem that an appropriate sentence would have Lyndsay carry that legacy of compassion and generosity forward in either a sentence of community service to the elderly, which both Sue and Beverly served, or in educating community youth on the dangers of drunken driving. I imagine that when Lyndsay would speak on this subject, her audience would carefully listen and take her message to heart.

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The *Matrixx* Revisited

By Jared L. Kopel

The first part of this article provided the background to Matrixx Initiatives Inc. et al. v. Siracusano et al., No. 09-1156, which will be heard by the U.S. Supreme Court on Jan. 10, 2011. The case concerns whether plaintiffs may plead a securities fraud claim against a pharmaceutical company for nondisclosure of adverse event reports where there is no statistically significant evidence that the company's product caused the adverse event. The 9th U.S. Circuit Court of Appeals, in contrast to other courts, has held that statistically significant evidence is not required, and that plaintiffs successfully alleged scienter. This part discusses the arguments before the Supreme Court.

LAST IN A TWO PART SERIES

Part one appeared on Dec. 14.

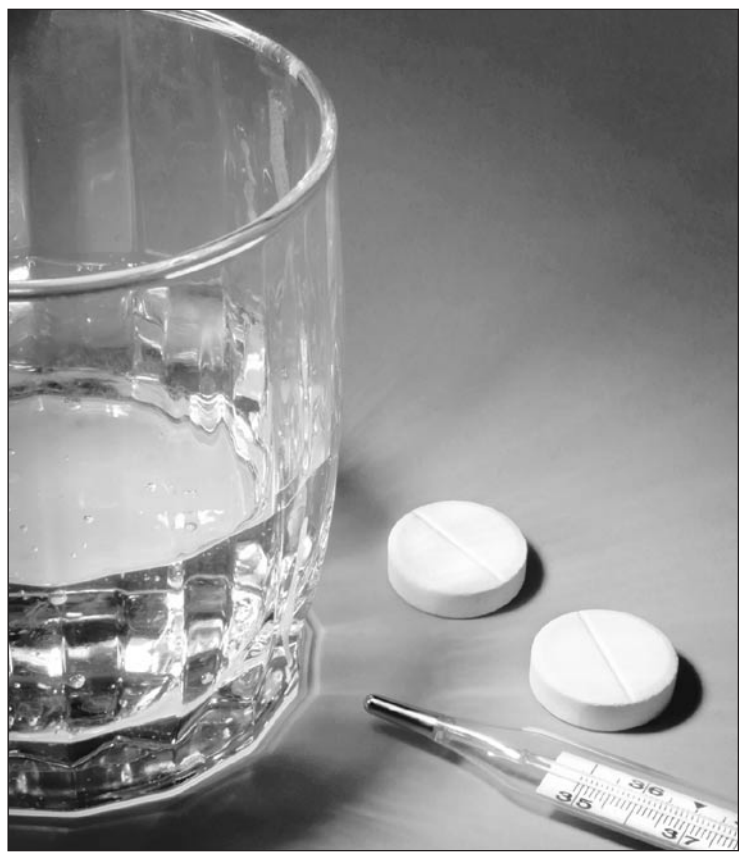
Petitioners argue that securities-fraud plaintiffs must be required to plead facts establishing that adverse event reports represent "statistically significant evidence" that the company's product caused the reported event, further asserting that "a reasonable investor would rely only on [adverse event reports]...where they provide statistically significant evidence of causation, because only then do [these reports] provide information that could objectively affect the product's sales." Petitioners also argue that 12 to 23 isolated hearsay reports of adverse events following Zicam use, compared to millions of products sold, was not material, especially when anosmia is closely related to the common cold. They claim that requiring premature disclosure of possible adverse health risks where no causal link was established would damage the financial markets by compelling companies to disclose all adverse event reports, regardless of whether they are reliable, which would only confuse investors. Petitioners also contend that plaintiffs failed to establish a strong inference of scienter because, given that the adverse event reports failed to connect Zicam use to anosmia, an inference that petitioners intentionally concealed the reports in order to deceive investors was nowhere near as compelling as the "obvious alternative explanation" that the petitioners genuinely did not believe that the reports reflected meaningful evidence of a serious problem.

Respondents argue that the Supreme Court's prior decisions require a "fact-specific inquiry" into whether specific information has significantly altered the "total mix of information" available to investors. Respondents assert that they had successfully pleaded a plausible claim of materiality, thereby satisfying the standards established by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (claim must be plausible on its face). Respondents argue that requiring statistical significance would exclude information that a reasonable investor would consider important and be contrary to the rejection of "bright-line" rules for materiality in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). They claim that the issue is whether the company concealed information showing a material increase in the risk that causation would later be proved — information investors want to know. Finally, respondents assert that a strong inference of scienter, as required by the Private Securities Litigation Reform Act, 15 U.S.C. Section 78u-4(b)(2), was established by allegations that defendants responded to the risks presented by Zicam by concealing the information.

The United States, through the Securities and Exchange Commission and the Department of Justice, filed an *amicus curiae* brief that supported the respondents. The amicus brief argued that data showing a statistically significant association is "not essential to establish a link between the use of a drug and an adverse event." The SEC stated that "[I]nformation suggesting that a company's product causes harm may be important to an investor even if the information does not establish that the causal link" exists.

The 9th Circuit's decision provided scant guidance to companies in reaching disclosure decisions. Petitioners and the SEC similarly offer little guidance. At what point do scattered reports of possible illness or injury caused by a company's products require disclosure and what statements would trigger that disclosure — only those discussing the safety and efficacy of the product or any statement discussing the company's outlook or financial condition? Must companies disclose all adverse event reports, which, as petitioners point out, are "ubiquitous in the pharmaceutical industry" and by themselves have no probative value that the drug is associated with the adverse event? May companies provide disclaimers that accompany disclosure of the adverse event reports, and what liability would potentially attach to these disclaimers? May companies delay disclosure pending internal inquiries into whether there is statistically significant evidence or other substantiation showing that a product is harmful? Corporations should not be left to guess at the answers at the risk of enormous liability. Under the standard advocated by petitioners and the SEC, the failure to disclose adverse event reports could subject the company to substantial liability. But the premature disclosure of unconfirmed reports of adverse effects could lead to an unnecessary stock price decline and loss of sales (and provoke lawsuits based on that disclosure).

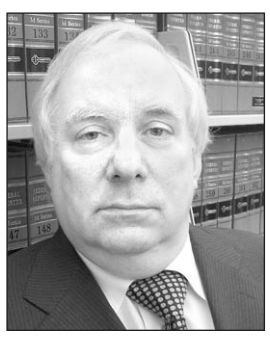
There is no need to depart from the statistically significant standard set forth in *In re Carter-Wallace Inc. Securities Litigation*, 150 F.3d 153, 157 (2d Cir. 1998) (*Carter-Wallace I*); *In re Carter-Wallace Inc. Securities Litigation*, 220 F.3d 36, 41 (2d Cir. 2000) (*Carter-Wallace II*); and *Oran v. Stafford*, 226 F.3d 275 (3rd Cir. 2000) (as well as other cases cited in the first part of the article). The standard for materiality is not all the information that investors might want to know, but only that information conducive to informed decision-making. *TSC Industries Inc. v. Northway Inc.* 426 U.S. 438, 448 (1976). That purpose is not served by the disclosure of raw data suggesting that a company's product might be harmful where there is yet no meaningful evidence of a causal link. Respondents and the SEC contend that a bright-line rule requiring statistically significant evidence would deny investors important information. However,



petitioners themselves noted that courts have permitted an inference of causation on the basis of factors other than statistically significant data: "(1) the 'strength' of the association, including 'whether it is statistically significant;' (2) temporal relationship between exposure and the adverse event; (3) consistency across multiple studies; (4) 'biological plausibility;' (5) 'consideration of alternative explanations' (i.e., confounding); (6) 'specificity,' (i.e., whether the specific chemical is associated with the specific disease at issue; and (7) dose-responsive relationship (i.e., whether an increase in exposure yields an increase in risk (citing *Magistrini v. One Hour Martinizing Dry Cleaning*, 180 F. Supp.2d 584, 592-93 (D.N.J. 2002)). The SEC approvingly cited these factors without expressly endorsing them. To the extent that the Supreme Court decides to depart from the *Carter-Wallace/Oran* standard, these factors could form the basis for a materiality standard (although such multi-factor tests often prove problematic in practice). However, because the 9th Circuit's decision did not rest on these factors, the case should at a minimum be remanded for further consideration.

The 9th Circuit's decision also should be reversed because plaintiffs failed to establish a strong inference of scienter. The usual indicia of scienter, such as suspicious insider stock sales, are lacking and no motive was provided to support the alleged fraud. Indeed, the decision is inconsistent with the high threshold for pleading scienter established by the 9th Circuit in *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 974 (9th Cir. 1999) (complaint must allege that defendants made alleged misstatements either intentionally or with deliberate recklessness).

The Supreme Court in *Matrixx* could provide clearer sign posts for when companies must disclose information suggesting that their products might be harmful and for materiality standards in general. Or, as is too often the case, the Court may only further complicate the disclosure process for companies and counsel.



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